LEGAL RESEARCH PAPER SERIES
Paper No 3/2011 **January 2011**

EU Sports Law: the effect of the Lisbon Treaty

STEPHEN WEATHERILL

EU sports law: the effect of the Lisbon Treaty

Stephen Weatherill

1 Introduction

The influence of the Treaty of Lisbon on sport in Europe is both profound and trivial. It is *profound* in that for the first time sport is subject to explicit reference within the Treaties establishing and governing the European Union. Given the fundamental principle that the EU possesses only the competences conferred upon it by its Member States the novelty achieved by this express attribution in the field of sport counts as immensely constitutionally significant. But for two reasons the Treaty's influence is also *trivial*. First because the content of the new provisions has been drawn with conspicuous caution, so that the EU's newly acquired powers in fact represent a most modest grant made by the Member States. And second because, notwithstanding the barren text of the pre-Lisbon Treaty, the EU has in fact long exercised a significant influence over the autonomy enjoyed by sports federations operating on its territory. So the Lisbon Treaty reveals a gulf between constitutional principle – where it seems to carry great weight – and law- and policymaking in practice, on which its effect is likely to be considerably less striking.

The purpose of this paper is to reflect on the development of 'EU sports law' during the long period in which an explicit Treaty mandate was lacking and to assess the extent to which the Lisbon Treaty will change the picture. Given the observations made in the opening paragraph, such changes are not likely to be dramatic, but nonetheless changes there will be, both at the level of detail and in the direction of securing a deeper legitimacy for EU intervention in the field of sport. A question which also deserves to be addressed is one that goes beyond the specific case of sport: why, in a Treaty which is in many ways marked by assertion of State control over and in some respects autonomy from the pattern of EU integration, has sport found its way into the very small group of policy areas in which EU competences have been formally *increased*?

2 EU sports law – the road to Lisbon

The EU possesses no general regulatory competence. It has only the competences and powers attributed to it by its Treaties. In the EC Treaty this was stipulated in Article 5(1) EC, whereas since the entry into force of the Lisbon Treaty this 'principle of conferral' is located in Article 5 TEU. Prior to the entry into force of the Lisbon Treaty on 1 December 2009 the EU was equipped with no explicit powers in the field of sport. More than that: the EC Treaty did not mention sport at all. But *ab initio* in *Walrave and Koch* 1 the Court rejected a line of reasoning that would have rigidly separated sports governance from EC law. That would have sheltered a huge range of practices with economic impact from the assumptions of EC law, damaging the achievement of the objectives of the Treaty. Instead the Court has consistently taken the view that in so far as it constitutes an economic activity sport falls within the

1 Case 36/74 [1974] ECR 1405.

scope of the Treaty and sporting practices must comply with the rules contained therein. But they *may* comply, even if apparently antagonistic to the foundational values of the Treaty. In the landmark decision in *Walrave and Koch* the Court accepted that the Treaty rule forbidding discrimination on grounds of nationality does not affect the composition of national representative sides. Such 'sporting discrimination' defines the very nature of international competition, and EU law does not call it into question.

The authority of the EC, now EU, to supervise sporting practices was and is rooted on the economic impact of sport. It therefore derived from the broad functional reach of the relevant rules of the Treaty (free movement and competition law, most conspicuously, and also the basic prohibition against nationality-based discrimination), but it was denied any specific legislative competence in the field of sport. Sport's 'road to Lisbon' is paved by the decisions of the Court, and subsequently those of the Commission, which applied first the free movement provisions and later the competition rules to sport. But the Treaty was never applied to sport as if it were merely a normal industry. Instead a more creative approach was adopted, requiring a significant investment of resources in making sense of the intersection between the demands of EC law and the aspirations of sport in circumstances where the Treaty did not spell out any guidance.

The core of the challenge is well captured by two observations made by the Court in its famous *Bosman* ruling. 2

First, the Court declared that:

> 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.' 3

The Court, while finding that the particular practices impugned in *Bosman* fell foul of the Treaty because they did not adequately contribute to these legitimate aims, showed itself receptive to embrace of the special features of sport. So sport's distinctive concerns are *not* explicitly recognised by the Treaty but they are drawn in to the assessment of sport's compliance with the rules of the internal market (in casu, *free movement*) by a Court which is visibly anxious to identify what is *legitimate* in the special circumstances of professional sport.

Second, the Court added remarks in the *Bosman* ruling about 'the difficulty of severing the economic aspects from the sporting aspects of football'. 4 This hits the nail squarely on the head. The vast majority of rules in sport also exert an economic impact, and it is that economic impact which triggered the application of the rules of the Treaty. Few sporting rules will not also have economic implications. The implication is that sporting practices will commonly fall within the scope of application of the Treaty, especially in the context of professional sport, which then

2Case C-415/93 [1995] ECR I-4921.
3 Para 106.
4 Para 76.

makes all the more important the choices made about what is treated as a *legitimate* sporting practice.

Typically sporting bodies have sought to argue for a generous interpretation of the scope of the 'sporting rule' which is wholly untouched by the Treaty, and, if the matter is judged to fall within the scope of the Treaty, they have then aimed to defend their practices as necessary to run their sport effectively. It is for the Court (or in appropriate cases the Commission) to consider the strength of these claims, and in doing so the EU institutions are forced to reach their own conclusions on the nature of sports governance – conclusions which are frequently (though not invariably) less persuaded by the need for sporting autonomy than is urged by governing bodies.

3 The practice of EU sports law

The story of the manner in which first the Court and more recently the Commission developed the law in its application to sport is a complex though intriguing one. It reflects the need to allow a *conditional* autonomy to sporting practices – an autonomy *conditional* on respect for the core norms of the Treaty. The matter has been addressed in full elsewhere. 5 The purpose of this summary is simply to set the scene in preparation for reflection on why there was a readiness in the negotiation of the Treaty of Lisbon to respond to this pattern of development by bringing sport explicitly within the Treaty for the first time, and also in order to assess the extent to which Lisbon changes the situation.

Deliége provides a good example. The litigation concerned selection of individual athletes (*in casu*, judokas) for international competition. 6 Participation was not open. One had to be chosen by the national federation. If one was not chosen, one's economic interests would be damaged. This was a classic case which brought the basic organisational structure of sport into contact with the economic interests of participants. The Court stated that selection rules 'inevitably have the effect of limiting the number of participants in a tournament' but that 'such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted'. 7 Accordingly the rules did not in themselves constitute a restriction on the freedom to provide services prohibited by the Treaty. So a detrimental effect felt by an individual sportsman does not mean that rules are *incompatible* with the Treaty. The *Deliége* judgment is respectful of sporting autonomy, but according to reasoning which treats EU law and 'internal' sports law as potentially overlapping.

The application of the Treaty competition rules to sport was a matter carefully avoided by the Court in *Bosman* itself. But the Commission came to adopt a functionally comparable approach to sport: that is, it did not exclude sport from

5 See eg R Parrish, *Sports law and policy in the European Union* (2003); S Weatherill, *European Sports Law* (2007); E Szyszczak, 'Is Sport special?' in B Bogusz, A Cygan, and E Szyszczak (eds), *The Regulation of Sport in the European Union* (2007); S Van den Bogaert and A Vermeersch, 'Sport and the EC Treaty: a Tale of Uneasy Bedfellows' (2006) 31 ELRev 821.
6 Cases C-51/96 & C-191/97 *Deliége v Ligue de Judo* [2000] ECR I-2549.
7 Para 64.

supervision pursuant to the relevant Treaty provisions but equally it did not rule out that sport might present some peculiar characteristics that should be taken into account in the analysis. The Commission's *ENIC/ UEFA* decision offers an illustration. 8 It concluded that rules forbidding multiple ownership of football clubs suppressed demand but were indispensable to the maintenance of a credible competition marked by uncertainty as to the outcome of all matches. A competition's basic character would be shattered were consumers to suspect the clubs were not true rivals. The principal message here is that sporting practices typically have an economic effect and that accordingly they cannot be sealed off from the expectations of the Treaty. However, within the area of overlap between EU law and 'internal' sports law there is room for recognition of the features of sport which may differ from 'normal' industries.

There is a 'policy on sport' to be discerned here, albeit that its character is influenced by the eccentric development generated by the Treaty's absence of any sports-specific material and the essentially incremental nature of litigation and complaint-handling. Formally this 'policy' involves a batch of decisions determining whether or not particular challenged practices comply with the Treaty. One can discern thematic principles binding together the decisional practice – respect for fair play, credible competition, national representative teams, and so on - but the EU is not competent to mandate by legislation the structure of sports governance in Europe.

The precise legal basis underpinning the Court's approach has long been rather murky. What is this 'sporting exception'? Does it mean that a practice falls outwith the scope of the Treaty altogether? Or is that the rules have an economic effect and fall within the scope of the Treaty but are not condemned by it because they also have virtuous non-economic (sporting) effects? 9 In the summer of 2006 the Court brought a welcome degree of analytical clarity to the matter. In *Meca-Medina and Majcen v Commission* the applicants, professional swimmers who had failed a drug test and been banned for two years, had complained unsuccessfully to the Commission of a violation of the Treaty competition rules. The CFI (as it then was) rejected an application for annulment of the Commission's decision. 10 So did the ECJ (as it then was). 11 But whereas the CFI attempted to insist that anti-doping rules concern exclusively non-economic aspects of sport, designed to preserve 'noble competition'12, the ECJ instead stated that 'the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down'. 13 And if the sporting activity in question falls within the scope of the Treaty, the rules which govern that activity must satisfy the requirements of the Treaty 'which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition'. 14 A practice may be of a sporting nature - and perhaps even 'purely sporting' in *intent* – but it falls to be

8 COMP 37.806 ENIC/ UEFA, IP/02/942, 27 June 2002.
9 For extended analysis see R Parrish and S Miettinen, *The Sporting Exception in European Law* (2007); also S Weatherill, 'On overlapping legal orders: what is the 'purely sporting rule'?' in Bogusz, Cygan, and Szyszczak (n 5 above).
10 Case T-313/02 [2004] ECR II-3291.
11 Case C-519/04 P [2006] ECR I-6991.
12 Para 49 CFI.
13 Para 27 ECJ.
14 Para 28 ECJ.

tested against the demands of EU trade law where it exerts economic *effects*. But, just as in *Bosman*, the Court in *Meca-Medina* did not abandon its thematically consistent readiness to ensure that sport's special concerns should be carefully and sensitively fed into the analysis. It took the view that the general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the adverse effect of penalties on athletes' freedom of action must be considered to be inherent in the anti-doping rules. The rules challenged in *Bosman* were not in the Court's view necessary to protect sport's legitimate concerns but in *Meca-Medina* the Court concluded that the sport's governing body was entitled to maintain its rules. It had not been shown that the rules concerning the definition of an offence or the severity of the penalties imposed went beyond what was necessary for the organisation of the sport.

In *Meca-Medina* the Court took a broad view of the scope of the Treaty, but having brought sporting rules within its scope it shows itself readily prepared to draw on the importance of matters not explicitly described as 'justifications' in the Treaty in order to permit the continued application of challenged practices which are shown to be necessary to achieve legitimate sporting objectives and/or are inherent in the organisation of sport. That, then, becomes the core of the argument when EU law overlaps with sports governance: can a sport show why prejudicial economic effects falling within the scope of the Treaty must be tolerated in a particular case? As the Court put it in *Meca-Medina*, restrictions imposed by rules adopted by sports federations 'must be limited to what is necessary to ensure the proper conduct of competitive sport'. 15 This is a statement of the *conditional autonomy* of sports federations under EU law. And in addition, and central to the primary importance of the ruling, it is an assertion of the need for a case-by-case examination of the compatibility of sporting practices with the Treaty. 16 There is no blanket immunity: there is no zone of 'sporting autonomy' that can be treated as naturally and inevitably beyond the reach of EU law.

The Commission absorbed the Court's thematic approach in its White Paper on Sport issued in July 2007. 17 The Commission examines aspects of practice explicitly in the light of *The specificity of sport* (para 4.1). It explains that the specificity of European sport can be approached through two prisms:

> The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;

15 Para 47 ECJ.
16 See S Weatherill, 'Anti-doping revisited – the demise of the rule of 'purely sporting interest'?' [2006] European Competition Law Review 645; M Wathelet, 'L'arrêt Meca-Medina et Majcen: plus qu'un coup dans l'eau' 2006/41 Revue de Jurisprudence de Liége, Mons et Bruxelles 1799; A Rincón, 'EC Competition and Internal Market Law: on the existence of a Sporting Exemption and its withdrawal' (2007) 3 Journal of Contemporary European Research 224.
17 COM (2007) 391. Full documentation is available *via* http://ec.europa.eu/sport/white-paper/index_en.htm.

> The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.

It extracts this from the decisions of the Court and it insists that future application of the rules, embracing 'specificity', must comply with the Treaty. Elaboration is provided by the supporting Staff Working Document, which identifies key features of the 'specificity of sport' to include interdependence between competing adversaries, uncertainty as to result, freedom of internal organisation, and sport's educational, public health, social, cultural and recreational functions. Substantial Annexes, containing detailed legal analysis, deal with *Sport and EU Competition Rules* and *Sport and Internal Market Freedoms.*

The key point, however, is that in so far as concessions are made to sporting 'specificity' they are made on terms dictated by EU law; and, moreover, a case-by-case analysis of sporting practices is required. A general exemption is 'neither possible nor warranted', in the judgement of the Commission. 18 This legal analysis is heavily dependent on *Meca-Medina*, which is the only decision of the Court explicitly referred to in the body of the White Paper. From the perspective of governing bodies in sport there are two principal objections to this position. The first is that EU law misperceives the nature and purpose of sport and that it intervenes in an insensitive and destructive manner. The second is that a case-by-case approach generates great uncertainty for those involved in the organisation of sport. Such anxieties have been audible for many years, but *Meca-Medina* inflamed the debate and the ruling attracted pained criticism from those close to sports governing bodies. 19 Similarly the White Paper has been greeted from this perspective with a degree of mistrust from those detecting a diminished concern on the part of the Commission to take full account of the supposed special character of sport. 20 This is the more general context within which *Meca-Medina* has been attacked for stripping away some of the autonomy to which sports governing bodies regularly lay claim as necessary and appropriate. Such rebukes may be fair, they may be unfair – but the essential *contestability* of the practice of EU intervention in sport, allied to the deficiencies and constitutional restraint embedded in the Treaty itself, is plain. So too is the magnitude of the sums of money at stake.

4 The politics of the 'sporting exception'

18 Staff Working Document (n 17 above) 69, 78.
19 See eg G Infantino (Director of Legal Affairs at UEFA), 'Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?' UEFA paper 02/10/06, available at http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf; J Zylberstein, 'Collision entre idéaux sportifs et continges économiques dans l'arret *Meca-Medina*' 2007/1-2 CDE 218.
20 J Hill, 'The European Commission's White Paper on Sport: a step backwards for specificity?' (2009) 1 International Journal of Sport Policy 253.

The result of the evolved pattern sketched above is that sports bodies need to engage with EU law. Their ideal outcome, periodically voiced with yearning, would be to immunise sport from the application of EU law. This would be in principle possible, though given that it would require the setting aside of the Court's interpretation of provisions of the Treaty by dint of unanimously agreed Treaty revision, it has never seemed politically realistic. It would, moreover, involve some heroic drafting. Some aspects of sport, such as protection of intellectual property rights, are not at all 'special' but rather ferociously commercial and should surely not be immunised from legal control. So a formula would need to be drafted which would protect necessary 'sporting' rules from legal oversight. This would be extremely difficult to achieve and, in any event, its interpretation would ultimately fall for authoritative determination by the Court in Luxembourg, which would not be what those seeking 'sporting autonomy' would want at all.

The Declarations on Sport agreed at Amsterdam and Nice are revealing. They show political disinclination to agree binding rules on sport and, moreover, even in a non-binding setting, there is no evident appetite to swallow the more aggressive appeals for partial or total immunity advanced by sporting 'insiders'.

The Declaration on Sport attached to the Amsterdam Treaty merely asserts that

'The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.'

The Nice Declaration is rather more elaborate but reveals a similar tone. A Declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies' was annexed to the Conclusions of the Nice European Council held in December 2000. This concedes the absence of any direct powers in the area, but accepts that in its action taken under the Treaty the institutions must 'take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.' The European Council calls also for the preservation of 'the cohesion and ties of solidarity binding the practice of sports at every level'.

The adoption of these Declarations is important in the sense that it showed that the tension between the EU's absence of explicit competence in the field of sport and the activity of its Court and Commission in applying the rules on free movement and competition had squeezed out a political response. But the legal form and the chosen content is telling: non-binding Declarations which do little more than sketch broad aspiration and generalities was the best that sport was able to extract from the political process. These Declarations emphatically do not subvert the core of the *Bosman* ruling's firm application of the fundamental Treaty rules governing free movement law to sport. Indeed this was expressly acknowledged by the Court in both *Deliege* 21

21Cases C-51/96 & C-191/97 n 6 above paras 41-42.

and in *Lehtonen* [22] where it treated the Amsterdam Declaration as confirming its own case law, not calling it into question. A 'sporting exception' is as far away as ever.

Underlying this narrative is the appreciation that for sport to secure protection from the EU and its legal order it must in some way engage with it, not dismiss it as irrelevant. After all, as the practice of the Court and the Commission accumulated it became increasingly plain that the EU's institutions did not merely show rhetorical acceptance of the claim that 'sport is (sometimes) special'. They put it into practice, and gave the green light to a number of challenged practices, ranging from rules against multiple club ownership 23 to selection for international competition 24 to collective selling of broadcasting rights. 25 Even in *Meca-Medina* the outcome was *not* to preclude anti-doping controls. The EU – the Court, the Commission – was something that sports bodies could do business with. UEFA, in particular, is notable for adapting its strategy towards a more co-operative model. 26 And this theme helps to explain the negotiation and likely impact of the provisions newly inserted by the Treaty of Lisbon.

5 The long haul: negotiating the Treaty of Lisbon

The Convention on the Future of Europe opened in February 2002. The small number of documents submitted which dealt explicitly with sport tended to have in common an anxiety that the special character of sport has been undermined and a consequent ambition to craft more legally durable protection than is provided by the Amsterdam Declaration. 27 None, however, offers a detailed explanation of what is really reckoned to be wrong with the current situation. So, for example, the Report of M. Lamassoure on the division of competences between the European Union and the Member States asserts that *Bosman* was 'ill-advised' but does not explain why. 28 At least at this stage, one's impression was that sport was mounting a modestly effective, if intellectually thin, case in favour of acquiring some degree of protection from EU law. But there was no clear notion of precisely what shape this might take – and, as will be explained, one never really emerged.

One of the few contributions to deal explicitly with sport was the so-called 'Freiburg draft'. 29 This is helpfully illustrative not merely for its failure to persuade mainstream thinking at the Convention but also for what it reveals about the difficulty of framing a reliable shelter for sport. In its Article 24, entitled 'Respect for the Sovereignty of the Member States', the draft provided that when exercising the competences assigned by the Treaty, the Union shall respect the sovereignty of the Member States especially in listed areas which 'are characteristic for their national

---

[22] Case C-176/96 [2000] ECR I-2681 paras 32-33.
23 Note 8 above.
24 Note 6 above.
25 Decision 2003/778 *Champions League* [2003] OJ L291/25.
26 B García, 'UEFA and the European Union: From Confrontation to Co-Operation' (2007) 3 Journal of Contemporary European Research 202.
27 See especially CONV 33/02 17 April 2002 (Duhamel), CONV 337/02 10 October 2002 (Tajani), CONV 478/03 10 January 2003 (Haenel et al). Documentation is available via http://european-convention.eu.int, last accessed 11 June 2010.
28 At http://european-convention.eu.int/docs/relateddoc/511.pdf, page 19.
29 CONV 495/03 20 January 2003.

identity and their fundamental constitutional legal order': 'sports policy' appears on the list. Union measures shall not 'encroach upon the core area of these sovereign rights'.

But to which institutions of the Union is this direction addressed? If it is a control over the exercise of *legislative* competence then it is of little moment, because there is scarcely any such legislative activity. If it is a restraint on the application of the law of the internal market to sport then it is much more significant: but it also horribly imprecise. How wide an exclusion is intended? It is inconceivable that all of the commercial activities undertaken in the field of sport would be immunised from EU law and so the formula simply throws up awkward boundary disputes. As a general observation, any attempt to carve out sectoral protection is difficult given the logic of the Treaty as a broadly based, functionally driven regime, and the Freiburg draft, like other similarly motivated controlling devices advanced at the Convention 30, persuaded few of its operational viability. The provision in the Treaty post-Lisbon which comes closest to Article 24 of the Freiburg draft is Article 4(2) TEU, but its direction that the Union shall respect the national identities and essential functions of the Member States does not mention sport and is unlikely to be apt to cover it, or at least *all* of it – and in any event it envisages a process of assessing the worth of particular State features in the context of the achievement of the EU's objectives whereas by contrast the Freiburg draft sought to seal off core areas of 'sovereignty' from EU intervention. 31

The majority view was more favourably disposed to placing sport within the explicit scope of the Treaty for the first time – or at least it was not inclined to side with such aggressive curtailment in the scope of EU activity. A 'Digest of contributions to the Forum', prepared in the summer of 2002 in advance of a plenary session on civil society, advised of a 'call for a specific legal basis for support for sport'.32

The Praesidium was famously influential in dictating the terms of the debate at the Convention. It presented a 'preliminary draft Constitutional Treaty' to a plenary session on 28 October 2002. There was at this stage no place for sport. However, the draft text proposed by the Praesidium and released on 6 February 2003 inserted sport into Part I of the Treaty as an area where the EU would be competent to take 'supporting action'. 33 And once the Praesidium's February 2003 text had added sport to the list of competences where supporting action could be taken little active dissent was provoked. The deal was done.

The Convention over, the Draft Treaty establishing a Constitution for Europe submitted to the President of the European Council in Rome in July 2003 duly placed sport alongside education, vocational training and youth as an area of 'supporting, coordinating or complementary action' and added detailed provisions in a new Article

30 For a survey see S Weatherill, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1.
31 One might understand the concern to protect national constitutional identity in the BVerfG's *Lisbon* judgment as a version of the Freiburg draft wrapped up in national, rather than EU, constitutional dress (http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html), but here too it would be a surprise if (all aspects of) sport were found to form part of that identity.
32 CONV 112/02 17 June 2002.
33 On the lobbying to achieve this change, see B García and S Weatherill, forthcoming.

buried deep in Chapter V of Title III of Part III of the text, under the title *Education, Vocational Training, Youth and Sport*. This provided that 'The Union shall contribute to the promotion of European sporting issues, given the social and educational function of sport'. Union action was to be aimed at 'developing the European dimension in sport, by promoting fairness in competitions and cooperation between sporting bodies and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'. There is a degree of ambiguity here: the EU's role in the field of sport is to be made legitimate but the grant of competence is limited and rather vague.

Ultimately the Convention's text underwent adjustment as particular points, largely of an institutional nature, proved indigestible to the intergovernmental conference later in 2003. But much of the Convention's text, and the essential pattern it had piloted, endured unaltered. For sport there was some small change beyond the cosmetic. The Treaty establishing a Constitution finally agreed in late 2004 included sport alongside education, youth and vocational training as an 'area of supporting, coordinating or complementary action' while the substantive elaboration provided that 'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.' Here, then, was a potentially significant change: the reference to the 'specific nature of sport' was added between the middle of 2003 and the end of 2004. 34 Its significance is considered below. Union action was to be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen'. On this aspect of the new provisions, then, there was minimal change between 2003 and 2004. And it was added that the Union and Member States 'shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe': this provision had appeared in the Convention's finally agreed 2003 text but with reference *only* to education.

The Treaty establishing a Constitution, fatally damaged by its rejection in referenda in France and the Netherlands during 2005, was laid to rest after an introspective period of reflection in 2007. The story is told elsewhere of how the Treaty of Lisbon was prepared so as to be sufficiently different from the Treaty establishing a Constitution to justify withdrawal of the promise of a referendum (except in Ireland) but not so different that the substance of the planned institutional reforms would be lost. 35 As far as sport is concerned, however, the narrative is one of consistency. What was agreed at the end of 2004 in the Treaty establishing a Constitution was left untouched in 2007 as the Lisbon Treaty was negotiated and agreed.

6 The Lisbon Treaty

The Lisbon Treaty brings sport within the explicit reach of the founding Treaties for the first time. In formal terms, then, it is profoundly significant. As is well known, the

34 Garcia and Weatherill (n 33 above).
35 See P Berman in this book.

effect of the Lisbon reforms is formally to abolish the three pillar structure crafted for the EU at Maastricht. From 1 December 2009 the European Union has been founded on two Treaties which have the same legal value: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is the amendments to what was the EC Treaty, and is now the TFEU, which grant sport its newly recognised formal status.

However, although the *fact* of sport's addition to the list of EU competences is undeniably important, the detailed content of this competence newly granted by the Member States to the EU is far less remarkable. The details, agreed in 2004 and reaffirmed in 2007, are found in the vast Part Three of the TFEU, which is entitled 'Union Policies and Internal Actions', specifically in Title XII of Part Three *Education, Vocational Training, Youth and Sport*. So sport is inserted into an amended version of Chapter 3 in Title XI of the old EC Treaty, which was designated 'Education, Vocational Training and Youth'. Under the post-Lisbon re-numbering the relevant Treaty Articles are Articles 165 and 166 TFEU.

Article 165 stipulates that the Union 'shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function'. And, pursuant to Article 165(2), Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' Article 165(3) adds that the Union and the Member States 'shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe'.

Article 165(4) provides that in order to contribute to the achievement of the objectives referred to in the Article, the European Parliament and Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; and that the Council, on a proposal from the Commission, shall adopt recommendations.

7 Assessing the impact of the Lisbon Treaty

The principal motivation behind the inclusion of sport in the Treaty is not to elevate the EU to a position of primary importance in the regulation of the sector. It is, instead, an attempt to make clearer the relationship between the EU and sport, under an assumption that the pre-existing state of the law, developed without any mandate granted explicitly by the Treaty, had failed to provide security.

It is in the first place important to note that there is created only a supporting competence for the EU, the weakest type of the three principal types of competence mapped in Title I of Part One of the TFEU. The basic competence descriptor is found in Article 6(e) TFEU: 'The Union shall have competence to carry out actions to

support, coordinate or supplement the actions of the Member States'. The areas of such action shall, at European level, include (inter alia) 'education, vocational training, youth and sport'. Moreover the provisions are drawn carefully and narrowly, stressing that the Union shall do no more than 'contribute' to the promotion of European sporting issues. And though legislation may be adopted, it is confined to 'incentive measures, excluding any harmonisation'.

This cautiously drawn formula is designed to reassure those who fear the rise of the EU as a sports regulator. The Commission's 2007 White Paper declared that 'sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs, with a central role for sports federations'. This deference to the value of sites for the regulation of sport other than the EU in general and the Commission in particular follows the Nice Declaration. The Lisbon Treaty is consistent with this theme. The EU's role, though formally recognised, is plainly designed to be limited and it lacks concrete shape. And Article 6 TFEU reinforces the impression that the EU's role in sport is strictly subsidiary to that of the Member States and governing bodies in sport. But modest though the change is, this is different from the position prior to Lisbon. Lisbon plus the 2007 White Paper provides institutional momentum. The first EU Sports Council was held in May 2010.

The EU's role in the field of sport is legitimated. Sporting bodies can no longer claim that sport is none of the EU's business. Instead one would expect them to claim that it is the EU's business but only to a very limited extent, and only in so far as respect is shown for its 'specific nature'. This is an important change, constitutionally and strategically. The theme here is consistent: sports bodies must engage with the EU as part of a strategy to minimise its perceived detrimental effect on their practice. They cannot simply ignore it but nor are they strong enough to extract a promise of immunity. So what is left is the ambiguous middle ground – the Lisbon Treaty's inclusion of sport in the text of the Treaty but on terms which are far from clear. The risk is plainly that Lisbon will be treated as a legitimation of the EU's involvement in sport in a way which generates intervention going beyond what the Treaty in fact envisages. That is: scrupulous adherence to the limits imposed by the Treaty may be overtaken by more ambitious institutional practice. This is certainly dangerous and should be monitored. 36 Not only the constitutional competence but also the basic expertise of the EU institutions to develop a general policy on, say, anti-doping is lacking. Their primary interaction with sport should be where it touches specific rules of the Treaty: free movement and competition. Should the EU overuse its new legislative competence it will risk damaging its legitimacy.

The most immediately obvious aspect of the Lisbon reforms for those actively involved in sports governance is likely to be the creation of an EU budget stream devoted to sports projects. It may not be large, it may not be easy to access. But the current position whereby any sports related project needed to be fitted often awkwardly into some other project where the EC did hold a competence has been brought to an end. So the designation of 2004 as the European Year of Sport was necessarily presented in the governing legal measure as the European Year of

36 The House of Lords Select Committee on the European Union, while noting the increased profile of sport in the Treaty post-Lisbon, urges the government 'to ensure that the European institutions adhere to this provision' (Tenth Report 2007-2008, Para 8.49, http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/6202.htm).

Education through Sport, based on what was then Article 149 EC on education. 37 The 2007 White Paper already provides a framework for EU action, and the entry into force of the Lisbon Treaty may prove important in facilitating a coherent and financially secure pattern of development.

8 Is 'EU sports law' now different?

Hitherto the principal body of 'EU sports law' has been shaped by the subjection of sporting practices to the Treaty rules on free movement and on competition. What effect will the Lisbon adjustments have on their interpretation? The formula chosen in the Lisbon Treaty does not give sports governing bodies the pure autonomy they may have desired. It is instead a cautiously phrased version of the notion that 'sport is special'. Ever since the *Walrave* ruling in 1974 38 the institutions of the EU have offered periodically inconsistent explanations of how and why sport is special, but now that sport finally enjoys explicit recognition in the Treaty, the newly introduced and admittedly open-ended provisions will doubtless provide the framework for future debate, policy articulation and litigation. It is true that Article 165 TFEU is not formally 'horizontal' in nature: unlike, for example, environmental protection (Article 11 TFEU) and consumer protection (Article 12 TFEU) it is not embedded in all the Union's activities. However, the Court has been willing to absorb non-binding texts pertaining to sport issued at EU level in exploring the nature and scope of the relevant rules of the Treaty. 39 Article 165, introduced at Lisbon, goes further: it is binding. So even though sport's special features are not located in a horizontal Treaty provision one would have readily anticipated that the Court would be receptive to their invocation in litigation arising out of free movement and competition law, and this was confirmed in the first 'post-Lisbon' sport-related judgment, *Bernard*. 40

Textual analysis is worthwhile, even if ultimately inconclusive. Union action shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.' This is a mix of the obscure and self-evident, spiced by an unsettling imprecision about just what the EU's developmental role really is. 'Openness' could be vague window-dressing which has no legal bite or it might be employed to argue for example that EU law, interpreted in the light of Article 165(2) TFEU, does not tolerate rules that exclude non-nationals from competitions designed to crown a national champion. This was mentioned as an issue deserving attention in the Staff Working Document accompanying the White Paper 41 and in 2008, the Commission, answering a question by MEP Ivo Belet, contented itself with a cautious reply setting out its basic approach to the application of EU law to sport and promising a study on access to individual sporting competition for non-national athletes. 42 Access restrictions vary

37 Dec 291/2003/ EC [2003] OJ L43/1.
38 Note 1 above.
39Cases C-51/96 & 191/97 note 6 above paras 41-42; Case C-176/96 note 22 above paras 32-33.
40 Case C-325/08 [2010] ECR I-0000 para 40.
41 Note 17 above page 45.
42 WQ P-4798/08. The contract was awarded to TMC Asser Instituut in 2010, Contract Notice 2010/S 31-043484.

state by state, sport by sport, and it is at least possible that recognition of the promotion of openness as a feature of the European dimension of sport will strengthen the force of a legal challenge by an excluded participant.

Probably it is the direction that the Union shall take 'account of the specific nature of sport, its structures based on voluntary activity and its social and educational function' that will become most high-profile consequence of the Lisbon reforms. Consider, for example, rules in football requiring that squads contain a minimum number of 'home grown' players: that is, players developed and trained for a defined period in the country in which the club is based. The Commission, following *Bosman*, has never been prepared to accept that football may re-instate rules in club football based directly on nationality, but the 'home-grown' rules favoured by UEFA are *not* based directly on nationality. Young players who are nationals of Member State X count as home-grown in Member State Y as long as they have spent long enough in the early part of their career on the books of a club in Member State Y. Doubtless such rules are indirectly discriminatory on the basis of nationality, because most home-grown players in Y will also be nationals of Y, but it is orthodox in EU law that indirect discrimination may be shown to be objectively justified. The 'home-grown' rules would be defended as means to promote balance in sporting competition (because richer clubs could not simply fill their squads with expensively purchased finished products) and as a device to encourage the training of young players. Both concerns have been recognised by the Court in *Bosman* as legitimate in sport. No Court ruling exists on the compatibility of such rules with EU law but the Commission has accepted that 'home grown' rules are potentially compatible with the Treaty. The Staff Working Document accompanying the 2007 White Paper merely mentions this as one of several important outstanding issues 43, but in May 2008 the Commission, publishing an independent (and poorly written) study on the compatibility of the scheme with EU law, announced a firmer view. It considers the home-grown rule compatible with EU law in the light of its contribution to promoting balance in sporting competition and encouraging the training of young players. 44

It is an approach that may prevail, but it is far from uncontroversially correct. The argument rooted in competitive balance is thin: rich clubs will plainly still acquire the best players while poorer clubs will find that the available pool of talent in which they can fish has been artificially diminished by the requirement to hire a defined number of 'home-grown' players. And it is far from clear that creating a protected class of 'home-grown' players, who will certainly enjoy higher wages than equally skilled non-qualifying players simply because clubs need to hit their quotas, is sensible as a means to improve the quality of training. Better, one might think, to open up the market so young players have to sink or swim rather than enjoy artificial buoyancy because of where they happen to have been 'grown'. Given these objections and given that there are other and plausibly more appropriate ways to achieve the objectives pursued by the home-grown rules it is at least arguable that they are incompatible with EU law. 45

43 Note 17 above page 76.
44 IP/08/807, 28 May 2008, http://ec.europa.eu/sport/news/news270_en.htm.
45 Cf S Miettinen and R Parrish, 'Nationality Discrimination in Community Law' (2008) 5 Entertainment and Sports Law Journal, http://www2.warwick.ac.uk/fac/soc/law/elj/eslj.

This is merely to scratch the surface of an intriguing debate, but the purpose of this paper is not to offer a concluded view. Rather, it merely questions whether the adjustments made by the Lisbon Treaty make any difference. The Lisbon reforms might alter the outcome, or they might merely re-frame the analysis. Post-Lisbon, one would expect the football authorities to headline their defence by asserting the 'specific nature of sport' recognised by the Treaty as a reason for accepting rules of this type that one would not expect to find in other industries. Moreover, one might anticipate that it would be argued that the 'specific nature of sport' recognised by the Treaty dictates that the institutions of the EU should adopt a light touch in reviewing the choices made by sports bodies, who have much greater expertise in understanding what really is 'specific' about sport. It is at least possible that the Court and the Commission will be tempted to show a greater deference to sporting choices than they did prior to the entry into force of the Lisbon Treaty. But the changes are sufficiently ambiguous to rule out confident prediction. In *Bernard* 46 the Court simply used Lisbon to 'corroborate' its own case law, which suggests it is not minded to alter course. The slippery quality of the Lisbon innovation is such that one can do more than observe that sport can, at last, rely on explicit wording contained in the Treaty to structure its argument that sport is 'special' while reflecting that this may be merely a confirmation of how the Court has always treated sport since *Walrave and Koch*.

One could readily regard this as a sport-specific manifestation of a more broadly applicable tilt. The changes to substantive EU law made by the Lisbon Treaty are very few and mostly cosmetic. However, Article 3(3) TEU states that 'The Union shall establish an internal market'. The pre-Lisbon Article 3(l)(g) EC provided that the activities of the EC shall include 'a system ensuring that competition in the internal market is not distorted', and the Court on occasion relied explicitly on this provision in interpreting the competition rules. 47 It is now lost from the text of the Treaty proper. This concession was apparently extracted during the Treaty negotiations in 2007 by the French, where part of the reason for voter dissatisfaction appears to have been disquiet over a perceived hard-edged pro-competition philosophy. A Protocol on the Internal Market and Competition attached to both the EU Treaty and the TFEU states that the internal market referred to in Article 3 TEU 'includes a system ensuring that competition is not distorted'. And in formal terms Protocols carry the same legal force as the Treaty itself. So perhaps the concession extracted by the French is of no practical or constitutional significance. But it cannot be excluded that the Court might conclude that the prominence of the Union's commitment to undistorted competition has been reduced and that it accordingly carries less weight than it has done hitherto when pitched against other concerns such as social cohesion or targeted industrial policy. One could certainly expect public authorities wishing, for example, to grant aid in circumstances where there are objections rooted in consequent competitive distortion to the market to argue that the balance of priorities has been shifted away from that aim by the Lisbon Treaty. The Commission may reject any such adjustment; the Court may too. And anyway even before the entry into force of the Lisbon Treaty the Court declared that the EU has 'not only an economic but also a social purpose' 48 so in fact the application of the Treaty's economic law provisions has not been

46 Case C-325/08 n 40 above para 40.
47 Eg Case C-67/96 *Albany International* [1999] ECR I-5751; Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.
48 Eg Case C-438/05 *International Transport Workers' Federation* v *Viking Line ABP* [2007] ECR I-10779 para 79.

sealed off from considerations of a non-economic nature. As with sport, so too at a much more general level in the development of EU trade law: it is plain that Lisbon provides some fresh material for those wishing to dull the blade of EU market-driven intervention, although it is not yet clear whether outcomes will ultimately be any different from those that would have been reached before the entry into force of the Lisbon Treaty.

9 Conclusion

The evolution of sports law in the EU represents a fascinating case study into the interaction of the orthodox rules governing the market-making project and the rules, formally sourced in private organisations, which underpin the global regime of sports governance. The EU's law does not compete with sport's own 'internal law' – it instead permits it a conditional autonomy. And in fixing the nature of those conditions the institutions of the EU, primarily the Court and the Commission, have been forced to develop a concept of legitimate sports governance despite the absence of any directly relevant material in the Treaty itself.

Lisbon changes everything – and nothing. After Lisbon there is no longer any doubt that the EU has a legitimate, if subordinate, role in the field of sport. There will be legislation (of a supporting nature): there will be a budget. And the Treaty does at last contain material capable of nourishing the Court's interpretation of the free movement and competition rules in the particular context of sport. The specific nature of sport is now written into the Treaty. One would suppose that sporting bodies would no longer waste time claiming EU law has no application to their activities and instead seek to rely on the wording of the new provisions as a basis for minimising the transformative effect of EU law on their practice. However, since the Court and the Commission have not in the past blindly applied EU law to sport as if it were a 'normal' industry it remains to be seen whether Lisbon really changes anything or whether instead it simply confirms existing practice. The vague nature of the new provisions delegates considerable power to the Court and Commission to make that choice, but the most likely outcome is – no change. EU law has *always* treated sport as 'special'.