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DISSERTATION:

"Lilia Malaja and Maros Kolpak: Unrestricted professional Athletes within Europe and beyond? Current Developments and Future Perspectives in the Area of Freedom of Movement in Sports"

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Table of Contents:

Introduction

The principle of free movement constitutes a core element of the EC Treaty and is nowadays generally accepted both in political circles as well as the business community. However, every time such principles are being applied in the context of sport, the most prominent example being *Bosman*[1], this leads to reactions ranging from surprise to outrage. Recent cases that again provoked harsh criticism by sports officials were the case of *Lilia Malaja*[2] in France and the ECJ ruling in *Kolpak.*[3]

This paper examines the relevance of the free movement principle in the context of professional sport. The majority of professional athletes are gainfully employed by clubs. Some athletes render services for remuneration. Thus, the emphasis of this paper will lie on free movement for workers (Art. 39 EC) and services (Art. 49 EC). Most legal problems arise in team sports like soccer (Bosman) or handball (Kolpak). Since these association's rules traditionally contain limitations on the number of foreigners allowed per team as well as restrictions on transfers, their governing bodies find it hard to accept that such long standing regulations may now be in breach of EU law. The provisions of EC Competition Law (Articles 81 and 82) are also very relevant for professional sport and the Commission has a sharp eye on potentially conflicting situations (e.g. in the context of centralised marketing of sports events);[4] for reasons of space, however, this paper will not deal with competition law aspects, but will instead concentrate on the freedom of movement principle as such, since these are the provisions individual athletes usually refer to when challenging rules.

After a very brief history of the general development of freedom of movement and a look at the specific characteristics of those individual freedoms that are

[1] Case C-415/93, *Union Royale Belge de Sociétés de Football v. Jean Marc Bosman*, [1995] ECR I-4921
[2] Ruling by the French Conseil d'Etat of 30 December 2002
[3] Case C-438/00, *Deutscher Handballbund e.V. vs. Maros Kolpak* of 8 May 2003

particularly relevant in the context of sport, we will describe the status quo of today's relationship between EU law and professional sports and assess the sports related case law.

We will then focus on recent developments to examine the question whether there is a tendency in EU law to expand the scope of applicability of freedom of movement in sport, both geographically and substantively. The geographical aspect concerns the issue whether and to what extent nationals of such non-Member States, which have entered into Association Agreements or similar treaties with the EU, may rely on non-discrimination clauses or on the Treaty provisions on free movement directly. The substantive facet is about the ambit of the principle itself. Some of the core questions here are: what are the limitations of freedom of movement in sport and to what extent may domestic restrictions to the principle through national immigration and employment rules be justified?
The paper will then offer a personal prognosis on possible future development, particularly whether nationality clauses may also be abolished for amateur sports and whether there will remain a "special relationship"[5] of sports and law - due to specific characteristics of sport - or whether professional sport will eventually be regarded as just another sector of the economy.

The essay closes with a conclusion of the issues discussed.

[4] For details: Zinger (2003), p. 139, Fritzweiler (1998), 506, each with further references
[5] Kerr, in Scherrer (2002), p. 17

Relevance of the Principle of Freedom of Movement in Sport - Context and Status Quo

Principle of Freedom of Movement - A Brief History

A General Overview

Community law is directed at establishing an effective Internal Market – an area without internal borders (Article 14 EC)[6] – and at eliminating obstacles to the proper functioning of the Single Market.[7] The four fundamental freedoms contained in the EC Treaty are essential tools to reach this aim. They limit the regulatory competences of Member States (MS), requiring them to justify measures that restrict cross-border economic activities.[8] The Courts interpretation of these Treaty provisions has undergone considerable evolution which was a major part of the integration process itself.[9]

Fundamental freedoms[10] prohibit – both open and hidden - discrimination based on nationality.[11] Foreign goods,[12] workers,[13] entrepreneurs[14] and services[15] must - in principle - be treated equal compared to their respective domestic counterparts. Overt discrimination exists when the criterion national origin is used to place, for example, workers in an unfavourable position.[16] Indirect or covert discrimination occurs when the application of other distinguishing criteria, such as residence or language requirements, lead in fact to the same result. Prohibition of discrimination is not only a way of ensuring fair treatment of – for example –

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[6] Classen, C. [1995] p. 97; Behrens, P. [1992] p. 145; Bernard, N. [1996] p. 102
[7] "Communication on […] the use of Satellite Dishes", Brussels, 26 june 2001
[8] von Wilmowsky, P. [1996] p. 362; Eberhartinger, M. [1997] p. 44
[9] Wyatt & Dashwood [2000] p. 473; Behrens, P. [1992] p. 145
[10] This paper will not deal with free movement of capital.
[11] Torgersen, O. [1999] p. 371
[12] C-12/74 *Commission vs. Germany* [1975] ECR 181 (198)
[13] C-175/78 - *Saunders* [1979] ECR 1129 (1135); C-222/86 – *Heylens* [1987] ECR 4097 (4116);
[14] C-2/74-*Reyners* [1974] ECR 631 (652); C-11/77-*Patrick* [1977] ECR 1199 (1204).
[15] C-279/80–*Webb* [1981] ECR 3305 (3324); C-106/91 - *Ramrath* [1992] ECR I-3351 (3384).
[16] Oliveira (2002), p. 85

migrant workers; it is also an instrument to encourage their movement.[17] All fundamental freedoms have direct effect and create individual rights which national courts must protect.[18] To ensure effective implementation, the ECJ from the beginning employed a wide interpretation of the rights granted,[19] while interpreting derogations restrictively, since they constitute an exception to the rule.[20]

It soon became apparent that the freedom's underlying aim can also be obstructed by non-discriminatory measures.[21] The Court therefore uses a pragmatic approach, focusing on the actual effect of MS' measures,[22] and has extended the scope of each freedom to also catch – some – "indistinctly applicable" measures, thus shifting the emphasis from the traditional approach (mere prohibition of discrimination;[23] freedoms as "equality rights") towards the abolition of obstructions of free movement in general (freedoms as "absolute freedom rights").[24] Some criticise the abandonment of the yard-stick of discrimination as unnecessary[25] and as exceeding the Courts competences,[26] because most cases could arguably be caught with a correct application of indirect discrimination, while truly indistinctly measures should not be subject to requirements of justification and proportionality at all.[27] This distinction is far from being purely academic, since the list of express derogations is exhaustive and the Court interprets them very restrictively, while the category "mandatory requirements" is non-exhaustive. Other important reasons – dogmatically and practically – for making this distinction are *presumption of legality* and the question who shall bear the *burden of proof* whether such measures are justified.[28]

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[17] ibid
[18] Wyatt & Dashwood [2000], p. 318; Jarass, H. [1995] p. 209; Case C-265/95 *Commission v. France* [1997] ECR I-6959, paras 24 and 27.
[19] Oliveira (2002), p. 92, 109
[20] ibid, p. 109
[21] Jarass, H. [2000] p. 710
[22] Zinger (2003), p. 132
[23] Hatzopoulos [2000] p. 44; Torgersen, O. [1999] p. 371
[24] Wyatt & Dashwood [2000], p. 473; Jarass, H. [2000] p. 713; Hatzopoulos [2000] p. 60; Bernard, N. [1996] p. 82
[25] Wyatt & Dashwood [2000] p. 477
[26] ibid p. 329
[27] Fischer, H. [2001] p. 323; Wyatt & Dashwood [2000] p. 477
[28] Jarass, H. [2000] p. 718: Discriminating measures are *prima facie* presumed illegal and the burden to prove justification lies with the MS while indistinctly applicable measures are in principle allowed and the applicant must convince the Court that an obstruction exists. The

Freedoms must, however, also be seen in the light of their social function and are therefore subject to certain derogations.[29] The ECJ does not only apply the express derogations, listed *inter alia* in Articles 30 and 46 EC, but has also introduced additional categories of justification ("judicial exceptions")[30], such as "mandatory requirements", "overriding reasons relating to the public interest" or "objective justifications",[31] and has precluded whole areas like "certain selling arrangements" from the applicability of these provisions.[32]

Overall, there is an apparent tendency towards convergence in the Court's case law on fundamental freedoms, both as to the reasoning used and the results achieved.[33] In the context of persons and services the ECJ sometimes even leaves open, which freedom is applicable.[34] Thus, if this paper puts an emphasis on the freedom of movement for workers, many observations are also true in regard to other freedoms, although some differences remain and the Court seems willing to go somewhat further in the protection of workers than in that of other economic factors.[35]

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mandatory requirements category also allows easier justification, since a more lenient proportionality test is applied.

[29] Chalmers, D. [1994] p. 396; Hatzopoulos [2000] p. 44

[30] Lever, J. [1998] p. 5

[31] Chalmers, D. [1994] p. 396

[32] Joined Cases C-267 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

[33] Zinger (2003), p. 137; Oliveira [2002] p. 125 ; Hatzopoulos [2000], at 70-72

[34] Case 48/75 *Procureur du Roi v. Royer* [1976] ECR 497

[35] Oliveira, C. [2002] p. 125

Some Specific Characteristics of Individual Freedoms

In the context of sport, the free movement of persons (Articles 39 and 43) as well as the freedom to provide services (Article 49 EC) are relevant. Therefore, we will briefly review the specific characteristics of these particular freedoms, putting an emphasis on Article 39, since most legal issues arise in this context.

Freedom of establishment:

This freedom applies when a professional athlete – for example a tennis or golf player – is not a worker but is self-employed and wishes to move to another MS for permanent business purposes.[36] The ECJ has consistently stated that the right of establishment[37] requires the removal of restrictions on the rights of individuals and companies to maintain a permanent or settled place of business in a MS.[38] The wording of Article 43(2) seems to demand merely equal treatment.[39] However, in later cases,[40] the ECJ has taken a broader approach[41] and openly stated that the legislation at issue did not contain any direct or indirect discrimination.[42] Meanwhile, cases like *Gebhard*[43] show that the ECJ has clearly expanded the ambit beyond discrimination.[44] Such non-discriminatory impeding measures – if proportionate – may be justified by "imperative reasons of general interest."[45] The ECJ has seen no need for an analogous application of the *Keck* doctrine, but has occasionally used the category of measures "*too remote and indirect.*"[46]

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[36] Zinger (2003), p. 137
[37] Defined as the actual pursuit of an economic activity through a fixed establishment in another MS for an indefinite period, Case C-221/89 *Factortame* [1991] ECR I-3905
[38] Caputi Jambrenghi, P. / Pullen, M. [1996] p. 390
[39] Torgersen, O. [1999] p. 384
[40] Case 107/83 *Ordre des Avocats v Klopp* [1984] ECR 2971; Case 143/87 *Stanton v INASTI* [1988] ECR 3877
[41] Wyatt & Dashwood [2000] p. 431 et seq.; Wägenbaur, R. [1991] p. 430; Torgersen, O. [1999] p. 384
[42] Case C-19/92 *Kraus* [1993] ECR I-1663.) at para. 32
[43] C-55/94 *Gebhard* [1995] ECR I-4165; see also C-250/95 *Futura* [1997] ECR I-2471.
[44] Torgersen, O. [1999] p. 384; Fischer, H. [2001] p. 304 et seq.; For details of evolution of ECJ case law see: Wyatt & Dashwood [2000] p. 431, 438 and Wägenbaur, R. [1991] p. 430; Eberhartinger, M. [1997] p. 48
[45] *Gebhard*, supra 43, para. 37
[46] Fischer, H. [2001] p. 307; Torgersen, O. [1999] p. 376

Freedom to provide Services:

Article 49 EC applies when self-employed athletes wish to participate in sporting events, for instance professional golf tournaments.[47] Although case law on services developed slower than case law on goods and not always in absolute parallel, they do show marked similarities.[48] The closeness of the two sets of rules is obvious since the ultimate objective of both freedoms is to maintain access to an integrated European market where goods and services are offered or requested across borders.[49] Service providers – just as sellers of goods – would face severe obstructions if they had to comply with different requirements in each MS. Article 49 EC bans "all requirements imposed on the person providing the service [...], which do not apply to persons established within the national territory *or which may prevent or otherwise obstruct the activities*[50] of the person providing the service", unless the requirements are justified by purposes of the general good."[51] With services (as with establishment) the Court uses a slightly different terminology but substantially makes a similar distinction between discriminatory and indistinctly applicable measures,[52] focusing on whether the measure is "liable to hinder or make less attractive the exercise of fundamental freedoms."[53] The Court ruled that non-discriminating measures may be justified – if proportionate – with "imperative reasons of the public interest".[54] Further, while rejecting the analogous application of *Keck*, thus creating a bigger scope for the non-goods freedoms, the Court occasionally precludes certain measures from the ambit of Article 49 EC by finding a link "too tenuous" or "too uncertain and indirect".[55]

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[47] Zinger (2003), p. 137
[48] Snell, J. / Andenas, M. [1999] p. 252
[49] Greaves, R. [1998] p. 305
[50] emphasis added
[51] Case 33/74 *van Binsbergen*, ECR 1974 p. 1299 (1309)
[52] e.g. *Stanton* supra 40, para. 9: "Measures which are "applicable without distinction to all"; Case 15/78 *Societe Generale Alsacienne de Banque SA v. Koestler* [1978] ECR 1971, para. 6: "provisions are not applied in a discriminatory manner either in law or in fact"
[53] e.g., *Kraus*, supra 42, para. 32; *Gebhard* supra 43
[54] Case C-384/93 *Alpine Investments* [1995] ECR I-1141; for a full list of such "imperative reasons": Fischer, H. [2001] p. 323
[55] Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan* [1991] 3 C.M.L.R. 849

Freedom of Movement for Workers:

This freedom is particularly relevant in the context of sport since most professional athletes are employees.[56] The scope of freedom of movement for workers is specified in extensive secondary legislation, particularly by Regulation 1612/68 and Directive 68/360, clarifying and giving effect to the rights already provided by Article 39 EC, thus leaving less room for open issues and controversy.[57] Most notably, Article 7 of Regulation 1612/68 prohibits different treatment of a migrant worker as compared to national workers for reasons of nationality: its paragraph (1) provides for equal treatment in respect to conditions of employment and work; according to paragraph (2) a migrant worker "shall enjoy the same social and tax advantages as national workers"; paragraph (3) grants the right of access to training in vocational schools and retraining centers, an aspect that may be relevant for young athletes that desire to move to a certain MS to participate in a sports development program as preparation for a career as professional athlete later on.

The ECJ continued to develop the protection afforded to migrant workers and their families by Regulation 1612/68, while clarifying its scope.[58] It also confirmed and enlarged the scope of "social advantages" within the meaning of Article 7(2) Regulation 1612/68.[59] In *O'Flynn*[60] the Court held that denying a migrant worker an allowance for funeral expenses abroad must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a risk that it will place the former at a particular disadvantage.[61] It added that it is not necessary to establish that such provision actually affects a substantially higher proportion of migrant workers; it suffices that the provision is liable to have such an effect.[62] Furthermore, the Court ruled that the personal reasons that led the worker to exercise his freedom of movement are irrelevant when assessing whether a national provision is

[56] Fritzweiler [1998] p. 518, 520
[57] Oliveira [2000] p. 110
[58] ibid
[59] ibid p. 112; O'Keeffe [1985] p. 93-123
[60] Case C-237/94 *O'Flynn* [1996] ECR I-2617
[61] ibid, para. 20

discriminatory, because the possibility of exercising the freedom cannot be limited by such – purely subjective – considerations.[63] This decision is notable for the sports lawyer because one can easily imagine similar constellations in the context of sport.

Eventually, the Court went beyond mere non-discrimination and also struck down non-discriminatory rules which nonetheless constituted an obstacle to free movement of workers.[64] In the landmark case *Bosman*[65] it dealt with UEFA-based rules of the Belgian football association which provided that a professional footballer could not, even on the expiry of his contract with a club, be employed by another club unless the latter club paid a transfer fee to the former. These rules did not place the migrant worker at a disadvantage as compared to a non-migrant worker. A player desiring to transfer to another MS was subject to the same restrictions as one who wanted merely to change clubs in the same country.[66] Nonetheless, the Court held that such transfer rules constitute an obstacle to free movement, as they are likely to restrict the freedom of movement of players by preventing or deterring them from leaving their clubs on the expiry of their contracts in order to move to a new club in another MS.[67] Such rules directly affect the players' *access* to the employment market in another MS.[68] The ECJ did not accept the justifications brought forward by sports organisations.[69]

The fundamental ruling in *Bosman* was repeated in *Lehtonen*,[70] but the concrete outcome was slightly different. In this case, the Court examined rules laid down by the Belgian Basketball Federation, which prohibited the transfer of players from another MS taking place after 28 February, while the transfer of players from outside Europe was allowed until 31 March. As in *Bosman*, the Court found that the rules were an obstacle to free movement of workers. Then, it considered whether they could be justified by the aim of ensuring comparability of participating teams and, therefore, the proper functioning of the championship as

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[62] ibid, para. 21; Oliveira (2002) p. 113
[63] O'Flynn, supra 60, para. 21; Oliveira (2002) p. 113
[64] Oliveira (2002), p. 87
[65] *Bosman*, supra 1, annotated by Weatherill, 33 CML Rev., p. 991-1033
[66] *Bosman*, supra 1, paras. 98 and 103
[67] *ibid* paras. 99-100; Oliveira (2002), p. 90
[68] ibid, p. 90, 91; *Bosman*, supra 1, para. 103
[69] This will be examined in more detail below.

a whole.[71] The Court found that those rules obviously went beyond what was necessary to achieve that aim. However, it left it to the national court to determine the extent to which objective reasons justified the different treatment of the players concerned.[72]

The Courts case law – particularly in regard to freedom of movement for workers – was also marked by the slow rise of the importance of Union Citizenship.[73] After the introduction of this concept, the limits of the Maastricht Treaty system have been tested in several cases in which rights were claimed directly on the basis of Citizenship.[74] A prominent example is the case *Martínez Sala*,[75] where the Court went beyond its previous case law, deciding that the simple fact that Ms. Sala was a Union citizen lawfully residing in another MS was enough for her to fall under the scope of application of the EC Treaty and, secondly, that a benefit previously granted only to workers should also be granted to a person other than a worker.[76] However, this case should not be over-emphasized, because the Court did not derive new rights directly from Citizenship, but rather – occasionally – refers to Citizenship as an additional argument to interpret other provisions.[77] For the time being, the Court appears unwilling to use Union Citizenship to grant new rights of residence to nationals of other MS; however, it does use Union Citizenship to facilitate their life in the host MS.[78] Thus, even after the introduction of EU Citizenship, it still makes a difference in regard to free movement rights whether or not a migrant EU-citizen is a worker.[79]

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[70] Case C-176/96 *Lehtonen*, [2000] ECR I-2681
[71] ibid, paras. 49-59; Oliveira (2002), p. 88
[72] Oliveira (2002), p. 88; *Lehtonen*, supra 70, paras. 49-50 and 54-59; on provisions of services concerning judo: Case C-51/96 *Christelle Deliège*, [2000] ECR I-2549, para. 43, where the Court declared measures excluding foreign players from matches between national teams not contrary to EC law; also see: Van den Bogaert, "The Court of Justice on the Tatami", 25 EL Rev., p. 554-563
[73] Articles 17–22 EC
[74] Oliveira (2002), p. 126
[75] Case C-85/96 *Martínez Sala*, [1998] ECR I-2691
[76] Oliveira (2002), p. 79
[77] ibid, p. 80, 126
[78] ibid, p. 126
[79] ibid, p. 84

Freedom of Movement in Sport - Scope and Limitations

Taking Inventory: "Special Relation" of Sports and Law?

Obviously, the extent to which athletes enjoy freedom of movement is determined by the system(s) of law applicable to them.[80] For the purpose of this paper we must therefore distinguish between participants that are – initially – subject to the laws of home countries that are either inside or outside both the EU and the European Economic Area (EEA).[81] However, a second important source of substantive law flows from sport itself, because most national legal systems generally allow sporting associations and clubs to regulate their affairs more or less autonomously.[82] Such sporting rules – for example transfer fee systems – adopted by sport associations, can have severe impact on freedom of movement[83] and may be subject to challenge within national jurisdictions, for instance on the ground that they operate as what in English law would be termed an unreasonable and unlawful restraint of trade.[84] According to German law, such rules may breach a workers fundamental right flowing from Article 12 paragraph (1) German Constitution (Grundgesetz).[85] However, the finding that such association rules affecting freedom of movement or right to work may already be in breach of national law, cannot be said to be true for all countries, since the level of "state interference" in sport differs widely. This paper will now examine the impact of EU law on the rules and practical administration of sports organisations.

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[80] Kerr, in Scherrer (2002) p. 19
[81] ibid
[82] ibid p. 18
[83] ibid p. 19, 21
[84] ibid p. 19-20: i.e. an unjustified restraint on the player's right to dispose of his labour freely
[85] This was in fact so decided by the Federal Labour Court (Bundesarbeitsgericht), which ruled that transfer restrictions for professional ice hockey players contained in the regulations of the German Ice Hockey Federation violated Article 12 paragraph (1) Grundgesetz: *Kienass v. German Ice Hockey Federation* as of 20.11.1996, BAG-NZA (1997), p. 647

Autonomy and Sporting Exception - does EU Law even apply?

Neither the EU- nor the EC-Treaty grants an express competence to regulate the field of sport as such.[86] In primary Community law the term "sport" first appears in the context of the Treaty of Amsterdam,[87] but this Declaration No. 29 expressly refers only to *amateur* sport. However, since *Walrave*[88] in the 1970s, the ECJ consistently ruled that commercialised sport is subject to Community law in so far as it constitutes an economic activity within Article 2 EC.[89] Articles 39 and 49 EC are thus applicable to sport if and insofar as the activities of pro athletes have the character of gainful employment or remunerated service.[90] Since commercialisation has also seized lower levels of sport, it is not easy to make a sharp distinction between "professional" and genuine "amateur" sport.[91] Even if a federation's statutes refer to its sport as having amateur status one must take a close look whether and to what amount athletes receive remuneration in connection with their sporting activity, either directly from their club or from third parties like sponsors.[92] The ECJ applies an extensive interpretation and construes the relevant Treaty provisions to also include such working or service relations where only small remuneration is being paid, unless it is so immaterial that the underlying relationship cannot be reasonably seen as economic activity.[93] Thus, semi-professional athletes – like the judo fighter Christelle Deliège[94] – also fall within the ambit of the freedom of movement principle.[95]

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[86] Zinger (2003), p. 127

[87] Declaration No. 29 on sport, annexed to the final act of Amsterdam, at Europa Website: http://europa.eu.int/eur-lex/en/treaties/selected/livre459.html (as of 8 August 2003): *"The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the EU to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport."*

[88] Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale*, [1974] ECR 1405

[89] Bosman, supra 1**,** para. 71 (with further references); Case 13/76 *Donà v. Mantero*, [1976] ECR, 1333-1340 (of 14 July 1976), paras. 14-16; Zinger (2003), p. 127

[90] *Deliège*, supra 72; *Walrave*, supra 88, para. 1418; *Bosman*, supra 1, para. 71 (with further references); Kerr, in Scherrer (2002), p. 18; Zinger (2003), p. 128; De Kepper, in Scherrer (2002), p. 43-45; Helsinki-Report – COM (1999)–644 final

[91] Zinger (2003), p. 129

[92] *Deliège*, supra 72, para. 51; Zinger (2003), p. 129

[93] De Kepper, in Scherrer (2002), p. 45

[94] *Deliège*, supra 72

[95] Zinger (2003), p. 129

In general, most governments – at least in the liberal western democracies – tend to accept the existence of "autonomy" of sport and mainly do not interfere with its regulation through the respective governing bodies,[96] except where such autonomous regulation impinges on classic areas of state responsibility such as public order, public safety or – in some countries – doping control.[97] Several countries – *inter alia* the USA – explicitly exempt sports organisations from the application of certain laws (particularly competition laws) or grant privileges (like the US "Sports Broadcasting Act").[98] Naturally, some states are more dirigiste than others, but hardly anyone advocates full statutory regulation of sports matters, either nationally or internationally.[99] Thus, the basic idea of autonomy of sport seems to be widely accepted.

Sports organisations go even further and advocate a so-called "sporting exception".[100] They refuse to apply certain legal rules of the economic world in the field of – even professional – sport, arguing that sport is unique in nature, follows other principles than normal business and thus requires a different approach.[101] An example often brought forward to illustrate theses specific requirements is: clubs in league competition are not business rivals in the orthodox sense. Quite to the contrary they have a strong interest to maintain a balance between themselves by preserving a certain degree of equality, thus guaranteeing exciting intra-league competition – the vital uncertainty of outcome.[102] Unlike normal competitors, clubs are mutually dependent to successfully market the league as a whole; exclusive dominance or monopoly situations are not desired by the participants of such a sports market. Therefore, many argue that exemptions from competition laws should be available (as is the case for many US pro leagues), allowing systems of intra and inter league wealth distribution.[103] Consequently, many sports officials and some legal authors are of the opinion that the EC Treaty's freedom of movement principles should not be

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[96] ibid, p. 220
[97] Kerr, in Scherrer (2002), p. 18
[98] Trommer (1999), p. 176, 184, 192: with details on the (non-)application of § 1 Sherman Act on professional leagues in the USA, statutory and non-statutory labour exemptions on the basis of Collective Bargaining Agreements and other sports related legislation.
[99] ibid
[100] Bosman, supra 1, para. 71
[101] ibid
[102] Weatherill, S. "The Helsinki Report on sport" E.L.Rev. (2000) 25, p. 289
[103] ibid

applied to sport at all, but sport should instead be granted a general exemption for its unique nature and its socio-political and cultural significance.[104]

However, the European Union seems to prefer a somewhat different approach to – at least commercialised – sport, as far as defining the Treaty's ambit is concerned. Apparently, the Commission and the ECJ are not willing to accept such broad notions of "sports autonomy" or "sporting exception". Freedom of movement starts with the premise that, within the limits properly allowed under the law, all workers should be free to dispose of their labour at will.[105] There is – for the Commission and the ECJ – no reason *a priori* why professional athletes should not enjoy the same rights as other workers.[106] However, the ECJ in *Donà*[107] did not completely refuse the notion of a possible sporting exception. It acknowledged the existence of such exception from the scope of Community law, however, only for rules which are not of economic nature but result from the specific quality and the unique demands of sport ("rules of sporting interest only").[108] Thus, the EC Treaty does not prevent rules which exclude foreign athletes from certain competition for non-economic reasons, if such restriction is demanded by the specific character of the respective event – as example the Court names the international competition of national teams.[109]

Consequently, sports organisations tended to believe for many more years after *Donà* that most, if not all of their rules and regulations were either exempt (as "rules of sporting interest only") or at least justified by sport specific requirements. The ECJ eventually destroyed this illusion in 1995, when it decided in *Bosman*[110] that transfer systems did not fall within the "sporting exception" and therefore must be assessed against the relevant provisions of Community law.[111]

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[104] Zinger (2003), p. 127 with further references; see also arguments of German government in *Bosman*, supra 1, para. 72, that sport falls under the provisions on "Culture", Article 151 EC, and the EU must therefore respect its uniqueness.
[105] Kerr, in Scherrer (2002), p. 18
[106] Zinger (2003), p. 129
[107] *Donà*, supra 89
[108] De Kepper, in Scherrer (2002), p. 45; Kerr, in Scherrer (2002), p. 21
[109] *Donà*, supra 89, para. 14 and 15; *Bosman*, supra 1, para. 76 and 127; De Kepper, in Scherrer (2002), p. 45
[110] *Bosman*, supra 1
[111] Kerr, in Scherrer (2002), p. 21

Also, the sporting exception is in general construed narrowly by the ECJ.[112] In *Lehtonen,*[113] the Court held that it did not apply to a rule prohibiting a basketball club from fielding players from other MS in national championship games where they have been transferred after a specified date which was earlier than the date applying to transfers from certain non-member countries.[114] The ECJ referred the case back to the national Court in Belgium to decide the question whether objective justification could be found, but strongly indicated that it could not.[115] In the *Deliège*[116] case, also of April 2000, the Court held that an exception does furthermore not apply to rules requiring athletes to be authorised or selected by their federation before they may take part in high-level international competition.[117] Such a rule does, however, not in itself constitute a restriction on the freedom to provide services as long as it derives from a need inherent in the organisation of such a competition.[118]

It should therefore now be commonly accepted that professional sport – which makes up more than 3% of world trade[119] – is subject to Community law.

A Brief Review of the Bosman Issues

The ECJ has dealt with a number of cases from the context of sport in the past, in particular *Walrave,*[120] *Donà v. Mantero,*[121] *Lehtonen,*[122] *Deliège*[123] and, of course, *Bosman*[124]. They have been commented on in numerous essays and journal articles,[125] so this paper will refrain from repeating factual details and will instead

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[112] ibid, p. 22
[113] *Lehtonen*, supra 70
[114] Kerr, in Scherrer (2002), p. 22
[115] ibid
[116] *Deliège*, supra 72
[117] Kerr, in Scherrer (2002), p. 22
[118] ibid
[119] Zinger (2003), p. 128
[120] *Walrave*, supra 88
[121] *Donà*, supra 89
[122] *Lehtonen*, supra 70
[123] *Deliège*, supra 72
[124] *Bosman*, supra 1
[125] see *inter alia*: Eilers, in: Scherrer [2002], p. 130; Fritzweiler et al. "Praxishandbuch Sportrecht" [1998], p. 238-267; Kerr, in: Scherrer [2002], 17-29; Krogmann, [2001], 5-17**,** each with further

concentrate on showing the most important legal consequences of this jurisprudence in regard to freedom of movement. The landmark *Bosman* ruling revolutionised European football and is commonly seen as starting ground for later developments of community law in the area of professional sport.[126] Therefore, we shall briefly review its basic principles and impact.[127]

In the context of sport, there are essentially two areas that have repeatedly led to conflicts with the freedom of movement principle and that were also central issues in *Bosman*:

(a) "foreigner restriction clauses" (also "nationality clauses"): rules that federations or leagues impose on their members to limit the number of foreign athletes that may either be recruited and employed for a club or be actually fielded in a match;

(b) "transfer systems": rules requiring a new employer to pay transfer fees or "development compensation fees" to the former employer in cases where an athlete – either during[128] or after termination of his contract – desires to change clubs.

In *Bosman*, the ECJ concluded that Article 39 EC prohibits both: (i) nationality clauses as well as (ii) transfer rules (if they require the payment of transfer fees for players whose contracts have expired).[129] The Court refused to grant a sporting exception[130] and found that the situation was not of purely internal nature. After explaining why both rules constituted obstacles to the freedom of movement principle,[131] the Court addressed possible justification.[132] It demanded the existence of pressing reasons of public interest; furthermore the rules in question

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references.

[126] AFP Press Release of 21 May 2003: "Kolpak ruling has left things destabilized: UEFA" at http://uk.sports.yahoo.com/030521/323/e0ja4.html (as of 24.06.2003)

[127] de Kepper, in Scherrer (2002), p. 45

[128] The ECJ has not yet decided upon mid-contract transfers (so-called "Anelka" question). There, transfer fees seem acceptable, since a player is bound by the valid contract (*pacta sunt servanda*) and it is up to the contractual parties to negotiate, if and under which conditions they agree to a premature release of the player; see also Commission Communication IV/36.5883, of 15.12.1998, concerning FIFA circular 616 of 4.6.1997

[129] De Kepper, in Scherrer (2002), p. 46; *Bosman*, supra 1, para. 100 and 119

[130] ibid, para. 73-87

[131] ibid, para. 92-104 and 116-129

would have to ensure achievement of the aim and not go beyond what is necessary for that purpose.[133] Sports organisations and some MS had brought forward numerous arguments why they considered such sport specific rules objectively justified. Such rules were claimed to be necessary: (i) to maintain a certain financial and competitive balance between clubs to safeguard exciting league competition,[134] (ii) to support the continued search for and the training of young domestic athletes,[135] (iii) to maintain the traditional link between a club and its country, so the fans can identify with their favourite teams[136] and, finally, (iv) to create a sufficient pool of domestic players to provide the respective national teams with top players.[137]

Both Advocate General Lenz and the Court were not convinced but were instead of the opinion that these arguments were either incorrect or irrelevant or that the objectives could be safeguarded through milder measures.[138] The ECJ is particularly strict in regard to nationality clauses. The only justification the Court has shown willing to accept is if the particular nature of matches – e.g. national team competition – demands such rules.[139] Transfer systems are a somewhat more complicated matter. The arguments for and against transfer fee systems have been exchanged extensively and the Courts position is now quite familiar.[140] The argument against is one of principle: why should players be "taxed" through a transfer system that depresses their wages for an assumed benefit of their sport?[141] Sport organisations, on the other hand, claim that sport is different from normal industries and that if players were treated the same as other workers, wage inflation at the top would strangle clubs at the bottom, which are the fount from which future talent must spring.[142] Sports administrators and politicians have not yet been able to negotiate a compromise that strikes a satisfactory balance between those opposing points of view and there is still no clear consensus on the

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[132] ibid, para. 105-114 and 121-137
[133] ibid, para. 104
[134] ibid, para. 105 and 125; De Kepper, in Scherrer (2002), p. 46
[135] ibid; *Bosman* supra 1, para. 105
[136] ibid, para. 123
[137] ibid, para. 124
[138] ibid, para. 105-114 and 121-137; Zinger (2003), p. 134; De Kepper, in Scherrer (2002), p. 46
[139] *Bosman*, supra 1, para. 127; Zinger (2003), p. 134
[140] Kerr, in Scherrer (2002), p. 19
[141] ibid
[142] ibid

way forward in most sports.[143] The federations' line of reasoning is described here in some detail because essentially identical arguments will reappear in the context of *Kolpak* later on.

[143] ibid

Recent Developments: Expanding the Scope of Applicability?

Prelude to Kolpak

After *Bosman* it was clear that Article 39 EC prohibit rules limiting the number of EU athletes as well as rules that require the payment of transfer fees in regard to athletes whose contracts had expired. As an effect, the international transfer system in its old form was abolished and teams in league competition have become more international because most clubs soon made use of the possibility to recruit an unrestricted number of nationals from other MS.[144] Purely domestic transfers remain outside the ambit of the free movement provisions. However, rules requiring transfer fees for out of contract players who change clubs within one MS may be in breach of Article 81 EC.[145] This paper can, however, not go into the complex issue of competition law and sport.[146]

Most sports organisations – while grinding their teeth – made only the inevitable modifications to their regulations but upheld their restrictive rules as far as non-EU nationals were concerned.[147] Soon after *Bosman* the question arose whether this ruling must also be applied to players from non MS.[148] In regard to the three EFTA-states (Liechtenstein, Iceland and Norway) this is clearly the case, because according to Articles 28 to 52 of the Agreement on the European Economic Area (EEA)[149] provisions on the four fundamental freedoms are also fully applicable in respect to these countries.[150]

More difficult to answer was the question whether these principles also pertain to

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[144] Gramlich, L./Niese H. SpuRt, [1998], p. 61

[145] This issue would have fallen to be decided in *Balog* (Case C-264/98, *Balog v. Royal Charleroi Sporting Club ASBL)*, had not the parties settled the matter on confidential terms on the day scheduled for publication of the Advocate General's Opinion. The threat of legal challenge founded on Article 81 EC – even if the chances of success appear slim – was apparently sufficient to persuade parties to settle the dispute.

[146] For further references: Kerr, in Scherrer (2002), p. 24; Krogmann [2001], p. 32-34; Brinkman, D. / Vollebregt, E. "The Marketing of Sport and its Relation to Competition Law" ECLR (1998), 19(5) p. 281-288; Egger A. / Stix-Hackl, C. "Sports and Competition Law: A Never-Ending Story" ECLR (2002), 23(2), p. 81-91

[147] Gramlich, L./Niese H. SpuRt, [1998], p. 61; Wirtschaftswoche of 21.5.2003

[148] De Kepper, in Scherrer (2002), p. 46

[149] between the EC and EFTA, entered into force on 1 January 1994

[150] Craig, P. / de Búrca, G. (2003), p. 26; De Kepper, in Scherrer (2002), p. 46

states that have entered into so-called Association or Cooperation Agreements with the EC, since many of those Agreements contain "non-discrimination clauses" in regards to working conditions, all of which are identically – or at least similarly – worded.[151] Did this mean that the remaining sports federation rules were incompatible with the free movement principle as well? The European Commission soon voiced the opinion that paragraphs 119 and 120 of the *Bosman* ruling also affected the working conditions of nationals of third countries that fell under such Europe Agreements.[152] Some club officials – particularly from sports like wrestling, table tennis or handball – were even eager to recruit relatively inexpensive athletes from non-EU countries (e.g. former Eastern Bloc states) and soon "discovered" the existence of Association or Cooperation Agreements as a chance to strengthen their teams.[153] This met, however, the fierce resistance of most national governing bodies. These sports federations only recently had to swallow the – from their perspective "bitter" – pill of the *Bosman* judgement and were not at all willing to extend its principles to non-EU nationals because – they argued – this would ultimately demoralize and frustrate the domestic young talent.[154]

This conflict of interest has led to a few legal disputes before national courts.[155] In a German case of 1997 between a table-tennis club and the German Table-Tennis Federation regarding rules restricting the use of Polish players in league competition, the Landgericht [District Court] Frankfurt decided contrary to the Commission's view and upheld the restrictive federation rules.[156] The Landgericht rejected the claim (which was based on Articles 3 and 12 Grundgesetz [German Constitution] on equal treatment and right to employment, combined with the provision of the Association Agreement with Poland), arguing that the Agreement did not have direct effect and that – even if it did – the rules were justified by

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[151] Zinger (2003), p. 137; Gramlich, L./Niese H. SpuRt, [1998], p. 64; De Kepper, in Scherrer (2002), p. 46, 47; this will be described in detail below.
[152] De Kepper, in Scherrer (2002), p. 47
[153] Gramlich, L./Niese H. SpuRt, [1998], p. 61
[154] ibid
[155] For example: *VfK Schifferstadt v. Deutscher Ringerbund* [German Wrestling Federation] before the Landgericht Frankfurt/Main (2-14 O 305/97) about the eligibility of a Polish wrestler in the German Premier League; *Oldenburger Turnerbund v. Handballbund Niedersachen* [Lower Saxony Handball Association] before the Landgericht Hannover (11 O 285/97) about the right of participation of a Belarusian handball player in league competition; these cases had not yet been ultimately decided until the *Kolpak* judgement was delivered.
[156] Landgericht Frankfurt am Main, Court Ruling of 26.11.1997 in the case „*TTC Zugbrücke*

exclusively sporting grounds.[157] This judgement is rather questionable, because the ECJ had at that time already ruled[158] that such clauses in Association Agreements were directly applicable.[159]

About two years later, however, the tide started to turn. In November 2000 a Spanish labour court ruled[160] that the Russian football player *Valeri Karpin* was entitled to equal treatment compared to EU players on the basis of the Cooperation Agreement between Russia and the Community.[161] The Russian national team player had sued the Spanish Football Federation as well as the professional football league, claiming breach of Spanish as well as European law.[162] The ruling did not attract too much attention outside Spain since the emphasis in this case – although the Cooperation Agreement was crucial to its outcome – was on aspects of domestic law.[163]

Lilia Malaja

More legal significance as well as more media impact was connected with the French case of *Malaja v. Fédération Française de Basket-Ball (FFBB)*, taking place first before the administrative court in Strasbourg, then before the administrative court of appeal in Nancy[164] and finally the French Conseil d'Etat.[165] The female pro basketball player Lilia Malaja is mostly described as Polish and, indeed, that is her citizenship now, but she was born in Kazakhstan and her basketball career has taken her to Belarus, Poland, Spain, France and Israel.[166] During her spell in France, in June 1998, Malaja signed for the basketball club RS Strasbourg. The FFBB rules then limited teams to a maximum of two non-EU players. RS Strasbourg had applied for FFBB's permission to register Malaja although the club already had two non-EU players on its roster.

Grenzau v. Deutscher Tischtennis Bund"

[157] Gramlich, L./Niese H. SpuRt, [1998], p. 61

[158] Case 12/86, *Demirel* [1986] ECR 3719

[159] Zinger (2003), p. 137; Gramlich, L./Niese H. SpuRt, [1998], p. 65; De Kepper, in Scherrer (2002), p. 47

[160] Madrid Labour Court No. 15, judgement of 23.11.2000

[161] De Kepper, in Scherrer (2002), p. 48

[162] ibid

[163] Gramlich, L./Niese, H. Spurt (1998), p. 64

[164] La Cour Administrative d´Appel de Nancy (Première Chambre) of 3.2.2000, No. 99NC00282; published in: RTD Eur [2000] p. 384

[165] Ruling of 30 December 2002

[166] Reuters Press Release of 04.02.2003 "New rule may change game for ever" From: Khaleej

The FFBB – following its rules – refused permission and the club was unable to field Ms. Malaja during the 1998/1999 season. Consequently, she filed a lawsuit with the administrative court in Strasbourg, claiming that she had a non-restrictive right to work in France under the terms of a state treaty with Poland, which laid down that no labour discrimination could be applied to a Polish citizen.[167] After having lost in the first instance,[168] Ms. Malaja addressed the Court d´Appel in Nancy which decided in her favour, basing its decision on the Association Agreement between the European Union and Poland, signed in 1991 and effective since February 1994, particularly on Article 37(1) on the freedom of movement for workers, guaranteeing Polish nationals that are lawfully employed in a MS equal treatment in regard to working conditions.[169] The ruling was challenged by the FFBB but was upheld by the Conseil d'Etat in Paris, France's highest administrative court, on 30 December 2002. The court argued that the Agreement "set out clearly and precisely a rule for equal treatment" and forbids "any discrimination" provided a person was in possession of a valid work permit and a contract.

The ruling was received by the media with dramatic headlines (e.g. „Polish Basketball Player Could Change the Face of European Sport"[170]) because this player's victory was seen by some as having the potential to also lift restrictions on athletes from Eastern Europe and even some African countries.[171] Numerous central and eastern European countries[172] have signed similar Association or Cooperation Agreements[173] – also called "Europe Agreements"[174] – which set out these principles, as have Romania, Bulgaria and Turkey, as well as the former Soviet republics Russia, Ukraine, Belarus, Moldova, Georgia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan and Uzbekistan.[175] Michel Pautot, legal

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Times Online at http://www.khaleejtimes.co.ae/ktarchive/040203/sports.htm
[167] ibid
[168] Cour Administrative de Strasbourg, ruling of 27.02.1999
[169] De Kepper, in Scherrer (2002), p. 47
[170] Agence France Press (AFP), Paris, 9 January 2003
[171] ibid
[172] Particularly the 2004 Accession Countries: Poland, Hungary, Slovakia, Czech Republic, Malta, Cyprus, Lithuania, Estonia, Latvia and Slovenia
[173] According to the ECJ in *Demirel*, supra 158, para. 9: "Association" is a form of relationship involving "special, privileged links with a non-member country"
[174] Wyatt & Dashwood´s "EU Law" (2000), p. 11,12
[175] Greater uncertainty remains in regard to the Agreement on Partnership and Cooperation with

counsel for Ms. Malaja, was quoted saying that this ruling could have huge implications for sports clubs in the EU, since "there is nothing to stop a football club from playing four Ukrainians, three Moroccans and four Czechs."[176] He expected the case to have an impact on athletes from all ten accession states and Turkey, as well as from at least 13 other countries.[177] Some went even further and argued that an identical non-discrimination clause also exists in the Partnership Agreement of Cotonou, Benin,[178] signed 23 June 2000, between the European Community and 77 countries from the African, Caribbean and Pacific regions.[179]

The ruling has, not surprisingly, provoked harsh criticism by parts of the media and sports officials: FIFA President Blatter considers this continuing development of easing restrictions on foreigners playing for EU sports clubs to be an `irresponsible interference with the special structures and needs of global football´, a `victory of the interests of an individual that will hurt football as a whole´.[180] He warned that every aspect of the game, from youth level development to national teams, will be affected: the decision would open the way for a massive influx of cheap foreign players and seriously undermine European soccer;[181] Blatter calls this `Bosman to the power of ten´ and `savage deregulation´ of the transfer market that will lead to `social dumping´, because clubs will no longer develop young domestic athletes but will instead import cheap players, particularly from countries in Africa and the Caribbean-Pacific areas.[182] Blatter predicted that *Malaja* would throw European football's doors wide open to players from more than 100 countries, causing `mass immigration of players´ and threatening investment in youth development.[183] RC Strasbourg president Patrick Proisy said: "Footballers from these countries have wages six to

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the Russian Federation of 24.6.1994 as well as in regard to the Agreement with Turkey because they are differently worded and are arguably also based on different objectives: Gramlich, L./Niese H. SpuRt, [1998], p. 65

[176] supra 170

[177] ibid

[178] at Website of General Secretariat of the African, Caribbean and Pacific Group of States http://www.acpsec.org/gb/cotonou/accord1.htm (as of 28.07.2003)

[179] Interview with FIFA President Joseph Blatter, Le Monde (Paris) of 21.01.2003; "Transfer market laid open", Tiscali Europe Online, at http://www.europe.tiscali.se (as of 23.07.2003); Reuters Press Release, supra 166

[180] Interview Blatter, supra 179

[181] Reuters Press Release, supra 166

[182] Interview Blatter, supra 179

[183] Reuters Press Release, supra 166

seven times lower than those of French players. This will cause unemployment for French players."[184] Philippe Piat, president of the French players' union, agreed: "The only certain consequence of removing this restriction is that more French players will be made redundant."[185] UEFA president Lennart Johansson expressed hope the Commission will grant football a six-plus-five exception which would force clubs to field at least six 'home nationals' per match.[186] Blatter added: "It's essential we maintain the delicate balance between national identity and the international diversity which enriches our sport."[187] Finally, here is another – quite typical – example of the sometimes remarkably hostile and often hardly objective reporting by parts of the media:

- [Malaja is] "Another blow for European football, and it could well be fatal. The Bosman ruling already caused enormous grief in 1995 […] The results [of Malaja] will truly be shattering, unsettling the very foundations of the most popular sport on the planet. The costly business of training players is already threatened by the arrival of cheap young players […] Training centres see their very existence threatened as the large clubs ignore them. […] National teams will also suffer. […] The richer countries willingly buy up players from abroad but this in turn means that their own national talent is denied a stage on which to shine. This also poses a problem as regards the fans. They no longer identify with their favourite clubs which tend to be filled with "mercenary" players […] The crowds are diminishing as is general interest. […] The affection for home-grown players who frequently spent their entire playing careers at the one club has gone. […] This extreme liberalisation has led to a near catastrophic situation which the football authorities are trying to remedy. The last thing they needed was the Malaja ruling."[188]

This criticism was presented here in detail because it will reappear below in the

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[184] "Malaja to become the new Bosman", UEFA Online News, 24 January 2003at http://www.uefa.com (as of 23.07.2003)
[185] ibid
[186] Reuters Press Release, supra 166
[187] ibid
[188] "Transfer market laid open", Tiscali Europe Online, at http://www.europe.tiscali.se (as of 23.07.2003)

context of *Kolpak*. We will examine later, whether such ruthless disapproval is justified or whether some commentators have gone overboard with their condemnation of these rulings.

Although *Malaja* met harsh criticism from sports officials and parts of the press, the ruling did not grasp the attention of the wide public, because, firstly, the judgment applies directly only to France; secondly, it came about in the context of women's basketball – a sport which is not in the centre of public attention.[189] Yet, agents of non-EU players were well aware of the implications.[190] In *Malaja* the principle of equal treatment for non-EU athletes has for the first time been conceded by a superior national court within the EU.[191] The sports world expected that sooner or later player agents and sports lawyers would flex their muscles in pursuit of similar concessions throughout the EU, either by bringing a case before the ECJ or by seeking a single Commission order ratifying the concession for all countries possessing similar labour agreements with the EU.[192]

Maros Kolpak

Cases like *Karpin* and *Malaja* had triggered a heated debate among sports lawyers about the exact meaning and scope of Association and Cooperation Agreement provisions.[193] Then along came the case of *Maros Kolpak*[194] which was to clarify the issue on the European level.

Facts of the case:

The case arose from the refusal by the German Handball Association, (Deutscher Handballbund, hereinafter: DHB), to allow the player Maros Kolpak, a Slovak national, access to championship matches. Kolpak was the goalkeeper for TSV Östringen, a German Division II handball team, since the 1997 season.[195] He had entered in March 1997 into a fixed-term employment contract expiring on 30 June 2000 and subsequently, in February 2000, entered into a new fixed-term contract

[189] Reuters Press Release, supra 166
[190] ibid
[191] ibid
[192] ibid
[193] de Kepper, in Scherrer (2002), p. 48; Gramlich, L./Niese, H. Spurt (1998), p. 64
[194] *Kolpak*, supra 3

expiring on 30 June 2003.[196] He was resident in Germany and held a valid residence permit. [197] The DHB issued to Mr Kolpak a player's licence marked with the letter "A" for "Ausländer" (German for foreigner) since he was a non-EU national.[198] Under the DHB rules (SpO),[199] teams in the federal and regional leagues were prohibited to field more than two such "A"-players.[200]

Mr Kolpak requested that he be issued with a regular player's licence, as he considered that he was entitled to take part without any restriction whatsoever in competitions by reason of the prohibition of discrimination set out in the Association Agreement between the EC and Slovakia (hereinafter: AA). Mr Kolpak challenged the DHB decision before the Landgericht (Regional Court) Dortmund, which agreed and ordered the DHB to issue him with an unmarked licence.[201] The Oberlandesgericht (Higher Regional Court) Hamm, before which the dispute was brought on appeal by the DHB, took the view that the reference to Article 39 EC (then Art. 48 ECT) by Rule 15(1)(b) SpO must be construed as meaning to cover only players who enjoy complete equality of treatment *vis-à-vis* Community nationals in respect of free movement of workers.[202] Thus, Mr Kolpak would not be entitled to an unrestricted licence, as such general equality of treatment does not feature in the AA.[203] The Oberlandesgericht stayed proceedings under the preliminary-reference procedure in order to ask the ECJ whether Article 38 AA precludes a rule drawn up by a sports federation under which clubs are authorised to field only a limited number of players from non-member countries.[204] The Oberlandesgericht observed that Mr Kolpak's contract qualifies as employment contract and also took the view that the provisions of Rule 15(1)(b) and 15(2) SpO, read together, give rise to inequality of treatment in regard to working conditions.[205]

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[195] ibid, para. 9
[196] ibid
[197] ibid
[198] ibid, para. 10
[199] DHB Spielordnung, Rule 15 para. (2)
[200] *Kolpak*, supra 3, para. 8
[201] ibid, para. 11
[202] ibid, para. 11, 12
[203] ibid, para. 13
[204] ibid, para. 13
[205] ibid, para. 15-17

The Decision:

The Court started with the statement that the provision of the AA laying down the principle of non-discrimination on grounds of nationality has direct effect.[206] This aspect must not be regarded as a matter of course, since the issue of direct applicability as well as the interpretation of the wording *'Subject to the conditions and modalities applicable in each MS […]'* contained in Article 38(1) AA[207] were central reasons for the Oberlandesgericht Hamm to stay proceedings and request a preliminary ruling.[208] The ECJ answered in the affirmative and referred to the case *Pokrzeptowicz-Meyer*,[209] concerning the interpretation of the same principle in the context of the Association Agreement between the EC and Poland, since the respective clause was identically worded and the two Agreements did neither differ in regard to their objectives nor in the context in which they were adopted.[210] Furthermore, in the opinion of the Court, Article 38(1) AA cannot be interpreted in such a way as to allow a MS to make the application of the principle of non-discrimination subject to conditions or discretionary limitations inasmuch as such an interpretation would render that provision meaningless and deprive it of any practical effect.[211] Slovak nationals are thus entitled to invoke that principle before the national courts of the host MS.[212]

The Court then pointed out that, according to the principles set out in *Bosman*,[213] the prohibition of discrimination laid down in the Treaty provisions on free movement of workers applies not only to measures of public authorities but also to rules drawn up by sporting associations which determine the conditions under which professional athletes can engage in gainful employment;[214] the reason being that working conditions in the different MS are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Therefore, if the scope of Article 48 EC

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[206] ibid, para. 30
[207] First indent of Article 38(1) AA provides: "Subject to the conditions and modalities applicable in each MS: - treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a MS shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals, […]"
[208] De Kepper, in Scherrer (2002), p. 48
[209] Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049
[210] *Kolpak*, supra 1, para. 24-29
[211] ibid, para. 29
[212] ibid, para. 30
[213] *Bosman*, supra 1, para. 87
[214] *Kolpak*, supra 3, para. 31, 37

were to be confined to acts of a public authority, there would be a risk of creating inequality in its application.[215]

Again referring to *Pokrzeptowicz-Meyer*[216] the Court stated that, although the relevant provision of the Agreement does not set out a principle of free movement for these workers within the Community, it follows from a comparison of the aims and context of the Association Agreement with Poland, on the one hand, with those of the EC Treaty, on the other hand, that there is no ground for giving the respective clauses of the Association Agreements a scope different from that of Article 39(2) EC.[217] Thus, the first indent of Article 38(1) AA introduces for the benefit of Slovak workers, *on condition that they are lawfully employed in the territory of a MS*, a right to equal treatment as regards working conditions having the same scope as that which EU nationals are recognised as having by virtue of Article 39(2) EC.[218]

The Court clearly defined the scope of this Agreement's provision by pointing out that this non-discrimination principle applies only to Slovak workers who are already lawfully employed in the territory of a MS and solely with regard to conditions of work, remuneration or dismissal. In contrast to Article 39 EC, that scope does particularly not extend to national rules concerning access to the labour market.[219] The Court found that Mr Kolpak was lawfully employed under an employment contract, that he held a valid residence permit and that, according to national law, he did not require a work permit – he was therefore no longer personally affected by any barrier to employment, even an indirect one, but had already lawfully accesses the German labour market.[220]

With regard to whether a rule such as the DHB's SpO constitutes a "working condition", the ECJ pointed out that the interpretation of Article 39(2) EC it has already applied in *Bosman*[221] can be transposed to the present case,[222] because the SpO in *Kolpak* is similar to the UEFA nationality clauses.[223] The Court made

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[215] ibid, para. 32; De Kepper, in Scherrer (2002), p. 49
[216] supra 229 paragraphs 39-41
[217] *Kolpak*, supra 3, para. 34
[218] ibid, para. 35
[219] ibid, para. 42
[220] ibid, para. 43
[221] supra 1, para. 120
[222] *Kolpak*, supra 3, para. 50
[223] ibid, para. 44, 49; ECJ Press and Information Division, PRESS RELEASE No 35/03 of 8 May 2003 at http://www.curia.eu.int/en/actu/communiques/cp03/aff/cp0335en.htm

clear that a rule which limits the number of professional players who may participate in certain matches does not concern the employment as such, on which there is no formal restriction, but the extent to which clubs may field players in official matches. Actual participation in such matches – not the mere existence of an employment contract – is, however, the essential purpose of those players' activities.[224] The Court concluded that such a rule relates to working conditions and that it constitutes forbidden discrimination.[225]

Then – again as in *Bosman* – the Court denied such rules justification on exclusively sporting grounds, letting the free movement principle prevail over the sporting reasons brought forward by the federation (to ensure sufficient playing time for the benefit of young German players and to advance the national team).[226] In matches other than national team competition (the only exception recognised by the Court so far[227]) any nationality clauses affect the essence of the activity of professional players.[228] In the Court's opinion, a football club's links with its MS cannot be regarded as any more inherent in its sporting activity as are its links with its town or region.[229] Even though national championships are played between clubs from different regions, there is no rule restricting the right of clubs to field players from other regions in such matches.[230] Moreover, in international competition participation is limited to clubs which have achieved certain sporting results in their respective countries, without any particular significance being attached to the nationalities of their players.[231] Thus, the Court did not regard the discrimination arising from the DHB's rules as justified on exclusively sports-related grounds[232] and no other argument capable of providing objective justification for the difference in treatment has been put forward.[233]

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[224] *Kolpak*, supra 3, para. 45
[225] ibid, para. 46-51
[226] ibid, para. 52; ECJ PRESS RELEASE No 35/03, supra 223
[227] *Donà*, supra 89, para. 14 and 15; *Kolpak*, supra 3, para. 53: excluding foreign players from certain matches is only justified for reasons which are not economic in nature, which relate to the particular nature and context of such matches and are thus of sporting interest only.
[228] ibid, para. 54
[229] ibid, para. 55
[230] ibid
[231] ibid; with reference to *Bosman*, supra 1, paragraphs 131 and 132
[232] *Kolpak*, supra 3, para. 52, 56
[233] ibid, para. 57

Again harsh Criticism:

The *Kolpak* ruling did not come as a great surprise but was instead expected among experts.[234] Advocate General Stix-Hackl, in her Opinion of 11 July 2002, had already stated that she considered the Agreement's prohibition of discrimination against Slovak workers clear and unconditional.[235] She had also correctly anticipated all other major issues of the decision that was delivered ten months later, like direct effect and the applicability to rules issued by private organisations. In particular, the Advocate General had expressed the view that the rules in question could not be justified on sporting grounds,[236] in fact, she referred to these issues as "settled case law".[237] The Enlargement Weekly Newsletter – as early as 16 July 2002 – predicted a victory by Mr Kolpak.[238] So the sports world should have been prepared for what was coming.

Still, sports organisations remained unwilling to recognize the rights of nationals from such associated countries.[239] After the ruling, the same kind of harsh criticism arose that we have seen after *Malaja* and it was issued by – one is tempted to say – the "usual suspects". This time, familiar sounding headlines were for example: "Kolpak Judgement causes commotion in football countries"[240] or "Kolpak ruling has left things destabilized".[241] The substance of the criticism is also essentially the same as was already described for *Malaja*. In fact, the reactions to *Malaja* might be interpreted as an – unsuccessful – attempt to influence the ECJ to rethink its position, especially on the justification issue, while *Kolpak* was still pending. Now that the ECJ has decided this issue with binding effect, the commentaries from sports officials appear like a mixture between anger and resignation. As one example for many, UEFA president Lennart Johansson's interview: [242]

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[234] Weiss [2003] p. 157
[235] A.G. Stix-Hackl, Opinion of 11 July 2002, paras. 40-43 at: http://curia.eu.int/en/cp/aff/cp0265en.htm
[236] ibid, paras. 60-69
[237] ibid, paras. 40, 60
[238] EU Commission: Enlargement Weekly Newsletter as of 16 July 2002 at http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_160702.htm (as of 24.03.2003)
[239] Weiss [2003] p. 157
[240] FIFPRO Press Release of 21 May 2003 at: http://www.spfa.org.uk/spfa/main.asp?strID=420 (as of 25.6.2003)
[241] AFP Press Release, supra 126
[242] ibid

> "Football is not a company which produces fridges. Politicians who see the salaries of players such as Vieri and Ronaldo need to realise football is a special case. […] You can't turn everything upside down with a single decision. It's going to take several years."

The fact that the ECJ refuses to accept the reasons brought forward as justification and that it has, in particular, repeatedly rejected with very brief words the issue of safeguarding domestic youth development annoys sports organisations to the extreme. Also some legal authors believe the Court does not weigh both the autonomous position of sports federations and the individual arguments brought forward attentively enough.[243] This is, however, the result of two contrary paradigms existing: the EU institutions regard commercialised sport primarily as a sector of economy and thus principally apply the same rules as to all other sectors. Sports organisations, however, see sport as something unique, something basically not economic but social in nature. Therefore, sports officials will most probably be frustrated again and again, because "protecting" domestic workers (in this case young athletes) from "foreign" competition is simply contrary to the idea of a Common Market, even more so if it happens through open discrimination as is the case with the federation's foreigner limitation clauses. Not surprisingly, the Commission expressly welcomed the ECJ ruling:[244] "The principle of non-discrimination must apply in professional sport as in other professions. The message sent by this ruling is that anyone who is thinking about quotas, about different ways of discrimination in professional football, or in professional sport are people of the past."[245]

Apart from the legal arguments, the federation's reasoning also seems unconvincing in substance. It is unclear why national sports federations seem to naturally assume that foreign athletes will always be better than domestic talent and that domestic athletes will be pushed aside. To the contrary, one must not disregard the possible positive influences of foreign talent: domestic athletes may get inspired and are being challenged by top competition to work harder. If there

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[243] Schäfer, in Scherrer [2002] p. 86; Gramlich, L./Niese H. SpuRt, [1998], p. 61
[244] AFP Press Release of 09.05.2003: "Brussels welcomes Bosman-style handball court ruling" at: http://quickstart.clari.net/qs_se/webnews/wed/dq/Qsports-eu-court-bosman.RVB0_Dy9.html

was no foreign athlete competing for the same position, then the domestic athlete may indeed get more unchallenged playing time, but it is doubtful if he will become a top international player for his national team that way.

Which Countries are affected?

There remains considerable controversy as to the exact geographical scope of the ruling's applicability.[246] Shortly after *Kolpak* the media[247] cited a European Commission spokesman with the statement: "The non-discrimination clauses are found in Agreements between the EU and about 100 countries, including […] some 75 nations in the African, Caribbean and Pacific group.[248] Others doubt that, saying the judgment will merely apply to players from 17 countries.

It is certain that the judgment does apply to the ten accession states[249] as well as another seven countries[250] that have entered into Association Agreements with the EC, because those Agreements contain identical clauses.[251] It is, however, doubtful, if the *Kolpak* judgment will also apply to countries that have entered into so-called Cooperation Agreements,[252] because the wording of the relevant provisions differs from the wording in the Association Agreements.[253] The *Kolpak* judgment does also not apply to the Association Agreement with Chile which does not contain a non-discrimination provision.[254]

The Difference compared to *Bosman*

Most headlines and commentaries referred to the cases *Malaja* and *Kolpak* as "another Bosman", "Bosman's little sister" or simply "Bosman II".[255] Even

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[245] ibid: quote of a Spokesman for sports commissioner Viviane Reding

[246] FIFPro Press Release of 26 May 2003 "Kolpak judgment has impact on players from 17 countries" at: http://www.fifpro.org/index.php?mod=one&id=11192 (as of 28.07.2003)

[247] AFP Press Release of 09.05.2003, supra 244

[248] ibid

[249] supra 172

[250] Algeria, Bulgaria, Croatia, Morocco, Romania, Tunisia and Turkey.

[251] Weiss [2003] p. 157

[252] Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan.

[253] Weiss [2003] p. 157

[254] FIFPro Press Release, supra 246

[255] *Inter alia* see: "Malaja to become the new Bosman", UEFA Online News, 24 January 2003at http://www.uefa.com (as of 23.07.2003); Rouquette, Cédrik „L´arret Malaja étire encore L´Europe" L´Equipe France Online (http.//www.lequipe.fr/football/L1_Mag_Malaja_1.html); Reuters Press Release of 27.02.2003: "French union calls for additions to 'Malaja' rule", Sports Illustrated Online, at http://sportsillustrated.cnn.com/soccer/news/2003/02/27/int_rdp/ (as of

though both *Malaja* and *Kolpak* echo to a large extent the restriction-lifting *Bosman* ruling by extending its line of reasoning to clauses in Association Agreements,[256] there are, however, important differences between *Bosman* and the rulings in the context of Association Agreements. Thus, we must take a close look whether it is actually correct to say that – through the *Kolpak* case – the rights of professional EU athletes have been extended to athletes of all countries that have entered into Association (or similar) Agreements with the EU.

The major difference compared to *Bosman* is that only those non-EU athletes that are already lawfully employed within the territory of a MS are covered by such Agreements and have a right to equal treatment – only – as regards conditions of employment of the same extent as that conferred in similar terms by Article 39(2) EC on MS nationals.[257] The ECJ has explicitly made clear that from the Agreement as such does not, however, result a right to access the respective domestic labour markets,[258] since the MS entering into these agreements never had the intention to give up their control over immigration or the labour market as in regard to these countries. They merely wanted to grant equal working conditions to those foreign workers that were already legally resident and employed in the host state.[259] "Movement of Workers" as title of the first chapter of the Poland Agreement is therefore somewhat misleading.[260] Mr Kolpak was not seeking access to the German labour market, but was instead already lawfully working in Germany pursuant to domestic law – thus remaining within the limits of the Association Agreement – and he was therefore suffering, in that connection, discrimination in working conditions.[261]

Consequently, the fear expressed – for example – by the French soccer player's union[262] that foreign players will stream into France uncontrolled seems unfounded, because neither *Malaja* nor *Kolpak* awards non-EU players a right of

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23.07.2003); Reuters Press Release of 04.02.2003, supra 166
[256] Weiss [2003] p. 157
[257] *Kolpak*, supra 3, para. 35
[258] ibid, para. 42; Zinger (2003), p. 137
[259] Weiss [2003] p. 158
[260] Böcker, ZERP Discussion Paper [2002] p. 10
[261] *Kolpak*, supra 3, para. 41
[262] supra 184 and 185

access to the labour market or to a specific job. Instead, each MS still has the power to regulate the access of such players to the national labour market. This is the significant difference compared to *Bosman*. It seems the critics – to a large degree – have either not understood the court decisions or they deliberately exaggerate the consequences. Statements – some even by law professors[263] – like "Kolpak gives athletes from non-EU countries the same rights compared to EU nationals"[264], "ECJ […] giving sportsmen from some 100 EU-linked countries full rights to play in national EU leagues"[265] or "pro athletes from accession countries must […] be treated exactly like their colleagues that are nationals of current EU Member States"[266] are simply wrong or at least very misleading, because these statements omit the important condition that the athlete must already be lawfully residing and employed in the host state. Since a large part of the media coverage was in this way incomplete, this created the impression that such athletes have now a right of full access to the EU labour market, which is – of course – exactly the opposite of what the ECJ ruled.

Practical Consequences:

Not surprisingly, as with *Bosman*, the game's rulers still try to pull up the drawbridge and to fight against this liberating development – painting all kinds of dramatic future scenarios on the wall.[267] For example, soon after *Malaja* France's soccer players' union called for further rules to be implemented to avoid harming club interests and proposed a complicated three-step plan: players who wish to join a French club would have to be internationals in their own countries, there should only be one player allowed from any of the 24 countries listed under the new ruling and a player's wage at the new club should be at least three times what he earned in his first professional contract.[268] Union member Jean-Jacques Amorfini explained: "We especially want to protect the second division clubs. Many players from Eastern Europe could be interested in joining French clubs for

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[263] Comment on *Kolpak* at Professor Heermann's Internet Website http://www.sportrecht.org/EU-Rechtmain.htm (as of 10.06.2003)
[264] ibid
[265] AFP Press Release of 09.05.2003, supra 244
[266] „Gleiche Rechte für Profisportler aus EU-Beitrittsländern" in: Wirtschaftswoche of 21.5.2003
[267] Reuters Press Release of 04.02.2003, supra 166
[268] Reuters Press Release of 27.02.2003: "French union calls for additions to 'Malaja' rule", Sports Illustrated Online at: http://sportsillustrated.cnn.com/soccer/news/2003/02/27/int_rdp/ (as of

almost nothing. We already have enough jobless players not to create some more. We must monitor the incoming players and not leave the door open to all of them."[269]

This shows that, as after *Bosman*, sports organisations still tend to react with the same kind of proposals: they suggest the implementation of new – a little less restrictive – rules, trying to save as much of the old system as possible. Only days after the *Kolpak* ruling UEFA President Johansson stated that UEFA would try to negotiate with the EU to achieve a rule based on having six national players and a maximum of five foreigners with the argument that football is a special case.[270] Of course, most of these proposals appear either unnecessary or inadequate from the outset, because they are obviously still discriminatory and thus contrary to the principles of the EC Treaty. Sports officials apparently have a problem with accepting the concept of non-discrimination. However, again as with *Bosman*, it appears inevitable that the demands of international law will force them into surrender.[271]

As a practical consequence of the ruling many sports federations and leagues will have to – again – change their regulations,[272] because sporting authorities themselves may no longer differentiate between EU-nationals and non-EU nationals falling under Association Agreements in regard of rules regulating the appearance in league or cup matches. Yet, one of the remaining questions after *Kolpak* is whether a federation itself may completely block such athletes' access to the sports labour market by prohibiting its clubs to employ such non-EU athletes entirely. Looking at 38(1) Association Agreement, one is tempted to say yes, because it contains the requirement "already legally employed". Thus, one could argue, if the player is not legally employed – because federations prohibit their clubs to sign such nationals – then the player is not in a position to claim equal treatment in regard to working conditions. Since the ECJ has not decided or commented on this issue, it is open to speculation. It appears imaginable that such

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23.07.2003)

[269] ibid

[270] AFP Press Release of 21 May 2003, supra 126

[271] Reuters Press Release of 04.02.2003, supra 166

[272] Schwartz, M. "Kolpak gewinnt gegen den DHB" Sport1 Online at http://www.sport1.de/coremedia/generator/www.sport1.de/sportarten/handball/ha_20Juli_20kolpak_202003_20mel.htm (as of 20.05.2003)

total federation restrictions might be accepted. In this case the sports authorities would be left with only the choice between either prohibiting employment of such non-EU athletes altogether or granting full and non-discriminatory access – an "all or nothing" approach. Some sports organisations[273] have started to practise so-called "voluntary self-constraint": the clubs have signed a "voluntary" agreement between themselves, not to employ more than a certain number of foreigners from non-EU countries. While such an approach is certainly illegal in regard to EU-nationals, because it contradicts Article 39(2) EC, it is doubtful whether such an agreement would breach *Kolpak.*

It is, of course, not at all certain that the ECJ would consider such restrictions by sports federations acceptable. Thus, from the perspective of sports federations, the only remaining "safe" possibility to restrict the access is an indirect one: via immigration and labour laws of their respective national state. Each MS is, as we have seen, still capable of restricting and funnelling the influx through requirements of public law, particularly domestic immigration and employment rules. Host states are free to decide and regulate according to their own discretion – which is the central difference to real freedom of movement – if and how many residence permits and/or work permits they will issue for non-EU nationals that want to play professionally in leagues of the respective host state. This is exactly how certain states have reacted: Germany for example has amended its Arbeitsaufenthalteverordnung[274] (AAV) and has adopted – in coordination with the Deutscher Sportbund (the central governing body for all German sports federations) – sport specific rules regulating that residence and work permits for non-EU foreign athletes will be issued exclusively to those athletes which will play for teams in the respective highest league in each sport.[275]

This shows that restriction of access to the labour market as such is still possible and the exact situation an athlete will face depends on the policy of the individual host state.

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[273] e.g. the German ice hockey leagues

[274] Regulation pertaining to Residency Rights of Foreign Nationals for Labour Purposes; for details see: Eilers, in Scherrer [2002], p. 129-140

[275] Sec. 5 Nr. 10 AAV: to qualify an athlete must be able to show a valid labour contract according to which he/she will earn at least EUR 1,600 per month during his/her stay in Germany.

Future Perspectives

Will genuine Amateur Sport be next?

So far, sport has been made subject to Community law only in so far as it constitutes an economic activity.[276] We have seen that the Court uses a wide interpretation of "professional sport", including semi-professional athletes,[277] but the genuine amateur sector has not been found to fall within the ambit of freedom of movement – yet.[278] In particular, the question if and to what extent EU Citizens that desire to engage in purely amateur sports within another MS may be protected against discriminating federation rules has not been addressed to the Court.[279]

Some argue that "Conditions of Employment and Work" in Article 7 Council Regulation 1612/68,[280] must be interpreted as including amateur sport as well.[281] Consequently, workers that are resident in another MS for non-sports employment would be entitled to equal access and participation in amateur sports programs under the same conditions as host state nationals.[282] Supporters are convinced that such interpretation is necessary for the desired full integration of migrant workers in the host state.[283] They refer to the case law in the context of Article 7(2) Regulation 1612/68, where the ECJ has repeatedly held that "social advantages" must not be interpreted restrictively, because of the underlying purposes to achieve equal treatment and similar living conditions and to promote mobility of workers within the Community.[284] The possibility to participate in amateur or recreational sport may constitute an essential factor for the social integration and the psychological well being of a migrant worker and his or her family members within the host state.[285] Also, there seems to be a general trend towards

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[276] Kerr, in Scherrer (2002), p. 21
[277] *Deliège*, supra 72; Zinger (2003), p. 129
[278] De Kepper, in Scherrer (2002), p. 44; Zinger (2003), p. 129
[279] ibid, p. 130
[280] Regulation No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (O.J., English spec. Ed., 1968 (II), b.475), dealing both with social advantages and tax and social and social security contributions; Oliveira (2002), p. 77, 78
[281] De Kepper, in Scherrer (2002), p. 44
[282] ibid; Zinger (2003), p. 130 (with further references in fn. 19)
[283] Zinger (2003), p. 130
[284] Case 32/75 *Fiorini (nee Cristini) v. SNCF* [1975] ECR 1085 (at 1995); Case 59/85 *Netherlands v. A.F. Reed* [1986] ECR 1283 (at 1303)
[285] Zinger (2003), p. 130

emphasising better integration of migrant workers and promoting social cohesion within the EU. Therefore, it appears quite possible that the Court – should such a case come up in the future – might regard amateur sport as an essential aspect of social integration and grant migrant workers and theirs families a right of equal treatment in this respect.[286]

Outside the context of Regulation 1612/68 the application of EU law to amateur sport is questionable, although some arguments can be made even for that.[287] Article 151 EC can hardly be seen as basis for EU competences in the regulation of amateur sport and declaration no. 29 on sport, annexed to the final act of Amsterdam,[288] does not help either, because it is a non-binding political statement.[289] The European Sports Charter,[290] adopted 1992 by the Council of Europe, contains the principle that EU nationals shall be granted equal access to sports facilities and sports activities throughout the Europe, but also does not have direct effect within the MS. Finally, the European Parliament adopted a resolution on the EU and sport in May 1994,[291] demanding equal access to amateur sport for all EU nationals and the abolishment of existing discrimination based on nationality.[292] So far, all these approaches have been merely political and non-binding in nature. However, it seems that full equal treatment also of amateur athletes will only be a matter of time. Federation regulations containing overt discrimination in the form of foreigner clauses will appear more and more anachronistic.

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[286] ibid
[287] ibid
[288] see supra 87
[289] De Kepper, in Scherrer (2002), p. 44 (footnote 4)
[290] at: http://www.coe.int/t/e/cultural_cooperation/sport/resources/list_texts_basic.asp [as of 20 August 2003]
[291] EU Parliament Resolution 1994, Document C 205, p. 486 (487)
[292] Zinger (2003), p. 130

"Special Relationship" of Sport and Law indeed?

In its "Helsinki Report on sport"[293] the Commission tried to help clarify sport's legal environment, particularly with regard to the future.[294] The Commission was (and still is today) confronted by the need to assess how special the business of commercialised sport really is and how to reflect this peculiar character in the application of Community law.[295] The Report's focus is on safeguarding sport's traditional structures and on maintaining its social function within the Community framework.[296] However, the Commission is neither competent nor does it appear to be anxious to impose solutions on sport; thus, the Report is – quite understandably – tentative, containing more questions than answers.[297]

In spite of *Walrave,*[298] where the Court somewhat imprecisely conceded that rules of "purely sporting interest" may escape the reach of Community law, it seems quite clear from the rulings in the area of freedom of movement, that the ECJ is very reluctant to allow restrictions of an athlete's freedom and sets very high standards for the existence of any justification.[299] So far, the only exception that has been accepted are national teams and it will probably remain singular, because sports organisations now repeatedly have had their chance to bring forward all kinds of reasons, all of which were rejected by the Court. Thus, although the Court acknowledges sports organisation's autonomy to regulate their matters, such autonomy is not allowed to impair the rights of freedom of movement for professional athletes.

The concept of "Special Relationship" may have somewhat greater chances to be accepted in the context of competition law,[300] which touches issues like centralised marketing, collective selling of broadcasting rights and closed leagues. Apparently, the Commission has set itself more lenient rules for the application of

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[293] COM (1999) 644-final-
[294] Weatherill, S. "The Helsinki Report on sport" E.L.Rev. (2000) 25, p. 286
[295] ibid, p. 285
[296] ibid
[297] ibid, p. 284, 285; De Kepper, in Scherrer, 2002, p. 56
[298] supra 88
[299] Schäfer, in Scherrer (2002), p. 85
[300] supra 294, p. 288-290; De Kepper, in Scherrer, 2002, p. 51

competition law in the field of sport[301] and seems willing to compromise with sports organisation, for example with FIFA in regard to the competition law aspects of the new transfer rules.[302] With some of these issues it is indeed much more difficult to deny that sport specific requirements may exist and there is plenty of scope for controversy about the extent to which sport's special characteristics dictate a more generous application of Article 81(3) EC compared to normal industries.[303] But even here it remains questionable whether the ECJ will join the Commission's view and would tolerate such exceptions or justifications being granted on the basis of "special characteristics of sport".[304] In this paper we cannot, however, go into the details of these complex issues of competition law.

Today, more and more federations seem to finally realize that the changes of framework conditions for their sport are here to stay. Some federations – like the German wrestling federation and table tennis association – even welcome this jurisprudence and try to use the new opportunities to improve league competition. The situation would, of course, be changed altogether if the Member States decide to grant sport an exemption through Treaty revision. This seems, however, rather unlikely, both for the requirement of unanimous support for such a change and also because the sport sector has failed to present an intellectually convincing case as to why it deserves such unique treatment.[305]

[301] ibid
[302] Egger A. / Stix-Hackl, C. "Sports and Competition Law: A Never-Ending Story" ECLR (2002), 23(2), p. 90
[303] supra 294, p. 288
[304] Brinkman, D. / Vollebregt, E. "The Marketing of Sport and its Relation to Competition Law" ECLR (1998), 19(5) p. 288
[305] supra 294, p. 291

Conclusion

Many sport specific problems result from the fact that sport is both organised autonomously by its governing bodies but also subject to the respective national law systems. This creates the need to define where "autonomy" ends and the scope of mandatory state law begins.[306] In fact, the world of sports features some characteristics that do not exist in "normal industries" – particularly the need for "credible rivals"[307] – and the EU institutions are in principle willing to acknowledge that fact.[308] Over time, there may well develop a special set of accepted sport specific rules or at least certain reasons for objective justification – including special freedom of movement rules being applied to athletes, which are not applied to other types of workers.[309] Some call this the creation of a *lex sportiva*,[310] which appears exaggerated because other areas of economy also have their peculiarities and specific requirements. However, the ECJ has proven to apply very strict tests to federation rules restricting an athlete's right to free movement.

On the whole, freedom of movement has been expanded once more by the most recent rulings and many sports organisations will need to change their "foreigner clauses" once again. But one has to look closely: the impact of *Kolpak* is not as great as it was widely perceived and as was the case with *Bosman*: non-EU-players are not granted full freedom of movement because they have no right to access the labour market, but may, instead, only rely on non-discrimination clauses in Association Agreements when they are already legally residing and employed in the host country.[311] This access to the national labour market is controlled – for non-EU nationals – by each host state. Thus, the individual MS – and possibly to some extent the federations themselves – can influence the practical impact of *Kolpak* to a large extent. The various MS traditionally apply immigration and labour laws differently and will probably keep doing so in the

[306] Zinger (2003), p. 232
[307] supra 294, p. 261
[308] ibid, p. 287, 289; Parrish, R. "Sports Law and Policy in the EU" (2003), p. 256
[309] Kerr, in Scherrer (2002), p. 29
[310] ibid
[311] Weiss [2003] p. 158; Zinger (2003), p. 139

foreseeable future. Consequently, certain nationality clauses in regard to such Association Agreement nationals may still be permissible, but the regulatory room for federations becomes increasingly smaller.

It is not surprising that sports officials like FIFA President Blatter stay sceptical – to put it in diplomatic terms – and that they repeat the ill informed criticism[312] as well as most of the same arguments already stated in the *Bosman* case: clubs will stop to train young domestic athletes and will instead "important cheap foreign players" which will again hurt the level of play, especially on the national teams, and will be bad for fan support. These arguments are not convincing. Some of them have already been refuted in practice by the years after *Bosman* and most of the fears are unfounded because of the simple fact that *Kolpak* does not grant access to the labour market. To make statements like "crowds are diminishing, as is general interest [in football]"[313] in 2001 requires serious chutzpah. Claiming that fans would turn their backs on a team because it has too many foreign star players and not enough "local boys" is close to absurd in a time of global media attention and international stardom. Also the fact that many of the highest paid superstars – among them currently being David Beckham and Roy Makaay – come from EU countries also contradicts the non-development theory. The fear that easing the restrictions on foreigners would stymie the grooming of home players may be true to some extent, but the attempt to protect the national workforce is not acceptable in other sectors of economy either; in contrary, one of the major reasons of the European market is to have the best economic actors available from all of Europe and to further competition – so why should it be acceptable in sport?

Hence, a fear of being flooded by thousands of cheap players from outside the EU as a consequence of the *Kolpak* ruling is – to put it nicely – a misunderstanding, to put it less nicely, nonsense from sports officials and journalists who did not understand the decision. To a large extent such criticism appears to stem from sheer fear of change and an unwillingness to give up long-standing rules and traditions. However, President Blatter states himself: "Football symbolises those

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[312] supra 294, p. 286

[313] "Transfer market laid open", Tiscali Europe Online, at http://www.europe.tiscali.se (as of 23.07.2003)

values that bridge national borders, ethnic origin, religion, gender and social class."[314] If this is not mere lip service, sports officials should not have so much difficulty accepting developments that are well accepted in other sectors of economy – or even general society – and have already proven to be successful there. Sport cannot have it both ways: scooping up the fruits of commercialisation yet aspiring to keep Community law entirely at bay by citing autonomy of sport.[315]

Sports organisations should take the Court's decisions very seriously and adapt their rules accordingly, because, otherwise, athletes will sooner or later not only sue to be admitted to competition but may also claim damages. In the past, sporting organisations in practice enjoyed a formidable capacity to resist legal control, because potential litigants were deterred by the frustratingly slow progress of judicial proceedings, contrasting with annual competition and short careers which are typical in sport.[316] Maybe this minimal formal legal action is the reason why some federations still try to circumvent EU law with dubious creations, for example the introduction of so called "voluntary self restrictions", where all clubs in a certain league "agree" not to employ more than a certain number of foreign players, including EU nationals. Such practices are in breach of EU law and only "work" as long as athletes do not litigate and no club changes its mind and decides to ignore it.

Over the last 10 years, freedom of movement in sport has entered completely new and uncharted territory.[317] Until recently, players lacked the industrial and legal power necessary to enforce their rights to equal treatment under the law vis-à-vis other workers.[318] Clubs and their representative national associations have been able to appropriate for themselves a large slice of the market value of a player's services through the transfer fee system, but a combination of "television money" and a series of landmark legal decisions have changed that.[319] Now it seems that

[314] Interview Blatter, supra 179
[315] supra 294, p. 291
[316] ibid, p. 282
[317] Kerr, in Scherrer (2002), p. 28
[318] ibid, p. 18
[319] ibid, p. 19

the balance of power has shifted to the players and they are increasingly able to sell their labour at its true market value.[320] So, although there is still no "unrestricted freedom of movement" in sport, the degree of freedom enjoyed by professional athletes to dispose of their labour freely in the marketplace has certainly dramatically increased in recent years and will probably do so even more in the future.[321] Finally, we have also seen signs that amateur sport might follow soon and abolish the last remaining "nationality clauses" applying to EU citizens.

[320] ibid, p. 19
[321] ibid, p. 28

Bibliography

Books

1. Breitenmoser, S. “Einfluss der Personenfreizügigkeit des Europäischen Gemeinschaftsrechts auf Nicht-EU-Staaten“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im EU Sport” Orell Füssli (Zürich 2002)

2. Callies, C. and Ruffert, M. (eds.) "Kommentar zu EU-Vertrag und EG-Vertrag" 2nd edition (Luchterhand Verlag 2002)

3. Craig, P. and de Búrca, G. "EU Law, Text, Cases and Materials" 3rd ed., (Oxford University Press, 2003)

4. De Kepper, C. “Freizügigkeit und Sport nach EU-Recht“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im Europäischen Sport” Orell Füssli (Zürich 2002)

5. Eilers, G. “Freizügigkeit im Sport – Beschränkungen durch Aufenthaltserlaubnis-Regelungen“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im Europäischen Sport” Orell Füssli (Zürich 2002)

6. Fischer, H. "Europarecht" 3rd ed., C.H. Beck Verlag (Munich, 2001)

7. Foster, N. "Blackstone´s EC Legislation 2001-2002" 12th edition (Blackstone, 2001)

8. Fritzweiler, J. / Pfister, B. / Summerer, T. “Praxishandbuch Sportrecht“, Beck (Munich 1998)

9. Kerr, T. “Freedom of Movement in Sport“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im Europäischen Sport” (Orell Füssli, Zürich 2002)

10. Krogmann, M. “Sport und Europarecht” (NOMOS, Baden-Baden, 2001)

11. Parrish, R. “Sports Law and Policy in the EU” (Manchester University Press 2003)

12. Schäfer, B. „Freizügigkeit aus vereins- und verbandsrechtlicher Sicht“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im Europäischen Sport” (Orell Füssli, Zürich 2002)

13. Steiner, U. "Autonomie des Sports" (Beck-Verlag, Munich 2003)

14. Streinz, R. „Die Freizügigkeit des Athleten“, in: Scherrer, U. and Del Fabro, M. (Eds.) “Freizügigkeit im Europäischen Sport” (Orell Füssli, Zürich 2002)

15. Trommer, H-R. „Die Transferregelungen im Profisport im Lichte des Bosman-Urteils im Vergleich zum amerikanischen Sport“, (Duncker & Humblot, Berlin 1999)

16. Wyatt & Dashwood´s “European Union Law” 4th edition (Sweet & Maxwell, London 2000)

17. Zinger, S. “Diskriminierungsverbote und Sportautonomie” (Duncker & Humblot, Berlin 2003)

Journal Articles

1. Behrens, P. “Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht” EuR [1992] Issue 2, p. 145-162

2. Bernard, N., “Discrimination and Free Movement in EC Law” International and Comparative Law Quarterly, 1996, 45(1), p. 82-108

3. Chalmers, D. “Repackaging the Internal Market - the Ramifications of the Keck Judgement”, E.L. Rev. 1994, 19(4), 385-403

4. Classen, C. D. “Auf dem Weg zu einer einheitlichen Dogmatik der EG-Grundfreiheiten?“ EWS [1995] Issue 4, p. 97-106

5. Gramlich, L./Niese H. “Zweierlei Maß für Ausländer im Ligasport? – Inländergleichbehandlung und Europarecht” Sport & Recht (SpuRt), [1998] , p. 61-65

6. Hatzopoulos, V. “Recent Developments of the Case Law of the ECJ in the Field of Services” Common Market Law Review, 2000, (37) p. 43-82

7. Jarass, H. “Elemente einer Dogmatik der Grundfreiheiten“ EuR [1995] Issue 3, p. 202-226

8. Jarass, H. “Elemente einer Dogmatik der Grundfreiheiten II“ EuR [2000] Issue 5, p. 705-723

9. Lever, J. “Freedom to provide Services in the Integrated Market: the Relationship between the Freedom to provide Services and other Fundamental Freedoms” Lawyers´ Europe [1998] (Winter/Spring Issue) p. 2-9

10. Maduro, M. “The Scope for European Remedies: the Case of Purely Internal Situations and Reverse Discrimination” in C. Kilpatrick et al. (eds.) The Future of Remedies in Europe (Oxford, Hart, 2000)

11. Nowak, C. and Schnitzler, J. “Erweiterte Rechtfertigungsmöglichkeiten für mitgliedstaatliche Beschränkung der EG-Grundfreiheiten“ EuZW [2000] Issue 20 p. 627-631

12. O’Keeffe, “Equal Rights for Migrants: The Concept of Social Advantages in Art. 7 (2) Regulation 1612/68”, 5 YEL (1985), p. 93-123

13. Oliveira, Á. Castro: "Workers and other Persons: Step-by-Step from Movement to Citizenship - Case Law 1995-2001" Common Market Law Review (CMLR) 39 (2002), 77-127

14. Snell, J. and Andenas, M. “Exploring the Outer Limits – Restrictions on the Free Movement of Goods and Services” E.B.L. Rev. 1999, 10(7/8) p. 252-283

15. Streinz, R. “EG-Grundfreiheiten und Verbandsautonomie”, Sport & Recht (SpuRt), [2000] , p. 222-228

16. Torgersen, O.-A. „The Limitations of the Free Movement of Goods and the Freedom to provide Services – in Search of a Common Approach“ E.B.L. Rev. 1999, 10(9/10) p. 371-387

17. Wägenbaur, R. “Inhalt und Etappen der Niederlassungsfreiheit” EuZW [1991] Issue 14, p. 427-434

18. Weatherill, S. “The Helsinki Report on sport“ E.L.Rev. (2000) 25, p. 282-292

19. Weiss, W. “Anmerkungen zum Kolpak-Urteil des EuGH” Sport & Recht (SpuRt) [2003] p. 153-158

Additional Material

1. Opinion of Adcocate General Stix-Hackl in Case C-438/00 (DHB e.V. / Kolpak) of 11 July 2002 at http://curia.eu.int/en/cp/aff/cp0265en.htm

2. EU - ECJ Press and Information Division, PRESS RELEASE No 35/03 of 8 May 2003 (Judgement in Case C-438/00 DHB e.V. / Maros Kolpak) at http://www.curia.eu.int/en/actu/communiques/cp03/aff/cp0335en.htm

3. Regulation No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (O.J., English spec. Ed., 1968 (II), b.475)

4. Partnership Agreement of Cotonou, Benin (signed 23 June 2000), Website of General Secretariat of the African, Caribbean and Pacific Group of States: http://www.acpsec.org/gb/cotonou/accord1.htm (as of 28.07.2003)

5. Commission "Helsinki Report on Sport" COM(1999) 644 final, at: http://europa.eu.int/comm/dg10/sport/publications/com(1999)644-en.pdf

6. "Malaja to become the new Bosman", UEFA Online News, 24 January 2003at http://www.uefa.com (as of 23.07.2003)

7. AFP Press Release of 9 January 2003: "Polish Basketball Player Could Change the Face of European Sport" Agence France Press (AFP), Paris

8. AFP Press Release of 21 May 2003: "Kolpak ruling has left things destabilized: UEFA" at http://uk.sports.yahoo.com/030521/323/e0ja4.html (as of 24.06.2003)

9. AFP Press Release of 09.05.2003: "Brussels welcomes Bosman-style handball court ruling" at ClariNet website: http://quickstart.clari.net/qs_se/webnews/wed/dq/Qsports-eu-court-bosman.RVB0_Dy9.html

10. Böcker, A., “The Establishment Provisions of the Europe Agreements” Zentrum für Europäische Rechtspolitik Universität Bremen (ZERP), Discussion Paper 1/2002

11. Publication of the EU Büro des deutschen Sports (Official EU Office for German Sports), Brussels, Monthly Newsletter December 2002

12. “Blatter dénonce une forme de `babélisation du football´” Interview with FIFA President Joseph Blatter, Le Monde (Paris) of 21.01.2003

13. FIFPro Press Release of 21 May 2003 “Kolpak Judgement causes commotion in football countries EU” at Internet Website Scottish Pro Football Association: http://www.spfa.org.uk/spfa/main.asp?strID=420 (as of 25.6.2003)

14. FIFPro Press Release of 26 May 2003 “Kolpak judgment has impact on players from 17 countries” at FIFPro Internet Website http://www.fifpro.org/index.php?mod=one&id=11192 (as of 28.07.2003)

15. Rouquette, Cédrik „L´arret Malaja étire encore L´Europe” L´Equipe France Online at http.//www.lequipe.fr/football/L1_Mag_Malaja_1.html (as of 23.07.2003)

16. Reuters Press Release of 27.02.2003: “French union calls for additions to 'Malaja' rule”, Sports Illustrated Online at: http://sportsillustrated.cnn.com/soccer/news/2003/02/27/int_rdp/ (as of 23.07.2003)

17. Reuters Press Release of 04.02.2003 “New rule may change game for ever” From: Khaleej Times Online at http://www.khaleejtimes.co.ae/ktarchive/040203/sports.htm

18. “Transfer market laid open - New Majala sports ruling” From Tiscali Europe Online, at http://www.europe.tiscali.se (as of 23.07.2003)

19. EU Commission: Enlargement Weekly Newsletter as of 16 July 2002 at http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_160702.htm (as of 24.03.2003)

20. Maduro, M. “Harmony and Dissonance in Free Movement”; University of Leicester, Material for LLM-Course in EU Law, June 2002

21. Norberg, S. “Developments in EU Competition Policy”, Ninth St. Gallen International Law Conference 25 April 2002

22. Snell, J. “Who´s Got The Power? Free Movement and Allocation of Competences in EC Law”; University of Leicester, Material for LLM-Course in EU Law, June 2002

23. Published Letter of Mr. Blatter of FIFA to Commissioner Monti dated 05.03. 2001, referring to the Commission’s complaint reference COMP/36 538

24. “Gleiche Rechte für Profisportler aus EU-Beitrittsländern - Einsatzbeschränkungen bestimmter Sportverbände verletzen Assoziierungsabkommen” in: Wirtschaftswoche (German newspaper) of 21.5.2003

25. Schwartz, M. “Kolpak gewinnt gegen den DHB - Hintergrund” Sport1 Online at http://www.sport1.de/coremedia/generator/www.sport1.de/sportarten/handball/ha_20Juli_20kolpak_202003_20mel.htm (as of 20.05.2003)

Chronological Table of Cases

National Courts:

Case *Kienass v. German Ice Hockey Federation*, German Federal Labour Court (Bundesarbeitsgericht), ruling as of 20.11.1996, NZA (1997), p. 647

Case „TTC Grenzau v. Deutscher Tischtennis Bund e.V.", Landgericht Frankfurt am Main, Germany, Court Ruling of 26.11.1997

Case *Lilia Malaja*

- La Cour Administrative d´Appel de Nancy (Première Chambre) of 3.2.2000, No. 99NC00282 ; published in: RTD Eur [2000] p. 384
- French Conseil d'Etat of 30 December 2002

European Court of Justice:

C-12/74 *Commission vs. Germany* [1975] ECR 181 (198)-

Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale*, [1974] ECR 1405

Case 32/75 Fiorini (nee Cristini) v. SNCF [1975] ECR 1085

Case 13/76 – *Donà v. Mantero*, [1976] ECR, 1333-1340 (of 14 July 1976)

C-106/91 *Ramrath* [1992] ECR I-3351 (3384)

Case C-415/93, *Union Royale Belge de Sociétés de Football v. Jean Marc Bosman*, [1995] ECR I-4921

Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165

Case C-237/94, *O'Flynn* [1996] ECR I-2617

Case C-85/96, *Martínez Sala*, [1998] ECR I-2691

Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-Ball ASBL*, [2000] ECR I-2681 Judgement of 13.03.2000

Joined Cases C-51/96 and C-191/97- *Christelle Deliège / Ligue Francophone de Judo et Disciplines Associés ASBL and others*, judgement of 11.04.2000 (Deliège), [2000] ECR I-2549

Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459

Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049

Case C-438/00, *Deutscher Handballbund e.V. vs. Maros Kolpak* of 8 May 2003