

The Oliver Bernard judgment and article 165 TFEU: Towards a “Specificity of (professional) football?”



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The Community Courts and the Commission have consistently taken into consideration the particular characteristics of sport setting it apart from other economic activities that are frequently referred to as the “specificity of sport”. Although no such legal concept has been developed or formally recognized by the Community Courts, it has become apparent that the following distinctive features may be of relevance when assessing the compliance of organizational sporting rules with Community law.

Commission Staff Working Document The EU and Sport: Background and context Accompanying document to the White Paper on Sport, 2007, p. 35.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

Article 165 (1) TFEU, second subparagraph, 2009

40. In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.

[...]

Judgement of the ECJ, *Olympic Lyonnais SASP v. Olivier Bernard and Newcastle United FC*, Case C 325/08, 16 March 2010.

1. Scope of this article

This article aims not at being a comprehensive analysis of the content and effects of the recent Judgment of the Court of Justice, in the already famous case *Olivier Bernard*¹.

Nor do we have the intention to deepen the analysis, which began in a Newsletter from the EPFL², based on said Judgment³, as to the meaning and reach for sport of Article 165 TFEU, and namely the expression specific nature of sport.

Our sole purpose is to try to demonstrate that paragraph 40 of the *Olivier Bernard* judgment not only leads to a strengthened recognition of a specificity of sport - whatever the scope in meaning of that expression - but also leads to the recognition of a specificity of football, and even further - to a specificity of professional football.

Therefore, this small text aims at giving a modest contribution to football authorities providing them with stronger arguments for a modulated and non discretionary application of EU Law to football.

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2. The relevance of the analysis of paragraph 40 of the Olivier Bernard Judgment

Moreover, the relevance of the referred paragraph lies in the fact that it deals with the application of the Principle of proportionality, as can be inferred from the first part of the respective text.

To this regard, it is important to remember that after the (recent, but already famous) Meca Medina Judgment, this matter has had important practical consequences to the sporting sector. In fact, according to that judgment, both the persons who have an activity regulated by a rule with a purely sporting nature, and the body which created that rule are not exempted from the scope of the Treaty.

Furthermore, the assessment of the compatibility of a purely sporting regulation with Competition Law lies mainly in whether the objectives at issue are proportioned or not⁴.

Therefore, in sport, there are a growing number of situations susceptible of being regulated by European Law, and thus likely to be submitted to the “proportionality test”, an assessment which is, in its nature, subjective, casuistic, and discretionary. The way in which the European Court of Justice (ECJ) establishes the limits for this assessment- just as it has done in the paragraph under consideration - is, therefore, very important because it can determine a reduction of the discretion of the court - whether it is a national or European court, or an administrative authority, such as the European Commission or the Competition Authority of any Member State of the EU.

3. The interpretative exegesis of paragraph 40 of the Olivier Bernard Judgment

3.1. The Nice Declaration at the heart of the Judgment

The first aspect we would like to point out is the fact that the ECJ did not intentionally use the expression laid on Article 165 TFEU, and previously mentioned in case Piau⁵ - specific nature of sport. The ECJ chose to use the expression specific characteristics of sport.

We believe this to be more than just a question of semantics, but rather the use of the terminology used in the famous Nice Declaration, which has the full title Declaration on the specific characteristics on sport and its social function in Europe of which account should be taken in implementing common policies⁶.

The reference made by the ECJ to the Nice Declaration is rendered even clearer when we consider the specific reference to paragraph 47 of the conclusions laid down by the Advocate General Sharpson⁷, in which the specific or special character of sport was specifically based on the Nice Declaration, in the following terms:

47. On the one hand, professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged rather than discouraged. More specifically, the European Council at Nice in 2000 recognised that ‘the Community must ... take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured’. (19)

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In addition, the Commission's White Paper on sport (20) and the Parliament's resolution on it (21) both place considerable stress on the importance of training.

Further to the importance, which in our opinion, the ECJ wanted to give to the Nice Declaration, it is important to emphasize the terms under which the ECJ introduced Article 165 TFEU: considering it not as the true and innovative juridical base for the concept of specificity of sport, but rather as an instrument which corroborates a previously established understanding that sport has specific characteristics.

It seems, at a first glance, that we are faced with a paradoxical subordination of a Treaty disposition in relation to a political declaration. One could even argue, based on an even hastier and inattentive reading, that the Court was “lazy” or cautious, exempting itself from defining a line of thought or reasoning on this issue and that it contented itself with working with a pre-existing one, or, ultimately, one could also argue that the Court wasted a long awaited opportunity: The opportunity of finding a based guidance in the Primary Law of the EU to define the concept of specificity of sport.

However, this is not our view on this matter. We are convinced that what the ECJ truly wanted to be define very clearly was, on the one hand, that the notion of specificity of sport had already been sufficiently defined even before sport achieved its place in the Primary law of the EU, and on the other hand, that the TFEU was in line with a notion of continuity by way of strengthening that definition.

Accordingly, it seems that the ECJ is also indicating that the interpretation of the text of Article 165 TFEU namely the expression specific nature of sport should be done in accordance with the Nice Declaration.

3.2. The emergence of a specificity of (professional) Football

In addition to the reference to paragraph 47, the Court also made another reference to paragraph 30 of the Sharpson Conclusions, thus indicating it shared or accepted the opinion of the Advocate General. In view of this, it is therefore important, take a closer look at that paragraph, hereby quoted as follows:

30. The specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether there is a prohibited restriction on freedom of movement. They must, however, be considered carefully when examining possible justifications for any such restriction - just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector.

Linking this paragraph in close articulation with paragraph 40 of the Olivier Bernard Judgment, reveals not only the formal recognition of the existence of a specificity of sport, but also the existence of a specificity of football, as a sporting activity with distinctive and specific characteristics.

In fact, this does not constitute a jurisprudential novelty, since the Court had already pointed out, in paragraph 106 of the Bosman Judgment, that:

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

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At any rate, in our opinion, it is very important to point out the fact that the Court has maintained its view on this matter more than 15 years after the Bosman Judgment, with all that entails, namely if we consider how, since then, the economic and entertainment aspects of football have grown exponentially (largely due to the Bosman Judgment). It should be noted that the view of the Court has not been hindered by those who argue that football is no longer a cultural, social and entertaining event, but just an economic activity. On the contrary, and rightfully so, the ECJ continues to recognize the significance of football in society.

It should be underlined that the view of the ECJ is far from being fragmentary. We should consider the revealing nature of the reference the ECJ made to the White Paper on Sport⁸, mentioned in paragraph 47 of the Conclusions of the Advocate General Sharpson. It is quite revealing that through the 21 pages of that important document issued by the European Commission, football is singled out and mentioned on 8 different occasions, in contrast to other sports, which are in no occasion individualized.

This reasoning of the European Commission follows another very important document, the Arnaut Report⁹, which despite dealing with sport in general, elected football as a case study, and in doing so resorted to arguments which were later included in the Olivier Bernard Judgment:

1.18 Due to the economic importance of football there is more potential (and there have been more examples) for rules and practices in football to be examined under European Community law. As confirmed in the Terms of Reference for the Review, football is arguably the only truly global game and its influence cuts across economic, political, social and cultural spheres. Perhaps more than any other sport, football is often seen as “big business”, even though this does not accurately reflect the wider role that it plays in the community. It

is necessary to reconcile this business side of football with its specific sporting nature in order to achieve the correct overall balance.

There is, in fact, no way of avoiding reality: - there is something different about football, a unique social relevance which justifies calling it “The King of Sports”. Such relevance must be taken into account, when in face of a rule or conduct prohibited by EU law - namely an infringement of the fundamental liberties or an infringement of the competition law - one has to decide whether there are any justifying causes which, ultimately, lead to the conclusion that the rule or conduct at issue complies with EU Law.

Therefore, there are reasons not to dwell on the recurrent discussion over the characteristics which set this sport apart from other sports - this discussion has prompted the basis for arguing that a specificity of sport exists - and go even further and acknowledge the specificities of a certain sporting activity in particular - football - which set it apart or separate it from sport in general. We are, therefore, before a new concept: the specificity of football¹⁰.



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Perhaps this also helps explain why the ECJ emphasized the Nice Declaration in detriment of the TFEU: in fact, while the latter mentions the specificity of sport - sport as a whole, as a reality with characteristics and values shared by all sports - the former allows for mentioning the specificity of a particular sport, in case football. In fact, football was the only sport specifically mentioned in that declaration, thus indicating the recognition of its higher relevance. Let us look at the paragraph at issue¹¹.

The European Council is keenly supportive of dialogue on the transfer system between the sports movement, in particular the football authorities, organizations representing professional sportsmen and -women, the Community and the Member States, with due regard for the specific requirements of sport, subject to compliance with Community law.

Besides, we believe it is possible to perform an even finer tuning of what is specific in the context of football. We believe that perhaps there is also leeway in arguing that professional football has specific characteristics which set it apart from football as a whole, i.e. there are reasons to defend the existence of something even more specific: a specificity of professional football.

That is indeed the view of the European Parliament, which not only passed a specific resolution on professional football¹², but also, in that same act, even if only once, specifically mentioned the specificity of professional football:

F. whereas it is thus the responsibility of the national and European political and sports authorities to ensure that, when Community law is applied to professional football, it does not compromise its social and cultural purposes, by developing an appropriate legal framework, which fully respects the fundamental

principles of specificity of professional football, autonomy of its bodies and subsidiarity.

The European Commission also seems to share that view, having created a specific platform for Professional football within the scope of social dialogue: the European Sectoral *Social Dialogue Committee for professional football*, launched on 1st July 2008.

EPFL's increasing relevance within the European and world football governing institutions also showcases the importance and specificity of professional football as such.

4. Call for the defense and application of the specificity of (professional) football; Actual consequences regarding the interpretation of Article 17 (1) of FIFA Regulations on the Status and Transfer of players.

In light of what has been said, and when applying EU law to (professional) football we call upon the judge to take into account its specificity.

We would also like to make another call, one aimed at the football authorities: there is still a long way to go in defining concepts such as specificity of sport, specificity of football or specificity of professional football. If football authorities fail to continue to tread that path, they will inadvertently contribute to what they criticize in those who do not recognize its specificity: juridical uncertainty and insecurity.

To be more specific, let us invoke the Webster¹³ and Matuzalém¹⁴ Judgments both by the *Court of Arbitration for Sport*, in Lausanne. Both judgments failed in contributing to a further deepening of the concept of specificity of sport but also, in our view, the contradictory judgments have shown beyond any doubt that there is still a wide margin for discretionarily in the interpretation of that concept¹⁵, which has been specifically laid down in Article 17 (1) of the FIFA Regulations on the Status and Transfer of players

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titled Consequences of terminating a contract without just cause. Thus the discrepancies in the legal analysis¹⁶.

However, it will be of no avail to qualify the specificity of sport as an objective criterion if, in practice, the margin for discretionarity is very wide.

Except for a better opinion, we should not leave everything within the powers of the courts (or the administrative authorities, of the EU and its Member States). In what falls within their powers, namely the elaboration of regulations, football authorities should be the first in contributing towards clarification. That will certainly strengthen the legitimacy of their claims with the institutions of the European Union.

1 - Judgment of 16 March 2010 in case C-325/08, *Olympic Lyonnais, SASP v. Olivier Bernard and Newcastle United FC*, not yet published.

2 - Cf. “Sport in the Reform Treaty”, *Newsletter EPFL* No. 4, Season 2006/07, August 07/December 07, pp. 19-20.

3 - It should be remembered that the judgment at issue was the first held by the Court after the entering into force of the TFEU, meaning that ECJ finally, had the opportunity to, in accordance with a disposition of the and not just based on soft law, case law, administrative decisions, doctrine and e jurisprudence - decide when and how to apply EU law to sport.

4 - § 42

5 - Cf. *Judgment* of the Court of First Instance of 26 January 2005, *Laurent Piau v Commission of the European Communities*, n Case T-193/02., ECR 2005, p. II-209, § 105.

6 - Cf. *Annex IV* of the Presidency Conclusions for the Nice European Council, December 2000. A few months earlier the European Council of Santa Maria da Feira, held on 19 and 20 June, had made the following reference to the expression in question in point 50 of the conclusions, dedicated to sport: *The European Council requests the Commission and the Council to take account of the specific characteristics of sport in Europe and its social function in managing common policies.*”

7 - Opinion delivered on 16 July 2009, not yet published.

8 - Brussels, 11.07.2007, COM (2007) 391 final.

9 - Cf. José Luis ARNAUT, *Independent European Sport Review 2006*. The full report is available at http://www.independentfootballreview.com/doc/Full_Report_EN.pdf

10 - We believe it not to be too farfetched to argue for a specificity of each sport per se. In support of this understanding is the fact that the Commission believes that *each sport has its specificities and deserves to be treated differently according to these.* (Cf. Commission Staff Working Document *The EU and Sport: Background and context* Accompanying document to the White Paper on Sport, 2007, p. 43) or the argument of Advocate General Cosmas, in *Case Deliège: On that premise, I shall now address an issue which, in my opinion, is crucial to a precise definition of the economic dimension of a sporting activity. I shall no longer be examining the individual conduct and subjective intentions of sportsmen, but the sporting event itself, viewed objectively, that is to say the specific characteristics of sporting competition. Indeed sportsmen can only be assessed by reference to the competitions they enter, their individual performances being largely meaningless unless combined with success in particular competitions in which they pit themselves against their rivals. The question therefore arises whether sporting activities - in the present case, international Category A judo tournaments - exhibit an economic interest. If the significance of the sports event does not relate purely to sport, in the sense that it does not merely represent confrontation and reward for being the best, but also exhibits an intrinsic economic interest, then the economic dimension of the sporting event is clearly such that the event in itself constitutes an economic activity within the meaning of Article 2 of the Treaty.* [Opinion delivered on 18 March 1999, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, in joint cases C- 51/96 and C-191/97, ECR [2000], p. I - 2549, § 54, *Emphasis added*]. In the same way and on the issue of illegal bets, a recent study argues that specific rules of each sport should also take into consideration specific challenges that might be of special relevance in their specific sport [Cf. *Examination of threats to the integrity of sports*, Oxford Research A/S, April 2010, p. 25]. In our opinion, the specificity of each sport also lies in the characteristics and values associated to that sport - this issue has been studied by the International Olympic Committee at the

time of the requests for the inclusion of new sports in the programme of the Olympic Games - or also in the degree of the economic aspect of each sport, based on which, for example, there will not be an equal distribution of television revenues among the 28 Olympic Sports Federations which will integrate the Programme of the Summer Olympic Games in London 2012 [Cf. “Sports federations to review \$375 m TV revenue share”, <http://www.guardian.co.uk/football/feedarticle/9049588>]. Obviously, what we have just argued, as well as our conviction that there is a “specificity of sport” is not incompatible with another, rather more peaceful understanding that: there is a common denominator to all sports, based on which the concept of specificity of sport has been built. And it is that common denominator which justifies common positions on the TFEU, of which we would like to point out the *Common position of the Olympic and Sports Movement on the implementation of the new Treaty of the Functioning of the European Union (TFEU) on sport (Lisbon Treaty)*, January 2010, or even the institutionalization of platforms for the defense of common interests, shared by several sports such as the European Team Sports (ETS), which aggregates basketball (FIBA Europe), handball (EHF), ice hockey (IIHF), volleyball (CEV) and football (UEFA).

11 - It is worth mentioning ETS’ s testimony based on the Bosman Judgment, that the judgments of the Court, on football issues may, due to a snowball effect, have implications to other collective sports, and that is why that entity has been calling for a full recognition of the specificity of sport by all the European Institutions [Cf. *Création de l’Association des sports d’équipe européens. Les sports d’équipe unissent leurs forces*, uefadirect No. 95, 3.10, pp. 10-11, Cf. also “Safeguarding the heritage and future of team sport in Europe, July 2008”, ETS, July 2008, p. 10.

11 - Pont 16 [Transfers].

12 - European Parliament resolution of 29 March 2007 on the future of professional football in Europe (2006/2130 (INI)), OJEU C 27 E of 31 January 2008, pp. 232-240.

13 - Arbitral award of the Court of Arbitration for Sport of 30 January 2008, CAS 2007/A/1298,1299 & 1230 - *Heart of Midlothian v Webster & Wigan Athletic FC*.

14 - Arbitral award of the Court of Arbitration for Sport of 19 May 2009, CAS 2008/A/1519 - *FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA & CAS 2008/A/1520 - Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA*.

15 - Cf. Webster award, § 132: [t]he specificity of sport is a reference to the goal of finding particular solutions for the football world which enable those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players on the other hand; Cf. also Matuzalem award, § 155: [...] the judging body shall therefore assess the amount of compensation payable by a party under art. 17 para. 1 of the FIFA Regulations keeping duly in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body shall aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case. [...] professional football is a special sector [...]

16 - In all cases, the party in breach shall pay compensation. Subject to the provisions of Art. 20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria.