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THE SPORTING EXCEPTION IN THE EC FREE MOVEMENT RULES

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1. INTRODUCTION

The European Union is an international organization which promotes integration among its members.[1] The Treaty of the European Communities established a *sui generis* legal order integrated into the legal order of the member-states from the moment the Treaty took effect and took precedence over their legal orders.[2]The principle of free movement, which involves the abolition among member-states of obstacles to the free movement of goods, persons, services and capital,[3] is the cornerstone of the European Community. However, the regulations of sport governing bodies and International Federations have introduced provisions which are not consistent with this principle, such as limitations on the number of foreign players in teams and other restrictions to the transfer system. Although the European Union has recognized that sport involves some special characteristics and has pointed out its social, educational and cultural significance[4], sport is nowhere mentioned in the EC Treaty, which makes it unclear whether EC law should have a direct application to the sporting field or sport should enjoy immunity towards EC law. Undoubtedly, nowadays, sport, even though unlike other economic activities, did not start out as a means to make money, has become a business like any other and its increased commercialisation has culminated in sport undergoing thorough legal scrutiny. Thus, it is not surprising that the Court of Justice has appeared quite unsympathetic towards arguments relied on the special character of sport and has generally applied rigorously the free movements rules to sport.[5] In the present essay, after presenting briefly the European legislation and the way that the Court has applied it to sporting cases, we will try to analyze the circumstances under which sport could enjoy an exemption from EC rules and we will try to assess this situation.

2. LEGAL FRAMEWORK AND APPLICATION TO SPORT

According to Article 3 EC Treaty, the abolition, between member states, of obstacles to the free movement of goods, persons, services and capital is required. Furthermore, according to Article 12, for this to be achieved, “any discrimination on grounds of nationality shall be prohibited”. Three further crucial Articles specify this goal in the fields of employment (Article 39), establishment rights (Article 43) and service provision (Article

[1] Dihn, Daillet, Pellet(1994), *Droit International Public*. 5th Edition, Dalloz, p.368

[2] Panagiotopoulos D., Pashou K., *Lex Sportive and Community Law :the Piau Case*, in International Sports Law Review Pandektis Vol.6:3-4, 2006

[3] European Union Treaty, Article 3(c)

[4] *Declaration (No20) on Sport*, annexed to the final Act of the Treaty of Amsterdam (1997), Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, annexed to the Conclusions of the Nice European Council, Bulletin EU, 12-2000

[5] Hoskins M, Gray M., *EC Free Movement Rules and Sport*, in Lewis A., Taylor J., Sport: Law and Practice, Tottel Publishing 2007, p.431

49).[6] More specifically, in the field of employment, Article 39 provides that freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states in respect of employment, remuneration and other conditions of work and employment[7], and the right to move freely within the territory of member states for this purpose[8], to stay in a member-state for the purpose of employment[9] and to remain in the territory of a member-state after having been employed in that state[10]. Article 39 is directly applicable[11] and has direct horizontal as well as vertical effect.[12] Article 39 is also escorted by secondary legislation. Directive 68/360 secures rights of entry and residence, regulation 1612/68 regulates access to and conditions of employment and regulation 1251/70 is about the right to remain in the territory of a member state after employment there. Finally, Directive 64/221 establishes the rights of member states in connection with the derogations pointed out in Article 39(3).[13]

Regarding Article 43, it should be mentioned that the right of establishment is about the right of individuals and firms to establish a business in other member-states. It is directly applicable[14] and effective.[15]

Finally, Article 49 prohibits restrictions of freedom to provide services within the Community in respect of nationals of member states who are established in a state of the Community different from that of the person for whom the services are intended. Directive 64/221, though, introduced a restriction on the freedom to provide services on the grounds of public policy, public security and public health.

In respect of the scope of the application of the free movement rules, a party may rely on them in order to set aside not only contrary national laws[16] but also rules of international sport organisations.[17]

Nonetheless, EU is not an omni-competent organization.[18]Its provisions do not apply directly in all area of human activities. So, it had to be established that sport is encompassed by the scope of the above treaty. The European Court of Justice (ECJ) decided that "the practice of sport is subject to Community Law only in so far it constitutes an economic activity within the meaning of Article 2 of the Treaty".[19]Therefore, sport falls within the scope of the Treaty only as long as it is associated with an economic activity. Otherwise, sport enjoys immunity against Community law. However, the scope of the free movement rules in the context of sport is quite far-reaching, since according to the Court[20],

[6] Parrish R., *Sports Law and Policy in the European Union*, Manchester University Press, Manchester and New York, p.83
[7] EC Article 39 paragraph 2
[8] EC Article 39 paragraph 3b
[9] EC Article 39 paragraph 3c
[10] EC Article 39 paragraph 3d
[11] Case 167/73, *Commission v French Republic* (1974) ECR 359. Re: nationality restrictions in the French Maritime sector.
[12] *Welrave, Koch, Bosman*
[13] Parrish, p.84
[14] Case 2/74, Reyners v. Belgian State (1974) ECR 631
[15] Parrish, p.85
[16] Case 167/73 *Commission v France* (1974) ECR 359
[17] *Welrave*, Hoskins M., Gray M., *EC Free Movement Rules and Sport* in Lewis and Taylor, Sport Law and Practice, Tottel Publishing 2007, p.433
[18] ibid, p.85
[19] *Welrave v. Union Cycliste International* 1974, paragraph 4
[20] *Deliege*

even where a particular sports person does not receive any financial benefit from participation in a competition, but is able to attract sponsorship by virtue of participation in such an event, that person will fall within the scope of the rules.[21] The ECJ via its judgments has followed this direction. Restrictions on free movement may arise due to either a rule which discriminates on the grounds of nationality (directly or indirectly discriminatory)[22] or a rule which is prone to make less appealing the exercise of fundamental freedoms guaranteed by the Treaty[23] (non-discriminatory).[24]

3. ECJ CASE LAW

3.1. EARLY CASES

The first sporting cases which were dealt with by the ECJ probably do not seem to be as important as the later ones but under closer examination they marked the intervention of EU law in sport and led to the subsequent cases. The *Welrave* case[25], which was about the nationality requirements of pacemakers in motor-paced cycle races, was the first sporting case which "bothered" the ECJ. In this case, the claimant challenged a rule laid down by the Union Cycliste International (UCI) according to which the stayer and the pacemaker taking part in an international competition have to be of the same nationality. It was pointed out- as already mentioned above- that sport is subject to EU law as long as it constitutes an economic activity. More specifically, according to the judgment the contract which the pacemakers had with either the cyclist, association or a sponsor is caught by the scope of Articles EC39 and 49. In terms of this case, though, the Court underlined that if the practice of sport is of "purely sporting interest", there should be a distinction and therefore national teams could discriminate on the grounds of nationality.[26]This point is considered to be of vital importance since the Court seemed to understand that the special characteristics of sport allow it a space of immunity. Subsequently, it was held that even if a rule leads to clear discrimination within the meaning of Article 7 EC, the prohibition arising from this provision does not affect a rule of purely sporting interest and therefore is not linked to economic activity.[27] However, this "purely sporting interest" has to remain in its proper objective.[28] Another important aspect of the *Welrave* case was that it highlighted that the prohibition of discrimination applies not only to public authorities but also to rules of any other nature aimed at collectively regulating gainful employment and services.[29] Subsequently, it involves horizontal, direct, effect and sport federations and governing bodies are subject to the EC provisions as regard their regulations. Since Welrave the Court has always examined at first step whether the practice of sport constitutes an economic activity and afterwards has gone on to examine whether it is caught by the Treaty Provisions.[30]

[21] Hoskins, Gray, p.434
[22] e.g. *Dona*
[23] e.g.*Bosman*
[24] Hoskins, Gray, op cit p.440
[25] *Welrave v Union Cycliste International* (1974)
[26] *Welrave*, paragraph 15
[27] *Welrave*, paragraph 8
[28] *Welrave*, paragraph 9
[29] *Welrave*, paragraph 17
[30] Colomo, *The application of EC Treaty Rules to Sport: the approach of the European Court of First Instance in the Meca Medina and Piau cases in ESLJ* (www) Volume 3 Number 2

The next case that the ECJ dealt with was the *Dona* case.[31]It was about nationality rules in Italian football, which introduced heavy restrictions on non-Italian footballers playing professional football in Italy. In terms of this judgment the Advocate General adopted a very sport-friendly approach. He stated that purely sporting interest could justify the imposition of some restriction on the signing of foreign players or at least at the participation in official championship matches so as to ensure that the winning team will be representative of the state of which it is the champon. According to his point of view, this makes even more sense taking into account that the champion team is usually chosen to represent its own state in international competitions. The ECJ noted that Article 7 EC applies to sporting rules as long as such rules or practice exclude foreign players for reasons which are not economic in nature.[32] Even though the approach is quite similar to the *Welrave* one, it is considered that while in *Welrave* the discrimination fell clearly outside the scope of the EC Treaty, the ECJ seemed to deviate slightly by stating that the non-economic nature of a sporting rule could be invoked as a justification for a measure otherwise caught by Articles 39 and 49.[33] The slightly stricter approach in *Dona* could be probably perceived as being a sign of the upcoming breakthrough of the *Bosman* case. However, it made clear that the Court was still aware of the special nature of sport and therefore justified a sporting exemption.

So, in these early cases, the Court made it clear that EC law applies to sport, took into consideration the special nature of sport and pointed out that under certain circumstances sport should enjoy an exemption. Therefore, these early judgments could be characterized as encouraging. The situation, though, was totally changed after the *Bosman* upheaval.

3.2. BOSMAN, KOLPAK

Until the *Bosman* Judgment the Court appeared to be rather lenient towards sport as regards the EC law application. However, in the Bosman case, the Court changed its attitude towards sport. Both the system governing the transfer of players between clubs and the rules requiring discrimination on the basis of nationality in European Club football competitions were found to violate Article 39 EC.[34] More specifically, Bosman, a Belgian national, had played football for RC Liege in Belgium but was out of contract following the breakdown of relations between him and the club. At that time there were certain UEFA sanctioned practices relating to transfers and nationality restrictions. In respect of the transfer rules, a club had the right to retain the registration card that permitted him to play football professionally even after the contract had ended. The club was also entitled to ask for compensation from the buying club for training and development even if the player was out of contract. As far as the nationality restrictions were concerned, there were rules limiting the number of foreign nationals in European Clubs. Bosman brought proceedings before the Tribunal de Premiere claiming damages against RC Liege in relation to breach of contract as well as action against UEFA, aiming at having UEFA's transfer rules declared null and void and in breach of Articles 39, 81 and 82 of the Treaty. Despite UEFA allegations that

[31] *Dona v Montero* (1976) ECR 1333
[32] *Dona*, paragraph 19
[33] Colomo, op cit
[34] Weatherhill St., "*Fair Play Please!":Recent Developments in the Application of EC Law to Sport*, in Common Market Law Review 40:51-93, 2003.

changing the transfer system would have a detrimental effect on the whole organization of sport, the Court decided that the nationality restrictions were contrary to the provisions of Articles 39(2) as they constituted typical discrimination on the grounds of nationality and that the transfer rules were also in violation of Article 39, since Article 39 prohibits any (including non-discriminatory) forms of restrictions on the freedom of movement, in particular where the restriction relates to access to the employment market in other member states, like the transfer rules. Thus, the transfer system, the nationality restrictions and the whole football situation were totally changed. Football and sport in general was subject to the pure application of EC law. Nevertheless, it has to be stated that in *Bosman* the ECJ recognized that the social importance of sporting activities could justify an exemption from the application of Article 39 but not in the present case.[35]

The field of interference of community law in sport was further expanded by the Kolpac case.[36] This case was about a professional goalkeeper of Slovak nationality who played in the German second division and challenged the rule of the German handball federation, stipulating that clubs were entitled to have only two non EU/EEA nationals in official matches.[37] The Court decided that Kolpak could legitimately resort to Article 38(1) of the Association Agreement between the European Communities and Slovakia, which provides the right to equal treatment to Slovak nationals in respect of working conditions, remuneration and dismissal in the EU in relation to the Host Member State's nationals.[38] Even though the consequences of these judgments prima facie seem to be minor and temporary since those countries in association agreements will soon enter the EU, they are quite important taking into consideration that bodies regulating professional sport in EU member-states will have to make sure that players from countries that have entered into associations agreements do not suffer discrimination. This judgment also makes clear that *Bosman* did not mark the end of the EU interference in sort.[39]

3.3. DELIEGE, LEHTONEN

Despite the fact that in *Bosman* the Court seemed to harsh against sport, in *Deliege*[40] and *Lehtonen*[41] it changed its attitude towards sport and it appeared more lenient. In both cases the Court reiterated the fundamental principle that sport is subject to Community Law only in so far as it constitutes an economic activity and confirmed that rules of sporting interest imposed for reasons that are not of economic nature slip outside the reach of EC Treaty. In *Deliege* the Court dealt with the selection of judokas for international competition by national judo federations. The selection criteria were challenged on the grounds of incompatibility with Article 49. This case is considered to be of pivotal importance because the whole sport system in the aggregate as well as the institution of the Olympic Games was in danger. Fortunately, the Court decided that although such selection

[35] *Bosman*, paragraph 50, 127-128

[36] Case C-438/00 *Deutscher Handballbund e v Kolpak (2003)* E.C.R. I-4135, Boyes S., *In the shadow of Bosman:The Regulatory Penumbra of sport in the EU*, in Nottingham Law Journal Vol12(2) 2003

[37] Van den Bogaert S., Vermeersch An, *Sport and EC Treaty: A tale of uneasy bedfellows?,* in European Law Review 2006

[38] ibid,*Kopak* paragraph 58

[39] Boyes S., *In the shadow of Bosman:The Regulatory Penumbra of sport in the EU*, in Nottingham Law Journal Vol12(2) 2003

[40] *Deliege v. Ligue de Judo*, C-51/96 & C-191/97, (2000) ECR I-2549

[41] *Lehtonen et al v. FRSB* C-176/96, (2000) ECR I-2681

rules "inevitably has the effect of limiting the number of participants in a tournament, such limitation is inherent in the conduct of an international high-level sport event, which necessarily involves certain selection rules or criteria being adopted".[42] Therefore, according to the Court a restriction under Article 49 was not established and, therefore, the application of Article 49 to sport was limited.[43]

The *Lehtonen* Case was about the transfer deadlines in Belgian basketball. They involved differential treatment of transferred players based on the "zone" in the world from which they are from.[44] The court finally decided that these transfer deadlines were contrary to Article 39 but before that it developed very interesting arguments. It stated that rules on transfer deadlines were sporting rules which were necessary for the organization of the game. However, these rules went beyond what it was necessary. Yet, it is considered to be crucial that the Court stated that even though there is a free movement restriction, it could be possibly justified on sporting grounds and be exempted from Article 39.[45] Indeed, there was a reference to the impact that transfer deadlines have on play-off games.[46]Therefore, the decision appears to be rather sympathetic towards the question of sports governing bodies and this is quite encouraging. Another very significant aspect of this case was the opinion of the Advocate General who equated sporting interest arguments not with sporting autonomy justifications but with a "public interest" justification. If this opinion prevails, it could lead to quite beneficial results for the autonomy of sport.

4. THE SPORTING EXEMPTION- LEGITIMATE DEPARTURE OF THE FREE MOVEMENT PRINCIPLE

In general, sporting rules, in order to be compatible with EC law must not involve nationality discrimination. However, according to ECJ rulings there is an exemption.

So, what precisely constitutes the so-called "sporting exemption"? We should clarify the circumstances under which the sports governing bodies can legitimately deviate from the free movement principle. According to the judgments of the Court, sporting rules can avoid the consequences of the application of the EC law on the following occasions.

A. Firstly, the ECJ has made totally clear since *Welrave* that if the rule in scrutiny does not involve an economic interest, it falls outside the ambit of the freedom of movement rules. For example, in the Meca-Medina Case[47] it was held by the Court of First Instance that anti-doping rules concern exclusively non-economic aspects of sport, designed to preserve "noble competition" and therefore fall outside the ambit of the EC Treaty. The ECJ, though, judging in appeal, held that antidoping rules fall within the scope of Articles 39 and 49 but not necessarily constitute a restriction of competition under Article 81 EC as they are justified by a legitimate objective, to ensure proper conduct of competitive sport[48] Much earlier, two cases in English law dealt with the question of whether doping rules constitute a restriction of Articles 39 and 49. In *Wilander v Tobin*, it was held that sanctions of suspension due to drug-test failure falls outside the scope of Article 49 as a rule governing sporting

[42] Parrish, p.104
[43] ibid
[44] Weatherhill, op cit
[45] *Lehtonen*, paragraphs 51-55
[46] *Lehtonen,* paragraph 55
[47] Case T-313/*02 Meca-Medina and Majcen v Commission* (2004) 3 CMLR 60
[48] Case C-519/04P Meca-*Medina and Majcen v Commission* (2006) 5 CMLR 18

conduct.[49] In *Edwards v BAF and IAAF*, it was held that doping rules also do not violate Article 49.[50] Apart from doping, which one way or another is saved from the EC test, purely sporting rules, such as technical rules of the games, like red cards or disqualification cannot be further examined, since they do not fall within the scope of the EC Treaty.

B.Beyond the purely sporting matters, other matters can slip outside the EC law application, but they have to meet some standards. As the Court has decided, sport rules and regulations, even if they involve an economic effect, may not violate the Treaty as long as they can be justified by the organisation of the sport itself. However, this is not enough. The sporting rule at stake will have to satisfy the test of proportionality.[51] The courts will scrutinize the rules of sports organizations to see whether these exceed what is necessary to pursue the legitimate aim of the sport. If these prerequisites (legitimate sporting objective, proportionality test) are met, the rule will remain in force even if it involves a restriction of freedom of movement. In *Bosman* and *Lehtonen* the Court found the rules at stake disproportionate. However, as has already been mentioned above, the ECJ considered doping rules to be necessary for the proper sporting conduct.[52] In *AEK Athens and Slavia Prague/UEFA*[53], when EC free movements rules were invoked to challenge the UEFA rule which prohibited clubs from having the same ownership, CAS decided that even assuming that the contested rule restricted the right of establishment or the free movement of capital, it was justified by the need to preserve "the authenticity and the uncertainty of results". So, as long as there is an important sporting reason and the restriction does not go beyond what is necessary, the rule is saved.

Of course, the rules at stake may not violate the free movements rule at all, as was held in *Deliege*. In *Deliege* it was made clear that the issue of selection for national teams constitutes an inherent limitation in the conduct of sport and therefore is not included by the ambit of EC law. In Olympic Games and World Championships, even in individual sports such as judo, participation is restricted to a maximum number of athletes from each country. National quotas can discriminate against elite athletes who are excluded from strong national teams in favor of poorer performers from weak countries. For instance, the Russian long jump athlete who placed fourth in the national championship may fail to qualify for the Olympics, while an athlete from a smaller country may succeed in qualifying even though her performance is far worse that Russian athlete's one. These kinds of quotas can limit the economic opportunities of some athletes but it is considered that the selection for participation in international organizations is based not on nationality but on the affiliation to the appropriate national federation.[54] Thus, national federations are free to decide about the selection criteria for the participation in national teams. The selection of

[49] *Wilander v Tobin* (1997) EuLR 265

[50] *Edwards v British Athletics Federation and International Amateur Athletics Federation* (1997) EuLr 721

[51] Proportionality is an established general principle of Community Law and is expressly recognized in Article 5 EC. The principle of proportionality is further analyzed in three narrower elements: capacity, necessity, and proportionality in stricto sencu (the disadvantages for the individual should not outweigh the advantages of the restriction).

[52] *Meca-Medina*

[53] Arbitration CAS 98/200, *AEK Athens and Slavia Parague/Union of European Football Associations* (UEFA), award of 20 August 1999.

[54] Foster K., op cit

the best athletes for their participation in events is a technical matter and cannot be controlled by the judge.[55]

It should be noted, though, that as long as the ruling does not involve a direct or indirect nationality discrimination there is not a problem. Restrictions concerning a particular number of athletes of the same nationality are not inconsistent with EC law. For instance, a rule which requires a number of players to be club-trained could be considered to be legitimate unless it is perceived as discriminating indirectly.

5. EVALUATION

From all of this, we can observe that the ECJ has been more lenient towards national teams (*Welrave/Deliege*), while it has been stricter towards domestic organizations (*Bosman/Lehtonen*) as regards the application of the free movement principle in sport.[56]This is because, in the domestic competitions, the economic effects of sport are much more obvious.

On the one hand, it could be stated that there is no difference between modern football and any other economic activity. Football and sport in general is now a big business. Football involves money and contracts that are a kind of elusive dream for any other field of activity. It would be totally unfair to overlook this reality and to deprive sportsmen and sportswomen of the rights and remedies that EC law offers to any kind of worker in European Economic Area. One could argue that if the European Communities kept a distance from sport and did not interfere, they would contradict themselves and this could lead to a devaluation of the European Union as a whole. Also, in all likelihood, the EC flexibility towards the international competitions and amateur sport should also be diminished. Of course, in *Deliege*, it was made clear that amateur sports involve economic interest and are subject to EC law. However, ECJ did not dare to interfere. Nevertheless, all sports nowadays are linked to huge economic benefits, since sponsorship, broadcasting and image rights are involved. Furthermore, in many countries medalists in important international competitions are blessed with enormous economic benefits. For instance, according to the Greek law 2725/1999 Greek athletes who win medals in the Olympics will receive a certain amount of money and they will be appointed to public positions.[57]So, since every sport includes some kind of economic interest, international competitions should also be subject to EC law.

On the other hand, the fact that sport includes some special characteristics should never be forgotten or overlooked. It is of vital importance that ECJ has been lenient in international competitions. If the *Deliege* decision had been different the entire structure of sport would have collapsed. However, it is submitted that the ECJ should also develop a more flexible attitude towards domestic events. Sport is something special and definitely does not coincide with any other kind of work. Under some circumstances nationality clauses and transfer deadlines are necessary, not to mention indispensable, for noble and equal competition and the EU should take this into account. The pure application of the EC law in sport would also lead to the strengthening of the already financially powerful clubs and the elimination of the smaller ones. Besides, it should not be forgotten that clubs are linked to the country that they come from. After domestic competitions, some teams are

[55] Panagiotopoulos D., Sports Law, A European Dimension, Ant.N.Sakkoulas Publishers, Athens-Komotini 2003, p.77

[56] Colomo, op cit

[57] Greek law 2725/1999 Article 39

selected to take part in international competitions. It is perceived as being crucial that the vast majority of the players of the club come from the country that it represents. Otherwise, the team would be less appealing for its fans. It would be baffling, for instance, for a team such as Manchester United to be composed exclusively of French and Portuguese players. If we reach this point, clubs will no longer be affiliated to an area but to a company.

Therefore, it is believed that the ECJ should take into consideration the special characteristics of sport and not strictly apply EC law to sport. Under no circumstances should it intervene to international organizations. If the *Bosman* case has harmed the sports system, a negative ruling on the *Deliege* case would have exploded the whole sports structure. As regards domestic organizations it is understandable that EC law has to be applied but it should be interpreted on the basis of the special nature and particular requirements of the institution of sport.[58]

6. CONCLUSION

After the creation of the EC a number of sporting rules have been challenged under the EC free movement rules. The ECJ has introduced some prerequisites under which sport could enjoy immunity towards EC law. The contested rule should be justified by a non-economic sporting reason and should be proportionate. Without attempting to argue that EC law should remain totally ineffective towards sport, it is considered that the Court, when scrutinizing such a rule, should take into consideration the special nature of sport and be lenient when applying the principle of proportionality. Hopefully, the ECJ will avoid interfering and changing fundamental sporting rules and structures, letting sport in this way keep its interest and appeal.

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[58] Panagiotopoulos D., *Sports Law, A European Dimension*, Ant.N.Sakkoulas Publishers, Athens-Komotini 2003, p.77