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AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

PROFESSIONAL SPORTS AND COMPETITION LAW IN EU AND TURKEY

YÜKSEK LİSANS TEZİ

Uğur MUTLU

İstanbul, 2009

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ONAY SAYFASI

Enstitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Uğur MUTLU'nun "PROFESSIONAL SPORTS AND COMPETITION LAW IN EU AND TURKEY" konulu tez çalışması 10 Aralık 2009 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğu~~ ile başarılı bulunmuştur.

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11.12.2009...tarih ve 2009/XVI. sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

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Danışman: Yrd.Doc.Dr.Yıldıray SAK

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ABBREVIATIONS AND ACRONMYS

AIOWF	Association of International Winter Sports Federations
ANOC	Association of National Olympic Committees
ANOCA	Association of National Olympic Committees of Africa
ARISF	Association of IOC Recognized International Sports Federations
ASOIF	Association of Summer Olympic International Federations
CAS	Court of Arbitration for Sport
CFI	Court of First Instance
DG	Directorates General
DHB	German Handball Federation
DRC	Dispute Resolution Chamber of FIFA
ECJ	European Court of Justice
EEA	European Economic Area
EFAA	European Football Agents Association
ENGSO	European Non Governmental Sports Organizations
EOC	European Olympic Committees
EPC	European Paralympics Committee
EPFL	Association of European Professional Football Leagues
FAPL	Football Association Premier League
FFF	Fédération Française de Football
FIA	Fédération Internationale de l'Automobile
FIFA	Fédération Internationale de Football Association
FIFPro	Fédération Internationale des Associations de Footballeurs Professionels
FINA	Fédération Internationale de Natation
GAISF	General Association of International Sports Federations
IOC	International Olympic Committee
IF's	International Federations
IPC	International Paralympic Committee
LFJ	Judo et Disciplines Associées

NF's	National Federations
NGB's	National Governing Bodies
NOC's	National Olympic Committees
OCA	Olympic Council of Asia
ONOC	Oceania National Olympic Committees
OJ	Official Journal
PASO	Pan American Sports Organization
SGEIs	Services of General Economic Interest
TAF	Arbitration Tribuna1 for Football
TCA	Turkish Competition Authority
TFF	Turkish Football Federation
TMF	Turkish Mountaineering Federation
TFFL	Law Pertaining to the Incorporation and Duties of Turkish Football Federation
UCI	Union Cycliste Internationale
UEFA	Union des Associations Européennes de Football
UN	United Nations
UNEP	United Nations Environment Programme
URBSFA	Union Royale Belge des Sociétes de football Association
VJF	Vlaamse Judo Federatie
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code
YSGD	Youth and Sports General Directorate
YSGD Law	Law Pertaining to the Organization and Duties of Youth and Sports General Directorate

ABSTRACT

Following the development and commodification of sports and related activities legal debates have arisen with the framework of EU and Turkey. Especially in EU, many of the issues have been discussed during the process which was initiated by the *Walrave* judgment. Considering both the social and ecomomic aspects of the issue, European institutions namely the Council and the Commission have adopted resolutions and prepared reports in this respect. Current status quo envisages attempts on the adoption of a specific sport article within the Reform Treaty which makes it a complimentary part of Community law. As far as the Turkish dimesion of the issue is concerned, it has been observed that although the development in Turkey was not as swift as EU, certain issues were taken into consideration. Within a limited scope, certain issues were discussed especially in terms of competition law. However, it can be stated that they are ineduqate. It has been observed especially in the context of State aids that Turkey did not fulfill its obligations as expected and this has serious consequences in affecting competition in sports.

ÖZET

Avrupa Birliği ve Türkiye ölçeğinde spor ve buna bağlı aktivitelerin gelişerek ticarileşmesi neticesinde konunun hukuki boyutları tartışılmaya başlanmıştır. Özellikle Avrupa Birliğinde *Walrave* kararı ile başlayan süreçte sporun Topluluk Hukuku içerisindeki yeri araştırılmıştır. Başta Konsey ve Komisyon olmak üzere Avrupa Birliği Kurumları konunun sosyal ve ekonomik boyutlarının olduğu düşüncesi ile birçok karar almış ve raporlar hazırlamışlardır. Mevcut durum itibariyle Lizbon Antlaşması çerçevesinde spor konusuna özel bir madde ayrılarak topluluk hukukunun bütünleyici bir parçası haline getirme çabaları bulunmaktadır. Konunun Türkiye boyutu incelendiğinde ise gelişimin hızı aynı olamamakla birlikte bir takım konuların inceleme alanı bulduğu ve özellikle rekabet hukuku konusunda kısıtlı bir alan içerisinde hukuki tartışmaların süregeldiği anlaşılmıştır. Ne var ki, sporun Türk hukuk düzeni içerisindeki yeri gerektiği kadar incelenmemiştir. Türkiye başta Devlet Yardımları konusu olmak üzere birçok konuda üzerine düşen yükümlükleri yerine getirmemiştir ve bu konunun sporda rekabetin etkilenmesi bakımından ciddi sonuçlara ulaşmakta olduğu görülmektedir.

1. INTRODUCTION

The United Nations has estimated that globally sport accounts for 3% of world total economic activity[1]. The European Commission has estimated that sport represents 1% of the GDP of the European Union[2]. In 2009 FIFA has entered into agreements with African TV Networks for the TV rights of 2010 FIFA World Cup in the amount of $ 3.74 billion[3]. The 2008 Olympic Games in Beijing are expected to boost the Chinese GDP by $ 2.8 billion in five years from 2004[4].

As all these figures above indicates that although sport is a physical activity for the people all around the globe to dedicate themselves to the game and competition, it has also become an industry in which stakeholders, players and other relevant actors are making huge revenues out of it. This aspect of sport has called into question its legal regime and to some extends the legal status of the bodies which are empowered to ensure its governance. Moreover, increase in the number of sport related disputes which have been brought before both national and international courts stimulated the process of legal scrutiny.

These arguments have even reached to a point where the establishment of sports governing bodies and their rules, regulations and proceedings are questioned. Some scholars even questioned from human rights perspectives that "how far should disciplinary proceedings for sport related misdemeanors take place behind doors? Or how far should disciplinary panels be independent and how far should such experienced sports men and women be seen to be the best judge of sport related disciplinary offences? Or should there be appeals to independent bodies in order to secure compliance with Article 6 of [European Convention on Human Rights and Fundamental Freedoms]?"[5]

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[1] United Nations Environment Programme (UNEP), November 2004
[2] Commission of the European Communities, *The European Model of Sport* (1998), Consultation Document of DG X
[3] *See* < http://www.foxsports.com.au/story/0,8659,25363444-23215,00.html > (21.04.2009)
[4] *See* < http://www.china.org.cn/english/sports/155475.htm > (16.04.2008)
[5] E.Szyszczak, 'Is sport special?', in B.Bogusz, A.Cygan and E. Szyszczak, (eds.), *The Regulation of Sport in the European Union*, (Edward Elgar Publishing 2007), p.5

On the other hand, debate at the EU level has started with the *Walrave* judgment of the European Court of Justice. In this judgment, basically, the compatibility of sporting rules with the Community law principles was challenged before the Luxembourg courts in the context of free movement. After the proceedings, the Court have delivered its judgment on the case and established that "sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty"[6]. This judgment, in principle, reflected the conflict of interest between EEC and world of sport in cases where the economic aspects of sporting activities are at stake.

Walrave was followed by other judgments of the European Court of Justice and the concept of "sporting exception" has been discussed within the framework of the case-law. In the meantime, even though there is no EC Treaty competence to interfere into sporting matters, EU institutions have made considerable attempts to ensure legal certainty on the matter. In 1997 the Amsterdam Declaration on Sport was attached to the Treaty of Amsterdam and series of declarations followed this attempt which finally resulted with the inclusion of a specific article in the Lisbon Treaty. The failure of the Ireland in the ratification referendum set back the initiatives to carry sport into the Treaty framework however, the Commission's White Paper on Sport in 2007 have proved that there is need for a broad initiative on sport considering the political support at the EU level and the demands of the sporting stake holders for legal clarity.

Until *Meca-Medina* judgment the debate on legal aspects of the sporting activities was gathered around the principles of free movement rules. However, in *Meca-Medina* competition law aspects of the issue was challenged and the European Court of Justice along with the other arguments, for the first time stressed that sporting activities may have anti-competitive implications.

Whilst there have been important developments at the EU level as regards the sport, Turkey was trying to deal with its "everlasting" membership process to the EU.

[6] Case C-36/74 *Walrave and Koch v.Association Union Cycliste Internationale* [1974] *ECR* 1405

Ankara Agreement which was concluded in 1959 in order to establish an association between with EEC at the time and the Customs Union project realized after Ankara Agreement in 1996 which also launched the process of approximation of EU legislation to Turkish Law. Adoption of the "Act on the Protection of Competition" constitutes an important component of this process.

This thesis, basically, examines the legal developments at EU and Turkey with respect to recognition of sporting activities in the sphere of competition law. It should be stressed right at this point that it is difficult to make an exhaustive comparative analysis given the lack of systematic data especially in terms of Turkish Law. However, what will be dealing below is to understand and discuss the main concepts that have been developed ever since in EU as regards the sport and to explore the applicability of these principles under Turkish Law.

In the first part of the thesis, the phenomenon of sport will be discussed in a historical context along with the sociological aspects and the identification of amateur and professional sport will be made in the light of the arguments that have been put forward in order to clarify their distinguishing factors.

Secondly, the relationship of sport and the law will be put under scrutiny. In doing so, some light will be shed on the "sports law" or "sport" and "the law" debate which has still been topical among scholars. Complementary to this, an overview on the regulation and governance of sport will be addressed in order to explore how the world of sports is governed on both national and international level.

In the third section, the focus will be turned to EU and the social and legal aspects of sporting activities will be discussed both from the perspectives of EU courts and EU institutions. In this respect, the concept of "specificity of sport" and its reflections on the European Court of Justice case-law will be discussed in detail. Then, the important policy developments in the EU will be explained in the light of policy coalitions that were emerged during the process.

In the last section of the thesis, competition law aspects of the issue will be examined form the EU and Turkey perspectives. After brief information on the general aspects of both systems, application of competition law principles will be emphasized in detail. In this section of the thesis core debate will take place on the question that to what extend competition law rules are applicable to sporting events and what are the similarities and differences if there is any. Within the analysis, relevant rules of both systems will be examined article by article. Moreover, suggestions will be made especially on the State Aid and Sport section since Turkey has not adopted any legislation on this issue.

Finally, thesis will be closed with a conclusion on the issues discussed above and on some implications and suggestions as regards the Turkey's membership to EU.

It should be stated at this point that broadcasting and media rights of sporting events are not included in this thesis since it requires a more detailed analysis which is beyond the limits of this thesis. However, especially the decisions of the European Commission and Turkish Competition Authority after conducting investigations on these issues were cited where necessary in explaining competition law aspects.

2. WHAT IS A SPORT?

2.1. History of Sport: From the 'Ancient Games' to the 'Modern Olympics'

The term 'sport' derives from the shortened form of *disport* which refers to a diversion and amusement. This original version of the word is rooted in Latin which literally means to 'carry away' (from *desporto*)[7]. The question as to how and when did the sports begin should be originated with the existence of human impulses and beings.

In accordance with some historians, sporting activities have found their basis in the daily routine of man such as 'work' whereas others believe that it can be found in the impulse to 'play'. Some others even argue that there is a logical linkage between sport and

[7] R. Brasch, 'How Did Sports Begin?' in S.Gardiner, et.al. *Sports Law*, 3rd edn. (Cavendish Publishing 2006), pp. 22-24

'combat'. However, all these efforts to define sport as part of human activity are criticized for their speculative nature due to lack of systematic data availability. The second problem would be that to apply western concepts of sporting activities to the prehistoric times while making definitions of sport. Since sporting activity derives its meanings from the culture that it is part, it would be a misjudgment and overstatement of definition if many of the human routines are defined as a form of sport[8].

Even though there has been an ongoing debate on the way to theoretically explain the origins of sport, no doubt that there were activities similar to today's games. The earliest evidence indicates that in 4000 BC in Mycenae horse riding was very popular as a sporting activity[9] and the traces of boxing is also recorded in Ethiopian hieroglyphics[10]. Following those years, paramilitary athletic activities such as racing, boxing and archery took place in Mesopotamia. While looking for answers regarding the historic origins of sport, one cannot argue the fact that the Olympic Games which were held in Olympia, Greece in 776 BC until AD 261 is undoubtedly the starting point as they were the oldest collectively organized sporting activity[11].

While noting that there is not enough evidence regarding the motive behind, one can argue that the Olympic Games in Greece were socio-cultural or even a religious phenomenon in terms of their effect on the lives of *Hellas*. Exceptionally, Games in Olympia had strong interaction with the religion and further regarded as a religious cult in the society. For instance, participants believed that their prizes were coming from the God. Rituals were being prepared and participants from various neighboring nations were also allowed to participate. Frankly, this organization was somehow rehabilitated the sociopolitical environment. Before the Games, an Olympic truce was declared in order to maintain the security of the participants and spectators[12].

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[8] G. Scambler, *Sport and Society: History, Power and Culture*, (McGraw Hill Education 2005), p.7
[9] *Ibid*, pp. 7-8
[10] S.Gardiner, et.al. *Sports Law*, 3rd edn. (Cavendish Publishing 2006), p.22
[11] *Ibid*, p.23
[12] Scambler, pp.11-15

Only the male citizens were allowed to be participated the Games while slaves and women were not. The Games were played in a place called '*stade*' and started with pentathlon, disc throwing and followed by wrestling. Then it came the horse riding and the car racing activities. There were also cultural activities organized and philosophers, poets and historians were invited to deliver speeches on certain issues during the games[13].

About 400 BC, following the defeat of Greek's by Spartan's, the ideology and the order of the Games were jeopardized and the spirit has begun to disappear[14]. Increasing Roman dominance in most of the world had no positive effect on the progress it rather set the process back. In the middle Ages personal and paramilitary sports become popular especially among the aristocratic members of the society. Tournaments were organized in sports like archery, spear throwing and hunting.

As the time passed, there were variety of games invented, of some played by ball or other supporting accessories. There were different sports popular in different countries. In France, for instance, the most popular sport was '*Jeu de Peume*'. This term refers to the word 'palm' in English language and the game is claimed to be the ancestor of the modern Tennis game. Even though French argue that they are the inventor of the tennis, there exists no historical evidence to prove that. In Italy, the game called 'Calcio' was very popular which also derived modern football. It has been so popular in Italy that since its incorporation, Italian Football Federation is using 'Calcio' in formal title[15].

In the modern ages the concept and the organization of sporting activities have begun to evolve towards in an affirmative way. Around 18th century British people in Europe were regarded as arrogant, non-socialized and even defined as animal like. However, British destroyed this apprehension by sport and evidently made it to go forward like no other nations did. They have re-invented athletic sports, advanced in football and

[13] U.Kesim, 'Dunya Spor Tarihi', in Erkiner and Soysüren (eds.), *Spor Hukuku Dersleri* (Istanbul: Kadir Has Üniversitesi Spor Hukuku Araştırma ve Uygulama Merkezi 2008) No:2, p.98
[14] K.Erkiner, 'Spora Tarihsel Bir Bakış', in K.Erkiner and A.Soysüren (eds.), *Spor Hukuku Dersleri* (Istanbul: Kadir Has Üniversitesi Spor Hukuku Araştırma ve Uygulama Merkezi 2008) No:2, p.57
[15] *Ibid*, pp.72-75

rugby. Establishment of sports 'club' is another contribution which, too, had considerable effect on the daily lives of British. Rowing races between Oxford and Cambridge Universities were very popular at that time[16].

There is no argument on the fact that the most important sporting activity organized throughout the history was Olympics. In the modern era, there were attempts for the Olympics to bring its unified and organized spirit back. The attempts of Frenchmen *Pierre de Coubertin* have resulted with the birth of modern Olympic Games which have become one of the biggest sporting events of our time[17]. He was an intellectual person coming from a wealthy French family and his ideas very well regarded among his friends[18]. *Coubertin*, for the first time, brought forward the idea to re-organize the Olympic Games in 1892 during the founding celebrations of the 5th anniversary of the French Athletic Sports Associations Federation. He then, traveled to many countries in order to find support for this idea. The outcome for all these efforts has gained success and International Olympics Committee (IOC) was founded in 1894 during the International Sports and University Congress[19].

Even though *Coubertin* have given considerable credit as the 'founding father' of Modern Olympics, transhistorical approach indicates that there were earlier attempts which also inspired him[20]. "The 'Cotswold Games', initiated by the Catholic English lawyer Robert Dover in the early 17th Century, also called 'Olympick Games', were probably the first athletic festivals in modern times to be linked to the ancient Games. However, other arrangements in other countries strove to establish connections to these noble roots as well. In Germany, philanthropic educational theorists and physical educators of the Enlightenment Guts Muths (1759-1839) and 'Turnvater' Jahn Centre for Olympic Studies (1778-1852) suggested the revival of the classical Olympic Games. In the 1830s, Gustav

[16] *Ibid*, pp.76-80
[17]The Olympic Museum Booklet, available at < http://multimedia.olympic.org/pdf/en_report_668.pdf > p.2 (01.12.2009)
[18] Erkiner, p.82
[19] *Ibid*, p.82
[20] *Ibid*, p.81

Schartau, the successor of Ling as a gymnastic and fencing instructor at the University of Lund, took the initiative to arrange folk festivals called the Olympic Games in Ramlösa in southwestern Sweden. In the county of Shropshire, England, the Much-Wenlock Games had been held regularly as 'Olympic festivals' since 1849. Coubertin personally attended the Much-Wenlock Games in 1890 on the invitation of their founder, the local surgeon and judge William P. Brookes. Finally, the Greeks had had their own Olympic Games in Athens, probably arranged four times between 1859 and 1889 and initiated by the wealthy business man Evanghelos Zappas[21]."

2.2. Sport in Turkish History

The historical origins of sport in Turkey can be traced back to ancient Anatolian Civilizations. For instance, a number of literary works suggests that sport in *Sumerians* was quite popular[22]. During the archeological excavations in *Kis* which is located 20 km eastern side of Babylon, illustrations and pictures were found that proves the existence sporting activities[23]. Especially, wrestling, sword fights, *çöğen* (game similar to modern polo), *gökbörü* (catching the goat while riding the horse), *seyirtme* (some kind of racing), *pijula* (boxing) were the most popular games played in Anatolia[24].

The *Hittes* who were the most advanced civilizations settled in Anatolian region at the time made sport an important part of their culture and daily lives. Around AD 2800 the element of 'iron' was invented by them and it was used for making sword, axes and shields. Unlike other societies they used these tools not just for pre-war practice but also for peaceful purposes to spend time and entertain themselves. It is in so much as that the demonstrations during their worship rituals to God are even compared with *Pan-Hellenic* Olympic Games held in *Olympia*[25].

[21] S. Loland, 'Pierre de Coubertin's Ideology of Olympism from the Perspective of the History of Ideas', *The International Journal of Olympic Studies*, 4 (1995) p.61
[22] Erkiner, p.83-85
[23] Erkiner, p.102
[24] *Id*.
[25] *Id*.

As far as the sport in *Turks* is concerned it can be said that evidence shows that sport was an inevitable component of the culture. During their habitation in Middle Asia they had to do exercise to keep their bodies warm and to survive. Some literary work even considers these physical activities as the foundations of sport in Turks[26]. The development of sport in Turkey can be better understood if a distinction in terms of the involvement of Islam is being made. According to some scholars development of sport in Turkey should be analyzed under three in three different periods: the pre-Islamic, the Islamic and post Islamic.

In the 'pre-Islamic' period archery, *cirit* and wrestling was very popular among the Turks[27]. Especially archery, unlike its performance for the pre-war practicing it was also played for entertainment and the best archers were rewarded for their good marksmanship. The teenager boys were tested for their strength and survival skills in order to obtain an honorable position in the society and moreover, they were not granted their public names until they had proved themselves in athletics[28]. Sport was so much popular that games were organized among the boys who are willing to get married with a single girl and the one who succeeded to grab the girl while riding his horse was granted blessing to get married to her[29]. Not merely the boys were interested in sport among Turks. Women who enjoyed ample freedom in Turkish society in the pre-Islamic period had of pivotal importance. They even fought, hunted and competed with men in sport contest[30].

"The sport during the 'Islamic' period was influenced significantly by the cultural habits and moral codes of Islam practiced in the Middle East (Arabia and Persia). These allowed only men to pursue certain athletic leisure activities, and in general in this period, athletic pursuits -sports- became a privilege of the rich and politically powerful. Again, archery, wrestling and *cirit* were the most popular events. It is during this period that

[26]Erkiner, pp.102-107
[27]E. Yurdadon, Sport in Turkey in the Pre-Islamic Period, *The Sp ort Journal,* < www.thesportjournal.org/article/sport-turkey-pre-islamic-period > p.1 (12.03.2008)
[28] *Ibid*, p.2
[29] Erkiner, p.85
[30] Yurdadon, p.1

athletics began to be institutionalized; a few primitive clubs became established. In the 19th century, European diplomats were largely responsible for introducing modern competitive sports to Turkey"[31].

The post-Islamic period that begins with the administrative Reforms of 1839 *Tanzimat Fermanı* have brought state governed sport policies. Gymnastic classes were included into the curriculum of military and civil schools. In the beginning of 1900's along with the arising conscience regarding the importance of sporting activities among the society, 'sport clubs' have begun to be registered in accordance with the Law of Associations. Beşiktaş in 1903, Galatasaray in 1905 and finally Fenerbahçe in 1907 incorporated themselves and have become the cornerstones of development of sport in Turkey.

2.3. Sport: Need for a Social Definition

At the micro level, it can always be argued that there is no need for such a sub-section that emphasize social dimensions of sport whilst an answer to understand what the sport is, being sought. Even though there has been an ongoing debate on to adopt 'sport sociology' as a sub-discipline[32], it has always been of crucial importance for the scholarly work to understand the social dynamics of the issue in order to develop accurate legal approaches[33].

There have been numerous attempts made and theories been developed among the scholars to understand the relationship between sport and society[34]. Since there is no necessity to discuss any of these theories in detail it would be much better to give an overview.

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[31] *Ibid*, pp.1-2
[32] J.H.Frey and D.S.Stanley, 'Sport and Society', *Annual Review of Sociology*, (1991), p.518
[33] K.Erkiner, 'Spora Sosyolojik Bir Bakış', in K.Erkiner and A.Soysüren (eds.), *Spor Hukuku Dersleri* (2008) p.111
[34] S.Gardiner, et.al. *Sports Law*, 3rd edn., (Cavendish Publishing 2006), p.10; Scambler, pp.142-161; for the theories developed by the French also *See* Erkiner, *Spora Sosyolojik Bir Bakış*, pp. 154-161

The "…functionalist theory offers an explanation for positive consequences associated with sport involvement in the lives of both athletes and spectators. Conflict theory identifies serious problems in sports and offers explanations of how and why players and spectators are oppressed and exploited for economic purposes. Critical theory suggests that sports are connected with social relations in complex and diverse ways and that sports change as power and resources shift and as there are changes in social, political and economic relations in society. Social interactionism suggests that an understanding of sport requires an understanding of the meanings, identities and interaction associated with sport involvement"[35].

There are also other theories which try to describe sport on the basis of gender. In accordance with these arguments sport is a gendered activity which has been monopolized throughout the history by men[36]. Figurative approach which has been developed by Ellias, on the other hand, argues that sport can be defined as "an example of civilizing process" as it controls public violence and provide environment for displaying public emotions[37].

All these theories have been trying to grasp the underlying social dynamics of sport. However, in order to provide a social definition one should take into consideration other paradigms and take a look at the identifying aspects. The question should be that; what kind activities can be defined as 'sport' and what are the differences from game, recreation, leisure, work and play?[38]

According to Gardiner, guidelines can be provided in order to draw boundaries between these activities. He argued that the 'level' of sporting activity can be determinant factor while making the definition. For instance, can we consider both the children playing soccer on the field and the Premier League teams play on the stadium, as doing sport? From his point of view, 'institutionalization' which brings together rules and regulations in this

[35] J. Coakley, *Sport in Society: Issues and Controversies*, (New York Transnational 1994), pp 49-50
[36] *Ibid*, p.38
[37] A.Blake, *The Body Language: The Meaning of Modern Sport*, (London: Lawrence & Wishart 1996), pp 48-49
[38] Gardiner, p.14

regard would be the key distinguishing factor between leisure, entertainment and sport. He also emphasized the "subjective intention and motivation" factor which gives sport its unique nature as well as identify it from the "mere play and entertainment"[39].

That analysis was improved by Stone in which argued that there are two main behaviors of the participants which characterize "play' and 'dis-play'. In play, motivation concerns the relationship between the competitors however; in dis-play, the relationship concerns spectators, audiences. That's what makes sport and entertainment different[40]. Thirdly, Gardiner highlighted the fact that sport requires "physical activity" which enables exertion of human skills[41]. At this point, the question arises whether the 'chess' can be considered as far as the above criteria is concerned?

It could be argued that chess, snooker, card games and even darts are sports since there is a lot of media and other related means of communication covers these activities both in their programs and in their newspapers. Moreover they can be considered competitive; however they involve little or no physical exertion so they do not fill the criterion for physical activity[42].

In this respect, it was suggested that there four basic elements of sport in which first and the second one should always have to be present. According to him, sport should involve physical activity, be practiced for recreational purposes, involve competition and have a framework of institutional organization along with the general acceptance by sports agencies[43].

2.4. Institutional Definitions of Sport

It emerges from the foregoing that there is no comprehensive social definition of sport. However, international governing bodies have attempts to make a definition in order

[39] *Ibid*, p.15
[40] G.Stone, Amercian Sports: 'play' and 'dis-play' *Chicago Review* (1965) 9
[41] Gardiner, p.15
[42] C.Gratton and P. Taylor, *Economics of Sport and Recreation*, (Newyork, E&FN SPON 2000), pp.6-7
[43] *Ibid*, p.7

to draw a policy borderline[44]. The European Sports Charter (1992) adopted by the Council of Europe can be illustrated as the most comprehensive one:

According to this definition Sport "means all forms of physical activity which through casual or organized participation aimed at expressing and improving physical fitness and mental well-being, forming social relationships or obtaining results in competition levels"[45]. Charter's definition of sport is comprehensive in terms of including many of the sporting activities without clearly categorizing them. Therefore, sports like chess or football are considered as a sporting activity so long as they are played in a competitive environment.

United Nations (UN) is another institution which drafted a general definition to sport. UN views sport in broad sense which even include indigenous games to the category. This definition "incorporated into the definition of 'sport' are all forms of physical activity that contribute to physical fitness, mental well-being and social interaction. These include play, recreation, organized, casual or competitive sport and indigenous sports or games"[46].

Since there is no general supra-national governing authority that shapes policies of world sports it seems impossible to provide an exact definition of sport. However, it can be argued that the existence of a recognizable institutional structure, rules and physical exertion and competition needs to be present in the definition.

2.5. Professional and Amateur Sport

Making a clear-cut distinction between amateurism and professionalism has always been a difficult task. Given the self regulatory autonomies of the governing bodies which grant the rights to adopt certain rules for the organization of games, their approaches towards concepts are worth considering while building definitions. And, it is the self

[44] S.Gardiner, 'Sport: a need for A legal definition?' (1996) 4(2) *Sport and the Law Journal* 31
[45] The Council of Europe, *The European Sports Charter* also *See* Commission of the European Communities, *White Paper on Sport*, COM(2007) 391 Final, p.2, adopted the same definition.
[46] United Nations, *Report from united Nations Inter Agency Task Force on Sport for Development and Peace, Towards Achieving the Millenium Goals*, (2003) p.v

regulatory autonomy that grants each international governing body draw up rules to decide who is amateur in their sport[47].

Fundamentally, it has been suggested that the main difference between these two concepts is that amateurism requires participation to the sporting activities without remuneration. That is to say, in amateurism, the sporting activity should be conducted without any expectation to generate yearly and/or monthly income like a certain profession[48].

In football for instance, FIFA regulations are regarded as the ultimate source in determining the status of players. In Article 2.2 of the FIFA Regulations on the Status and Transfer of Players it was set forth that "a professional is a player who has a written contract with a club and is paid more for his football activity than for the expenses he effectively incurs. All other players are considered to be amateurs"[49].

Until the beginning of 1970's it was designated in the Olympic Charter that amateur status of participants should be preserved in order to be eligible for the Olympic Games. However, this tendency loosened in the process and the athletes were granted to receive compensations from sponsors. Later on, in the 1990's Olympic Regulations regarding the amateur status of athletes were eventually abandoned. In the 21st century the attendance of the professional athletes at the Olympic Games are very common.

It can be argued within this context that after the extreme commodification of sporting activities, the differences between amateur and professional sport was blurred. Due to lack of any clear guidance for the definition of the concepts, every sport branch has built its own parameters. Therefore, one should examine the regulatory documents of the sport governing body and the relevant state legislation in order to identify a particular sport as amateur or professional.

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[47] W.T. Champion, *Sports Law, Cases, Documents and Materials*, (New York: Aspen Publishers 2005), pp.1-6; also *See* < http://www.encyclopedia.com/doc/1G2-3468301369.html > (04.03.2008)
[48] Ş.Ertaş and H.Petek, *Spor Hukuku*, (Ankara: Yetkin Yayınları 2005), p.220
[49] *See* < http://www.fifa.com/mm/01/06/30/78/statusinhalt_en_122007.pdf > (01.06.2008)

3. SPORT AND THE LAW

3.1. Is there a 'sports law'?

The above question is often posed to those who have been working on the concept. Both academics and practitioners have brought forward various perspectives. However, it appears that they have not come to a common position yet. In general, some argue that sports law have reached the point of maturation so that it would not be inaccurate to define it as a substantive and independent field of law[50] while others think that it is not[51]. For those who do not consider sports law different than that of other areas, prefer to use 'Sport and the Law' terminology which specifically indicates that legal aspects of sporting activities should not be thought of differently than any other areas.

Gardiner, who has been thinking hard on the subject, is one of the leading scholars claiming that sport is ready to gain its independence from other areas of law. While supporting his arguments he states that there has been an extreme growing application and official recognition process that makes it inevitable to categorize sports as an independent legal discipline; even though he accepts the fact that sports law is mostly an amalgamation of interrelated legal disciplines embracing various different areas of law[52].

Grayson, on the other hand, with a clear-cut approach have argued that there is no such discipline as 'sports law' so long as it has not been supported jurisprudentially[53]. Woodhouse, from the practitioner perspective have supported Grayson's general argument

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[50] S.Gardiner, Birth of a Legal Area; 'Sport and the Law' or 'Sports Law', *Sport and Law Journal*, (1997) p.10; M. Beloff, T.Kerr, M. Demeriou, *Sports Law*, (Oxford: Hart 1999), p.1; T. Davis, 'What is Sports Law', *Marquette Sports Law Journal*, (1997), pp.10-12; K. Erkiner, 'Bir Hukuk Disiplini Olarak 'Spor Hukuku' Kavramları ve Özellikleri', <http://www.sporhukuku.org/makaleler.php?id=19> (08.04.2009); R. Erten, Milletlerarası Özel Hukukta Spor, (Adalet Yayınları 2007), p.50-51

[51] K. L. Shropshire, 'Introduction: Sports Law?', *American Business Law Journal*, (1998), p.181; R.P.Garberinio, 'So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor or Contract Representative', *Sports&Ent.L.F.*, V.1, (1994), p.11; J.Barnes, 'Sports and the Law in Canada', (1996), pp.2-3; E.Grayson, *Sport and the Law*, 2.nd Edition, (Butterworths 1994), p.xxxvii; C.Woodhouse, 'The Lawyer in Sport: Some Reflections', *Sport and the Law Journal*, V.4, (1996), p.12; Ertas and Petek, p.30

[52] Gardiner, *Sport and the Law or Sports Law*, pp.10-15

[53] Grayson, *Sport and the Law*, pp.1-6

however stated that 'sports law' can only be considered as only the application of the various legal disciplines to the sport situations[54]. Barnes, while supporting the former views on the subject, basically claimed that the proliferation of the legislation or court activity does not necessarily grant the status of being a distinct discipline among others. It rather gives a doctrinal existence[55]. These four accounts present the leading two perceptible different views. Opie while supporting the idea that 'sports law' should be acknowledged as an independent legal discipline believes that debate on this subject among scholars whether we should call it 'sports law' or 'sport and the law' is rather unnecessary and further argued that public would consider such a debate as sterile "which is attractive to the inhabitants of ivory towers"[56].

Von Holstein, by giving a different angle, has taken 'computer law' as the case study in order to give a distinct angle to the existing approaches. According to him, the emergence of the computer law is quite similar to sports law. In the past, states have tried to control the legal difficulties with the existing legislation which are raised due to complex nature of computers and their rapidly growing environment. Even though they have tried to do so, they have failed and obliged to enact special legislation in order to fill the gaps. Therefore, it has now been accepted that there is a specific field of law called computer law. He further continued his analysis by categorizing the legal aspects of sporting activities. In accordance with this theory, regulations which derive out of self regularity autonomy of the governing bodies of sport can be placed to the top of the pyramid. For instance, 'off side rule' in football can be given as an example. Taxation of the players, IP related image rights or the contract law which indicates the interaction between 'sport and the law' has been placed to the bottom of the hierarchy. Sports law includes sport specific legislation should be found in the middle of those two above[57].

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[54] Woodhouse, *The Lawyer in Sport: Some Reflections*, pp.12-13
[55] Barnes, *Sports and the Law in Canada*, pp. 2-6
[56] H. Opie, 'Sports Associations and their Legal Environment', in Mc Gregor –Lowdens, Fletcher and Sieven (eds), *Legal Issues for Non-Profit Associations* (1996), pp.73-94
[57] N.M.von Holstein, 'Sports, Law & Regulation' < http://upload.twidox.com/media/download/107-doc > (01.06.2009)

Under Turkish doctrine, it has been suggested by Ertaş and Petek that there is no such independent discipline called Sports Law as it has interaction with many of the legal disciplines and considered as a hybrid field[58]. They further based their arguments to the fact that sport has not yet been acknowledged in legislative instruments and in judicial decisions as a separate discipline.

Approaches of Ertaş and Petek to define the existence or non-existence of the field would be inadequate and non-practical as far as the common law countries are concerned where there is no such distinction as public law or civil law[59]. More importantly, it would not be of help for the ongoing debate as it reduces the concept to a limited spectrum where only the legislative status and the self governing structure are placed as the parameters to make the definition.

On the other hand, neither the arguments emphasizing that sports law lacked juridical foundations nor the ones that propose sports law is a mixture of various disciplines are that satisfactory for those who are trying to explore whether there is an independent field of law as such exists or not.

Consequently, one cannot take himself to agree with the arguments of the Opie that the hesitancy to acknowledge the existence of sports law as a separate discipline is nothing more than a "sterile debate". Taking into consideration of the interesting comparison of Von Holstein, it can be argued that evolutionary process of sports law would inevitably result with the acknowledgment of the substantive discipline as independent of other fields.

3.2. Specificity of Sport: National Perspectives

Even though there has been an intense debate on the existence of sports law, one cannot deny that the explosion of sports related cases in recent years would eventually ensure its acknowledgment in many of the jurisdictions. Having regard to this starting point

[58] Ş.Ertaş and H. Petek, *Spor Hukuku*, (Ankara, Yetkin 2005) pp.30-31
[59] Ş. Gözübüyük, *Hukuka Giriş ve Hukukun Temel İlkeleri*, (Turhan Kitabevi 1983), p.13

of view, a question arises as to how and to what extent it should be placed in legal and policy systems of the states. Below, a general understanding for the peculiarities and organization of sport at the national levels will be provided in order to explain that sport is different than other fields of law.

Since the regulation and organization of sport is being controlled by national and international sports governing bodies which possess self-regulatory autonomies unavoidable conflicts which might appear while exercising their powers at national level. In other words, there may be some situations where their rules and regulations might conflict with the rules of a particular state.

It has been argued that "sporting autonomy" is a concept in which minimum interaction between "sport" and "the law" is maintained at the lowest level in order secure "divine" objectives which are necessary for the good of the game[60]. As suggested by Foster, at least, this has been the argument of the parties who are in favor of the cut-throat application of autonomy in sports[61].

Although many of the sport governing bodies are incorporated under different legal statuses (e.g. FIFA is incorporated as an association under Swiss Law) their actions and rules sometimes contested before national courts. However, each country has its own tendency towards sports related issues. The pattern in Europe is quite similar where countries maintain non-interventionist approaches as regards the juridification and policy construction as regards the sport[62]. In Britain, for instance, the involvement in sport both in terms of judicial review and policy intervention has been maintained at the minimal level. Self-regulatory autonomies have traditionally been protected and the role of State has mainly been pacified[63]. However in France, there is no such reluctance in terms of

[60] J.Arnaut, *Independent European Sport Review* (2006), available at < www.independentfootballreview.com > pp. 31-56
[61] K. Foster, 'Development in Sporting Law', in L. Allison, (ed.), *The Changing Politics of Sport* (Manchester University Press, 1993), pp.106-108
[62] A.N. Chaker, *Study of National Sports Legislation in Europe* (Strasbourg: Council of Europe Publishing 1999)
[63] S. Gardiner, et.al. *Sports Law*, 3rd edn., (Cavendish Publishing 2006), p.95

exercising regulatory powers in sport where there exist certain types of traditional regulation[64].

As far as the system in Turkey is concerned it can be observed that the state-centric governance model is still being applied unlike many of the European countries[65]. The hesitancy of Youth and Sports General Directorate to grant "full autonomy" to the certain sports branches and its inevitable supervision over the system indicates that there is a strong interaction between sports governing bodies and centralized state authorities. Besides, courts in Turkey many times does not show any reluctance in examining sports related disputes when they think that it is necessary[66].

As a matter of fact, one may argue that still there has not been a fully compromise on the notions of policy "non-interventionism" as regards sport. Even though this cannot be construed that there are tendencies of states to adopt "wholesale" statutory regulative approach, it should rather be construed that states need much more respect to the "public character" of sports since it has been used as a tool to "implement broader [national] social and economic policies". Therefore, it has been suggested that the sport governing bodies should implement "good governance" principles while taking into consideration of the state's common policy objectives in order to reconcile the tension of this ongoing debate[67].

"Judicial reluctance" is another component of this subject for the interested parties. It has always been the tendency of the sports world to resolve their disputes "within the family". Since many of them have their own legal systems composed of disciplinary and dispute resolution panels and after the creation of international sports dispute resolution mechanism such as Court of Arbitration for Sport (CAS), it has been the general

[64] J.F.Nys, 'Central Government and Sport', in Andreff and Szymanski, *Handbook on the Economics of Sport* (Edward Elgar 2006) pp.263; also see p.264 *et seq* for the details of the system.
[65] T. Çolakoğlu and E. Erturan, 'Spor Federasyonlarının Özerkleşmeleri ve Hukuksal Boyutunda Spor Hukuku Gereksinimleri', *Electronic Journal of Social Sciences*, V.8, N.27, (2009) pp.323-335
[66] *See* U.Mutlu, 'Türkiye Futbol Federasyonu Tahkim Kararlarının İcra Edilebilirliği', *Istanbul Bar Association Journal, Special Feature on Sports Law*, (2007) for the examples of the judgments of Turkish courts in sports related issues.
[67] R.Parrish and S.Miettinen, *The Sporting Exception in European Union Law*, (The Hague, T.M.C. Asser Press 2007) pp.11-14

assumption that nature of sports conflicts which needs "swift" dispute resolution necessitates that national courts should not intervene in this respect[68]. This position has been adopted by many of the European countries and North American jurisdictions[69].

The concept of settlement of disputes out of national courts has been put under threat at the Community level apparently after the judgment of the European Court of Justice (ECJ) in *Bosman* and provided a venue for those who are willing to challenge sports rules before the national courts[70]. However, interventionism of national courts has severely been criticized by many of the scholars who believe that the role of national courts in sports dispute endangers the proper function of the system and creates legal uncertainty[71].

All in all, it can be observed that the arguments of the both sides are complicated that one cannot deduce clear results on how much intervention by states does not jeopardize the self regulatory autonomy of the sport governing bodies and in which circumstances national courts should exercise jurisdiction over sports related disputes. However, in the name of reconciliation, it has been identified that the sport governing bodies should adopt a much more democratic and transparent system of governance within which stakeholders effectively takes part in the decision making mechanism. Moreover, dispute resolution bodies should apply due process of law and effectively respect their right to defense in proceedings.

3.3. Regulation and Governance of Sport

The governance concept has a broad appeal. In the last decade or so, the concept has gained currency in debates in political science, public policy, international relations and

[68] *Ibid*, p.12
[69] I.S. Blackshaw, *Mediating Sports Disputes*, (The Hague, T.M.C. Asser Press 2002) pp.3-6
[70] A.Lewis and J. Taylor, (eds), *Sport: Law and Practice* (London, Butterworths Lexis Neixs 2002) p.313 *et seq*
[71] J. Nafzinger, International Sports Law (Ardsley, New York State: Transnational 2004) pp.1-4; also *See* M.Beloff, T.Kerr and M.Demetriou, *Sports Law* (Oxford: Hart 1999) pp.257-258

international law[72]. Part of the reason for the term's rising popularity is its capacity to encompass the breadth of institutions and relationships involved in the process of governance. Simply, governance refers to ways of governing, involving a range of organizations, many of which are not necessarily classified under the "government" umbrella. Thus, governance is no longer assumed to involve a single, all-powerful government but a shifting combination of local authorities, public departments and agencies, quasi-public bodies, private and voluntary organizations.

However, social scientific usage of the governance concept has been eclectic, diverse and sometimes, confusing and misleading. Governance has been identified as having multiple meanings, utilized as both a descriptive and a normative term - referring to the way in which organizations and institutions are, or should be, governed - as well as seeking to explain a particular set of changes.

The aim of this section is to give a global insight from many of the top governing bodies of sports and their role and organization without entering into evident "good governance" discussion, which pays particular attention to the role that the law has in supporting and, in some ways, enforcing effective governance in sport and the resolution of sporting disputes[73].

3.3.1. International Governing Bodies

International Olympic Committee (IOC), International Paralympic Committee (IPC), World Anti Doping Agency (WADA) can be considered as the top governing bodies which possess the steering powers of the sports policy in international level. All these institutions have their own regulatory powers in terms of the particular sporting activity which they are delegated to govern. All the regional and national governing bodies are

[72] *See* F. H. Baykal, *Spor Kuruluşlarının Uluslararası Hukuktaki Yeri*, in K.Erkiner and A.Soysüren (eds.), *Spor Hukuku Dersleri* (Istanbul: Kadir Has Üniversitesi Spor Hukuku Araştırma ve Uygulama Merkezi 2008) No:2, pp.425-432

[73] S.Gardiner et.al, 3rd edn. *Sports Law*, (Cavendish Publishing 2006), pp. 154-156

obliged to act in conformity with the rules and regulations of international governing bodies.

3.3.1.1. International Olympic Committee

IOC has been situated on top of many sports governing bodies in the world. As the unique theorist and the implementing authority with the multi-national and multi-sportive structure, enjoys considerable authority in terms of the governance of sport[74]. "The IOC is an international non-governmental not-for-profit organization[75], of unlimited duration, in the form of an association with the status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2000. It is seated in Lausanne (Switzerland), in the Olympic capital. The object of the IOC is to fulfill the mission, role and responsibilities as assigned to it by the Olympic Charter." (Olympic Charter, Article 15)

The objects which have been assigned to the IOC are designated in the Article 2 of the Olympic Charter[76]. In accordance with this article, main objects of the IOC can be

[74] Erten, p. 21

[75] Defining IOC as an international organization requires much more elaboration in terms of international law. One should take into consideration of three different dimensions when examining international organizations which are membership, aim and institutional structure. A generally used definition for the number of members is that there should be at least two states as members. Today, however, this definition is no longer limited to states but also includes international interest groups and institutions. Nevertheless the membership is always accurately defined and the division between the members and non-members is thus also clear. We can roughly divide international organizations into three categories by their membership. Firstly there are intergovernmental organizations where all the members are states such as the United Nations, the European Union and the World Bank. Secondly there are non-governmental organizations where members are not states such as Amnesty International and finally there are mixed organizations where the members may be states or non-governmental associations. International sports governing bodies like IOC apparently does not completely fulfill these above criterions and their legal status in terms of international law remains topical. *See* F. H. Baykal, *Spor Kuruluşlarının Uluslararası Hukuktaki Yeri*, in K.Erkiner and A.Soysüren (eds.), *Spor Hukuku D ersleri* (Istanbul: Kadir Has Üniversitesi Spor Hukuku Araştırma ve Uygulama Merkezi 2008) No:2, pp.425-432; O. Croci and J. Forster, 'Sport and Politics: the question of legitimacy of internatioanl organizations' ,ISA Annual Convention, San Diego, CA, 22-25 March, 2006 available at < http://www.xtremeiceskating.com/online_documents/Global_Sport_Organizations.pdf > (12.09.2009) for the discussion.

[76] The objects are as follows: 1. to encourage and support the promotion of ethics in sport as well as education of youth through sport and to dedicate its efforts to ensuring that, in sport, the spirit of fair play prevails and violence is banned; 2. to encourage and support the organization, development and coordination of sport and sports competitions; 3. to ensure the regular celebration of the Olympic Games; 4. to cooperate with the

summarized as the promotion of the Olympic Movement, to lead the concept of Modern Olympism[77] and organization of sport competitions. "The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the CAS." (Olympic Charter, Article 15/4). IOC has been composed of natural persons whose number may not exceed 115. There are three main organs of the IOC which are the President, the Executive Board and the Session (Olympic Charter, Article 17). The Session is the highest legislative body of the IOC responsible for the adoption and the amendment of the Olympic Charter. They convene with an ordinary session held once a year and their decision is final (Olympic Charter, Article 18). Executive Board is composed of 10 members who are organized under the chairmanship of the President and 4 four Vice-Presidents. The terms of offices limited to 4 years for the members (Olympic Charter, Article 19). The President of the IOC is elected by the Session from among its members for a term of 8 years renewable once for 4 years[78].

3.3.1.2. Association of National Olympic Committees

National Olympic Committees (NOC's) are the national constituents of the worldwide Olympic movement. Subject to the controls of the IOC, they are responsible for organizing their people's participation in the Olympic Games. They may nominate cities

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competent public or private organizations and authorities in the endeavor to place sport at the service of humanity and thereby to promote peace; 5. to take action in order to strengthen the unity and to protect the independence of the Olympic Movement; 6. to act against any form of discrimination affecting the Olympic Movement; The Olympic Movement and its Action 7. to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women; 8. to lead the fight against doping in sport; 9. to encourage and support measures protecting the health of athletes; 10. to oppose any political or commercial abuse of sport and athletes; 11. to encourage and support the efforts of sports organizations and public authorities to provide for the social and professional future of athletes; 12. to encourage and support the development of sport for all; 13. to encourage and support a responsible concern for environmental issues, to promote sustainable development in sport and to require that the Olympic Games are held accordingly; 14. to promote a positive legacy from the Olympic Games to the host cities and host countries; 15. to encourage and support initiatives blending sport with culture and education; 16. to encourage and support the activities of the International Olympic Academy ("IOA") and other institutions which dedicate themselves to Olympic education. <http://www.olympic.org/uk/utilities/reports/level2_uk.asp?HEAD2=26&HEAD1=10> (07.04.2008)

[77] *See* preamble of the Olympic Charter for the main principles of the concept.

[78] *See* Erten, p. 31 for critics of the terms of office.

within their respective areas as candidates for future Olympic Games. NOC's also promote the development of athletes and training of coaches and officials at a national level within their geographies (Olympic Charter, Article 28). As of 2008, there are 205 NOCs, representing both sovereign nations and other geographical areas[79].

The NOC's come together at least once every two years in the form of the Association of National Olympic Committees (ANOC) to exchange information and experiences in order to consolidate their role within the Olympic Movement. In this way the ANOC helps the NOC's to prepare for their meetings with the IOC Executive Board and Olympic Congresses. The ANOC also makes recommendations to the IOC regarding the use of funds deriving from the television rights intended for the NOC's. These recommendations focus on the implementation of the Olympic Solidarity programmes in particular. ANOC is made up of five different continental associations: Association of National Olympic Committees of Africa (ANOCA), Pan American Sports Organization (PASO), Olympic Council of Asia (OCA), European Olympic Committees (EOC), and Oceania National Olympic Committees (ONOC)[80].

3.3.1.3. International Sports Federations

International Sports Federations (IF's) are non-governmental organizations that are responsible for the administration of one or more sports at the world level. IF's are recognized by the IOC and cooperate with it, in ensuring that their activities comply with the Olympic Charter. IF's are organized into three categories which are in turn each organized under its own supervising body[81]. IF's have also formed associations in order to make sure equal distribution of the broadcasting incomes, to discuss and resolve common problems and to decide on event calendars: the Association of Summer Olympic International Federations (ASOIF)[82], the Association of International Winter Sports

[79] *See* < http://www.olympic.org/uk/organisation/noc/index_uk.asp > (07.04.2008) for the organization of NOC's
[80] *Id.*
[81] *See* < http://www.olympic.org/uk/organisation/if/index_uk.asp > (08.04.2008) for the organization of IF's
[82] *See* < http://www.asoif.com/ > (08.04.2008)

Federations (AIOWF)[83], the Association of IOC Recognized International Sports Federations (ARISF)[84] and the General Association of International Sports Federations (GAISF)[85], which also includes other sports federations[86].

3.3.1.4. International Paralympic Committee

The IPC is the global governing body of the Paralympic Movement which was created to ensure engagement of handicapped people into sporting activities. The IPC organizes the summer and winter Paralympic Games, and serves as the International Federation for nine sports, for which it supervises and co-ordinates the World Championships and other competitions. The IPC is committed to enabling Paralympic athletes to achieve sporting excellence and to developing sport opportunities for all persons with a disability from the beginner to elite level. In addition, it aims to promote the Paralympic values, which include courage, determination, inspiration and equality"[87].

3.3.1.5. World Anti Doping Agency

The competitions held in a number of international sports, most notoriously cycling, appeared to be significantly affected by doping practices. A police seizure of various doping products during the 1998 Tour de France gave further publicity to the use of both stimulants and the then-recently synthesized hormone, erythropoietin, which was administered to increase the ability of the body to produce a greater number of erythrocytes (red blood cells), which permitted a correspondingly increased transport of oxygen in the bloodstream during competition[88]. Particularly after this event that shook the world of sports, IOC has convened all other relevant authorities of sports in Lausanne to take

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[83] *See* < http://www.olympic.org/uk/organisation/if/assoc_if_uk.asp?id_assoc=2 > (08.04.2008)
[84] *See* < http://www.arisf.org/ > (01.05.2008)
[85] *See* < http://www.agfisonline.com/ > (01.05.2008)
[86] Erten, p. 34
[87] *See* < http://www.paralympic.org/release/Main_Sections_Menu/IPC/About_the_IPC/index.html > (01.05.2008)
[88] *See* < http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312 > (01.05.2008)

necessary precautions. Following this conference, Lausanne Declaration[89] was produced that envisages the incorporation of an independent International Anti Doping Agency. Then, the WADA was established on November 10, 1999 in Lausanne, Switzerland to promote, coordinate and monitor the fight against drugs in sport.

WADA is the international independent organization for promoting, coordinating and monitoring the fight against doping in sport in all its forms. WADA works towards a vision of the world that values and fosters doping. In 2001, WADA voted to move its headquarters to Montreal, Canada the following year. Initially funded by the IOC, WADA now receives half of its budgetary requirements from it activities, with the other half coming from various governments throughout the world[90]. Its governing bodies are also composed in equal parts by representatives from the sporting movement (including athletes) and governments of the world. The agency's key activities include scientific research, education, development of anti-doping capacities and monitoring of the World Anti-Doping Code (WADC) - the document harmonizing regulations regarding anti-doping in all sports and countries. It also produces an annual list of prohibited substances and methods that athletes are not allowed to take or use[91].

3.3.2. National Governing Bodies

National Olympic Committees and National Federations are the primary institutions for the governing of sports at national level. National Governing Bodies (NGBs) are also responsible for the representation of the relevant country in international governing bodies.

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[89] *See* for the Turkish translation of the Declaration < http://www.tdkm.hacettepe.edu.tr/bildirge/lozan.html > (01.05.2008)

[90] *See* <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (05.01.2009)

[91] D.Howmann, Sanctions Under the World Anti-Doping Code, (2004) <http://www.wada ama.org/en/newsarticle.ch2?articleId=3115031>(09.01.2009); also See for the Prohibited List 2009 <http://www.wadaama.org/en/prohibitedlist.ch2> (09.01.2009)

3.3.2.1. National Federations

The necessity of the designating certain rules and laws for the proper functioning of the game led to the formation of a governing body called National Federations (NF's) within each respective sport. NF's are responsible for the general administration of the sport and the conduct of competition. The foundation of the system is that clubs become affiliated to their particular NF's. Clubs pay a certain amount of fee to become members of the bodies, which also gives the club the right to vote on sports issues and to take part in sports competitions. Most of the NF's are members of the international federations for their particular sport.

4. SPORTS LAW AND EUROPEAN UNION

4.1. Overview

"Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity." The above excerpt is from the European Commission's White Paper on Sport[92] which reflects a comprehensive approach that includes the complexity and magnitude of the role of sport in EU.

There was neither a clear legal basis nor a competence attributed to the EU in terms of sport up to the Constitutional and Reform Treaties[93]. According to the principle of attributed competences, the Community can act only within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein[94]. The remaining competences are relinquished for the Member States.

[92] Commision of the European Communities, *White Paper on Sport*, COM (2007) 391 final p.2
[93] *See* Article 165 (ex Article 149) Treaty of Lisbon amending the Treaty on European Union, also *see* Article III-282 of the Treaty Establishing a Constitution for Europe
[94] Article 5 EC

Even though EU lacks such a clear legal basis to exercise competence within the complex sphere of sport, ECJ by delivering repeated judgments since *Walrave*[95] have drawn the attentions to the implication that internal market rules are applicable to sport so long as it constitutes an economic activity[96]. The effects and implications of the ECJ's case-law have become increasingly apparent since *Bosman*[97] judgment.

The interventionist approach of the ECJ as regards the phenomenon of sport have inevitably stimulated policy making actors of EU and considerable attempts have been made in order to find the way to reconcile the main aspects of European values with the specificity of sport. All these attempts and the spontaneous developments in sports sector have inevitably endorsed the emergence of 'EU Sports Law' and the attempts to create a formal 'European Sports Policy'.

This section of the thesis mainly explores the underlying reasons of EU attempts to create such a policy area- or may be an '*acquis communautaire sportive*' while taking into consideration of the wide ranging difficulties on the way.

First, it attempts to understand the main characteristics of European sport and compare its differences with the North American system where necessary. Second, it moves and sophisticates "is there a sports law?" question within the European level by rephrasing it as "is sport special?" This general analysis can only be supported by the ongoing discussion between governing bodies of sport and EU Institutions over the appropriate definition and understanding of "specificity of sport" concept. Therefore within the context of this chapter, the approach of the ECJ and its contribution to the specificity debate will be discussed. Then, elaboration will be made to the role of EU policy makers and their approaches to the concept while accompanying the facile debate among policy

[95] Case C-36/74 *Walrave and Koch v.Association Union Cycliste Internationale* [1974] *ECR* 1405
[96] R. Siekmann, Is Sport 'Special' in EU Law and Policy?, in R.Blanpain, M.Colucci and F.Hendricx (eds), *The Future of Sports Law in the European Union*, (The Netherlands. Kluwer Law International 2008), p.38; also *See* Case C-13/76 Doná [1976] ECR 1333, para. 12.; Joined Cases C-51/96 and C-191/97 Deliége [2000] ECR I-2549, para. 41; Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681, para.32.
[97] Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v. Bosman* [1995] *ECR* I-4921

coalitions that continuing in policy sub-system. Finally, following the general information on the cornerstone EU policy documents, future perspectives on the EU Sports Policy will be provided.

4.2. Characteristics of Sport in Europe

As far as the regulatory models of sport in the world are concerned, it has been observed that there are two different systems emerged namely as "European Model" and "American Model". Even though it was suggested that some similarities between these two systems can be determined following an in depth analysis[98], there are still many clear distinct features of both systems. In this context, it has been observed that there are two main characteristics of European sport as far as the current system is concerned.

First one is that there is a pyramidal structure which allows system to build its own hierarchy[99]. Football can be taken as an example in this context. In football, FIFA, as the supreme governing body, is placed at the apex of the pyramid. The next level is formed by UEFA as a continental association. At the base of the pyramid there lies professional clubs, regional bodies and other non-exhaustive related actors[100]. Basically, under this system there has been interdependence between the levels not only on the organizational side but also on the competition side as the competitions are organized on all levels[101]. Decisions percolate downwards in the pyramid and a certain system of hierarchy is ensured[102].

In US system, however, there is no such hierarchy as there are no international level championships organized. For instance, there are no "world championships" in

[98] R. Fort, 'European and North American Sports Differences', *Scottish Journal of Political Economy*, V.47, No. 4, (2000), pp.451-453
[99] S. Gardiner et.al, 3rd edn. *Sports Law* (Cavendish Publishing 2006), p.162
[100] S. Weatherhill, 'Is the Pyramid Compatible with EC Law', *International Sports Law Journal*, (2005), p.3
[101] Gardiner, p.162
[102] Weatherill. p.3

American Football and Ice Hockey and therefore there is no need to create international or regional governing bodies like FIFA or UEFA[103].

Some argue that such a hierarchical structure is necessary so as to enable proper organization of European sport. Especially after the *Independent European Sport Review 2006*[104], supporters of this argument further enhanced their approach and suggested that existing structure should be regarded as the sole political and governing control mechanism that its status would be well regarded by the EU member states and the EU as a legal entity[105].

This pyramidal structure, from the political perspective, has been criticized by the Eichberg generally on the basis that, European sport rising on the pillars of this monopolistic and non-democratic structure which alienates rich spectrum of alternative practice of sports such as street football, children's football, grassroots football and etc. In accordance with this scholar, non-recognition of diversity in national sports policies makes the pyramid problematic[106]. He further argued that such an organizational structure is the reflections of Fascist and Soviet state monocracy instead of being a European cultural heritage[107].

Weatherill on the other hand have given new legal dimensions to the debate and have explored the compatibility of this so-called pyramid with the EU Law. Although he accepted the fact that governance of sport in EU level requires certain degree of autonomy conferred upon to the governing bodies, he also believes that the pyramid is currently too

[103] Fort, pp.434-435
[104] J.Arnaut, *Independent European Sport Review* (2006), available at < www.independentfootballreview.com > p.131
[105] *Ibid*, p.131
[106] H. Eichberg, 'Pyramid or democracy in sports? Alternative ways in European sports policies', (2007) available at < http://isca-web.org/filer/football%20European%20Sport%20revised300407.pdf > (11.05.2009) p.4
[107] *Ibid*, p.5

big to make decisions which might have greater economical implications as far the transactional volume of the market is concerned[108].

Another key feature distinguishing the European and US model of sport is the existence of the system of promotion and relegation. Unlike the US system, European leagues are not closed to vertical channels of mobility for clubs. That is to say, in US, a team cannot automatically be promoted to the next superior league even if it becomes a champion. To be promoted, it should meet certain type of financial criterion.

However European system rewards excellence through promotion and punishes under performance through relegation[109]. In this open competition system, teams are allowed to pursue their sporting dreams and in the meantime, promote exciting competition[110]. Nevertheless, as Gardiner suggested, this system of promotion and relegation has been put under threat by the supporters of a combined system where the clubs are qualified for the competitions not only by a system of promotion and relegation but also by fulfilling economic and technical criteria[111].

4.3. Specificity of Sport at Community Level: Evolution of ECJ Jurisprudence

The question as whether sport should be treated in a different manner while applying community law has been a matter of debate for a long time in Luxembourg Courts. As a matter of fact, the specificity debate traced back to mid-seventies with the *Walrave*[112] judgment, namely the first sports related case heard by the ECJ.

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[108] S. Weatherhill, 'Is the Pyramid Compatible with EC Law', *International Sports Law Journal*, (2005), pp.10-15

[109] Gardiner, p.162; also *See* R. Fort, 'European and North American Sports Differences', *Scottish Journal of Political Economy*, V.47, No. 4, (2000) for detailed comprasion of the European and North American system.

[110] *Independent European Sport Review*, p.65

[111] Gardiner, p.163

[112] Case C-36/74 *Walrave and Koch v.Association Union Cycliste Internationale* [1974] *ECR* 1405, hereinafter referred to as *Walrave*

In *Walrave* judgment, under Article 234 of the EC Treaty (*ex* Article 177) certain questions are referred to the Court relating to the interpretation of Article 7, Article 48 and Article 59 of the EC Treaty[113]. The basic question was that whether these articles mentioned above must be interpreted in such a way that the provisions in the rules of the *Union C ycliste I nternationale* (UCI) relating to medium-distance world cycling championships behind motorcycles, according to which the pacemaker must be of the same nationality as the stayer is incompatible with said articles[114]. Above questions were raised in an action directed against the UCI, the Dutch and Spanish Cycling Federations by two Dutch nationals who normally take part as pacemakers in races of the said type and who regard the aforementioned provision of the rules of UCI as discriminatory[115].

ECJ held, in this case that, "having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty". ECJ, in this judgment, held that EU law is not applicable to rules that are of purely sporting interest on the basis that such rules had nothing to do with the economic activities to which the EC Treaty relates.

In paragraph 8 of the judgment ECJ continued its analysis by ruling that "this prohibition [of discrimination based on nationality] however does not affect the composition of sport teams in particular national teams, the formation of which is a question purely sporting and as such has nothing to do with economic activity." ECJ further decided in paragraph 9 of the judgment that "this restriction on the scope of the provisions in question must however remain limited to its proper objective."

Basically, ECJ by ruling that way, also, developed the concept of 'sporting exception' in which rules of 'purely sporting interest' were removed from the scope of the Treaty[116]. However, what exactly did the ECJ mean by this judgment is being discussed ever since that has been delivered. There was one thing for sure that the main test to be

[113] *Walrave*, para. 1
[114] *Walrave*, para. 2
[115] *Walrave*, para. 3
[116] *Walrave*, para. 4

applied as regards the sport is that whether it constitutes and economic activity or not. However, it is obvious that one cannot easily infer from the judgment of ECJ that the boundaries between the sporting activities which are subject to EU law and those that are not have been clearly identified.

In accordance with the Parrish and Miettinen, *Walrave* judgment of the ECJ was not that instructive so one can identify those "sports rules" that fall outside the scope of EU law. According to them, the ECJ in *Walrave* basically developed two exceptions. First, sport was excluded in cases where there is no economic activity involved and also where it was not related with the fundamental freedoms designated in the Treaty. They argued that, specifically as regards the *Walrave*, in cases "where the team was not a national team in a competition structured exclusively on the basis of nationality, its rules of [team] composition might still fall outside the prohibition if the motives for such rules had nothing to do with economic activity." Second, they also argued that, based on paragraph 9, ECJ, by establishing the "proper objective" principle, not only left justification to the restriction door open, but also made things problematic since there was no indication in the judgment what those objectives might be[117]. Therefore, it has been deduced from the *Walrave* judgment that ECJ did not create nothing more than "uncertainties" which are lacking any clear guidance for the future challenges[118].

Only after eighteen months another judgment of the ECJ with the sporting nature was delivered. In *Doná*[119] "…questions have arisen in the context of an action between two Italian nationals over the compatibility of the [Articles 7, 48 and 59] of the Treaty with certain provisions of the rules of the Italian Football Federation, under which only players who are affiliated to that federation may take part in matches as professional or semi-professional players, whilst affiliation in that capacity is in principle only open to players of

[117] R.Parrish and S.Miettinen, *The Sporting Exception in European Union Law*, (The Hague, T.M.C. Asser Press 2007) p.74
[118] *Ibid*, pp.75-82
[119] Case 13/76 *Doná and Mantero* [1976] ECR 1333. Hereinafter referred to as *Doná*

Italian nationality."[120] The most important part of this judgment is that ECJ did not see any difference between "amateur" and "professional" sports in terms of the applicability of Community rules.

The ECJ, after restating the fundamental "economic activity" principle and the reasoning that Community fundamental freedoms are applicable to all players regardless of the professional or semi-professional nature who pursue gainful employment or provide services, ruled as follows: "However, those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries"[121].

From a theoretical standpoint, it has been suggested that *Doná* judgment was of no seminal importance to the specificity debate, on the contrary, judgment is even considered as a retreat from *Walrave*. According to Advocate General Lenz in *Bosman,* it is because the formulation in *Walrave* was incorrect. As Lenz suggested, if the formulation in *Walrave* was correct, "the Court could have contended itself in *Doná* with a simple reference to that judgment. It rightly did not do so, since it was presumably not unaware that the question of the composition of teams may very well be dominated by non-sporting motives". He concluded from this line of reasoning that "…in *Walrave* the question of the formation of teams in competitions is still exempt from the prohibition; in *Doná* the Court restricted the exception to the exclusion of foreign players from certain matches"[122].

Merely, after two decades later the ECJ found the opportunity to revisit the specificity of sports matter with the landmark *Bosman*[123] judgment which has widely opened the "floodgates" of the application of community law to sporting activities. Also, it

[120] *Doná*, Para.5
[121] *Doná*, Para.14
[122] *Bosman*, Opinion of Advocate General Lenz, points 137 and 138
[123] Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v. Bosman* [1995] *ECR* I-4921 hereinafter referred to as *Bosman*

was the first time in *Bosman* that the regulatory autonomy of the football governing bodies was called into question[124].

In order to give a better understanding of the legal grounds of the judgment, factual background that carried Mr. *Jean-Marc Bosman* to the court rooms of the ECJ should be explained in short.

Jean Marc Bosman, who was born in 1964 as a Belgian, had been employed by RC Liége on a contract expiring at the end of June 1990 on an average salary of BFR 120.000 per month, including bonuses. In April 1990, he was offered to take a new one-year contract at BFR 30.000 per month. He, thereby, refused RC Liége's offer and was put on to the transfer list at the compensation fee of BFR 11.743.000. US Dunkerque, a French club, agreed with Bosman to pay him a monthly salary of some BFR 100.000 plus certain bonuses. In July 1990 RC Liége and Dunkerque agreed a seperate contract for the temporary transfer of Bosman for one year only, at a price of BFR 1.200.000 including an option costing BFR 4.800.000 allowing Dunkerque subsequently to buy him. After the contracts had been signed, in order for the Bosman to be fielded with his new team, RC Liége was supposed to ask the Belgian Football Federation (URBSFA) to send a transfer certificate to the Fédération Française de Football (FFF) of which Dunkerque is a member. However, RC Liége had failed to do so as it doubted Dunkerque's solvency at the time. Following this, Bosman's contract did not take effect and he was suspended by RC Liége to play in 1990/1991 season[125].

He, then, brought actions before the national court of Belgium where he sought interim judgments and damages for his losses. Even though he partly succeeded in his applications before the courts, challenging matters in his legal situation have the clubs

[124] S.Weatherill, 'Annotation [Bosman Case]', in R.Siekmann and J.W.Soek (eds.) *European Sports Law Collected Papers* (The Hague: T.M.C.Asser Press 2007), p.87 *et seq*
[125] *Bosman*, Paras. 28-33

refrained from making new offers to him and he was stucked on playing with smaller clubs in Belgium and France[126].

It should also be noted before entering into the merits of the case that in accordance with the transfer rules at the time of Bosman's transfer was in question; a football player was not free to work his contract through to its expiry and then go into the labour market and conclude a new contract with another employer. That is to say, the selling club is entitled not to release the player's registration until it is financially satisfied with the certain amount of transfer fee by the buying club, if the players' contract is still in progress[127].

Eventually, in October 1993, the dispute was brought before the ECJ under Article 234 (ex Article 177) procedure by Cour D'Appel, Liége. There were two main questions referred to ECJ which are as follows: "Are Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as: (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club; (ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players [so called 3+2 rule according to which clubs may field three foreign players plus two assimilated players within the European club competitions organized by FIFA] from the European Community to the competitions which they organize?"[128]

At the end of the proceedings, with immense reference to the remarkable Opinion of Advocate General Lenz[129], the ECJ found in favour of Bosman and against RFC Liege, the Belgium Football Association and UEFA. There were two important decisions in the abstract: (i) Transfer fees for out-of-contract players were illegal where a player was

[126] *Bosman*, Paras. 34-40
[127] S.Weatherill, 'Collected Couses of the 7th Session of the Academy of European Law',The Hague, Kluwer Law International, (1999) pp. 339-342
[128] *Bosman*, Para.49
[129] *Bosman*, Opinion of Advocate General Lenz

moving between one EU state to another and only players who are still serving contracts with their teams could have transfer fees paid for them. (ii) Quota systems were also held to be illegal. Club sides are now able to play as many foreigners from other European Union states as they liked (although limits on players from outside the EU could still be imposed)[130].

As regards the specificity debate, it was suggested that analytical framework of the ECJ in *Walrave* has mainly been preserved in *Bosman* as to form and substance however with adopting a much more illuminative approach. The court again reiterated in Paragraph 73 that "sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty". In paragraph 96, the ECJ for the first time accepted that the application of fundamental freedoms within the context of sport is not limited to the nature of the rule or practice to be necessarily discriminatory by ruling that "provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned"[131].

Secondly, in Paragraph 104 of the judgment, ECJ developed that certain rules and practices of sporting activities can be granted "justification" only if they pursue "a legitimate aim compatible with the Treaty" and […] "by reasons of public interest". The notion of "legitimate aim" was also clearly defined in Paragraph 106 of the judgment as "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". In accordance with the Weatherill, developing such a justification can be regarded as the "importation of *Cassis de Dijon* principle of Community law"[132].

[130] *Bosman*, Operative Part of the Judgment, Paras. 1-3
[131] *Bosman* Para. 96
[132] S.Weatherill, 'Annotation [Bosman Case]', in R.Siekmann and J.W.Soek (eds.) *European Sports Law Collected Papers* (The Hague: T.M.C.Asser Press 2007), pp.102-103

Consequently, it has been suggested that, ECJ in *Bosman* have made considerable contribution to the specificity debate by making a much clearer definition as to the notion of purely sporting interest. Moreover, the ECJ in *Bosman* not only changed its "orthodox position" to grant justification for nationality discrimination rules only if there is any basis clearly specified in the Treaty but also identified that there can be certain rules and practices justified due to their "purely sporting" nature even if they have some economic implications[133].

It was in the joined cases of *Deligé*[134] that the rules of the sport governing bodies were again challenged before the Luxembourg courts. Ms. Deligé, practicing judoka since 1983 who was awarded numerous medals in national and international tournaments in 1996 informed that she was excluded to compete in the Paris Tournament that would take place in May, due to joint decision of the Vlaamse Judo Federatie (VJF) and Judo et Disciplines Associées (LFJ) and the requirement of national quotas[135].

Following the proceedings at the national level matter was referred to ECJ as to "Whether or not rules requiring professional or semi professional sportsmen or persons aspiring to such status to have been authorized or selected by their national federation in order to be able to compete in an international competition and laying down national entry quotas or similar competitions are contrary to the Treaty of Rome, in particular Articles 59 to 66 and Articles 85 and 86"[136].

Since the claims of the plaintiff were not based on the nationality discrimination[137], the implications of the ECJ in this case pertaining to the sporting exception was limited to the discussion provided within the scope of "economic activity". However, it was suggested that there is a new "tier" introduced in this judgment that it is

[133] Parrish and Miettinen, pp.88-89
[134] Joined Cases C-51/96 and C-191/97 *Deliegé v. Ligue francophone de Judo et disciplines Associeés Asb* [2000] *ECR* I-2549, hereinafter referred to as *Deliegé*
[135] *Deliegé* Paras.6-15
[136] *Deliegé* Para.16
[137] *Deliegé* Para.62

possible that there can be rules or practices which are "inherent in the conduct of an international high-level sporting event" and therefore does not constitute a restriction in the meaning of Article 59 of the Treaty. Therefore, it was established by the ECJ that there can be certain rules and practices which are immune from the freedom of movement principles if there is any specific rule is inherent in its conduct. Nevertheless, developing another criterion on a case basis did not contribute the creation of uniform rules that can be respected while making assessments on the application of community rules to sport[138].

The judgment of the ECJ in the *Meca-Medina*[139] case, so to say, has rocked the theoretical pillars of the concept of sporting exception that has been developed by the previous case-law to that date. In this case, there were two professional swimmers who banned for four years due to using a prohibited substance. The ban was imposed by the *Fédération Internationale de Natation* (FINA) Doping Panel. Following the emergence of new scientific evidence, parties referred the matter to the CAS again, and the sentence again reduced from four to two years. Swimmers who are, apparently, not satisfied with this award filed a complaint before the European Commission claiming that 'Doping Control Rules' as implemented by FINA are against the competition provisions (Articles 81/82) of the EC Treaty. However, Commission rejected the complaint on the grounds that anti-doping rules were purely sporting rules falling outside the scope of the EU competition law[140].

On 11 October 2002, the appellants brought an action before the Court of First Instance (CFI) to have the decision of the Commission set aside claiming that, in the abstract, the Commission in the proceedings made a manifest error while making determinations in terms of the competition law aspects and the complaints as to the compatibility of rules with Article 49 EC has not been duly observed[141]. However, the CFI dismissed this application by ruling that "…the prohibition of doping is based on purely

[138] Parrish and Miettinen pp.90-91
[139] Case C-519/04 P, *Meca Medina v. Commission*, ECR 2006, I-699, hereinafter referred to as *Meca-Medina*
[140] *Meca- Medina*, Paras. 1-20
[141] Case T-313/02 P, *Meca Medina v. Commission*, ECR [2004], II-329, Paras. 30-32

sporting considerations and therefore has nothing to do with any economic consideration…" also noting that "…anti-doping rules at issue have no discriminatory aim…" and they "fell outside the scope of Articles 81 EC and 82 EC because of their purely sporting nature…"[142]

Following the dismissal of the CFI, the case was brought before the ECJ for an appeal examination. By virtues of the Article 122 of the Rules of Procedure, the ECJ set aside the judgment of the CFI and delivered its final judgment instead of remitting back to it. The judgment of the ECJ comprised a brand new approach to the specificity debate. Even though the judgment of the CFI was set aside by the ECJ, the result was the same for the appellants since only a "correction" was made in terms of the reasoning.

The Court, first, via applying usual "economic activity" test in its judgment with reference to the previous case-law, ruled its "critical dictum" that "In light of all of these considerations, it is apparent 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"[143]. Therefore, within this decision, the court has left the longstanding established distinction between economic and the sporting dimensions and explicitly founded that non-economic nature of sporting activities can no longer escape from the scope of Community law.

It was further ruled by making reference to the erroneous interpretation of the CFI as regards the applicability of four freedoms and competition principles that "If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those

[142] *Meca- Medina* CFI, Paras. 44-66
[143] *Meca- Medina*, Para.27

provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition"[144].

Then, the ECJ applied the *Wouters*[145] principle just to explain the applicability of sporting activities into the sphere of community law. According to ECJ, based on the *Wouters* principle, the rules and regulations of sport governing bodies does not automatically immune from the application of community law principles and should be put under scrutiny in terms of their consequential restrictive effects[146].

One can easily observe that apart from the judgment's revolutionary nature with regard to the concept of sporting exception, it also has remarkable competition law implications which will be discussed in the following chapters.

Repercussions of *Meca-Medina* were and have been groundbreaking with respect to the debated sporting exception. The judgment even construed to be dismantling of the broader concept of sporting exception which has been developed by the ECJ up until that day and end of an era when the "consequential restrictive effects" of the sporting authorities are examined under EU law in terms of their "economical" implications[147]. According to Weatherill, who in principle welcome the judgment, suggested that longstanding principle of *Walrave* based sporting exception was curtailed in *Meca-Medina* and now, "all that can be intended by the purely sporting rule is a reference to the small category of rules which govern sport but which are devoid of economic effect-such as offside rule and fixing the height of goal posts"[148].

According to Siekmann, after the *Meca-Medina* sport is longer that "special". He argues that the ruling of the ECJ in *Meca-Medina* "dismissed" the concept of "purely

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[144] *Meca- Medina*, Para.28
[145] Case C-309/99 *Wouters e.o. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577
[146] *Meca- Medina*, Para.42
[147] Parrish and Miettinen pp.96-100
[148] S.Weatherill, 'Anti-Doping Revisited- the Demise of the Rule of Purely Sporting Interest' in R.Siekmann and J.W.Soek, (eds.), *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) p.345

sporting rule". His analysis suggests that the application of non-sporting *Wouters* principle in Paragraph 42 of the judgment which requires consequential restrictive effects of the rules to be "inherent" and "proportionate" while in pursuit of its objectives, presupposes that a proportionality test should also be applied while making a compatibility examination. Therefore, regardless of the rule being economic or non-economic in nature, proportionality test should be applied in order to determine whether the rule is in conformation with EU law. This, of course, would require a case-by-case analysis and lacks certain specific guidelines while making examinations on the issue[149].

The supporters of the argument which proposes that sporting exception should be given a broader meaning while examining the compatibility of the rules and practices of sports governing bodies with EU law have severely criticized *Meca-Medina* judgment. It has been suggested by Infantino who acts as the Director of Legal Affairs, UEFA, the ECJ, by its ruling in *Meca-Medina* "have taken a major step backwards" from the principles developed so far and instead of making contributions in order to clarify the scope of the concept, it rather increased the scope of "legal uncertainty"[150]. It was also argued within this context that the ECJ have missed a great opportunity to unify and clarify the relationship between EU law and sporting activities and therefore provide guidance to the further possible litigation[151].

In summary, it was observed that the implications of the *Meca-Medina* will continue to be discussed in the future and it is inevitable that after this judgment litigation will be provoked. The rules and practices of the many of the sports federations will be challenged before Luxembourg courts with respect to their compatibility with the EU law, especially on the basis of competition law principles. This, of course, will bring self-restraint and mediation before adopting certain rules and regulations as regards the sporting

[149] R. Siekmann, Is Sport 'Special' in EU Law and Policy?, in R.Blanpain, M.Colucci and F.Hendricx (eds), *The Future of Sports Law in the European Union*, (2008), p.49

[150] G. Infantino, 'Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport', (2006) pp.2-11 available at http://www.uefa.com (23.04.2009)

[151] P.Colomo, 'The Apllication of the EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the *Meca- Medina* and *Piau* Cases ', *Entertainment and Sports Law Journal* ,(2006) III, 2, p.8

activity. The sporting exception was "drown" by the two swimmers[152] in *Meca-Medina* and the substantial parameters of the sporting exception were *sensu stricto* simplified. However, one may argue that still there are questions to be asked in terms of specificity of sport concept and according to Weatherill; *Meca-Medina* is rather a clear message to the sports governing bodies to "explain how"[153].

4.4. The Role of Other EU Institutions and Sport

Even though there is no Treaty competence of EU institutions to exercise policy-making powers, it would not be inaccurate to suggest that they have major impact. Due to lack of clear competence in the EU legislation, from the historical perspective, it has been suggested that the European Parliament, the Council and the Commission was not very keen on intervening in sports issues. Such an approach can be reconciled with the existed point of view of EU institutions at the time which considered sport as only a complementary vehicle for European integration[154].

The European Council, situated at the top of the EU pyramid as the steering power, provides future perspectives to pave the way to EU Sports Policy. The attempts of the European Council to trigger policy making mechanisms pertinent to sport in EU have begun with the annexation of the Declaration on Sport to the Treaty of Amsterdam in 1997[155]. The Declaration on the specific characteristics of sport as a Presidency conclusion

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[152] J.Crespo, 'European Law: two Swimmers Drown the Sporting Exception', *The International Sport Law Journal,* (2006) 3-4, p.118

[153] S.Weatherill, 'Anti-Doping Revisited- the Demise of the Rule of Purely Sporting Interest' in R.Siekmann and J.W.Soek, eds., *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) p.353

[154] M. Papaloukas, 'Policy, European Sports Law and Lex Sportiva' paper presented at the 14th World I.A.S.L. Congress, 27-29 November 2008, Athens; also *See* Commission of the European Communities, *A People's Europe, Reports from the Ad Hoc Committie*, (1984) COM (84) 446 Final (also known as 'Andonnino Report'), avaible at < http://www.ena.lu > (28.05.2009); The report mainly adopted the perspective that the administration of the sporting activities should be reserved for the sport governing bodies and the sole purpose of using sport in the Community level should be enshrined to the promotion of cultural integrity.

[155] Declaration 29 on the Final Act to the Treaty of Amsterdam

constituted another major step on the way[156]. Although these attempts remained legally non-binding, they absolutely endorsed the policy debate within the EU[157].

However, due to the fragmented legislative powers of EU institutions the hands of the European Council is somewhat tied as it is obliged to share some of its legislative powers with the European Parliament. The Council of Ministers had no direct initiatives to endorse policy debate. Despite this fact via arranging informal organizations, such as expert meetings and conferences throughout 2004 and 2006 which subsequently resulted with the publication of Whiter Paper on Sport in March 2007[158], have made considerable contribution to the process[159].

"Although the Council cannot pass sports legislation, its general legislative activity has indirect impacts on sport. There are also other areas of Community regulation where sectoral special treatment can be authorized by way of a Council decision, for example in the field of state aid regulation"[160].

As far as the role of Commission is concerned it can be suggested that, similarly, it has considerable impact on the EU sports policy issues. Since the 'Andonnino Report', drafted by the Milan European Council in 1985, the Commission showed great willingness to contribute in many aspects of the EU involvement in sports industry. Surveys and reports have been prepared in order to understand the forthcoming challenges in the EU spectrum[161]. Today, there is a separate Sport Unit structured under European Commission's Education and Culture Directorate General (DG) for the purposes of facilitating

[156] Parrish and Miettinen, p.26
[157] *Ibid*., p.26
[158] Commission of the European Communities, *White Paper on Sport*, COM (2007) 391
[159] Parrish and Miettinen, p.27
[160] Parrish and Miettinen, pp.27-28
[161] *See* Coopers and Lybrand, The impact of European Union Activities on Sport, *Study for DG X of the European Commission* (1995)

cooperation with other DG's and EU institutions in sport related issues while maintain good cooperation with national and international sport governing bodies [162].

Even though there is a special Sport Unit created within the Education and Culture DG, no doubt that due to multi-dimensional aspects of sporting activities many of the certain other departments of the Commission, *inter alia*, on a case-by-case basis involved in sports policy issues including but not limited to training youth and policy, equal opportunities and abilities policy, employment and free movement policy, environmental policy, media and cultural policy[163].

The European Parliament which is another legislative component of EU mechanism has considerable work on the development of sport in EU in terms of its budgetary and scrutiny powers. The European Parliament has endorsed political debate within the EU via preparing various reports and adopting resolutions. These efforts of the European Parliament created awareness on the application of Community rules in sport[164]. Some of the members of the European Parliament are interested in the matter that they even created a 'sports intergroup' where they meet on a regular basis in order to discuss sporting issues and to encourage promotion of sports policies in EU[165]. Since the beginning of the 90's, in cooperation with other EU institutions, European Parliament made contributions to the important organizations where the sporting matters are discussed. Establishment of

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[162] The Sports unit of DG Education and Culture was created in 1999 following the Helsinki Report. Website is available at < http://ec.europa.eu/sport/index_en.htm > (20.05.2009)

[163] Parrish and Miettinen, p.28

[164] *Ibid*, Parrish and Miettinen haven given following examples for the actions of European Parliament: "European Parliament, rappoteur: J. Van Raay, *Report for the Committee on Legal Affairs and Citizen's Right, on the Free Movement of Professional Footballers in the Community* (1989); European Parliament, rapporteur: J. Larive, *Report on the European Community and Sport* (1994); European Parliament, rapporteur: D. Pack, *Report on the Role of the European Union in the in the Field of Sport* (1997); European Parliament, *Report on the Commission Report to the European Council With a View to Safeguarding Current Sport Structures and Maintaining the Social Function of Sport Within the Community Framework-The Helsinki Report on Sport* (2000); European Parliament, *Professional Sport in the Internal Market*, Commissioned by the Committiee on the Internal Market and Consumer Protection of the European Parliament on the initiative of Toine Manders, project No: IP/A/IMCO/st/2005-004 [conducted by T.M.C. Asser Institut]; European Parliament, rapporteur: Ivo Belet, *The Future of Professional Football in Europe*, European Parliament Committee on Culture and Education, 2006/2130 (INI)."

[165] *See* < http://www.sportsintergroup.eu/en/?menu=158 > (01.07.2009)

"European Year of Education Through Sport" in cooperation with the Council in 2004 can be given as an example. European Parliament has also adopted various resolutions and arranged public hearings in order bring up many pending issues of sporting nature including but not limited to Education, Drug-Taking, Women's Sport and Professional Football[166].

4.5. Sports Policy Coalitions in EU: Theoretical Perspectives

The policy-making process in EU has long been a subject of debate. In the abstract, it has been suggested that the fragmented system consist of inter-institutional triangle (European Parliament-Council) where the actors are diverse, things are much more problematic in terms of creating policy areas[167]. The inevitable consequence of this multi-leveled system is the birth of coalitions within the policy sub-system who seek "the most appropriate venue in which to discuss and create policy"[168].

The policy-making diversity naturally reflects itself in designating political framework of sporting activities in EU. The contemporary and ongoing debate in this matter is that how should EU perceive sporting activities? Should it be treated as a social or an economic activity as far the EU system is concerned? Under this sub-title, some light would be shed on the leading two policy coalitions acting within the EU sub-system where sport is treated in a different manner.

4.5.1. Single Market Coalition

The main analytical framework of the Single Market Coalition is to consider sporting activities in the same context as other business activities operating in the European Market. Having regard to the milestone jurisprudences of the ECJ in *Walrave*, *Dona* and finally *Bosman*; supporters of this coalition have grown in a considerable extent.

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[166] G.Macedo, 'Sports Policy', (2008) available at < http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.17.6.pdf > (28.07.2009)

[167] R. Parrish, 'The Politics of Sports Regulation in the European Union', *Journal of European Public Policy*, (2003) pp.246-249

[168] R.Parrish, 'The Birth of European Sports Law', *Entertainment Law Journal Vol.2 No.2*, (2003) p.23

Originating point of this view is most likely concerned with the "ideological attachment to the legal foundation of a Single European Common Market." The supporting basis of this approach also includes the idea that the specificity of sport should be taken into consideration so long it does not contradict with the fundamental principles which give rise to a Single European Market[169].

Considering the activist attitude of ECJ and the Commission's actions that does not show any hesitation to prosecute possible infringements of EU law pertaining to sporting activities, indicates that the approach has been mainly adopted by these two institutions[170].

4.5.2. Socio-Cultural Coalition

The Socio-Cultural Coalition finds theoretical basis on the assumption that EU should integrate into its legal framework the uniqueness and specificity of sport without adopting such a clear-cut approach to its economic nature[171]. However, there are different views of the supporters of this collation on the way to achieve this goal.

Parrish, who discussed the distinct arguments of the supporters, contemplates that there are *maximalist* who believes that the inclusion of an Article to the Treaties would be the best way to ensure exclusion of the sporting activities from the application of EU law. European Parliament and some of the Member States have shown their support to this argument. Secondly, *moderates*, unlike *maximalists* do not support an inclusion of a Treaty Article. They instead, suggested that the attachment of a protocol, mainly considering the specificity of sport, to the founding Treaties is the best possible solution. The third party, namely the *minimalists*, adopted that neither the attachment of a protocol nor the inclusion of an Article would be the accurate course of action[172].

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[169] M. Papaloukas, 'Policy, European Sports Law and Lex Sportiva' paper presented at the 14th World I.A.S.L. Congress, 27-29 November 2008, p.5, Athens
[170] *Ibid* p.5
[171] R.Parrish, 'The Birth of European Sports Law', *Entertainment Law Journal Vol.2 No.2*,p.25
[172] *Ibid* p.25

4.5.3. A Comparison: Which One Prevails?

It has been suggested by Parrish that both policy coalitions are "institutionally well resourced" and consistent in their entirety[173]. The Single Market Coalition as indicated above mostly adopted by the ECJ and the Commission whereas subjects of so-called 'autonomous' sporting world (e.g. UEFA/FIFA) does not share this attitude at all[174]. The Single-Market belief system is mainly based their arguments in law and this approach has been supported by the ECJ jurisprudence from *Walrave* to *Bosman* which considered sporting activities subject to EU law "in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty". By contrast, Socio-Cultural Coalition exerts political pressure in order to adopt 'soft law' instruments without directly penetrating the system. Result of these efforts has presented itself in the non-binding "Declaration on Sport to the Amsterdam Treaty[175] which called upon the institutions of the EU to recognize the social significance of sports"[176].

According to Papaloukas, the discrepancies between these two policy coalitions can only be eliminated by using Alternative Dispute Resolution (ADR) methods. He further argued that parties finally reached a "compromise" and this has been determined by the Commission report prepared in 1999[177]. Based on this compromise, legal aspects of sporting activities are divided into three different categories in terms of their possible interaction with the Community principles. The first category comprises rules of purely sporting nature where penetration of EU law is maintained at the lowest level. Rules of the game and some transfer cases were given as examples to this category. Sport rules which constitute the second category are the rules that *prima facie* falls within the scrutiny of EU

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[173] *Ibid* p.24-25
[174] J.Arnaut, Independent European Sport Review (2006), available at < www.independentfootballreview.com > p.129-140
[175] Declaration 29, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997.
[176] Parrish and Miettinen, pp.24-25
[177] Commission of the European Communities, *Report from the Commission to the European Council with a view to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework*: the Helsinki Report on Sport, COM (1999) 644

law on a case-by-case basis. Collective sales of broadcasting rights and the implementation of state aid rules are treated within this category. The third and the last category of rules include which are directly subject to the exposition of Community rules due to their economic nature. Even though Papaloukas has developed his analysis along with enriched citations varying from ECJ case-law to the EU policy documents, accepted in the meantime that there is a grey area, due to unique and diverse nature of sporting activities, which precludes making such an exhaustive analysis[178].

Parrish, on the other hand, suggested from a different angle that creating certain "separate zones" as such would be to develop a potentially fragile system and it is highly probable that will end up with unavoidable collapse. He identifies that "… [Defining separate territories] is a legal approach based on both hard and soft law. Hard law refers to the formal Decisions of the Competition Policy DG and the judgments of the ECJ. Soft law refers to rules of conduct which in principle have no legally binding effect on policy and legal developments. This includes non-binding measures adopted by the EU institutions such as Treaty Declarations, Presidency Conclusions, political guidelines and Commission orientation papers, comfort letters and notices. The use of soft law is partly a consequence of the EU lacking legal base for sports policy. It is not therefore possible for the Commission to initiate sports legislation or for the Council of Ministers and European Parliament to pass it…As such, the use of soft law represents distinct quasi-legal approach in its own right. However, the use of soft law leaves the separate territories approach legally fragile as hard law precedents have yet to be established…"[179]

Parrish has advanced his above-mentioned analysis in a very recent work by taking football a case study since most of the sports debate on the European level has been carried on football. He argued that EU policy subsystem coalitions in the case of football are divided into two parties similar to that of classical division. On the one hand, there is "*football bus iness"* coalition that shares the same theoretical perspectives with Single

[178] Papaloukas, p.8
[179] R.Parrish, 'The Birth of European Sports Law', *Entertainment Law Journal Vol.2 No.2*,p.28

Market Coalition and the "*sporting autonomy"* coalition on the other, which shares the same perspectives with Socio-Cultural Coalition[180].

In depth of his analysis, mainly the power struggle between football interest groups[181] (deployed on the *football business* coalition field) and the top governing bodies of football (aligned to the *sport autonomy* coalition), namely FIFA and UEFA has been explored. It has been identified in the paper that the attempts to create a social dialogue, by means of ADR methods, on the policy-making fields between these "two rival advocacy coalitions" with the endorsement of EU institutions, mostly the Commission, *prima facie* have given birth to an affirmative results. However, he concluded that given the inadequacy of procedural rules on the way to participate policy making mechanisms in terms of interest groups still maintain the reconciliation endeavors fragile[182].

4.6. Sport in EU Documents

Since the Adonino report on European citizenship which created awareness at the EU level in terms of sport, things have been evolving very rapidly. The interventionist approach of the ECJ has made policy making tendencies of EU institutions unstable, especially after *Bosman.* Instability as such, inevitably has caused policy shifts which are reflected to the EU documents[183]. Under this chapter the treatment of the sporting

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[180] R.Parrish, 'Advocacy Coalitions in European Union Sports Law', 59th Political Studies Association Annual Conference, April 7-9 2009, pp.1-17, The University of Manchester available at < http://www.psa.ac.uk/journals/pdf/5/2009/Parrish.pdf >, (06.07.2009) cited with permission. Also *See* W.Grant, 'Two Tiers of Representation and Policy: The EU and the Future of Football', available at < http://aei.pitt.edu/7888/ > (02.08.2009)

[181] Football interest groups are various umbrella organizations associated in order to defend the rights of players, agents and other different groups of interest, which are, in the meantime, very keen on to participate policy making processes within the European football. Leading interest groups in European Football are as follows: European Club Association (ECA) < http://www.ecaeurope.com > (17.07.2009); Association of European Union Premier Professional Leagues (EPFL) < http://www.epfl-europeanleagues.com/index.htm >(17.07.2009) ; Fédération Internationale des Associations de Footballeurs Professionels (FOFPro) < http://www.epfl-europeanleagues.com/index.htm >(17.07.2009); European Football Agents Association (EFAA).

[182] R.Parrish, 'Advocacy Coalitions in European Union Sports Law', 59th Political Studies Association Annual Conference, April 7-9 2009, pp.16-17, The University of Manchester available at < http://www.psa.ac.uk/journals/pdf/5/2009/Parrish.pdf > (06.07.2009), cited with permission

[183] Parrish and Miettinen, p.33

phenomenon by the European Institutions and its reflections to the formal EU acts will be explored in a chronological order. Although there is a huge archive of documents, consultation papers and reports prepared by the EU institutions within the time frame, only the milestone policy documents which have steered the sports policy process will be provided and discussed in order not to over expand the boundaries of the subject beyond what is necessary[184].

4.6.1. The Amsterdam Treaty Declaration

The very first reference to sport was made in a declaration accompanying the Maastricht Treaty in 1992. The declaration especially noted the "social significance of sport" along with the importance of amateur sport[185]. However, the first time when sport explicitly mentioned within the context of Treaties was the 1997 "Joint Declaration on Sport" in the Treaty of Amsterdam. It was stated in the Joint Declaration that "The Conference emphasizes 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."[186]

As far as the wording of the Declaration is concerned apart from making reference to the issue of sport, socio-cultural aspects were highlighted mainly because of the sport governing bodies intensive lobbying. The nature of the Declaration lacking any legally binding effect only promoted the political agenda which intensified the discussions on the European level[187].

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[184] *See* < http://www.euractiv.com/en/sports > (19.08.2009) for a complete information on the EU documents.
[185] *See* < http://www.euractiv.com/en/sports/sports-policy-eu-introduction/article-117541 > (10.08.2009)
[186] Declaration 29 on the Final Act to the Treaty of Amsterdam.
[187] M.Groll, *et.al*.'Political Aspects of Sport in the European Union', *Status Report within the Framework of the Project Sport in Europe-Social, Political, Organizational, Legal Transparency in Europe*, German Sport University Cologne, Institute of European Sport Development Leisure Studies, (2008) pp.19-20, available at

4.6.2. The Helsinki Report on Sport

Following the acknowledgment of the importance of sport within the Treaty of Amsterdam framework, momentum was provided to the efforts of EU institutions which resulted with the request by the European Council in Vienna in 1998 summit to the Commission for provision of a report on "safeguarding current sports structures and maintaining the social function of sport within community framework"[188].

Directorate General X of the Commission following the request of the Council drafted in 1998 the Staff Working Paper on "the Developments and Prospects for Community Activity in the Field of Sport".[189] The report mainly identified the various aspects of sport and suggested that it can be used as an important vehicle for achieving policy goals in other areas such as public health, education and recreational activities. Moreover, it was highlighted that the application of community law to sport should be monitored while taking into consideration the special characteristics of sport[190].

Another important work of the Commission was published in the same year which introduced the concept of "European Model of Sport"[191]. The importance of this document along with its direction to call upon political support from the actors, it was provided basis for the first EU conference held in Olympia, Greece in 1999[192]. In the conclusions of this very first organization hosted by the Commission, the theoretical and practical basis of the envisaged "European Model of Sport", and the relationship between television and sport, fight against doping was discussed as the major headings[193].

<http://www.sport-in-europe.eu/images/stories/PDFFiles/politische%20aspekte_final_end_1201.pdf> (10.08.2009)

[188] Presidency Conclusions, The Vienna European Council (December 1998) available at < http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00300-R1.EN8.htm > (10.08.2009)

[189] *See* < http://ec.europa.eu/sport/library/doc/a/doc252_en.pdf >(10.08.2009)

[190] *Ibid,* pp.13-15

[191] Commission of the European Communities, *The European Model of Sport*, Consultation Document of DG X, (1998) available at < http://ec.europa.eu/sport/library/doc/a/doc252_en.pdf >(10.08.2009)

[192] Parrish and Miettinen, p.32

[193] Conclusions, *First EU Conference on Sport*, Olympia, Greece (May 1999), pp.2-9

At the Helsinki Summit in December 1999, the Commission has submitted its report which was requested in the Vienna Summit. First, the Commission in the concluding remarks of its report explicitly reiterated the fact that it had "no direct responsibility for sport under the Treaty". Then, the Commission, taking account of the impact of sporting activities to the social integration and promotion of EU, considered that there should be a "new approach" adopted including EU Institutions, Member States and governing bodies[194].

Moreover, it was observed that the "core" aspects of the previous Commission work were preserved in this "post-*Bosman*" document[195]. As Weatherill suggested, the main principles in *Bosman*, especially the implications of the ECJ considering sport different from other industries and providing certain specificity justifications which are maintaining competitive balance and uncertainty as to the results are embraced by the Commission report[196].

Consequently, in the Helsinki Report, the Commission highlighted the paramount importance of sport in maintaining the social aspects of European integration without ignoring the economic trends that have been increasing its dominance over the sector. However, it has been suggested that certain degree of hesitancy was apparent in the wording due to lack of clear EU competence[197].

4.6.3. Sport in the Constitutional and Reform Treaties

The discussion regarding the status of sport and the required course of action at EU level continued at Nice Summit in 2000. However, the results after intensified

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[194] Commission of the European Communitties, *Report from the Commission to the European Council with a view to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework*: the Helsinki Report on Sport, COM (1999) 644 p. 10

[195] S.Weatherill, 'Fair Play Please! Recent Development in the Application of EC Law to Sport' in R.Siekmann and J.W.Soek, (eds)., *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) p. 208

[196] S.Weatherill, 'The Helsinki Report on Sport' in R.Siekmann and J.W.Soek, (eds.), *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) p. 148

[197] *Ibid* p.153-154

discussions were just the issuance of a Joint Declaration in the form of a Presidency Conclusion[198]. Even though sport was still lacking any binding character after the Nice, it was observed that the Council further enhanced its approach to the issue by adopting a more comprehensive declaration comprising the issues of the autonomy of sports federations, current status of the transfer system and the role of amateur sports in EU[199].

The first and the foremost draft EU legislation that has ever contained an Article regarding the sports was the Constitutional Treaty. Article III-282 of the Constitutional Treaty stated that "The Union shall contribute to the promotion of European sporting issues, while taking account of specific nature of sport, its structures based on voluntary activity and its social and educational function. [The] 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". In addition it was stated in the following paragraphs that "the EU and the Member States shall foster cooperation with third countries and the competent international organizations in the fields of education and sport, in particular the Council of Europe"[200].

Even though there is no such Article in the Constitutional Treaty exclusively dedicated to sport, it was granted a legal status and under Chapter 5 where it was regarded as an area requires "supporting, coordinating or complementary" action within the context of the youth, sport and vocational training policy[201].

It was deduced from the adoption of such an article that, first, EU accepted the fact that since it has no power to regulate the system, it shall remain respectful to the Member State competences and autonomy of sports governing bodies in this respect. Second, there

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[198] Presidency Conclusions, *The Nice European Council* (December 2000) available at < http://www.sportdevelopment.info/attachments/159_nice.pdf > (22.08.2009)
[199] *Ibid* pp.1-3
[200] Treaty establishing a Constitution for Europe, *OJ* 2004 C 310, 16 December 2004 available at < http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:en:HTML > (10.09.2009)
[201] *Ibid* p.123

shall be no hesitancy in overseeing the certain aspects of sports rules and practices, where necessary, in cases where the EU fundamental principles such as freedom of movement and non-discrimination are at stake[202].

It was also suggested that, not all but some of the problems of sports in EU platform were resolved within the Constitutional Treaty system. For instance, the budgetary appropriations in sport which previously suffered from the lack of any legal basis were averted and the "agenda" of the Council on sport was formalized to envisage future prospects. Another important point which deserves consideration is that the "divine" expectation of the sport governing bodies to be granted autonomy within the context of EU Treaty was again failed since the principle of "promotion of European sporting issues" was enshrined in the Constitutional Treaty. On the other hand, it was observed that the implications should not be overstated since it did not provide a comprehensive approach to the pending matters of sport in EU[203].

The Constitutional Treaty never entered into force due to failures of the France and the Netherlands to ratify it. However, the desire of EU leaders to re-generate the Constitutional Treaty resulted with the organization of an Intergovernmental Conference in 2007 where making reforms are discussed. Finally, they came up with the Reform Treaty Draft (also known as the Treaty of Lisbon)[204] and it was signed in December 2007. Verbatim quotation was made to the Constitutional Treaty through amending the Article 149 of EU Treaty[205]. Although the Reform Treaty was ratified by all the member states except Ireland, a second referendum is planned to be conducted there in October 2009[206]

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[202] M. Collucci, 'Sport in the EU Treaty in the name of Specificity and Autonomy', in Blanpain, Colucci and Hendricx (eds), *The Future of Sports Law in the European Union*, (2008), p.23

[203] Parrish and Miettinen, pp.39-40

[204] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community *OJ* 2007 C 306, 17, December 2007 available at < http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML > (17.07.2009)

[205] *See* < http://www.euractiv.com/en/sports/sport-eu-treaties/article-128550 > (17.07.2009)

[206] *See* < http://www.euractiv.com/en/future-eu/irish-confirm-date-eu-leaders-pledge-join-campaign/article-183929 > (17.07.2009)

and therefore the acknowledgment of the legal status of sport in EU was put on hold until the full entry into force of the Treaty.

4.6.4. Belet Report: Parliaments' Approach

While there was an ongoing debate regarding the Reform Treaty, the European Parliament published the "Report on the Future of Professional Football in Europe" in 2007 which is also known as "Belet Report" with the intensive contributions of the Ivo Belet, who is also a member of European Parliament[207]. The report, examining various aspects of football, mainly stressed the extreme commodification of the sports branches-especially the football and suggested that legal certainty in sports should be maintained as soon as possible in order to face forthcoming challenges. Moreover, social and cultural aspects of football were highlighted as well as the necessity of pluralistic approach in the governing bodies system in which the football clubs participation is maintained[208].

It has been suggested after the Belet Report that, the opinion of the European Parliament acquired its shape and there are certain key suggestions that can be implicated from the phraseology of the Report which are: "(i) A regulatory framework that recognizes the specificity of sport (ii) An action plan for European sport in general and football in particular (iii) Social dialogue between the Member States (iv) Leading football federations to enhance the transparency and legitimacy (v) Modulated cost control system for European football (vi) Central marketing of television rights and distribution of TV revenue (vii) The establishment of an independent monitoring body"[209].

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[207] Report is available at < http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0036+0+DOC+PDF+V0//EN > (10.09.2009)
[208] *Ibid*, pp.19-34
[209] M.Groll, *et.al.*'Political Aspects of Sport in the European Union', *Status Report within the Framework of the Project Sport in Europe-Social, Political, Organizational, Legal Transparency in Europe*, German Sport University Cologne, Institute of European Sport Development Leisure Studies, (2008) p.23, available at <http://www.sport-in-europe.eu/images/stories/PDFFiles/politische%20aspekte_final_end_1201.pdf> (10.08.2009)

4.6.5. The White Paper on Sport

The culmination of the long process on the recognition of the sports at EU level has finally given its results in the adopting of the "White Paper on Sport"[210]. Consist of 130 pages long with the accompanying documents, it was the most detailed and comprehensive document that has ever been prepared by an EU institution pertaining to sport. Needless to say that White Papers' are of pivotal importance for giving direction to the certain policy areas where Community action is planned to be addressed.

The aims of the Commission in preparing this report were clearly summarized as follows: "This initiative marks the first time that the Commission is addressing sport-related issues in a comprehensive manner. Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector. The initiative aims to illustrate important issues such as the application of EU law sport. It also seeks to set out further sports-related action at EU level"[211].

The White Paper consisted of three main components have addressed the current issues of sport in EU. In the first part, basically, the societal aspects of sport was examined within the context of its role in enhancing public health through physical activity, promoting fight against doping, supporting sustainable development and European integration[212]. In the second part, economic dimension of sport was discussed with special emphasis to the major events, economic statistics and financing of sport[213]. Finally, suggestions were provided on the most contested issue of sport which is the organization and governance of sport.

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[210] Commission of the European Communities, *White P aper on Spor t*, COM (2007) 391 Final and the accompanying documents are available at < http://ec.europa.eu/sport/white-paper/index_en.htm > (19.01.2009)
[211] *Ibid*, p.2
[212] *Ibid*, pp.3-10
[213] *Ibid*, pp.10-12

The results that were derived from this initiative of the Commission are generally determined as follows: "(i) Facilitate a strategic orientation of the role sport plays in Europe (ii) Enhance the visibility of sport in EU policy-making (iii) Encourage discussion about problems that are relevant to sport (iv) Raise public awareness of the needs and specific features of the sport sector above all in the social, economic and organizational area (v) Illustrate the applicability of EU law in the sport sector (vi) Develop measures for the financial support of sport-related projects (vii) Enhance political cooperation in sport at EU level"[214].

Apart from its structure to evaluate the general sport issues with a comprehensive approach there are important points in the White Paper which should also be emphasized. Firstly, it has been suggested with reference to the case law of the ECJ that specificity concept "should not be interpreted in such a way that justifies a general derogation to the enforcement of community law"[215]. In other words, it was identified by the Commission that specificity of sport is not an exception to Community law.

Accordingly, the specificity concept in sport was regarded by the Commission in two different dimensions. The first is the "specificity of sporting activities and of sporting rules" which includes rules of the game and the rules that ensure uncertainty concerning outcomes. The second is the specificity of sport [governing] structure which includes autonomy of sport federations, the pyramid structure and the organization of sport on the national level[216].

It has been described by the sport governing bodies that the publication of White Paper is just a "missed opportunity" for the EU institutions to provide a policy initiative in

[214] M.Groll, *et.al* 'Political Aspects of Sport in the European Union', *Status Report within the Framework of the Project Sport in Europe-Social, Political, Organizational, Legal Transparency in Europe*, German Sport University Cologne, Institute of European Sport Development Leisure Studies, (2008) p.24, available at < http://www.sport-in-europe.eu/images/stories/PDFFiles/politische%20aspekte_final_end_1201.pdf > (10.08.2009)
[215] Commission of the European Communities, *White Paper on Sport*, COM (2007) 391 Final p.13
[216] *Id*.

order to settle this matter once and for all[217]. However, according to Parrish and Miettinen the disappointments which have been expressed by the sport governing bodies are constitutes a misconception. In order to underpin their own observations they argued that the approach which has been put forward by the Commission as regards the current issues of sport is nothing more than the restatement of recent *Meca Medina* judgment of the ECJ. Therefore, the strong opposition to the document by the sport governing bodies was not that fair considering the evolution of sports policy actions and the previous work of EU institutions[218].

It has been suggested that at the White Paper, the Commission did not take "an interventionist approach" which might result with jeopardizing the fundamental freedoms concept. It prudently welcomed the concept of "specificity of sport" however stated that this concept should be understood in such a way that ECJ jurisprudence is respected. The White Paper, also, emphasized that the specificity of sport should be construed so as to justify a general exemption from the application of EU law as it was suggested in the *Independent European Sport Review*[219].

Consequently, it can be argued that the White Paper of the Commission on sport has been the most comprehensive and detailed document which includes detailed examination on various dimensions of sport. It is also noteworthy that its impact on the sport arena was highly effective since it clearly presents the views of one of the most influential EU institution pro-actively contributing policy making initiatives of EC.

4.6.6. Brussels European Council Declaration on Sport

Sport has become a serious policy phenomenon after the adoption of White Paper in 2007 and the culmination of ECJ judgments on the issue. However, there were still

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[217] CIO-FIFA, '*Joint Declaration on the White Paper on sport: Much Work Remains to be Done*', Media Release No.093 (11 July 2007) available at < www.fifa.com > (04.07.2009)
[218] Parrish and Miettinen, pp.43-44
[219] M.Wathelet, 'Sport Governance and EU legal Order: Present and Future, in R.Blanpain, M.Colucci, F.Hendrickx, (eds.) *the Future of Sports Law in the European Union* (The Netherlands: Kluwer Law International 2008), pp. 70-71

important subjects on the table especially at the political level. In order to further discuss these issues and to monitor the progress of White Paper the EU Sport Forum organized by the Commission in Biaritz on 26-27 November 2008[220].

The forum was organized to take place in three different sessions where the "implementation of White Paper on Sport", "support for grassroots sport" and "the specificity of sport" is discussed. Participants from various institutions and the representatives of sports organizations attended the organization. Great participation for the first time secured in this organization and the parties to the issue have open-mindedly presented their approaches.

The reflections of the EU Sport Forum in November have received institutional feedbacks from the European Council which was organized right after the next month. "European Council Declaration on sport" was annexed to the Presidency Conclusion of the European Council meeting held in Brussels on 11-12 December 2008. Council adopted in this declaration as follows: "The European Council recognizes the importance of the values attached to sport, which are essential to European society. It stresses the need to take account of the specific characteristics of sport, over and above its economic dimension. It welcomes the establishment of a constructive dialogue at the first European Sport Forum organized by the European Commission. It calls for the strengthening of that dialogue with the International Olympic Committee and representatives of the world of sport, in particular on the question of combined sports training and education for young people"[221].

One may argue after the adoption of such a declaration by European Council that the theoretical basis of the attempts to create a sports policy are becoming increasingly apparent and the constructive dialogue channels with the subjects of the sports business are expanded.

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[220] Report is available at < http://ec.europa.eu/sport/pdf/doc687_en.pdf > (01.09.2009)
[221] Presidency Conlusions, *The Brussels European Council*, (December 2008) available at < http://ec.europa.eu/sport/information-center/doc/timeline/european_council_12-12-2008_conclusions_en.pdf > (08.09.2009)

4.6.7. Future Policy Perspectives of EU

Recent and expected developments point in direction of a strengthening of European policies in the sport sector. It is in the interest of the sport movement to be prepared for the time when sport will fall within the competence of EU. Therefore, the initiatives on the side of EU institutions continue to intensify.

The Commission with its pro-active approach to date keeps on contributing these initiatives. On 16 March 2009 the Commission has launched €7.5 million 2009 annual programme on grants and contracts for the preparatory action in the field of sport and for the special annual events[222]. The main objective of this programme "is to prepare future EU actions in view of the implementation of the Lisbon Treaty after ratification and on the basis of priorities set in the White Paper on Sport as approved by the College"[223].

The programme was designated to grant appropriations to certain organizations and special annual events including but not limited to studies, surveys, conferences and seminars on "policy support" at EU level and to Mediterranean Games which shall take place in Pescara, Italy in June 2009[224]. As regards the future of Lisbon Treaty it was expected that the "EU will have a competence in sport, provided that all member states have ratified the Treaty" in the early 2010. Moreover, the second EU Sport Forum is also planned to take place in spring 2010[225].

5. SPORT AND COMPETITION LAW IN EU AND TURKEY

5.1. EC Competition Law System

The EC competition law deriving from the Articles 81 to 89 of the Treaty of Rome has been of significant importance to maintain an effective free market system. Its objectives are similar to that of other systems such as "enhancing efficiency", "protect

[222] *See* < http://ec.europa.eu/dgs/education_culture/calls/docs/sport09.pdf > (10.09.2009)
[223] *Ibid*, p.5
[224] *Ibid*, p.6
[225] *See* < http://www.euractiv.com/en/sports/eu-sport-policy/article-165956 > (10.09.2009)

consumer and smaller firms". However, to "facilitate the creation of a single European Market" can be illustrated as a third objective apart from others[226].

The main legal sources of EC competition policy can be identified within founding principles of European Community. Under Article 2 of the EC Treaty founding principles of European Community were expressly specified and in Article 3, the means through which these objectives can be attained were also designated in detail. Since competition law has been regarded as an integral component to the internal market system, special emphasis was given in ensuring free market in which the competition is not distorted[227].

Basically, competition law of EC is classified under three different dimensions. In the first part, concern is generally on the "cartels" where the second regulates "abuse of dominant position" in the internal market. Finally, "concentrations" which covers joint-ventures, mergers or takeovers were put under scrutiny[228].

Under Article 81 EC, "…all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market…" are prohibited[229]. In general, it was designated in this Article that anti-competitive nature of agreements which provides restrictions or having distortive effects on competition automatically regarded as void unless they are exempted under Article 81(3) as to their "objects" or "effects"[230].

The second dimension of the EC competition law system is to prevent abuses of undertakings of their dominant position in the internal market. Under Article 82 EC, "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as compatible with the common market in so far

[226] P.Graig and G. De Burca, *EU Law Text Cases and Material*s, 3rd edn. (Oxford, Oxford Press 2003), pp.936-937
[227] Article 3/g EC
[228] P.S.R.F. Mathijsen, *A Guide to European Union Law* (London, Sweet and Maxwell 1999), pp.253-254
[229] Article 81 EC (ex Article 85)
[230] Mathijsen, p.254

as it may affect trade between Member States." EC Treaty by incorporating Article 82 into the structure apparently has planned not only to prohibit collusive agreements between undertakings or association of undertakings but also the actions of "quasi-monopolized" undertakings which have the ability to restrict competition within the internal market. Unlike Article 81(3) EC it was observed that there has been no "statutory exemption" system was provided under Article 82 EC.

Concentrations, namely the mergers and takeovers which are treated as the third limb of EC competition law even though they have no specific legal basis in the EC Treaty. However, swiftly changing environment of corporate reorganizations contributed to the development of dynamic competition principles. Especially, the approach of the ECJ to fill these kinds of gaps in the Treaty through its interpretative powers has been applied in this case however legal uncertainty as to the concepts remaines topical[231].

In the EC competition law system emphasis was particularly given to the actions of private undertakings even though there are specific provisions designated for "public undertakings" to which Member States grant special or exclusive rights"[232]. Article 86 of EC provides that "…public undertakings…shall neither enact nor maintain in force any measure contrary to the rules contained in [the] Treaty …in particular to those rules provided for in…Articles 81 to 89." According to Mathijsen, "the logical consequence of the subordinate position of the public undertaking is that the public authority which controls it, is responsible for the market behavior. Indeed, the object of the [EC] Treaty is to prevent that a Member State would exercise, through a public undertaking, an activity which it is prohibited from exercising in its capacity of public authority"[233].

Development of a single market among the Member States has resulted with the inability of using national economic policies within their own system. In a mechanism where the competitive behaviors of market actors are strictly observed, states are more

[231] Graig and De Burca, pp. 1034-1035
[232] *See* Article 86 EC
[233] Mathijsen, p.303

inclined to pursue subsidization programs in order to protect their national producers[234]. However, under EC Treaty system there are certain provisions designated within the rules of competition in order to prevent the distortive actions of Member States as such on the internal market.

Under Article 87 EC, "…any aid granted by Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be compatible with the common market". Therefore adoption of state aids for certain sectors or may be for undertakings which might eventually jeopardize the parameters and effective functioning of internal market has been eliminated through these principles established.

It is of natural that there are specific regulatory mechanisms and statutory bodies have been incorporated in order to supervise the EC competition system. In EC, the mission to enforce the competition rules was entrusted mainly to the Commission and accordingly a General Directorate for Commission was mandated for this task[235]. Commission is empowered based on Article 85 EC to request necessary information from the governments, relevant authorities of Member States and undertakings as well as to conduct voluntary or mandatory inspections.

As far as the applicability of competition laws in community system is concerned it was identified that they have direct effect[236] and Member States are under duty to apply these principles regardless of their own rules.

5.2. Turkish Competition Law System

The legal foundations of Turkish Competition Law can be found in the "Act on the Protection of Competition" (Competition Act) which was entered into force in 1994. The

[234] C.Quigley and A.Collins, *EC State Aid Law and Policy* (Norfolk, Hart Publishing 2004), p.1
[235] *See* Article 85 EC
[236] Case C-127/73 *BRT v. SABAM* [1972] ECR 51(16)

systematic of EC competition law was mainly incorporated to the Turkish legislation. Objectives of the Act were prescribed as to take necessary measures within the national market of goods and services for prohibition of the anti competitive acts of undertakings and the abuse of their dominant positions[237].

The Act's substantive antitrust prohibitions organized in three sets of rules. The first one deal with the agreements between two or more undertakings and prescribes that "[a]greements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited"[238]. The second covers the abuse of dominant position by one or more undertakings "on their own or through agreements with others or through concerted practices" in the market[239]. The third and the final one concentrates on mergers-acquisitions[240].

Turkish Competition Authority (TCA) having financial and administrative authorities incorporated as an independent legal entity[241] and appointed on 27 February 1997, began operations in November 1997. The TCA at that time assumed the competition law and policy functions, while the General Directorate turned its focus to handling consumer protection issues. The Competition Act has now been in force for nearly fifteen years, and the Board has been applying it for twelve years of that period.

It should also be noted within this framework that, the main task of the TCA is to prevent anti-competitive acts of undertakings in the markets for goods and services through the use of the powers granted by law. In order to fulfill the requirements of this task TCA is empowered to grant block exemptions, prepare secondary legislation (communiqués), prevent monopolization in the market, penalize undertakings which distorts competition

[237] Article 1 and Article 2 of the Competition Act.
[238] Article 4 Competition Act.
[239] Article 6 Competition Act.
[240] Article 7 Competition Act.
[241] Article 20 Competition Act.

environment, hear the complaints and examine the notifications of parties[242]. Ensuring the fair allocation of resources and increasing social welfare by the protection of the competitive process constitutes the basic foundation of the mission of the TCA.

Unlike EC, Turkish competition legislation has not been incorporated State Aids rules into its legislation yet. However, there have been attempts for the enactment of the legislation in which state aids are covered. The "Draft Act on State Aids" was submitted to the Presidency of Turkish Parliament on July 31, 2008[243] and it was planned to be entered into force in 2009 according to "National Programme of Turkey for the Adoption of EU Aquis"[244].

In the Draft document scope and objectives of the Act are designated as "…determine the main principles and relevant rules for state aids, regulate state aids in conformity with the international [Treaties] concluded between EU and Turkey and duties arising out of other international obligations, ascertain the main principles for the coordination, supervision and inspection of state aids"[245]. Moreover, it is specified that the authority to implement and supervise the state aid rules will be granted to the TCA[246]. The relevant details of the Draft Act on State Aids will be examined below where necessary in making determinations as to its relationship with sports.

5.3. Application of Competition and State Aid rules to Professional Sport

It has been explained above that both in EU and Turkey there are established systems and principles built in order to maintain free competition among the competitors of the market. Under this sub-title, the "competition" and "state aid" rules of each system will put under scrutiny in detail with respect to their applicability to the professional sports sector.

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[242] Article 8 *et seq* Competition Act
[243] Draft Act on State Aids, available at < http://www.basbakanlik.gov.tr > (06.07.2009)
[244] Available at < http://www.abgs.gov.tr/index.php?p=42260&l=2 > (06.07.2009)
[245] Article 1 Draft Act on State Aids
[246] Article 6 Draft Act on State Aids

It might be appreciated within frontiers of such a thesis that it is, of course, impossible to take into consideration of all aspects of the issue however; while building bridges between the concepts of EC and Turkish competition law and sports, relevant notions will be examined in detail

The main problem formulation in this section, after clarifying the applicability of competition and state aid rules to sport, will be that to what extend above mentioned rules should be applied. While seeking for answers to this question, the ECJ's case-law as regards these particular matters as well as with the decisions of relevant EU and Turkish regulatory authorities- especially the Commission and TCA- will be discussed.

5.3.1. Specificity of Sporting Activities in terms of Competition Law

Before entering into the merits of competition law discussion, it would be informative if the "special nature of sporting rules" and the logic that lies behind are explained since it possesses some peculiarities compared to other sectors. Such an approach would hopefully be helpful in carrying sport into the competition law framework.

Bell, Lewis and Taylor in the first place argue that "the fundamental economic principle that the public interest is best served by unrestrained competition in a completely free market environment simply does not apply in the sports sector."[247]

Based on the argument above it has been suggested that "specificity of sporting activities and rules" can be classified under certain general headings. The first one is the "mutual interdependence" between sports clubs and "the need for co-ordinated action". Since the tournaments or leagues are organized with the participation of more than one team, every club needs a rival to compete with. If there is no rival, there would be no competition. This feature indicates the mutual interdependence between sports clubs[248].

[247] A.Bell, A.Lewis and J. Taylor 'EC and UK Competition Rules and Sport', in A.Lewis and J.Taylor, *Sport: Law and Practice* (London, Butterworths Lexis Nexis 2003) p.353
[248] R.Parrish and S.Miettinen, *The Sporting Exception in European Union Law*, (The Hague, T.M.C. Asser Press 2007) p.2-3

As far as the competitive behaviors of sports clubs are concerned within the framework of competition law, it was suggested that they are distinct from "classic" economic competition where in the former, objectives are not set to gain market share from other competitors. Moreover, in the sports industry there is a "need for coordinated action" to set fixtures and to make necessary organization in order to ensure continuance of the system. Although it is not permitted in other sectors to adopt such co-ordinated action which might *prima facie* have competitive implications, the sports sector requires such an attitude in order to maintain integrity of the games[249]. These two concepts also recalls the "cartelization" arising out of coordinated action in the sports industry and this will be discussed below along with other aspects of the issue whether sports sector should enjoy a "limited cartelization", if so, to what extent.

The second feature of sports sector is maintaining "competitive balance" between sports clubs. It has also been accepted that the main feature of ensuring competitive balance is to make sure resources are allocated in consideration of this fact. Since there is inequality of resources especially on the side of small teams, redistributive mechanisms organized in a co-ordinated manner is necessary for this objective. Furthermore, competitive balance is also important for the sports clubs in terms of keeping public interest alive to the games. Therefore, "use of limits on the number of teams' participation in the league, reserve clauses, draft rules, roster limits, salary caps, transfer windows, collective bargaining arrangements, revenue sharing, joint merchandising and the collective sale and reinvestment of broadcasting rights" are all designated rules, in some instances, required for maintaining competitive balance among teams[250]. Their compatibility with the competition law will also be discussed below.

The role of sports governing bodies for the "regularity and proper functioning of competitions" has presented itself as the third characteristic of sport. For instance, "in order to ensure consistency within and between leagues, it is important that the heights of goal

[249] *Ibid*, p.2-3
[250] Parrish and Miettinen, pp. 3-5

posts are standardized and the shape of the ball is uniform". This would also include rules of the game, field-of-play rules, structure of championships and calendars, rules concerning the composition of national teams, home and away rule. It is obvious that sports governing bodies are responsible for the application of these rules just to ensure basic conditions of fairness is maintained[251].

There is no doubt that envisaging such rules and creating a competition environment among teams cannot be better achieved by any structure other than sports governing bodies since they are specialized in their particular sport category. However, it should be kept in mind that regulatory discretion of sports governing bodies as such might have restrictive effects in terms of competition law and the argument whether they should deserve a special treatment or whether they need any exemption or justification needs further elaboration.

Consequently, compatibility of all the rules and activities mentioned above is under strain and should require detail analysis in terms of competition law in the light of favoring and opposing arguments. Even though there are over-lapping concepts which may be observed within the categories, nevertheless there is an evident truth that there are specific features of sporting world and they should be taken into consideration while making analysis.

5.4. Sport and Competition Law in EU

The relationship between the EU and sports sector as regards the application of competition principles is not as old as the application of free movement principles. Since *Walrave*, the application of free movement principles and corollary to this, the concept of "sporting exception" has long been debated in EU.

However, competition law dimensions of the issue have not been called into question in a comprehensive and illuminating way until *Meca-Medina*. In fact, for the first

[251] Parrish and Miettinen, p.6

time in *Bosman* the legal norms and actions of sports governing bodies (UEFA, FIFA and URBSFA) with respect to their compatibility with the competition rules were challenged before the ECJ[252]. The ECJ decided in this case that it was unnecessary "to rule on the interpretation of" relevant Articles [81 and 82 EC] "since both types of rule [in question already] are contrary to Article 48"[253].

Even though, the ECJ, in its subsequent judgments after *Bosman* had the opportunity to rule on the competition aspects of the matter, due to contested parties failure to provide supportive factual and legal backgrounds, it refrained from making interpretations as regards the competition law aspects[254].

The *Balog* case, thereafter, which had great potential in terms of giving ECJ an opportunity to cover the competition law aspects, and even considered as Bosman II[255] was concluded with an amicable settlement and removed from the register in 2001[256].

Finally, ECJ delivered its judgments in *Meca-Medina* which has widely opened the "floodgates" of competition law assessment in sports related issues.

5.4.1. ECJ's *Meca-Medina* Judgment: Herald of Change or Opening of Pandora's Box?

Since the factual and legal context of *Meca-Medina* was mentioned above[257], no detailed explanation will be made as to the main proceedings before the court. However, the necessary arguments of the parties pertinent to the competition law challenges will be reminded on the way to discuss main implications of the judgment.

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[252] *Bosman*, Paras. 46-47
[253] *Bosman*, Para. 138
[254] *Deliegé*, Paras. 37-38; also *See* Case C-176/96 *Lethonen en Castors Canada Dry Namur-Braine v. Federation Royale Belge des Sociétés de Basketball,* [ECR] 2000, I-2681, Paras. 28-31
[255] S. Vargılı, 'Bosman ve Balog Kararları', *See* at <http://blog.milliyet.com.tr/Blog.aspx?BlogNo=38180> (01.08.2008)
[256] Case C-264/98 *Balog v. Royal Charleroi Sporting Club*, hereinafter referred to as *Balog*
[257] *See* Chapter 3

As can be recalled from the explanations above that Meca- Medina and Majcen were two long distance swimmers who tested positive for *Nandrolone* which was considered as a prohibited substance at the time. Then, they were banned for four years to participate in the competitions however, following their appeals before the CAS, their ban reduced to two years. The case, after the unsatisfactory proceedings before FINA Doping Panel and CAS Panel, have continued before Brussels- for a Commission investigation- and Luxembourg-for an examination before CFI and ECJ. Consequently, the results for the EU sports law in general and competition law in the specifics are worth considering.

The main argument of the contesting parties as regards the competition law was that adoption of certain regulations by the IOC and implemented by FINA on the anti doping controls infringed their rights under Article 81 EC and 82 EC. They first, filed their complaints above with the Commission. However, after a detailed examination, the application was rejected by the Commission on the basis that anti doping rules at issue did not fall within the scope of the prohibition under Articles 81 EC and 82 EC[258].

In the aftermath of the Commission's decision, they brought an action before the CFI during which they sought to have the said decision set aside. The CFI by reiterating the standard test of "economic activity" concluded that the rules to combat doping cannot come within the scope of the Treaty provisions of Articles 81 EC and 82 EC due to their purely sporting nature[259] and also the fact that challenging rules exclusively fall within the jurisdiction of sporting dispute settlement bodies[260].

The CFI in its reasoning, unlike Commission, neither considered the economic nature of anti-doping regulations nor examined the legal status of the IOC and FINA as an undertaking or association of undertakings. CFI rather focused its analysis on the purely sporting rule concept and ruled that non-economic anti-doping rules at stake are intended "to preserve…the spirit of fair play" and "to safeguard the health of athletes. Thus, the

[258] Commission Decision of 1 August 2002, Case COMP/38158 *Meca- Medina and Majcen /IOC*, Paras.33-70
[259] *Meca- Medina* CFI, Paras. 44-66
[260] *Meca- Medina* CFI, Para.67

prohibition of doping, as a particular expression of the requirement of fair play, forms part of the cardinal rule of sport"[261].

Analysis of the CFI also included an implication derived from earlier case –law of ECJ which indicated that "…the fact that purely sporting rules may have nothing to do with economic activity, with the result, according to the [CFI], that they do not fall within the scope of Articles 39 EC and 49 EC, means, also, that they have nothing to do with the economic relationships of competition, with the result that they also do not fall within the scope of Articles 81 EC and 82 EC". CFI followed that "Conversely, rules which, although adopted in the field of sport, are not purely sporting but concern the economic activity which sport may represent fall within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and are capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions"[262]. Finally, CFI rejected the application of the plaintiffs by confirming the decision of the Commission.

From that perspective it was generally stated by the CFI that even though the case-law on sport so far concerned the application of the provisions on free movement of persons and services, the principles are valid also for the application of EC competition rules to sport. Moreover, it was ruled that anti-doping rules did not pursue any economic objective, rather they are intended to preserve the spirit of fair play and purely social.

Nevertheless, it was apparent that Meca-Medina and Majcen were not willing to quit the game until they hear the "final whistle". So, they appealed the CFI judgment before the ECJ. The ECJ in its judgment after reminding its previous case-law, dramatically derogated from the argued concept of "purely sporting rule" and decided in the first place that "… it is apparent 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

[261] *Meca- Medina* CFI, Para.44
[262] *Meca- Medina* CFI, Para.42

governed by that rule or the body which has laid it down"[263]. The effects of this judgment in terms of the "evolution of sporting exception" were discussed above.

ECJ further argued that, contrary to the assumption of the CFI on the applicability of Articles 81 EC and 82 EC, "if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition"[264]. ECJ, by ruling that way, highlighted that it does not follow the same line of reasoning with CFI especially in terms of application of competition and free movement rules.

According to ECJ, "…where engagement in the sporting activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, given the specific requirements of Articles 81 EC and 82 EC, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuse its dominant position, and whether that restriction or that abuse affects trade between Member States"[265].

Another important aspect of the *Meca-Medina* judgment is that the ECJ applied *Wouters*[266] and to some extent the *DLG*[267]principles in this case, just to discuss the scope of anti-doping rules. ECJ stated that within the framework of these judgments above "…the compatibility of [doping] rules with the Community rules on competition cannot be assessed in the abstract". It was further argued by the ECJ that "not every agreement between undertakings or every decision of an association undertakings which restricts the

[263] *Meca- Medina* , Para.27
[264] *Meca- Medina* , Para.28
[265] *Meca- Medina* , Para.30
[266] Case C-309/99 *Wouters e.o. v. Algemene Raad van de Nederlandse Orde van Advocaten,* [2002] ECR I-1577, hereinafter referred to as *Wouters*
[267] Case C-250/92 *Goettrup-Klim e .o. G rovvareforeninger v. D ansk L andbrugs G rovvareselskab AMBA* [1994] ECR, hereinafter referred to as *DLG*

freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC [and] for the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of association of undertakings was taken or produces its effects and, more specifically, of its objectives"[268].

Finally, in the concluding remarks of the analysis ECJ found that it should "be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives […] and are proportionate to them"[269]. Accordingly, as regards the specifics of the case at issue, ECJ-confirming the view of the Commission- decided that the rules that were laid down by IOC and implemented by FINA are designated to "combat doping", protect the health of athletes and ensure the integrity of competitive sport as well as to preserve ethical values and consequently, the effect of the rules must be considered "inherent" itself[270].

The above ruling of the ECJ in paragraphs 42 and 43 was somewhat a "short-cut" to the way which normally goes through in standard competition law tests. That is to say, instead of making a detailed analysis whether the rules have restrictive effects on the market or whether the sport governing bodies at hand can be regarded as undertakings or association of undertakings, it rather opened an "objective justification" door by considering their objective as legitimate.

However it has also been accepted by the ECJ that pursuing a legitimate objective envisaged as such does not solely make the rule fall outside the scope of competition law principles. So, analysis followed by the acknowledgment "…that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from

[268] *Meca- Medina* , Para.42
[269] *Meca- Medina* , Para.42
[270] *Meca- Medina* , Paras.43-44

sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in" and therefore provided that "in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport…"[271]

Furthermore, in Paragraph 48 of the judgment, ECJ stated that the rules should also not be "excessive". According to Court, "rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of penalties"[272].

Consequently, on the basis of the foregoing, the ECJ founded that the contested rules are not that excessive to declare them as disproportionate and therefore dismissed the arguments of Meca-Medina and Majcen however, set aside the judgment of the CFI based on the reasoning mentioned above[273].

Even though the interpretation of the ECJ has not been welcomed by the sports governing bodies that are on the side of having ultimate governing authority in terms of sport or at least willing to preserve existing self-governing authority structure[274], one can argue that *Meca-Medina* provides not "clear" but useful guidance for the future application of EC competition law to sport.

The most debated part of the *Meca-Medina* is the application of *Wouters* and *DLG* judgments in providing a justificatory mechanism on the basis of "ancillary restraints doctrine"[275]. According to Weatherill, ECJ in *Meca-Medina*, "seamlessly" moved between case law which on the one hand suggests that for a rule should not to be regarded as a

[271] *Meca- Medina* , Para.47
[272] *Meca- Medina* , Para.48
[273] *Meca- Medina* , Paras.54-60
[274] *See* G. Infantino, 'Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport', (2006) available at http://www.uefa.com (30.02.2009)
[275] *See* for the details of the doctrine, A. Jones and B.Sufrin, *EC Competition Law* (Oxford, Oxford University Press 2004), p.215 *et seq*

restriction on commercial freedom due to its "proper functioning" and which, on the other, provides that a rule should not constitute restriction of competition under 81(1) EC "since the restrictive effects are inherent in the pursuit of legitimate objectives". He also suggested-while noting that both approaches diminish the effect of Article 81(3) EC exemptions- they both have important implications pertinent to the application of Article 81 EC however, preferring one approach over another should be considered nothing more than an "analytical distinct" since they are "functionally equivalent"[276].

Having regard to the accurate usage of *Wouters* inherency test in *Meca-Medina*, Weatherill, in the meantime, highlighted that *Wouters* should not be considered as "a general tool in the interpretation of Article 81 [EC] beyond cases involving rules established by non-State actors to govern the conduct of a profession." He therefore concluded that "absorption" of *Wouters* in *Meca-Medina* is a clear declaration of the "conditional autonomy of sports federations" under Article 81 and the analysis method applied is fruitful[277].

Secondly, Parrish and Miettinen have also provided a comprehensive analysis as regards the effects of *Wouters* principle in *Meca-Medina* and stressed, first, that in *Wouters* there was a rule derived from a statutory body (i.e. Dutch Bar Association) whereas in *Meca-Medina* there was no such statutory delegation power vested on IOC or FINA and therefore according to their arguments this should be considered as "a further move in the modern trend towards the abolition of the public/private divide in Community law". They, then, argued that the source of rule is "[no longer] an essential element for consideration as an inherent ancillary restraint." However, as a result, they believe that *Meca- Medina* will not be the final analysis of ECJ in this regard[278].

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[276] S.Weatherill, 'Anti-Doping Revisited- the Demise of the Rule of Purely Sporting Interest' in R.Siekmann and J.W.Soek, eds., *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) p.347
[277] *Ibid*, p.348; also *See* to this effect, E. Szyszczak, 'Sport and Competition', *European Law Review*, (2007), pp.105-106
[278] Parrish and Miettinen, p.122

Another argument brought into discussion about *Meca-Medina* was that using "inherency" as objective justification constitutes "similarities" to the *Walrave* Paragraph 8 "purely sporting rule". It was suggested that "even though the ECJ dismissed the notion of purely sporting rules in the context of competition law, it is submitted that inherency in this respect a new manifestation of that notion, albeit in nominally different form."[279] Above mentioned analysis of Parrish and Miettinen is a typical example- to some extent- of "convergence"[280] trend which is proposed between free movement rules and competition rules of the EC Treaty. However, Weatherill noting that it is difficult to "decipher" whether the ECJ's interpretation in *Meca-Medina* is construed as an ultimate convergence between free movement rules and competition rules, instead he argued that there is an apparent "convergence in outcome"[281].

Although it seems that *Wouters*, in principle, "fits" in terms of application of EU law to sport, one might observe that the same approach was used in former occasions where the concern for sport at stake. It should also be noted that, in fact, *DLG* judgment constitutes the basis of *Wouters* since it is quite older.

The first reference to this principle in sports cases can be traced back to *Bosman* in which the Advocate General Lenz invoked the *DLG* principles while discussing the pleas of UEFA[282]. The Advocate General Alber in *Lethonen* case by making reference to *DLG,* indicated that regardless of the systematic of transfer windows which constitutes restriction in terms of Article 81 EC, it should be decided that objective of the rule should be considered as legitimate since it is imperative for equal competition between clubs[283].

Even the Commission used *Wouters* principles in its *ENIC* decision where there was a complaint towards multiple club ownership regulations of UEFA. In this decision,

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[279] *Ibid*, p.123
[280] R.O'Loughlin, 'EC Competition Rules and Free Movement Rules: An Examination of the Paralles and their furtherence by the ECJ *Wouters* Decision', *ECLR* 62, (2003), p.62 *et seq*
[281] S.Weatherill, 'Anti-Doping Revisited- the Demise of the Rule of Purely Sporting Interest' in Siekmann and Soek, eds., *European Sports Law, Collected Papers* (The Hague, T.M.C. Asser Press 2007) pp.341-342
[282] Opinion of Advocate General Lenz in *Bosman*, Para.268
[283] Opinion of Advocate General Alber in *Lethonen*, Paras.110-114

Commission considering the *DLG* principles stated that "the consequential effects of the rule are inherent in the pursuit of the very existence of credible pan European football competitions"[284].

In conclusion, it can be observed from above that *Meca-Medina* judgment of the ECJ has changed many of EU sports law parameters that has ever been applied until that day. Tailoring a "conditional autonomy dress" for sports governing bodies once again proved that sport is still not that "special" for the Luxembourg judges. However, as far as the developments in terms of competition law are concerned it can be argued that even though there are no clear guidance was provided by the ECJ, in practice a case-by-case analysis will be required and the sports governing bodies will be obliged to take into consideration of anti-competitive effects of their rules in a broad sense.

5.4.2. Post *Meca-Medina*: Fitting Sport into the Competition Law Framework

After *Meca-Medina*, it has been established that sporting rules and activities might have important anticompetitive implications and the ECJ is always ready to consider whether they are in conformity with the EC principles. On the other hand, one can argue that there exist some undefined concepts and matters of competition law as regards the sport.

Therefore, what will be dealing below is to understand the competition law principles of the EC Treaty and to explain sporting features within this framework. In *Piau*, some of these issues were addressed and advanced both by the CFI and ECJ. So, reference will be made to this judgment where necessary.

5.4.3. Article 81 EC and Sport

Article 81 EC provides that "…all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or

[284] Commission Decision of 25 July 2002, Case COMP/37 806, *ENIC/UEFA*

distortion of competition within the common market" are strictly prohibited[285]. In order to understand the application of the above mentioned Article one should attempt to examine the concepts which are included in the wording.

5.4.3.1. Agreements, Concerted Practices and Decisions

It has been provided by the Article 81 EC that there should be an "agreement", "decision" or a "concerted practice" of an undertaking at stake in order to conduct a competition law analysis. Since EC Treaty does not provide any definition for above concepts, focus should be turned to the ECJ/CFI case law and Commission decisions.

In one of the CFI judgments it was identified that an agreement, under Article 81 EC, refers the actions of the parties to express their intentions to conduct themselves in a certain way[286]. "A concerted practice, on the other hand, is an anti-competitive parallel market behavior of several undertakings, which is caught by the prohibition when it is the result of a concentration among said undertakings"[287]. Thirdly, decisions by associations of undertakings understood as "the constitutive act of a trade association and its internal rules, decisions made in accordance with those rules and which are binding upon the members of the association and also recommendations…"[288]. It should also be noted in this regard that according to ECJ, what constitutes an agreement, decision or a concerted practice is understood in a broad sense where even tacit activities of undertakings are considered within this context[289].

Considering the legal status of sports associations in the light of the foregoing definitions it appears that the rules and regulations of sports governing bodies such as UEFA and FIFA or IOC, can be considered as "decisions by an association of undertakings". In fact, this has been highlighted in the remarkable Opinion of Advocate

[285] Article 81 EC (ex Article 85)
[286] Case T-347/94 *Mayer-Melnhof* [1998] ECR II-1751 (65)
[287] Mathijsen, p.255
[288] *Ibid*, p.256
[289] Case C-49/92P, *Commission v. ANIC Partecipazioni SPA* [1999] ECR I-4125, Paras. 40-43

General Lenz in *Bosman* where he treated UEFA regulations on transfer of players as decisions of associations of undertakings[290]. *Piau* case which has been regarded as the predecessor of *Meca-Medina* to some extent includes the same line of analysis[291]. In this respect, it can also be stated agreements between sports clubs or between sports clubs and players can be considered within the concept of agreement in terms of competition law and they can be investigated by the relevant EU authorities.

5.4.3.2. Undertakings and Association of Undertakings

Secondly, definition of undertakings and association of undertakings in terms of competition law should be put under scrutiny since they constitute the source of agreements, decisions and concerted practices. Under EC competition law, the term of "undertaking" has given a broad meaning and the definition is valid for both Article 81 EC and 82 EC. Undertakings basically defined by ECJ as an "entity engaged in an economic activity regardless of the legal status of the entity or the way in which it is financed"[292]. An undertaking does not necessarily have a "legal personality" however; certain degree of "legal status" is required in order to be categorized as an entity which pursues economic interest[293]. The term covers corporations, partnerships, individuals, trade associations, liberal professions, state owned corporations[294] and even Member States when they follow economic interest[295]. Another requisite of being an undertaking is that it should be capable of determining "market behavior". Therefore, subsidiaries of undertakings are not regarded as an undertaking within the meaning of competition law unless they possess "independent" powers to determine their own market behavior[296].

[290] Opinion of Advocate General Lenz in *Bosman*, Paras.257-258
[291] Case T-193/02 *Laurent Piau v. Commission*, Paras.68-75
[292] Case C-41/90 *Höfner and Elser v. Macrotron GmhH* [1991] ECR I-1979, Para. 21
[293] Mathijsen, p.258
[294] Graig and De Burca, pp. 939
[295] Mathijsen, p.258
[296] *Id*

Having regard to the definitions above it has been suggested that sports governing bodies can be regarded as undertakings[297]. This argument was confirmed and extended to the sports clubs/teams in *Piau* case of CFI where it was ruled as follows: "…it is common ground that FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 81 EC and the national associations grouping them together are associations of undertakings within the meaning of that provision"[298]. Following the determination of legal status of sports clubs and national associations, CFI in *Piau* further ruled that "[s]ince the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 81 EC"[299]. In some of the Commission investigations it has even been suggested that international associations might also be referred to as "associations of associations of undertakings"[300].

Consequently, taking into consideration of the broad meaning which has been given to the term undertaking, one might argue that sports clubs/teams, national and international associations (federations) are basically regarded as undertakings. Nevertheless, their status of whether being an undertaking or associations of undertaking will be determined based on the particular conditions of the case.

A question arises after all these explanations on whether an individual athlete can be regarded as an undertaking. According to Advocate General Lenz, a distinction should be made at this point between a football player who is an employee of a club and an individual athlete not acting on behalf of an employer. His analysis suggests not considering former as an undertaking whereas latter might be treated as an undertaking

[297] A.Jones and B.Sufrin, *EC Competition Law: Text, Cases and Materials* (Oxford, Oxford University Press 2004), pp.108-110
[298] *Piau* CFI, Para.69
[299] *Piau* CFI, Para.72; *See* also Distribution of Package Tours During the 1990 World Cup OJ L 326/31 (1992), 5 CMLR 253, Para.52
[300] Joint Selling of Commercial Rights of the UEFA Champions League, OJ L 291/25

under Articles 81 and 82 EC[301]. Commission addressed this issue in the accompanying documents of the White Paper by making reference to the *Deliege* where "the ECJ found that a high-level judoka participating in an international competition was exercising an economic activity". Finally, it was suggested that individual athletes should be considered as undertakings for the purpose of relevant Treaty Articles so long as they carry out economic activities independent thereof even they are employed by a sport club.[302] It should be argued in this respect that the distinction which was made by the Advocate General Lenz is rather immaterial since both sportsmen and sportswomen enter into sports market by practicing their particular sport and generate income for their favor. Their engagement with a team does not change this fact.

Another distinction should be made right at this point on whether even amateur sports clubs are regarded as undertakings within the meaning of Community competition rules. It can be recalled from above that amateurism requires no compensation for the practice of that particular sport and usually does not pursue an economic interest. In line with the concept of amateur sport, the Commission suggests that amateur clubs are not generally considered within the scope of Article 81(1) EC and to the extent that they do not pursue economic cannot be regarded as undertakings[303]. The argument of the Commission is accurate in the sense that amateur clubs does not pursue economic interest; however it should be argued that considering the trend of professionalism in global sports arena and the lack of certain parameters to make distinction between an amateur and professional sport, automatic treatment of amateur sports clubs as not undertakings in the context of EC competition law might give rise to misconceptions. For instance, what if an amateur club sells sports mechanizing or enter into sponsorship agreements with a third party. In that case, would it be possible to consider that amateur club not within the scope of competition law rules? So, one should approach to the issue deliberately without jumping into

[301] Opinion of Advocate General Lenz in *Bosman*, Paras.255-263 (2003), Para.106
[302] Commission of the European Communities, *Commission staff working document. The EU and Sport: Background and Context*, SEC (2007) 935, p. 66
[303] *Ibid*, p.28

conclusions by not considering the economic activities of amateur sports clubs in this respect.

5.4.3.3. Effect on Trade between Member States

Alongside other criterion laid down by the EC Treaty in Article 81, this one is especially required for the application of said Article to the particular case at hand. If this criterion is not satisfied, the matter falls exclusively within the competence of Member States[304]. Under ECJ case law, any foreseeable "…influence, direct or indirect, actual or potential, on the pattern of trade between Member States" which may affect "the realization of the aim of a single market" would be considered to this effect[305]. Moreover, according to ECJ actual impact on trade is not imperative. Even the "capability" of having that kind of effect is sufficient for an act to be considered within this context[306]. The issuance of Commission Guidelines, on the other hand, regarding this matter with reference to the ECJ case-law provided specific numbers and principles for whether an agreement, concerted practice or a decision affects trade between Member States or not[307].

Determining the effect on trade between Member States is also of importance for identifying whether the rule in question falls within the jurisdiction of national competition rules. At this point, ECJ applies an appreciability test. If the practice is considered as appreciable, it should be regarded within EC competence. However, in cases where there is no such appreciable effect of the anti-competitive actions, practice falls within the scope of national competition rules[308].

In accordance with the competition law principles of EC Treaty distortion of competition must also take place within the common market. Actions of the undertakings

[304] Mathijsen, pp.258-259
[305] Case C-56/65 *Société Technique Miniére v. Maschinenbau Ulm* [1966] ECR 235, 249
[306] Case C-19/77 *Miller International Schallplatten GmbH v. Commission* [1978] ECR 131
[307] Commission Notice, Guidelines on the Effect of Trade Concept Contained in Arts.81 and 82 of EC Treaty, OJ 2004 C101/81, Paras.52-53
[308] Case C-5/69 *Völk v. Vervaecke* [1996] ECR 295

outside the boundaries of EU which might have restrictive effects on trade are not come under EC competition rules unless they affect competition within the internal market[309].

When the sporting matters are considered in the light of the foregoing, it has been observed that this aspect of the issue has given no specific attention. Nevertheless, considering the principles above, one can argue that since sports governing bodies' actions are regarded as a decision of an association of undertaking within the meaning of Article 81 EC and are applicable in various jurisdictions, it is likely that they might have effect on trade between Member States.

The definition of relevant market is another pivotal aspect of the matter. In the meantime, it should also be noted that relevant market definition is important not only for Article 81 EC but also for Article 82 EC which prohibits abuse of dominant positions of undertakings[310].

If undertakings are not operating in the same market, this means that they are not in competition and therefore, a market analysis would be unnecessary. However, if they do operate in the same market one should identify their positions in terms of their market shares. Commission suggested that the relevant market analysis has three subsequent facets which are the product (services) market, geographical market and the temporal dimensions[311].

It is defined that "there is competition when the end consumer has a choice between different products/services, which, because of their characteristics, their price and their intended usage are interchangeable"[312]. The approach of ECJ and Commission to the definition of product market mainly focused on "interchangeability". According to ECJ, "the concept of relevant market, in fact, implies that there can be effective competition

[309] Joined Cases 6-7/73, *Instituto Chemioterapico Italiano and Commercial Solvents v. Commission* [1974] ECR 223
[310] Mathijsen, p.274
[311] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law *OJ* 1997 C372/5, Para.2
[312] Mathijsen, p.274

between the products, which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as the specific use of the product is concerned"[313].

Determining geographical market constitutes the second limb of his analysis. Geographical market was defined by the Commission as an "…area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas"[314].

As stated above, temporal factor constitutes the last part of the relevant market analysis. This concept refers to the market conditions in which "a firm may possess market power at a particular time of year, during which competition from other products is low because these other products are available only seasonally."[315] Agricultural products are illustrative in this context[316].

Neither in the case-law of the ECJ nor in the Commission decisions one cannot easily identify certain guidelines for market definition as regard sport. In this respect, Parrish and Miettinen suggested that the Commission does not usually elaborate the concept of market definition in its decisional practice as far as the sporting issues are concerned. They argued that this attitude of the Commission is mainly related to the lack of objectively defined criteria[317]. For this reason, most of the Commission decisions were not usually appreciated by the Community courts. In *Piau*, for instance, the CFI after severely criticizing the market definition of the Commission[318] defined the relevant market as "a

[313] Case C-31/80 *L'oreal v.De Nieuwe AMCK* [1980] ECRE 3775
[314] Commission Notice on the Definition of Relevant Amrket for the Purposes of Community Competition Law *OJ* 1997 C372/5, Para.8
[315] Graig and De Burca, p. 1000
[316] Case C-27/76, *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207, Paras.45-53
[317] Parrish and Miettinen, p.116
[318] *Piau* CFI, Para.80

market for the provision of services where the buyers are players and clubs and the sellers are agents"[319].

In defining product market with respect to sport, it was suggested that the decisional practice of the Commission in *Bertelsmann* and *TPS+7* is much more comprehensive and illuminating with respect to media rights where they made a distinction between sports and other programming[320].

Egger and Stix-Hackl apart from the Commission practice provided a market definition with reference the informal Opinion of Advocate General Stix-Hackl in *Balog* case. Even though it was based on transfer rules, it is of importance in terms of providing clear definitions. Having regard to the fact that sport has specific features distinct from other economic activities; the analysis provides three "interconnected" markets. The first one refers to the "exploitation market" where undertakings-clubs and sports federations-sell their performances. Sports broadcasting rights were given as an example to this category. The second market is the "contest market" where the product of professional sport is produced. The final market is identified as the "supply market" where the players traded among clubs[321].

One can, *prima facie,* think of the geographical market for sport as the territory of the sports' governing bodies where their rules are applied. But, would such a definition be comprehensive or yet is it possible to make a clear geographical market definition as regards sport under Community competition law principles? As an answer to these questions, it has been suggested that "…sports markets are unlike many markets for goods that are considered Community-wide, capable of more geographical scope." This is because the "objective features of those markets are capable of influencing the outcome of the conventional geographic market analysis"[322] It has been observed that there are no certain

[319] *Piau* CFI, Para.112
[320] Parrish and Miettinen, pp.114-115
[321] A.Egger and C. Stix-Hackl, 'Sports and Competition Law: A Never Ending Story', (2002) *European Competition Law Review*, pp.86-87
[322] *Ibid*, p.87

guidelines provided in the Commission's and ECJ's decisional practice pertinent to determination of sports geographical market in the EU[323].

Temporal effects have also been considered by the Commission while making market analysis as regards the sport. For instance, the Commission, in its *Newscorp* decision has taken into consideration of temporal effects of the market where the joint selling of the rights were at stake[324].

5.4.3.4. Prevention, Restriction or Distortion of Competition

Under Article 81(1) EC, practices of the undertakings which prevent, restrict or distort competition among member states are strictly prohibited unless they are exempted under 81(3) EC or justified under certain circumstances. Accordingly, it has been established that the primary aim of Article 81(1) EC is to make sure market conditions are not affected by collusions between undertakings[325].

The analysis of whether an agreement, decision or a concerted practice restricts, distort or prevent competition among Member States, requires an analysis as to the "objective" or "effect" of that action.

According to ECJ, in order for the agreement to be declared as restrictive one should first examine whether that agreement has a restrictive object. If the objective of the agreement does not restrict competition among Member States, one should then consider whether it effects competition[326]. ECJ also ruled in this respect that if the "objectives" of an agreement identified so as to restrict the competition among Member States, one should no longer examine the "effects" of that agreement on the competition[327]. In this case, it automatically falls within the scope of Article 81(1) EC.

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[323] Parrish and Miettinen, pp.117-118
[324] Case M.2876 Newscorp/Telepiu, OJ 2004 L 110/73, Para.233
[325] Case C-49/92 *Commission v. ANIC* [1999] ECR I-4125
[326] Case C-56/65 *La Société Technique Ministrie v. Maschinenbau* [1966] ECR 235
[327] Case C-45/85 *VdS v. Commission* [1987] ECR 405

While exploring the restriction concept in EC law, it would be beneficial to discuss US concepts since they have reflections in EC systems. Basically, US competition law distinguishes between agreements that are prohibited due to their anti-competitive nature and those that require an economic analysis in terms of their possible affirmative effects on the competition. In other words, under US competition law, not every actions of an undertaking automatically declared restrictive without making an analysis as to their good effects on competition. This is called *rule of r eason* doctrine[328]. However, under Community competition law, ECJ in many instances has rejected this doctrine may be in order to protect the application of Article 81(3) exemptions and the issue has long been debated among academics[329].

As far as the sporting aspects of the issue is concerned, it can be argued that sporting rules, like any other decisions or agreements, are prohibited if they have as their object or effect the in restriction or distortion of competition within the common market and affect trade between Member States[330].

However, as it was mentioned above, after the *Meca-Medina* judgment of the ECJ it has been established that in cases where a sporting rule restricts the freedom of action of the athletes, may not fall within the scope of the provision laid down in Article 81 EC to the extent that the rule in question pursues a "legitimate objective" and its restrictive effects are "inherent" in the pursuit of that objective and are "proportionate" to it[331].

So, it can be argued that the judgment in *Meca-Medina* provided a general systematic to assess whether a rule designated by the sport governing bodies with respect to the sport infringes Article 81 (1) EC. In the first step of this analysis it should be examined whether the rules meets the conditions of Article 81 (EC). If the rule meets the conditions set forth in that Article, one should apply *Wouters* test and examine whether the anti-

[328] Graig and De Burca, pp. 952-953
[329] *Ibid*, pp.952-961
[330] Parrish and Miettinen, p.119
[331] *Meca-Medina* CFI, Para.45

competitive effects of the rule are inherent in the pursuit of the objective of that rule and whether it is proportionate.

5.4.3.5. Article 81(3) Exemptions

If an action of an undertaking falls within the scope of Article 81(EC), it can be granted exemption under 81(3) EC. There are four main conditions to be satisfied in order to be granted an exemption: it must improve the production or distribution of goods or promote technical and economic progress; consumers must receive a fair share of the resulting benefit; it must contain only restrictions which are indispensable to the attainment of the agreement's objectives; and it cannot be lead to the elimination of competition in respect of a substantial part of the products in question[332]. All of these conditions above should be satisfied in the case in order to granted exemption[333].

The question of whether sport should be granted an exemption within the scope of 81(3) EC still remains controversial. It has been stated by the Commission that objective pursued in the Treaty provisions should only be taken into account for granting exemptions to anti-competitive actions. Since sports do not have any Treaty basis, under current circumstances it cannot invoke for the exemptions under Article 81(3) EC[334]. On the other hand, CFI's approach in *Piau* to some extent disregarded this line of reasoning and directly jumped into 81(3) exemption assessment without making any reference to the *Wouters* judgment and this attitude has blurred the systematic of established objective justification[335].

Independent European Sport Review made some proposals as regards the application of Article 81(3) EC exemptions to sport. It was argued in this context that analogies can be drawn between the earlier case-law of the ECJ on specific instances and the peculiarities of sporting activities. The main argument of the Review was that certain

[332] Graig and De Burca, p. 964
[333] Case T-528/93 *Metropole v. Commission* [1996] ECR II-649, Paras.86-87
[334] Commission Notice, Guidelines on the Application of Art. 81(3) of the Treaty OJ C 101, Paras. 41-42
[335] *Piau* CFI, Paras.101 *et seq*

activities of sporting bodies and their rules should be granted exemptions based on the case-law of the ECJ which proposes certain exemptions for activities which possesses socio-cultural implications. This also includes application of *Wouters* principle into sporting activities. Therefore it suggests that sport should also be considered within this domain and exemptions should be granted to its activities. This may even be conducted by enshrining sporting activities in the statutory exemptions regime or either by granting non-statutory exemptions just like in US system[336].

It can be argued that the suggestions made in the Review should be regarded as applicable especially after the *Meca-Medina* judgment since it included broad reference to the *Wouters* principle. However, the question whether sport should be granted a wholesale exemption based on the pre-existing case-law of the ECJ still remains topical.

5.4.4. Article 82 EC and Sport

It has been observed above that trade between Member States can be adversely affected by the restrictive actions of undertakings within the common market. Competition in the interstate trade can also be restricted by an undertaking which holds a quasi-monopoly position, namely a "dominant position" in the market. Such an abuse of undertaking is prohibited under Article 82 EC.

The concept of dominant position basically refers to the ability of a particular undertaking to restrict competition through unilateral action. However, this does not necessarily requires a monopoly position within the market[337]. The question in which cases dominance exists in the market is a complicated one. In principle, when the market share is 50% or above, one can assume that there exists dominance[338]. In order to determine whether an undertaking holds a dominant position in the market, it should also be conducted a detailed relevant market analysis.

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[336] J.Arnaut, *Independent European Sport Review* (2006), available at < www.independentfootballreview.com > pp.107-109
[337] Mathijsen, p.273
[338] Case C-62/86 *AKZO v. Commission* ECR I-3359

An abuse, on the other hand, according to the ECJ, is related with the behavior of an undertaking exploits a dominant position in the market. This behavior gives rise to an abuse when it is such as to influence the structure of relevant market. Moreover, it should have effect on the common market that cannot be justified under community law[339]. There are four specific abuses listed in Article 82 EC, however it was ruled by the ECJ that there can be more abuses extracted from other objectives of the Treaty[340].

It has already been stated above that due proper functioning of sports competitions, governing bodies such as federations are enjoying a certain degree of monopoly status and regarded dominant in the market of the organizations of sporting activities for their particular sport. The most important question should be posed at this point is that whether their actions constitute abuse?

The answer to this question has been a matter of debate since *Piau* judgment of the CFI. In this case, CFI after making necessary market determination as the "market for professional agents"[341] ruled that "…the very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organization of sports associations by a private law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law…"[342]

According to Parrish and Miettinen, above extract from the CFI judgment "implies" that professional regulation itself could constitute an abuse where there is unilateral engagement for that activity. Nevertheless, in *Piau* CFI considered FIFA as an undertaking holding a "collective dominant position" in player agents market since it

[339] Case C-85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461
[340] Case C-6/72 *Continental Can v.Commission* [1973] ECR 215
[341] *Piau* CFI, Para.72
[342] *Piau* CFI, Para.77

emanates from national associations and clubs[343]. However, one can still argue that parameters are vague in this aspect of the matter.

The argument that sport governing bodies holds dominant position in the market is quite fragile. As far as their regulatory powers are concerned it is most likely that they can be regarded as dominant actors in the market and even considered as "monopolies". This was confirmed in the extract from CFI judgment. However, no one can deny the fact that current regulatory regime was based on sport governing bodies like FIFA and UEFA. So, in this respect their activities should be examined under the light justificatory regimes which were created by the ECJ. Otherwise their all activities fall within the scope of Article 82 EC and this draws the system to system to deadlock.

Reference can also be made to the earlier explanations which provide information on the special character of sporting activities. It has been argued above that sports have its own character which is different than other areas of economic activity. Need for coordinated action is one of them. So, holding a dominant position in the market in terms of competition law and to maintain the integrity of games by exercising regulatory powers may sometimes clash in this respect. Therefore, analysis should be included this aspect of the issue while examining the dominant position of sports governing bodies.

5.4.5. Merger Regulation and Sport

EC Treaty does not specifically regulate mergers in the common market. However, there are principles derived from the ECJ case law[344] and the secondary legislation in the form of regulations which have been enacted up until now[345]. In *Philip Morris*[346] the ECJ appeared to extend merger control by deciding that mergers might also fall within the scope

[343] *Piau* CFI, Paras.107-116; *See* also Opinion of Advocate General Lenz in *Bosman* for a similar approach where he treated national associations and sports clubs united with an economic link in which together they can be considered as dominant undertakings. Para.285
[344] Case C-6/72 *Continental Can v.Commission* [1973] ECR 215
[345] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24
[346] Joined Cases 142/84 and 156/84 *Commision v. Philip Morris*, [1987] ECR 4487

of Article 81 which deals with restrictive arrangements between undertakings, although there was considerable disagreement among commentators regarding the implications of this judgment. Following the *Philip Morris* judgment the European Commission proposed that certain mergers should be subject to Community control. This gave rise to the implementation of Council Regulation 4064/89, known as the 'Merger Regulation', which came into force in September 1990.

The relation of merger regulation in community is closely related to the multiple ownership rules of FIFA. However, according to Parrish and Miettinen, "if one considers that sporting clubs services are not generally interchangeable for consumers, these form different product markets and as such, their merger would have no effect on this aspect of their economic activity"[347].

In 2002, the Commission conducted a closed investigation for the multiple ownership rules of UEFA to which a company or individual cannot directly or indirectly control more than one of the clubs participating in a UEFA club competition based on the application lodged by ENIC Plc. which is an investment company with stakes in 6 clubs. However, the Commission did not make any examination on the basis of merger regulations instead; it decided that "the purpose of the rule was not to distort competition, but to guarantee the integrity of the competitions it organizes[348].

5.4.6. Services of General Economic Interest under Article 86 EC and Sport

Generally, under EC Treaty anti competitive behavior of private undertakings are prohibited. However, Community competition rules not only apply to private undertakings but also to the public undertakings. There can be state controlled undertakings in some sectors which might have the capability to distort competition among member states.

Under Article 86 (1) EC, it was designated that "public undertakings and undertakings to which Member States grant special or exclusive rights" are under to duty to

[347] Parrish and Miettinen, p.131
[348] Commission Decision of 25 July 2002, Case COMP/37 806, *ENIC/UEFA*

comply with the competition rules of the Treaty. However, Article 86(2) provides that "undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly" are subject to Treaty rules "…in so far as the application of such rules does not obstruct the performance …of the particular task assigned to them". Under Article 86(2), it was also provided that "the development of trade must not be affected to such an extent as would be contrary to the interests of the Community"[349].

Although the trend was towards examining both private and public undertaking actions in the common market, after the Treaty of Amsterdam a new concept has been introduced into the EC Treaty which allows derogation from the prohibitions provided in Article 81 EC for the actions of Member States on certain sectors[350]. This concept unique to the Community law and is mainly referred to as "Services of General Economic Interest" (SGEIs). According to ECJ the special treatment as such by Member States which results in non-compliance with competition rules should be "essential" to the fulfillment of the certain tasks[351]. By the way, the SGEI should not be confused with the concept State Aids. ECJ in its case-law found that compensation for the services of general economic interest does not lead to State Aids[352].

In this respect, a question arises on whether "sport" should be considered within the context of SGEI. According to the "so-called Independent" European Sport Review the answer to this question is affirmative[353]. However, it was argued that this assertion should be endorsed with concrete grounds; otherwise it would not go further than "attaching a label to it"[354]. It was further suggested that that kind of positioning will be contrary to the arguments of sports governing bodies which demands more self-regulatory autonomy

[349] Parrish and Miettinen, pp.131-133
[350] *See* Article 16 EC (ex Article 7D)
[351] Mathijsen, p.304
[352] Case C-280/00 *Altmark v. Commission* [2003] ECR I-7747
[353] J.Arnaut, *Independent European Sport Review* (2006), available at < www.independentfootballreview.com > p.110
[354] Parrish and Miettinen, p.133-134

because Article 86(2) EC requires that State expressly imposes a specific legal obligation for that particular undertaking to perform a defined public service and therefore state supervision would be inevitable[355].

5.4.7. State Aids and Sport in EC

Article 87(1) EC provides that "…any aid granted by Member State or through State resources in any form whatsoever which distorts or threaten to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member states, be compatible with the common market". The concept of aid was not defined in the Treaty. However, it can be argued that it was given very broad meanings. The term extends further than the limits of the subsidy and even includes the measures, regardless of its form; relieve the burden which normally weights on the undertakings budget[356]. Decrease in tax percentages for a specific undertaking can be given as an example.

Article 87 EC only applies in cases where there is any "selectiveness". The concept of selectiveness can basically be explained as favoring a certain undertaking or a certain branch of industry while granting state aids. ECJ held in this respect that a measure aimed at promoting the creation of jobs by reducing, for certain undertakings, social security contributions is to be regarded as State aid and that neither the high number of benefiting undertakings nor the diversity and importance of those industrial sectors to which the undertakings belonged warranted the conclusion that the scheme regarded not within the scope of Article 87 (1) EC[357].

Under Article 87(2), three derogations from the above rule were specifically designated. Aid having a social character, granted to individual consumers, aid to make good the damage caused natural disasters and exceptional occurrences and aids granted to certain areas of Germany to compensate for the economic disadvantages caused by the

[355] *Ibid*, p.134
[356] Case C-200/97 *Ecotrade srl v. AFS* [1998] ECR I-197 Para. 34
[357] Case C-75/97 *Belgium v. Commission* [1999] ECR I-3671, Paras. 32-34

division are considered within this category. These are the automatic derogations from the general principle.

Article 87(3) also provides a list for aids which "may" be compatible with the common market. Aid to promote the economic development, aid to promote the execution of an important project of common European interest, aid to facilitate the development of certain economic activities, aid to promote culture and heritage conservation and aid as maybe specified by decision of the Council acting by a qualified majority on a proposal from the Commission are provided as *a priori* derogations' from the general rule of Article 87(1) EC which also means that their compatibility requires a case-by-case analysis.

In practice, Member States are under duty to notify the aid scheme planned although there are many exceptions to this duty to notify. Furthermore, the Commission has laid down certain regulations for these purposes[358].

It can be observed from the above Articles that aid to sport *prima facie* cannot be included in any of the categories of derogations. So, does this mean that every aid granted to sport industry is compatible with the Community law principles or is there any other ways for the aids to be considered permissible? If so, how and to what extend?

The *Independent European Sport Review* includes a number of recommendations in the EC State aid area. In the view of the Review, Article 87 (3) (c), (d) and (e) EC can be applied to sport and therefore it might be considered compatible with the EC State aid rules so long as it meets the other criterion laid down[359]. It further asks the Commission to exempt certain categories of State aid under the Council Regulation (EC) No.994/98 of May 1999 on the Application of Articles 92 (87) of the Treaty[360].

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[358] *See* Small and Medium-sized Enterprises Commission Regulation (EC) No.70/2001, L 10; Commission Regulation (EC) N0.68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid

[359] J.Arnaut, *Independent European Sport Review* (2006), available at < www.independentfootballreview.com > p.112

[360] *Ibid*, p.113

However, the Commission responded to the request of the Review in the White Paper accompanying documents indicating that it is not possible to grant exemptions for the aids granted by Member States to sport at this stage since it has not been "habilitated by the Council to adopt such a block exemption regulation in the area of sport"[361].

Nevertheless, it has been indicated by the Commission that aids granted to "amateur sports" clubs cannot be regarded within the context of Article 87 EC whereas there is no compelling reason on the side of professional clubs to be exempted from the state aid rules since they pursue an economic activity within the meaning of EC Treaty[362]. Considering the difficulty to draw the line between amateur and professional sports, it would not be that true if someone argues that amateur clubs never engaged in economic activities. They may as well engage in economic activities.

Secondly, as far as the amateur clubs are concerned also a question arises as to the compatibility of "cross-subsidization" of leagues within the European model. It should be noted that under this system, there has been interplay "between amateur and professional levels, and that the amateur level tends to graduate its most proficient players to higher professional leagues". "Whereas these are locally connected, as for example under the regime envisaged by UEFA's home-grown player rules, questions of cross-subsidy between amateur activity supported by the state and the economic practice of sport may arise"[363]

Despite lack of any justificatory mechanism, it should also be addressed for the application of state aid rules that in the decisional practice of Commission it has been observed that if a sports club is performing a function as a state function under EC Treaty, Commission does not intervene to the matter. These are usually called general measures under EC Treaty practice. In an investigation where the aids granted by the French government to the sports club which incorporated "youth centers" were called into question, the Commission stated that matter does not fall within the scope of Community

[361] Commission of the European Communities, *Commission staff working document. The EU and Sport: Background and Context*, SEC (2007) 935, p. 28
[362] *Ibid*, p.29
[363] Parrish and Miettinen, pp.136-137

competence and should not be treated within the Community law since it constitutes a general measure to the national system of education[364]. Therefore, under the Commission's decisional practice aids related to the construction of sport "infrastructure" can be considered not to constitute aid, provided that certain conditions are fulfilled[365].

Olfers suggests within this respect that EC Treaty objectives should be interpreted broadly and sports should be provided economic and social justification grounds. He argues that a cost-benefit analysis should be conducted before declaring state aid scheme as incompatible with the EC Treaty. According to him social and cultural aspects of sport that was first determined in the non-binding declaration of Treaty of Amsterdam and the Commissions wide margin of discretion should be used some day in order to save a sporting club from a financial ruin[366].

5.5. Sport and Competition Law in Turkey

As it was discussed in detail above that there has been an intense relationship between sport and the competition rules of EC Treaty. The appearance of sports within the Community legal framework has been endorsed by the interventionist approach of ECJ since *Walrave* and has evolved after *Bosman*. Currently, even though there is still no Treaty base granted to sport, one can argue that the main principles have been established and some of the concepts have been defined within Community law.

When the focused is turned to the example of Turkey since it constitutes the second limb of this thesis, one can *prima facie* observes that no such evolutionary process has taken place yet. The approach to the legal dimensions of sport is rather immature and no sufficient academic work has been concluded. However, this does not mean that there exist no data for those who would like conduct a research on the sports law aspects.

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[364] SG (2001) D/ 2888165 *French Sudsidies for Youth Training* N118/00, 24.05.2001 IP/01/599

[365] Commission of the European Communities, *Commission s taff w orking doc ument. T he E U an d S port: Background and Context*, SEC (2007) 935, p. 28

[366] M.Olfers, 'State Aid to Professional Football Clubs: Legitimate Support of a Public Cause?', (2003) *The International Sports Law Journal* 2003/1, p.8

Based on the foregoing, in this part of the thesis, competition law system of Turkey will be examined in detail under the Competition Act. Such an analysis first requires a brief explanation of the scope of Competition Act and its applicability to sports sector. Then, relevant rules of Competition Act and their applicability to the sporting activities will be analyzed step by step along with the decisions of TCA where necessary. Finally, the forthcoming rules of State aids in the light of Draft Act on State Aids will be put under scrutiny in terms of its application to the sports sector.

5.5.1. Scope of Competition Act and Sport

The scope of the Competition Act under Article 2 covers "[a]greements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey, and the abuse of dominance by the undertakings dominant in the market, and any kind of legal transactions and behavior having the nature of mergers and acquisitions which shall decrease competition to a significant extent, and transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition…"

Above definition indicates that Competition Act is applicable to the actions of undertakings which are "affecting markets for goods and services". This inevitably suggests that determinant subjects of competition have to engage in "economic activities". If they do not pursue any economic aims, this means that they do not fall within the scope Article 2 of the Competition Act.

Considering the explanations above, in order to determine the applicability of competition rules to sporting activities it should first be examined whether the sporting activities can be considered as an "economic activity" within the sphere of Competition Act.

In this respect, no one can deny the fact that sport, along with its social and cultural role, has become a big business in today's world. The economic dimension of sporting activities has evolved in Turkey parallel with the developments in the Western states. During this process, sports clubs in Turkey, especially in football and basketball have turned into big enterprises operating in many of the product and services markets where they increase their revenues[367]. Federations are marketing their broadcasting rights, entering into sponsorship agreements and merchandising arrangements. Besides, sportsmen and sportswomen have started to make great amount of incomes out of their transfer payments.

However, in order to reach clear results, a distinction should be made right at this point, similar to the EC system, between "economic" and "non-economic" aspects of sport. Such a distinction is imperative since the scope of Competition Act only covers actions of undertakings which are "affecting markets for goods and services" or, that is to say actions of undertakings involved in economic activity. Even though sports in nowadays can be regarded as an economic activity, it would also not be that right if someone ignores its non-economic aspects. However, under Turkish Law this aspect cannot be taken into consideration as it has been in EU since Turkey it is not a supranational body which governs some of the policies of Member States. That is to say, Turkey is limited to apply its relevant legislation and that legislation as regards the competition law prescribes application of "economic aspects" of sporting activities. Since EU has broader policy concerns in this area, it is natural that non-economic areas are considered in the process.

Therefore, the first thing to do in examining anti-competitive aspects of sporting activities under Competition Act is to make a distinction as to whether the nature of the activity is economic or non-economic. TCA in its decision regarding the collective sales of broadcasting rights of Turkish First Division Football League by Turkish Football Federation (TFF), made such a distinction in examining the legal status of TFF and

[367] M.Ikiz, 'Türk Spor Klüplerinin Şirketleşme Modeli' in Erkiner and Soysüren (eds.), *Spor Hukuku Dersleri* (Kadir Has Üniversitesi Yayınları 2008), pp.697-719

indicated that the activities and rules necessary for the organization of the "clubs, stadiums, referees, match hours, fixtures and etc." does not fall within the scope of economic activity[368]. This indicates that TCA regarded certain distinct features of sporting activities in terms of their economic or non-economic nature. However, it must be argued that the distinction is lack of any convincing reasoning and needs further elaboration. As a matter of fact, it is really a tough work to decompose the economic and non-economic aspects of sport. Even in EC law there is no certain guidelines produced yet.

Consequently, having regard to the foregoing, it would not be inaccurate to argue that sporting activities of the subjects including but not limited to sports governing bodies and players should be considered within the scope of Article 2 of the Competition Act[369] so long as they constitute an economic activity although there are no guidelines to make such a distinction. Such a *Walrave* like implication would not be contrary to the objectives and scope of the Competition Act since there are considerable similarities between EC and Turkish systems. However, determining the boundaries of the economic aspects of sporting activities still falls within the jurisdiction of TCA.

5.5.2. Article 3 and 4 of the Competition Act and Sport

It was briefly discussed above that Competition Act is based on three sets of prohibitions. Under Article 4 all the "[a]greements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited."

Under Article 4, the concepts of agreement, concerted practices and decisions have given broad meanings similar to the EC system. Agreements etc. between undertakings, implicit or explicit, written or verbal or in any form whatsoever might be considered within

[368] Decision of TCA, 05-61/900-243, Para.960
[369] T.Inal, 'Spor ve Rekabet Hukuku', *Kazancı Hakemli Hukuk Dergisi*, Sayı: 57-58, (2009) pp.217-218

the definition of the concept[370]. According to Aslan, even the term "agreement" instead of "contract" was specifically chosen in order to make sure verbal agreements are included in the definition[371].

Concerted practice, on the other hand, is defined as the intentional parallel market behavior of the two or more undertakings which does not arise out of any agreement and cannot be defined by reasonable and economic arguments[372]. Due to difficulties in identifying the concerted practice, a presumption has been designated in Article 4 (2) of Competition Act "…in cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted…"

Thirdly, under Turkish competition law it has been considered that any decisions and practices of association of undertakings might have anti-competitive effects in the market. The concept includes decisions of statutory and non-statutory undertakings of any kind regardless of its binding effect.

Moreover, under Article 3 of the Competition Act, the terms undertaking and the association of undertakings have been defined. According to these definitions former refers to any "natural and legal persons who produce, market and sell goods or services in the market, and units which can decide independently and do constitute an economic whole" whereas latter refers to "any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals".

It has also been suggested that under Turkish Competition Act system, rules are reflected to legislation in a narrow sense where the actions of state actors- such as state aid schemes and anti-dumping applications are excluded. Therefore rules of Competition Act only cover the actions of private undertakings and the actions of public undertakings which

[370] Decision of TCA, 93-750-159, 26.11.1998, *Competition Journal*, V.1. p.135
[371] Aslan, p.72
[372] Aslan, p.81

are operating in the product and services market as an actor which pursues economic interest[373].

The line of analysis in determining whether an agreement constitutes a restriction under Competition Act requires an assessment similar to that of EC. In the first place, the object of the agreement should be examined. If there is no any restrictive objective intrinsic to this agreement one should then consider whether it has restrictive effects on competition. Even if the second criterion above is satisfied, a further analysis as to the agreements' "potential restrictive effects" should be conducted[374].

Thus far, general principles were provided as regards the Article 4 of the Competition Act however, the question of its applicability to the sporting activities still remains intact. In order to provide answers to that question one should discuss the legal status of the sporting activity subjects as undertakings. Sports governing bodies including Youth and Sports General Directorate (YSGD), sports clubs and individual athletes as subjects of sporting activity can be put under scrutiny in this respect.

Firstly, the question of whether individual athletes can be considered as an undertaking is responded in a recent decision of TCA while discussing the status of Turkish Mountaineering Federation (TMF). In TCA decision, regulation of TMF and YSGD which requires payment of fees for hosting climbers and for visitors who are willing to climb mountain *Ağrı*, were contested due to their restrictive effects on competition and their expensiveness.

It has been indicated in the decision that "mountain climbers" who are members of the TMF should be considered as undertakings. In order to reach that conclusion TCA argued that mountain climbing hosts as "self-employed individual sportsmen" registered with the TMF, should be considered as an undertaking within the meaning of Article 3 of

[373] Aslan, pp.31-32
[374] Aslan, pp.102-103

the Competition Act[375]. Such a decision indicates that activities of sportsmen performed in return for certain amount of money are considered as an economic activity and therefore falling with the scope of Competition Act. The implications of the said decision are applicable to other sports branches and the activities of other sportsmen who shall be regarded as self-employed athletes operating in the relevant market of services.

Secondly, sports clubs which are organized for the performance of particular sporting activity should be examined in the light of competition rules. Under Turkish system it can be observed that sports clubs are generally organized in two different ways. They are either incorporated under Turkish Civil Code as an "association" registered with the Department of Associations or they are organized in the form of joint stock companies which are registered to the relevant trade registries. Even though associations are much more common than joint stock companies, commercialization in the sports industry-especially in the football and the trend towards establishing good governance in the sports clubs have inevitably endorsed the process of organization as independent legal companies.

When we discuss their status from the competition law perspective it can be argued that there is no compelling reason for them not to be categorized as undertakings. Considering the definition of undertakings in the Competition Act, it can be argued that they are engaging in economic activities that fall within the scope of competition rules. They are also operating in the goods and services markets of sport industry especially by selling and buying of players, entering into various types of commercial contacts including but not limited to sponsorship, merchandising and trademarks. Moreover, they have their own and independent execute boards where they adopt resolutions for their management.

Even though decisional practice of the TCA, on the other hand, does not specifically provide explicit guidelines on whether sports clubs can be treated as undertakings, traces of consideration can sometimes be found in the reasoning. In a *sua sponte* investigation launched right after the news published on one of the national

[375] TCA Decision, 06-53/685-192, Paras.100-110

newspapers, TCA investigated whether the alleged "gentlemen's agreement" concluded between Galatasaray S.K., Beşiktaş Jimnastik Klübü and Fenerebahçe S.K. infringes competition within the professional football players market or not. The TCA, in this investigation, could not find any evidence which might give rise to a decision however, identified the legal status of sports clubs as "undertakings" without making any further analysis[376].

Consequently, based on the foregoing explanations regarding the economic activities of sports clubs and the TCA decision, one can argue that sports clubs meet all the criterion laid down by the Article 3 of the Competition Act and should be treated as undertakings.

Thirdly, as far as the legal status of national sports governing bodies in terms of Competition Act is concerned, explanation should be made as to their complex legal structure. National sports governing bodies in Turkey are organized in various forms under current legislation. Basically, they can be divided into three different categories: autonomous federations, quasi-autonomous federations and the federations which are subordinated to Youth and Sports General Directorate.

TFF is the only autonomous federation in Turkey. Under Article 1 of the "Law Pertaining to the Incorporation and Duties of Turkish Football Federation" (TFFL), TFF was incorporated as an autonomous legal entity subject to private law conditions in order to regulate football activities. It has full financial and administrative authority[377]. Specifically, TFF was mandated large powers including but not limited to the organization, regulation and inspection of football activities in Turkey and arrangement of the games in conformity with the regulations of FIFA and UEFA[378]. TFF has its own executive boards, decision making mechanisms and even judicial organs in order to settle football disputes[379].

[376] TCA Decision, 01-63/645-171, H.2
[377] Law Pertaining to the Incorporation and Duties of Turkish Football Federation, No.5894
[378] *See* TFFL Article 3
[379] *See* TFFL Articles 4,5,6 and 7

Within this context, the legal status of TFF as an "undertaking" has long been a subject of debate. In one of the TCA investigations it has been suggested by the Rapporteurs that TFF should be considered as a "public authority" exercising state powers in order to regulate sporting activities[380] and therefore should not be considered as an undertaking within the meaning of Article 3[381]. However, the dominant approach, on the other hand, suggests that it should be treated as an undertaking under Article 3 of the Competition Act since it enters into goods and services markets as an economic actor[382] especially by concluding sponsorship agreements[383] and by collectively selling broadcasting rights of all football matches organized within the borders of the Republic of Turkey[384].

As far as the quasi-autonomous federations are concerned it can be argued that their status is slightly different than TFF. Under current organizational structure of Turkish sports, there exist some federations which were granted limited administrative and financial authority. Even though they can be able to prepare their own budget, enter into sponsorship agreements and organize their own elections, to a certain extend they are subject to the supervision of Youth and Sports General Directorate (YSGD)[385].

The situation for the quasi-autonomous federations was also discussed in the above decision of TCA regarding the mountain climbers. Accordingly, TCA first of all, tried to identify the legal status of TMF by referring to its quasi-autonomous structure and

[380] As a matter of the fact, the legal status of TFF and its rules and regulations were subject to an intense debate during the process of investigation. The contested parties before applying to TCA brought an action before Ankara Administrative Court of First Instance and they sought for the annulment of Article 5 and 7/A of Broadcasting Regulation of TFF however; the Court dismissed this case and ruled that TFF is an autonomous legal entity subject to private law provisions. This judgment was confirmed by the Council of State and removed doubts about the legal status of TFF.*See* Council of State Judgment, 10th Circuit, 1997/972 and 1997/2081

[381] Decision of TCA, 05-61/900-243, Para.180

[382] H.Aker, 'Futbol Karşılaşmalarına İlişkin Yayın Haklarının Hukuki Niteliği ve Rekabet Hukuku Açısından Yayın Haklarının Merkezi Pazarlanması' (2006), *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, Cilt 55, S.1, p.32; also *See* Decision of TCA, 05-61/900-243, operative part of the decision (1) (a)

[383] *See* TFFL Article 8 (ç)

[384] *See* TFFL Article 13

[385] T.Colakoglu and E.Erturan, 'Spor Federasyonlarının Özerkleşmesi ve Hukuksal Boyutunda Spor Hukuku Gereksinimleri', (2009), *Elektronik Sosyal Bilimler Dergisi*, C.8,S.27, pp.323-335

stated that it is a sports federation subject to the supervision of YSGD in financial matters. Then, concluded that "it should at least be treated as an association of undertakings within the meaning of [Article 3] of the [Competition Act]" since individual mountain climbers who regarded as undertakings are obliged to be registered with TMF[386].

As stated above, for an undertaking to be classified under Article 3 of the Competition Act it must have the ability to "decide independently" in the goods and services market and should "constitute an economic whole" along with other conditions prescribed. TMF, given the particular case at hand, neither has the ability to make independent decisions nor constitutes an economic whole since its decisions require an approval of a supervisory body, which in this case YSGD. Therefore, even if the mountain climbers as individual undertakings are the mandatory members of this federation, this does not change the fact that TMF has restricted powers to engage in an economic activity. Consequently, it can be argued specifically for the above decision of the TCA that considering TMF as an "association of undertakings" is nothing more than a misconception.

To sum up, it can be concluded in this respect that the quasi-autonomous federations which are lacking financial authorities cannot be regarded as undertakings within the meaning of Article 3 of the Competition Act since they do not have the capability to adopt independent economic decisions which might have restrictive effect on the competition. Therefore, in order to conduct a straight analysis, legal structure of sports federations should be examined on a case-by-case basis due to their different legal regimes. The main criterion that should be applied is that whether they possess autonomous powers to engage in economic activities without the supervision of YSGD, if they can be able to do so, they can be considered as undertakings.

As stated above there are also sports governing bodies namely as federations which are completely subordinate to the Youth and Sports General Directorate. These

[386] TCA Decision, 06-53/685-192, Paras.120-130

federations do not have any administrative and financial autonomy which might enable them to adopt their own financial and administrative decisions. So, they, *a priori* should not be considered as an undertaking in the meaning of Competition Act since they cannot be able to meet the primary criterion which requires the ability to adopt independent decisions in the goods and services markets as an economic whole. Therefore, one may argue that provisions of Competition Act are not applicable to their activities.

However, in this respect YSGD should rather be put under scrutiny since it regulates all the activities of non-autonomous sports governing bodies. According to the "Law Pertaining to the Organization and Duties of Youth and Sports General Directorate" (YSGD Law), YSGD is a public authority situated in the central government system which subordinated to the Turkish Prime Ministry[387]. Tasks entrusted to YSGD mainly includes taking necessary measures to protect youth by promoting sporting activities in Turkey, working in coordination with the National Ministry of Education in order to organize sporting events for the development of children, following up of licensing, visa and registration procedure of sportsmen and sportswomen, adopting required regulations for the incorporation of sports clubs and for the initiating new sports branches and supervision of sports clubs[388]. General Manager is the top executive organ of the YSGD[389]. Central Advisory Board (Merkezi Danışma Kurulu) along with other permanent boards constitutes the main decision-making organ of YSGD[390]. Moreover, YSGD as the head organization is included in the supplementary budget of the government whereas its local branches are granted their own private budgets[391].

Foregoing explanations on the legal status of YSGD which suggests that it was organized as the highest supervisory authority in the organization of quasi-autonomous and non-autonomous sports federations and also designated to control and supervise all sporting activities at the national level.

[387] YSDG Law Article 1
[388] YSDG Law Article 2
[389] YSDG Law Article 5
[390] YSDG Law Article 8
[391] YSDG Law Article 13

TCA decision in the mountain climbers which was illustrated above, has implicitly given little attention to the legal status of YSGD as an undertaking. In the above mentioned decision where the actions of TMF and YSGD were called into question, TCA, after decided that TMF should be considered as an "association of undertakings", also argued that fees charged for climbing the mountain *Ağrı* by the TMF and YSGD should be regarded as "common practice in the light of information obtained in this respect". According to TCA charging fees for that particular sports activity should also be considered as an "administrative act" of YSGD and consequently not within the scope of Competition Act[392]. The conclusion of TCA implies that YSGD was acting as a public authority and therefore cannot be considered as an undertaking.

Laying aside the irrelevant reasoning of TCA in this decision which based its arguments to the vague notion of "common practices", implicit treatment of YSGD as a "public authority" constitutes a misinterpretation.

With respect to this, it has been observed that YSGD has the power to regulate all the activities of the federations which are subordinate to it and accordingly to fully control their market activities. This includes regulating players market, broadcasting rights market and other relevant markets which can be affiliated with sports.

There is no doubt at the point that the disputed action of YSGD before the TCA was an economic activity falls within the scope competition rules. Moreover, rules that requires charging of a certain amount of fee for that activity is emanated from both TMF and YSGD.

Since TMF is a quasi-autonomous federation subject to YSGD in financial matters, it does not "solely" capable of adopting decisions which might have effects within the market. YSGD, on the other hand, by exploiting the authorities of TMF in financial matters in a certain extent, "substitutes" TMF and exercise its "ability to affect" goods and services of sports related markets. This inevitably suggests that YSGD, instead of TMF,

[392] TCA Decision, 06-53/685-192, Para.140

should be considered as an "association of undertakings". Because in that case, activities of the mountain climbers are not being ultimately governed by TMF, but by the YSGD which possess great powers and supervisory authority on the sports federation at hand.

On the second limb of the TCA analysis, it was also decided that charging certain amount of fee by YSGD for mountain climbing is an "administrative act" which was derived from a "public authority"[393].

Interconnected with this, it has been suggested above that due to adoption of narrow approach in the systematic of Competition Act, actions of the State for disposing its administrative authority is excluded, even though it was not expressly reflected to the wording of relevant article.

However, since there is no clear provision specified in the Competition Act, one may argue that it is necessary that this principle should be applied broadly and the frontiers of the definition of undertaking should be extended. It can be recalled from the explanations above that under EC competition law; competitive actions of public undertakings deliberately have been put under scrutiny. In this context, the term undertaking has been given a broad meaning.

Leaving aside the sociological importance of adopting such an approach in maintaining competitive markets, application of this principle in competition rules is imperative for the requirement that States should obey their own rules[394].

This approach should also be applicable to the sports sector and the activities of YSGD should be considered in this spectrum. Even though some might argue that YSGD is a public authority which has close interaction with the central government, it does have considerable powers which might have anti-competitive effects on the sports related markets. Having regard to the EC approach which suggest that activities of public

[393] *Emphasis added*
[394] Oz, Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması (Ankara-Rekabet Kurumu 2000), p.150

authorities should be subject to competition law analysis even if they have minor powers to act independently from the central government, they should be treated as undertakings and therefore within the scope of competition rules[395]. When the YSGD was considered in the light of foregoing, it can be observed that it has considerable powers that may enable them to act freely and independently. So, it should be regarded as association of undertakings within the meaning of Article 3 of the Competition Act.

By way of conclusion, it can be argued that sports federations, individual athletes and under certain circumstances sports federations should be considered as undertakings so long as they meet necessary criterion. On the other hand, the legal status of YSGD within the meaning of Competition Act also requires close scrutiny.

5.5.3. Article 6 of the Competition Act and Sport

Under Article 6 of the Competition Act "[t]he abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited." Even though neither dominant position nor abuse was defined within the Article, particular situations in which dominant positions exist were specified.

According to Article 6 (2) of the Competition Act, preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market, making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts, purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price, actions which aim at distorting competitive conditions in another market for goods or services by means of

[395] Aslan, p.51

exploiting financial, technological and commercial advantages created by dominance in a particular market, restricting production, marketing or technical development to the prejudice of consumers are regarded as the main abuses.

For an undertaking to be considered within the scope of this Article certain criterion should first be satisfied. First of all, dominant undertaking should have the ability and the economic power to manipulate the competition. Market shares should be taken into consideration while determining the economic and manipulative powers of an undertaking. Secondly, they should act independently and arbitrarily in their particular market. Continuity of the dominance, *inter alia*, is another factor in considering an undertaking as dominant in the market[396].

Market definition is another factor which should be addressed while making determinations as regards the dominance of undertaking in the market. It has been suggest that, in principle, EC and Turkish competition law are similar in this respect. In order to identify the relevant market both geographical and product markets should determined in making a market analysis[397].

Under Turkish competition law, sports clubs, national federations or even individual athletes as undertakings might abuse their dominant position in the market. However, sports governing bodies tend by even the most permissive definitions constitute dominant undertakings in cases where they engage in economic activity. Most importantly, the question which should be posed at this point is that to what extend their acts constitute abuses. From a competition law perspective it can even be argued regarding the national sports federations that they constitute “natural dominant undertakings” since each and every institutionalized sports clubs are organized under their umbrella.

It has been suggested by Inal that application of competition law principles to sporting activities are different than that of principles applied to other sectors and they

[396] Aslan, pp.211-212
[397] Oz, pp.152-153

therefore requires more attention especially in terms of market determination. His analysis suggests that each sporting activity has its own market actors and there is no such "interchangeability" in terms of these actors. Therefore, he argues that it is difficult to determine the legal status of the sporting markets[398].

Even though there has not been any decision given by TCA under Article 6 of the Competition Act, this does not mean that there will not be in future. It can be recalled from the above explanations that same problem was observed also in the EC sphere and the market position of international governing bodies were called into question. So, in case there is any plea arises in the investigation process of TCA, they will be obliged to make a decision on the subject. In that kind of situation, one should carefully take into consideration of the regulatory autonomies of sports federations within the concept of specificity. In other words, TCA while making determinations on the dominant position of national sport governing bodies it should consider its legal position as a regulatory body delegated to govern its respective sport and should respect this dimension of the issue. However, the specificity of the sporting activities should not be construed so as to jeopardize the legal principles that have been established by the Competition Act.

5.5.4. Article 7 of the Competition Act and Sport

Under Article 7 of the Competition Act "[m]erger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its / their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited." Even though there is no such statutory merger regulation in the EC, Turkey has adopted certain rules under Article 7 of the Competition Act in order to regulate these activities.

[398] Inal, p.217

The Competition Act under Article 7(2) empowers the TCA to determine and publish accordingly, the categories of mergers and acquisitions which, to be considered as legally valid, require a prior notification to the TCA. The categories of mergers and acquisitions which require a prior notification, to be considered as legally valid, shall be published by the TCA and the thresholds for prohibited mergers and acquisitions are to be determined by the TCA.

It can also be recalled that competition in the sports market is quite different than other markets. Ultimate aims of sports clubs is therefore not based on the intention to disqualify it competitors from the market. To a certain extent, they need each other to compete with. This presents that there is a concept of competitive balance in the sports industry of which its actors cannot ignore. In this respect, the most debated issue of sports industry at EU level is that the multiple ownership of sport clubs however; what is the current situation in Turkey?

As far as the legal picture in Turkey concerned, swift commodification in sports industry does not reflected to the organizational structures of sports clubs as it has been reflected in EU countries. Apparently the fastest development occurred in the football. Nevertheless, incorporation process under the title of joint stock companies is still immature and economically non-feasible for some of the football clubs[399]. Only the biggest football clubs such as Galatasaray, Fenerbahçe and Beşiktaş successfully followed the process of incorporation as joint stock companies.

During the merger processes, since they are regarded as undertakings would be subject to Competition Act and the relevant secondary legislation created by the TCA. So far there has been no such violation of Article 7 was investigated by the TCA. The only example is the application for an exemption to the merger of Galatasaray Sportif ve Ticari Yatırımlar A.Ş. and Galatasaray Spor ve Futbol İşletmeciliği A.Ş[400].

[399] T.Aksar and K.Merih, *Futbol Ekonomisi* (İstanbul, Literatür 2006) p.134
[400] TCA Decision, 06-85/1086-315

In this application, TCA after determining the relevant market as "football games market" decided that since both undertakings are controlled by Galatasaray Sports Club Association, application should be rejected based on Article 7 of Competition Act and on the Communiqué of Mergers and Acquisitions which requires mergers of "two or more independent undertakings"[401].

Above decision at least indicates that mergers and acquisitions in the sport sector are capable of being investigated by TCA under the provisions of Competition Act. Therefore, in the following years if there is any further mergers take place in this sector; TCA might conduct much more detailed assessment and provide much more information. Even though realizing mergers in the sports sector are not that respected especially in football due to multiple club ownership restriction of UEFA, competition law aspects of the issue should be put under scrutiny.

5.5.5. State Aids and Sport

Turkey's membership process to the EU has brought many changes to the system. Adoption of EU *acquie* by the Turkey is still in progress although it moves way slower than expected. As regards the adoption of competition rules one can argue that many of the principles laid down in EC Treaty have been transferred to the Turkish legislation. However, complimentary part of the EC competition rules which mainly covers the actions of States in the goods and services market has not been legislated under Turkish Law yet.

This enables development of many incompatible state aid schemes in Turkey. In such a State like Turkey where instabilities and non-governance examples are usual, lack of supervision and regulation on the state activities especially on the state aid schemes, enables development of activities which might have restrictive and distortive effects on the competition. This also has been emphasized in the Commission's below extract:

[401] *Ibid*, Para.100

"Despite its commitments regarding the customs union and the ECSC-Turkey Free Trade Agreement, Turkey has still not completed alignment with the Community state aid legislation. There has been no progress in the legislative field or as regards the establishment of a state aid supervisory authority, which should operate entirely independently. The transparency of current and future state aid measures cannot be guaranteed. Turkey has not compiled an inventory of state aid measures or notified state aid schemes to the European Commission, even though new schemes have been adopted. These shortcomings are resulting in serious distortions of competition. While progress has been made in the steel industry, major shortcomings have still to be rectified"[402].

Even though things are taken slow in this respect there have been some initiatives one the way. National Programme of Turkey for the Adoption of EU Aquis envisaged that the relevant law for State aids is planned to be enter into force in 2009. As a result of the said initiatives Draft Act on State Aids was prepared by the Turkish Ministry.

As far as the general systematic of the Draft is concerned, it can be argued that a system similar to EU was adopted and in many of its parts reference have been made to the EU institutions especially the Commission. Providing a detailed analysis on the Draft is of course not falls within the scope of this thesis which requires delimitation of certain issues. Therefore, what will be dealing below is to provide a general understanding on the applicability of State aid rules to sport under the provisions laid down in Draft Act on State Aids[403].

State aid under Draft Act on State Aids was defined "as a measure adopted by State or through State resources in any form whatsoever which shall be granted to certain undertakings or to the production of certain goods and services"[404]. Under Article 5 of the

[402] Commission of the European Communities, COM (2007) 663 final - SEC(2007) 1436, available at <http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/community_acquis_turkey/e12113_en.htm > (20.07.2009)
[403] Draft Act on State Aids, available at < www.basbakanlik.gov.tr > (21.07.2009)
[404] Draft Act on State Aids Article 2 (a)

Draft, similar to EC Treaty, State aids which shall be compatible and the State aids which may be compatible with the Draft are provided.

Economic Coordination Board is entrusted with the coordination of the policy and implementations of State aid schemes under Article 6(1) whereas monitoring and inspection duties are granted to TCA under Article 6(2).

Draft does not include any provision as regards sport. However, this does not mean that it cannot be applied to the actions of market actors of sporting industry. Since sport clubs and federations are categorized as undertakings their activities in many instances have economic nature and there is no compelling reason that State aid rules should not be applied.

What kind of activities might constitute State aids should be responded with reference to distinct rules and regulations of sport. Under Article 59 of the Turkish Constitution, state is under duty to "protect" successful sportsmen[405]. Based on this general principle rules and regulations have been drafted which requires awarding of individual athletes and sports clubs if they succeeds in national and international competitions[406].

Under Provisional Article 3 of the YSGD Law it was designated that successful sportsmen and sports clubs shall be awarded for their achievements in national and international tournaments. Award which shall be granted is covered by the financial sources of YSGD and in cases where it exceeds the budget of YSGD, from the general budget based on the decision of Board of Ministers.

It can therefore be argued that awards as such may constitute State aids within the meaning of Article 5 if the Draft Act on State Aids enters into force as it is. Neither in Article 5 nor in any other parts of the Draft has no reference been made to the awarding of sports world. And, no exemption regime specifically envisaged for this type of aids which shall be granted in the form of award.

[405] 1982 Turkish Constitution Article 59
[406] *See* < www.gsgm.gov.tr > (21.07.2009) for the relevant regulations.

At this point, an example which was carried into newspapers might be helpful in discussing the case of awards. It was argued that in 2001, after the Galatasaray S.K. won the UEFA for the first time as a Turkish team, it was granted 5.5 million dollars of "award" financed through state budget[407]. On 16 April, 2008 Galatasaray S.K. have issued a press release in order to protest the attitude of newspaper on this issue but more importantly accepted that it was granted that amount of money not in the form "aid" but in the form of "award"[408]. Considering the provision laid down in the Draft, it can be argued that this kind of arbitrary aid scheme which was developed particularly for a sports club might constitute State aid within the meaning of Draft if it was entered into force at that time since it has great potential to favor one of the teams operating in the market without applying selectiveness so as to distort competition.

It should also be stated in this regard that not all the subsidization activities of state by granting awards is necessarily constitutes state aids incompatible with the proposed legal regime. The thing that will be incompatible with the regime would be to subsidize sportsmen and sports club in the name of "statutory awards" in order to by-pass state aid regulations.

However, Article 5 (3) of the Draft may be applicable in such circumstances. Under this Article TCA was empowered to grant block exemptions and to apply *de minimis* principle in cases where the distortion of competition is limited. Accordingly, TCA by adopting secondary legislation can be able to regulate this process and may even grant exemption to the awarding scheme for sportsmen and sports clubs having regard to specificities of sporting activities.

Another scheme which may fall within the restriction of State aid rules is the direct or indirect subsidization of sports clubs. It was discussed above that subsidization to sports clubs has long been a matter of debate in EU. However, it was established by the

[407] *See* < http://wtest.milliyet.com.tr/Spor/SonDakika.aspx?aType=SonDakika&ArticleID=517185 > (01.08.2009)
[408] *See* < http://www.galatasaray.org/kulup/haber/860.php > (01.08.2009)

Commission's decisional practice that subsidizations to amateur sports clubs for the purposes of compensating infrastructure activities should be considered within the scope of State aid provisions. Same can be applied in Turkey and the subsidization schemes for amateur sports clubs may be considered not within the scope of Draft State aid rules.

To sum up, it is likely that entry into force of Act on State Aid will bring many changes for the State intervention in the goods and services market. These changes will also be reflected to the activities of State in sports sector. As it was stated above, application of the State aid rules to the sporting industry has still been debated at the EU level. It is most likely that it will, too, be discussed in Turkey.

6. CONCLUSIONS

In conclusion, it has been observed that the sporting activities at EU level have become a legal phenomenon as the litigation was provoked during the process. The orthodox dictum of the ECJ in *Walrave* which established that sports is subject to Community law so long as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty have established the principle that only the economic sporting rules will be the concern of Community. When the *Bosman* appeared on the scene things have dramatically changed in the pre-existing governance structure of sports governing bodies. The entire transfer system in football changed and regulators of sports industry have finally found out that things will not be the same as it was used to be.

The *Bosman* judgment of the have opened the gates for ECJ scrutiny in sporting matters and the *Dona*, *Deligé* cases followed *Bosman* path in developing the case-law. During this process argument of the sport governing bodies was mainly based on the fact that it is difficult to distinguish between the economic and non-economic aspects of sporting activities and establishing otherwise may jeopardize the organization of sport as whole. However, it has been observed that their concerns are not shares by Community Courts.

Moreover, the actions of other EU institutions are not stable and the question of whether the adoption of a specific article in EC Treaty as regards the sport will solve the problems of sports world is still remains controversial. However, it can be argued that entry into force of Reform Treaty which includes specific article on sport will solve many of the problems and give the opportunity to the ECJ examine the matter on a Treaty base instead of on the pre-existing Community legal structure.

As far as the specificity of sport concept is concerned it can be argued that rules of EC law raised questions on the principle that have yet to be answered. It was identified that a number of sports related objectives have been acknowledged by the ECJ as warranting special treatment under Community law. These include the need to maintain some competitive balance and that of ensuring the regularity and proper functioning of those competitions. Especially in *Bosman* encouraging the training and education of young players and in *Walrave* the protection of national teams were regarded within this context by the ECJ. These rules were somehow granted justification either within the framework of competition or free movement rules.

Until *Meca-Medina* the judgments of the ECJ cases with sporting nature were accumulated in the sphere of free movement rules of the EC Treaty. After *Meca-Medina* it was found that sporting activities may have anti-competitive effects and they should also be regarded under the competition law of Community. In line with the case law, the ECJ recognized that restrictions which were inherent in the pursuit of legitimate non-competition objectives were not in fact restrictions of competition. Even where rules are not inherent and constitute *prima facie* restrictions, those rules may be justified on Article 81(3) grounds. The same line of reasoning can also be applied in the case of Article 82 EC where the activities of sport governing bodies concerned in terms of exercising dominant position in the market.

As far as the state action in sports within the sphere of competition is concerned, one can also argue that it still remains topical. In this respect, considering sport as an

activity of SGEIs have gone too far and this kind of determinations should require detailed examination and cannot be applied through general considerations. On the other hand, state aid applications under EC have put under scrutiny however in a narrow sense due to lack of relevant Commissions investigations and ECJ jurisprudence.

The application of EC law to sport have also provided venue for the arguments which discuss convergence between free movement and competition. *Meca-Medina* proved that even though the material consequences are similar, the ECJ will insist on separation of free movement and competition.

Even though abovementioned issues have been discussed within the EU there are still important matters should be addressed. As it was argued in the accompanying document of the White Paper on Sport, UEFA's home grown players rule, introducing salary caps and rules on geographic tying are still remains intact. In order to explore legal aspects of these rules, litigation and the Commission investigation mechanism should be stimulated. However, the tendency of the sport governing bodies to settle these matters out of court settlements definitely hinders the process of judicial scrutiny. A recent settlement in *Charleroi/Oulmers* case which was scheduled to be heard in 2008 by the ECJ can be given as an example in this respect. If the FIFA and G-14 did not reach a settlement on this case player release rules of FIFA would be examined by the ECJ especially in terms of competition rules.

The most important challenge on this way is to ensure free and fair competition while, at the same time, taking into account the specific characteristics of sport which includes limited cartelization, need for coordinated action and to maintain competitive balance. In any case, it appears that the assessment whether a given rule or practice infringes EC competition rules can only be made on a case-by case basis.

When the Turkish domain of the issue is concerned, it can be argued that similarities between these two systems are observed in terms of application of the competition laws. It should also be considered at even though these two systems have

similarities, the broad application territory of Community law by the EU institutions and the nature of Community law as a supranational system enabled the existence of a number of case-law and policy documents. Since Turkey is State which is obliged to implement its own rules cannot be expected to reach that kind of maturity level as EU.

However, it was observed that there are certain applications of competition rules to sports in Turkey. Even though the decisional practice of TCA is mainly limited to the conflicts between the TFF and Broadcasting right holders of Turkish First Division Football League, there are decisions which can be observed in the competition context. It was also observed that the legal status and the nature of the actions of sports governing bodies, sports clubs and individual athletes are resolved within the existing structure of competition law; however there are still areas of remaining uncertainties. The activities of YSGD should be put under scrutiny and the rules and regulations TFF should be examined from the perspective of competition rules. In practice, TFF and other sports federations sometimes exercise arbitrary authority over sports subjects. Therefore, TCA should effectuate its investigation mechanisms and focus on the sporting activities more pro-actively, just like EC.

On the way to recognize sporting activities within the sphere of competition law requires an approach similar to that of EC. Turkish courts and especially the TCA should take into consideration the developments at the EC level and should carefully examine sports related conflicts in such a way to respect its special nature. This, of course, requires clear definition of the relevant concepts.

Especially on the state aids side, Turkey, should adopt as soon as possible, the relevant legislation regarding this area. Regrettably to say that State aid schemes in Turkey have no certain legal basis and they cannot be inspected by a supervisory authority. This limping leg of competition policy should immediately be recovered since it distorts competition nothing more than anything as far as the arbitrary granting aid system in Turkey is concerned.

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