The impact of European law on sports law

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Introduction [arriba]

- Sports Law have a universal character

The particularity of the Sporting Power lies in the fact that it has always developed its rules autonomously and universally.

The international federations erect rules which aim to apply to the whole world.

These rules are originally private, but intend to apply independently of governmental and intergovernmental norms, and I would even go as far as saying beyond those governmental norms.

- The European Law have an economic character

In principle, Sport does not take part in the process of building the European Union as it is solely an economic process.

Hence Sport was never destined to be regulated by European law.

- The unavoidable penetration of European Law in the field of Sports

The conflict between certain sports rules and European law has occurred when the sports organisations began to develop their economic and commercial activities.

The sports entities have had the feeling that European Law had burst the door open to penetrate by force in the field of sports.

In reality, it is quite the opposite.

By developing commercial and economic activities, it is the sports organisations that have entered in the field of European Law.

To fully understand the shock between these two normative fields, one must be reminded of the great principles that govern Sports law and European law.

- The Lex Sportiva inherently infringes fundamental rights

The great legal theorists debate on whether there is a LEX SPORTIVA.

We, practitioners of sports law, know that sports norms are built autonomously by aiming for the following:

. Enacting universal norms to unify sporting practices
. Preserving the lawfulness and the integrity of sport competitions on an international level

. Maintaining a competitive balance between the contestants to foster the interest of competitions.

To achieve these aims the Sporting Power enacts regulations and imposes sanctions that are intrusive on fundamental rights.

- European Law is inherently deregulator

European law is, by nature, essentially economic. It is designed with a view to create a free-trade area, “the Single Market”.

Born from a liberal inspiration, European law works around the “great freedoms” established by the Treaty on the Functioning of the European Union (TFEU[1]). These great freedoms are the following:

. Free movement of goods (cf article 28 of TFEU)

. Free movement of people, services and capital

. Free movement of workers (cf article 45 TFEU) which leads to abolishing any discrimination based on nationality

. Freedom of establishment (cf article 49 TFEU)

. Freedom to provide services (cf article 56 TFEU)

As you know, the Treaty also includes competition laws which forbid all agreements between businesses, and concerted practices, which have as their object or effect the restriction of competition within the internal market (cf article 101 TFEU).

The abuse of a dominant position is also forbidden.

European Law prohibits all limitations to the freedoms enshrined in the Treaty.

Hence, it sits on a principle of de-regulation.

It acts as a de-regulator against all public or private bodies that purport to limit the economic freedom within the European market.

- European Law Prevails over National Law

European law is powerful because it is governed by two principles:

. The principle of Supremacy which means that this law prevails over national laws

. The principle of direct effect: not only do the European directives have to be implemented within the national law, but also any person or entity can rely on them before national courts, even if the Member State has not implemented the required regulation.

. The shock between European law and sports law was unavoidable

After a time of open conflicts, the sports bodies and European authorities have initiated new bonds in the form of cooperation.

However, this cooperation remains very fragile and relatively unstable.

A. The Time of Conflicts

B. The Difficult Consideration of European Law by Sports Bodies

C. The Time of Cooperation

A. The time of conflicts [arriba]

- 1970s: The First Shockwave: the Application of Free Movement of Workers to Professional Sportsmen

- 1974: WALRAVE and KOCH v UCI Decision[2]

The first contact occurred in 1974 with a leading decision made by the Court of Justice of the European Communities (CJEC) in the area of sports.

By this decision, the Court of Justice set the principle compelling all sports to comply with European Law so far as it constitutes an economic activity.

For the first time, the Court of Justice affirmed that the federal regulations that limit the movement of professional sportsmen based on nationality are not consistent with the principle of free movement of workers.

- 1976: DONA v MONTERO Decision[3]

In this decision, the Court of Justice confirmed its position: European Law is only applicable to the economic and commercial aspect of sports, in which case they fully apply.

- 1980s: Unsuccessful Negotiations

Despite the regular contacts in the 80s with the services of the European Commission, the great Sports Federations, including the FIFA and the UEFA have refused to admit that their regulations had to be amended in order to take European Law into account.

The BOSMAN decision in 1995 was the apogee of this conflict.

- 1995: The BOSMAN Ruling[4]

At the request of a Belgian court for a preliminary ruling, the Court of Justice of European Communities sanctioned two great principles on which the regulation of international football was set:

. The Principle according to which a Player cannot leave his Club when he reaches the end of his contract, unless the new Club pays a transfer fee to the former club.

. The rule on quotas relating to the Players who are nationals of other EU Member States.

In this case, the Court of Justice refuted the arguments developed by the sports authorities on the sporting exception.

The Consequences of the BOSMAN Ruling

The BOSMAN Ruling has had two effect on the international sports norms:

. It has freed the movement of professional football players within the European Community;

. It has compelled the international football entities to amend these international regulations.

The sports regulations being inherently universal, the fact that one interstate authority has sanctioned some of these rules on a given area (the European Union) has forced the UEFA and the FIFA to amend their regulations not only on a European level, but more broadly on an international level.

Thus the UEFA and the FIFA were bound to enact new regulations on the status and transfer of Players in July 2001.

The other international federations were also forced to abolish their regulations restricting the alignment of other Members States nationals in their teams.

The fact that an international entity (the European Court of Justice) representing only fifteen states, has been able to force a great number of international sports federations to change some of their rules is very unusual in the history of sports.

The shockwave of the BOSMAN ruling subsequently stretched a lot further than the fifteen Member States.

- 1998 - MALAJA Decision[5]

In 1998, the “Conseil d’Etat” (State Council), the French Supreme Court, has decided that the principle of non-discrimination based on nationality had to apply to Poland, since this state had signed an association agreement with the European Union regarding the movement of workers.

- The KOPLAK (8th of May 2003)[6] and SIMUNTENKOV (12th April 2005)[7] decisions

In these decisions, the CJEC has extended the principle of non-discrimination based on nationality to all the players who were nationals of States that had signed an EU Association Agreement.

To this day, it is considered that this principle of non-discrimination also stretches to the nationals of the Africa Caribbean Pacific (ACP) Group of States, signatory of the COTONOU agreement with the European Union in 2004.

- Expansion of the Influence of European Law on Amateur Sports

By the same time, the CJEC applied the principle of non discrimination to amateur sports.

- Years of 2000: The Recognition by the European Court of a Sports' Specificity

- 2000: DELIEGE Decision[8]

In this decision, the CJEC applied the principle of freedom to provide services to an amateur (semi-professional) judoka.

However it admitted that this freedom could be restricted by the Sporting Power, but only if it is justified by the requirements inherent to the organisation of a competition.

- 2000 – LETHONEN Ruling[9]

By this case, the CJEC allowed the sports entities to establish transfer periods, hence allowing them to infringe the principle of free movement of workers.

However, the Court sanctioned the fact that these transfer periods varied according to nationality. It referred back to the national courts the duty to ensure that this discriminatory rule was justified by the competition's requirements on a purely sporting level.

At this stage, one can understand how European law is not meant to strictly apply to solely economic undertakings related to sports.

The Sporting Power feels that the recognition of a European sports model, independent of EU law is off to a good start.

- 2006: The Second Shockwave: The Expansion of European Law's Influence on Purely Sports-related Norms

- 2006 – MECA-MEDINA Decision[10]

In July 2006, by its ruling MECA-MEDINA, the European Court of Justice (ECJ) further weakened the independence of the Sporting Power.

In this case of doping, two professional swimmers tried to revoke a suspension ordered against them by the International Swimming Federation, by arguing that such a suspension interfered with the European regulations on competition and on freedom to provide services.

The Court of Justice did not rule in their favour, but declared itself competent to decide whether the disciplinary sanctions were consistent with the Union's competition laws.

The Court of Justice has set the line in the following way:

. Any sports-related rule, whether it is inherently economic or not, must comply with the requirements of European Law

. A derogation is possible only if the violation to the freedoms enshrined in the Treaty are justified by a legitimate aim inherent to the organisation of sports competitions.

. These violations are only acceptable if they do not exceed what is strictly necessary to the pursued objective: the normal conducting of competitive sports.

A purely sports-related area hence no longer exists.

All of the Sporting Power's activities are now subject to the proportionality test.

Therefore, the demotion of a club or the reduction of a championship from 20 to 18 clubs would be appreciated not only with regards to sports-related interests but also with regards to European Competition law.

If these sanctions or measures are considered to be going beyond what is necessary to protect the sports competition, then it could be sanctioned under European competition law.

- 2010 – BERNARD Decision[11]

A Concrete application of the proportionality principle

In this ruling, the ECJ applied the proportionality test to the training compensation system.

It concerns a young development footballer under 21, who wished to join another Club, and hence leave his training club, the OLYMPIQUE LYONNAIS, who yet had offered him a professional player's contract.

The OLYMPIQUE LYONNAIS requested a training compensation from the new Club.

The French court seized the ECJ for a preliminary Ruling, asking it two questions:

1/Is the principle of free movement of workers opposed to a national law condemning to pay damages a young player who, at the end of his training period, signs a professional player's contract with another club from another EU Member State?

2/If so, could the necessity to encourage the recruitment and the training of young professional players form a legitimate aim or a compelling purpose of general interest which would justify such a restriction?

The ECJ decided that:

. The compensation of the training club when the trained player signs an employment contract with another club from the Union is not contrary to the free movement of workers,

- But only if the compensation system is able to guarantee the achievement of the training's objective and does not go beyond what is necessary to reach it.

. If the sports rule allows the player to be condemned to pay a compensation the amount of which has no link with the real costs of the training, this rule is not consistent with European law.

A proportionality control has been applied.

The Court of Justice validates the compensation system, but yet limits it with regards to the amount of the compensation which the club can claim.

One can wonder what the result of a proportionality test would be on the compensation system set up by article 17 of the FIFA regulations[12].

B. The difficult consideration of europen law by sports bodies [arriba]

The evolution of the FIFA Dispute Resolution Chamber's (DRC) case law, as well the court of arbitration for sport's (CAS) case law over the past fifteen years , show that these judicial authorities are very reluctant to take European Law into account.

Yet they have been forced to integrate European Law within their logic, even though they claim that it cannot be directly applied.

- FIFA's Position in the RONALDINO Decision

One of the first cases where the FIFA has taken European law into consideration to bend its position was in the case which opposed PARIS SAINT GERMAIN to the Club GREMIO concerning the player RONALDINO.

Indeed, this litigation occurred in 2001, when the FIFA and the UEFA were in the process of negotiating with the European Commission under the pressure of an investigation procedure based on competition law.

At that time, the FIFA could not afford to confront a litigation where the PARIS SAINT GERMAIN could criticise the old FIFA ruling and in particular article 14 on training compensation.

For that reason, the FIFA compelled the parties to come into an agreement to avoid a dispute.

This litigation hence ended with a protocol of understanding in which the principle of a training compensation has been accepted by the PARIS SAINT GERMAIN and its

amount was negotiated to a sum inferior to what had been decided at first by the FIFA.

- The CAS' Position

To free itself from European law, the CAS claims that in accordance with the second paragraph of article 66 of the FIFA Status, it must primarily apply FIFA regulations, and Swiss law on a residual basis (Atlético Penarol / Bueno Rodriguez Ruling[13]). Hence it excludes European law.

However, I think that the CAS has also indirectly integrated European Law in its reasoning, but without actually recognising it.

- 2005 The MEXES Decision[14]

This case opposed a French club to an Italian club in the early termination of a contract by the player MEXES.

Obviously, the Player and his new club invoked European law, and of course, the principle of free movement of workers.

In particular, they tried to demonstrate that some criteria of article 17 of the FIFA regulations[15], which set the compensation for termination of contract without just cause, were in contradiction with this principle.

The CAS upheld the principle that this compensation had to be set in consideration of the criteria in article 17 of the FIFA regulations, and in particular as to the loss of chance to achieve a transfer.

However it decreased the amount that had been granted by the DRC…

The rationale of the decision is based on Swiss law, but one can sense that the pressure of the argument based on European Law played a significant role.

After this case, the CAS made two decisions which in principle seem to completely contradict each other (cases of WEBSTER and MATHUSALEM).

In these two cases, the players' lawyers had used European law to try and mitigate the amount damages linked to an early termination of their employment contract

- 2007: the WEBSTER Decision[16]

In the case of WEBSTER, the CAS decided that the compensation for the breach of contract could not exceed the amount of the salary that the player would have perceived had he respected his contract until the end of its term.

- 2008: The MATHUSALEM Decision[17]

In this case, the CAS took a position that was radically opposed, since it took into consideration the damages suffered by the deserted Club and condemned the player MATHUSALEM to pay an insane amount to his former club.

In my opinion, these two decisions are rather similar because in both cases, the CAS tries to bring out the principle of “sports law specificity”.

A specificity which would justify setting European Law aside.

This position represents the battle lead by sporting bodies for the past 30 years!

Hence the CAS acts as a rampart, defending Sporting Power against EU law.

However, European Law manages to penetrate (to ooze) in where it is least expected.

- 2012: the VADA Girondins de Bordeaux v FIFA Decision[18]

The FIFA had opposed the transfer of a minor player from an Argentinian club, on the basis of article 19-2 of the FIFA regulations[19].

The Player and the French Club invoked the specific FIFA regulations in article 10-2 b) for transfers taking place within the EU and the EEA.

They also invoked the free movement of workers and the European Convention on Human Rights.

The CAS contradicts the FIFA by judging that the FIFA regulations applicable to the EU should benefit to this young player from an Argentinian club, since in that case in particular he was an Italian national.

This decision had the effect of extending the field of applicability of the FIFA regulations specific to the EU since any player, due to his nationality, can from now invoke them, no matter what their former Club is.

However, the CAS was careful to state that “the direct effect of EU norms is excluded”.

Yet, it is obvious that in this case, it indirectly applied the norm…

The time of cooperation [arriba]

- A Forced Cooperation

The evolution of the European Court of Justice in the 90s has compelled the international sports authorities to start a cooperation process with the European commission.

The most striking example of the cooperation between international sports authorities and the European commission is the one of international football.

The BOSMAN[20] ruling and its variations KOLPAK[21] and SIMUNTENKOV[22] have profoundly changed the system of international transfers in football.

Indeed the creation of a European market, open to all states that have signed a cooperation or an association agreement with the EU, has led to an increase of the salaries but also to an increase of the transfer fees.

The number of football players' transfers within the EU has increased by 320% between 1995 and 2011[23].

The amount spent by clubs in transfer fees have multiplied by 7.2 over the same period.

They reached more than 3 billion euros during the 2010/2011 season.

Five countries gather 55% of the transactions (England, Spain, Italy, Germany and France).

The BOSMAN ruling has also changed the career profiles of professional players, and in particular with the younger players.

Whereas before the professional players pursued long careers in their training clubs, today only 21% of the professional players evolve in the club that trained them.

Following the BOSMAN ruling, the European commission has launched an investigation procedure in the field of competition law against the FIFA and the UEFA and their transfer system.

After months of negotiation as to the rules on transfer, a compromise was reached.

It is essentially on the field of training that the European commission and the international football authorities have managed to come to an agreement.

This agreement, enacted by the FIFA in July 2001[24], is based on the following principles:

. The establishment of a system of training compensation for players under 23 years of age in order to encourage and reward the training efforts of the clubs, and in particular of small clubs;

. The international transfer of minor players is allowed but under the condition that an appropriate system of training and education is set up;

. Establishment of transfer periods (MERCATO);

. A minimum and maximum length of contracts (from one to five years);

. Establishment of a three years stability period until 28 years old and of two years after that;

. The breaches of contract outside of mutation periods are penalised by disciplinary sanctions;

. Unilateral contract termination is possible during mutation periods upon payment of a financial compensation;

. An independent arbitral court within which the employers and employees are represented in equal numbers must be set up (it is the Disputes Resolution Chamber).

The commission considered that the FIFA had correctly amended these regulations and closed the initiated proceedings on the transfer rules on the 5th of June 2002.

It is a first example of cooperation between the sports entities and the European commission.

- A Concerted Cooperation

One could quote 2 examples:

The 6+5 rule demanded by the FIFA

The financial fair play established by the UEFA

The 6+5 rule: the Issue on Quotas

Following the BOSMAN ruling, the European commission has warned the FIFA and the UEFA that rules in nationality quotas were contrary to European law.

From season 96/97 onwards, the UEFA has abolished quotas for EU Member States' nationals, which has profoundly subverted the players' transfer market.

The FIFA has then decided to implement a reform known as "6+5" so that at the beginning of each match, each club must field at least six players eligible to play for the national team of the country of the club.

This reform was designed to meet the evolution of certain clubs that favoured external recruitment (and in particular certain English club).

The European commission found that the 6+5 rule was not consistent with the free movement of workers.

The question is to know whether this rule is purely sports-related or whether it has an economic impact.

Since the MECA-MEDINA decision in 2006, one should rather ask themselves whether this rule, which limits the free movement of workers, is necessary to reach the aim pursued.

In the context of cooperation, the European commission ended up choosing the option defended by the UEFA within interclub competitions.

Since 2008-2009, 8 out of the 25 players registered for a European competition must have been trained "locally", in other words have trained for at least three

years between 15 and 21 years old in the Club itself, or within any other club affiliated with the national federation.

Out of these 8 players, at least 4 must have been trained in the Club.

On the 28th of May 2008, the commission decided that this system was compatible with EU law and respected the principle of free movement of workers, since it did not impose any condition regarding nationality[25].

In 2011, the FIFA presented a new project named “9+9”.

By that system, the teams would be compelled to line up at least nine players trained locally out of the 18 players registered on the game sheet.

The social dialogue which started in July 2008 for professional football between the representative authorities and the European commission could make up a working framework to progress in this issue.

. Financial Fair Play

In 2002, the European commission intervened on a litigation which opposed a British investing company, ENIC, to the UEFA, regarding the football regulation that prohibited shared-ownership of teams participating in an interclub competition[26].

The commission rejected ENIC’s claim, considering that this rule is primarily designed to guarantee the
European Commission’s point of view, this rule ensured that the results remained uncertain, which was in the interest of the public, and that was a legitimate aim.

Made stronger by the recognition of these principles, the UEFA elaborated a control mechanism for the management of European football.

“Financial fair play” was launched by the UEFA in 2009 and will apply at full capacity from season 2014-2015 onwards[28].

It has already been controlled by the CAS in the case of MALAGA.

The club had been sanctioned by the UEFA’s disciplinary authorities[29] and, very recently, the Court of Arbitration for Sports has rejected MALAGA’s appeal against this sanction[30].

However, one can question whether this system will resist an attack before the Commission or the ECJ.

A claim has been made by our colleague Jean Louis DUPONT before the commission and it is likely that a decision will be made two or three years from now.

All predictions aside, it seems clear that the financial fair play system is an economic regulation, and not a purely sports-related regulation.

In this regard, the Commission, if it applies the principles set by the ECJ in the MECA MEDINA ruling[31], will research whether or not this regulation which, evidently, contains restrictions to the fundamental rights established by the treaty, meets an objective of general interest and does not exceed what is strictly necessary to guarantee competitions' integrity.

In my opinion, this regulation exceeds the reasonable limits that could be justified by sports' specificity.

Indeed, the prohibition on investors to restore an accounting and financial balance in professional clubs though the providing of capital does not seem to me to be inherently justified by the necessity to guarantee the sporting equity of competitions.

- The Club of MONACO Case

On the same topic, the situation of the Club of MONACO is very likely to be submitted to the control of European judicial authorities.

On the 21st of March 2013, the French Professional football league set a new requirement to participate to League 1 and League 2 competitions: the obligation to locate the Club's headquarters and the effective management of the club on French territory[32].

Although the Club of MONACO has been participating in French competitions for about a hundred years, today it is threatened to be expulsed if it does not transfer its headquarters on the French territory.

To this day, the litigation that opposes MONACO to the French League is submitted to French jurisdictions (the Conseil d'Etat / State Council).

Of course, the arguments linked to European Law have been submitted to this Court.

The "Conseil d'Etat" should take them into consideration in the same way as the arguments founded on French law.

Conclusions [arriba]

The European Union is to this day the only international organisation to have imposed profound changes to sports authorities' regulations.

We can be proud that, under the influence of European law, the Sporting Power has undergone a significant change of attitude.

Indeed, the international federations now admit that certain general laws apply to their economic activity.

They even accept to discuss as to the modalities of their practical application with European bodies.

As a result, it often leads to greater transparency in practices, and to a higher level of compliance with European fundamental rights.

In parallel, European institutions have progressively opened up to the idea of taking into account sports' specificity.

They have not yet admitted the existence of a "sports exception", but the concepts of competition integrity, and the general interest considerations linked to sport competition, allow us to say that there really is a "sport specificity".

One can wonder whether this evolution is rather a positive or a negative thing for other football continents, and in particular for South-American football.

The example of third party player ownership (TPO) is very interesting.

The UEFA, represented by its general secretary Gianni INFANTINO, announced its decision to prohibit third party ownership of football players[33].

In my opinion, it is a principled stand which in reality is based on ethical and moral considerations, rather than legal ones.

I think that it is European Law which will rescue this mechanism which, as you know, is essential to the economy of football in South America and in several European countries, for example in Portugal.

Indeed, a general and global prohibition of TPO would certainly be against European Law.

This prohibition would violate both the principle of free movement of capital and the freedom of establishment.

Maybe the UEFA will manage to justify this infringement by the necessity to protect the integrity of sports competitions.

However, it seems to me that the way they chose to do it, that is a general prohibition, is not proportional with the pursued objective.

It is likely that the European commission or the ECJ, if it is seized, will consider that the objective aimed by the UEFA can be reached in other ways, which are less intrusive to the freedoms enshrined in the treaty.

Today, one cannot say whether this question will be resolved through conflict or through cooperation.

In any case, the Latin-American and European clubs that often assign players' economic rights in order to obtain funds have a great interest in using European Law to assert their point of view, and save their economic interests[34].

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