Joint selling of football broadcasting rights in Europe, 

a friend or foe of the principle of Fair Play?

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Työn nimi: Joint selling of football broadcasting rights in Europe, a friend or foe of the principle of Fair Play?
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Tiivistelmä:
Tutkielman tavoitteena on löytää käyttöekelpoinen ratkaisumalli eurooppalaisen jalkapalloilun tulonjakoon seurojen välillä. Lähtökohtaisena ongelmana on tulojen epätasainen jakautuminen eurooppalaisten jalkapalloseurojen välillä, joka aiheuttaa taloudellista eriarvoisuutta sekä kansallisten sarjojen välillä, että kansallisten sarjojen joukkueiden välillä. Ongelman aiheuttajaksi tutkielma tunnistaa Euroopan Komission poikkeusluvan nojalla sallimat jalkapalloliigojen yhteisymyynnijärjestelyt, jotka ovat luonteeltaan kartelja, mutta jotka Komissio on sallinut Euroopan Unionin toiminnasta annetun sopimuksen 101 (3) artiklan nojalla.

Ensimmäiseksi tutkielma selvittää urheilun erityisasemaa Euroopan Unionin oikeusjärjestelmässä pureutumalla asiaan sekä primarioikeuden, asiana liittyvien soft law -työkaluihin sekä eurooppalaisten urheilujärjestelmän erikoisuuspyynnön verraten sitä esimerkiksi amerikkalaiseen urheilujärjestelmään. Lisäksi se analysoi urheilun luottavuutta Euroopan Unionin toiminnasta annetun sopimuksen 165 artiklaa sekä arvioi urheilun tulevaisuutta Euroopan Unionin sääntelyjärjestelmässä.


Viimeisessä osassa tutkielma tekee johtopäätöksiä nykytilanteesta sekä antaa kaksi vaihtoehtoista ratkaisumallia tulevaisuutta varten jalkapalloilun televisiointioikeuksien myynnin, jalkapalloilun merkityksellisiä markkinoiden sekä eurooppalaisten urheilun millin näkökulmista.

Avainsanat: Kilpailuvoikeus, Eurooppaioikeus, Jalkapallo, Määräavä markkina-asema, Urheilun erityisasema, Televisiointioikeuksien yhteisymyntä.

Muita tietoja:
Suostun tutkielman luovuttamiseen Rovaniemen hovioikeuden käyttöön X
Suostun tutkielman luovuttamiseen kirjastossa käytettäväksi X
Suostun tutkielman luovuttamiseen Lapin maakuntakirjastossa käytettäväksi X
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# Abbreviations

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>CAS</td>
<td>Court of Arbitration for Sport</td>
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<tr>
<td>CFI</td>
<td>Court of First Instance</td>
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<td></td>
<td>(from 1.12.2009 on The General Court, GC)</td>
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<tr>
<td>DG</td>
<td>Directorate General</td>
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<td>ECA</td>
<td>European Club Association</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>(from 1.12.2009 on Court of Justice of the European Union, CJEU)</td>
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<td>EC treaty (EC)</td>
<td>The treaty on European Union</td>
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<td>EEC-treaty</td>
<td>Treaty establishing the European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>FA</td>
<td>Football Association</td>
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<tr>
<td>FAPL</td>
<td>Football Association Premier League (England and Wales)</td>
</tr>
<tr>
<td>FINA</td>
<td>Fédération internationale de natation (swimming federation)</td>
</tr>
<tr>
<td>FIFA</td>
<td>Fédération Internationale de Football Association</td>
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<tr>
<td>GBP</td>
<td>Pound sterling of the United Kingdom</td>
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<tr>
<td>IOC</td>
<td>International Olympic Committee</td>
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<tr>
<td>KHL</td>
<td>Kontinental Hockey League</td>
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<tr>
<td>OJ</td>
<td>Official Journal of the European Union</td>
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<tr>
<td>SSNIP</td>
<td>Short but Significant Non-transtitory Increase in Price</td>
</tr>
<tr>
<td>TEU</td>
<td>Consolidated Version of The Treaty on European Union</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TV</td>
<td>Television</td>
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<tr>
<td>UEFA</td>
<td>Union des Associationis Européennes de Football</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
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</table>
“Some people think football is a matter of life and death. I don't take that attitude. I can assure them it is much more serious than that.”

William “Bill” Shankly 1913-1981
1. Introduction of the subject matter and outlining the topic

1.1 Television Revenues in football

Television revenues have become the most important source of revenue for professional football leagues and sports in general during the last two decades\(^1\). Whereas during the 1980’s the clubs in most of the leagues received the majority of their income from gate receipts and sponsorship deals, today the revenues from the television rights bought by national or commercial television broadcasters provide the greater part of revenues for European sports entities, especially as it comes to football clubs from major European football leagues. Just to give a few examples from the season 2005/2006, FC Barcelona obtained 36 per cent of its overall revenue from television sales whereas another European giant Juventus made 68 per cent of its income from the joint and individual sales of TV-broadcasting rights\(^2\).

Consequently the football leagues have become an extremely important eye-catcher product for media-market and especially for commercial television channels. According to various surveys European football is the most popular television program especially in the Western Europe\(^3\). In order to give an example of the popularity, in Germany in for the season 2005/2006 German pay-tv group Premiere lost 42 per cent of its subscriber base after announcing losing the rights for the 1 Bundesliga\(^4\), while the new 1 Bundesliga rights owner Unity/Arena attracted over 900 000 subscribers within a few months\(^5\).

Since the competition between commercial television channels is becoming fierce, the prices are going up as well. A good example of price development from the world of football is development of television broadcasting deals for the English Premier

\(^{1}\) In the beginning it is important to draw the line between professional and semi-professional/amateur football. In the latter ones gate receipts are still often together with sponsorship money, the most important sources of income.


\(^{4}\) German 1\textsuperscript{st} national football league.

\(^{5}\) Hatton, Wagner, Armengod 2007, p.346.
League\(^6\). Whereas the initial deal was worth of £191 million over five years, the current deal has risen to £1.7 billion covering seasons 2007-2010.\(^7\) When these figures are broken down into costs for television broadcasting rights for a single season, in 1992 £38.2 million whereas under the latest deal with Setanta/Bskyb, broadcasting rights for a single season cost over £566 million. This means that the same product with same amount of games and more or less same group of teams costs nearly 15 times more than the same product used to cost 15 years ago!

Similar example from other sports is the price of broadcasting rights of the summer olympics. Whereas the television broadcasting rights of 1992 summer games of Barcelona were sold with 441 million USD, the summer games of Sydney 2000 only 8 years (and 2 Olympiads) later were sold with 1.318 billion USD\(^8\). The events are different but the pattern is the same. Over the time of rapid development of information technology, broadcasting rights of sports events have become a huge business for various sport leagues around the world with the largest football leagues topping the income tables.

On one hand this development is obviously a positive measure for sports society around the world since added television revenues bring naturally lots of opportunities for the development of sport together with sports related employment\(^9\). For example in Britain only sport related activity employs 376 000 people\(^10\). However this also poses a risk to sporting ethics in cases where commercialisation goes too far and the revenue allocation becomes unfair.\(^11\) This well recognised factor shall be one of the main lines of thought in judicial argumentation of this dissertation.

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\(^6\) The original reason for creation of this league was an idea of ten clubs to break away from the traditional English league one in order to take advantage of higher television revenue, which led to the establishment of English Premier League in 1992.

\(^7\) <www.premierleague.com/page/History>.

\(^8\) Helsinki Report on Sport 1999, p. 4.

\(^9\) Sport has become "big business", primarily as a result of the increase of the value of broadcasting rights, especially television rights to sport events. The economic importance of sport within the European Union is considerable. It has been estimated that sport generates a value-added of €407 billion in 2004 representing 3.7% of the EU GDP and 15 million employees, which represents a share of 5.4% of the labour force. (White paper on sport 2007, p. 11, 17).

\(^10\) Rowe 2003, p. 18

\(^11\) About this fact see The Helsinki report on Sport, 1999 p.4.
1.2 Principle of Fair Play in football and in the European competition law

‘Fair Play’ is considered an important concept, a core value as it comes to educational and social role of sport. It is a positive concept involving all stakeholders of sport. Further strengthened through the fulfilment of the social goals of European sports such as enhancing the public health, enhancing the role of sport in education and training as well as in the fight against racism and violence. As it comes to the European football in particular, ‘Fair Play has always been one of the main principles of both FIFA and UEFA, the latter even describing ‘Fair Play’ in its Statutes as follows: “‘Fair play’ means acting according to ethical principles which, in particular, oppose the concept of sporting success at any price, promote integrity and equal opportunities for all competitors, and emphasise respect of the personality and worth of everyone involved in a sporting event”.

In European competition law ‘Fair Play’ is not defined as directly as it is in the sporting regulations. However the goals mentioned already in the Article 2 TFEU concerning social cohesion and solidarity among the Member States is set to serve the same ideology in the European economic framework as the principle of ‘Fair Play’ is serving in the world of football. Further on as it comes to the European competition law in particular, also the main articles of the TFEU concerning competition law are based on mutual respect towards the common regulations as well as towards the other players in the market.

As it comes to broadcasting rights football clubs in the international and domestic leagues have joined their forces in order to make the market more efficient and bundled broadcasting rights of their games under one agreement usually administered by a national or regional football association. As we have seen, fact that rights are sold under one single point of sale instead of individual efforts of each club has added value.

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12 Gardiner et al. 2006, p. 68-69.
14 In the statutes of FIFA ‘Fair Play’ is mentioned as a responsibility of Members, Confederations, Clubs, Officials and Players (art. 4). FIFA also has a special committee for Fair Play and social responsibility (art. 51).
15 Statutes of UEFA, Chapter I, paragraph 7.
16 Art. 101 and 102 of the TFEU.
17 For example Football Association (FA) in England and Wales.
18 For example UEFA with regard to the pan-European UEFA Champions League.
to the agreements and especially to the bargaining power of these clubs in the broadcasting market. However the question that has been raised by the European Competition Authorities\textsuperscript{19}, public audience and that shall be one of the main questions of dissertation is; does the arrangement of joint sales of broadcasting rights play under the values of ‘Fair Play’ both as it comes to spirit of sport as well as it comes to the competition regulations set in the primary EU legislation.

In this dissertation my goal is to redefine the meaning and content of ‘Fair Play’ with reference to European Competition law related questions in the collective selling of broadcasting rights of football leagues. I see the topic as being very relevant and timely since there is need for groundbreaking structural revisions given that both financially big clubs\textsuperscript{20} as well as smaller ones\textsuperscript{21} are suffering from the current financial structure and re-distribution of revenues of football leagues. Soaring wages and transfer fees that have no reflection with reality are symptoms of current arrangement that does not reflect in spirit of fair play to any stakeholders of European football. And to make it even worse in the end of the day it is the consumer that suffers from increased prices of both live and television football.

Inverted cost structure is a joint concern for the entire European sporting society, and in order to overcome these challenges, common grounds for the competition regulations and re-distribution of revenues need to be found and executed. The main challenge of this analysis is to find a dynamic balance between love for the game of football and money spent in it, that is necessary in order to analytically grasp the passionate and pragmatic complexities of the beautiful game\textsuperscript{22}.

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\textsuperscript{19} For example Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, 2003 and a press release regarding the same decision, see a background note of Commission press release MEMO/03/156.

\textsuperscript{20} “Manchester City owner Sheikh Mansour bin Zayed Al Nahyan converted 305 million pounds ($487 million) of loans into equity as losses at the English Premier League soccer club grew to 92.6 million pounds”, from a report of Tariq Panja “Manchester City owner converts debt into equity as losses widen” see at <www.bloomberg.com> (6.1.2010).

\textsuperscript{21} For example comments of Danny Davis (Attorney at Mischon de Reya, London) in “Asiantuntija: Brittiseuroja häviää kartalta, 2.12.2009” concerning thread that many clubs are endangered to fall out from the market because there are not enough people to follow the games live and from the television <www.yle.fi/urheilu>. Concerning the same topic see articles “Kun menestystä ei sallita” in Suomen Urheilulehti 02/2010 p. 18-21 and “Pimeys laskeutuu” in Suomen Urheilulehti 02/2010 p. 44-45 and finally at <http://www.skysports.com/story/0,19528,11661_5982493,00.html> (Article in the webpage of skysports “Pompey enter administration”, 26.2.2010).

\textsuperscript{22} Vrooman (2007 I), p. 309.
1.3 EU sports policies

Although sport has not had any judicial position among the EU policies before the introduction of TFEU, it has influenced and it still influences the community from various directions. As a substantial topic has not been officially among the policies in the European Communities before 1st of December 2009 as the TFEU was enforced\(^{23}\). It was also planned to become a part of the European Constitution\(^{24}\), but since referendum held in France and the Netherlands rejected the introduction of constitutional treaty, sport did not enter primary European legislation on 1\(^{st}\) of November 2006 as it was planned and it took more than three years to wait before sport found its place among the EU policies. Despite the delay in its implementation the content of sport articles remained substantially unaltered in the diluted version of constitution (TFEU). Current content of sport article of the TFEU shall be analysed in detail in the section 2.2 of this dissertation. It is also noteworthy that sports related matters have been interpreted through their indirect effect for various times. This has happened under various articles of the treaty including- most importantly for this dissertation - under the Articles 101 and 102 TFEU.

Since sport has not been officially among the EU policies, it has also not been involved in secondary legislation\(^{25}\). However both the Commission and the European Council have taken sport into account through their soft law instruments\(^{26}\) and statements that offered political guidance for the interpreters and actors of European sport. Further on despite its absence in EU jurisdiction, cases related to sport have been challenged for several times in front of the European courts that has involved especially the Commission to debate whether different provisions of EC treaty are applicable to sport\(^{27}\). Finally there is also wide number of decisions of the European Commission with a connection to sport. These decisions (courts and Commission) together, that in fact are the most debated one in the academic world and that are also inevitable for the content of this, form the indirect effect to the EU legislation that has been widely debated and not al-

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\(^{23}\) For example Van den Bogaert – Vermeesch 2005, p. 4.
\(^{24}\) proposed European constitution, article III-282.
\(^{25}\) This has not changed after the introduction of EU-treaty since it does not provide EU opportunity to harmonise sport related legislation. See art. 165 of EU-treaty.
\(^{27}\) Garcia 2009, p. 269.
ways easily swallowed especially in the legal space before TFEU, where sport still lacked its position in the primary treaties 28.

In purely broadcasting related matters there are no court decisions in the European courts. However broadcasting related matters have been scrutinised by the European Commission in several decisions concerning broadcasting rights 29 most well-received decisions being decisions regarding joint selling of media rights for UEFA Champions League 30, German Bundesliga 31 and English Premier League 32. In these decisions the Commission is evaluating the position of European Competition law as it comes to the joint selling arrangements of the aforementioned football leagues and determining rules for the joint sales of football leagues in question. Until now the Commission has been rather generous with regard to the football associations and all three leagues have been given an exemption from the competition rules in order to ensure joint selling agreements if they fulfil certain commitments. These decisions are under special observation in the fourth chapter of this dissertation.

Finally, as a special feature and a traditional character, sport associations have extremely strong and autonomous internal regulation in European sport 33. In fact definition of ‘sporting autonomy’ assumes that sport and law are separate realms that each have its own purpose. This has also reflected to the national level in Europe and many European countries have taken non-interventionist policy concerning sport with reluctance to intervene any sport disputes. However on the course of last few years’ sports associations have received growing attention from the governments of member states with a task to implement social and economical policies of the state in exchange to the state aids given to the associations 34.

Today especially big international association IOC, FIFA and UEFA are considered to be extremely strong stakeholders in the European sport and this can be seen also through their major contribution to every sport related item of jurisdiction and decision that is made in the EU. They all possess strong lobbying networks established to run their autonomous interests. Thus it is no surprise that the incursion of EU into sport is

31 Commission Decision on Joint selling of rights to the German Bundesliga OJ L 134/46.
32 Commission Decision on media rights of FA Premier League.
33 Halila 2006, p. 12-16.
not welcome development for the governing bodies, especially since until December 2009 sport was lacking a direct reference points in the primary law of EU.\textsuperscript{35}

### 1.4 Outlining the topic of the dissertation

The legislative framework mentioned in the previous part of this dissertation form the core structure to the sport related matters in the European Competition law. This dissertation will evaluate the broadcasting rights sales related decisions given by the Commission\textsuperscript{36} from the European Competition law point of view. Furthermore sports as a phenomenon ad its special position in the legal framework of EU will be given an important position throughout this dissertation.

The dissertation will start with a definition of the position of sport in the European legal framework. First and the most important question when defining the position of sport is ‘whether sport enjoys a special status in the European legal network?’ and if yes, whether this has a direct effect to the competition regulations and decisions especially in broadcasting related matters\textsuperscript{37}. Another question to be answered in this paper is ‘where is the decisive line (or what are the characteristics to define this line) that will bring sports related matters to the application of EU legislation?’\textsuperscript{38}.

This dissertation will try to approach these questions mainly from the point of view of latest decisions of the European Courts and Commission decisions related to sports and in particular football. It will also give an overview to the preparation of sport related soft law agendas in the Commission and consider the future of sport in policy of the European Council with reflection to its statements in order to complete the background of the development of sport policy in the EU. It also tries to draw some references from the American sports model in comparison with the European model of sport.

For the sake of length of this paper, I will have to leave out some factors that are related to this topic and that would have added some value to the research. As it

\textsuperscript{35} Parrish – Miettinen 2008, p. 12.
\textsuperscript{36} UEFA-decision, Bundesliga-decision, FA Premier League-decision.
\textsuperscript{37} This matter is researched especially in the parts 2, 3 and 4 of this dissertation.
\textsuperscript{38} To get a starting point for the problem between recreational “purely sporting interests” and commercial nature of sport see Halila 2006 II, p. 12-14.
comes to the primary EU legislation, I will only concentrate on evaluation of Article 101 TFEU. Even though it is an exciting thought to extend the view to the Article 102 by including some consideration about the abuse of the dominant position for example concerning de facto monopolist positions of purchasers of the TV-deals, I will maintain the main line of this dissertation in the matters related to prevention, restriction and distortion of competition within the common market trade and possible exemptions with regard to Article 101 (3) TFEU.39 Train of thought and the ultimate goal throughout the evaluation is to try to make conclusions that ensure in sports and particularly in football the accomplishment of the initial goal of competition law: maximal consumer welfare.40

In order to proceed with the evaluation of football broadcasting deals from the competition law point of view, it is inevitable to define the position of football market in the European Competition law. As a basis for my evaluation I will use Commission Notice on the definition of relevant market for the purposes of Community Competition law41 and vast written literature spurred from this notice. The goal is to figure out whether sport and more narrowly sports broadcasting and football broadcasting have and can have a position of relevant market in the European Union, and finally what does it mean for the application of EU law.

For research economical reasons I will also have to leave out of this dissertation wider analysis of impact of Council regulation 1/200342 concerning national enforcement of scrutiny under Articles 101 and 102 TFEU. Reason for this is again research economical, although this regulation undoubtedly has influenced and widened the broadcasting related matters also to the hands of national authorities.43 However this regulation will be referred in this dissertation for several times due to its importance to the evaluation of article 101 AFEU.

New audiovisual media services directive of the council and the parliament44 will also have to be left outside this text. Although it has certainly relevance and history

39 TFEU article 81.
42 Modernisation regulation 1/2003 EC.
43 See for example Office of fair trading 2007.
with the football related broadcasting deals\textsuperscript{45} since the core value of the directive is to make a small technological revolution by ‘rebooting EU rules on traditional TV broadcasting for the digital age’\textsuperscript{46}. This dissertation will not concentrate to research the subject matter from the point of view of developing media. Instead it approaches the subject from the point of view of football and sport in wider perspective as a specific element in the European legal system.

Finally this dissertation will only concentrate to the joint sales -side of the broadcasting rights. The main reason for this is also research-economical. Making an in-depth analysis to the subject matter requires first of all vast study of sports as a phenomenon and to its socio-economical factor in the European legal system\textsuperscript{47}. Further on prudent analysis of collective sales as a phenomenon, football broadcasting related decisions of the Commission and following economic consequences is a wide and manifold subject. Therefore I had to leave broadcasting rights purchase -related matters outside this dissertation and choose the sales-side that has bigger influence to the economy of European football and European sport - two entities whose preservation and healthy future will the main goal for the considerations of the conclusions -section of this dissertation.

\textsuperscript{45} For example article 3a in the former directive 97/36/EC concerning access to the sports events of major importance on free television.


\textsuperscript{47} Part 2 of this dissertation.
2. Special status of sport in European law

2.1 Special status of sport in the European legal system

A French pedagogue better known as the founder of the modern Olympics, Pierre de Coubertin described the peculiar character of sport as follows:

“Sport is a part of every man and woman’s heritage and its absence can never be compensated for”48.

Although relatively long time has passed since de Coubertin’s times, sport has retained its special position in the society49. It is noteworthy to mention though that growing economic influence in sport has made the nature of sport different and has brought in lots of needs to regulate sport and the phenomena around it with legislative measures.

As it was mentioned in the introduction, the European legislative framework did not give the EU a specific legal competence for sport before TFEU.50 However sport has always been an area to which many EC treaty provisions have applied and which has therefore also been subject to judgements by the European Courts and Institutions starting from the first sport related case brought in the ECJ back in 1974 concerning freedom of movement and special status of sport51.

Many queries have been raised concerning potential special status of sport in the European legal system that have resulted numerous cases in the European Courts and also a few soft law papers from the institutions of EU. This part of dissertation will give an overview of sports in the European legal debate starting from the description of traditional European model of sport. It will the proceed with landmark decisions of the ECJ, giving also brief look at the Commission soft law papers on sport52 and finishing with a view towards the future of sport in post-Lisbon Treaty Europe.

48 de Coubertin.
49 Good example of remaining ideology of de Coubertin is that the Commission quotes de Coubertin’s words in the introduction of its white paper on sport released in 2007.
50 For example Commission working document accompanying the White paper on sport, 2007.
51 Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, para 14.
2.2 The European Model of sport

Before it is possible to begin formulating European sports policy, it is necessary to take a look at the organisational model of European sport. European sports model can be described in a pyramid-model where the top of the pyramid is occupied by International federation and in the bottom lay the athletes. In between there are from top to bottom continental federations, national federations and sports clubs. This chain is connected with a system where lower positioned entity is a member of the next entity “in the line”\(^{53}\). This model was created in Western Europe during the cold war and after the fall of communism also Eastern European countries adopted similar model. Sports associations and further on clubs are democratic institutions where every member can in principle vote and for example elect board of directors. However as many clubs choose to operate as professional branches, this picture of pure model is today blurred\(^{54}\).

Another very distinct feature for European sport is that every discipline of sport only has one federation, which makes it extremely hard for new leagues to penetrate the market. \(^{55}\) Further on state has usually strong role in European sport both as a facilitator and as a regulator\(^{56}\). Finally a system of promotion and relegation and hermetic sports leagues with best teams getting promoted at the end of the season to the higher division as worst ones are relegated to a lower division is something that is distinct for European model of sport as in the American model sports leagues are typically closed\(^{57}\).

European Commission took its first official position towards European sport in its consultation document “European Model of Sport”\(^ {58}\) that preceded Helsinki Report on Sport. In this document Commission recognised the described system and already acknowledged the fact that Bosman -judgement will have huge financial repercussions on European sport\(^ {59}\).

Since its adoption European model of sport has been plagued with growing amount of influencing factors from American model of sport\(^ {60}\). This is mostly caused by big economic changes in European sport and emergence of new stakeholders of sport repre-
senting players, clubs, agents and other stakeholders. The reformation of European sport and financial influence will be discussed in the later parts throughout this dissertation.

2.3 Formulating a European sports policy

2.3.1 Early landmark decisions of the ECJ before Meca-Medina

Sport related matters have been under the jurisdiction of the ECJ in several decisions. As mentioned before, first time the position of sport was under the observation of ECJ was in case Walrave and Koch v. Association Union Cycliste Internationale\(^6^1\) decided by the ECJ on December 12\(^{th}\) 1974. In this case two cyclists claimed that a provision in the internal regulations of the international cycling union\(^6^2\) stating that in the cycling competitions the pacemaker must be of the same nationality as the stayer, is incompatible with the freedom of movement related Articles 48 and 59 of the EEC treaty and the provisions of Council regulation on freedom of movement for workers within the community\(^6^3\) \(^6^4\).

The Court declared in its decision that sport is subject to community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the EEC treaty. Substantial claim of Walrave and Koch was deemed to be purely of a sporting interest and to have nothing to do with economic activity. Therefore it was decided that the EEC treaty did not apply in this matter and regulations of a sports association of a purely sporting interest do not fall in the scope of community law.\(^6^5\) Although the decision did not put the underlying case under the influence of Community law, it drew for the first time an extremely important and longstanding line between economic and non-economic side of sport in order to distinguish the position of sport in the Community law.\(^6^6\)

\(^6^1\) Weatherill 2005, p.416.
\(^6^2\) Association Union Cycliste Internationale is an independent sports association unconnected to any state, see Parrish – Miettinen 2008 p. 54-55.
\(^6^3\) Council Regulation (EC) 1612/68.
\(^6^4\) Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, para 2.
\(^6^5\) Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, para 4.
\(^6^6\) Court soon reaffirmed its position in case concerning semi professional football and practices that exclude foreign players from certain matches for “reasons which are not of an economic nature” in Case 13-76 Donà v Mantero, para 12.
Probably the most important, or at least the most recognised case related to football was decided by ECJ in 1995 as Bosman verdict liberated the transfer system in the European football communities and played also significant role in the revision of the foreign player quotas in the European football leagues leading to a tremendous increase in professional player mobility in Europe\textsuperscript{67}. In Bosman-case a Belgian football player Jean Marc Bosman whose transfer had failed appealed in the Belgian court that his club’s endeavour to block his transfer without getting compensation from the potential new club is against the fundamental right of free movement that is secured in the Article 48 EC. Furthermore Bosman claimed that the 3+2 rule applied by UEFA and also by Belgian football federation was discriminating free movement of labour. Thus he questioned the transfer system and the nationality quotas by FIFA and UEFA.\textsuperscript{68}

The court of appeal (Cour d'Appel) of Liège asked the ECJ to give a preliminary ruling concerning two questions. The first question concerned the rules which permit a football club, if a player under contract with it moves to another club after that contract has expired, to demand a certain sum of money (the so-called transfer fee) from that club. The second question concerned the rules that restrict the access of foreign footballers to the various competitions (the so-called rules on foreign players).

In its decision the court agreed with Bosman’s arguments on both claims and decided that a major economic activity such as transfer in football shall not be granted an exemption from the rules on Competition Law or to be given right to discriminate against EU nationals on the grounds of their nationality. It took a position against the rules of sports associations as follows:

‘Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.’\textsuperscript{69}

For the first time the court had taken a revolutionary position against internal regulations of a sports association that had economic repercussions as the Bosman case and

\textsuperscript{67} Kesenne, 2007, p. 388-389.
\textsuperscript{68} Garcia 2006, p. 1.
\textsuperscript{69} Case C-415/93, Union royale belge des sociétés de football association ASBL v Bosman, para 14.
rules applied in the case concerned directly economical dimension of sport\textsuperscript{70}. Advocate General Lenz\textsuperscript{71} as well as majority of academics\textsuperscript{72} shared the Court’s position regarding infringement of fundamental freedom of free movement of labour although many voiced their concern over the financial repercussions that this decision would be likely to cause to European football and sport in general. Therefore a small revolution in the European Community law with regard to sport saw its dawn.

Commercial world of football adapted very well to the changes followed by the Bosman-case. Although the decision shook the world in the beginning, clubs were soon able to find loopholes to ensure lucrative practices for the rich clubs and agents in the transfer market. Nowadays clubs just have to tie their young prospects and key players with long agreements and if in the end of the contract period player does not want to extend the contract, he is sold elsewhere well before the end of contractual season. Sports associations also had the stronghold in preparation procedure of new transfer regulations and finally these regulations were agreed between FIFA and the Commission not earlier than in 2001 with an agreement that was never approved by formal decision.\textsuperscript{73}

Today transfer fees still remain to exist in football and in fact biggest fees have only grown bigger after the Bosman-decision\textsuperscript{74}. Furthermore decreased transfer fees in most cases are replaced with an expenditure that comes from extremely high wages that clubs started to pay as a result of liberalised player market\textsuperscript{75}. In the end the greatest influence of Bosman-case to the European sport is that it officially launched the debate over the definition of suitable relationship between European Competition law and sport\textsuperscript{76} and has been followed by numerous other cases\textsuperscript{77}. As Bosman-decision deregulated and thus

\textsuperscript{70} In line with the preceding Walrave-case.
\textsuperscript{71} AG Lenz on Bosman 1995, para 154-164.
\textsuperscript{72} for example Pullen 1996, p. 156.
\textsuperscript{73} Commissioner Mario Monti had stated that this was “… the end of the Commissions involvement in disputes between players, clubs and football organisations”, Weatherill 2003, p. 72.
\textsuperscript{74} In fact 10 biggest transfer fees in history of football are all positioned to post-Bosman period with a phenomenal transfer fee of 92,5 million Euros paid by Real Madrid for transfer of Cristiano Ronaldo in summer 2009 topping the chart.
\textsuperscript{75} Today player salaries/transfer fees are even bigger than back in Bosman-days. This has also economic repercussions to other fees such as money paid to football agents. For example during the summer transfer window more than 70 million GBP was paid to the agents - out of the game of football. This tendency has caused plenty of unrest in the world of football. See for example Gary Neville column on The Sunday Times of Malta 6.12.2009.
\textsuperscript{77} for example Case C-176/96, Jyri Lehtonen v Fédération royale belge des sociétés de basketball ASBL and Joined cases C-51/96 and C-191/97, Deliège v Ligue francophone de judo et disciplines associées
opened player market in European football\textsuperscript{78}, it also strengthened the position of governing authorities FIFA and UEFA in European sport debate. Sports governing bodies had been involved already before but since the economic factor and Community legislation came strongly into the picture, they started actively lobbying for sport to be treated as a general exemption from Community law\textsuperscript{79}.

2.3.2 Primary legislation and sport before the TFEU

The Member States did not end up including sports into the TFEU accidently or without preparation. Although sport did not have any direct competence in community primary legislation before the introduction of TFEU, it had been - despite its unofficial position - subject to the application of European acquis communautaire and sport had created a considerable impact with wide application in European policies in a number of areas.

All three main EU Institutions Council, Commission and Parliament intervene EU sports policies in their own ways and have together had major impact to the development of European sport already long before TFEU. European Council has done its interventions infrequently but usually with influential impact\textsuperscript{80}, but as there has not been any provision in the treaty for establishment of formal Sports Council, the Council’s impact on sport has been limited. The work of the Commission has also a major impact on sporting activity despite its lack of regulatory competence. Formal responsibility for sport within the commission lies with the DG for Education and Culture, but the impact of sport extends altogether to at least 17 DG’s. In the Parliament sport is influenced through the exercise of its legislative, budgetary and scrutiny powers. Sporting issues are primarily discussed in and reported by the Committee of Culture and Education\textsuperscript{81}, although also numerous other Committees debate issues related to sport\textsuperscript{82}.

From the primary treaties the EEC treaty (Treaty of Rome) does not directly mention sport and neither does the treaty on European Union concluded 1993 in Maastricht nor its amendments made in 1999 by the treaty of Amsterdam and in 2003 by the treaty of

\textsuperscript{78} Kesenne 2007, p. 398.
\textsuperscript{79} Parrish – Miettinen 2008, p. 33-34.
\textsuperscript{80} See as an example in footnotes 83 and 84.
\textsuperscript{81} For example “Draft report on the future of professional football in Europe”, Committee of Culture and Education 2006.
Nice. Yet sport has its position as a declaration in treaty of Amsterdam\textsuperscript{83} and in the Presidency conclusions (“Nice declaration”) of the European Council Meeting of Nice\textsuperscript{84} 2000, which took positions concerning matters on economic side of sport and on the other hand with purely sporting interests related issues. Both of these interventions by the Council led to further preparation and also produced remarkable official statements on sport from the Commission, and particularly Nice conclusions were seen as long-awaited change in member states’ attitude to debate on the birth of EU sports law as a part of wider future EU sports policy\textsuperscript{85}.

2.3.3 Helsinki report on sport 1999

As a result of declaration in treaty of Amsterdam and further encouragement stated in the European Council meeting in Vienna December 1998, the Commission tried to pave the way for clearer application of sport in the Community policies for the first time through its Helsinki report on sport that was published in December 1999. Main goal of the report was to give pointers for reconciliation of sport dimensions between economic and non-economic sectors.\textsuperscript{86}

In its report Commission referred several times to its consultation document that was published in September 1998 called ‘European Model of Sport’\textsuperscript{87} with an aim to prepare the Helsinki report and in order to explain the European model of sport. In its wide explanation of the model, Commission recognised the facts that sport is changing and this change is best shown in commercialisation and globalisation of sport\textsuperscript{88}. In the end of its consultation document the Commission asked questions from the stakeholders of European sport, if it is reasonable to keep the existing pyramid-shaped European Model of Sport\textsuperscript{89} or if the system needs to be adjusted\textsuperscript{90}.

\textsuperscript{83} “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 European Union 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.”. Treaty of Amsterdam, declaration 29 on sport.

\textsuperscript{84} Council gave a lengthy opinion on sport and referred also to the broadcasting rights with a goal to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport. Presidency conclusions of Nice, 2000, p.31.

\textsuperscript{85} Parrish 2003, p. 19.

\textsuperscript{86} Helsinki Report on Sport 1999, p. 3.

\textsuperscript{87} Commission European Model of Sport 1998.

\textsuperscript{88} Garcia 2009, p. 272.

\textsuperscript{89} Ibid. p. 3.
The Helsinki report already recognised the danger of a growing number of lucrative sports events and the temptation for certain sporting operators and certain large clubs to leave the federations in order to derive the maximum benefit from the economic potential of sport for themselves alone as a jeopardy to the principle of financial solidarity between professional and amateur sport. It also reaffirmed the conclusions of the European Union Conference on Sport organised by the Commission in Olympia in May 1999 with a plea for clarification of the legal environment of sport in Community law. However it did not set any demands for large-scale implementation of the sports policies into the primary Community law.

In level of actual conflicts Helsinki report of sport brought up for example challenges around joint sales of television rights as well as the aftermath of Bosman-case that had resulted widening economic gap between rich and poor clubs as well as some differences in national tax legislation between member states. Further on the report raised its concern on measures taken by some member states to limit or manage the effects of the commercialisation of sport that might increase disparities between member states. Although these measures did not directly state the need of legal certainty and recognised state of sport in primary Community law, one can read it indirectly from the conclusion of the report.

Finally the Commission recognised in the spirit of Walrave-decision that in terms of economic activity sporting sector is subject to the rules and falls under the EC treaty like the other sectors of the economy. Commission also gave some substantial examples of the practices that would not come under the competition rules, about the practices that in principle would be prohibited by the communication rules and finally practices that would be likely to become exemptions from the competition rules thus creating a

\[90\] Ibid. p. 11.
\[91\] Ibid. p. 4.
\[92\] Helsinki report on sport, 1999, p. 6-7.
\[93\] First the conclusion states that without direct responsibility it cannot guarantee safe future for sporting structure in Europe. Furthermore it is stated that EU need to recognise the importance of the social function of sport in its policies with a goal to find a common foundation of sporting principles. This function could be fulfilled by recognition of sport in the EC treaty.
\[94\] Although commission stated that these examples are without prejudice to the conclusions that the Commission could draw from the in-depth analysis of each case. Helsinki report of Sport p. 8.
sporting exemption. These examples were also emphasised in the XXIXth Commission report on competition policy.

Helsinki report on sport received a warm welcome from the main governing football bodies FIFA and UEFA as both Joseph Blatter and Lennart Johansson were expressing their gratitude towards constructive approach of the Commission while encouraging Heads of State and Governments of the Member Countries to reinforce the changed attitude towards sport and to seriously consider the special position of sport in future EU politics. Both of these comments can be considered as strong voices of demand in order to lobby for a special treatment for football and its governing bodies in the European policies.

2.3.4 Meca-Medina decision, a new direction?

Strong demand and powerful lobbying of sports associations to increase their participation and influence in European sports governance was rewarded in decision concerning two professional swimmers David Meca-Medina and Igor Majcen, suspended from competing for a period of two years by a decision of FINA’s Doping Panel in August 1999. The athletes had unsuccessfully appealed the suspension to the CAS and subsequently were trying to impress the Commission with their complaint that was filed in May 2001. In their complaint Meca-Medina and Majcen claimed that the stringent doping regulations adopted by IOC and further implemented by FINA to be in collusion with the Community rules on competition (Articles 81 and 82 EC) and freedom to provide services (Article 49 EC) leading to a situation, that unfairly deprives them from practising their profession. After analysing the anti-doping rules at issue according to the assessment criteria of competition law and concluding that those rules did not fall

95 Ibid. p. 8-9.
97 President of FIFA.
98 At that time president of UEFA.
100 Athletes were tested positive for Nandrolone on 31 January 1999 during the World Cup in that discipline at Salvador de Bahia (Brazil), where they had finished first and second respectively. (Case 519/04 P., David Meca-Medina and Igor Majcen v Commission, para. 3.8).
101 The complaint was partially successful, though since the doping ban was reduced from initial four years to two years by arbitration award of 23 May 2001 (Case 519/04 P., David Meca-Medina and Igor Majcen v Commission, para. 3.13).
foul of the prohibition under Articles 81 and 82 EC, the Commission decided to reject their complaint.103

Meca-Medina and Majcen lodged their appeal against the Commission to CFI in October 2002 with a claim to the court to annul the disputed decision. Republic of Finland sought and was granted a leave to support the Commission and lodged a statement concerning the subject matter on 7th of April 2003, and thus Commission supported by Finland were claiming a dismissal for the action of the applicants.

The applicants had three pleas in law in support of their application. In their first plea they claimed that the Commission made a manifest error of assessment by deciding that IOC is not an undertaking in the meaning of community law. Further on in their second plea the applicants claimed that the Commission made an error of assessment when deciding that limitations set for the athletes in the anti-doping rules in question was not a restriction of competition in the meaning of EC law, and that the Commission had wrongfully applied the Wouters-formula104 in order to justify its cause105. Finally the applicants claimed that the Commission had done wrong by stating that in this matter ‘there is no evidence of the responsibility of any authority of a Member State for the adoption of measures which could prove to be contrary to the principle of the free movement of services’ (Article 49 EC).106

After hearing the parties and reading their submissions, CFI rejected all three pleas of the applicants and dismissed the application as erroneous and unfounded107. Court recognised also the fact that although it had never before had to rule on whether ‘the sporting rules in question are subject to the Treaty provisions on competition’108, the principles concerning sport set in previous decisions ‘are equally valid as regards the Treaty provisions relating to competition’109. Therefore, according to CFI, in relation

103 Ibid. para. 3.20.
104 Case C-309/99 Wouters and others v Algemene Raad van de Nederlandsche Orde van Advocaten, para. 107, that gave an exemption to the Dutch Bar Council to apply its internal regulations that infringed Article 81(1) EC, since the rule in question could reasonably be considered to be necessary in order to ensure the proper practice of the (legal) profession, as it is organised (in the Netherlands). About relationship of Wouters-doctrine and sport, see for example Whish 2009, p. 126-130 and also part 3.6 of this dissertation.
105 The CFI’s reluctance to use Wouters-formula was criticised for example by Stephen Weatherill (Weatherill 2005, p. 416).
106 Case T-313/02, Meca-Medina and Majcen v Commission, para. 29-32.
107 Ibid., para. 69.
108 Ibid., para 42.
109 Ibid.
with competition law Articles\textsuperscript{110} sports matters fall under the same exception as they do with other provisions of the treaty and are able to be evaluated under similar mechanism as other sport-related matters in relation with EC Treaty.

In the decision court used first the well-known orthodox approach created in Walrave case by creating a division between sports activities with economic connection and sports activities with purely sporting interest endorsing it with examples from earlier case law\textsuperscript{111}. Due to their pure sporting objectives to pursue fair play and health of the athletes, anti-doping were placed in the second group\textsuperscript{112}. Thus, according to CFI decision, anti-doping matters fall under the group of activities that have purely sporting interests and therefore their application will escape the rules of EC Treaty\textsuperscript{113}. CFI also rejected the applicants’ argument stating that rules cannot be purely sporting if they have economic repercussions as being against earlier case-law\textsuperscript{114}, and stated that even the excessive nature of anti-doping rules would not cease them from being purely sporting rules\textsuperscript{115}. The fact that rules in question had nothing to do with economic consideration meant subsequently also that the method analysis of Wouters doctrine could not be used in this case\textsuperscript{116}.

CFI’s arguments that were widely criticised by academics\textsuperscript{117} were obviously wonderful news for sports associations since it increased their potential influence in sports litigation\textsuperscript{118}. Critiques claimed that in its decision CFI was just desperately trying to form words to make sense of the claimed gulf between sports and economy by falsely stating that doping regulations of sports associations do not have any economic repercussions. Furthermore CFI’s reluctance to use Wouters formula was seen as a manifest error, especially since the Commission had already applied the same formula in its earlier sports related decisions to define home and away rule in football\textsuperscript{119} and in question concerning multiple ownerships of football clubs\textsuperscript{120}. Instead of claiming that doping-rules have no economic consequences, it would have been logical to admit the economic impact of

\textsuperscript{110} Articles 81 and 82 EC.
\textsuperscript{111} Lehtonen, Bosman, Deliege, Walrave etc.
\textsuperscript{112} Case T-313/02, Meca-Medina and Majcen v Commission, para. 44.
\textsuperscript{113} Weatherill 2005, p. 417.
\textsuperscript{114} Case T-313/02, Meca-Medina and Majcen v Commission, para. 52.
\textsuperscript{115} Ibid., para. 55.
\textsuperscript{116} Ibid., para. 65.
\textsuperscript{118} See for example Weatherill 2005, p. 417.
\textsuperscript{119} Commission Decision Excelsion Mouscron concerning home and away rules of UEFA (IP/99065).
\textsuperscript{120} Commission decision on Multiple ownerships of football clubs, COMP/37806.
internal regulation to sport and then by using Wouters formula to assess whether the overall context of the decision or effects that it produced, the consequential restrictive effects go beyond the effects that are necessary to “protect” integrity of sport. In case the overall effect would be justified because of its special characteristics as in Wouters\textsuperscript{121}, the sports activity would escape the effect of EC Treaty concerning that particular part of the case\textsuperscript{122}.

Meca-Medina and Majcen successfully appealed the CFI decision to the ECJ concerning all three questions that were under observation of CFI. The applicants pleaded ECJ to set aside the judgment of CFI and grant the form of order that they were initially seeking for. The Commission on its behalf retained its position with a plea to dismiss the appeal in its entirety and in the alternative to grant the form of order sought at first instance and dismiss the action for annulment of the decision at issue.\textsuperscript{123}

ECJ took an unusual step of relying upon the Statute of the Court\textsuperscript{124} to give a substantial decision instead of referring the case back to CFI\textsuperscript{125}. In it’s decision ECJ, recognising the difficulty of drawing the line between economic aspects and purely sporting interest, referred to Donà -decision stating that the provisions of Community law concerning freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events\textsuperscript{126}. However ECJ took a different opinion compared to CFI’s reasoning and AG Léger’s opinion\textsuperscript{127} stressing out that first of all doping regulations could not be left out of the observation under Article 81 EC just because they were purely sporting rules and were set to secure the principle of fair play\textsuperscript{128}. Second of all such provision will always have to be restricted to its proper objective and the entire sporting activity cannot be

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\textsuperscript{121} Case C-309/99 Wouters and others v Algemene Raad van de Nederlandsche Orde van Advocaten, para. 107.

\textsuperscript{122} Weatherill 2005, p. 420-421.

\textsuperscript{123} Case 519/04 P., David Meca-Medina and Igor Majcen v Commission, para. 13-14.

\textsuperscript{124} Statute of ECJ, Art. 61.

\textsuperscript{125} Szyszczak suspects that with its rare intervention ECJ wanted to address an issue of growing importance or optionally just approach the substantial application of sporting rules to competition law since it had not been yet done squarely (Szyszczak 2007, p. 104).

\textsuperscript{126} Case 13-76, Donà v Mantero, para. 14-15, See also AG Cosmas on Deliège 1999, para. 84 concerning restrictions to freedom to provide services, and “an overriding need in the public interest” justifying restrictions.

\textsuperscript{127} AG Leger took an interesting view on claiming that while it is clear that economic interest exist nearly in every case and also in this one, this case could not fall under the treaty since the economic interest is “secondary” interst. (AG Léger on Meca-Medina 2006). This view was criticised heavily by Stephen Weatherill (Weatherill 2006, p. 648).

\textsuperscript{128} Walkila 2008, p. 280.
automatically excluded from the scope of the treaty. Thus every case has to undergo to a separate analysis measuring its legitimate objectives and proportionality of those objectives. This has to be done with regard to each and every characteristic of the case that could connect it with the treaty. This is in line with spirit of Wouters formula that was earlier neglected by CFI, and therefore led to an error of law by CFI.

Concerning the substantial pleas ECJ dismissed all three questions that were under its observation finding that appellants’ pleas were not substantially convincing enough. Therefore substantial judgement did not change, pleas of the appellants were dismissed and Meca-Medina and Majcen were ordered to cover all costs of both proceedings without any remedies from the Commission since they were in essence unsuccessful.

Although ECJ’s decision in Meca-Medina did not substantially change result of CFI’s judgement, it’s meaning to European legislation concerning sport is significant. In its decision ECJ, by abandoning the argumentation of CFI, confirmed that Wouters formula should be applied in European law when making distinction between purely sporting matters and matters with economic interest. It also made an end to an argument used by sports associations that some things with regard to sport could be exempted from the application of EC treaty just because of its “purely sporting interest”. Following the AG Léger’s opinion on Wouters ECJ accepted that each professional rule must undergo to an examination on a case-by-case basis, depending on its subject matter, context and purpose. This is naturally cutting the autonomy of sports associations but instead of depriving it from them, it is making their autonomy conditional. It is still up to these associations to make first assessment, whether their rules and practices infringe treaty and can be exempted and according to Art 2 in the modernisation regulation. The burden of proving infringements of the treaties will rest on the party alleging the infringement and treaty provisions apply only where after assessment of the

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129 ECJ Press release No 65/06, p. 2. Same interpretation was already stated by ECJ concerning free movement of persons in Joined cases C-51/96 and C-191/97, Deliège v Ligue francophone de judo et disciplines associées ASBL, para. 43.
132 Ibid. para. 47.
134 Ibid. para. 62.
135 Weatherill 2006, p. 653.
138 Modernisation regulation art. 2.
overall context in which the decision was taken, the consequential restrictive effects go beyond those inherent to the pursuit of the objectives of sport\textsuperscript{139}.

Even though the idea of conditional autonomy mechanised with the scrutinising system based on Wouters formula has received lots of support in the academic world\textsuperscript{140}, some critiques see this approach as an application of American rule of reason approach that ECJ has been rejecting since it was first tried to introduce in Grunding\textsuperscript{141} -case back in 1966\textsuperscript{142}. As an interesting curiosity claimed by some academics is that this device amounts to a category of mandatory requirements that go beyond the treaty exception Article 101 (3) TFEU itself\textsuperscript{143}. Therefore, most likely deservingly, according to Parrish it is not very likely that this application will be court’s final refinement of law in this respect\textsuperscript{144}.

2.3.5 The Independent European sports review 2006

The Independent European sports review was drafted in between two Commission papers\textsuperscript{145} on sport in the aftermath of Meca-Medina discussion that shocked the sporting world. Initiative for this review came during the EU presidency of The United Kingdom with a goal to produce a report that is independent of the football authorities on how the European football authorities, EU institutions and Member States could best implement the Nice Declaration on European and national level. Review group was led by Portuguese José Luis Arnaut and consisted of in total 13 experts from 9 different countries divided in three groups: legal group, political group and economic group\textsuperscript{146}.

As a result of its work the research group published a vast study in various spheres of sport in European Union with a special focus on football\textsuperscript{147} acknowledging throughout the document that sport possesses characteristics distinct from other sectors\textsuperscript{148}. It also argued that rules of governing bodies listed in the report should be deemed compatible

\textsuperscript{139} Weatherill 2005, p. 421, Weatherill 2006, p. 652.  
\textsuperscript{140} See for example Weatherill stating that Wouters -formula fits the business of sport perfectly well by leaving space for the peculiar characteristics of sport. (Weatherill 2005 p. 421).  
\textsuperscript{141} Joined cases 56 and 58-64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission.  
\textsuperscript{142} Parrish – Miettinen 2008, p. 121.  
\textsuperscript{143} Szycszczak 2007 p. 105-106.  
\textsuperscript{144} Parrish – Miettinen 2008, p. 122.  
\textsuperscript{145} Helsinki report on sport 1999 and The White paper on sport 2007.  
\textsuperscript{146} Arnault 2006, p. 4.  
\textsuperscript{147} Even the official internet page of this study is called www.independentfootballreview.com.  
\textsuperscript{148} Same theme that was already developed in the “Nice declaration” by the Council.
with Community law thus further strengthening the tie of Community law in sport related matters\(^{149}\). Despite its argument stating that “sports and politics don’t mix”\(^{150}\), it also introduced a wide selection of tools for political interventions that it urged EU governments to commit to enforce\(^{151}\). Further on the review gave recommendations to the EU Institutions and to the European Football Authorities both individually and jointly. A list of recommendations include for example a goal to enhance legal certainty of the position of sport in European community, an aim to improve the level of governance around sports and especially in football and a task for the Commission to take the review into account in the elaboration of white paper on European Sport.

Finally the review pledged the EU and UEFA to set out the framework for bilateral relations and agreeing on model of cooperation for the good of European sports in order to save the European Model of Sport that, according to the review, was facing significant challenges and could only be saved through direct involvement of political leaders together with sports associations\(^{152}\)\(^{153}\).

Although (and maybe because of) the Independent European sports review was an informal report, it brought lots of substantial ideas to the framework of sport that people could have never before written in official reports. It was perhaps too focused on football but then again football is undoubtedly the biggest sport in Europe with the biggest division of economic and societal role of sport and therefore works well in a pioneer role for the rest of European sports to follow. As influence of the report the discussion on the position of sport in EU policies was re-opened and this led soon also to an official intervention by the European Commission\(^{154}\). As conclusion one could say that despite its unofficial nature the Independent European sports review made an important contribution to the development of European sports policies by initiating further discussions with its vast number of ideas that could be used in shaping the future position of sport in the EU.

\(^{149}\) List involved topics such as field of play rules, rules of structures of championships, rules relating to the national organisation of sport in Europe, rules concerning transfers and rules concerning encouragement of spectators to attend sporting events. See more about this list in Arnault 2006, p. 130 see at.

\(^{150}\) Ibid. p. 29-30.

\(^{151}\) Ibid. p. 117-128.

\(^{152}\) Ibid. p. 130-140.

\(^{153}\) Although this would give sports associations a central role in the decision making process of European sports, it could also give room for the opinion of other stakeholders – most importantly supporters that are the object of protection in the European competition law (García 2006, p. 4).

\(^{154}\) White paper on sport 2007.
2.3.6 The White paper on sport 2007

The Commission was pushed\textsuperscript{155} to publish another official paper on sport since Helsinki report of sport did not manage to have major impact in practice, and as new cases and legal challenges were constantly appearing around European law and sport. In its impact assessment paper Commission recognised need for better recognition of sport in EU policy making that stems from the objectives given in Nice -declaration, as well as potential of sport in both economic and social field in EU. In its assessment Commission set four different options to address role of sport in Europe and finally ended up addressing sport through a broad, comprehensive initiative, white paper on sport\textsuperscript{156}

Since sport was still not included in the primary community law, Commission was still not able to enact any legally binding documents and therefore this paper remained provisional towards other sports stakeholders and operational in non-obligatory sense for Commission itself. However Commission did its best in involving other stakeholders of sport through its extensive consultation including numerous consultation conferences, bilateral meetings with sports organisations and an online consultation that resulted 777 replies\textsuperscript{157}. The document features three main dimensions: societal role of sport, sports organisation in Europe (European sports model) and finally and most interestingly with regard to this dissertation the economic dimension of sport\textsuperscript{158}

As a result of the paper Commission published an action plan “Pierre de Coubertin” involving an action plan of 53 points with an aim to guide Commission in its sport-related activities during the upcoming years keeping in mind the principle of subsidiarity and the autonomy of sports organisations\textsuperscript{159} One of the all-embracing goals of the document was also to develop the concept of “specificity of sport” and thus contribute to legal clarity for all stakeholders of sport\textsuperscript{160}.

The chapter on the economic dimension of sport encouraged stakeholders of sport to further research the actual economic importance of sport in order to be able to determine it and to form sound knowledge background for future policy actions. However

\textsuperscript{155} For example report of Parliament’s Committee of Culture and Education report by Ivo Belet, Committee of Culture and Education 2006, p. 13.
\textsuperscript{156} Commission working document accompanying the White paper on sport, 2007.
\textsuperscript{157} MEMO/07/290.
\textsuperscript{158} White paper on sport 2007, p. 3.
\textsuperscript{159} Action plan “Pierre de Coubertin” 2007, p. 2-6.
\textsuperscript{160} IP/07/1066.
while encouraging stakeholders to further research the specificity of sport, the Commission ruled out the policy promoting general exemptions\(^{161}\) for sport by recalling the Wouters formula applied in Meca-Medina -decision\(^{162}\). This decision was particularly disappointing for the sports governing bodies.\(^{163}\) Another matter annoying sports governing bodies was Commission’s plan to improve sports governance through its intervention in governance of sports associations in order to develop transparency, democracy and accountability in the European sports association governance\(^{164}\).

White paper of sport received bitter and disappointed reception outside the European institutions, and in some sources\(^{165}\) the outcome was described even as a step backwards in comparison with Commissions previous paper, Helsinki report on sport 1999\(^{166}\). In particular European sports associations, being already in advance anxious over the upcoming decision and wanting to settle the status of sport in EU law once and for all and recognise the specificity of sport in a legally binding way\(^{167}\), were disappointed with the result of Commissions paper. Media release of FIFA described content of White Paper as “a missed opportunity” and as a direct ignorance of the regulatory competences of the International (sports) Federations forming the spine for the model of European sport\(^{168}\). UEFA together with other team sports associations declared the document as a disappointment that describes the current situation without addressing the autonomy of sport or legal stability in sport\(^{169}\).

Interestingly all associations failed (perhaps intentionally) to recognise the fact that the approach in White paper as a non-binding document was merely a re-statement of Meca-Medina principles without automatic contradiction in the potential autonomy given to sport in future\(^{170}\). Furthermore conditional autonomy of sports associations to decide exists since sport related issues would still escape the influence of TFEU provided that they are necessary in order to shield the special position of sport. EU has not

\(^{162}\) White paper on sport 2007, p. 12-13
\(^{163}\) Parrish – Miettinen 2008, p. 43-44.
\(^{165}\) See for example Hill 2009 (Jonathan Hill was at the time being a head of UEFA’s EU Office and therefore this view can be considered to be subjective).
\(^{166}\) On the other hand some academics clearly saw the paper as a serious attempt to find a balance between the Commissions need to supervise European sport and Sports associations’ will to secure wider autonomy for sport and thus their internal regulations. (Garcia 2009, p. 281-282).
\(^{167}\) UEFA Media Release 9/5/2007, point 3.
\(^{168}\) FIFA Media release 11/7/2007.
refused to accept the special position of sport. Its message to the sports associations is that from Meca-Medina on they just have to explain how their position is so special that it is necessary enough to “deserve” to be exempted\textsuperscript{171}.

2.4 Sport in EU today and future direction

Treaty on the functioning of the European Union finally introduced sport as a substantial part of primary EU legislation. Before the introduction sport related actions in community have been limited to soft law tools in form of communications, resolutions and different kinds of declarations (as it has been seen in previous parts of this chapter). Absence of direct reference of sport has definitely had its repercussions Since the Commission and European Courts have had to take positions, sometimes even drastic ones, regarding the application of EU law to sport in a space where there is no regulations concerning sport in the treaty, these decisions have always raised questions among the sport associations that have their mission to safeguard their autonomy in the sports decision-making. Therefore relation between European institutions and the sporting world before the TFEU could be considered to be “uncomfortable”\textsuperscript{172}.

Furthermore the community institutions had to be constantly careful not to overstep the limits of their competences\textsuperscript{173} as sport as a substantial matter has not been involved in the primary community legislation.\textsuperscript{174} Having a direct competence in the TFEU brings sport directly into the competence areas of the EU and should help to build confidence between the sports stakeholders in Europe. Yet the work is not done and there is still plenty to do in order to accomplish a clear definition of sport in the future Treaties\textsuperscript{175}.

Today’s position of sport in EU is manifold. One could say that sport is at the moment split into two sectors in three different ways. First of all, as established already with Walrave decision, there are two dimensions dividing sport into economic and social

\textsuperscript{171} Weatherill 2006, p. 653.  
\textsuperscript{172} Van den Bogaert – Vermeersch 2006, p. 839.  
\textsuperscript{173} Good example of mishap regarding competences is the case C-106/96 UK v Commission, where certain grants given by the Commission were annulled by the court because they concerned areas that were out of competences of EC Treaty. Sport related grants would have had same interpretation before the introduction in primary law.  
\textsuperscript{174} Van den Bogaert – Vermeersch 2006, p. 823.  
\textsuperscript{175} See for example Ojanen – Aine – Kinnunen – Mylly 2005 p. 91-94.
sectors that both have their own purposes and that both apply different sets of regulations.

Secondly EU has two major policy themes for sport. One that aims to use sport as an economic growth factor and source of employment and another that targets to use sport as a vehicle for achieving social cohesion and employing sport as part of EU Citizens agenda. Third of all the approach of EU towards sport and particularly towards professional football has fallen into two competing sides that are trying to fix the question regarding the right approach towards sport. One approach sees sport as purely economical activity inheriting its view from Walrave decision and willing to apply Wouters formula for further definition of the position of sport. The alternative one supported particularly by big sports associations takes more political approach stating arguments about the role and autonomy of sport in society and the necessity to preserve it as something 'specific' or 'special'.

Nevertheless the main question still remains: how the special characteristics of sport should be given expression in the European Union law and how the balance between a social integrating and cultural role, and series of major economic activities generated by sporting activities, could be found. Although the CJEU (ECJ from 1.12.2009 on) has clarified the positions of economic and non-economic dimensions of sport for several times, lack of clear methodology to prove why this is the case is apparent. While the Walrave rule itself is clear, the dividing line between economic and purely sporting interests is getting constantly harder to define, and currently there are no major break-throughs neither in case law nor EU legislation in sight to remedy this problem.

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176 Sport has become "big business", primarily as a result of the increase of the value of broadcasting rights, especially television rights to sport events. The economic importance of sport within the European Union is considerable. It has been estimated that sport generates a value-added of €407 billion in 2004 representing 3.7% of the EU GDP and 15 million employees, which represents a share of 5.4% of the labour force. (White paper on sport 2007, p. 11, 17).
179 Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, para 4.
182 For example cases C-415/93 Bosman, C-176/96 Lehtonen, Case C-191/97 Deliege and Case C-265/03 Simutenkov.
183 Szyszczak 2007, p. 96-97.
Thus despite sport has been brought in to the primary legislation of EU\textsuperscript{185} through the TFEU, there is still clearly an element of legal uncertainty in the sport related questions in the level of primary Community law. Despite recent developments it cannot be said that interpretation of sport in European Union law is clear. Thus one can say that in the current situation it is still up to the case-by-case interpretation of the Court or the Commission to decide how is the position of sport is and will be interpreted in the European Union law. Subsequently this leaves also a major position for different kinds of lobbying groups and sports associations to run their own interests to the EU policies, that in the end usually does not serve European citizens as well as a clear legislative position would. Something has to be done in order to preserve the European sport and moreover nurture well-being of a European consumer.

2.4.1 Direct effect of sport

According to most academics direct effect of sport defined in Article 165 TFEU will not be revolutionary in European sport\textsuperscript{186} and European sport programs will remain mostly as they were before the reform and will only continue the execution of the “Pierre de Coubertin action plan” set in the White paper on sport\textsuperscript{187}. Article 165 TFEU gives EU only limited tools that provide merely incentive measures to be taken in the field of sport and leaves the position of EU to be cooperative\textsuperscript{188}, while the competence will mainly still rest with the Member States and sport associations.\textsuperscript{189} This is often referred as “soft competence”\textsuperscript{190} that describes the nature of this competence very well.

Since both harmonisation measures and direct implementation of the Council are excluded from the article\textsuperscript{191}, the main importance of Article 165 TFEU seems to be of a symbolic nature as a tool to improve mutual trust between European institutions and sports associations. On one hand it gives the EU a confirmation that sport is one of the EU policies thus legitimising community actions already taken in the field of sport. On the other hand the sports associations get at least partially what they want through the

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\textsuperscript{185} Art. 165 TFEU.
\textsuperscript{186} Van den Bogaert – Vermeesch, 2005, p. 3.
\textsuperscript{187} Rogulski – Miettinen 2009, p. 246.
\textsuperscript{188} For example harmonisation of laws is excluded. Further on Council can only adopt recommendations with regard to sport.
\textsuperscript{189} Van den Bogaert, Vermeersch 2006, p. 837-838.
\textsuperscript{190} Article, Lisbon treaty gives EU a say on Sports, 30.11.2009 <www.euractiv.com>.
\textsuperscript{191} Art. 165 TFEU: “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States (...) the Council, on a proposal from the Commission, shall adopt recommendations”.
explicit introduction of sport in the TFEU also recalling their primary status in sports governance through stating that European institutions can only carry a supportive role in sport.

Further on since sport is now officially among the EU policies, the Commission is bound to have a program and an action plan accompanied with respective budget for sport for the upcoming years. This is something EU could have not do before and it will be interesting to see what will be the content of Commissions first sports program that is planned to be implemented in 2012-2013\(^\text{192}\). Most academics are guessing it is not very likely that the Commission will introduce very far-reaching policy concerning the future of European sport. Instead it would be important to seize the opportunity to improve the impaired relationship between EU and sports associations by introducing policies that would not try to change everything at one go, but that would start with small steps to bring sports further towards the centre of European policies.\(^\text{193}\) One useful idea for implementation would be for example an effort to bring sport related matters to the list of aids described in Article 107 (3) TFEU\(^\text{194}\) that could contribute to clearer state support policy for sport and moreover channel the state support to right directions. It could also contribute to the development of governance of sports associations\(^\text{195}\). Other considerable option would be an effort to establish a block exemption for sport that was already hoped to be achieved in the Nice treaty 2000\(^\text{196}\).

As a conclusion, there is potential for European institutions to find balance between the contradicting wishes of sporting world and EU.\(^\text{197}\) It can be even said that until today this has been successful since even the IOC and FIFA gave “a green light” to the new treaty by stating that in their media releases that new treaty is a boost to sport, although they wanted to remind again that instead of trying to regulate sport, EU should support it\(^\text{198}\).

\(^{192}\) Presentation of Michael Krejza, Head of Sport Unit, European Commission, DG Education and Culture, 2009, slide 19


\(^{196}\) Weatherill 2003, p. 89.


2.4.2 Indirect effect of sport

As it is already stated in this dissertation, ECJ’s decision in Meca-Medina\(^{199}\) resulted a big change in the European sports policies. It was seen as a demise of the rule of “purely sporting interest”\(^{200}\) since from Meca-Medina on every sports related case that suspected to fall under the application and to infringe the Treaty, could be subjected to observation of European Courts. Although ECJ’s application of Wouters formula in Meca-Medina has been described as a revolutionary manoeuvre, it needs to be remembered that it is not the first time that this formula has been used to solve hardships of application of EU law. Similar test that is now to be used in sport has been used already in other sensitive areas such as application of competition law to social protection matters.\(^ {201}\)

This “conditional autonomy” of sports associations was restated by Commission in its White paper on sport\(^{202}\), in which Commission also challenged the entire existence of European model of sport introduced back in 1998\(^{203}\). Commissions explanation for their reluctance to accept single European sport model was new emerging stakeholders in the European sport\(^{204}\), that are gaining influence and challenging the pyramid-structure presented in the model and thus making it unrealistic to try to maintain a unified model of sport in Europe.\(^ {205}\) Sports associations were keen to keep their autonomy that was secured in the European sports model, and therefore both White paper of Sport and ECJ’s decision in Meca-Medina were widely criticised by the governing sports bodies. For example UEFA made a direct plead to retain its position by stating that it ‘possesses a natural position of power when it comes to regulating football and that power must not be abused’\(^ {206}\). This rift between EU and sports associations will be hopefully consolidated through the introduction of sport policies in the TFEU.

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\(^{199}\) Case 519/04 P., David Meca-Medina and Igor Majcen v Commission.

\(^{200}\) See the article Weatherill 2006.


\(^{203}\) Commission European Model of Sport 1998.

\(^{204}\) Especially in football for example ECA (see FN 184), FIFPro that is the trade union of professional players and EPFL, an association of European professional football leagues.


\(^{206}\) UEFA, Vision Europe, the direction and development of European football over the next decade, 2005. p. 12.
Another interesting case concerning future direction is so called Oulmers -appeal\textsuperscript{207}, between Belgian football club Charleroi supported by G-14\textsuperscript{208}, a group consisting of 18 richest football clubs in Europe against FIFA concerning a rift over representation in the national games. In this appeal Charleroi had released its young star Oulmers to represent his national team (Morocco) and as a result Oulmers returned from his international duty with a severe injury that sidelined him for the rest of the season. This led to a slump of his team. Charleroi, without received compensation neither from FIFA nor from the national FA, decided to bring a case claiming compensation from FIFA before the Belgian Courts that then referred the case to ECJ in accordance with Article 234 of EC Treaty. Over 50 continental and national football associations decided to support FIFA against the claims of Charleroi.\textsuperscript{209}

Decision in Oulmers-case was never given, since G-14, FIFA and UEFA reached an out of court agreement in early 2008\textsuperscript{210}. Possible outcome of Oulmers-case could have been sensational compensations to be paid by FIFA or Moroccan FA and consequently a situation that would have meant end of professional international football, as we know it today\textsuperscript{211}. If the decision would have gone to the ECJ, it would have been interesting to see whether it would have exempted the system used by FIFA that strictly legally speaking gives a dominant position to FIFA (since clubs have no options but to release the players to the international matches without compensation stipulated by rules of FIFA) and therefore infringes the TFEU\textsuperscript{212}. Since the decision was never challenged in the court, the whole issue that shook the world of football was swept neatly under the carpet with an agreement of the sports associations that in the first place were claiming that their autonomy has perished through Meca-Medina -decision! Informal settlement is perhaps not a good thing for the development of EU sports policies, and for example Parrish stated that these settlements were rather causing legal uncertainty\textsuperscript{213}.

\textsuperscript{207} Oulmers -case C-243/06, reference for a preliminary ruling.
\textsuperscript{208} Today G-14 does not exist, since it was replaced by European Club Association <ECA>, an independent body fully recognized by FIFA and UEFA, that is directly representing at the moment 144 football clubs at European level).
\textsuperscript{209} Weatherill 2006, p. 654.
\textsuperscript{210} Garcia 2009, p. 275.
\textsuperscript{211} Since if the national FA’s would all be responsible for potential injuries of highly-paid players, especially smaller nations could have never afforded to field their best players because of risk of them getting injured and consequently FA getting responsible for extreme compensations towards the clubs. See also Weatherill 2006, p. 655.
\textsuperscript{212} Article 102 TFEU.
\textsuperscript{213} Parrish – Miettinen 2008, p. 141.
2.5 Conclusion - some future considerations about European sport

2.5.1 Demise of European model of sport?

With its White paper on sport the Commission abandoned the uniform model of European Sport\(^{214}\) that itself had structured for the Helsinki report on sport 1999. As a consequence the pyramid-model was no longer the exclusive model as it comes to organisation of sport\(^{215}\). Europe and in its future policies EU wants to give more attention also to non-traditional stakeholders in European sport such as players’ and clubs’ associations and clubs themselves. EU wants to involve every stakeholder of sport to participate in future litigation of European sport\(^{216}\). As it comes to its indirect effect, it seems that EU wants to give the governing bodies of sport a wide autonomy with a condition that they behave within the limits given by the EU law. It takes a supervising role that is mainly interfering on request of a claimant rather than being characterised as a regulator. Secondly the Commission in particular wants to identify the areas in which its actions can help the associations to develop their work\(^{217}\) and thus form a working partnership with them.\(^{218}\)

Sports organisations are still eagerly claiming for further autonomy and they feel at the moment somewhat of threat from the direction of EU. Especially since the Meca-Medina judgement they have been afraid that new direction of EU opens “a Pandora’s box” of legal problems\(^{219}\). Even though relationship between EU and the biggest sports associations improved after the adoption of TFEU and sport article 165, there is still plenty of work to do in restoring the relationship that was tainted because of lack of recognition of sport among the EU policies and procrastination of the adoption of treaty due to rejection of the constitutional treaty\(^{220}\).

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\(^{214}\) White paper on sport 2007, p. 12.
\(^{216}\) This can be well seen for example from wide consultation process that preceded the adoption of White paper on sport as well as from the TFEU article 165 stating "Union shall be aimed at (…) promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports".
\(^{217}\) See as an example the visions in the White paper on sport to share Commission’s experience in good governance with the sports associations. (White paper on sport 2007, p. 13-14).
\(^{218}\) García 2009, p. 280.
\(^{219}\) Infantino 2006, p. 6.
\(^{220}\) Proposed European constitution.
As it comes to existence of sport in the European judicial bodies, it is not very likely that sports related cases will cease to exist in their jurisdiction. Especially now since sport is “promoted” to the official list of EU policies and as the Commission launched the Wouters formula as an applicable tool to be used when testing the applicability of sport related issues to the union law, it is fair to expect that sport will remain in the agenda of European courts also during the following years and there will be some cases in near future in the European courts to “test” the autonomy of sport\textsuperscript{221}.

Latest example of to proof sustainability of Wouters test is decision of CJEU that was released on March 16\textsuperscript{th} 2010. In this decision the court protected again special position of sport in general and football in particular\textsuperscript{222} in a dispute concerning freedom of movement and training fees of young players that are leaving clubs with a professional contract to another football club. In spirit of Wouters CJEU was testing the extent of autonomy of sport and its extent to EU legislation as it gave a preliminary ruling stating that a club providing training of young players can ask for compensation for proportionate training costs as long as they are suitable to ensure the attainment of objective of encouraging the recruitment and training of young players\textsuperscript{223}. Therefore it is proven that as it was predicted, inclusion of sport to the TFEU does not provide any big changes in the basic setup of sports related justification of the European Courts.

\textbf{2.5.2 Position of football}

Football world has undoubtedly been the most active sports stakeholder to comment on changes with regard to sport in EU. FIFA and UEFA in particular are very influential organisations that possess remarkable lobbying resources. As we have seen the major goal for football associations in EU sports law has been their effort to lobby for the special position of sport. New and specified framework for sport in the EU treaties is in top of their wish list while there are also regular pleads for non-interventionist policy of the European courts.

Football world has also paid its price for the economic downfall in late 2000’s\textsuperscript{224}. Today too many clubs are struggling with economic difficulties\textsuperscript{225} relating to various reasons

\begin{itemize}
  \item \textsuperscript{221} Szyszczak 2007, p. 109.
  \item \textsuperscript{222} CJEU Press release No 30/10.
  \item \textsuperscript{223} Case C-325/08 Olympique Lyonnaise, para. 45.
  \item \textsuperscript{224} See footnote 21.
\end{itemize}
that are further discussed in the later parts of this dissertation. Therefore especially in today’s economic climate it is of an utmost importance that clubs and associations will cooperate with EU in order to stop spending and ensure that the revenues are directed into right directions. Salary caps, new revenue sharing systems and secondary legislation are all tools that were presented in the Independent European sports review and that will form significant part of future considerations. These tools will also be considered in this dissertation. These measures will have to be taken account in future consideration of European football in order to save it from economic demise that would clearly cause also some long term social repercussions for the European society around the ‘Beautiful game’.

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226 Warning concerning wage control is also included in Deloitte’s annual review of football finance 2009. (Deloitte Highlights 2009, p. 2). An example of out of hand –spending is Spanish club Levante that according to article “Euroopan jalkapalloseurat elävät yli tulojensa” at www.yle.fi/urheilu spends 322% of its revenue to wages whereas the recommendation is 60%.
228 Ibid. p. 155.
229 Ibid. p. 126-127.
230 Vromans’s ‘nickname’ for football, Vrooman 2007 II.
3. Joint selling arrangements of broadcasting rights in the scope of EU Competition law

This chapter will investigate characteristics of joint selling cases from the point of view of EU Competition law. It will give special attention to the most successful European sports broadcasting competition UEFA Champions League and Commission’s decision regarding joint sales of Champions League that was notified by UEFA in 1999 and exempted with a final decision of Commission in July 24 2003 after a long statement of objections that was issued by Commission and responded by UEFA with a new strategy starting from the 2003/2004 season\textsuperscript{231}. Before getting started with any further analysis, it is necessary to define the phenomenon of joint selling itself and also take a look at the concept of exclusivity that often has a crucial meaning when dealing with collective selling arrangements. After these analyses it will be easier to further analyse the practice and to define the borders for this phenomenon that EU Competition law sets and is capable to set in the future.

3.1 Key concepts and their influence to European football

3.1.1 Joint selling arrangements

Sporting events along with films are the two most popular pay-TV products\textsuperscript{232}. Contrary to some evaluations in 1990’s\textsuperscript{233} football clubs still usually sell their broadcasting rights collectively through one single sales point thus acting as a de facto cartel. This direction is confirmed lately for example by formerly collective selling reluctant Italy that passed a new law permitting joint sales of broadcasting rights\textsuperscript{234}. Joint sales are usually executed through governing bodies of football leagues such as FAPL or UEFA. This is devised through an agreement in which clubs owning the rights cede their rights to their home games to the governing body that further on sells rights of all clubs bundled to-

\textsuperscript{232} Commission decision relating to a proceeding pursuant to Article 85 of the EC Treaty, TPS, OJ L90/6/1999, para. 34.
\textsuperscript{233} Rauste 1997, p. 651-653.
gether to a broadcaster in a single point of sale.235 These leagues stipulate their special rules for these selling arrangements and it is often arguable whether these regulations are compatible with Article 101 TFEU and national Competition laws.236

Prima facie this commercial practice is restrictive and thus infringes the Article 101 TFEU. This practice also contains big amounts of money and financial management and thus Commissions decision to get involved with sport broadcasting in 1990’s was not really surprising237. Yet the commission has been quite lenient with joint selling arrangements and excused these practices as exemptions in accordance with 101 (3) TFEU. According to the Commission collective selling arrangements maintain competitive balance in sport as these arrangements raise value of rights and revenues are shared between league members238. However in some of its decisions Commission did not exempt these arrangements without certain further commitments from the other side239.

3.1.2 Exclusivity

As joint selling arrangements, also exclusivity seems to be a restrictive practice at first sight. With exclusive deal in broadcasting acquirer forecloses the market from other competitors by buying all broadcasting rights from the governing body. As a result this segments the market that seems as a restrictive practice per se240. However the Commission recognises the commercial need for exclusivity in broadcasting market. Its defence of exclusivity is based on the fact that as the less exclusive the rights are given, the less commercial value and therefore the smaller the size of broadcasting agreements is241.

It is noteworthy to mention that exclusivity in a deal is not a restrictive practice itself. There are many situations that giving exclusive rights for someone actually encourages competitors to invest in their business in order to match the one that obtained the exclusive deal in previous contest. Therefore exclusivity becomes restrictive and thus unac-

235 For example a regulation to make participation to a league subject to condition of agreeing to join the collective sales arrangement. See Parrish – Miettinen 2008, p. 146.
ceptable only when this exclusivity is given to one entity for unacceptable time that as an effect drives its competitors out of the market.  

### 3.1.3 Influence of collective selling arrangements and exclusivity

First joint selling arrangements were made in the USA during 1950’s and were concerning (American) Football but these arrangements have also been customary for European sports during the latest decade especially after the emerge of cable and satellite broadcasting in the late 1980’s and growth in number of commercial broadcasters. Joint selling arrangements have always pursued two goals, economic and technical development. As it comes to technical development, through the influence of single point of sale broadcasting sports leagues has become considerably easier product to sell for European television broadcasters and it has also helped them to develop their products into new media markets. From economic point of view the rise of commercial broadcasters has increased the competition and subsequently prices and changed the nature of sports broadcasts in Europe since while the selection of events in commercial TV gets wider, public broadcasters struggle to acquire TV-rights of major sports events as their budget is often more or less based on tax revenues of state.

First joint football league sales in Europe were done in the UK as “cosy duopoly” of ITV and BBC acquired the rights between 1983 and 1992. First exclusive deal was purchased then by ITV. BskyB entered the market 1992 and bought rights for five years with an exclusive and extremely lucrative 60 million GBP/season deal. Commission approved this deal although then Commissioner Van Miert did admit later that the deal was too long because the excuse for deal, developing broadcasting technique, was established much faster than it was first thought.

Single point sales has amounted bigger revenues especially for financially weaker clubs of the leagues since the revenues are often shared by using solidarity schemes that en-

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244 Commission decision relating to a proceeding pursuant to Article 85 of the EC Treaty, TPS, OJ L90/6/1999, para. 39.
245 Halgreen 2004, p. 112.
246 Interestingly these goals are also terms in article 101 (3) TFEU as requirements for exemptions from the regulations in article 101 (1) TFEU.
247 This was used as a main reason in first exclusive deal that was given to BskyB to broadcast FAPL between 1992 and 1997 (see McAuley 2004, p. 372).
sure steady amount of revenues to every club in the league. As rights are bundled together and broadcasters have both cable and satellite media in their toolbox, consequently the amount of sports available for European consumer is beyond comparison of what it was ten years ago. Further on as already emphasised, value of these collective television/media rights deals have skyrocketed during last decade due to fierce competition in the market and high popularity of live sports. In the beginning of 1990’s, during the previous recession, this development also led to rebranding of football in terms of creation of both concepts of FAPL and Champions League that eventually became and are today the most lucrative football leagues in Europe. As an outcome European football leagues have moved from a situation of nearly no television revenues and nearly no live broadcasts in 1990’s to a position of 2000’s, where the largest leagues generate collectively nearly 2 billion Euros per season from the sale of live rights.

However collective selling of football has also had negative effects to European football. As a result of fierce competition, increase in broadcasting rights prices and uneven redistribution models of broadcasting revenues, gap between rich and poor clubs both inter-league and intra-league in Europe has increased at a worrying rate in economic and sport-success terms. Inter-league caps is caused by big differences in television deals between different countries while intra-league differences are contributed heavily by extra revenues that top clubs get through their participation in Champions League. This obviously weakens competitive balance between clubs and leagues and also deteriorates uncertainty of the outcome as big clubs become bigger and small

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251 Introduction of cable and satellite services has increased the television coverage of sporting events by more than 600% over the period 1988-1999 (Caiger – Gardiner 2000 p. 165-166). See also Bogusz – Cygan – Szyszczak 2007, p. 157.
252 Parrish – Miettinen, p. 144.
254 Other reasons for the raise of television sales especially in English football are development in public security at football matches and increased investment in game after the introduction of FAPL. (Parrish – Miettinen p. 143).
257 See with regard to success Kesenne 2007 p. 395 table 1 showing how the increasing gap between bigger (Big four leagues: England, Germany, Italy, Spain) and smaller European leagues reflects to success in European club competition Champions league (that is the most profitable European football league). With regard to economy see table 3 of same article (p. 398) that recognises that average budget of a club in FAPL compared to Belgian league is 12 times bigger. See also Arnault 2006, p. 48 and table in Frick 2007, p. 423.
258 Kesenne 2007, p. 394.
259 According to Gardiner uncertainty of outcome is considered to be one of the distinctive and important characteristics for sports industry (Gardiner et al. 2006, p. 50-51).
clubs cannot compete with the growth-rate of their big opponents. To a consumer this development has had also other negative consequences as for example ticket prices to British football increased by 20 percent annually\textsuperscript{260}.

As stated before thus far the Commission, that grants exemptions for these arrangements, has had relatively lenient approach when granting the rights. Until now it has granted exemptions in every notified arrangement although in some of them after statement of objections that has been followed by leagues that are selling broadcasting rights. Due to overwhelming financial instability in European football, distortion in competitive balance and uncertainty of results, it is likely that new direction concerning broadcasting and exempted deals will have to be taken in the future since Commissions leniency has received critical attention from various sources\textsuperscript{261}.

3.2 Market definition and relevant market

Before the evaluation of restrictive practices of joint selling arrangements and potential of exemptions can begin, it is necessary to define the extent of relevant market in football broadcasting market. However in the very beginning it is necessary to have a look at market definition, its goals and general principles.

3.2.1 Market definition as a prerequisite for further analysis

Regulatory background and the inherent aim for EU Competition law can be found from Article 3(1) b TFEU. According to it EU is using its exclusive competence to establish rules necessary for the functioning of the internal market. New treaty speaks about functioning of the internal market instead of equivalent Article 3(1) g EC that underlined the goal ensuring that internal market will not be distorted. This wording underlines the preventive goal of the mechanism that aims to keep practices functioning in order to prevent even potential of distortions of the market.

One of the main goals behind the aim of EU Competition policy is to enhance economic efficiency and to maximize consumer welfare through free competition and optimal

\textsuperscript{260} Szymanski – Zimbalist 2006, p. 162.
\textsuperscript{261} For example Harbord – Szymanski 2005, p. 25.
allocation of resources in the internal market\textsuperscript{262}. These goals are then protected by competition regulations of TFEU with two main articles being Articles 101 and 102 TFEU\textsuperscript{263}. In its investigations regarding infringements of EU Competition law Commission and competition authorities measure the extent of market power and market behaviour of competitors. However this cannot be done before the extent of relevant market is defined in a market definition.\textsuperscript{264} Further on market definition can also be used to determine exemptions related to de minimis -rule and to determine market power for block exemptions related to Article 101 TFEU\textsuperscript{265}.

Although definition of relevant market is often connected with dominant position in the market (Art 102 TFEU), it is recognised that relevant market needs also often to be defined in various situations when it comes to application of Art 101 TFEU and when defining appreciable restrictions and or exemptions from it under the conditions of Art 101(3) TFEU\textsuperscript{266}. According to Commission notice on the definition of relevant market for the purposes of Community Competition law market definition is an analytical tool to define and identify the extent of competition between firms thus making it possible to define the boundaries and constraints for this competition between firms that compete in the same (relevant) market\textsuperscript{267}. Subsequently market definition will make it possible to establish a framework for the market in question, which is then applied by the Commission in its considerations of possible infringements of Competition law.

\textbf{3.2.2 Aims and tools of market definition}

Market definition aims to recognise relevant product markets and relevant geographical markets for the products or services that are under its investigation. Both types of market will have to be recognised and this sometimes requires a vast analysis. Briefly explained relevant product market consists of group of products that consumers consider to be substitutable with each other\textsuperscript{268} whereas the relevant geographic market comprises

\textsuperscript{262} Craig – De Búrca 2003, p. 936.
\textsuperscript{263} About common objective of these two articles see Weatherill 2007, p. 499.
\textsuperscript{264} Whish 2009, p. 26, Commission Notice on application of Article 81 of the EC treaty to horizontal cooperation agreements, OJ 2001/C 3, point 142.
\textsuperscript{265} Parrish – Miettinen 2008, p. 114.
\textsuperscript{266} Commission Notice on application of Article 81 of the EC treaty to horizontal cooperation agreements, OJ 2001/C 3, point 11, Whish 2009, p. 27-28.
\textsuperscript{267} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 2, Whish 2009, 26-27.
\textsuperscript{268} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 7.
an area in which the undertakings concerned are involved in the supply and demand of products or services in sufficiently homogenous conditions that can be distinguished from the conditions of neighbouring areas because of the different conditions of competition\textsuperscript{269}. As the internal market of EU is developing, many firms have tendency to mergers and for example Internet sales are emerging the concept of geographic (as well as product) market are likely to grow in the future\textsuperscript{270}.

Market definition aims to figure out which of the undertakings under investigation produce products and services that efficiently restrict or have potential to restrict each other’s market behaviour\textsuperscript{271}. This identification works through an analysis that investigates which of these products or services are substitutable from consumer’s point of view. This is measured both from product point of view and geographic point of view. Finally these two views are put together in order to find out which products are in fact substitutable.

While doing this examination of products, services and their substitutability the Commission enjoys wide cooperation with national competition authorities\textsuperscript{272}. Finally the Commission notice on definition of relevant market presents also a wide selection of tools for gathering evidence that Commission can use in its pursuit to find out the extent of relevant market\textsuperscript{273}. As a result of its analysis Commission makes a definition of relevant market for the products that were under its examination. Contrary to what it seems, defining relevant market is not always an easy task. When measuring substitutability of products considerable problems may rise for example with regard to lack of available data or unreliability of available data. Further on data might be incomplete in some way or open for various interpretations\textsuperscript{274}.

### 3.2.3 Basic principles for market definition

There are three main sources of competitive constraints that firms are subject to and that indicate and measure latitude of relative market and extent of substitutable products: demand substitutability, supply substitutability and potential competition. From eco-

\textsuperscript{269} Commission Notice on application of Article 81 of the EC treaty to horizontal cooperation agreements, OJ 2001/C 3, point 8.
\textsuperscript{270} Alkio – Wiik 2009, p. 86.
\textsuperscript{271} Bishop – Walker 2002, p. 82.
\textsuperscript{272} Alkio – Wiik 2009, p. 71-73.
\textsuperscript{273} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 33-34.
\textsuperscript{274} Whish 2009, p. 29.
nomic point of view most immediate and effective of these constraints towards the prod-
duct suppliers is demand substitutability that is measured with a test examining whether
the consumer is in a position to easily switch products.\textsuperscript{275}

Demand substitutability is often examined by using so called SSNIP-test\textsuperscript{276} that measures whether a customer would change a product or service to another replacing product and how long a customer would go to buy the same product if the price of the product in question would raise 5-10\%. Thus the SSNIP-test is trying to find out whether the increase of price is profitable for the firm in question. If the answer is yes, the test is widened with other products and other areas until product and geographic extent is so big, that small but permanent raise in prices will not be profitable for the supplier. That finally indicates the limit of relevant market from the point of view of demand substitutability.\textsuperscript{277} This test is also described (though without SSNIP-abbreviation) in the Commissions notice\textsuperscript{278}.

However this test must be approached with carefulness especially as it comes to cases concerning abuse of dominance. In this position monopolist is already charging high prices. As a result of price increase consumers are leaving the market. Normally this would suggest a high degree of substitutability and thus wide relevant market. However in this situation the reason for customers decision is not the competing products but the fact that prevailing price has already been substantially increased because of the monopolist position of the supplier. According to the Commission notice this ‘Cellophane Fallacy’\textsuperscript{279} has to be taken account in evaluation of relevant market\textsuperscript{280}.

As it comes to supply substitutability, it does not enjoy such a remarkable position with regard to market definition as demand substitutability does.\textsuperscript{281} It is to be taken into an account in situations where suppliers are able to switch production to the relevant pro-

\textsuperscript{275} Whish 2009, p. 13
\textsuperscript{276} “Small but Significant and Non-transitory Increase in Price”, see for example Aikio – Wiik 2009, p. 74-75.
\textsuperscript{277} Bishop, Walker 2002, p. 85-86.
\textsuperscript{278} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 17-18.
\textsuperscript{279} Name stems from the US Supreme Court case United States v EI du pont de Nemour (351 US 377, 1956) and Co concerning packaging materials including cellophane (Whish 2009, p. 30).
\textsuperscript{280} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 19.
\textsuperscript{281} Alkio – Wiik, p. 81-82.
ducts and market them in a short term without significant additional costs or risks\textsuperscript{282}. These situations appear usually in situations where firms market a wide range of qualities or grades of one product and since it is easy for suppliers to change from one product to another, these products count for same relevant market\textsuperscript{283}. However this test does not really apply on the football broadcasting markets since sunk costs invested in broadcasting of football league and barriers for entry to the market are high.

Finally potential competition usually has very small and indirect influence in the market definition procedure. In fact it is not taken account when defining markets\textsuperscript{284}. It usually enters the picture later when definition of relevant market is done and it is apparent that the position of an undertaking gives a reason to be concerned from the competition point of view\textsuperscript{285}.

Although it might seem different, Commission is not the only authority judging the definition of relevant market in the EU institutions. The European Courts have also issued numerous judgements that concern market definition and relevant market\textsuperscript{286}. These judgements have also had a significant impact to development of market definition both as it comes to product market\textsuperscript{287} and as it comes to geographic market\textsuperscript{288} and also appear regularly in EU law related literature.

Following parts shall examine different phases of definition process of relevant market with a review of the definition of relevant market as it comes to sport and in particular joint selling of football leagues. It tries to put special emphasis on the position of a consumer that is ‘at the heart of the Commissions competition policy’\textsuperscript{289} and that is one of the initial goals of entire competition policy.

\textbf{3.2.4 Product market definition and its segmentation}

In broadcasting related cases the Commission has traditionally narrowed down the relevant product markets and thus created many differentiated products from broadcasting

\textsuperscript{282} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 20.
\textsuperscript{283} Ibid. point 21.
\textsuperscript{284} Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ 1997/C 372, point 24.
\textsuperscript{286} Vogelaar 2007, p. 2-8.
\textsuperscript{287} For example Case 85/76 Hoffman-La Roche v Commission.
\textsuperscript{288} For example Case 27/76 United Brands v Commission.
\textsuperscript{289} Kroes 2008, speech.
even in the same sport of football. Its reasoning for narrow product market definition is low cross-elasticity of demand because consumers are not keen to switch the product with higher price to another quite similar product and consequently low demand substitutability. Sometimes commission has also considered the supply substitutability and whether other producers can easily switch to producing in the relevant product market.

Relevant product market for broadcasting sales has been described as market for the acquisition of TV rights of football, which is played regularly throughout every year. There are many reasons for the fact that product market of football broadcasting is so segmented. First of all, and what is one of the very peculiar aspects of sport in competition review, sport consumers’ brand loyalty is extremely high and therefore they are usually ready to pay extraordinary prices to see their team in action. On the other hand they do not see for example neighbouring national football league as a substitute for their own league. This explains also low cross-elasticity of prices. A good example of narrowed market definition is a Commission decision concerning ticket sales for FIFA World Cup 1998 where market for the ‘blind’ sale of entry tickets for first round matches and market for the later sale of entry tickets for the finals were considered to be two separate relevant markets.

Finally rapid changes in technology have increased the number of potential buyers and demand of sports rights and thus the Commission has recognised for example sales of rights concerning new media as separate relevant market in broadcasting sales market. Furthermore the fact that the division between public and commercial TV-broadcasters is getting more and more visible is setting new challenges for the Commission in its definition of relevant product markets.

3.2.5 Geographic market definition

Geographic market in sport is inherently national because of national setup of leagues and local loyalty of fans. However this is not an unconditional truth since for example

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290 Noll 2007, p. 401.
293 Ibid. p. 116.
Glasgow giants Celtic and Rangers have repeatedly tried to get an admission to FAPL in order to get bigger revenues (especially from TV-deals). However both national football associations and Commission have been so far strict with their geographic restriction policy. A good example of this is the Commission decision concerning home and away -rule established in its Mouscron-decision\(^{298}\) regarding temporary relocation of home pitch to another stadium from Belgium to France.\(^{299}\)

As it comes to geographic market definition in sport, special attention must be paid first of all to language and culture borders that naturally segment the market of sport events and therefore limit the geographic market definition of sport.\(^{300}\) Cultural factors, language barriers and national regulatory regimes were also recognised as influence in Commission’s decision concerning joint selling of commercial rights of the UEFA Champions League that considered upstream market as national, downstream market as national or bound to linguistic regions but for example market for sponsoring wider because it is not restricted due to aforementioned reasons as the program as a product in both upstream and downstream market is\(^{301}\). On the other hand sometimes special characteristics in sport can also widen the geographic market as in the Commission decision concerning ticket sales to World Cup 1998 to comprise at least the geographic region of European Economic Area\(^{302}\).

### 3.2.6 Temporal market

Fixed period of duration is typical for Commission decisions concerning broadcasting agreements of sport events. Market definition has sometimes also a temporal element and in broadcasting related matters this has usually been included into the decisions of the Commission when accepting restrictions to non-exclusivity of broadcasting deals. The Commission has taken a position concerning the duration of exclusive agreements in a case that concerned merger in the downstream broadcasting market\(^{303}\) in order to set a condition to justify its decisions to give exclusive rights for broadcasting.

\(^{298}\) Commission decision on C.U. de Lille/UEFA (Mouscron).

\(^{299}\) Halgreen 2004, p. 143-144.

\(^{300}\) Parrish – Miettinen 2008, p. 117.


\(^{303}\) See for example Commission decision on Newscorp/Telepiù OJ L 110/73, para 233;.
After analysing these different aspects of market definition, it is easy to say that from a large national football league such as FAPL there are several different products that can be created from the same concept. Gardiner\textsuperscript{304} has listed these products well and this list can be used also here to conclude the variety of different relevant markets of one national football league:

- Live broadcasts in the UK and licences to show a selection of matches abroad;
- Delayed broadcasts of matches – of less commercial value than live broadcasts;
- Match highlights;
- Per view on cable or satellite;
- The new media, which includes mobile phones and the Internet.

### 3.3 Some peculiarities of sports market and economics

Former president of South Africa, Nelson Mandela described the special position of sport as follows:

“Sport has the power to change the world. It has the power to inspire. It has the power to unite people in a way that little else does. Sport can awaken hope where there was previously only despair.”\textsuperscript{305}

Albeit its political nature, Mandela’s quotation shows that sport definitely enjoys a special importance and special position in today’s society. This is apparent in every level and spectrum of sport. European competition law does not make any exception and also gives sport special position among its policies. However this position is not unconditional and every sports related decision that gets exempted from regular competition rules needs to be well reasoned.

Sports have undoubtedly many special characters that separate it from regular product markets. These peculiarities stem from special character of sport as a form of entertainment that is based on eternal competition between opponents executed in a special spirit of sport. Following chapters will evaluate these special characters with an aim to give a thorough overview of these special characters and their application in EU Competition rules with a special regard to sports broadcasting related matters.

\textsuperscript{304} Gardiner et al. 2006, p. 380.
\textsuperscript{305} Mandela 2000 (speech).
3.3.1 Mutual interdependence

Unlike in normal business, sport teams and also stakeholders in individual sports are dependent on each other. Pure monopolist position does not function in sport since no team can produce a saleable output without an opponent to compete against\(^{306}\). In team sports this dependency is particularly high since status of opponent in terms of rivalry between clubs is clearly an important factor in enhancing the final product of football game and sometimes even the entire league\(^{307}\). These factors contribute to abnormally high interdependence in the market between sports clubs in comparison with other businesses.\(^{308}\) It can be said that cooperative practices are lifeblood for the very existence of sport.

Engaging the opponents and leagues together in cooperation is inherent for reasonable running of sport and from consumers’ point of view a well organised championship is much more interesting than number of occasional individual games.\(^{309}\) Main question in competition law is how long this ‘cartelisation’\(^{310}\) of clubs should extend? Flynn and Gilbert take this consideration of special position far by stating that teams in a professional sports league are not economic competitors. According to them ‘there is no harm to competition from the coordination among the member teams when those teams are not economic competitors in a relevant market’.\(^{311}\) Nevertheless interdependency of clubs and convenience of these cartels in question are important factors to be taken into consideration in evaluation of acceptability of restricted practices as it comes to joint selling of football leagues.

3.3.2 Competitive balance

Very peculiar thing in sport market compared to regular industries is that there is no so-called cut-throat model competition within leagues. The objective of teams cannot be to take market shares from others in order to push them off the market since, as it was shown in previous chapter, clubs need each other to create and complete the product

\(^{306}\) Downward, Dawson 2000, p. 20.
\(^{307}\) Good example is rivalry of Glasgow Celtic and Glasgow Rangers in Scotland. Their matches known with a nickname ‘old firm’ are the main sport annual sport events in Scotland, that gather an audience that no other sports event can compete with in Scottish football market. (Iain, Hutchinson 2008, p. 258).
\(^{308}\) Gardiner et al. 2006, p. 48.
\(^{309}\) Kesenne 2007 II, p. 2, this is also admitted by Commission in its decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para. 64.
\(^{310}\) For example clubs joining organisationally together in order to form a league.
\(^{311}\) Flynn – Gilbert 2001, p. 45.
market. In order to keep the public interest sport teams need to keep the result uncertain to a certain level to maintain and increase the level of interest of consumers. 312

Promoting this competitive balance between participants also requires co-ordinated activity that is shown through regulations regulating for example roster limits, transfer windows and revenue sharing that are peculiar forms of cooperation and to a certain extent cartelisation. 313 This special feature was noticed also by ECJ in Bosman judgement, as the court guaranteed that certain restrictive measures have to be accepted as legitimate in order to preserve certain degree of uncertainty and equality thus contributing to competitive balance 314. However this autonomy was then tied to a conditional framework in Meca-Medina judgement 315.

Unfortunately according to Arnault report competitive balance has declined in a number of top-flight football leagues in Europe 316. This view is supported by statistical analysis and for example Vrooman notes this polarization of success in FAPL noticing that since its foundation in 1992, two clubs have dominated league 317. Other two clubs winning the title 318 had both major external financial influxes behind them. Vrooman also takes an example of Leeds United, third club that tried to push the glass ceiling created by dominance of top two and ended up to a financial distress and eventual relegation. 319

In light of these examples it is apparent that evidence of competitive balance today is far from clear and judicial bodies and sport governing bodies are expected to introduce stronger tools in permitting restrictions justified in terms of maintaining competitive balance. Today’s situation with alarming lack of competitive balance is generating significant revenues for governing bodies and larger clubs. 320 Arnault report gave already in 2006 a wide set of tools that can be applied in a mission to restore the competitive balance 321 and thus restoration of competitive balance is now asking for cooperation from all and in particularly from financially strong stakeholders in European football community.

312 Parrish – Miettinen 2008, p. 3.
314 Case C-415/93, Union royale belge des sociétés de football association ASBL v Bosman, para 106.
317 Manchester United with 10 and Arsenal with 3 championships.
3.3.3 Uncertainty of outcome

Uncertainty of outcome is the lifeblood of any sporting event. In general the closer the competition between teams, the greater the interest in the sport and therefore the bigger the revenue flow is. According to Weatherill “Sport without uncertainty would be like opera. You would know who is going to die in the end. It might be entertaining; but it would not be sport.”

Former Director General for Competition, Alexander Schaub described live sports as being “ephemeral” because it is a fast perishable good. Also the reason for ephemeral nature of a live football match is a guarantee of uncertainty for the consumer. Thus although in some other circumstances products being so close to each other would qualify to the same relevant market, in sports broadcasting highlights and replays are not product substitutes since they lack the invaluable uncertainty.

As already stated in this dissertation, uncertainty of outcome of matches is invaluable in football in order to keep the product interesting for the consumers. In television sport the fact that differed games have much less value than live games is a clear indication that knowing the result in advance reduces the value of the product.

In live sport uncertainty is also used as an economic measure. In default match uncertainty is measured by looking at the league standings – if the difference between clubs is big, the uncertainty is small and vice versa. It cannot be denied that minimum level of uncertainty is needed in sport. As Kesenne describes, ‘To watch a football team winning by 12 goals to 1 can be great fun once, but no real sports fan wants to experience the same huge score in each game, week after week.’

Level of uncertainty shows obviously in match attendances as well as in the ticket prices where it is usual that tickets for games against bigger teams are more expensive than tickets for games against teams from the bottom of the league table. Same pattern is used also in a long run when measuring the success in longer scale by looking at the variation of league champions. Measure is then called championship uncertainty. According to Kesenne especially cham-

324 Weatherill 2003, p. 76.
325 Schaub 2002, speech.
pionship uncertainty is important for consumers’ interest since fans don’t like to see same clubs taking the top positions year after year.328

3.3.4 Utility maximisation instead of profit maximisation

Another peculiar characteristic of sport in this evaluation is sport clubs’ tendency to rather maximise their utilities in terms of good success than to maximise the amount of financial profit for their final accounts. Directors, managers, players and supporters all desire playing success that often takes the position of financial profitability as a main objective in sports business329. This phenomenon has been particularly apparent in football within the course of last few years as billionaire “sugar-daddy” owners such as Roman Abramovich in Chelsea inject millions of Euros to their clubs against any business rules that are used only in order to reinforce the playing squad and end up covering de facto debts by turning them into equity330. Finally there is probably no other industry that has such a strong loyalty of its group of consumers as football industry where clubs basically enjoy monopolist position to their own group of supporters331. Thus sport clubs tend to pursue their business differentially from other businesses that aim for maximal production efficiency.

After the transfer rules were regulated and player market was liberalised financial headache this has only worsened since key for success is now not transfer fee based on single payment but continuous salaries of players332 causing clubs continuous high costs in a market that has many uncertain factors. According to governing bodies that are keen to point their fingers at EU institutions, the economic demise of football is caused by soaring player wages that lead from liberation of transfer market while the product market of football leagues remains closed.333 This is causing higher consumer prices and lack of competitive balance.334 Money that is supposed to go to the entire European football family goes mostly to spectacular player wages335. Thus demise of economic balance in football can be seen as a consequence of the regulatory choices in revenue

328 Ibid., p. 10-11.
331 For example majority of Everton supporters would never start to support their rival club Liverpool FC even though Liverpool has been much more successful one out of these rival clubs during the last decade.
332 According to many highly influenced by ECJ judgement in Case C-415/93, Union royale belge des sociétés de football association ASBL v Bosman.
333 Kesenne 2007 II, p. 3.
335 Noll 2007, p. 419.
sharing made by the governing bodies in the product market such as current model of Champions League.\textsuperscript{336}

Although clubs often know their financial situation, they are often ready to rally for big risks in order to save their league position and success in long run\textsuperscript{337}. In big clubs this is not often crucial but their money draining influence is definitely destructive for the rest of the football community. Subsequently in smaller clubs and smaller leagues club owners and managing boards get influenced by these phenomenal salaries and utilise their squads with funds that exceed their budgets in order to excel on the field. Subsequently this is causing growing rate of insolvency in European football.\textsuperscript{338} Especially in smaller clubs combination of bad management and lack of professionalism often leads to a situation, where heart is used instead of brain often as a method to run a sports club\textsuperscript{339}. Commission has also noticed this as well as it in its White paper on sport launched a campaign to increase its influence in European sports governance in order to secure safer future for European sport\textsuperscript{340}.

\subsection*{3.4 Article 101(1) TFEU and joint selling}

A well known fact is that theoretic ideal of perfect competition with no market power possessed by single competitor is not even close to reality in the broadcasting market plagued by exclusive deals and strong commercial stakeholders\textsuperscript{341}. This is often the case in Competition law and therefore more realistic goal is to aim for workable competition\textsuperscript{342}. Further on market entry barriers are traditionally high in the broadcasting market that also decreases the amount of competitors in the market and makes it naturally limited.\textsuperscript{343} Another problem that is inverting the market in sport and in football particular, recognised by many academics, is that while national segmentation of player market

\begin{flushleft}
\textsuperscript{336} Parrish – Miettinen 2008, p. 6.
\textsuperscript{337} See for example Deloitte highlights 2008 p. 8, stating that The Premier League clubs’ net debt figure at summer 2007 increased by 19\% to £2,469 million.
\textsuperscript{338} “Euroopan jalkapalloseurat elävät yli tulojen la” (2.2.2010) \texttt{<www.yle.fi/urheilu>}.  \\
\textsuperscript{339} This is caused by lack of professional approach in these entities as volunteers that are doing their job for loyalty towards the club run them.
\textsuperscript{341} Whish 2009, p. 7-9.
\textsuperscript{342} Craig – De Búrca 2003, p. 936.
\textsuperscript{343} Alkio – Wiik 2009, p. 52-55.
\end{flushleft}
does not exist the organisation of European football remains strongly segmented by national borders and governing bodies.  

As joint selling arrangements may pose many concerns with regard to restrictive practices of competition, these arrangements have close relationship with Article 101(1) TFEU. Joint selling can be restrictive of competition because it involves price fixing, limits access to product sources, implies a foreclosure of the market and enforces the dominance of incumbent broadcasters. One of the main goals of this dissertation is to find out what kind of joint selling arrangements are permissible with regard to the framework of EU Competition law.

Article 101(1) TFEU applies to agreements between undertakings and to decisions by associations of undertakings. Football clubs are involved in economic activity for example through their sales of television rights and therefore act as undertakings and consequently constitute economic activity and thus fall under the application of TFEU. Since football clubs are considered to be economic undertakings, it is safe to recognise national football associations and regional associations as associations of undertakings when they represent football clubs and as an individual undertaking when they enter agreements without clubs. It is also clear that especially as it comes to big and most commercialised leagues, football-broadcasting sales have effect to competition within the internal market that is also a condition for application of Art 101(1) TFEU. Good evidence of this is statistic proving that sports related cases had been in Commission investigations already by the end of 1990’s for more than 60 times, most of them being football and more precisely broadcasting related investigations.

3.4.1 Price fixing

Commission stated in its press release concerning joint selling of FAPL that joint selling is tantamount to price-fixing, which could only be exempted in extreme necessity

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345 TFEU 101(1).
346 Case 36/74 Walrave and Koch v Association Union Cycliste Internationale, para 4.
347 UEFA, FIFA.
348 See for example Rules of the FA that actually is a limited company (Company number: 77797) in article 1, where the relationship between association and clubs is recognised (FA rules 2009, p. 91).
349 For the definition see also Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para. 106.
that would also give a benefit to the fans.\footnote{IP/02/1951.} In its Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements the Commission also labels price fixing as the main concern in commercial agreements between competitors\footnote{Commission Notice on application of Article 81 of the EC treaty to horizontal cooperation agreements, OJ 2001/C 3, para. 144.}. It also considers joint selling leading the very end of the spectrum of agreements that might be exempted and thus these arrangements can only be exempted under very special circumstances\footnote{Ibid. para. 139, 146.}.

In football broadcasting market clubs simply cease their rights to the governing body that further on sells the rights from one single point with one single price for entire league. This can be interpreted as tacit agreement between the clubs that results fixed price of the broadcasting rights through prevention of competition in the particular relevant market since central organisation prevents clubs from selling the rights individually. For third parties being potential buyers this gives only one single source of supply to buy broadcasting rights for the entire product.\footnote{For example Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para. 19.} Therefore it is truisms that Article 101(1) TFEU is infringed with regard to price fixing as righteous procedure would be to sell these rights individually.

### 3.4.2 Market closure

Before the Commission made its first interventions in joint selling related questions, infringements with an effect of market closure from potential buyers and restrictions in development of new media were one of the most apparent ones. First of all since all media rights were packaged into one media rights package, selling arrangements were in practice only concerning the television rights since new media operators could not buy packages including only new media rights. Since football broadcasting is undoubtedly premium content in the broadcasting market, it is invaluable that all media operators have an access to market\footnote{Gerardin 2005, p. 69.}. Another problem concerned big size of the packages that excluded smaller and especially free-TV operators out of the tendering process. Finally long duration of exclusive contracts have been unjustifiable and as a factor that
is closing markets since one single broadcaster has been given long exclusive rights leading to its dominance and de facto closing of the market.\footnote{Parrish – Miettinen 2008, p. 146.}

All these situations are naturally considered to be causing market closure even though their object is not necessarily to limit the market. However even if an agreement does not have restrictive object, it can be restricting the competition through its effect.\footnote{Whish 2009, p. 116-122.} The courts have done the effect test for several times.\footnote{for example Case C-234/89, Stergios Delimitis v Henninger Bräu AG, para 7-9.} In these cases anti-competitive effects as mentioned above were apparent and thus Art 101(1) TFEU was infringed. First of all as effect of the selling arrangements new media market was closed, since it was bound to a big TV-deal thus depriving all new media operators from competition since they did not stand a chance in competition against big commercial television operators. Closing effect was further strengthened through television operators’ reluctance to sell their rights through new media since they were afraid that it would decrease the value of televised rights.\footnote{Gerardin 2005, p. 70.} Further on in live television broadcasting market wide exclusive deals hampered competition between television broadcasters since only big commercial broadcasters had resources to bid for the offered packages.\footnote{About the effect, Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 20.}

As it comes to duration of the deals, the Commission has in the past accepted even broadcasting agreements with duration of seven years.\footnote{Commission decision on a licensing agreement for the broadcasting of Dutch football matches OJ 1996 C 228.} However this practice has changed towards better direction and in its latest broadcasting related decisions the commission has shortened the length of contract periods for joint selling arrangements to period of three years thus making it easier for the competitors to enter the market through participation in the tendering procedure more frequently.

### 3.4.3 Limitations of markets or production

Article 101(1) b TFEU is outright stating that arrangements that limit or control production or markets are forbidden. Limitation of markets is apparent in joint selling arrangements since as a result of agreement to pool the upstream of the market and to

\footnotesize{\begin{itemize}
  \item \footnote{Parrish – Miettinen 2008, p. 146.}
  \item \footnote{Whish 2009, p. 116-122.}
  \item \footnote{for example Case C-234/89, Stergios Delimitis v Henninger Bräu AG, para 7-9.}
  \item \footnote{Gerardin 2005, p. 70.}
  \item \footnote{About the effect, Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 20.}
  \item \footnote{Commission decision on a licensing agreement for the broadcasting of Dutch football matches OJ 1996 C 228.}
  \item \footnote{Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 200, Commission Decision on Joint selling of rights to the German Bundesliga OJ L 134/46.}
  \item \footnote{From rights holders to a broadcaster.}
\end{itemize}
execute in under one single sales point the supply of football broadcasting rights is severely restricted\textsuperscript{364}. In a downstream market\textsuperscript{365} limitation of market appears as limited number sources that a consumer can apply for watching the football product in question and thus to limited amount of televised matches. Advertisers share this concern with consumers since as the number of operators decreases, the selection of advertising sources is also getting smaller in numbers and usually higher in prices. If the rights that are sold are exclusively to a one single producer, the situation is even worse for the consumers and for the advertisers.

In order to give an example of effect of limitation of production, it is worth of having a look at the joint sales arrangements of FAPL. According to Harbord and Szymanski even after the Commission had expressed its concern over low amount of matches made available to the consumers and following arrangements of FAPL 2004, nearly two thirds of the football matches of FAPL were still not available to the TV viewers and they are proposing that a ban for collective selling would be the only option to achieve higher percentage of match live TV-coverage\textsuperscript{366}. Therefore it is easy to say that current arrangements are limiting both market and production of football and worst of all for example in the UK where a single broadcaster (BSkyB) has a major share of all markets, it does not serve consumers’ interests\textsuperscript{367}.

This situation has improved\textsuperscript{368} after the Commission intervened and took a position against joint selling arrangements of FAPL by starting its investigations in June 2001\textsuperscript{369}. This led finally to a substantive result in 2006 when Commission and FAPL entered a new agreement that will last until 2013 concerning horizontal joint selling arrangements for the exploitation of media rights in the UK\textsuperscript{370}. This decision aimed to open the bidding for media rights in the upstream market, limit scope of exclusive rights by unbundling rights into smaller packages (6), guaranteeing that no single bidder shall be awarded with exclusive audio-visual packages, balancing the content between offered packages and enhancing the opportunity of clubs to take an advantage of rights unex-

\begin{itemize}
\item \textsuperscript{364} Van den Brink 2000 II, p. 422.
\item \textsuperscript{365} From the broadcaster to a consumer.
\item \textsuperscript{366} Harbod, Szymanski 2004, p. 120.
\item \textsuperscript{367} Ibid. p. 118-119.
\item \textsuperscript{368} Although real effect of improvement has been questioned for example by Parrish and Miettinen (Parrish – Miettinen 2008, p. 150-151).
\item \textsuperscript{369} Commission Decision on media rights of FA Premier League, para 11.
\item \textsuperscript{370} Ibid., para 1, 44.
\end{itemize}
exploited by FAPL\textsuperscript{371}. These commitments that were in spirit of Commissions earlier decision relating to joint selling of Champions League rights\textsuperscript{372} and as a result monopoly of BskyB was broken as Irish Setanta Sports acquired two out of six packages starting from season 2006/2007. Newest deal was agreed in 2009 concerning seasons 2010/2013 that retain the same situation with BskyB holding four and Irish Setanta sports holding two packages for the media rights in the UK\textsuperscript{373}.

3.5 Exemptions under Article 101(3) TFEU

An agreement, which falls within Art 101(1), TFEU is not necessarily unlawful. Third paragraph of Article 101 TFEU is making a list of situations that are capable of forming exceptions to the rule of the second paragraph of the same article stating that agreements or decisions prohibited pursuant to Art 101(1) shall be automatically void.\textsuperscript{374} Its purpose is to give exemptions from Art 101(1) TFEU rules in situations where market efficiency reasons demand it. According to Odudu “Article 101(3)\textsuperscript{375} provides a framework in which to assess an undertaking’s claim that the allocative inefficiency consequences of their collusion are outweighed by productive efficiency claims”\textsuperscript{376}.

Under its now repealed regulation 17/1962 the Commission had an individual right to grant exemptions to agreements that had first been notified to it by the contracting parties. This applies to the majority of joint selling related decisions. However this notification system was abolished in May 2004 with regulation 1/2003 (hereinafter Modernisation regulation) giving Art 101(3) direct application\textsuperscript{377}. Furthermore this regulation shared the competence of Commission to scrutinize the application of Articles 101 and 102 with national competition authorities and courts\textsuperscript{378,379}. Uniformity of the interpretation of Commission and national authorities was secured through the Commission communication on guidelines on the application of Art 81(3)\textsuperscript{380} of the treaty that was

\begin{itemize}
\item\textsuperscript{371} Commission Decision on media rights of FA Premier League, para 37.
\item\textsuperscript{372} Report on Competition Policy 2006, p. 98.
\item\textsuperscript{373} “BskyB keeps Premier League rights” BBC sport webpage 3 February 2009 <http://news.bbc.co.uk/sport2/hi/football/eng_prem/7868759.stm>.
\item\textsuperscript{374} Whish 2009, p. 148-149.
\item\textsuperscript{375} Article number changed in order to be equivalent with TFEU.
\item\textsuperscript{376} Odudu 2006, p. 128.
\item\textsuperscript{377} Modernisation regulation art. 1 (1) and 1 (2).
\item\textsuperscript{378} Ibid. art. 5-6.
\item\textsuperscript{379} Whish 2009, p. 149.
\item\textsuperscript{380} New article number 101(3) TFEU.
\end{itemize}
published in April 2004\(^{381}\). As a consequence of this revision joint selling related matters are also be scrutinized by European national competition authorities.

In cases related to infringements of Art 101(1), burden of proof is lying on the party alleging the infringement\(^{382}\). Contrary it is on the undertaking that is seeking to defend itself with the conditions of Art 101(3) to proof that its actions generates the benefits that can justify the satisfaction the conditions of Art 101(3)\(^{383}\). Then Commission (or a national authority) will examine these arguments and in case it is unable to refute them, the undertakings will in certain cases be taken to have freed from their burden of proof\(^{384}\).

In Art 101(3) there are four conditions that will all have to be satisfied in order to be exempted\(^{385}\). Two of these conditions are positive (improvement in production and fair share for consumers) and two negative (indispensable restrictions, no elimination of competition). These requirements will all have to be satisfied throughout the duration of undertaking and not only at the moment that permission granted. If one or more of the conditions cease to exist, the exemption will be considered to be void\(^{386}\).

Finally it is noteworthy to mention that no anti-competitive practice that cannot be exempted can exist, provided that all the conditions laid down in Art 101(3) TFEU are satisfied\(^{387}\). Therefore joint selling agreements cannot be judged to be impossible to satisfy provisions of Art 101(3). This characteristic of European Competition law makes a difference between American rule of reason principle\(^{388}\) and European evaluation although many analysts have questioned this\(^{389}\).

Before the introduction of modernisation regulation 2004 the Commission had ultimately exempted most of the joint selling arrangements. Approval was often preceded with long negotiations between the governing bodies and Commission after the notification procedure. Possibly the most influential decision regarding joint selling arrange-

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\(^{381}\) OJ 2004/C 101/08.  
\(^{382}\) Modernisation regulation, art 2.  
\(^{383}\) Whish 2009, p. 149.  
\(^{384}\) Case T-168/01 GlaxoSmithKline Services Ltd v Commission, para 236.  
\(^{385}\) OJ 2004/C 101/08, para 34, 42.  
\(^{386}\) Whish 2009, p. 150.  
\(^{387}\) Case T-17/93 Matra Hachette SA v Commission, para 85.  
\(^{388}\) In the Sherman act that is the applicable law in the American system there is no equivalent of Art 101(3) TFEU and therefore case-by-case analysis based on pro and contra evaluation (rule of reason) is typical for the American system (Whish 2009, p. 131-132).  
ments was delivered by the Commission in July 2003, where the commission exempted UEFA’s joint selling arrangements concerning UEFA Champions League because of conditions of the exemption of the Article 101(3) TFEU were met\textsuperscript{390}. Therefore also this dissertation will use comprehensive reasoning of Commission decision in UEFA Champions League case as a core structure for analysis. The following sections contain an assessment in relation to each four condition of application of Art 101(3) with an ongoing assessment of solutions used by the Commission in its decision concerning joint sales of UEFA Champions League (hereinafter UEFA-decision).

3.5.1 Improvement in the production or distribution of goods or in technical and economical process

The gained benefit produced by an agreement must be something of objective to the EU as a whole that is contributed by either improvement of production or distribution or promotion of technical or economic progress. The advantages must therefore outweigh the detriments and the distortion must be proportionate to the objective.\textsuperscript{391} As an example a research and development project may lead to technical or economic progress as vertical agreements between distributors may in certain circumstances improve distribution.

According to a narrow view of this provision only agreements that would improve economic efficiency can fulfil this requirement leaving at least reasonable benefit to the consumers. According to a wider view benefit for important union policies such as agriculture, employment, regional policies or even sport may justify agreement under this requirement\textsuperscript{392}. In its decision Metropole television and others CFI even admitted that the Commission is ‘entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3)\textsuperscript{393} of the Treaty’\textsuperscript{394} - criteria mentioned with regard to Article 101(1) in Wouters -judgement\textsuperscript{395}.

\textsuperscript{390} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 197.
\textsuperscript{391} Whish 2009, p. 151
\textsuperscript{392} A good example of this is Commission decision relating to a proceeding pursuant to Article 85 of the EEC Treaty, OJ 1993 L 20, para 36, where the Commission exempted an agreement with exceptional circumstances the project would have constituted the largest ever single foreign investment in Portugal, one of the poorest areas of the Community.
\textsuperscript{393} Art 101(3) TFEU.
\textsuperscript{394} Joined cases T-528/93 and others Metropole télévision SA and others, para 118.
\textsuperscript{395} Whish 2009, p. 154-155.
After the introduction of modernisation regulation direction in interpretation has clearly been towards narrowing. Main reason for this is widened group of authorities applying the regulation after the modernisation regulation. Since also national authorities may interpret Art 101(3) it is important that its interpretation gets more precise thus improving legal certainty. Post-modernisation approach is based on economic efficiency that is mentioned several times in Commission guidelines on the application of Art 81(3)\textsuperscript{396}. This direction was later confirmed by CFI in its decision in GlaxoSmithKline\textsuperscript{397}.

In its notification UEFA listed number of factors to support this condition. First of all it stated that joint selling from a single point of sale facilitates their business partners the best, since the tournament consists of many teams from many different markets. UEFA claimed joint selling as a prerequisite for the existence of entire league since clubs are unaware of extent of their participation when entering it and individual sales would be hard and ineffective. Furthermore it would be beneficial for advertisers, broadcasters and viewers, as it would guarantee them availability for entire season and entire league instead of number of matches of an individual club\textsuperscript{398}. Finally UEFA stated that joint selling would develop European football through its solidarity revenue distribution model\textsuperscript{399}.

The Commission agreed with UEFA and stated that joint selling both helps the clubs to sell their rights efficiently\textsuperscript{400} and facilitates the existence of the attractive product that would be easier to buy and that would also reduce transaction complexity of producers\textsuperscript{401}. It also indicated that especially for smaller clubs, it would be difficult to build up a commercial sector to sell the rights and that even in a case of individual sales, this task would be probably outsourced\textsuperscript{402}. As it comes to the solidarity model and redistribution of money, Commission stated that it could be said to improve production and stimulate development of sport\textsuperscript{403}. As a conclusion the commission agreed that joint selling ar-

\textsuperscript{396} OJ 2004/C 101/08, para 11, 33 and heading 3.2 stating that first condition of Art 81(3) is efficiency gains.
\textsuperscript{397} Case T-168/01 GlaxoSmithKline Services Ltd v Commission, para 247-303.
\textsuperscript{398} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 139-140. This argument is also shared by Kesenne as he claims that league formation creates much more interest than group of individual matches (Kesenne 2007 II, p. 2).
\textsuperscript{399} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 142.
\textsuperscript{400} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 144.
\textsuperscript{401} Ibid. para 145, 148.
\textsuperscript{402} Ibid. para 153.
\textsuperscript{403} Ibid. para 164.
rangement improves production and distribution of football product and provides an advantage for media operators, football clubs and viewers\textsuperscript{404}.

### 3.5.2 Fair share for consumers

This provision encompasses all direct and indirect users of the product. According to it beneficial nature of the effect on all consumers in the relevant market must have to be taken into consideration. Thus fair share for consumers’ provision must be seen from a wide perspective.\textsuperscript{405} Also the greater the restriction of competition under Art 101(1) TFEU is, the greater must be the efficiency under the Art 101(3) TFEU\textsuperscript{406}. If a consumer will be left worse off through the agreement than without it, the condition is not satisfied\textsuperscript{407}. However consumers are not required to receive share from every efficiency gain. It is enough that there are sufficient benefits passed to consumers to compensate the negative effects and that it will result a fair share of the overall benefits for consumer\textsuperscript{408}.

According to Whish consumer benefits may appear as cost efficiencies leading to increased output and cheaper price for consumers or as qualitative efficiencies that appear as emergency of new and improved product\textsuperscript{409}. The important thing is however to make sure that consumer costs are compensated with more valuable benefits.

In UEFA-case the Commission considered straightforward that joint selling provides consumers with fair share of benefits to the consumers while it also provides media operators with a genuinely beneficial product\textsuperscript{410}. For a single broadcaster this arrangement creates possibilities for more intensive and more innovative exploitation of rights than individual sales points would provide. Further on packaging of the rights makes the bidding procedure more efficient and smaller packages provide also smaller broadcasters an opportunity to acquire some rights. Finally Commission states that new media and deferred media rights are ensured only with joint selling arrangement.\textsuperscript{411}

\textsuperscript{404} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 168.
\textsuperscript{405} Whish 2009, p. 158.
\textsuperscript{406} OJ 2004/C 101/08, para. 90.
\textsuperscript{407} Ibid. para 85.
\textsuperscript{408} Ibid. para 86.
\textsuperscript{409} Whish 2009, p. 158-159.
\textsuperscript{411} Ibid. para 171.
3.5.3 Indispensability of the restrictions

Third provision of Art 101(3) TFEU for an exemption is actually supervised before the consumer benefit, since there is no need for further analysis, if this provision does not fulfl.\textsuperscript{412} In commission guidelines indispensability of a restriction is tested with a two-fold test that is asking first whether a restrictive agreement is necessary for achieving the objected efficiencies. If the answer to this question is yes, further question will follow asking whether the individual restrictions of competition in question are reasonably necessary for the attainment of efficiencies\textsuperscript{413}. This always involves balancing of pro- and anti-competitive effects. Further on the guidelines state that a restriction may be indispensable only for a limited period of time\textsuperscript{414}. This is another argument in favour of shorter duration of exempted practices.

CFI took a position concerning indispensability in its decision Metropole télévision SA v Commission, where it declared that since Commission had failed to demonstrate indispensability when assessing the restrictions, it was not entitled to grant any exemptions and thus the decision was annulled\textsuperscript{415}.

In UEFA-decision Commission defended indispensability first of all with a fact that in order to ensure the quality of Champions League product, it is indispensable that UEFA takes the commanding role in the administration of the league. Further on as the season is long and unpredictable it would be impossible for media operators to buy reasonable sets of matches in advance. Even buying significant number of matches from many clubs would be inefficient. Finally the value of intellectual property rights of Champions League would be hampered if the league would be selling by both clubs and league through non-exclusive licences.\textsuperscript{416} Therefore Commission accepted the restrictions to be indispensable as long as joint selling body is able to find demand for the jointly sold media rights\textsuperscript{417}. Furthermore Commission noted that proposed arrangement gave good opportunities to fans to follow their favourite club as rights that were not exploited by UEFA, could be after embargo exploited by clubs under certain conditions.

\textsuperscript{412} Whish 2009, p. 157.
\textsuperscript{413} OJ 2004/C 101/08, para. 73.
\textsuperscript{414} Ibid. para 81.
\textsuperscript{415} Joined cases T-528/93 and others Metropole télévision SA and others, para 99.
\textsuperscript{416} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 174-177.
\textsuperscript{417} Ibid. para 180.
provided that a product that they create is not in contradiction with the Champions League product offered by UEFA\(^{418}\).

### 3.5.4 No elimination of competition in a substantial part of the market

Final one of four cumulative provisions for the applicability of Art 101(3) TFEU orders that exempted practice cannot prompt elimination of competition in a substantial part of market. This autonomous community concept is established to ensure that Art 101(3) TFEU cannot prevent the application of Art 102 concerning dominant position.\(^{419}\) Thus this article cannot be applied to cases related to dominant position.

Whether competition is being eliminated depends on degree of competition before the arrangement. If market is strong, it can take quite significant restriction to make this exemption void. On the other hand in a weak market even a small distorting effect can cause prohibition of the application of 101(3) exemption\(^{420}\). In the assessment both actual and potential competition will have to be taken into an account\(^{421}\). Finally the guidelines set out a series of substantial factors that have to be taken into an account when assessing the eliminating effect\(^{422}\).

According to the Commission in a relevant market formed by football tournaments UEFA Champions League represented only 20% of the relevant market. Further on the fact that rights are split up into several packages provides several media operators a possibility to acquire rights thus resulting further segmentation to the market\(^{423}\). Therefore Commission declared that joint selling of media rights of the UEFA Champions League is unlikely to eliminate competition of media rights\(^{424}\).

### 3.6 Wouters-formula and rule of reason argumentation

From strictly theoretical point of view in interpretation of restrictive practices and objectives behind exemptions of restrictive practices, ECJ’s decision in Wouters needs to


\(^{419}\) Whish 2009, p. 159.

\(^{420}\) OJ 2004/C 101/08, para 107.

\(^{421}\) Ibid. para 108, 114.

\(^{422}\) Ibid. para 115.


\(^{424}\) Ibid. para 196.
be taken into account. ECJ had traditionally concluded that restrictive agreements fell outside Art 101(1) where they were necessary to facilitate a commercial activity. However in its Wouters decision ECJ took a new direction as it concluded that it is also possible to balance non-competition objectives against a restriction of competition, and to conclude that these objectives outweigh the restrictions with the consequence that 81(1) is not infringed. In this case court exempted a restrictive regulation of Dutch bar association concerning prohibition of lawyers from practicing as members of the Bar in full partnership with accountants. The court justified this restrictive practice with, as Whish calls it ‘regulatory ancillarity’ as follows:

More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

This decision was confirmed in ECJ’s Meca-Medina decision with regard to sport with a notification that these ‘regulatory anciliarities’ have to be inherent in the pursuit of the objectives of sport and proportionate to them. In Meca-Medina this legitimate objective that was justified under Wouters-formula was fight against doping, and as a result this case fell outside the scope of EC Treaty because of its inherency to the attainment of the objectives of fair practice in sport. This interpretation was also confirmed in Commission’s White paper on sport stating that specificity of sport could not alone be construed so as to justify a general exemption from the application of EU law. Thus interpretation of ECJ in Meca-Medina can be declared as a prevailing rule for interpretation when considering the special position of sport.

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426 Case C-309/99 Wouters and others v Algemene Raad van de Nederlandsche Orde van Advocaten, para 2.
427 Whish 2009, p. 128.
428 Case C-309/99 Wouters and others v Algemene Raad van de Nederlandsche Orde van Advocaten, para 97.
429 Case 519/04 P. David Meca-Medina and Igor Majcen v Commission, para 42.
This interpretation is openly applying a mechanism that compares the positive effects of regulations against negative effects in market and therefore is very similar to American rule of reason system that is recognised in Sherman Act 1890. However as the European system has a device of exemption in terms of 101(3) TFEU, courts have stated several times that this kind of examination should be performed instead with regard to Article 101(3) TFEU. In Wouters decision this rule seems to be imported to the article 101(1) TFEU thus making regulatory ancillarity applicable to balance any kind of restricting practice with regulatory rules adopted for non-competition reasons. However for example Whish does not see that Wouters formula does not apply the American rule of reason doctrine and therefore it is not the correct expression to explain its application.

3.7 Conclusions concerning joint selling and EU Competition law

Many within the ambit of football in Europe have stated that pure competition policy just won’t work in sport. Despite this claim the Commission has involved itself in many cases concerning sport and in particular concerning joint selling of football since it has made it clear that the sale of broadcasting rights is an extremely valuable commercial activity for broadcasters, clubs and advertising companies. In its decisions Commission has exempted broadcasting deals since all four factors required for an exemption under 101(3) TFEU have been satisfied. While this arrangement seems to be good one in theory, it leaves some doubts if you take a look at the current state of European football economy.

Commission’s decisions to limit the duration of contracts and to divide the broadcasting rights into several packages that are sold in non-exclusive basis with respect to “single buyer rule” have undoubtedly improved acceptability of the arrangements from European Competition law point of view and has managed to put some discipline in

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431 Weatherill 2007, p. 518.
433 Whish 2009, p. 132-133.
435 Commission background note on UEFA-decision MEMO/03/156, p. 1.
437 See Commitments of the FAPL, p. 5.
spite of both horizontal and vertical restraints of competition that joint selling arrangements have earlier caused\textsuperscript{438}. In this respect it can be said that the Commission got it right with the joint selling decisions and Commissioner Monti was right to state that new regulations agreed between Commission and UEFA represented good news for clubs, broadcasters and fans\textsuperscript{439}. Furthermore as the Arnault review shows, the solidarity financial distribution system introduced by UEFA\textsuperscript{440} is redirecting funds to poorer leagues and particularly poorest European countries are benefitting from UEFA’s system\textsuperscript{441}.

However these improvements does not change the problematic facts stated many times in this dissertation. As the economic differences between rich and poor European football clubs both inter-league and intra-league continue to grow and multi-million broadcasting sales are followed by growing economic difficulties in European football, it cannot be said that the result of these money-making machineries is a desired one. As a result growing economic difference and decreasing competitive balance cannot be said to be fulfilling the objective of these arrangements.

Thus while object of Commission decisions is correct in theory but in practice effect followed from these decisions is definitely not\textsuperscript{442}. Therefore in the following conclusions chapter I will try to introduce some plausible tools from the economic point of view that could be used in restoration of balance in the European football family.

\textsuperscript{438} Toft 2005 (speech), p. 5-7.
\textsuperscript{439} IP/02/806, p. 1.
\textsuperscript{440} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 164-165.
\textsuperscript{441} Arnault 2006, p. 156-159.
\textsuperscript{442} Kesenne 2007, p. 393-395.
4. Conclusions; from chaos to control and from insolvency to economic balance

4.1 Quest for legal certainty

Before going into substantial content of broadcasting relations, it is necessary to provide some attention to the problem regarding lack of legal certainty in sports related decisions. The principle of legal certainty that is one of the general principles of EU law sets a fundamental premise that those subject to the law must know what the law is in order to be able to plan their actions accordingly. Clear legal state is a contributing factor to economically consistent results. As stated before sport has only been in the ambit of primary European legislation after the introduction of TFEU and even this new inclusion is not expected to improve the interpretation crucially.

Wouters formula that was introduced to sport in Meca-Medina decision sets a proportionality test for sport related matters. As the result of this decision the specificity of sport will continue to be recognised, but it cannot be construed as a general exemption from the application of EU law. This does not serve principle of legal certainty that should be able to eliminate randomness from the decision-making. To make it even worse the same problem of legal uncertainty is also said to exist in general ambit of EU competition law, therefore making the background for decision-making even more uncertain.

Best solution from the point of view of legal certainty would be definitely an introduction of a clear cut regulation for sport describing which activities do constitute economic activity and which do not. However this plea must be seen from politically realistic point of view. There are strong stakeholders in both ends of the rope that want to take European sports in to the “right” direction. EU institutions are eager to increase their influence in sport related matters while extremely influential governing bodies

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446 Raitio 2003, p. 337.
want to keep their autonomy and make sure that sport is not ruled by judges. This rift makes it unfortunately impossible to find a regulatory answer to reach legal certainty in near future. Therefore only solution to balance sport in near future is to have ongoing cooperation between EU institutions and governing bodies that aims to maintain the balance between regulatory and non-regulatory aspects of sport. Following chapters offer some examples for the future considerations.

**4.2 Unfair distribution of revenue in European football**

Growing gap between small and big clubs is the major substantial problem in European football economy. This has been resulting from soaring television revenues and distribution system that centralises the revenue to the biggest clubs and leagues. Increase of revenue is not a problem itself but the current revenue sharing system is since majority of money received from television deals is directed to biggest clubs. This is clearly against the idea of improvement of distribution within football world described by Commission in its UEFA-decision. Current situation with big difference in solvency of big and small clubs accompanied with overheated player wage market is resulting pressure to small clubs to compete in a market that they are doomed to fail since the revenue sharing systems are built to gear up the biggest teams while smaller ones only get some breadcrumbs of the loaf of broadcasting revenue bread. Further on big investments from the public purse supporting for example infrastructure and security of football matches give nothing in return as revenues go into private pockets of rich investors of biggest clubs and heavily over waged football stars.

In the following chapters of conclusion this research will introduce some solutions that could improve the situation and make it more even from every stakeholder’s point of view. First it will consider a possibility of introduction of salary caps to European football. It will be followed by consideration whether it is possible to introduce a new revenue sharing model and then concentrate to Champions League as a primary problem product. Finally it will propose another solution that comes from American model of

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451 Written question to the Commission, Goebbels 2002.
sport that would on one hand solve the problem in football markets but on the other hand lead to demise of pyramid model of European sport and Americanization of economics of European football.

4.2.1 Salary caps as a possible solution

As a result of Bosman and liberation of player transfers the transfer fees of players fell but consequently player wages rose\(^\text{452}\) and doubled within the course of ten years after Bosman decision\(^\text{453}\). Today they often result an unbearable burden for sport clubs since salary escalation has pushed leagues to a threshold of risk intolerance because leagues are competing in an open player market while the domestic league product markets remain closed. Salary caps that have been widely used in American professional sports are designed to give a solution to a problem of clubs spending unsustainable amounts of money to player wages in order to compete at the highest level\(^\text{454}\). A salary cap will by definition result in players receiving lower salaries than in a free-market system without the cap and thus limit the wages of football clubs.

According to theorists there can be two kinds of salary caps. Either one that places a spending limit applicable to all clubs known as a ‘hard cap’ or another option determined in relation to the revenue (%) of that club known as ‘soft cap’.\(^\text{455}\) Furthermore there are less restrictive measures that belong to more or less same group of restrictions. One proposed option is a luxury tax that would be imposed to clubs spending over the agreed limit and this tax revenue would be then redistributed within the game. Finally one solution that is even less restrictive could be introduction of squad limits that would impose a ceiling on the number of players in the club squad but would still leave questions concerning player wages to the clubs.\(^\text{456}\)

Salary caps are inherently collusive and may lead to club profit maximisation at the expense of player wages being controlled. Salary caps could be seen as a restriction of Art 101 TFEU on the level of competition for players’ services since its object is clearly to restrict ability of club to freely recruit players. However it would make sense to justify salary caps as a tool to ensure economic viability of teams competing in the

\(^{452}\) Vrooman 2007, p. 316. See also footnote 215.
\(^{453}\) Frinck 2007, p. 426.
\(^{454}\) Parrish – Miettinen 2008, p. 222.
\(^{455}\) Kesenne 2007 II, p. 125.
\(^{456}\) Parrish – Miettinen 2008, p. 221.
league, preserving competitive balance and encouraging youth development.\textsuperscript{457} Thus salary caps could escape definition as a restriction under article 101 TFEU since its in-herency could be demonstrated through the aforementioned facts. One thing that should not be forgotten in consideration of applicability of restrictive measures is that restrictive measures cannot be justified by purely economic aims\textsuperscript{458}.

In the current situation of European football leagues soft salary caps would only further widen the gap between rich and poor teams. This is because the market value of biggest teams being much higher\textsuperscript{459} will definitely allow them completely different salary range than teams with lower income. Therefore hard cap - although its more direct restriction of competition would actually be more justifiable and easier to be considered as inherent for the attainment of the economic objectives in sport leagues.

Nevertheless it is far from certain that introduction of salary caps would increase the equality in professional football. If you take an example from a hard cap, setting a maximum level of salary for a single player would decrease the salaries of superstars\textsuperscript{460}. However it would not change the fact that big clubs have superior financial resources compared to smaller ones and as a result of decreased salaries of superstars big clubs would have more money to spend to the wages of other players. This would lead to general price increase for other players that would further deteriorate the buying power of the smaller clubs.\textsuperscript{461}

Another problem with salary caps is a need for collective agreement between all European leagues, which is not easy to accomplish because supranational culture of collective bargaining is yet to be established in Europe. If only one or two of big leagues would agree on salary caps, it would only decrease the quality of players in the respective leagues while the other leagues would “wage them out” of the market since in the European system teams are contrary to the American one trying to maximize their utilities instead of making profit\textsuperscript{462}. The system of open leagues and promotion and relegation system further contributes to the utility maximization in European sport\textsuperscript{463}.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{457} Parrish – Miettinen 2008, p. 220.
\item\textsuperscript{458} Snell 2005, p. 38.
\item\textsuperscript{459} Frinck 2007, p. 423.
\item\textsuperscript{460} See examples of these salaries in Frinck 2007 p. 424.
\item\textsuperscript{461} Van den Brink 2000 II, p. 425-426.
\item\textsuperscript{462} Frinck 2007, p. 426.
\item\textsuperscript{463} Parrish – Miettinen 2008, p. 220.
\end{enumerate}
\end{footnotesize}
Salary cap as an idea is definitely no miracle cure for all financial problems that occur in league sport, since a considerable part of them are linked to simple mismanagement. Nevertheless, the use of salary caps in American sport successfully led to a solution to the problem of clubs spending unsustainable levels on player levels on player wages in order to compete at the highest level, and if it would be introduced under right circumstances, it might form at least a partial solution also to the financial management challenges in European sport. However as already recognized, negotiation of a collective agreement would be practically impossible in current state of European football. Thus as Szymanski stated, “it is clear in theory that a salary cap should improve competitive balance, and equally clear that making a salary cap effective has proved elusive”\textsuperscript{464}.

4.2.2 Possibility to introduce more stringent commitments to the exemptions

Solidarity between different levels of sport has always been an important objective in European sports policies. In Nice declaration the Council stated as follows:

‘Sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport, which co-exist there; they provide the possibility of access to sports for the public at large, human and financial support for amateur sports, promotion of equal access to every level of sporting activity for men and women alike, youth training, health protection and measures to combat doping, acts of violence and racist or xenophobic occurrences.’\textsuperscript{465}

This goal illustrates in a tangible way goals of European Council and Commission to ensure that money that is once collected by few professionals that base their fame and scoop their biggest eye-catcher products from hard working grassroots level of sport. As we have seen this is not entirely the case in football and despite the noble goals of the Commission with regard to execution and effect of the solidarity plan of UEFA\textsuperscript{466}, reality proofs that financial disparities between clubs of different countries and levels are increasing\textsuperscript{467} and broadcasting deals play a major contributing role in the phenomenon

\textsuperscript{464} Szymanski 2003, p. 1171.
\textsuperscript{465} Nice presidency conclusions 2000.
\textsuperscript{466} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 165-166.
\textsuperscript{467} Van den Brink 2000, p. 365.
of increasing financial gaps in European football\textsuperscript{468}. In general finance concentration and focus of media exposed disciplines lies on the highest level of sport while grassroots sport is suffering from hindrances in private financing and especially during the economic downfall uncertainty of public financing.

Another tool for the Commission to save the economy of European football is to introduce stricter conditions to the exemptions that it grants for the restrictive joint selling arrangements of European football leagues\textsuperscript{469}. This applies to both national and pan-European competitions. This is a highly political matter and involves major amendments from the direction of governing bodies and major clubs that today generate competitive imbalance through their significant revenues that allow them to dominate the player markets\textsuperscript{470}. Only efficient discussion and cooperation between these bodies and European institutions can save European football. Otherwise it will become “a thing of the past” as Hoehn and Szymanski predicted already in 1999\textsuperscript{471}.

Solidarity has to be real and tangible and motivation for participation of best clubs in European Champions League will have to boast from sheer will to embrace the European system and to be the best European team in football instead of current attitude of getting well paid through participation depend less of success\textsuperscript{472}. Unfortunately until now European model of sport has not included any systems that would share major revenue sources equally for the good of the game\textsuperscript{473}. Hope for better future is therefore set on the shoulders of biggest financial stakeholders, since if the big leagues will agree on more equal financial terms, smaller ones are likely to follow them. Emergence of this solidarity agreement would not however have to break down the model of joint selling, since the current model of joint selling is undoubtedly the most efficient one in terms of the amount of received income\textsuperscript{474} and as Commission stated, it is a good thing for broadcasters, clubs and fans\textsuperscript{475}.

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\textsuperscript{468} Frick 2007, p. 423.
\textsuperscript{469} See proposed model from competition law point of view from part 4.3 of this dissertation.
\textsuperscript{470} Parrish – Miettinen 2008, p. 6.
\textsuperscript{471} Hoehn – Szymanski 1999, p. 205.
\textsuperscript{472} For example Belgian club Anderlecht got over 20% of its annual profit from Champions League revenues during the season 2004-2005 even though it did not win any single game in the competition (Kessenne 2007, p. 396).
\textsuperscript{473} Halgreen 2004, p. 70.
\textsuperscript{474} Harbord – Szymanski 2004, p. 119.
\textsuperscript{475} IP/02/806.
One interesting legislative tool to “force” this change could also come from a rather surprising direction – from European football fans. New Article 11 TEU provides European people with an opportunity to take the initiative of inviting the European Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. This could be also used for sports and football since sport is now recognised among the policy areas.

However there are still some questions concerning practical application of citizens initiative and even though it might not be hard to find one million people citizens that are nationals of significant number of member states, it is not certain that time would be ripe for execution of European citizens initiative, since the consultation procedure of Commission is still on its way\textsuperscript{476}. In any case some kind of initiative from direction of fans would not be a big surprise since in many countries fans are expressing their discontent towards the current financial system in European football\textsuperscript{477}.

4.3 Champions League - a problem product that can be saved?

UEFA Champions League has undoubtedly been the most profitable success in the European sports broadcasting history\textsuperscript{478}. As a pan-European football competition its aim is to serve the entire European football community and to be the flagship of European club football. Unfortunately this profitability is lucrative for a few clubs only while it increases disparities both inter and intra league as it has already been stated in this dissertation. Due to lack of competitive balance big leagues get majority of positions in final stages and in fact due to the UEFA coefficient system biggest leagues\textsuperscript{479} get more positions already from the start to this lucrative league with their four positions while smaller ones that actually are in need of money get only one or maximum two. Permanent success for certain teams from certain leagues is increasing the gap between big

\textsuperscript{476} see Commission’s Green paper on European Citizens Initiative 2009.

\textsuperscript{477} As an example I’m using an ongoing protest of supporters of Manchester United. They are dissatisfied on the financial policies of the club owners and are trying to force them to change the direction (or to sell their ownership) and as a protest they are wearing original colours of club (green and gold) instead of normal red colours.

\textsuperscript{478} Halgreen 2004, p. 115.

\textsuperscript{479} FAPL (England), La Liga (Spain), Serie A (Italy).
and small clubs and big and small leagues\textsuperscript{480}. Thus also uncertainty of the outcome is decreasing that is again – bad news for football fans.

However UEFA has acknowledged these problems and has already taken some measures to improve the situation. More teams from smaller countries were involved already in season 2009/2010 as UEFA established renewed qualification system with “Champions path and Non-Champions path\textsuperscript{481}” thus providing better opportunities from smaller countries to enter the first group stage\textsuperscript{482} that also is the first phase that clubs will benefit from joint selling of broadcasting rights for big time\textsuperscript{483}. Furthermore current chairman of UEFA Michel Platini wanted to decrease the number of clubs from the biggest countries participating in the qualification round from four to three\textsuperscript{484}. However this was highly opposed by strongest football clubs (former G-14 clubs) and today this revision has not yet been executed. Finally UEFA is keen to implement and promote its solidarity system that was also reviewed in the independent sports review\textsuperscript{485}. However when looking at the latest quotations one can see that majority of money from the Champions League is still going to the richest clubs participating the competition\textsuperscript{486}.

Therefore it can be concluded that in order to save European club football in its current form, UEFA will have to take strong measures and try to oppose the biggest clubs in the negotiations over future revenue sharing systems of its flagship product. Commission will have to support this agenda by setting up measures that would force UEFA to implement more efficient solidarity and revenue sharing models that would provide less money to the participating clubs and more money to the European football family. These models will have to be included in Commissions future exemptions regarding joint selling agreements of Champions League, since it is clear that these exemptions will be needed as long as de facto cartelisation in terms of joint selling will continue but

\textsuperscript{480} Kesenne 2007, p. 395.
\textsuperscript{481} See the system at <http://www.uefa.com/uefachampionsleague/competitionformat/index.html>.
\textsuperscript{482} Ties in Champions path 2009 were now on the final qualifying stage from following countries: Republic of Macedonia v Greece, Austria v Israel, Latvia – Switzerland, Denmark v Cyprus, Bulgaria v Hungary. Five of them qualified to the group stage. Teams in the non-champions path came from stronger countries as follows: France v Belgium, Scotland v England, Romania v Germany, Portugal v Italy, Greece v Spain. Also five of them qualified to the group stage.
\textsuperscript{483} For the earlier stages of competition broadcasting rights are sold individually by clubs (Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 26).
\textsuperscript{484} <http://www.guardian.co.uk/football/2006/dec/29/championsleague200607.championsleague >.
\textsuperscript{485} Arnault 2006, p. 156-159.
\textsuperscript{486} UEFA’s TV and sponsorship earnings from the Champions League up to an estimated €1.09bn this season (09/10). Of that, 75%, €750.9m, is distributed to the participating clubs. < http://www.guardian.co.uk/football/2010/feb/14/michel-platini-uefa-champions-league>.
on the other hand in the spirit of Matra Hachette -decision\(^{487}\), it cannot be declared ‘per se’ illegal and thus it qualifies for Commission’s observation.

Commission’s argumentation on improvement of technical development through joint selling deals has expired since progress in new media market has been abnormally rapid. Therefore new measure will have to be identified to justify the first one out of four cumulative conditions set for an exemption in Art 101(3) TFEU. Commission could justify its exemption with economic progress that would be of objective value to the community as a whole\(^ {488}\) through a new reallocation model for television revenues. It would then be the ultimate condition for football associations to renew their actions, as they would have to choose between lucrative joint selling model with an efficient solidarity model and inefficient individual selling model that would be done through the football clubs.

If the first option would prevail, a result of this arrangement would in a long run restore the competitive balance between European football leagues and increase the uncertainty of the outcome for European club football. Although it seems that parties are at the moment far from each other, it should not be forgotten that Commission is being all the time “a nice guy” giving governing bodies a special permit to execute restrictive practice while it in fact has tools to draw stricter obligations to its decisions concerning these arrangements that de facto are restrictive practices. To conclude the case of Champions League one can say that product created through efficient joint selling system is good if not excellent, but only a new reallocation model for revenue needs to be lobbied, negotiated and finally implemented in order to secure a system that would really work in spirit of fair play for all European football stakeholders.

### 4.4 Another direction - Americanization of European football

European model of sport has been already described in the second part of this dissertation. It was also proven that this model has been abandoned or at least clarified as “endangered species” by the EU institutions\(^ {489}\) and European Courts\(^ {490}\). If cooperation be-

\(^{487}\) Case T-17/93 Matra Hachette SA v Commission, para 85.  
\(^{488}\) Whish 2009, p. 151.  
\(^{489}\) Commission white paper on sport 2007.  
\(^{490}\) Case 519/04 P., David Meca-Medina and Igor Majcen v Commission.
tween EU institutions and governing bodies of sport proposed in previous two chapters will not work, a rather revolutionary step proposed some academics\textsuperscript{491}, is to be taken in form of abolition of the most successful European sports broadcasting product, UEFA Champions League. If the economic and competitive balance cannot be restored through the measures proposed in the previous chapter, the solution is to abolish the current system and establish a new one.

Return to the system with closed player market is definitely not an option and even forced quotas of home-grown players seem to be very artificial solutions to the problem. Turning the clock backwards by restricting the international mobility of players is not feasible from free movement of labour point of view since its clear that there are no special reasons to declare sport as special area that could restrict the fundamental freedoms. Some arguments claiming that fans do not want to see foreign players in their clubs is not plausible either since If European fans would hate the mobility of players, they would have turned away from football, which would have stopped the international transfers because clubs do not shoot themselves in the foot.\textsuperscript{492}

Thus an option of opening the product market through a European super-league in football gathering the biggest clubs under one flag and establishing an entire new relevant market for European football\textsuperscript{493}, could balance competition in European football. In practice super-league would gather together 20-30 best European clubs that would depart from their national leagues and domestic football organised by national football associations as it is presented in European model of sport and start to compete in a closed super league working in spirit of American model of sport with a strict division between amateur and professional sport leagues\textsuperscript{494, 495}.

This system was already attempted to establish by Italian firm Media Partners owned by Silvio Berlusconi, that tried to convince European top football clubs to set up a closed league to possibly replace UEFA Champions League. However this attempt ended up to a failure and this league was never established\textsuperscript{496}. Super league model was however executed in Scandinavia for two seasons during the winter break of the domestic

\textsuperscript{491} for example Kesenne 2007, Noll 2007, Hoehn – Szymanski 1999.
\textsuperscript{492} Kesenne 2007, p. 397.
\textsuperscript{493} Ibid.
\textsuperscript{494} Halgreen 2005, p. 71-80.
\textsuperscript{496} Halgreen 2004, p. 80, Van den Brink 2000, p. 365.
leagues of Denmark, Sweden and Norway\textsuperscript{497}. This project did last however only two years before failing to secure a new TV-deal and was never organised after the season 2006/2007.

From the other sports there is at the moment similar system working in Russia as Russian domestic “Superleague” was replaced in 2008/2009 by Kontinental Hockey League (Kontinentalnaja hokkeinaja liga, hereinafter KHL). At the moment KHL, working to a certain extent with a concept similar to National Hockey League in US\textsuperscript{498}, has teams from Russia, Latvia, Belarus and Kazakhstan. It also has ambitious plans to expand to west and today it seems that at least one team from Czech league will join KHL in near future\textsuperscript{499} but as clubs such as AIK Solna from Stockholm have expressed their will to join KHL in the future\textsuperscript{500}, it is clear that tendency to open the product market in sport with a goal to cash bigger revenues does exist.

As an effect of this arrangement departure of big clubs from the domestic leagues would naturally decrease the interest in domestic markets. This would consequently mean decrease in revenue flows. However also competition in wages would decrease as a result of departure of biggest clubs and thus smaller clubs would be provided a possibility to compete in a league with healthier financial market and with a better competitive balance. In a long run this could be sustainable for the football market since people would be provided with two options to follow football. On one hand an expensive and highly commercial but also highly qualified super-football market and as another option a domestic league that would embrace the traditions and spirit of beautiful game in its purest form. Consequently this would also mean a departure from European pyramid model of sport and approach towards American professional and amateur leagues model, as the Commission indirectly predicted in its White paper of sport 2007\textsuperscript{501}.

\textsuperscript{497} Halgreen 2004, p. 81.
\textsuperscript{498} Closed league without promotion and relegation system.
5. Final words

There is not that much to be done at the moment from legislative point of view. TFEU finally managed to introduce a new article that governs European sport but its economic influence is rather limited. At the current stage where the European model of sport is in a stage of uncertainty, it is more viable to start from clarification of practices under current practices and thus attain legal certainty first through practices in order to be ready in a long run to introduce measures in legal perspective.

From execution point of view Commission practices are rather reasonable and Commission accompanied with European competition authorities just have to make sure that discriminating exclusivities in upstream markets are not created. After Modernisation regulation also role of the national competition authorities in increasing and they will most likely pay significant role in scrutiny of future joint selling agreements. Commission may and in my opinion should make stricter conditions as they admit exemptions under Art 101(3) TFEU regarding redistribution of money since current model has only increased disparities between the clubs. Wouters formula that is now confirmed as an interpretive model for sport related matters is applicable in consideration of special position of sport and even in introduction of restrictions that would per se be restrictive practices from the point of view of European Competition law. Special position does exist indeed but in order to ensure benefit of European community as a whole it should be kept highly conditional just as ECJ decided first in Wouters\textsuperscript{502} and then in Meca-Medina\textsuperscript{503}.

From economic point of view there are two optional models for future of which first one involves embracing the traditional European model of sport and second one making sacrifices for the sake of economy. If Commission will manage to set up more stringent conditions for its future decisions regarding exemptions in joint selling, a new financial model where money goes to the grassroots level will also limit consumption and keep player wages in control. This solution requires in a long chain of shared responsibilities from all stakeholders and can be compared with a battle against climate change, where better future asks of sacrifices from every one of us. However if this first option proves

\textsuperscript{502} Case C-309/99 Wouters and others v Algemene Raad van de Nederlandsche Orde van Advocaten, para 97.
\textsuperscript{503} Case 519/04 P., David Meca-Medina and Igor Majcen v Commission, para 27.
to be impossible to implement, a new European sport model with strong American influence needs to be introduced. In this model majority of income but also majority of expenditures would concentrate to the super-league while rest of the European sport community would have less money but less expenditures and thus their operation in their own market would be more reasonable.

Thus when using model of object and effect mechanism distinctive in competition law\textsuperscript{504}, ‘Fair Play’ is an object and should also be the effect of Commission decisions concerning joint sales of football leagues. However practice shows us that at the moment this arrangement does not lead to a desired effect that should satisfy all European stakeholders in football\textsuperscript{505}. Strictly from Competition law point of view Commission has been until now right to exempt joint selling agreements with the arguments expressed in the UEFA-decision\textsuperscript{506}. However the consequence of current revenue sharing system is in a need of urgent reconstruction that can be done either a way that is a salvation of European model of sport or trough a model that revamps the entire system starting from a brand new definition of position of sport in the European Union and its legal system. Today EU has finally a proxy given by its primary legislation\textsuperscript{507} to officially treat sport among its policies. Use of this proxy is desperately needed in a quest to save the European model of sport from its demise.

\textsuperscript{504} Whish 2009, p.116-119.
\textsuperscript{505} See an indicative economic assumption for example: “When a league has an average profit rate over 15 percent but some teams are losing money, there might be a problem in distribution of league profits, and some mechanism to share revenues might be appropriate” (Rosner – Shorshire 2004, p. 47).
\textsuperscript{506} Commission Decision on Joint selling of rights to the UEFA Champions League OJ L 291/25, para 139-197.
\textsuperscript{507} Art 165 TFEU.