
# MASTER THESIS

## *ON THE RECONCILIATION OF THE 'SPECIFICITIES OF SPORT' AND EUROPEAN COMPETITION LAW*

'Understanding the approach of European Competition authorities to the sports sector and evaluating its future'

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**Chapter I: Introduction.**

*"As freak legislation, the antitrust laws stand alone. Nobody knows what it is they forbid."*

- Isabel Paterson

The concept of competition amongst firms is one inherent to the success of any capitalistic society, and, as a consequence, the protection of such competition should be a constant concern for policymakers. In *The Wealth of Nations* Adam Smith claimed that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.", formally introducing the concept of cartelization and collusion. Over the following centuries, competition law was broadened and defined, in an attempt to identify specific rules to be applied in a strict and more recurrent fashion. It was in the 20th century, when antitrust law and scholarship grew substantially, that legal scholars were able to finally establish a clearer understanding of the subject (in spite of the aforementioned opinion of American libertarian Isabel Paterson). Legal experts suggested that the regulation of competition cannot be assimilated to other legal fields, in the sense that it is fairly complex (not impossible N.B) to identify anti-competitive agreements or behavior on a strictly *per se* basis. The very nature and purpose of establishing rules which defend and push for the advancement of competition between firms requires a substantial understanding of market power and the capacity to put any given situation or possible infringement into an economic context[1]. This drive to viewing agreements or behavior not under the lens of 'form-based law' but rather by assessing them through the application of a effects-based analysis finds its basis in the fact that certain actions, while appearing initially anti-competitive, may have positive repercussions on trade and should therefore be deemed pro-competitive. This argument, strongly defended by the intellectual fathers of the Chicago School such as Richard Posner and Milton Friedman, eventually became a guideline for competition authorities and regulation around the world. Indeed, both the European Union and the United States have developed their antitrust policy by shifting the focus from violations 'per se' (or by 'objective' in the EU) towards looking at the effect that said violations may have on the market. However, the European approach is said to be more schematic and more defined. Through its extensive provisions (and guidelines explaining them) it has sought to distinguish itself from the American 'rule of reason' (although not always successfully, see Chapter IV c.).

[1] 'Competition Law', R. Whish & D. Bailey, 2003, 8th Edition, Oxford University Press ("the analysis of competition issues invariably requires an assessment of market power and such an assessment cannot be conducted without an understanding of the economic concepts involved")

One particular aspect of applying this approach is the concept of exemptions; under Article 101 of the Treaty on the Functioning of the European Union (Articles 101 through 107 deal with competition law), the European Commission ('the Commission') sets out a series of situations in which case a violation by object or effect may be exempted (promoting progress, allowing consumers a share of the benefit, being indispensable to the attainment of the aforementioned objectives)[2]. Article 101(3), the clause which lists the exemptions stated above, specifically refers to "agreements and *categories* of agreements" thus giving the opportunity to the Commission, under "powers conferred upon it by regulations of the Council"[3], to exempt any type of type of action which, in spite of its anticompetitive nature, fulfills the points of criteria listed above. While it is rare that an industry be exempted in its entirety, such exemptions, which are known as Block Exemption Regulations, by their nature, may shelter certain specific industry behavior from the reach of Article 101[4].

It is possible to say that competition law is applied in a similar way to most industries providing any given product or service, and laws have been developed to direct these types of firms and their behavior. However, the appearance of one specific sector, at the end of the 19th century, has forced competition authorities to develop a *Sui generis* approach: the sports industry. Regulators and competition authorities have struggled with defining the sports sector and how to apply antitrust regulations to the industry. It can be said that the main concern lies in the lack of definitions: it has been a challenge for many to define the main actors involved in the sports sector in the context of antitrust. As stated by L. Farzin[5], "the industry would not exist without collusion". This sentence relates to the necessity for teams to be in constant communication and be able to cooperate in order to achieve success from a business perspective. Indeed, the service is not provided by one team, but rather by the interaction of all teams with each other. It would be impossible for one team to play itself; the product offered to the consumer is the match, which requires the presence of an opponent.

At the European level, sports leagues are governed and administered by Sports Governing Bodies (SGBs), such as the Federazione Italian Giuoco Calcio (FIGC) in Italy or the Union of European Football Associations (UEFA) as governing bodies for football competitions.

[2] See Article 101(3) Treaty on the Functioning of the European Union
[3] Id 1. pp. 178
[4] For a list of current (as of 2015) Block Exemption Regulations refer to 1. pp. 179-180
[5] Farzin, Leah (2015) "On the Antitrust Exemption for Professional Sports in the United States and in Europe" Jeffrey S. Moorad Sports Law Journal: Vol 22: iss, 1, Article 2.

While the role of Sports Governing Bodies will be discussed in the following chapters, it is important for the reader to understand that the very nature of the sports sector, its framework, and the activities it undertakes have been difficult to pin down from a legal perspective in most countries and geographic markets around the world. Throughout this thesis, the structure of sports leagues in Europe will be broken down, and some of the discrepancies with other sectors will be identified.

This paper will attempt to study the struggle between European Competition authorities and the sports sector. In particular, it will highlight the occasions in which the sports industry received special treatment under EU Treaty law. As will be seen in the coming pages, it has often become a necessity for regulators to treat the sports sectors differently, allowing for a degree of exemptions that would be unheard of in any other industry. In spite of this degree of autonomy which is already granted, sports leagues in the EU (as well as overseas in the United States) often argue for a more defined standing under competition law, in particular, one that would exempt them from antitrust entirely, allowing them to run themselves. While such arguments may sound preposterous, it is undeniable that EU competition authorities have not always been successful in determining the legal status of sports organizations, under competition law, nor have they always managed to properly assess the grounds for exempting particular league behavior. Leaving SGBs in a limbo of legal uncertainty.

In light of such, the research question for this thesis will be the following:

***When looking at both the peculiar nature of the sports sector and its specificities as well as the main European Competition provisions as found in Articles 101 and 102 of the TFEU, can it be demonstrated that it is indeed difficult to reconcile the specificities of the Sports industry with EU competition law and if so which measures or adjustments to the interpretation of competition law may be possible in order to improve the current status quo?***

The purpose of this study will be that of understanding the limits of the application of European Competition Law to the sports industry. We will identify the scenarios in which certain practices of SGBs are permitted and therefore exempted by the TFEU and the European Courts. After having considered the most relevant and current case law, the opinions of multiple legal scholars, and the position of the representatives of SGBs, this thesis will try to evaluate both the past approach of European Competition authorities (mainly as regards their application of Articles 101 and 102), its current standing, and the alternatives which may be pondered.

In order to effectively answer these questions, several items must be analyzed. Firstly, it will be necessary to demonstrate the '*Sui Generis*' nature of the Sports sector and the way in which it differs from other industries (Chapter II). Secondly, this paper will describe the most relevant provisions of EU Competition Law and their applicability to the sports sector, with the goal of highlighting the difficulties that competition authorities may encounter when applying Treaty provisions to SGBs (Chapter III).

Chapter IV will serve to describe, in a chronological fashion, the manner by which European Competition authorities have applied Treaty provisions to the sports sector. This part will focus on an analysis of the most relevant case law, accompanied by the opinions of legal scholars on the matter, and will serve the purpose of demonstrating that not only has the Commission struggled in determining the way in which Sport Governing Bodies fit under EU Competition Law, but also that SGBs still have not found the legal certainty they seek, and it remains unclear to what extent they are subject to Treaty provisions.

A fifth Chapter will look into the current status of Sport Governing Bodies under European Competition Law, and will therefore consider the effect of the most recent measures adopted by EU Competition authorities. This section will also include a specific example as to the approach that may be taken when determining the legality of decisions made by Sports Governing Bodies.

Chapter VI will consider the possibility of the EU Commission adopting a Block Exemption Regulation with the purpose of granting the sports sector a degree of legal certainty.

In order to successfully achieve this, it will be necessary to adopt the following research methodology: this thesis will, inasmuch as possible, combine academic literature (both economic and legal, considering the nature of competition law) with the relevant case law. European Competition Law as applied to the sports sector has been identified by multiple scholars as unclear and perhaps even incoherent at times (as will be illustrated in Chapter II, precisely due to the asymmetry between the objectives set out, and the decisions made by the courts in interpreting the goals which the EU wishes to achieve. It thus appears essential, to better understand the issue at hand, that our research be focused on both aspects, in the attempt to identify possible solutions to the issue.

Finally, the reader should know that the considerations made in this thesis are often applicable to the governing bodies of several different sports, however, most examples will describe the football sector, as it is the largest in Europe from an economic viewpoint.

## Chapter II: The Sports Industry as a Sui Generis sector

As most industries engaging in an economic activity, sports organizations are characterized by firms, a product/service and a consumer. As discussed earlier the primary concern for regulators is the necessity for cooperation and collusive behavior between the undertakings involved in order to effectively market the product in question to satisfy its consumers. Nonetheless, it is important to note that not only is collaboration amongst the undertakings necessary, but also the product offered and the consumer itself cannot be assimilated with those in other industries.

### *a. The Product*

As discussed in the introductory part of this study, one of the products offered is the match itself. The product is therefore characterized by two competing teams, each aiming to win the game in accordance with the rules of the sport which are known by all those involved with both teams and set out by the leagues or a body above holding influence over the league (N.B. the rules are not necessarily made by the governing body, for example in football the rules are set by the International Football Board- IFAB, which dramatically defines itself as 'The Guardians of the Laws of The Game'[6]). However, as pointed out by Borland and Macdonald[7], a contest in and of itself is not of much interest to the fan, one would not pay to watch his or her favorite team at random every once in a while, a game is to be viewed within a Championship or the possibility of winning a trophy by the end of it. The product therefore is not only a single match but also the bundle of all the games, since the result of one team may affect the position of another, this is known as the 'league product'. Moreover, there is a direct correlation between the amount of consumers and the uncertainty of end result[8].

To testify to the oddness of Professional Sports and its Business, Walter C. Neal, in is renowned 1964 article[9], set out two theories which to this day are at the forefront of Sports Organizations claiming a special status under competition laws.

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[6] See International Football Board Association website, accessible at: http://www.theifab.com/
[7] Jeffery Borland & Robert MacDonald, Demand for Sport, 19 OXFORD REVIEW OF ECONOMIC POLICY 478, 479 (2003)
[8] Stefan Szymanski, The Assessment: The Economics of Sport, 19 OXFORD REVIEW OF ECONOMIC POLICY 467, 471 (2003) ("Demand is increasing in the degree of uncertainty of the contest outcome, a claim which is largely supported by the very limited demand for delayed transmission of sports broadcasting rights—once the outcome of contest is known, viewers have quite limited interest in watching the match")
[9] Neale, W. C. (1964). The peculiar economics of professional sports. The Quarterly Journal of Economics, 78, 1–14.

### *i. The Louis-Schmelling Paradox*

In the late 1930s, two of the most acclaimed boxing fights of the century occurred between boxers Joe Louis (an African-American, representing the United States) and Max Schmelling (a German, representing Nazi Germany). Aside from the historical relevance of the match from a political perspective, both as symbolizing the contrast between a dictatorship and a democratic country, as well as being representative of the struggle of African-Americans in their own country, it served to the development of one of the most important sports economic theories. According to Neale, "the ideal market position for a firm is that of monopoly", since businesses performing economic activities which are not sports related are "better off the smaller or less important the competition". However, athletes and the teams surrounding them require competition to be successful as well as to maximize their profits - if one team were to hold a monopoly, it would have, paradoxically, no-one to compete against and thus no profits. "Pure monopoly is disaster: Joe Louis would have had no one to fight and therefore no income". Neale finally draws a distinction between sporting competition and market competition by stating that while it is true that it is unprofitable for single teams or individual athletes to hold a monopolistic position, it is nonetheless of great value to a league (or sporting organization) to hold a position of monopoly over a professionals sports business ("the firm in law, as organized in the sporting world, is not the firm of economic analysis"), leading to the latter paradigm (see below League Standing Effect).

Neale's concluding remark in regards to the Louis-Schmelling Paradox that "a business monopoly is profitable in the sporting business as well as in the business of life", is of particular interest to this thesis. The author discusses the existence of an inverted joint product (deriving from the entirety of the games and the final result of the complete competition), which was defined earlier as the 'league product', over which sporting organizations hold a monopoly, since they are the sole providers of said product. However, the 'peculiarity' of sports demonstrates that contrary to other industries, in which there is a *tendency*[10] to consider monopolies (this is not always the case[11]) as negative due to the possibility for resource misallocation or abuses of dominant positions, in sports, monopolies are ultimately beneficial to consumers. Such a statement, as outrageous as it may sound, can be justified through the example of the NBA-ABA merger. In 1970 the National Basketball Association voted to merge with the American Basketball Association (a basketball league which competed with the NBA). However, this merger was delayed until 1976 due to the

[10] Leonard E. Read (1960) 'Good and Bad Monopoly', Foundation for Economic Education, [Online]. Available at: https://fee.org/articles/good-and-bad-monopoly/ (Accessed: 31st of May 2017).
[11] See later discussion on natural monopolies and their definition

NBA players association filing a lawsuit on antitrust grounds[12]. The suit aimed to fix a considerable amount of antitrust and labor law violations which occurred under the NBA's rules and structure at the time. In summary, the NBA team which drafted a player owned his rights almost in perpetuity and would forbid him from negotiating with any other team. As a consequence, the ABA provided, to a certain extent, an escape route for players wanting to leave the NBA, thus making both leagues compete for the highest talents. While the violations by the NBA were clear, and the Oscar Robertson lawsuit provided incredible steps forward for athletes and their rights, it was not the merger *per se* which negatively affected competition and violated antitrust, but the current structure of the NBA and its standardized contracts. The merger should be considered as having been incredibly beneficial to the league, the players and the consumers. Since 1976 the NBA has grown into a worldwide brand, maximizing consumer interest, since the best players compete against each other on a nightly basis rather than in two different leagues (which would separate the best players, preventing them from playing against each other), which as a consequence has increased considerably broadcasting deals (the NBA has recently signed a 9 year 24 billion dollar deal with Turner Sports and ESPN[13]), leading to the maximization of player contracts. In other words, a league monopoly over a professional sport, under the right setting, results in the best possible outcome for the firms involved as well as the consumers.

A further example could be made of AS Monaco FC, the club, while being based in Monaco, plays in the French Ligue 1. This is due to the fact that Monaco, being a city state, is not large enough to establish its own professional football league, it is therefore necessary for them to join the French Association in order for them to have other teams to compete against.

*ii. The League Standing Effect*

In his paper Neale also recognizes the theory according to which it is not only the uncertainty of a single match or sporting event which is attractive to the fan, but also "the pennant race enjoyed by all and paid by none". Accordingly (this theory is applicable only to sports which include standings or playoff pictures, rather than single contests such as boxing matches or UFC fights), if the race to winning a title is close and competitive (from a sporting perspective), viewership and tickets sales are bound to increase.

[12] Robertson v. National Basketball Association, 389 F. Supp. 867 (Southern District of New York 1975), available at: http://law.justia.com/cases/federal/district-courts/FSupp/389/867/1591788/
[13] 'What The NBA's Insane New TV Deal Means For The League And For You', K. Draper, 10/06/2014, available at: http://deadspin.com/what-the-nbas-insane-new-tv-deal-means-for-the-league-a-1642926274

*b. The Consumer*

When thinking of the world of sports, it appears that the consumer is the sports fan, either by purchasing a TV package allowing him to enjoy the league product, or, by attending the stadium in person[14]. The consumer of a sporting contest is often characterized as a peculiar individual or group of individuals. There are usually two main reasons behind 'fan interest'[15]: an emotional attachment for geographical or sentimental ties to one team, and interest which arises with an event considered of high quality (competitive from a physical and mental standpoint), the outcome of which is uncertain, and which may have a particular impact on the final result of the league product. While the latter 'fan' is relatively comparable to consumers in other industries, since he is only interested in the best possible sporting matchups, and may easily watch other events or follow other leagues if not content with a certain game or with the competition in any given league; the fan who is sentimentally attached to a single team will/does not want to change the team he follows and supports (in this scenario, single teams could therefore take advantage of such a fan by increasing stadium or television prices, if the latter are not pre-determined).

*c. The League*

The previous sections clearly established the peculiarity of both the product offered as well as the consumer of said product. However, sports leagues themselves may also be qualified as an 'odd man out' compared to other associations of undertakings. Both in Europe and in the United States, legal scholars as well as economists have struggled to determine the most efficient model in order to run a sports league. Moreover, the two models described below seem to give different outcomes under competition law. Most leagues around the world operate similarly to a joint venture, as club run entities, their governance falling on the shoulders of the clubs themselves, via representatives which sit on the Board. It is, however, difficult to ascertain exactly whether leagues should be defined as a joint venture or a single entity, or in TFEU terms, whether it should be defined as an undertaking or an association of undertakings. It is common that sports governing bodies in the EU, while indeed acting as a parent to teams engaging in economic activities (ticket sales, sale of merchandise etc.), behave as economic actors, through marketing activities, sale of broadcasting rights and more, making them undertakings as well[16]. This is of particular interest to European

[14] See Id. 9- on the distinction between direct demand, which affects the final consumer (the sports fan) and derived demand (which includes broadcasters, organizations seeking input for marketing campaigns, organizations selling merchandise etc.)
[15] Mason, D.S. (1999), 'What is the Sports Product and Who Buys It? The Marketing of Professional Sports Leagues', *European Journal of Marketing*, 33(3/4), 402-18
[16] Id 16

Competition authorities, to the extent that defining a league as a single entity would characterize it as holding a dominant position, therefore having the potential of abusing its monopolistic power to the detriment of the consumer (in violation of Article 102); on the other hand, classifying leagues as associations of undertakings would translate to the various independent firms (the teams) having the possibility to collude and similarly reach detrimental and anti-competitive agreements (in violation of Article 101)[17].

*d. Sports leagues as natural monopolies?*

These considerations on the nature of sports leagues in the eyes of competition law, and the apparent necessity for leagues to hold a monopolistic position within their respective markets begs for the following question: would it be reasonable to define the sports sector as one of natural monopoly? To understand and opinionate on this proposition, it is first necessary to define the concept of natural monopolies (in particular to understand it in a European sense).

The notion of natural monopolies appeared for the first time in Adam Smith's *Wealth of Nations*, it was since elaborated by John Stuart Mill, who described it as the necessity for certain sectors (postal, transportation, electricity) to hold a dominant position within a geographic market, for that would be the most efficient way of allocating said resources. The most current and perhaps simple definition which we should consider was most recently given by William Baumol, in 1977: "an industry in which multi-firm production is more costly than production by a monopoly"[18]. The Treaty on the Functioning of the European Union recognizes the existence and necessity for natural monopolies in Article 106: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."[19]

In our case the question therefore becomes: would it be more or less costly to have multiple same sport leagues within a single geographic market? The answer, however, does not lie in the question. It might be true that having two leagues competing within a single geographic market would drive the prices down, since teams in opposite leagues would compete for the best players. On the other hand, such a scenario would be highly detrimental to the product and therefore would hurt

[17] This notion will be more clearly explained in Chapter V (a), when describing EU Competition Law provisions to a specific case.
[18] Baumol, William J., 1977. "On the Proper Cost Tests for Natural Monopoly in a Multiproduct Industry", American Economic Review 67, 809–22.
[19] Article 106(2) TFEU (ex Article 86 TEC)

consumer welfare: if the best players and the best teams are split amongst two leagues, and therefore do not play each other, the interest in the product (the game) drops dramatically.

When looking at whether or not leagues should be viewed as natural monopolies, and, in such a case whether they should be considered as efficient, it is useful to draw a brief comparison between American league structure as opposed to the European model. In the United States, leagues are constituted by a limited number of teams, which are usually based in major cities. The only way for a city to become part of a league is if a team decides to relocate (for example the NBA's Seattle Supersonics relocated to Oklahoma City in 2008, or the NFL's Oakland Raiders which will be relocating to Las Vegas by the 2020 season). Ergo, the teams within a league are constantly the same. On the other side of the Atlantic, the European model is quite different. When thinking of soccer in any given European country, there are a multitude of leagues, classified in tiers (1st, 2nd, 3rd...). Each year, the worst three teams in one tier are relegated to the tier below, and vice versa (the best three are able to advance to the tier above). The best teams in the 1st tier are able to participate in the Champions League, a tournament organized by UEFA). The latter model allows for teams to grow, and, access to the market is guaranteed to all new entrants (starting from the bottom). Moreover, European leagues should be seen as having a broader reach, for example, the Italian FIGC (Italian Federation for the Game of Soccer) is the governing body for all Italian league tiers, the international team, the woman's league and the amateur level.

From the perspective of competition law, it would appear as though the European Model is more efficient, granting access to the market to anyone (the best managed team will be able to reach the first tier, whereas the worst managed team will be relegated), contrary to the United States where inefficiencies in management are not punished, and what could possibly be more efficient actors are not granted access to the market. As stated by Noll[20], "even in a natural monopoly, competition for the market, while not as significant a force for efficiency as competition in the market, can improve consumer welfare". Moreover, the total control which leagues hold over their respective sports in Europe compared to the US might indeed be indicative of a natural monopoly.

Furthermore, contrary to the United States, Europe has not seen the appearance of rival leagues attempting to enter a given sports market. While this may be attributed by some to the fact that Europe is more closed as a market, it is considerably more likely that it is due to the possibility that every team is granted the possibility to reach the highest level of sporting competition. This is

[20] Roger G. Noll, *The Organization of Sports Leagues*, OXFORD REVIEW OF ECONOMIC POLICY, VOL. 19, NO. 4, 2003

known as the principle of contestability: “firms that do not operate efficiently might find themselves driven from the market by other firms if market entry is free”[21].

Finally, if one were to hypothesize on the effect of the appearance of a competing league in Europe, firstly it is likely that such a venture would fail, considering the strength of the already established leagues and their hierarchies. However if such a competing league were to flourish, while it is true that the competition between the two would in all likelihood lower the prices due to teams in either league fighting for players and fan bases, it is almost certain that the quality of the service offered would diminish, given that the best players, managers and staff would be scattered amongst the leagues, ultimately having a negative effect on consumer welfare.

If one were to limit the definition of a Natural Monopoly to the words of William Baumol, it appears that the European Sports League model does indeed fit such a description. However, as stated by John Stuart Mill[22], it is a risk to exempt an industry from the reach of competition rules simply for the fact that the appearance of competitors in the sector would ultimately diminish consumer welfare, due to the fact that profit-maximization seeking firms would in all likelihood ‘keep their rate of profit above the general level’. The exception to this is that of what Mill defined as ‘artificial monopolies’, those created by governments, the absence of which could cause market failures. The question of whether something should be protected from the application of Competition Law as a natural monopoly therefore becomes a policy issue more than a legal one. This is exactly the case in European Competition Law, specifically in Article 106 of the Treaty. As a matter of fact Article 106 refers to ‘public undertakings and undertakings to which Member States grant special or exclusive rights’ through which it seeks to exempt ‘services of general economic interest (SGEIs)’ and ‘revenue generating monopolies’. Yet for undertakings to receive such special or exclusive rights, the undertakings must be providing a ‘public service’, which is not the case for the sports sector. It would thus be impossible for SGBs to be exempted from competition law provisions by claiming they are a natural monopoly under Article 106.

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[21]Drewes, Michael. “‘Management, Competition and Efficiency in Professional Sports Leagues’”. Paper, 2004. http://www.arbeitskreis-sportoekonomie.de/spooek_drewes.pdf

[22] John Stuart Mill (1848) 'Chapter 2: Influence of the Progress of Industry and Population on Values and Prices', in (ed.) Principles of Political Economy, Book IV 'Influence of the progress of society on production and distribution'. London: Longmans, Green and Co.
‘All the natural monopolies (meaning thereby those which are created by circumstances, and not by law) which produce or aggravate the disparities in the remuneration of different kinds of labour, operate similarly between different employments of capital. If a business can only be advantageously carried on by a large capital, this in most countries limits so narrowly the class of persons who can enter into the employment, that they are enabled to keep their rate of profit above the general level’

*e. The Specificity of Sport in European Policy*

The concept of the specificity of sport should not be limited to its differences with other business sectors. This is particularly true in Europe more so than in the United States. Such a distinction should be drawn from the structure of leagues themselves. As a matter of fact, while U.S leagues are usually solely concerned about one or two specific competitions (usually a major and a minor league), the European Sports Model is built around the notion that the governing body for any given sport will be in charge of its development throughout an entire geographic market. For example, the UEFA is in charge of the male and female competitions, the development of youth programs, investments in sport centers for amateur athletes, the organization of the European cup for national teams etc. This aspect of the structure of sport in Europe forced competition authorities to recognize the value of the input of SGBs in society, beyond the economic activities they carry out. One of the first times such a specific nature was recognized was in the 2000 Treaty of Nice[23], whereby the Council admitted the importance of the sports sector outside of its economic nature: 'the Community must, in its action under the various Treaty provisions, take into account the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured'. This position has always been considered by European Courts when determining the legality of a decision made by an SGB. However, when it comes to Competition Law it might not always be simple. European Competition Law focuses on the effects of economic activities on the market, and in certain cases, whether infringements of Competition Law may be justified on the grounds of the economic efficiencies they create (see later discussion on Article 101(3)), yet the effects of the societal benefits guaranteed by sport are certainly more difficult to measure as they are intangible but incredibly beneficial in the long term[24].

This part has looked into the manner by which the sports sector might distinguish itself from other industries engaging in economic activities. In particular its objective was that of determining how, by its very nature, the sports sector requires legal bodies to be applied to it differently, this appears of particular relevance for competition authorities, whom must be careful in their application of Treaty rules to the decisions made by SGBS. The following Chapter will now focus on EU competition law provisions, and their applicability to the sports sector.

[23] Nice European Council, 7-10 of December 2000, presidency Conclusions, available at: http://www.europarl.europa.eu/summits/nice2_en.htm#an4
[24] J. L. Arnaut, *Independent European Sports Review,* 2006, available at: http://eose.org/ressource/independant-european-sports-review/

**Chapter III: Defining European Competition Law provisions**

This chapter will serve as a platform to assess the applicability of EU competition la provisions to the sports sector. Competition authorities have struggled with correctly identifying the roles played by all the actors involved and, subsequently, have encountered difficulties in how to approach possible competition law violations. A more simple and elementary explanation would lie in regulation itself, indeed, when looking at the wording of Article 101, it can be characterized as relatively broad. The use of the term undertaking refers to all firms or associations of firms engaging in an economic activity, but, as will be viewed later on, it is not always easy to determine whether behavior of SGBs should be defined as an 'economic activity'.

Economic activity in the sense of the TFEU is defined as entities which engage in offering goods or services on a given market. However, the definition is not be limited to such sales and purchases. Economic activity in the eyes of European Competition authorities is a nuanced concept, for example profit motive is not a requirement for an entity to be engaged in an economic activity, and one may engage in economic activities 'regardless of the legal status of the entity and the way in which it is financed'[25].

Article 101 also refers to "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States". In this sense the phrasing should be understood as an all-encompassing formulation which wishes to prohibit collusion amongst competitors. As stated by the Advocate General in Van Landewyck[26], competition authorities should be on the lookout for illegal collusion, whenever competitors in a market are in contact or have a meeting of the minds. Yet, as previously demonstrated, collusion is a necessary element to the proper functioning of Sport leagues. Later it will be discussed how SGBs are to be classified (for example in *Meca-Medina* the governing body in question was defined as both an undertaking as well as an association of undertakings).

This is not only applicable to European law; American statutes, such as the Sherman, the Clayton and the Federal Trade Commission Acts are characterized by a very similar failure to dictate in which way laws are to be applied to such a unique industry as is the sports sector.

It remains nonetheless difficult to make analogies between the American and European statutes, in particular as regards their application to the sports industry. Especially due to the dissimilarities in the structure of the leagues on both sides of the Atlantic, and more generally because of the

[25] See footnote 1, pp 188
[26] Case C-209/78 - Van Landewyck v Commission [1980] ECR 3125, Opinion of AG Reischl

different objectives of the legislative bodies which drafted them. When thinking of the European Union, the objective at the forefront of the authors' minds was that of implementing legislation which would favor economic activity and be as minimally burdensome to industries as possible, leaving much space for interpretation and focusing strongly on the effect of any given behavior on the market. Yet simultaneously strictly framing the approach which a court should take when analyzing a given decision or agreement. The American method is looser and focuses on the court applying a 'Rule of reason', by looking at any given behavior on a case-by-case basis. In a sense, the ample approach of Articles 101 and 102, and the willingness to overlook anti-competitive behavior once certain efficiency-generating externalities are proven[27], has fueled the claim by sports leagues that they should be granted a self-regulatory status (Chapter V). As a matter of fact, and as will be acknowledged in Chapter IV (see discussion on the White Paper on Sport), the European Commission has not shied away from recognizing the efficiencies of sport (particularly in a societal as well as economic role) and its importance as "a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives"[28]. It is exactly this position which could allow SGBs to hypothetically argue: 'If we generate economic and societal efficiencies, and, to a certain extent, the efficiencies we generate fall under Article 101(3), why should we not be granted, in regards to certain categories of agreements, a Block Exemption, and the leeway to operate freely where other industries cannot?'

This Chapter will essentially be dedicated towards the definition and explanation of the most important competition provisions of the TFEU. To support such a description, this thesis will make use of the multiple guidelines and reports published by the Commission on how to apply the different Articles, as well as utilizing relevant academic literature on EU Competition Law.

*a. Article 101 TFEU*

There are three conditions for an agreement to be declared illegal in accordance with Article 101: "there must be proof that there is some form of collusion between undertakings. Second, the collusion must affect trade between member states, and have an appreciable affect upon such trade. Third, the agreement must have the 'object or effect of restricting competition within the common market."[29]

[27] See later discussion on Article 101(3)
[28] See Commission White Paper on Sport (2007)
[29] *See* Valentine Korah, An Introductory Guide to EC Competition Law and Practice 40 (9th ed. 2007)

In Article 101(1), a distinction is made between violations by object, and violations by effect ("may affect trade between Member States and which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market"[30]). While a violation by object constitutes a direct restriction of competition, the effect requirement obliges regulators to look at the impact of certain behavior and whether or not it fulfils the exemption listed in paragraph 101(3). The initial distinction to be made between the American and the European model is therefore that of exemptions: while the U.S allows for a more case by case approach, the EU Commission requires that undertakings engaging in anticompetitive behavior demonstrate that they comply with all of the criteria within the exemption clause (as concerns the sports sector, the Commission has recently adopted the more American method, as will be explained in the following chapter). Moreover, the exemptions also mention the necessity for an agreement to be ultimately beneficial to consumer (by not excluding him from the efficiencies generated by the agreement).

Compared to United States legislation, the European Union has taken a stricter approach to competition law. While it is true that both legislative bodies wish to focus on the impact/effect of possible anticompetitive behavior, the European Union has developed a more encompassing legal body which has a more clear set up of the dos and do nots for undertakings in regards to both anticompetitive agreements and dominant positions. The Commission has published several guidelines in order to help courts in their assessment of competition law cases (on vertical and horizontal agreements, on the application of 101(1) and 101(3), on the application of Article 102 etc.). Certainly this may be viewed positively by competition law scholars, but it also creates a peculiar situation for Sporting organizations: in spite of the fact the EU is willing to recognize the specificities of sport, and while it is true that sporting organizations are granted, to a certain degree, a special status under EU Competition Law (as shown by the ever-changing case law described in the following chapters); the Commission clear-cut resolution of not entirely exempting certain categories of decisions or agreements made by SGBs, has maintained a certain degree of legal uncertainty in regards to their position under Articles 101 and 102 TFEU. Indeed, having to be constantly submitted to the scrutiny of competition authorities can become burdensome.

Article 101 contains an exemption clause, 101(3), which would allow anticompetitive behavior to be deemed acceptable in particular settings:

"The provisions of paragraph 1 may, however, be declared inapplicable in the case of agreements or *categories* of agreements (as well as other behavior) which contributes to improving the production or

[30] Id. 7 Article 101(1)

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."[31]

Through the use of the term 'category' of agreements, the authors of the TFEU set the stage for the appearance of Block Exemptions, which may be defined as follows: "In EU competition law, regulations issued by the European Commission, or in certain cases the European Council. Block exemptions have been introduced for certain types of agreements, such as vertical agreements, technology transfer agreements and research and development agreements"[32]. Block Exemptions offer the possibility to guarantee 'safe harbor' to certain agreements from Article 101[33] and will be discussed in more detail in the final chapter of this thesis.

If one were to look at decisions made by sports leagues under the lens of Article 101 by conducting the threefold analysis mentioned in the earlier stages of this part, certain elements stand out clearly. First and foremost, there is an obvious collusion amongst undertakings[34] (see also Chapter I), therefore automatically attracting the interest of competition authorities. However, whether or not such collusion is capable of affecting trade amongst member states or if the agreements reached by the colluding undertakings effectively restrict competition within the common market is established on a case by case basis. Chapter V will include an example of the application of Articles 101 and 102 to an agreement reached by the members of an association of undertakings.

*b. Article 102 TFEU*

The second main Article in European Competition Law, is 102 TFEU. In accordance with this statute, it is illegal for undertakings to abuse a dominant position within the internal market. Such abuse may take the shape, but is not limited to: the imposition of unfair purchase or selling prices, limiting production or development to the detriment of consumers etc.[35] Moreover, according to

[31] Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3)
[32] 'Block Exemption' – Definition, available at: https://uk.practicallaw.thomsonreuters.com/Document/I25017252e8db11e398db8b09b4f043e0/View/FullText.html?originationContext=docHeader&contextData=(sc.Default)&transitionType=Document&needToInjectTerms=False
[33] See Id 1.
[34] See Chapter II on the collusive nature of Sports leagues
[35] Article 102 TFEU (ex. Art. 82 EC)

the Commission, situations of collective dominance by multiple undertakings may also be subjected to Article 102 ("abuse by *one or more* undertakings of a dominant position,"), therefore allowing the Commission to examine league behavior under the lens of Article 102 regardless of whether or not leagues are defined as undertakings or associations of undertakings.

The ECJ has defined dominant positions as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"[36]. In the sports sector, examples of such an abuse of dominance could be seen in for example when "forcing consumers to buy a bundle of products that could be sold separately or forcing competitors off the market by entering into exclusive arrangements"[37]. Indeed such an occurrence could be seen in situations of joint sale of broadcasting rights (if not properly regulated), whereby an SGB would allocate the rights to broadcast matches on television to a single TV provider, usually on the basis of a tender (it will later be seen how the White Paper on Sport conditionally authorizes such a sale).

It is generally the case that leagues not only hold a dominant position within a geographic and product market, but a monopolistic one. While it has been stated by multiple scholars that monopolies in the sports sector paradoxically offer the possibility to generate efficiencies in the market, the role of competition authorities remains that of guaranteeing that such positions are not abused. This is particularly true when considering the unique nature of the sports fan, whom will not only be reluctant to start following a different sport, but is even unlikely to become a fan of another team in another geographic area, regardless of whether or not he or she has access to that product.

Similarly to the procedure taken by competition authorities when determining the legality of an agreement under Article 101, Article 102 requires an economic and effects based approach. In accordance with a paper published by the European Commission[38] in 2005, enforcement should not focus on determining the existence of a dominant position, but rather "the emphasis is on the establishment of a verifiable and consistent account of significant competitive harm, since such an anti-competitive effect is what really matters and is already proof of dominance. In an effects-based

[36] CJEU, Case 27/76 United Brands Company v Commission [1978] E.C.R. 207, para. 65
[37] Geeraert- Action for Good Governance in International Sports Organisations (AGGIS) (2013) *Limits to the autonomy of sport: EU law*, Leuven: HIVA- Research institute for work and society.
[38] Jordi Gual et al., Report by the EAGCP: An Economic Approach to Article 82, ECON. ADVISORY GROUP ON COMPETITION POL'Y OF THE EUR. COMM'N, 2 (July 2005), available at: http://ec.europa.eu/dgs/competition/ economist/eagcp_july_21_05.pdf.

approach, the focus is on the use of well-established economic analysis. Such a conceptual framework provides a benchmark for the detailed assessment of the key ingredients that have to be present in a case, whether one tries to check the presence of significant competitive harm, or the achievement of relevant economic efficiencies"[39]

While it is true that the holding of a dominant position in accordance with the standards set by the Commission (usually more than 50% in any given market), should indeed attract the immediate attention of European Competition authorities, it appears that the very nature of a sports league necessitates a monopolistic presence in order for maximize consumer welfare (see above *Leagues as Natural Monopolies*). In this sense, it becomes necessary for competition authorities to embrace the monopolistic nature of an SGB, to distinguish between the practices which may appear as an abuse of dominant position but ultimately generate efficiencies (such as may be the joint sale of broadcasting rights) and those which may indeed constitute an abuse. The necessity of the Commission adopting such a stance becomes considerably more important when considering that unlike article 101, Article 102 does not contain provisions granting exemptions to undertakings in cases which justify the abuse of such a dominant position.

*c. Relevant market*

Under European Competition Law, the Commission requires that for every case, one should initially define the relevant geographic and product market. While this thesis is not per se looking at a specific case, it is of paramount importance in order to effectively understand EU procedure to identify the market we will be discussing.

According to a notice by the Commission[40], 'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas' and 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.

When looking at the sports sector in Europe, there is a tendency for national leagues to organize tournaments or contests which include athletes and teams from all over the continent (think for

[39] Id 22.
[40] COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law, Official Journal of the European Communities, (97/C 372 /03 )

example of the UEFA Champions League or the Turkish Airlines Euroleague). The relevant geographic market is therefore is comprised of all the countries participating in a tournament, even those located outside of the European Union.

For the purpose of this thesis, we shall consider the relevant product market to be the entirety of professional sports competitions which are organized by any given league or by an association of leagues. Moreover, considering that 'a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer' and that it is often the case that only one league exists per sport per country (and a larger one which comprises all of Europe), "there are no substitutes for this. While people can watch other professional sports, it is a different type of entertainment than football, as people only prefer to watch certain sports."[41] A small parenthesis should be opened when discussing the substitutability of the product offered. When thinking of the avid sports fan, it is possible to make a parallel with smokers: regardless of any increase in prices, fans will not change the team they support, and will in all likelihood continue following their team, albeit with a grumpier face, in a much similar way with which a nicotine addicted smoker will continue smoking. To this day I will never forget the look of rage and disappointment in my father's eyes when six year old me told him, after an awful season performance by AS Roma, that I wanted to support another club.

[41] 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications', Valerie Kaplan, Emory International Law Review, Vol. 29, Issue 4

**Chapter IV: The European Competition Law Approach to the Sports Sector**

When considering the special status that sport governing bodies hold in the eyes of competition authorities around the world and in particular within the European Union, the initial approach should be that of looking at the evolution of case law. Indeed, it can be stated that the sports sector is a relatively new industry, and the application of competition law to it is an even more recent advent.

It is also important to underline the constant evolution of the industry due to external factors. In terms of broadcasting, for example, the consumer experience has been evolving constantly, from being limited to experiencing a sporting event on radio sixty or so years ago, to having the opportunity to follow any given sport on television, and ultimately having access to online streaming services which simplify to an even greater extent the access to sport. In light of such, this section will initially consider, in a chronological fashion, the most important and influential cases in terms of competition law and sports. Upon completion of this, it will be necessary to consider the opinions of legal scholars and their interpretation of the aforementioned case law.

*a. Walrave and Koch*

As stated by Siekman[42], there is "no competence for the Communities/European Union to deal with sport. So, there was no section on sport nor are there any provisions on sport in the Treaties. This at the same time implied that sport was not exempted from the Treaties". The first major clash between European Community Law and the sports sector appeared in 1974[43], when two Dutch cyclists participating in a competition organized by the International Cyclist Union, challenged the rule which stated that every cyclist competing for a national team, when acquiring the services of a pacemaker[44], should ensure that such services are provided by an individual of the same nationality, on the basis of EC laws regarding the free movement of people. While the actual case does not directly involve European Competition Law, it is the conclusions drawn by the European Court of Justice (ECJ) which clearly affected Europe's approach to the Sports Sector in particular regarding competition law, ultimately creating a sporting exception which lasted several decades. The decision by the European Court of Justice clearly stated that any action undertaken by a Sport

[42] See Robert Siekmann, The Specificity of Sport: Sporting Exceptions in EU Law, 49 COLLECTED PAPERS OF THE FAC. OF L. IN SPLIT 697, 714 (2012), available at http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=138869&lang=en

[43] Case 36/74, Walrave and Koch v. Union Cycliste Internationale, 1974 E.C.R. 1405

[44] See Definition Motor Paced racing, available at: https://en.wikipedia.org/wiki/Motor-paced_racing#Pacing_by_motorcycle. (Motor-paced racing and motor-paced cycling refer to cycling behind a pacer in a car or more usually on a motorcycle. The cyclist follows as close as he can to profit from the slipstream of his pacer)

Governing Body would only be subject to Community Law in cases where it constituted an economic activity: "purely sporting interest and as such have nothing to do with economic activity"[45]. The objective of the Court was therefore that of creating a distinction between economic activities falling under the scope of the TFEU (at the time the Treaty of Rome) and purely sporting rules, which include but are not limited to "the selection of athletes for a national team, the need to limit a number of participants in a competition, and the setting of deadlines for transfers of players in team sport"[46]. However, according to many legal scholars, the intent of the court was not that of examining whether behavior by SGBs should be considered an economic activity, but rather to look into the 'basis upon which the sporting rule was approved'[47]. More specifically, to determine whether or not any given measure was adopted with a 'purely sporting interest' regardless of the possible externalities on the economic aspects of the sector. This sporting exemption was upheld in the years that followed, the most notable case being that of *Donà* in 1976: 'The treaties do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only'[48].

The *Walrave* and later on the *Donà* cases effectively created a sporting exemption, allowing Sports Governing Bodies to successfully place themselves outside the reach of European Community Law. Nevertheless, the growth of the Sports Industry in terms of economic impact and the size of the markets involved, required legislators to amend this exception, ultimately eliminating it entirely, as will be shown in the cases below.

*b. Bosman*

Once again the case in question is not directly related to competition law per se. It did however alter the European Sports world in quite a substantial fashion (in a similar way to what happened in the United States and the NBA thanks to Oscar Robertson). This case[49] involved a Belgian football (soccer) player, whom disputed the international transfer rules which the UEFA had set up, in particular, claiming that they were in violation of the Treaty's rules on the free movement of workers. Jean Luc Bosman, whom played for R.F.C Liege, upon expiry of his contract, was offered to play for Dunkerque, a team playing in the French league. However, as RFC Liege requested an

[45] See Walrave, 1974 E.C.R. 1418, para 8 (stating prohibition does not involve economic activity)
[46] C. Boot, 'The Collision of the EU Legal Framework and FIFA/UEFA Regulations', 2012, Tilburg University
[47] Alfonso Rincon, ´ EC Competition and Internal Market Law: On the Existence of a Sporting Exemption and its Withdrawal, 3 J. CONTEMP. EUR. RES. 224, 226 (2007)
[48] Case 13/76, *Donà* [1976] ECR 479, §14.
[49] Bosman, 1995 E.C.R. I-04921

unaffordable transfer fee from Dunkerque, he was not allowed to change teams. Eventually, his wages were reduced substantially as a result of no longer being a starting player for Liege[50]. Bosman filed three distinct legal proceedings: against the Belgian Football Association, against R.F.C Liege, and against UEFA. The court eventually ruled in Bosman's favor, asserting that the request of such a costly transfer fee was in violation of the TFEU's, freedom of movement for employment purposes. This was due to the fact that while indeed it was within the rights of R.F.C Liege to set the transfer fee, such a price tag should be determined in relation to 'their incurred cost of training the player', the Court felt that the price requested was not closely connected with the supposed purpose of such fees. The approach was therefore that of using a proportionality test, in determining the validity of the claims.

While Bosman did indeed win the case(s), it was the impact on the entirety industry which is of the utmost importance. De facto, the Bosman ruling affected league policy throughout Europe, enabling players to leave their club upon expiry of their contract and change teams (upon the payment of a pre-determined fee). To this day, Jean Luc Bosman has stated that he is still waiting for a thank you note from Cristiano Ronaldo and other notable players[51].

This case therefore represented a crucial turning point in the relationship between European Law and the sports sector. It enable single individuals to take head-on established institutions, in a David versus Goliath fashion, and win, regardless of the lack of action by the European Commission, as was vehemently stated by Stephen Weatherhill[52]. Furthermore, it opened the eyes of the Commission to the dangers of granting SGBs the shelter of such a broad sporting exemption. Following the ruling, authors such as Richard Parrish, stated:

"The Commission appeared keen to avoid confrontation with the sports world. A number of factors altered this position. The ruling in Bosman acted as an important watershed. Even though in *Bosman* the ECJ did not address the question of competition law and sport, instead focusing on free movement principles, the Commission used the ruling to justify greater scrutiny of sporting activity.

[50] Burton, Mark (21 September 1995). "Who is Jean-Marc Bosman?". The Independent. Retrieved 14 December 2011.
[51] http://www.goal.com/en-us/news/69/transfer-zone/2015/12/14/18364232/bosman-ronaldo-and-messi-win-what-they-win-because-of-me.
[52] Stephen Weatherill, 2000, Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European Sport Model,' in L. AND SPORT IN CONTEMP. SOC'Y 157, 171 ("Bosman the litigant broke open, not simply a cartel within football, but also a cartel between the football authorities and the Community's regulatory authorities.")

Furthermore, competition law offered individual litigants a more cost-effective venue for redress than the private enforcement route via national courts and the ECJ"[53].

The Commission did indeed take notice of the Bosman Judgment and in particular of its lack of definitions regarding the application of Community law to the sector. It therefore attempted to mend such deficiencies through the publication of several reports and guidelines aiming at the clarification of the EU's position. The Helsinki Report on Sport[54], published in December of 1999 (in response to the Declaration on Sport attached to the Treaty of Amsterdam), delineated which practices would be directly submitted to the scrutiny of competition rules (such as discriminative sale of entrance tickets to stadiums, restrictive sponsoring agreements removing other suppliers, exclusion from the market of other economic operators etc.), practices which do not come under competition rules (such as the 'rules of the game') and the practices *likely* to be exempted (short-term sponsoring agreements or joint sale of broadcasting rights, provided it be nonexclusive, tender based and of limited duration)[55]. The object of such a report was also that of recognizing the specific nature of sport, ergo its value from a social-cultural perspective and the importance of reconciling such aspects with the astonishing growth of the sector from an economic perspective, accordingly it affirms that "through the values associated with fair-play, solidarity, fair competition and teams spirit, sport plays a morally elevating role in society".

Moreover, preceding the publication of the report, a Press Release by the European Commission[56] described the position of at-the-time Commissioner Mario Monti: "This guideline for applying the competition rules to sport will make it possible to create a framework that provides the world of sport with the legal certainty which it quite legitimately seeks".

The Commissioner confirmed his opinion regarding the content of the Helsinki report in a speech several years later: "Sporting regulations such as the way championships are organized, the way a coach structures his football team, how a referee rules the field, whether a judo player is selected to

[53] R. Parrish (2003) Sports Law and Policy in The European Union, 1st edn, Manchester: Manchester University Press.
[54] 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, COM (1999) 644 final, Oct. 12, 1999, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF
[55] This third category is to be determined on a case by case basis, in accordance with a statement by Commissioner Mario Monti
[56] Press Release, European Commission, Limits to Application of Treaty Competition Rules to Sport: Commission Gives Clear Signal IP/99/965 (Dec. 9, 1999) [hereinafter IP/99/965], available at http://europa.eu/rapid/press-release_IP-99-965_en.htm#PR_metaPressRelease_bottom (discussing clarification of Commission's "grey area")

represent his or her country at the Olympic Games or the suspension of a swimmer for having taken doping substances is not the business of the Commission's competition department and when we have received complaints we rejected them".

However, the stance adopted by the Commission was once again turned upside down, as the following case will come to show.

*c. Meca-Medina*

The most recent and perhaps most relevant case concerning the sports sector and European Competition Law, is *Meca-Medina and Majcen v. Commission*[57], in which the Court refuted the 'sporting exception' and in particular the aspect of a purely sporting rule from being subject to EU Law. The case involved two professional swimmers whom, after arriving in first and second position in a race, were tested positive for a performance enhancing drug which had been banned by the International Swimming Federation and the International Olympic Committee. As a consequence, both swimmers were banned from competing professionally for a period of four years each. Following several unsuccessful appeals to different courts on the grounds of anticompetitive behavior by the respective sport governing bodies (which had held that since doping rules are of a purely sporting nature, they should be exempted from Articles 101 and 102), the ECJ overruled its decisions in the *Walrave* case and disagreed with the stance taken by the Commission in this particular scenario. Accordingly, the Court claimed that if athletes receive remuneration for their activities, and are therefore professionals, their employers (and the industry which oversees the execution of such activities) should be subject to European Competition Rules[58]. The purpose of the ECJ's approach was not necessarily that of justifying the behavior of the two swimmers, but rather that of offering a new method to be applied by competition authorities when analyzing these 'sporting rules'. Indeed, the suggestion of the Court was to no longer judge cases by exempting every type of sporting rule, but to engage in a deeper analysis of said rules:

"Even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article [101 TFEU], since they are justified by a legitimate objective: inherent in the organization

[57] Case C-519/04 Meca-Medina and Majcen v. Commission , 2006 E.C.R. I-6991
[58] "The mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."

and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes."[59]

The exception to sporting rules therefore underwent a transformation due to the ECJs ruling. It is no longer a question of whether or not an action by a governing body should be qualified as a purely sporting rule, but it is now expected of SGBs to be able to justify the adoption of these rules, by successfully demonstrating that the adoption of such a rule was not driven by economic considerations[60].

"When an activity must be assessed under EC competition law, it will be necessary to determine whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States"[61]. As well as "If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty".

The ECJ, in reaching its decision, decided to look into a non-sports related case, in order to effectively develop a viable test applicable in different scenarios. To do so, it used the now renowned *Wouters*[62] case. When assessing particular sporting rules the Court felt it would be irregular to accept them regardless of their impact on trade between Member States, it therefore used a proportionality test: was the adoption of anti-doping rules legitimate and inherently necessary to the proper development of the sport? This test has been assimilated with the American approach, as some now refer to it as the European Rule of Reason[63]. In a certain sense this was a quite difficult decision to make, as European legislators have often claimed the rejection of a 'Rule of Reason' as what distinguished EU Competition law from American Antitrust statutes[64]. The *Wouters* decision, simply put, represented the Court's willingness to define an agreement not in violation of Article 101(1) "on the ground of a non-economic argument without applying Article 101(3) TFEU"[65]. By applying this test to *Meca-Medina*, the ECJ formally introduced the Rule of reason approach to the regulation of the sports sector. While this may seem as a step forward for

[59] Id 57
[60] Samuli Miettinen & Richard Parrish, 2007, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home Grown Player Rule)*, 5 Entertainment and Sports Law Journal
[61] See 45, paragraph 28
[62] Case C-309/99 Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577
[63] Katalin Judit Cseres, Competition Law and Consumer Protection (referring to *Wouters*), 2005.
[64] Case T-112/99 [2001] ECR II-2459 *Metropole television v. Commission*
[65] Id. 51

SGBs under EU Competition Law, legal scholars as well as industry representatives did not agree with its implementation, as will be described in the following sections.

*d. Understanding the European Approach on the basis of recent case law*

This section has looked at three landmark cases in terms of the approach taken by European competition authorities to the sports sector. All of these decisions have generated a considerable amount of debate and disaccord among legal scholars, legal institutions and representatives of the sports industry. If one where to simplify and explain chronologically the Commission's and the ECJ's *modus operandi* since the 1970's it would look something like this.

1. 1974: Creation on a sporting exemption in *Walrave*, when SGB implement rules or actions which are not economic in nature, they place themselves outside of the reach of the Treaties
2. 1995: Thanks to *Bosman* and the Helsinki Report which followed the Court's decision, European Competition authorities recognized the risks involved with granting such a wide range of actions to SGBs. It therefore becomes necessary to define stricter rules, and determining which behavior should indeed be allowed in order for leagues to be run effectively
3. 2006: In *Meca-Medina* the ECJ reshuffles the European approach to the sports sector, the sporting exemption is reduced, it now becomes necessary for courts to look at the primary intent behind any decision made by a Sports Governing Body

From an outsider's perspective, the above breakdown may testify to the lack of effective decision making by European Competition authorities, and the inconsistent nature of its general approach. However, the most important question, and one that has been asked by multiple scholars as well as industry representatives, is: what happened between *Bosman* (and more specifically the stance that was so strongly defended in the Helsinki Report by Mario Monti) and *Medina*? More specifically, it raises the question of its impact on the 'sporting exemption' outlined in *Walrave*, whether it still exists or if the ruling eliminated it entirely.

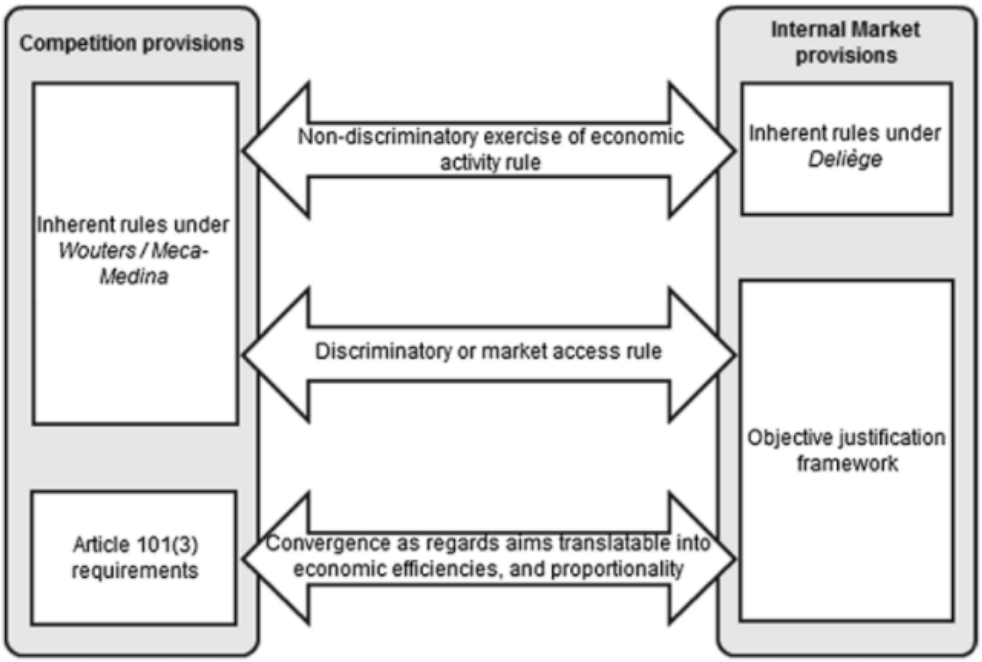


Fig. 1: Convergence between inherent rules and objective justification framework[66]

Stephen Weatherhill, in discussing the Meca-Medina decision[67], claimed that the Court had refuted the previous judgments of the Court of First Instance, by using the 'convergence in outcome' theory. This thesis would claim that the ECJ adopted a position whereby it recognized the overlapping nature of competition law with the internal market provisions (free movement of workers in particular). Accordingly, when making a decision, courts will be allowed to justify violations of competition law by using the same arguments put forth in justifying claims under the internal market rules. An example of this may be that of the economic efficiencies generated by a particular rule (see Fig. 1).

In discussing the convergent nature of competition law and the rules on free movement, Mortelmans asserts that, having acknowledged the coinciding character of the two, a recurrent approach by the Commission is that of letting the decision on one claim, directly affect the other. "The Commission bases this preliminary view on the Court's Judgment in the Bosman case. In this Judgment the Court confined its analysis to the provisions on the free movement of workers. Unlike

[66] *EU Sports Law and Breakaway Leagues in Football*, Katarina Pijetlovic, ASSER International Sports Law Series (ASSER Press, Springer), 2015. The *Deliege* case involves a Belgian Judoka whom brought an action against the Belgian Judo Federation, claiming that by not being selected for certain international competitions, the league had negatively impacted her career and breached European Treaty rules by not letting her perform her economic activity.
[67] S. Weatherhill (2012) 'On Overlapping Legal Orders: What is the 'Purely Sporting' Rule?' in S. Weatherhill, J. Delors (ed.) European Sports Law: Collected Papers. : ASSER Press, pp. 392.

the Advocate General it did not discuss the rules on competition. The Commission now uses the Court's interpretation in one area (free movement) in order to determine its position in another area (competition)."[68]

The ECJs line of thought should be identified as the birth child of *Bosman* and *Meca-Medina*, as it combines aspects of the decisions of both cases. It is indeed this newly adopted stance which began the conflicting exchange amongst scholars and industry representatives. While the previous case law appeared as clear and identifiable, the *Meca-Medina* decision required cases to be looked at under a 'Rule of Reason', creating difficulties for sports industries wishing to develop new policies.

One of the organizations which was the most vocal in its opposition to the decision was the UEFA, which vehemently asserted that the uncertainty created by the ECJs ruling would clearly have a negative impact not only on the sport of football itself but also diminish the economic efficiencies which it creates. This opinion was expressed in the now notorious paper by Gianni Infantino[69], in which the author challenged the legitimacy of the ECJ adopting such a stance: "the Court appears to have taken a major step backwards by partly reversing the earlier ruling of the Court of First Instance and by setting out an open ended legal test which will, almost inevitably, invite an even greater number of EU based legal challenges to rules and practices in the world of sport. In fact, looking at the precise language used by the Court, it is now more difficult to identify specific sports rules that are not capable of challenge under EU law".

Infantino believes that avoiding to clearly define which categories of rules should not be subject to European Law may "open up a 'Pandora's box' of legal problems". Indeed the possibility of claims being made that any given rule is restrictive of competition law, since it prohibits access to the market to certain individuals and as a consequence denies them the opportunity to perform a specific service, largely increases due to the Court's lack of clarity. The authority held by Sport Governing Bodies to punish athletes for behavior which could have a negative impact on the sport, may now be in jeopardy, considering that every "sports disciplinary measure for any offence (e.g. doping, match-fixing, gambling, bad conduct, etc.) might be described as representing a condition 'for engaging in' sporting activity (in the sense that such measures may restrict somebody from "working")".

[68] K.J.M. Mortelmans (2001) 'Towards a Convergence of the Application of the Rules on Free Movement and Competition?', Common Market Law Review, (38), pp. 613-649
[69] Gianni Infantino, Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport? At 7, Oct. 2, 2006, available at:
http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf

Many argued against the ECJ, such as Romano Subiotto, whom emphatically agreed with the UEFA in criticizing the *Wouters* approach and the use of such a broad test, claiming that by eliminating entirely the *Walrave* exemption the ECJ wrongly assumes that SGBs, as undertakings (or associations undertakings), can only make decisions which should be considered as economic activities. However, SGBs do not act exclusively as undertakings, as some of the measures they undertake are not related to economic development but rather to ensure the preservation of the sport itself. Accordingly, Subiotto opined that "European competition law has been made to apply more in the sports sector than in other sectors"[70], meaning that even other sectors, which are not as peculiar as the sports one are granted exemptions for certain types of behavior. Paradoxically, the industry which may hold a claim to be granted a substantial amount of exemptions in regulating itself, now has none.

Yet it should be noted that Infantino's stance was not met exclusively by the agreement that the UEFA had hoped for. Certain legal scholars, such as Rincon, claimed that the Meca-Medina decision would allow for a higher degree of legal certainty, which Sport Governing Bodies would ultimately benefit from it: "In any event, since Meca-Medina the sporting associations do at least have more legal certainty than before. Now they should be secure in the knowledge that, in relation to the compatibility with EC law, their actions will be assessed on a case-by-case basis"[71].

The *Bosman* and *Meca-Medina* rulings clearly represented a step in a different direction as regards the sports industry and European regulatory authorities, not only in regards to Competition Law, but more broadly in terms of the applicability of the TFEU to SGBs and the sector in general. These decisions have generated an ample amount of controversy, and, regardless of one's opinion on the matter, it is possible to state that the lack of a consistent and accurate standpoint, the constant back and forth between the different European legal authorities (such as the Commission and the ECJ), and more generally the recurrent shying away from establishing clear definitions and statutes for sports leagues, have proven costly for the industry as well as for the reputation of European legislative bodies[72].

[70] Romano Subiotto, 'The Adoption and Enforcement of Anti-doping Rules Should not be Subjected to European Competition Law', 31 European Competition Law Review, (2010)
[71] See footnote 35
[72] Student Comment*, European Sports Law is Incapable of Recognising the 'Specificities of Sport'*, LAW TEACHER, http://www.lawteacher.net/sports-law/essays/ european-sports-law.php (last visited Jan. 25, 2015)

As such, the European Commission, in its last attempt to clarify its position on the interaction between the TFEU and the sports industry, published the 'White Paper on Sport'[73] in 2007, which was accompanied by a Staff Working Document named the 'Pierre de Coubertin' Action Plan, "to honor of the father of the Modern day Olympics", containing, amongst others, a more specific annex on Sport and EU Competition Rules.

*e. The Commission's White Paper on Sport*

"*This initiative marks the first time that the Commission is addressing sport-related issues in a comprehensive manner. Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector. The initiative aims to illustrate important issues such as the application of EU law to sport.*"

The White Paper on Sport, and its annexes, is perhaps the most relevant legal document addressing the relationship between the TFEU and its impact on the Sporting World (in spite of the fact that, ironically, it is not legally binding[74]). Its publication (in 2007) was directly following the ECJs ruling on *Meca-Medina*, and represented, to a certain degree, a *mea culpa* by the European Commission. This publication may be understood as a recognition of the vagueness and legal uncertainty which was created by the ECJs final ruling, and was drafted in an attempt to help Sport Governing Bodies in understanding their *dos and do nots* under the TFEU. Nonetheless, when thinking of Competition Law, the White Paper itself is relatively vague: the paper restates that which was previously determined in *Meca-Medina* ("the assessment whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis", and the dismissal of a 'purely sporting rule'), acknowledges the 'Specificity of Sport' (the way by which sporting activities are structured), as well as a the necessity for a proportionality test etc.

The Staff Working Document however provides a considerably more insightful and detailed approach. Specifically, Annex I tackles the relationship between Sport and Competition Rules[75]. The main body of the Annex is split into "two separate but interrelated aspects of sport, namely (i) the regulatory (organizational) aspects of sport and (ii) certain revenue generating activities related to sport, in particular the sale and purchase of sports media rights and ticketing arrangements.". Thus

[73] Commission White Paper on Sport, 11th of July 2007
[74] See footnote 4
[75] COMMISSION STAFF WORKING DOCUMENT THE EU AND SPORT: BACKGROUND AND CONTEXT Accompanying document to the WHITE PAPER ON SPORT COM(2007) 391, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52007SC0935&from=EN

far this thesis has predominantly focused on the exceptions granted (or not granted) to Sporting Governing Bodies to the extent that they qualify as undertakings or associations of undertakings. Particular attention has been dedicated to understanding to what extent their behavior may be qualified as an 'economic activity' in the sense of the TFEU. Moreover, there has been a strong focus on the very nature of the sports industry, as opposed to looking at the 'revenue generating activities' in which the actors involved in the sports sector may engage in. This part will thus continue in such a path, by focusing primarily on 'the regulatory aspects of sport'. Nonetheless, it is of paramount importance for the reader wishing to properly assess the impact of European treaty Law on the industry, to acknowledge that in its paper, the Commission has indeed considered and discussed revenue generating activities, and in certain cases identified behavior which in other sectors would be viewed as breaching community law, to be deemed acceptable (as for example the joint selling of media rights).

The Commission's approach to the first part of the Annex was indeed that of clarifying once and for all, and in a very systematic manner, the ECJs ruling in *Meca-Medina*, by also indirectly addressing those who claimed that the ruling eliminated any type of legal certainty which the sports sector enjoyed under *Walrave*. The initial paragraphs of the paper conclusively establish the test which is to be used when evaluating a SGB's behavior. Accordingly, the relevant court will have to take a four step approach[76]:

- Step I: The first step of the test attempts to determine whether the SGB should be considered an 'undertaking' or an 'association of undertakings' under Article 101(1), therefore it requires competition authorities to determine whether the economic activity is carried out by the members (such as the teams) or if its carried out by the league itself. If it is determined that no 'economic activity' is being implemented, the Treaty is not applicable.
- Step II: Secondly it is necessary to consider whether or not the measure implemented is in violation of Article 101 (restrictive of competition) or if constitutes an abuse of dominant position under Article 102. "This will depend, in application of the principles established in the *Wouters* judgment, on the following factors: a. the overall context in which the rule was adopted or produces its effects and its objectives; b. whether the restrictions caused by the rule are inherent in the pursuit

[76] Id. 63 at 2.1.2 (The 'test' for organizational sporting rules under Articles 81 and 82 EC)

of the objectives; and c. whether the rule is proportionate in light of the objective pursued."

- Step III: Does the rule adopted affect trade between Member States?
- Step IV: If all of the aforementioned points of criteria are met (economic activity, violation of Articles 101 or 102, impact on trade between member states), may the rule be exempted under Article 101(3)

Subsequently, in the following paragraphs, the Commission gives a thorough explanation of this test by clearly describing each and every step, and the manner in which it should be carried out. To do so, the Annex contains explanations on how to determine whether an action is carried out by an undertaking or an association of undertakings (measures implemented by teams or by the league itself), what would constitute a restriction under Article 101 and 102, the extent to which a given measure is inherent and proportional to its objective and, if need be, whether it may be justified under Article 101(3). This part is then concluded by a description of relevant case law, and a lengthy list of "Examples of sporting rules unlikely to infringe Articles 101(1) and 102".

The drafting of this document is a strong statement by European Competition authorities, as well as a necessary one. In a sense it could be said that the *Meca-Medina* ruling was an interim decision, which ultimately enabled the Commission to finally draft a clear set of guidelines both for courts, as well as Sport associations. If one were to break-down the four step test mentioned above, it could be done as follows. Firstly, the Commission wanted to ensure that SGBs are subject to Treaty law, in the same way as are all undertakings. By opting for such a systematic approach which considers all of the steps used to handle competition law cases in other industries, the Commission clearly implies its resolve to hold all industries accountable under Articles 101(1) and 102. However, the Commission is equally clear in its recognition of the special status which should be granted to the Sports Industry. The first two steps of the test are a reminder of the (partial) validity of the *Walrave* sporting exception as well as the willingness to accept certain behavior which would be qualified as anti-competitive in other sectors (on the basis of *Wouters*). Indeed, step 1, by referring to the necessity of identifying the economic activity involved, as well as the nature of the actor performing it, stands to show that the Commission does not entirely refute the *Walrave* ruling, but rather that it wishes to take a stronger and more specific stance. Similarly, in step 2, the Commission does not claim that courts should apply the standard procedure used in cases of violations of Article 101(1)

and 102, instead, it is willing to accept certain behavior by looking at the context under which the rule was adopted, its necessity in the pursuit of certain objectives and its proportionality[77].

From this perspective, not only does the Commission recognize the uniqueness of the Sports Industry, but it also transforms the vagueness of the ECJs ruling, and the 'Pandora's box' which it had opened, into a clear set of guidelines which grant, to a certain extent, a reliable exception which sports leagues had so fiercely lobbied for. Moreover, as stated by Leah Farzin[78] "The *Walrave* sports exemption did not appear to have a strict legal basis, especially considering that professional sporting rules undeniably have an impact on commercial activities in Europe. After the elimination of the exemption in *Meca-Medina* and the subsequent Commission White Paper supporting that decision, sports are now afforded special treatment based partly on their place in European society, but primarily due to the features of the sports industry". It therefore becomes possible to make the claim that, in contrast with the opinion of Infantino and the UEFA, not only did *Meca-Medina* result in an increase in legal certainty for sports leagues, but it also led to the creation of a more encompassing exemption.

Nonetheless, sports leagues and federations will continue to claim that this is not enough; that regardless of the Commission's leniency, being put under constant scrutiny by Competition authorities will still impact the sports world negatively, both from a sporting perspective as well as from a business one. This can be proven by the fact that, sporting organizations have often requested an almost all encompassing exemption from European Treaty, making the case for self-regulation and independence. Such statements do require us to look into the matter, and determine its hypothetical feasibility.

[77] See Step II of 4 above
[78] See footnote 4

## Chapter V: The Current Standing of SGBs under EU Competition Law

In 1998 the Financial Times[79] interviewed several upper management directors at UEFA, and other SGBs, from different departments. The article recurrently contained quotes which strongly defended the need for auto-regulation by sport leagues. Marcel Benz, working for the legal department of UEFA, stated: "We have our own rules and our traditions, we are asking: Why should the EU interfere? The interests of sport are not necessarily best served by EU rules". Similarly, FIFA's director of communications has claimed that "Football has always been remarkably successful at looking after its own affairs. It is difficult to understand why regulatory authorities feel they now have to become involved".

### *a. Competitive balance in European Football Leagues following Bosman*

These quotes came shortly after the Bosman decision, and more specifically following the first 'Bosman transfer': Edgar Davids moved in 1996 as a free agent, from Ajax to Milan for a fee of 5 million euros. Indeed as mentioned earlier, the *Bosman* ruling, amongst other changes, revolutionized the transfer system within different leagues. Since, it has been considerably easier for individual players to leave their team upon the conclusion of their contract to play for another team, or to be transferred whilst still under contract. Moreover, the Bosman ruling also eliminated the quota for the number of EU players allowed on any given team, and allowed most leagues to drastically increase the number of non-EU players allowed to play in any given team. While the ruling provided exceptional rights which football players had, up until that moment, never received, it also generated certain unforeseen consequences which, to some extent, negatively impacted the sport.

Indeed, many have described the *Bosman* ruling as playing a key factor in the decline in competitive balance across leagues in Europe, as well as the competitiveness of teams across countries. Indeed, the *Bosman* ruling, has to a certain extent, allowed bigger market teams to increase in size and value. The top teams across the larger European football markets, such as Real Madrid and Barcelona in Spain, Bayern Munchen in Germany, Juventus in Italy or the top four English teams (both Manchester teams, Chelsea and Arsenal), have seen their grasp over the top spots in the leagues be strengthened since the *Bosman* decision. As a matter of fact, since *Bosman*, in the four major European football leagues, the major clubs have been winning on a more consistent basis than the years previous to the ruling (Bayern Munchen increased its winning percentage from 45%

[79] *Financial Times*, 24th of March 1998

in the ten years previous to *Bosman* to 70% in the ten years that followed[80] etc.). The same might be stated about the competitive balance of the sport across the continent (meaning in the UEFA Champions League), Kesenne found that "from 1994 to 1998 55 per cent of the semi-finalists were from the four major European leagues while from 1999 to 2003 the figure increased to 95 per cent."[81]

When thinking of competition law, this aspect becomes extremely relevant, in particular as regards European Policy. Indeed, if one were to look at the objectives driving the adoption of the competition provisions of the Treaty, one of the more essential elements to consider is consumer welfare[82]:

*"Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources."*[83]

When thinking of the sports sector, by using the theories developed by Neale mentioned earlier, Binder claimed that "the degree of interest in professional sporting events, and therefore the success of a league overall is positively related to how competitive the teams are because fans are not interested in competitions with very predictable or very lopsided outcomes."[84] It is therefore arguable, that it is indeed the Commission's intervention which fueled what could result in a decrease in the benefits received by consumers (by fault of the product quality diminishing).

This argument may be further developed in light of the more recent events concerning this decrease in the competitive balance. By 2008, the football world had begun to notice the detrimental aspects of Bosman, and its negative impact on the European Football scene, to the extent that the president of FIFA at the time openly stated "Should we let the rich become richer and say nothing?"[85], describing the scenario by which bigger market teams were increasing in value due to the quality of the players they were entitled to acquire worldwide. Moreover, teams which

[80] Schmidt, D. (2007). The effects of the Bosman-case on the professional football leagues with special regard to the top five leagues. University of Twente, the Netherlands.
[81] Kesenne, Stefan. 2007. "The Peculiar International Economics of Professional Football in Europe." Scottish Journal of Political Economy (July): 388-399.
[82] Zimmer, *The Goals Of Competition Law*, Edward Elgar, 2012
[83] Speech/05/512 of 15th of September 2005, available at www.ec.europa.eu/competition/speeches
[84] J. Binder (2011) 'The Effects of the Bosman Ruling on National and Club Teams in Europe'
[85] Joseph Blatter, FIFA president, 2008 (SPEECH)

did not hold the same capital as others were forced into over spending in order to maintain the competitive balance of the league, which in some cases led to grave financial problems or even insolvency[86] (see case of Rangers Football Club in Scotland).

*b. The Financial Fair Play Rules and the Striani Challenge*

UEFA, amongst others, having taken notice of this concern decided to adopt certain rules which would limit the capability of certain teams to over-spend every year by getting the best possible players available. The 'regulation' took the name of Financial Fair Play Rules (FFP) and reiterates the importance of "making European football healthier and ensuring that teams competing in European competitions operate within their means, as well as guaranteeing sustainable growth for long term financial stability"[87]. While the wording within the FFP regulations may seem as focused on ensuring the balance of teams as undertakings, UEFA as also assured that such provisions will help ensure a "more level playing field amongst competing teams". In point of fact, the first sanctions which occurred thanks to the FFP were mostly directed towards big teams such as Manchester City or Paris Saint Germain, whom, due to the wealth of their owners, had spent record-breaking amounts in order to acquire the best possible players[88].

The content of the regulation focuses above all on the 'break-even' principle, accordingly, UEFA wishes to ensure that clubs do not over spend from season to season. For example, the expenses incurred throughout the 2016-2017 season must no longer be outstanding at the beginning of the 2018-2019 season (barring an acceptable deviation of 5 million)[89]. "The relevant expenses considered in the break-even assessment includes the cost of sales, employee benefits expenses, and other operating expenses, plus either amortization or costs of acquiring player registrations, finance costs and dividends. Costs that do not count toward the break-even assessment include youth development, stadium infrastructure, and community development"[90].

While these measures were clearly adopted with the purpose of both providing guidance to teams often mismanaged, and to ensure the competitive balance of leagues, by its nature, such a decision could be considered as in breach of European Competition Laws. Thus, in in 2013, a football agent

[86] "Rangers FC signals intent to go into administration". BBC. 13th of February 2012
[87] UEFA (2015) Financial fair play: all you need to know, Available at: http://www.uefa.com/community/news/newsid=2064391.html (Accessed: 30th of May 2017).
[88] A. Hampson (2017) Manchester City have fulfilled obligations after breaching Financial Fair Play rules, confirm UEFA , Available at: http://www.dailymail.co.uk/sport/football/article-4433386/Man-City-fulfill-obligations-breaching-FFP-rules.html (Accessed: 30th of May 2017).
[89] FFP Regulations, art. 58-68.
[90] See Valerie Kaplan at 41

named Daniel Striani, represented by the same attorney involved in the *Bosman* case (Jean-Louis Dupont), lodged a complaint with the Belgian Court of First instance (informally known as the *Striani* challenge) claiming that the FFP regulations were in anti-competitive in nature[91].

The claim was immediately referred to the ECJ, requesting a preliminary ruling, due to the Court's self-declaration of 'incompetence to rule on the merits of the case'. The questions referred to the Commission regarded concerns both in terms of Competition Law as well as issues in terms of a breach of the freedom of movement. The focus on the competition law claims were based on Article 101(1) and 102 as follows:

"Must Article 101 TFEU (or Article 102 TFEU) be interpreted as meaning that the UEFA rule known as the 'break-even requirement' or 'break-even rule' infringes that provision of EC law in so far as the UEFA rule gives rise to a restriction of competition (or the abuse of a dominant position), in particular a restriction 'by its object' in that it limits the right to invest, which is either 'by its object' anticompetitive or is not necessary for the achievement of the objectives pursued by UEFA, namely the long-term financial stability of football clubs and the sporting integrity of UEFA's competitions — or, in the alternative, which is not proportionate to the achievement of those objectives?"[92]

The Court's immediate reply, was that of clearly stating the "manifest inadmissibility" of the request for a preliminary ruling, on the basis that it had not received the necessary information which would have enabled the ECJ to address such issues, as well as the fact that the Belgian Court also publicly admitted to its incompetence in assessing the matter, begging the question of 'What's the point?'.

While UEFA promptly stated its 'satisfaction' with the ruling[93], the ruling by the ECJ should not be viewed as a victory for the sports sector and SGBs. Indeed, some have gone as far as calling the case a 'missed opportunity'[94]. In his article, Molè describes the *Striani* challenge as a 'Waterloo', claiming that the Belgian Court failed in properly describing the anti-competitive effects of the FFP, which,

[91] Request for a preliminary ruling from the Tribunal de première instance de Bruxelles (Belgium) lodged on 19 June 2015 — Daniele Striani and Others, RFC Sérésien ASBL v Union Européenne des Sociétés de Football Association (UEFA), Union Royale Belge des Sociétés de Football — Association (URBSFA) (Case C-299/15)
[92] Id at 1.
[93] UEFA (2017) UEFA welcomes European Court of Justice ruling on financial fair play, Available at: http://www.uefa.org/mediaservices/newsid=2267061.html (Accessed: 30th of May 2017).
[94] R. Mole' (2015) 'The Curious Case of Daniel Striani (C-299/15): A missed opportunity', Eurojus Rivista [Online]. Available at: http://rivista.eurojus.it/the-curious-case-of-daniel-striani-c-29915-a-missed-opportunity/?print=pdf (Accessed: 30th of May 2017).

according to the author were clear (see also Kaplan below), both in terms of the unlawful decision by an association of undertakings, as well as UEFA's abuse of a 'super-dominant' position. Such a stance was also taken by Kaplan[95], whom analyzed the most relevant aspects of the FFP and determined that they were in breach of both Article 101 as well as Article 102 TFEU. In particular she states that the question of whether UEFA would be in violation of 101 or 102 depends on whether the FFP is identified as an agreement reached amongst separate undertakings or it should be identified as the action of a single undertaking. Truly, UEFA could be described as both, as the organization engages in its own economic activity (sale of broadcasting rights, marketing etc.) as well as an association of leagues and teams whom may individually engage in certain economic activities.[96] Her extensive analysis is briefly described below.

When looking at the article by Valerie Kaplan, the author addresses the issues from multiple perspectives. First and foremost it is deemed necessary to verify whether or not the decision fulfills the three conditions of Article 101(1): whether the agreement is the result of collusion amongst undertakings (or associations of undertakings), whether the collusion affects trade amongst Member States and finally, whether the agreement has the object or effect of restricting competition. While the first two conditions are quite simple to fulfill, as the agreement was reached with the general accord of the SGBs which are members of UEFA, thus the element of collusion is clearly present, and, secondly, the content of the FFP, which essentially results in limiting any given teams' capacity to engage in transactions with other teams within Europe, by definition affects trade between Member States. In regards to the restriction of competition by object or effect, once again the answer is quite self-evident, and even UEFA does not shy away from it. By telling the management of a team that they are not authorized to spend freely, by the generosity of their owners, or through their own personal sources of income not directly related to the team, UEFA is indeed restricting competition both in object, and, since the repercussions will be those of a decrease in investment and trade, the restriction is in effect as well.

Kaplan then examines whether or not, the FFP could be exempted under the criteria of Article 101(3) or under the Block Exemption Regulation on vertical restraints. Firstly, the FFP clearly falls outside of the latter, due to the fact that it affects more than 30% of a market[97] (FFP regulations

[95] See Valerie Kaplan at 41
[96] Dirk Kaufmann, UEFA has commercialized football, DW (Sept. 17, 2013), http://www.dw.de/uefahas-commercialized-football/a-17095173
[97] Commission Regulation 330/2010, On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102/1)

impact almost the entirety of European football leagues). Moreover, according to Kaplan it is also unlikely that FFP regulations would fulfill all of the criteria of 101(3), as she believes that the FFP does not guarantee a fair share of its benefits to consumers, nor are its restrictions indispensable.

The argument could perhaps be made that in her paper Kaplan did not focus *too much* on the *Meca-Medina* decision nor the annex to the White Paper on Sport, therefore leaving space for argumentation that the FFP would survive the *Wouters* test.

The author also verifies the illegality of the Financial Fair Play rules under Article 102, by conducting the following reasoning. In order to claim an abuse of dominant position under 102, three conditions must be met[98]. Firstly, it must be demonstrated that the conduct in question is that of an undertaking or association of undertakings which holds dominant position, considering UEFA's monopolistic nature over the football market in Europe, this step does not require further examination. Secondly the decision under scrutiny must impact a substantial part of the market, once again, this was shown earlier in the analysis of the FFP under 101(1). The final requirement is that by its actions, the undertaking (or association) is 'abusively exploitative'. According to Kaplan, this is truly the case, as it would appear that through the FFP UEFA has paradoxically limited the growth of smaller clubs to the benefit of clubs in bigger markets. Accordingly, since the FFP is only applicable to clubs qualifying for UEFA's competitions (Champions and Europa leagues), smaller clubs not qualifying for such competitions, will be limited from trying to improve their standing in the domestic league by investing further.

In spite of the possibility for making a claim on the illegality of the FFP under Article 102, Kaplan herself states that the stronger case should be made under 101(1).

However, the purpose of describing this example, and briefly looking into the opinions of certain legal scholars was precisely that of illustrating the position of legal uncertainty that is still faced by SGBs to this day. If one were to consider the fact that in drafting the FFP regulations UEFA consulted on a regular basis with the Commission to ensure the legality of its behavior, to the extent that a Joint Statement by the two entities was released reiterating the validity of the FFP[99], it would seem legitimate for UEFA to assume that its behavior was truly lawful (as UEFA would assume that

[98] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

[99] Joint Statement by Vice-President Joaquin Almuni and President Michel Platini (Mar. 21, 2012), available at: http://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158_DOWNLOAD.pdf

these measures were 'inherently necessary and proportionate' to its objectives). Yet, the above papers have proven the exact opposite: Kaplan's analysis provided an equally justifiable claim to the illegality of the FFP, and Malò's assertions have led us to believe that if the complaint had been drafted more effectively, or if the Belgian court had acted differently, the FFP would currently be under the microscope of the ECJ.

It is therefore appropriate to state that regardless of the Commission's efforts, SGBs are still uncertain as to their position under European Competition Rules. Thus begging the question, which other measure could the Commission adopt in order to finally guarantee to the sports sector, the legal certainty it seeks.

**Chapter VI: Is the Creation of a Block Exemption by the Commission a viable solution?**

Earlier in this paper the notion of a Block Exemption was defined as the possibility held by the Commission to implement a regulation which would systematically place certain 'categories of agreements' outside of the scope of European Competition Law[100]. Since it is highly unlikely, in spite of Mr. Benz's extensive argumentation, that the Commission would allow SGBs to regulate themselves from an internal organization perspective, it would seem that such associations should look elsewhere in order to achieve a more certain status in the eyes of EU competition authorities. This thesis will therefore hypothesize on whether or not the creation of a specific Block Exemption Regulation would offer such a solution.

Earlier, in Chapter IV (e), when describing the Commission's White Paper on Sport, and in particular the first Annex to the paper, it was mentioned how the Commission drew a distinction between the regulatory and organizational aspects of sport as opposed to revenue generating activities. The Commission's decision to separate the two was in part inspired by the *Walrave* exemption, which granted SGBs the possibility to act unhindered from the TFEU when its decisions were of 'purely sporting interest', and not made on the basis of economic considerations. Furthermore, when describing the regulatory aspects of sport under competition law, the Annex developed a four step test which focused strongly on considering whether decisions are inherently necessary and proportionate to the attainment of their objectives. Finally, the Commission elaborates several examples of behavior conducted by SGBs, based both on previous case law as well as other types of agreements which have been deemed acceptable and others which cannot be considered as such:

> "Based on the case-law and considerations set out above, the following types of rules constitute examples of "sporting rules" that – based on their legitimate objectives – have been found or are likely not to infringe Articles 81(1) and/or 82 EC provided that the restrictions contained in such rules are inherent and proportionate to the objectives pursued.
>
> - "Rules of the game" (e.g. the rules fixing the length of matches or the number of players on the field; [211]
>
> - Rules concerning selection criteria for sport competitions;
>
> - "At home and away from home" rules;
>
> - Rules preventing multiple ownership in club competitions; [212]
>
> - Rules concerning the composition of national teams;
>
> - Anti-doping rules; and

[100] See Chapter II

- Rules concerning transfer periods ("transfer windows")

The following rules represent a higher likelihood of problems concerning compliance with Articles 81 EC and/or 82 EC, although some of them could be justified under certain conditions under Article 81(3) EC:

- Rules protecting sports associations from competition;

- Rules excluding legal challenges of decisions by sports associations before national courts if the denial of access to ordinary courts facilitates anti-competitive agreements or conduct;

- Rules concerning nationality clauses for sport clubs/teams;

- Rules regulating the transfer of athletes between clubs (except transfer windows); and

- Rules regulating professions ancillary to sport (e.g. football players' agents)[101]"

The Commission clearly stated that such a list is not all-encompassing and should not be viewed as exhaustive, reiterating the ECJ's judgment in *Meca-Medina*, that such decisions should be made on a case-by-case basis. Moreover, as mentioned earlier, the White Paper on Sport and its annexes, are not legally binding. Thus, in the eyes of Sport Governing Bodies, the latest of the European steps towards guaranteeing legal certainty to the sector, is merely a set of guidelines and tests which reinforce the *Meca-Medina* decision, one that was heavily criticized by SGBs. In other words it is difficult to properly assess the validity of the White Paper on Sport: while it is true that it provided strong clarifications on the ECJ's ruling, and it does indeed set up a clearer approach for Courts when applying competition provisions to decisions made by Sport Governing Bodies, yet, on the other hand it also cements *Meca-Medina* and the case by case approach as the leading method to be implemented when looking at the Sports sector, something which industry representatives have vehemently expressed their disaccord with.

Consequently, it seems necessary to ask the following question: to the extent that SGBs continue to be unsatisfied with their statute under European Competition Law[102], could it be a

[101] Id at 75

[102] B. van Rompuy (2015) Sport and EU Competition Law: New developments and unfinished business, Available at: http://www.asser.nl/SportsLaw/Blog/post/sport-and-eu-competition-law-new-developments-and-unfinished-business-by-ben-van-rompuy (Accessed: 1st of June 2017). It should be considered that the White Paper on Sport and its annexes have been adopted only in 2007, and other than the Financial Fair Play complaint (which UEFA ultimately won), there have not been substantial claims in front of European courts, as to the regulatory/organizational aspects of sports

reasonable (and satisfactory for both parties) solution for the Commission to adopt a Block Exemption Regulation exempting 'the regulatory and organizational aspects of sport'[103]?

The most obvious counter argument to such a claim would be that of stating that placing organizational and sport related decisions by SGBs under the umbrella of a Block Exemption could revert all of the EU's past efforts in effectively trying to apply EU Competition law to the sector, by creating an exception considerably similar to that of *Walrave* (purely sporting decisions). However, the very nature and composition of Block Exemptions would allow the Commission to apply the exemptions which it already partially grants to the sector (see example above, in the excerpt from the first Annex to the White Paper), in a more systematic fashion and increasing legal certainty for SGBs. The Commission has also stated that it would be not be "possible to predetermine an exhaustive list of sporting rules which breach Articles 101 and/or 102 (or of those which do not)". This could indeed represent a struggle for the Commission if it wished to develop a Block Exemption. Yet, it has been argued by some that a non-exhaustive list would suffice to guarantee more legal certainty to the undertakings involved[104]. In my personal opinion I believe that it would be unwise to reject the possibility of developing a Block Exemption which could guarantee legal certainty to SGBs on the basis that it would be difficult to work out an 'extensive list'[105].

As mentioned earlier, BERs grant the possibility to the EU Commission to exempt entire categories of agreements 'whose pro-competitive benefits outweigh their anti-competitive effects'[106]. Examples of Block Exemptions issued (and currently in force) include: exemptions to vertical agreements in the automobile aftermarket[107], to certain standardization agreements[108] or to technology transfer agreements[109].

If one were to look at the format of Block Exemptions, the structure *used to be* the following[110]:

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[103] *N.B* through this paragraph we will follow the Commission's distinction in Annex I between regulatory and organizational aspects of sports and revenue generating activities (we do not believe the latter should be considered in an eventual exemption)
[104] Jose Luis Arnaut (2006) Independent European Sports Review, Brussels: UK Presidency of the EU.
[105] Id 104 at pp. 102
[106] N. Moussis (1999) Access to the European Union Law, Economics and Policies, 22nd edn, Intersentia.
[107] OJ [2010] L 129/52; Council Regulation 461/2010
[108] OJ [1971] L285/46; Council Regulation 2821/71
[109] OJ [2014] L193/17; Council Regulation 316/2014
[110] J. Goyder & A. Albors-Lorens (2009) Goyder's EC Competition Law, 5th edn., Oxford: Oxford University press. Pp 143

1. Policy considerations and the basic scope of the exemption
2. The 'White List', meaning the actions which are permitted under the exemption
3. The 'Black List', meaning the actions which are not permitted under the exemption
4. Some contain an 'opposition' clause, which included all type of agreements or actions which were neither 'Black' nor 'White' and therefore classified as 'Grey', and would be subject to the analysis of the Commission

Under such a format, it would appear as almost obvious for the Commission to set forth a Block Exemption regulation on the 'organizational aspects of sport'. Indeed if one were to look at the White Paper as well as at its first Annex, all of the elements described above are present: the White Paper is a policy declaration recognizing the role played by sport and the need for European Authorities to protect its development and the importance of its presence in the European market; it sets forth a list of examples which illustrate measures which do not infringe Article 101 and 102 (the 'White list') and those which have a higher likelihood of infringing the provisions (the 'Black list'); the existence of the four step test mentioned in Chapter IV may facilitate the interpretation of any other type of agreements not present on the Black or White list, therefore embracing the existence of a 'Grey list'.

However, while the White Paper on Sport and its Annex may have a very similar structure to that of Block Exemptions Regulations, it is important to notice that such a format has been modified[111]. Through the adoption of Regulation 2790/99[112] the Commission established that 'white lists' and 'grey lists' would no longer be included in Block Exemptions. By formatting Block Exemption in such a way, the Commission wished to develop an approach whereby "everything that is not prohibited is permitted". This methodology, which grants substantially more leeway to operate for firms protected by a Block Exemption, is also one which guarantees less legal certainty. In accordance with such, the Commission determined that for firms to be shielded by a Block Exemption, it would be necessary for them to hold a market share smaller than 30%. Thus creating the market share cap in Block Exemptions. Since then, most BERs include a market cap (which ranges from 20 to 40 percent).

As it has been demonstrated in the first Chapters of this thesis, Sport Governing Bodies often require a monopolistic or at least a very dominant position in any given market in order to

[111] See footnote 103 at pp 221-222
[112] OJ L 336; Regulation 2790/99

run effectively and guarantee the best possible product for the consumer. This holding of a monopolistic position is therefore inherently necessary to the success of a sports league, and it could be viewed as one of the 'specificities' of the sport sector (See Chapter II - Sports as natural monopolies). Moreover, since the introduction of the market cap rule in Block Exemptions is not standardized but rather determined on a case by case basis depending on the sector or type of agreement, it is probable that there is a way to develop a new format of the BER, specifically for the sports sector, which encompasses the monopoly held by SGBs. As such, I believe, that refuting to consider such an option, could translate into meaning that the Commission still hesitates on recognizing the specificities of sport in their entirety.

**Chapter VII: Conclusion and Personal Considerations**

Throughout this thesis we have attempted to uncover and describe the position of Sports Governing Bodies under European Competition Law. The structure of this paper, in particular, held the objective of demonstrating that reconciling the specificities of the sport sector with the main provisions of the Treaty on the Functioning of the European Union (and in particular Articles 101 and 102) has proven to be an arduous task for EU competition authorities and courts. The European Commission as well as the European Court of Justice have indeed struggled with effectively determining which agreements or decisions by Sports Governing Bodies should be placed out of reach of Article 101 and 102. The strongest development of the sports sector as one engaging in economic activity was aligned with the growth of the European Economic Union, and therefore posed more difficulties for regulators than industries which were already well established.

The first two parts of this thesis were used in an attempt to describe the asymmetries between the industry and the regulating body. Chapter II focused on highlighting how Sport Governing Bodies differ from other undertakings or associations of undertakings, how the product offered and the consumer involved are also different from what is seen in other industries, and how the very nature of the sports business cannot receive the same application of Competition law provisions as other sectors. Chapter II on the other hand looked at certain provisions of European Competition Law, focusing on Article 101 and 102 and their applicability to the decisions and agreements made by Sports Governing Bodies and allowed us to determine that indeed the sports sector requires a special approach by competition authorities. Chapters IV and V were dedicated to the analysis of the methodology and the decisions made by EU Competition authorities starting from the first landmark decision in European Sports, *Walrave*, to the most recent one in *Meca-Medina.* This analysis enabled us to see in practice the difficulties in finding exactly how to apply treaty provisions to Sports Governing Bodies, and shined a light on the struggle of European Courts in decisively dictating what procedure should be opted for in ruling on the behavior of SGBs, having to ultimately "settle" for a case-by-case approach. Yet, as seen in Chapter V, in spite of the efforts of the Commission to clarify the position of European Sports organizations under Competition Law, such a goal as not yet been reached, and Sport Governing Bodies do not believe they hold legal certainty in terms of the applicability of the Treaty's provisions. Many scholars and industry representatives have given their opinion, some claiming that the sports sector should be put under closer scrutiny, others demanding that SGBs be left to govern themselves. It is truly difficult to find a compromise between the two. Certainly it is necessary to allow the sports sector some leeway in terms of how it

wishes to govern itself, but due to the often dominant position which such organizations hold in the European Market, it would be unwise to advocate self-regulation. In this sense I personally believe that the EU Commission might be on the right path, the content of the White Paper on Sport and its Annex, clarifying the objectives the EU wishes to achieve and recognizes the utility, importance and special characteristics of sport along with its significance from an economic perspective. However, I am also of the opinion that stopping at the White Paper would be a mistake. The Financial Fair Play decision example in Chapter V illustrated how SGBs are not yet guaranteed legal certainty by the White Paper or its Annex. I am therefore convinced that continuing the path set by the ECJs decision in *Meca-Medina*, and the following publications of the Commission, by developing clearer rules would benefit both the European Competition law landscape as well as the sports sector. Doing so will not prove to be an easy task. However I believe that to consider the adoption of a Block Exemption protecting certain activities engaged in by SGBs (as for example in relation to their organization), would indeed be a step forward for both the Commission and the Sports Sector, while simultaneously following in the steps of the blueprint set by the Annex to the White Paper. By suggesting the adoption of a Block Exemption in order to further define the position of SGBs under EU Competition Law, I do not wish to arrogantly claim to have found the solution to the concerns held by both the Commission and Sport associations across Europe. The objective of this thesis was that of demonstrating the risks of unclear regulations and legal uncertainty. The *Walrave* exemption lasted until the 1990s before it was removed and replaced, and the *Meca-Medina* decision was the result of a long sequence of appeals and referrals to other courts. When it comes to the sport sector, SGBs will constantly be in need to develop measures which ensure the competitive balance of the sport, in order to increase fan interest and therefore maximize consumer welfare. In particular when it comes to European Competition Law, which seeks to consider the effects of any given decision on the market, it appears of extreme importance to develop specific dos and do nots for the industry. If one were to look at the trend of the decisions made by European Courts regarding the sports sector, it shows that there is a constant need for re-elaboration and examination of the behavior allowed. I also believe that this trend will continue in spite of the efforts which followed *Meca-Medina*, unless legal certainty is in part guaranteed to SGBs, more of their decisions will be contested and will ultimately require the drafting of the next White Paper on Sport.

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