

The Rise of the Regulatory State in Sport

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ABSTRACT

The last two decades have witnessed the rise of the paradigm of the regulatory state in political science. Despite a growing body of research dedicated to regulatory dynamics and convergence, the dynamics of governance regimes and their transformation has not been exhaustively examined. Hardly noticed from political science the regulatory state has also got ahead in the field of sport. Regulatory interventions have increasingly replaced traditional mechanisms and arrangements for self-regulation despite state and sectoral actors were united in their belief in the advantages of the self-regulatory governance regime. It will be argued that much can be learned from this change of regulatory regimes in sport for the more general debate on regulation. At first, the erosion of the traditional self-regulatory arrangements in sport is intriguing for the reasoning about the requisites of successful sectoral self-regulation. It will be shown that despite prevalent romanticism among sport politicians the traditional governance structures in sport were not able to cope effectively and fair with important regulatory problems, above all the detrimental effects of the commercialisation of the sport sector. The main reason seems to be that the self-regulatory institutions faced rival interests. Second, the regulation of sport can serve as an informative case about the relationship between self-regulation and the regulatory state. Despite the recent debate on governance and the use of context-sensitive policy instruments –, like self-regulation – the indifference of the European regulatory state vis-à-vis the so-called peculiarities of sport has served to accelerate the erosion of the established self-regulation in sport. Regardless of the efforts of – mainly: national – sport politicians to defend and to restore the capacity for self-regulation, the rise of the European regulatory state in sport advanced and came along with the “disembedding” of sport. Due to intergovernmental resistance to negative integration in sport, a distinctive European regulatory state in sport has emerged – shaped by the co-existence of rival agendas for sport regulation.

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INTRODUCTION: THE SIGNIFICANCE OF SPORT FOR THE DEBATE ON THE REGULATORY STATE

One of the themes most prominent in current comparative politics is the rise of the regulatory state. This debate is about the increased reliance of public policy-making on regulation, as a distinctive form for publicly supervising and monitoring market processes. The regulatory state is a state that employs regulations at the expense of other modes of governance such as redistribution, public ownership, directly provided services and intervention (Hood et al., 1999: 3). Hence, the regulatory state is often assumed to be a neo-liberal state – replacing the old ‘positive state’ – so that its goals are much narrower. These goals consist in improving the efficiency of the economy, promoting competition and consumer protection (Majone, 1997).

Yet there exist another interpretation of the regulatory state. The regulatory state is also supposed to be a ‘smart’ state. The images of ‘smart’ or ‘responsive’ regulation appear as part of a wider trend toward some kind of smart and modern ‘governance’, i.e., a state that – to employ a worn-out metaphor – prefers steering to rowing, which it does by employing markets and society to reach its targets and relying on a mixture of cultural change, institutional innovation and strategic selection of enforcement instruments, among which the most prominent is ‘enforced self-regulation’ (Levi-Faur & Gilad, 2004; Jordana & Levi-Faur, 2004).

Actually, comparative research has shown that the regulatory state is by far not a consistent concept (Moran, 2002). In a recent work on the British regulatory state, Michael Moran (2003) has contested the notion of a smart regulatory state and has argued that at least the British regulatory state appears to have its own teleology which consists in the transformation of the tacit knowledge of insiders into public knowledge available to all. According to Moran (2003) this rise of a distinctive British regulatory state is result of the destruction of an anachronistic system of ‘club governance’ based on informal agreements of elites. Due to this legacy, the regulatory state could be a colonising state with its own utopian projects, described by Moran as ‘hyper-innovation’. According to this interpretation, key features of the new regulatory state are ‘its persistent interventionism, its drive to ever more systematic surveillance, its colonization of new regulatory spheres’ (Moran, 2003: 6).

To prove the claim of the existence of a hyper-innovatory agenda of the regulatory state, it is not sufficient to focus on the already well-researched issue of public utilities or risk regulation, rather the argument requires the examination of policy domains traditionally treated as autonomous spheres of society characterised by self-regulatory governance. Moran scrutinises, among others, the rise of the regulatory state in British sport because, as he correctly notes, the rise of regulation in that sector concerns a ‘fundamental alteration in the relationship between civil society and state power’ (Moran, 2003: 70). It is one of the common clichés associated with sport that ‘sport and politics should not mix’ (Houlihan, 1991: 5). The sport bodies themselves traditionally claimed superiority for their rules and regulation over national law regulation. They stressed that sport belonged to the autonomous sphere of civic society. Because of the supranational character of sporting rules, international sport associations also claimed that their rules represented an international law *sui generis* (Vieweg, 2000).

Moran’s (2003) empirical case is primarily based on an account of the relationship between the UK government and the Great Britain Sports Council. Moran is able to show that the funding of elite sports has been increasingly made dependent on objective performance measurement of sporting success and that the Labour government has pursued an agenda of social engineering in sport attempting to use sport to help achieve wider purposes in social

policy. Unfortunately, Moran has not extended his research focus to other areas of sport policy. In particular the case of the English football industry, vis-à-vis Labour has pursued a highly ambitious agenda – resulting in the set-up of a semi-independent football regulator –, would have proved his claim of a ‘hyper-innovatory’ tendency of the British regulatory state much better (Meier, 2005b).

What makes sport an interesting case for the debate on regulation is not only the question of ‘hyper-innovation’ but the fact that the rise of regulation in sport has come to the expense of a long-established system of self-regulatory governance despite sport politicians and sectoral actors were united in their belief in the advantages of that governance regime. The replacement of sectoral self-regulation has been blamed to jeopardize the provision of services that are in the public interest.

Without any doubt, the traditional self-regulatory governance of European sport has been subject to enormous pressure triggered by commodification and re-regulation. At first glance, the rise of regulation in sport seems to be a quite simple tale about commercialisation and subsequent re-regulation of a sector which self-regulatory regime did not fit to the shifted environmental parameters. In that sense, sport regulation adds just another piece of evidence to the ‘freer markets, more rules’-paradigm (Vogel, 1996). Accordingly, a number of students of sport law have applied just that re-regulation paradigm for the analysis of the dynamics of the sectoral regulatory regime. Regulatory change is then perceived as a response to the commodification of sport (Caiger & Gardiner, 2000; Greenfield & Osborn, 2001; Parrish, 2003a). It is hardly to deny that this theoretical frame has its point but by relying on macro-factors, we will only be able to explain why regulatory adjustments in European sport were inevitable, but we can hardly predict what shape the emergent regulatory regime will assume. Moreover, from the viewpoint of sectoral actors, sport re-regulation poses a serious challenge to the ‘smartness’ of the regulatory state because of the cultural significance of sport, its role in civic allegiances and social cohesion. What is at stake in the change of the sectoral regulatory regime is the ‘public’ character of sport. The hybrid character of sport as an entertainment industry and some kind of cultural and social institution requires a ‘smart’ regulatory response in order to balance economic matters and broader public interests. Otherwise, commercialisation and globalisation of media industries will inevitably result in the ‘disembedding’ of sport from its traditional context of meaning and production and in a re-embedding into a mere consumer capitalist cultural logic – as some sport sociologists assume (Hall & Hodges, 1998).

The paper addresses the following questions:

1. Why has the incumbent self-regulatory regime been replaced by state regulation?
2. Why has the European regulatory state failed to give a smart response to the commodification of sport and the threat of the ‘disembedding’ of the sector?
3. Is there something as distinctive European regulatory state in sport?

According to the argument developed in this article the rise of the regulatory state in sport has indeed been driven by commercialisation as ‘macro-structural process’ but the rise of regulation is also result of failures of sectoral self-regulatory governance. Furthermore, the rise of the European regulatory state in sport had to take place within a unique institutional framework – a multi-level policy-making system. Within that polity there exist two rival agendas for sport regulation. This co-existence has not resulted in a ‘smart’ but rather in a hybrid governance regime. The early indifference of the European regulatory state vis-à-vis the so-called peculiarities of sport has actually served to accelerate the erosion of the established self-regulation in sport. The distinctive features of the emerging European regulatory state in sport are the result of a complex interaction by certain institutional features of the European polity and of the traditional governance structure of the European model of sport. The refinement of the regulatory regime has reinforced historical legacies, and functional pressure – as highlighted by the ‘more market, more rules’-paradigm – has been

mediated by cultural and institutional factors (Thatcher & Stone Sweet, 2002).

The paper proceeds as follows. At first, the hybrid character of sport as part of the entertainment industry and as a cultural and community institution will be sketched out. At second, an account of main features of the traditional governance system of the sport sector that has primarily relied on self-regulation will be given. The empirical part of this paper consists of an analytic narrative about European sport regulation. This narrative is based on the assumption that in order to understand the dynamics of governance regimes multi-tier analyses have to be conducted. The particular properties of a regulatory regime can only be 'explained' by employing a 'pattern model of explanation' relying on macro- and micro-factors (Braithwaite & Drahos, 2000) to construct relevant, verifiable causal stories resting on differing chains of cause-effect relations (George & McKeown, 1985; Tilly, 1997). After a discussion of the results, the paper attempts to make some informed guesses about the stability of the emerged regulatory regime.

SPORT AS A HYBRID INDUSTRY

Whereas sport in the United States is primarily perceived as an entertainment industry, the European stance to sport regulation remarkably differs from a pure market approach – despite European elite sport is in fact an entertainment business, too. The political stakeholders of European sport ascribe important political, cultural and community functions to sport. Thus, sport is regarded as some hybrid industry.

Sport as a policy instrument and a community institution

According to European sport politicians sport can contribute to public health, social cohesion and identity formation as well as to social integration. The political stakeholders perceive sport as a means to keep the work force fit and to reduce expenditures for public health. This consideration has become of growing importance since the industrialised countries face an aging population. Thus, even elite sport is expected to contribute to public health by animating the audience to engage in sporting activities of its own. From this viewpoint, increased doping in professional sport does not only cause harm to professional athletes but also to the public by giving amateur athletes a bad example since people are assumed look up to athletes and view them as role models (Winkler & Karhausen, 1985; Houlihan, 1991; CEC, 1998b; Federal Government, 2002).

Of great importance for a socio-cultural agenda to sport regulation is the fact that sport is perceived as one of the most potent of human activities in its capacity to give meaning to life, to create and interconnect senses of achievement and identity (Allison, 1993: 4). Sport in general and football as the most popular European sport in particular have been regarded as a catalyst of social cohesion and integration, as well as of social separations and demarcations (Mangan, 1996; Giulianotti, 1999; Markovits & Hellerman, 2001). Sport clubs are perceived as focal points for civic allegiance and, accordingly, voluntary service in or for grassroots clubs is considered as forming an important element of a vital civic culture or some kind of 'social wealth' (Baur & Braun, 2003; Jütting et al., 2003).

The role sport can play for collective identity construction has long been recognised by politicians: 'Sport is a latently political issue in any society, since the cultural themes which inhere in a sport culture are potentially ideological in a political sense.' (Hoberman, 1984: 20) Sport has always been employed as a means of symbolising the national community (Washington & Karen, 2001). Even telecasted sport events are thought to advance social cohesion and integration because such events create the experience of belonging which become increasingly rare in pluralistic societies (Boardman & Hargreaves-Heap, 1999). The political stakeholders in sport consider team sports such as football also as a pedagogic means of 'character building' and social integration because participation in team sports teaches

young athletes central social values such as subordination, team spirit, co-operation and discipline (Mangan, 1996). By doing so, sport should also serve to channel the disruptive activities of adolescents (Houlihan, 1991).

Sport as (peculiar) entertainment business

Because of its attractiveness to a broader audience, sport even in Europe has not remained a community institution but turned into a highly attractive entertainment business. Actually, elite sport and broadcasting enjoy a 'symbiotic relationship' (Hoehn & Lancefield, 2003). Sport entertainment is crucial for media companies and can serve as a 'battering ram' when it comes to opening up or to entering new media markets (Spink & Morris, 2000). Because the uncertainty over the outcome and therefore the actuality of sport events are crucial for their consumption, exclusive live exploitation of sport events generates the biggest revenues (Gaustad, 2000; Solberg, 2002). *The role of sport entertainment as one of the most important upstream markets for media industries made a re-regulation of sport almost inevitable, but professional sport has always been a highly regulated industry because it is a peculiar business in consumption as well as in production* (Franck, 1995; Scully, 1995; Szymanski & Kuypers, 1999).

Regarding the costumer side, it is essential to note that the consumption of team sports like football shaped by long-enduring affections possesses a distinctive emotional dimension. As a report produced by a financial analyst has noted, the demand for professional team sport is often highly inelastic (Salomon Brothers, 1997). That puts teams in the position of a local monopoly and makes fans vulnerable to monopolistic exploitation (Hamil, 1999).

Yet, the primary reason why sport has always been a highly regulated industry are the peculiarities in the production of sport entertainment. Sport is unique in that competitors are needed in order to prosper; the teams in a league are mutual interdependent. It is a core belief in the sport industry that the attractiveness of a sport league depends heavily on its competitive balance and that therefore some special regulations are necessary in order to secure uncertainty of match outcome (Szymanski, 2003). The most important instruments employed are the sharing of gate revenues and the collective selling of broadcasting rights and subsequent revenue distribution. The sport bodies used to present collective selling arrangements as a necessary precondition for internal distribution arrangement – despite the two matters can be clearly distinguished and creating such cartels is highly problematic for downstream markets, i.e. the media industry, because collective selling systems turn the leagues into supply monopolies which can then restrict their output and determine prices in order to exploit consumers (Parlasca & Szymanski, 2002). Therefore, foreclosure of broadcasting markets through exclusive, long-term contracts, bundling and vertical integration are the most significant anti-trust issues in sport broadcasting (Hoehn & Lancefield, 2003).

Sport leagues also usually impose some restrictions on player mobility. Such regulations are once again considered to be necessary due to the peculiarities of the production of team sport. Restrictions in player mobility should prevent teams with strong draws from buying up all the top players and in doing so damaging competitive balance. This claim is highly controversial since restrictions on player mobility create a demand cartel of the clubs allowing for redistribution of revenues from players to clubs (Scully, 1995). Besides the concern over competitive balance, restrictions on player mobility are considered to be necessary because professional team sport is a risky business. The income of the teams is lumpy and periodic – depending on sporting success – whereas expenditures, most notably for players as a scarce and expensive resource, is largely consistent and regular. The dependence on sporting success tempts the clubs to engage in socially inefficient hyper-investments in playing talent which decrease the total revenues of the league (Rosen & Sanderson, 2001).

THE EUROPEAN MODEL OF SPORT GOVERNANCE: MERITS AND TENSIONS

As has been already noted, in sport exists a long-established self-regulatory governance structure. When the European Commission (CEC) started to develop its own approach in the field of sport, it condensed the distinctive features of that governance regime into the image of a 'European model of sport' contrasting it sharply with the US model where professional sport is a pure commercial branch of entertainment business (CEC, 1998b).

The European model of sport governance is not primarily an outflow of considerations about the advantages of self-regulation over state regulation but rather the European sport model is the result of an attempt to unify sport regulations as well as of the opposition of middle-class gentlemen amateurs to professionalism. The amateurs viewed the professional game only as an apex of a much larger and deeper movement stretching into local communities and grassroots football. Insofar as the founders of the sport organisation rejected professionalism as a threat to sport's ethics and attempted to diminish the influence of commercial interests on sport, it can be said that the self-regulatory regime in European sport has been originally founded to preserve the social and cultural functions of sport and to domesticate the forces of commerce.

As one of the defining features of the European model of sport, the CEC identified its grassroots linkage. Local amateur clubs form the foundation of European sport, offering everyone the possibility of engaging in sport. As a result, sport is mainly run by non-professionals and unpaid volunteers. This strong connection of European sport to the amateur level is guaranteed by the structure of European sport which resembles a pyramid with a hierarchy – ranging from the local clubs to regional and national bodies to international federations. Every federation claims a regional monopoly for organising a championship or other sporting competitions and for coordinating and regulating sport at that level. Traditionally, legislative, executive and judicial jurisdiction over sport were entirely in the hands of sport federations. That monopolistic structure created the sport bodies a considerable power base and enabled them to link the professional game with the amateur level by, among other things, channelling revenues to the amateurs. The professional sport leagues were hindered from organising themselves as closed, profit-oriented businesses like in the US. Quite in contrast, European leagues were 'open' – relegation and promotion between amateur and professional sport were standard features of national team sport championships. The sport bodies also regulate the recruiting policy of professional clubs in order to secure the connection between professionals and amateurs (CEC, 1998b).

The institutionalised dominance of amateurism and the embedding of professional sport into an amateur structure have become part of the regulatory ideology of the policy domain. Obviously, the traditional self-regulatory regime in sport had left a lasting imprint on the preferences of political actors regarding the appropriate model of sport regulation (Parrish, 2003b; Meier, 2005a). *For the trajectory of European sport regulation it is essential to understand the European model of sport as some kind of 'institutionalised organization' – perceived as an embodiment of a certain normative vision of sport.* The institutionalised dominance of the amateurs created and legitimated a normative order and made the sport bodies in some way a 'hostage of their own history' (Selznick, 1992: 232) by leaving a lasting imprint on the normative expectations of political stakeholders. Insofar as the amateur legacy has succeeded in shaping the European regulatory state in sport, sport regulation makes a good case for theorizing on the path-dependence of regulation (on this: Thelen, 1999).

Seen from the perspective of the regulation debate, the *sport associations were classic private interest governments* in the sense of Streeck and Schmitter (1985; see also: Ronit, 2001). They had a monopoly in the organization of a given interest category, an avoidance of an unacceptable degree of free riding, a capacity to achieve compliance among members and a capacity to sanction violations of these rules: The sport bodies had their own judicial

procedures and could exclude teams and players from competitions.

As Ogus (1992) has argued, the traditional public interest justification for self-regulation is that self-regulation can normally command a higher degree of expertise and technical knowledge so that information, monitoring and enforcement costs are being reduced. Costs for regulation will be further reduced by basing the interactions between regulators and practitioners on trust and by making rule amendments less formalized. Eventually, the costs for running self-regulation are normally internalised by the activity which is subject to self-regulation. Further advantages of self-regulation are speed, flexibility and greater sensitivity to sector-specific circumstances. But it is essential that effective self-regulation has to rely either on a strong natural coincidence between the public and private interest or the existence of one or more external pressures sufficient to create such a coincidence (Gunningham & Rees, 1997: 390).

Seen from these requirements, it becomes clear that the traditional European model of sport governance was far from being perfect. This is mainly due to *rival incentives for the sport organisations, low governance capabilities and the character of self-regulation as a 'stand alone' mechanism*. Despite its merits, the existing self-regulatory governance represented a hybrid solution. The European model of sport was characterised by inherent tensions ready to break apart in case of significant shifts in the environment of sport.

At first, *the sport bodies face rival incentives* because they have 'multiple selves' – as promoters of their sports and as guardian of a classic amateur ethos. As promoters of their sports they act as fund raisers and always try to maximize revenue streams. In order to raise money and to channel it to the amateur level, the sport bodies were tempted to invite commercialism by themselves. This temptation to outsell parts of the old amateur ethos only grew when the ability to raise money became a major power resource in internal turf wars within the sport bodies (Sugden & Tomlinson, 1998, 2003). It must also be noted that within the European model of sport existed serious conflicts over revenue distribution. First of all, for professional sport a connection with the amateur level is not *per se* desirable – especially when the amateurs are supposed to participate in revenues mainly generated by the professionals. Redistribution of revenues to the amateur level as well as the considerable economic risks resulting from relegation (Szymanski & Zimbalist, 2005) could be avoided if professional leagues broke away from the sport bodies¹ – like some sport economists have already predicted (Franck, 1995). But even among the professional clubs exist serious conflicts over revenue distribution. Additionally, the European model of governance favoured the exploitation of athletes. The sport bodies sided with leagues and clubs and supported labour market restrictions for professional athletes, the infamous transfer system² to keep the revenues 'within' sport. As presenters of national teams' competitions, the sport bodies also were interested in restrictions on player mobility in order to secure strong national teams (Flory, 1997; Blanpain & Inston, 1996; cf. below).

Due to their massive commercial interest as organizers and presenters of competitions, the sport associations face also a credibility problem when it comes to their efforts to fight doping. It has been argued that as organizers the sport bodies could have not a substantial interest in detecting doping because scandals are likely to alienate audience and sponsors (Eber, 2002). In fact, it is undeniable that in some sports (cycling, weightlifting) doping has for a long time been not simply an act of individual cheating but an institutional activity

¹ Whereas the US American leagues are profitable businesses, European football clubs struggle to break even (Szymanski & Zimbalist, 2005).

² Under the old transfer system players were unable to move freely between clubs even after their contracts had expired. The transfer system was enforced world-wide by the football authorities because a club was only permitted to field a player in an official match once it has secured the player's registration. This was dependent on the approval of the former employer who could claim the payment of a transfer fee (for details: McArdle, 2000; Greenfield & Osborn, 2001; Oberthür, 2002).

tolerated by these sports' organizations (Stokvis, 2003). But even the IOC had long a poor record in anti-doping policy. It needed highly visible scandals during the Tour de France and the Olympics in 1998 to provoke an 'occasional burst of activity' by the IOC (Houlihan, 2004).

Besides an ambiguous stance toward doping, the sport bodies were long not able to guarantee the enforcement of anti-doping provisions. Thus, the case of doping makes another problem of traditional sport governance evident. Despite claiming the sole responsibility for sport matters, some sport associations lacked the capabilities to regulate sport effectively. This has been most impressively demonstrated for the case of English football, where the rival football authorities, the Football League and the Football Association, failed to build-up regulatory capacity to deal with a high-wage player economy and refused to address the problems of stadium safety and rising hooliganism. This negligence resulted in crowd disasters killing several hundred people (Johnes, 2004).

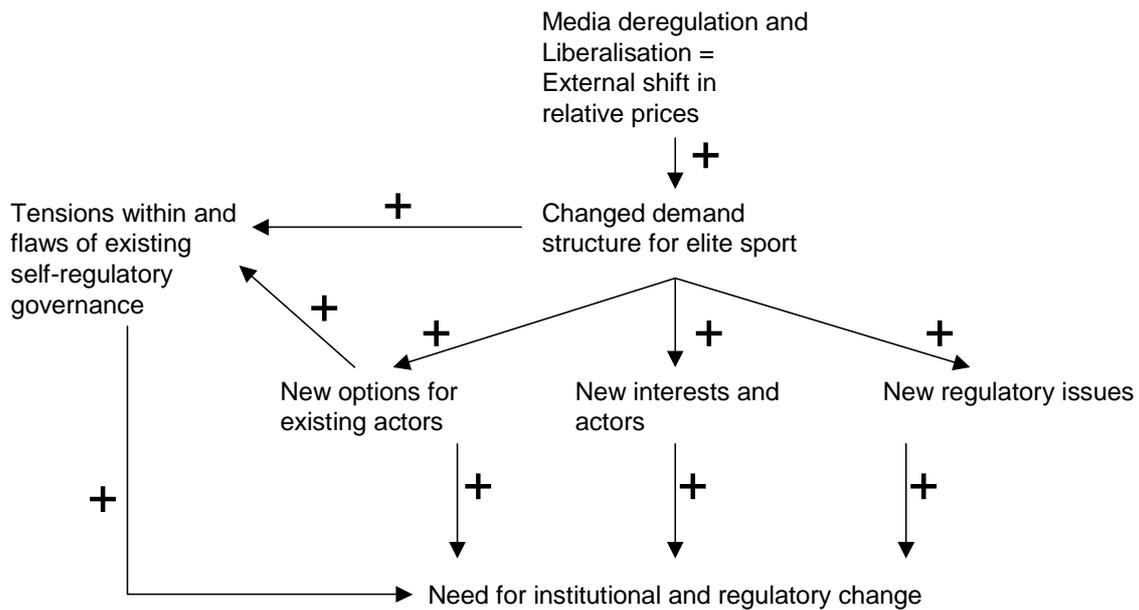
Eventually, the advocates of the European model of sport seem to have exaggerated the democratic nature and accountability of the sport bodies. Quite in contrast, self-regulation in sport resembled features of Moran's (2003) model of 'club government' – hardly accountable to the public or to the athletes. International sport bodies like the International Olympic Committee (IOC) and the World Football Association (FIFA) have a long reputation to be ruled by an autocratic elite serving its own needs and employing Machiavellian tactics to resume office (Sugden & Tomlinson, 1998, 2003; Simson & Jennings, 1992; Jennings, 1996). Moreover, this elite was not eager to share its power with athletes: 'Sport policy is generally made for, or on behalf of, athletes, rarely in consultation with athletes, and almost never in partnership with athletes.' (Houlihan, 2004: 421-2). Whereas the athletes are highly dependent on the sport bodies due to the sport bodies' monopoly in organizing competitions and the short span of an athlete's career, the athletes were traditionally not compensated for their marginality in sport's policy processes by an effective protection of the law. In European countries committed to a non-interventionist sport policy, the courts usually hesitated to intervene into matters 'internal' to sport (Houlihan, 2004).

In sum, self-regulation in sport has been a 'stand-alone mechanism' favouring some flaws. It was not part of a responsive regulation, i.e. there was no underpinning of state intervention sufficient to ensure that self-regulation did operate in the public interest. The problem of rival incentives was only made worse by the fact that the sport bodies had a considerable monopoly power at their command.

RIVAL AGENDAS OF SPORT (RE-)REGULATION

The commercialisation and commodification of sport is mainly a result of changes in the media industry, i.e. the liberalisation of European TV markets and the advent of new transmission technologies such as cable and satellite television that eased spectrum scarcity. With that, broadcasting markets have moved from situations of content competing for scarce distribution outlets, to distributors competing for scarce contents (Cowie & Williams, 1997). That rise in demand for sport broadcasting constituted a shift in external prices that inevitably raised some new regulatory issues (Parrish, 2003b; Hoehn & Lancefield, 2003) and created a need for institutional change (cf. fig. 1).

Figure 1: Need for institutional and regulatory change in sport



From an anti-trust perspective, the primary regulatory issue that newly emerged consisted in determining how the increased market power of the sport bodies should be regulated. Regarding the traditional monopoly status of sport bodies as organizers of competition it had to be clarified who would be in future in control of competitions and whether new commercial competition organizers outside the structures of the European sport model would be approved (Meier, 2004b). The shift in relative prices created new actors in the sport industry – commercial interests striving to take over elite sport – and changed the scope of options for existing actors – clubs and athletes facing new commercial possibilities. Existing tensions within the European model of sport were strengthened. The increasing conflicts over revenue distribution were likely to erode the dominant positions of the sport bodies, because – given the complex governance structure of the European sport model (comprising sport bodies, leagues, clubs and athletes) – struggles over property rights in sport competitions became probable. Eventually, the commercialisation of sport made the problem of doping worse since professional athletes had now more to gain from winning competitions by cheating (Haugen, 2004).

In order to understand the emergence of a distinctive European regulatory state in sport it is essential to note that as a result of the hybrid character of sport, there exist two rival agendas for sport regulation. As has been already worked out by Richard Parrish (Parrish, 2003a, 2003b), the case of European regulation of sport is very indicative of the tensions between these approaches. Borrowing the fruitful notion from Parrish the first approach can be labelled ‘socio-cultural’ whereas the second will be called the ‘market approach to sport regulation’.

The socio-cultural approach

For a socio-cultural approach of sport re-regulation the main rationale is to preserve the cultural significance of sport and special features of the European governance model. Given the temptations commercialisation poses to the sport elite it seems necessary to preserve the democratic structure of sport bodies, to prevent professional sport from breaking-off from the sport bodies and to turn into a mere entertainment industry. Regarding the ‘multiple selves’ of the sport bodies, a socio-cultural approach to sport regulation requires the associations to define their commitment to the broader public interests in a more explicit and auditable

manner. Given the assumption of social network externalities from watching sport broadcasting (Boardman & Hargreaves-Heap, 1999) and the risk of a siphoning of elite sport in pay TV, access of the broad public to major sport events is an essential concern for that approach (Hoehn & Lancefield, 2003).

On the European level, the famous Helsinki report of the CEC's Directorate-General Education and Culture (CEC, 1998b) fits well into the pattern of a socio-cultural approach for sport regulation (see below). On the national level, the 'Football Charter' of the then oppositional British Labour party can be considered as one of the most explicit and comprehensive agendas for socio-cultural re-regulation of sport (Labour Party, 1995). This agenda perceived football and its culture as an important part of the national heritage, 'not a device for squeezing money out of customers who face a monopoly' (Sutcliffe, 2000). Labour intended to devote commercialised football again to the public interest and community purposes. The football charter proposed, among others things, an investigation into more equitable pricing policies and announced the launching of a Football Task Force which was to investigate a restructuring of football governance, the links between football and TV, the treatment of fans, and football's finances. Labour also promised additional efforts to combat football violence and racist abuse. Furthermore, fans' views concerning the running of the game should be given a greater weight (Labour Party, 1995). Once in office, the Labour government continued to perceive football clubs as vital components of the community and tried to use football to achieve wider social purposes (Leeke, 2003).

The market approach to sport regulation

The rival regulatory agenda frames sport primarily as some kind of entertainment business. When such a frame is applied, the most important regulatory question consists in establishing *what regulations are necessary to maximise consumer welfare?* In sport, this question is hard to answer because almost all regulations of the sport bodies bear a resemblance to anti-trust issues: The organizer of a competition unavoidable determines and restricts 'market output' (matches, events) by defining the competition design; in addition, rules of eligibility restrict 'market access' (Hannamann, 2001). Furthermore, as has been already mentioned above, sport leagues claimed anti-trust exemption for the teams in the labour market for team sports and the downstream markets are necessary for the leagues in order to be viable. *Thus, the main question for a market focused regulation of sport is to determine whether and to what extent has (professional) sport to be granted exemptions from antitrust laws?*

Due to the controversial findings of sport economists (see above) these questions are difficult to answer and, as is evident from the US American experience of sport regulation, the answers can considerably differ. In the history of American sport regulation the courts applied anti-trust provisions in a variable manner.

In 1922, the Supreme Court established the infamous 'baseball exemption' freeing baseball from all anti-trust laws. This decision allowed professional Baseball to employ one of the most restrictive labour market regimes in professional sport and to monopolise broadcasting from baseball matches (*Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208 [1922]). It took the 'mother of all sport strikes' from 1994/95 to convince Congress to revise this exemption in 1998 with the 'Curt Flood Act' (15 U.S.C. § 27). American football, basketball and ice-hockey were somewhat less successful in convincing the courts from the uniqueness of professional league sport. Thus, in contrast to the European sport model the US American leagues were granted no monopoly for organizing sporting competitions. Particularly American Football has experienced the market entry of rival leagues (Quirk & Fort, 1992). The US courts also denied to treat the leagues as a 'single entity' incapable of violating anti-trust laws (*North American Soccer League v. National Football League* 670 F.2d 1249 [2nd Cir. 1982]). But the courts entitled the leagues to decide about their membership and the relocation of teams of

their own (*Levin and Lipton v. Knight*, 385 F. Supp. 149 [S.C.NY. 1974]; *National Basketball Association v. San Diego Clippers Basketball Club*, 815 F.2d 562 [9th Cir. 1987]).

After the advent of the Chicago School of 'law and economics' the courts were even more responsive toward the claims of the sport leagues and changed the application of antitrust laws in professional sport. The turn toward 'consumer welfare' as the rule of the day resulted in an extensive application of a 'rule of reason'-approach in the regulation of professional team sport. According to a 'rule of reason'-approach forms of horizontal arrangements do not violate anti-trust law if they provide offsetting consumer benefits and are plausibly the least anti-competitive means for obtaining those benefits. The courts were now more responsive to the leagues' claims that a special treatment of professional league sport was necessary in order to offer the customer an attractive product. Under the 'rule of reason'-approach, the Supreme Court seemed to be eager to accept collective selling arrangements (*National Collegiate Athletic Association v. Board of Regents* 468 U.S. 85 [1984]).

Given the restrictive labour market arrangements of the leagues, the US courts had no other choice then to disapprove of the labour market restrictions of the leagues. But in connection with statutory and non-statutory labour exemptions the 'rule of reason'-approach has been applied to labour market restrictions (*Mackey v. National Football League* 543 F.2d 606, 619 [8th Cir. 1976]). On the one hand, these decisions made professional players to 'free agents' capable to receive a greater share of the enormous monopoly rents of the leagues. The leagues were required to engage in collective bargaining agreements (CBAs) with the players' unions. On the other hand, the leagues could now legally control their labour costs (Berry et al., 1986; Staudohar, 1996; Quirk & Fort, 1999).

In case the courts refused to support the leagues in anti-trust proceedings, Congress was more than once willing to strengthen the market power of the leagues. The political economy of professional sport has been shaped by the lobby power of the incumbent leagues as ones of the most appealing entertainment industries. When collective selling of broadcasting rights was declared to be a violation of antitrust laws in the 1950s, Congress – after being heavily lobbied from the National Football League (NFL) – granted collective selling of broadcasting rights of league matches an anti-trust exemption (15 U.S.C.A. sec. 1291 [1988]). In 1966, Congress legitimised the merger of the NFL and its rival league, American Football League (15 U.S.C. § 1291 [1966]). Furthermore, Congress in 1976 provided the leagues cover in their arguments with cable broadcasters over revenue distribution and granted them exclusive copyright-protection in the broadcasting of their matches. In result, the leagues could extract considerable monopoly rents from cable broadcasters and were able to avert copyright claims of players (Garrett & Hochberg, 1996). Even in the issue of siphoning of sport broadcasting from free TV to pay TV, Congress failed to act against the leagues. After the FCC regulations prohibiting telecasts of certain sport events in cable TV had been repealed (*Home Box Office, Inc., et al. v. F.C.C.*, 567 F.2d 9 [D.C. Cir.], *cert. denied*, 434 U.S. 829 [1977]), Congress abstained from implementing regulation concerning siphoning of sport events in the Cable Broadcasting Act of 1984 (Cox, 1995). This enabled the cable broadcasters to extract more consumer rent and increased the TV revenues of the leagues once again (Zimbalist, 1992).³

To conclude: Whereas the socio-cultural approach of sport regulation has to combat commercialisation and dis-embedding, even sport as business requires a considerable level of regulatory efforts, whereas difficult anti-trust issues have to be resolved. In the US, there exist a number of statutory and non-statutory antitrust exemptions for professional league sport. These exemptions serve to ensure economic stability of the leagues. They enable the leagues to counter the power of players and to reduce salary inflation, they restrict new entries and

³ After a public debate on siphoning of sport events, Congress authorized FCC to investigate the issue. The FCC report found that sport broadcasting had increased in free and in pay TV so that there was no need of legislative action (van Glish, 1994).

help to maintain some level of competition amongst the league members by redistributing resources and they improve the leagues' bargaining position in the downstream markets. Whereas the leagues greatly benefit from these exemptions, it is highly controversial whether this kind of sport regulation actually maximise consumer welfare. It has been complained that the leagues are exploiting their fans and blackmailing the host cities for subsidies by threats of relocation (eg.: Rosentraub, 1997; Noll & Zimbalist, 1997; Quirk & Fort, 1999; Owen, 2003). While several bills have been introduced in Congress in order to restrict the discretion of the leagues about relocation (Amoroso, 1986; York, 1987), the leagues were always able to frustrate such efforts by employing their lobby power (Johnson, 1985).

THE RISE OF THE EUROPEAN REGULATORY STATE IN SPORT

In this chapter it will be shown how in the European Union a different approach of sport regulation has emerged. In order to keep the analysis manageable it seems to reasonable to distinguish between three 'phases' in the rise of the European regulatory state in sport. Given the hegemonic status of football in European sport, it should come as no surprise that European sport regulation has been driven forward by football issues.

First Phase: Regulatory spill-over, low sectoral responsiveness and intergovernmental resistance

European re-regulation of professional sport appears as an almost classic neo-functional tale of a regulatory spill-over of European Community law (EC law) and negative integration, i.e. the opening of markets, fostered by the institutional prerequisites of the supranational polity (Weatherill, 2003; Barani, 2005). The first spill-over of European Community law (EC law) was not set in motion by commercialisation but by a conflict of distinctive labour market regulations of European sport bodies and European market integration. The *selective stance of the supranational institutions* toward sport is a result of their lack of regulatory powers in that policy domain. It is conventional wisdom that the EU has a constitutional predisposition for market regulation (Majone, 1997, 1999). In combination with the lack of a treaty base for sport, sport came to the European agenda primarily as an economic activity with relevance to the internal market,⁴ i.e. as professional sport. For critics of European sport regulation, this lack of competence in the field of sport has resulted in a selective perception of regulatory issues and a bias toward negative integration that paid no attention to the structural link between professional and amateur sport. Sport bodies and sport politicians continuously complained that 'the EU has tended to regulate sport as business without acknowledging that it is also a socially and culturally significant game which has developed its own internal rule structure indispensable for its proper functioning' (Parrish & McArdle, 2004: 410). Given the peculiar sectoral regulations in sport with their controversial relationship to anti-trust matters, in particular the application of European competition law to sport formed a major threat to the existing governance structures. The selective perception of sport regulations by the European polity provoked actors who felt disadvantaged by regulations of the sport bodies to shift to the European venue and use *EC law as some 'mechanism of institutional arbitrage'*. Thus, the European integration in the sport domain has been driven forward by the spill-over effects of transnational involvement of private actors in supranational policymaking.

Secondly, it is essential to note that *the early spill-over of EC law into sport was only made possible by the distinctive labour market regulations of the European sport bodies*. These regulations were the result of the role – and the connected commercial interests – of the sport bodies as organizers of national team matches. The European sport bodies responsible

⁴ An exception is the doping issue where matters of public health are concerned.

for team sports restricted the employment of foreign nationals by clubs⁵ and the composition of national teams because they perceived such restrictions as necessary in order to guarantee the strength of the national teams. Moreover, the so-called ‘nationality clauses’ were also regarded as a necessary link between the professional game and the amateur level by securing the promotion of national talents to the top division. The nationality clauses got on the agenda of the European institutions when, in 1970, the Council Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers came into effect. The nationality restrictions were now contested by a Belgian football club which had ‘lost’ a match by fielding an excessive expatriate player. The club appealed the European Commission; the CEC scrutinized the opportunities to take legal action against the Belgian soccer associations (*Frankfurter Allgemeine Zeitung*, 8 December 1970). CEC considered discrimination on grounds of nationality to be a clear violation of the right of free movement, yet the Commission was unsure of its legal competencies. Until then the question of horizontal effects of internal market freedoms, i.e. the application of EC law to discriminations in purely private affairs, was still unsettled. Moreover, the CEC stated that the requirements for legal actions based on European competition law were not fulfilled (*Official Journal*, 16 October 1971, C 103/3). The indirect way of using infringement proceeding against member states – demanding them to legislate against sport bodies – was risky and very unfeasible for the CEC (Varenwald, 1996; Barani, 2005).

However, the CEC started to engage in negotiations with the football associations to persuade them to revise their labour market regulations in a way compatible with EC law. The football bodies showed little responsiveness to the CEC. The UEFA objected to the CEC’s demands by referring to the autonomy of sport and the supranational character of its regulations (McArdle, 2000; Meier, 2004a). In this context, it is essential to note that UEFA represented *all* European football associations – including these from communist countries – whereas the European Community was then only a state alliance of regional scope.

Parallel to the negotiations between CEC and the football bodies of the member states, decentralised enforcement of EC labour market provisions began to work. The CEC’s preoccupation with discrimination in sport brought legal actions to the ECJ. From other policy domains, decentralised enforcement of EC law is known to be one of the most powerful mechanisms of Europeanisation – enabling the European Court of Justice to drive forward the integration process (Alter, 1996, 1998). The court extended its judicature supportive of European integration into the realm of professional sport. The famous Walrave case established that EC law as applicable to sport if it constituted an economic activity. By doing so, that decision favoured a selective perception of sport by the European institutions. In Walrave, the ECJ supported also the legal viewpoint of the CEC that restrictions on free movement are illegal. Yet, the ECJ was prevented from making a final judgment in the Walrave case because the case was withdrawn after the international cycling association had forced the sportsmen involved to do so (ECJ, Case 36-74, *Walrave and Koch*, [1974] ECR 1405). In contrast, the Donà-case, which reached the ECJ in 1976, seemed too obviously to be constructed to abolish the absolute prohibition to employ expatriate players which was practised by the Italian professional league. Thus, the ECJ hesitated to take the opportunity to ban foreign national clauses in football (ECJ, Case 13-76, *Donà v. Mantero* [1976] ECR 1333).

After these judgments, the CEC succeeded in 1978 in pressuring the football associations into making some initial, albeit marginal, concessions⁶ since the associations

⁵ The Italian league even prohibited the fielding of any foreign players.

⁶ The football associations no longer made restrictions on the signing of contracts between clubs and expatriate players from EC member states, but ‘only’ on the fielding of these players. In the first division and its relegation competitions of the national leagues the clubs were allowed to field two players from other EC member states in a match. Furthermore, in the lower leagues the football associations

wanted to avoid the risks of further legal actions (*Official Journal*, 7 August 1978, C 188). On their part, the football bodies tried to reduce the risks of further legal actions by enforcing the transfer system using drastic sporting sanctions directed at the clubs and by enforcing amicable arrangements (Blanpain & Inston, 1996).

Whereas the CEC perceived the agreement with the football bodies only as a first step toward a complete liberalisation of nationality clauses, another feature of the formation of a unique European sport regulation appeared – *the resistance of the member states against a Europeanisation of the policy domain*. As Barani (2005) has correctly noted, the member states continuously perceived European sport regulation as an unintended and undesirable consequence of market integration. The member states forced the CEC several times to reconsider its regulatory approach toward sport and to abstain from liberalising the players' market. Both, national sport politicians and football associations, were convinced that the restrictions on player mobility were essential for the coherence within and the social functions of European sport (Coopers & Lybrand, 1995). Yet, it is obvious that the sport bodies have a strong incentive to dress up their desire for maximizing revenue streams in the clothes of 'fair play' (Weatherill, 2003: 52). But the interventions of the Commission contradicted also the well-established doctrine of the sporting autonomy which was – at least in some member states – the agreed policy paradigm of sport politicians as well as sport associations. Probably the primary reason for national sport politicians' resistance towards the CEC policy was fear of losing further national regulatory competencies to the supranational level (Coopers & Lybrand, 1995). Thus, the member states ended also attempts of CEC and European Parliament (EP) to employ sport as a means of promoting 'positive integration'.⁷ The coalition around core policy beliefs – in this case the ideology of sporting autonomy and the European model of sport – and institutional self-interests on part of the member states remained characteristic for the European politics of sport regulation. National and/or intergovernmental channels of influence were most important for the sport associations to shape the European re-regulation of sport.

CEC had already declared that it aimed explicitly at avoiding radical changes in European football (*Official Journal*, 3 March 1985, C 135/44). It has been assumed that CEC did so because it was quite aware that it would otherwise risk the legitimacy of the European project (McArdle, 2000; Barani, 2005). In result, until the Bosman judgement in 1995 the football authorities were only forced to marginal concessions to the CEC – even after the adoption of the single market project in 1986. In 1988, the football authorities simply decided to walk out of the negotiations and to appeal to their member states' governments (Renz, 1993). The implementation of freedom of movement in European professional football gained only new momentum after the EP passed in 1989 a motion demanding the CEC to enforce by all legal means EC law in professional football (A2-415/88). But, whilst CEC and football bodies struggled over nationality clauses in the player market, new regulatory issues had emerged and had the member states inspired to make their resistance more vocal: After the ECJ had applied the principles of negative integration to the vocational training of sport coaches (EuGH, Rs. C-222/86, *UNECTEF v. Heylens*, Slg. 1987, 4097), the member states' sport ministers in 1990 demanded the CEC to develop instruments taking the sport

abandoned all discriminations against EC citizens. Eventually, foreign national clauses would no longer apply to players from EC member states who had taken up residence in another EC country for five years (*Official Journal*, 7 August 1978, C 188).

⁷ These attempts had started with the Adonnino report from 1985 (COM[85] 310 final). After that report, the CEC developed an action plan which intended to create European sport events and European teams. The national sport bodies were opposed to this project and obstructed its implementation (De Kepper, 1996). Eventually, the United Kingdom ended CEC's policy of positive integration in sport by hinting to the lack of competencies of the CEC in sport in a proceeding before the ECJ (ECJ, Case 106-96, *United Kingdom vs. Commission* [1996] ECR I/02729).

compatibleness of European regulations into account. The CEC assured the member states to respect the autonomy of sport and to engage in sport's matters only as they were of economic importance (CEC, 1991). In response to the intergovernmental resistance, the CEC committed itself to a highly pragmatic approach concerning the abolition of nationality clauses. In this way, the CEC accomplished only a modest liberalisation of the players' market in the shape of the notorious '3+2' rule of 1991 – referred to as 'gentlemen's agreement' (CEC, 1995; cf. below). The CEC faced another defeat by the member states when it was forced in 1991 to abandon the project of liberalizing the lottery sector which posed a threat to the funding of the national sport authorities. International and national sport associations were afraid that such a liberalisation would end the practice of tying-up of proceeds of lotteries and successfully appealed the member states (Petry, 1993; Walter, 1993).

But with the changes in the European media markets, new regulatory issues emerged requiring new responses. The sport associations were eager to exploit these new market opportunities by using their monopoly power. In 1988, UEFA first tightened its 'black-out rules'.⁸ These regulations tried to ban cross-border telecasts of football matches by giving the football associations complete control over live telecasts from matches. These output restrictions were intended to protect stadium attendances but also served to keep prices for match telecasts high. In 1993, the CEC forced UEFA to ease these black-out rules for the first time. In this context, the CEC established that the blackout-rules represented a decision of associations of undertakings capable of infringing the prohibition contained in Article 81 EC (Coopers & Lybrand, 1995). This was an important precedence for the sport bodies since their regulations could now be regarded as cartel agreements. Nonetheless, the sport associations continued to act as cartels. UEFA invited commercialisation and decided to use its monopoly status to extract more revenues from the TV markets in order to expand the funding base of the European football association. In 1992, UEFA opened the door wide for commercialism and founded the Champions League as a vehicle for increasing revenues (explicitly: UEFA, 1998). In an extraordinary general meeting the member associations of UEFA were 'persuaded' to assign all marketing rights to UEFA.⁹ From the beginning, UEFA restricted telecasts from the Champions League and obtained monopoly prices by signing exclusive package deals with commercial broadcasters (Hellenthal, 2000; Parlasca & Szymanski, 2002).

Second Phase: Negative integration and institutional arbitrage

This invited commercialism was likely to distort competition in the TV market and had to provoke interventions from anti-trust authorities. These new regulatory issues that emerged due to the commercialisation of European sport and the continuation of one-sided labour market regulations were the defining feature of the second phase of European sport regulation. *This second phase was the heyday of negative integration and is primarily associated with the Bosman ruling. The Bosman ruling changed the rules of the regulatory game by establishing a clear legal basis for negative integration; the impact of Bosman was amplified by the rapid commercialisation of sport.*

As was already mentioned, after pressurized by the member states the CEC accepted the infamous '3+2'-agreement in April 1991 (van Miert, 2000). According to this, first national division professional clubs were, from 1 July 1992, allowed to field three players from EC member states plus two 'assimilated' players. UEFA agreed also to ease the transfer system. Now a player was entitled to enter into an agreement with a new club if his old contract had

⁸ The notion 'blackout-rules' is borrowed from the US American experience. There, the NFL was the first league to prohibit live telecasts from matches in order to protect stadium attendances (Leifer, 1995). Later, the leagues used the 'blackout-rules' to keep live telecasts short in order to raise prices (Garrett & Hochberg, 1996).

⁹ Some clubs had to break existing marketing contracts but UEFA was able to settle early proceedings.

expired. Regardless, freedom of movement continued to be limited, the previous club remained eligible for a transfer fee from the new club now referred to as compensation for training delivered. By tolerating restrictions on the fielding of players from EC member states, with the '3+2'-agreement, the Commission had effectively accepted discriminating practices in the players' market on the ground of nationality (Parrish, 2003b: 92). EP and ECJ criticised the compromise and blamed the CEC for its soft stance on the football bodies (Zuleeg, 1993). But regardless of considerable concessions on the part of the CEC, UEFA failed to enforce a less restrictive administration of transfer regulations by the national soccer associations. This failure partially caused the famous Bosman proceeding. Of central importance for the far-reaching consequences of the Bosman judgment were the interdependencies between the Belgian and the international transfer regulations of UEFA and FIFA. When the case finally reached the ECJ in 1995, the ECJ made a far-reaching decision which appeared to be highly critical of the 'give-and-take'-approach of the CEC.

The court extended the right of free movement, moving considerably toward a comprehensive ban on discriminatory practices in the labour market (ECJ, Case 415-93, *Bosman* [1996] ECR I/4921). The ECJ not only prohibited national clauses for EC citizens but also imposed a ban on transfer payments after the expiration of contracts. The ECJ considered the arguments of competitive balance and training costs and, by doing-so, the court acknowledged both goals as legitimate concerns and left the impression that football was indeed 'special', but the ECJ decided that the labour market regulations were unsuitable to serve these goals because the regulations represented a carefully constructed distributive mechanism (Weatherill, 1996, 2003). The court left a number of questions unsettled. The most important was whether the regulations of the sport associations such as the transfer system had to be considered as a cartel agreement serving to reap the profits from playing talent from the players. This question was crucial for the future of the players' market (Greenfield & Osborn, 2001; Parrish, 2003b). Furthermore, the ECJ did nothing to define the scope of a 'purely sporting interest' exemption mentioned in the *Doná* case (Weatherill, 2003).

The Bosman judgement marked the beginning of a new era in European sport regulation:

On the one hand, the judgement laid a more solid ground for the regulation of professional sport at the European level. Moreover, after the ECJ had clearly criticised its hesitant approach in the Bosman judgement, the CEC adopted a strict anti-trust approach to sport that remarkably differed from the US American 'rule of reason'-approach. The CEC forced UEFA to implement the Bosman ruling as soon as possible and announced in the beginning of 1996, to end central selling of Champions League matches soon (*Frankfurter Allgemeine Zeitung*, 6. February 1996). It is well known that European competition law gives the CEC far-reaching powers vis-à-vis the member states (Schmidt, 1998). The policy of the Commission toward the sport association bodies now started to follow the *well-known pattern of negative integration* according to which the CEC uses integrationist judgments of the ECJ in combination with its own comprehensive anti-trust jurisdiction to further liberalise a sector (Scharpf, 1999). The post-Bosman-era also makes a strong case for neo-institutionalist multi-level governance theory which stresses that the member states are no longer in complete control of the integration process (Hooghe & Marks, 2001). Quite consistent with Scharpf's account of the European 'joint decision trap' the case of sport regulation demonstrates what difficulties the member states face when it comes to revise a ECJ judgement strongly in favour of negative integration (Scharpf, 1996). Whereas CEC and ECJ could – by relying on European competition law – act against the peculiar regulations of the sport bodies, 'positive integration' or a reversal of negative integration requires explicit consensus among the member states. *Since the need of consensus was very high and the member states' preferences on a sporting exemption in the treaties diverged, narrow limits were set upon a positive sport*

re-regulation at the European level. Hence the European regulatory state in sport was turning into a 'deregulatory state'. In result, *European antitrust law started once again to work as a mechanism of institutional arbitrage against the sport bodies.* The CEC was increasingly appealed by actors who felt discriminated by the regulations of the sport bodies (Weatherill, 2003).

On the other hand, the Bosman ruling took place when European sport started to gain importance as an economic activity and the EU had just completed the single market and the ideology of the four freedoms was strong (Parrish & McArdle, 2004). Anti-trust matters in sport broadcasting gained increased importance because of the digitalisation of TV markets (Cameron, 1997; Hoehn & Lancefield, 2003). Now, foreclosure of media markets became a central issue due to the strategic role played by the definition of technical standards for digital conditional access technology. Digital TV market seemed to be a 'winner takes all'-industry, where the first competitor to reach a dominant position in the digital market would occupy a nearly invulnerable market position (Solberg, 2002). In order to gain market share for their proprietary technology, broadcasters aggressively purchased sport broadcasting rights. Since the sport bodies bundled rights and engaged in exclusive, long-term contracts, CEC had to clarify both the legality of the centralised selling and exclusive contracts in order to preserve competition in the audio-visual market. Furthermore, due to the advent of new conditional access technology the question of siphoning of sport events to pay TV and the access of the broad public became a major political issue.

The Bosman judgement provoked fierce criticism from sport bodies and sport politicians as a damage to sporting autonomy and solidarity mechanisms in European sport. Moreover, the decision was blamed for fostering rapid commercialisation. The shift of property rights in favour of the players resulted in a boost of player salaries and the labour costs of the clubs. By leaving the system of transfer payments for players under contracts intact, the Bosman decision facilitated a system of long-term contracts and astronomic transfer payments. The rising salaries and transfer payments forced the clubs to maximise their revenues in order to stay competitive (Caiger & Gardiner, 2000; Antonioni & Cubbin, 2000). The clubs now avoided the risky in-firm training of their own talent. In doing so, they reduced the chances of national youngsters being fielded in league matches and contributed to the erosion of the links between grassroots football and the top level (Riedl & Cachay, 2002). The heavy resistance of national sport politicians to the Bosman judgment was primarily caused by the ensuing global migration of football players to the prospering European leagues (Maguire & Pearton, 2000).

Immediately after Bosman, the football bodies obviously believed they would succeed in mobilising their national governments for a revision of the Bosman judgment (Flory, 1997). But quite to the contrary, the high requirements for revising European treaties turned out to work as an institutional veto point in favour of the liberalisation approach of the CEC. The revision of the treaties failed because of a conflict between substantial and institutional preferences on the side of the member states; in particular, the British government feared that the supranational institutions would use any mentioning of sport in the treaties as a means of further competence creeping. Thus, several member states tried to block any far-reaching transfer of regulatory powers to the EU in the field of sport (Schneider, 2002).¹⁰ Given the absence of larger consensus on a sport exemption, the complex European polity favoured CEC's negative integration approach. But the member states found ways to send political signals to CEC and ECJ that the European approach of sport regulation clashed with member states' preferences. The member states agreed to a common 'soft law' declaration, which was adopted at the Amsterdam summit on 2 October 1997. That declaration stressed the social importance of sport, but did not exempt professional sport from the application of European

¹⁰ The UK government's position was supported by the Sports Council (Henry & Matthews, 1998).

anti-trust law. (*Official Journal*, 10 November 1997, C 340, Declaration No. 29).

Whereas ‘soft law’ as some kind of informal governance is known from other policy domains to be an escape route from political impasse in the EU (Héritier, 1999), the Amsterdam declaration was far too abstract to leave an impact on the CEC’s sport regulation. But beside intergovernmental resistance, the post Bosman-era with its rapid commercialisation of European sport and the increase in conflicts within the sport sector also witnessed the formation of a ‘socio-cultural’ advocacy coalition of parts of EP, CEC and some sport associations dedicated to preserving the European model of sport in order to employ sport’s cohesive potential to advance European integration (cf. Parrish, 2003a, 2003b). One of the most important policy documents of this advocacy coalition was the Pack report of 1997 (A4-1097/97). The Pack report criticised the CEC’s approach to sport for ‘only taken account in a very marginal fashion of the cultural, educational and social dimension of sport’ yet concluded that ‘such neglect stems basically from the fact that there is no explicit reference to sport in the Treaty’. The report demanded the CEC to set up a ‘Task Force on Sport’ to take account of sport across the entire spectrum of activities.

In its seminal account of European sport regulation, Parrish mainly ascribes the advent of a new European ‘pragmatic’ regulatory approach to the appearance of this advocacy coalition. Surely *the criticism from within the EP signalled the CEC a legitimacy gap of its regulatory efforts in the sport domain* but, whereas this European coalition without any doubt left an impact on the new approach, Parrish’s account underestimates *the central role played by intergovernmentalism*. On the one hand that European advocacy coalition was first too weak to overcome the dominance of negative integration represented by the influential Competition Directorate. On the other hand, beside the belief that sport is special, the European advocacy coalition was very heterogeneous. Whereas some sport associations wanted simply to get their autonomy restored, others were interested in getting access to European funding. The parts of EP and CEC sympathetic to the sport bodies were not interested in hollowing out European anti-trust law, one of the most efficient policy instruments of the EU, in order to protect the rule of the sport bodies (Henry & Matthews, 1998). Neither demanded the Pack report a general anti-trust exemption for sport nor the return to the status quo ante-Bosman. Regarding the impact of the Bosman judgement, the CEC was only required ‘to give active support, with the associations involved, to the introduction of efficient redistribution and solidarity mechanisms so that training of young players and the continued existence of amateur clubs may be financed by means compatible with Community law’ (A4-1097/97).

The ambiguous stance of the EP on sport regulation becomes evident from later EP reports on the sport issues, especially the Mennea report of 2000 (A5-0208/2000). The Mennea report welcomed the CEC’s statements regarding the significant educational and social functions of sport but called at the same time on the CEC to refrain from taking measures or putting forward proposals which might call into question the Bosman judgement. The report also stressed the need of the sport bodies’ marketing practices to comply with European competition rules. Furthermore, the Mennea report demanded the sport bodies to revitalise their internal democracy. Whereas the sport bodies hoped for a restoration of their autonomy, the actors from EP and CEC seemed to be convinced that the preservation of the European model required a European competence to re-regulate sport at the European level as can be seen in the Helsinki report of the CEC (CEC, 1999) and later statements of CEC before the sport bodies. The Helsinki report of the CEC hinted to an ambitious agenda for socio-cultural sport re-regulation that resembled Moran’s concept of ‘hyper-innovation’ (below).

Whereas the socio-cultural advocacy coalition at first failed to leave an impact on the anti-trust approach of the DG Comp, it partially succeeded in combating the ‘over-commercialisation’ of sport by the sport association. The most visible success of the socio-cultural coalition was the introduction of a listed-events regulation in the TV directive of 1997

entitling the member states to adopt measures to secure the access of the broader public to major sport events. This success had been made possible by the intense debate on public access to the Football World Cup after FIFA had sold the broadcasting rights for the World Cups in 2002 and 2006 not, as previously, to the European public service broadcasters (PSBs) but to the German Kirch group which intended to recoup the costs for the deal by telecasting the event in pay TV. The EP was now heavily lobbied by the PSBs which feared becoming marginalized in an increasingly commercialised media industry. Having acquired new jurisdictional rights in the Maastricht treaty and thanks to the public outcry, the EP was able to press for a listed-events regulation¹¹ despite the fact that the CEC and the Council were initially opposed (*Official Journal*, 30 July 1997, L 202; Diesbach, 1998).

Regarding the anti-trust issues in sport, the CEC had first to deal with the Federation Internationale de l'Automobile (FIA) which had centralized the marketing of telecasts of all of its sporting competitions by a revision of the FIA Sporting Code. That revision was followed by an increase in the prices for broadcasting rights which caused economic troubles for some competitions. Eventually, a German movie producer – who has excluded from broadcasting of motor sport events by the Sporting Code – appealed the CEC and blamed the Sporting Code to be an anti-trust violation. The FIA now heavily pressurized on the CEC to abandon the case and to issue a 'letter of comfort'. The hard-nosed methods of FIA probably contributed to the highly critical stance of the DG Comp toward sport bodies and central selling regimes (cf. van Miert, 2000).¹² DG Comp seemed to have been sympathetic to a regulatory approach dedicated to a 'unbundling' of regulatory and commercial roles of the sport bodies – which was later actually applied by the FIA (cf. *Official Journal*, 13 June 2001, C 169/5).

In response to further pending antitrust cases on centralised selling regimes in some member states as Britain, Germany and the Netherlands, in June 1998, the CEC presented the antitrust authorities of the member states with an orientation document on centralised selling. The CEC left the impression that collective selling was very likely to be deemed illegal under European competition law (CEC, 1998a). The highly critical stance the CEC showed toward the double role of the sport bodies as organisers and regulators of sporting competitions, contributed to the erosion of the European model of sport by furthering schemes about independent and purely commercial leagues run by media conglomerates. Simply by *creating a legal uncertainty about the position of the sport associations*, the CEC enabled the European top clubs to gain more control of the game. In the beginning of 1998, the sport marketing agency Media Partners Internal (MPI) offered the European top clubs participation in a European super league that was intended to be a closed competition without relegation or promotion (for details: *Official Journal*, 13 March 1999, C 70) – which would have reduced economic uncertainties for the involved clubs and increased revenues for them. To avoid a breakaway of the top clubs, UEFA had to modify its competition as well as its marketing policy in order to make financial concessions (Hoehn & Szymanski, 1999). At the same time, that 'super league' incident instigated the formation of the G-14 – an organization of European professional top clubs striving to have a say in all commercial issues of professional football (G-14, 2002; Schopf, 2003). Later, G-14 should grow into one of the most important allies of the CEC when it came to further liberalize the marketing practices of UEFA (see below).

¹¹ The listed events regulation entitles member states to prohibit events of major public interest to be broadcasted in pay TV.

¹² Hostilities between CEC and FIA only grew when the FIA opposed the Tobacco advertising directive which placed a total ban on advertisement for Tobacco products in sport competitions. The first version of the directive was eventually brought down by the German government after being heavily lobbied by the Tobacco industry.

Thus, in 1998, the European model of sport seemed to be in a serious crisis (Barani, 2005). Beside the super league incident, in some member states media operators were trying to take over football clubs; an anti-trust procedure against the prohibition of cross-ownership in clubs had already been brought before the CEC. Moreover, the 1998 Tour de France was shaken up by a doping scandal. Hence, the European Council of Vienna demanded in December 1998 that the CEC present to the European Council of Helsinki in 1999 a report on the preservation of the current sport structures and the doping issue. This initiative partly signalled the possibility of a new phase of European sport regulation, since, in response, the CEC organized a conference on sport attracting representatives from the governing bodies of sport (IP/99/133). The sport bodies hopes in a new regulatory approach were further nurtured by the Helsinki report from 1999, in which CEC sketched out a ‘separate territories approach’ according to which the CEC would respect pure sporting regulations and would utilise anti-trust exemptions to account for the special features of sport (Parrish, 2003b). But the area of sporting autonomy was narrowly restricted to regulations inherent to sport and proportionate to the objectives pursued by the governing bodies. The wider range of sporting rules for which the CEC announced to employ anti-trust exemptions on an issue base if the sport bodies’ practices were not *per se* illegal. In particular, arrangements serving to maintaining a balance between clubs and to encouraging the recruitment and training of young players could expect to enjoy anti-trust exemptions (IP/99/133; CEC, 1999; Parrish & McArdle, 2004). That was consistent with the Bosman ruling and meant that the sport bodies would not get their broad autonomy back rather most of their regulation would fall under some kind of ‘supervised sporting autonomy’ (Foster, 2000). Whereas the CEC committed itself visibly to a pragmatic application of anti-trust provisions, it showed little willingness to make substantial concessions in the regulatory issues then at stake. The CEC announced to continue to prohibit practices that were infringing competition on ground of pure economic interests. The CEC expressly objected to restrictions on the free movement of athletes in the European Union and declared that any misuse of monopoly positions by sport associations would not be accepted (IP/99/133; CEC, 1999). The then only visibly concession of CEC to the specifics of sport was the upholding of the UEFA ‘home and away’-rule according to which clubs could not change their venues for UEFA competitions in 1999 (IP/99/965). An end of that factual ‘relocation ban’ would have probably amplified the commercialisation trend.

Whereas offering limited concessions in anti-trust matters, the Helsinki report sketched out an ambitious European agenda for a socio-cultural re-regulation of sport by emphasizing the social, educational and democratic functions of sport. The Helsinki report acknowledged the increasing number of conflicts and hinted to the breakaway tendencies in European elite sport and the widening economic gaps in sport. Whereas these conflicts had been partially facilitated by European regulatory interventions, the Helsinki report put the blame primarily on sport’s commercialisation. In order to preserve the social functions of sport, CEC declared that convergent endeavours were in need aiming at ‘the clarification, at each level, of the legal framework’ (CEC, 1999: 7). Whereas the CEC would employ a pragmatic anti-trust approach, the member states were expected to clarify the legal rules for sport federations and clubs – including their corporate governance. The sporting organizations were thought to define their missions and statutes more clearly committing themselves to the social and educational functions of sport and solidarity within sport. That regulatory agenda was surely not consistent with the tradition of non-interventionist sport policy in some member states and nurtured fears of competence creeping since it tended to obscure the constitutional limitations of EU in the policy domain (Weatherill, 2003). The ambitions of CEC for imposing a harmonised ‘European model of sport’ probably contributed to the hostility of member states against a consideration of sport in the European treaties.¹³ Regarding the doping issue, the

¹³ This account is based on interviews with officials from Ministries of Interior from German Federal Government (24 March 2003) and Rhineland-Palatine (3 April 2003).

IOC was able to prevent the EU from taking unilateral measures by proposing the set up of a World Anti-Doping Agency (WADA) (Stokvis, 2003).¹⁴

In contrast to CEC, the ECJ seemed more eager to respond to the signals of the political environment and ‘operated a complex realignment of its doctrine on sport regulation’ (Barani, 2005: 51). The ECJ clarified the scope of sporting regulations to which EC law applies. In April 2000, EC upheld regulations of the sport bodies concerning the eligibility criteria for international competitions (ECJ, Case 517/191-97, *Deliège*, [2000] ECR I-2000, 2549) and regulations about transfer periods (ECJ, Case 176-96, *Lehtonen*, [2000] ECR I-2000, 2681). Both decisions assumed that the sport bodies are permitted to set rules ensuring the regularity of competitions even when they had an incidental affect on the liberty of economic actors (Weatherill, 2003).

Third phase: Intergovernmental interventions and the emergence of a pragmatic approach

These decisions marked the beginning of a third phase of European sport regulation. *This phase is shaped by continuous disagreement among the member states about a treaty revision. This problem was solved by intergovernmental soft law interventions into concrete issues of sport regulation signalling the CEC a legitimacy gap and requiring it to adopt a more pragmatic stance.*

Whereas the Helsinki report prepared ground for a more pragmatic regulatory approach of the CEC, it firstly left little impact on the policy of the Competition Directorate. While the issue of collective selling systems was still pending, the CEC had adopted the legal standpoint that the complete transfer system fell under the ban of anti-trust law because in the post Bosman system of long term contracts player mobility remained effectively restricted and the sport bodies continued to apply pre Bosman regulations to transfers of non EU nationals.¹⁵ The CEC considered all regulation of the players’ market, including long-term contracts and training compensations, to be part of a complex cartel agreement which restrained the freedom of the clubs to recruit players (Pons, 1999; Egger & Stix-Hackl, 2002). In spring 2000, the CEC threatened to prohibit the whole international transfer system, arguing that it was based on arbitrarily calculated payments of compensation and that transfer payments violated EC law and were not mandated by the peculiar features of sport (Speech/00/152; Speech/00/290). A prohibition of the whole transfer system would have completely devalued past club investments in the players and would also have put an end to the payments for training compensation perceived as one of the basic pillars of the European model of sport. The interdependence of national and international transfer regulation resulted in the involvement of FIFA as the world governing body – traditionally claiming superiority over national or regional law. Hence, the resistance of the football authorities was fierce. The football bodies once more lobbied the member states for an antitrust exemption for sport in the European treaties. Yet the member states remained split over that question because the British government continued to oppose any mentioning of sport in the European treaties (Conclusions du Conseil des Ministres du Sport, 2000; Parrish, 2000).¹⁶

Faced with serious pressure from the football industry, the German chancellor and the British prime minister eventually jointly intervened but they did not support the idea of giving

¹⁴ The IOC adopted a stricter doping policy not only in response to European pressure but also in response from the US American state and sport authorities which represented the most attractive TV market for the Olympics. The IOC had to adapt its own definitions of doping to US American framing of anti-doping policy as part of the ‘war against drugs’ (Stokvis, 2003).

¹⁵ In contrast, top-players were able to bypass the post Bosman-System by threat of legal proceedings (Gardiner & Welch, 2000).

¹⁶ In June 2000, the European Council answered in reply to a written request that the agenda of the Nice summit did not include the issue of a sport exemption (PE-QE 214, 9 June 2000).

special status to sport. Obviously, the football bodies had failed to convince the heads of government that the transfer system represented a 'first best'-solution. Thus, Schröder and Blair encouraged the sport associations to find a solution through a social dialogue with player representatives. Both heads of governments demanded that new transfer regulations should give the clubs sufficient opportunity to train young players, build up their teams and keep the game healthy at all levels (*Federal Government Press Release*, 425/00).

The CEC was responsive and tried to facilitate a cooperative solution among sport bodies, clubs and players' representative. But this social dialogue strategy failed due to the complex governance structure of the football industry. There existed considerable internal divisions on the employers' side with sport bodies primarily intending to sustain training compensations for amateur clubs and the professional clubs – now represented by G-14 which had managed to get access to the negotiations – mainly interested in 'contract stability', i.e. the limitation of players' free agency. Moreover, UEFA and G-14 were at a secession war – with G-14 claiming to be the true representative of clubs' interests and UEFA denying the G-14 any legitimacy. Yet even the players' representatives showed limited strategic capacity because they were deeply divided over the liberalisation issue. Players' unions from small countries were primarily interested in pure free agency whereas representatives from bigger football markets took a more moderate or 'protectionist' stance. The negotiations on the transfer system almost resulted in the split of the international players' union FIFPro (Dabscheck, 2003; Meier, 2004a).

In the end, *an intergovernmental intervention was necessary that left a lasting imprint on European sport regulation*. After a temporarily breakdown of the negotiations between CEC and football representatives, the member states adopted a new declaration on sport at the Nice summit in December 2000. The member states remained divided on the issue of a treaty amendment but they advanced the Amsterdam soft law approach and found ways to signal the CEC a gap between its policy and the member states' preferences more clearly. The Intergovernmental Conference adopted a 'declaration on the peculiar characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies'. In contrast to the Amsterdam declaration, the Nice declaration was far more concrete and therefore more consequential. It showed the determination of the member states to adhere to the European model of sport. The European Council stressed 'its support for the independence of sport organisations and their right to organise themselves through appropriate associative structures'. The social functions of sport 'entail special responsibilities for federations and provide the basis for the recognition of their competence in organising competitions'. The declaration demanded that 'federations must continue to be the key feature of a form of organisation providing a guarantee of sporting cohesion and participatory democracy'. The Council went even further and expressed its expectations from CEC's resolution of the pending issues. Alluding to central selling, the Council stated that 'moves to encourage the mutualisation of part of the revenue from such sales, at the appropriate levels, are beneficial to the principle of solidarity between all levels and areas of sport'. Regarding the conflict about the transfer system, the Council declared to be 'keenly supportive of dialogue on the transfer system between the sport movement, in particular the football authorities, organisations representing professional sportsmen and -women, the Community and the Member States, with due regard for the peculiar requirements of sport, subject to compliance with Community law'.

After being sent a clear message, CEC was eager to further concessions to the football representatives. CEC accepted that training compensations should be standardised and also acknowledged contract stability as a legitimate concern for the negotiations (IP/00/1417) but UEFA and G-14 adopted a hardliner-approach demanding long contract duration and no unilateral right of the players to abolish contracts. Eventually, UEFA appealed the Swedish Presidency to resolve the deadlock. In March 2001, the Swedish Presidency facilitated a

compromise between the CEC and the sport associations (IP/01/314). In the end, the sport bodies and the clubs were able to sustain a special treatment of the labour market for professional footballers – without being forced into some kind of CBA with the international football players' union FIFPro. The new transfer regulations of FIFA (2001) maintained a number of restrictions on player mobility in order to secure compensation payments for training efforts, which were perceived as a central feature of grassroots support, and to guarantee contract stability, the primary economic interest of the clubs. In exchange, the duration of players' contracts was limited (Egger & Stix-Hackl, 2002; Oberthür, 2002; Weatherill, 2003). The CEC denied the enforced compromise a formal approval and by doing-so encouraged the FIFPro to force FIFA to further concessions regarding the composition of appellate bodies and the participation of FIFPro in revising the transfer system (Meier, 2004a). In June 2002, CEC closed its investigations and declared the end of its involvement in matters of the players' market (IP/02/824). Nonetheless, CEC tried to facilitate a social dialogue in the sport sector (Branco Martins, 2004).

The intergovernmental enforcement of the transfer compromise definitely marked the beginning of the third, 'pragmatic' phase of European sport regulation. CEC seemed to have learned the lesson of avoiding an escalation of arguments with the sport associations and was eager to accentuate its respect for the special role of sport (Parrish, 2003b; Weatherill, 2003).

Despite the expressed will of the member states to preserve the European sport model, the willingness of the DG Comp to make substantial concessions regarding centralised selling remained limited. As should be obvious the treatment of centralised selling regime as one of the crucial issues for the positions of the sport bodies. After the Nice declaration the CEC could hardly pursue a strategy of unbundling the regulatory functions of the sport bodies from their role as organizers of competitions. Thus, the CEC developed an approach adopting behavioural remedies to avoid foreclosure of media markets. The main features of these behavioural remedies are the requirement to split up the broadcasting rights in several packages, to limit the duration of exclusive contracts and to allow for decentralised selling of some rights.

In order to enforce that approach, CEC employed a twofold tactic: (1) It tried to capitalise on the dimensionality of the member states' preferences regarding the regulation of media markets. The member states had expressed their interest in vitalising the new media markets (COM [2002] 263 final). The CEC limited now its regulatory approach toward centralised selling to minimising the negative effects of the marketing policy in professional sport on the downstream media markets. The CEC argued against the football bodies that the exclusive selling of comprehensive rights packages had prevented new enterprises in the Internet and UMTS-domain from acquiring attractive media contents since the incumbent broadcasting corporations had no interest in new competitors (Ungerer, 2003a, 2003b). (2) Furthermore, the CEC exploited the conflicts within football. After CEC had sent UEFA a statement of objections declaring that the collective selling arrangement for the Champions League infringed European anti-trust provisions (IP/01/1043), CEC engaged in consultations with G-14 (CEC, 2002) which was going to claim the property rights in clubs competitions such as national football leagues and UEFA Champions League for the clubs (G-14, 2002). The involvement of G-14 strengthened the position of CEC, since in order to protect an anti-trust exemption from being damaged by European top clubs, UEFA was now forced to bid for the support of the G-14. UEFA had to acknowledge the co-ownership with the clubs of broadcasting rights. As a result of its negotiations with UEFA and G-14, the CEC accepted maintaining the centralised selling of the Champions League in free and pay TV, but UEFA had to split up the rights in several packages and limit the duration of the contracts. Furthermore, the centralised selling system and the exclusivity principle were infringed upon in the domains of radio broadcasting, Internet and UMTS since clubs were now able to market rights individually. In result, more operators will be able to acquire a degree of involvement

in the coverage of the Champions League (Weatherill, 2003: 78). The CEC also demanded that UEFA implement 'fall back'-clauses according to which rights not sold by UEFA returned to the clubs (IP/02/806; *Official Journal*, 17 August 2002, C 196).

Even when the CEC abstained from an orthodox anti-trust approach, its approach visibly differs from the American 'rule of reason'-doctrine. The CEC neither granted centralised selling systems an anti-trust exemption based on the arguments of sporting solidarity or competitive balance which were stressed by the sport bodies, nor recognised CEC the monopoly position of sport bodies. Moreover, the 'fall-back'-clauses are likely to strengthen the clubs and the centrifugal tendencies within European football. CEC justified the upholding of centralised selling with the argument that in order to 'brand' a league competition, it was necessary to bundle telecasts rights at some point in the value-creation chain and to offer a 'single point of sale' (COMP/C.2-37.398):

'The EC recognizes that collective selling avoids the transaction costs associated with individual negotiations, and in the case of league competitions, the hold-up problems associated with broadcasters waiting for others to bid, which causes delays, uncertainty, and, in some cases, the sport not being broadcast [...].' (Hoehn & Lancefield, 2003: 565-6)

In the aftermath of the Nice declaration, CEC resolved a number of further anti-trust issues in sport and showed its eagerness to take peculiar characteristics of European sport into account. Regardless of the defensive wording of CEC in its memo from June 2002 in which CEC claimed that it was engaged in a constructive dialogue with the sport bodies (Memo/02/127), the outcome of this constructive dialogue was mixed for the sport bodies since they were required 'to bring their rules in line their legal obligations, bringing about better legal security to sport as basis for future economic and sporting development, and a better deal for fans and consumers'. The most visibly signs for a new pragmatic approach of the CEC toward sport regulation were the acceptance of state aid for French professional clubs for training centres (in 2001) and the maintenance of the UEFA ban on multiple shareholding in professional clubs (in 2002). The latter was adopted by UEFA in order to preserve the integrity of sporting competitions. The issue was pretty difficult since the ban contradicted the freedom of capital movement (IP/02/942). The record of the other cases CEC mentioned in its memo on 'the application of the EU's competition rules to sport' (Memo/02/127) was rather mixed. CEC's clearing up of conflicts in economic interests in Formula One competitions in 2001 resulted in an unbundling of regulatory and commercial roles of FIA. Regarding FIFA's rules on players' agents which had been tightened after the Bosman decision as a means to control the players' market, CEC uphold the requirement of a certificate for players' agents but visibly reduced the requirements and made them more transparent and reliable (IP/02/585). In the case of UEFA's blackout-rules, CEC pressed in 2001 for a further liberalisation. The national football associations are now only permitted to prohibit telecasts of matches within their territory during a two-and-a-half hour period on Saturday or Sunday corresponding in the relevant country (*Official Journal*, 6 June 2001, L 171).

Despite the emergence of a pragmatic European approach to sport regulation, the sport bodies remained interested in getting sport in European primary law. Thus, they tried to use the process on the European Convention on the Future of Europe as a 'window of opportunity' to get a sport consideration into the European treaties (cf. among others: UEFA, 2002). Regardless of the preliminary failure of the European convention, the draft article for sport is very intriguing over the direction European sport regulation may take. Parrish and McArdle have correctly noted, for the sport organisations, a sport consideration should serve two potentially purposes: It is intended to place a binding obligation on CEC and ECJ to recognize the specificity and autonomy of sport when deciding sport-related cases. The second purpose a treaty article should serve is to locate sport within the EU budget to enable EU to fund sporting initiatives (Parrish & McArdle, 2004). After being lobbied by several

sport bodies, the Spanish Presidency placed the issue of a European sport policy on the agenda of the EU sports minister conference in May 2002 in Almería, yet only eleven of the fifteen sports minister supported the consideration of sport in the treaties. Eventually, the French government decided to present the European convention a unilateral proposal for a sport consideration according to which anti-trust matters should no longer dominate the European approach of sport regulation. Instead, sport traditions should be preserved. The French government intended to guarantee the broad public access to major sport events and support voluntarism in sport (Conv 33/02). This proposal remained controversial among the European sports ministers (EU Sports Ministers Conference, 2002), but EP as well as the Directorate for Culture and Media supported a complementary competence of the European Union in the sport domain (A5-0133/2002). In January 2003, some members of the Convent presented their ideas about a consideration of sport in the European Convention (Conv 478/03). Due to the prevailing scepticism among the member states toward a sport competence for the EU and the resistance of CEC to include general anti-trust exceptions in the treaties, the draft of the European Convention defined sport only as an area for ‘supporting, coordinating or complimentary action’. The draft article expects the EU to take account of the specific nature and structure of sport, to co-operate with the ‘bodies responsible for sport’ and to abstain from ‘any harmonisation of the laws and regulations of the Member States’. As Parrish and McArdle argue, the reference to the ‘specific nature’ of sport can be interpreted as a legal base for a European ‘sporting exception’ in EU law but there remains much uncertainty over the application of EC law to sport. Whereas the sport associations put great hope in the sport article,¹⁷ the Competition Directorate does not seem to feel noticeable restricted by the draft article.¹⁸ Regarding the prohibition to harmonise sport regulation, it is highly probable that EU will make financial support for sport organisations dependent on the fulfilment of some criteria of ‘good sport governance’.¹⁹ In sum: It seems that two European approach to sport regulation continue to exist.

DISCUSSION: A EUROPEAN REGULATORY STATE IN SPORT?

The following discussion tries to answer the questions posed in the introduction. Regarding the question of why the long-established and politically accepted self-regulatory governance in sport has eroded it should have become obvious that on the one hand, the advent of a commercial and global media industry constituted a macro mechanism – an external shift in relative prices for sport entertainment – changing the option of some sector actors and ‘disembedding’ sport from its traditional contexts. That macro process inevitably posed new regulatory challenges and set the established governance regime under pressure because the European model of sport represented a hybrid solution with latent conflicts.

On the other hand, the traditional governance in sport fell prey to its own flaws. Insofar the rise of the regulatory state in sport supports reasoning about the prerequisites of effective self-regulation. The primary flaw of the old system of self-regulation was that the sport faced rival interests. That problem was made worse by the fact that self-regulation in sport was some kind of ‘club government’ in the sense of Moran. It was a ‘stand alone’-mechanism and not part of carefully designed responsive regulation. At first, players and athletes were disadvantaged by that model of self-regulation. Later, the sport bodies failed to handle to new regulatory issues in a responsive way. They exploited new market opportunities without taking collateral damage caused in the media sector into account. Maybe, the sport bodies could have avoided the escalation of regulatory interventions by being more responsive to

¹⁷ Interview with representative from the EU bureau of German sports, 5 November 2003.

¹⁸ Interviews with officials from the Competition Directorate, 6 November 2003 and 4 December 2003.

¹⁹ Interview with Member of European Parliament, 6 November 2003.

public interest concerns.

Eventually, it must also be taken into account that European regulation had heavily contributed to the transformation of sector governance by fostering commercialisation and favouring certain actors within the domestic arenas, namely clubs and players, and by disadvantaging others, i.e., the sport associations. Given the massive conflicts of interests within the sport sector, European antitrust law in particular served as a kind of mechanism of institutional arbitration, allowing the top clubs to compel the sport bodies into concessions. Such effects of European regulation are in no way special to sport regulation, but are well-known from other policy domains (Thatcher, 2004).

This leads to the second question of the paper. The European regulatory state has initially failed to give a smart response to the commodification of sport and the threat of its 'disembedding' because of the lack of jurisdictional competencies. As Barani (2005) has already established, the institutional setting of the EU, made up of a complex of interdependent norms, rules and organizations, has heavily influenced the process of sport regulation. Sport was primarily perceived by the supranational actors as a commercial activity without taking its cultural significance and links to the grassroots into account. European sport regulation makes a strong case for reflecting on the momentum of negative integration in the multi-level polity which could only be slowed down by determinate intergovernmental interventions. At first, the member states retained their formal powers but were not able to prevent European regulation from gaining importance. Only when the member states intervened more decisively in pending regulatory issues, they were able to push the CEC to adopt a more pragmatic regulatory approach, paying tribute to some considerations of sport politicians. Since the member states were split on the issue of an amendment of the treaties for sport, they had to rely on soft law-measures. The member states also denied the adoption of a hyper-innovative agenda for socio-cultural sport re-regulation pursued by a European advocacy coalition. Thus, neither is there a complete revision of European sport regulation by the member states nor does there exist a coherent 'positive integration' approach by the member states. The socio-cultural approach has retained a somewhat defensive stance vis-à-vis negative regulation.

In result, two rival agendas for sport regulation continue to exist in the EU and the European regulatory state in sport has assumed a very distinctive shape (table 1).

Table 1: Co-existence of rival approaches of sport regulation in Europe

	Socio-cultural approach	Market approach
Principles	Commitment to <ul style="list-style-type: none"> - Traditional governance structures in sport (including monopoly for organising competitions and embedding of professional sport into pyramid) - Solidarity mechanisms in sport - Public value of training efforts 	Commitment to <ul style="list-style-type: none"> - Deal professional sport is business - Anti-trust relevance of most of the peculiar regulations of sport and ‘supervised autonomy’ No acknowledgement of <ul style="list-style-type: none"> - Monopoly positions of sport bodies - Solidarity or sport economic arguments
Concrete Stipulations	<ul style="list-style-type: none"> - Ex ante regulations for sport broadcasting (listed events regulation) - No unbundling of commercial activities of the sport bodies from their regulatory role - Restrictions on the mobility of football players - Respect of pure sporting regulations - Upholding of relocation ban - Upholding of ban on multiple ownership 	<ul style="list-style-type: none"> - Denial of approval for the transfer compromise; attempts to foster CBAs - Detailed behavioural regulations for sport broadcasting - Insistence on transparent and objective regulations

At the principle level, the socio-cultural agenda committed the EU to the preservation of the current governance regime in sport, i.e. the pyramid structure ranging from the grassroots to professional and elite sport. The member states have expressed their preference for the sport bodies to act as the sole organizers of sporting competitions. They have insisted on the importance of horizontal solidarity (between clubs) and vertical solidarity (between professional sport and amateur sport). Eventually, the member states have forced the CEC to give the market for football players a special treatment by dealing the training efforts of the clubs as some kind of public good.

Yet, the market approach to sport regulation as pursued by the DG Comp does also prevail. The CEC refuses to acknowledge a monopoly in organizing competitions for the sport bodies and insofar has denied to commit European sport regulation to the traditional self-regulatory regime. Thanks to this, the position of the sport bodies has been considerable weakened. CEC also has refused to grant the transfer compromise a formal approval and is obviously striving to foster CABs in the sport sector. Moreover, most of the regulations and activities of the sport that bear some relevance to economic matters now are subject to ‘supervised autonomy’. There exist detailed behavioural regulations for the commercial activities of the sport bodies. The coexistence of two rival agendas of sport regulation means that the sport organisations could not hope to get their autonomy restored. The impact of that market approach of sport regulation becomes evident by comparison to the US (cf. Hoehn & Lancefield, 2003): Whereas collective selling enjoys in the US a general statutory exemption, European sport lacks such a provision. While in the US regulations concerning the access of the audience to major sport events have been abolished, the EU has adopted a (limited) *ex*

ante-regulation in the form of the listed events-provision in 1997. The public service broadcasters are currently pressing for a further strengthening of compulsory access regulations.²⁰ The anti-trust intervention of the CEC into collective selling regimes have resulted in the creation of a set of detailed provisions regulating the market behaviour of sport bodies. Actually, sport broadcasting is treated as some kind of ‘essential facility’, i.e. an upstream input that is essential for downstream media operators.

Thus, whereas there is no doubt that sport is given a special treatment by the European regulatory state but the European ‘rule of reason’ for sport regulation is by far no settled legal doctrine. It is more a kind of political principle, whereas the sport bodies enjoy only a ‘supervised autonomy’ as long as they adhere to some ideals of the European model of sport.

PROSPECTS

At the end of this paper, it should be speculated whether the current regulatory regime of supervised autonomy could be regarded to be a stable solution? The author has some doubts because (1) football is hardly in need of further regulations and (2) conflicts within the sport sector continue to exist.

(1) Regarding labour market regulations in sport, it is essential to note that in contrast to the US there does still not exist a European CBA. The special status of the players’ market has been codified by the new FIFA transfer regulations – possessing a somewhat ambiguous legal status. In order to avoid becoming engaged in further arguments in the players’ market, the CEC tries currently to foster a social dialogue in the sport sector. So far, that project has failed to take off. Beside the complex industry structure, it seems that political interference has prevented the social partners from building up the necessary institutional capacities for a social dialogue (Branco Martins, 2004; Meier, 2004a). But football is desperately in need of further regulations, because the new transfer regulations failed to address wage inflation as one of the central problems of team sport. Whereas the US leagues have included salary cap provisions into the CBAs to dampen the demand for playing talent, the ‘open’ European leagues face serious problems implementing such tight measures of labour costs control. UEFA as well as G-14 are currently working on measures to solve that problem. Whereas the G-14 members agreed on a ‘soft’ salary cap according to which the G-14 clubs should dedicate only 70 per cent of their turnover to salaries, UEFA worked out a licensing procedure in order to adjust the costs of the clubs to their realistic revenues (UEFA, 2004). The unilateral character of these initiatives could trigger new regulatory interventions because the UEFA licensing procedure will only prevent hyper investments if it restricts the freedom of the clubs to hire players. Thus, players and clubs may initiate proceedings before the EU competition law authorities which obviously prefer to see these questions solved by some kind of CBA.

(2) The sport bodies face another threat concerning their role as organisers of international competitions. So far, the regulations of the sport bodies require the clubs to leave their players to the federations for national team matches. Whereas the clubs have to pay the salaries and to bear the risk of injuries, they usually get only a small compensation from the federations – despite international competitions as the FIFA World Cup generate the federations enormous revenue. Thus, G-14 demanded FIFA and UEFA to take over the payment for the players during the world and European tournaments. The G-14 estimated the amount of payments to be €120m (*Süddeutsche Zeitung*, 3 December 2003). In response, FIFA abandoned any consultations with G-14. The European top clubs initiated proceedings

²⁰ The PSBs are primarily trying to get a regulation on news access to major sport events implemented in the revised TV directive (EBU, 2003). Given the statement of the EP on this issue, the adoption of a news access rule is probable (A5-251/2003; see also: CEC, 2003).

before the Swiss Competition Commission (*Frankfurter Rundschau*, 14 April 2004; Weko, 2004). This move is probably intended to improve the bargaining position of G-14 by getting a ruling not binding for EC law. The issue could outgrow to another serious setback for the sport federations. The case is still pending (G-14, 2005).²¹

In sum, while a distinctive European regulatory state in sport has emerged, it can be doubted whether this will be a stable solution, given the continuous existence of massive conflicts of interest in the sport sector.

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²¹ Personal communication from Weko, 19 July 2005.

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