

The Birth of European Union Sports Law

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Employing a methodology drawn from policy studies, this article claims that the EU has devised a distinct legal approach to applying the law to sporting situations in order to reconcile differences within the EU sports policy sub-system. Whilst some actors see sport primarily in economic terms, others wish to see the socio-cultural characteristics of sport protected from EU law. In the absence of a legally rooted common sports policy, the EU has used law to construct the separate territories of sporting autonomy and judicial intervention. Whilst the findings of this research are limited to the EU experience, this article nevertheless empirically and theoretically strengthens the emerging sports law thesis within legal studies.

Introduction

The increasing frequency of legal disputes involving sport throughout the 1970s and 1980s led to closer academic scrutiny of how law affects sport. As the volume of disputes increased further and as courts began to develop a line of legal reasoning concerning sport, so academics identified the emergence of a field of law – sports law. Slowly attention began to focus on the dynamics driving the birth of sports law. The commercialisation of sport emerged as a leading explanation. Commercialisation and juridification are therefore considered parallel developments. Throughout the 1990s sports law has internationalised. The European Union (EU) has emerged as a key player. Whilst the initial relationship between sport and EU law was undoubtedly influenced by commercial developments in sport, the birth of EU sports law has been politically driven. Employing a methodology drawn from policy studies, this article claims that EU sports law (the term taken to mean the legal construction of the separate territories of sporting autonomy and judicial intervention) has emerged as a result of activity within the EU's sports policy sub-system. Whilst some actors see sport primarily in economic terms, others wish to see the socio-cultural characteristics of sport protected from EU law. In the absence of a legally rooted common sports policy, sports law has emerged as the glue unifying these two tensions.

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The findings of this research are most relevant for professional sport given that the law of the EU is concerned with regulating the economic activity of companies and individuals involved in the provision of goods and services within the Single Market. However, amateur sports bodies and individuals engaged in such economic activity are still subject to EU law even if this activity does not involve the generation of profit. Whilst a distinction is often made between professional and amateur sport, in the context of the EU the distinction between economic activity and non-economic (or purely sporting) activity is more relevant. Whilst the empirical and theoretical findings of this research strengthen the emerging international *sports law* thesis within legal studies, this case study only claims relevance for the emergence of EU sports law.

Sport and the Law or Sports Law?

Sport has traditionally seen itself as a private social activity separate from the reach of legal frameworks. As Foster explains, 'legal norms are fixed rules which prescribe rights and duties; relationships within the social world of sport are not seen in this way'.¹ Sport has instead devised its own legal system. On the one hand, this legal system specifies the rules of the game such as the offside rule in football. On the other, it also relates to the more commercial aspects of the organisation of sport. Commercial developments in the sector have blurred the boundaries between these 'rules of the game' and 'commercial rules' to such an extent that the law of the land finds it difficult to differentiate between the two. The result has been the gradual juridification of sport, a phenomena which has accelerated academic interest in the idea of *sport and the law* as an area of legal study.² Established general legal principles deriving from the ruled boundaries of modern law have become applied to a growing number of sporting activities. Hence, criminal law, contract law, the law of torts, public law, administrative law, property law, competition law, EU law, company law, fiscal law and human rights law, have been applied to sporting contexts involving public order, drugs, safety, disciplinary measures, conduct and wider issues relating to restraint of trade, anti-competitive behaviour and the commercial exploitation of sport.

The extent of the relationship between sport and law has led some academics to extend their legal analysis beyond the confines of *sport and the law* by identifying a distinct body of *sports law*.³ As Beloff *et al.* claim, 'the law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or bodies. Discrete doctrines are gradually taking shape in the sporting field.'⁴ In other sectors the weight of legislation and case law combined

with the development of discrete doctrines has led to the creation of other activity-led fields of law such as employment law.⁵

Critics of sports law argue that cases involving sport are grounded in the well-established fields of law such as contract and tort. Indeed, 'the traditionally minded, purist lawyer, may indeed distrust any activity-led "vertical" field of law, preferring the surer, traditional ground of rule-led "horizontal" law'.⁶ Grayson for instance argues that 'no subject exists which jurisprudentially can be called sports law. As a sound-bite headline, shorthand description, it has no juridical foundation; for common law and equity create no concept of law exclusively relating to sport. Each area of law applicable to sport does not differ from how it is found in any other social or jurisprudential category ...'.⁷

In recent years, *the sport and the law* versus *sports law* debate has taken on a new dimension. Commercial pressures and the public's desire to see top class competition has fuelled the internationalisation of sport. To regulate this cross-border activity, sports governing bodies have established rules governing relations between participants. However, these transnational rules have not escaped the scrutiny of international law. The growth of the EU's Single Market based on the Treaty of Rome's fundamental economic freedoms has been central to the internationalisation of sports law.⁸ The European Court of Justice (ECJ) rulings in *Walrave*, Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale* [1974] ECR 1405. *Donà* Case 13/76, *Donà v. Mantero* [1976] ECR 1333., *Heylens* Case 222/86, *UNECTEF v. Heylens* [1987] ECR 4097. and *Bosman* Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v. Bosman* [1995] ECR I-4291 illustrate the growing relationship between sport and the EU. However, the relationship between sport and the EU has a relevance beyond the narrow confines of regulating economic activity within the Single Market. The EU has social and cultural aspirations and sport has been identified by the EU institutions as one of the tools through which these goals can be achieved.⁹ The result has been a debate within the EU on how to reconcile the tension between sport as an economic activity and sport as a social pursuit. As in national jurisdictions, the EU has attempted to establish the boundaries of judicial penetration in sport. This has necessitated the application of a vertical activity-led approach to disputes involving sport imbued with discrete legal doctrines unique to sport. The sports law thesis therefore sits comfortably within the context of the EU legal system.

The case for the recognition of a field of 'sports law' is therefore beginning to gain empirical credibility at both national and international level. However, the theoretical foundations of sports law remain weak despite the subject being taught at a growing number of universities.

Beloff *et al.*'s observation that sports law is 'a field which has yet to be subjected to thorough treatment from a theoretical perspective' remains apposite.¹⁰ Given the apparent relationship between the commercialisation of the sports sector and juridification, the emerging dominant theoretical approach has concerned regulation.¹¹ Implicit in these approaches is the assumption that once sport began to practise as a significant economic activity, so the forces of regulation came into operation. The ECJ's assertion in *Walrave*, that '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', confirms the relevance of this approach.

However, the re-regulation of sport at EU level does not simply conform to a classic 'sport and the law' thesis. Although sports initial linkage to the EU's legal framework was driven by the heightened commercial profile of sport, the emergence of a distinct field of EU sports law has been driven by a political agenda to reconcile the commercial and socio-cultural policy tensions inherent within EU sports policy. Reconciling these two tensions has necessitated a commitment on the part of the EU institutions to recognise the specificity of sport in the application of EU law – an example of the law recognising a 'vertical' field of activity. As the emergence of EU sports law has been heavily influenced by political argument over the balance between these two forces, political science and public policy therefore offer a fruitful venue for analysis.

Search for Theory: Actor-Centred Institutionalism

The battle for control of EU sports policy has taken place within the context of a sports policy sub-system.¹² Within it purposeful and resourceful actors form loose advocacy coalitions enabling them to exploit a multitude of institutional venues in order to steer policy in a direction consistent with their belief system. It is this interaction between these actors and the institutional set-up of an organisation which generates policy change – hence the expression 'actor-centred institutionalism'.¹³ However, institutions are not simply defined in a legalistic sense encompassing only formal institutional rules and procedures – a characteristic of 'old institutionalism'. A 'new institutional' perspective draws into the analysis the impact of informal rules such as codes and norms on policy change.¹⁴ Given the multi-level nature of EU governance in which decisions are taken by many actors on many different levels, it is common for policy advocates to go 'venue-shopping' in order to seek the most appropriate venue in which to discuss policy.¹⁵

The sports policy sub-system within the ECU is composed of two relatively evenly matched advocacy coalitions. The primary belief system of the *Single Market coalition* reflects their ideological attachment to the legal foundations of the Single European Market. In other words no sector can be exempt from the application of EU law. Broadly, the Single Market actors favour the market model of sports regulation in which sport is treated in the same manner as any other business operating within the Single Market.¹⁶ However, embedded within their secondary belief system is a recognition that the EU does have a socio-cultural vocation in addition to the market-based and legal ethos on which it was created. In this connection, whilst sport should be subject to law, the application of the EU's legal framework may take into account the specificity of sport in so far as it does not impede the uniform application of EU law and as such undermine the fundamentals on which the Single Market is based. As is demonstrated in the following, this pragmatic market-based agenda is increasingly being adopted by the Competition Policy Directorate General within the European Commission and the European Court of Justice. It is an attitude not shared by the more ideological market regulators within the coalition such as individual law firms, litigants and some commercial operations seeking to maximise sports' 'real' market potential through penetrating the sports' market. The Single Market coalition is institutionally well resourced. The Competition Policy DG and ECJ have a strong and insulated role in acting as the guardian of the EU's legal framework. Individual litigants support this through the provisions of directly effective law, Article 234 and complaints procedure with the Commission.¹⁷ This has resulted in the Single Market coalition enshrining much of its belief system in law. For instance the ECJ's rulings in *Walrave*, *Donà* and *Bosman* clearly establish that sport is an activity subject to EU law. Furthermore, flowing from the *Bosman* ruling a series of Commission competition law investigations came into a range of sporting activities.

The Single Market members do not, however, operate in a vacuum. Both the ECJ and the Commission are sensitive to the prevailing political context and the Commission suffers from resource limitations which handicaps the ability of Competition Policy DG to investigate all alleged breaches of Competition law. While therefore the Single Market coalition is institutionally strong, it is sensitive to wider political and administrative issues. Scope for compromise with the socio-cultural coalition therefore exists.

By contrast, the primary belief system of the *socio-cultural coalition* reflects their commitment to the socio-cultural model of sports regulation which asserts the need for the EU to recognise the uniqueness and specificity of sport within its legal framework. However, differences in

the belief system of the socio-cultural coalition suggest that a 'coalition of convenience' has been formed.¹⁸ As such, various strands of opinion exist within the coalition on how best to achieve this goal.

The *maximalists* are strong supporters of the People's Europe concept whereby the EU employs a range of traditionally non-economic strategies to reconnect with its apathetic citizens. They support the inclusion of an Article for sport in the EU Treaty as a way of protecting sports rules from the application of EU law and as a way of facilitating the development of a socio-cultural common sport policy. This agenda has strong support from within the European Parliament and from up to eleven member states of the EU.¹⁹ Furthermore, many important sports organisations such as the European Non-Governmental Sports Organisations, the European Olympic Committee and national sports federations support an Article for sport as a means of safeguarding sports rules from the reach of EU law and as a potential new source of funding.

The *moderates*, mainly composed of sports bodies (the most significant of which is UEFA) support attempts to clarify the legal environment in which sport operates but they do not favour the Article approach. Instead a protocol attached to the Treaty outlining the need for the EU to recognise the specificity of sport is supported. Such a move would achieve the goal of shielding sports rules from EU law without entailing further supranational involvement in sport which would inevitably be the consequence of the Article proposal.

Finally, the *minimalists* share the objective of EU law softly touching sports structures but reject both the Article and protocol proposals. The governments of Britain, Sweden and Denmark argue that sufficient flexibility exists within the EU's institutional framework for the specificity of sport to be recognised. The Amsterdam Declaration on Sport, the Nice Declaration and the jurisprudence of the ECJ and Competition Policy DG are frequently sourced examples of the effective functioning and sensitivity of the EU institutions in sporting matters (see the following).

The socio-cultural coalition is also institutionally well resourced, particularly given the Treaty-making powers of the member states. However, the unanimity requirement for changes to primary legislation renders the use of this resource problematic. Nevertheless, the coalition can draw on the political persuasiveness of member state soft law initiatives in this field. Following *Bosman* the member states responded to calls for sport to be granted a legal base within the European Treaty by annexing a non-binding Declaration on Sport to the Amsterdam Treaty which called on the institutions of the EU to recognise the social significance of sports.²⁰ Member states have followed up the Declaration by releasing important

political guidelines on the need to recognise the specificity of sport within the EU's legal framework. The series of Presidency Conclusions on this matter culminated in the release of the unusually long Nice Declaration in December 2000 which acknowledged that

even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured.²¹

TABLE 1
SOCIO-CULTURAL VENUE ACTIVITY

Member State Initiatives	Commission Initiatives	European Parliament Initiatives	Sports Bodies Initiatives
Amsterdam Treaty Declaration	'Developments and Prospects for Community Activity in the Field of Sport', Commission Staff Working Paper, Directorate General X, 29/09/98.	Article 3A of the Television Frontiers Directive.	Lobbying activity at both national and EU level.
Informal meetings of sports ministers, press releases and Council Presidency conclusions.	'The European Model of Sport'. Consultation Document of DG X. 1998.	The Larive Report on the European Community and Sport	Participation in the First European Union Conference on Sport (the Assises), May 1999 and annual meetings of European Sports Forum
Nice Declaration on Sport	The First European Union Conference on Sport (the Assises), May 1999 [Q6]	The Pack Report on the Role of the European Union in the Field of Sport	
	Annual European Sports Forum		
	The Helsinki Report on Sport		

In addition to the member states, the socio-cultural coalition has support from within the European Parliament and the Education and Culture Directorate General within the Commission (see Table 1). The 1994 'Larive Report' on the European Community and Sport and the 1997 'Pack Report' on the Role of the European Union in the Field of Sport articulated the desire for a more balanced approach to sports policy in the EU.²² Furthermore, the Parliament was successful in inserting an amendment into the second Television Without Frontiers (TWF) Directive in 1997 guaranteeing public viewing access to major sporting events on television.²³ This theme was also central to a series of Commission policy papers on sport emanating from the Education and Culture DG throughout 1998 and 1999.²⁴

Birth of the Separate Territories

The sports policy sub-system became more active since developments in broadcasting technology and changing media and public attitudes towards sport contributed to the commercialisation of European sport throughout the late 1980s and 1990s. This greatly affected the internal dynamics of the sub-system and resulted in heightened competition between the rival advocacy coalitions over the definition of sport – is sport an economic activity or is it a socio-cultural activity? If it is both, how does the law recognise these qualities? Both coalitions (but most particularly the socio-cultural coalition) have exploited the multi-level nature of the EU to go venue-shopping in order define sport in a manner consistent with their particular belief system. As both coalitions are relatively evenly matched institutionally, venue-shopping has had the result of pulling sports policy in opposing directions. Whilst Single Market activity has pulled sports policy towards the market model of sports regulation, socio-cultural activity has attempted to draw it back towards the socio-cultural model. This less than efficient tension within the sub-system has contributed to coalition mediation within the secondary aspects of their belief systems. Mutual adjustment and compromise is a particularly pronounced feature of EU decision-making.

Mediation has contributed to the birth of a more co-ordinated sports policy based on the construction of the *separate territories* approach for dealing with legal disputes involving sport. Separate territories refers to the definition of three territorial zones. The first (sporting autonomy) refers to sporting rules which are not contrary to EU law or which fall outside the scope of EU law (such as the *de minimis* rule in EU competition law). The second (supervised sporting autonomy) refers to rules which fall within the scope of EU law but which are capable of

being exempt from it. The third (judicial intervention) refers to sports rules which are prohibited by EU law. In essence territories one and two refer to rules inherent to sport whilst territory three concerns rules of an essentially commercial nature. This approach was formally acknowledged by the Commission at its first formal post Amsterdam review of the application of competition rules to sport in February 1999.²⁵ The model developed in that paper has also informed the jurisprudence of the ECJ.

By defining these territorial zones, the EU has facilitated an approach to sports policy which allows the EU's Single Market and socio-cultural interests in sport to co-exist. However, the separate territories approach is potentially fragile. It 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 judgements of the ECJ. Soft law refers to rules of conduct which in principle have no legally binding force but which nevertheless may have a significant 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 a 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. In the context of the application of EU competition law, the strength of soft law is that

while competition law is generally an adequate mechanism for regulating normal markets, it can often be too crude to be applied to markets touched upon by sport, because sport operates under different market conditions to other sectors'.²⁶

The use of informal soft law measures can therefore be defended on the grounds of flexibility and sensitivity to the concerns of sport. Its use is also frequently supported by sports bodies who prefer the informal negotiated enforcement procedures of the Commission. As such, the use of soft law represents a 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. Nevertheless, the separate territories approach is beginning to have some practical effects. Table 2 illustrates the construction of a pattern of rule governing the operation of sport in Europe.

TABLE 2
THE SEPARATE TERRITORIES FRAMEWORK

Sporting Autonomy	Supervised Autonomy	Judicial Intervention
Rules preventing club relocation ²⁷	Collective sale of broadcasting rights ²⁸	Periods of long exclusivity for sports rights ²⁹
Transfer windows ³⁰	Collective purchasing agreements ³¹	Export bans for sports goods ³²
Selection criteria ³³	Restrictions on the cross border transmission of sport ³⁴	Nationality restrictions ³⁵
Rules preventing multiple club ownership ³⁶	Ticketing arrangements ³⁷	Out of contract transfer payments ³⁸
	In contract transfer payments ³⁹	Rules maintaining commercial and regulatory dominance in a sport ⁴⁰
The granting of state aid to sport ⁴¹		

The Future of EU Sports Law and Policy

The successful application of the separate territories approach rests on an apparently simple concept. The rules of sport are either sporting in nature and as such not in breach of EU law or they are commercial in nature and fall within its scope. However, the reality remains that the precise definition of what constitutes sporting rules and commercial rules is problematic. Nevertheless, the future of EU sports law will be concerned with exactly this definitional issue. Where will the boundaries of the separate territories lie?

The decision of the Laeken European Council of December 2001 to establish the European Convention on the Future of Europe offers the socio-cultural coalition an opportunity of further defining the boundaries. The nature of the Convention's work – to propose a new framework and structure for the EU – means that the sporting autonomy territory has an opportunity to entrench itself legally within the new Treaty architecture through the adoption of an Article for sport. However, should sport fail to achieve Treaty status following the 2003–04 intergovernmental conference (IGC) discussions, it is unlikely the EU would revisit the issue in the short to medium term. The outcome of the IGC will therefore have a significant

impact on the course of EU sports policy. The profile of sport during the negotiations is likely to be enhanced by the staging of major sporting events in Europe in 2004. The Olympic Games are to be held in Greece and the European Football Championship will also be staged. Furthermore, 2004 is due to be declared European Year of Education Through Sport, thus giving sport a high profile during the IGC discussions.⁴²

Since *Bosman*, discussion has taken place among some socio-cultural members on how to achieve greater protection from the application of EU law. Some options for Treaty reform were proposed but soon disregarded as impractical. One option involved sport being added to the list of EU activities outlined in Article 3 of the Treaty which when combined with the so-called 'catch-all' Article 308 would permit action by the EU in sports matters if it was felt appropriate for the attainment of one of the objectives of the Treaty.⁴³ Another option involved placing limits on the freedom of movement for workers (sportsmen and women) by amending Articles 39, 43 and 49. In addition, partial or full exemptions from the Treaty's Competition Policy provisions could be established by amending Articles 81 and 82. A third option involved defining sport within the context of Article 86(2) of the Treaty which potentially allows for an exemption from Treaty principles if undertakings entrusted with the operation of services of general economic interest or having the character of a *revenue-producing monopoly* can demonstrate that the application of the competition rules would obstruct the performance of tasks assigned to it. Two proposals have however remained serious options for the maximalist and moderate socio-cultural actors. In two previous IGCs in the run-up to the Amsterdam and Nice Treaties, some members of the socio-cultural coalition tried and failed to achieve Treaty status for sport either through a separate Article for sport or through the adoption of a sporting protocol. However, the 1997 Amsterdam Declaration remains the only mention of sport within the Treaty. Dissatisfied with this the maximalist and moderate socio-cultural actors have again been active in seeking more robust Treaty status, this time within the context of the work on the Convention on the Future of Europe.

A Treaty Article for Sport

The first position and one commanding considerable support from within the maximalist group is for sport to be granted Treaty status through the adoption of an Article for sport or for sport to be added to Article 151 (Culture). Three arguments are advanced in favour of a sports Article. First, an Article for sport would place a legal requirement on the EU institutions to take sporting aspects into account in their actions under other Treaty provisions. This could potentially be employed to protect sporting rules and structures from the reach of EU law. A frequently

quoted example of this insensitive application of law to sport is the *Bosman* ruling. *Bosman* not only confronted specific issues concerning the compatibility of sports rules with EU law, it also altered the cultural context of sports regulation in Europe. Whilst some sports federations harbour desires to re-fight the *Bosman* battle, the more thoughtful justification for a sports Article concerns the clarification, not reconfiguration, of the legal environment in which sport operates. By legally rooting sport in the Treaty, the EU would be obliged to respect sporting autonomy and take sport into account in the framing of other policies. An Article could conceivably resolve the coordination problem within the EU in which the EU's economic and essentially regulatory interest in sport pulls against its socio-cultural interest in the sector. Furthermore, the European Parliament, an important maximalist player, would serve as the guarantor of socio-cultural ideas through its co-decision role in the legislative process. However, the minimalist actors within the coalition do not share this analysis. The governments of Britain, Denmark and Sweden, three states generally sceptical about extending governmental involvement in sport, argue that sufficient flexibility exists within the EU's legal framework for the specificity of sport to be recognised (for instance within the competition law exemption criteria outlined in Article 81(3)). The recent jurisprudence of the Competition Policy DG and ECJ illustrate this argument (see Table 2). Furthermore, insufficient time has elapsed since the Nice Declaration on sport to suggest that member state guidance on the specificity of sport has been ignored. Should this call for further reflection result in no change at the 2004 Summit, sport is unlikely to achieve Treaty status for some years.

The second argument in favour of an Article for sport concerns the establishment of a budgetary line which could be exploited for the purposes of developing a common sports policy. This budget could also be exploited by sports bodies and indeed EU institutions interested in promoting People's Europe projects. As the EU lacks a Treaty competence to make specific sports budgetary appropriations, any financial activity in the sports field is potentially legally fragile. In Case C-106/96, *UK v. Commission* ECR I-02729, the ECJ held that each budget item must have a legal base. This ruling resulted in the Commission abandoning its sports-related programmes. To replace this activity, the Education and Culture DG has had to either carefully navigate within the EU's budgetary rules or link sports spending to measures with a legal base. Concern has however been expressed by some sports bodies that as sport is not the primary focus of these measures and as sport still lacks a Treaty base, so sport lacks equality of opportunity when attempting to access EU funds. Any funding of sports programmes will continue to be susceptible to legal challenge as the soft

law initiatives which have characterised much of the development of EU sports policy are not considered 'basic acts' in support of budgetary appropriations.⁴⁴

The third justification in support of a Treaty Article for sport concerns the symbolic value of such a move. The EU has acknowledged that since its inception in 1957, a gap has emerged between the EU 'project' and its citizens. The 1984 Adonnino Committee reported on measures that could strengthen the image of the EU in the minds of its citizens, thus addressing the legitimacy crisis. Amongst other measures, the Committee suggested that sport could contribute to the establishment of a People's Europe.⁴⁵ Whilst the acceptance of the Adonnino Committee's recommendations by the member states marked more of a commitment to the concept of a People's Europe than it did to the development of a sports policy, the spirit of Adonnino has lived on within the sports policy sub-system. The strength of this agenda is such that minimalist members of the socio-cultural coalition question the need for further measures given the equally powerful agenda of re-connecting the EU to its citizens through the application of the principle of subsidiarity. The acquisition of further powers would do little to persuade Europe's citizens that the EU was serious about decentralising power and recognising the autonomy of sport.

Sports Protocol

The second option is for the member states to attach a protocol on sport to the Treaty. As their name suggests, protocols establish rules of procedure for the EU institutions. Article 311 (ex 239) of the Treaty provides for protocols having Treaty status. The member states have attached protocols to previous Treaties as a way of addressing specific issues. For example, the Maastricht Treaty attached protocols on social policy, second home acquisitions in Denmark and occupational pension schemes. The social protocol addressed specific member state concerns about the direction of EU social policy. The Danish Second Homes protocol permitted Denmark to retain national legislation on the acquisition of second homes. Member states agreed the Barber protocol as a way of limiting the effect of a Court ruling. All three instances pose problems. In the first instance a precedent for a more flexible à la carte Europe is set. In the second, a precedent is set for allowing a range of industries to claim 'special status'. In the third, a potentially undemocratic precedent is established whereby member states interfere in Court rulings.

The protocol approach is supported by the moderates within the socio-cultural advocacy coalition. UEFA Chief Executive, Gerhard Aigner explained:

we are not seeking to change EU law by having the Bosman ruling repealed but what we do want is a sporting protocol to the European Treaty which would allow the EU to apply certain exemptions in sport.⁴⁶

UEFA's support for a sports protocol was further elaborated in their brochure, *A Vision for European Sport: The Case for a Sports Protocol*. UEFA sees a protocol as a method of legally rooting the expansion of the sporting autonomy territory whilst maintaining distance from the Treaty. An Article for sport would entail much greater supranational involvement in sport. As such a protocol establishing the relationship between sport and the EU could clarify the legal environment without requiring the development of a common sports policy. In essence, both an Article and protocol would act as an important reference point to guide the actions of the ECJ and the Competition Policy DG in the execution of their Treaty obligations.

Apart from the generic case against the use of protocols explained above, the arguments against their use in a sporting context broadly mirror those arguments against the adoption of an Article for sport. In essence, the minimalist socio-cultural actors argue that the legal environment in which sport operates has already been clarified. The post-*Bosman* political agenda of the member states and Commission has informed the jurisprudence of the ECJ and Competition Policy DG in sports-related cases. The construction of the separate territories approach is testament to this change in the legal environment. Furthermore, whilst a sporting protocol would undoubtedly inform the future jurisprudence of these two bodies, the ECJ in particular has chosen to interpret protocols very narrowly.⁴⁷ The value-added benefit of such a protocol may therefore be limited.

The Convention on the Future of Europe

The current debate taking place within the context of the Convention on the Future of Europe offers the socio-cultural actors the opportunity to enhance the visibility and legal status of sport within the EU's Treaty. Supporters of Treaty recognition for sport argue that such a move is consistent with the Laeken Declaration's focus on a democratic, transparent and people-centred approach to EU reform.⁴⁸ In this connection it is a natural progression of the line of thinking on the symbolic value of sport expressed in numerous reports (see above). A number of sports bodies have contributed submissions to the European Convention concerning the place of sport within the Treaty.⁴⁹ These favour the insertion of an Article for sport into the Treaty, or for sport to be grafted onto the provisions on cultural policy.

The task of examining the merits of these proposals has fallen to the working group considering the competencies of the EU.⁵⁰ The working group examined how to establish and monitor a more precise delimitation of

powers between the EU and the member states. In this connection, the working group examined competences which should fall exclusively on the EU, those which should be *shared* between the EU and member states and those which the member states retain control over but the EU provides *supporting* action. In its final report, the working group did not consider sport to lie in any of these categories, indicating an unwillingness to recommend the creation of a legal base for sport within the Treaty. It was concluded that 'a proposal providing for the adoption of supporting measures with respect to international sports was not broadly supported'.⁵¹ However, in the subsequent Draft Constitutional Treaty proposed by the Convention, sport does appear as one such 'supporting' area. Supporting measures are to be of 'low intensity' and permit the EU to take action in areas which, although remaining the competence of the member states, do have a common European dimension. As such, supporting measures allow the EU to assist and supplement national policies where appropriate. Supporting measures may take the form of financial support, administrative co-operation, pilot projects and guidelines.⁵² Should the proposal to define sport as a supporting measure be accepted by the member states following the IGC negotiations, sport would be granted a specific legal base in the Treaty.

For the minimalist socio-cultural actors, the need for such a specific Treaty Article defining sport as a supporting measure is questionable. In effect, the EU has already defined sport as a supporting measure through the adoption of a series of soft law measures concerning the specificity of sport and the need for the EU to acknowledge its social, cultural and integrationist qualities. However, given the 'basic act' requirement for EU budgetary appropriations (see above), actions based on soft law measures remain legally fragile. But if basic acts are adopted in support of such measures, does this not contradict the EU's claim of decentralised decision-making (subsidiarity)? It is conceivable that the two are not incompatible. Supporting measures only apply to areas which the member states have not transferred legislative competence to the EU. This means that the EU cannot legislate (using basic acts such as regulations and directives) in order to replace or harmonise national law. Other measures such as decisions would however satisfy the basic act requirement. In conjunction with the common European interest requirement, it is therefore possible for subsidiarity and supporting measures to co-exist.

Conclusions

If the European Conventions Draft Constitutional Treaty is ratified by the Member States, sport will finally have achieved legal status within the EU just ten years after the divisive ruling in *Bosman*. In an organisation

characterised by incremental policy change, this level of agenda expansion is considerable. Having initially adopted a Single Market model of sports regulation, the EU stands on the verge of legally consolidating its new socio-cultural approach to the sector. How can this development be explained? If the academic discipline of sports law is to gain mainstream credibility, it is these more analytical and theoretical questions that need answering.

The methodology employed in this study, asserts the need for sub-system analysis. Initially dominated by legal norms, the sports policy sub-system has become penetrated by political argument. Theories of European integration and EU public policy therefore become useful toolkits. By identifying actors and their belief systems and the institutional resources available to them, the researcher can better understand coalition strategy and the chances of strategic success. In response to the Single Market coalition's definition of sport, the socio-cultural coalition has gone 'venue-shopping' in order to safeguard and promote its sporting belief system. Table 1 illustrates the extent of this activity. On one level therefore, policy changes as a result of the formal institutional configuration of an organisation – such as the relative balance of legislative or judicial power between participants. Rational actors are therefore both empowered and constrained by their institutional resources or lack of them.

However, this essentially rational-choice brand of new institutionalism lies at the thin end of the new institutional literature.⁵³ At the 'thicker' end of institutionalism lies historical institutionalism, an approach which ascribes a greater role for institutions within the policy process. Rather than simply constraining individual action, institutions, defined in a broad sense to include informal characteristics, can shape and determine individual preferences. The EU generally, and the sports policy sub-system specifically, is heavily populated with such informal institutional venues. The socio-cultural coalition have exploited the cultural context of contemporary European integration to press for an approach to sports law and policy consistent with the People's Europe project. They have also made considerable use of soft law as a vehicle to lever their belief system into the policy debate. Furthermore, the institutional norm of compromise and mediation is deeply embedded within the diverse multi-competence, multi-national and multi-level EU. This decision-making norm has prompted coalition mediation and the construction of the separate territories approach which allows the belief systems of both coalitions to co-exist.

Within the separate territories mediated approach, the coalitions will seek to protect their fundamental beliefs above anything else. To compromise these beliefs would be to call in question their reason for existing. While some under-resourced coalitions may be faced with having

to accept such compromise, this is not the case in the sports policy sub-system where both coalitions are well resourced. As such, it is to the secondary aspects of their belief systems that the analysis must turn. The future direction of EU sports law and policy is likely to be confined to this field. When this insight is read in conjunction with the reluctance of the minimalist socio-cultural actors to sanction a legal hardening of separate territories through a legal base for sport, it is likely that the future of EU sports law and policy will deviate little from the status quo.

Although the socio-cultural coalition (or individual elements within it) will undoubtedly seek wider venue exploitation at the 2004 intergovernmental conference, sub-system analysis indicates that attempts to extend EU involvement in sport beyond a strengthened Declaration are problematic. Member-state soft law has been influential in informing the jurisprudence of the Commission and the ECJ. In the absence of consensus, nothing more than a declaratory re-iteration of the member states desire to see the specificity of sport recognised within the EU's legal framework is therefore likely in the short to medium term. This means that the Commission is likely to continue to employ existing provisions within Articles 81 and 82 to further define the separate territories. Furthermore, as has already been demonstrated in *Deliège* and *Lehtonen*, the ECJ will apply the so-called sporting exception within the spirit of member-state guidance.

While the construction of the separate territories is welcomed by the members of the socio-cultural coalition, the lack of a legal base for sport leaves the territories legally fragile. However, an Article for sport or a sporting protocol is not the only mechanism through which legal certainty can be achieved. ECJ case law establishes important precedents which can be legally relied on. The same is true of formal Commission Decisions. However, faced with political and administrative pressures, the Commission has tended to rely on negotiated settlements with sports bodies. The greater use of hard law will add clarity to the legal environment and inform the jurisprudence of national competition authorities who have recently acquired a greater role in applying EU competition law.⁵⁴

Of course, the separate territories approach has its limitations whether legally rooted or not. The relative freedom of manoeuvre afforded to sports bodies by separate territories needs exercising wisely. It does not grant sport a general exemption from EU law. The rights of players still need greater protection within the constitutions of sports bodies. Without such protection, the EU will continue to be regarded as a venue for legal redress. Furthermore, sports bodies need to demonstrate a greater commitment to solidarity in sport. By doing so, they can rely more satisfactorily on the sporting justifications argument when issues of a commercial nature are being examined. Finally, the interests of fans should be safeguarded.

Although sports bodies have an obligation to maximise the commercial potential of sport, the extent of permitted commercialisation should be proportionate to the requirements of the solidarity function of the sports bodies. The second potential weakness of the separate territories approach may be termed the 'boundary' problem. The EU is only one player in the expanding world of sporting governance. It shares the regulatory space with a range of national, non-governmental and trans-national regulatory organisations. Whilst the supremacy of EU law establishes the primacy of the separate territories in relation to national and non-governmental organisations, the EU cannot apply the same logic to sporting contexts covered by international agreements to which it is a party. Just as agricultural reform in the EU was prompted by trade liberalisation developments in the World Trade Organisation, so policy change within the sports policy sub-system may be similarly externally generated.

NOTES

1. K. Foster, 'Developments in Sporting Law', in L. Allison (ed.), *The Changing Politics of Sport* (Manchester: Manchester University Press, 1993), 106.
2. See E. Grayson, *Sport and the Law*, 2nd edn. (London: Butterworth, 1994).
3. S. Gardiner, *Sports Law* (London: Cavendish, 2001); M. Beloff, T. Kerr and M. Demetriou, *Sports Law* (Oxford: Hart, 1999).
4. Beloff *et al.* (note 3).
5. See Gardiner (note 3), 100.
6. Beloff *et al.* (note 3), 3.
7. Grayson (note 2), xxxvii.
8. The four freedoms are the free movement of goods, services, labour and capital.
9. First identified by the Adonnino Committee Report, COM (84) 446 Final, A People's Europe, Reports from the ad hoc Committee.
10. Beloff *et al.* (note 3), 15.
11. For a review of the literature, see Gardiner *et al.* (note 3). Also, see Foster's typology of different models for regulating sport, K. Foster, 'How can Sport be Regulated?', in S. Greenfield and G. Osborn, (eds.), *Law and Sport in Contemporary Society* (London: Frank Cass, 2000).
12. For more on sub-system politics, see P. Sabatier, 'An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning therein', *Policy Sciences* 21 (1988).
13. For more on this concept, see F. Scharpf, *Games Real Actors Play* (Oxford: Westview Press, 1997).
14. For more on new institutional literature see J. March and J. Olsen, 'The New Institutionalism: Organizational Factors in Political Life', *American Political Science Review* 78 (1984), 734-49; J. March and J. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press 1989).
15. The concept of multi-level governance was first employed by G. Marks, L. Hooghe and K. Blank, 'European Integration from the 1980's: State-Centric v. Multi-Level Governance', *Journal of Common Market Studies* 34/3 (1996), 341-78.
16. For a useful discussion on models of sports regulation see Foster (note 11).
17. Article 234 allows national courts to seek guidance from the ECJ on the status and meaning of EU law.

18. Sabatier (note 12).
19. See 'The Place of Sport in the Future Treaty', contribution 183 to the European Convention 10/01/03 (CONV 478/03) (in French).
20. Declaration 29, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, 1997.
21. Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, Presidency Conclusions, Nice European Council Meeting, 7,8,9 December 2000.
22. A3-0326/94/ Part A (27/4/94) Part B (29/4/94), Report on the European Community and Sport. Rapporteur: Mrs J. Larive. A4-0197/97. Report on the Role of the European Union in the Field of Sport, (28/5/97) Rapporteur: Mrs D. Pack.
23. Article 3a Directive 97/36/EC.
24. Three papers are of particular importance: 'Developments and Prospects for Community Activity in the Field of Sport', Commission Staff Working Paper, Directorate General X, 29/09/98; 'The European Model of Sport', Consultation Document of DG X. 1998; Com (1999) 644, 'Report from the Commission to the European Council with a View to Safeguarding Sports Structures and Maintaining the Social Significance of Sport within the Community Framework: The Helsinki Report on Sport', 1/12/99.
25. DN: IP/99/133, 'Commission debates application of its competition rules to sport', 24/02/1999.
26. S. Kinsella and K. Daly, 'European Competition Law and Sports', *Sports Law Bulletin* 4/6 (2001), 7.
27. DN: IP/99/965, 09/12/99, 'Limits to application of Treaty competition rules to sport: Commission gives clear signal'.
28. Case No. IV/37.398-UEFA (1999), OJ C 99.
29. Case No. IV/36.033-KNVB/Sport (1996), OJ C 228, although see Case No. IV/33.245-BBC, BSB and Football Association (1993), OJ C 94 for a long exclusive contract exempted by the Commission.
30. Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga* [2000] ECR I-2681.
31. Case No. IV/32.150. Commission Decision 2000/400/EC, OJ L 151, 24/06/00. See also See Commission Press Releases DN: IP/00/372, 12/04/2000, 'Commission ready to lift immunity from fines to Telefónica Media and Sogecable in Spanish football rights case', and DN: IP/00/1352, 23/11/2000, 'Commission withdraws threat of fines against to Telefónica Media and Sogecable, but pursues examination of their joint football rights'.
32. Commission Decision of 18/03/92, OJ L131 (Dunlop Slazenger International). Also Commission Decision of 21/12/94, OJ L378 (Tretorn).
33. Joined cases C-51/96 & C-191/97, *Deliège v. Asbl Ligue Francophone de Judo and others* [2000] ECR I-2549.
34. Case No. 37.576-UEFA's Broadcasting Regulations, Commission Decision 2001/478/EC OJL 171, 19/04/01. See also Commission Press Release DN: IP/01/583, 20/04/2001, 'Commission clears UEFA's new broadcasting regulations'.
35. Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v. Bosman* [1995] ECR I-4291.
36. Case COMP/37 806: ENIC/UEFA. See DN: IP/02/942, 27/06/2002, 'Commission closes investigation into UEFA rule on multiple ownership of football clubs'.
37. Case No. IV/36.888-1998 Football World Cup, Commission Decision 2000/12/EC (2000), OJL 5, 08/01/2000.
38. Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v. Bosman* [1995] ECR I-4291.
39. DN: IP/02/824, 'Commission closes investigations into FIFA regulations on international football transfers', 05/06/2002. See also Letter from Mario Monti to Joseph S. Blatter, 5.03.01 D/000258.
40. DN: IP/01/1523, 30/10/2001, 'Commission closes its investigation into Formula One and other four-wheel motor sports'.

41. DN: IP/01/599, 'Commission does not object to subsidies for French professional sports clubs', 25/04/2001.
42. COM (2001) 584 Final, Proposal for a Decision of the European Parliament and of the Council establishing the European Year of Education Through Sport, 16/10/2001.
43. It should be noted that despite concerns expressed during the European Convention's deliberations that Article 308 contradicted the EU's attempts to allocate powers transparently and as such should be deleted, the Final Report of the Working Group on Complimentary Competencies recommended its retention.
44. See OJ C 344, 12/11/98. Subsequently replaced by OJ C 172/1, 18/06/99 (Interinstitutional Agreement of 06/05/99). For a full review of the potential legal bases relating to sporting actions see Commission document 'Community Aid Programmes'. Available online at: http://europa.eu.int/comm/sport/doc/ecom/actions_comm_en.pdf.
45. COM (84) 446 Final, A People's Europe, Reports from the ad hoc Committee.
46. UEFA News Release 13/4/00.
47. The ECJ sought to limit the reach of the Barber Protocol in Cases C-128/93, *Fischer v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583, and C-57/93, *Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting ensioenfonds NCIV* [1994] ECR I-4541. For a review of the litigation, see P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials* (Oxford: Oxford University Press, 1998), 831–9.
48. The Laeken Declaration is part of a process of constitutional review of the EU initiated by the Heads of State and Government of the 15 member states of the EU following the conclusion of the Nice Summit in December 2001.
49. These include submissions by the International Olympic Committee, the French and German National Olympic Committees, the European Non-Governmental Sports Organisations (ENGSO) and the Austrian Sports Organisation.
50. Working Group V of the European Convention: Complimentary Competencies.
51. CONV 375/1/02, Final report of the Working Group V 'Complimentary Competencies', Brussels, 4 November 2002, p.9.
52. 3-4. CONV 375/1/02.
53. K. Armstrong and S. Bulmer, *The Governance of the Single European Market* (Manchester: Manchester University Press, 1998), 53.
54. Council Regulation (EC) No. 1/2003 of 16/12/2002 on the implementation of the rules on competition laid down in Articles 81 and 82.