



What if sport and labour law have become interlocked?

Frank Hendrickx, University of Leuven (Belgium)¹

– Paper submitted for the “Sport and labour law” panel of the ISLSSL European Regional Conference held in Prague, 20-22 September 2017 –

1. Setting the scene

1. Sport and labour law make an interesting combination. Many sports legal issues are related with the legal status of athletes and the relationship between athletes and their teams or sport associations. The sports world aspires to be a well-organised activity and appears even as a ‘business’. It is clear that not only in professional sports, but also much wider in sport, labour law is a mostly relevant field. Many issues on employment, contracting, wages, sports labour markets, athlete selection, player freedoms, fair play, discipline, doping, club relations etc. may be part of, or even originate from, a labour law context. The major and most famous EU sport case law, the *Bosman*-case, is a labour case.

The relationship between sport and the law has received growing attention over the years. Against this background, a discipline is emerging, called sports law. This field of study is concerned with the relationship between law and sport, and more precisely with the role of law in the field of sport. This is still an area under construction, but it is key in sports governance issues. The growing societal relevance and (public) policy concerns in the area of sport have not only led to an increasing role of the law in the sports arena, it has also made claims for autonomy in sport more prominent. In the EU, this has been given shape by a legal

¹ Frank Hendrickx is professor of labour law at the Law Faculty of the University of Leuven (Belgium). He also teaches sports law in the Law Faculty and in the Faculty of Kinesiology and Rehabilitation Sciences of this university.

debate on the 'specificity of sport' which has served the desire of sports bodies to be shielded off from public regulatory intervention. It has been partly triggered by the emerging case law of the Court of Justice of the EU, who has played an important role in applying (or adapting) European law in the area of sport.

2. The increasing claim for an autonomous field of 'sports law' creates a tension with the rules and principles of labour law. Would there be reasons to look at a sports legal issue in a different way when labour rights are at stake? In this paper, serving as an 'introduction' for the "Sport and labour law" panel of the ISLSSL European Regional Conference held in Prague, 20-22 September 2017, it is suggested that it is impossible and highly undesirable to pull sports legal issues away from the general legal context, including the labour law context. But the 'specificity' debate remains relevant. There remains a challenge of combining (labour) law and the specific context of sport. Against this background the fields of 'labour law' and 'sports law' even share common concerns (of autonomy) which sometimes seems to drift them away from each other, but also unifies them in their unique aspirations. In this unique way, sport and labour law are interlocked. In light of this, we should ask ourselves not only what sport can learn from labour law, but also what labour law learn can from sport.

We will make an attempt to put this broader question in the panel setting. Hereafter, a couple of perspectives are offered to further define our approach.

2. Characteristics of sport and law

3. One could argue that sports law is similar to labour law as it relies heavily on autonomous law making, on the freedom of association and contract, and on collective private rule setting. This is combined with various forms of government intervention and regulation.

Looking at its characteristics, sports law is to be seen as dealing with both autonomous as well as state-created rules regarding the variety of economic, social, commercial, cultural and political aspects of sports activities. It thus concerns both private (relations between private actors) and public law (relations with or rules from governmental actors). However, in essence, sport originates from private initiative. Sports law, therefore, emanates primarily from the sports movement. This sports movement has established – sometimes powerful – organisations which have powers to determine and regulate the activity of sport and its stakeholders. One can think about the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA), or the International Football Association (FIFA).

4. This specific complex of (strongly) private and (increasingly) public regulation in the sports arena has led to questions about the mutual relationship, even the hierarchy, between them.

The Court of Justice of the European Union has played a major role in the development of sports law in Europe, also in the discovery of the boundaries between public policy intervention in sport versus autonomy of sports organisations. The Court had to define to what extent EU legal rules and principles, or more generalized, the rule of law governing our societies, would be applicable to the sports world. The professionalization and commercialization of sport and related public policy concerns have activated case law of the European Court.

The first European Court sports case, *Walrave and Koch*, has been the start of the debate about the relationship between EU law and sport. The case is known for the European Court's (early) position that, in regard to the objectives of the Union, sport is subject to EU law only in so far as it constitutes an economic activity within the meaning of the treaties.² This approach in *Walrave and Koch*, confirmed in later case law, allowed the European Court to exclude certain matters from the scope or operation of the European Treaty and thus to create exceptions for sport.

In this early case law sporting exceptions seemed to be based on a rather pragmatic approach in which common sense would seem the rough guideline. In *Walrave and Koch*, the Advocate-General³ asked himself whether the signatories of the founding European Treaty intended to preclude a requirement that, in a particular sport, a national football (soccer) team should consist only of nationals of the country it represented. His response was that "common sense dictates that the signatories, with their pens poised, would all have answered impatiently 'Of course not' - and perhaps have added that, in their view, the point was so obvious that it did not need to be stated." In the view of the Advocate-General, the inapplicability of non-discrimination provisions thus seemed to be self-evident.

5. The lack of real conceptual guidance on defining the relationship between sports and law also appeared in *Dona v. Mantero*⁴. The Advocate-General stated rather rhetorically: "I confess my inability to see what justification there would be, in a private sector where Community law directly applies, for action by State authorities other than judicial bodies. It would be difficult to imagine administrative authorities intervening in the affairs of private parties which were being conducted wholly within the field of private law."⁵ Nevertheless, both in *Walrave and Koch* as well as in *Dona v. Mantero*, the Court applied the provisions of European free movement law, though with exceptions.

3. The specificity of sport

6. The issue on the relationship between law and sport in the context of European Union law has led to a debate about what has been called the 'sporting exception' (Parrish & Miettinen, 2008). This presumed exceptional status of sport under EU law is connected with the so-called 'specificity of sport' concept (Siekmann, 2008, 2011). This concept implies the view that sport has specific characteristics which make deviations or exceptions from normal legal principles justified or necessary. It has been defined as "the sum of the unique and inherent aspects of sport which distinguish it fundamentally from all other areas of activity and service" (Zylberstein, 2008, 95-96).

The specificity of sport was recognised in a declaration at the occasion of the European Council meeting in Nice (7-9 December 2000). It was stated that "even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it

2 Case 36/74, [1974] ECR 1405.

3 Opinion of 24 October 1974.

4 Case 13/76, [1976] ECR 1333.

5 Opinion of 6 July 1976.

special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.”

The fact that the concept of ‘specificity’ is strongly related with the relationship between the law and sport becomes clear in the Commission Staff Working Document accompanying the 2007 White Paper on Sport: “The Community Courts and the Commission have consistently taken into consideration the particular characteristics of sport setting it apart from other economic activities that are frequently referred to as the "specificity of sport". Although no such legal concept has been developed or formally recognized by the Community Courts ...”.⁶

7. The ‘specificity of sport’ is a dynamic concept and it has been under development since the sports case law of the European Court emerged. It’s emergence can be explained by the European Union’s limited competences or because of the specific regulatory interaction between EU law and the member states (internal market law is often driven by techniques of deregulation). As European integration models influence the integration of social, cultural and economic values through EU law (Hepple, 1995) ‘sport specificity’ can also be connected with substantial models of regulation, such as a market model, a welfare model, a socio-cultural model or a political model (Parrish, 2003b). But a conceptual approach behind the European case law is not easy to point out, as the Court does not make theoretical assumptions, if any, explicit and also seen the fact that the Court uses different wording or phrasing throughout its case law.

4. Immunity from market logic?

8. Building further on the above, there seems to be a concern that ‘sports law’ and labour law have in common. This is the desire of getting away from a purely economic approach in EU legal approaches towards phenomena that can only be more broadly explained. It includes a debate on legal immunity from legal market logics.

9. In the early sport cases, the ‘market model’ was quite dominant, although subject to corrections. In *Walrave and Koch*, the Court’s position was that sport does not, in principle, fall under European Union law, unless it concerns an economic activity. Sport was seen as a phenomenon that obeys the legal principles of the (EU) market order, but not (completely) if the non-economic dimension is at stake. The *Walrave* case also implied that, even within the economic dimension of sport, matters pertaining purely to sport could not be regulated under the provisions of EU (market-modelled) law. The Court established the “purely sporting interest” concept to preserve the tradition of national teams in sport. It decided that “the Treaty does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity”. The concept of “purely sporting interest” suggests that there is no public policy interest. The approach was confirmed in *Dona v. Mantero* where it was accepted that there are “reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only”.

⁶ SEC(2007) 935.

In the *Bosman* case⁷, the Court threw more light on the subject. Advocate-General Lenz⁸ stated that “it is certainly undeniable that the sports associations have the right and the duty to draw up rules for the practice and organization of the sport, and that that activity falls within the association's autonomy which is protected as a fundamental right” (§216). But he argued that “only an ‘interest of the association which is of paramount importance’ could justify a restriction on freedom of movement” (§216). The Court limited itself to stating that the debated EU “provisions (...) do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective (§76).

The Court’s concept of what constitutes an economic activity has been quite broad as can be seen in the *Meca-Medina*⁹ case concerning the International Olympic Committee’s rules on doping control. The Court held that “it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down”. This leaves a lot of room for interpretation but the Court seemed to allow European legal intervention in areas of a purely sporting nature (Siekmann, 2008).

10. It reminds us at the labour law debate. The ‘immunity’ discussion can be recalled from the *Albany*-case where a form of immunity of labour law from market principles has been granted by the European Court,¹⁰ as according to the Court, it is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of their objectives must, *by virtue of their nature and purpose*, be regarded as falling outside the scope of the rules of European competition law.¹¹ A similar idea was raised in the *Monti* Regulation on the free circulation of goods in the EU¹² which provides that this legal instrument “may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike.”¹³ A comparable concept underlies the European Services Directive¹⁴, providing that it “does not affect labour law.”¹⁵ It is well known that the Court did not grant a form of immunity, or strong exceptionalism, in the cases of *Viking*¹⁶ and *Laval*¹⁷.

5. But saved by the (labour) market

11. The specificity and immunity argument from the sports world, in a sports law context, bears also some dangers. It may lead to a sports movement – even a professional sport – that

7 Case 415/93, [1995] ECR, I-4921.

8 Opinion of 20 September 1995.

9 Case C-519/04, [2006] ECR, I-6991.

10 *Albany*, Case 67/96, [1999] ECR, I-5751, para 59.

11 *Idem*, para 60.

12 Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, OJ L337, 12/12/1998.

13 Cf. Article 2.

14 Directive 2006/123, O.J. L 376, 27 December 2006.

15 Cf. Article 6.

16 C-438/05, [2007] ECR, I-10779.

17 C-341/05, [2007] ECR, I-11767.

becomes completely disconnected from the normal legal mechanisms and fundamental principles governing the labour market. It is obvious that a founding labour law principle, like that 'labour is not a commodity', should remain safeguarded also in a sport context.

12. The relationship between transfers of players in professional football and the law on free movement of workers in the European Union is, as is well known, not an easy discussion. In the *Bosman* case (see above) the Court of Justice of the EU confirmed player mobility rights of out of contract players and, by prohibiting market-value-based transfer fees, supported the principle that labour is not a commodity. However, the *modus operandi* of the legal test allows for justifications specific to sport. The "*Bernard*" judgment¹⁸, delivered by the European Court in 2010, has provided new ground for discussion. The *Bernard* case shows a lot of resemblance with the *Bosman* case. In both cases, the European Court considered player mobility in professional football and dealt with the specificity of the football competition and the football labour market. Although *Bosman* is seen as freedom (for workers) oriented, in *Bernard* the Court provides more room for training compensation systems and thus accepted further restrictions on players' freedoms. It leaves room for further discussion as a broader problem in employment law in general is dealt with, although, in the case at hand, it was translated to the specific football sector. While lump sum or fixed damages for breach of contract exist in employment laws in European jurisdictions,¹⁹ the Court's reasoning in *Bernard* suggests that this might be problematic in light of free movement law if these damages are also supposed to include compensation for lost investment in training (Hendrickx, 2010).

6. Treaty recognition

13. With regard to the politics of sports regulation in the EU, it is argued that the body of sports aspires – either implicitly or explicitly – to integrate social, cultural and economic policies (Parrish, 2003a). Following further pressure from the sports world, the 'sport article' (article 165 TFEU) was adopted in the Lisbon Treaty. This may be seen as a major shift. With this development, the EU took a step away from the spill-overs of internal market law towards a more socio-cultural approach of sport (Garcia, 2007).

The sports article (article 165 TFEU) provides that "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." It is further provided that "Union action shall be aimed at developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen."

14. There is a double aspect in this sport article, relevant for our discussion. The European Treaty explicitly recognizes not only "the specific nature of sport" and refers to its "social and educational function", it also provides a basis for positive policy intervention from the European Union institutions, although this cannot lead to legislation (but only to incentive

18 *Bernard*, Case 325/08, [2010] ECR, I-2177.

19 Cf. R. Blanpain and C. Grant (eds.), *Fixed-term employment contracts. A comparative study*, Bruges Vanden Broele, 2009, 441p.

measures and recommendations), nor to harmonization. It concerns an positive (though soft) regulatory approach (Cuendet, 2008, 12). The European Commission's 2007 White Paper, however, takes a rather 'modest' European governmental role, referring to the autonomy of sporting organisations and their responsibility (Wheatherill, 2008, 6). The exclusion of harmonisation, is also a sign that EU action may remain limited (Vermeersch, 2009, 6).

In light of this, it is relevant to look at the potential impact of article 165 TFEU on the case law of the Court of Justice and the acceptance of sports specificity. The *Bernard*-case²⁰ shows that the Court was more willing to accept training compensation in professional football, compared to *Bosman* (Hendrickx, 2010). The impression that the issue of specificity of sport played a role is strengthened by the Court's reference to article 165 TFEU, notwithstanding the interesting tempering by the Advocate-General²¹ indicating that sport must be considered carefully "just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector" (§30). She nevertheless stated that professional football is not merely an economic activity but also a matter of considerable social importance in Europe (§47).

15. The codification of the 'specificity of sport' will, therefore, not be a magic concept to exclude sport from EU law, or from EU 'market law', but it may be an example of how there may still be more potential for a specific labour law recognition, based on its own foundations and purposes, in light of a larger EU Treaty framework.

7. Conclusions

16. It is clear that many sport legal issues are labour law issues: wages, breach of contract, player transfers, players' agents, doping, discrimination, collective bargaining, etc. The law of sport shows interesting characteristics which are shared with labour law: autonomous law making and collective rule setting. From an external viewpoint it can be said that sports law is an interdisciplinary field of law, including labour law.

However, the world of sport is quite different from the wider labour market, is even wider than a market context, and its specificity has led to a quest for a specific legal approach, including an immunity from certain legal rules and principles. Nevertheless, sports need the guarantees of labour law. So, specificity should not mean that sport operates outside the law, nor that the hierarchy of legal norms can be disregarded. Labour law will thus certainly play a big role in sport, certainly in professional (team) sports. The European Court's *Bosman*-case, referred to above, has shown the influence that the labour law dimension can play. Realities in the sports world show the importance of respect for the rule of law and for fundamental rights, including labour rights.

17. While sport, in many cases, cannot do without (nor do away with) labour law, it is interesting to note how relatively successful the sports movement has been in defending its business model and its own foundations and values, for example in the context of EU law. It is an aspiration that both labour law and sports law seem to share: being shielded off from pure

20 *Bernard*, Case 325/08, see above.

21 Opinion of 16 July 2009.

economic market logics, striving for an implicit, and preferably explicit, recognition of its specificity. This comes through in both the case law of the Court of Justice of the EU and in the European Treaty. In many ways, the arguments from the sports (law) movement and from the labour (law) movement seem to run parallel. General popularity, media attention and political attractiveness certainly play a role in favour of sports. But, in legal terms, perhaps the key concept is the social function of sport, which is also proper to the functions of labour law. It is (also) recognised in the European Treaty for a sports context and this Treaty recognition may have (or already has) spill-over effects in the European Court's case law. These developments may also enrich labour law discussions and support a more optimistic outlook for the development of labour law in Europe.

Bibliography

Cuendet, S. (2008), The EU Commission's White Paper on Sport: an Official Coherent, Yet Debated Entrance of The Commission in the Sports Arena, *International Sports Law Journal*, nr. 1-2, 9-13.

Foster, K. (2005), 'Lex sportiva and lex ludica, the Court of Arbitration for Sport's jurisprudence', *Entertainment and Sports Law Journal*, 1-14.

García, B. (2007), 'From regulation to governance and representation: agenda-setting and the EU's involvement in sport', *Entertainment and Sports Law Journal*, Vol. 5, 2007, 1-12.

Hendrickx, F. (2009), 'Future directions of EU sports law', in R. Blanpain, M. Colucci, & F. Hendrickx (eds.), *The future of sports law in the EU: Beyond the EU Reform Treaty and the White Paper*, (*Bulletin of Comparative Labour Relations*, 66), The Hague, Kluwer Law International, 9-20.

Hendrickx, F. (2012), 'Rules of law in the business of sport', in B. Segaert, M. Theeboom, C. Timmerman en B. Vanreusel (eds.), *Sports governance, development and corporate responsibility in Routledge Research in Sport, Culture and Society*, New York, Routledge, 177-195.

Hendrickx, F., 'The Bernard case and training compensation in professional football', *European Labour Law Journal*, 2010, nr. 3, 380-397.

Hepple, B. (1995), 'The Development of Fundamental Social Rights in European Labour Law', in A. C. Neal & S. Foyn, *Developing the Social Dimension in an Enlarged European Union*, Oslo: Universitetsforlaget, 23-34.

K. Kehrl, 'The unspecified specificity of sport: a proposed solution to the European , Court of Justice's treatment of the specificity of sport', *Brooklyn Journal of International Law*, 403-441.

Mitten, M. J. (1997), 'Sports Law as a Reflexion of Society's Laws and Values', *South Texas Law Review*, Vol., 999-1006.

Nafziger, J. (2006), 'Lex Sportiva and CAS', in *The Court of Arbitration for Sport*, The Hague, Asser Press, 409-419.

Parrish, R. (2003a), 'The Politics of Sports Regulation in the European Union', *Journal of European Public Policy*, Vol. 10(2), 246-262.

Parrish, R. (2003b), *Sports Law and Policy in the European Union*, Manchester University Press, 271p.

Parrish, R. & Miettinen, S., *The Sporting Exception in European Union Law*, The Hague, Asser Press, 2008, 295p.

Siekman, R. (2008), 'Is Sport Special in EU Law and Policy?', in R. Blanpain, M. Colucci & F. Hendrickx (eds), *The Future of Sports Law in the European Union. Beyond the EU Reform Treaty and the White Paper (Bulletin of Comparative Labour Relations, 66)*, The Hague, Kluwer Law International, 37-49.

Siekman, R. (2011) *The Specificity of Sport: Sporting Exceptions in EU Law*, *International Sports Law Journal*, 2011, nr. 3-4, 75-85.

Vermeersch, A. (2009), 'The future EU sports policy: hollow words on hallowed ground?', *International Sports Law Journal*, nr.3-4, 3-7.

Weatherill, S. (2008), The White Paper on Sport as an exercise in 'Better Regulation', *International Sports Law Journal*, 2008, nr. 1-2, 3-8.

Zylberstein, J. (2008), "The specificity of Sport: A concept under Threat", *Bulletin of Comparative Labour Relations*, no. 66, 95-106.