ASSER INSTITUTE
Centre for International & European Law

ASSER International Sports Law Centre

Study on sports organisers' rights in the European Union

Final Report

February 2014

IViR
Instituut voor Informatierecht
Faculteit der Rechtsgeleerdheid - Universiteit van Amsterdam

Europe Direct is a service to help you find answers to your questions about the European Union.

Freephone number (*)**:**

00 800 6 7 8 9 10 11

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

More information on the European Union is available on the Internet (http://europa.eu).

Luxembourg: Publications Office of the European Union, 2014

HOW TO OBTAIN EU PUBLICATIONS

Free publications:

- one copy:
  via EU Bookshop (http://bookshop.europa.eu);
- more than one copy or posters/maps:
  from the European Union's representations (http://ec.europa.eu/represent_en.htm);
  from the delegations in non-EU countries (http://eeas.europa.eu/delegations/index_en.htm);
  by contacting the Europe Direct service (http://europa.eu/europedirect/index_en.htm) or
  calling 00 800 6 7 8 9 10 11 (freephone number from anywhere in the EU) (*).

(*) The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

Priced publications:

- via EU Bookshop (http://bookshop.europa.eu).

Priced subscriptions:

- via one of the sales agents of the Publications Office of the European Union (http://publications.europa.eu/others/agents/index_en.htm).

EAC/18/2012

Study on sports organisers' rights in the European Union

T.M.C. Asser Instituut / Asser International Sports Law Centre

Institute for Information Law - University of Amsterdam

February 2014

EUROPEAN COMMISSION
Directorate-General for Education and Culture
Directorate Youth and Sport
Unit Sport

This report has been prepared by the T.M.C. Asser Instituut (Asser International Sports Law Centre) and the Institute for Information Law (IViR) of the University of Amsterdam, for the European Commission, DG Education and Culture.

The primary authors are Prof. Dr. Ben Van Rompuy (Asser) and Dr. Thomas Margoni (IViR). The project was led by Prof. Dr. P. Bernt Hugenholtz (IViR).

The research team consisted of three additional high-level experts and two researchers: Prof. Dr. Nico van Eijk (IViR), Dr. David McArdle (Asser / University of Stirling), Prof. Dr. Tilman Becker (Gaming Research Center, University of Hohenheim), Catherine Jasserand-Breeman (IViR, author of chapter 3), and Marco van der Harst (Asser). Further research assistance was provided by Fabienne Dohmen (IViR), Petroula Lisgara (Asser), and Tim Wilms (Asser). Annex III lists the national correspondents that also have contributed to this study.

EXECUTIVE SUMMARY

The legal protection of rights to sporting events ("sports organisers' rights") is a contentious issue. While in recent years distinct aspects of the problem have been addressed by legislatures and courts, both at the national and at the European level, a great deal of legal uncertainty persists. Divergent views on the appropriateness, form and scope of such legal protection exist among stakeholders and other concerned parties, reflecting the complex nature and multiple functions of sports in modern society. The universe of sports and media is a complex network of social and commercial relationships with a variety of stakeholders, each one of whom can claim rights or specific interests in the value chain of organizing and exploiting sports events, such as clubs, leagues, athletes, federations, fans, media content providers, sponsors, owners of sport facilities, sports betting operators and news media.

Consequently, the question of protecting sports events is by no means a one-dimensional legal issue, and should be framed in a broader socio-economic context. On the one hand, professional sport represents a large and fast-growing sector of the European economy – and in no small measure this is due to the commercial significance of sports media rights. On the other hand, sports are widely regarded as playing a pivotal role as a "social cohesive", an agent of communal, and conveyor of moral, values. This helps explain why major sports events qualify in various Member States as "events of major importance" for society, subject to special media rules mitigating exclusive rights of broadcasters to guarantee viewers' access to these events via free-to-air television.

The general objective of this study is to examine and critically assess a number of the most pressing questions of substantive law relating to the existence and exercise of sports organisers' rights in the EU. The specific objectives of the study are:

- To map the legal framework applicable to the origin and ownership of sports organisers' rights in the 28 Member States;
- To analyse the nature and scope of sports organisers' rights with regard to licensing practices in the field of the media, taking into account relevant EU law provisions;
- To examine the possibility of establishing licensing practices beyond the media field, notably in the area of gambling and betting;
- To provide recommendations on the opportunity of EU action to address any problem that may be identified in the above mentioned areas of analysis.

Protection of sports organisers' rights

Part 1 of the study focuses on the various types of legal protection presently available to the organisers of sports events. Property rights are the first category to be addressed. Most sports events take place in dedicated venues over which the sports organisers have either ownership or exclusive-use rights. This type of exclusivity, carrying the power to *exclude* unauthorized individuals or media from the venue and to allow entry subject to specific contractual conditions, serves as an important legal instrument of protection for sports organisers. This scheme is usually referred to as "house right" and while it has not been explicitly recognized by the courts in all Member States, it most likely exists and is enforceable everywhere in the EU.

Intellectual property rights comprise the second category. In the case of *Premier League v QC Leisure* the (European) Court of Justice (CJ) has clarified that sports events *as such* do not qualify for copyright protection under EU law. The same does not hold true, however, for the audiovisual production, recording and broadcasting of sporting events. The images of sporting events attract the interest of constantly growing shares of TV and on-line audiences, and are often of enormous commercial value. The various media products resulting from the audiovisual recording and broadcasting of sports events give rise to a variety of intellectual property rights, especially in the field of copyright and rights related to copyright (neighbouring rights) – areas that are largely harmonized at the EU level. These rights include the copyright in the cinematographic work (film work) that, in many cases, is the result of audiovisual coverage, as well as an array of related (neighbouring) rights in the recording and broadcasting of the audiovisual registration of the sports event. While many of these rights find their origin in EU secondary law, some related rights occur only in distinct Member States, such as the special sports organisers right that exists in France under the *Code du Sport*, or the Italian sports audiovisual related right.

A third category of rights examined are so-called "image rights" - rights that protect the commercial likeness of sports players and athletes, based on a variety of legal doctrines, such as personality rights and right to privacy. While image rights form a heterogeneous legal category untouched by harmonization, most Member States do accord some level of legal protection against unauthorized commercial uses of players' images. As recent case law in Germany and the Netherlands suggests, players or athletes can, however, not invoke their image rights to prohibit, or require remuneration for, audiovisual coverage of sports events in which they participate.

As Part 1 demonstrates, the rights and interests of sports organisers are generally well safeguarded at the substantive legal level. The "house right" gives sports events organisers and clubs (and indirectly the sports federations) a right to exclude unauthorized media from the venue, and thereby creates leverage for the event organisers to negotiate exclusive contracts regarding media coverage. In practice, these contracts may or may not provide for complete or partial transfer(s) to the sports organisers of the copyrights and neighbouring rights in the audiovisual recording and transmission of the event. Sports events organisers or their federations may, alternatively, elect to produce and distribute media coverage of the sports events themselves. Either way, the combination of house right, media contract(s), and intellectual property protection of the audiovisual recording and broadcast effectively allows the sports event organisers to enjoy complete ownership and/or control over the audiovisual rights in the sports events.

Sports organisers' rights management in the field of media

Part 2 of this study examines how sports organisers' rights are managed and licensed in the field of media. Regarding the marketing of sports media rights, it analytically describes the way in which these rights are sold and critically analyses the compatibility of current and evolving licensing practices with EU competition law and internal market law. Regarding the exploitation of sports media rights, it looks into the limits posed to exclusivity in order to grant access on free-to-air television for events of "high importance for the public".

The marketing of sports media rights: licensing practices

EU competition law enforcement has had a major impact on the way premium sports media rights are sold in the EU. Prior to the European Commission's precedent decisions on the joint selling of sports media rights (*UEFA Champions League* 2003, *DFB* 2005, *FAPL* 2006), the National Competition Authorities (NCAs) of various Member States had prohibited this practice on the basis of their national competition rules. The Commission, however, made clear that joint selling can be deemed compatible with EU competition law, albeit under strict conditions.

Ten years after the *UEFA Champions League* decision, the joint selling of sports media rights has become the dominant practice. Since Italy reintroduced the system of joint selling in 2010, Cyprus, Portugal, and Spain are now the last European markets in which first division football clubs sell their rights individually. Also for other sports, the individual sale of media rights is exceptional.

The comparative analysis of EU and national decisional practice reveals that for the most part the NCAs have replicated the heavy-handed remedy package designed by the European Commission. The "no single buyer" obligation, a remedy that was exceptionally imposed by the Commission in *FAPL*, is increasingly being emulated at the national level. Only with regard to the duration of exclusivity, more and more NCAs are demonstrating a readiness for a more flexible approach (i.e. by accepting exclusive rights contracts exceeding three years).

The imposed remedies, facilitated by technological developments, have effectively addressed concerns about output restrictions related to joint selling. The problem of warehousing of rights or unused (new media) rights no longer seems to be a concern. The positive impact of EU competition law intervention on the supply-side dynamics is all the more evident when considering prevailing practices in Member States where NCAs have not (yet) intervened. In these countries, sports media rights are still sold in one exclusive bundle, for a long period of time, and without a transparent public tender procedure.

EU competition law intervention has been less successful in terms of challenging existing market dynamics at the downstream level: the premium sports content bottleneck continues to frustrate markets for the acquisition of premium sports media rights. In various markets, the main vertical effect of the chosen remedies has been that in the downstream market a duopoly emerged in the place of a monopoly. This also has implications for competition in new media markets. The emerging trend to market premium sports media rights on a platform-neutral basis favours powerful vertically integrated media content providers. This risks negating the progress that was made in enabling smaller operators to acquire earmarked packages for certain platforms.

The study also examined licensing provisions granting sports media rights on an exclusive territorial basis in light of EU internal market law. While initially the CJ's *Premier League v QC Leisure* judgment was considered a game-changer for the way in which sports media rights would be marketed in the EU, so far little seems to have changed. The English Premier League has responded by introducing new contractual provisions that, unfortunately, make consumers everywhere in the EU worse off. The *de facto* imposition of the UK "closed period" rule for Premier League matches across Europe, however, again raises questions about the public interest dimension of this old-fashioned measure and may indicate competition issues.

The exploitation of sports media rights: right to short reporting

The study further analysed the right to short reporting as enshrined in Article 15 AVMSD and as implemented in the national regulatory frameworks of the 28 Member States of the European Union. Three scenarios have been tested. The first one sought to determine the conditions of access to the signal of a domestic broadcaster which has acquired exclusive TV rights on those events of high interest to the public as well as the conditions and modalities of use of the short extracts produced. The second scenario is similar to the first one, except that it involved two broadcasters established in different EU jurisdictions. It also sought to define which law is applicable to determine if an event qualifies as an event of high interest to the public. The last scenario tested the possibility for a broadcaster to get access to the venue of an event of high interest to the public to exercise its right to short reporting. In addition, the scenario checks whether the right of access to the venue extends to a right to record images in margin of the events.

The right of short news reporting is an important element of the EU legal order safeguarding the right of broadcasters to have access to "events of high interest to the public", such as important sports events, which are subject to exclusive broadcasting rights. However, the way this right is currently framed, allowing Member States the option of either mandating access to the transmitting broadcaster's signals, or requiring direct access to the venue where the event takes place, has resulted in some differences in implementation by the Member States (i.e. on the duration of the short news reporting).

Sports organisers' rights management in the field of gambling

Part 3 of this study examines, from an EU and national legal perspective, the possibility for sports organisers to license their exploitation rights beyond the media field, notably in the area of gambling. In the last decade or so, the advent and rapid rise of online sports betting services has fundamentally altered the relationship between professional sports organisers and the gambling industry, creating commercial and promotional opportunities but also integrity threats for sport. The analysis focuses on the existence of a sports organisers' right to consent to the organisation of bets ("right to consent to bets") and on legal limitations that restrict the licensing of other exploitation rights to gambling operators.

A sports organisers' right to consent to bets

With the enactment of a new gambling law in 2010, the French legislature, following case law precedent recognizing sports bets as a form of commercial exploitation of sports events, introduced a right to consent to bets. Apart from France, two other Member States have legally recognized a right to consent to bets, namely Poland and Hungary. Sports organisers in these countries, however, have so far no experience (Hungary) or only limited experience (Poland) with the actual enforcement of this right.

Numerous national and European sports organisers have called for the adoption of a similar right at the EU or EU-wide national level. This report dispels two general misconceptions that seem to persist in the debate on the merits of a right to consent to bets.

First, when sports organisers advocate the right to consent to bets as a mechanism to enable a "fair financial return" from associated betting activity and to preserve the integrity of sport, the arguments are commonly framed within a perceived need for more legal protection. In essence,

what is asked is the recognition of a broad-scoped sports organisers' right that would cover all kinds of commercial exploitation of sports events, including the organisation of bets. The analysis reveals however, that the financial and integrity benefits attributed to a right to consent to bets could be achieved well outside the framework of private law. A right to consent to bets can be introduced as a regulatory condition in gambling legislation without recourse to an express recognition of a broad-scoped horizontal sports organisers' right.

Second, the right to consent to bet is not an efficient way to allocate revenue from betting to all levels of professional and amateur sport. Whatever the fee structure, the price paid in exchange for the right to consent to bets will always be relevant to the volume of bets that a sporting event is able to attract. Hence, financial benefits predominantly flow to professional sport and more particularly to the organisers of premium sports events. Small or less visible sports are unlikely to benefit from this instrument. Furthermore, there is no evidence for a link between the financial return stemming from a right to consent to bets and the financing of grassroots sports.

The review of the experiences with the implementation of a right to consent to bets in Victoria (Australia) and France further highlights a number of challenges associated with the introduction of such an instrument.

Since the exercise of a right to consent to bets is capable of constituting a restriction on the free movement of gambling services within the meaning of Article 56 TFEU, it must be justified by an imperative requirement in the general interest and comply with the principle of proportionality. The CJ has accepted the prevention of fraud as a legitimate objective justification. The financing of public interest activities through proceeds from gambling services, on the other hand, can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted. It follows that a strict regulatory framework that genuinely reflects a concern to prevent the manipulation of sports events must accompany the introduction of a right to consent to bets. Of the existing regulatory systems, only the Victorian (Australia) regulatory regime clearly demonstrates a primary concern with safeguarding the integrity of sports events and is therefore recommended as a best practice model.

Regarding the institutional and operational requirements for the successful implementation of a right to consent to bets, it must be concluded that the transaction costs related to this instrument are particularly high. The integrity and financial benefits of a right to consent to bets can only be fully achieved when it is carefully managed by a national regulatory authority that:

1. actively prosecutes illegal betting services (including the offering of sports bets by licensed operators without the sports organisers' consent);
2. monitors the commercial exploitation of the right to consent to bets to prevent discriminatory or anti-competitive marketing conditions;
3. provides for an *ex post* mechanism for complaint handling and dispute resolution;
4. has the power to conduct on-going monitoring of the parties' compliance with the mutual rights and obligations contained in the contractual agreements.

Given that a number of national regulatory authorities suffer from limited staff and resources, it is questionable whether they would be capable of fulfilling this challenging task.

Gambling advertising restrictions and sports sponsorship

In line with the principle of freedom of contract, sports organisers are in principle free to choose the contractual partners for the commercial exploitation of their rights. One main obstacle emerges, however. Restrictions on gambling advertising at the national level (may) create difficulties for

sports organisers, clubs, and individual athletes to enter into sponsorship agreements with gambling operators.

The analysis of regulatory frameworks governing the advertising of gambling services reveals a patchwork of different national approaches. The potential for conflicting national restrictions causes in particular challenges for organisers of cross-border sports events and for clubs or individual athletes participating in such events (as they may be induced to infringe national gambling advertising regulations or breach personal sponsorship contracts).

Over and above the lack of consistency across Member States, a widely observed absence of legal certainty appears to cause the biggest problem. Even when national gambling advertising regulations exist, uncertainties remain about their applicability to sponsorship agreements. For example, only a few national gambling advertising regulations clarify the extent to which both parties to a sponsorship agreement, i.e. the sponsored party and the gambling operator, can be found liable for breaching these regulations. Inconsistencies in the enforcement of the applicable regulations make it even more difficult to anticipate the costs of non-compliance.

This legal uncertainty undermines the effectiveness of the measures that seek to protect consumers against the financial, social, and health risks associated with gambling. Moreover, it ultimately results in considerable market uncertainty and potential losses of sponsorship revenue for sports organisers, clubs, and individual athletes.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AAMS	Amministrazione Autonoma dei monopoli di Stato / Autonomous Administration of State Monopolies
AFL	Australian Football League
AG	Advocate General
ARJEL	Autorité de Régulation des Jeux En Ligne / French Online Gambling Regulatory Authority
ARL	Australian Rugby League
AVMSD	Audiovisial Media Services Directive
CFF	Cyprus Football Federation
CJ	(European) Court of Justice
DBU	Dansk Boldspil-Union / Danish Football Association
DFB	Deutscher Fußball-Bund / German Football Association
DFL	Deutsche Fußball Liga / German Football League
DIV	Divisionsforeningen / Danish League Association
DTT	Digital Terrestrial TV
ECHR	European Convention on Human Rights
ECN	European Competition Network
ECTT	European Convention on Transfontier Television
EEA	European Economic Area
EFTA	European Free Trade Association
EHF	European Handball Federation
EMM	Eredivisie Media & Marketing C.V.
EU	European Union
EURO	UEFA European Football Championship
FAPL	FA Premier League
FFT	French Tennis Federation
FIFA	Fédération Internationale de Football
FIS	Fédération Internationale de Ski / International Ski Federation
FTA	Free-to-air
GlüStV	Glücksspielstaatsvertrag / Interstate Gambling Treaty (Germany)
GRA	Gambling Regulation Act (State of Victoria, Australia)
IGA	Interactive Gambling Act (Australia)
IOC	International Olympic Committee
IPTV	Internet Protocol TV
KNVB	Koninklijke Nederlandse Voetbalbond / Royal Dutch Football Association (the Netherlands)
LBO	Licensed Betting Offices
LFP	Ligue de Football Professional (France)
LNP	Lega Nazionale Professionisti (Italy)
MLB	Major League Baseball
NBA	National Basketball Association
NCA	National Competition Authority
NFL	National Football League
NHL	National Hockey League
ÖSV	Österreichischer Schiverband / Austrian Ski Federation
SCB	Sports controlling body
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights

UEFA	Union Européenne de Football Association / Union of European Football Associations
UWG	Gesetz gegen den unlauteren Wettbewerb / Act against Unfair Competition
VCGLR	Victorian Commission for Gambling and Liqour Regulation
WIPO	World Intellectual Property Organization

LIST OF FIGURES

Chapter 2

Chapter 4

INTRODUCTION TO THE STUDY

I Background

The legal protection of rights to sporting events ("sports organisers' rights") is an extremely contentious issue. While in recent years distinct aspects of the problem have been addressed by legislatures and courts, both at the national and at the European level, a great deal of legal uncertainty persists. Likewise, strongly divergent views exist among stakeholders and other concerned parties regarding the appropriateness, form and scope that such legal protection, if granted at all, should take.[1] The reasons for this plurality of stances are many, but they are largely rooted in the multi-faceted nature - commercial, socio-cultural, and educational - of sport and sports related activities. On the one hand, professional sport represents a large and fast-growing sector of the European economy – and in no small measure this is due to the commercial significance of sports media rights.[2] National and international sports organisations are leading commercial actors: their decisions contribute not only to the regulation of professional sports, but also have an impact on the growth of the respective economies. On the other hand, sport is widely regarded as playing a pivotal role in modern society as a "social cohesive", an agent of communal, and conveyor of moral, values. Moreover, amateur sport, to which professional sport is directly linked by way of various institutional and financial arrangements, contributes significantly to public health and welfare, especially but not exclusively for the young. Sport in the modern world ostensibly serves as an essential thread of the social fabric, and this thinking helps explain why major sports events qualify in most Member States – in line with the Audiovisual Media Services Directive – as "events of major importance", subject to special media rules mitigating exclusive rights of broadcasters. Similarly, the public news value inherent in the reporting of sports events is reflected in the right to short reporting that is also enshrined in the Directive.

Another important factor that contributes to the reported uncertainty and complexity is the sheer number of stakeholders involved in the organization of sports events. Sport has developed into a complex network of business relationships with a variety of stakeholders, each one of whom can claim rights or specific interests in the value chain of organizing and exploiting sports events. Clubs, leagues, athletes, federations, media content providers, sponsors, owners of sports facilities, sports betting operators, and news media all contribute to a complex web of commercial relationships that need to be properly addressed.

II Objectives

By looking at a range of questions crucial to the existence and exploitation of sports organisers' rights in and beyond the media sector, this study aims to enhance the general knowledge from the perspective of the EU legal framework and to assess the desirability of future actions in the field.

The general objective of this study is to provide a comprehensive analysis of some of the issues related to sports organisers' rights from an EU perspective, and to formulate suggestions as to whether EU action is needed to address any identified problem. In its Communication "Developing

[1] As observed by the Expert Group on Sustainable Financing of Sport (XG FIN), the discussion around sports rights at both an European and national level is *"very much underdeveloped"*. Expert Group on Sustainable Financing of Sport, Strengthening financial solidarity mechanisms within sport, December 2012.
[2] See e.g. European Commission, "Sport keeps not only you, but also industry fit" (Memo), 21 January 2014; SportsEconAustria et al, "Study on the Contribution of Sport to Economic Growth and Employment in the EU" (2012).

the European Dimension in Sport", the European Commission highlighted the importance it attributes to these issues by stressing that:

"Exploitation of intellectual property rights in the area of sport, such as licensing of retransmission of sports events or merchandising, represents important sources of income for professional sports. Revenue derived from these sources is often partly redistributed to lower levels of the sports chain. The Commission considers that, subject to full compliance with EU competition law and Internal Market rules, the effective protection of these sources of revenue is important in guaranteeing independent financing of sports activities in Europe".[3]

The European Commission has set the following specific objectives for this study:

1. To map the legal framework applicable to the origin and ownership of rights to sports events (sports organisers' rights) in the 28 Member States;
2. To analyse the nature and scope of sports organisers' rights with regard to licensing practices in the field of the media, taking into account relevant EU law provisions;
3. To examine the possibility of establishing licensing practices beyond the media field, notably in the area of gambling and betting;
4. To provide recommendations on the opportunity of EU action to address any problem that may be identified in the above mentioned areas of analysis.

It must be emphasized that the scope of this study, and consequently the research questions drafted and conclusions reached, mainly concerns aspects of substantive law. Enforcement of rights and legal procedure are not among the objectives of the study, and neither are rules on (secondary) liability for infringement of rights. This is an important observation since the unauthorized retransmission over the Internet of sports-related content is considered, as will be seen, one of the major threats to right-holders' commercial interests.

While substantive law, liability, and enforcement rules are necessarily correlated they belong to different levels of legal and classificatory analysis. Substantive law looks at the justification, existence and functioning, including the availability of remedies, of a given right or set of rights. Enforcement, which is intimately connected with procedural law, looks at the mechanisms to make those remedies available and effective in practice, whereas liability rules are particularly relevant in respect of online intermediaries that do transmit illegal content made available by third parties.[4]

III Research questions

The first set of questions this study addresses concerns **the existence, the nature, and the scope of sports organisers' rights on the basis of property and intellectual property rights.**

[3] European Commission, Communication "Developing the European Dimension of Sport in the EU" (2011) COM(2011) 12 final, section 3.2.

[4] In EU copyright and neighbouring rights law, substantive legal provisions are present in a number of Directives that are object of analysis in this study. In the field of intellectual property enforcement rules are harmonized to a significant extent by the EU Enforcement Directive. See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Rules on secondary liability of online intermediaries are not harmonized, albeit that the EU E-Commerce Directive does provide for certain immunities. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Although the European Court of Justice (CJ) has held that sports events as such are not the subject matter of copyright protection,[5] and match fixtures are not amenable to the database *sui generis* right,[6] many other questions regarding the protection of sporting events, especially at the national level of the 28 Member States, remain unanswered. As the CJ puts it: "*... sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders*".[7] As will be seen in the first part of the study, there are multiple approaches that Member States have followed to protect (certain aspects of) the organization of sports events *vis-à-vis* the media and other users.

Indeed, while a sports event as such under current EU and national rules does not qualify for copyright or neighbouring rights protection, the same does not necessarily hold true for the audiovisual recording of a sporting event, nor for its broadcasting. Additionally, extensive legal remedies are available to sports organisers based on the ownership or exclusive use of the venue (land, stadium, infrastructures) where the sports performance takes place. These remedies are commonly referred to as "house right" and they represent the legal basis for the conclusion of specific contractual agreements with persons or entities attending the event (e.g. spectators, media, broadcasters, and sponsors).[8]

The existing property and intellectual property based protection for sports events inevitably cause a tension with the fundamental rights – protected, inter alia, by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU – of the media and other users to conduct a business, and the rights of the media and the general public to impart or receive information. Both the national and EU legislators have sought to balance these conflicting rights by e.g. defining the modalities and conditions regarding the right to make short news reports.[9]

The first part of this study focuses on the first side of this equation: the relevant rules regarding the protection of sports events, whereas the second side, the right of short reporting, is discussed in the second part of the study.

A second set of questions concerns **the exploitation of sports organisers' rights by the media**.

For decades professional sports organisers and the media have developed a symbiotic relationship. The coverage of premium sports events constitutes vital input for media content providers, capable of attracting large audiences that are appealing for advertisers. Conversely, media content providers act as an important revenue source and promotional tool for sport. The emergence of digital technology and the Internet has also created new opportunities to self-exploit media rights, in particular for organisers of "smaller" sports that previously had little or no media exposure.

---

[5] See Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR I-9083.
[6] See Case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, 1 March 2012 (nyr); Case C-203/02 British Horseracing Board Ltd v William Hill Organization Ltd (2004) ECR I-10415; Case C-338/02 Fixtures Marketing Ltd v Svenska AB, (2004) ECR I-10497.
[7] Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR I-9083, para. 100.
[8] Commercial interests of sport organisers, particularly clubs, may also be protected by trademark rights or rights in trade names. These rights, however, remain outside the scope of this study: they are primarily relevant for merchandising activities and generally do not concern or affect the media uses of sport events that are central to this study.
[9] Pursuant to Article 17(1) of the Charter of Fundamental Rights of the EU, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions ("right to property"). The use of property, however, may be regulated by law in so far as is necessary for the general interest. See e.g. Case C-201/11 P UEFA v. Commission, 18 July 2013 (nyr), para. 101.

The analysis of the ways in which sports organisers' rights are managed in the media field is at the core of the second part of the study. It provides an in-depth legal analysis of the systems and practices related to the commercial exploitation of sports media rights in a constantly evolving media landscape. Particular attention is given to the way in which legal provisions, such as competition law and media law, govern the way in which premium sports media rights are marketed and exploited in the EU.

A third set of questions concerns **the exploitation of sports organisers' rights beyond the media field, notably by gambling operators**.

In the last decade or so, the advent and rapid rise of online sports betting services has fundamentally altered the relationship between professional sports organisers and the gambling industry, creating commercial and promotional opportunities but also integrity threats for sport. The changes currently being made to the national legislative frameworks regulating gambling, and in particular online betting, services have significant direct or indirect implications for (1) the funding of sport, (2) the commercial partnerships between sports organisers and gambling operators (i.e. sponsorship), and (3) the preservation of the integrity of sport. These issues are central to the third part of the study, which analyses, from an EU and national legal perspective, the possibility of extending sports organisers' rights management practices in the media field to the area of gambling and betting.

IV Interests of stakeholders

The specific interests of stakeholders have been identified firstly by way of desk research into relevant literature, case law, and policy documents, and secondly by interrogating the experts from various stakeholder organizations that attended the expert workshops organised in the context of this study.[10] These interests, summarized in the following sections, are recurring key issues of analysis and evaluation in the entire study.

Interests of sports organisers

The main arguments brought by the sports organisers, as emerged during the expert workshops, are structured around the multi-faceted nature of sport set out above. On the one hand, sport (especially professional sport) plays a major role in national and international economies, both in terms of GDP and employment. On the other hand, sport (especially amateur sport) is practiced by large numbers of people and carries the clear potential for positive effects on social well-being, both in terms of health and education, especially for the young. A key point in the sports organisers' line of arguments is that these amateur and grass-root sports activities are partly financed by revenues redistributed from professional sports.[11]

Given these important economic and social functions, sports organisers argue that sport deserves more legal protection than what is currently available at the EU level and in the majority of the Member States. This argument for extra protection has become particularly compelling during recent years because new technologies have increased the potential harm that the unauthorized use

[10] See the section on methodology below for details.
[11] See European Commission, Communication; "Developing the European Dimension in Sport" (2012) COM(2011) 12 final, 9-10; See also more generally Eurostrategies, CDES, AMNYOS and the German Sport Institute of Cologne, "Study on the funding of grassroots sports in the EU with a focus on the internal market aspects concerning legislative frameworks and systems of financing" (2011).

of sport-related content and information can cause to the legitimate interests of those who take the risk (organizational and financial) to coordinate the sports event. In this regard, sports organisers identify two main threats.

The first threat is the unauthorized rebroadcasting (especially on-line) of televised matches. Live streaming, usually from websites based outside the EU, has become the most common form of unauthorized dissemination of sports content. The relative technical ease of setting up this type of website, combined with the practical difficulties of enforcing content-related rights against the providers of these services, explains their "success". While calls for legal protection of sports content against digital piracy can be easily extended to unauthorized uses of other types of content on-line (potentially diluting the argument of the "speciality" of sport[12]), it is true that whereas for other types of illegally transmitted content such as music or movies the temporal dimension is important, for live sports events it is crucial. Live televised sports events, sports organisers argue, are extremely time-sensitive; much or all of their value is exhausted immediately upon the live transmission of the event. Accordingly, whereas a legal remedy that effectively blocks the online availability of the protected content within a few days from giving notice might be deemed adequate for illegally-available music or videos, it is not for the unauthorized live streaming of sports events. Therefore, sports organisers have on various occasions informed the Commission of their need for novel and more effective legal tools protecting from the unauthorized use of sports content. One such novel remedy identified by the sports organisers would target the advertising revenues of the illegal streaming sites. By blocking the advertisement and the connected revenues, sports organisers argue, the entire business model based on the unauthorized streaming of sports events might be halted.[13]

The second threat is the unauthorized use of sports events by sports betting operators. In this context, sports organisers have repeatedly put forward the argument that sports bets are a form of commercial exploitation of sports events that warrants some form of "fair financial return". In the same way that the exploitation of sports events by (for example) media content operators creates revenue for sport, sports organisers should participate in the financial profits generated by this type of commercial activity. The explicit recognition of a sports organisers' right to consent to bets, as introduced in France in 2010, would reflect this principle. A related, but distinct, claim is that such a right to consent to bets would enable sports organisers to preserve the integrity of their events. First, it would establish a statutory obligation for betting operators to work in partnership with sports organisers. According to contractual provisions agreed upon by the involved parties, reciprocal obligations concerning fraud detection and prevention could be introduced. Second, the financial remuneration paid by the betting operators would contribute to the investment of sports organisers in preventive anti-match fixing measures.[14]

Interests of athletes

Athletes are the lifeblood of the sports event. While it is still possible to imagine a sports event in the absence of a stadium or a properly maintained field or track, it is axiomatic that without the athletes there is no sport. Given their essential role in sports, professional athletes argue that they

[12] See European Commission, White Paper on Sport (2007) COM(2007) 391 final, sec. 3.2.5 (*"The protection and enforcement of intellectual property rights is an important issue for sport right-holders, although the sport sector hardly differs from other business sectors in this respect and faces similar challenges"*).
[13] See submissions of the Sport Rights Owners Coalition, Football Association, and Bundesliga to "Consultation on the Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", available at http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values (doc. 07. Sport Related Entities).
[14] See e.g. various position papers of the Sports Rights Owners Coalition.

deserve a specific type of protection that can be used and invoked not only towards the unauthorized uses of content where their images are recorded, but also as a bargaining tool with employers (clubs) and media companies. In the athletes view, in fact, image rights as currently structured and exploited can grant a substantial financial return only to a handful of extremely famous sportsmen and women, while for the large majority of relatively unknown athletes, this is not a realistic option. On the contrary, image rights-based contracts are in many instances used "against" athletes by employers to lower their social security, pension or tax contributions.[15]

On the other side, the activity that athletes perform while playing does not qualify as a work of authorship for the purposes of copyright law nor as a performance protected under the law of neighbouring (related) rights. In light of this absence of intellectual property protection for the specific contribution of athletes, it has been argued that the legal framework should be amended. The direction of the amendment, athletes contend, should be towards a specific recognition of their image rights and of their "intellectual creation" (the act of playing) in a way that will effectively benefit them not only against unauthorized uses by the media, but also against employers. In particular, the athletes' position is that if any specific new right in favour of sports organisers will be created (including rights over the commercial exploitation of sports events and connected betting activities) a fair financial return should go to athletes, given their central role in sport.

Interests of the media sector

Unsurprisingly, the sports organisers' and athletes' calls for (enhanced) legal protection tend to be opposed by media content operators against which these claims are primarily directed. Public broadcasters in particular point out that sports events are not to be equated with "normal" entertainment content justifying unfettered exclusive rights protection, but that the events' social dimension, as set out above, requires that access to the event by the general public is, to a certain extent, guaranteed.[16] Media content operators may also argue that sports organisers and athletes already receive considerable, and steadily increasing, revenues from media exploitation of sports events, based on an array of existing legal rights and remedies, which suggests that there is effectively no need for enhanced legal protection. Media content operators argue, moreover, that broadcasting and other media coverage of sports events invites highly lucrative sponsorship deals for the clubs and athletes that would never be possible without the intervention of the media.

Interests of the gambling sector

Stakeholders from the gambling (and in particular betting) sector generally oppose the calls for the recognition of a right to consent to bets. They argue that they already contribute significantly to sport and fully respect sports organisers' (intellectual) property rights. First, they contend that the development of online gambling and betting services does not affect existing gambling-derived revenue channelling systems that have been set up in various Member States to benefit grassroots sports (e.g. through national lotteries, tax income or levies) as the offline sector continues to grow. Second, they stress that the rise of online sports betting increases the visibility of sport at large and creates various new sources of revenue for sports in the form of lucrative sponsorship deals (i.e. sponsorship enables them to reach out to sports fans, which are a key target demographic for sports betting services) or licensing agreements for live digital media rights or sports data rights.

[15] See e.g. EU Athletes and UNI Sport Pro, "An analysis of the working conditions of professional sports players of Basketball, Hockey, Handball and Rugby across a number of European member states" (2013).
[16] See e.g. Submission of the European Broadcasting Union (EBU) to "Consultation on the Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" (2013).

Regarding the increased sports integrity risks, betting operators stress that corruption in sport goes far beyond the sole remit of sports betting, as demonstrated by various non-betting match fixing scandals.

V Methodology

In order to fulfil the different research tasks and to address the twin requirements of (1) undertaking comprehensive research into various legal issues related to sports organisers' rights in the EU, and (2) providing input for policy formulation, we have combined traditional legal research methods (desk research, literature review, document analysis), with an approach based on "field work" and data collection (qualitative analysis). Such an approach is particularly suitable in light of one of the main objectives of this study, which is to map the legal framework and rights management practices in the 28 different EU countries.

Questionnaire

For this purpose a three-part questionnaire was drafted, mirroring the three core research questions that the study covers. The first part of the questionnaire concerned the existence, nature, and scope of sports organisers' rights. The second part focused on the licensing practices related to media rights and image rights. The third was dedicated to the potential for licensing exploitation rights to gambling operators.[17]

Parts one and two of the questionnaire are based on the "factual approach" method.[18] This approach favours the identification, within the selected legal systems, of a variety of aspects that could go unnoticed or misinterpreted with a traditional theoretical approach. The factual approach method, a quite common and successful approach in the field of comparative law, uses real-case scenarios to which national correspondents are asked to respond. The use of real case scenarios, while offering a rather precise description of the targeted legal order, allows researchers to overcome the possible biases connected with the fact that the lawyer/researcher asking the question has been educated in a specific legal system, and is familiar only with his or her own legal categories.
Part three of the questionnaire follows a more traditional approach (no real-case scenarios) and seeks to identify the extent to which sports organisers' rights may be licensed to gambling and betting operators. Given the exploratory nature of this assessment, we concluded that a traditional approach would be preferable. A traditional approach, in fact, by asking a direct, specific and circumscribed question to the national correspondent has the advantage of producing direct and uniform answers, and requires less "training" of the respondents.

The questionnaire was administered to 28 national legal experts (lawyers and legal scholars), carefully selected on the basis of their expertise, from the long-established lists of national correspondents collaborating with the research partners.[19] The names and affiliations of the national correspondents is appended to this report as Annex IV.

---

[17] The Questionnaire is attached to this study in Annex V.
[18] See Pierre Bonassies and Rudolf Schlesinger., *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications, New York 1968); Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 The American Journal of Comparative Law (1) 1; Mauro Bussani and Ugo Mattei, "The Common Core Approach to European Private Law" (1998) 3 Colum. J. Eur. L. 339; Ole Lando, "The Common Core of European Private Law and the Principles of European Contract Law" (1998) 21 Hastings International and Comparative Law Review 809-823.
[19] In line with the chosen methodological approach, national correspondents were instructed to answer questions in a precise way. They were asked to indicate first of all the "operative rule" i.e. whether their domestic legal system offers a remedy for that specific case. Successively, they had to indicate the "descriptive elements" (called "descriptive formants" in the referenced literature, we decided to slightly change the taxonomy to ensure all correspondents would understand it). Descriptive elements refer to the

Analysis of questionnaire and desk research

Once all the 28 questionnaires were answered and returned to our team, the researchers proceeded to a first evaluation of the results, focusing at this stage primarily on the completeness of the information reported and on the correct application of the methodology. Where any inconsistency was found the questionnaires were returned with requests for clarification or additional information. During the subsequent analysis, the researchers combined data emerging from the questionnaires with the data from our own desk research based on EU and Member States' legislation, case law and academic literature, and where inconsistencies or doubt emerged, researchers again contacted the national correspondent for further clarifications.

Building on the outcomes of the analysis, three workshops were organized where selected experts and stakeholders were invited to discuss the most outstanding issues. Each one of the three workshops was dedicated to one of the three core questions that constitute the structure of the study. The workshops, held under the "Chatham House Rule", proved essential for the identification of right-holders' interests and claims, and together with the questionnaires' results and desk research, form one of the main pillars on which this study was built.

Workshops

The workshops were invitation-only events that brought together a limited number of recognised experts, both from practice and academia. The format was intentionally informal and the objective was to develop an open discussion on some of the most complex issues connected with the conducted research. The arguments and the perspectives that emerged from the discussion served as input for the next phases of the study. Experts were welcome to submit brief memos, an opportunity accepted by some but by no means all of them. A list of the experts that participated in the expert workshops can be found in Annex III.

The first expert workshop, "**Sports organisers' rights and their management in the field of media",** examined and discussed the existence of sports organisers' rights and their management in the media field. Two leading sessions steered the discussion and addressed these major questions:

a) The level of protection that sports organisers enjoy in the EU and whether that level is appropriate from a legal and an economic perspective. Themes discussed included the nature of the rights protecting sports organisers; how effective the functioning of such rights is; and the legal and economic arguments that justify them (Session 1);
b) The level of access to sporting events that the media enjoy in the EU and whether that level is appropriate from a legal and an economic perspective. Themes discussed included the nature of the rights granting access to sporting events; how effective the functioning of such rights is; and whether they sufficiently protect the public interest to have access to such information (Session 2).

relevant legal sources (laws, case law, regulations, etc.) necessary for the resolution of the case. Correspondents have been asked to report – by attaching or offering a link to institutional repositories – all legal sources either in English or, if not available, in its original language. Where relevant, correspondents have provided short translations of national sources. Descriptive elements are not only reported, but also briefly discussed in the context of the case in order to outline the most relevant peculiarities of the domestic legal system. A third and final section is dedicated to "additional considerations" ("metalegal formants" in factual approach terminology), a category where correspondents were invited to add considerations that do not fall strictly in the first two but which, nonetheless, influence the resolution of the case, or are essential to its comprehension. Supplementary information that is not strictly "legal", such as market conditions, or economic, ethical, societal, and institutional considerations, finds its place here. The guidelines sent to national correspondents can be consulted in Annex VI.

The debate focused on substantive law, regulatory, and policy considerations. Aspects connected with the enforcement of rights already available were not part of the discussions and were only considered to the extent that they were related to substantive law or regulatory provisions.

The second expert workshop **"Gambling-originated funding of (grassroots) sport"** was aimed at discussing the virtues and challenges of different regulatory approaches to channel revenue from gambling activities to sport. Two leading sessions steered the discussion and addressed the following major questions:

a) The recognition of a sports organisers' right to consent to the organisation of bets on a given sports event. Themes discussed included the exploration of the merits of introducing a right to consent to bets; practical experiences with the implementation of a right to consent to bets in France, Poland, and Hungary and its effectiveness; the recipients and use of related financial benefits; and compliance with EU internal market law and competition law (Session 1);
b) Statutory contributions from gambling operators to sport. Themes discussed included different systems of revenue distribution; the recipients of contributions; the transparency of systems of revenue distribution; and compliance with EU internal market law and State aid law (Session 2).

The third expert workshop, **"The marketing and sale of sports rights (media rights, sponsorship, and sports data)"**, discussed current/possible future market trends relating to the licensing of sports rights to media companies and other commercial clients, most notably betting operators. The debate focused on emerging trends in:

a) The licensing of sports rights to betting operators. The discussion of commercial and legal challenges regarding commercial partnerships between sports organisers and betting operators. It focused particularly on the policing and selling of live sports data, the sale and exploitation of digital media rights (premium sports events versus other sports events), and advertising-related restrictions on sponsorship deals (Session 1);
b) Licensing practices in the media field. To start the discussion, some of the participants were invited to briefly discuss their views on the commercial challenges and opportunities they are facing in the years to come. Themes discussed included the sales process for sports media rights; the exploitation of new media rights; the length, duration, and territoriality of exclusive contracts; and the emergence of new market players competing for sports media rights (including rights holders commercializing their own (digital) media rights) (Session 2).

PART 1

SPORTS ORGANISERS' RIGHTS: PROPERTY AND INTELLECTUAL PROPERTY

1 SPORTS EVENTS: PROPERTY AND INTELLECTUAL PROPERTY

The first part of this study focuses on the types of legal protection presently available to the organisers of sports events. Property rights are the first category to be addressed. Many sports events take place in dedicated venues over which the sports organisers have either ownership or exclusive-use rights. This type of exclusivity, carrying the power to exclude unauthorized individuals from the venue and to allow entry subject to specific conditions, serves as an important legal instrument of protection for sports organisers.[20] One of the business models based on such a conditional access - the sale of tickets - remains one of the main sources of income for organisers of sports events, together with the proceeds of television rights and merchandising.[21] More importantly, the right of exclusive use of the venue serves as the primary legal basis for the sports organisers in their dealing with the media. Property and exclusive use rights of the sport venue will be discussed in Section 1.2.

In professional sports today the economic value of media rights regularly surpasses the income generated by audience attendance.[22] The images of sporting events, whether broadcasted live or delayed, attract the interest of constantly growing shares of TV and on-line audiences. The various media products resulting from the audiovisual recording and broadcasting of sports events give rise to a variety of intellectual property rights, especially in the field of copyright and related rights to copyright. These activities and the corresponding rights will be discussed in Sections 1.3 to 1.5.

Likewise, athletes play an essential role in any sports event. This raises the question whether the athletes have rights to object to, or share in the proceeds of, the media exploitation of the events. As it will be seen below, while athletes cannot usually be considered "performers" meriting protection under copyright related rights, there may exist other rights that might support such claims, such as rights of privacy, personality, publicity, and image rights. Unlike copyright and related rights that are largely harmonized throughout the EU, rights of privacy, personality, publicity and image rights are protected heterogeneously in the Member States, with varying levels of protection and with different systematic classifications. With this in mind, a general discussion of these rights will be developed in Section 1.3.1.

1.1 Scope and objectives

The objective of the first part of the study – represented by Q 1 and Q 3 of the questionnaire – was to understand whether, under Member States' legal systems, sports events are protected by copyright, rights related to copyright (neighbouring rights, *droits voisins*, *Leistungsschutzrechte*, *naburige rechten*, etc.), or protection based on ownership or exclusive use of the venue where sports events are played.

The question was intentionally framed around independent recordings by "users" and other spectators and asked whether this could be held as infringing the holders' rights. The formulation allowed the research team to inquire the double aspect of whether the sports event is protected as such, or whether it is protected only when it is expressed in the form of an audiovisual work, moving images, or broadcasting signal. In the research team's hypothesis, in fact, the audiovisual

[20] See Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1077; Simon Gardiner et al, *Sports law* (4th edition, Routledge, Oxford 2012) 312.
[21] See Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1077.
[22] See SportsEconAustria et al, "Study on the Contribution of Sport to Economic Growth and Employment in the EU" (2012).

production of the sports event (usually made by, on behalf of, or licensed by the event or competition organiser) as well as its broadcast, are protected by copyright and/or related rights to copyright, independent of any eventual form of protection offered to the sports event as such.

The question also probes the presence of so called "house rights", that is rights and other proprietary prerogatives that emanate from property or exclusive use of the sports venue. Therefore, in answering the question, national correspondents were asked not only to look at the existence of any copyright and/or rights related to copyright, but also examine on other forms of legal protection based on the ownership of the venue, as well as possibly applicable special legislative or administrative rules.

The last part of the case scenario asks whether any of the rights or remedies available under the national legal system depend on conditions connected to the level at which the sport is played (professional or amateur), whether the sports event is held on private or on publicly-owned and public accessible land, whether tickets or any form of membership is required, and finally whether the type of sport played (football is used in the case scenario) is relevant. These elements are useful to determine the boundaries of the protections offered by national legal orders, and will be outlined in the discussion below to the extent they offered relevant insights.

The next section will discuss the results of Q 1 and Q 3 on the basis of the data collected through desk research, the questionnaire and workshops. In the course of the analysis four main systematic categories were identified, namely, the sports event as such (1.2); the performance of the sports event (1.3); the recording of the sports event (1.4), and finally the broadcasting of the sports event (1.5). For each part the relevant forms of protection will be outlined.

1.2 The sports event as such

This section focuses on the legal protection of the sports event as such, rather than on its recording or broadcast. What kind of remedies are available to organisers of sports events in relation to the event *per se*? The section commences with an analysis of the remedies based on the property or exclusive use of the venue (also known as "house right") and the conditional access that can be granted on this basis, followed by considerations on the relevance of the sports event as such in light of copyright and related rights.

1.2.1 Ownership, exclusive use of the venue, and "house rights"

Sports events are usually held in dedicated venues, such as stadia, circuits, tracks and the like. Typically, access to these can be controlled by the presence of perimeter walls, doors and gates. These boundaries not only serve the purpose of delimiting the area where the sports event is played (e.g. a squash court, or a swimming pool), but also of physically regulating entrance into the wider venue. The possibility to physically exclude access to the venue, and the consequential power that vests in the person or entity owning or operating the venue to regulate access are the crucial elements constituting the so-called "house right". This "house right" does not represent a strict dogmatic legal category with precisely defined boundaries, but is a term that legal scholars and courts often employ to refer to a common hermeneutic construction.[23] As is evident in this section,

[23] See e.g. Reto Hilty and Frauke Henning-Bodewig, *Leistungsschutzrecht für Sportveranstalter?*, study commissioned by the German Football association, the German Football League, the German Olympic association, and others (2006) 42 et seq. See also Boris Paal, *Leistungs- und Investitionsschutz für Sportveranstalter* (Nomos, Berlin 2014) 74 et seq. For case law see e.g.: German

the power to control admission is a power that can be utilised in a variety of ways. Admission to the venue is usually granted on the basis of the acceptance of terms and conditions that regulate the licit stay of an individual or a group of individuals in the venue. This power emanates directly from the right to property, which includes, inter alia, the right to use the property and to exclude others from such use.

The organisers of sports events are sometimes the owners but more often the exclusive users (at least for that event) of the venue, which normally entails the power to determine the conditions of access.[24] Ownership of sports facilities is a quite complex issue and – as the answers to Q 1 indicate – its status varies from country to country, and may be contingent to the type of sport, and the success of the team.[25] The survey illustrates that, for sports in general, venues are usually publicly owned, often by municipalities or city councils. In some instances, infrastructures are owned by private companies, but not necessarily by the clubs that use the facilities as their "home" field. Clubs usually lease their "home" field on the basis of specific agreements with the public body or private company owning the facility. While attention should be paid to the specific agreements on a case-by-case basis, it can be generally observed that clubs usually are the exclusive users of the venue, at least with regard to the events played. This exclusive use right allows the sports event organisers to "exclude" spectators, journalists, and media from the location, and to set the terms and conditions for audience, media, and broadcasters to legally access the venue.

In some professional sports it remains the norm for top clubs to own their home stadia rather than leasing them from a local authority or from a private landlord. In these – numerically limited – cases the ownership of the stadium (and the connected activities, from club's museums to commercial initiatives such as shops and restaurants), represents one of the club's most significant commercial assets.

The exclusive use right of the sports organisers can be based either in the right of property of the stadium or derive from a contractual agreement between the owner of the stadium and the sports organiser; for the purpose of this analysis the origin of such exclusivity, whether property-based or contract-based, is however of little importance. The crucial aspect is that there is an exclusivity which is based on property rights, and that this exclusivity can be contractually transferred.[26]

National courts in multiple Member States have recognized the exclusive rights in the venue of the sports organisers and have commonly, but not constantly, referred to the existence of a "house right" in their decisions.[27] This finding is no surprise, as the – explicit or implicit – recognition of a

---

Federal Supreme Court (BGH), 8 November 2005, KZR 37/03 ("Hörfunkrechte"); Dutch Supreme Court (Hoge Raad), 23 October 1987, NJ 1988, 310 (KNVB v NOS); and also Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord); Danish Supreme Court U2004 2945 H and U 1982 179 H. Outside the EU see Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor (1937) 58 CLR 479, HC of A.; Sports and General Press Agency Ltd v 'Our Dogs' Publishing Ltd [1917] 2KB 125, CA. Sometimes similar doctrinal constructions have been referred to as "arena right" however, in the survey it has been found that the term "arena right" and similar national translations are employed to identify rights that are at the exact opposite. An example is the *droit d'arène* reported by the French correspondent that refers to the right of journalists to access the stadium. Due to this terminological uncertainty only the term "house right" will be employed to identify the legal phenomenon described in this section. Readers should be aware, however, that other names could be found in national literature and case law that might refer, or not, to similar concepts.

[24] See Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1077. See also Q1 of the questionnaire.

[25] See Q1 contributions of national correspondents.

[26] See Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1119.

[27] See German Federal Supreme Court (BGH), 8 November 2005, KZR 37/03 ("Hörfunkrechte"); Dutch Supreme Court (Hoge Raad), 23 October 1987, NJ 1988, 310 (KNVB v NOS); and also Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord); Danish Supreme Court U2004 2945 H and U 1982 179 H. Outside the EU see Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor (1937) 58 CLR 479, HC of A.; Sports and General Press Agency Ltd v 'Our Dogs' Publishing Ltd [1917] 2KB 125, CA.

"house right" is based on two basic pillars of modern legal traditions, namely the right of property and contracts.

Accordingly, the owner/exclusive user of the stadium can negotiate – and in some situations, dictate - the conditions, rules, prices etc. that spectators, audiovisual production companies and broadcasters have to accept if they want to access the venue and, for media and broadcasters, be allowed to do their job.[28] This is done in the terms and conditions that spectators accept when purchasing a ticket, as well as in the "house rules" sometimes publicly posted on the premises of the venue in order to inform the attendees. Special agreements with the audiovisual production and broadcasting companies are of course also concluded, setting out (*inter alia*) the precise terms and conditions of the right of the media companies to report the event(s), payment structures and ownership in the broadcast signal (see below Section 2).

The terms of access to the venue that come with the sale of tickets have developed into quite lengthy lists of conditions, with differences depending on the type of events and on the commercial relevance they represent for the sports organisers. Usually, together with the prohibition to carry into the stadium items considered dangerous or otherwise inappropriate, the use of recording and broadcasting equipment, the unauthorized transmission and/or recording through mobile phones or other recording devices, and sometimes even flash photography, are explicitly forbidden.[29]
Yet, these rules are purely contractual. Therefore, in the case in which a spectator has, without authorization, succeeded in recording the match on a personal device such as a cell-phone and then uploads it to an online platform, he will still be in breach of the contractual agreement with the stadium operator, but a third party acting in good faith (such as the online platform) will not be bound by that agreement. It follows that this third party cannot be forced, merely on this contractual basis, to take down the content from the platform.

From a commercial point of view, however, the damage caused to sports events organisers by the making and posting of illegal amateur recordings of a sports event seems rather negligible.[30] Amateur recordings are usually of significantly lower quality than professional audiovisual recordings, and are not normally a market substitute for televised content. As will be discussed below, the professional production of sports events commonly involves the use of dozens of cameras and a production team of cameramen, directors and production managers, not to mention the provision of extra content such as graphics and animations. Nevertheless, irrespective of whether this kind of user-generated content is detrimental to the interests of the sports organisers, it must be borne in mind that the act of unauthorized recording is still a breach of contract and the usual

---

See also Opinion of Advocate General Jääskinen delivered on 12 December 2012, Cases C-201/11 P, C-204/11 P and C-205/11 P, UEFA, FIFA v European Commission, 18 July 2013 (nyr) paras. 36-38. The opinion of the Advocate General has been upheld by the CJ, although the Court did not make any specific reference to the detailed analysis of property rights developed by the Advocate General.

[28] See Simon Gardiner et al, *Sports law* (4th edition, Routledge, Oxford 2012) 246; Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1077, 1092–1094.

[29] See Simon Gardiner et al, *Sports law* (4th edition, Routledge, Oxford 2012) 318 offering different examples of terms and conditions of tickets used during the Olympic Games. Literature is rich of similar examples, see *inter alia* Oles Andriychuk, "The legal nature of premium sports events: IP or not IP?" in Ian Blackshaw, Steve Cornelius and Robert R Siekmann (eds.) *TV rights and sport – legal aspects* (T.M.C. Asser Press, The Hague 2009) 137; Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008) 1077.

[30] During the organized expert workshops, amateur recordings were not identified as a significant threat to the commercial interests of sports organisers. This is in line with, e.g., the document submitted to the European Commission consultations by representative of sports organisers and leagues, which does not mention recordings by personal-use devices as a threat, see submissions of SROC, FA and Bundesliga to "Consultation on the Green Paper "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values", available at http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values (doc. 07. Sport Related Entities).

contract law based remedies are available. The gap in the legal protection of sports organisers, if any, is in the absence of a third-party effect.[31]

By contrast, from the answers to the questionnaires and the workshops it has become apparent that a much more serious, if not the most serious, commercial threat arises from the illegal retransmission, mostly by streaming web-sites, of live broadcasts or audiovisual recordings of the sports events. The unauthorized use of the broadcast and audiovisual recordings will be discussed below in Sections 1.3–1.5.

Of course, a key factor in securing the required exclusivity is the proper drafting of the contracts, both between the owner of the stadium and the sports organiser (when they are not the same entity), and between the sports organiser and the individuals and companies interested in attending the event. Another important factor is the effective control of the venue. For sports events held in open public spaces (marathons, mountain biking, etc.), effectively controlling the area merely on the basis of the property or exclusive use might be problematic. In such cases, the administrative permits usually required by the public authorities to organize these events in open public spaces, which are granted to the sports organiser, may create a (more limited) form of *de facto* exclusivity.

Advocate General (AG) Jääskinen offers a succinct perspective when he states that "contracts based on the power to control access to a specific venue (power usually based on property or exclusive right to use) are usually stipulated to determine who and under which conditions can view, film, or broadcast the event. However, this is based on a contractual relationship, not on a property right (which includes *jus in re*, *jus ad personam*, and intellectual property rights)".[32] The view expressed by the AG is supported by the results of our survey. In the absence of any special form of protection (such as the French or the Italian, see below Sections 1.2.5 and 1.4.2.2), and leaving aside (for now) the ownership of copyright and neighbouring rights in the televised signals and recordings of the events, the possibilities for sports organisers to protect their investments are based primarily on a combination of the ownership of, or exclusive right to use, the venue where the event is held, and the network of contractual agreements based on that exclusivity.

Case law from the national courts in the EU confirms this. In some cases, courts have further elaborated the concept of a "house right". For example, the Netherlands Supreme Court has ruled that the Dutch Football Association (KNVB) or the clubs were entitled to prohibit, or require remuneration, for radio broadcasts on the basis of a "house right", *i.e.* the right to control access to the stadiums and make access conditional upon a prohibition to broadcast matches. Accordingly, whoever engages in radio broadcasting of a match "*in a stadium or on a terrain where KNVB and its clubs organize football matches [...] knowing that the owner or user of the stadium or terrain has not consented to the broadcast, acts unlawfully against the owner or user*".[33] However, "merely informing the public" or "reporting on a match after it is over" would not be deemed unlawful. In a subsequent decision the Court of Appeal of The Hague held that as a consequence of the Supreme Court's "house right" doctrine those rights belonged solely to the club controlling the venue, not (jointly) with the Football Federation. The club could therefore exclusively exercise or market the rights to televise its home matches.[34] The Court of Appeal's decision was subsequently

[31] This type of considerations lead some renown doctrine to be skeptical towards the category; See Reto Hilty and Frauke Henning-Bodewig, *Leistungsschutzrecht für Sportveranstalter?*, Study commissioned by the German Football association, the German Football League, the German Olympic association, and others (2006) 42.

[32] See Opinion of Advocate General Jääskinen delivered on 12 December 2012 in *UEFA, FIFA v European Commission*, 18 July 2013 (nyr) 36–38. The opinion of the AG has been upheld by the CJ, although the Court did not reproduced the detailed analysis on property rights developed by the AG.

[33] See Hoge Raad, 23 October 1987, NJ 1988, 310 (KNVB v NOS). See also Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord), cited by Dutch correspondent.

[34] See Court of Appeal of The Hague, 31 May 2001 (KNVB v Feyenoord) cited in the Dutch Questionnaire.

upheld by the Supreme Court.[35]

Similarly, according to the case law of the German Federal Supreme Court, "house rights" may be invoked by sports organisers to protect their events against certain unauthorized uses. In the *Hörfunkrechte* case the German Court held that professional football clubs (that are the owners or users of the stadium) have the right to prohibit audio recordings, filming or photographing of their games from within the stadium based on their house rules. If attendees do not respect these rules they can be removed from the stadium or forbidden entry to the stadium.[36]

Similarly, the Austrian Supreme Court has validated "house right" claims on the basis of property law as regulated in the Austrian Civil Code.[37] The Court clarifies that tenants are entitled to invoke the "house right" just like proprietors are, because for the duration of the tenancy contract, the tenant solely decides who is granted access and who is not.[38]

1.2.2 Copyright

The answer to the question whether sports events as such are copyrightable, or protectable by rights related to copyright, is unsurprisingly negative for all 28 Member States. A sports event as such is not a work of authorship under common principles of copyright law and all 28 Member States adhere to this view in their national legal systems. The absence of any original or creative form of expression, the uncertainty enveloping the execution of the game, race, or competition, and the structural lack of a script or plot – a large part of the interest in a sports event being its unpredictability and randomness – are mentioned by national correspondents as the reasons why sports events generally fail to qualify as a works of authorship. Some correspondents reported that the legislative history or preparatory works of their copyright acts explicitly left sports events outside the scope of copyright protection as they do not fulfil the prerequisites of a work of authorship.[39]

From this perspective the European Court of Justice (CJ) in *Premier League v QC Leisure* (2011),[40] has done little more than confirm an interpretation already present at the national level. In its decision the Court confirmed the absence of copyright in sports events as such (notably football games) under current EU copyright law, but did leave open the possibility for Member States to offer legal protection under their own national laws. The Court explained that in order to be classified as a work, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation.[41] However, sporting events cannot be regarded as intellectual creations within the meaning of the EU Copyright Directive.[42] This applies in particular to football matches, which are subject to rules of the game, leaving no room for creative expressive freedom for the purposes of copyright.[43] The Court added that sports events, and football matches in

[35] See Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord), cited in the Dutch Questionnaire.
[36] BGH 8 November 2005, KZR 37/03 ("Hörfunkrechte"). See also Danish Supreme Court U2004 2945 H and U 1982 179 H. Outside the EU see Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor (1937) 58 CLR 479, HC of A.; Sports and General Press Agency Ltd v 'Our Dogs' Publishing Ltd [1917] 2KB 125, CA.
[37] See Arts. 339, 344 and following, 354, 362 and following of ABGB (*Allgemeines Bürgerliches Gesetzbuch*).
[38] See Austrian Supreme Court 23 March 1976, 4 Ob 313/76; 22 March 1994, 4 Ob 26/94 and 29 January 2002, 4 Ob 266/01y.
[39] See e.g. Q1 Belgium questionnaire.
[40] See Joined Cases C- 403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR-I-9083.
[41] Idem, para. 97.
[42] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
[43] See Joined Cases C- 403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR-I-9083, para. 98.

particular, are not protected by European Union law on any other basis in the field of intellectual property, excluding therefore neighbouring or related rights (including database *sui generis* rights) as well.[44]

As said, while the Court rules out copyright protection for sports events as such, it does seem to leave room for national solutions in that direction. According to the Court, "Nonetheless, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders".[45] In other words, while clarifying that sports events are not covered by EU copyright law, the Court leaves open the possibility for national schemes protecting sports events. An example of such protection would be the special rights granted to sports organisers under the French Sports Act or the recently created Italian neighbouring right (see below Section 1.2.5 and 1.4.2.2).

In conclusion, it can be confirmed that on the basis of the results of the survey, and in accordance with the orientation of the CJ, under EU law, as well as under the law of the 28 Member States sports events as such cannot be considered works of authorship protected under copyright. The next section will look into the different but connected field of neighbouring rights.

As a last observation, some of the national correspondents (e.g. in the UK and Belgium) have speculated whether under certain specific circumstances some particular sports events, such as gymnastics, figure skating or synchronized swimming, or other events that strictly follow a certain script, could be seen as artistic works subject to copyright protection by virtue of their similarities with, for example, choreographic or dramatic works. This eventuality - acknowledged as a remote possibility by our correspondents - would be relevant only for a handful of sports that border on the arts, and seems to be refuted by the limited case law available on the subject.[46]

1.2.3 Neighbouring rights

A sports event as such does not enjoy legal protection on the basis of "traditional" neighbouring rights in any of the 28 EU Member States. This is in line with EU law, which does not identify sports events as protectable subject matter, and is also confirmed by the findings of the CJ in the *Premier League v QC Leisure* case, where the Court clearly states that "it is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property", which includes, but is not limited to, neighbouring rights.[47] However, national forms of protection, that might be seen as neighbouring or rights related to copyright, are found in France and Italy and perhaps in other countries (such as Greece, Bulgaria and Hungary). With the exception of the Italian solution, these forms of protection can be defined "special" as their categorization is not certain, and they will be discussed below in Section 1.2.5. The Italian solution is explicitly called a right related to copyright (integrated into the Italian Copyright Act); however its systematic

[44] Idem, para. 99.
[45] Idem, para. 100.
[46] See Dutch Supreme Court (Hoge Raad), 23 October 1987, NJ 1988, 310 (KNVB v NOS); Stockholm Administrative Court of Appeal decisions of 3 December 2007, case 2896 and 2898; The UK correspondent reports a Canadian case, which may be considered as a persuasive precedent in other common law jurisdictions such as England, Wales and Ireland, that a sport game does not constitute a choreographic work, even though parts of the game were intended to follow a pre-determined plan; See FWS Joint Sports Claimants v Copyright Board (1991) 22 I.P.R. 429 (Fed. CA of Canada), as indicated in Q1, UK questionnaire. *Contra* a French decision by the Paris Court of Appeal of September 2011 has recognized copyright in a sailing race, however such decision is so far isolated and harshly criticized by commentators, on the basis that such event cannot be assimilated to choreographic or dramatic works; See Michel Vivant & Michel Bruguière, *Droit d'auteur ed droits voisins* (2nd edition, Dalloz 2012) 1059.
[47] See Joined Cases C- 403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR-I-9083, para.99.

categorization and precise object of protection are not entirely clear (see below). In this section only the "traditional" EU neighbouring rights (those that can be said to be part of the *acquis communautaire*) are analysed.

Neighbouring rights are a heterogeneous category and the rights included under this label usually protect quite different activities, in different ways, and in situations that can vary from one jurisdiction to another. At the EU level there are four categories of neighbouring rights that are made mandatory for all the Member States. Three of these are also recognised at the international level and concern rights in performers' performances, sound recordings and broadcasts of broadcasting organizations, while one is unique to the EU legal landscape, namely the film producer's right of first fixation of a film.[48]

With regard to the sports events as such the only neighbouring right that might potentially be relevant is the right of performers. Performers are defined as "actors, singers, musician, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform *literary or artistic works*".[49] In other words, performers can enjoy the related right only to the extent to which they are performing or executing a work of authorship, *i.e.* a work that is, or has been, protected by copyright.[50] Since sports events do not qualify as works of authorship, their execution by athletes cannot be protected by a performers' right. This might be different only in the special case, briefly discussed above, that the sports event follows a predefined, creative script, as is perhaps the case for figure skating, gymnastics and similar dance-related sports.

A similar conclusion can be reached in respect of the specific neighbouring right that exists in Germany for the commercial organisers of performances (*Schutz des Veranstalters*), as provided by Article 81 of the German Copyright Act.[51] Likewise this neighbouring right presupposes the performance of a work protected by copyright.[52] As seen, sports events as such are not protected by copyright and therefore the protection offered by Article 81 German Copyright Act is not available to organisers of sports events.[53]

Interestingly, a completely different conclusion has been reached by Portuguese scholars and courts in respect of a right similar to the German organiser's right: the *direito ao espectáculo*.[54] Article 117 of the Portuguese Copyright Act provides that the organiser of a show (spectacle) in which a work is performed has the right to authorize any broadcasting, recording or reproduction

---

[48] Performer's performances, sound recordings and broadcasts of broadcasting organizations are the "traditional" neighbouring rights present in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations signed in Rome the 26 October 1961 [Rome Convention]. More recently, phonogram producers and performers protection has been "updated" by the WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on December 20, 1996. In the EU, these and other neighbouring rights, have been introduced mainly by Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 93/83/EEC on the coordination of certain rules concerning copyright and related right to copyright applicable to satellite broadcasting and cable retransmission; Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights; 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

[49] See Rome Convention Article 3(a); See also the almost identical definition of Article 2(a) of the WPPT.

[50] See Paul Goldstein and Bernt Hugenholtz, *International copyright law, Principles, law and practice* (2nd edition Oxford University Press, Oxford 2010), at 234.

[51] See Article 81 *Gesetz über Urheberrecht und verwandte Schutzrechte* of 1965, as amended.

[52] See Reto Hilty and Frauke Henning-Bodewig, "*Leistungsschutzrecht für Sportveranstalter?*", Study commissioned by the German Football association, the German Football League, the German Olympic association, and others. (2006) 40 and literature therein cited. See also German Supreme Court (Bundesgerichtshof, BGH) I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de); Oberlandsgericht Hamburg, decision of 11 October 2006, 5 U 112/6.

[53] Idem.

[54] The authoritative reference is to the work of José De Oliveira Ascensão, *Direito Civil – Direito de autor e direitos conexos* (Coimbra 2008), at 590, and the references therein cited. See also de Luís Menezes Leitão, *Direito de Autor* (Coimbra 2011), at 270.

of the performed work.[55] The constitutive elements for the right (the performance of a work) should suggest that, similarly to the German rule, sports events do not benefit from this type of protection because there is no "work". It has been argued, however, that Article 117 reflects a right of customary basis generally conferred to the organisers of shows as a reward for their investment and the risks they carry, and from an economic point of view there should be no discrimination between the organization of a concert and that of a sports event, given that the type of risk and investment are comparable.[56] This interpretation has been supported by the legislature, which in different provisions has confirmed – albeit without offering detailed regulation – the existence of a "spectacle right" that is applicable to sports events.[57] Following a wave of legislative reforms and amendments,[58] the continuation of the right has been challenged by the 2007 reform on the Regulation of Physical Activities and Sports, which removed any explicit reference to a "spectacle right" in the field of sports.[59] Part of the doctrine argues that, although an explicit reference to the right is absent in the new law, the right still survives in what is now Article 49 n.2, which confers on the owner of the show the right to limit access to the shows for which a fee is required.[60]

In 2009, the Supreme Court did confirm the existence of the right in the specific case of football games; however, the Court, *ratione temporis*, applied the old 1990 law, and made reference to the fact that Article 19 of the old law specifically mentioned that right.[61] The Supreme Court (and the Court of Appeal) however seemed to use Article 19's explicit reference more as an argument to confirm the existence of the right, rather than as an explanation of its legal basis. In the reasoning of the court, the legal basis of this right is to be found in the reported doctrine that confers it a customary nature.[62]

In conclusion, athletes competing in a race or players in a team are not "performers" in the sense of international, national and EU copyright law, as the activities they are performing are not literary or artistic works, unless in exceptional circumstances. The same argument excludes the applicability to sports events of the special neighbouring right for event organisers offered by Article 81 German Copyright Act. While Portugal offered, at least until 2007, a form of protection for organisers of sports events, the current status of this right is not entirely clear.

---

[55] See *Codigo do Direito de Autor e dos Direitos Conexos*, of 1985, as amended.

[56] See José De Oliveira Ascensão, *Direito Civil – Direito de autor e direitos conexos* (Coimbra 2008), at 590, and the references therein cited. See also Luís de Menezes Leitão, *Direito de Autor* (Coimbra 2011), at 270.

[57] The right has first appeared in 1985 in Article 117 of the Copyright Act where it was stated that for the broadcast of a show, the consent of the organiser, together with that of the authors and performers was necessary. The *direito ao espectáculo* finds explicit recognition in the field of sport in 1990 in Article 19 of the law 1/90 on the "Basis of the Sport System". For a precise account of the evolution of the right including the numerous amendments, see Luís de Menezes Leitão, *Direito de Autor*, (Coimbra, 2011), at 270.

[58] See Article 19.2 of "Lei n. 1/90", of January 13th, 1990; repealed by "Lei n. 30/2004 of July 21st, 2004" (Article 84); repealed by "Lei 5/2007 of January 16th, 2007" (Article 49); see also Luís De Menezes Leitão, *Direito de Autor*, (Coimbra, 2001),at 270; José De Oliveira Ascensão, *Titularidade de licença de emisor de televisáo e direito ao espetáculo no rescaldo do litígio S.L. Benfica/Olivedesportos* , in *Colectânea de Jurisprudência*, ano XXV (2000) – V. 71-78.

[59] See Law No 5/2007 of 16 January (*Lei de Bases da Actividade Física e do Desporto*).

[60] *"A entrada em recintos desportivos por parte de titulares do direito de livre trãnsito, durante o período em que decorrem espectáculos desportivos com entradas pagas, só é permitida desde que estejam em efectivo exercício de funções e tal accesso seja indispensável ao cabal desempenho das mesmas, nos termos da lei",* see Article 49 Law No 5/2007 of 16 January (*Lei de Bases da Actividade Física e do Desporto*); See de Luís Menezes Leitão, *Direito de Autor* (Coimbra 2011) 272.

[61] See Supreme Court (*Supremo Tribunal de Justiça*), n. 4986/06.3TVLSB.S1, of 21 May 2009, confirming in this regard the finding of the Lisbon Court of Appeal (*Tribunal da Relaçao de Lisboa*) n. 3599/2008-6, of 17 December 2008.

[62] See *Supremo Tribunal de Justiça*, n. 4986/06.3TVLSB.S1, of 21 May 2009 (*"Para compreender o objecto do contrato em causa, achamos oportuno lembrar os ensinamentos de Oliveira Ascensão");* JoséDe Oliveira Ascensão, *Direito Civil – Direito de autor e direitos conexos* (Coimbra 2008); Luís Menezes Leitão, *Direito de Autor* (Coimbra 2011).

1.2.4 Protection of sports events under unfair competition law in Europe

Unfair competition law aims to protect fairness in competition. This section examines whether under certain circumstances organisers of sports events might resort to the remedies offered by unfair competition law to protect the events against misappropriation by third parties.[63]

The main source of international obligations in the field of unfair competition is the Paris Convention for the Protection of Industrial Property (PC). It states that: *"the countries of the Union are bound to assure to their nationals effective protection against unfair competition"*.[64] Article 10 bis PC defines any act of competition "contrary to honest practices in industrial or commercial matters" as an act of unfair competition. Furthermore it contains some examples of acts considered particularly unfair.

Unfair competition is a separate field of law that can be applied independently from other areas of law such as intellectual property law.[65] Therefore protection on the basis of unfair competition law might be invoked in situations where intellectual property law does not offer protection or when this protection has lapsed.[66]

A specific act of unfair competition is misappropriation. Misappropriation can be best defined as taking unfair advantage of a competitor's trade value, goodwill, i.e. by imitation/copying its products, goods or services and leading the public to believe these are yours.[67]

In Europe, there is no overall harmonisation or unification of the law against unfair competition.[68] Only specific areas of unfair competition law have been harmonised by Directives.[69] Apart from these areas unfair competition law is covered by the domestic laws of the Member States. Consequently, the level and object of protection of unfair competition law may vary from one Member State to another.

Continental legal systems such as Germany, the Netherlands and France prohibit unfair commercial practices if they are likely to significantly affect the interests of competitors, consumers and other market participants. [70] Common law systems tend to have a more sceptical approach to unfair competition law. The United Kingdom does not have a general acknowledged notion of unfair competition and no general law prohibiting unfair competitive practices. Acts of unfair competition are covered by general tort law and administrative law. English law has defined specific

---

[63] See Sanders Kamperman, *Unfair competition law. The protection of intellectual and industrial creativity* (Clarendon Press, Oxford 1997) 52.

[64] Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979. WIPO.

[65] See Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 4.

[66] This is the case e.g. in Germany and the Netherlands where it is common practice to invoke unfair competition law in intellectual property cases. An example thereof is Hoge Raad, 20 november 2009, LJN BJ6999 (Lego v Mega Brands).

[67] See Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 25.

[68] Idem.

[69] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (2006) OJ L 376/21 and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (Text with EEA relevance) (2005) OJ L 149/22.

[70] See Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006). See also dissertation of Rogier W de Vrey, "Towards a European unfair competition law. A clash between legal families" (University of Utrecht, 2005).

economic torts that under specific circumstances may protect traders against certain types of unfair behaviour of competitors.[71]
Examples of acts of misappropriation of sports events can be found in the case law of several European jurisdictions, for example the broadcasting on the radio/television/internet of "game-in-progress news" either from within or outside the stadium[72] or the making of photo and or video footage during the event and posting this footage on the internet.[73]

Germany has regulated unfair competition in its "Act against unfair competition" of 3 July 2004 (*Gesetz gegen den unlauteren Wettbewerb*, UWG).[74] The UWG regulates all unfair competition practices in the interest of consumers, competitors and the general public. The basis of the UWG is the "general clause" in Section 3 UWG. It prohibits "unfair commercial practices if they are likely to significantly affect the interests of competitors, consumers or other market participants". The general clause is illustrated by seven (non-exhaustive) examples of commercial behaviour that are seen as particularly unfair (Section 4-7) UWG.

The non-exhaustive list of unfair commercial practices in section 4-7 UWG serves as *lex specialis* to the general clause of section 3 UWG, also referred to as the sweeping clause.[75]

The general clause can only be applied to unfair competitive acts if they are capable of impairing competition to a substantial extent.[76] In case law, the general clause has also been applied by the Courts in situations of parasitic exploitation of another's achievement – situations when consumers are not confused as to the source of the goods or services. However this has been exceptional practice by the Courts and requires a higher threshold of justification as to why this particular practice is unfair.[77]

Misappropriation of goods and services is covered in Section 4 no. 9 UWG. Section 4 no.9 states that "copying of goods and services may be unfair if the product/service is of a competitive individuality" (*wettbewerbliche Eigenart*) and if additional factors are present, in particular: causing confusion as to the source, taking unfair advantage or causing damage to a competitor's goodwill and breach of confidence.

Nevertheless, the general rule in Germany is that one is free to imitate unless the products/services are protected by intellectual property rights.[78]

In the *Hartplatzhelden* case the German Federal Supreme Court (*Bundesgerichtshof*) was called to judge on the claim of an organiser of sports events for protection under unfair competition law of the performance in organizing sports events.[79] *Hartplatzhelden.de* (Hard court heroes) is a German

---

[71] Jennifer Davis, "Unfair competition law in the United Kingdom", in Reto Hilty and Frauke Henning-Bodewig, *Law against unfair competition, Towards a new paradigm in Europe* (Springer Verlag, Berlin 2007) 183-198.
[72] See BBC v Talksport 2001 FSR 53 United Kingdom; Danish Supreme Court U 1982 179 H, also cited in Danish Questionnaire.
[73] German Supreme Court (BGH) I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de).
[74] .BGBI Bundesgesetzblatt (Federal Law Gazette) 2004, p.1414: GRUR 2004, 660.
[75] Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 128. See also Dennis Jlussi, "Hard Court Heroes annotations to Bundesgerichtshof, Case I ZR 60/09, Judgement of 28 October 2010 (*Hartplatzhelden*)" (2011) 3 JIPITEC 250, 1.
[76] Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 129.
[77] BGH 07 May 1992, I ZR 163/90, GRUR 1992, 619 (Klemmbausteine II) and BGH, 02 December.2004), I ZR 30/02, GRUR 2005, 349 (Klemmbausteine III)..See also Henning Harte-Bavendamm et al, "Gesetz gegen den Unlauteren Wettbewerb UWG Kommentar" § 4 Nr. 9 53-70 (Verlag C.H. Beck, München 2013).
[78] See Ansgar Ohly, „The Freedom of Imitation and Its Limits - A European Perspective" (2010) 41 International Review of Intellectual Property and Competition Law, 506-524.
[79] See German Supreme Court (BGH), I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de).

website that allows its members to post and share short clips of amateur football matches. WFV is the organiser of amateur football matches for the Wurttemberg region. Their main organisational activities lie in creating match schedules and instructing referees. According to their statutes they own exclusive commercial exploitation rights in the amateur matches they organise.
WFV sued Hartplatzhelden claiming that by posting video footage of their games on its website Hartplatzhelden misappropriated WFV's commercial performance in organising these matches. WFV based its claim on article 4 nr.9 of the UWG. The Lower Instances, the *Landsgericht Stuttgart* as well as the *Oberlandesgericht Stuttgart* decided in favour of WFV.[80] The German *Bundesgerichthof* however overturned the decision of the lower Courts by stating that the conditions as laid down in article 4 nr.9 UWG were not fulfilled in this case. The Court stated that the uploaded videos are not "imitations" of the football games within the meaning of article 4 nr. 9 UWG. The Court found that there were no circumstances present in this case that made this practice unfair.[81] WFV's performance consisted in organising the match schedule and training referees; clearly none of these services was imitated by the videos published on Hartplatzhelden.[82] The Court furthermore stated that the videos cannot be considered an imitation of the live game since these are two different concepts and the public will not be confused as to the source of these services; therefore the Court also did not find that Hartplatzhelden unreasonably exploited WFV's reputation. The Court then moved to an analysis of whether WFV's commercial performance in organising the match could be protected under the General Clause of section 3 UWG. The Court declined this protection by stating that sports events as such are not protected by intellectual property rights and therefore the freedom of imitation applies. The legislator deliberately left sports events unprotected, therefore competition law should not be (ab)used to fill the gap.[83] Interestingly, the Court also considered that football matches as such have no commercial value. The value lies in the ticket sale and the exploitation of audio-visual broadcasting rights. Both of these can be protected under the "house right" of the organisers. Therefore the Court felt that there was no need for additional protection under unfair competition law. In other words, the Court found that the house right was sufficient to protect event organisers.[84]

The Netherlands does not have a general law relating to unfair competition.[85] The concept of unfair competition has been developed in case law of the Dutch Supreme Court (*Hoge Raad*) on the basis of the Civil Code's general prohibition of unlawful acts (Article 6:162 Civil Code).[86]

According to the Dutch Supreme Court performances cannot normally be protected by unfair competition law unless in the exceptional case of performances that are similar to (or are in line with) those that would receive protection under intellectual property law: this is known as the doctrine of *Eenlijnsprestatie*.[87] In the landmark case of *Holland Nautic v Decca* the Court held that profiting or using someone else's performance is not unfair as such; it may become an act of unfair competition under certain circumstances – for example when the goodwill of the original performance is being exploited or when the original performance was covered by an unregistered

[80] See *Landsgericht Stuttgart,* LS 41 O 3/08 of 8 May 2008, and *Oberlandesgericht Stuttgart,* OLG 2 U 47/08 of 19 March 2009.
[81] German Supreme Court (BGH) I ZR 60/09 of 28 October 2010 (Hartplatzhelden.de), para. 16.
[82] Idem, para. 18.
[83] Idem, paras. 27-28.
[84] Idem, para. 25. See also Ansgar Ohly, "Kein wettbewerbsrechtlicher Leistungsschutz für Amateurfussbalspiele" GRUR 2011 no.5, 436. With its decision in Hartplatzhelden.de the Court follows its earlier case law. In the *Horfunkrechte* case the Frederal Court decided that professional soccer clubs (that are the owners or users of the stadium) have the right to prohibit audio recordings, filming or photographing of their games from within the stadium based on their house rules, BGH case KZR37/03 of 8 November 2005, in 62 GRUR 2006 269 Rdnr.25 (Horfunkrechte).
[85] Charles Gielen, *Kort begrip van het intellectuele eigendom* (Kluwer, Deventer 2007) 569.
[86] Hoge Raad 31 January 1919, NJ 1919, p.161 Lindenbaum v Cohen.
[87] Hoge Raad 27 June 1986, Holland Nautica v Decca NJ 1987, 191 para. 4.2 and Hoge Raad, 20 november 1987, Staat v Den Ouden NJ 1988, 311, annotated by Wichers Hoeth.

right of intellectual property.[88]

More recently, however, the Dutch Supreme Court has refrained from granting legal protection on the basis of unfair competition law to organisers of sports performances.[89] In the case of KNVB (the Dutch national football federation) against public broadcaster NOS the Supreme Court was called to answer the question whether the organisation of a sports event may be considered an "*Eenlijnsprestatie*" and therefore receive protection under unfair competition law against third parties that take unfair advantage of this performance. The KNVB is responsible for organising all premier league and national competitions for all professional football clubs that are members of the KNVB. KNVB claimed a fee from NOS for the right to broadcast on the basis of unfair competition law. The Supreme Court held that organizing a sports event is not an "*Eenlijnsprestatie*" that would justify protection under unfair competition law; hence the NOS was deemed not to take unfair advantage of the KNVB's organisational performance. However, according to the Court the KNVB may claim a fee from NOS for the right to broadcast on the basis of the house right in the stadium. The owner or user of the stadium may permit third parties based on its house right to make audio and video footage in exchange of a fee. In sum, event organisers have no remedy under unfair competition law, but they may claim protection against unauthorised makings of audio and video recordings on the basis of their house right in the stadium.

In France, unfair competition law is regulated by Articles 1382 and 1383 of the Civil Code (Code Civil).[90] These articles deal with several categories of unfair competition. Article 1382 Civil Code forms the basis of protection against misappropriation or imitation. This follows from the so called "*concurrence déloyale*". Under this doctrine it is possible to claim protection against imitation of products and services. However, there must always be present an element of confusion (by the public) as to the source of the products and services.[91] The exploitation of another parties' commercial performance may be prohibited as "*concurrence parasitaire*" if there is exploitation of reputation/goodwill.[92] As will be discussed in more detail below, French law has codified in its *Code du Sport* a right for sports organisers in the commercial exploitation of the sports events they organize. [93] Since the rights of sports organisers have been codified in the *Code du Sport* there is little need or sense for sports organisers to resort to additional protection via unfair competition law.[94] The route to protection under unfair competition law via the "*concurrence déloyale*" or the "*concurrence parasitaire*" is difficult anyway, since confusion of the public must be proven in order for a claim to succeed.

The United Kingdom does not have a general acknowledged notion of unfair competition[95] nor does it recognise a general prohibition on unfair competition in its laws.[96] Acts of unfair competition are sometimes covered by tort and administrative law.[97] English law has defined specific economic

[88] Th. C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten* (W.E.J. Tjeenk Willink Zwolle 1994) 233.
[89] Hoge Raad 23 October 1987, NJ 1987, 310 KNVB/NOS para. 5.1
[90] Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 123.
[91] Idem.
[92] Idem.
[93] Code du Sport Nr. 2006/569 23 may 2006, Journal Officiel 25.5.2006
[94] See Reto Hilty and Frauke Henning-Bodewig, *Leistungsschutzrecht für Sportveranstalter?*, study commissioned by the German Football association, the German Football League, the German Olympic association, and others., 2006, at 52.
[95] In the *Mogul Steamship Co v MC Gregor* 1892 ac 25, The Courts have argued that; *'dividing a line between fair and unfair competition between what is reasonable and unreasonable surpasses the power of the Court's*".
[96] Unfair competition law can be a synonym for passing off, it can cover all causes of action against unlawful acts done by a competitor or general tort of misappropriation of trade values. See for example William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (5th edition, Sweet and Maxwell, London, 2010), at 13; Kamperman Sanders, *Unfair competition law. The protection of intellectual and industrial creativity* (Clarendon Press, Oxford 1997) 53.
[97] Hazel Carty, *An analysis of the economic torts* (2nd edition, Oxford University Press, Oxford 2001) 225.

torts that under circumstances may protect traders against certain types of unfair behaviour of competitors, for example passing off.[98] As seen above, English law does not recognise the existence of proprietary rights in sports events as such.[99] A possible avenue for protection is the general tort of passing off. The doctrine of passing off was first developed by the English Courts in order to prevent competitors from passing their goods off as goods of someone else, usually a competitor.[100] In order for a claim to succeed under passing off three elements must be proven by the claimant: the claimant must be the owner of goodwill, there must be misrepresentation (the defendant must mislead the public as to the origin of the products or services) and there must be a proven damage caused by the defendant to the claimant.[101] An example of passing off in relation to a sports event is the case of BBC v Talksport.[102] Talksport, a radio station, had broadcast commentaries on football matches from a hotel room based on the live television coverage of the matches by the BBC. Talksport had advertised that they were broadcasting live commentaries of the matches. The BBC sued Talksport, claiming that Talksport passed off her services as BBC's, since they owned the exclusive broadcasting rights. The Court however dismissed BBC's claim. The BBC did not succeed in proving that Talksports' commentaries caused damage to their goodwill in the live radio broadcastings.[103] The BBC case shows that there is a heavy burden of proof on the claimant and that it is difficult to prove "damage caused to their own goodwill".[104]
In Denmark unfair competition law is based upon the Marketing Practices Act of 1994 amended in 2003.[105] Section 1 of the Act deals with protection against imitation of goods and services (misappropriation), requiring that a product or service has distinctiveness and that there is a risk of confusion of the public.[106]

Interestingly, Denmark features a specific protection for "game in progress" news, *i.e.* sports organisers have the right to oppose the transmission of such "game in progress" news before the end of the match, regardless of how the news has been provided. This legal remedy is based on a theory of non-statutory commercial misappropriation, somewhat similar to the INS doctrine in the U.S.,[107] and has been confirmed by the Danish Supreme Court in 1982.[108] However, more recently, the same Court, while confirming its earlier ruling, confined protection to such cases where the news did not come from a legitimate public source, such as radio and television broadcast.[109] This form of protection in favour of sports organisers is based on the fact that they have a proprietary interest in the sports event itself, that the organisers control the admission to the stadium, and that they enforce restrictions on the recording of sound and images on admission tickets in the

[98] Idem.
[99] Adam Lewis and Jonathan Taylor, *Sport law and practice* (2nd edition Tottel Publishing, West Sussex 2008) 1080.
[100] Case *Reddaway v banham* 1896, AC 199, 204, 13 RPC 218, 224.and JG v Samford 1618.
[101] Case *Reckitt & Colman v Borden* 1990 RPC 340 HL.
[102] *BBC v Talksport* 2001 FSR 53
[103] Idem. See Adam Lewis and Jonathan Taylor, *Sport law and practice* (2nd edition, Tottel publishing, West Sussex 2008) 1084-1087.
[104] See also Andreas Breitschaft, "The Future of the passing-off action in the law against unfair competition – an evolution from a German perspective" (2010) 32 E.I.P.R. (9) 427-436.
[105] Frauke Henning-Bodewig, *Unfair competition law European Union and Member States* (Kluwer Law International, The Hague 2006) 94.
[106] Idem, 100.
[107] See *International News Service v. Associated Press*, 248 U.S. 215 (1918), where the Court recognized a proprietary interest in "hot-news" although in absence of any copyright infringement, on the basis of misappropriation. The extent to which such form of protection still survives after the enactment of the U.S. 1976 Copyright Act is debated, but commentators and agree that this doctrine has been largely pre-empted by the enactment of the 1976 Act; See Barclays Capital Inc. v. Theflyonthewall.com, Inc. 650 F.3d 876 C.A.2 (N.Y.), 2011, at 878 (*"... we conclude that because the plaintiffs' claim falls within the "general scope" of copyright, 17 U.S.C. § 106, and involves the type of works protected by the Copyright Act, 17 U.S.C. §§ 102 and 103, and because the defendant's acts at issue do not meet the exceptions for a "hot news" misappropriation claim as recognized by NBA, the claim is preempted"*).
[108] See Danish Supreme Court U 1982 179 H, cited in Danish Questionnaire.
[109] See Danish Supreme Court U2004 2945 H, cited in Danish Questionnaire.

stadium.[110] This proprietary interest and its third party effect apparently extends, to a certain degree, to the news generated by the organised event.

1.2.5 Special forms of protection: sports codes

A number of Member States (5) have created special forms of protection for sports organisers in their sports laws.[111] These provisions deserve their own categorization ("special form of protection") not just because they are codified in dedicated codes or acts specifically drafted for the sport sector, but also and mainly for their intrinsic characteristics. As it will emerge from the discussion below, they possess some unique traits in terms of nature, structure, and functioning – at least with regard to the most advanced and developed of these codes thus far, the French Sports Code.

France enacted a specific provision for sports organisers in Law no. 84-610 of July 16th, 1984 on the organization and promotion of sportive and physical activities[112], successively amended and now codified in Article L.333-1 of the French Sports Code.[113] The French approach deserves particular attention because it represents the first and so far the most developed example of its kind in the EU.

Article L.333-1 of the Sports Code establishes that sports federations and organisers of sports manifestations (as defined by Article L.331-5) are proprietors of the exploitation rights of the sports manifestations or competitions they organize.[114] The Article does not clarify what rights are included in the definition of "exploitation" of sports events. The French Council of State (*Conseil d'Ètat*, the highest administrative court) in a recent case on the interpretation of Article L.333-1-2 has held that sports federations and the organisers of sports manifestations are *propriétaires* of the right to exploit such manifestations according to Article L.333-1 of the Sports Code,[115] leading many commentators to speak of a property (as opposed to intellectual property) right in sports events.[116] However, the exact nature of this right remains uncertain, and while for some sources, including the highest administrative Court, it is a property right[117], for others it is a type of (un-codified) neighbouring or related right to copyright.[118]

---

[110] Idem; as reported by the Danish respondent.

[111] These Member States are: France, Bulgaria, Greece, Hungary, and Romania. Although Italy offers a specific form of protection to audiovisual sports rights that under some aspects could be assimilated to this category, the Italian law creates a specific neighboring right that amends the Italian Copyright Act and therefore deserves, in our opinion, a separate classification.

[112] See Loi n°84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives, Article 18-1.

[113] See Code du Sport, created by Ordonnance n° 2006-596 du 23 mai 2006 relative à la partie législative du code du sport, as amended.

[114] "*Les fédérations sportives, ainsi que les organisateurs de manifestations sportives mentionnés à l'article L. 331-5, sont propriétaires du droit d'exploitation des manifestations ou compétitions sportives qu'ils organisent*".

[115] Article L. 333-1-2 codifies the ruling of the Court of Appeal of 2009, establishing that the organization of bets on the results of the sports events is a form of commercial exploitation and therefore is included in the scope of Article L. 333-1; See Court d'Appel de Paris, Arrêt du 14 Octobre 2009, 08/19179 (Unibet Int. v Federation Francaise de Tennis).

[116] "[...] l'article L. 333-1 du code du sport attribue aux fédérations sportives et aux organisateurs de manifestations sportives la propriété du droit d'exploitation des manifestations ou compétitions qu'ils organisent, eu égard, notamment, aux investissements financiers et humains, parfois particulièrement importants, engagés pour organiser ces événements et à l'objectif d'intérêt général de faire bénéficier au développement du mouvement sportif les flux économiques qu'ils induisent"; See Conseil d'État (France), 5ème et 4ème sous-sections réunies, 30 mars 2011, 342142 (http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-20110330-342142).

[117] Id.; See also the Report to the French National Assembly "*fait au nom de la commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi relatif à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (n° 1549), par M. Jean-François Lamour, Député*" of 2009, at 312, available at: http://www.assemblee-nationale.fr/13/pdf/rapports/r1860.pdf.

[118] "*Considérant, en l'absence de toute précision ou distinction prévue par la loi concernant la nature de l'exploitation des manifestations ou compétitions sportives qui est l'objet du droit de propriété reconnu par ces dispositions, que toute forme d'activité économique, ayant pour finalité de générer un profit, et qui n'aurait pas d'existence si la manifestation sportive dont elle est le prétexte ou le support nécessaire n'existait pas, doit être regardée comme une exploitation au sens de ce texte;* see

In the authors' view the French right is probably best conceptualized as a neighbouring or related right. Like most neighbouring rights, this right has as its primary justification the principle of rewarding the substantial investments of sports organisers in the organization of the event, which constitutes a risky financial undertaking.[119] According to the Paris Court of Appeal, the scope of this right is to cover "each and every economic activity, with the purpose of generating a profit, which would not exist if the sports event did not exist".[120] French courts have interpreted the right quite extensively, well beyond what the rationales underlying copyright or related rights would normally justify. In a decision of 2004 the right has been interpreted to include any form of exploitation of the images taken at the event.[121] In this decision the French Supreme Court held that organisers of sports events have the right to authorize the recording of all the images of the manifestations they organized notably by distribution of the pictures taken on the occasion.[122] Lower courts have held that the right of exploitation of the sports event even encompasses the right to publish a book dedicated to that event.[123] French courts have gradually expanded the right of commercial exploitation of sports events beyond the audiovisual dimension thus far emerged. They went as far as including a right to consent to bets on the sports events. While a complete discussion of the right to consent to bets is developed in chapter 5 of this study, some aspects have to be anticipated here.

In 2008 the Court of First Instance of Paris held that the right of exploitation of sports events allows a sports organiser or sports federation to collect all the profits arising from their efforts to organize the events. The Court considered that the organization of online bets is an activity generating revenues that are directly linked to the event. Accordingly, the organisation of online betting is not an exception to the right of commercial exploitation that vests in sports organisers and should therefore be also included.[124] The ruling was upheld on appeal, where the court clarified that any form of economic activity that generates a profit, which would not arise without the sports event itself should be considered an exploitation of the sports event.[125] In this case the court justified such an extensive interpretation of the right of exploitation through reference to the prevention of corruption and the role of sports federations in preserving and promoting sport's ethical values.[126] In a similar case, the Court of first instance of Paris clarified that while Article L.333-1 of the Sports Code in its original formulation only covered the right to audiovisual exploitation of the sports event, in the absence of precision in the adopted law no distinction concerning the scope of the right of exploitation should be made.[127] The right to consent to bet has eventually been introduced by

---

Court d'Appel de Paris, Arret du 14 Octobre 2009, 08/19179 (Unibet Int. v Federation Francaise de Tennis), at 4; See Michel Vivant and Jean-Michel Bruguiére, *Droit d'auteur et droits voisins* (2nd edition, Dalloz 2012) 1053 et seq.. Lucas & Lucas calls this right a sui generis, or non-typified, related right to copyright; Lucas & Lucas Traité de la propriété littéraire et artistique, 4th Ed., Paris, 2012, at 934.; For an immaterial property right in the form of a *Leistungsschutzrechts* see Retio Hilty and Frauke Henning-Bodewig, *Leistungsschutzrecht für Sportveranstalter?*, Study commissioned by the German Football association, the German Football League, the German Olympic association, and others. (2006) 57; Christophe Geiger, *Droit d'auteur et droit du public à l'information* (Litec, Paris 2004) 278 – 281.

[119] "*qu'elle detient sur l'épreuve elle-même un droit d'exploitation, en dehors du droit à l'information, qui l'autorise légitimement, en raison de l'importance des investissements réalisés à recueillir les fruits des efforts qu'elle consacre à cette manifestation, que celle-ci soit ou non antérieure à la loi de 1984 qui est venue définir exacts de ce droit exclusif*", See Cour d'Appel de Paris arret du 28 Mars 2001 (Gemka Productions SA v Tour de France SA), cited in the French report.

[120] See *Court d'Appel de Paris, Arret du 14 Octobre 2009, 08/19179 (Unibet Int. v Federation Francaise de Tennis),4, cit.*

[121] See French Supreme Court (*Cour de cassation - Chambre commerciale*) *Arrêt 542 du 17 mars 2004* (Andros v Motor Presse France), available at http://www.courdecassation.fr/jurisprudence_2/financi_re574/arr_ts_575/arr_ecirc_925.html.

[122] "Attendu qu'en statuant ainsi, alors que l'organisateur d'une manifestation sportive est propriétaire des droits d'exploitation de l'image de cette manifestation notamment par diffusion de clichés photographiques réalisés à cette occasion"; See *French Supreme Court (Cour de cassation - Chambre commerciale) Arrêt 542 du 17 mars 2004* (Andros v Motor Presse France), available at http://www.courdecassation.fr/jurisprudence_2/financi_re574/arr_ts_575/arr_ecirc_925.html.

[123] See Paris Commercial Court (Cour de Commerce), December 12th, 2002 (Gemka v Tour de France).

[124] See TGI, Paris, 30 May 2008 (Fédération Française de Tennis (FTT) v. Unibet).

[125] See Paris Court of Appeals, 14 October 2009 (Fédération Française de Tennis (FTT) v. Unibet).

[126] Id.

[127] See TGI, Paris 30 May 2008 (FFT / Expekt.com). See also Verheyden, Ownership of TV rights in professional football in France (2003) The International Sports Law Journal (3) 18.

legislative reform in the Sports Code. A complete discussion of the right to consent to bets under French law, including whether, to the extent to which it can be considered a related right to copyright, it complies with EU law – namely protection of match fixtures and statistics – is developed below in this study (see Chapter 5).

Bulgaria is another example of a country that regulates ownership of rights in the television and radio broadcasting of sports events through dedicated legislation. Article 13(3) of the Physical Education and Sports Act[128] provides that sports clubs are entitled to the television and broadcasting rights of the sports events they organize in compliance with the rules established by the federations themselves. The condition for such entitlement is simply the club's membership in the relevant sports federation. The Bulgarian Football Union (BFU), for example, adopted the Regulation for the Championships and Tournaments organised by the BFU from Season 2012/2013.[129] It is binding on all members and establishes that the broadcasting of matches in championships and tournaments where professional clubs participate shall be carried out exclusively by the holder of the television rights (a contract having been concluded with the BFU).[130]

Similar rules exist in a few other Member States. In Greece, Article 84(1) of Law 2725/1999 ("Amateur and Professional Sport and Other Provisions") establishes the right of every sport club or professional sport entity to authorize the radio or television broadcasting or retransmission, via any technical method or means, of sporting events in which the said club or entity is considered to be the host as per the respective regulations.[131] The recognized sports federations hold the same rights on the events of the respective national teams and the matches of the Greek Cup Competition. Clubs can assign such rights to federations or leagues.[132]

In Hungary, the Sport Act[133] at Article 36(1) establishes that "sporting activity as well as recording and broadcasting of sporting activity and sports events through television, radio and other electronic or digital means (*e.g.* Internet) as well as their commercial licensing" belong to sports associations, on behalf of clubs and athletes, which are entitled to commercially exploit the media rights of competitions organized by them for a definite period of time and to enter into agreements for their exploitation on behalf of the original rights owners.[134]

In Romania, Article 45 of the Sport Law states that sports associations, clubs and leagues own exclusive rights over group or individual images, static and dynamic, of their sportsmen when they take part in competitions, and other commercial activities such as advertising. They are also entitled to radio and television broadcasting rights on competitions that they organize.[135]

With the exception of France, however, no case law has been found nor reported by our national correspondents.

[128] Physical Education and Sorts Act Bulgaria, cited in the Bulgarian questionnaire and available at http://www.lex.bg/bg/laws/ldoc/2133881857.
[129] Cited in the Bulgarian Questionnaire and available at the BFU website in Bulgarian.
[130] See Bulgarian questionnaire.
[131] See Greek questionnaire.
[132] Cited in Greek questionnaire.
[133] See Act I of 2004 on Sport, cited and available in original language in the Hungarian questionnaire.
[134] Idem Article 37(1)-(3).
[135] See Romanian Sport law cited and available in original language in the Romanian questionnaire.

1.2.5.1 Sports statutes

While France leads a group of five Member States that have regulated, in more or less detail, the existence of sports organisers' rights by legislation, other Member States have left the matter to self-regulation by the relevant leagues and federations. This is usually done in the form of by-laws or statutes of those bodies, and while the level of detail varies greatly from country to country (and from federation to federation), a common denominator of these rules is that they are binding only for the members of the federation or association. Whereas such provisions probably exist in the majority of, if not in all, Member States, a few will suffice as examples.

In Spain, on the basis of a resolution of the General Assembly of the Football Professional League (FPL), clubs have agreed that for the exploitation of the audiovisual and broadcasting rights of football matches the authorization of the two participating clubs is required.[136] It must be pointed out, however, that a resolution of the Spanish National Competition Authority (NCA) has established that in the absence of any legislation clarifying the allocation of ownership of the audiovisual and broadcasting rights, those rights should belong to the event organiser – the rationale being that this is the entity that is assuming the organizational and financial risks for the realization of the event. The NCA roots its argument in traditional property law principles and in particular in the legal concept of "accession". On the basis of this principle "ownership of a good entitles to everything that that good produces, or that attaches to it, naturally or artificially".[137] A Spanish legal commentator arrives at the same conclusion (ownership by the clubs), albeit following the different (but still property law-based) route of the ownership or exclusive use right of the stadium ("house right").[138]

The Czech Republic has specific provisions in the Czech Football Association Statutes (Article 2.3) granting the exploitation rights "at all levels" to the competition organiser.[139]

In Portugal, the Regulation of Competitions Organized by the Portuguese League of Professional Football provides at Article 68(2) that clubs are individually holders of the rights of transmission of games and summaries.[140] The Executive Committee of the League can however establish provisions regarding the broadcasting of games. The League has an exclusive right on the images of the competitions organized by the League itself. "Home" clubs must allow visiting clubs to collect images, but the latter cannot communicate such images (Article 74(2)).

Swedish law recognizes TV exploitation rights' ownership in clubs in their capacity of risk takers, however the relative exercise for competitions organized by the *Svenska Fotbollsförbundet*, is based on joint ownership, as stated in the Federation by-laws.[141]

---

[136] General Assembly of the LFP, resolution of July 11th, 2002 (not published, cited in the Spanish Questionnaire).

[137] "Sin embargo, las reglas generales de atribución de derechos de propiedad en el Derecho español conducen a asignar la titularidad del derecho audiovisual al organizador del evento, esto es, el encuentro de fútbol, que no es otro que el club que soporta el riesgo económico y empresarial de la celebración del mismo. Cabe en este sentido remitirse a los artículos 348 y siguientes del Código Civil, y en particular a su Article 353, que establece que "la propiedad de los bienes da derecho por accesión a todo lo que ellos producen, o se les une o incorpora, natural o artificialmente". La accesión es una institución jurídica que atribuye la propiedad de un bien o derecho que se genera al titular del bien o derecho del cual aquél nace, o que resulta más próximo a él"; See Comisión Nacional de la Competencia (CNC), *Informe sobre la competencia en los mercados de adquisición y explotación de derechos audiovisuales de fútbol en España*, (2008) 33.

[138] See Luis Ques Mena, *Perpectivas sobre los derechos audiovisuales futbolisticos a la luz de las normas de la competencia*, Revista Aranzadi de Derecho de Deporte y Entretenimiento, 28, 2011..

[139] See Czech Republic questionnaire.

[140] See *Regulamento das Competições Organizadas pela Liga Portuguesa de Futebol Professional*, cited in the Portuguese questionnaire in original language.

[141] See Swedish questionnaire, citing the bylaws.

1.3 The sports performance

Having examined the protection of the sports event as such in the previous section, this section will look at the sports performance by the athletes and players. As seen in Section 1.2.3, "actors, singers, musician, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform *literary or artistic works*" may qualify for protection under neighbouring rights as performing artists.[142] In other words, performers can enjoy the related right only to the extent to which they are performing or executing a work of authorship, *i.e.* a work that is, or has been, protected by copyright.[143] Since sports events as such are generally not deemed to qualify as works of authorship, their execution by players and athletes cannot be protected as a performers' right. This might be different only in the special case, briefly discussed above, where the sports event follows a predefined, creative script, as is perhaps the case for figure skating, gymnastics and similar dance-related sports.
However, sports athletes and players may enjoy other forms of legal protection, notably on the basis of their so called "image rights" (1.3.1). In some Member States the enjoyment and exercise of image rights of professional players is subject to special sports laws or statutes (1.3.2).

1.3.1 Image rights of athletes in the European Union

Unlike copyright and related rights, which are largely harmonized in Member States domestic legislation, rights of privacy, personality and publicity – in the terminology of the sports industry commonly known as "image rights"– are protected heterogeneously across EU countries.

In many European jurisdictions, in particular those belonging to the civil law tradition, "image rights" are tied to the concept of "personality rights". A personality right can be best defined as a right to self-determination in all matters of a personal nature.[144] Personality rights encompass both economic and non-economic interests. Personality rights therefore generally entail, on the one hand, the right to keep one's name, image and likeness from being commercially exploited without permission[145] (the so-called "image right" or "right of publicity") and, on the other hand, the right to privacy, which is codified in Article 8 of the European Convention on Human Rights (ECHR) and in many national constitutions.[146] Personality rights of sportsmen generally concern the commercial exploitation of all aspects of their personality. Here one can think of the use of an athlete's image, name, voice or likeness in advertisements and/or merchandising.[147] Few famous sports (usually football players in the EU) athletes commonly earn substantial endorsement fees from the use of their image or name in advertisements. For example: former football player David Beckham earned £ 42 million in endorsement fees alone, in 2012.[148]

---

[142] See Rome Convention Article 3(a); See also the almost identical definition of Article 2(a) of the WPPT.
[143] See Paul Goldstein and Bernt Hugenholtz, *International copyright law, Principles, law and practice* (2nd edition Oxford University Press, Oxford 2010) 234.
[144] William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (5th edition, Sweet and Maxwell, London, 2010) paras. 16-34.
[145] Huw Smith, Ansgar Ohly, Agnes Lucas-Schloetter, "Privacy, property and personality", (Cambridge University Press, Cambridge 2005) 8-10.
[146] Article 8 of the Convention states: 1. '*Everyone has the right to respect for his private and family life, his home and his correspondence.* 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*' Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 10 January 2014]
[147] Iain Higgins, Stelehn Boyd, and Richard Hawkins, "Image rights" in Adam Lewis and Jonathan Taylor (eds.) *Sport law and practice* (Tottel publishing, West Sussex 2008) 1155 et seq.
[148] http://www.forbes.com/profile/david-beckham/ last visited 10 January 2014.

The laws relating to "image rights" have not been harmonised, therefore there are vast differences in the levels of protection offered throughout the European Union. Even the terminology used to describe commercial exploitation of aspects of one's personality differs throughout the European Union. Some jurisdictions speak of "image rights" but also terms such as "right of publicity" or "personality rights" are commonly used.[149] Certain jurisdictions such as Germany, The Netherlands and France grant a basic form of "image rights" protection, as opposed to the UK, which does not statutorily recognise the concept of image rights at all.[150] These differences in the level of protection throughout the EU give rise to legal uncertainty for persons wanting to invoke their image rights against third parties across the EU. Cross-border cases where a person's image is used throughout the European Union need to be enforced on a Member State per Member State basis, on the basis of rights or legal interests that differ markedly from country to country. In the recent *Martinez* case the Court of Justice of the European Union addressed the problem of cross border enforcement of image rights and recognised a "personality right" online.[151] The case concerned a publication by the Sunday Mirror (a UK newspaper) on its UK website accompanied with photos. The website was also accessible in France. Martinez brought an action in France claiming that his personality right was infringed by this unauthorised publication by the Sunday Mirror. The Sunday Mirror claimed that the French court did not have jurisdiction.[152] The Court of Justice however stated that victims of an infringement of a personality right by way of the Internet can initiate litigation before a Court of a Member State in which they have their centre of interests in respect of all the damages caused.[153] With this decision the Court of Justice implicitly recognized the protection of personality rights, and allowed affected subjects to litigate before national courts where damages are caused. The ruling is a step forward towards harmonising personality rights. However differences in the level of protection afforded in the Member States remain.

In Germany image rights protection has a strong legal tradition, firmly based on the notion of personality rights. In 1954 the Federal Supreme Court (*Bundesgerichtshof*) developed a doctrine of a general personality right (*allgemeines Persönlichkeitsrecht*) that protects all aspects of a personality against violations.[154] Personality rights in Germany have the dual purpose of both protecting economic/commercial interests (publicity) and non-economic interests (privacy).[155] German law recognises "specific personality rights" such as the right to one's name[156] and the right to one's image (*Recht am eigenen Bild*).

The right of the portrayed person to control the use of his or her *eigene Bild* (own image) is codified in Article 22 of the *Kunsturheberrechtgesetz* (the Act on Copyright in works of visual arts of 1907 - KUG).[157] The German image right however cannot be classified as a related right to copyright. The

---

[149] This chapter will use the term image right to describe commercial exploitation of aspects of one's personality.

[150] Huw Beverley-Smith,Ansgar Ohly, Agnes Lucas-Schloetter, *Privacy, property and personality* (Cambridge University Press, Cambridge 2005) 1-11.

[151] Joined Cases C-509/09 and C-161/10. *E date advertising v X and Olivier Martinez and Robert Martinez V MGM*. This case demonstrates the difficulty that arises with online content being globally available and the different levels of protection afforded by the Member States.

[152] Joined Cases C-509/09 and C-161/10 *E date advertising v X and Olivier Martinez and Robert Martinez V MGM* at para. 25.

[153] Idem, at para. 69.

[154] This general right of personality is derived from article 2 par.1 and article 1 of the Basic Law. It is also protected via Civil Law under section 823 (1) of the BGB. See also Bundesgerichtshof (BGH) 1 December 1999, I ZR 49/97, BGHZ 143, 214 (Marlene Dietrich). Bundesgerichtshof (BGH) 14 May 2002, VI ZR 220/01, BGHZ 151, 26 (Marlene Dietrich III).See also Huw Beverley-Smith, Ansgar Ohly, Agnes Lucas-Schloetter, *Privacy, property and personality,* (Cambridge Universty Press, 2005) 108; Martin Senftleben, "Commercieel portretrecht in Duitsland", in Dirk Visser et al, *Commercieel portretrecht 30 jaar 't Schaep met de vijf poten,* (UItgeverij Delex Amsterdam 2009) 182.

[155] Huw Beverley-Smith,Ansgar Ohly, Agnes Lucas-Schloetter, *Privacy, property and personality* (Cambridge University Press, Cambridge 2005) 95.

[156] Article 12 Civil Code (BGB).

[157] *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie Gesetz* of 09 January 1907, as amended (KunstUrhG or KUG).

Recht am eigenen Bild requires consent of the portrayed person for any type of (commercial) exploitation and covers every type of image.[158] According to the Federal Supreme Court a broad definition should be given to the concept of *image*. In its *Marlene Dietrich* decision the Court stated that a depiction of a person is considered to be an image where this person is recognisable by third parties, it is not necessary that facial features of this person are recognisable. Even imitations of persons by body doubles using characteristic moves of that person which are recognised by the public are covered under Article 22 KUG. [159] Image rights are a specific form of the general personality right. Image rights as laid down in article 22 KUG only cover the exhibition and the dissemination of the visual image. The general personality right protects against unauthorised commercial exploitation of one's reputation and public image, personal information and the private sphere. Image rights cover the commercial exploitation of one's visual personality. The Federal Supreme Court in the *Marlene Dietrich* case stated that because of the potential to commercially exploit these images they must be descendible. With regard to the possibility of licensing image right there is however no legal precedent. Generally it is assumed that since image rights (the commercial aspect of one's personality) are deemed to be descendible it should also be possible to license them.[160] Image rights are not absolute rights and there are several limitations to them.[161] An important limitation is the freedom of expression and information enshrined in the German Constitution. The Federal Supreme Court has ruled that pictures "from the sphere of contemporary history" (*Bildnisse aus dem Bereiche der Zeitgeschichte*) are not protected since these pictures have informational value, meaning there is a public interest in these pictures. The case law of the Court distinguishes between two types of images of persons that may fall within contemporary history. Images that depict persons with respect to a specific event, so-called relative public figures, and images depicting famous persons that are always in the public interest, so-called absolute public figures. These absolute public figures may be portrayed without their consent when there is a public interest in information; this also extends to gossip and entertainment news.[162]

However this does not mean that images of absolute public figures may be used for any purposes. Publishing the portrait of a celebrity may not be justified when the publication violates legitimate interests of the portrayed person; this can be a privacy violation but also unauthorised use in advertisements and merchandising since the use of the images in that context does not serve a public interest in information.[163]

The Court always balances the (commercial) interests of the portrayed persons against the public interest in information. There are however borderline cases. For example, the Federal Supreme Court has ruled that no consent was necessary for the publication and distribution of a football calendar showing pictures of well- known football players.[164] This judgment has elicited criticism since there seemed to be little information value or public interest in a calendar that would outweigh the obvious commercial interests that players had in the exploitation of their images.[165] In another case Oliver Kahn, the former goalkeeper of the German national football team,

---

[158] Gerard Schricker, "Urheberrecht Kommentar", (Munchen C.H. Beck 2006) 1199.

[159] BGH I ZR 49/97, of 1 December 1999 (*Marlene Dietrich)*, GRUR 2000, 709; and BGH I ZR 226/97, of 1 December 1999 (Der Blaue Engel) GRUR 2000, 715.

[160] See also Martin Senftleben, *Commercieel portretrecht in Duitsland*, in Dirk Visser et al, "Commercieel portretrecht 30 jaar 't Schaep met de vijf poten" **(**UItgeverij Delex Amsterdam 2009) 182.

[161] Exceptions are listed in article 23 of the Act on Copyright in works of visual arts of 1907 (Kunsturheberrechtgesetz-KUG).

[162] Bundesgerichtshof (BHG) 08 May 1956, I ZR 62/54, BGHZ 20, 345 (Paul Dahlke). Bundesgerichtshof (BGH) 1 December 1999, I ZR 49/97, BGHZ 143, 214 (Marlene Dietrich). See Also Huw Beverley-Smith, Ansgar Ohly, Agnes Lucas-Schloetter, "Privacy, property and personality" (Cambridge Universty Press, 2005) 105.

[163] Von Hannover v Germany, Application no. 59320, 24 June 2004, Para. 63, 65 and 72.

[164] BGH 06 February 1979, VI ZR 46/77, GRUR 1979, 425 (Fußballspieler). See also Huw Beverley-Smith,Ansgar Ohly, Agnes Lucas-Schloetter, "Privacy, property and personality", (Cambridge Universty Press, 2005), 107.

[165] See Huw Beverley-Smith, Ansgar Ohly, Agnes Lucas-Schloetter, "Privacy, property and personality", (Cambridge Universty Press, 2005), at 107.

successfully claimed that his personality right was infringed when his image was used for a virtual player in a football computer game. The Court of Appeal of Hamburg considered that the game developer's main purpose was not to give information to the public but to sell a game and profit from the fame of the well-known players he had portrayed in the game. [166] A recent case – one of many concerning depiction of members of the Von Hannover family – decided by the German Federal Supreme Court concerned the daughter of Caroline von Hannover who was photographed during a public ice skating contest.[167] Von Hannover claimed her image rights (Article 22 KUG) had been infringed by publication of pictures in the "Freizeit Revue" magazine. The Federal Supreme Court however denied the claim. The Court allowed the publication as a report relating to an event of contemporary history. Furthermore it stated that there was no protection in this situation since the pictures were taken at a public sporting contest where it is normal practice to make photo and video footage of the contestants. The Court found no evidence that these pictures taken at a public event could negatively affect her and therefore her image rights were not infringed. [168]

In conclusion it can be said that consent of the depicted person is always necessary when his or her image is used for commercial purposes such as advertisement or merchandising, unless there is a prevailing public interest in information. The German Courts will weigh the (commercial) interest of the portrayed person in his image against the public interest in information. From this line of cases one can assume that famous sports players fall under the category of "absolute public figures" and therefore no consent is required for the publication and dissemination of their images, unless the images are used for commercial purposes or if the use is harmful to the portrayed person. Also most sporting events can be considered public events and pictures or video footage taken of players during the game will be considered by the German Courts as images relating to an event of contemporary history and therefore there will be a public interest in these images.

The Netherlands does not recognize an image right as an absolute right.[169] However the Dutch Copyright Act and the Dutch Civil code do offer persons, including sports players, several actions to prevent third parties from using their image without their consent. The Dutch Copyright Act contains provisions in Articles 19-21, 25a and 35 that may protect sports players against the unauthorized (commercial) exploitation of their image. These provisions are generally referred to as "portrait rights" and they can protect image rights of sports players when depicted in a portrait.[170]

A portrait is defined in the explanatory memorandum of the Copyright Act as "a depiction of a person's face, with or without other parts of the body, regardless of the way the portrait is made".[171] Therefore it covers photographs, paintings, television recordings etc. According to the Dutch Supreme Court recognizable facial features do not have to be present for a depiction to be considered a portrait, as long as there are other identifying elements.[172] A parody which shows a minimum of resemblance also qualifies as a portrait.[173] The Supreme Court has stated that even a typical body posture of a person can qualify as a portrait and be protected under portrait rights.[174] This can be very relevant for sports players who are generally known by the public not only form their facial features but also from characteristic sport action moves. A case before a Dutch District

[166] OLG Hamburg 13 january 2004, 7 U 41/03, MMR 2004, 413 (Oliver Kahn). See also Christopher Benson et al, "Hitting Back, to what extent can celebrities protect the exploitation of their image?" (2005) Copyright World 153.
[167] BGH, VI ZR 125/12 of 28 May 2013 (Von Hannover v Germany)
[168] BGH, VI ZR 125/12 of 28 May 2013 (Von Hannover v Germany) para. 15-20.
[169] Steffen Hagen, "Sports image rights in the Netherlands" (2011) The International Sports Law Journal (3-4) 116.
[170] Auteurswet Stb. 2008/85 (Dutch Copyright Act).
[171] Jaap Spoor, Feer Verkade en Dirk Visser, *Auteursrecht*, (Deventer: Kluwer 2005), at 303.
[172] Hoge Raad 2 May 2003 (Breekijzer), with annotation of Bernt Hugenholtz, in AMI 2003-5, at 175-178.
[173] President Rechtbank,Gravenhage, 7 December 1965 BIE 1966 (Feyenoord-spelers).
[174] Hoge Raad 30 October 1987, NJ 1988 (Naturiste).

court exemplifies this aspect. A famous Dutch marathon ice skater was confronted with an unauthorized action photo of himself in an advertisement for a heater system; the Court stated that he was recognizable due to facial features but also due to his characteristic posture on the ice, which was recognizable by the public.[175]

According to Article 21 of the Dutch Copyright Act portraits made without the consent of the portrayed person cannot be published when the portrayed person can prove he has a "reasonable interest" in the prevention of publication of his image. This reasonable interest can lie in the sphere of protecting one right to privacy as codified in Article 8 of the ECHR (European Convention on Human Rights) and Article 10 of the Dutch Constitution and needs to be balanced against other interests such as the freedom of expression and information of Article 10 ECHR.[176] The European Court of Human Rights has provided guidance in this balancing of interests in its *Caroline von Hannover* case law.[177] The Dutch Supreme Court has also recognized a commercial interest in one's image as a "reasonable interest" to prevent publication.[178] This commercial interest lies in the popularity of the person gained through the exercise of his profession, which is of such a nature that publication of his image can be commercially exploited.[179] This standard is known as "exploitable popularity" (*verzilverbare populariteit*). This type of popularity does not necessarily have to be gained through professional work; according to the Court of Appeal it covers amateur sports players as well.[180] These commercial interests are also protected by Article 8 ECHR and can be used to weigh the interests of the person in protecting his image against the interest of the public to receive information. It depends on the specific circumstances in each case which interest should prevail.[181] When the person enjoining "*verzilverbare populariteit*" only has a commercial interest in prohibiting publication of his image an important factor taken into consideration is whether a financial compensation has been offered to this person.[182] If a reasonable financial compensation has been offered the publication can only be prohibited if there are other circumstances present such as defamation or harm to a person's reputation. If no such reasonable financial compensation has been offered unauthorized publication of an image of a famous person remains unfair and can be prohibited.[183] Recently the Dutch Supreme Court and the Amsterdam Court of Appeal have dealt with two important cases concerning the protection of image rights of football players. These cases are illustrative of the current status of portrait rights in the Netherlands and therefore they will be discussed in some detail. On 14 June 2013 The Dutch Supreme Court laid down its ruling in the case of Johan Cruijff versus Tirion.[184] Johan Cruijff is a very famous former football player, trainer and commentator. Tirion is a publishing company, which was planning to publish a book containing a collection of photographs of Johan Cruijff made during his career as a professional football player for the Amsterdam football club Ajax. Tirion contacted Cruijf before publication and offered him financial compensation. Cruijff declined the offer and brought a case against Tirion

[175] Kantongerecht Harderwijk 29 may 1991, AMI, 1991 p. 206 (Kramer/Burnham).
[176] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 10 January 2014]
[177] European Court of Human Rights, 24 June 2004, *Caroline von Hannorver v Germany* (No.59320/00), *Mediaforum* 2004-7/8, p.252.
[178] Hoge Raad 19 January 1979, NJ 1979 383, (*Scheap met de vijf poten*).
[179] Commercial exploitation can lie in using the image in advertising, merchandising etc. Not relevant is whether an actual financial compensation has been paid for the use of the image. Decisive is the mere possibility of the image being viable for financial compensation. See in this respect Jacop Spoor, Dirk Verkade and Dirk Visser, Auteursrecht: auteursrecht, naburige rechten en databankenrecht, (3rd ed., Deventer, Kluwer 2005) para 6.12.
[180] Hof Den Haag 27 May 1993, NJ (Nederlandse Jurisprudentie) 1994, 658, Informatierecht/AMI 1995/5, 96 (Spaarnestad / Vanderlijde).
[181] This has been confirmed by Hoge Raad 14 June 2013, LJN CA2788 (Johan Cruijff/Tirion), see also Mediaforum September 2013, nr.22, at 224, with annotation by G.A.I. Schuijt.
[182] Idem.
[183] Idem.
[184] Idem.

before the District Court for violation of his image rights. Both lower Courts ruled that there was no violation of Cruijffs image rights.[185] Cruijff lodged an appeal before the Supreme Court. Cruijff claimed that the publication of this book was a violation of his privacy since the book was published without his consent. He based this claim on Article 8 ECHR, which he claimed provided him the exclusive right to determine publication of his image. He also claimed that he had a 'reasonable interest' within the meaning of article 21 Dutch Copyright Act in preventing publication and distribution of this book.[186] The Supreme Court held that a portrayed person can prevent unauthorized publication of his image if he has a reasonable interest that prevails over the right of the public to receive information. When a reasonable interest is proven a publication can be deemed unfair and can be prohibited.[187] A situation where the portrayed person always has a right of consent prior to publication cannot be assumed. According to the Dutch Supreme Court it does not follow from the case law of the European Court of Human Rights in the *Von Hannover* and *Reklos* cases that Article 8 ECHR provides for an absolute right of consent. That would go against freedom of expression and information.[188]

The pictures in the book were taken during the time Cruijff exercised a professional career as a football player for a well-known football club. The pictures were taken during matches that drew large public attention and interest. The pictures did not concern any aspect of his private life and the pictures were not in any way harmful or defamatory.[189] It follows that in cases where portraits of famous persons are made in a public place during the exercise of their profession, in general more weight should be given to the information value and news value that these portraits have for the public, rather than in the personal interest of the depicted person.[190] According to the Court Cruijff could also not prevent publication of the photographs based on "a reasonable interest" (Article 21 of the Copyright Act). Although Cruijff has "*verzilverbare populariteit*" (exploitable popularity) he could not invoke his portrait right since financial compensation was offered to him by the publishing company.

The second case was decided on 10 December 2013 by the Amsterdam Appeals Court.[191] This case was brought before the courts by the association of professional football players (VVCS and PRO PROF) against the Dutch football clubs and the Dutch football federation KNVB. The players' association claimed that all professional football players in the Dutch leagues have an absolute "portrait right" based on article 21 of the Dutch Copyright Act. This absolute right would allow them to prohibit any image taken during matches without their consent. Based on their right the players' association claimed that football players should receive monetary compensation every time images of a game are shown to the public. The Amsterdam Court of Appeals confirmed the ruling of the Supreme Court in the Johan Cruijff case. Article 21 of the Copyright act does not grant an absolute right to one's image. A portrayed person can only prevent publication if he has a "reasonable interest" which must prevail over the freedom of information of the public; his claims cannot be based only on the fact that he did not consent to prior publication of the image. A reasonable interest, especially in the case of famous football players, can lie in the commercial exploitation of their own image. There is a large football culture in the Netherlands and football players are celebrities, therefore they can have enjoy "*verzilverbare populariteit*" in their image. According to the Court, the fact that these players are depicted while exercising their profession; that there is a

[185] Hoge Raad 14 June 2013, LJN CA2788 (Johan Cruijff/Tirion) paras 3.1-3.3.
[186] Idem, para. 3.2.
[187] Idem, para. 3.6.2.
[188] Idem, para. 3.5.
[189] Idem, para. 3.9.
[190] Idem, para. 3.9.
[191] Gerechtshof Amsterdam (Court of Appeal of Amsterdam), 10 December 2013, ECLI:NL:GHAMS;2013;4501 (Centrale spelersraad, Vereniging van contractspelers and Proprof v (all) KNVB soccer clubs).

large public interest in images of their profession (namely football matches); and that these images are made in public places all amount to the finding that there should be given more weight to the public's right of information and the public news value of these images than to the protection of the commercial interests of the players.[192] Importantly, the Court pointed out that this case deals with professional football players who are being paid for participating in these matches and that they have already received financial compensation for the broadcasting of their image right in the form of their wages, which are largely (indirectly) financed by income from the broadcasting rights.[193] Another important consideration by the Court is the fact that because the images shown depict the football players as part of a team, and not individually, this does not negatively impact their individual portrait rights. Lastly the Court also adds that these considerations are the same for amateur players in the competition.[194] From the two cases discussed above it can be concluded that the Netherlands does not recognize an absolute right of self-determination in one's image. Professional and amateur players cannot invoke their image rights in order to receive compensation for their images broadcast in the context of the reporting of the matches they are playing in. The courts bases this denial of protection of image rights on an economic argument: the players already earn income for their participation in the matches, which is derived from the proceeds of broadcasting rights, and they cannot therefore claim additional remuneration for their images shown during the broadcasting of these matches.

In France, protection of image rights (*droit à l'image*) has been developed largely in case law. Image rights as such are not codified but fall within the general protection of personality rights protected under Article 9 of the French Civil code. According to Article 9 "everyone has a right to privacy".[195] Personality rights cover both protection of one's image against unauthorised commercial use (also referred to as publicity right) and protection of privacy and reputation. These rights are very broad but can in certain circumstances be limited by a right to freedom of information protected under Article 10 ECHR (European Convention on Human Rights).[196] Image rights are tied to a person and as such are non-transferable.[197] However recent practice and case law have shown a change of attitude. It is now generally assumed that image rights are contractually transferable and can be the subject of a license. [198] According to the case law of the French Courts both famous and non-famous persons are entitled to image rights protection and are able to control the use of their image.[199] As a general rule a written and signed permission of the portrayed person is required before a portrait of a person can be taken and/or used/published.[200] In order for a person to invoke image rights the person must be recognisable on the portrait.[201] There are however some limitations to this broad protection of image rights. The first is that consent to make or publish a portrait is not

[192] Idem, para. 3.7.1.
[193] Idem, para. 3.7.3.
[194] Note that at the time of writing of this study the decision of the Court of Appeals was still open to appeal at the Supreme Court.
[195] See also article 8 *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html.
[196] Court of first instance (*Tribunal de grande instance,* TGI) of Paris (réf.), 8 July 2005, Real Madrid club de Football, Zinedine Zidane, David Beckham v c/Hilton Group PLC, William Hill http://www.juriscom.net/documents/tgiparis20050708.pdf. Football team Real Madrid and some of its players (David Beckham, , Ronaldo and Zinedine Zidane) tried to stop the use of their image and name on a gambling website by invoking image rights protection. The court however decided that there was no violation of their image rights and that their images were merely used to present and illustrate the matches concerned by the bets and that there was no association between the players and the gambling website, no commercial exploitation of their image only providing information.
[197] French Supreme Court civil chamber (*Cour de cassation chambre civil*, Cass. Civ.), 15 February 2005, 03-18.302 bull. civ. n 86; and 14 December 1999, 97-15.756 bull. civ. n 345.
[198] Cass. Civ, 11 December 2008, 07.19.494 bull civ n. 282. See also Rein Jan Prins, "Commercieel portretrecht in Frankrijk" in Dirk Visser, *Commercieel portretrecht:30 jaar 't Scheap met de Vijf poten*, (Amstelveen : deLex, 2009).
[199] Cass. Civ. 13 April 1988, 21219, Bull. Civ. I 67, No. 98.
[200] TGI Paris 30.04.1997, Legipresse 1998, n 153, 1-86 and R-J Prins, Commercieel portretrecht in Frankrijk in Dirk Visser e.a. Commercieel portretrecht 30 jaar 't Schaep met de vijf poten UItgeverij Delex Amsterdam 2009, p.3.
[201] The law does not provide for any limitations with regard to how the portrait is made. Any type of portrait made by any type of technical/artistic means is covered by "droit de l'image".

required when a person is portrayed in the context/performance of his or her profession in a public place. The portrayed person can only oppose such pictures in the event that they are harmful, denigrating or consist false statements. Consent of the portrayed person together with a financial compensation is necessary when the images are being used for commercial purposes, e.g. advertisements, postcards etc.[202] The second limitation concerns news reporting and the right of the public to information. Portraits of persons that have news value generally do not require consent of the portrayed person. However here too privacy limitations may apply.[203]

In the United Kingdom personality rights or image rights are not generally recognised under common or statutory law.[204]Sports players in the UK therefore have to rely on a variety of specific legal doctrines, such as privacy, defamation and tort law in order to protect their images. English law does not recognise a general right of privacy.[205] However it has included Article 8 ECHR on the protection of privacy in the Human Rights Act. In the *Naomi Campbell* case the House of Lords specified that the tort of breach of confidence, also known as the misuse of private information, can be used to protect one's privacy.[206] Naomi Campbell sued Mirror Group Newspapers (MGN) for a breach of confidence or misuse of private information based on a violation of her privacy when MGN published unauthorised photographs taken of Naomi Campbell in a public place. The House of Lords introduced a two-step test: firstly, a court must consider whether the information is of a private or confidential nature; did the claimant have a reasonable expectation of privacy? Secondly, if that is the case the Court must weigh the right of freedom of expression against the claimant's privacy interest. When the photographs are taken in a place where the portrayed person should have a reasonable expectation of privacy (even if this is a public place) the Court will likely allow the privacy interest to prevail over the public interest in information. Considering the circumstances in which sports players perform they will most likely not be able to use the doctrine of breach of confidence and privacy to protect their image. Football matches are organised in public places and are accessible for the general public. Sports players may stand a better chance of protecting their images on the basis of the tort of passing off. "*Passing off prevents parties passing their goods or services off as the claimant's good or services (misrepresentation), exploiting without authority the goodwill that the claimant enjoys in the marketplace*".[207] In the *Eddie Irvine* case the House of Lords held that Irvine (a well-known Formula 1 racing driver) had a "property right" in his reputation. A radio station in the UK had used a photograph of Irvine in a brochure for the radio station that created the impression that he had endorsed this station. Irvine claimed that he was recognisable on the photo and because he was a famous race car-driver, he had a valuable reputation. The Court agreed.[208] In order for a claim under the tort of passing off to succeed there must be goodwill in the sense that there be a commercial interest in the image/reputation of the portrayed person. There must also be misrepresentation; the public must be falsely led to believe that the person is endorsing a product or a service. This misrepresentation must cause damage to the goodwill established by the plaintiff in his or goods or services.

A more recent case before the High Court in London concerned the famous pop singer Rihanna.[209] Rihanna sued Topshop over t-shirts, which featured unauthorised photos taken during a video

---

[202] Huw Beverley-Smith,Ansgar Ohly, Agnes Lucas-Schloetter, "Privacy, property and personality", (Cambridge Universty Press, 2005), 47-93.
[203] *Von Hannover v. Germany* [2004] ECHR 294 (24 June 2004), European Court of Human Rights
[204] William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (5th edition, Sweet and Maxwell, London, 2010), para. 16-34.
[205] *Campbell v MGN Limited* (2004) UKHL 22. And see also Wainwright v. Home Office (2203) UKHL 53.
[206] *Campbell v MGN 2004* UKHL 22. See also Huw Beverley-Smith, Ansgar Ohly, Agnes Lucas-Schloetter, *Privacy, property and personality* (Cambridge Universty Press, Cambridge 2005).86.
207 Christopher Wadlow, "The law of passing off" (Sweet & Maxwell, London 3d ed. 2004) Chapter 1.10.
[208] *Eddie Irvine v Talksport Ltd* [2002] 2 All ER 414.
[209] Fenty v. Arcadia, (2013) EWHC 2310 (Ch) of 31 July 2013.

shoot in 2011. Rihanna claimed that this use caused damage to her reputation. Mr Justice Birss held that "a substantial number of buyers were likely to have been deceived into buying the t-shirt because of a false belief that it had been approved by Rihanna."[210] The Court agreed that this use could be damaging to her goodwill. Mr Justice Birrs reaffirmed that "there is none such thing as a general right by a famous person to control the reproduction of her image. The taking of the photograph is not suggested to have breached Rihanna's privacy. The mere sale by a trader of a t-shirt baring an image of a famous person is not an act of passing off. However in these circumstances I find that Topshop's sale of the t-shirt was an act of passing off".[211] Arguably, the law of passing off can be used by (famous) sports players to prevent the unauthorised use of their reputation for example in advertisements or merchandising.

1.3.2 Protection of image rights of athletes by special sports statutes

In some Member States the enjoyment and exercise of the image rights of sports players are subject to special sports laws and statutes. For example, the 2010 Polish Act on Sport[212] gives *national* sports associations the right to economic and commercial exploitation of the images of those representing a national side when they are wearing national team colours[213] or the apparel of the national Olympic squad.[214] In the context of football, those national-level players (in all age categories) have to observe the national federation's rules on advertising and marketing in accordance with the rules of the Polish Football Association. This requires players to observe the advertising and marketing rights granted to the national governing body, UEFA and FIFA and their sponsors or commercial partners. The rules further provide that clubs can use players' individual rights and that an individual sponsor of a player cannot come into trade collision with the sponsors of the club unless the parties have expressly agreed to the contrary. In the absence of such an agreement the default position applies, but as is the case in other jurisdictions neither the national sports law nor the rules of the governing body make adequate provision for bad faith negotiations.

The Hungarian Sports Act provides that in sponsorship and merchandising agreements concluded by an employer club, the employer must have obtained the player's prior written consent to being covered by that agreement (e.g., through the employment contract) (Sports Act, Article 35).

In Spain, Royal Decree 1006/1985[215] governs the exploitation of the image rights of professional athletes. It differs from the Hungarian Act in that it obliges the parties to an employment relationship to agree to a collective agreement for their specific sport, and that agreement is to be incorporated into the employment contract (it thus works in a manner similar to the arms-length collective bargaining agreements utilised in many US professional sports and where jurisdiction lies with the National Labour Relations Board[216]).
In Portugal, the Sport Labour Act 1998[217] grants the player the right of either personal use or the right to authorise use by another and collective image rights such as team photographs are a matter for collective negotiation. In football, a collective agreement negotiated by the League and the Players' Union pursuant to the 1998 Act properly grants the player the right to use and explore his image (or to assign it) during the currency of the contract, while the team owns the rights in respect of the collective image.

---

[210] Idem, para. 34.
[211] Idem, paras. 34 and 70-75.
[212] Act of 25 June 2010 on Sport, Official Journal of the Republic of Poland, Dz. U. No. 127 position 857, as amended.
[213] Article 14 paragraph 1.
[214] Article 14 paragraph 2.
[215] Royal Decree 1006/1985, dated 26th June, *regulating the special employment relations of* professional sportspeople. http://noticias.juridicas.com/base_datos/Laboral/rd1006-1985.html.
[216] David McArdle, *Sports Dispute Resolution: Athletes, Law and Arbitration'* (Taylor & Francis, London 2014).
[217] Law No 28/98 of 27 June, as amended by Law No 114/99 of 2 August.

In many other Member States as well collective labour agreements govern the enjoyment and exercise of image rights by professionally employed players. Discussion of these agreements, however, exceeds the scope of this study.

1.4 The recording of sports events

1.4.1 Copyright

While sports events generally do not attract copyright or neighbouring rights protection in the Member States, this by no means implies that copyright and related rights play no role in protecting the commercial interests of the sports organisers. In all of the surveyed jurisdictions,[218] with the possible exception of Sweden, audiovisual recordings of sports events such as football games will likely meet the (relatively low) levels of originality required for copyright protection.[219] Sweden represents a peculiar (and somehow contradictory) exception to this rule in that a Swedish Court of Appeals has held that the audiovisual recording of an ice hockey game (with added commentary) could not be considered an original work.[220] This however seems to be an exceptional and isolated case. National legislation and case law in all the other surveyed jurisdictions point in the opposite direction.[221]

The audiovisual recording of football games, as usually broadcast on TV, will normally amount to a work of authorship protected by copyright law, usually as a film or cinematographic work.[222] Cinematographic works are protected by copyright when they represent the author's own intellectual creation[223]. In some jurisdictions (e.g. UK and Ireland), works in general, therefore including films, have to be fixed in a tangible (material) form for copyright protection to arise.[224]

---

[218] See answers to Q1 in Questionnaire (Annex I).

[219] See answers to Q1 in Questionnaires. See among others Lars Halgreen, *European Sports Law* (Forlaget Thomson, Copenhagen 2004), at 297. See also e.g. Italian Supreme Court (*Cassazione Penale*), sec. 3, n. 33945 of 4 April 2006

[220] See Court of Appeal of Southern Norrland of 20 June 2011, n. B 1309-10, as cited in the Swedish questionnaire.

[221] See answers to Q1 in Questionnaire (Annex I).

[222] Cinematographic productions were required to be protected as literary or artistic works if by "the arrangement of the acting form or the combination of the incidents represented, the author has given the work a personal and original character", by Article 14 of the Berlin Revision of the Berne Convention in 1908. In the current version of the Convention cinematographic works are present in Article 2 as a protected work and are further regulated in Articles 4, 7, 14, 14bis, and 15. See Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd Ed., Oxford University Press, Oxford 2009) 84 and fn 159; See Pascal Kamina, *Film Copyright in the European Union*, (Cambridge University Press, Cambridge 2002); See Clive Lawrence and Jonathan Taylor, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (Tottel Publishing, London 2008) 1077, at 1106–1107. For case law see e.g. Case C- 403/08 *Football Association Premier League Ltd et al v QC Leisure et al* (ECJ), of 4 October 2011, at 149 – 152 *("It is to be noted that … two categories of persons can assert intellectual property rights relating to television broadcasts … namely … the authors of the works concerned and … the broadcasters. [A]uthors can rely on the copyright which attaches to the works exploited within the framework of those broadcasts. In the main proceedings, it is common ground that FAPL can assert copyright in various works contained in the broadcasts, that is to say, in particular, the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics"* (emphasis added)). See also Paris Court of first instance (Tribunal de Grand Instance de Paris), *S.A. Television Française 1 v Youtube LLC*, of 29 May 2012, RG: 10/11205, (cited in French questionnaire).

[223] After the landmark Infopaq decision (as confirmed by more recent ruling of the CJ) the threshold of "intellectual creation of the author", which was originally created by the EU legislator only with regard to computer programs, photographs (Term Directive) and databases should be safely assumed to operate for all copyright subject matter (with the exception of works of applied art and industrial design for which there is a special derogatory rule); See Case C- 5/08, of 16 July *2009 Infopaq International A/S v Danske Dagblades Forening* [Infopaq].

[224] Sec. 5B Copyright, Designs and Patents Act 1988 [UK], defines films as "a recording on any medium …". Similarly sec. 2(1) Copyright and Related Rights Act, 2000 [Ireland] requires that the film be fixed on any medium. However, a film, as the work suggests, is usually recorded on a support, tape, film, disk, etc.

Under the 1988 UK Copyright Act (CDPA[225]), films are defined as a *recording* on any medium from which a moving image may be produced by any means.[226] Absent fixation there will be simply no film, but not necessarily no copyright. A televised live transmission will be likely protected as a broadcast (see below Section 1.5).[227] The UK is a peculiar system in this regard compared to continental-European laws, as its copyright law provides for a closed number of exhaustive – instead of illustrative – subjects for copyright protection.[228] Additionally, in the UK there is no explicit requirement for films to be original in order to be protected by copyright, which will make it even easier for recordings of sports events to qualify for protection.[229] As we will see, however, films can also be protected as dramatic works.[230]

Cinematographic works are usually complex works where the intellectual creative contributions come from a plurality of providers, such as the script author, the author of the cinematographic adaptation, the director of the film, the artistic director, the author of the soundtrack and the producer.[231] However, the principal director of a cinematographic or audiovisual work shall be considered its author, or one of its authors, in all the Member States.[232] The latter are, in fact, free to recognize authorship also to other subjects, who will be considered co-authors of the principal director. In the EU, these subjects usually include the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the cinematographic or audiovisual work.[233] The list is merely illustrative, as it is left to Member States to determine for each domestic legal order the principal director's co-authors, if any.[234] However, the Term Directive identifies these authors as relevant for the calculation of the term of protection: it shall expire 70 years after the death of the last of the listed persons to survive, whether or not they are designated as co-authors under domestic law.[235]

According to national law, and in contractual practice, the main economic rights in an audiovisual work are commonly vested in the film producer. Accordingly, in so far as sports organisers, clubs, or federations act as producers of the audiovisual coverage of the games, the copyright in the audiovisual work will be owned by them. Alternatively, if the coverage is produced by an outside producer or broadcaster, the copyright can, and in practice often will be, assigned or licensed to the club(s) or organiser of the sports event or competition on the basis of specific contractual agreements.

Once the audiovisual work has been created, its unauthorized reproduction, distribution, or

---

[225] Copyright, Designs and Patent Act 1988.

[226] See s. 5B(1) CDPA.

[227] See Joined Cases C- 403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR-I-9083, para. 150 *("broadcasters ... can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Related Rights Directive, the right of communication of their broadcasts to the public which is laid down in Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) of the Copyright Directive"*).

[228] See e.g. Lionel Bently, UK Section 1[1], in International Copyright Law and Practice, (Geller ed.,) 2011; William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (5th edition, Sweet and Maxwell, London, 2010),,at 11-04.

[229] If the film qualifies as a "cinematographic work" under the Berne Convention then it can be protected as a dramatic work under the UK copyright law; see Norowzian v. Arks (No. 2) [2000] EMLR 67; See in general Pascal Kamina, "Film Copyright in the European Union", (Cambridge University Press, 2002), at 35 et seq.

[230] See Richard Arnold, "Copyright in Sporting Events and Broadcasts or Films of Sporting Events after Norowzian", The Yearbook of Copyright and Media Law, 2001/2002, 51 – 60.

[231] See Mark Perry and Thomas Margoni, *Authorship in complex ownership: A comparative study of joint works*, in EIPR, 2012, 34(1), 22.

[232] See art 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [Term Directive], repealing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

[233] See Article 2(2) Term Directive.

[234] Idem.

[235] Idem.

communication to the public will constitute a copyright infringement entitling the right holder (original or derivative) to the usual remedies, including injunctive relief and damages.
In most instances, the audiovisual registration of a major sports event will easily achieve the fairly modest levels of originality required to qualify for copyright protection. The audiovisual recording of a sport commonly features a large number of cameras placed in different sections of the field in order to capture not only the most important aspects of the event, but also the smallest details. Cameras, more recently, have been located on devices such as small helicopters or flying drones, or, in the case of F1 or other motor races, on the very same competing cars. The added content that is usually part of the televised audiovisual work, such as 3D animations indicating whether a football player was actually off-side, or the telemetry recordings of racing cars, are blended with the various cameras' recordings. The resulting audiovisual product is the – usually original – combination of all these elements through the creative filter of the director. This state of affairs has been confirmed by at least 27 of the 28 surveyed Member States.

Yet, it is still possible, albeit unlikely, that such an audiovisual product will not be deemed sufficiently creative, and therefore not protected by copyright.[236] Even in such event the producer can rely on the protection granted to the first fixation of a film on the basis of a specific EU created neighbouring rights, as set out in the following section.

1.4.2 Neighbouring rights

1.4.2.1 Film producers

The EU Rental Right Directive, or simply Rental Directive, requires Member States to offer a special form of protection to the producers of the first fixation of films, *i.e.* film producers, in the form of a neighbouring right.[237] The Rental Directive defines films in Article 2(1c) as cinematographic or audiovisual works or moving images, whether or not accompanied by sound. Similarly to the case of other neighbouring rights, and unlike copyright, originality is not required to trigger the neighbouring right. If there is originality, the film will be protected both by a copyright (in the cinematographic work) and by a neighbouring right (in the fixation of the film).[238] The latter neighbouring right operates independently from any copyright in the cinematographic or audiovisual work. The goal of this form of protection is to reward the producer of the film for accepting the financial risks and organizational responsibilities connected to the realization of the film[239]. This is confirmed by Recital 5 of the Rental Directive, which clarifies that the investments required for the production of films are especially high and risky, and that the possibility of recouping that investment can be effectively guaranteed only through adequate legal protection of the right-holders concerned.[240]

The film producer's neighbouring right includes the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproductions by any means and in any form, in whole or in

[236] Imagine the case of a minor production where there is only one camera, perhaps even fixed, that records everything that happens in front of its objective.
[237] See Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) repealing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
[238] But see above the analysis of the UK for the case of films.
[239] See Paul Goldstein and Bernt Hugenholtz, "International Copyright", (2nd Edition, Oxford University Press, 2010), at 232; See German Federal Supreme Court, October 22, 1992, Case 1 ZR (300191), in 25 IIC 287, 288 (1994).
[240] See Recital 5 Rental Directive.

part in respect of the original and copies of the films.[241] It also provides for the exclusive right to authorize or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them – in other words, *on demand* – of original and copies of their films.[242] However, the right does not include, at least at the EU level, the broader right of communication to the public.[243] Producers of first fixations of films also enjoy the exclusive right to distribute (make available to the public in tangible copies), by sale or otherwise, in respect of the original or copies of their films.[244] This neighbouring right lasts 50 years from the date of first lawful publication or communication to the public. If the film has not been lawfully communicated to the public or published, the 50-year term will accrue from the date of fixation.[245]

As seen, the UK is somehow an exception to the dual protection of audiovisual productions in the EU – copyright in the cinematographic work and neighbouring right rewarding the producer's investment. UK law recognizes only a single right: copyright in the film.[246] According to some authors this approach fails to properly implement EU law.[247] However, under certain circumstances a film in the UK can also be protected as a dramatic work, as clarified by the Court of Appeal in the *Norowzian* case.[248] It must be noted that even if, under certain conditions, a duality of protection is available in the aftermath of the *Norowzian* case, it is not of the kind considered by EU law. If a film is *also* a dramatic work, it will benefit from two forms of copyright protection, not from a copyright and a neighbouring right. This can be inferred, *inter alia*, from art. 13B CDPA, which states that the copyright in a film expires 70 years *pma*.[249]

1.4.2.2 Sports audiovisual rights

A peculiar situation exists in Italy, where in 2008 a new neighbouring right was introduced by legislative decree amending the Italian Copyright Act and creating a new Article 78-*quater* titled "audiovisual sports rights".[250] The article provides that "to the audiovisual sports rights established by law 19 July 2007 n. 106, and implementing legislative decrees are applied the provisions of the present law, if compatible".[251] This quite unfortunate formulation has been object of harsh

[241] See Article 2(d) InfoSoc Directive which now governs horizontally the right of reproduction in EU copyright law. Article 7 of the previous version of the Rental Directive has been repealed in virtue of Article 11(1)(a) of the InfoSoc Directive.
[242] See Article 3(2)(c) InfoSoc Directive.
[243] See Article 3(2) InfoSoc Directive.
[244] See Article 9 (1)(c) Rental Directive.
[245] See Article 3(3) Term Directive, which however uses an incomprehensible way to express this.
[246] But under some circumstances the film could be considered also a dramatic work, restoring, somehow, the EU duality; see Pascal Kamina, "Film Copyright in the European Union", (Cambridge University Press, 2002), 137.
[247] See Pascal Kamina, *British film copyright and the incorrect implementation of the EC Copyright Directives*, Ent. L.R. 1998, 9(3), 109-114.
[248] See Norowzian v. Arks (No. 2) [2000] EMLR 67, recognizing that a film can also be a dramatic work when it is a "work of action".
[249] See Article 13D Copyright, Designs and Patents Act 1988.
[250] The new neighbouring right is based on Law 19 July 2007, n. 106, "*Diritti televisivi sugli eventi sportivi nazionali: delega per la revisione della disciplina" Legge 19.07.2007 n° 106*, and on the decrees implementing such framework act, mainly the legislative decree *"Sport e diritti audiovisivi" Decreto legislativo 09.01. 2008, n.9*. The law and the legislative decree represent a quite organic intervention in the field of media and TV rights, implementing provision of different EU directives, most importantly here those of the Directive 2010/13/EU of the European Parliament and of the council of 10 March 2010 *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services* (Audiovisual Media Services Directive, AVMSD)(Codified Version). For a detailed account see Ferrari, *Rights to broadcast sporting events under Italian Law*, The international sports law journal, 2010, I-II, 65 – 73.
[251] See Italian Copyright Law, *Capo I-ter Diritti Audiovisivi sportivi, Article 78-quater. "Ai diritti audiovisivi sportivi di cui alla legge 19 luglio 2007, n.106, e relativi decreti legislativi attuativi si applicano le disposizioni della presente legge, in quanto compatibili".*

criticisms among legal scholars.[252] Law 19 July 2007 n. 106 attempts to regulate organically the entire field of sports TV rights, and among its ambitious goals listed in the first Article of the law are *"the competitive equilibrium of participants to sports events, the enactment of an efficient system of measures to grant transparency of the transmission and communication to the public rights, for the radio and television market and on other electronic networks, of sports events of professional championships and tournaments composed by teams, and of correlated sports manifestations organized at the national level"*.[253]

No less relevant for these purposes is the implementing legislative decree of 9 January 2008 n° 9 on sport and audiovisual rights [Sport Decree][254], Article 2 of which defines a number of basic concepts: event, organiser of the event, competition, organiser of the competition, live transmission, audiovisual product among the most relevant. Of particular interest for our purposes, is the definition of *audiovisual rights* (which corresponds to the concept of *audiovisual sports rights* in the Italian Copyright Act)[255].

Audiovisual rights are defined as the exclusive rights, lasting 50 years from the date of the event, which include:

- The fixation and the reproduction live or delayed, temporal or permanent, in any manner or form.
- The communication to the public of the recordings, fixations, and reproductions, and their making available to the public on demand.
- Distribution in any form, including sale, of the original or copies of recordings, fixations, or reproductions of the event.
- Rental and lending.
- Fixation, elaboration, or reproduction, of the whole or a part, of the broadcast of the event, for new broadcasts or rebroadcasts of the event.
- Use of the images of the event for promotional and advertising purposes, as well as for purposes of combining the images of the event to gambling and bets, and for the operation of such activities.
- The storage of the fixations of the images of the event with the purpose of the constitution of an archive.

According to Article 3, the organiser of the competition and the organiser of the event are joint owners of sports audiovisual rights, but the archival right (defined as the right described at Article 2(7)), connected with each event of the competition belongs exclusively to the organiser of that event. The exercise of the sports audiovisual rights relative to the single events of the competition vests in the organiser of the competition (Article 4). Agreements contrary to this rule are considered void. The exercise of the archival right still belongs to the event organiser, which under conditions of reciprocity, allows the visiting sporting club to archive and exploit commercially the same images. Event organisers are also entitled to *"independent commercial initiatives regarding the broadcast rights on official thematic channels of the synthesis, of the rebroadcast, and of the highlights of the events to which they take place"*.

Article 4 states that the audiovisual production of the event belongs to the event organiser, who can operate autonomously, or through technical recording services and communication operators. The

[252] See Vincenzo Zeno Zencovich, *La statalizzazione dei diritti televisivi sportivi*, in Il diritto dell'nformazione e dell'nformatica, XXVI, 6, 2008, 695–710.
[253] See Article 1 Law 2007 n. 106.
[254] See legislative decree *"Sport e diritti audiovisivi" Decreto legislativo 09.01. 2008, n.9.*
[255] See Article 2 Sport Decree.

competition organiser coordinates the audiovisual productions and establishes in specific guidelines the standards of production (qualitative and editorial) to which the event organiser has to adhere. If the event organiser does not manifest an interest in the audiovisual production of the event, the event is produced by the competition organiser (Article 4(5)).

Article 4(6) establishes that the ownership of the recordings resulting from the audiovisual production as described in Article 4(4) and 4(5) belongs to the event organiser, amending, if necessary, Article 78-*ter* of the Italian Copyright Act. The latter Article establishes that the producer of cinematographic or audiovisual works and of sequences of images in movement is the exclusive owner of the right of reproduction, distribution, communication to the public, and rental for a period of 50 years from the date of first fixation. Article 78-*ter* is in other words the implementation into Italian law of Article 3 Rental Directive regarding the related right of the producer of the first fixation of a film.[256] As seen, Article 3 provision mandates that the owner of the related right of first fixation is the producer. It is in contrast to EU law therefore to attribute that ownership to a different subject, such as the sports organiser identified by Article 78-*quater* (sports media rights). In other words, as long as the producer of the first fixation is a different subject than the event organiser identified by the Sport Decree, the provision establishing the prevalence of Article 78-*quater* over Article 78-*ter* should be deemed in contrast to EU law.[257]

The limited case law available to date suggests that the party with the strongest commercial interest in preventing the unauthorized diffusion of the recordings of sports events are – unsurprisingly – the licensees of the recording and broadcasting rights. These entities already possess title and standing on the basis of standard copyright (and related rights, where relevant) rules, with little to no necessity for the event organiser (e.g. *Lega Calcio*) to intervene in the proceedings.[258]
Commentators have been particularly critical towards the decision, reached at a late stage in the legislative process, to amend the Copyright Act and create a specific neighbouring right[259].

1.5 The broadcast of sports events

Broadcasting organizations enjoy neighbouring rights protection for the transmission for public reception of their broadcast signals. This protection extends to the right to prohibit the fixation, the reproduction of fixations and the rebroadcasting by wireless means of broadcast, as well as the communication to the public of television broadcast of the same.[260] These broadcast signals, which usually contain cinematographic or audiovisual works or moving images, are protected by a neighbouring right (or copyright in the UK[261]) that operates independently from, and regardless of, any copyright in the content of the signal.[262] In other words, the neighbouring right exists even in

[256] See Article 3 et seq. Rental Directive and see Section 1.4.2.2 above.
[257] The main difference consists in the indication that the owner of the right of commercial exploitation is not the producer of the cinematographic or audiovisual work but the event organiser. In all those cases where the two roles do not coincide in the same subject or entity, the amending intent of Article 78-quarter seems to be contrary to EU law.
[258] See e.g. Court of first instance (Tribunale) of Rome, order of 2 December 2011, *Reti Televisive Italiane v. Google Inc.* (ordinanza depositata il 13 dicembre 2011); and order of 19 August 2011, *Reti Televisive Italiane v. Rojadirecta.es.*
[259] See Vincenzo Zeno Zencovich, *La statalizzazione dei diritti televisivi sportivi*, in Il diritto dell'informazione e dell'informatica, XXVI, 6, 2008, 695–710.
[260] The relevant EU directives in this field are the Rental Directive (particularly Articles 7–9), the Satellite Directive, and the InfoSoc Directive (See arts 2(e) and 3(2)). At the international level see TRIPs Agreement Article 14(3). In substantially similar terms see Article 13 Rome Convention. See also the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 1974; For an account of different Member States approaches towards the redistribution and rebroadcast of copyright works (although analysing the specific field of the "clouds") see Mihaly Ficsor, *The WIPO „Internet Treaties" and Copyright in the „Cloud"*, ALAI 2012 Congress Kyoto, 16-18, October 2012.
[261] See sec. 6 CDPA. Systematically, however, it can be considered a related rights, as suggested by the duration of protection which is limited to 50 years from when the broadcast was made as stated by Section 14 CDPA.
[262] See Lionel Bently and Brad Sherman, "Intellectual Property Law", (3rd Ed., Oxford University Press, 2009), at 86.

the absence of any copyright in the content carried by the signal. This is an important aspect: the signal is protected as such, even if the underlying transmitted material is neither a work of authorship protected by copyright nor other material protected by neighbouring rights.[263] This means that even if a court were to find that a televised football game is not protected as a work of authorship, nor by the producer's neighbouring right (something not possible in the EU), its broadcast still qualifies as subject matter protected by copyright or related rights.

The Rome Convention, on which the European *acquis* is largely built, defines "broadcasting" as the transmission by wireless means for public reception of sounds or of images and sounds".[264] This right, in other words, affords protection to broadcasters' technical contributions to the assembly, production and transmission of live and pre-recorded events, regardless of the subsistence of any copyright (works) or other related rights (performances, phonograms, or first fixations of films) that are carried by the transmitted signal.[265] The signals transmitted merit protection because the value is in the act of communication itself, rather than the content of what is being communicated.[266]

In the EU, the Rental Directive requires Member States to grant broadcasting organizations the exclusive right to fix their broadcasts whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, expanding therefore the definition of the Rome Convention to transmissions by wire or cable.[267] In addition, the Directive requires the grant of public rebroadcasting and communication rights and public distribution rights to broadcasters.[268] The EU Copyright Directive of 2001 extends the reproduction right of broadcasting organizations to include temporary digital copies and also introduces a right of making available online.[269] Under UK law, where usually fixation is a requirement for copyright protection, broadcasts seem to escape this condition. According to Bently and Sherman, *"[a]rguably, the ephemeral nature of broadcasts makes them one of the most intangible of all form of intellectual property"*.[270]

While a clear, internationally or EU shared, definition of what constitutes a "broadcasting organization" is lacking, it is safe to assume that it is commonly represented by the entity or person that organizes the broadcasting, *i.e.* the transmission by wire or wireless means for public reception of sounds or of images and sounds.[271] In the case of sports events, the broadcasting organization can be the same club or federation when it autonomously acts as the actual broadcasting entity,[272]

---

[263] See Case C- 403/08 *Football Association Premier League Ltd et al v QC Leisure et al*, of 4 October 2011, at 150 ("broadcasters … can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Related Rights Directive, the right of communication of their broadcasts to the public which is laid down in Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) of the Copyright Directive").

[264] See Rome Convention Article 3(f). Similarly, Article 2(f) WPPT that defines broadcasting as "the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent".

[265] See Paul Goldstein and Bernt Hugenholtz, *International copyright law, Principles, law and practice* (2nd edition Oxford University Press, Oxford 2010), at 237.

[266] See Lionel Bently and Brad Sherman, "Intellectual Property Law", (3rd Ed., Oxford University Press, 2009), at 86. *Id.* See also Court of first instance of Paris (Tribunal de Grand Instance de Paris), S.A. Television Francaise 1 et al v S.A. Dailymotion, of 13 September 2012, RG:09/19255 (cited in the French questionnaire).

[267] See in general Lucie Guibault and Roy Melzer, *The legal protection of broadcast signals*, IRIS Plus, 2004 – 10, 2 – 8.

[268] See Rental Directive Articles 7 – 9.

[269] See arts 2(e) and 3(2) InfoSoc Directive; See also Paul Goldstein and Bernt Hugenholtz, *International copyright law, Principles, law and practice* (2nd edition Oxford University Press, Oxford 2010) 342.

[270] See Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd Ed., Oxford University Press, Oxford 2009) 92.

[271] Broadcasting organizations are not better defined by international and EU legislation. Member States usually regulate the broadcasting activity and set the requirements to qualify as broadcasting organizations. In the UK, the CDPA defines authors as the person making the broadcast or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast; see CDPA 9(2)(b).

[272] This was the case of Eredivisie Live, which until recently was an undertaking of the Dutch Eredivisie clubs.

or, usually, an entity that professionally operates as a broadcaster and that has acquired the exclusive right to broadcast the sports event on the basis of contractual agreements signed with the sports event/manifestation organiser, or jointly, depending on the factual circumstances.[273]

Accordingly, in *Premier League v QC Leisure* the CJ found that broadcasters can assert copyright or copyright related rights in their broadcasts of sporting events, together with the authors of the works eventually contained in the broadcasts.[274] In fact, as the CJ explains, broadcasters of sporting events can invoke the right of fixation of their broadcasts which is provided for in Article 7(2) of the Related Rights Directive, the right of communication of their broadcasts to the public which is laid down in Article 8(3) of that directive, or the right to reproduce fixations of their broadcasts which is confirmed by Article 2(e) of the Copyright Directive.[275] Interestingly, however, the questions asked in the main proceeding, as the same Court notes, do not relate to such rights.[276] The reason lies in a particular provision of the applicable domestic law (the UK Copyright Act, CDPA), that at Section 72b provides that "The showing or playing of a broadcast in public, to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in the broadcast or any film included in it". In other words, publicans were communicating FAPL's broadcasts (the live sporting events) to the public via screens and speakers of televisions placed in the pubs. However, pursuant to the Section 72b defence the communication was exempted. Nonetheless, if pubs were to charge an admission fee, or to show other content not covered by the exception – such as FAPL logos or anthem, as the Court suggests – the exception would not operate, restoring the normal course of affairs, i.e. making it a copyright infringement.

Similarly, any unauthorized use of a television broadcast whether on another TV channel or on the Internet, is to be considered an infringement of the neighbouring right (or copyright), granting right-holders the usual remedies, first and foremost injunctive relief and claims for damages. As confirmed by the European Court of Justice in a judgment concerning the interpretation of Article 3(1) of the Copyright Directive in a case of unauthorized retransmission of television broadcasts over the internet, the neighbouring right of broadcasters is protected against any act of communication to the public, including any online retransmission by way of streaming.[277] In light of this judgment, the meaning of Article 3(1) must be interpreted as covering retransmissions of the television broadcast, where the act of retransmission is conducted by an organization other than the original broadcaster. The fact that the subscribers to the streaming service (the British company "TVCatchup") were within the area of reception of the original terrestrial television broadcast, and were allowed to lawfully receive the broadcast on a television receiver, was considered irrelevant by the Court.[278]

In this context the Court reaffirms that, on the basis of Article 3(3) of the Copyright Directive, authorizing the inclusion of protected works in a communication to the public does not exhaust the right to authorize or prohibit other communications of those works to the public.[279] It follows that "by regulating the situations in which a given work is put to multiple use, the European Union legislature intended that each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorized by the author of the work in

[273] On the sale of sports media rights, see Chapter 2, Section 2.3.
[274] See Joined Cases C- 403/08 and 429/08 *Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd* (2011) ECR-I-9083, para. 148.
[275] Idem, para. 150.
[276] Idem, para. 51.
[277] See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013.
[278] Idem, para. 40.
[279] Idem, para. 23.

question".[280] In the Court's opinion, this is confirmed by Articles 2 and 8 of the Satellite Directive[281], which require independent authorization for the simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programs containing protected works, even though those programs may already be received in their reception area by other technical means, such as by wireless or terrestrial networks.[282]
Therefore, because an Internet rebroadcast uses a specific technical means (the Internet) which is different from that of the original TV communication, that retransmission is a "communication" within the meaning of Article 3(1) of the Copyright Directive, and consequently, it cannot be exempt from authorization by the authors of the retransmitted works when these are communicated to the public.[283]

It must be noted, however, that on the basis of the Court's previous case law a mere technical means to ensure or improve reception of the original transmission in its reception area does not constitute a "communication" within the meaning of Article 3(1) Copyright Directive.[284] Nevertheless, this interpretation can be considered correct only as long as the intervention of such technical means is limited to maintaining or improving the quality of the reception of a pre-existing transmission and cannot be used for any other transmission.[285]

1.6 Survey results and conclusions

As emerged from the discussion above, every Member State offers a standard form of protection based on the ownership or exclusive use of the venue in combination with contracts ("house right").[286] Of the 28 Member States the majority offer this standard form of protection as the only one directly relating to the organization of sports events. It was established that six Member States offer additional forms of protection, usually in the sports codes or in related acts. One of these Member States has enacted a special neighbouring right in its copyright act protecting audiovisual sports rights.

This is in addition to the protection offered to the audiovisual recordings and broadcasts of sports events, by copyright or neighbouring rights, which is recognized in all the Member States with the possible exception of Sweden. The sports event as such is not protected by copyright or neighbouring rights in the totality of the 28 Member States.

In conclusion:

- Neither under EU law nor under the laws of its 28 Member States can a sports event as such be considered as a work of authorship and therefore copyrightable. The sports event as such is also not protectable by any neighbouring right under EU law.

---

[280] Idem, para. 24.
[281] See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
[282] See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013, para. 25.
[283] Idem, para. 26.
[284] *"Such activity is not to be confused with mere provision of physical facilities in order to ensure or improve reception of the original broadcast in its catchment area, which falls within the cases referred to in paragraph 74 of the present judgment, but constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although physically within that area"*; See Joined Cases C-431/09 and C-432/09 *Airfield and Canal Digitaal*, at 79. See also See Joined Cases C- 403/08 and 429/08 *Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd* (2011) ECR-I-9083, para. 194.
[285] See Case C-607/11, *ITV Broadcasting Ltd v TVCatchup* Ltd, of 7 March 2013, at 29.
[286] See questionnaires.

- Exclusivity is commonly created on the basis of the ownership or exclusive right to use the venue where the sports event is staged. On this basis, conditional access contracts are employed to regulate access by the public, the news media, and the broadcasting organizations. This protection scheme, often called "house right", is the default form of protection in the surveyed Member States. In some Member States (e.g.: Netherlands, Germany, Austria) the "house right" has received express recognition by the highest courts. In many others the house right is implicitly recognized by courts and commentators on the basis of the combination of property right and contract law.

- Additionally, some Member States offer specific rules in special sports laws or codes:
  - France represents the most developed and far-reaching example of this category. The French Sports Code offers protection to the commercial exploitation of sports events in any form or manner, including a right to consent to bets.

  - Italy offers a detailed regulation of TV media and broadcasting rights in a dedicated decree, which amends the copyright act and creates a new neighbouring right. While explicitly considering the betting sector, a right to consent to bet is clearly absent. The real impact of this right after 6 years of its entry into force remains unclear.

  - Portugal has a special rule – customary in nature but statutorily recognized and applied by the Courts at least until 2007 – protecting the organisers of sports events. Its current status however is not completely clear.

  - Bulgaria, Greece, Hungary, and Romania possess specific provisions in their acts on the ownership of media rights in favour to the sports organisers, but case law seems to be inexistent.

- All Member States offer copyright and neighbouring right protection to audiovisual recordings of sporting events and to their broadcasts, with Sweden as a possible exception.

- No Member State offers specific protection stemming from unfair competition law for sports events, nor can organisers of sports events easily claim rights to protect the commercial value of that event against misappropriation by third parties. However, courts in Denmark have on occasion protected the news value of sports events under a theory of misappropriation.

- Image rights may offer some protection of the athletes' commercial interests. However, their nature and characteristics vary significantly from Member State to Member State, and even in countries where such rights are expressly recognised, image rights do not seem to protect athletes against unauthorized recordings or broadcasts of the sports events in which they participate. Unlike copyright and related rights, image rights are not harmonized by EU law.

PART 2

SPORTS ORGANISERS' RIGHTS MANAGEMENT IN THE FIELD OF MEDIA

2 THE MARKETING OF SPORTS MEDIA RIGHTS: LICENSING PRACTICES

2.1 Introduction

From the 1950s until the mid-1980s, European broadcasting markets were characterized by natural monopolies. This limited the number of broadcasts and kept the prices paid for sports broadcasting rights down.[287] At the time of the first sports broadcasts in Europe, sports organisers received either no or very little compensation for the exploitation of their rights.[288] The progressive liberalization of European broadcasting markets in the late 1980s-1990s combined with technological developments, however, led to an explosion of actors on the demand side. Incumbent public broadcasters increasingly faced competition from cable and satellite (pay TV) providers. In various European markets, telecommunications operators have also been moving into the market for audiovisual services. The transition from analogue to digital delivery platforms further accelerated platform competition as it effectively removed earlier spectrum constraints.[289]

The unprecedented demand from a multitude of market players dramatically increased competition for premium sports content. Given the scarcity and exclusivity of truly attractive sporting events, the adjustment was made by price. As a result, the sale of sports media rights became a lucrative business capable of attracting enormous sums of money.

This chapter will analytically describe how sports media rights are managed and licensed by sports organisers and will focus on the compatibility of such licensing practices with EU competition law and internal market law.

The convergence of transmission techniques and media services has fundamentally changed the way in which sports content is marketed and ultimately transmitted to consumers. Apart from a TV set, consumers increasingly use a range of Internet-connected devices to watch sports: via PC, tablet, and smartphones. The traditional term "(sports) broadcasting rights" no longer captures this new market reality. For the purpose of this report, it is therefore more appropriate to use the term "(sports) media rights".[290]

2.2 The commercial significance of sports media rights

This section will highlight the commercial significance of sports media rights for media content providers (2.2.1) as well as the interests of professional sports organisers in the sale of these rights (2.2.2). It will reveal that the market dynamics vary significantly between a small number of "tier one" sports events, which have a high domestic demand or even global appeal, and the rest.

---

[287] Claude Jeanrenaud and Stefan Késenne, *The Economics of Sport and the Media* (Edward Elgar, Cheltenham 2006) 1-4.
[288] Jean-François Bourg and Jean-Jacques Gouguet, *The Political Economy of Professional Sport* (Edward Elgar, Cheltenham 2010) 101.
[289] See e.g. Karen Donders, *Public Service Media and Policy in Europe* (Palgrave Macmillan, Basingstoke 2012); Jackie Harrison and Lorna Woods, *European broadcasting law and policy* (Cambridge University Press, Cambridge 2007).
[290] The term "media rights" encompasses the rights to transmit audio-visual material across all transmission techniques.

2.2.1 Killer content for media content providers

In numerous decisions, the European Commission has recognised premium sports events and first run premium films (mostly Hollywood blockbusters) as *"vital input"* for media operators to compete.[291] Both types of premium content have proven particularly decisive in the battlefield for market positions in the European pay TV markets.[292] The importance of premium content as key sales driver for pay TV subscriptions is widely acknowledged.[293] The large amounts consistently paid by pay TV operators for premium content is probably the clearest indicator of the value they believe consumers place on it.

Whereas both types of premium content are able to attract high audience shares and high advertising revenues, sports programming does display particular features.

First, premium sports programming, and in particular top-flight football, is capable of attracting viewers with above-average buyer power that are otherwise difficult to reach via television advertising. This means that advertising slots during sports programmes can be sold for a higher rate compared to other programmes.[294]

Second, the coverage of popular sports events allows media operators to develop a unique brand image. This branding encourages viewers to use the channel (or other content service) as a point of reference for their viewing.[295] The fact that pay TV operators in various European markets experienced a significant fall in subscriber numbers after losing the rights they held to premium sports content is a case in point.[296] In terms of branding, the media rights for other popular sports events are also important for premium sports channels as they provide long tail opportunities for particular audiences and are essential to assemble a credible package. This also applies to new media markets. While the acquisition of media rights for niche content might not be a profitable operation as such (in terms of direct recuperation through subscription fees), it can be a key branding element for the take-up of new media services.[297]

Third, sports content is time critical: its coverage is most attractive when transmitted live. As a result, traditional linear broadcasting services have a competitive advantage for transmitting premium sports content demanded by a mass audience.[298]

To gain or retain market share, media content providers all compete for attractive content, preferably distinct from that of rivals. While the demand for premium sports content has grown exponentially over the last two decades, such content has remained a scarce resource: there are

---

[291] See e.g. *CVC/SLEC* (Case M.4066) Commission decision of 20 March 2006; *Bertelsmann/Kirch/Premiere* (Case IV/M.993) Commission Decision 4064/89 (1999) OJ L 53/1; *Vivendi/Canal+/Seagram* (Case IV/M.2050) OJ C 311/3, para. 19.
[292] See e.g. *Newscorp/Telepiù* (Case COMP/M.2876) Commission Decision (2004) OJ L 110/73, para. 61; *TPS* (Case IV/36.237) Commission Decision (1999) OJ L 90/6, para. 34; *British Interactive Broadcasting/Open* (Case IV/36.530) Commission decision (1999) OJ L 312/1, para. 28.
[293] OECD, Background Note to Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)2, 18. The consumer research underpinning Ofcom's investigation into the UK Pay TV market, for instance, highlighted that 88% of consumers cited content as the reason for their selection of Pay TV service (over and above platform features). One third of them cited sport as their most valued content. Ofcom, Pay TV second consultation: Access to premium content (2008) paras. 3.34-3.38.
[294] *UEFA Champions League* (Case COMP/C.2-37.398) Commission Decision (2003) OJ L 291/25, paras. 73-75.
[295] Idem, paras. 64-70.
[296] For example, the German pay TV operator Premiere, the German pay TV lost 42% of its market value and part of its subscriber base after it announced that it had failed to secure the rights for the Bundesliga in December 2005, while the new Bundesliga rights owner Unity/Arena attracted over 900,000 subscribers in just a few months. Ofcom, Pay TV second consultation: Access to premium content (2008) paras. 3.62-3.79.
[297] Tom Evens, Katrien Lefever, Peggy Valcke, Dimitri Schuurman, and Lieven De Marez, "Access to Premium Content on Mobile Television Platforms: the Case of Mobile Sports" (2010) 28 Telematics and Informatics (1) 32; European Commission, Concluding Report on the Sector Inquiry into the provision of sports content over third generation mobile networks (2005).
[298] OECD, Background Note to Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)2, 18, 25.

only a limited number of premium sports events capable of attracting large and commercially attractive audiences. This has led to an incredible rise in the value of premium sports media rights.

Figure 2.1 - Growth in value of premium sports media rights over two decades[299]

As a result, the acquisition of premium sports rights constitutes a major cost for media content providers. In 2009, EU broadcasters spent around € 5,8 billion on the acquisition of sports media rights, which represents a significant proportion of their total € 34,5 billion programming spend.[300]

Pay TV operators are responsible for the vast majority of the annual sports media rights expenditure in the top five European markets (France, Germany, Italy, Spain, and the United Kingdom), with the exception of Germany. In 2011, German free-to-air broadcasters spent more on sports media rights than pay TV operators.[301]

Although in some countries other sports, such as ice hockey or basketball, may be more important, football by and large dominates the total spend on sports media rights in the EU.
In 2011, broadcasters in the top five European markets spent on average 79% of their annual sports rights expenditure on football. The acquisition of media rights to the domestic football league accounts for more than half of the total spend. Formula One is the second biggest sport, followed by rugby, the Olympic Games, and tennis. The United Kingdom is set apart from the other markets in terms of a greater diversity of sports: in addition to football, Formula One, and the Olympic Games, a series of second-tier sports (i.e. rugby, cricket, tennis, and golf) also generate significant

[299] UEFA, "Financial Report 2011/12" (2013); FIFA, "Financial Report 2010" (2011); IOC, "Olympic Marketing Fact File" (2012); UEFA, "UCL Media Rights Sales 1992-2012 (2008); TV Sports Markets, Sportel Briefing: Celebrating 20 years of sports TV" (2008); The Economist, The paymasters: money is the name of every game, 4 June 1998; *EBU/Eurovision system* (Case IV/32.150) Commission Decision (1993) OJ L 179/23, Annex IV.
[300] Attentional Ltd et al, Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services (2011) 99-100.
[301] Sportbusiness Intelligence (2011).

revenues. In Italy, by contrast, non-football sports constitute only 10% of the total spend on sports media rights.[302]

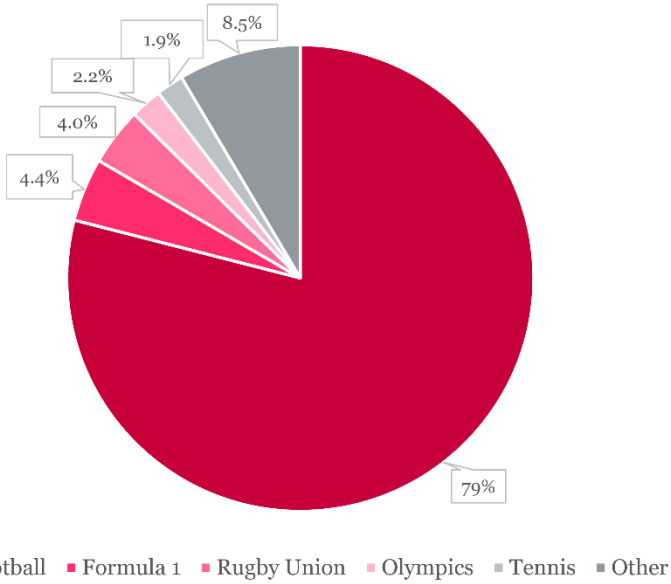

Figure 2.2 - Percentage of total spend on sports media rights in top 5 EU markets in 2011 [303]

2.2.2 Important revenue source for (some) professional sports

After having sketched the commercial importance of acquiring premium sports media rights for media content providers (and pay TV operators in particular), it is also important to consider the interests of professional sports organisers in the sale of these rights.

The most volatile revenue streams for professional sport are sponsorship, ticket sales for live sporting events, the sale of media rights, and merchandising.[304] As a corollary to the skyrocketing prices paid for premium sports media rights, the revenues derived from their sale have become an important pillar of, in particular, football finance.

For instance, about half of the revenues of the Fédération Internationale de Football Association (FIFA) comes from the sale of media rights.[305] This income is made up primarily of revenue from the FIFA World Cup.

[302] Idem.
[303] Rights fees for 2010 and 2012 Olympic deals annualised. Idem.
[304] PriceWaterhouseCoopers, "Back on track? The outlook for the global sports market" (2010).
[305] See e.g. FIFA, "Financial Report 2012" (2013); "Financial Report 2011" (2012); "Financial Report 2010" (2011).

Source		2006 (period 2003-06)		2010 (period 2007-10)	
		Revenue	%	Revenue	%
Media rights		1.050,6	58	1.791,3	66
	Europe	475,3		958,9	
Marketing rights		451,8		797,4	
Hospitality		164,5		89,3	
Licensing		58,2		40,9	
Ticketing		19,6		-	
Other		63,9		-	
		1.808,6		2.718,9	

Figure 2.3 - Revenue sources FIFA World Cup in € m [306]

The Union of European Football Associations (UEFA) even derives around 70% of its revenue from the sale of the media rights to its events.[307] Media rights increasingly make up most of the revenue of the UEFA European Football Championship (EURO) and the UEFA Champions League.

Source	1996		2000		2004		2008		2012	
	Revenue	%	Revenue	%	Revenue	%	Revenue	%	Revenue	%
Media rights	53,3	36	93,3	41	560,0	65	801,6	59	837,2	60
Commercial rights	29,3		54,1		182,2		289,8		313,9	
Ticketing	64,7		82,5		81,5		100,6		136,1	
Hospitality	-		-		29,9		155,0		102,0	
Other	-		-		1,6		3,9		1,7	
	147,3		229,9		855,2		1.350,9		1.390,9	

Figure 2.4 - Revenue sources UEFA EURO in € m [308]

Source	2007-08		2008-09		2009-10		2010-11		2011-12	
	Revenue	%	Revenue	%	Revenue	%	Revenue	%	Revenue	%
Media rights	625,7	81	623,2	76	836,5	76	885,1	77	892,3	77
Commercial rights	149,8		195,9		260,6		259,9		260,9	
	775,5		819,1		1.097,1		1.145		1.153,2	

Figure 2.5 - Rights revenue UEFA Champions League in € m [309]

Also for the International Olympic Committee (IOC), the sale of media rights has become the main source of revenue. It represents half of the IOC's income.

Source	1993-96		1997-00		2001-04		2005-08		2009-12	
	Revenue	%	Revenue	%	Revenue	%	Revenue	%	Revenue	%
Media rights	1.251	48	1.845	49	2.232	53	2.570	47	3.850	48
Sponsorship	813	31	1.234	33	1.459	35	2.421	45	2.788	35
Ticketing	451	17	411	16	411	10	274	5	1.238	15
Merchandising	115	4	87	2	87	2	185	3	170	2
	2.630		3.770		4.189		5.450		8.046	

Figure 2.6 - IOC revenue sources for past five quadrenniums in USD m[310]

Turning to the national top football leagues, the picture becomes more diffuse. In 2012, the sale of domestic media rights contributed 40 to 48 % of the total revenue of the first division football clubs in Italy, France, the United Kingdom, and Spain. In comparison to these other major markets, the

[306] FIFA, "Financial Report 2010" (2011) (Euro figures converted from USD: 2010 average exchange rate used USD 1,34 = € 1); FIFA, "Financial Report 2006" (2007) (Euro figures converted from CHF: 2006 average exchange rate CHF 1,58 = € 1).
[307] See e.g. UEFA, "Financial Report 2011/12" (2013); "Financial Report 2010/2011" (2012); "Financial Report 2009/2010" (2011).
[308] UEFA, "Financial Report 2011/12" (2013).
[309] UEFA, "Financial Report 2011/12" (2013); "Financial Report 2010/2011" (2012); "Financial Report 2009/2010" (2011); "Financial Report 2008/09" (2010).
[310] IOC, "Olympic Marketing Fact File" (2014).

first division football league in Germany traditionally generates less revenue from media rights (23% in fiscal year 2012).[311]

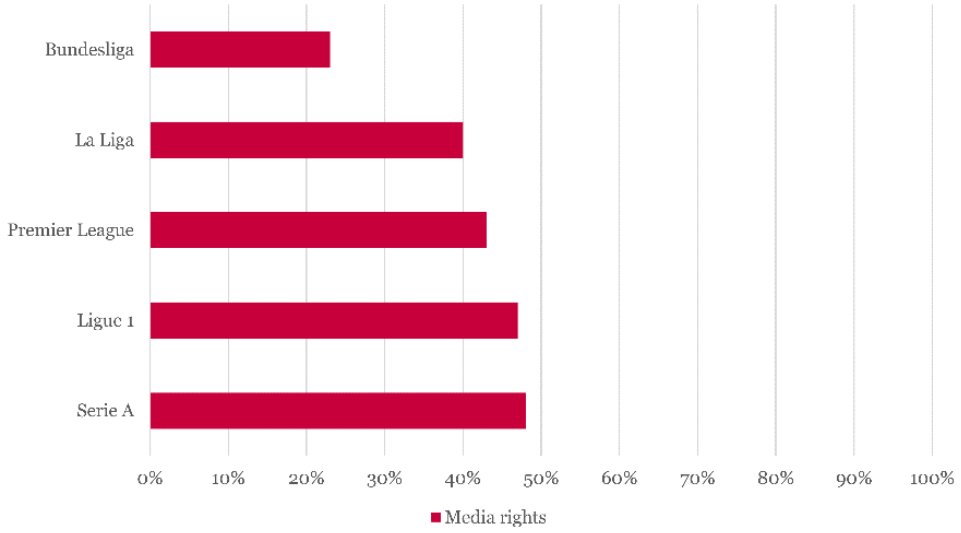

Figure 2.7 - Domestic media rights as percentage of total club revenue: top five football leagues in 2012 [312]

Even for the top five European football leagues, the great majority of the revenue from the sale of media rights is generated in the domestic market. Only the English Premier League has a considerable cross-border appeal.

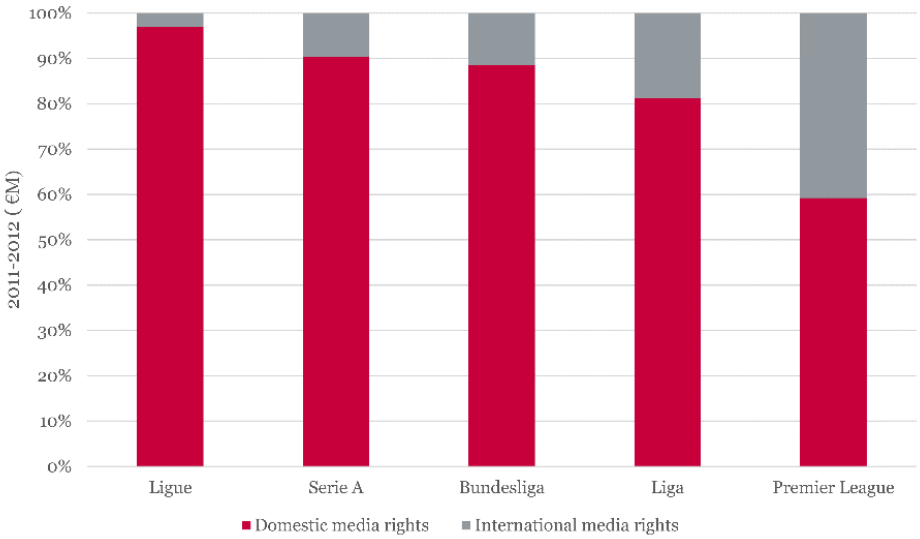

Figure 2.8 – International and domestic media rights revenue top five European football leagues (season 2011-12)[313]

On average, revenues from the domestic sale of media rights make up around one quarter of the income of top division football clubs competing in UEFA club competitions.[314] The figure below indicates the media rights income as percentage of total revenues of the top 20 highest earning football clubs in Europe for the season 2012-2013.

[311] UEFA, "Benchmarking report on the clubs qualified and licensed to compete in the UEFA competition season 2013/2014" (2013).
[312] Idem.
[313] Lega Serie A, "The economic exploitation of TV rights in Europe: principal models and conclusions from the comparison" (2011).
[314] UEFA, "Benchmarking report on the clubs qualified and licensed to compete in the UEFA competition season 2013/2014" (2013).

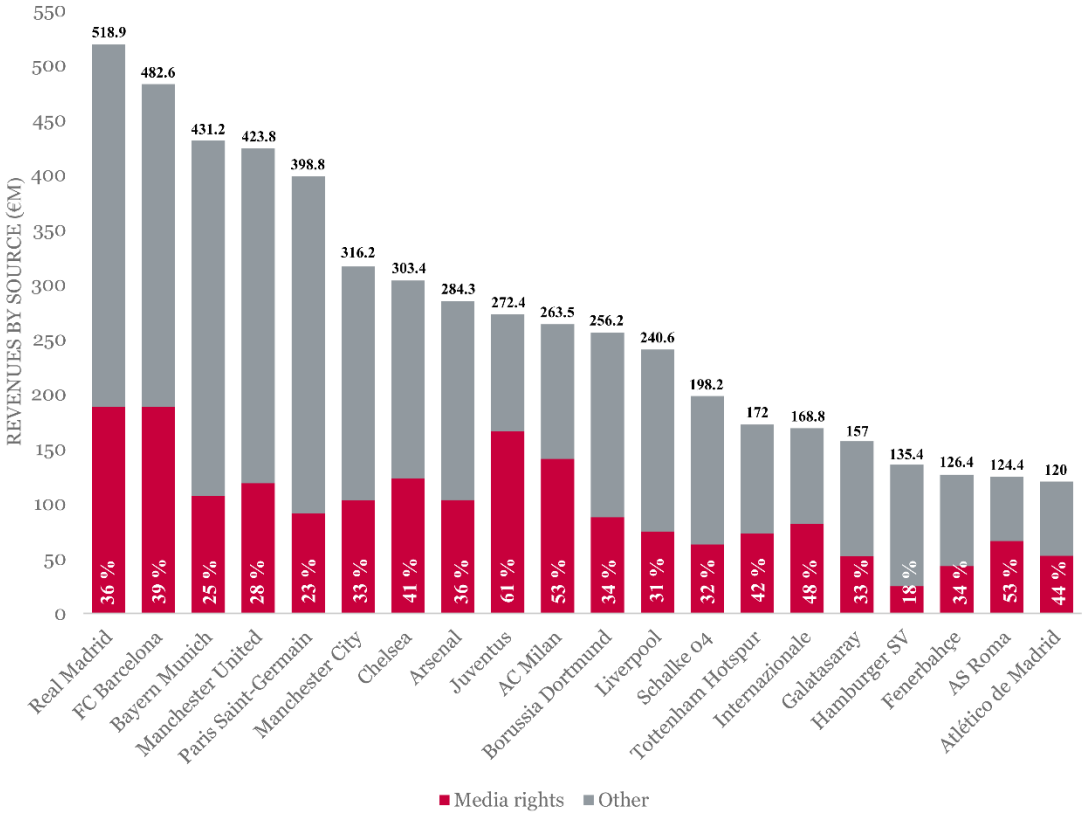

Figure 2.9 - Revenue by source of the top 20 highest earning clubs (season 2012-13)[315]

It follows that in smaller leagues, which are less attractive for media content providers and advertisers, football clubs have to do with much more modest media revenues (10% or less).

Apart from only a handful of "tier-one" sports events, including top division football and a few other sports events depending on national taste, most professional sports struggle to attract significant revenue from selling their media rights.

It should be noted, however, that media coverage is also important as an indirect driver of other revenue streams for professional sport. Media coverage raises a sports' profile, increases the value of sponsorship deals, and has significant potential in attracting new supporters and driving up stadium attendance.

In response to reduced financial offers from media content operators, various "second-tier" rights holders have been experimenting with exploiting their media rights through their own website or other online platforms, such as YouTube. The advent of new media services coupled with the increased availability of broadband enables sports organisers to become over-the-top content providers themselves and reach consumers directly, thus bypassing traditional media and service providers. This creates unique opportunities for niche sports to gain media exposure for fans, their brand, and their sponsors.[316] Examples include:

- In 2014, Spain's professional football league association (Liga de Fútbol Professional) launched La Liga TV, a free online channel that streams live matches of the second division without geographical restrictions.[317]

[315] Deloitte, "Football Money League" (2014).
[316] For examples see Section 2.3.4.
[317] http://www.laligatv.es.

- The Sports Hub is a multi-sports video platform developed by SportAccord, the umbrella organisation for international sports federations and organisers of sports events, in collaboration with YouTube. It features a series of sub-channels organised by sport and discipline. Each SportAccord member may build a tailored video channel with a customised look. Various Olympic sports, many of which do not enjoy extensive television coverage outside the Olympic Games (such as boxing, cycling, fencing, judo, swimming, table tennis, and wrestling) provide live and deferred coverage on their events, interviews, behind-the-scenes footage, educational material, etc.[318]
- The European Handball Federation (EHF) offered full coverage of the European Handball Championship 2014 live and on-demand via its official YouTube channel and via a special mobile app.[319]
- To broaden its media exposure for its men's and women's championships, the French Volleyball League agreed a digital media rights deal with the video streaming website Dailymotion. Since 2012, matches of the championships can be streamed online.[320]

In addition, an increasing number of "second-tier" sports license their live digital rights to online sports betting operators, who stream such events on their websites to promote their live betting services. In the context of the expert workshop on "The marketing and sale of sports rights", participants highlighted that such arrangements are beneficial to both parties as they ensure widespread distribution and an alternative revenue stream for sports organisers.

2.3 The licensing of premium sports media rights: supply-side dynamics

While enhanced competition between traditional media content providers and new players operating over the Internet significantly reduced access to transmission facilities as an entry barrier in the media sector,[321] access to premium content emerged as a new major bottleneck. This bottleneck is most acute for premium content that is time critical, demanded by mass audiences, and for which there are no substitutes.[322] As discussed, premium sports content fits all of these criteria.

In particular as a result of scarcity mixed with exclusivity, the upstream markets for the acquisition of premium sports media rights and the downstream markets for the provision of sports media services by retail operators suffer from serious market failures. The rights holder of "tier one" sports events have experienced an inexorable rise in the value of their media rights, which are primarily acquired by media content operators with great spending power.[323] It follows that few powerful

[318] http://www.youtube.com/thesportshubchannel.
[319] EHF, "Full coverage of EHF EURO 2014 live and on-demand available worldwide" (News Report), 10 January 2014.
[320] http://www.lnv.fr/99/tv/le-volley-sur-dailymotion.html.
[321] OECD, Background Note to Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)2, 16-18. See also e.g. European Commission, Explanatory Note accompanying the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, SEC(2007) 1483/2, 48 (observing that in the majority of Member States access to transmission facilities no longer constitutes a significant barrier to entry to the wholesale market for broadcasting transmission services to deliver broadcast content to end users).
[322] See e.g. OECD, Background Note to Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)2, 17; Pablo Ibanez Colomo, "On the application of competition law as regulation: elements for a theory" (2010) 29 Yearbook of European Law (1) 261; Damien Geradin, "Access to Content by New Media Platforms: a review of the competition problems" (2005) 30 European Law Review (1) 68.
[323] While maximizing the value of their media rights is the single most important factor for the rights holders, it must be stressed that other factors are also important. For instance, securing broad reach and exposure can be a major factor for sports that are e.g. heavily reliant on sponsorship (such as Formula One). Rights holders may also value a strong fit with the brand and production values of a particular media content operator. MTM London, The BBC's process for the management of sports rights: review presented to the BBC Trust's Finance and Compliance Committee (2011) 12; Chris Gratton and Harry Arne Solberg, *The economics of sports broadcasting* (Routledge, Abingdon 2007) 99-100; Ofcom, "Summary of UK sports rights" (Annex 10 to pay TV market investigation consultation) (2007) 8.

players characterize both the supply and demand structure for premium sports media rights. Unsurprisingly, the inherent risk of market foreclosure has attracted much attention from competition authorities over the past 15 years.

Before considering the competition issues that result from these market features, this section will succinctly describe the main characteristics of the way in which the holders of premium sports media rights license their content in a multi-platform world.

2.3.1 Joint versus individual selling

Today joint selling is the standard way of marketing sports media rights. The practice of joint selling refers to arrangements by which clubs entrust the selling of their media rights to their national or international sports association, which then collectively sells the rights on their behalf.

Since Italy reintroduced the system of joint selling in 2010, Cyprus, Portugal, and Spain are now the last EU markets in which first division football clubs sell their rights individually. The Spanish legislator, however, is currently drafting a new law that will establish a centralized sales model.[324] Also for other sports, the individual sale of media rights is exceptional.

Even in the context of joint selling, individual clubs will often retain the possibility to either self-exploit or individually market certain secondary rights and/or rights that the joint selling entity was unable to sell.

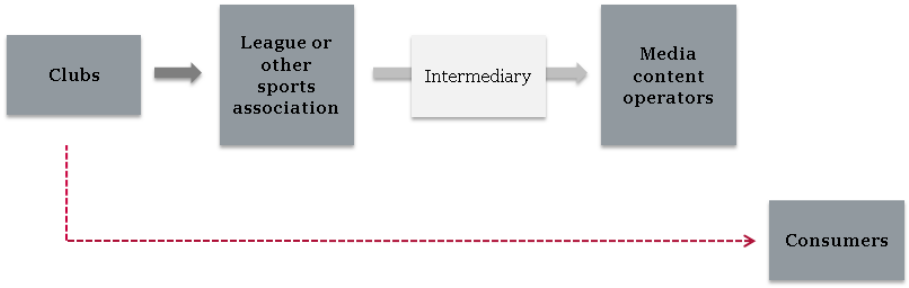

Figure 2.10 – The joint selling model for sports media rights

2.3.2 The use of intermediaries

In the upstream market for the acquisition of sports media rights, sports organisers sell their media rights either (1) directly to licensees or (2) via an intermediary who sells the rights on their behalf (i.e. sports rights agencies such as IMG Media, Lagardère Unlimited, Infront Sports & Media, MP & Silva, and CAA Eleven).

Sports organisers with highly valuable media rights often use a combination of the two models. For example, a sports organiser may prefer to deal directly with media content operators in certain markets (e.g. the domestic market or Europe), but work in partnership with sports rights agencies for other international markets where they can benefit from the agency's deeper market knowledge and contacts. The agency then charges a commission for each licensing agreement, e.g. based on income brought in above a certain minimum guarantee. The two different sales models can also co-

[324] See Section 2.4.4.

exist within one territory. It is common, for instance, that live digital rights are marketed to both domestic and foreign online sports betting operators through a specialist intermediary (such as PERFORM).

Alternatively, rights agencies can also compete with media content providers and acquire the rights for certain territories in bundle. The agency will then try to make a profit by reselling the rights market by market. The disadvantage of the latter approach is that the sports organiser loses control over which retail operator ends up acquiring the rights.[325]

2.3.3 Exclusivity

Exclusivity is typically a core feature of sports media rights licensing agreements. Both sports organisers and licensees have strong commercial incentives to contract with each other on an exclusive basis. It was already pointed out that content media providers seek to acquire premium content that enables them to differentiate their offerings from that of their rivals. Since exclusive content strengthens their position to compete for audience shares and advertisers, exclusive selling increases media content providers' willingness to pay. Also the sports organisers will typically prefer to sell rights on an exclusive basis given that they seek to attract maximum rent for their content.[326]

A distinction can be made between three different types of exclusivity: territorial, temporal, and platform exclusivity.[327]

2.3.3.1 Territorial exclusivity

Under current market practice, sports media rights are licensed on an exclusive territorial basis. This is the most common form of exclusivity contained in sports media rights contracts. It means that the licensee acquires the exclusive right to exploit the media rights in a given territory (i.e. most commonly a Member State).[328] Territorial exclusivity not only increases the value that media content operators active in the territory place on the rights. It also enables sports organisers to maximise return on investment by selling them in different territories.
To ensure territorial exclusivity, sports media rights are sold on the condition that the licensee eliminates the possibility of reception and viewing of its transmission outside the (national) territory.

A licensing agreement typically requires the licensee to ensure that: (1) its transmissions on a pay and/or pay-per-view basis and by satellite are encrypted; (2) its digital and analogue terrestrial transmissions do not overspill outside the territory other than as a natural consequence of using terrestrial transmission systems; and (3) its transmissions via the Internet are geo-blocked in accordance with the highest reasonable industry standards.[329]

---

[325] As emerged from the expert workshops discussions.
[326] OECD, Background Note to Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)2, 29.
[327] RBB Economics and Value Partners, "The benefits of territorial exclusivity in the European audio-visual industry" (2009).
[328] There are a few notable exceptions, however. In the Nordic countries, pan-Scandinavian broadcasters usually sell and exploit media rights at a regional basis, i.e. in more than one national territory.
[329] Based on the "Invitation to Tender" of various national and European football media rights.

2.3.3.2 Temporal exclusivity

A licensee can also be granted the exclusive right to exploit the media rights for a predefined amount of time. Typically time restrictions are imposed for certain (deferred) media rights to guarantee the first run exclusivity of more valuable live rights.

2.3.3.3 Platform exclusivity

Lastly, a licensee can be granted the exclusive right to exploit the media rights on a given distribution platform. This means that the rights holder slices and dices up the rights and sells them separately to different retail platforms.

Traditionally, media content providers delivered their services via one particular platform, e.g. analogue TV, digital terrestrial TV (DTT), cable TV or satellite TV. As a result of technological developments, however, these services are increasingly migrating towards distribution platforms that are hybrids of traditional broadcasting and Internet (i.e. delivering services via Internet Protocol TV (IPTV) or the open Internet). While perhaps not (yet) providing a substitute for traditional broadcasting, particularly in sparsely populated areas, Internet connectivity has been changing the way in which many consumers access content. In addition to TV sets, second devices are increasingly being used to follow sport.[330]

In response to these developments, a new trend is to market premium sports media rights on a platform-neutral basis with rights packages carved out by time windows (e.g. live, near-live or deferred, highlights, and clip rights). The licensee that, for instance, acquires the live rights to certain matches will thus benefit from exclusivity across all media platforms, including e.g. TV, Internet, and mobile, throughout the period of the live match.

Yet this does not imply that platform exclusivity is disappearing altogether. Various secondary rights will still be carved out from the traditional media rights for particular distribution platforms, such as highlights and clips rights. Other carved out "ancillary" rights are generally sold on a non-exclusive basis (e.g. live digital rights for online sports betting operators, archive rights, in-flight rights, and DVD rights).

2.3.4 Self-exploitation of media rights

As long as traditional (pay TV) broadcasting continues to generate the lion's share of income from sports media rights, the strategy of exclusive licensing is likely to remain standard practice.[331] Nonetheless, some rights holders have started to explore different strategies.

One alternative business model for sports organisers is to self-exploit their media rights on a dedicated sports channel, which is then distributed by multiple platform operators. Inspiration for this model can be found particularly in the US. Following the NBA's lead (1999), other major sports leagues launched their own 24-hour cable TV channels: the NFL network (2003), the NHL network

[330] According to PERFORM's Global Sports Media Consumption Report 2013, there has been a continued growth in the consumption of sport via Internet-connected mobile devices. The study finds that the following percentages of sports fans consume sports online: 48% in France, 55% in Germany, 60% in Italy, 69% in Spain, and 61% in the United Kingdom. PERFORM, Kantar Media Sport, and TV Sports Markets, "Global Sports Media Consumption Report 2013: a study of sports media consumption and preferences in 14 international markets" (2013).

[331] As emerged from the expert workshops discussions.

(2007), and the MLB network (2009). In recent years, some sports organisers in Europe have taken similar initiatives and now exploit the majority of their media rights on their own channel:

- In 2008, the Dutch Premier Football League (Eredivisie) decided to set up its own branded pay TV channel, Eredivisie Live, after failing to attract satisfactory bids for its media rights. For this purpose, the joint venture Eredivisie Media & Marketing C.V. (EMM) was established between the Eredivisie clubs, joined in a private limited partnership, and the Dutch TV production company Endemol.[332] The Eredivisie Live channels are not exclusively tied to one or two particular broadcasters. EMM agrees distribution deals with all interested platforms (including cable, satellite, terrestrial, and IPTV platforms), giving control of price to the platforms to market the Eredivisie Live product. This innovative non-exclusive distribution model is based on royalties paid by the platforms for each subscriber. After Fox International Channels, a broadcast subsidiary of News Corporation, acquired a majority stake in EMM in 2012,[333] the Eredivisie Live channels have been rebranded as Fox Sports Eredivisie.
- The Portuguese football club Benfica has employed a similar strategy. The club decided not to renew its licensing agreement with rights agency Olivedesportos beyond the 2012-13 season, but to retain them for its own club channel. Benfica TV, which is available through various distribution platforms, was relaunched as a premium pay TV channel in July 2013. The channel shows exclusive coverage of the matches played by Benfica in the Portuguese football league. After acquiring the live media rights to the English Premier League and the top division Brazilian and Greek football leagues, a second channel (Benfica TV2) was launched in October 2013.[334]
- The Polish Football League (Ekstraklasa) recently announced that it also plans to launch its own pay TV channel.[335]

While a competitive multimedia landscape may accelerate direct-to-consumer retail models in the coming years, it should be stressed that such a move is not without risks. Contrary to the exclusive licensing model, sports organisers have less financial guarantees when exploiting their most valuable rights themselves. They must also consider increased transaction costs. The rights holder needs to manage a complex network of relationships with distributors and consumers and must invest considerable resources in infrastructure and staffing. Only very few sports organisers attract sufficient interest to sustain this model.[336]

Numerous other sports organisers have more modestly experimented with self-exploiting their secondary media rights on a variety of platforms. This also includes pay TV channels devoted to certain clubs, such as Chelsea TV, Real Madrid TV or MUTV, the official channel of Manchester United. Rather than a substitute, the transmitted content is complementary to the traditional media rights, which are still being licensed to media content operators, and would only appeal to fans (e.g. exclusive documentaries and interviews, match replays and highlights, match commentary, news bulletins, and footage of trainings). In recent years, however, it has become more common to offer this type of services via online platforms. With the aid of increased

---

[332] In 2010, the Dutch Football Federation (KNVB) also took share in EMM.

[333] Fox agreed to pay € 1,02 billion over a period of twelve years encompassing the 2013-2014 to the 2024-2025 seasons and to underwrite the € 60 million of debt attached to Eredivisie Live. For more details see Ben Van Rompuy, "Cunning as a Fox. Dutch competition authority clears long-term acquisition of Dutch football broadcasting rights" (2013) 34 European Competition Law Review (1) 223.

[334] Sportsbusiness, "Benfica set to launch second television channel", 28 August 2013, http://www.sportbusiness.com/tv-sports-markets/benfica-set-launch-second-television-channel.

[335] Sportbusiness, "Ekstraklasa considers television channel launch", 12 December 2013, http://www.sportbusiness.com/tv-sports-markets/ekstraklasa-considers-television-channel-launch.

[336] Tom Evens, Petros Iosifidis, and Paul Smith, *The Political Economy of Television Sports Rights* (Palgrave, Macmillan 2013) 36-45; Johan Lindholm and Anastasios Kaburakis, "Case C-403/08 and C-429/08 FA Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd, 4 Oct 2011" in Jack Anderson (ed.) *Leading Cases in Sports Law* (T.M.C. Asser Press, The Hague 2013) 281.

availability of broadband, rights holders can bypass traditional media and service providers and become over-the-top content providers themselves. For example, in 2013, the European Tour launched a free online TV channel "European Tour TV", which streams video on demand highlights from the elite golf tournaments European Tour and The Ryder Cup.[337] Also in 2013, the German Football League (DFL) launched an official international YouTube channel with clips (e.g. five best goals from each match day, highlights, previews, interviews, and archive content) adapted for fans in different countries.[338]

Increasingly, rights holders also use online platforms to exploit their media rights in territories where no media content provider was willing to acquire them. This fall back option makes sure that access to their content is available to those that wish to access it.

2.4 The joint selling of sports media rights and EU competition law

It was only towards the end of the 1990s that there emerged a need for the European Commission to examine practices in the sale of sports media rights under the EU competition rules, many of which were not considered contentious in the past.[339] By 2002, the Commission had received around 80 complaints against national and international sports organisers alleging restrictions of competition. The complaints related primarily to the practice of joint selling of sports media rights and the duration and extent of exclusivity granted in respect of those rights.

The common practice at that time was for sports organisers to sell the broadcasting rights in one bundle exclusively to a single broadcaster (in each country). Licensing agreements were concluded for a long period (five years or more). Moreover, in an attempt to maximise revenues, only the rights to a selection of the games played were marketed.

In three decisions the Commission established the conditions under which it considered the joint selling of sports media rights permissible under Article 101 TFEU, namely *Joint selling of the commercial rights of the UEFA Champions League* (*UEFA Champions League*) (2003),[340] *Joint selling of the media rights to the German Bundesliga* (*DFB*) (2005),[341] and *Joint selling of the media rights to the FA Premier League* (*FAPL*) (2006).[342] These decisions were intended to provide guidance for the future application of EU competition law in this area.

To illustrate the major importance of the Commission's decisional practice, Section 2.4.1 will briefly discuss how the National Competition Authorities (NCAs) and national courts addressed joint selling arrangements under their national competition laws prior to the Commission's *UEFA Champions League* decision. Section 2.4.2 will then give a brief overview of the principles set out by the Commission. All EU competition law cases concerning the joint selling of sports media rights, subsequent to the Commission's three precedents, have been dealt with at the national level. Section 2.4.3 will discuss how closely the NCAs of the Member States have adhered to the policy set out by the Commission.

---

337 European Tour, "European Tour TV launches", 24 May 2013, http://www.europeantour.com/europeantour/season=2013/tournamentid=2013038/news/newsid=193330.html.
338 DFL, "Bundesliga stars come even closer to fans around the world", 26 September 2013, http://www.bundesliga.com/en/liga/news/2013/0000271025.php. The channel is available at www.youtube.com/bundesliga.
339 European Commission, "Broadcasting of Sports Events and Competition Law: An orientation document from the Commission's services" (1998) Competition Policy Newsletter (2) 18.
340 *Joint selling of the commercial rights of the UEFA Champions League* (Case COMP/37.398) Commission decision 2003/778/EC (2003) OJ L 291/25.
341 *Joint selling of the media rights to the German Bundesliga* (Case COMP/37.214) Commitment decision (2005).
342 *Joint selling of the media rights to the FA Premier League* (Case COMP/38.137) Commitment decision (2006).

2.4.1 Early national enforcement practice: the financial solidarity conundrum (before 2003)

Prior to the Commission's *UEFA Champions League* decision, four Member States (Germany, Italy, the Netherlands, and the United Kingdom) had already initiated actions regarding the joint selling of football media rights on the basis of their national competition rules. In all cases, the NCAs found that the joint selling arrangements were anti-competitive.

To justify their joint selling arrangements, the sports organisers in question argued that such a system encourages financial solidarity among the clubs and thus helps to promote and maintain competitive balance. If the clubs were to sell their media rights on an individual basis, this would have severe adverse consequences for the distribution of income between clubs. Subsequently, the sports organisers argued, smaller clubs might fold entirely.

The question whether the financial solidarity argument could be accepted as a valid legal defence against the prohibition of restrictive agreements proved to be a controversial one.

In 1997, the German Federal Supreme Court (*Bundesgerichtshof*) upheld the decision of the NCA prohibiting the collective sale of the broadcasting rights to the home matches of German clubs participating in European competitions.[343] From the 1989-1990 season onwards, the German Football Federation had decided to market these rights centrally. The Federal Supreme Court agreed with the NCA's conclusion that this marketing practice restricted competition among the clubs (as original rights owners for the games they are hosting) without justification and thus violated German competition law. Although the Federal Supreme Court acknowledged the need to maintain competitive balance within a professional sports league, it concluded that this is essentially a political aim that cannot justify the identified restriction of competition (in particular because it would be achieved at the consumers' expense). In response to the judgment, the German Federal Parliament passed an amendment to the competition law in May 1998, exempting the central marketing of television broadcasting rights by sports associations from the prohibition of restrictive practices.[344] Hence, a political solution was found to preserve the joint selling arrangement of the league.

In the United Kingdom, the NCA referred three agreements[345] concerning the commercialization of the broadcasting rights to the Premier League to the Restrictive Practices Court in 1996. The NCA requested the court to assess whether various restrictive provisions contained in the agreements were reasonable with regard to the balance between benefits and detriments. According to the NCA, the restrictions were contrary to the public interest because they resulted in a restriction in supply and unduly distorted competition among broadcasters. The court, however, ruled that the restrictions were not unreasonable since their removal would deny the public specific and substantial benefits flowing from the agreements. Although it only had the choice between either approving or striking down a restriction completely, the court acknowledged *inter alia* that the clubs would suffer a significant diminution in their income and that the Premier League's ability to maintain and improve competitive balance in the league would be lost or seriously diminished.[346]

---

[343] Bundesgerichthof, Beschl. v. 11.12.1997, KVR 7/96 – BGHZ 137, 297 (Europapokalheimspiele).

[344] German Law against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen), Section 31, provided that the prohibition of anti-competitive agreements *"does not apply to the central marketing of rights to television broadcasting of sports competitions organised according to bye-laws, by sports associations which, in the performance of their socio-political responsibilities, are committed also to promoting youth and amateur sports activities and which fulfil this commitment by allocating an adequate share of the income from the central marketing of these television rights"*. In 2005 this exemption was removed.

[345] I.e. the Premier League rules restricting the clubs' ability to sell the rights to their matches and two exclusive contracts between the Premier League and Sky (to broadcast a number of live matches) and the BBC (to broadcast a highlights programme).

[346] Restrictive Practices Court, Televising Premier League Football Matches, 28 July 1999 [2000] EMLR 78.

In 1997, the Minister of Economic Affairs granted a temporary exemption to the Dutch Football Association (KNVB) for the regulations introducing the joint sale of the highlights rights for the first and second division football championships. Even though the NCA opposed the plan to authorize an exemption, the Minister regarded the joint selling arrangement as being in the general interest.[347] After the new Dutch competition law came into force in 1998, the KNVB formally notified a new joint selling arrangement for the live broadcasting rights of the first division football league to the NCA. The NCA issued its decision in 2002. While acknowledging the need for the collective exploitation of the highlights rights, the NCA concluded that the joint selling arrangement for the live rights was incompatible with national competition law. The NCA was not convinced that there is a necessary connection between joint selling and the redistribution of income.[348]

Lastly, the Italian NCA issued a decision finding that the joint selling of the broadcasting rights for the first and second division championships (Serie A and Serie B) by the Italian football league infringed Italian competition law in 1999. The NCA recognized the relevance of a redistribution mechanism (enabling the maintenance of competitive balance), but pointed out, in line with the Dutch NCA's reasoning, that there was no necessary correlation between joint selling and redistribution. As a result, the league amended its regulations and the Serie A and Serie B broadcasting rights for the 1999-2000 season were sold by the clubs individually. Only for the direct elimination rounds of the annual Italian football cup (Coppa Italia), the NCA was willing to accept a joint selling arrangement.[349]

It is clear that the NCAs and national courts, apart from the UK Restrictive Practices Court, were sceptical about the necessary link between the joint selling of football media rights and revenue distribution. They did not consider financial solidarity as a pro-competitive benefit capable of off-setting the identified restrictive effects. While the NCAs uniformly spoke out against the joint selling of football media rights, in three Member States their decisions were either overruled by national courts or circumvented through legislative action. This created uncertainties regarding the circumstances under which joint selling could be considered compatible with EU and national competition law.

2.4.2 The European Commission's decisional practice (2003 - 2006)

In the *UEFA Champions League* decision, the European Commission for the first time assessed the compatibility of the joint selling of premium sports media rights with Article 101 TFEU.[350] The Commission made clear that this decision *"sets out the basic principles, which we intend to follow in similar situations in the sports rights area"*.[351] In two subsequent cases, namely the *DFB* and *FAPL* cases, the Commission raised similar competition concerns and imposed similar remedies to address these concerns.

As this decisional practice is well-documented,[352] it is sufficient to briefly describe the main principles laid down by the Commission.

---

[347] Beslissing inzake ontheffingsaanvraag KNVB, 22 December 1997, Staatscourant 1997 nr. 247/68.
[348] NMa (Dutch Competition Authority) Eredivisie N.V. – wijze van exploitatie van live uitzendrechten van eredivisie-voetbalwedstrijden (Joined cases 18/105 and 1162/14) Decision of 19 November 2002.
[349] Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) Annual Report 1999, 24-25.
[350] *Joint selling of the commercial rights of the UEFA Champions League* (Case COMP/37.398) Commission decision 2003/778/EC (2003) OJ L 291/25.
[351] See e.g. Herbert Ungerer, "Commercialising sport: Understanding the TV Rights debate", address given at FKG Sports Consulting, Brussels, 2 October 2003; Mario Monti, "Sport and Competition", address given at a Commission-organized conference on sports, Brussels, 17 April 2000; Jean-François Pons, "Sport and European Competition Policy", address given at the Twenty-sixth Annual Conference on International Antitrust Law & Policy, New York, 14-15 October 1999.
[352] See European Commission, The EU and Sport (Commission staff working document accompanying the White Paper on Sport) (2007) SEC(2007) 935. For an in-depth analysis of the decisions, see e.g. Ben Van Rompuy, *Economic efficiency: The Sole Concern*

In all three decisions, the European Commission found that joint selling agreements are caught by the prohibition of Article 101(1) TFEU as they lead to competition restrictions that would unlikely have occurred in the absence of the agreements.

First, joint selling agreements prevent clubs from individually competing in the sale of their media rights. This can lead to market foreclosure. If all media rights are sold on an exclusive basis to one single purchaser, for a long duration, competitors in the downstream market and neighbouring markets are shut out from accessing this key content. Second, joint selling leads to uniform prices. This constitutes price-fixing. The joint selling body also determines other trading conditions under which the media rights are sold: the mode and conditions of coverage are fixed by a uniform contract covering sometimes hundreds of matches. Third, joint selling can lead to output restrictions when certain parts of the jointly acquired rights are withheld from the market. This may restrict competition and lead to consumer harm.

The Commission, however, recognized that joint selling agreements may create substantial efficiency gains as a result of which Article 101(3) TFEU may be invoked as a legal defence. It identified three main benefits:

- the creation of a single point of sale (which creates efficiencies by reducing transaction costs for sports organisers and media content operators);
- branding of the output (which creates efficiencies as it helps media products receive wider recognition and distribution);
- the creation of a league product that is focused on the competition as a whole rather than the individual football clubs participating in the competition.

To ensure that the pro-competitive efficiency benefits outweigh the anti-competitive effects of joint selling agreements, the Commission has sought to remedy the identified competition concerns by imposing a list of behavioural remedies. The table below summarises the main competition issues identified in the three cases and the types of remedies that were imposed to address them.

Competition concern	Remedy	UEFA	DFB	FAPL
Risk of foreclosure effects in downstream markets	Non-discriminatory and transparent tendering procedure	X	X	X
	Independent monitoring trustee overseeing tender process			X
	No conditional bidding			X
Risk of market foreclosure effects in downstream markets as a result of exclusivity and bundling of media rights.	Limitation of scope of exclusive contracts:			
	- a reasonable amount of different rights packages	X	X	X
	- no combination of large and small packages			X
	- earmarked packages for special markets/platforms (new media rights)	X	X	X
	Limitation of duration of exclusive contracts: max. three football seasons	X	X	X
Risk of output restrictions	Fall-back option to clubs for unsold or unused rights	X	X	X
	Parallel exploitation of less valuable rights by clubs	X		
Risk of monopolisation	"No single buyer" obligation			X

Figure 2.11 – Remedies imposed in *UEFA Champions League* (2003), *DFB* (2005), and *FAPL* (2006)

of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU (Wolters Kluwer Law & Business, Alphen aan den Rijn 2012).

2.4.3 The national decisional practice (2004 - 2014)

After the three Commission precedents, NCAs and national courts have adopted a substantial number of decisions on the joint selling of sports (football) media rights (approximately 30 between 2004 and 2010).[353]

Before the reform of the enforcement system in 2004, EU antitrust enforcement (i.e. enforcement of Articles 101 and 102 TFEU) was highly centralized within the hands of the European Commission. Firms had to notify all agreements falling within the scope of Article 101 TFEU (ex Article 81 EC) to the Commission, which had the sole competence to deliver an exemption on the basis of Article 101(3) TFEU (ex Article 81(3) EC). Since May 2004, NCAs and national courts are empowered to apply Articles 101 and 102 TFEU fully.[354] Both the European Commission's exemption monopoly and the former system of notification and authorization have been abolished. Undertakings now themselves must assess whether their agreements satisfy the exemption criteria of Article 101(3) TFEU. Investigations are initiated *ex officio* or upon complaint. Within this new enforcement system, the NCAs and the Commission form an integrated network of agencies, namely the European Competition Network (ECN). The Commission, however, maintains a key role to both the enforcement of the EU antitrust rules and the formulation of antitrust enforcement norms. It monitors the action of the NCAs and retains the possibility to intervene in cases dealt with at the national level. Moreover, the NCAs and national courts cannot take decisions that run counter to decisions adopted by the Commission.[355]

As a result of this procedural modernization, EU antitrust enforcement has largely shifted to the national level.
The following overview of national decisional practice will reveal that for the most part, NCAs and national courts have replicated the remedy package designed in the Commission's *UEFA Champions League*, *DFB*, and *FAPL* decisions. Yet some remarkable divergences and trends can be observed. To highlight these developments, the overview of the decisional practice in this section is structured around the list of remedies developed by the European Commission.

At the outset, some general observations can be made:

- Almost all of the national decisional practice concerns the joint selling of football media rights. This is perhaps unsurprising as these are by far the most valuable sports media rights in the EU.[356]
- Almost all cases examined joint selling arrangements under Article 101 TFEU. Only in a few instances, both Article 101 and 102 TFEU were applied or the issue was addressed within the context of a merger case.
- Most of the national competition cases concerning the joint selling of sports media rights have been resolved by making binding commitments offered by the parties. In the context of a commitment decision procedure, competition authorities can swiftly resolve a case without formally establishing that there has been an infringement of the competition rules. Instead, the competition authority will conclude that there are no longer grounds for action (because the commitments fully address the competition concerns). This means that the competition authority is not obliged to conduct an as complete factual and economic assessment as in the context of infringement decisions.[357] Accordingly, commitment decisions usually offer limited

[353] European Commission, Contribution to OECD Global Forum on Competition: "Competition issues in television and broadcasting" (2013) DAF/COMP/GF/WD(2013)52, para 6.
[354] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.
[355] Idem, Article 16.
[356] See Section 2.2.
[357] This is also true for the commitment decision procedure at the EU level.

insights into the competition law assessment: the NCA merely concludes that, in light of the commitments offered, there no longer is ground for action. It follows that the depth of analysis of these cases is necessarily limited.

- In some Member States, the conditions under which joint selling of sports media rights is permissible under the (EU) competition rules were codified in legislation. In France, Hungary, and Italy sports legislation now prescribes in much detail the mechanism for the marketing of sports media rights. In Bulgaria[358] and Greece[359] the sports law stipulates that sports organisers own the media rights to the events they organize, thus legitimizing the joint selling of these rights, but without laying down conditions for the sales process.
- In 13 Member States there has been no decisional practice to date (i.e. Austria, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Slovakia, and Slovenia).

2.4.3.1 Non-discriminatory and transparent tendering

In order to reduce foreclosure effects in the downstream markets, the European Commission required in *UEFA Champions League*, *DFB*, and *FAPL* that the media rights be sold by means of a non-discriminatory and transparent public tender procedure. This should ensure that all qualified broadcasters have an equal opportunity to bid for the rights in the full knowledge of the key terms and conditions that the licensee must satisfy.

As the examples below illustrate, ensuring compliance with this remedy has represented challenges in practice.

Objective evaluation criteria

Recurring problems in connection to the criteria used to evaluate the bids highlight difficulties in controlling a transparent and competitive bidding process. In some cases, media rights agreements contain preferential renewal clauses, often called "English clauses", pursuant to which the incumbent buyer is given the opportunity to match the highest bid received from other parties. Because such clauses increase transparency in the market and discourage competitors from making aggressive offers, they are generally considered to be anti-competitive. In the *FAPL* decision, for instance, the Commission told the parties that Sky's right to match the financial term of the highest bid from any third party was not acceptable.[360]

In a 2005 decision on the joint selling of the broadcasting rights of games of the first division football competition (Jupiler Pro League) for the seasons 2005-2008, the Belgian NCA stressed that preferential renewal clauses, matching rights or pre-emptive rights cannot be accepted.[361] According to the existing rights agreement for the seasons 2002-2003 to 2004-2005, the licensees would be entitled to a preferential negotiation period for the next rights cycle. The Belgian Professional Football Association decided not to make use of this preferential treatment in the contested auction process. The NCA nonetheless pointed out that options or pre-emptive rights as

[358] Physical Education and Sports Act, Article 19(1).
[359] Law 2725/1999, Art. 84.
[360] Alexander Schaub, "Sport and competition: broadcasting rights of sports events", address given at Jornada dia de la competencia, Madrid, 26 February 2002.
[361] Council of Competition (Belgian Competition Authority) The selling by the Liga Beroepsvoetbal (LBV) of the broadcasting rights of games of the national football competition for the seasons 2005-2006, 2006-2007, and 2007-2008 (Joined Cases MEDE-I/O-05/0025 and MEDE-P/K-05/0036) Decision No. 2005-I/0-40 of 29 July 2005, para 35. Upheld by Court of Appeal of Brussels, 28 June 2006, *Telenet N.V. v. Liga Beroepsvoetbal V.Z.W.*, Case No. 2005/MR/2 and *BeTV N.V. v. Liga Beroepsvoetbal V.Z.W.*, Case No. 2005/MR/5.

an indirect means to extend the duration of exclusive contracts are incompatible with EU competition law.

Up until 2004, the Cyprus Football Federation (CFF) sold all the broadcasting rights to the first division football competition (Cypriot Championship First Division) exclusively to one dominant broadcaster (Lumiere TV). Following a complaint filed by broadcaster Antenna, the Cypriot NCA examined the CFF's joint selling arrangement and its preferential agreement with Lumiere TV, but concluded that the national competition rules were not violated due to the lack of interest shown by other interested parties at the time the agreements were adopted. Now that competitors had demonstrated interest, however, the NCA decided that in order for the CFF to continue to collectively sell the rights it should secure an exemption from the prohibition of restrictive agreements.[362] Subsequently, the CFF notified its joint selling arrangement and a new agreement with Lumiere TV that aimed to continue their co-operation. In September 2004, the NCA exempted the agreements on *inter alia* the condition that the CFF in the future would market the broadcasting rights through a public tender procedure.[363] Although the Supreme Court eventually annulled the decision,[364] the market entry of new broadcasters accelerated the implementation of the changes anticipated by the decision.

In December 2006, the Danish Football Association (DBU) and the Danish League Association (DIV) announced that their existing contract with commercial broadcaster Viasat (owned by Modern Times Group (MTG)), which would expire at the end of June 2009, would be extended until 2013. Pursuant to clauses that ensured the right to exclusive negotiations regarding extensions of the current contract long before competitors would have an opportunity to bid for the rights, MTG exclusively owned the broadcasting rights to the Premier National Football League (Superligaen) since 1998. The prolonged contract now also included new media rights. Because this would mean that the media rights would not have been put out for a public tender in 15 years, several competing broadcasters filed a complaint and the Danish NCA intervened. The DBU and DVI offered various commitments, including that media rights contracts would no longer include a preferential renewal clause.[365]

In a merger case between TV4 AB and C More Group AB, the Finnish competition authority identified competition concerns resulting from a matching right or right of first refusal in the media rights contracts for the Finnish professional ice hockey league (SM-Liiga).[366] The concentration was approved on certain conditions, including the prohibition of C More to make use of these clauses.[367]

In 2012, the German NCA closed its investigation into the award procedure for the media rights of the first and second German football leagues after accepting commitments offered by the German Football League (DFL) and the League Association (DFB). Those commitments included detailed safeguards regarding the use of pre-determined and objective evaluation criteria. Moreover, the

[362] Commission for the Protection of Competition (Cypriote Competition Authority) Antenna Ltd / Lumiere TV Ltd, Lumiere Services Ltd and the Cyprus Football Federation, Decision of 12 August 2004.
[363] Commission for the Protection of Competition (Cypriote Competition Authority) Application filed by the Cyprus Football Federation and Lumiere TV Ltd for individual negative certification and individual exemption, Decision of 2 September 2004.
[364] Supreme Court, Case 95/2004 ANTENNA v Commission for the Protection of Competition and Case 1120/2004 CYTA v Commission for the Protection of Competition, 9 August 2007.
[365] Danish Consumer and Competition Authority (Danish Competition Authority) Joint selling of media rights to Danish Football (commitment decision) Journal nr. 4/0120-0204-0052/TUK/MIK, 31 October 2007.
[366] FCCA (Finnish Competition Authority) Decision 579/81/2008, 27 November 2008.
[367] Upheld by Market Court (Case MO 525/09 Dnro 580/08/KR) 30 October 2009 and 22 January 2009.

NCA required the parties to submit a detailed evaluation of each bid to the authority for review before taking the decision to accept or reject the bid.[368]

In March 2005, the Italian NCA opened proceedings against Mediaset for the alleged violation of Article 102 TFEU (ex Article 82 EC) after RTI, owned by Mediaset, secured the broadcasting rights for transmission via DTT of matches played by the main Italian football clubs. The licensing agreements, which were concluded for the 2004-2007 seasons, included clauses that gave RTI the right to first negotiation and first refusal to obtain the pay TV rights (relative to all platforms including DTT and satellite) for the subsequent 2007-2016 seasons. During a first negotiation phase, only RTI would be able to make an offer for the acquisition of the rights. If RTI and the clubs fail to reach an agreement, RTI would still have the opportunity to match the offers made by third parties. The NCA found that these contractual conditions strengthened the likelihood of foreclosure effects on the TV advertising market by (1) significantly extending the contract duration in practice and (2) strongly reducing the incentives for competitors to formulate an offer. The investigation was closed when Mediaset offered various commitments, which included the negotiation of new contracts without the first negotiation and first refusal clauses.[369]

In 2006, the NCA imposed a fine of almost € 2 million on the Polish Football League (Ekstraklasa) and Canal+ because they had signed an exclusive contract containing an English clause. Even though Canal+ had not made use of its matching right in the bidding process for the subsequent seasons, the NCA considered that the privileged position of Canal+ had made a reallocation of the rights at the expiry of the existing contract nearly impossible. In its initial bid, Canal+ could offer conditions much worse than other broadcasters, knowing that it always could use the right of pre-emption and increase the amount determined by the competitor with the best offer.[370]

In Romania, the NCA closed its investigation into the joint selling of the media rights to the Professional Football League after the parties committed *inter alia* that contracts would not include preferential renewal clauses.[371]

In a resolution against the Spanish Liga football clubs, the Spanish NCA observed that many media rights contracts included preferential renewal clauses and concluded that such clauses infringe national and European competition rules.[372]

Combined or conditional offers

The discriminatory nature of combined offers or conditional offers is a matter of debate.

In 2005, the Belgian NCA accepted that incumbent telecom operator Belgacom Skynet - who made the highest bid for only five of the six packages, but had offered an exclusivity bonus - was awarded all the broadcasting rights to the first division football (Jupiler Pro League). Contrary to the view of the claimant (cable TV operator Telenet) the NCA concluded that the highest bidder for every package does not automatically need to receive that package as long as the bids are evaluated in accordance with predetermined criteria. Price can be one criterion among many, such as the

[368] Bundeskartellamt (German Competition Authority) Bundesliga (Case B 6-114/10) Commitment decision of 12 January 2012, para 105.
[369] AGCM, "A362 – Diritti Calcistici", decision nr. 15632 of 28 June 2006 (2006) Bulletino Settimanala (26).
[370] OCCP (Polish Competition Authority) Canal+/Polski Związek Piłki Nożnej, Decision n° DOK-49/06 of 29 May 2006.
[371] Competition Council (Romanian Competition Authority) Romanian Football Federation and Professional Football League, Decision n° 13 of 19 April 2011 and Decision n° 44 of 10 August 2012.
[372] CNC (Spanish Competition Authority) AVS, MEDIAPRO, SOGECABLE, Y CLUBS DE FUTBOL DE 1ª Y 2ª DIVISION (Case S/0006/07) Resolution of 14 April 2010.

acceptance of the bidder of all relevant contract obligations or the expertise and production capability of the bidder.[373]

In France only stand-alone unconditional bids for each individual package are allowed. The French Sports Code, which sets outs the conditions for the sale of sports media rights, stipulates that the French Professional Football League (LFP) must turn down global or joint offers or offers including exclusivity bonuses.[374]

To prevent the possibility of discrimination and to ensure a level playing field and increased competition for individual right packages, the Danish NCA precluded conditional bids. Tenders must relate to one single package.[375]

In October 2009, the Italian NCA decided to widen the scope of its ongoing investigation into the sale of the media rights to Serie A in response to the invitation to tender that was released by the Italian Football League (*Lega Nazionale Professionisti*, LNP) for the sale of the media rights to Serie B (for seasons 2010-2013).[376] The tender documents provided that a discount would be offered to the owners of the Serie A satellite packages if they would also acquire rights to Serie B. According to the NCA, this discount was likely to give the main pay TV operators an unfair advantage over other bidders. This risked limiting the potential for growth and market entry for other media operators. In response to these concerns, the LNP committed not to offer the discount when awarding the media rights to Serie B.[377]

Independent monitoring trustee

Because competition authorities lack the resources and expertise to actively monitor compliance with remedies, they traditionally act on a case-by-case basis and rely on passive forms of remedies enforcement such as self-reporting by the parties and complaints from third parties. In recent years, however, a more pro-active type of monitoring activity is becoming an increasingly important feature of EU competition law enforcement. In the *FAPL* decision, the Commission required the appointment of an independent monitoring trustee to oversee the sale process.

In recent proceedings at the national level, the use of an independent monitoring trustee is also becoming more common. In Denmark, the commitments offered by the Danish Football Association (DBU) and the Danish League Association (DIV) concerning the joint selling of the media rights included the appointment of an independent monitoring trustee that would follow the tender, negotiation, and the awarding process.[378] In Romania, the NCA closed an investigation into the joint selling of the media rights to the Professional Football League after the parties proposed various commitments to remedy the alleged anti-competitive practices. The acceptance of the behavioural commitments was made conditional on compliance monitoring by an independent

[373] Council of Competition (Belgian Competition Authority) The selling by the Liga Beroepsvoetbal (LBV) of the broadcasting rights of games of the national football competition for the seasons 2005-2006, 2006-2007, and 2007-2008 (Joined Cases MEDE-I/O-05/0025 and MEDE-P/K-05/0036) Decision No. 2005-I/0-40 of 29 July 2005. Upheld by Court of Appeal of Brussels (Joined Cases 2005/MR/2 and 2005/MR/5) Telenet N.V. and BeTV N.V. v. Liga Beroepsvoetbal V.Z.W., 28 June 2006.
[374] Code du Sport, Article R-333-3.
[375] Danish Consumer and Competition Authority (Danish Competition Authority) Joint selling of media rights to Danish Football (commitment decision) Journal nr. 4/0120-0204-0052/TUK/MIK, 31 October 2007.
[376] AGCM (Italian Competition Authority), "A418 - Procedure selettive Lega Nazionale Professionisti Campionati 2010/2011 E 2011/2012", provvedimente nr. 20343 of 1 October 2009 (2009) Bolletino Settimanala (39) 11-12.
[377] AGCM, "A418 - Procedure selettive Lega Nazionale Professionisti Campionati 2010/2011 E 2011/2012", decision nr. 20687 of 6 February 2013 (2013) Bulletino Settimanala (7) 5-27. (was already part of the commitments in decision 20687 18.01.2010)
[378] Danish Consumer and Competition Authority (Danish Competition Authority) Joint selling of media rights to Danish Football (commitment decision) Journal nr. 4/0120-0204-0052/TUK/MIK, 31 October 2007.

trustee who would report to the competition authority.[379] In the Netherlands, the NCA recently made the approval of the acquisition of the Premier Football League's own pay TV channel (Eredivisie Live) by Fox subject to compliance monitoring by an independent accountant to ensure that the channel would be offered to distribution platforms on non-discriminatory terms.[380]

2.4.3.2 Limitation of the scope of exclusive contracts

In the *UEFA Champions League*, *DFB*, and *FAPL* decisions, the Commission sought to limit the risk of market foreclosure by obliging the collective selling entity to unbundle the media rights in separate packages. The Commission required that there should be a reasonable amount of different packages, including at least two independent live rights packages. Moreover, in the *FAPL* decision, the Commission requested the sale of "meaningful" packages (i.e. packages that are independently valuable).[381] As discussed above, the Commission paid particular attention to the availability of separate new media rights packages.

In line with the Commission's precedents, NCAs have required the unbundling of sports media rights into several rights packages. In some instances, the NCA prescribed detailed conditions for the constitution of the packages. In Denmark, for example, the commitments offered by the Danish Football Association (DBU) and the Danish League Association (DIV) concerning the joint selling of the media rights included the offering of several packages for different categories of rights. The commitments prescribe a minimum number of packages that must be offered (the categories and packages included in the commitment agreement can only be amended after approval by the NCA).[382]

In France and Italy, guiding principles for the definition of media rights packages have been defined in legislation.

In France, the Sports Code prescribes that the number and constitution of the rights packages must correspond to the characteristics of the market on which they are sold.[383] The aim of this provision is to ensure that packages are of such large scale that only the most powerful players can acquire them.

In Italy, the 2008 Legislative Decree governing the ownership and sale of certain[384] sports media rights stipulate that sports organisers must determine, approve (by 2/3 majority), and publish guidelines stipulating the conditions for the licensing and exploitation of the media rights, including a description of the arrangement of the rights packages.[385] Once issued, the guidelines must be notified to the NCA and the Italian Communications and Media Authority for approval. Within 60 days each authority will verify their compliance with the provisions of the Decree. It

---

[379] Competition Council (Romanian Competition Authority) Romanian Football Federation and Professional Football League, Decision n° 13 of 19 April 2011 and Decision n° 44 of 10 August 2012.
[380] NMa (Dutch Competition Authority) Informele zienswijze Fox/Eredivisie, 29 November 2012.
[381] European Commission, Joint selling of the media rights to the FA Premier League ("FAPL") (Case COMP/38.173) Commission Decision (commitment decision) (2006) para 37. This was to avoid a situation where the "no single buyer" rule could be bypassed through the sale of live packages that would not enable the purchaser to compete effectively on the downstream market. See Section 2.5.3.5.
[382] Danish Consumer and Competition Authority (Danish Competition Authority) Joint selling of media rights to Danish Football (commitment decision) Journal nr. 4/0120-0204-0052/TUK/MIK, 31 October 2007.
[383] Code du Sport, Article R. 333-30.
[384] The scope of the Decree is limited to the audiovisual rights to *"professional championships and tournaments organized for team sports at the national level"*. In practice this means it only applies to football and basketball, since it excludes professional team sports that are not organized in championships or tournaments (e.g. cycling), team sports that are not qualified as professional (e.g. volleyball, rugby) or professional individual sports (e.g. tennis, golf).
[385] Legislative Decree nr. 9 of 9 January 2008 on Sport and Audiovisual Rights (*Sport e diritti audiovisivi*), Article 6.

prescribes *inter alia* that the rights packages contain a suitable number of live rights so as to offer each operator a balanced and competitive product.[386] Furthermore, the Decree determines that the Serie A and Serie B Football Leagues[387] must in principle offer all audiovisual rights to all operators of each available platform by way of different competitive tenders. If they, however, would choose to sell its audiovisual rights on a platform-neutral basis, they must increase the number of valuable packages, each including a comparable number of premium events.[388] The approval of the guidelines does not preclude enforcement action in case the actual sales process raises anti-competitive concerns. On 22 July 2009, the Italian NCA opened an investigation into the joint selling of the media rights to the two highest football divisions (Serie A and Serie B) because it suspected that the Italian Football League (LNP) had abused its dominance by marketing rights packages that benefited the incumbent pay TV operators. In its invitation to tender for the media rights to Serie A for the seasons 2010-2012, the LNP had defined two rights packages for satellite TV: "Platinum live" (compromising the exclusive right to live and delayed transmission of all Serie A matches plus highlights and exclusive features) and "Satellite highlights" (compromising the highlights for transmission between 5.30 pm and 10.30 pm). The NCA observed that the "Platinum live" package could only be fully exploited by a large operator (such as Sky Italia) and that the second package was not meaningful and seemingly intended to avoid competition with the main operator (i.e. the highlight rights were also included in the "Platinum live" package and due to the defined time restrictions, the transmission of the highlights would run parallel with the transmission of the highlights on FTA TV). The NCA further noted that also the two packages for DTT seemed to be unbalanced.[389] On 1 October 2009, the NCA widened the scope of the investigation to also include possible abusive conduct regarding the sale of the media rights to Serie B (for seasons 2010-2013) in response to the invitation to tender that was released by the LNP.[390] The LNP proposed a first set of commitments – exclusively relating to the Serie B rights - on 18 November 2009, but following the comments received by third parties during the market test these were deemed insufficient. Subsequently, the LNP proposed a second set of commitments relating to the Serie A rights. On 18 January 2010, the NCA decided to make the commitments binding and closed its investigation.[391] Regarding Serie A, the LNP committed to market an additional satellite package "D" containing highlights (of max. 10 minutes) of all Serie A matches that may be transmitted immediately after the match is over. Regarding Serie B, the LNP committed to subdivide the premium satellite package into three independent packages and to assign these packages through a competitive tender procedure. Moreover, the LNP committed to accommodate the NCA's recommendations when formulating the guidelines for the sale of the Serie A and Serie B media rights for the 2012-2013 season. The NCA's commitment decision was appealed by Conto TV, seeking both an annulment of the decision and an interim injunction aimed at preventing the LNP from carrying on the tender procedure.[392] The Regional Administrative Tribunal for Lazio annulled the decision both on procedural and substantive grounds. The Tribunal did not oblige the LNP to organize a new tender, but it did order the NCA to market test the final commitments (which

[386] Idem, Article 8(3).
[387] In 2010, a split within the former *Lega Nazionale Professionisti* between Serie A and Serie B clubs led to the creation of two separate leagues: *Lega Nazionale Professionisti Serie A* and *Lega Nazionale Professionisti Serie B*.
[388] Legislative Decree nr. 9 of 9 January 2008 on Sport and Audiovisual Rights (*Sport e diritti audiovisivi*), Article 8.
[389] "Gold live" (compromising live and delayed transmission of matches involving 12 teams) and "Silver live" (compromising the live and delayed transmission of matches played by the remaining 8 teams).
[390] AGCM (Italian Competition Authority), "A418 - Procedure selettive Lega Nazionale Professionisti Campionati 2010/2011 E 2011/2012", provvedimente nr. 20343 of 1 October 2009 (2009) Bolletino Settimanala (39) 11-12.
[391] AGCM (Italian Competition Auhority), "A418 - Procedure selettive Lega Nazionale Professionisti Campionati 2010/2011 E 2011/2012", provvedimente nr. 20687 of 18 January 2010 (2010) Bolletino Settimanala (3) 5-19; AGCM (Italian Competition Authority) "Soccer League: Antitrust Authority accepts commitments, one new package for Series A and three new packages for Series B" (Press Release) 18 January 2010.
[392] On 24 May 2010, the Tribunal of Milan rejected the request for injunctive relief. Tribunale di Milano, Case nr. 21604/10, Conto TV/Lega Calcio. The Milan Court of Appeal had previously issued an injunctive relief ordering the LNP to refrain from awarding the "Platinum live" package. This decision, however, was overturned by the Milan Court of Appeal Panel of Judges because it found that the Milan Court of Appeal lacked due competence. Corte d'Appello di Milano, Cases nr. 2610/09 and 2913/09, Conto TV/Lega Calcio, 26 February 2010.

it had failed to do). On substantive grounds, the Tribunal held that the commitments were manifestly insufficient to satisfy the initial competition concerns raised in the NCA decision to initiate proceedings against LNP.[393] The Council of State confirmed the decision of the Tribunal in May 2011. Consequently, the NCA reopened its investigation and adopted a new and final decision on 6 February 2013.[394]

2.4.3.3 Limitation of the duration of exclusive contracts

In its decisional practice, the European Commission has always acknowledged the need for a certain degree of exclusivity to protect the value of sports media rights. The mere fact that a right holder grants to a successful bidder the exclusive right to exploit certain media rights during a specified period is not in itself problematic.[395] Exclusive media rights agreements are a well-established commercial practice. If the contract duration exceeds what is necessary to ensure a fair return on investment, however, it risks creating a situation where a successful buyer would be able to establish a dominant position on the market. This would reduce the scope for effective competition in the context of future bidding rounds.[396]

It can be observed that football media rights have generally been subject to stricter limitations than other premium sports rights in the national decisional practice.

Premium football media rights

In the *UEFA Champions League* decision, the Commission established the principle that the length of the exclusive football media rights contracts could not exceed three football seasons. In the subsequent *DFB* and *FAPL* cases, the Commission similarly requested the parties to limit the cycle of contract periods to three years.

This does not mean, however, that exclusive sports media rights contracts of longer duration are never justified. In 1993 the Commission considered that a five-year exclusivity period was justified to facilitate the entry of BSkyB in the developing market of satellite broadcasting in the UK.[397]

The Dutch and Danish NCAs have granted similar exceptions. In the Netherlands, the NCA deemed an exclusive contract of six years for the highlights rights to the Premier Football League (Eredivisie) in the Netherlands proportionate to ensure the successful introduction of a new free-to-air sports channel.[398] In Denmark, Danish public service broadcasters DR and TV2 acquired various premium sports broadcasting rights (including the rights to the Premier National Football League (Superligaen), the Danish national football team's home matches, and the Premier National Handball League) with the purpose of setting up a new pay TV sports channel in 1996. The NCA did not object to the long exclusivity period of eight years. It stressed that the restrictive effects of the long exclusivity period were reduced by the fact that DR and TV2 were entitled to sublicense the rights to third parties. If the broadcasters would discriminate against those seeking a sublicense, the NCA would intervene. Furthermore, the NCA gave weight to the fact the purpose of the exclusive agreement was to create a new market in Denmark for sports subscription channels. The subscription channel turned out to be unsuccessful and was closed down in 1998. DR and TV2

[393] Regional Administrative Tribunal for Lazio, Sentenza nr. 10572/2010, 10 May 2010.
[394] AGCM (Italian Competition Authority), "A418 - Procedure selettive Lega Nazionale Professionisti Campionati 2010/2011 E 2011/2012", decision nr. 20687 of 6 February 2013 (2013) Bulletino Settimanala (7) 5-27.
[395] Joined Cases C-403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v. Media Protection Services Ltd ECR (2011) I-9083, para 137.
[396] Case 262/81 Coditel SA and Others v Ciné-Vog Films SA and Others ECR (1982) 3381, para 19.
[397] European Commission, "XXIIIrd Report on Competition Policy" (1994) p. 495.
[398] NMa (Dutch Competition Authority) Informele zienswijze Fox/Eredivisie, 29 November 2012, p. 10.

transferred all the rights apart from the rights to the Danish national football team's home matches.[399] The new agreement was notified to the NCA. In 2001, the NCA decided that, in light of the European Commission's decisional practice, the eight-year exclusivity period could no longer be justified and thus declared the agreement null and void. The NCA, however, did not prevent the conclusion of a new, two-year agreement, which in fact covered the remaining period of the original agreement.[400]

If there is no reason to protect a particular newcomer on the market, the NCAs strictly adhered to the three-year principle. Automatic renewal clauses in rights contracts, which extended the duration of exclusivity in practice, have been subject to scrutiny and severe sanctions (e.g. in Belgium, Cyprus, Denmark, France, Germany, Romania, and Spain).

In the years following the Commission's *UEFA Champions League* decision, the principle that three years was the maximum tolerable length for football media rights contracts seemed firmly set. More recent decisional practice and legislative action signals a departure from that general principle. Several national football associations have successfully argued that the exclusivity period of sports media rights contracts must be at least four years. In Germany, for example, the German Football League (DFL) similarly argued that contract cycles of four years would facilitate the market entry of new operators by making their investment more profitable. The NCA accepted that the media rights to the first and second football divisions could be sold for a period of four years from the 2013-2014 season onwards.[401] In Poland, it was pay TV operator Canal+ who argued that prevailing market conditions justified four-year exclusive contracts. The Polish NCA summarily accepted the argument.[402]

Interestingly, the matter has divided the NCA and the legislator in France in Spain. In France, even though the NCA expressed doubts about the validity of similar arguments made by the French Football Federation,[403] the legislator issued a decree amending the tolerated length of exclusivity to four years.[404] The opposite scenario enfolded in Spain. Article 21(1) of the Audiovisual Communications Act 7/2010 established that *"contracts for the acquisition of football rights may not exceed four years"*. Soon thereafter the Spanish NCA adopted a resolution in which it found that football media rights contracts exceeding 3 years/seasons infringe national and European competition rules.[405] Some clubs completely disregarded the NCA's instructions, setting contractual terms of four years, understanding that the valid time limit was the one established in the law. These new contracts gave rise to the NCA opening new proceedings against one operator and three football clubs, which led to the imposition of fines in November 2013.[406]

---

[399] Soren Sandfeld Jakobsen, "Denmark" in IanBlackshaw, Steve Cornelius, and Robert C Siekmann (eds.) *TV rights and sport – legal aspects* (T.M.C. Asser Press, The Hague 2009) 327-328.

[400] Danish Competition and Consumer Authority, "DBU skal ændre eneretsaftale med DR og TV2 om landsholdsfodbold i TV" (Press release) 31.October 2001.

[401] Bundeskartellamt (German Competition Authority) Bundesliga (Case B 6-114/10) Commitment decision of 12 January 2012.

[402] OCCP (Polish Competition Authority) Canal+/Polski Związek Piłki Nożnej, Decision n° DOK-49/06 of 29 May 2006. Upheld by Polish Supreme Court (Case III SK 16/08) Canal+/Polski Związek Piłki Nożnej, 7 January 2009.

[403] Autorité de la concurrence (French Competition Authority) Avis n° 07-A-07 relatif aux conditions de l'exercice de la concurrence dans la commercialisation des droits sportifs, 25 juillet 2007.

[404] Legislative Decree No 2007-1676 of 28 November 2007, amending the Code du Sport.

[405] CNMC (Spanish Competition Authority) AVS, MEDIAPRO, SOGECABLE, Y CLUBS DE FUTBOL DE 1ª Y 2ª DIVISION (Case S/0006/07) Resolution of 14 April 2010.

[406] CNC (Spanish Competition Authority) MEDIAPRO Y CLUBS DE FÚTBOL II (Case SNC/0021/12) Decision of 28 November 2013.

Other premium sports rights

The media rights to other popular sports have generally been treated more leniently in the national decisional practice.

In Austria, following a complaint and an extensive inquiry of the NCA into the 10-year exclusivity media rights contract between the Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, ÖRF) and the Austrian Ski Federation (*Österreichischer Schiverband*, ÖSV), the latter ommitted to limit the length of future contracts for Austrian Ski World Cup events to maximum five subsequent competition seasons.[407]

In Denmark, the NCA accepted a five-year exclusive licensing agreement for the media rights to most handball matches played in Denmark. The agreement was concluded between the rights holders, Team Denmark and the Danish Handball Federation, and public broadcasters DR and TV2. The NCA considered *inter alia* that Danish handball as a sport was in a phase of development and therefore needed a sustainable long-term source of revenue.[408]

In the United Kingdom, the NCA found that a media rights contract of five years, with an option to extend to the period of ten years, was excessive in so far as it concerned rights used by bookmakers other than Licensed Betting Offices (LBO). The Competition Appeal Tribunal, however, annulled that decision because the contract duration was necessary to successfully market these novel rights.[409] Similarly, the High Court of Justice deemed a five-year contract proportional because it was designed specifically to introduce competition on the relevant markets by sponsoring the entry of a new purchaser of LBO media rights.[410]

2.4.3.4 Fall-back option to individual rights owners

In order to prevent that powerful media content operators would buy up rights, which subsequently would remain under-exploited, the Commission required in *UEFA Champions League*, *DFB*, and *FAPL* that there should be no unused rights. When rights are not made available for exploitation, output is restricted and consumer choice is compromised. In addition, rights that are not sold by the collective entity within a certain time period should not remain exclusive, but fall back to the individual clubs for parallel exploitation. After all, the efficiencies and benefits of joint selling could not be claimed when the collective selling entity fails to find demand in the market for certain rights.[411]

In France, the Sports Act prescribes that unsold or unused sports media rights should fall back to the individual clubs.

---

[407] Cartel Court (Case 26 Kt 42/06) Österreichischer Rundfunk und Fernsehen – Österreichischer Schiverband, 18 February 2008, Verpflichtungszusagen (gemäß § 27 KartG) des Österreichischen Rundfunks (ORF) und des Österreichischen Skiverbands (ÖSV) mit Wirkung bis einschließlich der FIS-Skiweltcup-Saison 2011/12, Article 6.4.

[408] Danish Competition and Consumer Authority, Aftale mellem DR, TV2, Team Danmark og Dansk Håndboldforbund om tv-, radio-, og internetrettighederne til dansk håndbold, Journal nr.3/1120-0301-0128/Industri/mvn, 27 November 2002.

[409] Competition Appeal Tribunal, The Racecourse Association and Others v OFT and The British Horseracing Board v OFT (2006) CAT 1, 8 February 2006.

[410] High Court of Justice, Bookmakers Afternoon Greyhound Services Ltd & Others v Amalgamated Racing Limited & Others (2008) EWHC 1978.

[411] European Commission, UEFA Champions League (Case COMP/37.398) Commission Decision 2003/778/EC (2003) OJ L 291/25, para 159.

In Germany, the German Football League (DFL), in proceedings before the NCA, reasserted the commitment that if it fails to sell certain media rights collectively, the rights fall back to the respective home clubs for individual exploitation on a non-exclusive basis.[412]

In Italy, the Legislative Decree nr. 9 of 9 January 2008 on Sport and Audiovisual Rights, Article 11 equally provides that unsold or unused rights should fall back to the individual clubs. In December 2009, the Italian NCA found that the Italian Football League (LNP) had infringed Article 101 TFEU by preventing the Serie B clubs from selling the media rights for seasons 2007-2008 independently. The LNP favored the collective sale of these rights. Even though it failed to find demand in the market, the LNP continued to deny clubs the possibility of marketing the rights to their home matches on an individual basis (e.g. by issuing warnings against the clubs). As a result, LNP significantly limited the live transmission of Serie B matches on TV to the detriment of media operators and consumers: only 16 out of 462 games from the 2007-2008 season were broadcast live. Accordingly, the NCA imposed a fine of € 102 million on the LNP.[413]

In Romania, the Professional Football League committed to giving the clubs the right to market unsold or unused rights following the NCA's investigation into the League's joint selling arrangement.[414]

2.4.3.5 "No single buyer" obligation

The imposition of a "no single buyer" obligation on the collective selling entity was a peculiar feature of the European Commission's *FAPL* decision. The Commission made clear that this remedy was of relevance only in this case due to the structure of the UK market. In the *UEFA Champions League* and the *DFB* cases there was no need to target the long-term presence of a dominant buyer.

The "no single buyer" remedy is still subject of controversy. In some Member States, the NCA followed the Commission's reasoning that this far-reaching remedy should be an exceptional measure.

In Belgium, the NCA spoke out against the remedy in one of its decisions.[415] Upon appeal, the court subscribed to this view. It even identified that the fact that a single purchaser acquires all the live rights, thus preventing consumers from purchasing two subscriptions and decoders, as an important benefit.[416]

In France, in an opinion delivered in 2004, the French NCA spoke out against a "no single buyer" obligation. It stressed that such an obligation, which would make the outcome of the bidding

[412] Bundeskartellamt (German Competition Authority) Bundesliga (Case B 6-114/10) Commitment decision of 12 January 2012. See also Bundesliga, "Richtlinie zur individuellen Verwertung und Vermarktung medialer Rechte von den Spielen der Bundesliga und 2. Bundesliga" (2013) Section 8.
[413] AGCM (Italian Competition Authority), "A403 – Lega Calcio/Chievo Verona", decision nr. 20575 of 28 December 2009 (2009) Bulletino Settimanala (50) 5-44.
[414] Competition Council (Romanian Competition Authority) Romanian Football Federation and Professional Football League, Decision n° 44 of 10 August 2012.
[415] Council of Competition (Belgian Competition Authority) The selling by the Liga Beroepsvoetbal (LBV) of the broadcasting rights of games of the national football competition for the seasons 2005-2006, 2006-2007, and 2007-2008 (Joined Cases MEDE-I/O-05/0025 and MEDE-P/K-05/0036) Decision No. 2005-I/0-40 of 29 July 2005.
[416] Court of Appeal of Brussels (Joined Cases 2005/MR/2 and 2005/MR/5) Telenet N.V. and BeTV N.V. v. Liga Beroepsvoetbal V.Z.W., 28 June 2006, para 44.

process predictable, could have severe negative implications for competition and the value of the rights.[417]

In Germany, the NCA also argued that the necessity of this remedy strongly depends on the structure of demand. The NCA agreed with the great majority of respondents to the market test that the market structure in Germany did not call for a "no single buyer" obligation. It deemed the commitments offered by the German Football League (DFL) regarding the composition of the rights packages sufficient to safeguard a competitive bidding process.[418]

Several other NCAs, on the contrary, decided to introduce a no single buyer obligation – even in the absence of a long-term dominant buyer on the downstream market.

In Austria, the remedy was part of the commitments offered by the Austrian Broadcasting Corporation (ÖRF) and the Austrian Ski Federation (ÖSV) concerning the marketing of media rights to the Austrian Ski World Cup events.[419] There is an exception, however. Unsold rights are to be tendered in the two years following the first unsuccessful bidding procedure. Thereafter, the ÖSV is allowed to sell these rights by way of bilateral negotiations. If, upon bilateral negotiation, a single purchaser acquires all of the rights packages, the ÖSV must prove that no other operator has made an economically acceptable offer. In this scenario, the length of the licenses for the rights packages must be reduced to three years.

In Denmark, the remedy was part of the commitments offered by the Danish Football Association (DBU) and the Danish League Association (DIV) concerning the joint selling of the media rights to Danish Football.[420] From the 2009 season onward, no single broadcaster is entitled to buy all the packages containing exclusive live rights to the matches of the Super League. An exception applies when only one or two broadcasters would bid for these rights. The DBU/DVI will then negotiate with the parties and may award all the live rights to the broadcaster that is prepared to pay an exclusivity bonus of at least 30 percent relative to the original bid. If no broadcaster is willing to do so, however, the "no single buyer" rule remains applicable. The DBU/DVI had pushed for this exception. They feared that broadcasters could anticipate acquiring at least one of the packages and therefore would submit lower bids. The NCA discarded the criticism that a household would have to subscribe to different channels if the live broadcast of the Premier National Football League (Superligaen) matches is spread over several different channels: *"this situation does not arise only as a result of the no single buyer rule … the channels will compete on price and quality – which will benefit both the viewer who will watch all matches and the viewer that does not need to see all the matches, because the TV channels will be cheaper"*.[421]

In Italy, the remedy was even inserted in the 2008 Legislative Decree governing the ownership and sale of sports audiovisual rights and the relative distribution of resources. The Decree, which only applies to football and basketball, prohibits that a single operator exclusively acquires all live rights packages.[422]

---

[417] Autorité de la concurrence (French Competition Authority) Opinion 04-A-09 relative to a draft decree on the sale by professional leagues of rights for broadcasting sporting events of competitions, 28 May 2004.
[418] Bundeskartellamt (German Competition Authority) Bundesliga (Case B 6-114/10) Commitment decision of 12 January 2012, para 102.
[419] Cartel Court (Case 26 Kt 42/06) Österreichischer Rundfunk und Fernsehen – Österreichischer Schiverband, 18 February 2008, Verpflichtungszusagen (gemäß § 27 KartG) des Österreichischen Rundfunks (ORF) und des Österreichischen Skiverbands (ÖSV) mit Wirkung bis einschließlich der FIS-Skiweltcup-Saison 2011/12, Article 6.4.
[420] Danish Consumer and Competition Authority (Danish Competition Authority) Joint selling of media rights to Danish Football (commitment decision) Journal nr. 4/0120-0204-0052/TUK/MIK, 31 October 2007.
[421] Idem.
[422] Legislative Decree nr. 9 of 9 January 2008 on Sport and Audiovisual Rights (*Sport e diritti audiovisivi*), Article 9(4).

In Romania, the NCA imposed a "no single buyer" obligation on the Professional Football League in a recent commitment decision.[423] Only three out of the five rights packages containing live rights to certain matches of the Romanian Cup can be acquired by a single purchaser. An exception applies when only one or two broadcasters would bid for these packages as long as the amount offered for all packages is higher than the amount obtained from the previous auction of rights.

2.4.4 Taking stock: ten years of EU competition law intervention

After there emerged a need to address competition issues in relation to joint selling arrangements for football media rights in the 1990s, several NCAs found that the system was incompatible with the national competition rules (see 2.4.1). The European Commission's decisional practice, however, made clear that the joint selling of football media rights, under certain strict conditions, can be deemed compatible with the EU competition rules. In doing so, the Commission *de facto* legitimized the joint selling of football media rights.

Ten years after the *UEFA Champions League* decision (2003) the joint selling of sports media rights (and in particular football media rights) has evolved from a common practice to the dominant system for marketing those rights.[424]

The Commission made clear that the remedies used in its three precedent decisions merely presented possible options to deal with competition issues arising in this area. The accepted solution in each case would depend on the facts of the individual case including the degree of market power and the restrictive practices found.[425] The preceding overview of national decisional practice (2004-2014), however, demonstrated that the NCAs have commonly replicated *all* of the remedies adopted in the Commission's decisions. Most surprisingly, the "no single buyer" obligation, a remedy that was exceptionally imposed by the Commission in *FAPL*, is increasingly being emulated at the national level. It is unclear whether this drastic structural remedy can be considered necessary and proportionate in the absence of a long-term dominant buyer on the downstream market. The fact that principles first developed in the sphere of competition policy have been or are currently being codified in legislation in France, Hungary, Italy, and Spain, further exemplifies the regulatory nature of competition law intervention in this field.

In one respect, the NCAs have demonstrated a readiness for a more flexible approach. More and more NCAs are abandoning the view that the duration of exclusive rights contracts cannot exceed three years.

Unfortunately, the question whether the financial solidarity argument can be accepted as a valid legal defence against the prohibition of restrictive agreements still lingers.

The European Commission has never substantially addressed the issue. In all three of the Commission's investigations, the parties put forward this argument as the central justification for an exemption of their joint selling agreements under Article 101(3) TFEU.[426] Yet the justification

---

[423] Competition Council (Romanian Competition Authority) Romanian Football Federation and Professional Football League, Decision n° 13 of 19 April 2011 and Decision n° 44 of 10 August 2012.

[424] In 2011, UEFA announced that it would move to a system of joint selling for the domestic and international media rights to all national-team qualifying matches, including pay-offs, from 2014.

[425] European Commission, The EU and Sport (Commission staff working document accompanying the White Paper on Sport) (2007) SEC(2007) 935, para 3.1.3.1

[426] *UEFA Champions League* (Case COMP/37.398) Commission Decision 2003/778/EC (2003) OJ L 291/25, para 125-131; European Commission, 'Case No IV/37.214 – DFB – Central marketing of TV and radio broadcasting rights for certain football competitions in Germany' (Notice) (1999) OJ C 6/10, para 7; European Commission, 'Notice published pursuant to Article 19(3)

was only briefly considered in the *UEFA Champions League* decision. According to the Commission, UEFA failed to substantiate the indispensability of a joint selling arrangement for the redistribution of revenue, and subsequently, for the organisation of the UEFA Champions League. The Commission also pointed out that redistribution of revenue can be implemented through other, less restrictive mechanisms, such as a taxation system or the redistribution of voluntary contributions.[427] Because UEFA's amended joint selling arrangement could already be justified on the basis of the economic efficiency benefits it generates, however, the Commission concluded that *"it is not necessary for the purpose of this procedure to consider the solidarity argument any further"*.[428]

The national decisional practice subsequent to the Commission's precedents has equally refrained from addressing this issue. Instead, the NCAs have focused their assessments on the efficiency benefits that were also recognized by the Commission, i.e. the creation of a single point of sale, the creation of a league product, and the branding of the media output by a single entity. This is somewhat remarkable, since the discussion of the early national decisional practice illustrated the controversy over the financial solidarity justification.

Even though the joint selling of media rights might not be essential, it arguably facilitates the sharing of revenues among clubs. The ability of sports organisers to impose alternative financial solidarity mechanisms is constrained by the pressure of larger clubs: they wish to see a larger share of the revenues flow back to them because they are primarily responsible for generating these revenues. Moreover, in a system of individual selling, a club's bargaining power is not determined by the collective attractiveness of the competition as a whole, but by the market potential of a specific clubs' matches. This typically results in a huge disparity in revenue between the top clubs, who are able to extract supra-normal profits, and the other clubs.[429] The overview of clubs' media rights income ratio in the top five European football leagues (season 2011-2012) in the table below illustrates this point.

of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453 – joint selling of the media rights of the FA Premier League on an exclusive basis' (2004) OJ C 115/3, para 10.

[427] *UEFA Champions League* (Case COMP/37.398) Commission decision 2003/778/EC (2003) OJ L 291/25, par. 131.

[428] Idem, para 167.

[429] Tom Evens, Petros Iosifidis, and Paul Smith, *The Political Economy of Television Sports Rights* (Palgrave Macmillan, 2013) 36-45; Bill Gerrard, "Competitive balance and the sports media rights markets: what are the real issues?" in Claude Jeanrenaud and Stefan Késenne, *The Economics of Sports and the Media* (Edward Elgar, Chelthenham 2006) 33.

Spain (individual selling)

- The earnings ratio of the top to bottom club in La Liga: 10:1
- Dominance of two top clubs: they earn three times as much as the next-biggest clubs and 10 times as much as the smaller teams

La Liga					
Rank		€ m	Rank		€ m
1	Barcelona	125	11	Real Zaragoza	15
2	Real Madrid	125	12	Getafe	13
3	Atletico de Madrid	42	13	Levante	13
4	Valencia	42	14	Malaga	13
5	Sevilla	32	15	Real Mallorca	13
6	Real Betis	25	16	Osasuna	13
7	Villarreal	21	17	Rayo Vallecano	13
8	Athletic Bilbao	19	18	Sporting de Gijon	13
9	Real Sociedad	16	19	Granada	13
10	Espanyol	15	20	Racing Santander	12.5

United Kingdom (joint selling)

- The earnings ratio of the top to bottom club in the Premier League: 1,55:1
- Most egalitarian league in Europe
- Premier League domestic rights income is divided: 50% equally between the 20 teams; 25% on the basis of final league position; 25% linked to the number of times each club's matches are broadcast on television

Premier League					
Rank		€ m	Rank		€ m
1	Manchester City	74.6	11	Swansea City	56.5
2	Manchester United	74.2	12	Norwich City	56.1
3	Tottenham Hotspur	70.6	13	Sunderland	54.6
4	Arsenal	69.1	14	Stoke City	53.6
5	Chelsea	66.9	15	QPR	53.3
6	Liverpool	66.9	16	Wigan Athletic	52.8
7	Newcastle United	66.7	17	Aston Villa	51.8
8	Everton	60.1	18	Bolton Wanderers	49.9
9	Fulham	58.3	19	Blackburn Rovers	49.6
10	West Bromwich Albion	57.3	20	Wolves	48.1

Italy (joint selling since 2010)

- The earnings ratio of the top to bottom club in Serie A: 4,35:1.
- Ratio in last season of individual selling was 8,6:1.
- Serie A domestic rights income is divided: 40% equally between the 20 clubs; 30% on the basis of past results (15% on results during last five seasons, 10% on historical results, and 5% on last season's final league position); and 25% according to club supporter base.

Serie A					
Rank		€ m	Rank		€ m
1	Juventus	87	11	Atalanta	31
2	Inter	74	12	Cagliari	30
3	Milan	74	13	Bologna	30
4	Roma	58	14	Parma	29
5	Napoli	54	15	Catania	28
6	Lazio	48	16	Chievo	25
7	Fiorentina	40	17	Lecce	23
8	Palermo	35	18	Siena	22
9	Udinese	35	19	Novara	20
10	Genoa	32	20	Cesena	20

Germany (joint selling)

- The earnings ratio of the top to bottom club in Bundesliga 1: 2,3:1
- Bundesliga income divided according to ranking system bases on four seasons: winner of Bundesliga 1 receives max. 5,9% of total league income and bottom club receives min. 28%

Bundesliga 1					
Rank		€ m	Rank		€ m
1	Bayern Munchen	30.9	10	Hamburger SV	20.5
2	Borussia Dortmund	28.1	11	B. Monchengladbach	19.9
3	Schalke04	26.9	12	Wolfsburg	19.0
4	Bayer Leverkusen	26.6	13	Nuremberg	17.8
5	Werder Bremen	25.0	14	Cologne	16.5
6	Hannover96	23.2	15	Freiburg	15.7
7	Stuttgart	23.1	16	Kaiserslautern	15.0
8	1899 Hoffenheim	20.9	17	Hertha Berlin	14.9
9	Mainz05	20.6	18	Augsburg	13.5

France (joint selling)

- The earnings ratio of the top to bottom club in Ligue 1: 3,2:1
- Ligue 1 income is divided: 50% equally between the 20 clubs, with the rest split according to the league position in the last season and on performance over the five most recent seasons

Ligue 1					
Rank		€m	Rank		€m
1	Olympique Lyonnais	43.8	11	Nancy Lorraine	19.9
2	Paris Saint-German	43.3	12	Valenciennes	19.8
3	Olympique de Marseille	39.5	13	Lorient	18.9
4	Lille	38.1	14	Nice	18.8
5	Bordeaux	36.5	15	Sochaux-Montbeliard	18.2
6	Montpellier	35.3	16	Auxerre	17.8
7	Stade Rennais	30.7	17	Stade Brestois 29	16.8
8	Saint Etienne	29.3	18	Ajaccio	16.1
9	Toulouse	27.0	19	Caen	14.S
10	EvianTG	19.9	20	Dijon	13.7

Figure 2.12 - Media rights income per club in top 5 football leagues (season 2011-2012)[430]

2.4.4.1 The merits of EU competition law intervention: supply-side dynamics

It is clear that the heavy-handed remedy package designed by the European Commission (and replicated by the NCAs) fundamentally altered the way in which premium sports media rights are marketed in the EU.

One of the most immediate and obvious consequences of EU competition law intervention has been the expansion of the rights marketed by sports organisers. One of the main concerns about output restrictions related to joint selling was that rights holders and/or licensees would withhold certain rights from the market. Initially, sports organisers showed great reluctance to market new media rights. They feared that the exploitation of these rights would have a cannibalising effect on traditional media rights, thus reducing the core revenues generated by the latter.[431] In its 2005

[430] TV Sports Markets, "Domestic media rights deals of the top 5 European football leagues" (2012); Premier League, "Season Review 2011-12" (2012); Ligue de Football Professionnel, "Rapport d'activité saison 2011/2012" (2012).
[431] Mary Still, Kate Jordan, and Toby Ryston-Pratt, "TV rights related to major sports events: the example of the Olympic Games" in Ian Blackshaw, *TV rights and sports: legal aspects* (T.M.C. Asser Press, The Hague 2009) 190-191; Claude Jeanrenaud and Stefan Késenne, "Sport and the Media: an overview" in Claude Jeanrenaud and Stefan Késenne, *The Economics of Sports and the Media* (Edward Elgar, Chelthenham 2006) 11.

concluding report on the Sector Inquiry into the provision of sports content over 3G mobile networks, the European Commission found that also *"many TV operators perceive a potential threat to their business model of exclusivity as a result of the availability of new media rights"*.[432] Rights holders that did market new media rights would usually bundle them with the traditional media rights and impose overly restrictive conditions on their exploitation by the licensee. The unequal treatment of the rights made new media services unattractive, which risked undermining market developments and user take-up.[433] Arguably facilitated by technological developments, the initial problem that new media rights remained largely unexploited seems to be a thing of the past. In recent years, media content providers have embraced new technologies and demonstrated willingness to innovate by offering their content to consumers across traditional and new media platforms. At the same time, sports organisers have embraced the opportunities created by new media services to expand the coverage of their events.[434]

The positive impact of EU competition law intervention on the behaviour of the rights holders is also evident when considering the prevailing practices in Member States where competition authorities have not (yet) intervened. In some of these countries the sale of at least first division football media rights corresponds more or less to the practices identified elsewhere. More often, however, such rights are still sold in one exclusive bundle, for a long period of time, and without a transparent public tender procedure (i.e. through private negotiations between the rights holder and long-standing partners).[435] The situation in these Member States is thus comparable to the one that prevailed prior to competition law and/or regulatory intervention elsewhere.

2.4.4.2 The limits of EU competition law intervention: downstream competition

The decisional practice in the aftermath of the *UEFA Champions League* decision has sought to challenge existing oligopolistic market structures and introduce market rivalry. To limit the risk that one dominant player acquires all of the most valuable media rights, joint selling entities have been required to unbundle their rights in separate, meaningful packages. In some cases a "no single buyer obligation" has even obliged them not to accept a single buyer for all or certain types of rights.

The following table gives an overview of the domestic rights packages of four of the top five European football leagues for the 2010-2012 seasons,[436] including the licensees that acquired them.

[432] European Commission, Concluding Report on the Sector Inquiry into the provision of sports content over third generation mobile networks (2005) para. 13.
[433] Katrien Lefever, New Media and Sport: International Legal Aspects (T.M.C. Asser Press, The Hague 2012) 146-153.
[434] See Sections 2.2.2 and 2.3.6.
[435] As emerged from the discussions in the expert workshops and the data from the questionnaires.
[436] The overview excludes the Spanish top-flight football league since they have not (yet) introduced a system of joint selling.

	Package	Live / Deferred	Platform	Subscription	Exclusive	Licensee
Ligue 1	1 Premium (top 10 matches Sunday)	L	Broadcast	Pay TV	yes	Canal Plus
2008-12	2 Premium (other 28 matches Sunday)	L	Broadcast	Pay TV	yes	Orange
	3 Premium (38 matches Saturday)	L	Broadcast	Pay TV	yes	Canal Plus
	1 Fans (6 clubs)	L/D	PPV, VOD	PPV/VOD	yes	Canal Plus
	2 Fans (7 clubs)	L/D	PPV, VOD	PPV/VOD	yes	Canal Plus
	3 Fans (8 clubs)	L/D	PPV, VOD	PPV/VOD	yes	Canal Plus
	Multiplex (4 top matches)	L	Broadcast	Pay TV	yes	Canal Plus
	1 Magazine/ highlights (Saturday)	D	Broadcast	Pay TV	yes	Canal Plus
	2 Magazine/highlights (Sunday)	D	Broadcast	Pay TV	yes	Canal Plus
	3 Magazine/highlights (Monday)	D	Broadcast	Pay TV	yes	Canal Plus
	Highlights VOD	D	Broadcast	Pay TV	yes	Orange
	Mobile	L/D	Mobile	PPV	yes	Orange
Serie A	Platinum live	L	Satelitte	Pay TV	yes	Sky
	D (highlights)	D	Satellite	Pay TV	yes	/
2010-12	Gold live (12 clubs)	L	DTT	Pay TV	yes	RTI
	Silver live	L	DTT	Pay TV	yes	(Dahlia TV)
	Highlights	D	Broadcast	FTA	yes	RAI
	Highlights	D	Broadcast	FTA	no	RTI, Interactive
	Highlights (local TV)	D	Analogue, DTT	Pay TV/FTA	no	ca. 40 local TV stations
	Web Highlights	D	Internet	PPV	no	Vodafone, RTI, RCS
	Radio	L	Radio	FTA	yes	Radio RAI
	Mobile	L	Mobile	PPV	no	Vodafone
Premier League	A (23 matches)	L	All	Pay TV	yes	BskyB
	B (23 matches)	L	All	Pay TV	yes	BskyB
	C (23 matches)	L	All	Pay TV	yes	BskyB
2010-13	D (23 matches)	L	All	Pay TV	yes	ESPN
	E (23 matches)	L	All	Pay TV	yes	BskyB
	F (23 matches)	L	All	Pay TV	yes	BskyB
	Highlights	D	All (FTA)	FTA	yes	BBC
	1 Near-live	D	All (PPV)	Pay TV	yes	BskyB
	2 Near-live	D	All (PPV)	Pay TV	yes	BskyB
	Near-live clips	D	Internet	PPV	no	Yahoo
	Mobile highlights	D	Mobile	PPV	no	ESPN
Bundes liga	(Frid)	L	Broadcast	Pay TV	yes	Sky D
	(Sat)	L	Broadcast	Pay TV	yes	Sky D
	(Sat)	L	Broadcast	Pay TV	yes	Sky D
2009-13	(Sun)	L	Broadcast	Pay TV	yes	Sky D
	Highlights Sat + Sund	D	Broadcast	Pay TV	yes	Sky D
	All matches	L	Internet	PPV	yes	Sky D
	All matches	D	Internet	PPV	yes	Sky D
	All matches clips	D	Internet	PPV	yes	Sky D
	2 matches (opening matches)	L	Broadcast	FTA	yes	ARD
	4 matches (play-out)	L	Broadcast	FTA	yes	ARD
	Highlights Sat afternoon	D	Broadcast	FTA	yes	ARD
	Highlights Sat evening	D	Broadcast	FTA	yes	ZDF
	Highlights Sund evening	D	Broadcast	FTA	yes	ARD
	All matches	L	IPTV	Pay TV	yes	DT

	All matches	L	Mobile	PPV	yes	DT
	All matches	D	IPTV	Pay TV	yes	DT
	All matches	D	Mobile	PPV	yes	DT

Figure 2.13 - Domestic media rights packages top five European football leagues (minus Spain) seasons 2010-2012

The overview makes clear that the most valuable media rights, i.e. the live rights for pay TV exploitation, are usually acquired by two operators. At least in these markets, the main vertical effect of the chosen remedies has been that in the downstream market a duopoly emerged in the place of a monopoly.

	Ligue 1 (FR)	**Bundesliga (GER)**	**Serie A (IT)**	**Premier League (UK)**
Contract duration	4 years (2008-12)	4 years (2009-13)	2 years (2010-12)	3 years (2010-13)
Number of matches	380 / 380	306 / 306	380 / 380	138 / 380
Configuration of rights packages	Platform neutral	Per platform	Per platform	Platform neutral
Number of live rights packages	8	7+2	5 (4)	6
Number of operators (live rights)	2 (Canal Plus, Orange)	2 (Sky D, DT) + ARD (6 matches)	3 (Sky, RTI, Vodafone)	2 (BskyB, ESPN)

Figure 2.14 - Domestic media rights contracts top five European football leagues (minus Spain) seasons 2010-2012[437]

The offset of this rather modest shift from competition for premium sports media rights "for" the market rather than "in" the market is that consumers now need to purchase an additional subscription in order to continue to be able to watch the entire competition.[438] For the sports organisers, on the other hand, the competitive battle between two powerful market players has been advantageous: they are experiencing an astonishing increase in the value of their media rights. In the United Kingdom, for instance, the recent face-off between long-term partner BSkyB and newcomer British Telecom for the live Premier League rights for the years 2013-16 resulted in a € 3,5 billion record deal, a 71% increase on the previous deal.

While these observations by no means invalidate the application of the competition rules to address the premium (sports) content bottleneck, it is debatable whether the results so far amount to the level playing field that the European Commission initially aspired.[439]

One development that deserves particular attention is the emerging trend to market premium sports media rights on a platform-neutral basis with rights packages carved out by time window. This means that the purchaser of the exclusive live media rights for certain matches may exclusively exploit them across all media platforms (e.g. TV, Internet, and mobile). A potential risk of this approach, even more so when combined with the return of longer exclusivity contracts, is that it favours powerful vertically integrated media content providers and negates the progress that was made in enabling smaller operators to acquire earmarked packages for certain platforms.

[437] AGCM (Italian Competition Authority), "A418C – Procedure selletive Lega Nazionale Professionisti Campionati 2010/2011", provvedimente nr. 24206 of 6 February 2013 (2013) Bolletino Settimanala (7) 19.
[438] With regard to the UK market, Ofcom, the regulator for the UK's communication's sector, concluded that the competition law remedies have had little effect on consumer choice and pricing. It therefore proposed to impose *ex ante* wholesale release obligations on BSkyB to offer its premium sports channels to retailers on other platforms. Ofcom, Pay TV statement (2010).
[439] Katrien Lefever and Ben Van Rompuy, "Ensuring access to sports content: 10 years of EU intervention. Time to celebrate?" (2009) 1 Journal of Media Law (2) 243.

2.5 The *Premier League v QC Leisure* judgment (2011)

On 4 October 2011, the CJ delivered its long-awaited preliminary ruling in two joined cases, *FA Premier League v QC Leisure and others (Case C-403/08)* and *Murphy v Media Protection Services (Case C-429/08)* (*Premier League v QC Leisure*).[440] The High Court of Justice of England and Wales had asked the CJ to give guidance on several questions concerning the marketing and use in the UK of foreign decoder cards to access Premier League matches.

The territorial exclusivity granted by the Premier League to the licensee that acquired its domestic live media rights was upheld by a combination of private and public measures. The Premier League imposed a contractual condition preventing broadcasters, which acquire the rights, from offering services to subscribers outside the Member State for which they hold the licence. Moreover, national legislation prohibited foreign decoding equipment – giving access to satellite broadcasting services from another Member State – from being imported, sold, and used in the UK. Several pubs in the UK bypassed this territorial exclusivity by screening Premier League matches via a Greek decoder card and subscription package. The Premier League brought a civil action against these pubs and the suppliers of foreign decoder cards. Criminal action was also taken against Karen Murphy, a landlady who used a Greek subscription to show Premier League football in her Portsmouth pub. This way she avoided having to subscribe to the (more expensive) commercial subscription from BSkyB (i.e. the official UK licensee). It also allowed her to circumvent the "closed period" rule that prevents UK broadcasters from showing live football matches on Saturday afternoon (see below). The appeal against her conviction and the appeal from the foreign decoder suppliers form the background to the cases that reached the CJ.

In its preliminary ruling, the CJ addressed *inter alia* questions about the compatibility of the public and private measures, designed to ensure compliance with the territorial allocation of the Premier League broadcasting rights, with different EU law provisions.

First, the CJ found that the UK legislation prohibiting the import, sale, and use of foreign decoding devices is a restriction on the freedom to provide services prohibited by Article 56 TFEU.[441] The CJ rejected the arguments that were put forward to justify this restriction.

Second, the CJ found that the contractual obligation on broadcasters not to supply decoding equipment that would enable access to its broadcasts outside the licensed territory infringes EU competition law. Those contractual provisions *"prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches"* and thus enable *"all competition between broadcasters in the field of those services to be eliminated"*.[442]

Importantly, the CJ did not call into question the principle of granting exclusive licenses.[443] It is apparent from earlier case law that a rights holder may in principle grant to a sole licensee the exclusive right to broadcast protected subject matter from a Member State. The mere fact that the rights holder consequently prohibits its transmission by others, during a specified period, *"is not sufficient to justify the finding that such a contract must be regarded as … an agreement, decision, or concerted practice prohibited by the Treaty"*.[444] The *Premier League v QC Leisure* judgment did made clear, however, that contractual clauses granting absolute territorial protection is incompatible with Article 101 TFEU. Absolute territorial protection means that the licensee is

[440] Joined Cases C-403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v. Media Protection Services Ltd (2011) ECR I-9083.
[441] Idem, para 89.
[442] Idem, para 142.
[443] Idem, para 141.
[444] Case 262/81 Coditel SA and others v Ciné-Vog Films SA and others ECR (1982) 3381, par. 15.

prohibited not only from selling actively in other licensee's territories (*in casu* other Member States) but also passively (i.e. responding to unsolicited demands from consumers located in other Member States).[445]

2.5.1 Territorial exclusivity (reprise)

As discussed, premium sports media rights are typically licensed on an exclusive territorial basis in the EU. Both rights holders and media content operators have incentives to do so because it enables them to maximize their return on investment.[446] Even though strong international players have emerged (such as Fox International Channels and Al Jazeera) that increasingly purchase sports media rights for multiple Member States,[447] these rights are still exploited market by market.

At the time the CJ delivered its judgment, it was deemed a radical game-changer for the way in which sports media rights are sold in the EU. It was suggested that the Premier League would be required to move to a pan-European licensing model or might decide no longer to market its rights in certain Member States. Some even speculated that the Premier League might decide to self-exploit its rights on its own satellite channel.

So far, however, the Premier League is sticking to the old recipe. In response to the CJ's judgment and the subsequent rulings of the High Court of Justice of England and Wales,[448] the Premier League was forced to renegotiate its licensing agreements with broadcasters in the EU. Instead of outright prohibitions of passive sales in the licensing agreements, other contractual provisions were introduced:

1. Licensees are no longer allowed to offer an optional English language feed to its consumers. They can only transmit Premier League matches with the commentary in the language of that country. The English language feed is now limited to UK and Irish licensees.
2. Non-UK licensees are no longer allowed to transmit more than one live Premier League match on Saturday afternoon (3-5 pm).

Inspiration for these contractual amendments was found in the Opinion of Advocate-General Kokott and in the CJ's final judgment.

The CJ rejected the need to ensure compliance with the UK "closed period" rule, which prohibits the broadcasting of live football on Saturday afternoon, as a ground of justification for the prohibition on the import, sale, and use of foreign deciding devices because it found this prohibition to be disproportional. The CJ noted that:

"even if the objective of encouraging such attendance of stadiums by the public were capable of justifying a restriction on the fundamental freedom (to provide services), suffice it to state that compliance with the (rule) can be ensured, in any event, by incorporating a contractual limitation

---

445 This is in itself also not a real innovation: restrictions on passive selling are considered to be restrictions by object and thus caught by the prohibition of Article 101(1) TFEU. In most circumstances they are qualified as "hard core" restrictions and thus incapable of exemption under Article 101(3) TFEU. European Commission, Guidelines on Vertical Restraints (Notice) (2010) OJ C 130/1 paras 56, 60-62.

446 See Section 2.3.3.1.

447 See e.g. Sportsbusiness, DFL secures major tie-up with 21st Century Fox, 14 October 2013, http://www.sportbusiness.com/tv-sports-markets/dfl-secures-major-tie-21st-century-fox.

448 High Court of Justice, Murphy v Media Protection Services Ltd, 24 February 2012 (2012) EWHC 466 (Admin); High Court of Justice, Football Association Premier League Ltd & Others v QC Leisure & Others, 3 February 2012 (2012) EWHC 108 (Ch).

in the license agreements between the rights holders and the broadcasters. It is undisputable that such a measure proves to have a lesser adverse effect on the fundamental freedoms".[449]

In her opinion, Advocate-General Kokott concluded that a partitioning of the internal market for the reception of satellite broadcasts is not necessary in order to protect the specific subject-matter of the rights to live football transmissions. She suggested, however, that:

"In this regard it would appear relevant in particular whether alternative marketing models can be developed, as the Commission demands, or whether restricting the commentary to certain language versions might create a sufficiently effective practical delimitation of the markets in order to continue to serve the different national markets at different prices." [450]

It should be recalled that pub owners like Karen Murphy had two fundamental reasons to use foreign decoder devices and subscriptions to access Premier League matches: a lower subscription price and circumvention of the "closed period" rule. The creative tactics used by the Premier League seek to deter such practice by taking away the benefits that pub owners enjoyed when using foreign decoder devices legally imported from elsewhere in the EU.

2.5.2 The "closed period" rule

The UEFA broadcasting regulations allow national football associations that are member of UEFA to block a number of hours ("closed period") during which football may not be broadcasted.[451] The associations can schedule domestic football fixtures[452] at a time when they are not liable to be disturbed by the contemporaneous broadcasting of football. This is not mandatory. National football associations must, however, respect the local blocked hours of other national football associations when selling their broadcasting rights into their territories.

UEFA first introduced the broadcasting rules in 1988.[453] At the end of the 1980s, ticket sales were still an important source of revenue for professional sport. The growing demand for televised sports content, which significantly increased the airtime of sport, was perceived as a threat to this volatile revenue stream.[454]

The introduction of UEFA's broadcasting regulations prompted numerous complaints by broadcasters to the European Commission, who shared the complainants' concern that the rules restricted competition. At the Commission's request, UEFA substantially reduced the scope for national associations to block the broadcasting of football (1) by defining the main domestic fixture

---

[449] Idem, para 123.

[450] Opinion of Advocate-General Kokott in Joined Cases C-403/08 and 429/08 Football Association Premier League Ltd and others v QC Leisure and others and Karen Murphy v Media Protection Services Ltd (2011) ECR I-9083.

[451] UEFA, Regulations governing the implementation of Article 48 of the UEFA statutes (2002) refers in Article 1(2) to "*(a)ny transmission or reproduction by any actual or future transmission technique (including, but not limited to Internet) of a football match".*

[452] The broadcasting regulations define the main domestic fixture as the time when the majority (i.e. more than 50 %) of the weekly football matches in the top or top two domestic leagues or in the national cup(s) is played. The prohibition of football broadcasting may only apply during the football season, which *"starts with the first match in the domestic league championship(s), or, if earlier, in the national cup(s), and ends with the last match in the domestic league championship(s) or, if later, in the national cup(s)".* No prohibition can apply during interruptions to the fixture schedule, e.g. during the winter break. Idem, Article 3(4).

[453] UEFA's Executive Committee issued the broadcasting regulations on the basis of Article 48(1) (ex Article 47(1)) of the UEFA Statutes. *UEFA's broadcasting regulations* (Case COMP/37.576) Commission Decision 2001/478/EC (2001) OJ L 171/12, para 9.

[454] European broadcasting markets were characterized by natural monopolies. This limited the number of broadcasts and kept prices paid for broadcasting rights down. See Section 2.1. See also UEFA, 'Report of the General Secretary for 1988 and 1989' (1990) 34, cited in Borja Garcia Garcia, *The European Union and the governance of football: a game of levels and agendas* (2008) Loughborough University, unpublished doctoral dissertation, 141 (*"It is in the interest of football that there should be firm control over the televised coverage of matches. An invasion of such transmissions can only lead to a devaluation of the game's worth and thus a decline in interest not only on the part of the public but also in that of the commercial circles which are currently seeking to become involved in football"*).

schedule precisely, and (2) by introducing a clear and unambiguous rule that the blocked hours should correspond to this fixture schedule.[455] The Commission further stressed that it would only accept the blocking of two and a half hours on Saturday or Sunday.[456] In April 2000, UEFA notified the amendment of the broadcasting regulations in accordance with the Commission's requests. In its *UEFA's broadcasting regulations* decision (2001), the Commission subsequently concluded that the regulations, as amended in 2000, were compatible with Article 101 TFEU.[457] The Commission essentially considered that the broadcasting regulations, in its amended form, only have limited effects on competition in the internal market. Hence, it found that UEFA's broadcasting regulations *"cannot be qualified as constituting an appreciable restriction of competition"* and therefore did not infringe Article 101(1) TFEU.[458]

Over the last two decades, UEFA's broadcasting regulations have gradually become less significant. For the season 2000-2001 ten football associations in the EU used the broadcasting regulations to block hours. Since then, their relevance further decreased. For the season 2011-2012 only seven football associations in the EU blocked broadcasting hours under the UEFA broadcasting regulations. For the season 2013/2014, only Austria and the United Kingdom (England, Northern Ireland, and Scotland) have defined "closed periods".[459]

The underlying assumption of the "closed period" (or "blackout") rule, namely that television coverage of professional sport matches risks undermining attendance or even amateur participation, has also been contested. The empirical research on the impact of live broadcasting on stadium attendance is far from conclusive. While some studies find a statistically significant effect of broadcasting on attendance,[460] others conclude that the effect is negligible or zero.[461]

In any event, the UEFA member associations in the UK and Austria continue to hold on to the "closed period" rule. As a result of the contractual amendments in the licensing agreements of the Premier League, however, the UK "closed period" rule is now *de facto* imposed across the entire EU, to the detriment of media content operators and millions of sports fans outside of the UK and Ireland.

This sits at odds with the European Commission's aspirations to promote cross-border access to audiovisual content.[462] In its Second report on the implementation of Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access, the Commission acknowledged that *"the possibility of legalising the grey market is disturbing to most stakeholders since it necessarily challenges the organisation of the sale of (sports media rights)"*. Rights holders

[455] *UEFA's broadcasting regulations* (Case COMP/37.576) Commission Decision 2001/478/EC (2001) OJ L 171/12, paras 6-7.
[456] The Commission reasoned that a football match lasts 2 x 45 minutes with a 15 minutes break, in total nearly two hours. A time slot of two and a half hours *"gives spectators sufficient time for transport to and from the stadiums and to watch the football match in the stadium without being concerned about missing football on TV"*. Idem, para 7.
[457] Idem, para 3.
[458] Idem, para 51.
[459] UEFA, Blocked broadcasting hours defined, 25 August 2013, http://www.uefa.org/news/newsid=19817.html.
[460] See e.g. Babatunde Buraimo, "Stadium attendance and television audience demand in English league football" (2008) 29 Managerial and Decision Economics (6) 513 (stressing however that the effect in the other direction (i.e. the broadcasting's impact on stadium attendance) is positive); Jaume Garcia and Placido Rodriguez, 'The Determinants of Football Match Attendance Revisited: Empirical Evidence from the Spanish Football League" (2002) Journal of Sports Economics 3, 18; Fiona Carmichael, Janet Millington and Roberts Simmons, "Elasticity of Demand for Rugby League Attendance and the Impact of BSkyB" (1999) 6 Applied Economic Letters 12, 797.
[461] See e.g. David Forrest, Rob Simmons and Stefan Szymanski, "Broadcasting, Attendance and the Inefficiency of Cartels" (2004) 24 Review of Industrial Organization 243; David Forrest and Rob Simmons, "New Issues in Attendance Demand. The Case of the English Football League" (2006) 7 Journal of Sports Economics (3) 259; Stephen Allen, "Satellite Television and Football Attendance: The Not so Super Effect" (2004) 11 Applied Economic Letters (2) 123.
[462] See e.g. European Commission, Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values (2013) COM(2013) 231 final; European Commission, Communication on content in the digital single market (2012) COM(2012) 789 final.

naturally aim to maximise revenue by selling their rights for each individual Member State. Yet, the Commission indicated that:

"the only cross-border market which the Commission would like to see being developed is that for services catering to the mobility and legitimate expectations of European citizens and, as such, legally available in their mother tongue and the language of their native country."[463]

In addition, considering the current spill over effects of the UK "closed period" it could be questioned whether the UEFA broadcasting regulations can still be considered not to appreciably restrict competition. In the present economic and legal context it is unlikely that the restrictive effects of the "closed period" rule could be deemed inherent in and proportional to a legitimate objective.[464] It follows that the broadcasting regulations no longer escape the application of Article 101(1) TFEU and UEFA would face the even more formidable task of substantiating objective efficiency gains and consumer benefits resulting from the "closed period" rule to satisfy the exemption conditions of Article 101(3) TFEU.

2.6 Conclusions

This chapter analytically described how sports media rights are managed and licensed by sports organisers, focusing on the compatibility of these practices with EU competition law and internal market law.

The key findings can be summarized as follows.

- There have been various experiments with sports organisers self-exploiting their (new) media rights on a variety of platforms (pay TV channels, online platforms). New technologies are enabling sports organisers to expand their competition's (live) coverage in territories where their rights would otherwise not be exploited. Also for smaller sports online platforms create important opportunities to get media exposure. However, for the most premium sports, particularly football, most if not all of the value is still created via traditional distribution networks (especially pay TV). As a consequence, the strategy of exclusive licensing is likely to remain standard practice for these rights.

- EU competition law and/or regulatory intervention has fundamentally altered the way in which premium sports media rights are marketed in the EU. The imposed remedies, facilitated by technological developments, have effectively addressed competition concerns about output restrictions related to joint selling. The problem of warehousing of rights or unused rights no longer seems to be a concern. In absence of public intervention through competition law enforcement or legislation, the most valuable rights tend to be sold in larg(er) bundles.

- In competitive sports media markets, the most valuable sports media rights are marketed through a competitive and transparent public tender process.

- Over the last decade, the joint selling of sports media rights has become the dominant practice.

---

[463] European Commission, Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (2008) COM(2008) 593 final, 4.

[464] The argument put forward by UEFA in the European Commission's *UEFA's broadcasting regulations* decision, namely that the objective of the rule is to promote the development of football and the variety of the competition, has always been disputable. See Ben Van Rompuy, *Economic efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU* (Wolters Kluwer Law & Business, Alphen aan den Rijn 2012) 293-300, 324-330.

Regarding football media rights, NCAs have commonly replicated all remedies adopted in the European Commission's decisions. Regarding the duration of exclusivity agreements, more and more NCAs are showing more flexibility by accepting 4 or 5-year exclusive agreements.

- EU competition law intervention has been less successful in terms of challenging existing market dynamics at the downstream level: the premium sports content bottleneck continues to frustrate markets for the acquisition of premium sports media rights.
  - While the splitting up of sports media rights into separate attractive rights packages has generally increased competition for live rights, the most valuable sports media rights typically remain in the hands of one or two large operators. This has created stronger price competition, but the downside for consumers is that they often now need two subscriptions in order to watch all the matches of e.g. their national football competition.
  - Content distributors increasingly seek to exploit sports media rights on a platform-neutral basis. Instead of slicing and dicing the rights per platform, more and more licensing agreements grant exclusivity for live rights packages across all media platforms. This trend again favours powerful vertically integrated operators and risks negating the progress that was made in enabling smaller operators to acquire earmarked packages for certain platforms.

- Initially the CJ's *Premier League v QC Leisure* judgment was considered to be a game-changer for the way in which sports media rights would be marketed in the EU. So far little seems to have changed. The Premier League has responded by introducing new contractual conditions that, unfortunately, makes consumers everywhere in the EU worse off. The *de facto* imposition of the UK "closed period" rule for Premier League matches across Europe not only raises questions about the public interest dimension of this old-fashioned measure, but even indicates competition issues.

- A few other main sports organisers have also decided no longer to offer licensees outside the UK and Ireland an optional English language feed, but the issue seems to affect only a very limited amount of sports media rights that have cross-border appeal and generate significant value on the domestic UK market.

- Strong international players such as Fox International Channels or Al Jazeera are increasingly purchasing sports media rights for multiple Member States, but on the downstream market territorial exclusivity remains key.

3. THE EXPLOITATION OF SPORTS MEDIA RIGHTS: RIGHT TO SHORT REPORTING*

3.1 Introduction

The right to short reporting finds its roots in the European Convention on Transfrontier Television (ECTT or the Convention), where it is advanced as a measure that parties to the Convention might adopt. The purpose of the right to short reporting, as enshrined in the Convention, is to protect the right of a wider public to receive information on events of high interest for which certain broadcasters have acquired exclusive TV rights. At the EU level the right was protected in the Television without Frontiers Directive (TWF Directive) in 2007 and can be found in Article 15 of the consolidated version of the Audiovisual Media Service Directive (AVMSD). The rationale of the right, as defined in that Article, is to keep the public informed on events of high interest by allowing non-exclusive broadcasters to produce and use short extracts of those events.

This chapter will describe and analyse the right to short reporting as enshrined in Article 15 AVMSD and as implemented in the national regulatory frameworks of the 28 Member States of the European Union. To map out the national implementations of Article 15 AVMSD, national correspondents have answered specific questions asked through the questionnaire. Three scenarios have been tested. The first one seeks to determine the conditions of access to the signal of a domestic broadcaster which has acquired exclusive TV rights on those events of high interest to the public as well as the conditions and modalities of use of the short extracts produced. The second scenario is similar to the first one, except that it involves two broadcasters established in different EU jurisdictions. It also seeks to determine which law is applicable to determine if an event qualifies as an event of high interest to the public. The last scenario tests the possibility for a broadcaster to get access to the venue of an event of high interest to the public to exercise its right to short reporting. In addition, the scenario checks whether the right of access to the venue extends to a right to record images in margin of the events. It should be noted that football matches of the UEFA Champions League have been used as examples of sports events to which the right to short reporting might apply. However, answers to the questionnaire are not limited to football games and competitions.

The chapter is divided in three sections. The first section introduces the background on the right to short reporting and describes the framework rules at the level of the Council of Europe and of the European Union. The second section maps out the national implementations of Article 15 AVMSD in the 28 Member States. The third section analyses the national rules. The report is completed by an annex summarizing in table form the national answers to the questionnaire. For linguistic reasons and to be consistent with the expressions used in the Directive, the expressions "short extracts", "short reports" and "short reporting" are interchangeably used. Likewise, the terms "primary broadcaster" to designate the broadcaster which has acquired the exclusive rights on the sports events and "secondary broadcasters" for the other broadcasters i.e. broadcasters seeking access to the events to report on them, are similarly employed. The terms have been borrowed from Recommendation R(91) 5 of the Council of Europe (as described in the following section) as the adjective "primary" clearly indicates which broadcaster has acquired the exclusive rights of transmission. By contrast, the adjective "secondary" suggests that the other broadcaster, i.e. the one seeking access to the events, does not have exclusive TV rights on these events. It should be noted that Article 15 AVMSD does not refer to the primary or to secondary broadcaster, but instead to the transmitting broadcaster having acquired exclusive rights on the events and to the

* The author of this chapter is Catherine Jasserand-Breeman.

broadcaster seeking access to the events. For the sake of simplicity "primary" and "secondary" broadcasters have been employed.

Finally, it should be noted that the right to short reporting cannot be an absolute right because it limits the rights that exclusive broadcasters might have on the events, such as their right of property, their right to conduct business or their copyright (and related rights) in their signal or programs. However, this chapter will not discuss these issues in depth but only mention them where relevant in the national implementation of the rules.

3.2 Background and framework rules

The right to short reporting in Europe finds its roots in Article 9 ECTT and in the Recommendation no. R(91)5 of the Council of Europe. At the European Union level it has been implemented in Article 15 AVMSD. Whereas the right to short reporting has been introduced in the ECTT as an example of measures that would guarantee the public right to information on certain events, it has become a mandatory right in the AVMSD.

3.2.1 Origins of the right to short reporting in Europe

Original Article 9 ECTT, as adopted in 1989, did not mention the right to short reporting. Instead it referred to the general right of the public to information in relation to events of high public interest. [465] The Article exhorted parties to the Convention to adopt measures to protect this right and ensure that the public could follow events of high interest to the public on television. The initial wording of Article 9 ECTT calls for several remarks. First of all, it did not set up a right of access to the public but only required signatory states to adopt legal measures if they were necessary. Second, the Article was entitled "access to the public to major events", whereas the text of the Article itself referred to "events of high public interest". At that stage, it seems that the distinction between "major events" and "events of high public interest" did not matter – it could even be deduced that the two expressions were synonymous in the original version of the ECTT. But one should keep in mind that the right to make short extracts had not been introduced yet.
A few years later, to take into account the cross-border development of television services and the acquisition of exclusive transmission/retransmission television rights in major events in countries others than the country of origin, the Committee of Ministers of the Council of Europe adopted Recommendation no. R(91) 5 on the right to short reporting.[466] The Recommendation set up principles that parties to the Convention were encouraged to take into account when they were elaborating the necessary national measures on the basis of Article 9 ECTT. First of all, it is up to the broadcasters, and not the parties to the Convention, to determine which events are "of particular interest for (the) public" and therefore subject to the principles contained in the Recommendation.[467] It should also be noted that the Recommendation does not mention the term "event of high interest to the public". The detailed description of the Recommendation, which follows below, is necessary to determine which national features of the right to short reporting might have been inspired by the principles contained in the Recommendation and which ones are implementing the features of Article 15 AVMSD.

[465] Article 9 of the European Convention on Transfrontier Television reads as follows: "each Party shall examine the legal measures to avoid the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission or retransmission, within the meaning of Article 3, of an event of high public interest and which has the effect of depriving a large part of the public in one or more other Parties of the opportunity to follow that event on television".
[466] Recommendation R(91) 5 of the Committee of Ministers to Member States on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a trans-frontier context, 11 April 1989.
[467] Recommendation R(91) 5, Definitions section.

The first principle of the Recommendation defines the right as a limitation to the right of property of exclusive broadcasters. The principles of the Recommendation are then divided into conditions to enable secondary broadcasters to make short extracts and conditions applicable to the use of short extracts.

The Recommendation suggests two ways of access to the events: through the recording of the broadcaster's signal or through direct access to the sports venues. To facilitate the making of short reports, the Recommendation provides criteria to determine what should be considered as an "event" when the sports event takes place over several days or when it comprises several independent elements. Likewise, the Recommendation provides criteria to determine the length of short extracts.

Concerning the use of short extracts, it is relevant to note the detailed conditions that the Recommendation sets out. They relate in particular to their exclusive use in "regularly scheduled news bulletins"; the waiting period before broadcasting the short reports ("not before the primary broadcaster has had the opportunity to carry out the main broadcast of the major event"); the indication of the name/logo of the primary broadcaster as the source (when the signal is used to make the report); the single use of a short report ("unless there is a direct link between its content and another topical event); the destruction of all original programme materials used after the production of the short reports and the possible preservation of short reports for archive purposes only.

The last principle of the Recommendation is also very relevant as it sets the general financial conditions. As a rule, short reports should not be charged but if some charges apply, they should not cover the costs of television rights. As an exception, in case the secondary broadcaster has access to the venue, the broadcaster can be charged by the event organiser or the site owner "for any necessary additional expenses incurred".

The Recommendation had some influence on the ECTT. The Convention was amended in 1998 to introduce the right to short reporting as one of the measures that signatories to the Convention could adopt to ensure the right of the public to information. The amendment of the Convention was justified by a change of context and by the revision of the TWF Directive to introduce, among others, a provision on the public's access to "events of major importance for society" (Article 3a).[468] The aim of that Article, however, was to ensure the full coverage of certain events on free-TV and not the making of short extracts to inform the public. Nevertheless, the Committee in charge of the revision of the ECTT decided to "bring the Convention in line with Article 3a of the revised Directive". As a consequence, the revised ECTT contains a general provision on "access of the public to information" relating to events of high public interest (amended Article 9) and another article on "access of the public to major events" (Article 9bis).

Article 9 ECTT was therefore revised to introduce "the right to short reporting on events of high interest to the public" as an example of the legal measures that countries could adopt to protect their public's right to information in case of broadcasting exclusive rights. Article 9 does not oblige signatory states to introduce such as a right in their national regime but invites them to examine the possibility to do so.[469] The notion of "events of high public interest" is defined in the explanatory report to the Convention as "any political, social, cultural or sports event which is regarded by one

[468] Article 3a of Directive 97/36/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJEC 1997 L 202/60.
[469] See Max. Schoenthal, "Major events and reporting rights" in Ian. Blackshaw, Steve. Cornelius, Robert. Siekman (eds.) *TV rights and sport: legal aspects* (T.M.C. Asser Press, The Hague 2009) 75.

or more broadcasters in other Parties as being of high interest to the public in one or more other Parties".[470] Contrary to the original version of the Convention and to Recommendation R(91) 5, the revised version makes a clear distinction between the notion of "events of high public interest" and the notion of "events of major importance". The explanatory report further specifies that "events of high public interest do not have to meet the criteria of events of major importance for society". However the latter ones "will usually meet the criteria for national measures foreseen in Article 9". As a consequence, if the two notions are clearly distinct, events of major importance can meet the criteria and threshold of events of high public interest. Finally, while Article 9 does not contain the conditions prescribed in Recommendation R(91) 5, the explanatory report considers those conditions applicable.[471]

Article 9bis relates to the "access of the public to major events", for which "more far-reaching measures to protect access by the public to information" are justified.[472] At the EU level, the right to information (short extracts) on events of high public interest has been implemented in Article 15 AVMSD; whereas the right of (full) access to major events has been transposed in Article 14 AVMSD. As explained in the following paragraph, a differentiated regime applies to "events of high interest to the public" and "events of major importance for society".

3.2.2 European framework applicable to the right to short reporting

During the revision process of the TWF Directive, the European Commission expressed concerns on the absence of harmonized rules to guarantee access to short extracts of events of high interest to the public. To avoid internal market distortions, the European Commission proposed to add a provision on the right to short reporting. This has become Article 15 AVMSD. [473]

3.2.2.1 Background on the introduction of the right to short reporting

The TWF Directive did not contain any provision on the right to short reporting. It only addressed the issue of events of major importance for society in its Article 3a(1). This Article, which has become Article 14 of the current AVMSD, has set up a voluntary regime in which Member States take measures to ensure that the public can have access to events that are listed. Member States notify their list to the European Commission, which in return offers an opinion on its compatibility with EU law.[474]

The idea of introducing a right to short reporting at the Community level was first considered in 2003, in the European Commission's fourth report on the application of the TWF.[475] Discussions were then launched in a public consultation,[476] followed by the work of a Focus Group on the right to information/short reporting.[477] The results of the Focus Group were summarised in "issue

[470] Explanatory report, European Convention on Transfrontier Television, paragraph 176.
[471] Idem, para. 180.
[472] Idem, para. 181.
[473] European Commission, Commission Staff Working Document "Impact assessment- Draft Audiovisual Media Services Directive", SEC (2005) 1625/2.
[474] Article 14(2) AVMSD.
[475] Fourth report on the application of Directive 89/552/EEC "Television Without Frontiers", COM (2002), 778 final, 6 January 2003, p. 37-38.
[476] Public consultations following the fourth report on the application of Directive 89/552/EEC "Television Without Frontiers", see COM (2002) 778 final, p. 39.
[477] The establishment of a Focus Group on the right to short reporting was announced in the European Commission's Communication on the future of European regulatory audiovisual policy, 15 December 2003, COM (2003) 784 final, p. 16.

papers", one of which addressed "the right to information and right to short reporting".[478] The issue papers were published for consultation as a part of the Audiovisual Conference in Liverpool on the modernisation of the TWF and its possible replacement with a Directive on "Audiovisual Content Services."[479] The outputs from the conference included a proposal to establish minimum criteria at the Community level in case the right to short reporting was introduced in the amended Directive. These included at least "a reasonable length of extracts, maximum 90 seconds"; "freedom of choice of extracts by the summary broadcaster"; "insertion solely in news…programs"; "identification of source"; "inclusion in the context of traditional broadcasting"; and "exploitation limited in terms of time".[480] Taking into account the answers to the public consultation, the European Commission proposed to modernise the TWF Directive.[481] One of the novelties was the introduction of a right to short reporting.[482] The right was enshrined in Article 3k of the adopted Directive (Directive 2007/65/EC),[483] which has been renumbered Article 15 of the consolidated version of the AVMSD.[484]

The right to short reporting as described in Article 15 AVMSD is only applicable to broadcasters.[485] The Article defines the basic features of the right, some of which are explained in Recitals 48, 55, 56 and 57 of the Directive. The Directive gives some flexibility to Member States, in particular in the definition of the conditions and modalities of the provision of short extracts but also in the definition of the notion of "events of high interest to the public". The rules contained in Article 15 AVMSD can be split in rules relating to the access to events to produce the short extracts and rules relating to the use of these short extracts.

3.2.2.2 Conditions of access to events of high interest to the public

The right to short reporting aims at ensuring that any broadcaster can have "access (…) to events of high interest to the public, which are transmitted on an exclusive basis" by another broadcaster in the same jurisdiction. The purpose is to ensure news reporting on specific events and inform the public. The notion of "events of high interest to the public" is not defined in Article 15 AVMSD or in any of the recitals. The question is whether the notion encompasses the notion of "events of major importance for society". The latter are so important that they should not be exclusively broadcast; rather, the public should be guaranteed a full coverage (on live or on deferred basis) of such events. The notion is not defined in Article 14 AVMSD but Recital 49 provides examples of events of that type: the Olympic Games, the football World Cup and the European football championship. The listed event regime pursues a different goal than the right to short reporting. Some commentators consider that the threshold of events of major importance for society is higher than the one applicable to events of high interest to the public[486] and this view is consistent with the explanatory report of the Convention on Article 9 and Article 9bis of the ECTT. The difference

[478] Focus Group No.3, "the right to information and the right to short extracts", October 2004, available at http://ec.europa.eu/avpolicy/docs/reg/modernisation/focus_groups/fg3_extracts_en.pdf.
[479] *Liverpool Audiovisual Conference, Between Culture and Commerce*, 20-22 September 2005, Consolidated conference report, http://ec.europa.eu/avpolicy/docs/reg/modernisation/liverpool_2005/uk-conference-report-en.pdf.
[480] Idem, p. 15-16.
[481] Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM (2005) 646.
[482] Idem, Article 3b.
[483] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (2007) OJ L332/27.
[484] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (2010) OJ L 95/1.
[485] Defined as "media service provider of television broadcasts" in Article 1 (f) of AVMSD.
[486] Alexander Scheuer and Max Schoental, "Article 3k AVMSD" in Oliver. Castendyk et al (eds) *European Media Law* (Kluwer Law International, Alphen aan den Rijn 2008) 930.

in thresholds also seems logical when one takes into account the difference of purposes between Article 14 and Article 15 AVMSD. Article 14 relates to the right to broadcast events and seeks to ensure their full coverage without the possibility to deprive the public from watching these events. By contrast, Article 15 seeks to ensure the public's access to news coverage of less important events. Two different regimes therefore apply to two different types of events. However, the AVMSD leaves at the discretion of Member States the definition of "events of high interest to the public".

Events to which the right to short reporting applies are events broadcast on an exclusive basis. Exclusive basis should be understood the way in it is defined in Article 14 AVMSD, i.e. as "restricting the coverage to subscribers via technical means or prohibiting exclusive coverage on pay-tv".[487] In application of Article 15 (2) AVMSD, access for the purpose of short reporting should be first requested to the exclusive broadcaster (primary broadcaster) established in the same Member State as the broadcaster seeking access (secondary broadcaster). In a cross-border case, the principle of the country of origin should apply to access and transmission of short extracts. In the absence of a primary broadcaster established in the same Member State, the secondary broadcaster should be allowed to request access to the exclusive broadcaster established in a different Member State.

Recital 55 provides for the sequential application of different laws. The law of the Member State where the exclusive broadcaster is located (i.e. the one supplying the signal) should apply to the request of access to the short extracts. Then the law of the Member State where the transmitting broadcaster is established should apply to the transmission (and the use thereof) of short extracts. The recital does not specify further, except that when a Member State has established an equivalent system of access, the law of that Member State should apply. One could note that the sequential approach contained in Recital 55 has not been duplicated in Article 15 AVMSD. Its binding application is therefore questionable. Article 15 (2) AVMSD only rules on the issue of access to the events in cross-border cases. Besides the lack of symmetry between the recital and Article 15, one could also wonder whether the sequential approach should apply to the determination of an "event of high interest to the public" in a cross-border situation.[488] This interrogation has indeed been checked at national level through scenario 2 of question 2 (see questionnaire in Annex I). The purpose of that scenario was to determine whether and how Member States have ruled on cross-border situations and whether their regulations cover the notion of "event of high interest to the public".

The law applicable to access to short extracts should be the law where the broadcaster giving access is established; whereas the law applicable to the transmission of short extracts should be the law where the transmitting broadcaster is established.
Concerning the access to short extracts, as a general rule, Article 15 (3) AVMSD stipulates that access should allow broadcasters to freely choose short extracts from the signal of the broadcaster transmitting the event (thus having acquired the exclusive TV rights). This presupposes that the secondary broadcaster has accessed to an un-encrypted signal, otherwise it would not be able to choose excerpts of the events.

Member States are allowed to offer other equivalent systems to achieve access.[489] As suggested in Recital 56 AVMSD, equivalent means can be access to the venue as long as access is granted on "fair, reasonable and non-discriminatory basis".[490] The Directive does not specify further.[491]

---

[487] Idem, 414.
[488] Idem, 931.
[489] Article 15 (4) AVMSD.
[490] Article 15 (4) AVMSD.
[491] In this context, the European Court of Human Rights has pointed out that article 10 ECHR does not automatically result in a claim to have access to private property (ECHR d.d. 6/5/2003, nr. 44306/98 (Appleby/UK), recital 47 ("... *While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come*

3.2.2.3 Conditions of use of short extracts

First, the AVMSD indistinctly refers to the expressions "short news reports"[492] and "short extracts"[493] without defining them.

Second, the Directive sets some limits on the use of the short reports. The first limit concerns the use of short extracts in "general news programs".[494] Although the Directive does not define the news programs[495], it sets a limit by excluding the re-use of short extracts for entertainment purpose. The exclusion as such is to ensure conformity with the purpose and rationale of the right to short reporting, which is to inform the public and ensure media pluralism.[496]

The second limit concerns the use of short extracts in on-demand audiovisual media services "only if the same programme is offered on a deferred basis by the same media service provider".[497] Short extracts should not be used or repackaged to create new on-demand services (such as entertainment services).[498]

Article 15 (3) AVMSD provides that the source of short extracts should be indicated, unless impossible for practical reasons.[499] Details are left at national level.

The Directive further specifies that "modalities and conditions" regarding the provision of the short extracts are defined at national level. Article 15 (6) AVMSD mentions that they should include at least the maximum length of short extracts; the time limits regarding their transmission and any compensation arrangements. The only strict requirement imposed in Article 15 (6) AVMSD concerns the scope of compensation, which "shall not exceed the additional costs directly incurred in providing access". The other conditions are not further specified in the Directive, to exception of the length of short extracts, which is set to 90 seconds in Recital 55 AVMSD.
On the specific issue of compensation, the Court of Justice of the European Union (CJ) has interpreted Article 15(6) AVMSD in Case C-238/11 (*Sky Österreich GmbH v. ORF*).[500] At national level, the case concerned a dispute between a private satellite broadcaster, Sky Österreich, and the Austrian public broadcaster ÖRF over the financial conditions under which the public broadcaster could have access to Sky's signal to make short news reporting on Europa League football matches. Sky claimed that it was prevented from getting compensation higher that the costs incurred in providing access to its signal and that the wording of Article 15 (6) AVMSD was infringing its right to property (Article 17 of the Charter of Fundamental Rights) as well as its right to conduct business (Article 16 of the Charter of Fundamental Rights). The CJ acknowledged that Article 15(6) AVMSD interfered with Sky's economic rights but held the interference was justified by the need to safeguard public access to information. On the determination of compensation, the Court recalled

into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance"). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example.

[492] Recital 56, Title of Chapter V, Article 15 AVMSD.
[493] Recital 55, Recital 57, Article 15 (3), Article 15(5) and Article 15(6) AVMSD.
[494] Article 15 (5) AVMSD.
[495] Note (1) that the notion of news programs also appears elsewhere in the Directive, more notable in article 10.4 (without further definition or explanation in the preamble) and (2) that the wording of 'general"news programs assumes a distinction between 'general"and other news programs.
[496] Recital 55 AVMSD.
[497] Article 15(5) AVMSD; Recital 57 AVMSD.
[498] Recital 57 AVMSD, see also Katrien Lefever, *New Media and Sport: International Legal Aspects* (T.M.C. Asser Press, The Hague 2012) 218.
[499] Article 15(3) AVMSD.
[500] Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk, 22 January 2013 (nyr).

that the compensation cannot include the costs of television rights.[501] This does not prevent exclusive broadcasters from conducting business as they can broadcast the event or assign their broadcasting rights.[502] In Case C-238/11, the CJ has ruled on the interaction between on one side the fundamental right to receive information and on the other side the freedom to conduct business and the right of property.

3.3 Stocktaking and findings

The three scenarios developed under Question 2 of the questionnaire were aimed at testing the rules implemented and created at national level. Answers to the questionnaires can be divided into two categories. The first relates to the implementation of the rules defined in the AVMSD, with a distinction between the rules relating to the access to events of high interest for short reporting purpose and the rules linked to the conditions of use of the short extracts. The second relates to the rules created at national level as identified from the answers provided by the national correspondents.

3.3.1 Implementation of the general rules

3.3.1.1 Access to make short reports

The Directive provides several ways of access: access to the exclusive broadcaster's signal, or access to any other equivalent ways (such as access to the venue of the event).

Most Member States grant access to the primary broadcaster's signal. As permitted by Article 15 (4) AVMSD, the law and regulations of several Member States include alternative systems of access. At least 9 Member States provide for access to the venue in their national regimes. This is the case of Belgium (both the French[503] and Flemish Communities[504]), Bulgaria,[505] Croatia,[506] Germany, Hungary,[507] Malta,[508] Poland,[509] Romania[510] and Spain.[511] In most of these Member States, the law grants at least two means of access (through the primary broadcaster's signal and through the venue) without establishing a hierarchy between them or specifying whether primary broadcasters can refuse one way of access and propose a second one instead. By exception, the law in Poland provides that access to the events should be granted through access to the primary broadcaster's signal unless the secondary broadcaster had the opportunity to enter the venue and prepare its own short reports. In that case, the primary broadcaster is exempted from the obligation to provide access to its signal.[512]

---

[501] Idem, para. 44.
[502] Idem, para. 49.
[503] Article 3, para. 2 of the Decree on audiovisual media services (2009).
[504] Article 118 of the Flemish Decree on Radio Broadcast and Television (2009).
[505] Article 19c, para 5 in relation to Article 19b of the Radio and Television Act.
[506] Article 45 of the Croatian Electronic Media Act, as provided in national corresopndent's contribution and in the non-official English translation of the Act, see http://www.e-mediji.hr/files/repozitorij/ ELECTRONIC_MEDIA_ACT__12_ December_2009.pdf.
[507] Article 19 (1) of the Media Act.
[508] Article 3 (4) of the Subsidiary legislation 350.25 broadcasting (short news reporting) regulations.
[509] Article 20c (5) of the Broadcasting Act.
[510] Article 84 of the Romanian Audiovisual Law (English translation) available at http://www.cna.ro/The-Audio-visual-Law.1655.html.
[511] Article 19.3 of the LGCA (Audiovisual Communications Act 7/2010).
[512] Article 20c (5) of the Broadcasting Act.

The law of the other Member States show further particularities. In Croatia, broadcasters may, before and instead of access to the signal, get access to the events themselves for short reporting purposes. The law there does not specify whether secondary broadcasters must request access to the venue in case they do not have access to the primary broadcaster's signal. The law only stipulates that secondary broadcasters "may get" access. In Belgium's French Community, a secondary broadcaster is only entitled to get access to the sports venue to record images in the margin of the event. [513]As a rule, for the purpose of informing the public, the secondary broadcaster cannot produce its own extracts but should make recordings from the signal of the exclusive broadcaster.[514] By way of exception, when no exclusive rights have been sold or when the exclusive broadcaster did not record the event, the secondary broadcaster can record the event on site to produce its own extracts.[515] In Germany, access to the venue is the general way of access.[516] By exception and only if the venue does not have the capacity to accommodate all the broadcasters seeking access, the excluded broadcasters (and only those ones) have an indirect right of access to the primary broadcaster's signal. In Hungary, the law provides for a third means of access, which is through the footage of the recorded event. Finally, access to the venue in the Netherlands is not granted through the law: the Dutch Supreme Court has ruled that sports organisers are entitled to make access to stadiums conditional upon a prohibition to broadcast sports events.[517]

It should be added that the law of the United Kingdom is silent on the issue of access. In the UK, the right to short reporting has been implemented in the Copyright Act as a copyright exception and it falls under the fair dealing exception for the use of copyrighted work (i.e. the broadcaster's signal).[518] As a consequence, the UK regime only deals with the use of short extracts and not with the access to the events themselves. Two other Member States, Finland and Sweden, have implemented the right to short reporting in their national copyright legislation. However in Sweden, the legislature did not consider it necessary to make provision on the issue of access to the events as the broadcasting authorities already have technical access to each other's signal.[519] In Finland, the law does not rule on the access to the events but this does not seem to be an issue either.[520]

On the matter of the origins of secondary broadcasters, most of the Member States have adopted rules to grant rights of access to non-domestic broadcasters. The rules usually apply to broadcasters within the European Union (or the European Economic Area) although some countries extend the rules to all the parties to the European Convention on Transfrontier Television (such as Latvia).[521] It should be noted that the law in Romania limits access to one foreign broadcaster per Member State,[522] but with the exception of Denmark and Slovakia the national regimes do not set rules on the law applicable to the definition of "event of high interest to the public" in a cross-border case. In Denmark, when a non-domestic EEA broadcaster requests access to a broadcaster established in Denmark, it must take into account the "particular circumstances" in the country of the foreign EEA broadcaster instead of the national circumstances.[523] In Slovakia, the law provides that when a foreign EU broadcaster seeks access to the signal of a Slovak broadcaster for events, which are

[513] Article 3, § 1, of the Coordinating Decree of 26 March 2009.
[514] Article 3, § 2, 1st indent, of the Coordinating Decree of 26 March 2009.
[515] Article 3, § 2, 2nd indent, of the Coordinating Decree of 26 March 2009.
[516] Article 5 para 1 of the RStV.
[517] Hoge Raad, 23 October 1987, NJ 1988, 310 (*KNVB v. NOS*); extracted from national correspondent's contribution.
[518] Section 30(2) CDPA.
[519] As contained in the «travaux préparatoires » of the amendment to the copyright act and described by the national correspondent's contribution.
[520] Extracted from the national correspondent's contribution.
[521] Article 27 (4) of the Electronic Mass Media Law.
[522] Article 86 (2) of the Romanian Audiovisual Law.
[523] Extracted from the national correspondent contribution.

considered as events of high interest to the public in the other Member State, the domestic broadcaster has to comply with the non-domestic rules.[524]

Concerning the law applicable to trans-frontier cases, Recital 55 AVMSD provides some guidance and proposes a sequential approach to determine the relevant jurisdiction. On this specific issue, based on the answers provided by the national correspondents, it could be observed that most of the Member States have implemented Article 15(2) AVSMD *mutatis mutandis*.

3.3.1.2 Use of short reports

Three main characteristics have been identified, as follows.

Shown in general news programs (Article 15(5) AVMSD)
The law of most Member States stipulates that short extracts should only be shown in general news programs. Very few Member States define the notion of "general news programs". A notable exception is provided in the Czech Act on Radio and Television Broadcasting. In its Article 34 (4), a general program unit is defined as a "programme consisting of news, reports and interviews focusing on the current course of events in internal and foreign politics, culture, public life, crime or sports, including a special news block, which regularly follows after such a programme unit".[525] In Italy, the notion is not defined but the applicable rule expressly excludes from the scope of general news programs the ones relating to entertainment.[526]

In other Member States, the use of short extracts is not limited to general news programs. In Belgium's French and Flemish Communities, in Bulgaria and in Cyprus, the use is also permitted in a current affairs programme. In France, short extracts can be used in news programs, which are defined as (a) regular news update; (b) multisports and general news programs (i.e. broadcast at least once a week) and (c) sports news programs dedicated to a single sport (i.e. broadcast at least once a week).[527] However, the French High Audiovisual Council (CSA) definition of the conditions and modalities of the right to short reporting has been challenged before the French Council of State.[528]

As permitted by Recital 55 AVMSD, short reporting can be broadcast on channels dedicated to sports. The law in Poland has made used of this faculty as short extracts can be broadcast in general news programs or in sports programs.[529] Likewise, in Denmark, short extracts can be shown in general news programs on any channel, including sports channels.[530]

Used in non-linear services (Article 15 (5) AVMSD)
Most member states authorise the use of short reports in non-linear services (also called on-demand services) and have implemented the optional rule contained in Article 15 (5) as phrased. The Directive does not clearly state that short extracts should only be used in general news programs. However Recital 58 of the Directive provides that on-demand services should be subject

[524] Section 31 para 9 Act No. 308/2000 Coll, on broadcasting and retransmission, as extracted from the national correspondent's contribution.
[525] As published on the website of the Czech Ministry of culture (unofficial translation): http://www.mkcr.cz/en/media-a-audiovize/act-no--231-2001--of-17-may-2001--on-radio-and-television-broadcasting-and-on-amendment-to-other-acts-84912/.
[526] Article 32quater of the legislative decree No. 177 of 31 July 2005, as amended by the legislative decree 44/2010.
[527] Article 4 of Decision no. 2013-2, available at http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027004183&dateTexte=&oldAction=rechJO&categorieLien=id.
[528] http://www.lnr.fr/IMG/pdf/Communique_-_Recours_Conseil_d_Etat_contre_deliberation_brefs_extraits_CSA.pdf.
[529] Article 20c, para 4, of the Broadcasting Act.
[530] Section 4 of Order no.106 on short news report from events of high interest to the public.

to the basic rules of the Directive. In addition Recital 57 AVMSD prohibits the use of short extracts in on-demand services to create new on-demand business models.

The laws of most member states do not link the use of short extracts in on-demand services to the condition of exclusive use in general news programs. The law in Estonia adds an extra condition for the use of short extracts in non-linear services. Short extracts in general news programs of on-demand services can only be used after the live transmission of the news programs by the primary broadcaster. [531] In other Member States, the law does not always distinguish between linear and non-linear services and therefore neither prohibits nor restricts the use of short extracts in on-demand services. This is the case in Germany, for example.[532]

Conditions and modalities

As already mentioned, Article 15 (6) AVMSD provides key features for which Member States benefit from some discretion in their implementation. The survey of the 28 Member States has shown the following recurrent rules.

- *Compensation arrangements*

On *compensation arrangements*, Article 15 (6) AVMSD does not impose any compensation but limits any to "additional costs directly incurred in providing access". The regulations of four Member States provide for the use free-of-charge of short extracts. This is the case in Denmark, Finland, Sweden and UK. In two other Member States, the law expressly stipulates that the rule is access free of charge (Bulgaria and Cyprus) but it also contains an exception, permitted by Article 15(6) AVMSD, to the effect that compensation can be requested in those Member States if it does not "exceed direct additional costs for providing access". The laws of two other Member States have unique features in respect of compensation: in Germany, the exclusive broadcaster has the right to claim "fair compensation" (although the conformity of this provision with the EU law is questioned by the doctrine)[533] while in Spain, the compensation is limited to "costs associated with assisting in the preparation of news summary".[534] The answers to the questionnaire also indicate significant linguistic differences among the Member States" approach to compensation. In Italy, it is limited to the "reimbursement of technical costs;" in Latvia, compensation for the use of extracts should "not exceed costs of broadcasting or copying materials;"[535] in Malta, compensation is limited to "appropriate compensation for technical costs incurred" and costs of television rights are specifically excluded[536] and in Portugal, it simply covers "costs resulting from making the signal available".[537]

- *Length of short extracts*

Article 15 (6) AVMSD provides that Member States should define "*the maximum length of short extracts*," but Recital 55 sets a maximum of 90 seconds and the answers from national correspondents indicate that 21 Member States have followed that. Two Member States have set a lower threshold: in Hungary and in the United Kingdom, the length is fixed at respectively 50 seconds and 60 seconds. However, in the case of UK, the duration is not determined by the law but by the (voluntary) Sports News Access Code of Practice, which only applies to its signatories. In three Member States, Belgium's Flemish Community,[538] Cyprus[539] and Spain,[540] the maximum

[531] Article 50 (3) of the Media Act, as translated in the national correspondent's contribution.
[532] Extracted from the correspondent's contribution.
[533] See for example Claudia Wildman and Oliver. Castendyk, "Fußball im europäischen TV" (2012) MMR 2012, 75.
[534] Extracted from the correspondent's contribution.
[535] Article 27 (4) of the Electronic Mass Media Law.
[536] Article 3 (7) of SL 350.
[537] Article 33 (2) of the Television Act.
[538] Article 121 of the Flemish Decree on Radio Broadcast and Television.
[539] Article 28B of the Law on Radio and Television Stations.
[540] Article 19.3 of the General Law on Audiovisual Communications 7/2010.

length has been set at 180 seconds. In the Netherlands, the regular length is fixed at 90 seconds; however by exception i.e. when the "competition determining moments of the event last longer than 90 seconds and the presentation is limited to those sporting moments", short extracts can last up to 180 seconds.[541] In Ireland, the law implementing the AVMSD specifies that the Broadcasting Authority of Ireland (BAI) will adopt a code of practice to define the conditions and modalities of the provision of short extracts, including the maximum length of short extracts.[542] To date, the Code has not been adopted. In Sweden, the law does not stipulate a maximum duration but states that short extracts should not be longer that what is justified by their informative purpose, their length thus being determined on a case-by-case basis. However, in its consideration of the matter the legislature felt that 90 seconds would only be acceptable in exceptional (but unspecified) cases and, as a rule, extracts should be shorter.[543] In Italy, the rules have recently changed and the Italian media authority, AGCOM, has defined the conditions and modalities of use of short extracts. In 2010, the Italian regulator enacted a regulation through which it imposed a maximum length of 180 seconds for short news reports.[544] However that provision was challenged before the administrative courts and annulled for its lack of compliance with the AVMSD.[545] As a consequence, AGCOM adopted a new decision in 2012 in which it has set the limit of short extracts to 90 seconds.[546]

In several Member States, the law provides that the length is determined by the time needed to report about the events with a cap to 90 seconds. This is the case in Austria, Denmark, Germany and Portugal.

- *Time limits*

As for the *time limits* regarding the transmission of short extracts, answers to the questionnaire indicate a great diversity among Member States. Time limits can be defined as either an "embargo" or a waiting period that a secondary broadcaster is compelled to respect before broadcasting its short extracts and/or as a period during which the extracts can be used.

As already explained, Article 15 AVMSD does not provide any guidance and leaves the issue to the Member States. Accordingly, most determine either a waiting period (which can start at the end of the sports events or after the primary broadcast) or a period of time during which extracts can be shown. In several Member States, the law provides both. This is the case in Austria, Belgium, France, Italy, Malta, Romania, the Netherlands, Romania and Slovakia.

The regime of three Member States expressly determines a waiting period in terms of minutes or hours after the end of the event. In Belgium's French Community, the waiting period has been set at 20 minutes after the end of the event;[547] In Italy, it is 1 hour.[548] In other Member States, the waiting period is not defined in terms of time but the law determines that the extracts can be shown after the end of the event (Malta,[549] Lithuania[550]); after the broadcast of the event by the primary

[541] Article 5.4 (1) of the Media Act 2008, as translated in English by the University of Luxembourg, available at http://wwwfr.uni.lu/recherche/fdef/droit_des_medias/audiovisual_media_services_directive/national_execution_measures/netherlands
[542] Article 2(b) of S.I. No.247 of 2012, European Communities (Audiovisual Media Services) (Amendment) Regulations 2012.
[543] Extracted from the correspondent's contribution; see the proposal of law, Prop. 2009/10:115 p. 174-175.
[544] Decision no.667/10/CONS.
[545] Judgment of the administrative court (judgment no.7844 of 13 July 2011), confirmed by the Council of State (judgment no. 3498 of 23 March 2012).
[546] Decision no.392/12/CONS.
[547] Article 3, § 2 of the Audiovisual Media Services Decree.
[548] Decision no.667/10/CONS.
[549] SL 350.28 Broadcasting (Short News Reporting) Regulations.
[550] Article 38 (1) of the Law on provision of information to the public.

broadcaster (Belgium's Flemish Community,[551] Denmark,[552] Finland,[553] the Netherlands,[554] Romania,[555]); or after the primary broadcaster has reported on the events (France)[556] or had the opportunity to do so (Slovakia).[557] The law in Romania also specifies that if the primary broadcast has not broadcasted the event 24 hours after its occurrence, the secondary broadcaster does not need to wait any longer.

In several Member States, the law determines the period during which extracts can be used. In most of the Member States, the countdown starts at the end of the event and the period lasts for 24 hours (Austria,[558] Bulgaria,[559] Malta,[560] Poland),[561] 36 hours (Portugal)[562] or 48 hours (Italy)[563]. In Romania[564] and in France,[565] the countdown starts after the initial broadcast and the period elapses 24 hours after. In addition, in the UK, the rule contained in the Sport News Access Code of Practice provides that a short extract may not be used more than 6 times within the 24 hours of the primary broadcast. In Denmark, the law does not specify any time slot but provides that extracts can be shown after the transmission of the event and as long as they have news value.[566]

3.3.2 Rules created at the national level

The questionnaire sent to the national correspondents sought to explore the margin of appreciation given to Member States and the existence of specific national rules to supplement the provisions of the Directive, for example on the scope of Article 15. These issues are discussed below.

3.3.2.1 Notion of event of high interest to the public

Article 15 AVMSD describes the regime applicable to short news report on "events of high interest to the public" without defining that notion. At national level, several Member States have given their own definition and/or recategorised the events to which the right to short reporting applies. It should however be noted that the English translations of the notions are the one provided by the national correspondents and are not in most cases official translations. As a consequence the same notion can have several translations in English.[567]

A few Member States have defined "events of high interest to the public". This is the case in Bulgaria and Denmark. In Bulgaria, the notion covers "social, political, economics, sports or entertainment events, which affect the majority of the audience"[568] while in Denmark, such events are "*newsworthy* in the sense that they appeal to a broader number of people, and (…) of interest to

[551] Article 124 (1) of the Flemish Decree on Radio Broadcast and Television.
[552] Section 3, subs. 2, of Order No. 106 on short news report from events of high interest to the public.
[553] Following the preparatory works of the amendment to the copyright act (HE 87/2009 vp) as reported by the national correspondent.
[554] Article 5.4 of the Dutch Media Act.
[555] Article 85 (4) of the Romanian Audiovisual Law.
[556] CSA's decision No. 2013-2, Article 2.
[557] Section 30 (3) c) of Act No. 308/2000 as amended.
[558] Not established by the law but by a decision of the regulatory authority.
[559] Article 19c (4) of the Radio and TV Act.
[560] SL 350.28 Broadcasting (Short News Reporting) Regulations.
[561] Article 20c, para 4, of the Broadcasting Act.
[562] Article 33 of the Television Act.
[563] AGcom's Regulation No. 667/10/CONS.
[564] Article 85 of the Audiovisual Law.
[565] CSA's decision No. 2013-2.
[566] Section 3 of Order No. 106 on short news report from events of high interest to the public.
[567] This could explain the inconsistencies of the notion that one could observe between the translations provided and the translations offered by the University of Luxembourg on the national implementations of the AVMSD; see http://wwwfr.uni.lu/recherche/fdef/droit_des_medias/audiovisual_media_services_.
[568] Paragraph 1, item 8 of the Additional Provisions of the Radio and Television Act.

people who would not normally follow similar events".[569] In Italy, the regulator has defined the notion as "a single event, such as a sports match, or a cultural, artistic or religious [event], whose importance to the public is well recognized".[570]

Other Member States apply different thresholds to the right to short reporting. In Austria, the right applies to *events of public information interest*.[571] In Germany, the events are those of *events of general interest to the public*, the threshold for which is lower than "events of high public interest".[572] In Latvia, the law applies to *events having a significant interest in the community*, which the national correspondent believed to have the same meaning as 'events of high public interest" as used in Article 9 ECTT.[573] In Portugal, the notion refers to *events of general public interest*. In Slovakia, the law refers to *events evoking higher public interest*" although, again, without defining them. In Spain, the concept refers to the non-defined concept of *event of general interest to society*. In Belgium's French Community, the right to short reporting applies to the broader category of *public events*, which are defined as events that are not private and for which there is no obstacle to their public accessibility.[574] In Belgium's Flemish Community, the right to short reporting applies to any *events for which exclusive broadcasting rights have been granted*; the law does not mention events of high public interest as a separate category.[575] In UK, the provisions on the right to short reporting are included in the Copyright, Designs and Patent Act 1988, as amended. Section 30 merely refers to "*current events*" and not to "events of high interest to the public".[576] In Romania, the law applicable to the short reporting refers to "*events of public interest*" and "*events of general interest*" without defining the notions or clarifying the link between the two.[577]

3.3.2.2 Notion of event

The AVMSD does not define the word "event" and does not contain any indication of what can constitute an event. Some guidance can be found in Recommendation R(91) 5 of the Council of Europe, Principle 2 of the Recommendation specifies the criteria applicable to an "event" which is composed of several self-contained elements (such as the individual games of a tournament) and the criteria to determine whether the right to shorty reporting should apply to events lasting more than one day. These two issues are important since they determine whether a secondary broadcaster has the right to broadcast short extracts for each component of the "event" (such as an individual football game) or whether its right is limited to one short extract for each day of the event's duration.

Most Member States have taken these issues into account in their national laws or regulations. For example, in Belgium's French Community, when a sports event is composed of a series of individual events, the right to short reporting applies to each individual event. The same rule has been put in place in Croatia, Denmark and Malta, although in Malta if the event lasts several days the right to short reporting is limited to one short extract per day. The national rules in the Netherlands and Slovakia allow secondary broadcasters to broadcast one short news report per day when the event lasts several days. In Austria, the Administrative Court has established that each individual game

[569] Extracted from the national correspondent's contribution.
[570] AGCom's Regulation 667/10/CONS on 17 December 2010 on the broadcasting of short news report events of major interests, as translated in IRIS 2011-8/32 (European Audiovisual Observatory's Newsletter).
[571] Extracted from the national correspondent's contribution.
[572] Extracted from the national correspondent's contribution.
[573] Extracted from the national correspondent's contribution.
[574] Article 1, 18° of the Decree of 26 March 2009 on the coordination of the audiovisual media service decree.
[575] Article 118 of the Flemish Decree on Radio Broadcast and Television.
[576] Extracted from the national correspondent's contribution.
[577] Article 84 of the Audiovisual Law; extracted from the national correspondent's contribution.

of a competition is an "event" and that the maximum time length (90 seconds) applies to each game.[578]

3.3.2.3 Recording of images in the margin of the event

One of the questions of the last scenario sought to determine whether the national rules on short reporting cover the right to record images "in the margin of the event" when the secondary broadcaster had accessed to the sports venue. The correspondents of two Member States have discussed national rules relating to images in the margin of the event. In Belgium's French and Flemish Communities, the applicable regulations on short reporting for sports events limit the right of recording images of a sports event to the images in the margin of the event.[579] For the production of short extracts on sporting events, secondary broadcasters have access to the primary broadcaster's signal.

3.4 Analysis

3.4.1 Implementation types

Article 15 AVMSD has been implemented into national laws in different types of instruments, the Member States not being constrained to adopt the rules in any specific legal form. It is unsurprising that most Member States have usually followed the logic of the AVMSD by incorporating the rules into their pre-existing media, television or audiovisual services laws or regulations, but as already mentioned, three Member States have implemented the right to short reporting in their copyright laws. This is the case in Finland[580], Sweden[581] and the United Kingdom.[582] In Finland, the right to short reporting is a "full limitation to rights enshrined in the Copyright Act (404/1961)" provided without prejudice to the copyright protection of broadcasting signals.[583] In Sweden, the right to short reporting has been implemented in the Copyright Act as a copyright exception. The "right to use excerpts from TV broadcaster of an event of particular public interest" has been introduced to implement Article 15 AVMSD.[584] In the UK, the right to short reporting is covered by the "fair dealing" provisions of the Copyright, Designs and Patent Act. The copyright in the broadcasting signal is not infringed by "fair dealing (…) for the purpose of reporting current events".[585] According to the UK national correspondent, it is for the national courts to determine whether the quantities used amount to "fair dealing".[586] Other Member States, such as Denmark, have also amended their national copyright laws when implementing the AVMSD in other legal instruments. According to the Danish law, "any copyright subsisting in the broadcast is not infringed when a broadcaster grant access under Section 90 (3) of the Radio and Television Act."[587] Likewise, the law in Germany states

[578] Administrative Court (Verwaltungsgerichtshof), judgment of 20 December 2005, 2004/04/0199.
[579] In the two communities, the secondary broadcasters have the right to record images of the events they attend if the events are not sporting events.
[580] Section 48, para. 5 of the Copyright Act (404/1961).
[581] Article 48a of the Copyright Act.
[582] Article 30 (2) of Copyright Designs and Patents Act 1998.
[583] Extracted from the national correspondent's contribution.
[584] Extracted from the national correspondent's contribution.
[585] Section 137 of the Broadcasting Act 1998 specifies that reporting in current events does not infringe the copyright in the broadcast of cable program.
[586] See *BBC v. British Satellite Broadcasting Ltd* (1992) Ch. 141.
[587] Extracted from the national correspondent's contribution.

that the right to short reporting is "without prejudice to all other statutory provisions, in particular those of copyright law".[588]

In other Member States, the right to short reporting might belong to a different set of rights. In France, the right to short reporting is regulated under the broader framework of rights of exploitation of sports organisers, whose rules have been codified in the Sports Code.

3.4.2 Implementation of the rules

The survey on the implementation of the right to short reporting shows several trends. First of all, the right to short reporting existed before the AVMSD (as part of the ECTT), so one cannot say it was "introduced" by the Directive: the Council of Europe Recommendation R(91) 5 has had an influence on both the definition of the right to short reporting in several Member States and on the definitions of the conditions of use of short extracts. Some Member States have even kept the wording of the Recommendation (such as the use of short extracts in "regularly scheduled news bulletins") while still implementing the Directive.
As described in Section II and shown in the table charts, most Member States have implemented the basic features of the right to short reporting as defined in Article 15 AVMSD. Concerning the access to the events, they have largely opted for an access to the signal to allow secondary broadcasters to freely choose short extracts. Most of them effectively "cut and pasted" Article 15 (2) AVMSD in the sense of not specifying what the expression "freely choose" means. It is questionable whether the free choice of extract extends to the right to copy the primary broadcaster's signal; on the means of access to the events, national laws rarely state which means prevail over the other(s) when several means (access to the signal, access to the venue, access to the footage) are made available; and the answers to the questionnaire indicate that national laws are not very precise on the issue of cross-border situations. However, the national correspondents did not mention any relevant case law or regulatory decisions relating to cross-border situations. One of the aspects tested in the scenario that could give rise to a conflict between two Member States is the determination of the notion of "events of high interest to the public". However the answers provided by the national correspondents did not give us concrete elements to assess the importance of the issue and to determine whether the lack of harmonization impedes the application of the right to short reporting on a cross-border case. No case law was reported on this matter.

On the conditions and modalities of provision of short extracts, Article 15 AVMSD gives some leeway to Member States. It can be observed that some have not detailed the conditions in the legislation itself but in secondary legislation or non-binding guidance on issues such as duration of short extracts, criteria applicable to events or exclusive use of short extracts in general news programs (Finland, Sweden). In some Member States (such as in Austria), it is also relevant to note that the competent regulatory authorities only define the conditions and modalities in the absence of agreement between the broadcasters. On the other non-harmonized aspects of the right to short reporting, such as the time limits, it can be observed that several Member States are allowing the use of short extracts for a period of 24 hours after the end of the event or after the first broadcast by the primary broadcaster.

Finally, it is worth mentioning the link that some Member States have established between the notions of "events of high interest to the public" (Article 15 AVMSD) and "events of major importance for society" (Article 14 AVMSD). In that respect, the law in Hungary is interesting as

[588] Article 5 (2) of the Interstate Broadcasting Law as translated by the University of Luxembourg, see http://wwwfr.uni.lu/recherche/fdef/droit_des_medias/audiovisual_media_services_directive/national_execution_measures/germany.

the right to short reporting applies to "events of major importance" as listed at national level in accordance with Article 14 AVMSD. In Denmark, the law and applicable regulations do not distinguish between the two notions. The right to short reporting as well as the regime of exclusive rights both apply to events of high interest to the public.[589] In Estonia, the right to short reporting applies to events of major importance for society.[590] Several remarks can be made. First, the distinction between the two notions at the level of the Council of Europe has only been introduced in the revision of the European Convention on Transfrontier Television. Second, the AVMSD does not provide any criteria to determine the notion of "events of high interest to the public". Third, no national correspondents reported the existence of case law on the issue or the notion itself.

3.5 Conclusions

The main findings can be summarized as follows.

The first finding concerns the implementation of the basic features of the right to short reporting in most Member States: some discrepancies could be observed between Member States that have implemented the right in their media laws and Member States that have implemented the right in their copyright law. However, the regime of the latter is complemented in the case of two Member States by extensive and detailed interpretation guidance in the preparatory works of their respective copyright law.

The second finding concerns duplication between some provisions of national law and the language in the Directive; this particularly applies in the provision on the rule of access to the events in a cross-border case (Article 15 (2)) and for the re-use of short extracts in on-demand services.

The third finding concerns the failure to define "events of high interest to the public" and the absence of rules to determine the law applicable to the notion in a cross-border situation. No relevant case law at national level on the interpretation of these issues has been indicated.

The fourth finding is the lack of clear rules to solve cross-border issues. The sequential approach contained in Recital 55 has not been duplicated in Article 15 AVMSD. Jurisprudence has remained quite limited.

[589] Sections 1 to 4 of Order No. 106 on short news report from events of high interest to the public.
[590] Article 50 of the Media Service Act.

PART 3

SPORTS ORGANISERS' RIGHTS MANAGEMENT IN THE FIELD OF GAMBLING

4 A SPORTS ORGANISERS' RIGHT TO CONSENT TO BETS AS FINANCING AND INTEGRITY MECHANISM FOR SPORT

4.1 Introduction

In recent years, numerous national and European sports organisers have advocated the principle that sports events, upon which betting relies, should receive a "fair financial return" from associated betting activity. They have found support for their position in the European Parliament: in its 2009 report on the integrity of online gambling, the Parliament highlighted for the first time that *"sports bets are a form of commercial exploitation of sporting competitions"* and recommended that sporting competitions be protected from unauthorized use, *"notably by recognition of a sports organiser's right"*. The Parliament called on the European Commission "*to examine whether it is possible to give competition organisers an intellectual property right (some sort of portrait right) over their competitions*", by virtue of which no betting operator could offer bets on sporting events without first entering into a contractual agreement with the sports organiser.[591] In several subsequent reports and resolutions on online gambling the European Parliament has reiterated this position.[592]

These calls for the adoption of a specific sports organisers' right to consent to the organisation of bets ("right to consent to bets"), enabling a "fair financial return" from betting to sport, rests on two lines of reasoning.

The first argument is essentially economic. Considering that sporting events on which bets are placed are the result of their intellectual, financial, and human investment, sports organisers reason that they should participate in the financial profits generated by this type of commercial activity. They contend that sports betting operators generate increasing levels of income on the back of sports. In the same way that the commercial exploitation of sports events by e.g. media content operators generates revenues for sport, betting operators' commercial use of sports events warrants some form of financial return. The explicit recognition of a right to consent to bets would reflect this principle.[593]

From its part, the gambling industry argues that it already contributes significantly to sport, either through commercial partnerships (e.g. sponsorship and acquisition of live digital media rights) or through statutory contributions.[594] However the advocates of a right to bets counter-argue that commercially-driven deals cannot be considered as a "fair financial return" for the exploitation of their sports events; they would argue that such deals are to both parties' economic benefit, but they are disproportionately advantageous to the already-wealthy clubs, rather than the leagues or

[591] European Parliament, Report on the integrity of online gambling (2008/2215(INI)), 17 February 2009.
[592] See e.g. European Parliament resolution of 15 November 2011 on online gambling in the Internal Market (2011/2084(INI)); European Parliament resolution of 10 September 2013 on online gambling in the internal market (2012/2322(INI)).
[593] As emerged from the discussions in the expert workshops. See also e.g. Sports Rights Owners Coalition (SROC) Response to the European Commission Green Paper on Online Gambling in the Internal Market (2011) and Position on the upcoming EP report on the Green Paper in the Internal Market (2011); contributions to the European Commission's consultation on Online Gambling in the Internal Market by e.g. the Association of European Professional Football Leagues (EPFL) and UEFA, available at http://ec.europa.eu/internal_market/consultations/2011/online_gambling_en.htm; SportAccord, "Integrity in sport: understanding and preventing match fixing" (2013).
[594] As emerged from the discussions in the expert workshops. See also e.g. European Commission, Summary of Responses: Green Paper on Online Gambling in the Internal Market (2011) 27 and in particular the contributions to the consultation by e.g. the Remote Gambling Association (RGA) and the European Gaming and Betting Association, available at http://ec.europa.eu/internal_market/consultations/2011/online_gambling_en.htm; RGA, "Sports Betting: Legal, Commercial, and Integrity issues" (2010).

federations who can redistribute the income among all their members - including those who support youth, women's and recreational participation.[595]

The second argument is related to sports integrity. The recognition of a right to consent to bets would enable sports organisers to preserve the integrity of their events. Firstly, it would establish a contractual relationship between sports organisers and sports betting operators that would strictly define reciprocal obligations concerning fraud detection and prevention. It would also empower sports organisers to e.g. determine which aspects of their events may be legitimately bet upon. Secondly, the financial remuneration that would be guaranteed would compensate for the investments of sports organisers in preventive measures to protect sports integrity.[596]

The two-fold rationale for a right to consent to bets is also evident in the European Parliament's pronouncements: *"sporting competitions should be protected from any unauthorised commercial use, notably by recognising the property rights of sports event organisers, not only in order to secure a fair financial return for the benefit of all levels of professional and amateur sport but also as a means of strengthening the fight against sports fraud, particularly match-fixing"*.[597]

A sports organisers' right to consent to bets was first introduced in Australia in 2007. Yet it was the recognition of a similar right in France that created the true momentum for sports organisers to advocate its adoption at the EU or EU-wide national level. Following case law precedent, the French legislature codified the principle that the exploitation rights that sports organisers hold on the events they organise include a right to consent to bets when it enacted a new gambling law in 2010. Apart from France, Poland and Hungary have also legally recognized a right to consent to bets.

This chapter will explore the virtues of a right to consent to bets and analyse the possible challenges of adopting such a mechanism from a legal, institutional, and practical perspective.

The chapter is divided in three sections. The first section queries, as a preliminary matter, whether a right to consent to bets is not already implicit in the Database Directive that instructs Member States to protect databases by way of copyright and *sui generis* database right, and if not, to what extent national regimes in Member States providing for a right to consent to bets are compatible with the Directive. The second section comparatively describes and analyses the national implementation of the right to consent to bets in Australia and France. The main purpose is to gather context-dependent knowledge about the effectiveness of the right to consent to bets in terms of ensuring a "fair financial return" to sport and preserving the integrity of sports events. Given that sports organisers in Poland and Hungary so far have no or limited experience with the enforcement of their right to consent to bets, it is all the more pertinent to draw lessons from the many years of experience with this legal instrument in Australia. The rest of the section focuses on the French right to consent to bets. The third section, building on the foregoing review of national practices, considers in a more general fashion the virtues and drawbacks of the right to consent to bets. It examines in particular the conditions for the successful implementation of a right to consent to bets and the legal issues that arise from the perspective of EU internal market and EU competition law.

---

[595] As emerged from the discussions in the expert workshops. See also e.g. Sports Rights Owners Coalition (SROC) Response to the European Commission Green Paper on Online Gambling in the Internal Market (2011) and Position on the upcoming EP report on the Green Paper in the Internal Market (2011); contributions to the European Commission's consultation on Online Gambling in the Internal Market by e.g. the Association of European Professional Football Leagues (EPFL) and UEFA, available at http://ec.europa.eu/internal_market/consultations/2011/online_gambling_en.htm.
[596] Idem.
[597] European Parliament resolution of 10 September 2013 on online gambling in the internal market (2012/2322(INI)), para. 57.

4.2 Protection of fixtures lists and sports events schedules under the Database Directive

Lists of match fixtures and (other) schedules of sports events have always played an important role in the sports betting industry. Fixtures and schedules are reproduced, published and otherwise made available to customers by the sports betting companies, both on paper betting forms and (increasingly) on online betting websites. This has raised the question of whether fixtures and schedules qualify for protection under the law of intellectual property, in particular copyright and/or database right. If so, sports organisers would effectively be equipped with an exclusive right to consent to bets that might be monetized through licensing deals, since reproducing and making available the fixtures and schedules would require permission of the sports organisers.

Prior to the adoption and implementation of the Database Directive[598], which has harmonized copyright protection for "databases" – a wide category of information products that includes compilations of discrete items of information, such as fixtures lists and sports events schedules – and has also introduced *sui generis* protection for databases, organisers of sports events in some Member States relied on copyright protection for fixtures and schedules. This was the case particularly for countries of the common law tradition, such as the United Kingdom and Ireland, where courts routinely granted copyright protection to compilations under a theory of invested "skill and labour".[599] In these countries, therefore, fixtures and schedules were commonly licensed to betting operators. In a few other Member States sports organisers benefited from quasi-copyright protection, such as the Nordic catalogue rule existing in Denmark, Finland and Sweden, which protected compilations of large numbers of items of information, event absent creativity, and the Dutch *geschriftenbescherming* that offered legal protection of all published writings, original or not.

While national legislatures and courts have been slow to recognize that these copyright(-like) protection schemes have now been pre-empted by the Database Directive, which has raised the bar for copyright protection for databases to the standard of "the author's own intellectual creation", recent decisions by the Court of Justice (CJ) have clearly put an end to these regimes. According to earlier case law of the CJ, sports event organisers also fail to meet the 'substantial investment' standard of the *sui generis* database right. This section describes the protection of fixtures lists and sports events schedules under the Database Directive, and looks at relevant CJ case law. It will conclude by speculating on whether the current EU legal framework would allow, on the national or EU level, the introduction of a right to consent to bets.

4.2.1 The Database Directive

In the EU, legal protection of databases is governed by the Database Directive (Directive 96/9/EC) that was adopted in 1996, and implemented by the Member States in the course of 1996-2000. The Directive establishes a two-tier protection regime. First, Member States are to protect databases by copyright as intellectual creations. Second, Member States must provide for a *sui generis* database right to protect the contents of a database in which the producer has substantially invested. Both rights apply cumulatively if the conditions for both regimes are fulfilled.

---

[598] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996) OJ C L77/20.

[599] For almost half a century the leading English case was Football League Ltd. v. Littlewoods Pools, [1959] 1 Ch 637 (holding that copyright subsists in a football fixtures list as a literary work); see discussion at Football Dataco Ltd. a.o. v Britten Pools Ltd. a.o., [2010] EWHC 841 (Ch) paras. 45-49.

The Directive *"concerns the legal protection of databases in any form"* (Article 1(1)) and thus protects not only electronic databases, but also databases in non-digital form. Article 1(2) defines a *database* as *"a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."* The elements of a database must be *"independent"* (i.e. discrete data) and *"individually accessible by electronic or other means*" (i.e. retrievable). Additionally, the elements of the database must be *"arranged in a systematic or methodical way."* The Directive does not protect the computer software driving a database (Article 1 (3)). Computer programs are protected independently by the European Computer Programs Directive.[600]

Case law from various national courts in Europe demonstrates that the notion of "database" is quite flexible and open-ended, leaving room for a wide variety of information products and services. National courts have, for example, qualified as "databases": telephone directories, collections of legal materials, real estate information websites, bibliographies, encyclopaedia, address lists, company registries, exhibition catalogues, television program listings, etc.[601] Judging from national and CJ case law, fixtures lists and sports events schedules certainly also qualify.[602] By contrast, a discrete item of information, such as the data denoting a single fixture (e.g. *Newcastle-Arsenal, Sunday, 29 December 2013, 13.30 pm, St. James' Park)*, will not qualify as a "database".

4.2.2 Copyright protection of a database under the Database Directive

Databases will enjoy copyright protection only if *"by reason of the selection or arrangement of their contents, [they] constitute the author's own intellectual creation". "No other criteria shall be applied to determine their eligibility for that protection"* (Article 3(1)). The "selection or arrangement" criterion is similar to that of Article 10(2) of the TRIPs Agreement and Article 5 of the WIPO Copyright Treaty. The requirement of the "the author's own intellectual creation" implies *originality*. In the landmark *Football Dataco* case, which was decided in 2012, the CJ interpreted this criterion in response to a reference by the Court of Appeal (England & Wales) of the UK. The case concerned the annual fixtures lists of the main British and Scottish football leagues. According to the original claimants, Football Dataco Ltd. and the leagues, the fixtures lists were protected under UK copyright law, based on the intellectual effort and skill in creating both the fixtures data and the complete fixtures lists. The main question referred to the CJ was whether the Database Directive that harmonizes copyright protection for "databases", allowed such a legal basis. The CJ's answer in *Football Dataco* is clearly negative. According to the CJ the *"criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices [...] and thus stamps his 'personal touch' . [...] By contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom."*[603] The Directive, in other words, requires creativity in the selection and arrangement of the database's contents. Merely investing "skill and labour" (intellectual effort) is not enough. According to the CJ, *"significant labour and skill of its author, [...] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data"*. In addition, the CJ clarified that copyright protection of databases under the Directive concerns only the selection or

[600] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) (2009) OJ C L111/16.
[601] For examples of (older) decisions by national courts, see http://www.ivir.nl/files/database/index.html.
[602] Case C-46/02 Fixtures Marketing Ltd v Oy Veikkaus Ab (2004) ECR I-10365; Case C-203/02 British Horseracing Board Ltd v William Hill Organization Ltd (2004) ECR I-10415; Case C-338/02 Fixtures Marketing Ltd v Svenska AB, (2004) ECR I-10497; and Case C-444/02 Fixtures Marketing Ltd v OPAP (2004) ECR I-10549.
[603] Case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, 1 March 2012 (nyr).

arrangements of the contents of a database, and not the data themselves. Echoing its holding in the 2004 Fixtures cases,[604] the CJ held that expending resources in the creation of data are irrelevant for purposes of copyright protection.[605]

In sum, copyright protection under the Directive cannot be based merely on the investment ("skill and labour", "sweat of the brow") involved in producing the database or its contents. Copyright protection will arise only if the selection or arrangement of the data (or other materials) are the result of creative (i.e. subjective) choices. This clearly rules out copyright protection for fixtures lists and sports events schedules *per se*. However, publications containing fixtures or schedules accompanied by original background information, commentary and/or illustration might still attract copyright protection as original works.

4.2.3 Sui generis database right

Sui generis database right is a special intellectual property right that protects the investment of the database producer, i.e. the skill, labour and financial means invested in the database. The right is a legal invention of the European Commission, and was introduced in the 1996 Database Directive. While the right has never become an international standard, despite a failed attempt by WIPO to propose a "WIPO Database Treaty", a number of countries outside the EU, notably those with strong trade-related ties with the EU, such as the EFTA countries and Turkey, have also adopted the *sui generis* right. Variants of the database right also exist in Russia, South-Korea, and Mexico.

In the course of implementing the Database Directive all Member States of the EU have introduced *sui generis* database protection, in addition to copyright protection for databases, either in the form of a neighbouring right or as a stand-alone right of intellectual property. According to the Directive, for a database to qualify under the *sui generis* right investment must be "substantial", either in a "qualitative" and/or a "quantitative" sense (Article 7 Database Directive). *Qualitative* investment might, for instance, result from employing the expertise of a professional, e.g. a football expert compiling and analysing football statistics. In practice, most databases will rather be the result of *quantitative* investment, involving *"the deployment of financial resources and/or the expanding of time, effort and energy"*.[606] The Directive defines the owner of the database right as the "maker of a database" (Article 7(1)). According to Recital 41, the *"maker of a database is the person who takes the initiative and the risk of investing"*, in other words: the database *producer*.

The substantial investment is to be made *"in either the obtaining, verification or presentation of the contents"* of the database Article 7(1). "Obtaining" obviously refers to the collection of data, works or other materials comprising the database. "Verification" relates to the checking, correcting and updating of data already existing in the database. "Presentation" involves the retrieval and communication of the compiled data, such as the digitalisation (scanning) of analogue files, the creation of a thesaurus or the design of a user interface.

In four landmark decisions decided in 2004, the CJ clarified that investment not in obtaining, verifying or presenting the contents of the database, but in generating its contents, does not count towards substantial investment.[607] The cases concerned similar facts. Each case related to a

[604] See discussion below.
[605] Case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, 1 March 2012 (nyr).
[606] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996) OJ C L77/20, Recital 40.
[607] Case C-46/02 Fixtures Marketing Ltd v Oy Veikkaus Ab (2004) ECR I-10365; Case C-203/02 British Horseracing Board Ltd v William Hill Organization Ltd (2004) ECR I-10415; Case C-338/02 Fixtures Marketing Ltd v Svenska AB (2004) ECR I-10497; and Case C-444/02 Fixtures Marketing Ltd v OPAP (2004) ECR I-10549.

database of sporting information, the largest and most complex of which was a database of horse racing information maintained by the British Horseracing Board. The other three cases related to lists of fixtures of the main British football leagues. All four cases revolved around the question of whether the sports events organisers could invoke database right against betting companies using the horse racing data and fixtures lists without permission.

According to the CJ, *"the expression 'investment in … the obtaining … of the contents' of a database must, […] be understood to refer to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation as such of independent materials. The purpose of the protection by the sui generis right provided for by the directive is to promote the establishment of storage and processing systems for existing information and not the creation of materials capable of being collected subsequently in a database."* In other words, investment in *creating* (synthesizing) the contents of a database may not be taken into account. Compilations of such 'created' data will not qualify for database right unless some *additional* "substantial investment", for instance in presenting or verifying the database, can be demonstrated. Consequently, fixtures lists and (other) sports events schedules, being databases of "created" (synthesized) data will not qualify for *sui generis* database right.

Following these decisions scholars and courts have speculated on what, exactly, distinguishes data "creation" from a mere "obtaining" of data.[608] Philosophically speaking, one could argue that any reporting of facts amounts to data "creation". In the case of *Football Dataco v. Stan James and Sportsradar*, which concerned a database collecting and reporting live statistics of football matches, the English Court of Appeals, however, squarely rejected this view. Facts observed, such as the scoring of a goal, are not "created", but "obtained".[609] According to the Court there is a *sui generis* database right in Football Dataco's *Football Live* database, since the aggregate investment in obtaining the football statistics is substantial.

Consequently, a listing of football match results will qualify for database right protection, assuming collecting these data requires substantial investment, whereas – according to the CJ's case law – a listing of match fixtures will not, since fixtures are not data "obtained" but "created", and investment in "creating" data does not count.

4.2.4 Would a right to consent to bets be compatible with the Database Directive?

Following the fixtures cases decided by the CJ in 2004, and again following the CJ's 2012 ruling in *Football Dataco*, sports organisers have advocated the amendment of the Database Directive, in order to "restore" (that is, for those Member States that previously had such regimes) protection of fixtures lists against unauthorized uses by betting operators.[610] This would imply a revision of the *sui generis* right to the extent that investment in organizing a sports event would count towards "substantial investment" justifying *sui generis* protection of fixtures and event schedules. In its first (and only) official evaluation of the Database Directive, which was published in December 2005,[611] the European Commission briefly addresses the concerns of the sports events organisers. While admitting that the consequences of the decisions of the CJ, holding that fixtures lists are denied database right protection, may have financial consequences for the organisers concerned, the

[608] See e.g. Mark J. Davison and P. Bernt Hugenholtz, "Football fixtures, horseraces and spinoffs: the CJ domesticates the database right" (2005) EIPR (3) 113-118.
[609] Football Dataco Ltd & Ors v. Stan James plc & Ors and Sportradar GmbH and Anor [2013] EWCA Civ 27.
[610] See the responses of various stakeholders, including British Horseracing Board, Deutsche Fußball Liga and Football Dataco to the European Commission's consultation document, available at http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm#maincontentSec3.
[611] European Commission, First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12 December 2005.

Commission also notes that *"the Court's narrow interpretation of the 'sui generis' protection for 'nonoriginal' databases where the data were 'created' by the same entity as the entity that establishes the database would put to rest any fear of abuse of a dominant position that this entity would have on data and information it "created" itself (so-called 'single-source' databases)"*.[612] In other words, amending the Directive to meet the demands of the sports organisers would bear the risk of creating undesirable information monopolies.

In this context it is important to underscore that the EU legislature, when drafting the Database Directive, has clearly wished to avoid establishing single-source information monopolies. Various recitals accompanying the Directive clarify that the rights created by the Directive do not protect data as such, which explains (*inter alia*) why the CJ refrained from recognizing *sui generis* rights in data "created".[613] Moreover, the First Proposal of the Directive provided for a regime of compulsory licensing in respect of sole-source databases.[614]

At the end of its evaluation report, the Commission presents four different policy options. One is the possible amending of the *sui generis* right:

> *"An [...] option would be to amend and clarify the scope of protection awarded under the 'sui generis' provisions. Attempts could be made to reformulate the scope of the 'sui generis' right in order to also cover instances where the 'creation' of data takes place concurrently with the collection and screening of it. Amendments could also clarify the issue of what forms of 'official' and thereby single source lists would be protected under the 'sui generis' provisions.*
>
> *Amendments could also be proposed to clarify the scope of protection and clarify whether the scope would only cover 'primary' producers of databases (i.e. those producers whose main business is to collect and assemble information they do not 'create' themselves) or would also include producers for whom production of a databases is a 'secondary' activity (in other words, a spin-off from their main activity). Amendments could, in addition, clarify the issue of what actually constitutes a substantial investment in either the obtaining, verification or presentation of the contents of a database. On the other hand, reformulating the scope of the 'sui generis' right entails a serious risk that yet another layer of untested legal notions would be introduced that will not withstand scrutiny before the CJ."*[615]

Another possible solution, which is also entertained by the Commission in the report, would be the complete withdrawal of the Directive. This would theoretically leave Member States the freedom to restore former copyright regimes based on "skill and labour" or similar doctrines. However, the CJ has in various more or less recent decisions concerning non-database subject matter pronounced that works generally qualify for copyright protection only under the common EU standard of "the author's own intellectual creation". This, according to the CJ, is the case even where express

---

[612] Idem, p. 14.
[613] Recitals 45 and 46 read as follows: *"(45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data; (46) Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves; [...]"*. Idem.
[614] Proposal for a Council Directive on the Legal Protection of Databases, COM (92)24 final, Brussels, 13 May 1992 (1992) OJ C 156/4. Article 8 § 1 and 2. See P. Bernt Hugenholtz, "Abuse of Database Right Sole-source information banks under the EU Database Directive" in François Lévêque and Howard Shelanski (eds.) *Antitrust, Patents, and Copyright: EU and US Perspectives* (Edward Elgar, Cheltenham 2005) 203-219.
[615] European Commission, First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12 December 2005, p. 26.

harmonization of (specific) copyright subject matter is not in place.[616] Consequently, the CJ's decisions do not appear to leave room for the revival of "skill and labour" based copyright or similar regimes for databases. Moreover, withdrawing the entire Directive altogether seems highly unlikely, not only because this would require the consent of a majority of Member States by now well attuned to the Directive and its national implementations, but also because the Directive has become part of the Community *acquis* imposed on the EU's trade partners by way of an assortment of trade agreements.

The question remains whether the Directive does allow, or would allow, national legislative solutions specifically geared towards the needs of the sports organisers, such as the French right to consent to bets. This raises the difficult issue of pre-emption of national law by harmonized EU standards. In principle, both the copyright rules and the *sui generis* rules of the Directive provide for complete harmonization. This would, for instance, rule out the continued existence or introduction of a national rule of copyright protecting fixtures lists under a standard of skill and labour.[617] A national rule protecting fixtures lists under a regime of *sui generis* or neighbouring (related) rights would probably also be pre-empted.[618] With regard to France this raises the question of the legal qualification of the French right to consent to bets. If this right is to be deemed a copyright or related right,[619] it is arguably pre-empted by EU law. If, on the other hand, it is to be qualified as a species of the general right of property,[620] or as a special rule of unfair competition, it is more likely not to be affected by EU harmonization.

Importantly, the Directive does not harmonize or pre-empt national law in adjacent legal fields. According to Article 13 of the Directive:

> "*This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract*".

This language apparently leaves some room for (the introduction of) national rules based on other legal doctrines, such as the law of unfair competition or the law of contract, provided these rules materially deviate from the rules that fall within the scope of the directive. Indeed, it is quite common in the Member States of the EU to have national rules supplementing fully harmonized intellectual property rights.[621]

In conclusion, national rules based on notions of unfair competition or – even further removed from intellectual property law – rules embedded in (public) sports or gambling laws, would not

---

[616] Case C-5/08 Infopaq International A/S v Danske Dagblades Forening, (2009) ECR I-06569; Case C-145/10 Eva-Maria Painer v Standard Verlags GmbhH a.o., 1 December 2011 (nyr).
[617] Case C-604/10 Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, 1 March 2012 (nyr), para. 52: *"Directive 96/9 must be interpreted as meaning that, subject to the transitional provision contained in Article 14(2) of that directive, it precludes national legislation which grants databases, as defined in Article 1(2) of the directive, copyright protection under conditions which are different to those set out in Article 3(1) of the directive"*.
[618] See European Commission, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998 – Notification 2009/0122/F, p. 4. Retrieved from http://www.lesechos.fr/medias/2009/0608/300353488.pdf (Accessed 1 February 2013). For further discussion of the opinion see Section 4.3.2.1.
[619] André Lucas and Henri-Jacques Lucas, *Traité de la propriété littéraire et artistique* (4th edition LexisNexis, Paris 2012) 934.
[620] See e.g. ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013).
[621] See Reto M. Hilty and Frauke. Henning-Bodewig, Reto M Hilty and Frauke Henning-Bodewig, "Leistungsschutzrecht für Sportveranstalter?", study commissioned by the German Football association, the German Football League, the German Olympic association, and others (2006) 21-23.

necessarily be pre-empted in so far as these rules do not materially reconstruct the exclusive right in fixtures and event schedules that the CJ has deemed incompatible with the Database Directive.

4.3 The right to consent to bets: origin, scope, enforcement, and effectiveness

As outlined in the introduction to this chapter, a sports organisers' right to consent to bets was first introduced in Australia in the State of Victoria 2007. Yet it was the recognition of a similar right in France that created the true momentum for sports organisers to advocate its adoption at the EU or EU-wide national level.

This section will describe and comparatively analyse the origin, scope, and enforcement of the right to consent to bets in Australia (4.3.1) and France (4.3.2). Without downplaying the important institutional, legal, and cultural differences between the two regimes, the comparative assessment of the enforcement of the right to consent to bets provides a rich source of guidance for Member States that might contemplate introducing a similar mechanism. In addition, this section will consider the extent to which the alleged benefits of a right to consent to bets, in terms of ensuring a "fair financial return" to sport and protecting the integrity of sports events, have actually been delivered.

Apart from France, two other Member States have introduced a similar mechanism, namely Poland and Hungary. Given the limited experience with the actual enforcement of the right to consent to bets in these countries, however, this section will only make brief reference to them (4.3.3).

4.3.1 Victoria (Australia)

The Commonwealth of Australia is a nation that comprises six states and two territories, namely, the states of Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia, and the Australian Capital Territory and Northern Territory. Traditionally the regulation of gambling has been the exclusive preserve of the states and territories. With the arrival of new types of (interactive) gambling services, however, the federal level has taken a more active approach with the enactment of the Interactive Gambling Act (IGA) in 2001.[622] The IGA aimed to *"minimise the scope for problem gambling online among Australians by limiting the provision of online gambling services"*. In the event of conflict between the state and federal legislation, the IGA will prevail.[623]

The Commonwealth of Australia Constitution Act guarantees the freedom of interstate trade in Australia.[624] Consequently, betting operators authorized in one state (or territory) are permitted to provide their services in other states (or territories). Due to this framework, betting operators typically choose to have a license granted at one state, preferably with a beneficial tax regime, and offer their services online in the rest of Australia.

Even though the IGA generally prohibits the offering of "interactive gambling services",[625] Section 5(3) introduces a number of exceptions such as telephone betting services and excluded wagering

[622] See http://www.austlii.edu.au/au/legis/cth/consol_act/iga2001193/.
[623] Revised Explanatory memorandum-Interactive gambling Bill 2001(Cth), p. 1.
[624] See http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/.
[625] Interactive Gambling Act 2001, Part I, Section 3. An "interactive gambling service" is defined as any gambling service that presupposes interactive activity, thus including online gambling. Idem, Part I, Section 5b (i).

service. Section 8A excludes *"(a) a service to the extent to which it relates to betting on, or on a series of, any or all of the following: (i) a horse race; (ii) a harness race; (iii) a greyhound race; (iv) a sporting event; (b) a service to the extent to which it relates to betting on: (i) an event; or (ii) a series of events; or (iii) a contingency; that is not covered by paragraph (a)"*. Betting on sports events that are conducted after the beginning of the event (in-the-run betting) and services that provide for wagering on contingencies within a sporting event (micro betting) after its commencement, however, fall outside of the scope of the exception and are thus prohibited.[626]

4.3.1.1 The origins of the Victorian right to consent to bets

The state of Victoria introduced the Gambling Regulation Act (GRA) in 2003,[627] which was amended with the Gambling and Racing Legislation Amendment Act 2007 (Sports Betting Act).[628] The Sports Betting Act introduced a strict regulatory framework for sports betting. The purpose of the amendments was to (1) strengthen public confidence in the integrity of sport from a betting perspective and (2) ensure that sporting bodies receive a share of the proceeds from betting that takes place on their respective sports.[629]

In order to achieve these objectives, the Sports Betting Act introduced a right to consent to bets that can be licensed by recognized sports bodies. As a result, betting operators may not offer betting on Victorian sports events without first reaching a contractual agreement with the relevant sports body.

Even though the right to consent enables sports bodies to receive a financial remuneration for the exploitation of their events, the next section will show that the exercise of such right is preconditioned on the presence of adequate measures to ensure the integrity of the sports events being bet on. One of the intended outcomes of the Victorian regulatory scheme was that sports bodies would gain financial compensation from betting operators to help cover the costs of running their integrity departments.

4.3.1.2 Enforcement mechanism for the Victorian right to consent to bets

The application of the right to consent to bets is embedded in a strict enforcement framework. To fully reap the benefits of the instrument, sports bodies must follow a three-step process.

Step 1: Approval of events for betting purposes
Betting operators are only entitled to offer bets on sports events that have been approved by the Victorian Commission for Gambling and Liquor Regulation (VCGLR), i.e. the competent authority to supervise the gambling market in Victoria.[630] In order for the VCGLR to approve a sports betting event, it considers a number of integrity and consistency factors. In particular, the VCGLR will assess:

- whether the event or class is exposed to unmanageable integrity risks;
- whether the event administered by an organisation that is capable of ensuring the integrity of the event;
- whether betting on the event or class is offensive or contrary to the public interest;

[626] Idem, Part, Section 8A(2).
[627] See http://www.austlii.edu.au/au/legis/vic/consol_act/gra2003190/.
[628] Gambling and Racing Legislation Amendment (Sports Betting) Act 2007, No. 18 of 2007.
[629] Parliamentary debates (Hansard), 56th Parliament, Government of Victoria, Thursday, 15 March 2007, p. 863.
[630] Gambling Regulation Act 2003, Section 4.5.9.

- except in the case of a sporting event, whether the approval would represent an unreasonable extension of the scope of gambling in Victoria.[631]

Once the VCGLR approves a sports event, a sports betting provider[632] can offer bets on that event provided that the operator has an agreement with the relevant approved sports controlling body.

Step 2: Approval of sports controlling body status
A sports body can apply to the VCGLR to be approved as the "sports controlling body" (SCB) for an approved sports event. The benefit of SCB status is that it provides the sports body with the legal right to negotiate agreements with sports betting operators.[633]

In determining whether to approve an application for recognition as an SCB, the VCGLR must consider:
- whether the applicant has control of the event (i.e. organises or administers the event);
- whether the applicant has adequate policies, rules, codes of conduct or other mechanisms designed to ensure the integrity of the event;
- whether the applicant supports compliance with relevant international codes and conventions applicable to the event that relate to integrity in sport;
- whether the applicant has the expertise, resources, and authority necessary to administer, monitor, and enforce the integrity systems;
- whether the applicant has clear policies on the provision of information that may be relevant to the betting market;
- whether the applicant has clear processes for reporting the results of the event and hearing appeals and protests regarding those results;
- whether the applicant has clear policies on the sharing of information with sports betting providers for the purpose of investigating suspicious betting activity;
- whether the applicant is the most appropriate body to be approved as the approved sports controlling body for the event; and
- whether the approval of the applicant is in the public interest.[634]

The investment of time and resources into developing appropriate integrity mechanisms is thus a prerequisite for a sports body to obtain SCB status.

To date, nine sports bodies have been granted SCB status by the VCGLR: the Australian Football League ("Aussie Rules"), the now-defunct Australian Rugby League, Basketball Australia, Cricket Australia, Football Federation Australia Limited (soccer), National Rugby League, Netball Australia, the Professional Golfers Association of Australia, and Tennis Australia.[635]

Step 3: Integrity and product fee agreements
Provided that the organiser has been granted SCB status for a particular sport (step 2) and a sports event has been approved as a sports betting event (step 1), the GRA makes it an offence to offer bets on that event without a written agreement from the SCB.[636]

---

[631] Idem, Section 4.5.8.
[632] A "sports betting provider" is defined as *"a person who, in Victoria or elsewhere, provides a service that allows a person to place a bet on a sports betting event"*. Idem, Section 4.5.1.
[633] Idem, Section 4.5.12.
[634] Idem, Section 4.5.14.
[635] http://www.vcglr.vic.gov.au/home/gambling/new+applicants/sports+betting/sports+controlling+bodies.
[636] For instance, Cricket Australia has been approved as a sports SCB body and has made agreements with more than one sports betting providers that are also listed as approved sports betting partners of Australia Cricket.

The contracts between SCBs and betting operators ("Integrity and Product fee agreements") must at least include terms, first, to ensure the exchange of information among the parties for protecting and supporting integrity in sports and sports betting, and second, the inclusion of the fee that the betting operator settled to pay the SCB for the betting activities.[637]

The parties determine the details of the integrity and product fee agreements, including the type and level of the fee. In case the parties cannot reach an agreement, then the betting operator may apply to the VCGLR to resolve the dispute.[638] The VCGLR may make a binding determination on the outstanding issues, once again having regard to integrity issues. The VCGLR should assess *"(a) any integrity-related costs that the sports controlling body has incurred or may incur as a result of betting taking place on the sports betting event; (b) the integrity of the sports betting event; (c) any actual or potential financial returns to the sports betting provider, taking into account existing taxes, charges and levies, from conducting betting on the sports betting event; (d) the existing legislative rights and liabilities of the sports betting provider and the sports controlling body with respect to the use and provision of information; and (e) any other matters the Commission considers relevant".*[639]

In the context of the 2011 review of the Sports Betting Act, SCBs unanimously expressed that sports betting operators have been very co-operative in negotiating the integrity and product fee agreements.[640] The fact that no intervention by the VCGLR has been necessary for the conclusion of such agreements further indicates that the terms and conditions have been acceptable to betting operators.

4.3.1.3 Review of the effectiveness of the Victorian right to consent to bets

Since the passing of the Sports Betting Act in 2007, the substantial growth of the sports betting market in Australia gave rise to concerns about greater integrity risks for sport. To address these concerns, the former chairman of stewards for Racing Victoria was appointed to undertake an independent review of the Sports Betting Act. While the review found overwhelming support for the existing regulatory framework, it recommended a number of measures that could enhance its effectiveness.[641] The most important conclusion of the review was the strong need for a national approach: only the introduction of equivalent legislation in other states would guarantee that the objectives of the Sports Betting Act – to enforce the integrity of sport and ensure that sporting bodies are fairly remunerated for the betting that takes place on their events – could be met.

The review highlighted two main regulatory gaps. A first issue is that the integrity and product fee agreements are technically only mandatory (i.e. enforceable) for sports events that take place wholly or partially in the State of Victoria.[642] Since various major sports events take place in Victoria, the majority of SCBs are capable of levering off their agreements to also receive product fees for events occurring in other States and territories.[643] Furthermore, as soon as one of the events of a national competition takes place in Victoria, the requirement for betting operators to exchange information applies to all of the SCB's events - regardless of whether a particular game is played in Victoria or elsewhere in Australia. Nonetheless, a minority of SCBs, whose events are mostly held

[637] Gambling Regulation Act 2003, Section 4.5.23.
[638] Idem, Section 4.5.24(1).
[639] Idem, Section 4.5.26(3).
[640] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 18.
[641] Idem.
[642] Gambling Regulation Act 2003, Section 4.5.7.
[643] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 18.

outside Victoria, have significantly less bargaining power to demand product fees for all their events. This results in a potential integrity gap.[644]

A second issue is that betting on sports events that have not been approved by the VCGLR and the SCBs should be prohibited. However, the reality is that such a ban is ineffective because consumers outside Victoria are still able to bet on these events with operators based elsewhere in Australia.[645] Additionally, the VCGLR can only impose penalties when a betting operator is taking bets on events held within Victoria.[646]

The Victorian Government welcomed the review and announced that it would gradually implement the review's recommendations where it has the power to do so. The Government also committed to work with other Australian state governments to pursue nationally consistent legislative arrangements.[647] The discussion below will focus and elaborate on the findings of the review regarding the effectiveness of the right to consent to bets in terms of enabling a "fair financial return" from sports betting to sport (4.3.1.3.1) and in terms of protecting the integrity of sports events subject to betting (4.3.1.3.2).

4.3.1.3.1 Enabling a "fair financial return" to sport

As discussed, the parties determine the details of the Integrity and product fee agreements, including the type and level of the fee. Reports have shown that most agreements set a fee of 5 % on the betting operator's gross profit from betting that takes place on events controlled by the SCB.[648] Unfortunately, the actual figures paid by betting operators are not publicly available.

In 2011, Australian betting operators generated an estimated A$ 81,5 million gross win revenue from bets on sports events organized by the Australian Football League (AFL) and the Australian Rugby League (ARL) (AFL: A$ 45 million, ARU: A$ 36.5 million). AFL and ARL events attract about half of all sports bets in Australia.[649] Under the 5% fee model, the AFL and ARL should have received product fees of approximately A$ 2.2 million and A$ 1.8 million.

Despite the limited coverage of the Victorian regulatory regime, SCBs have so far been able to ensure that they also receive payment for betting on events occurring outside of Victoria. The review points out, however, that sports betting operators may not be willing to continue this arrangement if the SCBs would push for higher fees or for fees based on turnover rather than profit.[650]

4.3.1.3.2 Protecting the integrity of sports events

Given the limited financial remuneration that (most) SCBs receive for betting that takes place on their sports events, SCBs have identified the integrity assurance as the main benefit that accrued to them as a result of the Victorian regulatory framework.[651]

---

[644] Idem, p. 28.
[645] Idem, p. 14.
[646] Idem, p. 19.
[647] The Victorian Government's Response to the Review of Victorian Sports Betting Regulation, 3 August 2011, available at https://assets.justice.vic.gov.au/justice/resources/6b909b3b-7afa-46ad-923d-43748b6d7dd0/government_response_to_the_regulation_of_sports_betting_2011_report.pdf.
[648] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 18; Deloitte, "Optimal Product Fee Models for Australian Sporting Bodies", July 2012.
[649] Deloitte, Optimal Product Fee Models for Australian Sporting Bodies, July 2012.
[650] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 18.
[651] For instance, the CEO of the Australian Football League, Andrew Demetriou, stated: *"The reason why we are involved with gambling agencies is not the revenue, it's so we have access to information to protect the integrity of the code. Unless you have*

The primary concern of safeguarding the integrity of sports events is evident from the way in which the regulatory framework connects the exercise of the right to consent to bets with the fulfilment of integrity obligations.

Before a sports body is legally entitled to negotiate integrity and product fee agreements, it must obtain SCB status. In the previous section it became clear that this presupposes the investment of time and resources into developing appropriate integrity mechanisms. In other words, a sports body must first put in place adequate integrity mechanisms and only then it may claim its right to consent to bets.

The 2011 review of the Sports Betting Act pointed out that the costs involved in seeking SCB status contributes to the reluctance of smaller sports bodies to apply for SCB status. Some sports bodies, such as the Ballarat Football League, have managed to come to arrangements with sports betting operators without seeking SCB status. While these arrangements allow them to receive a financial return for the bets placed on their events, the problem is that there are no guarantees that these bodies have any integrity procedures in place.[652] The review therefore suggested that smaller sports bodies would set up an integrity body that could serve their collective integrity needs.[653] Even though this solution might address their lack of capacity, it remains unclear how it would be funded. Regarding the content of the integrity and product fee agreements, the review observed that the amount of information sharing taking place between SCBs and betting operators appears to vary considerably.[654] Nonetheless, some standard integrity assurances can be observed. SCBs will typically require betting operators to inform the SCB about unusual betting activity or suspicious transactions. SCBs may also e.g. ask betting operators whether there has been any betting linked to what appears to be an unusual on-field event and require betting operators to undertake integrity checks, such as an annual check that specified players and officials have not placed bets on their own sport. Moreover, SCBs may impose restrictions on bets that they consider inappropriate (e.g. who will be the first player to be carried from the ground on a stretcher).[655]

The review further stressed that the rights and obligations contained in the agreements must work both ways. In return for the product fee and the information sharing requirements, sports betting operators are also entitled to expect under the contract that the SCBs truly implement their integrity policies. The review therefore recommended giving the VCGLR the power to conduct on-going monitoring to ensure that SCBs are enforcing their integrity mechanisms. In the context of post-approval monitoring, the VCGLR could then adjust or even revoke its approval of SCB status.[656]

4.3.2 France

France was the first Member State to legally recognize a sports organisers' right to consent to bets. With the enactment of a new law on the opening up to competition and regulation of the online gambling and betting sector, which came into force on 13 May 2010, the right to consent to bets was codified in the French Sports Code.

---

an arrangement, a legal arrangement, and I say absolutely legal, we get access to betting sheets. That's how we catch people who bet on football. That's how we try and protect the game". Dale Wood, "The Gamble: Courting the Wagering Industry", Sports Business Insider, 29 May 2013.

[652] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 16.

[653] Idem, p. 19.

[654] Idem, p 20.

[655] Peter Cohen, Submission to the Legal and Constitutional Affairs Committee - Sports betting, Parliament of Canada, 4 October 2012; The Allan Consulting Group, Research for the review of the Interactive Gambling Act 2001: online gambling and 'in-the'run' betting (2012) 52-53.

[656] Des Gleeson, "Review of Sports Betting Regulation", 31 March 2011, p. 24-25.

4.3.2.1 The origins of the French right to consent to bets

As discussed in Chapter 1, the French legislator introduced a specific sports organisers' right to exploit the sports events they organize in the 1992 Law No. 92-652, amending the 1984 Law No. 84-610 on the organization and promotion of physical and sports activities.[657] These provisions were eventually codified in the Decree No. 2006-596 of 23 May 2006 and then laid down in Article L.333-1 of the amended French Sports Code. Article L. 333-1 establishes that *"sports federations, as well as the organisers of sports events (…) are the owners of the exploitation rights for the sports events or competitions which they organise"*.

The scope of the sports organiser's exploitation rights has been clarified by the French courts, and the case law has established that the exploitation rights are not confined to media rights, but apply to all forms of commercial exploitation of sports events. Any form of economic activity, the purpose of which is to generate a profit, and which could not exist if the sports event for which it is the necessary pretext or support did not exist, must be regarded as a commercial exploitation for the purposes of the law.[658] In a judgment delivered in October 2009, in which the Paris Court of Appeal had to rule on a dispute between an online betting operator and the French Tennis Federation (FFT), the Court held that *"the organisation of sports betting must be regarded as an exploitation of the sports event that is likely to affect the exploitation rights granted to the FFT by Article L.333-1 of the Sports Code"*. [659] Hence, the Court established that no betting could be organized on sports events unless the organiser has authorized this form of commercial exploitation. The French legislature took the opportunity to codify this principle when it enacted the new gambling law in 2010.[660]

Interestingly, the concept of the right to consent to bets evolved considerably during the course of the legislative process. When the draft law opening up online gambling and betting to competition and regulation was introduced in the French parliament, the rationale of the right to consent to bets was solely expressed in terms of generating a "fair financial return" to sport. Under Chapter IX ("Provisions concerning the exploitation of sports events") of the original draft law, Article 52 (ex Article 32)[661] the following addition to Article L.334-1 of the Sports Code was proposed:

> *"The use, for commercial purposes, of any characteristic element of sporting events or competitions, notably names, calendars, data or results, requires the consent of the owners of the exploitation rights under conditions, in particular of a financial nature, defined by contract, subject to the provisions of articles L. 333-6 to L.333-9".*[662]

---

[657] Loi no 92-652 du 13 juillet 1992 modifiant la loi no 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives et portant diverses dispositions relatives à ces activités, Article 13.

[658] Paris Court of Appeal, Unibet Int. v Federation Francaise de Tennis, Case No 08/19179, 14 October 2009; Paris Court of Appeal, Fédération Française de Rugby v VIP Consulting, Case No 09/22229, 16 March 2011 (*"toute forme d'activité économique ayant pour finalité de générer un profit et qui n'aurait pas d'existence si la manifestation sportive est le prétexte ou le support nécessaire n'existait pas, doit être regardée comme une exploitation au sens de ce texte"*).

[659] Paris Court of Appeal, Unibet Int. v Federation Francaise de Tennis, Case No 08/19179, 14 October 2009 (*"Considérant en définitive, que l'organisation de paris sportifs se référant aux compétitions du tournoi de tennis de Roland Garros, telle que mise en oeuvre par Unibet, dont il n'est pas contesté qu'elle consiste en une activité économique destinée à générer des profits, doit être regardée comme une exploitation de cette manifestation sportive de nature à porter atteinte au droit d'exploitation reconnu par l'article L.333-1 du code du sport à la F.F.T., organisatrice de ce tournoi"*). The judgment thus confirmed the judgment rendered on 30 May 2008 (No 08/02005) by the Paris First Instance Court, which found that "*organisation of online betting is an activity which generates income directly relating to the conduct of single events, namely to tennis matches, of which the sports event is the scene; it consequently represents an exploitation of the said event*".

[660] The law on the opening up to competition and regulation of the online gambling market in France entered into force on 13 May 2010, following its publication in the French Official Journal (Law N°2010-476 of 12 May 2010).

[661] Throughout the legislative process, the original Article 32 was renumbered as Article 52.

[662] Unofficial translation by the research team (*"L'utilisation, à des fins commerciales, de tout élément caractéristique des manifestations ou compétitions sportives, notamment leur dénomination, leur calendrier, leurs données ou leurs résultats, ne peut être effectuée sans le consentement des propriétaires des droits d'exploitation, dans des conditions, notamment financières, définies par contact, sous réserve des dispositions des articles L. 333-6 à L. 333-9"*).

On 5 March 2009, the French authorities notified the draft law to the European Commission, in accordance with the provisions of Directive 98/34/EC of 22 June 1988.[663] In its detailed opinion of 8 June 2009, the Commission stressed that several provisions of the draft law would infringe Article 56 TFEU if they were to be adopted without due consideration of its objections. One of the Commission's objections concerned Article 52 of the draft law: the Commission noted that, according to established case law, the funding of benevolent or public interest activities may not constitute the substantive justification for restrictions to the freedom to provide services. The financing of such activities can only be accepted as a beneficial consequence that is incidental, i.e. it is accessory to a general public interest.[664] Subsequently, the Commission rightly observed that *"to the extent that the requirement (to obtain consent of the sports organiser) envisaged in (Article 52) of the draft law seeks to ensure or strengthen the financing of benevolent or public interest activities, it must be noted that this may not constitute a valid justification for the restrictive policy adopted"*.[665] The Commission further noted that the characteristic elements that are already in the possession of sports organisers, such as calendars, data or results, could not qualify for *sui generis* database right protection.[666]

It was only during the subsequent first reading of the draft law in the French National Assembly that the statutory recognition of the right to consent to bets was presented as a means of preserving sports integrity. On 21 July 2009, the French Minister for the Budget declared:

> *"in reality, the interest of this right for sport is not financial but ethical, by requiring commercial agreements between gambling operators and the organisers of sports competitions, this right finally will give professional sport the means to make the operators share their concerns in matters of competition ethics"*.[667]

Accordingly, the relevant provision was substantially amended to better accord with the Commission's opinion. First, the title of Chapter IX was changed to "Provisions concerning the exploitation of sports events and the fight against fraud and cheating in the context of these events" (emphasis added). Second, multiple paragraphs were added to Article 52, so as to stipulate that (1) the marketing betting right contract should impose obligations on licensed gambling operators concerning fraud detection and prevention and (2) the financial contribution seeks to compensate for costs incurred by sports organisers for anti-fraud mechanisms.[668]

The law opening up the online gambling and betting sector to competition and regulation (Act No. 2010-476), which entered into force on 13 May 2010, inserted the following provisions relative to the right to consent to bets in the Sports Code:

---

[663] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (1998) OJ L 204/37. This "Transparency Directive" requires Member States to notify their rules on information society services in draft form, and generally observe a standstill period of at least three months before formal adoption, in order to allow other Member States and the European Commission to raise concern about potential trade barriers within the EU.

[664] See e.g. Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Markus Stoß and Others v Wetteraukreis and Others (2010) ECR I-8069, para. 104; C-67/98 Questore di Verona v Diego Zenatti (1999) ECR I-7289, para. 36; Judgment of the EFTA Court in case 3/06 (Ladbrokes) §63.

[665] European Commission, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998 – Notification 2009/0122/F, p. 4. Retrieved from http://www.lesechos.fr/medias/2009/0608/300353488.pdf (Accessed 1 February 2013).
See also Section 4.4.2.

[666] Therefore, the Commission considered that the use of such information for the purposes of organising betting could be permitted without the prior consent of the data owners in accordance with the current European copyright framework. Idem, p. 9. See Section 4.2 for a detailed analysis of this aspect.

[667] Assemblée Nationale, Audition de M. Éric Woerth, ministre du budget, des comptes publics, de la fonction publique et de la réforme de l'État au cours de la réunion du 21 Juillet 2009.

[668] In the context of the second reading of the draft law in the French Senate, the *rapporteur* of the Finance Committee welcomed this solution to accommodate the European Commission's concerns regarding Article 52. Sénate, Rapport n° 209 (2009-2010) de M. François Trucy, fait au nom de la commission des finances, déposé le 19 janvier 2010.

Article L.333-1-1

The exploitation right set out in the first paragraph of article L. 333-1 includes the right to grant (consent to the) organisation of betting on the sports events or competitions.

Article L.333-1-2

Where the right to operate betting has been granted to online gambling operators by a sports federation or by an organiser of sports events referred to in the first paragraph of article L.331-5, the draft contract binding upon the operators must be submitted, prior to signature, to the French authority for the regulation of online gambling and to the French competition authority, who will publish a decision within fifteen days of the date of receipt of the document.

The organiser of sports events or competitions may consent to mandate the empowered or approved federation in question or the committee referred to in article L.141-1 to sign the contract referred to in the previous paragraph with the online gambling operators.

Sports federations and organisers of sports events shall not award the exclusive right to organise betting to an operator nor discriminate between the licensed operators of the same betting category.

Any refusal to sign a contract for operating betting must be justified by the sports federation or organiser of sports event in question and notified by it to both applicant and the French Online Gaming Regulatory Authority.

The contract referred to in the preceding paragraph specifies fraud detection and prevention obligations imposed on online betting operators. It includes in particular the conditions of information exchange with sports federation or organiser of the sports event.

It confers them the right to remuneration taking account in particular of the costs incurred in detecting and preventing fraud.

4.3.2.2 Enforcement mechanism for the French right to consent to bets

The French legislature strictly regulated the marketing of the right to consent to bets in Act No. 2010-476 and its implementing provisions.

Step 1: Approval of events for betting purposes
According to Act No. 2010-476, licensed operators can only offer bets on competitions, types of results, stages of play, and scores included in a list drawn up by ARJEL, the French Online Gaming Regulatory Authority.[669] An implementing Decree of 12 May 2010 guides ARJEL in its definition of competitions and types of sports on which bets can be offered.[670] This restriction aims to limit risks of cheating and corruption, by preventing all kinds of undue external interventions in relation to the course of the game, which might affect its outcome.

The list of authorized sporting events categories is defined, and regularly revised, further to an opinion of the competent sports federation, or failing that, of the Ministry of sports. Four criteria must be considered.[671] First, the sports organiser must be a sports federation mentioned in Article

[669] Loi No. 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne, Article 12.
[670] Décret No. 2010-483 du 12 mai 2010 relatif aux compétitions sportives et aux types de résultats sportifs définis par l'Autorité de régulation des jeux en ligne.
[671] Idem, Article 2.

L.131-1 of the Sports Code, an international sports federation, a sports organiser mentioned in Article L.331-2 or Article L.331-5 of the Sports Code or a sports organiser that is legally organized abroad. Second, the rules applicable to the sporting events must include provisions on the publicity of the event's results. Third, the sporting event does not exclusively involve minors.[672] Fourth, the sporting event must be capable of attracting a sufficient number of bets.
For each sports discipline and sporting event category, ARJEL further defines the types of results of the events on which bets may be offered. Also for this purpose, ARJEL seeks the opinion from the competent sports federation or the Ministry of sports. The types of results can either be the final result of the sporting event or the result of the phases of the game during the events.[673] It follows that betting on "negative" score elements of the game (e.g. faults, lost balls, and penalties) is prohibited. Furthermore, the results must be the expression of objective and quantifiable performances of the athletes taking part in the event.[674] Sports where marking is given (e.g. gymnastics, artistic skating, dressage and animal training) are excluded since, as they involve human judgment, they are considered as being exposed to increased risks of manipulation of sports competition results.[675]

The full list of authorized sports bets is published on ARJEL's website.[676] When the market was first opened in May 2010, the list covered fifteen sports. As of January 2014, it contains 43 approved sports. For each sport, it defines the categories of sporting events together with the types of results and the corresponding phases of the game for which betting is permitted. It follows that the right to consent to bets can only be exercised for approved, and thus listed, sporting events.

Step 2: Betting right marketing contracts
Decree No. 2010-614 of 7 June 2010 lays down the marketing conditions for the right to consent to bets.[677] It aims to ensure that the right to consent to bet is exploited in a non-exclusive and non-discriminatory fashion.

The owners of the right to consent to bets are the organisers of competitions, such as French sports federations, delegated professional leagues created by the federation, and private law organisers, whatever their nationality, if authorized by the French empowered federation to organise events.[678]

To market the right to consent to bets, the Decree imposes a consultation procedure that must be open to all authorized betting operators. Upon request, the sports federations or sports organisers must provide the operator with the terms and conditions of the betting right marketing contract, which must at least stipulate:
- the time table for the assignment procedure;
- the events that are the subject to the consultation, which may relate to one or more competitions in compliance with the list of competitions on which betting is authorized;
- the duration of the exploitation right;
- the rules governing the consultation;
- the monitoring and detection measures that the sports federation or sports organiser intends to introduce for preventing the risk for the integrity of the events in question;

[672] This is a corollary to one of the objectives of Act No. 2010-476, namely the protection of minors (Article 3(I)(1°)).
[673] Décret No. 2010-483 du 12 mai 2010 relatif aux compétitions sportives et aux types de résultats sportifs définis par l'Autorité de régulation des jeux en ligne, Article 3.
[674] Idem.
[675] See e.g. ARJEL, Ruling No. 2012-042 of 5 April 2012, http://www.arjel.fr/IMG/pdf/2012-042.pdf
[676] http://www.arjel.fr/-Paris-Sportifs-.html
[677] Décret no. 2010-614 du 7 Juin 2010 relatif aux conditions de commercialisation de droits portant sur l'organisation de paris en relation avec une manifestation ou compétition sportives.
[678] Sports Code, Article L.333-1 and Article L.331-5.

- the information and transparency obligations imposed on the licensed operator in detecting fraud and preventing the risk of harm to the integrity of sports competitions.[679]

In order to prevent any abuse of the right to consent to bets by the sports federations or sports organisers, Article L.333-1-2 of the Sports Code provides that they can neither grant an operator the exclusive right to organise betting on their events, nor exercise discrimination between the operators accredited for a given category of betting. Any betting operator that meets all the conditions and accepts the consultation price must be granted the right to consent to bets.[680] To ensure compliance with these principles, Article L.333-1-2 of the Sports Code further provides that a betting market contract, prior to signature, must be notified to both ARJEL and the National Competition Authority (NCA).[681] Within fifteen days of receipt of the contract, they must issue an opinion. Any refusal to conclude a betting marketing contract must also be notified to ARJEL, who will then check the justifications put forward by the sports federation or sports organiser.

While the compensation paid for the right to organise bets depends on the consultation carried out with the operators, the Decree provides that the price can only be expressed in a percentage of the volume of bets.[682] Furthermore, the Act No. 2010-476 provides that the remuneration takes account *"in particular the costs incurred in detecting and preventing fraud"*.[683]

As long as a licensed operator has failed to reach an agreement with the sports federation or sports organiser, it cannot offer bets on its competitions. If an operator ignores this prohibition it may be brought before ARJEL's sanctions commission for breach of the obligations arising from the law.[684] The sanctions can take the form of a reduction of the accreditation of a term of not more than one year, suspension of the accreditation for three months,[685] or complete withdrawal of the accreditation (possibly coupled with a prohibition to apply for a new accreditation for a maximum period of three years).

Finally, it should be stressed that horse racing betting is covered by specific regulations. On a proposal of the French Equestrian Federation, it is up to the Ministry of Agriculture, Food Production and Forestry to approve, by Decree, the schedule of national and foreign horse races that can alone be used for online horse racing betting[686]. Therefore, it is not ARJEL's responsibility to decide whether or not a race can be used for horse racing betting.

4.3.2.3 Review of the effectiveness of the French right to consent to bets

In the context of the notification procedure of Act No. 2010-476, the French authorities committed to submit to the European Commission a report on the implementation of the right to consent to bets, two years after the measure had come into force. On the basis of this report, the Commission

[679] Décret no. 2010-614 du 7 Juin 2010 relatif aux conditions de commercialisation de droits portant sur l'organisation de paris en relation avec une manifestation ou compétition sportives, Article 2.
[680] Idem, Article 4.
[681] ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013) 27. The French NCA stressed that it is unable to submit a useful opinion for each draft contract within the time limit prescribed by the law. It therefore issued an opinion identifying the main competition concerns and drafted general recommendations to guide ARJEL. However, ARJEL may refer to it draft betting right market contracts that are likely to give rise to competition concerns. Idem, 20-23.
[682] Décret no. 2010-614 du 7 Juin 2010 relatif aux conditions de commercialisation de droits portant sur l'organisation de paris en relation avec une manifestation ou compétition sportives, Article 3.
[683] Codified in the Sports Code, Article L.333-1-2.
[684] Loi No. 2010-476 du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne, Article 43.
[685] As an example, ARJEL suspended the accreditation of REKOP LIMITED, notably due to the need to obtain new economic and financial guarantees from this operator (Decision No 201-066, 4 July 2011). This suspension was eventually lifted by ruling No 2012-083 of 24 September 2012.
[686] A Decree was enacted to stipulate the type of races that could be covered by betting (Decree No 2010-498 of 17 May 17 2010).

would assess (1) its impact on the freedom to provide services and (2) its genuine contribution to the preservation of sports integrity in the context of sports betting.[687] The report, drafted by ARJEL, was presented at the beginning of 2013[688] and documents the implementation of the right to consent to bets in the period from May 2010 to June 2012.
Regarding the territorial impact of the right to consent to bets, the report stresses that its implementation has had no impact on the effective opening up of the sector to competition. The report addresses two dimensions regarding the geographical scope of the right to consent to bets.

A first question is whether or not the right to consent to bets covers sports events that are not organised on French territory. This question is not settled in French law and has not yet been resolved by the French courts. ARJEL, which was asked for an opinion on this matter, issued a ruling on 6 October 2011, which unfortunately gives no clear reply. It merely notes that "*events being held abroad do not appear to satisfy the requirements of Article L.333-1 of the Sports Code concerning their organisational conditions, due to the absence of any links with French territory",* whilst immediately stipulating that *"on the other hand, the question of the existence of a right to consent to the organisation of betting, of which these organisers would be holders by virtue of any other applicable laws, remains open*". ARJEL therefore concludes that "*the question of whether or not organisers of sports events being held outside France can claim a right to consent to the organisation of betting, in French territory, does not appear to have been settled by case law at the current time*".[689] Consequently, ARJEL considers it does not lie within its competences to engage in possible administrative proceedings against licensed betting operators offering bets on events taking place outside France without contracting first with the sports federation or sports organiser.[690]

A second question concerns the exercise of the right to consent to bets *vis-à-vis* sports betting operators operating outside French territory (but offering bets on sports events organised in France). The report notes that the restriction to betting organised solely on French territory undermines the effectiveness of the system: *"the organiser of the competition can thus only have a partial view of the betting activity performed during its event and consequently, it can only claim a fair return on an exceedingly small proportion of the income generated by betting on its event"*.[691] ARJEL therefore recommends an expansion of the French right to consent to bets (or an equivalent system) to other territories within the EU.

The discussion below will focus and elaborate on the findings of the report regarding the effectiveness of the right to consent to bets in terms of enabling a "fair financial return" from sports betting to sport (4.3.2.3.1) and in terms of protecting the integrity of sports events subject to betting (4.3.2.3.2).

4.3.2.3.1 Enabling a "fair financial return" to sport

The right to consent to bets entitles sports federations or sports organisers to demand a financial remuneration as compensation for the commercial exploitation of their sports events. The level of the fee, which must be expressed in a percentage of the registered stakes, depends on the consultation with the betting operators. The report on the implementation of the right to consent

[687] European Commission, Réaction des services de la Commission concernant la réponse d'un Etat membre à la suite d'un avis circonstancié et d'observations, 1 September 2009.
[688] ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013).
[689] ARJEL, Ruling No 2011-106 of 6 October 2011.
[690] ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013) 41.
[691] Idem, 41-42.

to bets reveals that on average the betting right marketing contracts set a fee of 1,1% of the bets placed.[692]

The beneficiaries of the financial return are national sports federations (59%), private-law sports organisers such as UEFA (36%), and national professional leagues (5%).[693]

In the period June 2010 (i.e. the effective opening of the online sports betting market) to June 2012, a total of € 2,4 million was paid by online betting operators to the holders of the right to consent to bets. As Figure 4.1 demonstrates, only the most commercially attractive sports are capable of generating a substantial financial return: 80% of the total amount was paid to football, tennis, and rugby.

Sport	Financial return (€)			% of total
	2010-11	2011-12	Total	
Football	694.000	811.000	1.505.000	64
Tennis	251.000	203.000	454.000	18
Rugby	82.000	96.000	178.000	8
Basketball	49.000	70.000	120.000	5
Volleyball	31.000	18.000	49.000	2
Handball	11.000	26.000	38.000	2
Cycling	11.000	9.300	20.000	1
Ice hockey	228	3.300	3.600	0,2
Table tennis	-	1.900	1.900	0,1
Badminton	-	1.100	1.100	0,05
Fencing	97	-	97	0,004
Golf	-	26	26	0,001
Total	**1.130.000**	**1.241.000**	**2.371.000**	100

Figure 4.1 - Allocation of financial return per sport for online betting[694]

In the same period, a total of € 6,9 million was paid by land based operators to the holders of the right to consent to bets. Almost all of the generated income went to football and rugby (93%).

Sport	Financial return (€)			% of total
	2010 (2nd half)	2011	2012 (1st half)	
Football	1.347.000	2.955.000	1.718.000	87
Rugby	123.000	189.000	123.000	6
Tennis	-	-	64.000	0,9
Basketball	41.000	115.000	102.000	3,7
Handball	48.000	62.000	35.000	2,1
Ice hockey	-	4.000	10.000	0,2
Total	**1.558.000**	**3.325.000**	**2.053.000**	100

Figure 4.2 - Allocation of financial return per sport for land based betting[695]

ARJEL observes that the amount paid by betting operators for the right to organise bets remains limited. Excluding football, tennis, and rugby, the remuneration is quite small and is unlikely to cover the costs incurred for risk prevention.[696]

Even though all sports federations and sports organisers heavily market their events for betting purposes,[697] only a minority of them are able to sign betting right marketing contracts. It should be

[692] Idem, 34.
[693] For the period June 2010 to June 2012. Idem, 27-28.
[694] Idem.
[695] Idem.
[696] Idem, 38.
[697] Idem, 30, 38.

stressed that the sporting events covered by the right to consent to bets does not represent a decisive share of the overall sports betting offer in France. During the first half of 2012, French gamblers placed € 362 million on the websites of licensed sports betting operators. Of this total amount, only € 75 million involved sporting events covered by the right to consent to bets (i.e. less than 21% of the stakes).[698] This indicates that licensed sports betting operators only sign betting right marketing contracts for sports events that are most attractive in terms of sports betting. The top division of the French Football League alone generates almost half of the total financial return from online sports betting.[699]

4.3.2.3.2 Protecting the integrity of sports events

In its report on the implementation of the right to consent to bets, ARJEL positively evaluates the role of the right to consent to bets in the preservation of the integrity of sports competitions. According to ARJEL, the instrument *"constitutes an effective contribution to the comprehensive system introduced by the French authorities in on-line sports betting"*.[700] It highlights two main benefits. First, the right to consent to bets creates a legal link between betting operators and sports organisers. Second, the right to consent to bets makes the participation of sports organisers in alert systems (for the detection of irregular betting patterns) more effective.

Since all betting right marketing contracts must be notified, ARJEL has been able to identify the integrity measures that are most frequently introduced under the contracts.

As discussed, Decree No. 2010-614 requires the betting right marketing contracts to specify information and transparency obligations imposed on operators to detect fraud and prevent the risk of harm to the integrity of sports events.[701] The holders of the right to consent to bets typically require the following information and transparency obligations:

- the sharing of systematic, real-time information of any suspicious movement in bets on the competition, in particular an abnormally high volume of stakes on the competition (in comparison to an amount fixed by the parties with respect to stakes usually taken by the operators for similar competitions), an abnormal distribution of stakes in view of the probable sports results, and an abnormally high level of stakes for a specific bet (according to a threshold established by the parties);
- the sharing of systematic, real-time information from the sports organiser of any delisting of bets on the event by providing justification for such delisting;
- a commitment by operators to answer justified requests for additional information regularly sent to them by the sports organiser relating to an enquiry following an alert;
- the appointment of a contact person working for the operator and the determination of methods of transmission of information by the operators to the sports federations or sports organisers.[702]

The report notes that the contracts, by offering information on the actual betting activity, have increased awareness of sports federations and sports organisers of the associated integrity risks. As a consequence, ARJEL observes, the holders of the right to consent to bets have gradually

[698] Idem, 38.
[699] For the period June 2010 to June 2012. Idem, 37.
[700] Idem, 46.
[701] Décret no. 2010-614 du 7 Juin 2010 relatif aux conditions de commercialisation de droits portant sur l'organisation de paris en relation avec une manifestation ou compétition sportives, Article 2.
[702] ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013) 47.

introduced suitable preventive measures.[703] The measures specified in the betting right market contracts commonly include:

- the appointment of a referee as late as possible;
- the presence of referees or commissioners associated with the competition organisation, in sufficient number to ensure monitoring of the course of the competition;
- the introduction of a ban on betting from the premises of the sports event;
- video recording of the competition to enable *a posteriori* scrutiny of the event in case of fraud suspicion in bets placed on the event;
- the appointment of a contact person in the sports federation or sports organisation to interact with a betting operator and/or ARJEL;
- the establishment of procedures for dealing with alerts issued following information submitted by the operator or from any other source concerning a risk to the integrity of a sports competition.

However, the law does not mandate the effective implementation of these integrity measures. Contrary to the relatively strong language about the stipulation of "information and transparency obligations" imposed on the operators, Decree No. 2010-614 merely requires the holder of the right to consent to bets to specify in the contracts the measures it *"intends"* to introduce for preventing the risk for the integrity of the events in question.[704]

It must be recalled that the discussion of the Victorian right to consent to bets also raised a concern about compliance by the parties, *in casu* the sports bodies, with the obligations arising under integrity and product fee agreements. In return for the product fee and the information sharing requirements, betting operators are entitled to expect that the SCBs truly implement their integrity mechanisms. The 2011 review of the Sports Betting Act therefore recommended giving the Victorian Commission for Gambling and Liquor Regulation (VCGLR) the power to conduct on-going monitoring of the integrity policies of the SCBs.[705] Yet there is a crucial difference between the two systems. The Victorian regulatory regime conditions the right to consent to bets upon the investment of time and resources into developing appropriate integrity mechanisms. In case an SCB fails to fulfil its obligations in this regard, the VCGLR could revoke its approval of SCB status (and the sports body would subsequently lose its right to exercise the right to consent to bets). This safeguard is absent in the French system. The adoption of adequate integrity mechanisms is not a prerequisite for the exercise of the French right to consent to bets. Even though the compensation paid for the right to organise bets must take account *"in particular the costs incurred in detecting and preventing fraud"*,[706] there is no guarantee that the income is in fact allocated to fraud prevention and detection.

In its report on the implementation of the right to consent to bets, ARJEL further stresses that its review of the betting right marketing contracts enables it to check whether sports federations and sports organisers have put in place rules on the prevention of conflicts of interest.[707] The adoption of such rules is mandated by the Sports code for all sports federations and sports organisers, however.[708] The resulting integrity benefits can therefore not be attributed to the right to consent to bets. At most, the betting right marketing contracts help ensure compliance with the provisions of the Sports Code.

---

[703] Idem, 46-49.
[704] Décret no. 2010-614 du 7 Juin 2010 relatif aux conditions de commercialisation de droits portant sur l'organisation de paris en relation avec une manifestation ou compétition sportives, Article 2.
[705] See Section 4.3.2.3.2.
[706] Sports Code, Article L.333-1-2.
[707] ARJEL, Report of the French Online Gaming Regulatory Authority on the betting right (2013) 47.
[708] Sports Code, Article L.131-16.

The establishment of a legal link between betting operators and the holders of the right to consent to bets undeniably empowers the latter and makes their participation in alert mechanisms more effective. However, unlike the Victorian regulatory system, it is not evident that safeguarding the integrity of sports events constitutes the principal rationale of the French right to consent to bets.

4.3.3 Poland and Hungary

Apart from France, two other Member States have also legally recognized a right to consent to bets, namely Poland and Hungary.

In Poland, the 2009 Gambling Act stipulates that an operator applying for a license, or for changing the terms and conditions thereof, concerning the result of a sports competition, *"shall obtain the consent of the local competition organisers to use the competition's result"*.[709] In other words, a betting operator must obtain consent from the respective sports organiser before it can make use of the results of a sporting event for betting purposes. Similar to the Victorian regulatory regime, the principle is a regulatory condition and is not conceptualized as a property right. The provisions of the Gambling Act do not indicate that the sports organiser must receive a financial remuneration for the right to organise bets. In practice, however, licensed betting operators must pay a considerable fee to sports organisers to obtain such permission.[710]

In Hungary, the legal basis of the right to consent to bets is more akin to the French system. It was included in the amended Sports Act, which entered into force in 1 January 2012.[711] Pursuant to Article 37(1) sports associations hold the right to exploit the rights to their events that have commercial value. The Act further specifies that sports rights with commercial value concerning: *"(i) the matches (competitions) of national teams; and (ii) the announcement, organization, and conducting of sports tournaments (championships), including the licensing of online betting concerning (i) the matches (competitions) of national teams and (ii) the matches of sports tournaments (championships), belong to the respective sports association"*.[712] Accordingly, the exploitation of a sporting event for betting purposes is subject to the sports association's authorisation. The qualification of the right to consent to bets as a right with commercial value that can be licensed to betting operators implies that consent will be subject to remuneration. To date, however, sports associations have not been claiming a financial return for two main reasons.[713] First, the state-owned operator Szerencsejáték Zrt. currently holds an exclusive license to offer online sports betting services in Hungary. The operator, which launched a sports betting website in May 2013, is already statutorily required to contribute to the funding of sport.[714] Second, the sporting events covered by the right to consent to bets comprise only a small fraction of the current online sports betting offer in Hungary.[715]

Under anticipated amendments to the Gambling Operations Act, concession agreements will enable more operators to offer online sports betting in Hungary. It remains to be seen whether this will prompt (for example) the Hungarian Football Federation, which strongly advocated the introduction of the right to consent to bets in the Sports Act,[716] to start exercising this right.

---

[709] Gambling Law, Journal of Laws of the Republic of Poland, Dz. U. 2009 No. 201 position 1540, Article 31(1).
[710] Polish questionnaire; expert workshop II and III; IRIS/EU Commission Program Fight Against Match-fixing, Synthesis of Poland Seminar, 12 December 2013. Polish sports betting operators were unable to share more information on their contracts with sports organisers to the research team.
[711] Act I of 2004 on Sport (in Hungarian: 2004. évi I. törvény a sportról).
[712] Emphasis added.
[713] As emerged from the discussions in expert workshop II.
[714] Act XXXIV of 1991 on Gambling Operations (in Hungarian: 1991. évi XXXIV. törvény a szerencsejáték szervezéséről) Article 3.
[715] This also applies to the online sports betting offer of the various unlicensed operators that offer their services in Hungary.
[716] As emerged from the discussions in expert workshop II.

4.4 The virtues and challenges of a right to consent to bets

The legal recognition of a right to consent to bets in France inspired various sports stakeholders to advocate the adoption of a similar model at the EU or EU-wide level; but apart from Hungary, no other Member State has adopted legislation similar to that existing in France. Several Member States that have recently proceeded to the opening of their (online) gambling markets to licensed operators have instead opted for alternative mechanisms to collect and allocate revenue derived from gambling to sport. Member States' approaches to the gambling-originated funding of sport as well as to the financing of sports integrity measures differ significantly. These divergences are, like many other aspects of gambling legislation, essentially a reflection of different cultural, historical, and national traditions.[717] Case law from the CJ clearly establishes that Member States are competent to determine, in accordance with their own scale of values, their policies on gambling.[718] It follows that the emergence of one particular model that fits all Member States will continue to be elusive. As the European Commission stressed in its 2012 Communication "Towards a comprehensive framework for online gambling", *"none of the financing models currently applied has been found to be more or less efficient than others"*.[719]

Nevertheless, it remains important to examine in a more general fashion the virtues and challenges of the adoption of a right to consent to bets. This section will appraise the legal basis of the right to consent to bets (4.4.1), its potential benefits as an anti-match fixing measure (4.4.2), its potential benefits as a financing measure for sport (4.4.3), and its institutional and operational requirements (4.4.4).

4.4.1 The legal basis of the right to consent to bets

It has been noted above that the calls for the adoption of a right to consent to bets has typically rested on two lines of reasoning, but the examination of the (limited) experiences with the implementation of a right to consent to bets in the previous section reveals that the synthesis of these two rationales is a unique feature of the French regulatory regime. The first line of reasoning is property right-based and rests on the premise that sports betting is a form of commercial use of sporting events. This is in line with calls to recognize sports organisers' rights generally that would cover all kinds of commercial exploitation of sporting events, including the organisation of sports bets. This is the conception of the primary purpose of the right to consent to bets that currently exists in France and Hungary; it is founded on an economic logic that aims to ensure a "fair financial return" from associated betting activity.

The second line of reasoning is related to sports integrity. Here, the primary benefit accruing from the right to consent to bets is that it establishes a statutory obligation for betting operators to work in partnership with sports organisers. According to contractual provisions agreed upon by the involved parties, mutual obligations (for fraud detection and prevention, for example) and conditions of information exchange can be introduced. The European Parliament has acknowledged *"that the conclusion of legally binding agreements between organisers and sports competitions and online gambling operators would ensure a more balanced relationship between*

[717] European Commission, Commission staff working document: "Online gambling in the Internal Market", SWD(2012) 345 final 100.
[718] See e.g. C-34/79 Henn and Darby (1979) ECR 3795, par. 15; C-275/92 Schindler (1994) ECR I-1039, par. 32; C- 268/99 Jany and others (2001) ECR I-8615, par. 56, 90.
[719] European Commission, Communication: "Towards a comprehensive European framework for online gambling", COM(2012) 596 final, 15.

them".[720] Beyond the EU, the Committee of Ministers of the Council of Europe has likewise invited the member states *"to consider the possibility of ensuring that no betting is allowed on sports events unless the organiser of the event has been informed and has been given prior approval, in accordance with fundamental principles of international and national law".*[721] This particular conception of the right to consent to bets, namely as an instrument to preserve the integrity of sport, does not presuppose intellectual property rights or similar protection for sporting events. The Victorian regulatory regime is a clear illustration of how a right to consent to bets can be introduced well outside the framework of private law, i.e. as a regulatory condition in gambling legislation.

All of this is to say that the recurrent calls for the recognition of a right to consent to bets in Europe more often than not conflate the two rationales. At one fell swoop the principle of a "fair financial return" for the commercial exploitation of sporting events is linked to the protection of the integrity of these events. However, the two sets of arguments are distinct and can be accommodated by diverse regulatory responses without recourse to an express recognition of a sports organisers' right that would cover all types of commercial exploitation of sports events, including the organisation of bets.

4.4.2 The right to consent to bets: a restriction on the freedom of services?

From an EU internal market law perspective, it is important to note that the conditions implementing a right to consent to bets are capable of constituting a restriction on the free movement of services within the Union. Indeed, the requirement for betting operators to obtain consent for the organisation of sports bets could impede or render less attractive the free provision of gambling services.[722]

The CJ has consistently held that restrictions on gambling activities are acceptable only if justified either by reasons set out in the Treaty itself or by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming.[723] Even if they are justifiable under these criteria, restrictions imposed by Member States must also satisfy the conditions laid down in the case law as regards their proportionality. This means that they must be appropriate for ensuring attainment of the objective pursued (i.e. genuinely reflect a concern to obtain it in a consistent and systematic manner) and must not go beyond what is necessary in order to obtain that objective. Moreover, the restrictions must be applied without discrimination.[724]

The CJ has stated that the financing of public interest activities through proceeds from gambling services cannot in itself be regarded as an objective justification for restrictions to the freedom to provide services. The financing of such activities can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted.[725] As noted above, this issue was raised by the

[720] See e.g. European Parliament resolution of 15 November 2011 on online gambling in the Internal Market (2011/2084(INI)) para. 41.
[721] Recommendation CM/Rec(2011)10 of the Committee of Ministers to member states on promotion of the integrity of sport against manipulation of results, notably match-fixing (Adopted by the Committee of Ministers on 28 September 2011) para. 20.
[722] European Commission, Detailed opinion under Article 9.2 of Directive 98/34/EC of 22 June 1998 – Notification 2009/0122/F, p. 4. Retrieved from http://www.lesechos.fr/medias/2009/0608/300353488.pdf (Accessed 1 February 2013). All measures that prohibit, impede or render less attractive the exercise of the fundamental freedoms must be regarded as restrictions. See e.g. C-439/99 Commission v Italy (2002) ECR I-305, para. 22; Case C-205/99 Analir and Others v Administración General del Estado (2001) ECR I-1271, para. 21.
[723] See e.g. C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International (2009) ECR I-7633, paras. 55-56; C-243/01 Piergiorgio Gambelli and Others (2003) ECR I-13031, para. 54.
[724] See e.g. C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International (2009) ECR I-7633, paras. 59-61.
[725] See e.g. Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Markus Stoß and Others v Wetteraukreis and Others (2010) ECR I-8069, para. 104; C-67/98 Questore di Verona v Diego Zenatti (1999) ECR I-7289, para. 36; Judgment of the EFTA Court in Case 3/06 (Ladbrokes) para. 63.

European Commission in the context of the French right to consent to bets, after which the French legislature notably redefined its purpose.[726] In 2011, the French Council of State ruled that the exercise of the right to consent, while probably of such a nature as to restrict the free provisions of services, is justified by the desire *"to prevent threats to sports' ethics (and) the fairness and integrity of competitions"*. It held that the restriction appears proportionate in the light of that objective.[727]

It can be concluded from the above that, to the extent the requirement to obtain consent from the sports organiser restricts the free provision of gambling services within the meaning of Article 56 TFEU, it must be compliant with the principles deriving from the case law. Subsequently, Member States must demonstrate that the restriction is genuinely directed to an overriding reason in the public interest that is capable of justifying it (such as the prevention of fraud), does not go beyond what is necessary to obtain that objective, and must be applied without discrimination.

Of the two systems discussed in Section 4.3, the Victorian regulatory regime most clearly demonstrates a primary concern with safeguarding the integrity of sports events. Before a sports body is legally entitled to exercise the right to consent to bets, it must first put in place adequate integrity mechanisms. While a post-approval monitoring of the actual enforcement of the integrity mechanisms remains absent,[728] the financial return is a compensation for the integrity assurances given by sports bodies (in the context of their application to obtain SCB status). In France, on the other hand, the compensation paid for the right to organise bets must take into account *"in particular the costs incurred in detecting and preventing fraud"*;[729] but there is no legal obligation to utilise the income for fraud prevention and detection.

One obvious disadvantage of the right to consent to bets as integrity mechanism is that it risks leaving less popular and less visible sports more exposed to integrity risks. This particular concern has been raised in the context of both the Victorian and the French regulatory framework. Several other Member States have put in place alternative financing models for anti-match fixing measures that would appear more inclusive. In Italy, for example, the gambling regulator (Autonomous Administration of State Monopolies, AAMS) runs its own real time sports betting monitoring system, which is indirectly financed by licensing fees.[730] All licensed betting operators' servers must be linked up to the AAMS so that every bet can be recorded, monitored, and validated.[731] The AAMS processes and analyses all data in order to detect possible unusual betting patterns in relation to sports events. Reports on unusual betting patterns are sent to *inter alia* the Italian National Olympic Committee for further forwarding to the respective sports organiser for investigation.[732]

In any event, from an EU legal perspective, it appears critical that the introduction of a right to consent to bets is accompanied by a strict regulatory framework that genuinely reflects a concern to prevent the manipulation of sports events. It is therefore up to each Member State to weigh up the pros and cons of moving to this policy option and possible alternatives.

Considering the differences with regard to the approaches chosen by different Member States in regulating gambling, it comes as no surprise that various Member States have opted to obtain the

[726] See Section 4.3.2.1.
[727] Conseil d'État, Décision n° 342 142 du 30 mars 2011 (fourth subsection).
[728] See Section 4.3.1.3.2.
[729] Sports Code, Article L.333-1-2.
[730] Each licensed operators must pay a one-time contribution to the costs for the technical and administrative management of the monitoring activities.
[731] The information is sent to the central totalisation systems, managed by the technical partner SOGEI (Sociètà Generale d'Informatica SpA), which is solely owned by the Ministry of Economics. Article 9-*octies* of Legal Decree No 16 of 2 March 2012.
[732] In 2011, the Ministry of Interior also created a task force to safeguard the integrity of sports events consisting of a Sports Betting Intelligence Unit and a Sports Betting Investigations Group. Decree of the Ministry of Interior of 15 June 2011.

claimed benefits of the right to consent to bets through other regulatory means.[733] In the UK, for example, the requirement for betting operators to share relevant information on unusual betting patterns with the gambling regulator and the respective sports organiser is imposed as a licensing condition.[734]

Lastly, it must be pointed out that even the main integrity benefit attributed to a right to consent to bets may sit at odds with certain national legal frameworks. As highlighted above, there appears to be a widespread view that the conclusion of legally binding agreements between sports organisers and betting operators is valuable because it enables them to closely co-operate in the fight against match-fixing, in which they both have a great interest. However, this does not automatically imply that such practice is appropriate in the context of all national gambling systems. In Germany, for instance, the national gambling regulatory framework explicitly aims to prevent collusion between sports organisers and betting operators. The amended Interstate Treaty on Gambling provides that there must be a clear separation between the two stakeholders from an organisational, legal, economic, and personal perspective.[735]

4.4.3 The right to consent to bets as a financing measure for sport

To dispel the argument that gambling operators already contribute significantly to sport through commercial partnerships, where legislative frameworks permit,[736] sports organisers often maintain that such deals benefit already-wealthy clubs rather than leagues or federations. They therefore stress the need for a new gambling-derived revenue channelling system.[737] The recognition of a right to consent to bets, in particular, would *"secure a fair financial return to sports bodies and their members, providing funding to further protect the integrity of the game, but also finance other areas such as youth, amateur and female sport to develop the economic and social role of sport"*.[738]

However, there is not always a link between the financial return stemming from a right to consent to bets and the sustainable financing of all levels of professional and amateur sport. Whatever the fee structure, the price paid in exchange for the right to consent to bets will always be relevant to the volume of bets that a sporting event is able to attract. Hence, financial benefits will predominantly flow to professional sport and more particularly to the organisers of premium sports events. Small or less visible sports, for which there is little or no demand from betting operators, are unlikely to benefit from this instrument. The experiences with the implementation of a right to consent to bets in Australia and France confirm that only the most commercially attractive sports

---

[733] A detailed analysis of regulatory restrictions or prohibitions in the different Member States regarding the types of sports bets that may be offered is the subject of another study commissioned by the European Commission. See T.M.C. Asser Instituut, "Study on risk assessment and management and prevention of conflicts of interest in the prevention and fight against betting-related match-fixing in the EU 28" (2014). In Italy, for instance, the AAMS also publishes and regularly updates an official list of sports events on which bets can be placed. If a given event is not listed in the AAMS events programme, bets collected on it are illegal. Decree of the Ministry of Finance No 111 of 1 March 2006 regulating fixed-odds betting on sporting events other than horseracing and on non-sporting events, Article 3. Legislative Decree No 39 of 28 April 2009, however, introduced the possibility for licensed operators to offer and manage personalised event programmes containing any events or types of bets not included in the AAMS official programme. The main difference is that the licensed operator is responsible for verifying the outcomes of events included in a supplementary programme.

[734] Gambling Commission, "Licence conditions and codes of practice (consolidated version)" (2012) Condition 15.1. A detailed analysis of the exchange of knowledge and intelligence about suspicious sports betting activity is the subject of another study commissioned by the European Commission. See Oxford Research, "Study on the sharing of information and reporting suspicious betting activity in the EU 28" (2014).

[735] Staatsvertrag zum Glücksspielwesen in Deutschland (2012), § 21 (3); expert workshop II.

[736] See Chapter 5.

[737] See e.g. Sports Rights Owners Coalition (SROC) Response to the European Commission Green Paper on Online Gambling in the Internal Market (2011).

[738] Professional Football Strategy Council (PFSC) European Football United for the Integrity of the Game (2013).

(such as football, tennis, and rugby) are capable of generating a substantial financial return.[739] It follows that the beneficiaries of a right to consent to bets are almost identical to the main beneficiaries of commercial partnerships with betting operators, in particular sponsorship agreements. Various stakeholders from the betting industry thus argue that the costs incurred for a right to consent to bets inevitably reduce their willingness to invest in sports sponsoring.[740] Unfortunately, empirical data to properly assess the levels of substitution between these two revenue streams is generally lacking.

Whether grassroots sport can be a recipient of revenue derived from the marketing of the right to consent to bets entirely depends on the redistribution of this revenue by the sports organiser. The experiences in Australia and France, however, indicate that for most sports organisers the financial return would be insufficient to cover their own integrity costs. It is therefore unclear how (additional) revenue generated by the right consent to bets could filter down to the members of the leagues and federations.

A variety of alternative gambling-derived revenue channelling systems have been set up by Member States. A 2011 EU-funded study on the financing of grassroots sports concluded that in 2008 € 2,1 billion was directed to sport through the State through lotteries and levies on lotteries and that € 0,2 billion reached sport directly from statutory levies. Of this, € 1,1 billion went to the grassroots level.[741] The advantage of channelling revenue from gambling through government accounts is that it enables the State to define the distribution as well as the use of the contributions by recipients.[742]

4.4.4 The implementation of a right to consent to bets

Any gambling-derived revenue channelling system comes with certain transaction costs (e.g. search and information costs, contracting costs, and enforcement costs) for the parties involved and third parties affected by the mechanism. A drawback of the right to consent to bets is that the transaction costs associated with this instrument are particularly high.

Leaving aside the *ex ante* costs incurred for the integrity obligations imposed on both the sports organisers and the betting operators, it is clear that the effective implementation of a right to consent to bets requires a strong institutional arrangement.

For example, if more than one (online) betting operator is authorized to offer sports bets in a Member State, a right to consent to bets ought to be licensed on a non-exclusive basis. A regulatory framework therefore must strike a balance between the sports organisers' freedom to license their consent to bets and the aim to ensure access to the sports betting market to all the licensed operators. A national regulatory authority will ultimately be accountable to give effect to the chosen regulatory approach in practice.

Also, from an EU and national competition law perspective, the commercial exploitation of a right to consent to bets necessitates strict regulation and monitoring by a national regulatory authority. The right to consent to bets enables a sports organiser to effectively control the organisation of bets on its events within a particular Member State. Depending on the precise definition of the relevant

---

[739] See Sections 4.3.1.3.1 and 4.3.2.3.1.
[740] As emerged from the discussions in the expert workshops.
[741] Eurostrategies, CDES, AMNYOS and the German Sport Institute of Cologne, "Study on the funding of grassroots sports in the EU with a focus on the internal market aspects concerning legislative frameworks and systems of financing" (2011). The by far largest part of the funding from gambling is generated by national lotteries.
[742] Expert Group on Sustainable Financing of Sport (XG FIN) Strengthening financial solidarity mechanisms within sport (2012) 5.

market(s), this legal monopoly granted to sports organisers might be considered as leading to the creation of a dominant position within the meaning of Article 102 TFEU.[743] Consequently, the marketing of the right to consent bets might give rise to anti-competitive concerns.

In a market environment where a right to consent to bets cannot be licensed exclusively, a non-discriminatory and transparent public tender procedure, which could ensure that prices are set at a competitive level, cannot be used.[744] The main competition concern with regard to the marketing of the right to bets thus relates to the price set by the sports organiser. In the absence of price competition, the sports organiser could be tempted to impose excessive prices on betting operators for its consent to bets. Such behaviour might be considered as an abuse prohibited by Article 102 TFEU.[745] The legal test to identify an instance of exploitative pricing is, however, complex. It must be determined whether the difference between the costs actually incurred and the price charged is excessive, and it then must be considered whether the price charged is unfair.[746] In its Opinion on the marketing conditions of the French right to consent to bets, the French NCA stressed that there is insufficient transparency over the actual costs incurred for anti-fraud measures by the sports organisers and the betting operators to make such an assessment.[747] The NCA therefore recommended that ARJEL would establish an inventory of the reasonable costs of the integrity measures implemented by both parties so as to determine whether the prices charged could constitute a market barrier for access to the French sports betting market.[748] The NCA even went as far as to suggest that the price charged for the right to consent to bets should be subject to *ex ante* regulation as is the case within other economic sectors.[749]

Other competition issues could arise when a sports organiser, whose events are of particular importance to betting operators, would apply discriminatory prices or trading conditions[750] or would refuse to license its right to consent to bets ("refusal to supply").To prevent such risks of competition distortion, the French legislator placed the following controls on the exploitation of the right to consent to bets: (1) the rights holder cannot discriminate between licensed operators of the same betting category; (2) a refusal to sign a betting right marketing contract must be justified and notified to both the applicant and ARJEL; and (3) the price paid in exchange of the right to consent to bets must be expressed in a percentage of the registered bets.[751] Ensuring compliance with these principles evidently presupposes effective supervision of the contractual agreements by a national regulatory authority.[752] In France, the notification requirement of the draft betting right

[743] In determining whether Article 102 TFEU and/or the national equivalent competition law provision on abuse of dominant position apply, the territory in which the dominant position is held should be considered. In the case of Article 102 TFEU, the dominant position must be held in the whole or a substantial part of the internal market. Each Member State is likely to be considered as a substantial part of the internal market, in particular when an undertaking enjoys a *de facto* monopoly. See e.g. Case 127/73 BRT v SABAM (1974) ECR 313.

[744] See e.g. Autorité de la Concurrence (French Competition Authority) Avis No. 11-A-02 du 20 janvier 2011 relatif au secteur des jeux d'argent et de hazard en ligne (2011) paras. 117-136. This is in contrast to the exclusive licensing of e.g. sports media rights. See Chapter 2.

[745] See e.g. Case 6/72, Europemballage Corporation and Continental Can Co Inc. v. Commission (1973) ECR 215; Case 27/76, United Brands Company and United Brands Continental BV v. Commission (1978) ECR 207.

[746] Idem.

[747] A comparison with prices charged in other Member States could be indicative of an abuse of dominant position. Joined Cases 110/88, 241/88, and 242/88, Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and Others (1989) ECR 281, para. 25 (*"When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States."*). Unfortunately, such a comparative yardstick is not (yet) available.

[748] Autorité de la Concurrence (French Competition Authority) Avis No. 11-A-02 du 20 janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne (2011) paras. 135-139.

[749] Idem, para. 134.

[750] Article 102(c) TFEU provides that an abuse of a dominant position may consist in *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*.

[751] See Section 4.3.2.2.

[752] Effective supervision also presupposes monitoring of the transactions by the national regulatory authority, e.g. by controlling a safe server to which betting operators are linked.

marketing contracts enables ARJEL to ensure that it takes into account the applicable legal obligations. ARJEL may refer potentially anti-competitive practices to the NCA. At the very least, an *ex post* mechanism for complaint handling and dispute resolution should be available. In Victoria, a betting operator may apply to the VCGLR when it fails to reach an agreement with an SCB. The VCGLR may then make a binding determination on *inter alia* the type and level of the product fee.[753]

Finally, while diverse arrangements can be envisaged, the costs associated with the administering of the right to consent to bets will always be considerable. This is evident from the experiences with both the French and the Victorian enforcement mechanism. Figure 4.3 illustrates the lengthy administrative and procedural requirements that must be fulfilled for each betting right marketing contract in France.

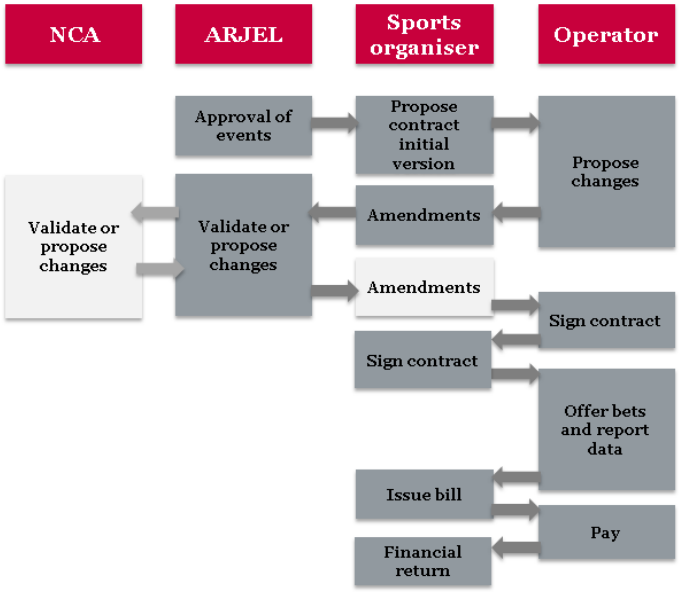

Figure 4.3 - Administrative process French betting right marketing contracts

Over and above these administrative costs, the benefits of a right to consent to bets can only be achieved when it is carefully managed by national regulatory authorities, which also actively prosecute illegal betting services (including the offering of sports bets by licensed operators without the sports organisers' consent). Given that a number of national regulatory authorities suffer from limited staff and resources,[754] it is questionable whether they would be capable of fulfilling this challenging task.

4.5 Conclusions

This chapter examined both the virtues of a right to consent to bets and the challenges of adopting such a mechanism from a legal, institutional, and practical perspective.

The analysis dispelled a general misconception that seems to persist in the debate on the merits of a right to consent to bets. When sports organisers put forward the right to consent to bets as a

[753] See Section 4.3.1.2.
[754] European Commission, Commission staff working document: "Online gambling in the Internal Market", SWD(2012) 345 final 100, 50.

mechanism to enable a "fair financial return" from associated betting activity and to preserve the integrity of sport, the arguments are commonly framed within a perceived need for more legal protection. In essence, what is asked is the recognition of a sports organisers' right that would cover all kinds of commercial exploitation of sporting events, including the organisation of sports bets. This conception of the right to consent to bets is, however, unique to France and Hungary (and is currently only being enforced in France).

The financial and integrity benefits attributed to a right to consent to bets can be achieved well outside the framework of private law. The Victorian regulatory regime is a clear illustration of how a right to consent to bets can be introduced as a regulatory condition in gambling legislation, i.e. without recourse to a property-based approach.

While it is for each Member State to weigh up the pros and cons of a right to consent to bets *vis-à-vis* various alternative mechanisms for the gambling-originated funding of sport and/or for preserving the integrity of sport, the analysis revealed the conditions for the successful implementation of a right to consent to bets.

From a legal perspective, the following observations need to be made:

While various calls have been made for the recognition of a right to consent to bets at the EU level, it is clear that the competence to introduce such a right lies exclusively within the competence of each Member State.

As the CJ has clarified in several landmark cases, the EU Database Directive does not permit copyright or *sui generis* database right protection for fixtures lists or similar sports events schedules. Such rights cannot, therefore, form the basis in national law for the recognition of any right to consent to bets. The Directive, nevertheless, does not pre-empt special national rules providing for a right to consent to bets, in so far as such regimes are substantively distinct from copyright and database right, and therefore outside the scope of the Directive.

Since the requirement to obtain consent from sports organisers for the organisation of sports bets is capable of constituting a restriction on the free movement of services, however, EU law requires that such restriction serves an overriding reason in the public interest and must satisfy the conditions laid down in the case law as regards their proportionality. It was observed that the financing of public interest activities through proceeds from gambling services can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted. It follows that within an EU context, a right to consent to bets would need to be accompanied by a strict regulatory framework that genuinely attains a non-economic public interest objective (*in casu* the prevention of the manipulation of sports events).

Of the systems discussed, the Victorian regulatory regime most clearly demonstrates a primary concern with safeguarding the integrity of sports events.

From a broader policy perspective, the following observations need to be made:

There is no necessary link between the financial return stemming from a right to consent to bets and the sustainable financing of all levels of professional and amateur sport. Financial benefits will predominantly flow to the organisers of commercially attractive events, which are the main beneficiaries of commercial partnerships with betting operators.

It is clear that the transaction costs associated with a right to consent to bets are particularly high for all parties involved. The effective implementation of a right to consent to bets requires a strong institutional arrangement and active monitoring.

5 GAMBLING ADVERTISING RESTRICTIONS: PITFALLS FOR SPORTS SPONSORSHIP

5.1 Introduction

One of the objectives of this study was to explore whether or not national legal frameworks impose restrictions on the licensing of sports organisers' rights to betting operators. All of the national correspondents responded to this question that, in line with the principle of freedom to contract, sports organisers are in principle free to choose the contractual partners for the commercial exploitation of their rights.[755] Contractual freedom is also one of the general principles of EU law and has been enshrined in Article 16 of the Charter of Fundamental Rights of the EU.[756]

One main obstacle emerged, however; restrictions on gambling advertising (may) create challenges for sports organisers, clubs, and individual athletes to enter into sponsorship agreements with betting operators.

In recent years, the gambling industry has become a significant source of sponsorship funding for (mostly) professional sport. This upward trend is attributable to the growth of online sports betting as sports sponsorship enables betting operators to reach out to sports fans, which are a key target demographic for their services.

Sponsorship, and sports sponsorship in particular, commonly crosses borders. For instance, if a betting operator is a shirt sponsor of a sports team playing in international competitions, it will also expect that the team will wear the shirts with the operator's logo when participating in such competitions in a variety of countries. The subsequent cross-border exposure is typically built into the value obtained from sponsorship deals.[757] Most notably in the United Kingdom, numerous Asian online betting operators, currently holding licenses in the white-listed Isle of Man,[758] have entered into sponsorship deals with Premier League teams that primarily target Asian markets through the broadcasting feeds.

Yet even in a purely European context, the cross-border dimension of sports sponsorship frequently clashes with the current disparity of national gambling advertising restrictions.

The problems faced by French football club Olympique Lyonnais, who reached a shirt sponsorship agreement with online betting operator Betclic in July 2009, is a notorious example. The French Professional Football League (LFP) prohibited the club from wearing its kits displaying the logo of Betclic in France since Betclic was not yet authorized to offer its services on the French market. UEFA did permit Olympique Lyonnais to wear the sponsored shirts in Champions League matches outside France. This permission extended until the start of the group stages in December 2009 in anticipation of the new French Gaming Law. Since the enactment of the Law was postponed, however, Olympique Lyonnais was ordered to remove the Betclic logo from its shirts during an away game against Real Madrid in March 2010. Real Madrid, on the other hand, was allowed to wear shirts bearing the logo of their own gambling sponsor. According to the UEFA Champions

[755] In his Opinion in Case C-7/97 *Oscar Bronner* (1998) ECR I-7791, para. 56, Advocate General Jacobs similarly observed that *"the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification"*.
[756] See e.g. Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* (1999) ECR I-135, paras. 45- 46; Case C-240/97 Spain v European Commission (1999) ECR I-6571, para. 99; Case 151/78 Sukkerfabriken Nykøbing Limiteret v Ministry of Agriculture (1979) 1, para. 20.
[757] As emerged from discussion in the expert workshops. See also e.g. European Sponsorship Association (ESA), Written evidence submitted to the Culture, Media, and Sports Committee of the UK Parliament, January 2013.
[758] See Section 5.2.2.

League regulations, visiting clubs must comply with national legislations applicable at the match venue. If such legislation prevents the visiting club from using its approved shirt sponsor, it may ask UEFA to replace that sponsor with a UEFA-endorsed programme (e.g. the Respect campaign) or with a charity.[759] The obvious anomaly is that home matches of that team can be widely available to watch on national television. By way of illustration, German sports fans are able to watch La Liga, the Spanish Football League, on television and would therefore already be accustomed to watch the Spanish teams play with their normal shirt sponsor. Yet if a Spanish team plays a friendly match in Germany, it risks significant sanctions unless it removes its gambling sponsor from its shirts.

A more difficult challenge faced by sports clubs and individual athletes, for which no pragmatic solutions can be found, occurs when international sports events are being sponsored by betting operators. As the example below illustrates, this may present a conundrum for participants.

Since 1 January 2010, the advertising of gambling services is forbidden in Poland.[760] As a consequence, the Polish Handball club Vive Kielce faced a serious dilemma. According to the regulations of the European Handball Federation (EHF), every delegation participating in the EHF Champions League must comply with the exclusive sponsorship arrangements of the sports organiser.[761] For many years the online gambling operator, Bet-at-home, has been one of the main sponsors of the EHF Champions League. The sponsorship deal allows the operator to advertise in all handball arenas in which Champions League games are held. When hosting qualification matches during the 2010-2011 Champions League season, Vive Kielce had to choose whether to have the advertisements removed, which would mean elimination from the tournament,[762] or to commit an offence sanctioned by the Polish Gaming Law. The club decided to adhere to the regulations of the EHF. Subsequently, Vive Kielce was charged with a violation by the Customs Chamber in Kielce. Ultimately, the director of Vive Kielce admitted breaching the national advertising regulations.[763]

This chapter examines the regulation of gambling advertising in the EU and its relationship to sports sponsorship, with a particular focus on the challenges this poses for sports organisers, clubs, and individual athletes.

5.2 National advertising regulations for gambling services

In the EU, 28 divergent regulatory frameworks govern the advertising of gambling services through e.g. sponsorship agreements between sports organisers and gambling operators.

In all Member States, national gambling laws and/or subsequent implementing regulations contain certain provisions on gambling advertising. The enactment of new gambling regulatory frameworks increases the urgency to sufficiently regulate the advertising of gambling services. For example, tailor-made restrictions such as the prohibition of testimonials by well-known (sports) personalities (that would suggest that gambling contributed to their success or that sport is more enjoyable when bets are placed on it) are typically introduced by gambling legislation.
More often than not, however, the provisions on advertising in the national gambling regulatory frameworks are rudimentary, e.g. they merely state that advertisement for illegal gambling services is prohibited, and are too vague or ambiguous for practical purposes. They must be read in

[759] UEFA, Regulations of the UEFA Champions League 2012-2015 Cycle, Article 19.13.
[760] See Gambling Act, Section 2.1.
[761] European Handball Federation, EURO Regulations applicable as from November 1, 2010, Article 22.
[762] European Handball Federation, Legal Regulations, Article 14.
[763] http://pilka-reczna.przegladsportowy.pl/Pilka-reczna-Vive-kontra-Izba-Celna-Poszlo-o-reklamy,artykul,117769,1,284.html.

conjunction with more general provisions on advertising that can be found in a variety of legislative acts, such as consumer protection laws,[764] unfair competition or market practices laws,[765] media laws,[766] and advertising laws.[767] Since the latter provisions generally apply to all promotional activities within a certain Member State, their application to gambling advertising is not always straightforward. This problem is especially pertinent in those Member States that have no detailed rules or standards specific to gambling advertising.

An additional difficulty is that national gambling advertising regulations only seldom contain requirements specific to (sports) sponsorship and, more critical, typically remain silent on the question whether sponsorship constitutes advertising for the purposes of the regulations.

Specific provisions on sponsorship can be found (or are contemplated) in the gambling legislation of only a limited number of Member States.

The Bulgarian Gambling Act stipulates that *"any organisers of games of chance, which have obtained licence under this Act, shall have the right to sponsor events and activities supporting sports, culture, health, education, and social welfare"*.[768] In the same way, the Spanish Law on the Regulation of Gaming explicates that sponsorship of gambling activities can only be offered by gambling operators that have acquired authorization to promote their services.[769] The law further establishes that future regulations will determine more specific conditions and limitations for gambling sponsorship at sports events.[770] In the UK, sponsorship is explicitly included in the definition of gambling advertising for the purposes of the Gambling Act.[771] In Denmark, the explanatory notes of the Bill for a Regulation of Gaming Act confirm that sponsorship by unauthorized gambling operators is caught by the prohibition to "promote" illegal gambling services.[772] In Poland, on the contrary, the Gambling Law distinguishes sponsoring, advertising, and promoting respectively and provides different definitions and rules for the three types of commercial communications accordingly.[773]

In all other Member States, the gambling advertising regulations make no specific reference to (sports) sponsorship. Consequently, the applicability of the advertising restrictions to (sports) sponsorship can only be implied from a broad interpretation of the definition of advertising, marketing or promotional activities. A characteristic example is Portugal, where the Decree-Law No. 282/2003 on Gambling Regulation prohibits the promotion and advertising of unauthorized gambling services, without defining the notions "promotion" or "advertising". The Advertising Code makes clear that the rules on advertising apply to sports events and events sponsorship. Yet the Advertising Code contains a separate, and substantially different, restriction on gambling advertising,[774] leaving open the question whether advertising restrictions in the gambling legislation should be interpreted broadly. However, subsequent to the *Santa Casa* ruling of the

[764] E.g. Belgium, Estonia, and Finland.
[765] E.g. Austria, Belgium, and Spain.
[766] E.g. Austria, Czech Republic, Croatia, Denmark, Germany, and Luxembourg.
[767] E.g. Czech Republic, Denmark, Estonia, Germany, Ireland, Latvia, Lithuania, Malta, the Netherlands, Portugal, Slovakia, Spain, and the United Kingdom.
[768] Gambling Act, Article 10(3).
[769] Law on the Regulation of Gaming No. 13/2011, Article 7(1).
[770] Idem, Article 7(2)(c); Royal Decree No. 1614/2011 implementing Law No. 13/2011 in regard to gaming licenses, permits, and registers, Temporary provision one.
[771] Gambling Act, Section 327.
[772] "Explanatory notes to the individual provisions of the Bill".
[773] Gambling Law, Amended Act 2011.
[774] Decree-Law No 330/90 de 23 Outubro, as last amended by Law 8/2011 of 11 April, Article 21 (prohibiting all forms advertising for gambling services - except for those offered by the public operator Santa Casa - in so far as games of luck and chance are the essential part of the message).

CJ,[775] the Oporto Criminal Court of First Instance held that a sponsorship agreement between the Portuguese Professional Football League and Bwin was in breach of this prohibition, thus confirming that sponsorship by unauthorized gambling operators constitutes a form of advertising for the purposes of the Decree-Law on Gambling Regulation.

In the majority of cases, however, legal uncertainty persists and the question whether (sports) sponsorship is subject to the advertising regulations is open for interpretation. For example:

- In Cyprus, Law No. 106(I) 2012 on Betting sets a number of requirements for gambling advertising without making reference to sponsorship. The Law on the Display of Advertisements defines advertisement as *"any word, letter, model, sign, placard, board, notice, bill, poster, device or representation, whether illuminated or not, in the nature of, and employed wholly or in part for the purpose of advertisement, announcement or direction (excluding any such thing employed wholly as a memorial) and … any hoarding or similar structure, whether fixed or movable, used or adapted for use for the display of advertisements and references to the display of advertisements"*.[776] Moreover, Article 3 enumerates the places where this law does not apply. Since sports events are not among the listed exceptions, the definition of advertisements would appear to include sports sponsorship.
- In Greece, commercial communications on gambling services are defined as any type of communication which is designed to promote, directly or indirectly, products, services or the image of businesses, organizations or persons carrying out activities that relate to games, information allowing direct access to gambling activity, and the communication of products or services of a company that operates in the field of gaming.[777] Following a broad interpretation of this definition, it can be held that sponsorship deals are subject to the restrictions on commercial communications, but this is not certain.
- In Italy, the legislature introduced advertising regulations for licensed gambling operators with the adoption of the so-called Balduzzi decree in September 2012.[778] The restrictions imposed by the decree, however, only refer to advertising in the press, media or via Internet,[779] and remain silent on sponsorship.
- In Lithuania, the Law on Advertising[780] defines advertising as *"the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations"*. Read together with the gambling advertising restrictions contained in the Gambling Act, sponsorships would appear to fall under their scope.
- In the Netherlands, Article 1(d) of the Governmental Decree on canvassing, advertising and preventing the addiction of gambling,[781] defines gambling canvassing and advertising as any form of communication where licence holders, with or without the aid of third parties, directly or indirectly recommend their services or goods. In absence of further clarifications, the concept of sponsorship potentially falls under this definition.

As these examples demonstrate, the presence of advertising regulations specific to gambling does not necessarily resolve uncertainties regarding their applicability to sponsorship agreements.

---

[775] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin v Departamento de Jogos da Santa Casa de Misericórdia de Lisboa (2009) ECR I-07633.
[776] Law on display of advertising (1959).
[777] Article 25(ig) of Law No.4002/2011.
[778] Legal Decree No 158 of 13 September 2012.
[779] E.g. the decree broadly prohibits advertisements that *"create an incentive to gambling activity or to exalt the game"*. Idem, Article 7(4).
[780] Žin., 2000, Nr. 64-1937.
[781] The Decree's date of entry into force is 1 July 2013. See also the Ministerial Order on canvassing, advertising and preventing the addiction of gambling (i.e. reporting and informing obligations applicable to gambling operators). The Order's entry into force is 1 July 2013, with the exception of Article 3, paras. 1 and 3 (1 October 2013) and par. 2 (1 January 2015).

The following subsections will describe the three types of restrictions imposed by national gambling advertising regulations: a general ban on gambling advertising (5.2.1), a prohibition on advertising by unauthorized operators (5.2.2), and restrictions applicable to advertising by authorized operators (5.2.3).

5.2.1 General prohibition of advertising of gambling services

Four Member States have introduced a complete ban on gambling advertising practices. Similar bans are also in place in e.g. Russia, Serbia, and Ukraine.

In Poland, Article 29 of the Gambling Law[782] adopted in 2009 introduced a general prohibition to advertise, sponsor or promote gambling services:

> *"(1) It shall be forbidden to advertise or promote cylindrical games, card games, dice games, betting or games of chance on machines.*
> *(2) It shall be forbidden to communicate sponsoring activities by the entity running the activity in the scope of cylindrical games, card games, dice games, betting or games of chance on machines."*

As a result of this new advertising and sponsorship ban, several sports organisers were forced to end their existing sponsorship arrangements with providers of gambling services. The Polish Football Association, for example, had to revoke its contract with online betting operator Unibet, title sponsor of the second division of the football league. Similarly, various first division football clubs (e.g. Wisla Krakow and Lech Poznan) had to drop their shirt-sponsorship deals with betting operators.

A general prohibition on gambling advertising also exists in Estonia[783], Latvia,[784] and Lithuania.[785]

Despite these general advertising bans, the regulatory frameworks of some of these Member States do include a number of notable exceptions to the general prohibition.

A first exception is to allow advertising in certain gambling premises, either physical (e.g. betting shops or casinos) or virtual (online gambling websites). In Poland, for instance, the prohibitions do not impact advertising and promotion inside casinos and bet making points or the placing of a name or logo on the exterior of the buildings of these premises.[786] Since the amendment of the 2009 Gambling Law, which legalized remote gambling under certain conditions, advertising and promotion on online gambling websites is also excluded from the general ban.[787] In Estonia, the prohibition of gambling advertising does not extend to the premises where gambling is organized, including online gambling websites and even sports events on which totalisator betting is organized.[788] Advertising in gambling locations is also permitted in Latvia.[789]

A second exception is the use of registered trademarks or other graphic marks of gambling operators, which effectively creates a considerable margin of exploitation for sponsorship activity.

---

[782] Journal of Laws No. 201 Item 1540, Article 29.
[783] Advertising Act, Article 21(1).
[784] Article 41(5) of the Gambling and Lotteries Act.
[785] Gaming Law of the Republic of Lithuania (No IX-325 of 17 May 2001, as last amended on 6 November 2008, No X-1783).
[786] Gambling Law, Journal of Laws No. 201, Item 1540, Article 29(5).
[787] Act on the amendment of the Gambling Law and some Other Acts, Journal of Laws No. 134, Item 779, Article 21 (5).
[788] Advertising Act, (Reklaamiseadus) Article 21. The Act also allows gambling advertising in e.g. airport terminals, ports or hotels where casinos are located, an exception intended to inform tourists about gambling locations in Estonia.
[789] Law on Gambling and Lotteries, Article 41(5).

In Lithuania, the gambling advertising ban does not apply when only the name and/or address of a gambling operator is mentioned.[790] In Estonia, the mere disclosure of the name and trademark of a sponsor is excluded from the definition of gambling advertising.[791] This trademark exception in combination with the aforementioned exception for advertising at certain sports events creates a legal loophole that enables gambling operators to promote their (sports betting) services in Estonia.

5.2.2 Prohibition of advertising by unauthorized operators

In various resolutions, the European Parliament has called on Member States to prohibit advertising by illegal (online) gambling operators.[792]

The regulatory frameworks in the vast majority of the Member States already impose a ban on the advertising of gambling services that are not authorized in their jurisdictions. In most cases the relevant provision explicitly forbids the "advertising" of unauthorized gambling services. This is the case in Austria,[793] Belgium,[794] Bulgaria,[795] Croatia,[796] Czech Republic,[797] Cyprus,[798] Greece,[799] Finland,[800] Germany,[801] Hungary,[802] Portugal,[803] Romania,[804] Slovenia,[805] Spain,[806] and the UK.[807]

Other national regulatory frameworks instead prohibit the "promotion" of unauthorized gambling services: Denmark,[808] France,[809] Italy,[810] Malta,[811] Slovakia,[812] Sweden,[813] and the Netherlands.[814] It follows that at least one gambling operator, in many cases the (state-owned) operator who retains a monopoly position, is allowed to advertise its services in these Member States.

In some Member States, however, there are no explicit provisions governing gambling advertising by unauthorized operators. In Luxembourg and Ireland, the absence of adequate advertising regulations results from outdated gambling legislations. The 1931 Irish Betting Act forbids advertisements relating to betting on football games,[815] but the level of compliance with this old rule is relatively low. The current legislative framework does not cover online betting services. Consequently, it is not illegal under Irish law to offer or advertise bookmaking services to Irish residents from an overseas jurisdiction.[816] To counteract such practices, the Irish Government

[790] Article 10(9) of the Gaming Act.
[791] Advertising Act, Article 2(2)(2)(6).
[792] See e.g. European Parliament resolution of 10 September 2013 on online gambling in the internal market (2012/2322(INI)), para. 24.
[793] Article 3 of the Gambling Act.
[794] Article 4(2) of the Gambling Act.
[795] Article 10(5) Gambling Act.
[796] Article 68(iv) of the Act on Games of Chance.
[797] Act No. 202/1990 of Collect., On Lotteries and other Like Games, Article 1(9).
[798] Article 74 of Law No. 106 (I) 2012 on Betting, Law No. 106(I) 2012.
[799] Article 35(4) of Law No. 4002/2011 in the Chapter on the Regulation of the Gaming Market.
[800] Section 62(1) of the Lotteries Act.
[801] Article 4(1) Interstate Treaty on Gambling.
[802] Article 2(7) Gambling Operations Act.
[803] Article 21 of the Advertising Act approved by Decree-Law No 330/90, de 23 de Outubro, as last amended by Law 8/2011.
[804] Article 26 Emergency Ordinance no. 77/2009 on organising and exploiting of gambling activities.
[805] Article 6 of the Gaming Act.
[806] Article 40(d) of the Gaming Law No. 13/2011 Act.
[807] Section 330 of the Gambling Act 2005.
[808] Bill for a Gaming Act 2011, Part 12, Article 59(2)
[809] Article 57 of the Gambling Act 2010.
[810] Article 4 of Law No. 401 of 13 December 1989.
[811] Article 5 of the Lotteries and other Games Act; Chapter 438, regulation 3, Remote Gaming Regulations.
[812] Section 35(2) Act on Gambling Games and on Amendment and Supplement to Some Acts.
[813] Section 38 of the Lotteries Act 1994.
[814] Wet op de Kansspelen (Stb. 1964, 483), Article 1(1)(b).
[815] Section 32 of the Betting Act 1931.
[816] As indicated in the Irish Questionnaire.

recently introduced the Betting (Amendment) Bill 2013. Once adopted, the new gambling legislation will enable the Minister for Justice and Equality to apply to the District Court for an order against unlicensed bookmakers or remote betting intermediaries that contravene Articles 2, 2A or 23 of the new Bill. Subsequently, the District Court can order that unauthorized gambling service providers must cease their sponsoring of sports events that take place in Ireland.[817]

Even when advertising bans for unauthorized operators are in place, it is not always clear which gambling services are considered "unauthorized" and thus subject to the advertising restrictions. The legislative frameworks of some Member States equate "unauthorized" gambling operators with "foreign" operators. This is particularly the case in Member States in which a single (state-owned) operator is exclusively entitled to offer gambling services. In Croatia, for example, Article 68(i) of the Act on Games of Chance prohibits gambling services provided by foreign operators on Croatian territory.[818] Accordingly, Article 68(iv) specifically prohibits the advertising or promotion of foreign games of chance on Croatian territory.[819] The Czech Republic similarly prohibits both the operation and advertisement of "foreign" lotteries or similar games of chance.[820] Some Member States (e.g. Belgium and Cyprus) also require gambling operators to have an establishment in their territory, but do allow foreign gambling operators to co-operate with an authorized operator in their territory.

In most Member States remote gambling operators established in another EEA or EU Member State are, in principle, eligible to obtain authorization in their jurisdictions. Advertising and possibly sponsorship by gambling operators will, however, require an operator to obtain a license in the particular Member State, regardless of whether they are regulated in another Member State. Only a few Member States allow - under certain conditions and to varying degrees - the advertising of gambling services that are authorized in another EEA or EU Member State but not in their jurisdiction. In Malta, for instance, the Remote Gaming Regulations forbid the operation, promotion, selling or abetting of remote gaming in or from Malta unless a valid license of the relevant class has been issued by the Authority or an equivalent authorisation has been issued by the government or competent authority of an EEA Member State, or any other jurisdiction approved by the Authority.[821] A similar system of mutual recognition currently exists in the United Kingdom. Under the Gambling Act 2005, operators that are regulated by an EEA Member State and Gibraltar are allowed to operate and advertise their services in the UK. In addition, the Secretary of State adopted regulations so that operators authorized in the Isle of Man, Alderney, Tasmania, and Antigua and Barbuda (i.e. the "white list" of approved countries) are also allowed to advertise their services in the UK. On 9 May 2013, however, a Gambling (Licensing and Advertising) Bill 2013 was introduced to parliament to amend the Gambling Act, introducing a shift from a "point of production" to a "point of consumption" regulation model. Subject to parliamentary approval, remote gambling operators who wish to continue selling and/or advertising their services in the British market will be required to obtain a licence from the UK Gambling Commission. Subsequently, the operators would have to adhere to the Gambling Act's

[817] Article 29(3b and c) of the Betting (Amendment) Bill 2013.
[818] The main principle of the Act on Games of Chance (Official Gazette No 87/2009) and Regulation on Providing On-line Betting Games (Official Gazette No. 8/2010, 63/2010) is that games of chance can be operated on Croatian territory exclusively by entities with registered office in Croatia on the grounds of a decision of the Government of Croatia and the approval of the Ministry of Finance.
[819] Act on Games of Chance (Zakon o igrama na sreću).
[820] Article 4(4) of Act no. 202/1990 Coll. Act of the Czech National Council of May 1990 on Lotteries and Other Like Games provides that only those companies with a registered seat in the Czech Republic and pure Czech ownership are permitted to provide with lottery activities. Furthermore, pursuant to Article 1(9) of the Czech Lotteries and Other Like Games Law, *"it is prohibited to promote, advertise and support the sale of lotteries and other like games not licensed or reported under this Act"*. Similarly, Article 4(10) defines: *"The operation of foreign lotteries including the sale of foreign lottery tickets, participation in betting abroad, with which the wagers are paid abroad, and the collection of wagers for betting games operated abroad or the mediation of wagers for betting games operated abroad, is prohibited. The operation of the Czech lotteries and other like games, with which the wagers are paid abroad, is prohibited. The Ministry may grant an exemption from this ban in order to ensure mutuality"*.
[821] Remote Gaming Regulations, Chapter 438, Regulation 3.

provisions, its secondary legislation, and the Gambling Commission's standards and requirements – including the national gambling advertising regulations. Another example of mutual recognition with a much more narrow scope can be found in Austria. According to Article 56(2) of the Gambling Act,[822] casinos established in other EU or EEA Member States may promote their businesses in Austria when they obtain an authorisation for this purpose by the Minister of Finance. This exception only applies to casinos, however, and not to e.g. online gambling services.[823]

Lastly, in some Member States unauthorized gambling operators are free to advertise their services in their jurisdictions as long as they do not offer these services in that particular Member State. In Germany, the Interstate Treaty on Gambling prohibits the advertising of unauthorized games of chance in Germany.[824] Yet the prohibition does not apply if consumers in Germany cannot participate in these games.[825] In Finland, the Lotteries Act also exempts the following activities from the general ban on the advertising of unauthorized gambling services: (1) the mere availability of foreign lottery websites (regardless of the languages used on the website); and (2) the marketing of lotteries in foreign publications distributed in Finland.[826] It must be stressed that these exceptions only apply when the advertising is not specifically aimed at enhancing participation in Finland. In Sweden, the Lotteries Act provides that a violation of the prohibition of the promotion of unauthorized gambling services will only be subject to penalties *"if the promotion particularly relates to participation from Sweden"*.[827]

5.2.3 Advertising restrictions applicable to authorized operators

Even when authorized gambling operators are legally entitled to advertise their services, national gambling advertising regulations may impose certain qualitative and quantitative restrictions.

5.2.3.1 Qualitative restrictions

If national advertising regulations specific to gambling exist, they usually share at least some basic measures to promote responsible advertising. National or international self-regulatory gambling advertising codes typically contain similar minimal requirements. These qualitative restrictions normally prohibit gambling advertising that would e.g. encourage excessive or uncontrolled gambling, exceed limits of decency, lead to the belief that gambling promotes or is required for social acceptance, personal or financial success or the resolution of economic, social or personal problems or target children or vulnerable social groups.

In most cases, qualitative requirements imposed on authorized gambling operators primarily address traditional forms of advertising and seem to have little bearing on (sports) sponsorship. There are two noteworthy exceptions to this observation. First, several national gambling advertising regulations prohibit testimonials or endorsements by well-known (sports) personalities that would suggest that gambling contributed to their success (e.g. Cyprus,[828] Denmark,[829]

[822] Glücksspielmonopol. See BGBl 620/1989 idFBGBl I 112/2012.
[823] This differentiation also is in conformity with the constitution. VfGH 10.6.2010, B 887/09.
[824] Staatsvertrages zum Glücksspielwesen in Deutschland (2012) § 5(5).
[825] Explanatory notes (Erläuterungen zum Glücksspieländerungsstaatsvertrag) (2012).
[826] Section 4(3) of the Lotteries Act.
[827] Lotteries Act, Article 4(3).
[828] According to Article 85(1b) of Law No. 106(I) 2012 on Betting, advertisements which include the support or participation of famous personalities in such a manner that may create the perception that their success is due to these games, is prohibited.
[829] Guidelines for betting and online casino services under the Gambling Act, para 12.1, define that the chance of winning must not deceitfully suggest that gambling participation has contributed to the success of well-known personalities.

Germany,[830] and Malta[831]). Second, restrictions regarding minors and vulnerable social groups can also have relevance for sports sponsorship. In Germany, for instance, gambling advertising on jerseys of children or youth teams or banner advertising that is used in sports competitions of minors is prohibited.[832] In France, the Gambling Act prohibits authorized gambling operators to fund or sponsor sports activities that are specifically destined for minors.[833]

5.2.3.2 Quantitative restrictions

Some national gambling advertising regulations also impose certain quantitative restrictions on authorized gambling operators, such as limitations on the turnover that can be invested on advertising, TV watersheds, and prohibition of gambling advertising in TV programmes aimed at minors. In some Member States restrictions on advertising during the live broadcasting of sporting events are in place. For instance, the German Interstate Treaty on Gambling (GlüStV) contains a general prohibition *"to coordinate the transmission of sporting events over the radio or on television with the organisation or arrangement of bets on such events, or with advertising on jerseys or boards. Placing bets during an on-going sporting event, as well as via telecommunications equipment, is prohibited"*.[834] Consequently, advertising sports betting services during sports events or advertising of betting services on television immediately prior to or during a sports event is not permitted. This restriction, however, only refers to advertising of specific sports betting products, e.g. bets on the ongoing event. The restriction does not cover brand or image advertising. The Interstate Advertising Directive in Article 5(2) has imposed the same restriction where it prescribes that sports betting in the context of live sports broadcast or sports betting that is directly linked to the sports events concerned are prohibited. Moreover, the article bans betting during breaks and the broadcast of commercial breaks during live coverage.[835] The *Länder* can, according to Articles 5(3)(2) to (3) and 9a GlüStV, jointly provide for exceptions to this rule for betting on the outcome of games but not for betting on events during the game (e.g., betting on the team getting the next corner) provided that they adhere to the objectives of Article 1 GlüStV (i.e. preventing addiction, combating the black market and associated crime, youth protection, and protecting the integrity of sporting competition).

5.2.4 Sanctions and enforcement

Considering the commonly observed lack of legal certainty in relation to the applicability of national gambling advertising restrictions on (sports) sponsorship, the potential response from national administrations in cases of non-compliance is difficult to anticipate. An additional complexity is that it is unclear whether or not the sponsored parties can be held liable for breaching these regulations.

The following overview will demonstrate, however, that liability for sports organisers, clubs, and individual athletes who enter into sponsorship agreements with gambling operators that do not comply with the advertising regulations, cannot be excluded.

An infringement of the prohibition to advertise unauthorized gambling services is usually considered an administrative offence and therefore may be sanctioned with a substantial fine. In

[830] Interstate Advertising Directive, §5 (no advertisement with active athletes or sports officials).
[831] Remote Gambling Regulations, Chapter 438, Article 60(1)(b).
[832] Interstate Advertising Directive, Article 12(2).
[833] Gambling Act, Article 5.
[834] Staatsvertrages zum Glücksspielwesen in Deutschland (2012) §21(4).
[835] IRIS 2013-5:1/19. Germany. "Inter-state Gambling Agreement Advertising Directive Enters into Force".

some Member States, however, the sponsored party may even risk criminal prosecution. The advertising or promotion of unauthorized gambling services can be sanctioned both with a fine and imprisonment in e.g. Belgium, Denmark, Finland, Cyprus, Greece, Italy, Malta, and the United Kingdom.

5.2.4.1 Liability of sports organisers, clubs, and individual athletes

Only in Denmark and the United Kingdom, the national gambling advertising regulations clearly indicate the extent to which both parties to a sponsorship agreement, i.e. the sponsored party and the gambling operator, can be found liable for breaching the regulations.

In Denmark, anyone who *"intentionally or by gross negligence"* gives publicity to unauthorized gambling services or operators shall be liable for a fine.[836] Under aggravating circumstances, including in particular, persistent offending or when the offence is of a particularly extensive nature, the penalty may even be increased to imprisonment for one year. The Gambling Act makes it clear that the receipt of sponsorships from illegal gambling operators constitutes a violation of the ban on advertising by unauthorized gambling operators.[837] It follows that sports organisers, clubs, as well as individual athletes can be found liable for entering into a sponsorship agreement with an unauthorized gambling operator.

In the United Kingdom, any person that brings facilities for gambling to the attention of one or more persons, with a view to increasing the use of the facilities, is considered to be advertising gambling for the purposes of the Gambling Act.[838] The Act makes it clear that this also applies to any person *"who enters into arrangements (whether by way of sponsorship, brand-sharing or otherwise) under which a name is displayed in connection with an event or product"*.[839] It follows that a sports organiser, club or individual athlete who obtains a sponsorship deal with an unauthorized gambling operator will commit the offence of advertising unauthorized gambling and shall therefore be liable to a fine, imprisonment or both. Illustrative of the broad scope of liability is the Gambling Commission's Advice Note to British sports clubs, which urges them to bear the advertising regulations in mind when hosting international competitions: *"Care should be exercised to ensure that visiting team's sponsors are permitted to advertise within Great Britain. The advertising of a gambling sponsor on a visiting clubs' branded shirts will constitute an offence … if that sponsor does not meet the licensing criteria"*.[840]

In most other Member States, the national gambling advertising regulations typically provide that any legal or national person can be considered to commit an offence in the case of non-compliance. Whether a sponsored party can be sanctioned for breaching the regulations thus remains unclear. However, some notorious examples of sports organisers, clubs or individual athletes being sanctioned for violating the national gambling advertising regulations confirm that they in fact can be held liable. Consequently, they risk administrative or even criminal proceedings when their gambling sponsorship deals do not comply with the applicable advertising regulations.

In Austria, whoever advertises or facilitates the advertising of unauthorized gambling services may face an administrative fine up to € 22.000.[841]

---

[836] Bill for a Regulation of Gaming Act. Article 59(2-5).
[837] Explanatory notes to the individual provisions of the Bill for a Regulation of Gaming Act, Section 59.
[838] Gambling Act 2005, Article 327(1).
[839] Idem, Article 327(2)(a).
[840] Gambling Commission, Sponsorship of British sporting clubs by foreign gambling operators (Advice note), September 2009.
[841] Gambling Act, Article 54(1)(9). See also Bundesministerium Für Finanzen, Häufig gestellte Fragen zum Glücksspielmonopol (FAQ), https://www.bmf.gv.at/steuern/gluecksspiel-spielerschutz/gesetzliche-grundlagen/gspg-faq.html.

In Bulgaria, only authorized gambling operators are entitled to sponsor events and activities supporting sports with the additional restriction that only the registered trademark of the operator can be used for advertising purposes.[842] The Gambling Act obliges any legal person or sole trader who wishes to *"publish, broadcast or distribute"* any gambling advertisement to request, *"upon signing of contracts"*, proof that the gambling services in question have been authorized under the Act.[843] As a result of this duty of care, it would be difficult for any legal person or sole trader to disclaim liability in case of an infringement. The infringement is subject to an administrative fine of up to BGN 30.000 (€ 15.000).[844] While at first sight the notions of publishing, broadcasting, and distributing would seem to primarily target intermediaries such as broadcasters or newspapers, also sports organisers can be found liable e.g. when allowing advertising billboards at the events they organize. In 2013, for example, the Bulgarian Gambling Commission initiated a procedure against the Bulgarian Volleyball Federation because an advertisement for a black-listed gambling website appeared on the billboards during the national team's World League matches against Poland.[845]

In Germany**,** advertising for unauthorized gambling operators is forbidden under the GLüStV – a federal law. Moreover, it is regarded as a misdemeanor which may be fined up to € 500.000.[846] For instance, in the Champions League game between Bayern München and AC Milan (11 April 2007), the players of AC Milan wore a shirt with the name of their shirt sponsor Bwin. This was considered by the Bavarian authorities as advertising for an unauthorized gambling operator (i.e. in Bavaria). AC Milan received therefore a fine of € 100.000. After four unsuccessful efforts to seize the money from AC Milan, the club finally paid the fine in 2009.
In Estonia, anyone that commissions, produces or publishes gambling advertising can be found liable for violating the general prohibition on gambling advertising.[847] Though it should be recalled that the use of the trademark of a sponsor is explicitly excluded from the definition of gambling advertising.[848]

In France, Article 9 of the Gambling Act provides that anyone who transmits or distributes a commercial communication for an unauthorized gambling service may be fined up to € 100.000. The Court can impose a higher fine, but it should not be higher than four times the amount spent on the advertising. According to the French practice, broadcasters and advertisers are to be sanctioned,[849] although Article 57(1)(2) Gambling Act explicitly states that sanctions will be imposed to whoever promotes unauthorised online gambling websites. In absence of specific rules for sponsorship, the liability of sponsored parties can therefore not be excluded.

In Lithuania, the Gaming Law merely stipulates that violations of the law, and thus also the violation of the general ban on gambling advertising included in Article 10(9), shall incur liability.[850] Who will incur liability is not defined. However, as discussed earlier, the mere use of the name of a gambling operator is excluded from the advertising ban.[851]

In Poland, the Gaming Law makes clear that the prohibition for gambling operators to advertise and promote their services or to engage in sponsorship applies to: *"natural persons, legal entities*

[842] Article 10 (1) – 10(4) Gambling Act.
[843] Article 10(5) Gambling Act.
[844] Ibid, Article 10.
[845] The Sofia Globe, Bulgaria's volleybal federation faces fine for gambling ad, 16 July 2013.
[846] This is regulated in the implementation laws of the *Länder*.
[847] Advertising Act, Article 34.
[848] As indicated in the French Questionnaire.
[849] Parliamentary Question n° 65361 by M. Gaëtan Gorce.
[850] Gaming Law, Article 32.
[851] See Section 5.2.1.

or non-incorporated legal entities that commission or perform (these activities), place advertisements or communications, or profit therefrom".[852] Accordingly, in the case of sponsorship, the Fiscal Penal Code makes both the gambling operator and the sponsored party profiting from the sponsorship agreement, liable for a fine.[853]

In Portugal, Article 11(1) of the Decree-Law No 282/2003 classifies the promotion of unauthorized gambling services as an administrative offence. That both unauthorized gambling operators and the sponsored party can be held responsible for breaching this provision became clear in 2005, when the Gaming Department of State-owned operator Santa Casa imposed fines of € 75.000 and 74.500 respectively on the Portuguese Professional Football League and Bwin for entering into a sponsorship agreement.[854]

In Romania, the Emergency Ordinance on the organisation and operation of gambling games provides that advertising, publicity or any promotional activity carried out for unauthorized gambling services shall constitute an offence subject to a fine.[855] Assuming that sponsorship by an unauthorized gambling operator can be considered as a promotional activity, it appears that the sponsored party would be committing an offence.

In Spain, the Law on the Regulation of Gaming classifies the unauthorized advertising, sponsorship, and promotion of gambling services as a serious infraction that will be sanctioned with a fine of € 100.000 up to a million.[856] The law only makes reference to certain intermediaries, i.e. advertising entities and providers of communication services, indicating that they bear responsibility to ensure that the advertised gambling services they promote have obtained the necessary authorization certificate.[857] In an implementing decree, however, the Spanish legislature clarified that gambling operators that advertise their services without authorization, will be held liable – even when the actual promotion is done by a third party acting on their behalf.[858] The transitional provision of the Law on sports sponsorship - contracts that were concluded before 1 January 2011 were allowed to remain in force until the first licenses were granted or until 30 June 2012 – also appears to suggest that responsibility lies with the operators rather than the sponsored parties. Though it must be stressed that additional regulations concerning sports sponsorship may still be adopted, as foreseen in Article 7(2)(c) of the Law on the Regulation of Gaming.

In Sweden, Article 54 of the Lotteries Act provides that criminal or administrative sanctions may be imposed on persons who, in the course of business or otherwise, for the purpose of profit intentionally unlawfully promote participation in gambling organised abroad.[859] An even broader scope for liability is established by the Criminal Code, which shall apply when several persons are party to the offence.[860] According to the Criminal Code, not only the perpetrator of criminal acts is liable for them, but also anyone who furthered it by advice or deed. Even a non-perpetrator can be held responsible if he aided the perpetrator in any way.[861] It should be stressed, however, that the

[852] Gambling Law, Article 29 (4).
[853] Fiscal Penal Code Law, Journal of Laws from 2007 No. 111 item 765, Articles 110a and 110b.
[854] C-42/07 Liga Portuguesa de Futebol Profissional and Bwin v Departamento de Jogos da Santa Casa de Misericórdia de Lisboa (2009) ECR I-07633.
[855] Emergency ordinance on the organization and operation of gambling games, Article 26.
[856] Article 42(2) Law on the Regulation of Gaming.
[857] Ibid, Article 36(3).
[858] Royal Decree No. 1614/2011 implementing the Gaming Regulation Act (Law No. 13/2011) regarding licenses, authorizations, and gambling registrations.
[859] Lotteries Act, Article 54.
[860] Lotteries Act, Article 56.
[861] Penal Code, Chapter 23, Section 4.

criminal sanctions cannot currently be enforced in relation to the advertising of unauthorized gambling services.[862]

In Slovakia, the prohibition to promote unauthorized gambling services also broadly applies to any natural and legal person that engages in such promotion.[863] Similarly, any legal and natural person that advertises or promotes unauthorized gambling services in Croatia, Finland, Hungary, Malta, Romania, and Slovenia shall be guilty of an offence against the gambling legislation.[864] In Belgium, the same principle applies[865], but only when that person became aware that the gambling services in question were not authorized.[866]

5.2.4.2 Enforcement

The difficulty for sponsored parties to anticipate the costs of non-compliance is exacerbated by inconsistencies in the enforcement of the national gambling advertising regulations.[867] Often it is unclear which national regulatory authority is responsible for enforcement, as competences can be spread over gambling regulators, advertising authorities, consumer protection authorities, police, etc. Moreover, Member States frequently point to the fact that it is difficult to tackle advertising by foreign online betting operators that are not authorized in their jurisdiction. A similar problem also emerges with regard to sponsorship agreements between unauthorized operators and international sports organisers.[868]

To improve compliance, some Member States have decided to put in place mechanisms of *ex ante* approval. The advantage of this approach is that it makes it easier for third parties to determine that a particular operator is authorized to advertise.

In some Member States, gambling operators must obtain a special permit before they are allowed to advertise their services. For instance, in Hungary, Article 1(5) of the Gambling Operations Act determines that the licensed remote gambling games operators should first require permission by the tax authority for advertising.[869] In Malta, the Remote Gaming Regulations provide that *"No person shall operate or promote or sell or abet remote gaming in or from Malta unless such person is in possession of a valid licence of the relevant class, as set down in the First Schedule, issued by the Authority or is in possession of an equivalent authorisation by the government or competent authority of an EEA Member State, or any other jurisdiction approved by the Authority. Any person who acts in breach of the provisions of this regulation shall be guilty of an offence against the Act"*.[870] The appropriate license to be acquired by the betting operators is Class 3 Remote Gaming Licence which gives the freedom to the operators to promote and, or abet remote gaming from Malta. In Spain, Article 40(d) of the Law on the Regulation of Gaming[871] stipulates that the licensed gaming operator must obtain an additional authorization that grants the operator the right to advertise. Forthcoming implementing regulations will still have to clarify the conditions and limitations imposed by the authorisation certificate.

---

[862] The Swedish Supreme Court recently, after referring the matter to the CJ for a preliminary ruling, found the criminal sanctions for infringement of the gambling advertising prohibition were in breach with EU law because they only applied to foreign operators (and hence violated the principle of non-discrimination). See Section 5.5.
[863] Act No. 171/2005 Coll. On gambling, Article 56(2).
[864] Slovenia: Gaming Act, Article 111. Finland: Lotteries Act as amended by Act 11.3.2011/230, Article 62(a-c); Criminal Code (39/1889), Chapter 17, Section 16a. Hungary: Act XXXIV of 1991 on Gambling Regulations, Article 12(3).
[865] Wet van 7 mei 1999 op de kansspelen, de kansspelinrichtingen en de bescherming van de spelers, Article 46 and 70.
[866] Idem, Article 4(2).
[867] As emerged from the discussions in the expert workshops and the analysis of the questionnaires.
[868] European Commission, Summary of Responses: Green Paper on Online Gambling in the Internal Market (2011) 11-12.
[869] Act XXXIV of 1991 on Gambling Operations (in Hungarian: 1991. évi XXXIV. törvény a szerencsejátékszervezéséről).
[870] Remote Gaming Regulations, Chapter 438, regulation 3.
[871] Act on Regulation of Gaming No.13/2011.

An alternative, but administratively more burdensome, mechanism is a system of notification. Gambling operators that wish to advertise their service must provide notification of their campaign to a regulatory body and obtain approval.

In Belgium, by virtue of a Royal Decree of 21 June 2011, any operator applying for a licence to operate online gambling services, must inform the Belgian Gaming Commission of its advertising policy.[872] Moreover, each advertising campaign, should indicate a person whom the Commission can contact and can order to immediately cease the campaign if necessary.[873] This information requirement however only applies to online gambling services.

In Germany, (the *Bundesland*) North Rhine-Westphalia is responsible for approving advertising on television and Internet for all *Länder*. Regarding advertising in the press and other media, the respective *Land* where the gambling operator is located, is responsible for approving the respective advertising after notification. With a licence according to the old gambling law in Schleswig-Holstein, it is forbidden for gambling operators who are not authorised in other *Länder*, to advertise outside of Schleswig-Holstein. In the case of Schleswig-Holstein no *ex ante* approval is necessary for advertising (yet sponsorship is not subject to approval).

In Spain, advertising entities or agencies may seek copy advice from the Association for the Self-Regulation of Commercial Communications (Autocontrol), the organization that manages advertising self-regulatory systems in Spain, before launching an advertising campaign or signing a sponsorship deal. This mechanism, introduced through a co-regulation agreement between the Spanish Directorate-General for Regulation of Gambling and Autocontrol in accordance with Article 24(5) of the Gaming Regulation Act No. 13/2011[874], is intended to reduce the risk of non-compliance with the gambling advertising regulations. If a positive copy advice has been issued, it shall be understood that the entity acted in good faith.

5.3 Self-regulatory codes

Gambling operators and advertising agencies, both at national and European level, have also adopted various self-regulatory codes of conduct on gambling advertising.

At the national level, it can be observed that certain Member States, where the national gambling legislation contemplates the adoption of detailed regulations controlling the advertising of gambling, have refrained from doing so, instead opting for a self-regulatory system. Notable examples are Spain and the United Kingdom.

In the United Kingdom, Section 328 of the Gambling Act 2005 empowers the Secretary of State to make regulations controlling the advertising of gambling. To date no such regulations have been made. Instead, the Gambling Commission asked the Committee of the Advertising Practice to perform that task and administer new rules, resulting in the adoption of the "Broadcast Committee of Advertising Practice" (BCAP) and the "Committee of Advertising Practice" (CAP). In addition to these codes, the gambling industry also developed its own voluntary code, namely the "Gambling Industry Code for Socially Responsible Advertising". Regarding sports sponsorship, the latter code addresses the issue of the placement of gambling operators' logos on children's replica kits.

[872] Koninklijk Besluit betreffende de kwaliteitsvoorwaarden die door de aanvrager van een aanvullende vergunning dienen te worden vervuld inzake kansspelen, 21 juni 2011, Article 8.
[873] Idem, Article 9.
[874] The co-regulation agreement ("Acuerdo de corregulación en materia de publicidad, patrocinio y promoción de lasactividades de juego") is part of the provisions of Royal Decree No. 1614/2011 implementing the Gaming Regulation Act (Law No. 13/2011) regarding licenses, authorizations, and gambling registrations.

UK Gambling Industry Code for Socially Responsible Advertising (2007)

Sports Sponsorship

33. The advertising of adult-only gambling products or product suppliers should never be targeted at children. This applies equally to sponsorship and this code requires that gambling operators will not allow their logos or other promotional material to appear on any commercial merchandising which is designed for use by children. A clear example of this would be the use of logos on children's sports' shirts which in future would not be permitted under the terms of this code. Children's shirts and other merchandise will be defined as those that do not attract VAT.

34. This should be reflected in all sponsorship agreements which are signed after 1 September 2007.

The Gambling Commission has made compliance with the advertising codes a provision of the Commission' Code of Practice, which authorized operators must respect, in principle. The provision stipulating that licensees must follow the advertising codes, as well as the industry code of practice, however, are earmarked as "ordinary provisions", which means that they do not have the status of binding operator license conditions.[875] Consequently, failure to comply with a provision of the code shall not make a person liable to civil or criminal proceedings.[876] At most, the Gambling Commission may take non-compliance into account on a licence review.

In Spain, the Gaming Law of 2011 contemplated the establishment of implementing regulations that would clearly define the conditions and limitations for gambling advertising, *"particularly with respect to … sponsorships at sporting events subject to betting activity"*.[877] The conditions and limitations for sports sponsorship, however, remain undefined. Instead, the gambling regulator encouraged the gambling industry to adopt principles of self-regulation. In June 2012, one week after the first online gambling licences were issued in Spain, various companies (including gambling and media operators and advertising agencies) signed a self-regulatory code for advertising gambling activities.[878] The code contains a number of general responsible gambling advertising principles that in particular seek to protect minors and other vulnerable groups. The sponsorship activities of the code's signatories must also adhere to the prescribed ethical standards.

Also at the European level, gambling operators and advertising agencies have undertaken a number of self-regulatory initiatives. In 2011, the European Committee for Standardization (CEN) published the CEN Workshop Agreement 'Responsible Remote Gambling Measures', a voluntary consensus agreement made by and for stakeholders.[879] Other examples include e.g. EUROMAT's Responsible Gambling Statement and the European Lotteries' Responsible Gaming Standards. Organisations such as the European Advertising Standards Alliance (EASA) or the International Chamber of Commerce (ICC) have also adopted standards applicable to gambling advertising.

While industry stakeholders naturally advocate self-regulation as the most appropriate mechanism to ensure consumer protection,[880] self-regulatory advertising codes would appear to be a useful

[875] Gambling Commission, Gambling codes of practice: consolidated for all forms of gambling, March 2013.
[876] Gambling Act 2005, Article 24 (stressing nonetheless that the codes of practice are admissible in evidence in criminal and civil proceedings and must be taken into account when they appear relevant to the court or tribunal).
[877] Article 7(2) Gaming Law.
[878] Código de Conducta sobre comunicacionescomerciales de las actividades de juego, available at http://www.ordenacionjuego.es/es/acuerdo-de-corregulacion.
[879] European Committee for Standardization (CEN) Workshop Agreement Responsible Remote Gambling Measures (2011).
[880] See e.g. Europen Commission, Minutes of the workshop on online gambling: responsible gambing advertising and protection of consumers of gambling services (2013) ARES(2013)2497284.

complement, rather than a substitute, for national gambling advertising legislation. Particularly where regulations were intended to address legal uncertainties pertaining to sports sponsorship, such as in Spain, the decision to opt for self-regulation instead is unsatisfactory. Moreover, mere reliance on voluntary commitments raises pertinent questions about effective implementation.[881] Enforcement *vis-à-vis* non-compliance exclusively based on (at best) contractual obligations is clearly insufficient when national gambling laws qualify certain types of gambling advertising (e.g. advertising of unauthorized gambling services) as a serious (criminal) offence.[882]

5.4 Restrictions imposed by sports organisers

Some sports organisers have introduced restrictions on their members to ensure they only enter into sponsorship deals with authorized gambling operators that observe applicable advertising regulations. The (English) Premier League, for example, requires that when a Premier League club enters into a commercial agreement with a gambling operator, the operator must also enter into an agreement with the League. Pursuant to the latter agreement, the gambling operator must contractually commit to *inter alia* respect the national advertising regulations and self-regulatory codes.[883]

A remarkable development is that some international and national sports federations have even recently introduced bans on gambling sponsorship to their members.

The International Ski Federation (FIS) recently tightened its rules on accepting sponsorship by gambling operators.[884] In June 2013, the FIS Council decided that FIS's title and presenting sponsorship rights would no longer be awarded to "commercial" gambling operators. Moreover, it introduced a prohibition against athletes to carry ads for gambling operators on their racing suits. Organisers of skiing events may, however, still allow small-scale sponsorship by gambling operators. Spectators at the Alpine World Cup, for instance, can typically place bets on skiers. The sponsorship restrictions are part of a range of measures the FIS has recently adopted to safeguard the integrity of the sports of skiing.[885] The FIS is certainly not the only one voicing concerns about in particular sponsorship by gambling operators that take bets on either the sponsored party's events (in the case of a sports organiser) or on events in which the sponsored party participates (in case of a club or individual athlete).[886] Even the CJ stated in its *Santa Casa* judgment that *"the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly"*.[887]

A completely different rationale underpins the Norwegian Olympic Committee's policy to ban athletes that are sponsored by gambling operators other than the state-owned monopolist Norsk Tipping. By means of statutory contributions, Norsk Tipping's gambling revenues constitute a considerable source of income for Norwegian Sports. According to the Norwegian Olympic Committee (NOC), Norwegian athletes that have sponsorship deals with other gambling operators

[881] See also e.g. European Commission, Commission staff working document: "Online gambling in the Internal Market", SWD(2012) 345 final 100, section 7.4.1.
[882] See Section 5.2.4.
[883] Premier League rules, Section 5, Article 25.
[884] FIS, Decisions of the FIS Council at its Spring Meeting 2013 in Cavtat-Dubrovnik (CRO), Press release, 10 June 2013, available at http://www.fis-ski.com/mm/Document/document/General/03/31/70/fis-council-decisions-june-2013_Neutral.pdf.
[885] See e.g. FIS, Betting and other anti-corruption violations Rules, July 2013.
[886] See e.g. Council of Europe, resolution on the promotion of the integrity of sport against the manipulation of results (match-fixing) adopted at the 18th Council of Europe Informal Conference of Sports Ministers, 22 September 2010.
[887] C-42/07, Liga Portuguesa de Futebol Profissional and Bwin v Departamento de Jogos da Santa Casa de Misericórdia de Lisboa (2009) ECR I-07633, para 71.

undermine its good relationship with Norsk Tipping. For many years national sports federations in Norway have exerted pressure on their members not to accept sponsorship from other gambling operators. In July 2013, the NOC fortified this ban by announcing that athletes with gambling sponsors other than Norsk Tipping are prohibited from representing Norway in international competitions. Additionally, they are no longer eligible for state funding and will be denied access to state-owned training facilities. As a consequence, the NOC has effectively induced Norwegian athletes to breach their existing sponsorship agreements with gambling operators. For example, in order to be able to participate in the Sochi Olympic Games 2014, Mats Zuccarello Aasen, a Norwegian top ice hockey player playing for the New York Rangers (NHL), was forced to terminate his personal sponsorship deal with online gambling operator Unibet. The latter agreed to end the deal, even though the contract formally ran until May 2014.[888]

5.5 Cross-border issues and EU internal market law

Since gambling advertising restrictions may constitute a restriction on the freedom to provide services that is guaranteed by Article 56 TFEU, they can only be allowed to the extent they are justified by overriding reasons in the public interest and satisfy the principles laid out in the case law of the CJ regarding their proportionality.[889]

In two cases, where the proceedings at issue only concerned the advertising of gambling services, and not the organization of these services, the CJ acknowledged that strict limitations on the advertising of gambling services might be regarded as necessary to achieve the objectives of the national policy on gambling. Since the judgments shed light on the conditions under which national gambling advertising restrictions can be deemed compatible with EU law, they are briefly discussed below.

5.5.1 Sjöberg and Gerdin (2010)

The CJ first dealt with the restrictive effects of national gambling advertising restrictions in *Sjöberg and Gerdin* (Joined cases C-447/08 and C-448/08).[890] The case was a reference for a preliminary ruling submitted by the Swedish Court of Appeal in the context of criminal proceedings against the editors-in-chief of two Swedish newspapers. The Public Prosecutor's Office had initiated the proceedings because both newspapers had published advertisements for foreign, unauthorized gambling services, a practice which is prohibited by Article 38(1)(1) of the Swedish Lotteries Act. The District Court of Stockholm found the editors-in-chief to be liable and ordered them to pay criminal penalties for having promoted, unlawfully and for profit, participation in unlicensed gambling. After the Court of Appeal refused to allow the admissibility of their appeal against the judgments of the District Court, the editors-in-chief appealed to the Swedish Supreme Court, where the question arose as to the compatibility of the gambling advertising prohibition with the freedom to provide services (Article 56 TFEU). After the Supreme Court held that the appeals before the Court of Appeal were admissible, the latter court decided to refer this question to the CJ.

According to the Swedish Lotteries Act, a licence to organise gambling can in principle only be issued to a Swedish entity that is a non-profit association and has as its main purpose *"the*

[888] Fredrik Pålsson, Zuccarello might be banned from Norwegian national team, 8 May 2013 (http://www.eurohockey.com/article/2599-zuccarello-might-be-banned-from-norwegian-national-team.html); Nina Bergland, Conflicts chill ice hockey action, 14 May 2013, http://www.newsinenglish.no/2013/05/14/conflicts-chill-ice-hockey-action.
[889] See Chapter 4, Section 4.4.2.
[890] Joined Cases C-447/08 and 448/08, Criminal proceedings against Otto Sjöberg and Anders Gerdin (2010) ECR I-6921.

advancement of socially beneficial objectives in Sweden".[891] As a result of this basic principle, the Swedish gambling market is shared between non-profit associations and two operators that are state-owned or mainly state controlled, SvenskaSpel AB (SvenskaSpel) and TravochGalopp AB (ATG). The two latter operators more or less enjoy a *de facto* monopoly on the Swedish sports betting market. SvenskaSpel has the sole right to arrange sports betting (with a few exceptions for local events) and ATG has the sole right to arrange betting on horse racing.
The CJ observed that the prohibition to advertise unauthorized gambling services in Sweden constitutes a restriction on the freedom to provide services, but is suitable for achieving the legitimate objective of the restriction, i.e. to exclude private profit-making interests from the market.[892] Already in *Schindler*, the CJ had acknowledged the compatibility with EU law of *"national legislation seeking to prevent lotteries from being operated exclusively on a commercial basis and managed by private organisers who themselves receive the profits from that activity"*.[893] The CJ therefore concluded that the Swedish gambling advertising prohibition did not violate Article 56 TFEU (ex Article 49 EC).

In addition to assessing the proportionality of the gambling advertising restrictions in question, the CJ addressed the question whether the restrictions are in conformity with the principle of non-discrimination. The criminal proceedings against the two editors-in-chief were initiated on the basis of Article 54(2) of the Swedish Lotteries Act, which provides for criminal sanctions for the violation of the advertising ban. The criminal sanctions, however, only apply to the promotion of unauthorized gambling organized in another Member State. The promotion of unauthorized gambling organised in Sweden, on the contrary, is only punishable by an administrative fine.[894]

In light of the division of responsibilities between the national courts and the EU courts, the CJ did not ascertain whether or not the two infringements in practice are prosecuted with the same due diligence and would lead to the imposition of equivalent penalties by the competent courts.[895] Yet the CJ did stress that: *"if the persons carrying out the promotion of gambling organised in Sweden without a license incur penalties which are less strict than those imposed on the persons who advertise gambling organised in another Member State, then it must be stated that those arrangements are discriminatory and that the provisions of Article 54(2) of the (Lotteries Act) are contrary to (Article 56 TFEU) and, consequently unenforceable"*.[896]

In doing so, the CJ made clear that EU law precludes national advertising regulations according to which unauthorized gambling services organised in that Member State would be treated differently than unauthorized gambling services organised abroad.

5.5.2 HIT hoteli and HIT LARIX (2012)

In *HIT hoteli and HIT LARIX* (C-176/11) the CJ again examined restrictive effects resulting from national advertising regulations.[897] HIT hoteli and HIT LARIX, two gambling operators established and licensed in Slovenia, applied for a permit to promote their casinos in Austria. Pursuant to Article 56 of the Austrian Gambling Act, casinos licensed in another EU or EEA Member State may

[891] Lotteries Act, Article 15. The Swedish government may, however, grant permits to other entities if there would be "special reasons" to do so.
[892] Joined Cases C-447/08 and 448/08, Criminal proceedings against Otto Sjöberg and Anders Gerdin (2010) ECR I-6921, para. 33.
[893] Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler (1994) ECR I-1039, paras. 57-59.
[894] Lotteries Act, Article 54(2).
[895] Joined Cases C-447/08 and 448/08, Criminal proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) (2010) ECR I-6921, paras 54-55.
[896] Idem, para. 56.
[897] Case C-176/11 HIT hoteli and HIT LAREX v Bundesminister Für Finanzen, 12 July 2012 (nyr).

be granted an authorization to advertise their services in Austria on the condition that the *"legal provisions adopted by that Member State at least correspond to the Austrian provisions"*.[898] The applications of HIT hoteli and HIT LARIX were rejected on the basis that they had failed to prove that this condition was satisfied. Both operators appealed these decisions before the Austrian Administrative Court, which asked the CJ to rule on the compatibility of the requirement with Article 56 TFEU.

The CJ found that the Austrian advertising regulations constitute a restriction to the freedom to provide services by impeding access of Austrian consumers to services offered in casinos located in another Member State. The Austrian Government, however, justified the restriction by pointing out that the number of casinos is limited in Austria and that casino operators must observe strict rules concerning the protection of gamblers.

In his opinion, Advocate-General Mazak concluded that the system of prior authorization went beyond what is necessary to achieve the undisputed objective of protecting consumers against the risks connected with gambling. First, he expressed doubts as to the possibility of actually comparing the level of protection of gamblers in different legal systems given the lack of harmonization. He therefore stressed that the authorization system *"could represent a 'hidden' total prohibition of the advertising of foreign casinos ... if the authorities systematically held that the legal protection of gamblers in all other Member States was inferior to that of their own State"*.[899] Second, he noted that the grant of a permit depends solely on the content of the legislation of the Member State, without taking into account the actual level of protection provided by the operator.

The CJ did not follow the reasoning of the Advocate-General. The CJ instead held that the requirement to establish that its national legislation ensures protection at a level equivalent to that guaranteed in Austria, *"does not appear to constitute an excessive burden for operators"*.[900] Subsequently, the CJ summarily concluded that the Austrian gambling advertising restrictions are proportional to the pursued objective and therefore compatible with Article 56 TFEU. The CJ did add that the legislation would have to be regarded as disproportionate if it would require that the rules in other Member States are identical or if it would impose rules not directly related to the protection against the risk of gambling.

5.5.3 Co-existence of different national gambling advertising regulations

The CJ has repeatedly held that gambling legislation is one of the areas in which significant moral, religious, and cultural differences exist between Member States. In the absence of harmonization in this field, it is therefore for each Member State to determine the objectives of their policy on gambling and to define, in accordance with its own scale of values, what is required to protect the interests in question.[901]

The cases discussed above illustrate that gambling advertising restrictions can be considered necessary to achieve objectives pursued by national gambling legislations, such as the protection of consumers against the risks of gambling. As long as the restrictions are suitable, necessary, and applied in a non-discriminatory way, Member States thus enjoy a significant margin of discretion.

---

[898] See Section 2.2.
[899] Opinion of Advocate-General Mazak, Case C-176/11 HIT hoteli and HIT LAREX v BundesministerFürFinanzen, 17 April 2012, par. 24.
[900] See e.g. Case C-176/11 *Henn and Darby* (1979) ECR 3795, para. 15; Case C-275/92 Schindler (1994) ECR I-1039, para. 32; Case C-268/99 Jany and Others (2001) ECR I-8615, paras. 56 and 60.
[901] See e.g. C-34/79 Henn and Darby (1979) ECR 3795, para. 15; C-275/92 Schindler (1994) ECR I-1039, para. 32; C- 268/99 Jany and others (2001) ECR I-8615, para. 56, 90.

Importantly, the proportionality of limitations imposed on gambling advertising must be assessed in light of the level of protection sought by a particular Member State.[902] The fact that one Member State applies stricter rules, such as a general prohibition of gambling advertising, than others does not in itself affect that assessment.

In short: as EU law currently stands, gambling operators and sponsored parties are necessarily confronted with the regulatory burden to comply with 28 different legal requirements, and cross-border issues are bound to arise.
Further attention could be paid to pragmatic solutions offered by technological tools, such as virtual advertising.[903] This digital technology makes it possible to alter the broadcast signal (transmitted to media content operators) by e.g. substituting the advertising on billboards in the stadium with other advertisements. Various organisers of international sports events have successfully employed this technique for the transmission of their events in countries were tobacco advertising is prohibited. In a similar fashion, compliance with national gambling advertising regulations could be ensured by tailoring the advertising at a sporting event in country-specific broadcasts.

5.6 Conclusions

This chapter examined the national regulatory frameworks governing the advertising of gambling services and its relationship to sports sponsorship. It revealed a great disparity of national rules. A first category of Member States strictly prohibits any form of gambling advertising. A second category of Member States only allows authorized operators to advertise their services, subject to certain quantitative and qualitative restrictions to ensure responsible gambling advertising. A third category of Member States has no rules specific to gambling advertising.

As it is a Member States prerogative to define the level and detail of consumer protection they deem appropriate in the context of their gambling policies, the patchwork of different national approaches is inevitable. This does not mean that the outcome is a welcome one. The potential for conflicting national rules causes difficulties for the organisers of cross-border sporting events and especially for clubs or individual athletes participating in these events as they may be induced to infringe national gambling advertising regulations and/or breach personal sponsorship contracts.

Over and above the lack of consistency across Member States, however, a widely observed absence of legal certainty appears to cause the biggest problem for sports organisers, clubs, and individual athletes in terms of ensuring compliance with sponsorship agreements.

Identified key issues:

- The definition of "gambling advertising" is lacking or too ambiguous for practical purposes. In most Member States it is unclear whether sponsorship by gambling operators constitutes advertising for the purpose of the gambling advertising regulations. This problem is particularly pertinent in those Member States where no detailed rules exist on gambling advertising (i.e. where only general provisions on advertising).

- Only a few national gambling advertising regulations clarify the extent to which both parties to a sponsorship agreement, i.e. the sponsored party and the gambling operator, can be found

[902] See e.g. C-124/97 Laara and others (1999) ECR I-6067, para. 36; C-67/98 Zenatti (1999) ECR I-7289, para. 34.
[903] As emerged from discussions in the expert workshops.

liable for breaching the regulations. Confusion persists regarding the subject upon whom the responsibility falls, even when sanctions include severe fines or even criminal prosecution.

- Inconsistencies in the enforcement of the applicable regulations make it difficult to anticipate the costs of non-compliance.

While self-regulatory advertising codes developed by the industry are to be encouraged, they cannot function as a substitute for national gambling advertising regulations: more binding norms are necessary to ensure effective enforcement and to address the prevailing lack of legal uncertainty.

PART 4

GENERAL CONCLUSIONS AND POLICY RECOMMENDATIONS

6 CONCLUSIONS AND RECOMMENDATIONS

6.1 Protection of sports organisers' rights

Part 1 of the study examined the existence, nature, and scope of sports organizers' rights, largely on the basis of the law of property and intellectual property law. While there is variety in protection regimes across the EU, organisers of sports events seem to be fairly well protected as a matter of substantive law, against unauthorized acts of exploitation of live transmitted or recorded sports events on the basis of a combination of the "house right", the law of contract, and original or derivative rights of intellectual property in audiovisual recordings and broadcasts.

The "house right" that is derived from the property right in the stadium or other venue where sports events normally occur, and which is expressly recognized by the courts in several Member States, gives sports events organisers and clubs (and indirectly the sports federations) a right to exclude unauthorized media from the venue, and thereby creates leverage for the event organisers to negotiate exclusive contracts regarding media coverage.

Whereas sporting events as such – as confirmed by the CJ – will not qualify for protection under EU copyright and/or related (neighbouring) rights, the audiovisual recording of the sports event and its broadcast are protected by copyright and neighbouring right according to harmonized EU standards. In addition, a handful of Member States provide for special legal protection of sports organisers under legal regimes that are somewhat difficult to qualify. The French Sports Code offers protection to the commercial exploitation of sports events in any form or manner, including a right to consent to bets. Italy offers a detailed regulation of TV media and broadcasting rights in a dedicated decree that amends the Copyright Act and that explicitly creates a new neighbouring right. Portugal also has a special rule protecting the organisers of sports events (at least until 2007) as do Bulgaria, Greece, Hungary, and Romania.

Athletes and players may derive some legal protection from their "image rights", i.e. rights that protect the commercial likeness of athletes, based on a variety of legal doctrines, such as personality rights and right to privacy. Image rights form a heterogeneous legal category untouched by European harmonisation. Most Member States do accord some level of legal protection against unauthorized commercial uses of players' images. As recent case law in Germany and the Netherlands suggests, athletes can, however, not invoke their image rights to prohibit, or require remuneration for, audiovisual coverage of sports events in which they participate.

In practice the media contracts that the sports organizers conclude may or may not provide for complete or partial transfer(s) to the sports organisers of the copyrights and neighbouring rights in the audiovisual recording and transmission of the event. Sports events organisers or their federations may, alternatively, elect to produce and distribute media coverage of the sports events themselves. Either way, the combination of house right, media contract(s), and intellectual property protection of the audiovisual recording and broadcast effectively allows the sports event organisers to enjoy complete ownership and/or control over the audiovisual rights in the sports events.

The case often made by sports organisers for express recognition of a "sports organisers' right", which would take the form of a special neighbouring right or *sui generis* right, is therefore not very strong. Admittedly, a "house right" will not arise in cases where sports events do not occur within the enclosure of a stadium or similar proprietary venue, but in unregulated open spaces (e.g. an air race over open water). Nevertheless, even in such (relatively rare) cases sports events organisers

may be able to derive some de facto exclusivity from the property rights in premium admission-only areas and/or from special administrative permits. The main concern of the sports organisers seems to relate to the lack of immediate and effective enforcement remedies, rather than to any real or imaginary gaps in substantive legal protection.

Recommendations

In the great majority of Member States the rights of sports organisers are found in the general laws of property and contracts, which are not likely to be harmonized in the EU in the near future. The same is true for the image rights of the athletes, which are protected heterogeneously, based on a variety of legal doctrines, and with only limited legal certainty, from one Member State to the next. By contrast, the laws on copyright and neighbouring rights that provide for legal protection of the audiovisual recordings and broadcasts of sports events are almost completely harmonized. This state of affairs does not, in our opinion, point to an urgent need for a harmonizing initiative.

While the calls of the sports organisers for effective enforcement remedies are comparable to those of the traditional content and information industries, the case for expedient remedies is arguably somewhat stronger here, given the highly perishable media value of many sports events, which is usually exhausted immediately with the live coverage of the event. What sports organisers, therefore, ideally want are enforcement remedies that can effectively and rapidly terminate acts of unauthorized live streaming of events. While issues of enforcement are outside the scope of the present study, and it is doubtful that such remedies can realistically be conceived, it is recommended that these demands be assessed and evaluated in the context of a general review of the EU IP Enforcement Directive.

6.2 Sports organisers' rights management in the field of media

Part 2 of the study examined the management of sports organisers' rights in the field of media. Chapter 2 analytically described how sports organisers market and license their media rights and focused on the compatibility of these licensing practices with EU competition law and internal market law. Chapter 3 focused on the way media law governs the exploitation of sports media rights, in particular by defining the modalities and conditions regarding the right to make short news reports.

6.2.1 The marketing of sports media rights: licensing practices

EU competition law enforcement has had a major impact on the way premium sports media rights are sold in the EU. Prior to the European Commission's precedent decisions on the joint selling of sports media rights (*UEFA Champions League* 2003, *DFB* 2005, *FAPL* 2006), the National Competition Authorities (NCAs) of various Member States had prohibited this practice on the basis of their national competition rules. The Commission, however, made clear that joint selling agreements can be deemed compatible with EU competition law, albeit under strict conditions. Since then, all EU competition law cases concerning the joint selling of sports media rights – and in particular football media rights, by far the most valuable sports media rights in the EU - have been dealt with at the national level. This study examined how closely the recent national decisional practice adhered to the principles set out by the Commission and took stock of ten years of competition law intervention.

Ten years after the *UEFA Champions League* decision, the joint selling of sports media rights has become the dominant practice. Since Italy reintroduced the system of joint selling in 2010, Cyprus, Portugal, and Spain are now the last European markets in which first division football clubs sell their rights individually. Also for other sports, the individual sale of media rights is exceptional.

The comparative analysis of EU and national decisional practice reveals that for the most part the NCAs have replicated the heavy-handed remedy package designed by the European Commission. The "no single buyer" obligation, a remedy that was exceptionally imposed by the Commission in *FAPL*, is increasingly being emulated at the national level. Only with regard to the duration of exclusivity, more and more NCAs are demonstrating a readiness for a more flexible approach (i.e. by accepting exclusive rights contracts exceeding three years). The fact that principles first developed in the sphere of competition policy have been or are currently being codified in legislation in France, Hungary, Italy, and Spain, further exemplifies the regulatory nature of competition law intervention in this field.

The imposed remedies, facilitated by technological developments, have effectively addressed concerns about output restrictions related to joint selling. The problem of warehousing of rights or unused (new media) rights no longer seems to be a concern. The positive impact of EU competition law intervention on supply-side dynamics is all the more evident when considering the prevailing practices in Member States where the NCA or legislator has not (yet) intervened. In these countries, premium sports media rights are still sold in one exclusive bundle, for a long period of time, and without a transparent public tender procedure.

EU competition law intervention has been less successful in terms of challenging existing market dynamics at the downstream level: the premium sports content bottleneck continues to frustrate markets for the acquisition of premium sports media rights. In various markets, the main vertical effect of the chosen remedies has been that in the downstream market a duopoly emerged in the place of a monopoly. This also has implications for competition in new media markets. The emerging trend to market premium sports media rights on a platform-neutral basis favours powerful vertically integrated media content providers. This risks negating the progress that was made in enabling smaller operators to acquire earmarked packages for certain platforms.

The study also examined the practice of licensing premium sports media rights on an exclusive territorial basis in light of EU internal market law. Initially, the CJ's *Premier League v QC Leisure* judgment was considered a game-changer for the way in which sports media rights would be marketed in the EU. So far little seems to have changed. The Premier League has responded by introducing new contractual provisions that, unfortunately, make consumers everywhere in the EU worse off. The *de facto* imposition of the UK "closed period" rule for Premier League matches across Europe, however, raises questions about the public interest dimension of this old-fashioned manner and may indicate competition issues.

Recommendations

In view of the important role of the European Commission in ensuring uniform application of the EU competition rules, it is recommended that the Commission would provide guidance and/or assess (1) the increasingly divergent views of NCAs on the acceptable length of exclusive sports media rights contracts and (2) the impact of platform-neutral rights packages on access to premium content by smaller (new) media content operators.

The observation that certain rights holders, in particular those that generate significant value on the domestic UK market, have started to impose language restrictions and output limitations to ensure territorial exclusivity also deserves scrutiny.

Several Member States have codified in legislation general principles to ensure that the pro-competitive efficiency benefits of joint selling agreements outweigh the anti-competitive effects. Because it increases legal certainty, consistency, and transparency, it would seem beneficial that other Member States (especially those that have built up considerable market experience on the basis of EU competition law decisional practice) consider a similar approach.

6.3 Right to short reporting

Chapter 3 described and analysed the right to short reporting as enshrined in Article 15 AVMSD and as implemented in the national laws of the 28 Member States of the European Union.

Three scenarios were tested. The first one sought to determine the conditions of access to the signal of a domestic broadcaster which has acquired exclusive TV rights on those events of high interest to the public as well as the conditions and modalities of use of the short extracts produced. The second scenario is similar to the first one, except that it involved two broadcasters established in different EU jurisdictions. It also sought to define which law is applicable to determine if an event qualifies as an event of high interest to the public. The last scenario tested the possibility for a broadcaster to get access to the venue of an event of high interest to the public to exercise its right to short reporting. In addition, the scenario checks whether the right of access to the venue extends to a right to record images in margin of the events.

Some discrepancies can be observed between Member States that have implemented the right to short news reporting in their media laws and Member States that have implemented the right in their copyright laws. However, the regime of the latter is complemented in the case of two Member States by extensive and detailed interpretation guidance in the preparatory works of their respective copyright law. Nevertheless, most Member States stayed close the text of the directive.

Another conclusion we can draw is a general failure to define "events of high interest to the public" and the absence of rules to determine the law applicable to the notion in a cross-border situation. No relevant case law at national level on the interpretation of these issues has been indicated. More generally, a lack of clear rules to solve cross-border issues can be denounced. The sequential approach contained in Recital 55 has not been duplicated in Article 15 AVMSD. Case law has remained quite limited.

Recommendations

The right of short news reporting is an important element of the EU legal order safeguarding the right of broadcasters to have access to "events of high interest to the public", such as important sports events, which are subject to exclusive broadcasting rights. However, the way this right is currently framed, allowing Member States the option of either mandating access to the transmitting broadcaster's signals, or requiring direct access to the venue where the event takes place, has resulted in some differences in implementation by the Member States (i.e. on the duration of the short news reporting). At the same time, the research shows that jurisprudence on the matter is limited. This could imply that solutions have been found in practice. It is therefore recommended

that in a future review of the Directive the possible need for further harmonisation of the right of short news reporting be considered.

6.4 Sports organisers' rights management in the field of gambling

Part 3 of the study examined, from an EU and national legal perspective, the possibility for sports organisers to license their exploitation rights beyond the media field, notably in the area of gambling. Chapter 4 focused on the existence of a sports organisers' right to consent to the organisation of bets ("right to consent to bets"). Chapter 5 focused on legal limitations that restrict the marketing of other exploitation rights to gambling operators.

6.4.1 A sports organisers' right to consent to bets

With the enactment of a new gambling law in 2010, the French legislature, following case law precedent recognizing sports bets as a form of commercial exploitation of sports events, introduced a right to consent to bets. Apart from France, two other Member States have legally recognized a right to consent to bets, namely Poland and Hungary. Sports organisers in these countries, however, have so far no experience (Hungary) or only limited experience (Poland) with the actual enforcement of this right.

Numerous national and European sports organisers have called for the adoption of a similar right at the EU or EU-wide national level. The analysis dispelled two general misconceptions that seem to persist in the debate on the merits of a right to consent to bets.

First, when sports organisers advocate the right to consent to bets as a mechanism to enable a "fair financial return" from associated betting activity and to preserve the integrity of sport, the arguments are commonly framed within a perceived need for more legal protection. In essence, what is asked is the recognition of a broad-scoped sports organisers' right that would cover all kinds of commercial exploitation of sports events, including the organisation of bets. The analysis revealed, however, that the financial and integrity benefits attributed to a right to consent to bets could be achieved well outside the framework of private law. The Victorian regulatory regime (Australia) is a clear illustration of how a right to consent to bets can be introduced as a regulatory condition in gambling legislation without recourse to an express recognition of a broad-scope horizontal sports organisers' right.

Second, the right to consent to bet is not an efficient way to allocate revenue from betting to all levels of professional and amateur sport. Whatever the fee structure, the price paid in exchange for the right to consent to bets will always be relevant to the volume of bets that a sporting event is able to attract. Hence, financial benefits predominantly flow to professional sport and more particularly to the organisers of premium sports events. Small or less visible sports are unlikely to benefit from this instrument. Furthermore, there is no evidence for a link between the financial return stemming from a right to consent to bets and the financing of grassroots sport.

The review of the experiences with the implementation of a right to consent to bets in Victoria (Australia) and France highlighted a number of challenges associated with the introduction of such an instrument.

Since the exercise of a right to consent to bets is capable of constituting a restriction on the free movement of gambling services within the meaning of Article 56 TFEU, it must be justified by an

imperative requirement in the general interest and comply with the principle of proportionality. The CJ has accepted the prevention of fraud as a legitimate objective justification. The financing of public interest activities through proceeds from gambling services, on the other hand, can only be accepted as a beneficial consequence that is incidental to the restrictive policy adopted. It follows that a strict regulatory framework that genuinely reflects a concern to prevent the manipulation of sports events must accompany the introduction of a right to consent to bets.

Of the existing regulatory systems discussed, only the Victorian regulatory regime clearly demonstrates a primary concern with safeguarding the integrity of sports events. Before a sports body is legally entitled to exercise the right to consent to bets, it must first invest time and resources into developing adequate integrity mechanisms. The "fair financial return" is a compensation for the integrity assurances given by the sports bodies. In case a sports body fails to fulfil its obligations in this regard, its ability to exercise the right to consent to bets could be revoked.

Regarding the institutional and operational requirements for the successful implementation of a right to consent to bets, it must be concluded that the transaction costs related to this instrument are particularly high. The integrity and financial benefits of a right to consent to bets can only be fully achieved when it is carefully managed by a national regulatory authority that:

1. actively prosecutes illegal betting services (including the offering of sports bets by licensed operators without the sports organisers' consent);
2. monitors the commercial exploitation of the right to consent to bets to prevent discriminatory or anti-competitive marketing conditions;
3. provides for an ex post mechanism for complaint handling and dispute resolution;
4. has the power to conduct on-going monitoring of the parties' compliance with the mutual rights and obligations contained in the contractual agreements between sports organisers and betting operators.

Given that a number of national regulatory authorities suffer from limited staff and resources, it is questionable whether they would be capable of fulfilling this challenging task.

Recommendations

Even though various calls have been made for the recognition of a right to consent to bets at the EU level, it is clear that the introduction of such a right lies within the competence of the Member States. It is up to each Member State to weigh up the pros and cons of a right to consent to bets in comparison to various alternative mechanisms for the gambling-originated funding of sport and/or for the preservation of the integrity of sport. Nonetheless, based on the previous considerations, the following recommendations can be made:

If the main concern is to secure a "fair financial return" from revenue derived from (commercial) betting or other gambling services to sport, it is recommended to put in place a centrally driven distribution system that allocates this revenue on the basis of transparent criteria (i.e. proportions and beneficiaries prescribed by legislation).

If the main concern is the preservation of the integrity of sport, a right to consent to bets could be considered as one of the available mechanisms on condition that the demanding institutional and operational requirements necessary for its successful implementation (listed above) can be satisfied. The Victorian (Australia) regulatory framework emerges as a best practice model. Yet it

can only function as a partial regulatory response since it risks leaving less popular and visible sports more exposed to integrity risks.

6.4.2 Gambling advertising restrictions and sports sponsorship

In line with the principle of freedom of contract, sports organisers are in principle free to choose the contractual partners for the commercial exploitation of their rights. One main obstacle emerged, however. Restrictions on gambling advertising at the national level (may) create difficulties for sports organisers, clubs, and individual athletes to enter into sponsorship agreements with betting operators.

The analysis of national regulatory frameworks governing the advertising of gambling services revealed a patchwork of different national approaches. A first category of Member States strictly prohibits any form of gambling advertising. A second category of Member States only allows operators that are authorized in that respective Member State to advertise their services, subject to certain quantitative or qualitative restrictions to ensure responsible gambling advertising. A third category of Member States has no specific rules specific to gambling advertising.

Over and above the lack of consistency across Member States, a widely observed absence of legal certainty appears to cause the biggest problem. The existence of national gambling advertising regulations does not necessarily resolve uncertainties regarding their applicability to sponsorship agreements.

First and foremost, this legal uncertainty undermines the effectiveness of the measures that seek to protect consumers against the financial, social, and health risks associated with gambling.

Second, this legal uncertainty ultimately results in considerable market uncertainty and potential losses of sponsorship revenue for sports organisers, clubs, and individual athletes. For example, only a few national gambling advertising regulations clarify the extent to which both parties to a sponsorship agreement, i.e. the sponsored party and the gambling operator, can be found liable for breaching these regulations. Confusion persists regarding the subject upon whom the responsibility falls, even when sanctions include severe fines or even criminal prosecution. Inconsistencies in the enforcement of the applicable regulations make it even more difficult to anticipate the costs of non-compliance.

Recommendations

The EU should encourage Member States to address the generally observed lack of legal certainty as regards sports sponsorship by gambling operators in the context of their national gambling advertising regulations.

It is recommended that sponsorship-related issues are included in the European Commission's upcoming "Recommendation on responsible gambling advertising". Other additional courses of action ought to be considered, in particular to facilitate enforcement co-operation between different national regulatory authorities concerning cross-border advertising of unauthorized gambling services.

Regarding cross-border sports events, further attention should be paid to the use of technological tools that may offer pragmatic solutions (e.g. virtual advertising). In any event, organisers of such

events must respect national legislations. In case they induce participants in their events to infringe national gambling advertising and/or breach personal sponsorship contracts, they should arguably be found liable and not the participant that is faced with a dilemma: respect the regulations of the sports organiser (that typically require participants to comply with the organisers' sponsorship arrangements) or respect national regulations and personal sponsorship contracts with the risk of being eliminated from the competition.

BIBLIOGRAPHY

LITERATURE

Allan, Stephen, "Satellite Television and Football Attendance: The Not so Super Effect" (2004) 11 Applied Economics Letters (2) 123.

Andriychuk, Oles, "The legal nature of premium sports events: IP or not IP?" in Ian Blackshaw, Steve Cornelius and Robert R Siekmann (eds.) *TV rights and sport – legal aspects* (T.M.C. Asser Press, The Hague 2009).

Benson, Christopher et al, "Hitting Back. To what extent can celebrities protect the exploitation of their image?" (2005) Copyright World 153, 13.

Bently, Lionel and Sherman, Brad, *Intellectual Property Law* (Oxford University Press, Oxford 2009).

Beverley-Smith, Huw, *The commercial appropriation of personality* (Cambridge University Press, Cambridge 2002).

Beverley-Smith, Huw, Ohly, Ansgar and Lucas-Schloetter, Agnès, *Privacy, property and personality. Civil law perspectives on commercial appropriation* (Cambridge University Press, Cambridge 2005).

Blackshaw, Ian, Cornelius, Steve and Siekmann, Robert C.R. (eds.) *TV rights and sport – legal aspects* (T.M.C. Asser Press, The Hague 2009).

Bonassies, Pierre and Rudolf, Schlesinger, *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications, New York 1968).

Bourg, Jean-François and Gouguet, Jean-Jacques, *The Political Economy of Professional Sport* (Edward Elgar Publishing, Cheltenham 2010).

Boyd, Stephen, "Does English law recognise the concept of an "image" or personality right? Is the current position satisfactory in the light of modern sports marketing practice and the comparative legal position in competitive overseas' markets?" (2002) 13 Entertainment Law Review (1) 1.

Breitschaft, Andreas, "The future of the passing-off action in the law against unfair competition – an evaluation from the German perspective" (2010) 32 European Intellectual Property Review (9) 427.

Buraimo, Babatunde, "Stadium attendance and television audience demand in English league football" (2008) 29 Managerial and Decision Economics (6) 513.

Bussani, Mauro and Mattei, Ugo, "The Common Core Approach to European Private Law" (1998) 3 Colum. J. Eur. L. 339.

Carmichael, Fiona, Millington, Janet, and Simmons, Roberts, "Elasticity of Demand for Rugby League Attendance and the Impact of BskyB" (1999) 6 Applied Economics Letters (12) 797.

Carty, Hazel, *An analysis of the economic torts* (Oxford University Press, Oxford 2001).

Castendyk, Oliver, Dommering, Egbert and Scheuer, Alexander, *European Media Law* (Kluwer Law International, Alphen aan den Rijn 2008).

Colomo, Pablo Ibanez, "On the application of competition law as regulation: elements for a theory" (2010) 29 Yearbook of European Law (1) 261.

Cornish, William, Llewelyn, David, and Aplin, Tanya, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights* (Sweet & Maxwell, London 2010).

Davis, Jennifer, "Unfair competition law in the United Kingdom" in Hilty, Reto M. and Henning-Bodewig, Frauke (eds.) *Law against unfair competition. Towards a new paradigm in Europe* (Springer Verlag, Berlin 2007).

Davison, Mark J. and Hugenholtz, P. Bernt, "Football fixtures, horseraces and spin-offs: the ECJ domesticates the database right" (2005) 27 European Intellectual Property Review (3) 113.

Teles de Menezes Leitão, Luis Manuel, *Direito de Autor* (Alemdina, Coimbra 2011).

De Oliveira Ascensão, José, *Direito Civil – Direito de autor e direitos conexos* (Editora, Coimbra 2008).

Derclaye, Estelle, *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing, Cheltenham 2009).

Donders, Karen, *Public Service Media and Policy in Europe* (Palgrave Macmillan, Basingstoke 2012).

Dreier, Thomas and. Hugenholtz, P. Bernt (eds.) *Concise European Copyright Law* (Kluwer Law International, Alphen aan den Rijn 2006).

Ericsson, Seth, "Ambush marketing: examining the development of an event organizer right of association" (2011) Max Planck Institute for Intellectual Property and Competition Law Research Paper 2011, No. 11-19.

Evens, Tom, Iosifidis, Petros and Smith, Paul, *The Political Economy of Television Sports Rights* (Palgrave Macmillan, Basingstoke 2013).

Evens, Tom, Lefever, Katrien, Valcke, Peggy, Schuurman, Dimitri and De Marez, Lieven, "Access to Premium Content on Mobile Television Platforms: the Case of Mobile Sports" (2011) 28 Telematics and Informatics (1) 32.

Ferrari, Luca, "Legal Aspects of Media Rights on Football Events under Italian Law: Ownership, Exploitation and Competition Issues" (2003) The International Sports Law Journal (3) 4.

Forrest, David and Simmons, Rob, "New Issues in Attendance Demand. The Case of the English Football League" (2006) 7 Journal of Sports Economics (3) 247.

Forrest, David, Simmons, Rob and Szymanski, Stefan, "Broadcasting, Attendance and the Inefficiency of Cartels" (2004) 24 Review of Industrial Organization 243.

García, Jaume and Rodríguez, Plácido, "The Determinants of Football Match Attendance Revisited: Empirical Evidence from the Spanish Football League" (2002) 3 Journal of Sports Economics (1) 18.

Gardiner, Simon, Boyes, Simon and others, *Sports law* (Routledge, Abingdon 2012).

Geiger, Christophe, *Droit d'auteur et droit du public à l'information* (Litec, Paris 2004).

Geradin, Damien, "Access to Content by New Media Platforms: a review of the competition law problems" (2005) 30 European Law Review (1) 68.

Gerrard, Bill, "Competitive balance and the sports media rights market: what are the real issues?" in Jeanrenaud, Claude and Késenne, Stefan (eds.) *The Economics of Sport and the Media* (Edward Elgar Publishers, Cheltenham 2006).

Geiger, Christophe, "The right to the image of one's own property on the run: Has the brake finally been pulled on the privatisation of the public domain?" (2005) 36 International Review of Intellectual Property and Competition Law (6) 706.

Gielen, Charles, *Kort begrip van het intellectuele eigendomsrecht* (Kluwer, Deventer 2007).

Goldstein, Paul and Hugenholtz, P. Bernt, *International copyright. Principles, law, and practice* (Oxford University Press, Oxford 2012).

Gratton, Chris and Solberg, Harry Arne, *The economics of sports broadcasting* (Routledge, Abingdon 2007).

Hagen, Steffen, "Sports image rights in the Netherlands" (2011) The International Sports Law journal (3-4) 115.

Halgreen, Lars, *European Sports Law: a Comparative Analysis of the European and American models of Sport* (Forlaget Thomson, Copenhagen 2004).

Helberger, Nathalie, "The 'right to information' and digital broadcasting: About monsters, invisible men and the future of European broadcasting regulation" (2006) 17 Entertainment Law Review (2) 70.

Helberger, Nathalie, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (Kluwer Law International, Alphen aan den Rijn 2005).

Henning-Bodewig, Frauke, *Unfair competition law: European Union and Member States* (Kluwer Law International, The Hague 2006).

Harrison, Jackie and Woods, Lorna, *European broadcasting law and policy* (Cambridge University Press, Cambridge 2007).

Higgins, Iain, Boyd, Stephen and Hawkins, Richard, "Image rights" in Lewis, Adam and Taylor, Jonathan (eds.) *Sport: Law and practice* (Tottel Publishing, West Sussex 2008).

Hilty, Reto M. and Henning-Bodewig, Frauke, *Leistungsschutzrechte zugunsten von Sportveranstaltern?* (R. Boorberg, Stuttgart - München 2007).

Hilty, Reto M. and Henning-Bodewig, Frauke, *Law against unfair competition: towards a new paradigm in Europe?* (Springer, Berlin 2007).

Hilty, Reto M. and Henning-Bodewig, Frauke, "Leistungsschutzrecht für Sportveranstalter?" study commissioned by the German Football Association, the German Football League, the German Olympic Association, and others, Munich 2006.

Hugenholtz, P. Bernt, "Het Zwarte Schaep. Commercieel Portretrecht in de Periferie van het Recht van de Intellectuele Eigendom" in Visser, Dirk J.G. (ed.) *Commercieel portretrecht - 30 jaar 't Schaep met de vijf poten* (Delex, Amsterdam 2009).

Hugenholtz, P. Bernt, "Abuse of Database Right Sole-source information banks under the EU Database Directive" in Lévêque, François and Shelanski, Howard (eds.) *Antitrust, Patents, and Copyright: EU and US Perspectives* (Edward Elgar Publishing, Cheltenham 2005).

Jakobsen, Soren Sandfeld, "Denmark" in Blackshaw, Ian, Cornelius, Steve and Siekmann, Robert C.R. (eds.) *TV rights and sport – legal aspects* (T.M.C. Asser Press, The Hague 2009).

Jeanrenaud, Claude and Késenne, Stefan (eds.) *The Economics of Sport and the Media* (Edward Elgar Publishing, Cheltenham 2006).

Kamina, Pascal, *Film Copyright in the European Union* (Cambridge University Press, Cambridge 2002).

Kamperman Sanders, Anselm, *Unfair competition law. The protection of intellectual and industrial creativity* (Oxford Clarendon Press, Oxford 1997).

Korthals Altes, Willem F. and Schuijt, Gerardus A.I., *Sport en Informatiemonopolies* (Otto Cramwinckel Uitgever, Amsterdam 1991).

Lando, Ole, "The Common Core of European Private Law and the Principles of European Contract Law" (1998) 21 Hastings International and Comparative Law Review 809.

Lawrence, Clive and Taylor, Jonathan, "Proprietary rights in sports events" in Adam Lewis and Jonathan Taylor (eds.) *Sport: Law and Practice* (2nd edition, Tottel Publishing, London 2008).

Lefever, Katrien, *New Media and Sport: International Legal Aspects* (T.M.C. Asser Press, The Hague 2012).

Lefever, Katrien and Van Rompuy, Ben, "Ensuring Access to Sports Content: 10 Years of EU Intervention. Time to Celebrate?" (2009) 1 Journal of Media Law (2) 243.

Lewis, Adam and Taylor, Jonathan, *Sport: Law and Practice* (Tottel Publishing, West Sussex 2008).

Lindholm, Johan and Kaburakis, Anastasios, "Case C-403/08 and C-429/08 FA Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd, 4 Oct 2011" in Anderson, Jack (ed.) *Leading Cases in Sports Law* (T.M.C. Asser Press, The Hague 2013).

Lucas, André, Lucas, Henri-Jacques and Lucas-Schloetter, Agnés, *Traité de la propriété littéraire et artistique* (Lexis Nexis, Paris 2012).

MacQueen, Hector, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008).

Matzneller, Peter. "Short Reporting Rights in Europe: European Legal Rules and their National Transposition and Application in Exclusive Rights and Short Reporting (IRIS Plus 2012-4) (European Audiovisual Observatory, Strasbourg 2012).

McArdle, David, *Sports Dispute Resolution: Athletes, Law and Arbitration* (Taylor & Francis, London 2014).

Nafziger, James.A.R and Ross, Stephen F. (eds) *Handbook on international sports law* (Edward Elgar, Cheltenham 2011).

Ohly, Ansgar, "Kein wettbewerbsrechtliche Leistungsschutz für Amateurfussbalspiele" (2011) Gewerblicher Rechtsschutz und Urheberrecht (5) 436.

Ohly, Ansgar, *MPI studies on intellectual Perspektiven des geistigen Eigentums und Wettbewerbsrechts: Festschrift für Gerhard Schricker zum 70. Geburtstag* (Beck, München 2005).

Paal, Boris P., *Leistungs- und Investitionsschutz für Sportveranstalter* (Nomos, Berlin 2014).

Perry, Mark and Margoni, Thomas, "Ownership in complex authorship: A comparative study of joint works in copyright law" (2012) 34 European Intellectual Property Review (1) 22.

Poracchia, Didier, "Information du public et droit à l'image des sportifs" (2005) 7 Communication Commerce électronique (12) 12.

Prins, Rein-Jan, "Commercieel portretrecht in Frankrijk" in Visser, Dirk J.G.(ed.) *Commercieel portretrecht - 30 jaar 't Schaep met de vijf poten* (Delex, Amsterdam 2009).

Ques Mena, Luis, "Perspectivas sobre los derechos audiovisuales futbolisticos a la luz de las normas de la competenzcia" (2010) Revista jurídica de deporte y entretenimiento: deportes, juegos de azar, entretenimiento y música (28) 203.

Ricketson, Sam and Ginsburg, Jane C., *International Copyright and neighbouring rights – The Berne Convention and beyond* (Oxford University Press, Oxford 2006).

Rosati, Eleonora, "Judge-made EU copyright harmonisation: the case of originality", dissertation European university Institute 2012.

Sacco, Rodolfo, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 The American Journal of Comparative Law (1) 1.

Scanlan, Garey, "Personality, endorsement and everything: The modern law of passing off and the myth of the personality right" (2003) 25 European Intellectual Property Review (12) 563.

Scheuer, Alexander and Strothmann, Peter, "Sport as Reflected in European Media Law (Part I)" (2004) IRIS plus (4).
Schricker, Gerhard, *Urheberrecht Kommentar* (C.H. Beck, Munchen 2006).

Senftleben, Martin, "Commercieel portretrecht in Duitsland" in Visser, Dirk J.G. (ed.) *Commercieel portretrecht - 30 jaar 't Schaep met de vijf poten* (Delex, Amsterdam 2009).

Siekmann, Rob, *Introduction to European and Sports Law* (T.M.C Asser Press, The Hague 2012).

Siekmann, Rob and Soek, Jan-Willem (eds.) *The European Union and Sport* (T.M.C. Asser Press, The Hague 2005).

Sithigh, D. Mac, "Death of a Convention: Competition between the Council of Europe and European Union in the Regulation of Broadcasting" (2013) 5 Journal of Media Law (1) 133.

Spoor, Jaap H., Verkade, Feer W.F. and Visser, Dirk J.G., *Auteursrecht* (Kluwer, Deventer 2005).

Still, Mary, Jordan, Kate and Ryston-Pratt, Toby, "TV rights related to major sports events: the example of the Olympic Games" in Blackshaw, Ian (ed.) *TV rights and sports: legal aspects* (T.M.C. Asser Press, The Hague 2009).

Taylor, Jonathan and Lawrence, Clive, "Proprietary rights in sports events" in Lewis, Adam and Taylor, Jonathan, *Sport: Law and Practice* (Tottel Publishing, West Sussex 2008).

van Engelen, Dick C.J.A., *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten* (W.E.J. Tjeenk Willink, Zwolle 1994).

Van Rompuy, Ben, "Cunning as a Fox. Dutch competition authority clears long-term acquisition of Dutch football broadcasting rights" (2013) 34 European Competition Law Review (1) 223.

Van Rompuy, Ben, *Economic efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency considerations under Article 101 TFEU* (Wolters Kluwer Law & Business, Alphen aan den Rijn 2012).

Verheyden, Delphine, "Ownership of TV rights in professional football in France" (2003) The International Sports law journal (3) 17.

Vallee, A., "European Convention on Transfrontier Television" (1998) 10 Mediaforum (11/12) 352.

Vrey, de Rogier W., '"Towards a European unfair competition law: A clash between legal families", dissertation University of Utrecht 2005.

Visser, Dirk J.G., *Commercieel portretrecht - 30 jaar 't Schaep met de vijf poten* (Delex, Amsterdam 2009).

Vivant, Michel and Bruguière, Jean-Michel, *Droit d'auteur et droits voisins* (Dalloz, Paris 2012).

Wadlow, Christopher, *The Law of Passing-off: Unfair Competition by Misrepresentation* (Sweet & Maxwell, London 2004).

Wise, Aaron.N. and Meyer, Bruce.S., *International sports law and business* (Kluwer Law International, Alphen aan den Rijn 1997).

Zeno Zencovich, Vincenzo, "La statalizzazione dei diritti televisivi sportive" (2008) 24 Il diritto dell'informazione e dell'informatica (6) 695.

ANNEXES

ANNEX I TABLES CHAPTER 1

Countries	AUSTRIA	BELGIUM (French and Flemish Communities)	BULGARIA	CROATIA	CYPRUS
1. Is there a remedy against UPLOADERS?	1	1	1	1	1
If yes is the remedy based on: a) copyright	0	0	0	0	0
b) related rights	0	0	0	0	0
c) special right	0	0	0	0	0
d) house right	1	1	1	1	1
2. Is there an exclusive right (other than house right) to record the game?	0	0	1	0	0
If yes, will uploaders be infringing such rights by uploading?	0	0	could be, not clear ("television and radio broadcasting)	0	0
C. Is professional vs. Amateur sport relevant?	0		0	0	0
Is private (exclusive used) land vs. Public land relevant?	0	0	1	0	0
Is access restriction (tickets, price, registration, etc) relevant?	1	1	0	1	1
Is the type of sport relevant?	0	0	0	0	0,5
Are there any other relevant observations	0		There is a right to TV and radio broadcasting, owned by clubs regularly registered at the relevant federation, but is a kind of sui generis and seems to have an admistrative nature,		Until 2004 there was an exclusive right allowing NFF for the broadcasting of football matches. It was contained in the bylaws of the NFF STADIUM OWNERSHIP
0=no; 1=yes; 0.5=check details					

Countries	CZECH REPUBLIC	DENMARK	ESTONIA	FINLAND	FRANCE
1. Is there a remedy against UPLOADERS?	1	1	1	1	1
If yes is the remedy based on: a) copyright	0	0	0	0	0
b) related rights	0	0	0	0	0,5
c) special right	0	1	0	0	1
d) house right	1	1	1	1	1
2. Is there an exclusive right (other than house right) to record the game?	0	0,5	0	0	1
If yes, will uploaders be infringing such rights by uploading?	0	0	0	0	1 (if commercial)
3. Is professional vs. Amateur sport relevant?	1	0	0	0	0
Is private (exclusive used) land vs. Public land relevant?	1	1	0		0
Is access restriction (tickets, price, registration, etc) relevant?	1	1	1	1	0
Is the type of sport relevant?	1	0	0	0	0
Are there any other relevant observations	Football stadiums are usually city owned. FA By-law attributes rights to competition organiser	1. Remedy based on commercial missapropriation (forbidding "game-in-progress" news transmission). 2. Power of attorney	Sport Act, but says nothing. House rule.	1.c Limited recognition of "risk theory" for sports organisers, but based on ownership/exclusive use of stadium + contractual agreements. Limits in consumer law and unfair business practice.	Abnormal trouble for the image of the stadium but not relevant. Droit d'arene is for press to attend, but not recording unless so authorized. There has been 1 decision recognizing copyright in sailing race, but harshly criticized. New right in Code du sport "exclusive right on the exploitation of event/competition for organisers and federations". Not limited in time. Similar to "fonde de commerce" (See France SubQ 1b). Legal organisers are defined

Countries	GERMANY	GREECE	HUNGARY	IRELAND	ITALY
1. Is there a remedy against UPLOADERS?	1	1	1	1	1
If yes is the remedy based on: a) copyright	0	0	0	0	0
b) related rights	0	0	0	0	1
c) special right	0	0	0	0	0,5
d) house right	1	1	1	1	1
2. Is there an exclusive right (other than house right) to record the game?	0	1	1	0	1
If yes, will uploaders be infringing such rights by uploading?	0	1	1	0	1
3. Is professional vs. Amateur sport relevant?	0	0	0	0	1
Is private (exclusive used) land vs. Public land relevant?	0	0	0	0,5	0
Is access restriction (tickets, price, registration, etc) relevant?	1	0	0,5	1	0
Is the type of sport relevant?	0	0	0	0	0
Are there any other relevant observations	In 2009 Court of Appeal ruling against spectators of amateur football uploading videos online, for unfair competition. BGH in 2010 overruled saying there is no right, no houseright, no identical work exploited, and not inappropriate. Contractually is possible to limit access to radio and tv.	Based on tort law and specific regulation of amateur and professional sports. Hosts usually have the right and can act against uploaders.	Sport rights, originally belong to athletes, but automatically transferred to clubs. Sport association have right to exploit those rights in relation to the competition they organize. Only if no broadcasting is made at all, uploaders might prevail for freedom of info.	No relevant case law	Decree of 2008 established joint-ownership of rights. Rights cannot be transferred to NBC, but as exclusive licensee NBC can have action. Law 2007 & Decree 2008 created joint ownership (league + clubs) and centralized commercialization (similar to UEFA).

Countries	LATVIA	LITHUANIA	LUXEMBURG	MALTA	NETHERLANDS
1. Is there a remedy against UPLOADERS?	0	0	0	0	0
If yes is the remedy based on: a) copyright	0	0	0	0	0
b) related rights	0	0	0	0	0
c) special right	0	0	0	0	0
d) house right	1	1	1	1	1
2. Is there an exclusive right (other than house rightl) to record the game?	0	0	0	0	0
If yes, will uploaders be infringing such rights by uploading?	0	0	0	0	0
3. Is professional vs. Amateur sport relevant?	0	0	0	0	0
Is private (exclusive used) land vs. Public land relevant?	0	0	0	0	1
Is access restriction (tickets, price, registration, etc) relevant?	1	1	1	1	1
Is the type of sport relevant?	0	0	0	0	0
Are there any other relevant observations	Remedies are contractual.	0	0		House right recognized by Supreme court cases.

Countries	POLAND	PORTUGAL	ROMANIA	SLOVAKIA	SLOVENIA
1. Is there a remedy against UPLOADERS?	0	0,5	0	0	0
If yes is the remedy based on: a) copyright	0	0	0	0	0
b) related rights (specify)	0	0,5	0	0	0
c) special right	0	0,5	0	0	0
d) house right	1	1	1	1	1
2. Is there an exclusive right (other than house right) to record the game?	0	0,5	1	0	0
If yes, will uploaders be infringing such rights by uploading?	0	1	1	0	0
3. Is professional vs. Amateur sport relevant?	0	0,5	0	0	0
Is private (exclusive used) land vs. Public land relevant?	0	1	0	0,5	0
Is access restriction (tickets, price, registration, etc) relevant?	1	1	0	0	0
Is the type of sport relevant?	0	0	0	0	0
Are there any other relevant observations	Contracts	Not clear if legislatively repealed but courts enforced until recently. In football act, individual ownership of clubs of the rights of transmission and summary of games. Supreme courts says such right is not absolute (only between parties). Football Regulation gives an exclusive right to record to sports organiser. Organization is the constitutive element.	Sort Law says sporting structures and associations own exclusive rights over competitions and broadcasting, TV & radio	Sport Act gives federation the possibility to establish who has the right to exclusive broadcast, but only binding for federations members. No case law.	One authors sustains that the audiovisual production could not be protected because based on an unprotected work. No case law.

Countries	SPAIN	SWEDEN	UK
1. Is there a remedy against UPLOADERS?	0,5	0	0
If yes is the remedy based on: a) copyright	0	0	0
b) related rights	0	0	0
c) special right	0	0	0
d) house right	1	1	1
2. Is there an exclusive right (other than house right) to record the game?	0	0	0,5
If yes, will uploaders be infringing such rights by uploading?	0	0	0,5
3. Is professional vs. Amateur sport relevant?	1	0,5	0
Is private (exclusive used) land vs. Public land relevant?	1	0,5	1
Is access restriction (tickets, price, registration, etc) relevant?	1	1	1
Is the type of sport relevant?	0	0	0
Are there any other relevant observations	There are regulations at the Federation level recognizing ownership in broadcasting to leagues. Constitutional Court and Competition Agency recognize that broadcasting rights are part of property rights, and benefit who bear the risk, the sports organiser. Not completely accepted in doctrine. Actions for unfair competition also possible depending on circumstances.	Admin court of appeal declared football match is not a work. Swidish Football Ass. organizes competitions, but clubs the event, they take the financial risk, therefore they should own bradcast/media rights, but FootAss. does not agree... Apparently, the audiovisual production (including comment) is not considered a work. Case cited. Uploaders infringe (only on contractual basis).	Sport is not copyright, canadian authority. Australian precedent declaring there is no property nor quasi-property in spectacle. Commentaries on live broadcast, themselves rebroadcast as live where held not infringing copyright nor BBC's goodwill (no passing-off). Mention of arena rights, but just as the owner of stadium + well drafted contracts (house right). Sometimes remedies based on confidence. Recognizes that there have been lobbying attempts in order to obtain a "sports organisers' right" on the events. But says the main advantage would be that to obtain a right to bet.

ANNEX II TABLES CHAPTER 3

The answers provided by the national experts were completed by a desk research and cross-checked with the database of the University of Luxembourg translating into English the national laws and regulations implementing the Audiovisual Media Services Directive.

Countries	**AUSTRIA**	**BELGIUM (Flemish Community)**	**BELGIUM (French Community)**	**BULGARIA**	**CROATIA**
Is there any remedy?	YES	YES	YES	YES	YES
What is the national authority competent?	Austrian Communications Authority	Flemish Regulator for the Media (VRM)	Audiovisual High Council (CSA)	Court of First Instance	Electronic Media Council
Definition of event of high interest to the public	Notion of *event of public information interest* defined as an event which is expected to receive wide media coverage due to its importance.	Notion of *event for which exclusive broadcasting rights have been granted* (not defined)	Notion of *public event* defined as an event which is not private and for which there is no obstacle to its public availability.	Notion of *event of high interest to the public* defined as social, political, economic, sports or entertainment events which affect the majority of the audience	Notion of events of high interest to the public (not defined).
Right applies to individual event and/ or entire competition day	Entire competition day according to the law/ but individual event according to case law		Each event	Each event	Both: one report per self-contained event in case of several organisationally self-contained elements; one report per day in case of event lasting more than one day.
Duration of short extracts	90 seconds max.	180 seconds max. (6 minutes/per competition day/per sport discipline; up to 15 minutes for extracts shown in current affairs programmes)	90 seconds max.	90 seconds max.	90 seconds max.
Extracts only shown in general news programmes	YES	Not only (can also be shown in current affairs programmes)	Not only (can also be shown in frequently scheduled current affairs programmes)	Not only (can also be used in current affairs programmes)	YES
Definition of general news programmes	NO	NO	A current affairs programme is defined as an informative programme dedicated to current affairs, including events.		
Waiting period to broadcast extracts	After 30 minutes following the end of the event (as established by a non-binding decision of the regulatory authority)	YES after first broadcast by exclusive broadcaster (except when the secondary broadcaster has made the recording, it is free to choose the time of broadcasting)	YES after at least 20 minutes after the end of the event		
Period to use extract after the end of event	Within 24 hours following the first broadcast (as established	Within 24 hours (during the week) or during 48 hours (during the weekend)	Not provided by the regulation	Within 24 hours after the end of the event	

	by a non-binding decision of the regulatory authority)	according to the explanatory memorandum of the law			
Use of short reports in non-linear service	YES (under the condition the news programme is offered in the same form on a deferred basis)	YES (under the condition the same programmes are used under the same condition and by the same media service provider)	YES (as Article 15 (5) AVMSD)	YES (as Article 15 (5) AVMSD)	YES under the condition it is offered on a deferred basis by the same media service provider (only if the same programme is offered on a deferred basis by the same media service provider)
Access conditioned to compensation	Not exceeding additional costs directly related to the provision of access	Fair payment on the basis of the technical costs incurred (however when short reporting made for current affairs programmes, compensation can take into account broadcasting rights)	Fair, reasonable and non-discriminatory compensation not exceeding additional costs directly incurred for the recording of extracts	In general free of charge; otherwise not exceeding direct additional costs for providing access	Right to a compensation of actual costs, not exceeding additional costs directly related to the provision of access
Access to the signal	YES	YES, also right to use recordings	YES	YES	YES
Access to the venue	NO	YES with a right to make own recordings in case access to signal is denied by the primary broadcaster	YES	YES	YES
Images in the margin of the event included in the right of short reporting	No elements for response (law, case law)	YES	YES		
Origin of the broadcaster entitled to get access	Broadcasters established in countries participating in the event	EU	EU	EU	EU
Applicable law for access to the signal/ cross-border cases		Access first requested from an operator under the same jurisdiction.	Access first requested from an operator under the same jurisdiction he primary broadcaster.	Access first requested from an operator under the same jurisdiction.	
Indication of source	YES	YES (logo)	YES (including logo)	YES (name and logo)	YES
Legal basis	Art 5. FERG (the Exclusive Television Rights Act)	Art. 118-126 of the Flemish Decree on Radio Broadcast and Television	Art.3 of the Audiovisual Media Services Decree (+ Coordinating Order of 26 March 2009)	Art.19 c, para 1 of the Radio and TV Act	Art. 45 of the Croatian Electronic Media Act
Other					

Grey fields: indeterminate answers

Countries	CYPRUS	CZECH REPUBLIC	DENMARK	ESTONIA
Is there any remedy?	YES	YES	YES	YES
What is the national authority competent?	Cyprus Broadcasting Authority	Court	Court	Court
Definition of event of high interest to the public	Notion of events of high interest to the public (undefined)	Notion of events of high interest to the public (undefined)	YES (Events newsworthy in the sense they appeal to a broader number of people, and which are of interest to people who would not normally follow similar events)	Notion of events of major importance to society
Right applies to individual event and/or each competition day			Distinction between a multidiscipline sport (right applies to each discipline) and simple type of sport (right applies to each competition day)	
Duration of short extracts	180 seconds max.	90 seconds max.	90 seconds max.	90 seconds max.
Extracts only shown in general news programmes	Not only (in news bulletins and current affairs programmes)	YES	YES	YES (the primary broadcaster may require priority to broadcast the event in TV news programme)
Definition of general news programmes		"A programme consisting of news, reports and interviews focusing on the current course of events in internal and foreign politics, culture, public life, crime or sport, including a special news block which regularly follows after such a programme unit"	"A general news programme is characterised by being a programme consisting of events which have news value and deal with more than a single topic or single event during the programme. Depending on the circumstances, a general news programme can consist exclusively of events within a single category, for instance sport"	
Waiting period to broadcast extracts			No time frame determined; however short extracts may be used at the end of the transmission as long as they have news value.	Broadcast on the date of the event and the following day
Period to use extract after the end of event	Within 24 hours after the end of the event		No time frame determined (idem)	Determined in an agreement between the primary and secondary broadcasters,
Use of short reports in non-linear service	YES (only if the same audiovisual media provider offers a recording of the same programme)	YES (under the condition it is offered as recording by the same television broadcaster)	YES (as Article 15 (5) AVMSD)	YES (only after live transmission of the news programmes by the exclusive broadcaster)
Access conditioned to compensation	Not exceeding the direct costs resulting from the provision of access.	Not exceeding additional costs directly related to the provision of access	No form of compensation of expenses can be requested	Compensation for expenses directly connected to the provision of access
Access to the signal	YES	YES	YES	YES

Access to the venue	NO	NO	NO	NO
Images in the margin of the event included in the right of short reporting	YES since ancillary images in the margin of the main event but in connection with it should be included in the concept of "event".		In the absence of obligation to grant access to the venue, no legal provision requires the primary broadcaster to grant access to a secondary broadcaster to record images in the margin of the sports event.	
Origin of the broadcaster entitled to get access	EU	EU	EEA	EU + ECTT
Applicable law for access to the signal/cross-border cases	Access first requested to an operator under the same jurisdiction	Access requested to an operator under the same jurisdiction	Access first requested to an operator under the same jurisdiction	
Indication of source	YES (logo)	YES		YES
Legal basis	Article 28B of the law on radio and television (Law 7(i) 1998 as amended)	Art. 34 of the Act on Radio and Television Broadcasting	Art. 90 (3) of the Radio and Television Act; Order no. 106 on short news report from events of high interest to the public; Section 25 a of the Copyright Act.	Art. 49 and 50 of the Media Service Act
Other	The Cyprus broadcasting authority found that the transmission of football matches extracts after 24 hours after the end of the game was in violation of Article 28B of the applicable law (case 11/2003 (57))		Link with Copyright law: no copyright infringement in the broadcast when a broadcaster grants access under Section 90(3) of the Radio and Television Act + use of extracts in accordance with Section 25 of Copyright Act	Art.22 of the Media Services Act encourages self-regulation. The Explanatory memorandum of the law clarifies that the term "exclusive rights" used in the context of the Media Services Act does not have the same meaning as in the Copyright Act since the rights are not necessarily linked to copyright holder.

Grey fields: indeterminate answers

Countries	FINLAND	FRANCE	GERMANY	GREECE
Is there any remedy?	YES	YES	YES (only for access to the venue)	YES
What is the national authority competent?	District Court of Helsinki	Civil or Commercial Courts	Civil Courts	National court or National Council for Radio and Television
Definition/notion of event of high interest to the public	Event of high interest to the public (which may be sporting events, as stated in the preparatory works of the Copyright Act).	No definition but French doctrine considers that events of high interest to the public are covering any kind of events, whatever their nature (including music festivals).	Notion of events of general interest to the public (undefined)	YES, criteria such as the general recognition and importance of the event within the population, the participation of Greek clubs in stages, or the fact that the event has been broadcast on free television and attracts large television audiences.
Right applies to individual event and/or each competition day	(Each day of competition for the same sport is an event, as provided in the preparatory works of the amendment to the Copyright Act)	Each day of competition or event defined as the period starting from the beginning of the competition or event during a given calendar day until midnight the same day; by exception, for a team sport, a competition day designates the period during which all sporting events belonging to the same phase of competition occur.	Each competition day for access to the venue	Each individual event or part of event transmitted simultaneously
Duration of short extracts	(90 seconds max., as provided in the preparatory works of the amendment to the Copyright Act)	90 seconds max. per hour of air time and per day of competition/ But following Courts' decisions, overall length of short extracts limited to 30 seconds per event and 90 seconds by day	90 seconds max.	90 seconds max.
Extracts only shown in general news programmes	YES (sports news included)	Not only	YES	YES
Definition of general news programmes	NO	News programmes include regular news updates; multisport magazines and general news programmes broadcast at least once a week or sports news programmes dedicated to one sport and broadcast at least once per week.	NO	
Waiting period to broadcast extracts	Extracts may be used after the TV transmission by the primary broadcaster	Extracts can only be shown after the first broadcaster has reported on the game.		Primary broadcaster can impose a fair waiting period
Period to use extract after the end of event		Within 24 hours after broadcast by the primary broadcaster for daily news programmes; or in the first edition if weekly news programmes.		Primary broadcaster can impose a fair time-limit of use

Use of short reports in non-linear service	YES (no further condition).	YES (condition only linked to the period of time during the short extracts are available).	YES (no distinction between linear and non-linear services).	YES (under the condition that the same programme is offered as a recording by the same media service provider)
Access conditioned to compensation	No compensation is required by the law		Right to claim for fair compensation, "adequate payment which is appropriate to the nature of the short report" (however conformity of the legal provision with EU law is questioned by doctrine).	Reimbursement of access costs (in line with the Directive)
Access to the signal		YES	YES as an exception in reason of limited capacity of the venue	YES
Access to the venue	Not provided by the law but access to the venue via accreditation possible.	Not provided by the law but provided by the French Football Federation's Regulation and the French Federation of Automobile Sport (*Droit d'arène*).	YES as a general rule	Not provided by the law. But NFF's or Super League Greece's regulations can regulate access to sports venues.
Images in the margin of the event included in the right of short reporting		YES (as *reportage d'ambiance*)	YES	
Origin of broadcaster entitled to access	EEA	EU + EEA	Europe	EU
Applicable law for access to the signal/cross-border cases	No explicit cross-border mechanisms	Access first sought to operator under the same jurisdiction, by default to the primary broadcaster established in France		Access first sought to the operator under the same jurisdiction; by default to the primary broadcaster established in Greece
Indication of source	YES	YES (for 5 seconds mini, during the broadcast of each extract)		YES
Legal basis	Section 48, para. 5 of the Copyright Act (404/1961)	CSA' s Decision No.2013-2/ Art. L 333-6 and L.336-7 of the French Sports Code/Article R.333-4 of the French Code of Sports	Article 5 RStV (Rundfunkstaatsvertrag)/Interstate Broadcasting Law	Art, 16 of Presidential Decree 109/2010
Other	Definition of acceptable short extracts is left to the established practices in the field of broadcasting	Validity of the CSA's decision No.2013/2 challenged before Council of State + recent public consultation on the implementation of the Decision		

Grey fields: indeterminate answers

Countries	HUNGARY	IRELAND	ITALY	LATVIA
Is there any remedy?	YES	YES	YES	YES
What is the national authority competent?	Hungarian Media Council	Courts	Italian Media Authority (AGCom)	National Electronic Mass Media Council or Civil Court
Definition of event of high interest to the public	Definition of events of major importance for society (right to short reporting applicable to events of major importance)	No definition	YES, defined as a single event such as a sports match, or a cultural, artistic or religious event, whose importance to the public is well recognized and which is organized in advance by an event organiser legally entitled to sell rights.	Definition of "important event for community of Latvia" following at least two of the following criteria: (1) national or cultural event of special significance for inhabitants of Latvia; (2) event is a sport game or competition of international character, where national team of Latvia is taking part; (3) event has traditionally been broadcast for free via TV and has attracted attention of significant part of inhabitants of Latvia,
Right applies to individual event and/or each competition day			Each event	Each event
Duration of short extracts	50 seconds max.	Should be defined in a Code of Practice (established by the Broadcasting Authority of Ireland)	90 seconds max. (the previous length set at 180 seconds has been invalidated by administrative courts)	90 seconds max.
Extracts only shown in general news programmes	YES	YES	YES (express exclusion of entertainment programmes)	No limitation
Definition of general news programmes				
Waiting period to broadcast extracts		Should be defined in a Code of Practice (established by the Broadcasting Authority of Ireland)	1 hour minimum after the end of the event	No limitation
Period to use extract after the end of event		Should be defined in a Code of Practice (established by the Broadcasting Authority of Ireland)	Within 48 hours after the end of the event	No limitation
Use of short reports in non-linear service	YES under the condition that programmes containing the brief news report are identical in both the linear and in the on-demand audiovisual media services.	YES (as Article 15 (5) AVMSD)	YES (as Article 15 (5) AVMSD)	The law excludes on-demand services unless they are provided by "those electronic mass media, which have distributed the relevant news broadcast prior to its inclusion in the catalogue as a part of its programme".
Access conditioned to compensation	Not exceeding additional costs directly incurred in providing access	Not exceeding additional costs directly incurred in providing access	Reimbursement of technical costs	Not exceeding costs of broadcasting or costs of copying
Access to the signal	YES (as well as access to the footage)	YES	YES	YES
Access to the venue	YES	Not provided by the law. But could be based on contractual terms	Not provided by law but registered media operators can have accessed to the venue	NO

Images in the margin of the event included in the right of short reporting				Not provided by law
Origin of the broadcaster entitled to get access	EU	EU	EU	EU + Members of the ECTT
Applicable law for access to the signal/cross-border cases	Access first sought to operator under the same jurisdiction, by default to the primary broadcaster established in Hungary.	Access first sought to operator under the same jurisdiction, by default to the primary broadcaster established in Ireland.	Access first sought to operator under the same jurisdiction, by default to the primary broadcaster established in Italy.	
Indication of source	YES	YES		YES
Legal basis	Art. 19 of Media Act	Regulation 17 of European Communities (Audiovisual Media Services) Regulations 2010	Art.32 quater of Decree of 31 July 2005 as amended + AGCom OM's Regulation 667/10/CONS, as amended by AGCom's Regulation 392/12/CONS	Art. 27 (4)-(6) of the Electronic Mass Media Law
Other	Other remedies could be based on fair dealing for the purpose of providing information (Art.36(2) and 37 of Copyright Act)	It should be noted that originally the conditions and modalities concerning the provision of short extracts should have been defined by a self-regulatory code of practice. The Regulation was amended in 2012 to require from the BAI the adoption of a Code of Practice instead.		

Grey fields: indeterminate answers

Countries	LITHUANIA	LUXEMBOURG	MALTA	NETHERLANDS
Is there any remedy?	NO in the absence of list of events of high interest to the public	YES	YES	YES
What is the national authority competent?		Independent Television Commission	Broadcasting Authority or Civil Court	Dutch Courts (guidance on interpretation of modalities can be provided by the Dutch Media Regulator)
Definition of event of high interest to the public		NO	Event of high interest to the public transmitted on an exclusive basis by a primary broadcaster	Notion of events of major importance
Right applies to individual event and/or each competition day		Not provided by the law	If an organised event is composed of several organisationally self-contained elements, each self-contain element shall be deemed an event; Right to produce one short report per day of competition.	The entire competition day is a single continuous event
Duration of short extracts	90 seconds max.	90 seconds max.	90 seconds max.	90 seconds (exception: 180 seconds)
Extracts only shown in general news programmes	YES	YES	YES	YES
Definition of general news programmes				
Waiting period to broadcast extracts	Short news reports are not broadcast earlier than the end of the live transmission of the event.	No rule	No broadcast before the event ends or before the end of a single day of a multi-day event	No broadcast before the exclusive rights to the event have been used for the first time
Period to use extract after the end of event		Not provided by the law	Within 24 hours after the end of the event	Within 24 hours
Use of short reports in non-linear service		YES (as Article 15 (5) AVMSD)	YES (as Article 15 (5) AVMSD)	YES
Access conditioned to compensation	Not exceeding additional costs directly incurred in providing access	Not exceeding additional costs directly incurred in providing access	Appropriate compensation for technical costs incurred but in no case financial compensation to cover the cost of television rights.	Not exceeding additional costs directly incurred in providing access
Access to the signal	YES	YES	YES	YES (in identical form by the same media service provider)
Access to the venue	NO	NO (but the law enables exclusive broadcasters to provide an equivalent system of access without further defining it)	YES	YES
Images in the margin of the event included in the right of short reporting	No legal provisions but likely to fall under the category of short news report and, thus, be subject to the freedom of the access			NO
Origin of the broadcaster entitled to get access	EU + EEA	EU + EEA	EU	EU
Applicable law for access to the signal/cross-border cases	Access first sought to an exclusive broadcaster under the same		Access first sought to an exclusive broadcaster under the same	

	jurisdiction as the secondary broadcaster		jurisdiction as the secondary broadcaster	
Indication of source	YES	YES	YES	YES
Legal basis	Art. 38 (1-5) of the Law on Provision of Information to the Public	Art. 28ter of the Law on Electronic Media	Chap. 350 of the Maltese Broadcasting Act; Regulation SL 350.28 Broadcasting (Short News Reporting) Regulations	Art. 5.4 of the Dutch Media Act and Dutch Media Regulation (2008 Mediabesluit)
Other			Remedies could also be grounded on the copyright exceptions relating to the reporting of current events or the right of quotation for criticism or review (Art 9 (1)(j) and (k) of the Copyright Act).	Dutch case law on the link between the right to use short extracts and the right of access to short extracts in the context of copyright exceptions.

Grey fields: indeterminate answers

Countries	POLAND	PORTUGAL	ROMANIA	SLOVAKIA
Is there any remedy?	YES	YES	YES	YES
What is the national authority competent?	National Broadcasting Council	Media Authority or Courts	National Audiovisual Council (NAC)	Council for Broadcasting and Retransmission (CBR) and Court
Definition of event of high interest to the public		Events of general public interest	Notions of events of public interest and events of general interest, both not defined. Regime of right to short reporting applicable to events of public interest.	Notion of events evoking higher public interest, not defined.
Right applies to individual event and/or each competition day			Elements that are autonomous from an organizational standpoint and that are components of a general interest event are deemed to be independent events.	If an event of high interest to the public comprises several mutually independent parts, each of these parts shall be regarded as an event; If an event of high interest to the public takes place over two or more days, at least one day shall be regarded as an independent part.
Duration of short extracts	90 seconds max.	90 seconds max.	90 seconds max.	90 seconds max.
Extracts only shown in general news programmes	Not only, but also in sport programmes. Up to three times in the programme	Only in regular programmes of general information	YES	YES
Definition of general news programmes				
Waiting period to broadcast extracts			After the end of the transmission by the primary broadcaster unless it did not broadcast the event within 24 hours of its occurrence.	After the primary broadcaster had the opportunity to report on the event
Period to use extract after the end of event	Within 24 hours	Within 36 hours after the end of the event	Within 24 hours after the initial transmission	Within 24 hours after the first broadcast
Use of short reports in non-linear service		Yes (but only if included in programmes previously broadcast by the same operator in television programme services)	YES (as Article 15(5) AVMSD)	YES
Access conditioned to compensation	Payment of costs for the provision of access	Costs resulting from making the signal available	Not exceeding additional costs directly incurred in providing access	Reimbursement of reasonable costs incurred in providing access
Access to the signal	YES	YES	YES	YES
Access to the venue	YES	Provided by the Statute of Journalists (right of access to public places for information purposes) but not by the law	YES	Not expressly provided by the law but possible
Images in the margin of the event included in the right of short reporting		NO		
Origin of the broadcaster entitled to get access	EU + Members of the ECTT	EU	EU (access limited to one foreign broadcaster/EU Member State)	EU

Applicable law for access to the signal/cross-border cases	Access first sought to an exclusive broadcaster under the same jurisdiction as the secondary broadcaster	Access requested to a primary Portuguese broadcaster in case there is any	Access requested to a primary Romanian broadcaster in case there is any	Access first sought to operator under the same jurisdiction, by default to the primary broadcaster established in Slovakia
Indication of source	YES	YES	YES (name and logo)	YES
Legal basis	Art. 20c of the Broadcasting Act	Art. 33 of the Television Act	Art. 84 to 86 of the Audiovisual Law	§ 30 Act Nr.308/2000 on broadcasting and retransmission
Other			Online public consultation launched in January 2013 by NAC to define in particular the concept of event of public interest. Definition of short reports: "brief succession of images and sounds regarding a public interest event, with a view to informing the public on essential aspects of the respective event".	

Grey fields: indeterminate answers

Countries	SLOVENIA	SPAIN	SWEDEN	UNITED KINGDOM
Is there any remedy?	YES	YES	YES	YES (only on the basis of the fair dealing exception)
What is the national authority competent?	Court	Court of First Instance	Court	OFCOM (Regulator) and Court
Definition of event of high interest to the public	Important events (not defined)	Event of general interest to society (not defined)	Events of particular interest (defined as events of interest for a broad majority of the general public)*	current events and listed (sporting) events
Right applies to individual event and/or each competition day	single set of events or competition		(each individual event)*	No rule
Duration of short extracts	90 seconds max.	180 seconds (free of charge)	No longer than what is justified by the informative purpose; duration to be determined on a case-by-case (guidance: 90 seconds max. only in exceptional case; otherwise, length lower)*	(in relation to football matches, 60 seconds max/match or 3 minutes/programme hour)**
Extracts only shown in general news programmes	YES	Only for general information programmes	General news programmes and sports news programmes	(YES but possible to include a sports news summary)**
Definition of general news programmes				
Waiting period to broadcast extracts		Not provided by the law	(NO-extracts allowed to be shown even during events)*	No rule
Period to use extract after the end of event		Not provided by the law		(up to 6 times within 24 hours of the primary broadcast)**
Use of short reports in non-linear service	Only if programme of the primary broadcaster is offered in non-linear service	YES (as Article 15(5) AVMSD)	(YES)*	(NO)**
Access conditioned to compensation	Not exceeding additional costs directly incurred in providing access	Only compensation for costs associated with assisting in the preparation of news summary		(NO)**
Access to the signal	YES	YES	YES	(YES)**
Access to the venue	NO	YES	NO	NO but many event organisers have adopted policies to grant access to the stadium.
Images in the margin of the event included in the right of short reporting	NO			
Origin of the broadcaster entitled to get access	EU	EU	EEA	
Applicable law for access to the signal/cross-border cases	Access first sought to operator under the same jurisdiction			
Indication of source	YES			(YES, of 4 seconds minimum)**

Legal basis	Art. 33 of the Audiovisual Media Services Act	Art. 19.3 of the General Law on Audiovisual Communications Act 7/2010	Art. 48 a of the Copyright Act + Chap. 5 (Sec.10) of the Radio and Television Act	Art. 30 (2) & (3) Copyright Designs and Patents Act (fair dealing): provision on criticism, review and news reporting; Section 137 of the Broadcasting Act 1998: no copyright infringement in the broadcast or cable programme in case of short reporting
Other		Following Courts' decisions, the right to be informed of the results of sports events is a part of the Constitutional right of information. Likewise, a broadcaster has the right to access stadiums to exercise its constitutional right of information. References in Art. 19.3 to citizens' right of information	Article 15 of the AVMSD is implemented in the Copyright Act.	Most of the rules are based on a the Sports News Access Code of Practice. The Code governs the use of UK-based broadcasters' signals and recordings in their broadcasts. However the rules only apply if the primary and the secondary broadcasters have signed the Code of Practice.

Grey fields: indeterminate answers;
* not provided by the law but by the travaux préparatoires of the law in Sweden;
** not provided by the law by the Sports News Access Code of Practice in UK

ANNEX III NATIONAL CORRESPONDENTS

Austria	Dr. Stefan Korn	Attorney at law, Partner Korn Rechtsanwälte OG, Vienna
Belgium	Research team	
Bulgaria	Plamena Georgieva	Attorney at law, Senior associate Dimitrov, Petrov & Co, Sofia
Croatia	Vanja Kovacevic	Attorney at law Divjak Topic Bahtijarevic Law Firm, Zagreb
Cyprus	Tatiana-Eleni Synodinou	Law Faculty, University of Cyprus
Czech Republic	Dr. Pavel Hamernik	Institute of State and the Law of Czech Academy of Sciences
Denmark	Prof. Dr. Lars Halgreen	Attorney at law, Partner Johan Schlüter advokatfirma, Copenhagen
Estonia	Katarina Pijetlovic	Law School, Tallinn University of Technology
Finland	Anette Alén-Savikko and Dr. Taina Pihlajarinne	Institute of International Economic Law, University of Helsinki
France	Fabienne Fajgenbaum	Attorney at law, Partner Nataf Fajgenbaum Associés, Paris
Germany	Dr. Michael Gerlinger	Legal Director, FC Bayern München AG
Greece	Andreas Zagklis	Attorney at law, Associate Martens Rechtsanwälte, Munich
Hungary	Dr. Péter Rippel-Szabó	Attorney at law, Associate Bird & Bird, Budapest
Ireland	Gary Rice	Attorney at law, Partner Beauchamps Solicitor, Dublin
Italy	Luca Ferrari	Attorney at law, Partner CBA Studio Legale e Tributario, Milan
Latvia	Liga Mence	Attorney at law Loze & Partners, Riga
Lithuania	Liudas Karnickas	Attorney at law, Senior Associate LAWIN, Vilnius
Luxembourg	Jean-Luc Schaus	Attorney at law, Partner Pierre Thielen Avocats, Luxembourg
Malta	Dr. Jeanine Rizzo	Attorney at law, Associate Fenech & Fenech Advocates, Valletta
The Netherlands	Research team	
Poland	Dr. Renata Kopczyk	Director of the Intellectual Property Institute, University of Wrocław
Portugal	Prof. Alexandre Libório Dias Pereira	Faculty of Law, University of Coimbra
Romania	Daniel F. Visoiu	Attorney at law, Partner SCPA Biris Goran, Bucharest
Slovakia	Dr. Jozef Čorba	University of Pavel Jozef Šafárik, Kosice
Slovenia	Dr. Maja Bogataj Jančič	Intellectual Property Institute, Ljubljana
Spain	Yago Vázquez Moraga	Attorney at law, Partner Pintó Ruiz & Del Valle, Barcelona

Sweden	Michael Plogell and Erik Ullberg	Attorney at law, Partner / Attorney at law, Senior Associate Wistrand Advokatbyrå, Göteborg
United Kingdom	Adrian Barr-Smith	Attorney at law, Consultant SNR Denton UK LLP, London

ANNEX IV EXPERT WORKSHOPS ATTENDEES

Workshop I

Jonas Baer-Hoffman	EU Athletes and FIFPro
Stefan Brost	Deutscher Fussbal-Bund & Bundesliga
Ben Groocock	Modern Times Group/Viasat
Egbert Dommering	Emeritus professor IViR
Mark Lichtenhein	European Tour (golf)
Andrew Moger	News Media Coalition
Mathieu Moreuil	Premier League and Sports Rights Owner Coalition
Reto Hilty	Director Max Planck Institute
Peter Jaszi	American University's Washington College of Law/IViR
Michiel Karskens	Consumentenbond
Katrien Lefever	Vlaamse Media Maatschappij
Gianluca Monte	European Commission, DG Education and Culture
Seong Sin Han	Head of marketing legal services, UEFA

Workshop II

Florian Cartoux	European Gambling and Betting Association (EGBA)
Fabienne Fajgenbaum	Nataf Fajgenbaum & Associates, France
Florence Gras	European Pari Mutuel Association
Will Lambe	British Horseracing Authority
Mark Lichtenhein	Chairman Sports Rights Owners Coalition (SROC); European Tour
Gianluca Monte	European Commission, DG Education and Culture
Walter De Beauvisier Watson	De Lotto / European Lotteries
Patricia Foito E Camisão	European Lotteries – EU Representation
Pierre Tournier	Remote Gambling Association (RGA)
Caroline Larlus-Lefebvre	French Online Gambling Authority (ARJEL)
Alan Littler	Kalff Katz & Franssen Attorneys at Law
Mathieu Moreuil	English Premier League; Sports Rights Owners Coalition (SROC)
Jérôme Perlemuter	Association Nationale des Ligues de Sport Professionnel
Péter Rippel-Szabo	Bird&Bird, Hungary
Luca Turchi	Agenzia delle Dogane e dei Monopoli (AAMS), Italy
Paul Van Den Bulck	McGuireWoods, Belgium
Jean-François Vilotte	French Online Gambling Authority (ARJEL)
Philippe Vlaemminck	ALTIUS, Belgium
Tobias Wild	Gambling Authority Freie Hansestadt Bremen, Germany

Workshop III

Guido Bouw	Infostrada Sports
Antonio Constanzo	Bwin.party
Bart Cordemijer	Van Dooren Advies / BD Sport Europe
Andrew Danson	European Sponsorship Association
Nick Flitzpatrick	DLA Piper
David Folker	Football Dataco
Inés Gete	Imagina/Mediapro
Orest Kucan	Sportradar
Andrew Lyman	William Hill
Ross Maceacharn	PERFORM
Ewout Keuleers	Unibet

Representatives from the following organisations were also invited:
BBC, British Telecom, BSkyB, Canal Plus, Constantin Sport Marketing, Eredivisie Media & Marketing, European Broadcasting Union, Eurosport, Formula 1, Fox International Channels, The Sportsman, Wasserman Media Group.

ANNEX V QUESTIONNAIRE

PLEASE STRICTLY FOLLOW THE INSTRUCTIONS CONTAINED IN THE "GUIDELINES FOR COMPLETING THE QUESTIONNAIRE"

Part I – Intellectual property

Question 1

The National Football Federation (NFF), the governing body that is responsible for overseeing, organizing, and managing the First Division Football Competition (FDFC), exclusively licenses the rights to commercially exploit all of its matches (therefore the rights to record, to broadcast, to retransmit, to redistribute, etc.) to the National Broadcasting Company (NBC).

NBC, after years of exclusive exploitation of the rights, is concerned since recordings of the games are increasingly made available on different online platforms and decides to take legal action in defence of its interests. The videos are uploaded by individuals who attend and record the event (UPLOADERS)

NBC legitimately identifies different UPLOADERS who confirm that they have uploaded the videos. However, UPLOADERS add that there is no infringement of the NBC rights or interests given that football games per se are not copyrighted and UPLOADERS create different and independent recordings, and do not copy NBC recordings or signals.

a) Does NBC have a remedy against the legitimately identified UPLOADERS on the basis of copyright and/or related rights? Can NBC invoke any "quasi-property" remedies based on the ownership of the stadium where the match is played?
b) Could NBC successfully defend itself against the argument that UPLOADERS' recordings do not infringe NBC rights, by arguing that it acquired from the NFF the exclusive right to record the game, a right that the NFF is entitled to in its capacity of organiser of the sports event, and therefore NBC's exclusive right to record (and distribute) the matches has been infringed by UPLOADERS' recordings?
c) Would the situation be different if the scenario above did not involve the FDFC, but an amateur league organizing its matches on municipal (i.e. publicly owned) sporting grounds that are open for free to the general public? Does the fact that attendance to matches does or does not require the purchase of tickets nor any other form of payment or registration, play a role? Would it make any difference if the sport was not football but a different one?

Part II – Sports organisers' rights management in the field of the media

Question 2

Broadcaster A exclusively exploits all media rights[904] relating to the UEFA Champions League (across all transmission platforms) for the 2012/2013, 2013/2014 and 2014/2015 seasons within the territory of your jurisdiction.

[904] Media rights means the rights to transmit on a linear and/or non-linear basis by any and all means and in any and all media, audiovisual, visual, and/or audio coverage of all Premier League matches.

Scenario 1

Domestic Broadcaster B requests access to A's signal to produce short news reports on certain matches from the knockout phase through to the finals. Broadcaster A is willing to provide access to its signal,[905] but only for the finals and semi-finals because it contends that only these matches can be considered events of high public interest. Broadcaster A further imposes the following conditions:

1. extracts may not exceed 60 seconds of the entire match day (i.e. Broadcaster A does not consider each game of the match day as an individual event, but considers the entire match day as a single continuous event);
2. extracts can only be shown in general news programmes;
3. extracts may be shown no earlier than 60 minutes and within 24 hours after the scheduled end of the match(es) being reported on, but not before A has reported on the match;
4. extracts may not be used in non-linear media services;
5. access is conditional upon the payment of a financial compensation of EUR 1000 per minute with per-second billing.

Broadcaster B takes legal action against A because it believes that the modalities and conditions, including A's refusal to grant access to its signal of matches from the knockout phase, is in breach of national law. What would the court (or other competent public body, e.g. your national media authority) in your jurisdiction decide?

Scenario 2

Broadcaster C, established in another EU Member State where no domestic broadcaster has acquired the relevant media rights, requests access to A's signal to produce short news reports on certain matches from the knockout phase through to the finals. Broadcaster A is willing to provide access to its signal, but only for the finals and semi-finals because it contends that only these matches can be considered events of high public interest. Broadcaster C, however, argues that matches from the knockout phase involving domestic clubs are considered events of high public interest in its own jurisdiction. Is Broadcaster A entitled to turn down C's request?

Scenario 3

Regional Broadcaster R-TV requests access to the stadium for a UEFA Champions League group stage match that is played in the stadium of Team A in your jurisdiction. As Team A is the most important team of its region, R-TV wishes to record images in the margin of the event (e.g. interviews with the players, images of the public). A points out that, according to the terms and conditions of its licensing agreement with UEFA, UEFA is entitled to control media access to the stadium. UEFA refuses R-TV to enter the stadium with cameras.

R-TV sues Broadcaster A and UEFA because it believes that its right of news reporting is restricted. What would the court (or other competent public body, e.g. national media authority) in your jurisdiction decide?

Question 3

Football Club A entered into an employment contract[906] with Player B. According to the contract, Player B is not entitled, either on his own behalf or with or through any third party, to commercially exploit his/her image in a Club context. Some years ago, Football Club A entered

[905] I.e. access to the raw material or access to the broadcasted material.
[906] Or any other working relationship.

into an exclusive sponsorship agreement with sportswear company B-DIDAS. When performing their services under the contract with Football Club A, all players must wear a kit manufactured by B-DIDAS.

Some time prior to signing with Football Club A, Player B had entered into a personal sponsorship and endorsement agreement with sportswear company NIEK to exploit Players B's image in advertisements for NIEK shoes. The agreement also foresaw the obligation for Player B to wear NIEK shoes during football games and in the public eye. This agreement still existed. Football Club A was aware of the agreement between Player B and NIEK.

Football Club A and its sponsor B-DIDAS sue Player B and NIEK to (1) prevent Player B from wearing NIEK shoes any longer during football games and in the public eye and (2) to prevent NIEK to exploit Player B's image in any advertisement for NIEK shoes.

What would the national court in your country decide?

Question 4

The National Football Federation (NFF), the governing body that is responsible for overseeing, organising, and managing the First Division Football Competition (FDFC) in your country, collectively sells the media rights relating to the FDFC on behalf of the clubs participating in the competition. NFF offers the media rights for the seasons 2013/14, 2014/15, and 2015/16 in six different packages via a public tender procedure.

Content distributor A made the highest bid for four of the six packages that were offered. Content distributor B submitted the highest bid for the two remaining packages. A, however, offered NFF to pay an exclusivity bonus (i.e. it believes that the exclusive acquisition of all the rights is crucial to successfully launch its pay TV platform). Subsequently, NFF decided to award all of the packages to A.

B believes that national competition law is infringed by the fact that (1) the exclusivity bonus was accepted and (2) that every individual rights package was not awarded to the highest bidder. It files a complaint against the NFF before the National Competition Authority (and/or other competent public authority) and demands a new tendering procedure that is transparent and non-discriminatory.

What would the National Competition Authority (and/or other competent public authority) in your country decide?

Variation

(under the assumption that Content distributor A exclusively exploits the FDFC media rights): At the end of the 2013-2014 season, the top two clubs from the second division are eligible for promotion to the first division, i.e. the FDFC. Both clubs had already sold, on an individual basis, the exclusive broadcasting rights for their home games (season 2014/15) to B. The two clubs wish to respect their contracts with B. According to the NFF, this would undermine the financial solidarity between the FDFC clubs and decrease the value of its contract with A. Should the clubs refrain from exercising their individual contracts?

Part 3 – Sports organisers' rights management in the field of betting

Question 5

Searching for new revenue sources, an organiser of a domestic football competition decides to offer live coverage of the matches played in its competition via the Internet or via mobile wireless technology. It gives betting operators the opportunity to acquire the non-exclusive right to exploit these live transmissions for betting purposes (e.g. via a website, mobile application or digital interactive TV).

a) Under the existing or planned legal framework of your country, would the organiser be free to conclude contracts with any (remote) betting operator? Or can contracts only be concluded with regulated within your country?
b) Under the existing or planned legal framework of your country, would the organiser be free to conclude contracts with regulated betting operators authorised in one or more EU Member States or only with regulated betting operators authorised within your country?
c) Are there any other exploitation rights that the organiser of the domestic football competition or an organiser of an international sports event could license to betting operators under the existing or planned legal framework in your country, for example an enforceable right to consent to the organisation of betting on particular sporting events?

Question 6

If a regulatory framework specific to sports betting exists in your country, please explain whether different regulations apply to different types of sports events (e.g. football versus horse-racing) and to different types of betting (e.g. live betting, fixed odds betting, and parimutel betting).

Question 7

Under the existing or planned legal framework in your country, are regulated sports betting regulated betting operators statutorily required to contribute to the funding of grassroots sports (across all disciplines)?

Question 8

What legal provisions apply to betting operators established in another country (EEA or non-EEA), who may advertise and offer (certain) sports betting services in your country, notably in terms of enforcing existing prohibitions concerning these activities.

* * *
* *

ANNEX VI GUIDELINES TO THE QUESTIONNAIRE

1. Purpose of the "Study on Sports Organisers' Rights in the EU" and the questionnaire

The study aims to provide a comprehensive, comparative analysis of national legal frameworks and licensing practices related to rights to sports events (sports organisers' rights) from an EU perspective and to formulate suggestions as to whether EU action is needed to address any identified problems.

The purpose of the questionnaire is twofold: (1) to map the legal framework applicable to sports organisers' rights and (2) to analytically describe how sports organisers' rights are managed and licensed in the 27 EU Member States (+ Croatia).

2. General instructions

The answers should mention all legally binding and non-binding measures in your country, as well as relevant national case law, that is needed to resolve the case. Existing binding and non-binding legal measures are for instance legislation, administrative rules, standards, and guidelines.

If your country has a federal or similar structure which might influence the answer on the state or regional jurisdiction chosen, please give an account of such situation.

Given the focus on the applicable legal framework and related case law in your country, you should not refer to EU legislation or case law, except when this is directly relevant to the application of national legislation and case law in the case at hand.

We also emphasize that we are seeking to gather *legal and analytical information* and not personal opinions or stakeholders' views.

2.1 Structure of the answers to the questionnaire (Part 1 and Part 2)

Answers to a scenario or to a variation of that scenario should follow the proposed tri-partition structure:

1. Operative rule

Under this section, you should indicate what would be the holding of the competent body (court of justice/public authority) in light of the facts presented. Please be brief and only mention the outcome of the case (1 to maximum 4 sentences). Please, mention which is the competent authority in your country.

2. Descriptive elements

Under this section, you should elaborate on the legal sources (legislation, case law, administrative regulations, public bodies decisions and standards, etc.) on the basis of which the operative rule is formulated. In this section you should include complete references to all relevant legal sources (in

English) cited in your analysis as footnotes. You should also include a web link to the original documents and to English translations (if available). For other specific editorial instructions please consult the sample answers attached to the guidelines.

3. Additional considerations

Under this section, you should include your specific remarks, as needed, for peculiarities that may arise and will need to be taken into account to fully understand the contents of your information included in questionnaire. For example, mention national measures that have been adopted but not yet enforced, mention any other on-going developments that are likely to affect the solution of the case; mention possible conflict of competence among different authorities, etc. Under this section, you can also include explanation of legislation and/or special provisions; as well as anything that needs to be highlighted, such as a specific rule that applies only to a given sport (for example: 'the same rules applies for all sports, save for water polo for which other rules apply…'), or to a given type of sport ('the same rules applies for all sports as long as they are considered 'professional' by the Authority X and/or as long as they play in a closed or identifiable perimeter' etc.). If relevant, please also mention on-going developments (e.g. legislative, regulatory, market, social, public debate) that are likely to affect the solution of the case.

2.2 Structure of the answers to the questionnaire (Part 3)

Questions 5, 6, 7, and 8 are different in method and do not follow the "real-case scenario" structure. They should be answered as general purpose questions without following the tri-partition model. However, when citing legislation or case law please follow the standard rule: in reporting the relevant legislation and case law, please compile the information with a link to the original document and to its English translation if available. For specific editorial instructions please consult the sample answers attached to these guidelines.

If available, please also provide relevant documentation relating to these questions as annex to your report.

3. Specific instructions for individual questions

The following instructions explain the objective and the structure of each question and should be used as an interpretative element in case of doubts.

The expected length of the answers are indicative (not including references).

Question 1	*The objective of this question is to understand whether according to your country legal system there is any protection stemming from real property and/or intellectual property rights for football matches and sports events in general. In answering this question please focus on the existence of copyright and/or related rights to copyright (including any form of related rights for organisers of sports events however labelled or called), as well as on "quasi-property" rights based on the ownership in the stadium.* ***Sub question a):*** *In answering this question please consider whether any exception or limitation to copyright (including fair dealing provisions) such as the right of news reporting, the right of quotation, or similar provisions, may*

	apply. In your answer please assume that the exclusive licensing contract between FDFC and NBC provides for a power of attorney allowing NBC to litigate on the basis of any rights that FDPFC might have). ***Sub question b)*** *In answering this question please consider a) the existence and nature of such right; b) its transferability; and c) the actionability and type of the remedy* ***General:*** *If you have answered yes to either a) or c), please qualify and clarify the ownership of the relevant right (copyright, related right and/or quasi-property right to sports event), indicating who is the original owner (clubs, league, broadcaster, jointly) and whether restrictions apply to its transferability.* *Expected length of the answer: 1000 words*
Question 2	*The objective of this question is to understand how news access to sports events is regulated by law and applied in practice in your country.* *In answering the scenarios please identify with clarity if the reporting of short news is based on the short extracts provision of art. 15 Audiovisual Media Services Directive (2010/13/EU, AVMSD), or on the basis of art. 5(3)c (the reporting of current events), or art. 5(3)d (quotation for criticism or review) of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. Identify under which conditions the matches can be considered of high interest to the public).* *Expected length of the answer: 1200 words in total (i.e. all three scenario's)*
Question 3	*The objective of this question is to understand the origin (i.e. the legal basis), the existence and ownership and the transferability of sports image rights (a.k.a. 'portrait rights', 'rights of privacy', 'rights of publicity' or 'rights of personality') in your country.* *Expected length of the answer: 800 words*
Question 4	*The objective of this question is to understand how sports media rights are licensed and managed in your country and how legal provisions, in particular competition law provisions, govern the way in which these rights are sold and acquired.* *In answering this question, please also discuss under what circumstances (if any) the duration of exclusivity could be extended beyond three years, e.g. pursuant to a longer exclusivity contract or to a preferential renewal clause for subsequent seasons.* *Expected length of the answer: 1200 words for the answer to the main scenario, 400 words for the variation*
Question 5	*The objective of this question is to understand whether the existing or planned legal framework in your country provides sports organisers with a right of commercial exploitation that might include agreements with betting*

	operators. In answering this question please also discuss in detail any legal limitations regarding the type of commercial users of sports organisers' rights that may apply). ***Sub question c)*** *In answering this question please specify whether the enforceable exploitation rights could relate to any sports event or whether territorial restrictions would apply, e.g. only relating to sports events that take place within your country or are (co-)organized by a domestic sports organiser.* *Expected length of the answer: 1200 words in total*
Question 6	*Expected length of the answer: 500 words*
Question 7	*Expected length of the answer: 800 words*
Question 8	*Expected length of the answer: 500 words*

4. Sample Answers

Please, use as an additional guidance tool the following two sample answers that we have prepared for your convenience.

Question 1 Sample answer for The Netherlands

Subquestion a)

1. Operative rule

NBC will have no valid claim against UPLOADERS ('U') based on copyright or related rights. No copyright or related rights in (organizing) the sporting event as such; also no protection under misappropriation doctrine. Copyright or neighbouring right in NBC television signal likely, but not relevant, since television program/signal is not reproduced or retransmitted by U. Limitations and exceptions under copyright/neighbouring rights therefore not relevant in this case.

2. Descriptive Elements

Dutch law does not recognize copyright in football matches. A football match is generally seen as a (random) event, not as a work of authorship. Similarly, individual football players, while on occasion producing plays that please the eye, are not considered authors of works.[907]

Organisers of sporting events also do not as such qualify for legal protection under neighbouring rights legislation, nor do individual athletes, unless under exceptional circumstances. In line with the European Lending and Rental Rights Directive (Directive 2006/115/EC) the Dutch

[907] See J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer (2005), p. 127. Contra: S.A. Klos, 'Sport op het speelveld van de intellectuele eigendom' , I.E.R. 1997, afl. 3, 82.

Neighbouring Rights Act (NRA[908]) protects only four categories of persons/entities: performers, phonogram producers, broadcasting organizations and film producers. In addition, the Database Act protects database producers under a sui generis regime, in line with the Database Directive (Directive 96/9/EC).

Art 1.1 (a) of the NRA defines a 'performer' as "an actor, singer, musician, dancer or any other person who acts, sings, delivers or otherwise performs a literary or artistic work, or an artist who performs a variety or circus act or a puppet show". Since football players (at best) execute certain tactics or strategies, but not perform 'works' (nor circus acts or puppet shows), they are not protected under the NRA.[909] Sports events organisers do not fall under any of the categories of neighbouring rights holders, and are therefore also excluded, unless in a capacity as broadcasting organization.

NBC will probably have both copyright and neighbouring right protection in its (live or delayed) coverage of the football matches. A televised football match is likely to qualify as an original audiovisual work, since (live) televising sports events entails creative choices by (multiple) camera operators, director(s) and video editors. Also, NBC will enjoy a neighbouring right in the broadcast signal. However, neither copyright nor neighbouring right in the televised match program or signal can be successfully invoked against U., since the videos uploaded by U. are not directly or indirectly copied from the program or signal. Since NBC cannot rely on copyright or neighbouring rights, a Dutch court would not need to examine possibly applicable limitations and exceptions. Theoretically, U. might rely on the news reporting exception of Art. 15 of the Dutch Copyright Act[910], which applies mutatis mutandis to neighbouring rights (Art. 10 NRA), provided that U. can successfully argue that it is "a medium fulfilling the same purpose" as the conventional mass media.

The Dutch national football federation (KNVB) and individual professional football clubs have on several occasions claimed protection under a doctrine of misappropriation based in general civil tort law (*onrechtmatige daad*, i.e. unlawful conduct). However, these claims have been consistently rejected by the Dutch Courts, including the Supreme Court (*Hoge Raad*). In its landmark ruling in *KNVB v. NOS*[911] the Supreme Court opined that organizing football matches is not an activity on a par with acts that merit intellectual property protection; therefore, the KNVB could not invoke protection under a doctrine of misappropriation against the unauthorized radio broadcasting of the football matches by Dutch public broadcaster NOS. According to the Court, "the mere fact that NOS [through its radio broadcasts of the games] profits from the matches organized by KNVB is not in and by itself unlawful, not even if KNVB or the clubs would suffer harm from these broadcasts."

However, the Court did recognize that KNVB or the clubs were entitled to prohibit, or require remuneration, for the radio broadcasts, on the basis of a 'house right', i.e. the right to control access to the stadiums and make access conditional upon a prohibition to broadcast matches. Accordingly, whoever engages in radio broadcasting of a match "in a stadium or on a terrain where KNVB and its clubs organize football matches [...] knowing that the owner or user of the stadium or terrain has not consented to the broadcast, acts unlawfully against the owner or user." In other

[908] Available in Dutch at http://www.ivir.nl/wetten/nl/wnr.html and in English at http://www.ivir.nl/legislation/nl/nra.html
[909] See D.W.F. Verkade & D.J.G. Visser, *Parlementaire geschiedenis van de WNR* (1993), 45-51 and 275-276. See also Conclusion of Advocate-General Verkade in *KNVB v. Feyenoord* (note 3), para. 4.26.
[910] Available in Dutch at http://wetten.overheid.nl/BWBR0001886/geldigheidsdatum_14-02-2013 and in English at http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf
[911] Hoge Raad, 23 October 1987, NJ 1988, 310 (KNVB v NOS). See also Hoge Raad, 23 mei 2003, NJ 2003, 494 (KNVB v Feyenoord).

words, live radio coverage (whether complete or in the form of live coverage of several matches synchronously by way of 'flashes') required permission of the KNVB or the clubs. The Supreme Court, however, did not go as far as completely denying NOS its freedom of news reporting. In an interesting obiter dictum the Dutch Supreme Court made clear that "merely informing the public" or "reporting on a match after it is over" would not be unlawful against KNVB or the clubs.

In a later dispute concerning the 'ownership' of the rights to televise football matches that arose between KNVB and professional football club Feyenoord, the Court of Appeal of The Hague held that as a consequence of the Supreme Court's 'house right' doctrine these rights belonged solely to the club controlling the venue, not (jointly) to KNVB. Feyenoord could therefore exclusively exercise or market the rights to televise its home matches. The Court of Appeal's decision was upheld by the Supreme Court.[912]

Subquestion b)

1. Operative rule:

No, the 'house right' cannot be validly transferred to NBC.

2. Descriptive Elements:

As described under a), based on *KNVB v. NOS* NFF (or the home-playing football club) would be able to successfully invoke its 'house right' against those making unauthorized recordings or broadcasts of the matches. However, as previously explained, this 'house right' is solely based on (derivative) ownership or exclusive use of the venue where the matches take place. Since the contract between NFF and NBC does not make NBC a co-proprietor or co-lessor of the venues, NBC does not enjoy and cannot invoke the house right. In practice NBC would probably ask NFF/FDPFC to act as a co-claimant against U.

Subquestion c)

1. Operative rule:

Matches played on sporting grounds or other venues not owned or exclusively controlled by the match organiser are not protected under 'house right' doctrine.

2. Descriptive Elements

As described under a), the Supreme Court in *KNVB v. NOS* has recognized a 'house right' for the organiser of a sporting event based on its (derivative) ownership or exclusive use of the stadium or venue. Consequently, no house right can be invoked in cases where the events take place on municipal (i.e. publicly owned) sporting grounds that are open for free to the general public. Whether or not attendance to matches requires the purchase of tickets or any other form of payment or registration will in that case not play a role. However, the house right is likely to apply in the case of amateur matches being played on grounds that are owned or exclusively used by the (amateur) club.

[912] Court of Appeal of The Hague, 31 May 2001; Hoge Raad, 23 May 2003, NJ 2003, 494 (KNVB v Feyenoord).

3. Additional considerations

The Supreme Court's 'house right' doctrine has drawn criticism from some legal scholars and practitioners.[913] According to these commentators this doctrine is misdirected; rights granted to organisers of (potentially valuable) sporting events should derive from the act of organizing these events, regardless of the place where these events occur. The Supreme Court's approach has also been criticized for offering organisers of sports events too little legal protection against third parties. Although KNVB and other sports leagues have on occasion publicly lamented the absence in the Netherlands of intellectual property protection of sporting events, there does not appear to be serious lobbying at the national level to introduce such a right. This can probably be explained by the current structure of marketing the television rights of *Eredivisie* (Dutch premier league) football matches. The Eredivisie clubs have agreed to jointly market the television rights regarding Eredivisie matches. They have also founded and jointly own a football channel ('Eredivisie Live'), which provides live pay-per-view or subscription-based coverage of Eredivisie matches online.

Question 4 Sample answer for Belgium

Main case

1. Operative rule

The National Competition Authority, i.e. the Belgian Competition Authority (BCA),[914] is likely to decide that the bidding procedure followed by the NFF did not infringe national (and European) competition law.

2. Descriptive elements

The BCA has repeatedly held that the decision of football clubs to give the Belgian Professional Football Association (Belgian Liga Beroepsvoetbal, LBV) the exclusive right to collectively sell the media rights relating to first division football competition (Jupiler Pro League) is a decision by an association of undertakings. It constitutes an anti-competitive agreement within the meaning of Article 2(1) of the Belgian Act on the Protection of Economic Competition (APEC).[915]

In a 2005 decision on the joint selling of the broadcasting rights of games of the Jupiler Pro League by the LBV,[916] the BCA concluded that both Article 2 APEC and Article 101 TFEU were applicable

[913] See E.J. Dommering, 'De sportprestatie: bescherming en vrije berichtgeving', in: W.F. Korthals Altes & G.A.I. Schuijt (eds.), *Sport en informatiemonopolies*, Amsterdam: Otto Cramwinckel Uitgever (1991), 9-21; and Th.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, dissertation Leiden University (1994), 287-289.

[914] The Belgian Competition Authority currently consists of two components: the Directorate-General for Competition (Competition Service) and the Council of Competition. The Council of Competition, an administrative tribunal, takes decisions with the assistance of the Directorate-General for Competition. A draft bill, which proposes merging the two components into a single, independent administrative authority has recently been submitted to Parliament.

[915] Belgian Act on the Protection of Economic Competition (APEC) consolidated on the 15th of September 2006 (Belgian Official Gazette 29/9/2006) and amended by the act of 6/5/2009 (Belgian Official Gazette 19/5/2009). An unofficial translation in English of the official Dutch and French version of the act is available at http://economie.fgov.be/en/binaries/apec-new_tcm327-56301.pdf

[916] Decision No. 2005-I/O-40 of the Belgian Competition Authority of 29 July 2005, Joined Cases MEDE-I/0-05/0025 and MEDE-P/K-05/0036: The selling by the Liga Beroepsvoetbal (LBV) of the broadcasting rights of games of the national football competition for the seasons 2005-2006, 2006-2007, and 2007-2008, http://economie.fgov.be/nl/binaries/40_2005i040_LigaBeroepsvoetbal_tcm325-28898.pdf. Upheld by the Court of Appeal of Brussels, 28 June 2006, *Telenet N.V. v. Liga Beroepsvoetbal V.Z.W.*, Case No. 2005/MR/2 and *BeTV N.V. v. Liga Beroepsvoetbal*

because the collective selling agreement is capable of affecting trade between the EU Member States.[917]

On 9 May 2005, the LBV had awarded all packages of the Jupiler Pro League TV broadcasting rights (for the seasons 2005/06 to 2007/8) to incumbent telecom operator Belgacom Skynet. Contrary to the view of the claimant (cable TV operator Telenet), the BCA concluded that the bidding procedure was open, transparent, and non-discriminatory and therefore did not infringe the competition rules.[918] The BCA's decision meticulously refers to the decisions of the European Commission on the joint selling of sports media rights.[919] According to the BCA's interpretation of the principles set out in these decisions,

1. selling all packages to one party is not an infringement of competition law. The BCA saw no reason why exclusivity for the Jupiler Pro League broadcasting rights for a period of three years should be forbidden in light of the market situation in Belgium at the time.[920]
2. offering a bonus for obtaining multiple or all packages is not an infringement of competition law.[921]
3. the highest bidder for every package does not automatically need to receive the package, because competition law allows for various other factors to be taken into account - as long as this happens in an objective and non-discriminatory way.[922]

The BCA further stressed that competition law seeks to protect and promote consumers' interests and that consumers' interests are best served when they get to see as many Jupiler Pro League matches as possible. The fact that the broadcasting rights were awarded to the sole candidate that would grant sub-licenses to free-to-air broadcasters (for the exploitation of several packages), should therefore be considered as being pro-competitive.[923] The Court of Appeal, upholding the decision, added that consumers further benefit from the deal because they can follow the entire Jupiler Pro League competition without purchasing two subscriptions, decoders, etc.[924]
Applied to our case, it seems that the BCA would similarly reject the complaint submitted by B against the NFF as long as the bids were evaluated in accordance with a number of objective criteria. It is also likely that broad access to premium content by consumers will always be an important element in the BCA's analysis.
According to the BCA, the European Commission's decision-making practice on joint selling of sports media rights makes it clear that the duration of exploitation contracts concluded between

V.Z.W., Case No. 2005/MR/5, http://economie.fgov.be/nl/binaries/2005MR2-5_Telenet_BeTV_Liga_Beroepsvoetbal_tcm325-68283.pdf.

[917] The BCA pointed out that foreign broadcasters have the opportunity to bid for the rights and that some of the broadcasters that tendered could also be received in other Member States. Decision No. 2005-I/0-40, n 3 above, paras 16-17. The Court of Appeal of Brussels endorsed this conclusion. Judgment of 28 June 2006, n. 3 above, para 22. The BCA discussed the relevant product markets and geographic market, but concluded that its decision would not be influenced by a small or broad definition of the markets in one way or another.

[918] Because the cumulative conditions of Article 2(3) APEC and Article 101(3) TFEU are fulfilled.

[919] *UEFA Champions League* (Case COMP/37.398) European Commission Decision (2003) OJ L291/25; *DFB* (Case COMP/37.214) European Commission Decision (2005) (commitment decision); *FAPL* (Case COMP/38.173) European Commission Decision (2006) (commitment decision).

[920] Decision No. 2005-I/0-40, n 3 above, paras 33. To substantiate this point, reference is made to *UEFA Champions League*, n. 5 above; *DBL*, n 5 above, Annex, Paras 2.2, 3.2, 4; and *FAPL*, n. 5 above (stressing that from a competitive point of view the UK and Belgian market situations are very different).

[921] Idem, para. 34. To substantiate this point, reference is made to *FAPL*, n. 5 above, para 25.

[922] E.g. acceptance of the bidder of all relevant contract obligations and expertise and production capability of the host content operator). Idem, para 32. To substantiate this point, reference is made to *UEFA*, n. 5 above, para 30. The BCA stressed that the LBV could legitimately dismiss the tender submitted by Telenet, since the latter proposed substantial amendments (e.g. the wish to also obtain rights on HD, broadband, and Internet and the requirement to make individual clubs and the Belgian football association contracting parties) to the contractual proposal. Idem, paras 50-53. Belgacom Skynet, on the contrary, demanded no amendments to the contractual obligations put forward by the LBV.

[923] Idem, paras 29, 20, 26.

[924] Judgment of 28 June 2006, n. 3 above, para 44.

the LBV and content distributors cannot exceed three years.[925] Clauses providing for preferential renewal of contracts cannot be accepted.[926]

3. Additional considerations

It must be stressed that the acquisition of the Jupiler Pro League broadcasting rights (for the seasons 2005/06 to 2007/8) was crucial for Belgacom Skynet, a wholly owned subsidiary of incumbent telecommunications operator Belgacom, who was about to launch its digital pay TV platform via ADSL in Belgium in June 2005. In Flanders, it would encounter strong competition from Telenet, which would start to offer iDTV via cable a few months later (September 2005).[927]

In the 2005 competition case discussed above, Belgacom Skynet (supported by the LBV) argued that the award of all the broadcasting rights to Belgacom Skynet had another significant pro-competitive aspect. It would enhance competition on a market dominated by others. The BCA acknowledged that awarding all packages to Belgacom Skynet could be considered as a positive, competition-enhancing market evolution.[928] The BCA questioned, however, whether Belgacom Skynet could really be considered as a new entrant. In light of the convergence between the broadcasting and telecommunications markets, there might be a risk that Belgacom – holding a (very) strong position on the telecommunications market – would be able to leverage its market power to the broadcasting market. The BCA therefore noted that it would closely monitor future market developments.[929]

Variation

1. Operative rule

The National Competition Authority, i.e. the BCA, is likely to decide that the clubs should refrain from exercising their individual contracts.

2. Descriptive elements

In 2012, the BCA delivered an informal opinion in which it found that a refusal by the Pro League to grant membership to clubs for not respecting the joint selling for the broadcasting rights of games of the Jupiler Pro League could *prima facie* not be considered an infringement of competition law.[930] According to Article 7(6) of the Statutes of the Pro League, new clubs entering the competition need to accept all commercial activities between the members and third parties. The BCA observed that this particular clause is objective, transparent, and non-discriminatory and seeks to ensure a fair and balanced competition. Furthermore, Article 304.21 of the Regulations of the Royal Belgian Football Association,[931] stipulates that, in order to participate in the first division football competition (i.e. the Jupiler Pro League), clubs need to be a member of

[925] See e.g. Decision No. 2005-I/0-40, n 3 above, paras 31, 35.
[926] Idem, para. 33. The Court of Appeal of Brussels endorsed this conclusion. Judgment of 28 June 2006, n. 3 above.
[927] In Belgium, digital TV is currently offered via cable distribution networks, DSL, terrestrial networks, and satellite. Belgacom and Telenet are major competitors with regard to telephony, Internet access, and digital TV in the Flemish market. Peggy Valcke and Eva Lievens, *Media Law in Belgium* (Wolters Kluwer, Alphen aan den Rijn 2011) 32-34.
[928] Belgacom would only likely be able to actually penetrate the digital TV market if the product has a clear added value in comparison to the products offered by other market players. Moreover, this would likely increase the number of strong bidders for subsequent contracts. Decision No. 2005-I/0-40, n. 3 above, paras 59.
[929] Idem, paras 59-60.
[930] Informal opinion of the Belgian Competition Authority of 5 July 2012 (non-public document).
[931] http://static.belgianfootball.be/project/publiek/reglement/reglement_nl.pdf

the Pro League. Subsequently, the Pro League is entitled to refuse participation of clubs - eligible for promotion to the first division - on the grounds of non-compliance with its Statutes.

Applied to our case, it seems that the BCA would similarly conclude that the NFF would be entitled to oblige the two clubs to respect the NFF's media rights agreement with Content distributor A (in so far as the regulations of the NFF prescribe, in an objective, transparent, and non-discriminatory fashion, that clubs participating in its competition need to adhere to the NFF's commercial policies). In other words, if the clubs wish to respect their individual contracts with Content distributor B, they would be unable to promote to the FDFC.

3. Additional considerations

Since the collective selling of football media rights is an established practice in Belgium, accepted as legitimate by the BCA and courts under certain conditions (see above), the BCA has not yet expressed its views on alternative marketing and exploitation systems of such rights. In 2011, when five top division clubs threatened to collectively sell their respective media rights, the BCA delivered an informal opinion stressing that this would require a new investigation to determine whether this scenario would be compatible with Article 2 APEC and Article 101 TFEU.[932] Shortly thereafter, the five clubs decided not to pursue their plans.[933]

* * *
* *

[932] Informal opinion of the Belgian Competition Authority of 19 April 2011 (non-public document).
[933] Pro League, Press Release of 6 May 2011, http://sport.be.msn.com/nl/jupilerproleague/proleague/persberichten/ProPers_22.pdf

NC-02-14-483-EN-N

Publications Office