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Conclusion and termination of employment relationship in professional sports: special regulations and particular protection requirements

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Which Specificity of Sport? (Blampain, 2008)

Whether and to what extent Specificity of Sport could influence/limit the Legal Orders (National Laws and EU Laws) and the application of Labour Law rules?

Main Items

- I) Limits to Autonomy of Sports Law
 - ▶ Interactions between Sport Law, EU Law, State Law
 - ▶ «Gainful Employment» (ECJ Jurisprudence), Self-Employment, Amateur Sport Activity: Autonomy of Sport, EU Law, States' competence in Regulating job relationships
- II) Forms of Job Relationships in Professional Sports Activities
- III) Work conditions and forms of protection, between General Labour Law Rules and Sport Specificity
 - ▶ – Interventionist vs. Non-Interventionist Models
 - Inclusion of Sport Employment Relationships within the scope of general Labour Law rules
 - Specificity and Exemption

I) Which kind of Sport Law Autonomy?

A General Overview

- ▶ Sport Organization as Institutions
- ▶ Sport Law as Autonomous Legal Order
- ▶ Specificity  Autonomy (Full Autonomy)?
- ▶ Sport Law as a Sectoral Legal Order?
- ▶ Interactions with Others (Superordinate?) Legal Orders (EU Law, States' Laws)

«Indeed, athletes have rights and obligations deriving from ordinary law but also from the rules of the sports federations they are registered with. Many of those rules are captured by the EU's internal market competence»

(Mrkonjic and Geeraert, 2013; see also Parrish, 2003)

Utility of an updated Scientific Assessment on the issue of the Autonomy of Sport Regulation which could involve General Theory of Law, EU Law, Constitutional Law, Sport Law, Labour Law

I) Which kind of Sport Law Autonomy?

Example:

Italian law no. 280/2003,

Article 1, paragraph 2:

“Relations between the rules enacted by the sporting bodies and national laws are regulated on the basis of the principle of autonomy, with the exception of the cases in which could arises situation which are relevant for the national law, although connected with the sporting rules

I) Which kind of Sport Law Autonomy?

- ▶ Sports Law and EU Law
- ▶ Space of Autonomy: *Lex Ludica* and [partially] *Lex sportiva* («rules of the game») [Foster, 2005]

2007 *White paper on sport*, chapter 4.1

Development of ECJ *Meca Medina* (Case C-519/04) approach

“Sport activity is subject to the application of EU law....Competition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity. Sport is also subject to other important aspects of EU law, such as the prohibition of discrimination on grounds of nationality, provisions regarding citizenship of the Union and equality between men and women in employment.

At the same time, sport has certain specific characteristics, which are often referred to as the "specificity of sport". The specificity of European sport can be approached through two prisms:

- The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;***
- The specificity of the sport structure, including notably the autonomy and diversity of sport organizations, a pyramid structure of competitions from grassroots to elite level and organized solidarity mechanisms between the different levels and operators, the organization of sport on a national basis, and the principle of a single federation per sport;*

*The case law of the European courts and decisions of the European Commission show that the specificity of sport has been recognized and taken into account. They also provide guidance on how EU law applies to sport. In line with established case law, **the specificity of sport will continue to be recognized but it cannot be construed so as to justify a general exemption from the application of EU law**...there are **organizational sporting rules** that – based on their legitimate objectives – **are likely not to breach the anti-trust provisions of the EC Treaty, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued.***

*Examples of such rules would be ‘**rules of the game**’ (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, ‘at home and away from home’ rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods”* ⁷

EUROPEAN COMMISSION

Communication on Sport (2011)

Developing the European Dimension in Sport

«The concept of the specific nature of sport is taken into account when assessing whether sporting rules comply with the requirements of EU law (fundamental rights, free movement, prohibition of discrimination, competition, etc.)»

Scope of *Lex Sportiva* after Meca–Medina ruling

«Homegrown players rule» UEFA Regulation Accepted by European Commission – compatibility with EU Law (2008–2013),

although controversial (Weatherill, 2017; Dalziell, Downward, Parrish, Pearson, Semens, 2013)

Italy Cases (Waterpolo – amateur) (Basket – professional)

Infringement procedures launched (and closed)

By European Commission against Italy no. 4146/2011 and 4128/2012

Respectively closed on 15 of February 2017 and 22 of July 2016

A change with respect to ECJ approach in the Kolpak case (C–438/2000)?

II) Professional Sport Activity as a Employment Relationship – a controversial match

Starting point: the «Control» test

Walker vs. Crystal Palace Football Club (1910)

*“It has been argued before us ... that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g. the club in this case would have no right to dictate to him how he should play football. I am unable to follow that. **He is bound according to the express terms of his contract to obey all general directions of the club**, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions...it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody” (Blackshaw, 2006)*

A similar approach and conclusion were adopted by Dutch Judges in the *Laserom /Sparta* ruling (1967)

II) Professional Sport Activity as a Employment Relationship – a controversial match

Work Relationship in Sport and EU Law notion of Employee (ruling *Lawrie Blum*, paragraphs 16 ff.)

Work relationships between sportsmen and clubs as having the substance of a “*gainful employment*”

ruling *Walrave*, paragraph 5; ruling *Donà*, paragraph 16; ruling *Bosman*, paragraph 73; ruling *Deliège*, paragraph 4, ruling *Lehtonen and Castors Braine*, paragraph 35, ruling *Meca-Medina*, paragraph 23

Inclusion within the scope of EU Law – Economic Freedoms – Charter of Fundamental Rights

Consistency between many National System (either interventionist or not-interventionist) and ECJ approach – Inclusion of Professional Sport Activities within the scope of Labour Law

(Chaker, 1999; Chappelet, 2010)

The «Interventionist» Model: Sport Employment Contract Regulation

▶ Special Terms and Conditions

- ❑ Definition of special requirements of the Employment Relationship in Professional Sport (continuity, training obligation etc.)
- ❑ Written Form
- ❑ Duty of the parties to conform to the standard agreement set by the relevant organization (Federations) and duty to transmit the contract to the Federation for its approval
- ❑ Special fixed-term contract regulation
- ❑ Ordinary obligation of the parties to observe collective agreements signed by Leagues and players' Unions
- ❑ Loan and Transfer
- ❑ Special protection against sport injuries
- ❑ Special Labour Disputes Settlement (arbitration clauses)

▶ Common Rules applicable

- ❑ Fundamental Labour rights (prohibition of discrimination, freedom of expression,)
- ❑ Social security Laws (pensions schemes, sickness/illness insurance, unemployment risk protection)
- ❑ Working time limitations

II) Professional Sport Activity as a Employment Relationship – a controversial match

Alternative Patterns adopted in some national system within and outside EU

(Anyway outside the Scope of EU Law)

Civil Law Contracts – Self–Employment Relationships

Situation of Double or Alternative Pattern

Free choice OR Different regulations for national and foreign sportsmen

Economic Justification – **Unclear Justification with respect to the existence/absence of a real condition of subordination**

Indeed, specific features of sport activity do not imply in itself a departure from the category of employment contract

Substantive lack of protection due to exclusion from Labour Law (and Social Security Law) scope (Hamerník 2004,

Jurevicius–Vaigauskaitė, 2004, Simov – Kolev, 2006, Gábriš , Gürsoy, Haindlova, Smokvina, Tatu, 2014)

Departure from Employment Law – problematic issues

Could the Specificity of Sport work as «exemption» from Labour Law Rules?

I) Consistency with General Principles of National Laws

Reasonableness Control and respect of the Principle of equality (Constitutional Justice)

II) Double Patterns and Possible Interferences between Transnational Dimension of Professional Sport and Compliance of the Reverse Discrimination with with EU Law – Condition/Limit of «purely internal situations»

“As a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen to receive in the Member State of which he is a national treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the EC Treaty in relation to freedom of movement” (rulings C-224/98 D’Hoop, paragraph 30, C-76/05, Schwarz, paragraph 80; C-56/09, Zanotti, paragraph 70)
(Tryfonidou, 2009)

Exclusion of Sportsmen from the scope of Labour Law – possible consequences on the front of social dialogue

- ▶ Implementation process of of the *Agreement regarding the minimum requirements for standard player contracts in the professional football sector in the European Union and in the rest of the UEFA territory*, signed on 19 April 2012, between FIFPro, EPFL, ECA and UEFA (Smokvina, 2016)
- ▶ Connections with ECJ Jurisprudence on the **links between the prohibition of agreements restricting competition laid down in Article 101(1) TFEU and collective bargaining** – Cases C-76/96, *Albany*, and C-413/13, *FNV Kunsten Informatie en Media* (O’Leary, 2017; Evju, 2003)
- ▶ Condition to maintain a collective labour agreement outside the scope of Article 101(1) TFEU
- ▶ Applicability of such contract setting minimum standards (with particular reference to pay) to employees or, alternatively, to workers who could be defined as **“false-self employed”** because their contracts provides the obligation to perform the same activity of the workers who have been expressly hired as employees under the direction of the other contracting party

The Uncertain Border between Professional and Amateur Sport – a misleading path toward Exemption?

- ▶ Autonomy and Specificity of Sport as means to exclude work relationships from the scope of Labour Law rules
- ▶ Inherent risk of the Interventionist Model
- ▶ Italy Case – Law no. 91 / 81 which Entrusts to Sport Federations the competence on the matter of distinction between professional and amateur
- ▶ Legal Absolute Presumption – Estoppel to judicial review – Prevention of Control test

The Uncertain Border between Professional and Amateur Sport – a misleading path toward Exemption?

*«The free movement rules apply only to workers and professional players in the framework of an economic activity. However, **the free movement rules apply also to amateur sport as the Commission** considers that following a combined reading of Articles 18, 21 and 165 TFEU, the general EU principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement, including those exercising an amateur sport activity»*

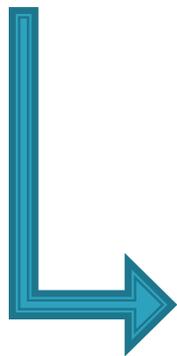
European Commission's 2011 Communication on Sport

III) Work conditions and forms of protection, between General Labour Law Rules and Sport Specificity

- ▶ Fundamental Labour Rights / General Fundamental Rights as Limits to the Specificity of Sport
- ▶ Some examples:

Behavioural duties  **heteronomous**

- Disciplinary codes enacted by Sporting Bodies (e.g. swearing ban)
- General rules of Law



Duties arising from / regulated by the employment contract

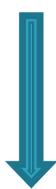
Idea of the «Athlete as a hero» vs. the one of the «Athlete as employee»

Freedom of expression, right to privacy, prohibition of discrimination as limits to on-field and off-field duties

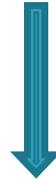
III) Work conditions and forms of protection, between General Labour Law Rules and Sport Specificity

- ▶ Fundamental Individual and Workers' Rights Enshrined by International Treaties, Charters and Conventions (UN Declaration of Human Rights, International Covenant of on Economic, Social and Cultural Rights, European Convention on Human Rights, Charter of Fundamental Rights of EU etc.)

Admissibility of Limitations: Conditions



Public Interest



Proportionality

(Rigozzi, Kaufmann-Kohler, Malinverni, 2003)

Inadmissibility of limitation of rights neither justified by such interests or by the need to respect general prohibition nor inherent to employment duties (sporting performance)
(Gábriš, 2010)

III) Work conditions and forms of protection, between General Labour Law Rules and Sport Specificity

Proportionality and WADA Anti - Doping CODE

A specific issue: Limits to provide whereabouts information 24/7

A general issue

Admissibility of restrictions which result consistent with a general, objective and **teleological** notion of doping, e.g.

«Are considered as doping the administration or consumption of drugs or other substances biologically pharmacologically active and adoption and submission to medical procedures which are not justified by pathological conditions and are apt to alter the psychophysical or biological conditions of the of the athletes' organism with the purpose to improve their performances»

(Italian Law no. 376/2000, art. 1, paragraph 2)

Need to distinguish doping practices from the situations where such substances or procedures could not influence the Athletes' performances (privacy's sphere)

Termination of the Contract – a border area between Specificity and Labour Law general rules

- **The limited range of hypothesis of General Labour rules applicability – nullity and voidness**

Dismissals as violation of Fundamental Rights
not exclusively subjectable to sporting rules

Consequential issue of potential overlappings
between Sport Law and National Laws

- **Scope of general Specificity of Sport Employment Relationship – the Paradigmatic Situation of Football**

Other causes of termination as just cause (namely gross misconduct, lack of performance, «*sporting just cause*») – objective need of special rules

Termination of the Contract – a border area between Specificity and Labour Law general rules

Compensatory system provided by art. 17 of FIFA Regulations on Status and Transfer of Players– Unilateral Breach and duty to pay compensation

General aim to Encourage Contractual Stability

Need to balance parties' positions (which are differently set up than in the «ordinary» employment relationships)



Right of the player not to be dismissed without a just cause, namely a misconducting «of a certain severity» (CAS 2014/A/3684–3693)



Entitlement of the club to claim for compensation in case of anticipated termination of the contract

Tight connection between the issue of termination of contract and the one of transfer

Difficulty to find stable and objective criteria in the CAS Jurisprudence

The ambivalent meaning and role of the «*Positive Interest*» criterion: from *Webster* through *Matuzalem* cases until current times

Termination of the Contract and CAS Jurisprudence

Apparently different approaches depending on the party who breaches the contract

Unilateral Termination
by the club

Positive interest as

“expectation interest”...determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly

(recently, CAS 2012/A/3033 A. v. FC OFI Crete), so, basically,

“The amount the Player would have earned with the Club should the Club have properly performed the Employment Contract”

Termination of the Contract and CAS Jurisprudence

Unilateral Termination by the Player

Positive interest as mainly based on the «*value of the services of the Player as expressed by the New Club*» (CAS 2008/A/1519, CAS 2008/A/1520, Matuzalem)

or alternatively on the *replacement's costs* (CAS 2010/A/2145 and CAS 2010/A/2146, De Sanctis)

Change of approach with respect to Webster case (CAS 2007/A/1298; see also CAS 2008/A/1453 and CAS 2008/A/1469, Soto Jaramillo)

Lack of Clarity and Predictability – need for Amendments (Czarnota, 2013)

Unilateral Termination and Buy-out Clauses

Buy-out Clauses: A contractual path towards Specificity

Absence of limitations as a general limit of such clauses
(Giancaspro, 2016)

Misuse and abuses in introducing such clauses in sport employment contracts – abnormal utilization, notably by the great clubs

Inadequacy to fulfil the goal of redressing the imbalance between the great clubs and the smaller ones

Judicial interventions on disproportionate clauses – e.g. Cases *Tellez*, *Zubiaurre* and *Bocos* in Spain – CAS Cases CAS 2015/A/4187 and CAS 2010/A/2022; DRC 26th November 2004

Need to define objective criteria «to prevent abuses and excessive payments» (Sala Franco, 2009; KEA – CDES, 2013)

Main References:

- Blackshaw, I., *The Professional Athlete – Employee or Entrepreneur?*, *International Sports Law Journal*, 2006, 3–4, pp. 91 ff.,
http://www.asser.nl/sportslawwebroot/cms/documents/cms_sports_id115_1_ISLJ_2006_3-4_DEF.pdf
- Blanpain, R., *The Future of Sports in Europe : Specificity of Sport : A Legal Perspective*, and Colucci, in *The Future of Sports Law in the European Union : Beyond the EU Reform Treaty and the White Paper*. Ed. Roger Blanpain, Wolters Kluwer, 2008, pp. 1 ff.
- Chaker, A., *Study on national sports legislation in Europe*. Council of Europe Publishing, 1999
- Chappelet, J.L., *Autonomy of Sport in Europe*, Council of Europe Publishing, 2010
- Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf
- Dalziel, M., Downward, P., Parrish, R., Pearson, G., Semens, A., *Study on the Assessment of UEFA's "Home Grown Player Rule"*, University of Liverpool, Edge Hill University, 2013
- Czarnota, P.A., *Fifa Transfer Rules and Unilateral Termination without Just Cause*, *Berkeley Journal of Entertainment and Sport*, 2013, vol. 2, issue 1, pp. 1 ff.

Evju, S., *Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude, International Journal of Comparative Labour Law and Industrial Relations*, 2001, Issue 2, pp. 165 ff.

Foster, K., *Lex Sportiva and Lex Ludica: the Court Of Arbitration for Sport's Jurisprudence, The Entertainment and Sports Law Journal*, 2005,3(2), pp. 2 ff.

Gábriš, T., *Employment relationships at national level: Slovak Republic*, in in Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf pp. 343 ff.

Gábriš, T., *Behaviour Clauses in Sports: Basic Rights of Sportsmen*, Tilburg School of Law, 2010, <http://arno.uvt.nl/show.cgi?fid=106138>

Haindlova, M., *Employment relationships at national level: Czech Republic*, in Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf pp. 101 ff.

Giancaspro, M., *Buy-out clauses in professional football players contracts: questions of legality and integrity*, *International Sports Law Journal*, 2016, pp. 22 ff.

Gürsoy, A., *Employment relationships at national level: Turkey*, in Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf pp. 413 ff.

Gürsoy, A., *Professional Football Players' Contracts Under Turkish Law*, *Ankara Bar Review*, 2008/1, pp. 19 ff., <http://www.ankarabarosu.org.tr/siteler/AnkaraBarReview/tekmakale/2008-1/4.pdf>).

Hamerník, P., *The Impact of EC Law on Sport in the Czech Republic*. *International Sports Law Journal*, 2004, 3-4, pp. 56 ff.

Jurevicius, R. – Vaigauskaitė, D., *Legal Regulation of the Relationship between Football Clubs and Professional Players in Lithuania*, *International Sports Law Journal*, 2004, 1-2, pp. 33 ff.

KEA European Affairs – CDES (Center for the Law and Economics of Sport), *The Economic and Legal Aspects of Transfers of Players*, Study Commissioned by the European Commission, Directorate General for Education and Culture, 2013, http://www.keanet.eu/docs/full_study_transferofplayers.pdf

Mrkonjic, M. and Geeraert, A., *Sports organisations, autonomy and good governance*, in Alm J., *Action for Good Governance in International Sports Organisations*, Play the Game/Danish Institute for Sports Studies, 2013, pp. 133 ff.,

https://lirias.kuleuven.be/bitstream/123456789/397725/1/AGGIS_Final_report.pdf

O'Leary, L., *Employment and Labour Relations Law in the Premier League, NBA and International Rugby Union*, T.M.C. Asser Instituut, 2017

Parrish, R., *The Birth of European Union Sports Law*, *Entertainment and Sports Law Journal*, Vol.2, No. 2, Summer 2003, pp. 21 ff.

Simov, T. – Kolev, B., *Player's Contracts in Bulgarian Football*, *International Sports Law Journal*, 2006, 1–2, pp. 110 ff.

Rigozzi, A., Kaufmann–Kohler, G., Malinverni, G., *Doping and Fundamental Rights of Athletes: Comments in the wake of the Adoption of the World Anti-Doping Code*, *International Sports Law Review*, 2003, Issue 3, pp. 39 ff.

Rogachev, D. and Shevchenko, O. (eds.), *Sports Law in Russia*, Moscow, Prospekt, 2016

Sala Franco, T., *Las cláusulas rescisorias contractuales del deportista Profesional*, *Revista Aranzadi de Derecho de Deporte y Entretenimiento*, 25/2009, pp. 1 ff.

Smokvina, V., *New issues in the labour relationships in professional football: social dialogue, implementation of the first autonomous agreement in Croatia and Serbia and the new sports labour law cases*, *International Sports Law Journal*, 2016, Issue 3-4, pp. 159 ff.

Smokvina, V., *Employment relationships at national level: Croatia*, in Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf pp. 73 ff.

Tatu, G., *Employment relationships at national level: Romania*, in in Colucci, M. and Hendricks, (eds.), *Regulating Employment Relationships in Professional Football. A Comparative Analysis*, Sport Law and Policy Center, 2014, http://www.sportslawandpolicycentre.com/Bulletin%20I_2014.pdf pp. 289 ff.

Tryfonidou, A., *Reverse Discrimination in EC Law*, Kluwer Law International, 2009

Weatherill, S., *Principles and Practice in EU Sport Law*, Oxford University Press, 2017