

# Chapter 2

## Towards a Typology of (International) Comparative Sports Law (Research)

**Abstract** This contribution presents the international comparative research that was undertaken by the ASSER international Sports Law Centre in The Hague in the previous decade, in most cases in cooperation with other national and in particular international sports law centres and individual researchers at those centres or connected with universities. The ASSER experience is used here to apply and test in practice to sports law research a set of distinctions which are proposed in general comparative law literature, such as internal and external comparative law; national and international comparative law; comparative law in the stricter and wider sense; horizontal and vertical comparative law; and macro and micro comparative law.

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## 2.1 Introduction

Sports law is an independent field of law: it complies with the requirements that can be set for the existence of fields of law.<sup>1</sup> Sports law consists of a private and a public segment. The private segment is formed by the rules of organised sport. Organised sport is built up of national organisations for each sport, which are members of regional (continental) and global federations. This segment is a hierarchical pyramid with global federations such as the world football association FIFA at the top, with UEFA as the regional organisation for Europe. There is also the Olympic Games, under the auspices of the International Olympic Committee, which heads the national Olympic Committees and with which global federations cooperate.

The rules of organised sport are largely of a transnational character. For each sport there is in fact a single legal order in which the national and international levels are highly integrated. The rules of football, for example, are the same worldwide and there are uniform regulations for transfers of professional footballers from one club to another.

The private segment of sports law, also known as *lex sportiva*, forms the core of the legal field. There is also a public segment that bears far more of an incidental character in terms of regulations. This consists primarily of national legislation and a number of regional and universal treaties that relate particularly to sport. Naturally, sport is in general subject to the national and international public legal systems. In the European Union, for example, the jurisprudence of the European Court of Justice has led to the development of what could be described as European sports law.<sup>2</sup>

Writing from an international private law perspective, Kokkini already stated in 1988 that if one reviews the comparative law publications of recent decades, it is easy to see that, with the exception of the recognition that comparative law is not a branch of objective law, such as family law or maritime law, and that it can be helpful in achieving many objectives, there is as yet no generally accepted theory about comparative law. Those engaged in comparative law appear to be very enthusiastic about distinctions. Almost everyone active in the field feels obliged to introduce at least one new distinction, which, needless to say, reduces the chances of reaching a consensus about the theoretical principles of comparative law—and this is not even taking the confusion caused by the use of the same terms to mean different things into account. A few examples of such distinctions are:

- a. internal and external comparative law (comparing legal systems of countries with the same or a different social system);
- b. national and international comparative law (bilateral, between two national legal systems, or multilateral up to and including universal);

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<sup>1</sup> Davis 2001, pp. 211–346. See also: Siekmann 2011.

<sup>2</sup> Weatherill 2011, pp. 38–41.

- c. comparative law in the stricter and wider sense (the study of normative rules as such or also including the reasoning of law and the wider environment of the rules);
- d. horizontal and vertical comparative law (comparing legal systems that are equivalent by law, i.e., sovereign legal communities, or comparing rules of a 'lower' and 'higher' order, such as national and supranational rules, for example); and:
- e. macro and micro comparative law (comparing legal systems or groups of legal systems in their entireties or comparing specific parts of different legal systems).<sup>3</sup>

The above-mentioned distinctions (hereafter: 'Kokkini-criteria') in principle can also be relevant in the context of (international) comparative sports law research ('international' is used here in the ordinary meaning according to which comparative sports law per definition is 'international'; international sports law in fact is a pleonasm; cf., 'national' = bilateral according to 'Kokkini-criterion' a); bilateral means international, between two states (!)). The character of each of these criteria may be described as follows:

- a. internal/external: socio-political;
- b. national/international: geographical;
- c. *strict/lato* sensu: literal v sociological/teleological (spirit of the law) legal interpretation;
- d. horizontal/vertical: hierarchic; and
- e. macro/micro: scope of the legal comparison. Of course, the follow-up of a–e might be changed in a more logical order: geographical/socio-political/hierarchic/interpretative/scope (this order is used in this article below).

As already stated, one of the few points on which there is consensus among authors concerns the recognition that comparative law can be helpful in achieving many objectives. An overabundance of literature has been published about these objectives, as authors seek to outdo each other in maximising ideals and expectations in relation to comparative law. According to Kokkini, efforts have been made to place the different objectives of comparative law into two broad categories: theoretical and practical.<sup>4</sup>

It is remarkable that a criterion regarding the purpose(s), the *ratio* of legal comparison is missing amongst the 'Kokkini-criteria' themselves. Of course, there may be a purely academic/scientific or theoretical purpose. However, legal comparison is a scientific research method for practical purposes too, like unification or harmonization of the law (international perspective), or the national perspective of

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<sup>3</sup> Kokkini-Iatridou et al. 1988, pp. 3–5. See also, generally on comparative law: Zweigert and Kötz 1988.

<sup>4</sup> Kokkini-Iatridou et al. 1988, pp. 26–27.

improvement of the law also in the light of 'best practices,' 'lessons learned' from elsewhere, from abroad. So, an additional criterion as to purpose has to be formulated: (f) theoretical/practical.

From the perspective of contributing to the developing of a theory of legal comparison, regarding sports law in principle the following options of types of legal comparison would exist: (1) the comparison between national sporting rules and regulations (per sport and theme) ('private part'); (2) the comparison between international sporting rules and regulations (per theme) ('private part'); (3) the comparison between national legislation (per theme) ('public part'); (4) the combined comparison between (1) and (2) on the one hand and (3) on the other. Additionally, for example the globally valid Laws of the Game (association football) might be scrutinized for improvement by comparing them with those of other, in particular comparable team sports (why, for example, not introducing the temporary ban from the playing field which is known from ice hockey, etc.?) The striking aspect of (international) comparative sports law is of course the role played by what is called here the private segment or part, that is the NGO or transnational law of sporting organisations. So, in the context of (international) comparative sports law research, a criterion must be added to the 'Kokkini-criteria': (g) private/public (or public/private if as a starting-point is taken that the public part is of a hierarchically higher legal order and not the circumstance that the private part is the hard core/inner circle of sports law). Combined, private/public legal comparison could be also a special example of horizontal/vertical comparative research. The same would apply to the combined thematic comparison between international (INGO) and national (NGO) sporting rules and regulations [for example, of course only in case the international rules and regulations are not to be 'copied' at the local level for reasons of hierarchy (cf., for example the WADA Code)]. As to the internal/external 'Kokkini-criterion' it should be noted that countries may have similar social systems at large, but different sporting systems [cf., interventionist and non-interventionist national sports models in the European Union (and beyond), see below]; the opposite is less imaginable, but might also be true.

In this article, I will present the international comparative research that was undertaken by the ASSER international Sports Law Centre in the previous decade, in most cases in cooperation with other national and in particular international sports law centres and individual researchers at those centres or connected with universities. The ASSER experience is used here to apply and test the 'Kokkini-criteria plus' in practice. To the survey will be added an example of the legal comparison between *continental* sports systems, the European and North American ones (re: the 'Americanization' debate in Europe). This can be considered macro legal comparison at the private, NGO (transnational) level, since it concerns jurisdictions, that is sporting jurisdictions, at large.

In chronological order the following research projects were undertaken and reported on:

- Klaus Vieweg and Robert Siekmann (eds), *Legal Comparison and the Harmonisation of Doping Rules; Pilot Study for the European Commission, Beiträge zum Sportrecht Band 27*, Berlin 2007 [EU commissioned study 2001]<sup>5</sup>;
- Promoting the Social Dialogue in European Professional Football (Candidate EU Member States), November 2004 [EU-commissioned study; see also: Robert C.R. Siekmann in *ISLJ* 2004/3-4 pp. 31–33];
- Football Hooliganism with an EU Dimension: Towards an International Legal Framework, November 2004 [EU-commissioned study];
- Janwillem Soek, *Sport in National Sport Acts and Constitutions: Definitions, Ratio Legis and Objectives*, *The International Sports Law Journal (ISLJ)* 2006/3-4 pp. 28–31 and 33–35 [Netherlands Ministry of Sport commissioned study];
- Robert Siekmann, *Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector*, *ISLJ* 2006/3-4 [G-14 European Football Clubs Grouping commissioned study];
- Health and Safety in the Sport Sector, May 2009 [EU-commissioned study];
- Study into the Identification of Themes and Issues which can be Dealt with in a Social Dialogue in the European Professional Football Sector, May 2008 [EU-commissioned study];
- Study into the Identification of Themes and Issues which can be Dealt with in the European Professional Cycling Sector, October 200 [EU-commissioned study];
- The Role of Member States in the Organizing and Functioning of Professional Sport Activities, November 2009 [EU-commissioned study]; see also: Robert Siekmann and Janwillem Soek, *Models of Sport Governance in the European Union: The Relationship between State and Sport Authorities*, *ISLJ* 2010/3-4 pp. 93–95 and 98–102<sup>6</sup>;
- The Implementation of the WADA Code in the European Union, August 2010 [commissioned by the Belgian EU Presidency];
- Study on the Equal Treatment of Non-Nationals in Individual Sports Competitions, December 2010 [EU-commissioned study];
- European Social Dialogue in Professional Basketball (forthcoming) [EU-commissioned].

And the following books consisting of thematic country-per-country studies of a comparative European/worldwide nature were published in the ASSER international Sports Law Series:

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<sup>5</sup> See also: *Bestrijding van doping in de sport: een internationale terreinverkenning in publiekrechtelijk perspectief* [The fight against doping in sport: an international survey from a public law perspective], October 2001 [Netherlands Ministry of Justice commissioned study].

<sup>6</sup> This article will also be published in the *Research Handbook on International Sports Law* (Nafziger and Ross 2011, 112–130).

- I.S. Blackshaw and R.C.R. Siekmann (eds), *Sports Image Rights in Europe, The Hague 2005* (second edition, forthcoming 2011);
- R.C.R. Siekmann, R. Parrish, R. Branco Martins and J.W. Soek (eds), *Players' Agents Worldwide: Legal Aspects, The Hague 2008*;
- I.S. Blackshaw, S. Cornelius and R.C.R. Siekmann (eds), *TV Rights and Sport: Legal Aspects, The Hague 2009*;
- P. Anderson, I.S. Blackshaw, R.C.R. Siekmann and J.W. Soek (eds), *Sports Betting: Law And Policy* (forthcoming);
- R. Siekmann and J.W. Soek (eds), *National Models of Sport Governance in the European Union* (forthcoming 2011).

These books were preceded by the following documentary volumes (books) of a comparative nature:

- Robert C.R. Siekmann and Janwillem Soek (eds), *Basic Documents of International Sports Organisations, The Hague/Boston/London 1998*;
- Robert C.R. Siekmann, Janwillem Soek and Andrea Bellani (eds), *Doping Rules of International Sports Organisations, The Hague 1999*;
- Robert C.R. Siekmann and Janwillem Soek (eds), *Arbitral and Disciplinary Rules of International Sports Organisations, The Hague 2001*.

The studies and reports will be presented hereafter according to the criteria of belonging to the public, private or private/public parts of sports law. In each case, at the end a typology according to the 'Kokkini-criteria' plus the two additional ones (theoretical/practical (purpose), and private/public (sports law) will be given. This in fact will be a typology along the lines of the 'orientation' of research. It should be noted that the results/findings of the research are not delivered here, being irrelevant in this context. Neither a typology of the methodology used in the operational/implementation phase of research will be given (cf., desk research and use of the the internet regarding literature and documentation, distribution of a questionnaire amongst stakeholders like sport and other pertinent ministries, national and international sport governing bodies and organisations, etc.). The test of the studies and reports against the 'Kokkini-criteria plus' focuses on the starting-point of the research, since the criteria deal with the issue of the point of departure of research. It is possible that the private and public segments of sports law are equally represented at the start, but that as a result of research it turns out that most information available is of a private character, or the opposite conclusion might apply. For example, before the WADA Code was adopted in 2004, all national and international sport governing bodies (per sport) had their own doping regulations, whereas only a restricted number of countries in the world had a public law on anti-doping in sport. In the opposite case, health and safety matters in sport are mainly governed by public law.

## **2.2 Studies and Reports: A Survey**

### ***2.2.1 Public Studies and Reports***

#### **2.2.1.1 National Framework Legislation on Sport: National Sports Acts and Sport Governance (2006) (hereafter: ‘Sports Acts’)**

The study concerned a subject in the public segment of sports law, namely the phenomenon of national laws of general purport concerning sport, i.e., framework legislation that governs the relationship between public authorities and organised sport in a country. Many countries in the world have a national Sports Act, based on provisions of their Constitutions or otherwise (there are also countries that only have a Constitutional provision). Furthermore, some countries that do not have such legislation are considering whether they should introduce it. In December 2001, in the Netherlands Parliament a motion concerning the advisability of enacting national sports legislation was tabled. As a result of this, the State secretary for Sport requested the sports law section of the Faculty of Law of the Free University of Amsterdam to deliver an advisory opinion on this matter. The general question needed answering whether sports legislation at national level would be appropriate. In the Free University’s opinion of September 2003 it was concluded that there was no reason to enact national legislation specifically concerning sport. The State Secretary for sport followed this conclusion. Some years later, however, it became apparent that the Netherlands government was still struggling with the question of sports legislation which covered different aspects (funding, football hooliganism, doping, etc.). The starting point was not that a Sports Act had to be prepared, but that a solid and careful study had to be undertaken into the usefulness and need for a ‘foundation’ for the sports policy of the Dutch government. From that perspective, the T.M.C. Asser Institute in November 2005 was asked by the Ministry of Sport to examine by means of a ‘quick scan’ which countries in the European Union had enacted a Sports Act. In these Acts, the definition of the term ‘sport’ had to be examined in addition to the factors which had motivated the various legislators to enact such laws.

With regard to the distinction between countries with and without national sports legislation, the following should be noted in the context of sport governance in Europe. In 2004 André-Noël Chaker published a study on ‘Good governance in Sport—A European survey’ which was commissioned by the Council of Europe. The Council of Europe was the first international organization established in Europe after the Second World War. With 46 Member States, the Council of Europe currently represents the image of a ‘wider Europe.’ Its main objective is to strengthen democracy, human rights and the rule of law. The Council of Europe was the first international intergovernmental organization to take initiatives, to establish legal instruments, and to offer an institutional framework for the

development of sport at European level.<sup>7</sup> The study covers the sport-related legislation and governance regulations of twenty European countries. The aim of this study was to measure and assess sport governance in each of the participating countries. For the purposes of this study the term ‘sport governance’ had been given a specific meaning. Sport governance is the creation of effective networks of sport-related state agencies, sports non-governmental organisations and processes that operate jointly and independently under specific legislation, policies and private regulations to promote ethical, democratic, efficient and accountable sports activities. The legislative framework of the countries under review was analyzed according to whether they have references to sport in their constitutions and whether they have a specific law on sport at national level. There are two distinctive approaches to sports legislation in Europe. Countries have adopted an ‘interventionist’ or a ‘non-interventionist’ sports legislation model. An interventionist sports-legislation model is one that contains specific legislation on the structure and mandate of a significant part of the national sports movement, generally speaking including a general national Sports Act. All other sports-legislation models are deemed to be non-interventionist.<sup>8</sup>

It is a distinguishing feature of law that in time, after a shorter or longer period, it is amended, replaced or repealed. A new government will have different ideas, possibly as a result of altered social conditions. This is no different in the field of sport. Attention to national regulation of sports activities and the role of public authorities in this has increased considerably in many parts of the world, particularly in the last decade. In the People’s Republic of China, interest in sports law developed in the run-up to the Olympic Games in Beijing (2008) and various universities now offer sports law courses and conduct fundamental research. China has a national Sports Act of 29 August 1995. At the end of 2010, an international scientific conference was held in Beijing on the reform of the national Sports Act.

Ideally, countries wishing to introduce a national Sports Act, reform the existing Act or introduce a completely new Act should have a review in which all possible substantive options are shown for each topic and sub-theme. That model would then be based on an inventory of all existing national Sports Acts in the world. Such an inventory could offer public authorities optimal choices. Comparative research should reveal the differences and similarities between Sports Acts, not only in purely textual terms (in terms of the letter of the law), but also in the light of the background, the reasons (*ratio legis*) for the Act as a whole (see the preamble) and its operative provisions (see the explanatory government memorandum etc.).

The purpose of this type of study is to create the systematic review outlined above, which may provide building blocks (components) and their variants for national framework legislation on sport. Such research has never before been conducted on a global scale with such a substantive scope. The Asser Institute did

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<sup>7</sup> See: Siekmann and Soek 2007, at p. XIX.

<sup>8</sup> Chaker 2004.

broaden its aforementioned ‘pilot study’ for the Ministry of Sport on its own initiative beyond the European Union to include 50 countries, but the theme was limited and did not extend to background information such as official notes etc. Furthermore, the study is no longer up to date.

For an even better understanding of the significance of the national Sports Acts, a broader political perspective of these Acts needs to be defined. What is the national sports policy of the relevant countries? Is there an integrated government vision of the role and function of sport in society and what are the ideas of organised sport itself regarding that role and function? After all, national laws are only a legal instrument to give shape to such policy. The study of national Sports Acts in this broader light could lead to a typology of different types of national sport governance models in the world.

N.B. The typology of the legal comparison in this Study according to the ‘Kokkini-criteria plus’ is as follows: international/external/horizontal/lato sensu/micro/practical/public.

### **2.2.1.2 The Role of EU Member States in the Organizing and Functioning of Professional Sport Activities (2009) (Hereafter: ‘Sport Governance’)**

In December 2009, the European Commission (Employment, social affairs and equal opportunities DG) commissioned the T.M.C. Asser Instituut (ASSER International Sports Law Centre) to undertake a study on ‘The Role of Member States in the Organising and Functioning of Professional Sport Activities.’ The background of the Study is as follows.

Article 39 of the European Community Treaty (EC Treaty) establishes the free movement of workers in what became the European Union. It prohibits all discrimination on the basis of nationality. The European Court of Justice has confirmed that professional and semi-professional sportsmen are workers within the meaning of this Article and consequently, Community law applies to them.<sup>9</sup> This implies the application of equal treatment and the elimination of any direct or indirect discrimination on the basis of nationality. The Court particularly stated that Article 39 EC Treaty not only applies to the action of public authorities but also extends to rules of any other nature aimed at regulating gainful employment in a collective manner and that obstacles to freedom of movement for persons could not result from the exercise of their legal autonomy by associations or organizations not governed by public law.<sup>10</sup>

In light of recent developments in the field of sport, however, certain international sport authorities have advocated the adoption of rules that might be contrary to Community law and in particular to the free movement-of-workers principle.

<sup>9</sup> Case 13/76 Donà, ECR 1976, p. 1333 and Case C-415/93 Bosman, ECR 1995, I-4921.

<sup>10</sup> Case C-415/93 Bosman, ECR 1995, I-4921.

National sport authorities, being members of the international sports authorities, should also apply the rules adopted at the international level. Therefore, the implementation at the national level of such rules would be contrary to EC law.

For example, the European Commission has published an independent study on the ‘home-grown players’ rule’ adopted by the European football governing body. This rule requires clubs participating in the European-wide club competitions—Champions League and UEFA Cup (as from the 2009/2010 season: Europa League)—to have a minimum number of ‘home grown players’ in their squads. Home grown players are defined by UEFA as players who, regardless of their nationality or age, have been trained by their club or by another club in the same national association for at least three years between the age of 15 and 21. Compared with the ‘6+5’ rule adopted by the world football governing body FIFA, which is incompatible with EU law, the Commission considers that UEFA has opted for an approach which seems to comply with the principle of free movement while promoting the training of young European players.<sup>11</sup> The ‘6+5’ rule provides that at the beginning of each match, each club must field at least six players who are eligible to play for the national team of the country of the club. The European Commission, as guardian of the EC Treaty and within the framework of its competences, can initiate infringement proceedings before the European Court of Justice (ECJ) against Member States that have breached Community law. According to the case-law, an infringement procedure can be initiated against a Member State if government authorities of that Member State are at the origin of the infringement.<sup>12</sup> As to the actions of private entities, the ECJ has indicated that Member States might be responsible for breach of EC law by private entities, recognized as having legal personality, whose activities are directly or indirectly under State control. Possible criteria that are mentioned in this context are, in particular the appointment of the members of the entity’s management committee by state authorities, and the granting of public subsidies which cover the greater part of its expenses.<sup>13</sup>

Therefore, the fundamental element authorizing the Commission to initiate an infringement procedure against a Member State is the existence of behaviour breaching Community law that can be attributed to the State. The same reasoning applies also in the field of professional sports activities, where in order for the services of the Commission to launch the infringement procedure, behaviour—breaching Community law attributed to the State must be present. Consequently, it is essential to determine whether and to what extent, Member States participate directly or indirectly in the organisation of professional sports activities.

Community law on the free movement of workers and in particular Article 39 of the EC Treaty being directly applicable in the Member States’ legal orders, means that every EU citizen who considers that his/her rights have been violated

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<sup>11</sup> Cf., IP/08/807 of 28 May 2008.

<sup>12</sup> Case C-95/97 *Région wallone v. Commission*, ECR 1997, I-1787.

<sup>13</sup> Case C-249/81 *Commission v. Ireland*, ECR 1982, 4005.

might go and seek a redress in front of the national administrative authorities and jurisdictions. If the application of EU law is at stake, national courts may request a preliminary ruling from the European Court of Justice, which is entitled to give rulings about the compatibility of sporting rules with the EU legal order. In the White Paper on Sport, adopted in 2007,<sup>14</sup> the Commission reaffirmed its acceptance of limited and proportionate restrictions (in line with EU Treaty provisions on free movement and European Court of Justice's rulings) to the principle of free movement in particular as regards:

- The right to select national athletes for national team competitions;
- The need to limit the number of participants in a competition; and
- The setting of deadlines for transfers of players in team sports.

In order to improve knowledge of the functioning of sport regulations across the EU and to outline the general trends in Europe, analysis of national sport legislation is required in order to determine whether and to what extent, Member States participate directly or indirectly in the organization of professional sport activities, with a view of clarifying the different levels of responsibility. This country-by-country analysis is to cover:

- a. Organization of professional sport activities: the way in which professional sport activities are organized with particular focus on whether the organisation is:
  - part of general organization of sport activities or whether there are separate special rules regulating professional sport activities;
  - underpinned by general law, framework law or specific rules governing sectoral sport activities;
  - at the level of the state, or has devolved to, for example, the regional/local level.
- b. Organization and functioning of sport authorities: the way in which sport authorities are organized and function, with particular focus on whether the sport authorities
  - are private actors or whether they act or operate under the auspices of the State;
  - have State participation in any of their responsibilities for the organization of professional sport activities (for example, nomination of members of governing bodies, financing, and adoption of regulations governing professional sport competitions).
- c. Discrimination: whether there are direct or indirect discriminatory rules and/or practices with regard to Community citizens. The following fields of professional sport activities must be covered: football, basketball, volleyball, handball, rugby and ice-hockey (as to both men and women championships, and in both first and second divisions).

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<sup>14</sup> COM (2007) 391 final, pp. 14–15.

The final purpose of the study was to determine, on the basis of the information gathered and the research undertaken, to what extent the organising and functioning of professional sport activities might be attributed to the State in the European Union.

N.B. the typology according to the 'Kokkini-criteria plus' is as follows: international/external/horizontal/stricto sensu/macro/practical/public.

## ***2.2.2 Private Studies and Reports***

### **2.2.2.1 Study into the Possible Participation of EPFL and G-14 in a Social Dialogue in the European Professional Football Sector (2006) (Hereafter: 'SD EPFL/G-14')**

The purpose of this study was to investigate whether EPFL and G-14, as European employers' organizations may participate in a possible Social Dialogue with FIFPro under the EC Treaty in the professional football sector. An additional question to be answered was which themes might be relevant to be put on the agenda of a European Social Dialogue in particular from the perspective of G-14.

One precondition is of course that the objects, the mandate (and the tasks) of EPFL and G-14 must (implicitly or explicitly) allow them to deal with 'industrial relations' including a Social Dialogue. It was examined whether this is the case on the basis of the Statutes of both organizations, as presumably the status of employers' (interest) organization is a *conditio sine qua non* for admittance to a Social Dialogue. In this context, it was also important with regard to EPFL whether 'industrial relations' and Social Dialogue were part of the objectives of the national Leagues (at the time EPFL had 15 members). The national Leagues could only have mandated EPFL to deal with these aspects at European level if they themselves were expressly or otherwise empowered under their Statutes to do so. In view of the question concerning the (in)dependence of EPFL and G-14 in relation to UEFA and FIFA as well as of the Leagues in relation to the FAs the objectives of UEFA and FIFA had also to be taken into account.

The social partner organizations must be able to function freely, without outside intervention. This may be considered as an implicit condition for meaningful participation in a Social Dialogue in a free, democratic community of States and in its individual Member States. In the football world the clubs are affiliated to their national FA which is represented in the international federations UEFA and FIFA. This is termed a 'pyramid model' with FIFA at the top, UEFA at the European regional intermediate level and the FAs at the bottom. Football is administered according to this model. The model consists of levels of administration which transcend the clubs. The question therefore was whether EPFL and G-14 as clubs' organizations for the purposes of a Social Dialogue can operate sufficiently independently from the governing bodies. With regard to EPFL not only the

relationship to the Leagues/members which must have commissioned EPFL to deal with 'industrial relations' including a Social Dialogue is important, but also the way the Leagues were affiliated to the FAs at the national level.

Apart from that, employers' and employees' organizations and EPFL and G-14 alike had to fulfil certain (explicit) criteria which were developed by the European Commission. In this context, the question could be asked which lessons were to be learned from previous practice regarding the application of the criteria in other industrial sectors, for it could be presumed that the (manner of) application of the criteria in principle also determines their precise meaning and importance. What was the 'case law,' what useful precedent exists?

There is another EU perspective which is even broader than that of the criteria and which deserved to be examined here. What did it mean for the possibility of participation of EPFL and G-14 in a Social Dialogue that 'the specific characteristics of sport' should be taken into account in the European context (Treaty of Nice)? Finally, the question of which themes might be particularly relevant for G-14 in a Social Dialogue was examined.

N.B. The typology according to the 'Kokkini-criteria plus' is as follows: international/external/horizontal/stricto sensu/micro/practical/private.

#### **2.2.2.2 The Identification of Themes and Issues Which Can Be Dealt with in a Social Dialogue in European Professional Football (2008) (Hereafter: 'SD Football Agenda')**

The White Paper on Sport states that in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions. The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector.

In previous years several initiatives were undertaken by FIFPro, EFFF and the Asser Institute in the form of EU subsidized studies, seminars and conferences in order to promote Social Dialogue in the European professional football sector and make potential social partner organizations aware of the instrument of Social Dialogue for settling issues through negotiations between management and labour by way of a European collective bargaining agreement for their mutual benefit. Additionally, in the so-called Louvain Report conclusions were presented on the representativeness of the parties concerned. The Asser Institute undertook a separate study into the position of G-14 regarding participation in a Social Dialogue at the European level.

In November 2006, at the concluding stage of the campaign, the outcome of a FIFPro conference in Brussels with all stakeholders, including the international football governing bodies UEFA and FIFA present, was that consensus in principle

exists about the usefulness of initiating the process to establish an official Social Dialogue Committee under the EC Treaty. FIFPro and EPFL were prepared to take the lead.

The purpose of this study was to identify the ‘content’ of a Social Dialogue in the European professional football sector, once a pertinent Committee would have been officially established under EU auspices, that is possible themes and issues which are suitable to be considered and discussed in a Social Dialogue, the formal framework for setting an agenda of topics being Article 136 et seq. of the EC Treaty.

The envisaged study was a follow-up to the previous studies that were undertaken to promote Social Dialogue in the European professional football sector in accordance with Articles 138 and 139 of the EC Treaty. In those studies, *inter alia*, social partner organisations at the national level in EU member states and candidate countries were identified and it was investigated whether a Social Dialogue existed at that level between management and labour. The first phase of operations was concluded. The second phase was the establishment of a Social Dialogue. This study was expected to facilitate Social Dialogue in the European professional football sector by anticipating the third phase in which an agenda for the Social Dialogue had to be set.

This study would help social partner organizations and other stakeholders at international and national level to become aware of the possible options regarding themes and issues which can be dealt with between management and labour in a Social Dialogue at the European level. The study was expected to facilitate the start of negotiations once the official Social Dialogue Committee would be established in the European professional football sector. It would offer social partner organizations a helpful instrument for determining their thematic framework. A similar effect was *mutatis mutandis* to be expected with regard to Social Dialogue in professional football at the national level of EU member states and candidate countries.

Regarding the executing of this study, the following remarks should be made:

An essential aspect to be researched in this context was to what extent the agenda and the way of dealing with themes and issues is determined by the fact that the broader framework of a Social Dialogue in European professional football in fact includes pertinent rules and regulations of the international football governing bodies UEFA and FIFA.

The practice in other industrial sectors having an official Social Dialogue Committee in operation, was studied in order to identify themes and issues which *mutatis mutandis* could be usefully introduced also in a Social Dialogue in European professional football (‘best practices’/‘lessons learned’).

N.B. The typology according to the ‘Kokkini-criteria plus’ is as follows: international/external/horizontal/stricto sensu/micro/practical/private.

### 2.2.2.3 Study into the Identification of Themes and Issues Which Can Be Dealt with in Social Dialogue in European Professional Cycling (2009) (Hereafter: 'SD Cycling Agenda')

The White Paper on Sport states that in the light of a growing number of challenges to sport governance, social dialogue at European level can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions. The Commission encourages and welcomes all efforts leading to the establishment of European Social Dialogue Committees in the sport sector.

In October 2007 Association Internationale des Groupes Cyclistes Professionnels (AIGCP), International Professional Cycling Teams (IPCT) and Cyclistes Professionnels Associés (CPA) announced that they had jointly requested the European Commission to establish a Social Dialogue Committee in the professional cycling sector in Europe. AIGCP, IPCT and CPA stated that they are convinced that this Social Dialogue, under the umbrella of the European Commission, will be a good tool to renew and modernize professional cycling and its governance.

The purpose of this study was to identify the 'content' of a Social Dialogue in the European professional cycling sector, once a pertinent Committee would have been officially established under EU auspices, that is possible themes and issues which are suitable to be considered and discussed in a Social Dialogue, the formal framework for setting an agenda of topics being Article 136 et seq. of the EC Treaty.

This study would help social partner organizations and other stakeholders at international and national level to become aware of the possible options regarding themes and issues which can be dealt with between management and labour in a Social Dialogue at the European level. The study was expected to facilitate the start of negotiations once the official Social Dialogue Committee will be established in the European professional cycling sector. It would offer social partner organizations a helpful instrument for determining their thematic framework. A similar effect was *mutatis mutandis* to be expected with regard to Social Dialogue in professional cycling at the national level of EU member states and candidate countries.

Regarding the executing of this study, the following remarks should be made:

An essential aspect to be researched in this context is to what extent the agenda and the way of dealing with themes and issues is determined by the fact that the broader framework of a Social Dialogue in European professional cycling in fact includes pertinent rules and regulations of the international cycling governing body UCI.

The practice in other industrial sectors having an official Social Dialogue Committee in operation, was studied in order to identify themes and issues which *mutatis mutandis* could be usefully introduced also in a Social Dialogue in European professional cycling ('best practices'/'lessons learned').

In December 2008, a ‘riders’ meeting’ was organized in Barcelona in cooperation with CPA to discuss the theme under consideration with representatives of their national member associations and individual professional cyclists.

In May/July 2009, regional workshops were planned to take place in Madrid, Berlin, Brussels, Paris and Rome for discussion of the theme under consideration with stakeholders.

N.B. The typology according to the ‘Kokkini-criteria plus’ is as follows: international/external/horizontal/stricto sensu/micro/practical/private.

#### **2.2.2.4 The Equal Treatment of Non-Nationals in Individual Sports Competitions in the EU Member States (2010) (Hereafter: ‘Non-Nationals’)**

This Study was commissioned by the European Commission to an international research group which was headed by the TMC Asser Institute and further consisted of Edge Hill University, United Kingdom and Leiden University, The Netherlands. On behalf of the research team, the Study’s findings were presented by Professor Stefaan van den Bogaert, Leiden University, at the European Sport Forum in Budapest (Hungary) on 21–22 February 2011.

In its 2007 White Paper on Sport, the Commission indicated its intention to launch a study to analyze access to individual competitions for non-nationals. In the 2008 Biarritz Declaration, the European ministers called on the Commission to provide clearer legal guidelines on the application of EU law to sport organizations concerning the highest priority problems they face, thereby paying due attention to the specific characteristics of sport and noting the concerns and difficulties encountered by international, European and national sport organizations in governing their sport. This study will enable the Commission to answer the EU sport ministers’ call.

The Court of Justice of the European Union expressly determined in the case of *Ruckdeschel* that the general principle of equality is one of the fundamental principles of EU law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified. With this statement, the Court of Justice has instituted a superior rule of law with general application. The fundamental principle of equal treatment finds specific expression, in particular, in the general prohibition of any discrimination on grounds of nationality, as laid down in Article 18 TFEU and further specified in Articles 45, 49 and 56 TFEU.

The prohibition of discrimination on grounds of nationality has already been applied on several occasions to the sports sector. It is now established case law that sport falls under the scope of application of the Treaty in so far as it constitutes an economic activity. The Court of Justice made this particular statement in *Walrave and Koch*, the first ever Court ruling on a sports issue, a case which turned around nationality discrimination in cycling. The Court displayed sensitivity towards the

specificity of sport, which was later officially recognized in the Nice Declaration on Sport, ruling that the prohibition of nationality discrimination does not preclude rules or practices excluding foreign players from participation in certain matches for reasons which are not of an economic nature and are thus of purely sporting interest.

The Court has consistently reaffirmed this restriction on the scope of EU law in subsequent case law (e.g. *Donà*, *Bosman*, *Deliège*), adding that such rules of 'purely sporting interest' must remain limited to their proper objectives. This has for a long time offered matches between national teams shelter from the application of the Treaty free movement and competition rules. In its recent *Meca-Medina* ruling, the Court of Justice refined this approach in a competition law context, in practice dismantling the concept of rules of purely sporting interest but replacing the idea with a new test. The Court held that for the purposes of the application of the competition law rules to a particular case, account must firstly be taken of the overall context in which the decision was taken or produces its effects and, more specifically, of its objectives; subsequently, it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them. These findings can be transposed to the free movement context. It constitutes a new standard by which the Court of Justice of the European Union will in the future evaluate sports rules and practices.

The Court has also dealt with nationality discrimination at club level in sport. So far, it has always firmly branded these discriminatory measures as incompatible with EU law. In the wake of the judgments in *Donà* and *Bosman* there appears to be limited room for sporting federations to treat domestic players more favourably than foreign players who are protected by EU law. The decisions in *Kolpak* and *Simutenkov* have made it clear that third-country nationals who are legally residing in a host Member State and can also often rely upon a directly effective equal treatment provisions contained in international agreements concluded between the EU and the third-country from which they originate. In these cases, the Court categorically held that the justificatory arguments relating to the maintenance of a traditional link between a club and its country or the creation of a sufficient pool of players for the national team were not such as to preserve the contested nationality clauses.

However, by the same token, the Court also acknowledged that the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate. The Court has thus not completely shut the door to all nationality clauses but has left it to the self-regulatory autonomy of the sporting associations to elaborate rules or practices at club level that are compatible with the requirements of EU law. The European Football Association UEFA has made use of this opportunity to introduce the so-called '4+4' or 'home-grown' rule, which requires clubs to include in their teams a minimum number of domestically trained players. The CJEU has not yet pronounced on this rule, which has already received support from the European Commission and the European

Parliament. Conversely, both European institutions appeared reluctant towards the proposal of World Football Association FIFA to gradually introduce the '6+5' rule, requiring football teams to start official matches with minimum six players eligible to play for the national team of the club. This was generally regarded as unjustifiable discrimination. Nevertheless, in the 2008 Biarritz Declaration of the sports ministers of the European Union, the ministers clearly expressed their interest in further discussion on the initiatives of international federations to encourage the teams of professional clubs to develop the presence of athletes capable of qualifying for national teams, in order to strengthen the regional and national roots of professional clubs, albeit in compliance with EU law. Despite extensive jurisprudence and countless discussions at political level, the issue of nationality clauses even in team sports has thus not yet been settled.

Until now, the situation with regard to equal treatment of non-nationals in individual sporting disciplines has been the subject of much less debate and legal scrutiny. Traditionally, individual sports have been organized on a national basis with one sports federation organizing its respective sport within its territory. This has endowed sport with a distinctly national character. The development of an internal market supported by free movement and citizenship rights has the potential to call into question this traditional feature of the so-called 'European model of sport.' This is generating debate amongst some Member States and sports organizations who are concerned for the purity of national competitions should EU non-discrimination law apply to their constitutional arrangements. For example, for cultural reasons it has been suggested that the conferment of 'national champion' titles should be reserved for nationals of the Member State within which the competition takes place. There is also concern at the prospect of some athletes being able to take part in the national championships of more than one country. Eligibility rules for international competitions and championships that are based on the representation of states (legal nationality), are logically a (co)determining factor for the nationality of sportspersons in competitions at the national level that are qualifiers for these international competitions.

Rules designed to maintain the purity of national competitions can lead to the adoption of discriminatory measures. For example, with effect from March 2008 the Belgian Swimming Federation adopted new rules excluding non-nationals from participating in national swimming championships in Belgium. The report provides a comprehensive list of such measures and the sports in which these restrictions present themselves. Some sports raise specific issues in this respect. For example, the participation of non-nationals in the national championships of sports with direct elimination, such as tennis or fencing, may exert a more significant impact on the outcome of the competition than in other sports. Furthermore, the report specifies the level at which the discriminatory provisions are adopted. In determining whether the discriminatory measures involve access to sports, the conditions relating to the actual practice of sports, the determination of national records, the award of medals or titles, or any other aspect of the sport, the report investigates the objectives pursued by these measures and the consequences on each sport of removing the restrictions. In doing so, the report comprehensively

enquires into the ongoing debate within the sports movement concerning the definition of the ‘specificity of sport’ and its application in EU law to both the economic and non-economic aspects of sport. This allows for the presentation of a typological analysis of the discriminatory measures identified.

This typology against which the directly or indirectly discriminatory measures identified is measured is essentially the same as in the context of discriminatory measures at club level and primarily consists of the Treaty rules on freedom of movement. Furthermore, the Treaty provisions on Union citizenship, which is destined to be the fundamental status of nationals of the EU Member States (*Grzelczyk*) is duly regarded in this respect.

According to settled case-law, EU citizens lawfully resident in the territory of a host Member State who find themselves in the same situation as home State nationals can rely on Article 18 TFEU to receive the same treatment in law irrespective of their nationality in all situations which fall within the scope *ratione materiae* of EU law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States, as conferred by Article 21 TFEU. In addition, where and whenever necessary, also instruments of EU secondary legislation such as, in particular, Directive 2004/38 on the rights of citizens and their family members to move and reside in the EU and Regulation 1612/68 are taken into consideration. Essentially, all discriminatory rules are grouped in four different categories: firstly rules of purely sporting interest; secondly, rules which are inherent in the organization of the sport and necessary to pursue the objectives outlined and which therefore do not constitute a restriction of EU law; thirdly, those rules which are discriminatory but capable of justification and proportionate; and finally those rules which are discriminatory and cannot be justified and must therefore be dismissed.

Additionally, the report undertakes an assessment of the likely impact of the Lisbon Treaty which establishes sport as a competence of the EU. Article 165(1) TFEU provides that ‘The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.’ Article 165(2) adds that Union actions shall be aimed at ‘developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.’ The likely impact of these provisions on the jurisprudence of the Court is considered. In particular, the report will consider whether these provisions constitute the legal basis for eliminating the discrimination in question or a means of insulating such measures.

First, in the Study a full evaluation of the situation per country is provided concerning the provisions in sports (competition) regulations that are discriminatory based on nationality in the sports disciplines selected, and relating to access and all other aspects of individual sports competitions. The level at which the discriminatory provisions identified are adopted (national, regional or local sports

federations) is specified and it is indicated whether they are imposed at lower levels of this pyramid-shaped hierarchy. Information regarding any regulatory provisions that are discriminatory on grounds of nationality established under public administrative decision is provided.

Second, a typology analysis of the discriminatory measures identified is given. It is indicated whether the discriminatory measures involve access to sports (participation in competitions), conditions relating to the actual practice of sports, the award of medals and titles, etc. The various criteria that hamper access to competitions either directly or indirectly, are listed. A detailed list of the various objectives identified as underlying the establishment of discriminatory measures is presented. Particular attention is given to the selection of national champions, determining national records, the award of titles and medals to nationals, avoiding the award of national titles to athletes in different Member States, etc.

For the purposes of this Study the term ‘non-nationals’ was defined as follows:

citizens, their family members, and workers from other EU Member States, as well as citizens of States which have signed agreements with the EU that contain non-discrimination clauses, and who are legally employed in the territory of the Member States (third country nationals).

The term ‘individual sports competitions’ was defined as follows:

national competitions involving individual sportspersons, regarding sports disciplines practiced in a professional or amateur capacity within the European Union.

The individual (‘non-team’) sports disciplines that are covered in the Study, are the Olympic sports disciplines concerned (Winter and Summer Olympics). There are 26 Olympic sports which are whether individual disciplines themselves or to which individual disciplines belong: triathlon, modern pentathlon, tennis, table tennis, badminton, rowing, canoe/kayak, athletics, aquatics, archery, boxing, judo, shooting, weightlifting, wrestling, taekwondo, equestrian, gymnastics, skating, luge, biathlon, bobsleigh, cycling, skiing, fencing and sailing (see: [www.olympic.org/en/content/Sports/](http://www.olympic.org/en/content/Sports/)).

Partly in the light of the findings of this study, the European Commission intends to ‘issue guidance on how to reconcile the Treaty provisions on nationality with the organisation of competitions in individual sports on a national basis.’<sup>15</sup>

N.B. The typology according to the ‘Kokkini-criteria plus’ is as follows: international/external/horizontal/lato sensu (cf., ‘objectives underlying the establishment of discriminatory measures’)/micro/practical/private (the public segment concerns a priori illegal discriminatory regulatory provisions, since they are established under public administrative decision; so they were not part of the legal comparison exercise).

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<sup>15</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Developing the European Dimension in Sport*, COM(2011) 12 final, Brussels, 18.1.2011, p. 13.

### ***2.2.3 Private/Public Studies and Reports***

#### **2.2.3.1 Legal Comparison and the Harmonization of Doping Rules (2001) (Hereafter: ‘Doping Harmonization’)**

In 2000, an international research group consisting of sports law experts from the University of Erlangen-Nuremberg (Germany), the T.M.C. Asser Institute for International Law, The Hague (The Netherlands), the Max Planck Institute for Foreign and International Criminal Law, Freiburg i.B. (Germany), and the Anglia Polytechnic University, Chelmsford (United Kingdom), was asked by the European Commission to undertake a research study on ‘Legal Comparison and the Harmonisation of Doping Rules’ within the framework of the ‘Pilot Project for Campaigns to Combat Doping in Sport in Europe.’

The final report of the research study was presented on 7 November 2001 and was discussed at an international conference in Brussels, which was organized by the T.M.C. Asser Institute with the support of the Flemish Ministry for Sports during the Belgian EU Presidency. The conference was attended by representatives of international sports federations, as well as sports ministries and national sports organisations from the EU Member States.

The European Commission commissioned the study during the initial stages of the drafting of a World Anti-Doping Code. In the years following the publication of the study, work on the World Anti-Doping Code continued and was finally completed with the adoption of the ‘WADA Code’ in 2003. The study may be considered to have contributed significantly to the completion of this work, as it provided the drafters of the Code with an important tool, giving them an overview of the doping rules and regulations of national and international sports organizations, including a comparative analysis, as well as a survey and analysis of the relevant public law legislation available. Since the study may be considered to form part of the travaux préparatoires underlying the WADA Code, which in the meantime has entered into force and is being applied in practice, the undersigned consider it necessary that the study reflecting the legal situation in 2001 be published as a book. This publication in particular wishes to promote a better understanding of the background of the harmonization of doping rules and regulations, the results of which may be found in the WADA Code a milestone in the campaign to combat doping in sports.

The Study contains a public law part and a part concerning sports rules and regulations on anti-doping. Both parts are presented in a comparative, thematic form. The first part consists of a comparative legal analysis of anti-doping activities, in particular with regard to combating doping by means of criminal law in the 15 EU Member States at the time. In the sports rules and regulations part, the results of the study of the pertinent national instruments in the EU Member States for the then 35 Olympic international sports—together with the regulations of the International Olympic Committee (IOC), the International Paralympic Committee (IPC) and the Olympic international sports federations—were delivered. Aspects

such as the following are considered in this part: definition of doping (description of the doping offence), the purpose of the ban on doping (arguments against the use of doping), system of sanctions, etc.<sup>16</sup>

N.B. The typology according to the 'Kokkini-criteria plus' is as follows: international/external (public level: the EU is to a certain extent a supranational body, but cf., interventionist v non-interventionist national sport models in the EU)/horizontal (on both levels: public and private)/stricto sensu/micro (one issue: doping)/practical (cf., the drafting of a WADA Code)/private and public.

### **2.2.3.2 Promoting Social Dialogue in European Professional Football (Candidate EU Member States) (2004) [Hereafter: 'SD Football (Candidates)']**

In November 2004 the Final Report on the above-mentioned project was presented by the ASSER International Sports Law Centre to the European Commission. Part of the project was a comparative legal 'pilot' study on the basis of country studies regarding the above-mentioned subject. In addition to the 'pilot' study, in the first half of 2004 regional seminars were organized in Nicosia (Cyprus and Malta), Vilnius (Estonia, Latvia and Lithuania), Ljubljana (Hungary and Slovenia), Warsaw (Poland), Prague (Czech Republic and Slovakia), and Bucharest (for the 2007 candidate Member States Bulgaria and Romania).

In this report, three key questions which are relevant in a Social Dialogue context have been examined:

1. What is the legal basis for the relationship between a player and the club (comprising aspects concerning the regulation of sport in the country concerned, termination of contracts, compensation for training and education)?
2. What has the candidate country (now EU Member State plus Bulgaria and Romania) already done to implement Council Directive 1990/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by European Trade Union Confederation (ETUC), Union of Industrial Employers' Confederation of Europe (UNICE) and Centre of Enterprises with Public Participation and Enterprises of General Economic Interest (CEEP)?
3. The possibilities for entering into a social dialogue in professional football.

The project was intended to inform about and thereby promote the concept of the Social Dialogue and of collective bargaining at the sectoral level of the professional football industry in the EU candidate countries (now Member states plus Bulgaria and Romania). The aim was to contribute to facilitating the start of consultations of management and labour at national and Community level and, in pursuance thereof, the establishment of relevant contractual relations by the exchange of information and experience on a European basis, in particular

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<sup>16</sup> Cf., also Soek 2006.

regarding employment contracts and collective bargaining agreements. In addition, the current EU legal developments concerning labour and sports was presented, followed by a comparison with the relevant law in the candidate countries. Differences between the EU and national law were indicated and solutions for avoiding conflicts were provided. Besides promoting the Social Dialogue in the professional football sector in the candidate countries the objective of the project was also to identify the national law that is not in conformity with EU law and to propose solutions to remove any conflict.

It was expected that the project will be helpful to pave the way for starting the Social Dialogue in professional football in the EU candidate countries at national and European level by creating awareness amongst organizations involved of the possibilities the Dialogue offers for establishing effective industrial relations and, in particular, by creating common ground amongst management and labour for the purpose of future negotiations.

This project regarding the candidate countries was carried out in cooperation with the European Federation of professional Football Clubs (EFFC). It in fact is an addendum to the similar project that was undertaken by the EFFC with regard to the 15 'old' Member States in 2003–2004. In the Final Report on that project proposals are made to the European Commission for the reasoning it could adopt when dealing with a joint request from organizations who wish to establish a Social Dialogue Committee in European professional football. These proposals in principle are also fully applicable to the 10 'new' Member States, being now part of the family of EU nations.

N.B. The typology according to the 'Kokkini-criteria plus' is as follows: international/external/horizontal/stricto sensu/micro/practical/private and public.

### **2.2.3.3 Football Hooliganism with an EU Dimension: Towards an International Legal Framework (2004) (Hereafter: 'Football Hooliganism')**

Under the terms of Article 29 of the Treaty, the European Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police cooperation. Due to the various international and European competitions involving both national and club teams and the resultant travelling of large numbers of supporters together with the associated social and often violent disorder, football has a highly visible profile. This international dimension has made it necessary to approach security in connection with football matches in a way that extends beyond national borders. Within the EU framework, the focus is mainly on the coordination of police measures (cf., Council recommendation on guidelines for preventing and restraining disorder connected with football matches, 22 April 1996; Council Resolution on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media

policy, 9 June 1997; Council Resolution concerning a handbook with international recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one Member State is involved, 6 December 2001 (previously, 21 June 1999); Council Decision concerning security in connection with football matches with an international dimension, 25 April 2002).

Apart from the existence of the Council of Europe's Convention on spectator violence and misbehaviour at sports events and in particular at football matches, of 19 August 1985, an international legal framework is still lacking and fundamental legal differences between Member States make it difficult to envisage the generalized application of restrictions on attendance at matches in other Member States by persons convicted of football-related offences.

Because of the lack of an international legal framework and the fundamental legal differences between Member States, tackling transnational football hooliganism in the EU is mainly based on 'adhococracy,' i.e., specific cooperation agreements and policy arrangements between individual Member States in connection with individual international competitions and matches. This results in the conflation of an 'instant coordinated approach' with a 'permanently coordinated basis.'

The purpose of the study is to determine what the fundamental legal differences between Member States (and candidate countries/Member States since 1 May 2004) exactly are and to evaluate what the precise consequences are of the absence of an international legal framework. On the basis of the results of this research, recommendations will be made for the development of a common and consistent international legal framework.

The following information was collected and analysed for the purposes of this Study:

- international legislation (treaties, decisions of intergovernmental organizations, etc.);
- an additional aspect was the *transnational* law and policy situation of the country (cf., possible bilateral treaties, agreements, or ad hoc arrangements etc. with neighbouring countries to control the cross-border movement of groups and persons concerned).
- all the laws, regulations and administrative provisions constituting the legal framework of the EU Member States and candidate countries and all the corresponding implementing measures applicable in the event of football hooliganism as well as the official documents (Memoranda, Notes to Parliament etc.) that form the basis for the Government's general policy in this field within the framework of general criminal and administrative law.
- decisions of national and international courts and tribunals;
- the academic literature in respect of the relevant legislation and court decisions;
- rules and regulations of national football associations and UEFA/FIFA as well as official policy documents regarding 'football hooliganism.'

N.B. The typology according to the ‘Kokkini-criteria plus’ reads as follows: international/external/horizontal/stricto sensu/micro/practical/private and public.

#### **2.2.3.4 Health and Safety in the Sport Sector (2009) (Hereafter: ‘Health and Safety’)**

In September 2008, in the framework of the project ‘Moving forward towards European social dialogue in the sport sector: Content and Contact’ (CC-project), EURO-MEI together with its managing partner EASE and its strategic partner the EOC EU Office (formerly EU Sport Office), commissioned the T.M.C. Asser Institute for international law, The Hague, The Netherlands, to undertake a comparative research study on health and safety in the sport sector. As the sport sector is in full development on all levels, not much European research exists so far on this topic. The project was undertaken in order to extend the knowledge on health and safety in the sport sector and thereby to help professionalize the sector. The research was financed by the European Commission through the above-mentioned project.

EASE and EURO-MEI are willing to be proactive to defend the specificities of the sector through European social dialogue. To prepare their social dialogue, EASE and EURO-MEI agreed to start with soft issues: issues on which a consensus is easily reached. Health and safety is one of them. The specificities of sport related to health and safety have not been taken into account yet at the different levels of the sector. The sport workers (players but also trainers and coaches) in many European countries are facing a lack of regulation specific to sports regarding health and safety issues. On the basis of the study and the results of the Conference on health and safety in the sport sector that was held in Lisbon on 1 and 2 April 2009 EASE and EURO-MEI would like to find similarities and opportunities for harmonization and to define best practices in health and safety in the sport sector. Once the European social dialogue in the sport sector will be effective, autonomous agreements and process-oriented texts (such as joint declarations) between the European social partners on those issues could provide a kind of harmonization that could help many countries to address the health, safety and well-being of workers in the sport sector.

The below comparative survey on health and safety in the sport sector is descriptive and includes a general listing of health and safety issues in a broad sense in the sport sector as well as a listing of measures taken to prevent risks and injuries and promote workers’ (players’, trainers’, coaches’) health (best practices, innovative actions) on the basis of the research undertaken. It covers relevant information on the present 27 EU Member States.

N.B. The typology according to the ‘Kokkini-criteria’ is as follows: international/external/horizontal/stricto sensu/micro/practical/private and public.

### 2.2.3.5 The Implementation of the WADA Code in the European Union (2010) (Hereafter: 'WADA Code')

The fight against doping has become an increasingly important theme on the EU agenda.

On this subject, the White Paper on Sport published by the European Commission on 11 July 2007 stated the following:

The EU would benefit from a more coordinated approach in the fight against doping, in particular by defining common positions in relation to the Council of Europe, WADA and UNESCO, and through the exchange of information and good practices between Governments, national anti-doping organisations and laboratories. Proper implementation of the UNESCO Convention against Doping in Sport by the Member States is particularly important in this context.

The Commission will play a facilitating role, for example by supporting a network of national anti-doping organisations of Member States.

In the past few years, activities in this field have essentially concentrated on the Code of the World Anti-Doping Agency (WADA) which is the subject of the Copenhagen Declaration and the UNESCO Convention against Doping in Sport. Naturally, the work of the informal European working party, the 'EU Working Group on Anti-Doping,' actively contributes to this.

Despite the increased interest in this subject, in practice the central objective of the Code, i.e., to ensure harmonized, coordinated and effective anti-doping programmes at both an international and national level with regard to the detection, deterrence and prevention of doping, is still far from being realized for a variety of reasons. The necessity for a European framework for cooperation in the fight against doping, on the basis of the Code, therefore requires further study.

An initial requirement for the achievement of strict agreements on a EU level is that reliable information is available about the state of affairs in each Member State.

With a view to the Belgian Presidency of the European Union in the second half of 2010, the Flemish Minister for Sport, Philippe Muyters, asked the T.M.C. Asser Institute of International Law in The Hague to carry out a thorough study of the application of the Code within the European Union and to catalogue its findings.

The study's inventory was undertaken on the basis of information collected from the relevant government departments and/or agencies with primary authority in the area of sport in each Member State and the National Anti-Doping Organisations (NADOs) in the European Union. As far as Belgium is concerned, a distinction was made between the four different authorities authorized to fight doping, namely: the Flemish Community, the French Community, the German-speaking Community and the Joint Community Commission.

N.B. The typology according to the 'Kokkini-criteria plus' is as follows: international/external/horizontal/stricto sensu/micro/practical (the implementation of the WADA Code)/private and public.

### 2.2.3.6 Comparative Continental Sports Law: An ‘Americanization’ of European sports Law?

In the years shortly before the beginning of this century, in sporting and sports law circles in Europe a discussion started concerning the ‘Americanization’ of European (EU) professional sport. The sports models of North America and Europe were compared.<sup>17</sup> Some of the European sports model’s features appeared to be under threat, as part of a trend which may be labelled ‘Americanization’ in recognition of the lurking desire to eliminate traditional rules of the game (such as promotion and relegation) which may inhibit wealth maximization on a North-American scale. Weatherill’s contribution to the debate proceeded from the assumption that it was realistic to suppose that European sport, particularly football, would become ever more lucrative in the next few years in the wake of the media revolution, perhaps eventually to the extent that it would compare financially with the dominant sports in North America, but that there are aspects of the American model that will prove unpalatable in Europe.<sup>18</sup>

Nafziger observes that comparative legal commentary on the organisational structure of sports, particularly of professional sports, is substantial and growing.

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<sup>17</sup> On 9 March 2000, an Asser Round Table Session entitled *The americanisation of sports law—the American and European sports models compared* was organized at the office of law firm CMS Derks Star Busmann Hanotiau in Utrecht and in co-operation with the Sports Law Centre of Anglia Polytechnic University and *Sportzaken* magazine/The International Sports Law Journal (ISLJ). Participants in the LLM/MA Sports Law Course of Anglia Polytechnic University, which was hosted by the T.M.C. Asser Institute in The Hague from 8 to 11 March, attended the Session. Speakers were Dr. Simon Gardiner, Sports Law Centre, Anglia Polytechnic University, Chelmsford, United Kingdom, Aaron Wise, Siller Wilk LLP, New York, United States of America, Dr. Martin Schimke, Wessing and Berenberg-Gossler Attorneys, Hamburg, Germany, James Gray, Pierski, Fitzpatrick and Gray, Milwaukee, United States of America, and Prof. Dr. Paul de Knop, Free University, Brussels, and University of Tilburg, The Netherlands. Mr Eric Vilé, CMS Derks, chaired the Session. The Session was sponsored by the FBO, the Dutch Federation of Professional Football Organisations. Simon Gardiner’s and Paul de Knop’s contributions were published in *The International Sports Law Journal*, No. 2, 2000, pp. 17–20. The official programme explained the Round Table’s topic as follows: ‘In recent years, especially in the post-Bosman period, professional sport in Europe appears to have been increasingly influenced by what are regarded as characteristics of the traditional North American model of sport. The growing commercialisation in European professional football, in particular, makes it relevant to thoroughly consider the usefulness and adaptability of legal and institutional instruments that are available in the United States where the major leagues of American football, baseball, basketball and ice hockey have for decennia now been “big business.” This Round Table Session examines themes such as the appropriateness of closed leagues and the role of commissioners, the system of sports franchises, the relocation of clubs, anti-trust law and the collective selling of broadcasting rights, the phenomenon of club owners, cross-ownership, sponsoring, licensing and merchandising, the farm system, collective bargaining agreements and players’ unions, the regulation of the sports agent, the application of salary caps, salary arbitration and free agents, the draft system, and questions of intellectual property rights. In addition, specific developments that are taking place in the “sports industry” of the United States and Europe at the time of the Round Table Session are evaluated.’

<sup>18</sup> Weatherill 2000, pp. 155 et seq., and: Weatherill 2007, pp. 175 and 155.

One of the main themes in Europe has been the relationship between a rather pristine European Sports Model, as it has been called, and the growing commercialization of sport. This theme has been expressed variously in analyzing the regulatory power of the European Union over sporting activity and in contrasting the European Sports Model with a so-called North American Sports Model. Both models are largely policy constructs, and the North American Model may simply be that which the European Model is not. Even so, the models help each of us see our own sports culture as others see it. Although the European Sports Model has been the subject of many writings, in-depth comparisons between it and the North American Model are infrequent. Comparing the models highlights core values, sharpens analysis, and yields new insights. A few preliminary observations may be useful in defining the models. First, they are just that: models, that is general representations of reality rather than precise descriptions of organisational structures. Second, a functional analysis and evaluation of the European Sports Model inevitably must take account of the legal constraints, particularly European Union law.<sup>19</sup>

In the context of the debate of an ‘Americanization’ or even ‘McDonaldization’ of European sports, it is Halgreen’s belief that the European sports culture is unique and worth protecting, with its extraordinary mix of amateur and professional, commercial and non-commercial interests alongside each other, serving a very important role in European societies. However, in a time of increased internationalization and globalization, it was his realistic assertion that it will not be possible simply to ‘dismiss’ the American Model of Sport purely for political, ideological or protectionist reasons. This is because European sport *is* part of a global sports economy, and many professional European sports, faced with the tough and unfamiliar challenges of a commercialized sports environment, have already demonstrated a strong tendency to combine the European and American sports systems in one form or another.<sup>20</sup>

The ‘Americanization’ debate which from time to time comes back to the stage in Europe, is an example of international comparative legal and organizational comparison between continents and not individual countries. It concerns non-governmental sports law, the law of the ‘autonomous’ private sports organizations which as such is of a transnational character, not public legislation regarding sports. Of course, European sports law which sets the limits to the sporting law is the law of a supranational intergovernmental organisation of states, whereas the North American Model comprises two completely sovereign states, Canada and the United States of America which set the limits to sport by national legislative instruments.

N.B. A study on the ‘Americanization’ issue would start from the following ‘Kokkini-criteria’ qualifications: international (or: national = bilateral?); two sports systems on both sides of the Atlantic ocean, including on the one hand Canada and the United States of

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<sup>19</sup> Nafziger 2008, p. 100.

<sup>20</sup> Halgreen 2004, pp. 16-17.

America, and on the other the public international organisation EU with now 27 Member States); external (!); horizontal; *stricto* or *lato sensu*; macro (!); theoretical or practical (practical: when the North American Football League (NFL; American rugby) established a branch in Europe, it could have been useful to first have available a study on the state of affairs in European (EU) sport in an organisational and legal sense); and private (cf., public: EU law, i.e., the jurisprudence of the European Court of Justice has adjusted the European sports model to some extent in the past decade by opening it up, as it were into a more liberal, ‘American’ direction; however, at the opposite, in North American pro sports there do exist closed leagues with salary caps, drafts, etc. for promoting a level playing field).

### 2.3 Summary and Conclusion

The European Union regularly commissions legal comparative research in areas of sports law. Such research serves to provide a picture of which private and possibly, public sport rules exist in areas of sports law in the Member States. The surveys are intended to provide information that can be used by the European Union for relevant policy development. According to the new sport provision in the Lisbon Treaty, Article 165, any harmonization of the laws and regulations of the Member States by the European Union is excluded. Of course this type of studies and reports still could theoretically (scientifically, academically) be used for unification/harmonization purposes. Used outside the EU framework the ‘Doping harmonization’ study is a clear example of a harmonization report; the ‘WADA Code’ study—by monitoring of the implementation of the Code—in fact also fulfills this purpose. On the other hand, there are possible studies and reports which are meant to be used by an individual country by way of ‘best practices’/‘lessons learned’ from abroad. The ‘Sports Acts’ study is a study of this ‘national’ type.<sup>21</sup> The national/international (=bilateral/multilateral) ‘Kokkini-criterion’ is now here finally deleted as having turned out to be meaningless at least in the context of (international) comparative sports law; bilateral also means international and why not trilateral etc. research if and when a country looks for inspiration abroad to revise its Sports Act or other relevant legal instruments?! Instead of this distinction, it is a much better option to use this criterion in the sense of ‘best practices’ (national) v unification/harmonization research. So, now we have three new criteria: practical/theoretical, national/international (in a new meaning) and private/

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<sup>21</sup> Several years ago, the Asser Institute was requested by the Singapore Sports Council who referred to the “Sports Acts” study (2006) for the Netherlands government, to present a research proposal for the purpose of the revision of the Sport Council Act (1973). Particularly, because of the Singaporese ambition to create in the country a podium for the staging of international sporting mega events the question was whether the adoption of a new Sport Act could be drafted and how. The Asser Institute then proposed a worldwide study along the lines of what is described as follow-up research in the paragraph on the “Sports Acts” pilot study, *supra* Sect. 2.2.1.1.

**Table 2.1** Typology of the Asser research studies and reports according to the ‘Kokkini-criteria’ plusminus (or: minusplus) (in chronological order)

Studies and reports	Internal/ external	Horizontal/ vertical	Stricto/ <i>lato sensu</i>	Micro/ macro	Practical/ theoretical	National/ international	Private/ public
Doping harmonisation	External	Horizontal	Stricto sensu	Micro	Practical	International	Private/public
SD football (candidates)	External	Horizontal	Stricto sensu	Micro	Practical	International	Private/public
Football hooliganism	External	Horizontal	Stricto sensu	Micro	Practical	International	Private/public
Sports acts	External	Horizontal	<i>Lato sensu</i>	Micro	Practical	<i>National</i>	Public
SD EPFL/G14	External	Horizontal	Stricto sensu	Micro	Practical	International	Private
SD football agenda	External	Horizontal	Stricto sensu	Micro	Practical	International	Private
Health and safety	External	Horizontal	Stricto sensu	Micro	Practical	International	Private/public
SD cycling agenda	External	Horizontal	Stricto sensu	Micro	Practical	International	Private
Sport governance	External	Horizontal	Stricto sensu	<i>Macro</i>	Practical	International	Public
WADA code	External	Horizontal	Stricto sensu	Micro	Practical	International	Private/public
Non-nationals	External	Horizontal	<i>Lato sensu</i>	Micro	Practical	International	Private

public added to the ‘Kokkini-criteria’ (plus) whereas one criterion: national/international (in the old meaning) has disappeared (minus) (Table 2.1).

N.B. The ‘Americanization’ debate is an example of continental comparative sports law (Europe/North America). Its typology is emphatically ‘external’ and ‘macro.’

Sports law is two- or double-layered: there are private and a public segments—the (D)NGO part of the law on the one hand (sporting rules and regulations) and legislation as well as treaties on the other hand. The specific institutional characteristics of organized sport are ‘juridified’ by and in its own, private rules and regulations. In the context of comparative law research, this crucial feature of sports (law) may be characterized as an example of ‘sport specificity.’ So, the double stratification of sport and thereby sports law is the major, core aspect of (international) comparative sports law. Minor specific characteristics are a result of adapting the initial ‘Kokkini-criteria’ to organized sport and sports law. ‘External’ means in the sporting context for example research into interventionist *versus* non-interventionist states, not only in Europe but also worldwide. ‘Macro’ means In the sporting context comparative research into sport governance at large regarding national and/or international sport governing bodies (cf., the comparison between legal systems or jurisdictions of national states under the law of nations). Like in the inter-state context, this may also apply to comparative research regarding several crucially differing types of sports governance (see, the ‘Americanization’ debate). If sport governance is macro, Sports Acts research is relatively micro. Generally speaking, sport governance in the private segment concerns internal sport governance (‘intra sport’), whereas Sports Acts concern the relationship between state and national organised sport which may be characterised as external sport governance (‘intra state’). So, there are two (interrelated) types of sport governance.

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