

# The ‘Social dialogue’ in European professional football

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## Introduction

'Autonomy' and 'specificity' are the two key words in the regulation of sport in Europe.<sup>3</sup> Autonomy means that Sports organizations adopt their own rules and regulations which take into account the peculiarities, i.e. the *specificities*, of the game, the nature and structure of the associations at international, national and local levels.<sup>4</sup> Nevertheless, as professional sport increasingly became more commercialized, State Authorities have been trying to intervene in the sports world and stakeholders have started to question the legitimacy of sports associations in an attempt to have a greater input in their activities and regulations. As a result, the increasing litigation within the sports sector often arises out of (labor-related) disputes involving athletes and clubs and reveals their dissatisfaction for their lack of representativeness in the sports governance.

In this context, following a bizarre terminology – at least for a non-European - the so-called 'social partners', i.e. the employers (clubs) and workers (athletes) representatives, can be involved in a 'social dialogue', meaning that they can start discussion, consultation, and negotiations on labor related issues. In other words, it is a means to conclude agreements and to foster co-operation

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<sup>3</sup> See Commission of the European Union, White Paper on Sport, COM (2007) 391 Final, July 2007, 13 (see: [http://ec.europa.eu/sport/white-paper/doc/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf), accessed 10 July 2011); Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, (see: [http://ec.europa.eu/sport/information-center/doc/timeline/doc244\\_en.pdf](http://ec.europa.eu/sport/information-center/doc/timeline/doc244_en.pdf), accessed 9 July 2011); M. Colucci, 'EU Sports Law and Policy beyond the White Paper on Sport and the Treaty of Lisbon', in M. Colucci, R. Blanpain and F. Hendrickx (eds.), *The Future of Sport in the European Union*, The Hague, Kluwer Law, 2008.

<sup>4</sup> The European Commission of the European Union in its White Paper on Sport (2007), has defined the *specificity* of European Sport as a concept that can be approached through two prisms: First, the specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions; and second, the specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport. Para. 4.1 of the White Paper on Sport, *supra* note 3. However, in the European Commission Communication of 18 January 2011 'Developing the European dimension in sport', para. 4.2 (see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:EN:PDF>, accessed 10 July 2011) the specific nature of sport is defined as '*a legal concept established by the Court of Justice of the European Union [which] encompasses all the characteristics that make sport special such as for instance the interdependence between competing adversaries or the pyramid structure of open competitions*'. On the autonomy and specificity of sport, see R. Blanpain, 'The Specificity of Sport from a Legal Perspective'; M. Colucci, 'EU Sports Law and Policy beyond the White Paper on Sport and the Treaty of Lisbon'; R. Siekmann, 'Is Sport "Special" under EU Law and Policy?'; J. Zylberstein, 'The Specificity of Sport in the EU Policy'; J. de Dios Crespo Pérez, 'The Specificity of Sport in the CAS Jurisprudence' in M. Colucci, R. Blanpain and F. Hendrickx (eds.), *The Future of Sport in the European Union*, The Hague, Kluwer Law, 2008.

between employers and employees, sometimes with the assistance of a third party (often the government).<sup>5</sup>

At the EU-level, Social Dialogue can take two main forms - a *tripartite dialogue* involving the public authorities,<sup>6</sup> and a *bipartite dialogue* limited to the European employers and trade union organizations.<sup>7</sup>

European tripartite social dialogue takes place within the Tripartite Social Summit for Growth and Employment, established in March 2003, as well as the dialogues on macroeconomics, employment, social protection and education and training. European bipartite social dialogue takes place within the cross-industry social dialogue committee and sectoral social dialogue committees.<sup>8</sup>

Recently the European Union has been fostering a number of initiatives aimed at installing a social dialogue in the European sports sector. Professional football (soccer in the USA) is the first sport where a social dialogue has been set up at the EU level, paving the way for other sports. In this article, the authors make an assessment of the composition, work and functioning of the sectoral social dialogue committee in professional football. It is their aim to evaluate the 2011 compromise agreement on the implementation of the *European Professional Football Player Contract Minimum Requirements (hereafter referred as the MRSPC)*, taking into account its genesis, the parties' interests and difficulties linked to their implementation.

## **1. The Genesis of Social Dialogue in Sport in Europe**

In an attempt to deal with labor issues in the field of sport the European Union (EU) started encouraging dialogue within the sports sector as early as 1991 till 2004 through *Fora* which brought together representatives of the sports movement and EU Member States' governments in order to discuss and promote sports policies.<sup>9</sup>

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<sup>5</sup> The International Labour Organization (ILO) defines social dialogue as follows: 'to include all types of negotiations, consultation or simply exchange of information between or among representatives of governments, employers and workers, on issues of common interest relating to economic and social policy'. ILO, *Social dialogue*, 2011 (see: <http://www.ilo.org/public/english/dialogue/themes/sd.htm>, accessed 9 July 2011).

<sup>6</sup> S. Smismans 'The European Social Dialogue between Constitutional and Labour Law', *European Law Review*, vol. 32, 2007, 342.

<sup>7</sup> Commission of the European Union, *Social Dialogue*, (see <http://ec.europa.eu/social/main.jsp?catId=329&langId=en>, accessed 9 July 2011).

<sup>8</sup> Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe - Enhancing the contribution of European social dialogue, COM (2004) 557 final, 12.

<sup>9</sup> In 2008, the Commission decided to reinstate the Forum to follow up on the initiatives presented in the White Paper on sport. See: Commission of the European Union, White Paper on Sport, COM (2007) 391 Final, July

In the Amsterdam (1997)<sup>10</sup> and Nice (2000)<sup>11</sup> Declarations on Sport attached to the Treaty of the European Union, the Heads of State and Government of the EU encouraged the dialogue between sports associations and EU institutions. In particular, the European Council stressed that the sporting organizations had to fulfill their task to promote their particular sports on the basis of a 'democratic method of operation'.<sup>12</sup> Moreover, the European Council expressed its support for a dialogue on the transfer system between the sports movement, in particular the football authorities, organizations representing professional sportsmen and -women, the Community and the Member States.<sup>13</sup>

In 2001, an agreement on the new FIFA rules on international transfers of football players was reached between the main football associations, *Fédération Internationale de Football Association* (FIFA)<sup>14</sup> and the Union of European Football Associations (UEFA)<sup>15</sup>, on the one side, and the EU Commissioners in charge of competition, sport and social affairs, on the other side.<sup>16</sup> These new regulations replaced the old transfer rules which had to be abolished as a consequence of the *Bosman* judgment<sup>17</sup>, in which the European Court of Justice held that FIFA's transfer regulations violated the rights of professional athletes to move freely within the territory of the European Union pursuant to Article 45 of the Treaty on the Functioning of the European Union (TFEU).<sup>18</sup> The EU Commission invited FIFA and UEFA to encourage clubs to start or pursue social dialogue with the representative bodies of football players. The Commission recognized that social dialogue could have been an effective method to find common solutions on employment matters between clubs and players. Thereunto, they offered the Commission's assistance to the establishment of a social

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2007 [Hereinafter White Paper on Sport], 18 (see: [http://ec.europa.eu/sport/white-paper/doc/wp\\_on\\_sport\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf), accessed 10 July 2011).

<sup>10</sup> Declaration 29 on sport to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.

<sup>11</sup> Declaration 29 on sport to the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.

<sup>12</sup> Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account Should be Taken in Implementing Common Policies, § 7 (see: [http://ec.europa.eu/sport/information-center/doc/timeline/doc244\\_en.pdf](http://ec.europa.eu/sport/information-center/doc/timeline/doc244_en.pdf), accessed 9 July 2011). The Declaration of Nice was not incorporated into the Treaty and was merely adopted by the Council as a joint declaration. Discussing and summing up the relevance of sport for shaping the European Union comprehensively and in such detail at top political level for the first time, it proved to be of great political relevance and influence.

<sup>13</sup> *Ibid*, § 16.

<sup>14</sup> FIFA is the worldwide international governing body of football (for further information see: <http://www.fifa.com>, accessed 10 July 2011)

<sup>15</sup> UEFA is the governing body of European football and has the responsibility for safeguarding the development and interests of the sport at all levels (both professional and amateur) both in the EU and the rest of Europe (for further information see: <http://www.uefa.com>, accessed 10 July 2011).

<sup>16</sup> Letter from Mario Monti to Joseph S. Blatter, D/000258, 5 March 2001.

<sup>17</sup> ECJ, *Union Royale Belge Sociétés de Football Association and others v. Bosman and others*, Case C-415/93, [1995] E.C.R. I-04921.

<sup>18</sup> Consolidated Version of the Treaty on the Functioning of the European Union art.45, 2008 O.J. C 115/47 [hereinafter TFEU].

dialogue in the sport sector at European level and ever since, the Commission has been supporting projects for the consolidation of social dialogue in sport in general and in football in particular.<sup>19</sup> Amongst others, these projects were aimed at identifying the relevant social partners in the sector at both the EU and the national level.

In the 2007 *White Paper on Sport*<sup>20</sup> the European Commission addressed the main challenges in the field of sports and recalled the autonomy of sports associations which nevertheless needs to be '*respectful of good governance principles*'.<sup>21</sup> In that regard, the White Paper strongly encouraged the use of social dialogue in the sports sector, because '*[it] can contribute to addressing common concerns of employers and athletes, including agreements on employment relations and working conditions in the sector in accordance with EC Treaty provisions*'.<sup>22</sup> The Commission acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and therefore, it declared to be ready to '*examine any request to set up a sectoral social dialogue committee in a pragmatic manner*'.<sup>23</sup>

## **2. Who should dialogue? The representativeness issue**

At the beginning, the troubles with predetermining the form of a social dialogue in football in particular followed from the difficulty to identify the 'appropriate' social partners, i.e. those who could negotiate about working conditions and other issues such as doping, players' agents, transfer and training compensations, related to the particular nature of the employment relationship in sport. This is a consequence of the specific nature of sport, which involves several actors organized not only around sports activities in the strict sense, but also around a wide range of services. In particular, in the sports world we can identify four categories which enjoy relative autonomy: professional sports businesses, competitive sports associations, sporting leisure associations and not-for-profit

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<sup>19</sup> A list of these projects can be found at Commission of the European Union, Commission Staff Working Document, The EU and Sport: Background and Context, Accompanying Document to the White Paper on Sport, footnote 149, COM (2007) 391 final, July 2007 [Hereinafter White paper on sport staff working document], (see: [http://ec.europa.eu/sport/white-paper/doc/dts935\\_en.pdf](http://ec.europa.eu/sport/white-paper/doc/dts935_en.pdf), accessed 8 July 2011). Recently Commission of the European Union, Developing the European Dimension in Sport, 12, COM (2011) 12 final, January 2011 (see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>, accessed 10 July 2011).

<sup>20</sup> White Paper on Sport, *supra* note 3.

<sup>21</sup> White Paper on Sport, *supra* note 3, section 4.

<sup>22</sup> *Ibid*, section 5.3.

<sup>23</sup> White paper on sport staff working document, *supra* note 3, section 5.3.

organizations.<sup>24</sup> This complexity has certainly slowed down the creation of social partners at the EU-level. Moreover, in some cases national legislation sets apart the workers' organizations from social dialogue and on employers' side, there are very few single organizations representing all the employers in the sector.<sup>25</sup>

The European Commission even gave important economic support to the sports stakeholders in order to consolidate the social dialogue in the sports sector and therefore facilitated the creation of the European Association of Sport Employers (EASE) in 2003.<sup>26</sup> EASE amongst others identifies suitable national employers' organizations in the sports sector. Thereto, it co-operates with EURO-MEI, the Media, Entertainment, Arts and Sports sector of UNI Europa which helps to establish trade union awareness in the sector through EU funded projects.<sup>27</sup> UNI-Europa/EURO-MEI and EASE have recognized each other as the European social partners for the sports sector in February 2008.<sup>28</sup> Currently, EASE and EURO-MEI have decided to submit jointly to the European Commission an application for the establishment of a European Sectoral Social Dialogue Committee for the sport and active leisure sector.<sup>29</sup> EASE and UNI Europa Sport -following their mutual recognition- have already agreed on minimum requirements regarding employment contracts and health and safety regulations in the sport and active leisure sector through joint statements signed in 2008 and 2009. Those minimum requirements aim to secure the working relations between employers and workers (including athletes).<sup>30</sup>

Projects funded by the Commission relating to the encouragement of social dialogue in the sports sector have had a substantial impact on the emergence of suitable social partners for a social dialogue in European professional football. On 10 December 2007, a request was submitted to the Commission for the establishment of a Social Dialogue Committee in the Professional Football sector

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<sup>24</sup> R. Blanpain and M. Colucci, 'The European Social Dialogue in Sports' in: G. Di Cola (ed.), *Beyond the Scoreboard. Youth employment opportunities and skills development in the sports sector*, Geneva, ILO, 2006, 109.

<sup>25</sup> *Ibid*, 110.

<sup>26</sup> See: <http://www.easesport.org/art.php?id=3210>, accessed 10 July 2011.

<sup>27</sup> UNI Europa is a European trade union federation. It unites trade unions organising in services and skills sectors in 50 different countries and has over 320 affiliated trade union organisations, representing 7 million workers. EURO-MEI, the Media, Entertainment, Arts and Sports sector of UNI Europa, is developing worker representation in the sport and active leisure sector. For more information, see: [http://www.uniglobalunion.org/Apps/iportal.nsf/pages/20100319\\_pee9En](http://www.uniglobalunion.org/Apps/iportal.nsf/pages/20100319_pee9En), accessed 10 July 2011.

<sup>28</sup> *EURO-MEI and EASE sign joint statement on sport social dialogue*, 27 May 2009, (See: <http://www.uniglobalunion.org/Apps/UNINews.nsf/0/2557CCAAC9559E42C125761500544B79>, accessed 10 July 2011).

<sup>29</sup> For more information, see: <http://ease.franceolympique.com/art.php?id=26274>, accessed 10 July 2011.

<sup>30</sup> EASE and UNI EUROPA Sport, 'Common position on European Social Dialogue in the European Commission's Communication "Developing the European Dimension in Sport" ', 21 February 2011 (see: [http://www.easesport.org/ease/fichiers/File/Communucation\\_CE\\_2011/Positions\\_communes/EASE\\_\\_UNI\\_Europa\\_Sport/ease\\_uni\\_europa\\_sport\\_common\\_position\\_ec\\_com\\_feb11\\_en.pdf](http://www.easesport.org/ease/fichiers/File/Communucation_CE_2011/Positions_communes/EASE__UNI_Europa_Sport/ease_uni_europa_sport_common_position_ec_com_feb11_en.pdf), accessed 30 July 2011).

by the International Federation of Professional Footballers' Associations- Division Europe (FIFPro) and Association of European Professional Football Leagues (EPFL).<sup>31</sup>

In March 2008, the Commission confirmed the representativeness of FIFPro and EPFL and later on, the European Club Association (ECA). Given the specificity of sport governance, the social partners invited the European Federation of Football Association (UEFA) to chair their dialogue. The aim of the committee was – and still it is - to improve employment relations for all players and reduce disputes through dialogue. Hereto, minimum requirements for professional players' contracts were the first issue to be discussed in the committee.<sup>32</sup>

### **3. European sectoral social dialogue**

#### **4.1 Legal Basis**

Aimed at strengthening the sectoral dimension of the European social dialogue, the sectoral social dialogue committees were established through the Commission Decision of 20 May 1998.<sup>33</sup> In those sectors where the social partners make a joint request to take part in a dialogue at European level, organizations representing both sides of industry must fulfill the following criteria, which are assessed by the Commission:

*(a) they shall relate to specific sectors or categories and be organized at European level;*  
*(b) they shall consist of organizations which are themselves an integral and recognized part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States;*

*(c) they shall have adequate structures to ensure their effective participation in the work of the Committees.*<sup>34</sup>

Provisions on the EU's social policy are at present to be found under title X of the TFEU, which captures the important role for the social partners as representatives of management and labor in

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<sup>31</sup> EPFL was founded only in June 2005. EPFL, *History* (see: <http://www.epfl-europeanleagues.com/history.htm>, accessed 11 July 2011).

<sup>32</sup> Commission Press Release, IP/08/1064 (Jul. 1, 2008), Footballers and employers launch new EU forum for social dialogue (see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1064>, accessed 10 July 2011.).

<sup>33</sup> Commission of the European Union, Commission Decision on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, 20 May 1998 [hereinafter Commission ESSDC Decision] COM (1998) 500 final.

<sup>34</sup> *Id.*, art. 1



the governance of the EU.<sup>35</sup> These provisions continued the path which the EU has followed for several decades. Pursuant to article 152 TFEU:

*The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.*<sup>36</sup>

In particular, on the basis of art. 154 (1) TFEU, the European Commission has a special role in promoting the consultation of social partners and taking action to support social dialogue. The encouragement of social dialogue by the Commission is one of the key elements of the European social policy.<sup>37</sup> With every legislative proposal in the social policy field, the Commission has to consult the relevant social partners twice. First, about the possible direction of EU measures and, in a second phase, about the content of the Commission's proposal. In each of these steps, the involved social partners may make recommendations or opinions pursuant to articles 154(2) and 154(3) TFEU.

In addition, the social partners have the possibility to autonomously start formal negotiations concerning the Commission legislative initiative. Subsequently, the partners have 9 months to reach a mutual agreement, during which the Commission cannot continue its own legislative proposal.<sup>38</sup>

Even when there is no legislative initiative by the Commission, the social partners are free to autonomously –after a consultation by the Commission or on their own initiative– conclude agreements.<sup>39</sup> Once the social partners have jointly adopted a text, the Treaty provides two routes for the implementation of the agreement. As article 155(2) TFEU states:

*Agreements concluded at Union level shall be implemented (emphasis added) either in accordance with the procedures and practices specific to management and labor and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.*

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<sup>35</sup> This Social Chapter of the Treaty was introduced with the amendment of the Treaty of the European Community (TEC) by the Treaties of Amsterdam and Nice (Articles 136 ff. TEC, now Articles 151 ff. TFEU), and incorporated the Agreement on Social Policy of 31 October 1991 between 11 of the then 12 Member States (the U.K. was not party to the Agreement), which proposed a radical change in the Community legislative process in the sphere of social policy.

<sup>36</sup> Consolidated Version of the Treaty on the Functioning of the European Union art.152(1), 2008 O.J. C 115/47 [hereinafter TFEU].

<sup>37</sup> R. Blanpain and M. Colucci, *l.c.*, 105.

<sup>38</sup> TFEU, *supra* note 36, art. 154(4), 2008 O.J. C. 115.

<sup>39</sup> *Id.* art.155(1).

*The Council shall act unanimously where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 153(2).*<sup>40</sup>

Firstly, implementation of an agreement is possible according to national procedures and practices; this is the so-called 'voluntary route', based on the different structures of industrial relations within the respective Member States.<sup>41</sup> In this case, the responsibility to implement lies with the national members of the European social partner organizations. The latter play a prominent role in overseeing the implementation of these so-called 'voluntary agreements', which are not generally binding, do not form an integral part of EU-law and, therefore, have no direct effect.

In its first Communication concerning the application of the Agreement on social policy, the Commission confirmed that the terms of these agreements merely bind the members of the social partner organizations and will affect solely them and only in accordance with the practices and procedures specific to them in their respective Member States.<sup>42</sup> Pursuant to the Declaration, annexed to article 155(2) TFEU, *'this arrangement implies no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation'*.<sup>43</sup> According to Franssen, the duties and obligations of the national affiliates have to be derived from the internal rules of the European social partner organizations in combination with international private law.<sup>44</sup> Because article 155(2) TFEU uses the phrasing *'shall be implemented'* (emphasis added), an obligation to implement these agreements and for the signatory parties to exercise influence on their members in order to implement the European agreement is implied. Also, it should be noted that the 'voluntary route' does not *exclude* the agreement from being applied or transposed through national legislation.<sup>45</sup>

As a second choice for the implementation of their mutually agreed texts, the social partners can submit a joint proposal to the Commission requesting to submit their agreement to the Council of the European Union. Although –in theory- implementation through a Council Decision may also result in a Regulation, this procedure will in practice result in a Directive, which the Member States

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<sup>40</sup> *Id.* art.155(2).

<sup>41</sup> S. Smismans, *l.c.*, 343.

<sup>42</sup> Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 37.

<sup>43</sup> Declaration annexed to TFEU, *supra* note 36, art. 155(2), 2008 O.J. C.

<sup>44</sup> E. Franssen, *Legal Aspects of the European Social Dialogue*, Antwerp, Intersentia, 2002, 128-136.

<sup>45</sup> See: Commission of the European Union, Commission Staff working Paper of 2 July 2008: Report on the implementation of the European social partners' Framework Agreement on Telework SEC (2008) 217.

subsequently have to convert within a given period into their respective national legislations.<sup>46</sup> This way, European social dialogue has the capacity to be an autonomous source of European social policy legislation. However, according to article 155(2), the implementation through a Council decision is only possible for agreements falling under one of the fields listed in article 153 TFEU.<sup>47</sup>

While the European Parliament has no role in this second implementation route<sup>48</sup>, the Council shall decide on the implementation of the collective agreement by qualified majority<sup>49</sup> or, for agreements relating to any of the fields mentioned in Article 153 (2) TFEU, by unanimous votes.<sup>50</sup> The Council cannot make amendments and it only retains the political choice to adopt the agreement or not.<sup>51</sup> In the latter case, the Commission may still decide to produce a normal legislative proposal<sup>52</sup>, according to the appropriate (normal or special) legislative procedure stipulated in 153(2) TFEU.

Because of the possibility to bypass the democratic involvement of the European Parliament, it is very important that the Commission ensures that the management and labor sides really represent who they claim to represent.<sup>53</sup> Hence, the above mentioned representativeness criteria for the social partners are an important prerequisite for ensuring the democratic legitimacy of the bipartite sectoral social dialogue.

### 3.2 European sectoral social dialogue in motion

Sectoral social dialogue committees are composed by 40 representatives from both sides of industry represented in equal manner.<sup>54</sup> They are chaired by a representative from one side of industry or, at

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<sup>46</sup> TFEU, *supra* note 36, art. 288, 2008 O.J. C. 115.

<sup>47</sup> These fields are (a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5 153 TFEU; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c).

<sup>48</sup> This essentially means a deviation from the normal legislative procedure as listed in TFEU art. 294. According to TFEU art. 155(2), the European Parliament shall be *informed*.

<sup>49</sup> TFEU art. 16 (3) states: 'the Council shall act by a qualified majority except where the Treaties provide otherwise'.

<sup>50</sup> TFEU, *supra* note 36, art. 155(2), 2008 O.J. C. 115.

<sup>51</sup> Commission of the European Union, Communication concerning the application of the Agreement on social policy presented by the Commission to the Council and the European Parliament, COM (93) 600 final, (December 1993), point 41.

<sup>52</sup> *Id*, point 42.

<sup>53</sup> S. Smismans, *l.c.*, 346.

<sup>54</sup> Commission of the European Union, Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level, COM (1998) 500 final, art. 3.

their own joint request, by a Commission representative.<sup>55</sup> Each Committee establishes, together with the Commission, its own rules of procedure<sup>56</sup> and holds at least one plenary session a year.<sup>57</sup>

Currently, there are over 40 sectoral social dialogue committees, which cover more than 145 million workers in the EU. They have issued around 500 texts of varying legal status going from joint opinions and responses to consultations, to agreements that have been implemented through Directives.<sup>58</sup> The latter is however quite rare and atypical for sectoral social dialogue, as demonstrated in *infra*.

Since the 1993 Maastricht Treaty, social partners opted for more emphasis on autonomous bipartite dialogue which ought to be focused on voluntary non-legally binding agreements.<sup>59</sup> The European Commission also endorsed this clear movement away from legally binding agreements.<sup>60</sup> The reason for this desire for more autonomy is different for the respective sides of industry. For the unions, this followed from the cautious attitude of the Commission to launch legislative initiatives in the EU social policy. On the one hand, the Commission gave less and less response to the demands of the unions, resulting in a redefinition of its role. Employers, on the other hand, wanted once and for all to get rid of the pressure from the Commission.<sup>61</sup>

As a result of this shift toward more voluntary/autonomous agreements, alongside the more traditional methods of concluding agreements between the social partners as provided in Article 155(2) TFEU, a whole range of categories of instruments approved by the Commission exists. In its 2004 Communication on ‘enhancing the contribution of European social dialogue’, the EU institution proposes a typology to classify possible outcomes of the sectoral social dialogue committees.<sup>62</sup> By doing this, the Commission aimed to stress that the added value of texts not only depends on whether they are legally binding or not, but also on the operational follow-up and effective

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<sup>55</sup> *Id.*, art. 5(2)

<sup>56</sup> *Id.*, art. 5(1)

<sup>57</sup> *Id.*, art. 3

<sup>58</sup> Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final.

<sup>59</sup> P. Pochet, *European Social Dialogue between Hard and Soft Law*. Conference paper presented at the EUSA Tenth Biennial International Conference, Montreal, 17–19 May 2007, 5 (see: <http://www.unc.edu/euce/eusa2007/papers/pochet-p-08f.pdf>, accessed 12 March 2011); See: The Laeken Declaration on the Future of the European Union, Annex 1 to the Presidency Conclusions of the European Council Meeting in Laeken, 14-15 December 2001, Brussels, No. SN 300/1/01 REV 1, 19-27.

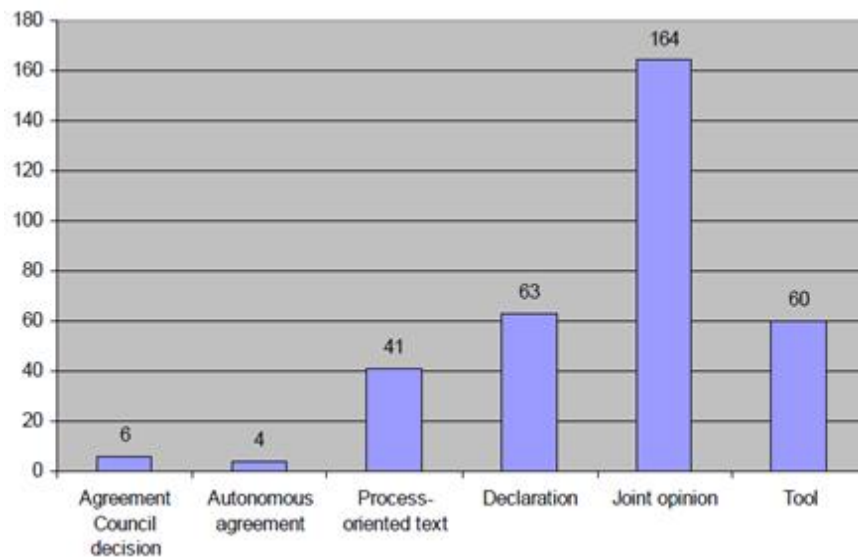
<sup>60</sup> Commission of the European Union, Communication from the Commission: The European social dialogue, a force for innovation and change COM (2002) 341 final; R. De Boer, H. Benedictus and M. van der Meer, ‘Broadening without Intensification: The Added Value of the European Social and Sectoral Dialogue’, *European Journal of Industrial Relations*, vol. 11, 2005, 65.

<sup>61</sup> E. Arcq, A. Dufresne and P. Pochet, ‘The Employers: Hidden Face of European Industrial Relations’, *Transfer*, vol. 9, 2003, 302-321; A. Branch and J. Greenwood ‘European Employers: Social Partners?’ in H. Compston and J. Greenwood (eds.), *Social Partnership in the European Union*, Houndmills, Palgrave, 2001, 41-70.

<sup>62</sup> Commission of the European Union, Communication from the Commission: Partnership for change in an enlarged Europe -Enhancing the contribution of European social dialogue COM (2004) 557 final.

implementation of the outcome. When assessing the outcomes of EU sectoral social dialogue, one must conclude that most of them are of a 'soft' nature, meaning that they aim to raise awareness, disseminate good practice, or help to build consensus and confidence (see figure 1).<sup>63</sup>

**Figure 1: Joint outcomes of the European sectoral social dialogue committees (1998- February 2010)**



**Source: Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, annex 4.**

There are several completely autonomous agreements like process-oriented texts, declarations, joint opinions and tools. These texts form the vast majority of the produced texts, with joint opinions as an absolute outlier. These outcomes mirror what Pochet described as a lack of pressure from the Commission and the Member States for the development of an ambitious European social policy and the lack of interest in the social dialogue on employers' side.<sup>64</sup> On the other hand, the peak in joint opinions, which are mostly aimed at influencing EU policy and by no means force obligations on the partner's national affiliations<sup>65</sup>, shows that the sectoral social dialogue has mainly taken a place within the European multilevel system of policymaking. Indeed, the influence the sectoral social partners can exercise is not limited to EU's social policy, but it extends over a range of European policies. As such, one of the key values of the sectoral dialogue committees (and, by extension, the

<sup>63</sup> Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue, SEC (2010) 964 final, 9.

<sup>64</sup> P. Pochet, *l.c.*, 2007, 17.

<sup>65</sup> R. De Boer *et al.*, *l.c.*, 2005, 61.

European social dialogue) is that it gives the social partners a certain amount of clout within the European agenda and the whole European policy process.<sup>66</sup>

**4. Social Dialogue in European Professional Football**

**4.1 The Stakeholders**

The EU Sectoral Social Dialogue Committee (hereafter: ESSDC) in the Professional Football sector started in July 2008, following the signing of the Rules of Procedure by the participating parties. According to the latter document, the ESSDC is composed by up to a maximum of 54 representatives, equally composed from both sides of industry.<sup>67</sup> The employers’ side is composed of representatives from EPFL and ECA. On the workers’ side, FIFPro Division Europe (hereafter FIFPro) provides representatives for the committee. The social partners agreed to invite the UEFA President to chair the ESSDC (see figure 1).<sup>68</sup>

**Figure 1: composition of the European Sectoral Social Dialogue Committee in the Professional Football Sector**

<b>Chairman</b>	
UEFA President	
<b>Employers</b>	<b>Workers</b>
EPFL	FIFPro Division Europe
ECA	

In this section, we discuss the stakeholders of the ESSDC in professional football. More specifically, for each party, we concentrate on three important questions, namely: a) Who are they?; b) Why do they engage in a social dialogue?; and c) What is their degree of representativeness?

The question as to why the stakeholders engage in a social dialogue is asked to find the possible reasons and incentives for their participation and co-operation in the ESSDC. More specifically, the authors seek to identify the ‘added value’ of a European social dialogue for each stakeholder. It is true that agreements between social partners are only possible when they contain an added value for both sides of industry,<sup>69</sup> if one or more of the involved stakeholders fail to identify clear benefits associated with a European social dialogue, the social dialogue eventually will fail. Moreover, if more

<sup>66</sup> *Ibid.*, 66; P. Pochet, *l.c.*, 2007, 15.  
<sup>67</sup> European Commission, Rules of procedure for the European sectoral social dialogue committee in the professional football sector, July 2008 [hereinafter ESSDCPF Rules of Procedure], art. 3 (see [http://ec.europa.eu/employment\\_social/dsw/public/actRetrieveText.do?id=8679](http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=8679), accessed 11 July 2011)  
<sup>68</sup> *Id.*, art. 4.  
<sup>69</sup> De Boer *et al.*, *l.c.*, 2005, 55.

favorable results with regard to European policy can be achieved through other channels of the European multilevel decision-making, the social partners will not be committed to the European social dialogue.<sup>70</sup>

As regards to the third question on the stakeholders' representativeness, one must understand that most European sectoral social partner organizations are characterized by a low degree of centralization, meaning that they have limited capacity to influence their national affiliates. However, involving national sectoral social partners in EU dialogue is crucial to assure an effective follow-up at the national level. The ESSDCs should be as inclusive as possible because the effective follow-up at the national level is also clearly linked to the representativeness of social partners. Moreover, national organizations which are not involved in the work of the committees at European level may not want to implement provisions which they do not endorse and to whom they made no contribution.<sup>71</sup> Thus, a strong mandate to negotiate at the European level is of vital importance.

#### 4.1.1 UEFA

In the hierarchical network that governs world football, UEFA is one of the 6 continental organizations that are located under the global football association FIFA and represents 53 national football associations (included those ones from the 27 EU Member States).<sup>72</sup> This means that UEFA has to comply with FIFA's rules and regulations<sup>73</sup> while national member associations are required to comply with and to enforce UEFA's statutes and regulations in their jurisdiction.<sup>74</sup>

With the growing importance of the economic aspect of football due to the extensive commercialization of the sport, stakeholders who are traditionally at the bottom of the hierarchical structure of the sport became more powerful.<sup>75</sup> Especially top professional clubs and national football leagues started criticizing UEFA's position in the governance of European football by

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<sup>70</sup> *Ibid.*, 55-56.

<sup>71</sup> Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final, 17.

<sup>72</sup> The other continental organisations are AFC (Asian Football Confederation), CAF (Confédération Africaine de Football), CONCACAF (Confederation of North, Central American and Caribbean Association Football), CONMEBOL (Confederación Sudamericana de Fútbol) and OFC (Oceania Football Confederation).

<sup>73</sup> FIFA Statutes, August 2010 edition, art. 20(3) a (see: [http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/generic/01/29/85/71/fifastatuten2010_e.pdf), accessed 11 July 2011).

<sup>74</sup> UEFA Statutes, edition 2010, art. 7bis (see: [http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.pdf), accessed 11 July 2011).

<sup>75</sup> See e.g. S. Szymanski, 'The future of football in Europe'. in P. Rodriguez, S. Kesenne, and J. Garcia (eds.), *Sports Economics After Fifty Years: Essays in Honour of Simon Rottenberg*, Oviedo, University of Oviedo, 2007, 200; M. Holt, 'The Ownership and Control of Elite Club Competition in European Football'. *Soccer & Society*, vol. 8, 2007, 51.

questioning its legitimacy to govern European football unilaterally.<sup>76</sup> For this reason, UEFA has been seeking recognition by the European authorities as the sole rulers of their sport on the European continent. However, the White Paper on Sport did not officially recognize the sports bodies as the governing bodies for their respective sports, which was heavily criticized by football's governing bodies and the International Olympic Committee (IOC).<sup>77</sup> Moreover, the European Commission refused to recognize one specific organizational model as typical for the European sports world and it acknowledged the emergence the new stakeholders in professional football, i.e. FIFPro, ECA and EPFL.<sup>78</sup>

Eventually, when EPFL and FIFPro submitted a joint request to the European Commission to start up a new ESSDC, UEFA wanted to participate in order to keep the control on the governance of European football.

UEFA itself has responded to the threats to its legitimacy by giving FIFPro, ECA and EPFL a place within its professional Football Strategy Council (PFSC), created in 2007.<sup>79</sup> The PFSC is a consultative body created to build a network for (social) dialogue and consultation with other stakeholders in the governance of professional football. It has no decision making power and merely informs the Executive Committee, the actual decision making body of the UEFA.<sup>80</sup> So, with the PFSC, UEFA created a forum for social dialogue within its own structures. Moreover, according to the rules of procedure of the ESSDC in professional football, every item for discussion must first be submitted to - and agreed by- the PFSC.<sup>81</sup> This way, some could argue that UEFA has *de facto* a strong control over the ESSDC. In the White Paper on Sport, the European Commission acknowledged that 'relevant third bodies' could be invited to take part in the social dialogue 'as observers'. The Commission however stressed that '[i]t should be kept in mind social dialogue is, above all, a bi-partite dialogue between

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<sup>76</sup> M. Holt, 'The Ownership and Control of Elite Club Competition in European Football' *Soccer & Society*, vol. 8, 2007, 52-53. For instance in 2000, Media Partners, a private business group linked to the Fininvest conglomerate that owns the club A.C. Milan had plans to set up a European Super League by luring fourteen of the most successful European clubs away from their respective national leagues.

<sup>77</sup> IOC-FIFA, joint declaration, 2007 (see: <http://www.fifa.com/aboutfifa/organisation/news/newsid=550327/index.html>, accessed 11 July 2011).

<sup>78</sup> B. García, 'Sport governance after the White Paper: the demise of the European model?', *International Journal of Sport Policy*, vol. 1, 2009, 274.

<sup>79</sup> These movements however fall short of the ambitions expressed by some professional leagues and clubs, who are seeking direct representation (i.e. on the executive committee). See: B. García, 'The European Union and the Governance of Football: A Game of Levels and Agendas' [Thesis (PhD)], Loughborough University, 2008, 37.

<sup>80</sup> UEFA Statutes, *supra* note 74, art. 35.

<sup>81</sup> ESSDCPF Rules of Procedure, *supra* note 67, 5.



*social partners*'.<sup>82</sup> When considering UEFA's control of the ESSDC, questions can be raised on the actual bi-partite nature of the committee and certainly about UEFA's supposed observer status.

UEFA –like FIFA, but also any other of private organization operating in every field- traditionally has a strong aversion for any government interference, certainly from the traditionally very market-oriented EU which has urged them to adhere to a strong protectionist vision of sport governance.<sup>83</sup> Thus, one cannot expect UEFA to be strong advocates for a European social dialogue which increases EU-interference in the sector.

Finally, UEFA does not need the ESSDC to gain more influence within the EU institutions. As García already pointed out, UEFA has rightly built up a strong partnership with the European Commission and uses clever and efficient lobbying strategies with the EU institutions to promote their policies.<sup>84</sup> Also, national politicians have traditionally been supportive of the 'football community' and the European Parliament is regarded as a loyal ally.<sup>85</sup>

Although UEFA in theory is not a social partner and does not represent the interests of the clubs nor of the athlete, because of its power as a rule making body within European football, any agreement concluded within the ESSDC will surely also need its signature.<sup>86</sup> UEFA however has to comply with FIFA's rules and regulations<sup>87</sup> and therefore, they have no mandate to conclude any agreements contrary to such rules. Therefore, a wider bargaining agreement in European football that contravenes with FIFA's rules is not an option within the context of the ESSDC.

#### **4.1.2 FIFPro**

FIFPro is a worldwide federation of national associations with 46 members<sup>88</sup> And FIFPro Division Europe was founded in July 2007 and currently has 24 member associations.<sup>89</sup> Of course, as a trade Union, FIFPro's specific intention is to pursue and defend the rights of professional football players.<sup>90</sup>

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<sup>82</sup> White paper on sport staff working document, *supra* note 3, section 5.3.

<sup>83</sup> R. Parrish, 'Social Dialogue in European Professional Football', *European Law Journal*, vol. 17, 2011, 215-216. Ever since the *Bosman* case, FIFA and UEFA argue that they should be afforded decision-making autonomy by the EU institutions. As Parrish describes, according to FIFA and UEFA, the need to promote competitive balance, to encourage the education and training of young players, to maintain the integrity and proper functioning of sporting competition and to protect national team sports all justify the imposition of market restrictions in the professional football sector.

<sup>84</sup> B. García, 'UEFA and the European Union: From Confrontation to Cooperation', *Journal of Contemporary European Research*, vol. 3, 2007, 202-223.

<sup>85</sup> M. Holt, *l.c.*, 2007, 62.

<sup>86</sup> UEFA's objectives are amongst others to deal with all questions relating to European football and monitor and control every type of football in Europe. See UEFA Statutes, *supra* note 74, art. 2.

<sup>87</sup> FIFA Statutes, *supra* note 73, art. 20(3) a.

<sup>88</sup> See: <http://www.fifpro.org/about>, accessed 12 July 2011.

Due to football's hierarchical governance network, professional football players, who are at the very bottom of this so-called 'football pyramid', are subject to the rules and regulations of the governing bodies when exercising their profession. As a result, for decades they had no voice in the governance of their sport. The extensively discussed *Bosman* ruling<sup>91</sup> of the ECJ initially seemed to change this. As 'Guardian of the Treaty',<sup>92</sup> and therefore guarantor of the fundamental rights therein enshrined, the European Commission initiated negotiations with FIFA and UEFA on a new transfer system and strongly encouraged them to involve FIFPro.<sup>93</sup> FIFPro's eventual input in the new transfer rules, approved by the Commission in 2001, was close to none. This was mainly due to their limited organizational capacity at the time. Moreover, there were serious doubts regarding their legitimacy as a representative organization<sup>94</sup> as well as some internal divisions.<sup>95</sup> There simply was no strong representative players' union at the European level that could adequately defend players' interests.

The European social dialogue in professional football and the European Commission's encouragement in this matter strongly enhanced FIFPro's position in the governance of European football, making it a stronger stakeholder with whom the other stakeholders are now forced to be reckoned with. First of all, the European Commission's support<sup>96</sup> truly improved FIFPro's organizational capacity. Moreover, the encouragements by the Commission for a social dialogue in professional football strengthened FIFPro's representativeness and legitimacy. Today, FIFPro is recognized by not only the Commission but also by UEFA<sup>97</sup> and the other relevant international stakeholders.

Finally, the ESSDC in professional football, outside UEFA's structures, certainly allows FIFPro to put more pressure on UEFA to change its policy into a more 'workers oriented' direction. This is equally true for its influence towards football clubs. In recent years, we witnessed an increase in labor

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<sup>89</sup> FIFPro, 'About Division Europe' (see: <http://www.fifpro.org/division/index/1/show:details>, accessed 12 July 2011).

<sup>90</sup> FIFPro Statutes, art. 1(2) (See: [http://www.fifpro.org/img/uploads/file/FIFPro\\_Articles\\_eng.pdf](http://www.fifpro.org/img/uploads/file/FIFPro_Articles_eng.pdf), accessed 12 July 2011).

<sup>91</sup> *Supra*, note 17.

<sup>92</sup> Consolidated Version of the Treaty on European Union art.17, 2010 O.J. C 83/01.

<sup>93</sup> Letter Mario Monti to Michael Zen-Ruffinen (FIFA general secretary), November 2000. Also, see: 'Statement from Mario Monti on football transfers', annexed in R. Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, The Hague, Kluwer Law, 2003, 143.

<sup>94</sup> J. Irving, 'Red Card: The Battle over European Football's Transfer System', *University of Miami Law Review*, vol. 56, 2002, 713.

<sup>95</sup> B. Dabscheck, 'International Unionism's Competitive Edge: FIFPro and the European Treaty', *Industrial Relations*, vol. 58, 2003, 97-102.

<sup>96</sup> *Supra*, note 19.

<sup>97</sup> UEFA, Memorandum of understanding between the UEFA and the FIFPRO, 2007, (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340_DOWNLOAD.pdf), accessed 12 July 2011).

related disputes between players and their clubs, the latter still holding a strong preponderance within their employment relationship.<sup>98</sup>

Today, FIFPro is recognized by all the parties in the ESSDC as the only umbrella organization of trade unions for professional association football players.<sup>99</sup> However, there are some concerns raised on FIFPro's internal division.<sup>100</sup>

#### 4.1.3 EPFL

Professional football leagues usually negotiate with their respective national Football Associations in matters such as management of league championships, division of competencies and selling of TV rights. In recent years, they have become active at the European level as well. In 2005 the EPFL (European Professional Football Leagues) was created in order 'to be the voice of professional football leagues in Europe on all matters of common interest'<sup>101</sup>, to consider social dialogue issues at a European level and act as a 'social partner'.<sup>102</sup> EPFL is thus an umbrella organization for the national football league organizations that organize national competitions. Remarkably, these organizations are controlled by the clubs that play in these national leagues. EPFL therefore indirectly represents the European football clubs that play in the top national European leagues.

UEFA recognized the EPFL as the legitimate representative<sup>103</sup> of the professional leagues in Europe and commits to ensure that the views of the leagues are incorporated in its decision-making process.<sup>104</sup> In return, the leagues commit among others to abstain from organizing 'any supra-

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<sup>98</sup> In this context, the tensions between players and clubs largely concern issues regarding the restrictions of labour market mobility through contractual stability. Divergent views have been expressed regarding the interpretation of the rather vague article 17 of the FIFA Regulations. Especially some rulings of the Court of Arbitration for Sport have been heavily criticised by FIFPro. E.g. see: W. Van Megen, 'The Olivier Bernard case compared'. *European sports law and policy bulletin*, vol. 1, 2010, 93-103.

<sup>99</sup> Université Catholique de Louvain, *Study on the Representativeness of the Social Partner Organisations in the Professional Football Players Sector, Report for the European Commission*, Project No VC/2004/0547, 2006 (see: <http://ec.europa.eu/social/BlobServlet?docId=4111&langId=en>, accessed 12 July 2011).

<sup>100</sup> J. Irving, *l.c.*, 2002.

<sup>101</sup> EPFL Constitution, version November 2007, art. 1.3.8 (see: [http://www.epfl-europeanleagues.com/files/EPFL\\_Constitution\\_2007.pdf](http://www.epfl-europeanleagues.com/files/EPFL_Constitution_2007.pdf), accessed 12 July 2011).

<sup>102</sup> *Ibid.*, art 1.3.8

<sup>103</sup> UEFA, *Memorandum of understanding between the UEFA and the EPFL*, 2009, art. 1.1 (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784_DOWNLOAD.pdf), accessed 12 July 2011).

<sup>104</sup> *Ibid.*, art. 4.2.

national sporting competitions, tournaments or football matches'.<sup>105</sup> The EPFL currently works in close co-operation with UEFA.<sup>106</sup>

Since EPFL indirectly represents the European football clubs, their incentives to participate in a social dialogue at the EU-level are very similar to those of the ECA. In addition, a recognition of EPFL at the EU-level by means of a participation in a ESSDC also increases its credibility and contributes to its *raison d'être* and consequently to its organizational strength.

It has been argued that the EPFL is representative but that it is not independent from UEFA's structures.<sup>107</sup> Moreover, the power to negotiate and conclude agreements from EPFL is seriously undermined by the fact that, analogous to similar issues in other industries, their strongest national member leagues (such as for instance the English, Italian, or Spanish leagues) will never give away their bargaining powers to their representatives in Brussels.

#### 5.1.4 ECA

Founded only in 2008 and simultaneously recognized by UEFA,<sup>108</sup> the ECA is an independent autonomous body directly representing the European football clubs. The 200 represented clubs are drawn from every one of the 53 National Associations within UEFA.<sup>109</sup> Under article 2(c) of its statute, one of the objectives of the ECA is '*to represent the interests of the clubs as employers in Europe including in the social dialogue process and to act as a social partner where appropriate*'.

The ECA was founded as a result of the dissolution of the G-14, the association of 18 of the leading professional football clubs in Europe, constituted in 2000 but originating from an informal network founded in 1997.<sup>110</sup>

Professional football clubs are subjected to the rules and regulations of the governing bodies just like professional football players. With the growing commercial nature of professional football, clubs began contesting the monopolistic power of football's governing bodies. In this sense, the so called G-14, regrouping the most powerful football clubs in Europe, was founded as a pressure group

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<sup>105</sup> *Ibid.*, art. 3.2.

<sup>106</sup> An expression of the latter can be found in article 4.4 of the Memorandum of understanding between the UEFA and the EPFL, which states that if requested by the EPFL, UEFA would provide administrative and logistical support for EPFL close to the UEFA headquarters including office spaces.

<sup>107</sup> R. Siekmann, Study into the possible participation of EPFL and G14 in a social dialogue in the European Professional Football Sector, *The International Sports Law Journal*, Vol. 3(4), 2006.

<sup>108</sup> UEFA, *Memorandum of understanding between the UEFA and the ECA*, January 2008 (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/82/881782\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/82/881782_DOWNLOAD.pdf), accessed 12 July 2011).

<sup>109</sup> ECA, *Vision and mission* (see: <http://www.ecaeurope.com/Default.aspx?id=1085058>, accessed 12 July 2011).

<sup>110</sup> B. García, *I.c.*, 2008, 40.

against UEFA and FIFA<sup>111</sup> and it used the EU institutions as mediators in its conflict with them.<sup>112</sup> As part of a settlement between football's governing bodies and G-14 concerning the payment of compensation to the national football clubs when their players are called up for their national teams, the G-14 was dissolved and in its place the ECA was established and subsequently recognized by FIFA and UEFA.<sup>113</sup>

It is clear that football clubs can use the EU institutions as a means to pressure football's governing bodies. The added value of the ESSDC, which in general is often used to lobby EU policies,<sup>114</sup> must be seen in this sense although some clubs are nevertheless not satisfied with the mere consultative role they have been given within the context of the Professional Football Strategy Council and seek representation in UEFA's Executive Body.<sup>115</sup>

Unlike EPFL<sup>116</sup>, ECA is very much independent of UEFA.<sup>117</sup> With a member base extending even far beyond the EU-territory, there can also be no doubt about ECA's representativeness. ECA does not fulfill the criterion set by the European Commission that a European social partner organization should consist of organizations which are themselves an integral and recognized part of Member States' social partner structures and should have the capacity to negotiate agreements.<sup>118</sup> Contrary to the EPFL, whose member leagues in some countries act as representative organizations, the ECA represents clubs directly so that they can never fulfill this criterion. The Commission however acknowledged the difficulty to predetermine the form of a social dialogue in the sport sector and

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<sup>111</sup> In 2000, the G-14 even threatened to establish a Super League, see supra, note 76.

<sup>112</sup> B. García, l.c., 2008, 41.

<sup>113</sup> This conflict reached a climax with the so-called Charleroi/Oulmers case concerning the payment of compensation to the national football clubs when their players are called up for their national team (ECJ, Sporting du Pays de Charleroi, G-14 Groupment des Clubs de Football Européens v Fédération Internationale de Football Association (FIFA), Case C-243/06, [2006]). The G-14 decided to join this case citing a lack of clubs' representation in the governance of professional football rules, which results in unfair and undemocratic rules for its decision. The parties to the dispute however decided to arrange matters out of the courts and met in January 2008 in FIFA's headquarters. There, representatives of FIFA, UEFA and the clubs agreed on a set of actions aimed at regulating their future relationship. The Charleroi/Oulmers case was withdrawn and the payment of financial contributions to clubs for player participation in European Championships and World Cups was agreed. Furthermore, the G-14 was dissolved and in its place the ECA was established and subsequently recognised by FIFA and UEFA. Finally, UEFA agreed to grant four ECA-representatives a seat in its Professional Football Strategy Council.

<sup>114</sup> R. De Boer et al., l.c., 2005.

<sup>115</sup> Supra, note 79.

<sup>116</sup> Supra, note 107.

<sup>117</sup> Siekmann also agrees on this, see R. Siekmann, 'Some Thoughts about the European Club Association's Possible Participation in a Social Dialogue in the European Professional Football Sector', *The International Sports Law Journal*, vol. 1-2, 2008, 95-96.

<sup>118</sup> *Ibid.*

stressed that it would examine any request to set up a ESSDC in a pragmatic but also in a flexible manner.<sup>119</sup>

## 5. Negotiations: key points

Recently, FIFPro has reported about the many abuses in Eastern Europe regarding players' contracts<sup>120</sup> such as the absence of any guarantee in case of illness and/or injuries, penalties from 10% to 100% of salary and bonuses unilaterally determined by the club management, etc. The adoption of Minimum Requirements in standard players' contracts at European Union level becomes thus very important in order to better define duties and obligations of the contractual parties in conformity with EU law and FIFA relevant rules on the status and transfer of players.

Already in 2006, FIFPro, EPFL and UEFA agreed upon Minimum Requirements for a professional football players' contract, elaborated by a working group consisting of members of the three parties.<sup>121</sup> The implementation of this agreement thus seemed like a suitable starting point for the ESSDC.

Table 1 depicts the emergence of the ESSDC in the professional football sector from the Joint Request by FIFPro and EPFL to the establishment of the Rules of Procedure.

**Table 1: the ESSDC: from Joint Request to Rules of Procedure**

<b>10 December 2007</b>	EPFL and FIFPro joint request to the Commission for the establishment of a Social Dialogue Committee in the Professional Football sector
<b>13 March 2008</b>	European Commission's letter, confirming the existence of the conditions for the creation of a Social Dialogue Committee in the Professional Football sector
<b>14 May 2008</b>	Professional Football Strategy Council agreement on EU social dialogue (Rules of Procedure and Work Programme)
<b>1 July 2008</b>	Official Launch of the ESSDC in the Professional Football sector
<b>27 October 2008</b>	Addendum to the Rules of Procedure of the European Social Dialogue (agreed by the

<sup>119</sup> European Commission, White Paper on Sport Staff working document, *supra* note 19, section 5.3.

<sup>120</sup> FIFPro press release, 'You can always change a bizarre standard contract', 9 September 2011 (see: [http://www.fifpro.org/news/news\\_details/1693](http://www.fifpro.org/news/news_details/1693), accessed 10 September 2011)

<sup>121</sup> FIFPro press release, 'FIFPro confident about Social Dialogue meeting', 11 February 2010 (see: [http://www.fifpro.org/news/news\\_details/162](http://www.fifpro.org/news/news_details/162), accessed 14 July 2011); The Minimum Requirements have already been approved by the PFSC, See Annex 1 'European Professional Football Player Contract Minimum Requirements' of the Memorandum of understanding between the UEFA and the FIFPRO, 2007, (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/Others/601340_DOWNLOAD.pdf), accessed 12 July 2011) and Annex 2, art. 4 of the Memorandum of understanding between the UEFA and the EPFL, 2009 (see: [http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/88/17/84/881784_DOWNLOAD.pdf), accessed 12 July 2011).

The first Work Programme of the ESSDC<sup>122</sup>, annexed to the rules of procedure, set the framework for the following two years by identifying the strategy and goals the social partners jointly wanted to achieve and react on. Should UEFA, FIFPro, EPFL and ECA so decide, other issues may also be included on the agenda. According to the Work Programme, the main objective of the Committee was to discuss and, where agreed, promote and develop the concept of ‘the European Professional Football player contract minimum requirements’ throughout the European Union Member States. The Programme is silent about the national football associations affiliated to UEFA which are not situated in EU Member states.

FIFPro’s hopes were that the conclusion of the agreement on Minimum Requirements could serve as a starting point for a broader cooperation at the European level between the social partners<sup>123</sup> and eventually lead to a real Collective Bargaining Agreement at European level on fundamental labor conditions in professional football.<sup>124</sup>

### **6.1 The European Professional Football player contract minimum requirements**

In January 2011 UEFA, FIFPRO and EPFL reached a compromise on the European Professional Football Player Contract Minimum Requirements (hereafter referred to as ‘MRSPC’). The first fifteen articles of the Agreement are almost identical to the provisions of the 2006 agreed minimum requirements.<sup>125</sup>

In the preamble of the Agreement it is made clear that the provisions of the EU Treaties, the Charter of Fundamental Rights of the European Union, and secondary EU law apply to professional football players’ contracts without prejudice to more stringent and/or more specific provisions contained in this agreement. The Parties commit to further elaborate provisions regulating the employment relationship in the professional football sector, taking into account its specific nature, in future agreements. Where appropriate, agreements on matters falling into the scope of Article 153 of the

<sup>122</sup> European Commission, Work programme annexed to the ESSDCPF, *supra* note 67.

<sup>123</sup> FIFPro press release, ‘FIFPro confident about Social Dialogue meeting’, 11 February 2010 (see: [http://www.fifpro.org/news/news\\_details/162](http://www.fifpro.org/news/news_details/162), accessed 14 July 2011).

<sup>124</sup> W. Van Megen, ‘Minimum Requirements: FIFPro’, Presentation to the ESSDC in Professional Football, 11 December 2008 (see: [http://circa.europa.eu/Public/irc/empl/sectoral\\_social\\_dialogue/library?!=/professional\\_football/2008/20081119\\_plenartagung/081119\\_requirements/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/empl/sectoral_social_dialogue/library?!=/professional_football/2008/20081119_plenartagung/081119_requirements/_EN_1.0_&a=d), accessed 15 July 2011).

<sup>125</sup> See Annex 1 ‘European Professional Football Player Contract Minimum Requirements’ of the Memorandum of understanding between the UEFA and the FIFPRO, *supra*, note 121.

TFEU may be submitted to the Commission for adoption by Council decision in line with the procedure laid down in Article 155 TFEU.

The first minimum requirement concerns the contract, its form (to be in writing) and essential elements (details of the parties, legal representatives, clear starting and ending dates).<sup>126</sup>

It is clearly stated that Club and Player have equal rights to negotiate an extension and/or an earlier termination of the Contract in accordance with the relevant international and national legislation and case law. This is by far one of the most important minimum requirements whereas several clubs in Europe still foresee such a clause only in favor of the clubs and this despite a consolidated jurisprudence of the FIFA Dispute Resolution chamber which expressly forbids these so-called 'potestative clauses'.<sup>127</sup>

Any early termination must be founded (just cause). In cases of prolonged periods of injury/illness or of permanent incapacity of the Player, the Club may serve a reasonable notice to the Player.<sup>128</sup>

The national legislation of the country where the Club is duly registered applies to the Employment agreement unless another national legislation is explicitly agreed. The Contract regulates the employment relationship among the parties and no further contract should cover the employment relationship between the Player and the Club. If another contract exists or is signed at a later stage

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<sup>126</sup> Pursuant to art.3 'the Contract must be in writing, duly signed by the Club and the Player with the necessary legal binding power of signature. It also includes indications with regard to place and date of when the Contract was duly signed. In the case of a minor the parent/guardian must also sign the Contract'. Following the current procedure in many national sports associations, the Club and the Player each (must) receive a copy of the Contract and one copy has to be forwarded to the professional league and/or national association for registration according to the provisions of the competent football body. Then reference must be made to the essential data to identify the contracting parties, such as the name, surname, birth date, nationality(-ies) as well as the full address of the residency of the Player (only an individual person). In the case of a minor the parent/guardian must also be mentioned accordingly. The Contract states the full legal name of the Club (incl. register number) and its full address as well as the name, surname and address of the person who is legally representing the Club

<sup>127</sup> For all, see FIFA DRC case 74508 of 22 July 2004; case 55161 of 13 May 2005; case 75975 of 28 July 2005 (see [http://www.fifa.com/mm/document/affederation/administration/75975\\_954.pdf](http://www.fifa.com/mm/document/affederation/administration/75975_954.pdf), accessed 4 August 2011), where *'the Chamber deemed that in view of its potestative nature, the aforementioned contractual clause shall not have any effect'*; case 261245 of 21 February 2006; case 36858 of 23 March 2006; case 117707 of 30 November 2007; case 58860 of 7 May 2008; case 19174 of 9 January 2009.

<sup>128</sup> Art. 4.5 MRSPC. See FIFA Regulations on the Status and Transfer of Players, edition 2010, art. 15 [hereinafter FIFA Regulations] (see [http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010\\_e.pdf](http://www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010_e.pdf), accessed 11 July 2011). An established professional who has, in the course of the season, appeared in fewer than ten percent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. The existence of sporting just cause is established on a case-by-case basis and in such a case, sporting sanctions shall not be imposed. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered.



then the parties are obliged to refer to this Contractor to any subsequent employment agreement. Any additional contract related to the Contract must be sent to the professional league and/or the national association.<sup>129</sup>

The Contract must contain all rights and duties for the clubs (*inter alia* financial obligations, benefits, medical and health insurance)<sup>130</sup> and for the players which are already inserted in the vast majority of contracts in the EU countries.<sup>131</sup>

Surprisingly enough there is even a very controversial clause – at least for clubs coming from East Europe - on image rights, enshrined in art. 8, stating that *'[t]he Club and the Player have to agree how the players' image rights are exploited'. As a recommendation and principle the individual player may exploit his rights by himself (if not conflicting with Clubs' sponsors/partners) whilst the Club may exploit the Players' image rights as part of the whole squad'*. To the best of our knowledge, this particular issue is not regulated in the majority of national collective bargaining agreements and we do not see how the parties could find an agreement at EU level on such a delicate issue.

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<sup>129</sup> Art. 5.2 MRSPC.

<sup>130</sup> In particular, pursuant to art. 6 the Contract should define the Club's financial obligations such as, for example: a) salary (regular; monthly, weekly, performance based); b) other financial benefits (bonuses, experience reward, international appearances); c) other benefits (non-financial ones such as car, accommodation, etc.); d) medical and health insurance for accident and illness (as mandatory bylaw) and payment of salary during incapacity (definition to be determined including its consequences with regard to salaries paid); e) pension fund/social security costs (as mandatory by law or collective bargaining agreement); f) reimbursements for expenses incurred by the Player.

The Contract must define the currency, the amount, the due date for each amount (e.g. by the end of each month) and the manner of payment. In that regard it is important to stress that in order to guarantee transparency the payment -at least for an international transfer- should be done only via bank account or via the so called FIFA Transfer Match System.

The Contract also regulates the financial impact in case of major changes of revenue of the Club (e.g. promotion/relegation).As minimum requirement, the Club and the Player agree on the payment of taxes according to national legislation.

<sup>131</sup> Pursuant to Art. 7 MRSPC, among the players' obligations there are a) to play matches to the best of his best ability, when selected; b) to participate in training and match preparation according to the instructions of his superior (e.g. head coach);c) to maintain a healthy lifestyle and high standard of fitness; d) to comply with and act in accordance with Club officials' instructions (reasonable; e.g. to reside where suitable for the Club);e) to attend events of the Club (sporting but also commercial ones);f) to obey Club rules (including, where applicable, Club disciplinary regulations, duly notified to him before signing the Contract);g) to behave in a sporting manner towards people involved in matches, training sessions, to learn and observe the laws of the game and to accept decisions by match officials; h) to abstain from participating in other football activities, other activities or potentially dangerous activities not prior approved by the Club and which are not covered by Clubs' insurance; i) to take care of the property of the Club and to return it after termination of the Contract; j) to immediately notify the Club in case of illness or accident and to not undergo any medical treatment without prior information to the Club's doctor (except in emergencies) and to provide a medical certificate of incapacity; k) to undergo regularly medical examination and medical treatment upon request of the Club's doctor; l) to comply with the terms of any association, league, player's union and/or club anti-discrimination policy; m) not to bring the Club or football into disrepute (e.g. media statements);n) not to gamble or undertake other related activities within football.

A specific provision is foreseen for the protection of minors<sup>132</sup> who shall follow mandatory school education in accordance with national law and shall have the possibility to continue their non-football education. This may also apply to prepare a second career after their retirement from the football activity.

Since the employment relationship between a club and a player may end in a labor dispute, art. 10 of the minimum requirements is dedicated to player discipline and grievance. It is expressly stated that the Club establishes in writing appropriate internal disciplinary rules with sanctions/penalties and the necessary procedures, which the Player abides by. And then – it is quite curious to read that *'[t]he Club has to explain such rules to the Player'*. It is quite an innovative clause because it implies that the Club does not only decides the rules and procedures as well as the sanctions including fines according to local agreement and standards but has also the obligations to inform the player and to explain them and the consequences of their violation.

### 5.3 The implementation

Implementation is the real key issue of the Minimum Requirements as because of their legal nature, they are not legally binding *per se*, in other words; they are not self-executory and they need to be implemented by the relevant national associations.<sup>133</sup>

On this point, FIFPro but also other stakeholders wanted a full agreement between all parties, not only for the territory of the European Union but for the whole UEFA territory.<sup>134</sup> Bearing in mind the two implementation routes provided for by the Treaty (i.e. the voluntary one and the legally binding one), this *a priori* poses a problem. An agreement through a Council decision resulting in a Directive would definitely mean a full agreement which would ensure a uniform implementation in all EU Member States. However, the implementation would naturally be limited to the 27 EU Member states and as a consequence it would not be extended to the remaining national football associations who are outside the EU or the EEA but nevertheless affiliated to UEFA. FIFPro nonetheless aimed for a binding agreement for all the parties for the whole UEFA territory, which was not agreed in the

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<sup>132</sup> Art. 6.5 MRSPC

<sup>133</sup> As the European Professional Football player contract minimum requirements were for the most part already agreed upon by FIFPro, EPFL and UEFA in 2006, the actual content of these provisions was not so much subject to debate in the ESSDC. The discord between the parties was on the method of implementation of these minimum requirements.

<sup>134</sup> W. Van Megen, 'Minimum Requirements: FIFPro', Presentation to the ESSDC in Professional Football, 11 December 2008 (see: [http://circa.europa.eu/Public/irc/empl/sectoral\\_social\\_dialogue/library?l=/professional\\_football/2008/20081119\\_plenartagung/081119\\_requirements/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/empl/sectoral_social_dialogue/library?l=/professional_football/2008/20081119_plenartagung/081119_requirements/_EN_1.0_&a=d), accessed 15 July 2011), slide 6.

Work Programme, and refused to conclude an agreement through the voluntary route. The latter would impose no real binding obligations on the parties and would hardly be enforceable. Tensions in the ESSDC between FIFPro and the other parties mounted as the latter were reportedly not prepared to sign a binding agreement.<sup>135</sup>

In an attempt to resolve the differences among the signatory parties and in order to reconcile their diverging visions (the players' representatives aiming at having a legally binding document while the clubs willing to have a voluntary agreement), the European Commission -in its role as a facilitator of the negotiations and on the basis of a specific request from all negotiating parties- proposed a compromise agreement to the professional football ESSDC parties on the implementation of the European Professional Football player minimum contract requirements.<sup>136</sup>

The Commission's implementation proposal was largely aimed at strengthening the implementation through the 'voluntary route' in all countries covered by UEFA. In case a national collective bargaining agreement existed, the relevant partners concerned would implement the Minimum Requirements in the national collective bargaining agreement.<sup>137</sup> In case no national bargaining agreement exists, implementation would have to be supervised by a taskforce created under the compromise agreement.

FIFPro immediately was prepared to sign the Commission's proposal. However, the other involved parties still had serious concerns about its legal implications. On Monday 28 February 2011, ECA, EPFL and UEFA refused to sign the Commission's proposal, stating that they needed more time to study its legal consequences and to have the agreement approved internally. FIFPro declared that *'the parties apparently were not ready to sign a legally binding agreement'*.<sup>138</sup> It seemed that the ESSDC in professional football had come to a severe impasse.

In the summer of 2011, UEFA, ECA and EPFL proposed an agreement on the implementation of the MRSPC to the board of FIFPro Division Europe. The latter accepted this compromise proposal and at

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<sup>135</sup> FIFPro press release, 'Only FIFPro is ready to sign minimum requirements', 1 March 2011(see: [http://www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469), accessed 10 July 2011).

<sup>136</sup> European Commission, *Compromise proposal HW 24 January 2011 based on comparison of "employers November 2010 and FIFPro January 2011"*, not published.

<sup>137</sup> An analysis on the existence of Standard Player Contracts and collective bargaining agreements in the UEFA territory, conducted within the context of the ESSDC in Professional Football shows that in England, The Netherlands, Belgium, Denmark, Sweden, Latvia, Portugal, Spain, France, Italy, Austria, Greece and Macedonia, the minimum requirements would be implemented in the existing bargaining agreements. UEFA, ESSDC in the Professional Football Sector, 'Analysis of Questionnaires on Standard Player Contracts, Results of all 4 stakeholders', Version 21.10.2009, not published.

<sup>138</sup> FIFPro press release, 'Only FIFPro is ready to sign minimum requirements', 1 March 2011(see: [http://www.fifpro.org/news/news\\_details/1469](http://www.fifpro.org/news/news_details/1469), accessed 10 July 2011).

the time the authors are finalizing this article, small details remain to be drawn up in order to complete the relevant approval procedures.<sup>139</sup> The Agreement will now have to be approved or ratified by the internal bodies of the signatory parties.

Unlike in the Commission's proposal, it is also stressed that the Agreement commits the Parties to use *best endeavors* (emphasis added) to ensure the implementation at national level where possible, not only in the EU territory but also in the rest of the UEFA Territory. Furthermore, article 18 MRSPC stipulates that implementation of the Agreement will follow only after it has been approved and/or ratified by the appropriate Organs of the Parties (i.e. General Assembly, Congress etc.). Finally, any disagreement concerning the implementation process at national level must be resolved by negotiations both at national and at European level.<sup>140</sup>

#### 5.4 The nature of the Agreement

It is hard to establish whether the agreement –if ever signed and ratified- could be considered as a valid collective bargaining agreement (CBA) for several reasons. It could be considered as a CBA because it is the result of voluntary negotiations between employers organizations (EPFL and ECA) and trade unions (FIFPro) in football and it regulates the terms and conditions of employment in European Football. Therefore it fulfills the criteria for collective agreements given by the ECJ and the ILO.<sup>141</sup>

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<sup>139</sup> *Ibid.*

<sup>140</sup> In Annex 8 to the Agreement, the implementation and enforcement of the MRSPC are dealt with in more detail. Again, it is stressed that the parties will use best endeavours to ensure the implementation of the Agreement. Whereas the proposal by the Commission envisioned a period of maximum six months in the relevant countries, article 1.1 of Annex 8 stipulates that within one year after the date of signature of the Agreement, the members of the Social Partners will implement this Agreement in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Portugal, Spain, Sweden, England, N.Ireland, Wales, Scotland, Switzerland and Norway. Pursuant to article 1.2, the members of the Social Partners will implement the Agreement in Bulgaria, Greece/Cyprus, Hungary, Poland, Romania, and Slovenia within 2 (or 3) years after the date of signature of the Agreement. In the remaining countries the Agreement should be implemented no later than three years after the date of signature of the Agreement. Pursuant to article 1.4 of Annex 8, the Parties have individually the right to postpone the deadline for all countries mentioned in articles 1.2 and 1.3. However, a party doing this has to consult the rest of the Parties to the Agreement before effecting the postponement and all Parties to the Agreement have to agree on the duration of the postponement.

The remaining provisions in Annex 8 on the implementation of the Agreement in existing national bargaining agreements are the same as those envisioned in the implementation strategy of the European Commission. If there is no collective bargaining agreement in place, the most appropriate and effective implementation method will be used. Finally, a European Professional Football Social Dialogue Taskforce will be established.

<sup>141</sup> See ECJ, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] E.C.R. I-5863, para. 57. Furthermore, in article 2 of ILO Recommendation no. 91 concerning collective agreements, the term 'collective agreement' is defined as '[...] all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in

However, it is difficult to establish requirements for *valid* collective bargaining agreements at European level because there is a large variation among the Member States concerning the specific rules which stipulate when an agreement is to be regarded a valid collective agreement.<sup>142</sup>

Moreover, European collective agreements are of a special nature because the signatory parties are European-level organizations which consist of national affiliates and these national affiliates have individual members. As such, there are various actors who can be legally affected by European CBAs.

Since the outcome of the negotiations is going to have an impact at national level, it would have been opportune for the bargaining parties on both sides in the ESSDC in professional football to verify, before entering into negotiations at the European level, whether they had a clear mandate from their national members to enter into negotiations.<sup>143</sup>

In the majority of the EU Member States, national collective agreements result in rights and obligations for the signatory parties and their individual members. This is not necessarily the case for the European collective agreements.

## **5.5 The legal effects of the Agreement**

### **5.5.1. The legal effects on the signatory parties**

In practically all EU Member States, the signatory parties of a CBA are bound by that agreement mainly because of general principles of contract law.<sup>144</sup> Whereas Article 155(2) TFEU states that '*European Collective Bargaining Agreements shall be implemented (emphasis added)*', the Treaty makers wanted legal rights and obligations to be created between the signatory parties.<sup>145</sup> Since a European collective agreement is an international agreement, private international law could be used to determine its legal effects. Although their agreement will probably be signed in Brussels, the parties in the ESSDC in professional football are residing in Switzerland (UEFA and ECA) and The Netherlands (FIFPro) and they will also perform their obligations there. As such, one of the criteria

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*accordance with national laws and regulations, on the other*'. Although European-level bargaining was not foreseen by the ILO, the right to affiliate to international unions and employers' organizations was explicitly recognized in article 5 of ILO Convention no. 87 on the Freedom of Association and protection of the Right to organize.

<sup>142</sup> See R. Blanpain (ed. in Chief), *International Encyclopaedia for Labour Law and Industrial relations*, The Hague, Kluwer Law International.

<sup>143</sup> E. Franssen, *l.c.*, 108; Commission of the European Union, Commission staff working document on the functioning and potential of European sectoral social dialogue SEC (2010) 964 final, 17.

<sup>144</sup> *Ibid.*, 116.

<sup>145</sup> *Ibid.*, 121; Commission of the European Union, Commission Staff working Paper of 2 July 2008: Report on the implementation of the European social partners' Framework Agreement on Telework SEC (2008) 217. Article 3(1) ILO Recommendation ILO Recommendation no. 91 furthermore states: '*Collective agreements should bind the signatory parties thereto and those on whose behalf the agreement is concluded [...]*'.

for defining the international character of a contract is fulfilled and therefore, private international law is applicable to the legal relationship between the signatory parties.<sup>146</sup>

Nevertheless, the consequences on the signatory parties themselves could be minimal since art. 18 of the Agreement on 'implementation and enforcement' simply states that '*[i]n the context of article 155 TFEU, this Agreement commits the Parties to use best endeavors to ensure the implementation at national level where possible, using the most appropriate legal instruments as determined by the relevant parties at national level in the European union and the rest of the Territory*'. As such, the Agreement confers to the parties an obligation of means.

### **5.5.2. The legal effects on the national affiliates of the European organizations**

The words 'shall be implemented' in article 155(2) TFEU can be seen as directed towards the national affiliates as the European social partners cannot implement the Agreement.<sup>147</sup> However, national affiliates to the signatory parties cannot be obliged to implement what has been agreed upon at European Union level because this would be contrary to the principle of international labor law and especially to article 8 of the ILO-convention no. 154 concerning the promotion of collective bargaining. Pursuant to such a provision, measures taken by governments with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining. Public authorities only have a duty to take measures to facilitate collective bargaining<sup>148</sup> and they should refrain from any interference which would restrict the right to bargain freely or impede the lawful exercise thereof.<sup>149</sup> Therefore, the words of article 155(2) TFEU can never be so interpreted as to suggest that the Treaty obliges the national social partners' organizations to implement European collective agreements. On the basis of EU law, there are no enforcement procedures possible towards the national affiliates to implement the European collective agreement.

Nevertheless, the European organizations can push their national affiliates to take the European collective agreement as a minimum basis when they start bargaining at national level. Pursuant to Franssen, the legal basis for such an obligation would lay in the internal rules of the European

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<sup>146</sup> Council Report on the Convention on the law applicable to contractual obligations by M. Giuliano and P. Lagarde, OJ C 282/1, 31-10-1980, p. 10.

<sup>147</sup> E. Franssen, *l.c.*, 129.

<sup>148</sup> Article 4 of ILO Convention no. 98 concerning the application of the principles of the right to organize and to collectively.

<sup>149</sup> Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 1985, para. 583.

organizations in combination with private law<sup>150</sup> but it is quite unlikely that sanctions could be issued vis-à-vis those member –organizations which do not comply with them.

### 5.5.3 The legal effects on clubs and footballers

In case national social partners' organizations will implement MRSPC the Legal effects of the European CBA for clubs and footballers will simply derive from the relevant national law and collective bargaining agreements.

On the contrary, much more controversial is the discussion about the legal effects on clubs and players in cases a European collective agreement has not been implemented or as been implemented incorrectly. In fact the TFEU does not give a legal basis for the presumption that European collective agreements have direct legal effects on individuals.<sup>151</sup>

Direct effect for clubs and players should only apply if they are member of a social partners' organization which in turn is affiliated to a European organizations. Clubs and players must fall under the personal scope of the European collective agreement and in any case they can invoke the direct applicability of those rules which are clear and final and not programmatic.

Moreover, claims against the national affiliates of the European employers and workers' organization will be difficult since it is not easy to determine who exactly is to blame for the non-implementation: the trade union? The league? And what about those countries where there are no trade unions?<sup>152</sup>

## Conclusions

Social dialogue in professional football is essentially about the credibility of the sports stakeholders and their capacity to self-regulate their activities in the name of the autonomy that they claim.

It is also an important element of good governance because associations, clubs, and players could shape employment relationships and working conditions on the basis of fundamental principles such as transparency, democracy, accountability<sup>153</sup> and, at the same time, comply with the relevant EU law and reduce the number of litigations.<sup>154</sup> Social dialogue could also better respond to the need to

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<sup>150</sup> E. Franssen, *l.c.*, 128-136

<sup>151</sup> *Ibid.*, 139.

<sup>152</sup> *Ibid.*, 146.

<sup>153</sup> See on this point A. Geeraert, J. Scheerder and H. Bruyninckx, The governance network of European football: introducing new governance approaches to steer football at the EU level, *International Journal of Sport Policy and Politics*, forthcoming.

<sup>154</sup> Commission of the European Union, Developing the European Dimension in Sport, COM(2011) 12 final, January 2011, 10 (see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>, accessed 10 July 2011).

safeguard the specificity of sport<sup>155</sup> and to guarantee a right balance between the fundamental rights of professional football players but also those of professional clubs to compete in a free market.

Despite the many difficulties related to the nature and role of the stakeholders as well as the (sporting and economic) interests at stake –as underlined in this article – the sports stakeholders were eventually able to conclude an agreement on minimum requirements. Nevertheless, as such a document has no direct legal effect on European football players and clubs, its implementation at the national level will be crucial. In fact, national organizations which have not been involved in the ESSDC in professional football may not want to implement provisions which they do not endorse and to whom they made no contribution.

The hope is that the minimum contractual requirements as agreed in Brussels will serve at least as a platform to enhance negotiations in those countries where both clubs and players do not yet have a strong bargaining power.

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<sup>155</sup> See on this point, S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, The Hague, Kluwer Law International, 2005, 391-400.