Summary and conclusions

Sport and Competition Law: an interesting twosome

‘I again saw under the sun that the race is not to the swift nor the battle to the strong, and neither is bread to the wise, nor wealth to the discerning, nor favour to men of ability; for time and chance overtake them all.’

Ecclesiastes 9 verse 11

Not that long ago, at the end of the twentieth century, competition law made its entry into the world of sport. Sports regulations have been placed in a (European) competition law framework ever since because of conflicts between players or athletes and the association, between the clubs and the association, between the association and emerging other associations, or between the association and third parties such as broadcasting licence holders, etc. In 1999 the European Commission had to handle more than 50 sport-related complaints. Competition law is being used as an instrument to settle disputes in favour of the individual’s own interests, the club’s interests, or those of a third party (such as broadcasting licence holders), which are often diametrically opposed to the interests of the collective, the sports organization as a whole (chapter 16). Casting a side-glance at the development of applying competition law to sports regulations in the United States, one may assume that the trend to interfere using competition law will continue for the time being.

Central to this research was the tension between sports regulations and European competition law. In that context the research was aimed at determining whether sports regulations have their own sphere, and, if so, how this sphere is defined in relation to European competition law.

The key question was researched from two important angles:

a. The uniqueness of sport. Referred to in this study also as the basic principles of sport or the intrinsic value of sport;

b. Sport’s beneficial function to society. Referred to in this study also as the extrinsic value of sport.

The uniqueness of sport

To find an answer to the central question in this doctoral thesis, a profound understanding of sport is necessary. For there is no authoritative definition (par. 1.5), the basic characteristics of this phenomenon have been researched. Sport is a (visible) form of competition or rivalry (par. 1.2 and 1.5). Sport has its own rules, making the game recognizable throughout the world (par. 1.3). The conditions of the (usually physical) contest in sport are identical to the extent possible, the ultimate goal being to produce a winner (par. 1.5). Collectively, these characteristics distinguish sport from various other social phenomena (par. 1.6).
Subsequently, in the second chapter, sport in an organized form was researched. Sport developed in clubs and associations (par. 2.2 and 2.3). The sports organization governed by private law is distinguished by a monopolistic structure (see par. 2.3). The association is the umbrella organization that stipulates when, where, and under which rules the product, the game or the competition, is realized. Sports regulations that have a direct relationship to the basic characteristics form part of this ‘uniqueness’ of sport (par. 2.4). In addition, there are numerous sports regulations regarding the structure of the sports organization and sports regulations guarding the ‘integrity’ of sport and the sports organization, for example through disciplinary rules (see par. 2.4.4).

**Sport as a phenomenon placed in a favourable social framework**

In the third chapter the social framework of sport was researched. Sport’s importance to society is, inter alia, evidenced by the Declarations to the Treaty of Amsterdam and Nice (par 3.2.1., 3.2.2), the European Constitution [*Europese Grondwet*] (par. 3.2.3), and the Treaty of Lisbon (par. 3.2.3). Not only is sport viewed as a means to improve health, the educational, social, cultural, and recreational dimension is also continuously emphasized by governments or by institutions such as the European Commission. Due to the Community administration’s one-sided attention for the benefits of sport to society, sport is being propagated as a play for pleasure, not for gain, which can be reduced to the original ‘amateurism’ of De Coubertin (par. 3.4). The one-sided approach to idealistic, virtuous goals does not do justice to the phenomenon of sport. After all, top-level sport still is very much part of the phenomenon of sport and of society as a whole, in which top-level sport, for that matter, also has important functions (par. 3.6).

**Delineation of jurisdiction**

In the second part, in chapter 4, aspects of delineation of jurisdiction were researched. If the Treaty of Lisbon should enter into force, the Union, for the first time, through an article in the Treaty about sport, will have the authority to support, coordinate, or supplement actions taken by the Member States with regard to sport. The responsibility for the social functions of sport in society still lies principally with the Members States and the sports organizations (par. 4.2.3 and 4.2.4). Sports organizations governed by private law cannot escape application of European law (par. 4.2.5). As is shown in par. 4.2.5, the EC Treaty is mainly aimed at economic integration. In order for European law to apply trade between states must be affected (chapter 5). In the United States, federal law applies only if interstate commerce is involved. It had opted for the intrinsic approach (by emphasizing the uniqueness) of the phenomenon of sport at first, which led to the exclusion of baseball from the application of federal law as no cross-border economic activity could be demonstrated (no interstate commerce, chapter 5.3). This angle, however, does not do justice to the concept of sport, as sport is part of society and, therefore, cannot evade the economy.
Sport evolves from a game into an economic activity (chapter 6). The question then arises how ‘amateurism’ fits into European law (chapter 7). Amateurism is not a legal concept. The concept of economic activity is strongly interwoven with the concepts of ‘worker’ and ‘service provider’ under the EC Treaty (see par. 8.2 and 8.3). A purely extrinsic approach taking only the economic aspects into consideration (just like a purely intrinsic approach), fails to do justice to the concept of sport. After all, such a one-sided approach denies the fact that sport has non-economic basic characteristics.

**Application of the free movement regulations to sports regulations**

Applying European law to sport and to sports organizations does not automatically mean that the law has no consideration for the unique characteristics of sport. In the third part the application of the free movement principles to sport was researched. The Court of Justice of the EC has applied the free movement regulations to nationality clauses (chapter 9), selection criteria (chapter 10), and transfer periods (chapter 11). Nationality clauses with regard to national matches and selection criteria do not contravene the free movement regulations for reasons that lie in sport only.

**Competition law and the sports organization**

In the fourth part competition law in relation to the sports organization was researched. In the United States competition policy is influenced by the idea that market interference must be kept to a minimum, even if this leads to powerful companies and the downfall of others (chapter 13). Gradually, Europe seems to accept a competition policy predominantly aimed at economic effects (par. 13.3.1). The European Community strives for ‘workable competition’ and has a multi-goal approach, as evidenced by article 2 of the EC Treaty.

Competition law (articles 81 and 82 of the EC Treaty), is aimed at the market behaviour of undertakings (chapter 14). An undertaking is any entity engaged in an economic activity (par. 14.1). A sportsman (a self-employed person, par. 14.2) as well as a club or an organizer (par. 14.3.3) can constitute an undertaking (par. 14.3.3). The association is an undertaking or an association of undertakings (par. 14.3.4). In sport, rivalry, the match or the competition, is the ‘product’ (par. 15.2). Sport has a natural tendency towards winning and the sports organization towards a monopolistic structure (par 15.3 and 15.4). Ultimately only one association per branch of sport and per district can organize a quality competition. The sports organization has a position of economic strength (chapter 16). Problems may arise within the sports organization because top-class players, athletes or clubs find that their interests are not adequately represented, and problems with third parties may arise because no other interest grouping offering the same quality product (the competition) is available to them. Subdividing the association into several, competing, associations does not provide a solution (chapter 17). In the United States, the NFL was regarded as the most efficient, effective and lucrative form of a sports organization (par. 17.3). Even if several associations compete with each other in the same branch of sport, sport always tends to produce only one winner.
and the structure again tends towards a monopoly. This is because the ‘one-winner principle’ is a basic principle, and because the underlying notion of rivalry is founded on the distinction based on nationality (par. 17.4).

In the United States, it has been debated that a sports organization has to be seen as ‘one entity’ (single entity-theory) when it regards the application of competition law, see chapter 18. In the application of antitrust law, therefore, they assume that clubs cannot determine market behaviour as separate entities, but that they are mutually dependent because the competition is a joint effort. The cartel ban of article 81 EC Treaty, which refers to separate undertakings, does not apply in that case. However, a sports organization may not abuse that dominant position. Europe has adopted a reticent attitude with respect to the one-undertaking concept (par. 18.4). The single-entity concept has some validity where safeguarding the basic principles is concerned. After all, the entire organization pursues this identical objective (par. 18.6). Also the single-entity concept, or the necessity of cooperation, has some validity where the exploitation of the competition is concerned, the sale of television rights, for example, because clubs will never be able to realize the product (the competition) individually (chapter 39).

Sports regulations and competition law
Central to part five was the question whether sports regulations have the nature, object, or effect of restricting competition, or should be considered abuse. In the application of the free movement regulations to sports regulations, the Court of Justice of the EC sought a link with ‘non economic reasons or objectives’ connected to sport itself. In a thorough analysis of competition, this quest does not solve anything. The sports activity itself does not change substantially in case of an economic activity (see chapter 1). It may well be that sports regulations were established for purely economic reasons and cause an economic effect on the market. Again, a purely intrinsic approach of sports regulations unjustly wrenches sport away from the economic reality (par. 19.4). This analysis, therefore, is not useful in competition law. Central to a competition analysis should be the competition limitations that cause negative market effects with regard to prices, production, innovation, or diversity and quality of the products, or the possible abuse by the collective. Whether sports regulations have or may have such negative consequences depends on the economic context. Therefore not only the nature of the agreement or the decision the sports regulations were based on should be considered, but also the joint market force of the parties, other structural factors, and the effect of the sports regulations.

In chapter 19 a number of concepts shielding sports regulations from competition law were discussed (par. 19.3). Researched successively were: the rule of reason in competition law (par. 19.3.2), the application of the concept of ancillary restraints (par. 19.3.3), and the ‘Wouters exception’ (par. 19.3.4). The Wouters exception concerns overriding reasons in the general interest; and it entails that regulations have to be appropriate to achieve their objective and not be unnecessarily restrictive. The Court of Justice of the EC has applied the Wouters excep-
tion in the Meca Medina case, which involved the association’s anti-doping rules (par. 19.4.3).²

At the moment no rational standard exists that determines when participants in an interest grouping may or may not collaborate. This creates legal uncertainty. I personally believe that a competition standard can, and must, be found in efficiency considerations. The fact is that only efficiency considerations do justice to the competition law framework, equally so where sport or sports organizations are concerned.

The delineation of sport (regulations): a basis for immunity

‘Efficiencies’ can be found in the distinctive characteristics and, therefore, in the basic principles of sport, since there would be no exploitable product without such basic principles. This certainly applies to the rules of the game, as the scope of the rules in sport is defined beforehand (chapter 1). Competition law should not intervene in this hard core, as there can be no sports activity without rules of play, and hence no exploitation either (see chapter 20). In addition, the sports organization creates rules that go beyond regulating this hard core, and tries to find rules that shape and safeguard other basic principles. Besides the rules of play, rivalry, the contest under -to the extent possible- identical conditions, the comparison of achievements, and the appointment of a winner, are typical of sport (chapter 1) and, therefore, distinctive of the product ‘sport.’ If this product is realized in cooperation, the distinctive character of the contest market (where the product is realized) makes that clubs and individuals do not compete economically. Regulations pertaining to the contest market allow for economic competition and enhance the economic competition on the exploitation market, which benefits the end users. Even if there were a restriction of competition on a part of the market, for instance because the regulations restrict access to the market, the regulations even then boost competition in a larger part of the market: the exploitation market. Because of the tendency to continually enhance performance, and because rivalry and the comparison of achievements are part of the product, of the match, or of the competition, all participants contribute to this product and to an efficient sports organization. Besides defining regulations (par. 2.4.1. and 2.5) there are the fundamental rules of competition; rules common to every sports organization (par. 2.4.3) irrespective of the question whether there is an economic activity. Selection criteria for playing sport within the interest grouping are required, for instance (chapter 21). Selection allows the best to compete with each other, resulting in a small group of top-level players within the sports organization and ultimately in one winner. These rules cannot be removed from a complex of regulations without jeopardizing the existence of the interest grouping. Where an economic activity within the meaning of the EC Treaty is concerned, this pertains to rules regarding competitive market behaviour which an undertaking can also afford in a nor-

² Case C-519/04.
mally functioning market. We see the same normal competition behaviour with regard to the achievements of the undertaking (club or sportsman). Competition law intervention is not necessary.

Sports regulations directly related to the basic principles of sport are, under a rational competition policy, considered effective and efficient. After all, regulations required primarily to realize a totally legitimate product indeed enhance competition rather than limit it. Sports regulations that pertain to the ‘contest market’ and only affect the behaviour of participants to the contest match in fact have the same effect as competition law: safeguarding competition.

Furthermore, the underlying notion of rivalry is typical to sport (chapters 9 and 23). The interpretation of this principle varies in time and place; the ancient Greek had a different interpretation than we have in this day and age (2.4.2). The identification from time immemorial with the village or the school has shifted via the city and the region to the country of origin, making international matches between national teams possible. Nowadays, the position of sport in the city or the country is crucial for the bond and identification with the team or the sportsman. Interpreting the concept of rivalry through a distinction based on nationality has become an independent part of both the perception of sport and the structure of the sports organization.

An uneasy tension exists between conflict situations that can be reduced to a difference in nationality and the fundamental rights Community law attempts to safeguard through the nondiscrimination principle and the rules of free competition. In Europe we face the question whether a bond with a country is inherent in sport, or whether this alleged uniqueness should be abandoned in order to create mobility between Member States. Another, more supranational oriented approach would neither mean the end of sport, nor the end of the sports organization. This is because it is in essence a perception- or extrinsic characteristic; the underlying rivalry also exists without a distinction based on nationality laid down in sports regulations and the sports structure. In other words: the underlying rivalry is the basic principle. Presently, this principle is expressed by the distinction based on nationality.

Whether Europe heads, or remains headed, for a different form of integration because of the current nationally oriented perception of sport, or whether Europe heads for a more radical form of European integration also in sport, is ultimately a social-political choice.

If Europe opts for an historic, political, and social compromise, and if it respects the national competitions, the conclusion is justified that not only the national perception of sport is typical of sport, but also that the law is reticent to interfere in all sorts of issues involving discrimination on grounds of nationality. With regard to competition law this means that regulations pertaining to a distinction based on nationality support rivalry and are, therefore, efficient. Reticence is also needed
with regard to the move of a club to another Member State (chapter 26), allowing players to play for the national team (chapter 24), and the participation of a club in any other than the national competition (chapter 26), as long as this principle, the underlying notion of national rivalry, is considered inherent in sport. Should Europe not opt for the above, the dynamics of the market and the correcting effect of competition law probably will not end all sport, but it will bring about a different perception of sport.

If Europe opts for consciously enforcing the fundamental right of nondiscrimination and competition regulations, another sports structure will emerge. The power of the national associations will diminish with the creation of a supranational competition. The free market will allow clubs and sportsmen to opt for participation in a quality competition, as any competition sooner or later always tends to attract the best sportsmen. True European unification of national sports markets will be reached when Europe participates in international contest matches, comparable to participation by the United States. Abandoning the nationality clauses as a basis for the underlying rivalry is particularly important to the perception of sport and its position in society.

‘General-interest’ objectives: a basis for immunity

I Safety- and other objectives
In addition to its task of safeguarding the basic principles of sport, the sports organization attempts to safeguard objective, generally accepted, and undisputed general-interest objectives not specifically related to sport, such as providing safety guarantees when issuing licences to sports facilities (30.4). During ticket sales the sports organization is allowed to take measures that limit competition, if the objective is to prevent supporters’ violence (chapter 42). Whether the requirements of suitability and proportionality in relation to this objectively justified general interest have been met will be tested every time.

II Quality criteria, integrity criteria, and disciplinary rules
Such rules also apply in other professional organizations and in that sense they are not specific to sport. But sport does have its own interpretation of these rules and has, for example, its own integrity rules which are specific to the applicable norms within the sports organization (chapter 31). For instance, it is generally accepted that the use of doping in sport is a violation of a norm. Anti-doping rules and other rules pertaining to integrity can be justified by maintaining that these rules contribute to the economic interests of the sports organization because they regard an objectively accepted norm which is enforced by the sports organization, for which there are sufficient economic ‘efficiencies’ in the market (chapter 31). Just like rules prohibiting certain misconduct, anti-doping rules contribute to the value of the product and trust in the sports organization, and they fit in with market objectives. In this case, efficiency considerations in a competition law argument, without reverting to the Wouters ruling, do justice to the nature and the objective of these rules.
III Virtuous objectives, amateurism

Considering the laborious delineation of the virtuous functions of sport in relation to the economic sports activity, difficulties are foreseeable as soon as it does regard an economically tinted sports regulation that also pursues an economic objective, but that is nonetheless connected to certain non-economic interests in such a way that, again, a choice must be made: either competition law prevails, or a basis for immunity must somehow be found. In the United States, the characterization of amateur sport as a specific and distinctive product is the basis for such immunity. Amateur regulations are necessary to realize this distinctive product (chapter 32).

European judicial authorities are forced to make a choice between the general interest pursued by competition law, and the non-economic interest pursued by the amateur regulations. It is likely that not every conceivable, socially beneficial function will prevail as a mandatory requirement of general interest above the interest of integration and market forces.

It remains difficult to discern which general-interest objective is justifiable and which general-interest objective must yield to the process of market integration and the safeguarding of consumer welfare. This no longer concerns a legal/economic context, but a political/social one of which the legal basis and the outcome are unclear and uncertain beforehand. The choice between competition law objectives and such general-interest objectives not based in treaty provisions is to be avoided to the extent possible because of its subjective experience framework. Besides, except for the basic principles of sport, it remains to be seen whether market forces form a real threat to the virtuous values of sport. After all, recreational sport will always exist and is not threatened by market objectives, because there is no economic activity within the meaning of the EC Treaty and therefore no ‘undertaking’ within the meaning of the EC Treaty (see chapters 7.4, 8.5 and 14).

IV Recognized sport-specific general-interest objectives based on case law

The Court of Justice of the EC has, in a number of cases, recognized general-interest objectives specific to the sports sector and in practice tests if the requirements of necessity and proportionality are met. This test usually has a political dimension. This regards defined grounds for justification such as a) maintaining a financial and competitive balance between clubs and b) supporting the search and the training of young players.

Re a. Whilst ‘maintaining a financial and competitive balance’ has been recognized, the Court of Justice of the EC has de facto negated this interest by considering rules of transfer neither necessary nor proportional (chapter 34.6), and by designating this justification ground with regard to television rights without subsequently assigning any value to it (39.6). As soon as money becomes a determinant factor in sport, the disruption of the financial and competitive balance automatically becomes a point of discussion. For a product to be as attractive as possible it is essential that the teams are well matched. Only the club with ample financial resources has access to the best means to enhance its sport achievements.
One club will have more sponsor monies, box-office receipts, income from merchandising, or government support than the other. Such income is intended for the clubs; they do not have to redistribute it. Can this be considered unfair, too? Bribing referees and unjustly disallowing goals are considered unfair. Tampering with a cricket ball to influence the outcome of the match is considered unfair. When dealing with a balanced financial force field, however, ‘unfair’ becomes a different concept, perceived by each club in a different way. When is this justification ground valid and when is the argument not justified? The beauty of sport happens to be that the outcome of a game, no matter how much money is pumped into it, is never certain. Even the best and most expensive players do not necessarily make up the winning team. In the World Cup Soccer tournaments there are always teams that, to everyone’s surprise, make it to the quarter-finals or even semi-finals. A possible redistribution of income is also difficult in practice, because the larger clubs will always feel that clubs contributing to the value of the competition the most are, for that reason, entitled to a larger part of the income. Furthermore, redistribution of income from international tournaments will always lead to an imbalance in the national competition if only a limited number of clubs participate in this international competition. Now that the Court of Justice of the EC has embraced this justification ground, Europe should examine the redistribution agreements accurately and effectively. The European Commission and the Court of Justice of the EC have not taken their responsibility in this respect. This justification ground seems to carry little or no weight in regulations, but reasons for this are insufficiently given.

Re b. Both the specificity to sport and the basis for immunity are not clear. There is no specific other interest in ‘supporting the search and the training of young players’ that does not exist in any other line of business where employers try to recruit talented employees. It is unwise to shield employers in sport specifically from the application of competition law for this reason, as they do not distinguish themselves from other employers who have to make exactly the same efforts to recover recruitment and training investments, and offer attractive employment conditions.

Rather than a matter of solid legal grounds, the justification grounds under a. and b. seem to embody the wishes and desires of the sports organization. In this way the Court of Justice of the EC has entered the realm of sport without ascertaining the effects and consequences. Furthermore, the justification grounds have caused a further politicizing of the phenomenon of sport, because these wishes and interests have also been adopted in the policies of the European Institutions.

Considerations regarding the (future) structure of sport

The monopolistic organization has an incredible amount of power in many different markets and market segments. From this angle, the monopolistic organization poses a considerable threat to the public interest. Certain activities are best performed by the association. For instance: establishing and guarding defining rules
Organization rules (par. 2.4.4), too, are best established by the association. In all the cases above-mentioned, clubs and/or sportsmen are not in a position to establish such rules, because they are biased and will put their own interests before those of the interest grouping as a whole. The advisability of an independent third party is, therefore, implied in the basic principles of sport on the one hand, and in the requirements set by the organization on the other. There are other activities that are best regulated by the clubs or the sportsmen themselves. Clubs can regulate all kinds of activities in and around the stadium, such as ticket sales, merchandising, club sponsorship, etc. They can also attract new players, trainers, and coaches; purchase and manage the facilities, etc. A sportsman is in charge of hiring a good coach, selecting his training facilities, etc.

There are numerous other activities that are regulated by the association, although one can question the efficiency of this arrangement. One example is the association’s supervision over the player’s job mobility in team sport (see part 6, especially chapter 37). This regards association regulations such as remuneration schemes imposed on players through stipulations in the standard contracts. Sport can easily function without these kinds of regulations. In the absence of such regulations, provisions of labour law will apply. Sports regulations pertaining to labour conditions are integral to labour law. On an European level social dialogue between representatives of employers and employees can solve issues related to the sports labour market. The collective exploitation of media rights is another example of regulation by the association (chapter 39). Collectivity is a consequence of the interdependence of clubs in the realization of a competition, and is in my view not based on an agreement between competitors. To avoid problems of exclusion, the association needs to offer the rights to the market in a public, nondiscriminating way for a limited, exclusive period.

Is it possible to structure sport in a different way in order to achieve that a better allocation of resources without jeopardizing the basic principles? Liberalization means that the sports organization as a private monopoly will, mandatorily, come under the control of one or more market parties other than the association. For instance, by separating the association’s organizing/commercial function from its duty of guarding the association’s intrinsic sphere of activity. The association in that case, inter alia, ensures the safeguarding of the basic principles of sport and in that respect executes its duty to regulate, monitor, supervise, and enforce.

Several competing, private organizations subsequently end up with fragments of the organizing/commercial function.

3 An example of a structural change is allowing a market party to organize a tournament following a public, transparent, bidding process. After acquiring a tournament, the organizer/promoter can conclude agreements with participating clubs that are eligible for participation in accordance with the association’s selection system. In these contracts the division of revenues from the sale of television rights could be arranged. An annual ranking takes place internationally. At the beginning of the year, each professional club has zero points. The team with the highest score after participation in several tournaments, is the (international) champion. During the year a number of (‘competing’) tournaments are organized. The club’s ranking determines whether the club is eligible to compete in quality tournaments. The ranking can take place in several ways.
The association’s tendency to exclude or exploit is indeed diminishing because the association’s own commercial interests are declining, but it will become more difficult for the association to guarantee the uniformity of the game and of the organization of competitions, as well as to monitor the quality of the competition. In spite of all competition considerations, the tendency in sport to organize ‘the best tournament’ generating the most public attention will prevail, because it is in such tournaments that the best teams/sportsmen participate (see chapter 17.) It is the winner of the Tour de France who is the most widely known to the general public. The same goes for tennis; winning Wimbledon is more important than winning the ABN-AMRO tennis tournament in Rotterdam. Sport is and will always be all about producing an ‘overall’ winner. It is a fact that at present there is no ‘liberalization’ of the sports sector and any reform will, therefore, have to come from within the sports organization.

Such reform forces emerge when a split-off is imminent, also as a consequence of market dynamics. (The imminence of) a new association often results in an huge boost of efficiency, in which interests are reassessed within the existing structure of the sports organization. Possible competition of a newcomer will motivate the association to reform and innovate. This will usually result in a better representation of the professional interests of those sportsmen and clubs who are the most important to the association because of their popularity. The question remains whether the imminence of a new association and the effects of competition law will yield the most desirable result. The essence is that forcing participation may be harmful to mutual relations. Law should be a last resort. It is far more important to communicate that interests need to be represented well and balanced within the sports organization. A good dialogue between interested parties in order to avoid conflicts.

The (imminent) arrival of a new association, either from a market or sport point of view, does not pose a problem as long as the basic principles of sport remain unchanged. However, a permanent division of the sports organization into several, competing, national and international associations is not desirable and is contrary to the essential basic principles of sport because of the need to declare only one winner and the underlying notion of national rivalry (chapter 17). History has shown that only one organization can produce the best product in a particular region, and that that organization will dominate the market.