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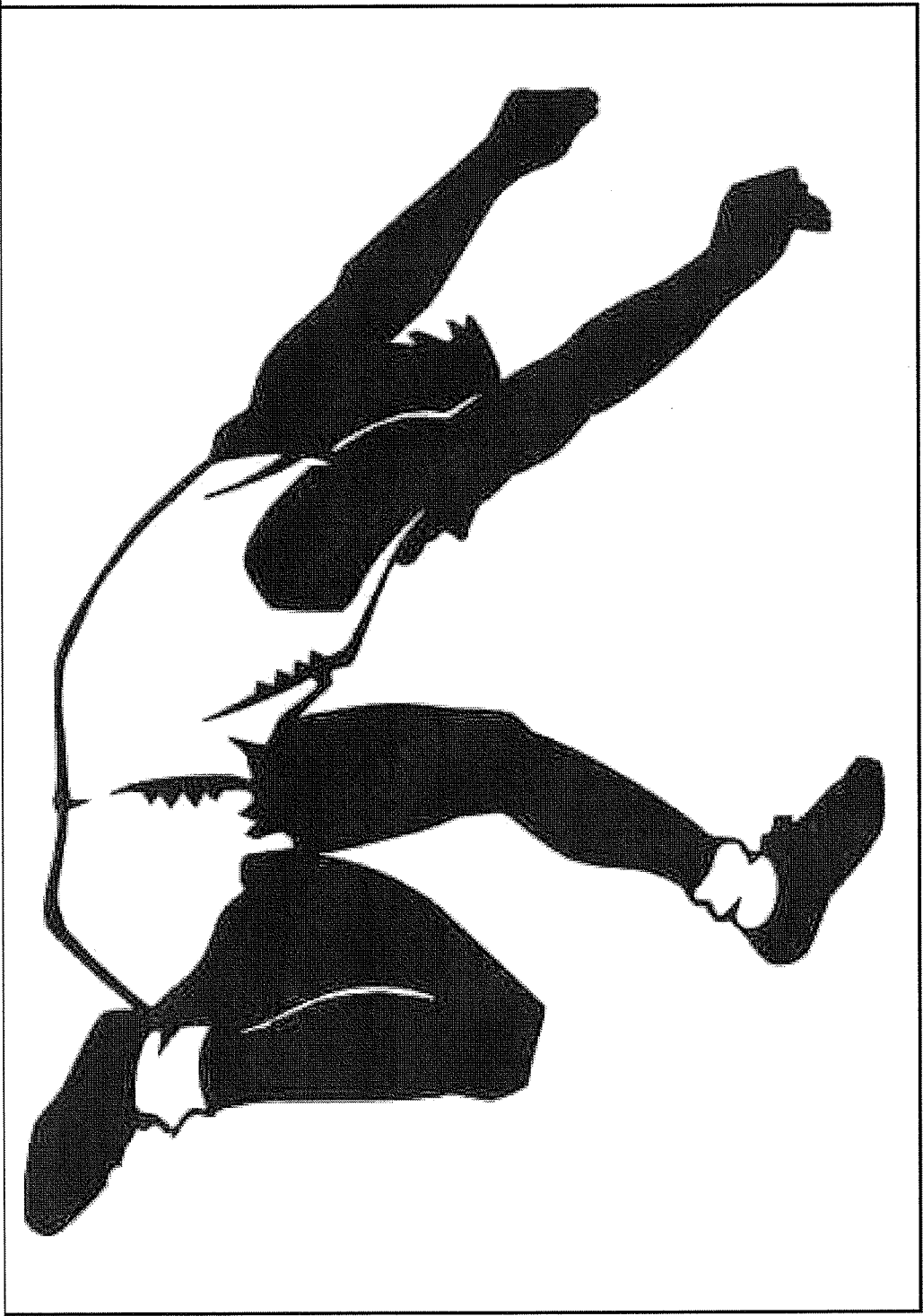
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Italian Regulation of Sports and its Law n. 91 of 1981 - A Solution for Sports-Related Problems in The Netherlands?

by Thomas Geukes Foppen*

1 - Introduction

Unlike several other European countries, the Dutch legal system does not have a specific Sports Act. The development of a body of sports-related law therefore mainly depends on civil judgments and decisions of the many judicial sports bodies. During such proceedings the question often arises to what extent the 'normal' law that in such cases is considered to be applicable, is able to resolve these sports matters¹.

In December 2001 two members of the Dutch Parliament, Jan Rijpstra and Bert Middel, presented a motion in which they posed the question whether a national Sports Act would be desirable². As a consequence of this motion the Ministry of Health, Welfare and Sport requested Professor Heiko van Staveren³ to investigate the desirability of such an Act. Van Staveren concluded that there was no need for a Dutch Sports Act⁴. His main arguments were that a Sports Act would isolate the sport sector from other public sectors and that the special rules of law that refer to sport are already sufficiently effective.

The Italian sports sector has been regulated by a specific Sports Act since 1981. This law n. 91 of 1981 is intended to provide the legal authorization for the regulation of the relationship between the participants in the sports sector and the clubs and federations to which these participants are affiliated. The law also pays attention to the practice of sport in the context of an employment relationship.

From a legal point of view many differences exist between the Dutch and Italian regulation of sports with Italy having several decades more experience than the Netherlands with respect to sports law. In this article I will describe to what extent the Netherlands could draw lessons from the Italian regulation of sports.

The second chapter of this article starts out by giving a detailed overview of the Italian sports legislation. Attention will be paid to the provisions of the Italian Constitution and to what extent they are applicable to the sports sector. Subsequently, the legislative history and the content of the various provisions of law n. 91 of 1981 will be discussed in detail.

The third chapter will discuss the role of the Italian Olympic Committee (CONI). The CONI occupies a prominent position within the Italian sports sector and is frequently mentioned in law n. 91 of 1981.

In his abovementioned research, Professor Van Staveren observes that a Dutch Sports Act would only be useful when "the current laws

provide insufficient possibilities to resolve the perceived problems"⁵. This statement brings us to chapters 4 and 5 of this article, in which three current Dutch sports situations will be discussed. Which solutions would the Italian sports legislation provide to these problems?

2. Sports legislation in Italy

2.1. The Italian Constitution

When adopting the new Constitution in 1947⁶, the Italian legislator did not yet find it necessary to include any provisions referring to sports. However, the remarkable growth of the sports sector in the following decades and the important role that sport played in Italy moved the Italian legislator to insert a provision on sport in the Constitution in 2001. In a constitutional amendment⁷ which reallocated the legislative competence of the Italian state and the regions the *ordinamento sportivo* was added to Article 117. This reallocation of competences took place in accordance with the principle of subsidiarity which intends to bring decision making and the execution of public tasks in closer proximity to the citizen. Article 117 stipulates that the regulation of sporting activities must be carried out by both the Italian state and the regional authorities⁸. Legislative powers regarding sports issues now mainly reside with the many regional authorities. However, rules that are drafted by the national government will have priority over regional rules at all times.

Article 117 is the only provision of the Italian Constitution specifically mentioning the term 'sport'. It nevertheless goes without saying that certain other provisions of the Constitution may also apply to the sports sector. For example, the freedom of association laid down in Article 39 provides employees with the right to join a union that looks after their collective interests. As many sportsmen are considered to be employees, this Article also applies to sportsmen.

According to Article 40 sportsmen have the right to strike. In the history of the Italian sports sector however sportsmen have only rarely made use of this freedom. Announcing a strike was often already sufficient in itself to bring about the aimed for response obliterating the need to go on an actual strike. It further needs to be pointed out that the right to strike has never found full applicability in the sports sector given that, for example, sports federations have in many cases determined that if a team refuses to play it will be handed a forfeit loss⁹.

In a more general sense, Articles 2, 3, 4 and 32 of the Constitution also apply to the sports sector. Article 2 guarantees inviolable human rights to individuals and their freedom to develop themselves individually or as a collective¹⁰. The general prohibition of discrimination as laid down in Article 3 also applies to sports. Nearly all of the sports federations and sports organizations have made the elimination of and the fight against discrimination one of their primary goals. Article 4 of the Constitution includes the freedom of labour, which in the Italian sports sector mainly applies to professional sportsmen due to the fact that only professionals have an employment contract with a sports club as opposed to amateur sportsmen who generally practice sport as a means of recreation. Article 32 applies to the sports sector because of the important role of sports for health purposes. The health of people as individuals or as a collective is considered a fundamental right according to this Article.

2.2. Law n. 91 of 1981

2.2.1 - History

Sport in Italy was initially regulated by law n. 426 of 16 February 1942¹¹ which over the years was amended several times¹². This law gave the CONI (*Comitato Olimpico Nazionale Italiano*) legal personality and placed it under the supervision of the Ministry of Tourism and Entertainment¹³.

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1 F. C. Kollen et al., *Praktijkboek voor de sportbestuurder*, Kluwer, Deventer, 1998, p. 10.

2 Parliamentary Paper II 2001/2002, 27841.

3 Heiko van Staveren is Emeritus Professor of Sports Law at the Free University of Amsterdam (VU).

4 See: Heiko van Staveren, *Sportwetgeving op nationaal niveau: geunst? Notitie naar aanleiding van de motie Rijpstra/Middel*, VWS, Den Haag, 2003.

5 Van Staveren, 2003, p. 6.

6 Decree n. 298 of the *Assemblea Costituente*, 22 December 1947. Announced in the *Gazzetta Ufficiale* on 27 December 1947.

7 *Gazzetta Ufficiale*, 24 October 2001, n. 248.

8 A. Chaker, *Good governance in sport*. A

European survey, Council of Europe Publishing, Strasbourg, 2004, p. 69.

9 M. Colucci, *Italy, Sports Law, Encyclopedia of Laws*, Kluwer Law International, Alphen aan de Rijn, 2009, p. 81.

10 This will be further discussed in the next chapter of this article.

11 Law of 16 February 1942, n. 426. *Costituzione e Ordinamento del Comitato Olimpico Nazionale Italiano (CONI)*. Announced in the *Gazzetta Ufficiale* on 11 May 1942.

12 *Regio Decreto Legge*, 2 August 1943, n. 704, *Decreto Legge del Capo Provisorio dello Stato*, 11 May 1947, n. 369 and *Decreto del Presidente della Repubblica*, 2 August 1974, n. 530.

13 This meant that the Ministry of Tourism and Entertainment had the power to void CONI judgments, to make decisions relating to the CONI's financial affairs and to appoint the president (see: Article 12, *Decreto del Presidente della Repubblica*, 2 August 1974, n. 530).

In the course of the evolvement of Italian sports effective legal measures were being sought that would create a situation whereby a balance would be guaranteed between government regulation on the one hand and sports regulation on the other hand. Until the 1980s, the relationship between a (professional) sportsman and a sports club used to be regulated by the analogous application of the many provisions of the *Codice Civile*. This was by many considered to be "an indifference on behalf of the government towards the requirement of having regulations regarding sport"¹⁴.

These relationships were further regulated by the statutes and rules of the various sports federations which themselves had to be recognized by the CONI. Sportsmen who were registered with a sports club were automatically linked to a sports federation and thereby to its rules¹⁵. In this way the sportsman acquired the status of professional.

As a consequence of registration a commitment (for an indefinite period of time) was thus created between the sportsman and the sports club: the so-called *vincolo sportivo*¹⁶. Because of this commitment the sports club could freely and exclusively dispose of the sporting performance of the sportsman and could therefore also transfer the sportsman to another club without his prior approval. This situation deprived the sportsman of his freedom to make certain decisions that he considered necessary for the optimal development of his sporting career.

The growing socio-economic importance of sport in the 1970s evoked the interest of the legislator in this sector which until that moment had remained mainly under the competence of the sports federations¹⁷.

In 1978 the public prosecutor approached the subdistrict court of Milan for a judgment concerning the fact that the presidents of many football clubs in his opinion had acted contrary to labour laws during the summer transfer period¹⁸. The subdistrict court consequently decided that all negotiations and contract talks regarding the summer transfers had to cease, as a result of which the CONI and the *Federazione Italiana Giuoco Calcio* (FIGC) were compelled to put pressure on the Italian government to finally regulate the relationship between sportsmen and the various national sports federations. At that moment the Italian Supreme Court had already decided that - due to amongst other things the aforementioned *vincolo sportivo* - the labour laws could not be considered applicable to the purchase and sale of football players. The Italian government responded by promulgating a law that declared this decision not applicable to the transfer of football players. The government next appointed a commission that had the task of drafting a law that would define sportsmen as self-employed persons and that would guarantee "discipline and security, which are necessary for the regular practice of every sporting competitive activity"¹⁹. After much intense political debate, this draft finally led to the entry into force of a law that derogates from the 'normal' labour law rules²⁰: the *legge n. 91 del 1981*²¹.

2.2.2 - Structure

Law n. 91 entered into force on 23 March 1981. The key elements of this law are the qualification of the sportsman's working activity as *subordinato* (subordinate) and the abolishment of the *vincolo sportivo*. Although this law originated in a football setting, it was declared applicable to sports in general. The purpose of this law can be considered as the "complete regulation of the phenomenon of 'sport'"²².

Law n. 91 of 1981 consists of provisions regarding the relationship between clubs and professional sportsmen and is divided into four different titles. Title I regulates professional sport in general; Title II concerns the functioning and the activities of sports clubs and national sports federations; Title III contains provisions with regard to taxation; and Title IV contains transitional and final provisions.

Article 1 of law n. 91 of 1981 states: "Sporting activities shall be freely engaged in, whether individually or collectively, as a professional or as an amateur". This provision makes certain constitutional rights directly applicable to sports as obviously recognizing and guaranteeing the inviolable human rights laid down in Article 2 of the Italian Constitution²³. This Article 1 therefore intends to provide the freedom to all, except in certain situations defined by law²⁴, to practice sports unconditionally and unrestrictedly. It is thus of indispensable economic value for the professional sportsman, as through this provision he acquires complete contractual freedom²⁵.

The freedom that is underlined by this Article 1 is exclusively intended for the activities that are considered to be sporting activities under the regulations of the CONI.

The Article furthermore emphasizes that practicing a sporting activity is not subject to membership of any sports federations or the CONI. However, such membership does imply acceptance of the rules that these entities lay down in respect of amongst other things the distinction between amateur and professional sportsmen. This distinction is subject to several terms and conditions as laid down by the CONI and the sports federations in cooperation with the international sports federations and sports organizations²⁶.

2.2.3. Scope of application

Article 2 of law n. 91 of 1981 defines its scope of application. This Article determines which persons can be considered professional sportsmen. In the first place, these are athletes, trainers, technical sports managers and athletes' coaches who carry out remunerated sporting activities on a continuous basis. Secondly, these activities must take place within the framework of the disciplines governed by the CONI and be qualified as such by the national sports federations, in accordance with the rules laid down by the federations themselves. Again here the CONI is the competent authority to issue guidelines regarding the distinction between amateur and professional sporting activities.

The criteria enumerated in Article 2 are not exhaustive²⁷. Case law shows that this Article should be considered as *lex specialis* in relation to Article 2094 of the Italian Civil Code which gives general rules regarding employees. It can thus be concluded that in accordance with the *ratio legis* the legislator when listing these criteria only intended to mention the most common categories without excluding other possible categories that are recognized by the sports federations²⁸.

Article 2 in the end imposes only two conditions for qualification as a professional sportsman, namely that authorization must have been obtained from a national sports federation and that the sportsman must be remunerated for his sporting activities.

It therefore follows that Article 2 cannot be applicable to those who practice sport as an amateur. Amateurs practice sports for other purposes than remunerated professionals. Amateurs can nevertheless, as is often the case in higher-level non-professional divisions, receive some remuneration for their sporting activities (for example match bonuses or expense allowances) which can make it complicated to dis-

14 G. Vidiri, *La disciplina del lavoro sportivo autonomo e subordinato*, Giustizia Civile II, 207, 1993, p. 41.

15 In Italy, this registration is called *il tesseramento* or *il cartellino*.

16 M. Sanino, *Il diritto sportivo*, Wolters Kluwer Italia, Padua, 2008, p. 243.

17 This development was also called the "emergence of sports organization at governmental level". See: S. Landolfi, *La legge n. 91 del 1981 e la emersione dell'ordinamento sportivo*, Rivista di Diritto Sportivo, 1982, n. 36.

18 Colucci, 2009, p. 74.

19 B. Cuccinello, *Considerazioni in tema di contratto di lavoro sportivo professionista: prescrizioni di forma e di contenuto nell'art. 4 L. 23 marzo 1981, n. 91*, Rassegna di Diritto Civile, 1994, 449.

20 Vidiri, 1993.

21 Legge del 23 marzo 1981, n. 91. *Norme in materia di rapporti tra società e sportivi professionisti*. Announced in the *Gazzetta Ufficiale* on 27 March 1981, n. 86.

22 A. Lener, *Una legge per lo sport?*, Foro Italiano, 1981, 298.

23 Article 2 of the Italian Constitution states that: "The republic recognizes and guar-

antees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity".

24 Colucci, 2009, p. 75.

25 I. Mariani Toro, *Sport e Lavoro*, Rivista di Diritto Sportivo, 1971, p. 175.

26 Colucci on p. 75 in this respect refers to: I. Mariani Toro, *Problematica della legge 91/1981*, Rivista di Diritto Sportivo, 1983 (Special Edition); D. de Silvestri, *Le Qualificazioni Giuridiche dello Sport e*

nello Sport, Rivista di Diritto Sportivo, 1991, 283; R. Frascaroli, *Sport (Diritto Pubblico e Privato)*, Eric. dir. XLIII, Milano, 1990.

27 G. Ambrosio, A. Mariani Toro, *L'iter Parlamentare della Legge 23 marzo 1981, n. 91, sui rapporti tra società e sportivi professionisti*, Rivista di Diritto Sportivo, 1981, 492.

28 Pretura di Venezia, 22 luglio 1998, Rivista di Diritto Sportivo, 1998, p. 164. Also further explained in: F. Bianchi d'Urso, G. Vidiri, *La nuova disciplina del Lavoro Sportivo*, Rivista di Diritto Sportivo, 1982.

tinguish them from professionals. The legislator however dealt with this problem by providing that a sportsman needs to practice his sport almost exclusively in order to be considered a professional. Professionals pursue a career in sports on a fulltime basis and give prominence to their sporting activity, while this is obviously not the case for amateurs²⁹.

In this respect, many authors have found that the definition of a professional sportsman that most correctly sums up the situation is contained in the articles of association of the FIGC. Although these articles mainly apply to football, they could also apply to other sports. According to the FIGC a sportsman can only be considered a professional if he practices sport as his primary occupation, as opposed to sportsmen who practice sports as a means of recreation alongside their regular job and other occupations³⁰.

2.2.4. The legal definition of sport as labour

Defining the term 'labour' in the field of sport has been a challenging problem under Italian law, as the application of general labour laws regarding self-employment and the relationship of authority has proven to be complicated.

To be considered self-employed according to Italian law, an individual must perform a task or a service for which he is remunerated and carry out this activity on a personal basis without being in a subordinate relationship vis-à-vis his contractor³¹. An employee, on the other hand, is defined as an individual who commits himself to carrying out intellectual or manual labour for remuneration and under the supervision of an employer³².

Article 3 of law n. 91 of 1981 clarifies how labour in the field of sport should be determined. It begins by stating that the provisions of this law are applicable to the remunerated services of athletes who are subject to a contract of employment. It must therefore be concluded that the law is not applicable to the sporting activities of individuals who are merely remunerated for these activities, which means that the sporting activities of amateur athletes do not fall within the scope of Article 3.

Article 3 lists three sets of circumstances in which no contract of employment shall be utilized and a contract for freelance work will be applicable instead:

1. the activities are carried out in the framework of a single sporting event or of several events linked together over a brief period of time;
2. the athlete is not contractually bound to attend preparation or training sessions;
3. although the services subject to the contract are continuous in nature, they are not carried out for a longer period than eight hours per week or five days per month or thirty days per year.

Article 3 for these situations therefore excludes a contract for an indeterminate period establishing a relationship of authority, i.e. it excludes the contract defined by Article 2094 of the *Codice Civile* as mentioned above. Thus, a contract for an indeterminate period estab-

lishing a relationship of authority cannot be used to regulate the carrying out of labour for a single or several events over a brief period of time (situation a) and vice versa, the mere fact that an individual is not contractually bound to attend means that his activities are not carried out under an employment contract (situation b).

The situation described under c) has however given rise to certain questions as to its practical application. It is unclear how the periods of time mentioned should be interpreted³³, even more so in cases where the period spanning the sporting activity is given in days, as a definition of the duration of a 'day' is lacking³⁴.

2.2.5. Form and content of the contract

According to Article 4 of law n. 91 of 1981, the relationship between a sportsman and a sports club whereby the sportsman supplies sports services and the club provides remuneration is created by the employment of the sportsman by the club through a written contract, on pain of nullity³⁵. The specific sports services to be rendered by the sportsman (i.e. the services referred to in Article 2) must be listed in this contract. The sports club then has to file the contract with a national sports federation. The national sports federation in this way has been given an important task as it has to assess whether the content of a contract is acceptable³⁶.

The stipulation that a contract should be in writing and the requirement of filing it with a national sports federation were included by the legislator in order to guarantee the authenticity of the contract and to grant the athlete a certain safeguard of his legal rights³⁷. The sports club is the entity that is responsible for drafting and filing the contract, which implies that if it neglects to perform these duties (causing the athlete to practice the sport without a contract), the athlete still has the same rights he would have had if a contract had been concluded.

Article 4 furthermore provides a summary of certain clauses that must be included in the sportsman's contract. Besides an obligation to include a specific definition of the (technical) instructions and provisions in place for the sportsman in order to achieve the competitive goals, it is also compulsory to include an arbitration clause which establishes that disputes between the sports club and the sportsman arising out of the implementation of the contract will be referred to a board of arbitration. Sports clubs are not allowed to include a non-competition clause in the contract, as this would limit the 'professional liberty'³⁸ of the sportsperson.

2.2.6. Transfer of the contract

Article 5 of law n. 91 of 1981 provides that an expiry term under the contract may not exceed five years from the time of conclusion of the contract. During these five years, the sportsman and the sports club are however allowed to prolong the contract or to alter its contents by mutual consent³⁹.

Article 5 also states that a sports club is allowed to transfer the contract to another sports club before expiry, provided that the other party agrees and that the procedures laid down by the national sports federations are observed. Such a transfer may occur on either a permanent or a temporary basis.

2.2.7. Coaching and training premium

Article 6 of law n. 91 of 1981 originally prescribed that a sports club when transferring a contract (and thus an athlete) always had to pay reimbursement for the training and technical development of the athlete. After the judgment of the European Court of Justice in the Bosman case⁴⁰ however, law n. 586 of 1996⁴¹ was promulgated which amended Article 6 of law n. 91 of 1981 in the sense that reimbursement only has to be paid if the athlete signs his first ever professional contract.

The sports club that has provided the athlete's youth training is also the one entitled to give him his first professional contract. According to paragraph 3 of Article 6, any monetary reimbursement that the sports club receives for training or coaching a young athlete must be reinvested for sports purposes.

29 C. Zoli, *Sul rapporto di lavoro professionistico*, Giustizia Civile I, 1985.

30 B. Zauli, *Dilettantismo e Professionismo nello Sport*, Rivista di Diritto Sportivo, 1955, p. 97; B. Zauli, *I limiti Sociali del Professionismo Calcistico*, Rivista di Diritto Sportivo, 1959, p. 3; G. Mazzoni, *Dilettanti e Professionisti*, Rivista di Diritto Sportivo, 1968, p. 368; D. Duranti, *L'attività Sportiva come Prestazione di Lavoro*, Rivista Italiana di Diritto del Lavoro, 1983, p. 699.

31 Article 2222 of the *Codice Civile*.

32 Article 2094 of the *Codice Civile*.

33 M. de Cristofaro, *Problemi Attuali di Diritto Sportivo*, Diritto del Lavoro, 1989, p. 97.

34 Duranti, 1983, p. 706.

35 This corresponds with the general rule of Article 2126 of the *Codice Civile*.

36 M. de Cristofaro, *Commento al Art. 4, L. 23 marzo 1981, n. 91. Nuove Leggi Civili Commentate*, 1982, 574.

37 M. Sanino, F. Verde, *Il Diritto Sportivo*, Padova, CEDAM, 2008.

38 See Article 4 of law n. 91 of 1981, paragraph 6.

39 Duranti, 1983, p. 699.

40 European Court of Justice, 15 December 1995. C-415/93.

41 Legge 18 novembre 1996, n. 568.

"Conversione in legge, con modificazioni, del decreto-legge 20 settembre 1996, n. 485, recante disposizioni urgenti per le società sportive professionistiche". Announced in the *Gazzetta Ufficiale* on 20 November 1996.

2.2.8. Social security

Articles 7 to 9 of law n. 91 of 1981 contain provisions regarding social security rights. Article 7 provides that professional sportsman have to undergo a medical examination at least once every six months. Sports clubs are responsible for carrying out these examinations. In this, sports clubs must comply with the standards set by the national sports federations, which must in turn have been approved by the Italian Ministry of Health.

Article 8 obliges sports clubs to take out individual insurance policies for professional sportsmen against the risk of death and against injuries which could compromise the continuation of professional sports activities.

As regards a pension plan, Article 9 states that law n. 366 of 1973⁴² is applicable. This law contains compulsory provisions concerning invalidity and old-age and concerning surviving dependents of a sportsperson⁴³. Pensions are managed through a specific sports fund by the *Ente Nazionale di Previdenza e di Assistenza per i Lavoratori dello Spettacolo* (ENPALS), the Italian Entertainment Industry Employees' Pension Organization. The ENPALS is a public non-profit organization under the supervision of the Italian Ministry of Social Affairs and Employment (*Ministero del Lavoro e delle Politiche Sociali*) and its activities are subject to examination by the Court of Auditors (*Corte dei Conti*)⁴⁴.

In a judgment of 2002⁴⁵, it was determined which persons are eligible for the compulsory social benefits under the ENPALS pension plan. As a result of this judgment, ENPALS now only handles the pensions of professional sportsmen who are employed as employees or who are self-employed but carry out sports activities more than 8 hours per week, 5 days per month or 30 days per year⁴⁶. This means that amateur sportsmen, even though they might be listed with one of the national sports federations, are completely excluded. This judgment once more made clear that the persons mentioned in Article 2 of law n. 91 of 1981 are professionals and that it does not matter whether they are considered employees or self-employed. For their pension plan all these persons are obliged to contribute to the specific sports fund that is managed by the ENPALS.

2.2.9. The abolishment of the *vincolo sportivo*

As was explained above, the *vincolo sportivo* was the commitment between an athlete and a sports club, by which the athlete - by signing a contract - was obliged, for an indefinite period and without the possibility of unilateral termination, to relinquish all exclusive rights regarding his sports career⁴⁷.

The *vincolo sportivo* could be considered as a kind of non-competition clause between the various sports clubs. Because of the *vincolo sportivo*, the athlete could no longer freely transfer from one club to another that might offer him a better salary. The club to which the athlete was affiliated had the exclusive right to transfer him.

Article 16 of law n. 91 of 1981 put an end to this practice by provid-

ing that: "The limitations to the contractual freedom of the professional athlete, identified as '*vincolo sportivo*' in current sports regulations, will be gradually eliminated over 5 years from the date on which this law comes into force, in accordance with the procedures and parameters established by the national sports federations and approved by CONI, in relation to the age of the athlete, and to the duration and financial content of the relationship with the club."

The abolishment of the *vincolo sportivo* was also put into practice by Article 5 of law n. 91 of 1981 which provides that a contract cannot bind an athlete to a sports club for longer than five years. It has therefore become impossible for sports clubs to indefinitely and freely dispose of the exclusive rights that belong to the athlete himself⁴⁸. As soon as the period stipulated in the contract comes to an end the athlete is once more 'free', which in Italian is also referred to by the term '*svincolato*'.

The introduction of the fixed-term employment contract in conjunction with Articles 2118 and 2119 of the *Codice Civile* guarantee the right of personal freedom to the professional athlete as well as his economic position. Athletes are hereby further provided with protection against dismissal⁴⁹.

2.2.10. Parts II and III

Part II of law n. 91 of 1981 amongst other things includes provisions concerning the structure of sports clubs and the role of the national sports federations. For example, Article 10 provides that sports clubs that enter into contracts with professional athletes have to be established in the form of joint stock companies⁵⁰ or limited companies⁵¹ and that sports clubs can only carry out sports activities and activities associated with and instrumental to sport. Part of the sports club's revenue must be reinvested for the club's sports purposes. Article 10 also stipulates the topics that must in any case be included in the articles of association of a sports club. The CONI is charged with the supervision of all actions under this Article.

Article 11 states that the sports club's articles of association must within a certain time limit be registered with the national sports federation to which it is affiliated. Article 12 states that the sports clubs must, in collaboration with the CONI, strive for the smooth running of the sports championships. According to Article 13 sports clubs are entitled to bring claims before a court. Article 14 stipulates that the national sports federations are made up of the sports clubs and the bodies affiliated to them and that they are governed by statutory rules and regulations on the basis of the principle of internal democracy. The CONI will at all times supervise the activities of the national sports federations. Article 15, which is also the only provision of Section III, contains rules on taxation.

3. Comitato Olimpico Nazionale Italiano (CONI)

3.1. History

Sporting activities in Italy are mostly state organized in an almost monopolistic manner based on a normative system that has its origin in the Italian fascist era. Several important alterations were later made in order to adapt to the modern constitution⁵². The leading body in all national sport events is the CONI, which was founded in 1907 by a group of fanatical amateurs who strove to realize Italian preparation for and participation in the Olympics. In 1914, Member of Parliament Montré called on representatives to form a first version of the future CONI. In 1927 it was decided that all national federations were to be centralized and in 1942 upon the entry into force of law n. 426 of 1942 the CONI finally acquired legal personality and was recognized by the Italian government.

Law n. 157 of 1986⁵³ provided the first codification of the articles of association of the CONI and the so-called *Decreto Melandri*⁵⁴ finally provided for the current structure and organization of the CONI. This latter law put an end to the characterization of the CONI as the 'federation of federations' and stipulated that the national federations would henceforth be associations with private legal personality which brought about the privatization of the sports federations. From that time on, the CONI is defined as a "public, non-profit organization that aims to regulate, supervise and administer all sporting activities

42 Legge 14 giugno 1973, n. 366.

43 "Estensione ai calciatori ed agli allenatori di calcio della previdenza ed assistenza gestite dall'Ente Nazionale di Previdenza e di Assistenza per i Lavoratori dello Spettacolo". Announced in the *Gazzetta Ufficiale* on 9 July 1973.

44 The law n. 366 of 1973 was originally drafted for the football sport. Later it has been determined that it would apply to sport in general.

45 Article 12 of law n. 259 of 21 March 1958.

46 Tribunale di Roma, sentenza 17 settembre 2002, n. 21072.

47 In accordance with Article 3 of law n. 91 of 1981.

48 A. d'Harmant Francois, *Note sulla Disciplina Giuridica del Rapporto di Lavoro Sportivo*, Massimario di Giurisprudenza del Lavoro, 1981.

49 E. Rotondi, *La Legge 23 Marzo 1981 n. 91 ed il professionismo sportivo: genesi, effettività e prospettive future*, *Rivista di Diritto Sportivo*, 1985, p. 409.

50 In Italy, a joint stock company is called a *Società per Azioni* (S.p.A.).

51 In Italy, a limited company is called a *Società a responsabilità limitata* (S.r.l.).

52 M. Carli, *Olimpionica. Tra fascistizzazione e 'italianizzazione' dello sport nella propaganda fascista dei tardi anni Venti*, *Memoria e Ricerca*, 2008, n. 27.

53 *Decreto del Presidente della Repubblica*, 28 March 1986, n. 157. Announced in the *Gazzetta Ufficiale* on 13 May 1986, n. 109.

54 *Decreto Legislativo*, 23 June 1999, n. 242. Recently amended by the so-called *Decreto Pescante*; *Decreto Legislativo*, 8 January 2004, n. 15.

on a national level, under the supervision of the Ministry of Culture (*il Ministero per i Beni e le Attività Culturali*)⁵⁵.

3.2. Structure

The CONI, which is thus the central authority regarding sports organization⁵⁶, is made up of several organs: the National Council (which is composed of the presidents of the various national sports federations (FSN)⁵⁷, the President, the Italian members of the International Olympic Committee (IOC), sportsmen and sports experts, two representatives of regional organizations of the CONI, the National Committee and the Secretary-General.

According to Article 3 of the *Decreto Melandri* the National Council's main objective is to provide general guidelines that all the participants in sports must comply with. In this, the Council performs tasks concerning financial aspects and promotional matters. The Council furthermore provides the criteria for distinguishing between professional athletes and amateurs.

The President is the legal representative of the CONI and acts as chairman of the Council in national and international relations⁵⁸.

The National Committee generally carries out administrative duties in accordance with the main objectives and plans of the CONI⁵⁹. These tasks mainly consist of defining objectives and plans, but also of supervising the legal and general organization of the CONI. Furthermore, the National Committee appoints the Secretary-General.

The Secretary-General organizes the administration of the CONI in accordance with the instructions laid down by the National Committee and directs the services and duties of the CONI. The Secretary-General can thus be considered the managing director of the CONI⁶⁰.

The main duties of the CONI are laid down in Article 5 of the *Decreto Melandri*. Article 5 originally stated that the national sports federations were bodies of the CONI and that they were authorized to lay down internal provisions concerning their technical and administrative duties in the organization of sporting activities. Such internal provisions had to be approved by the President of the CONI before they could enter into force. After the latest amendment of the *Decreto Melandri* in 2004 (the so-called *Decreto Pescanti*), the privatization of the national sports federations mentioned above took place, which emphasized that the CONI would maintain its status of non-governmental organization (NGO).

Through the *Decreto Melandri*, the Italian government delegated the task of regulating sports to the CONI. Thereby, the CONI must perform the tasks listed in Article 2. The CONI moreover must at all times take measures against doping, violence and discrimination in sports.

3.3. CONI Servizi S.p.A.

Since 2002, the tasks of the CONI have been carried out by a joint stock company (CONI Servizi S.p.A.) on the basis of an annual contract⁶¹. The Ministry of Economic Affairs is the sole shareholder of CONI Servizi S.p.A. which means that the Ministry - together with the CONI - is authorized to appoint the members of the board and the president. The CONI itself is financed by the Ministry of Economic Affairs (and thus by the Italian government). The Italian government is thus directly connected to CONI Servizi S.p.A.

In practical terms, the CONI continues to strive to attain its institutional goals as a public entity, while CONI Servizi S.p.A. is the entity that executes the tasks necessary to achieve these goals⁶².

CONI Servizi S.p.A. aims to safeguard the important role of sports in Italy by means of the following⁶³:

- By efficiently executing the mandate that has been set by the CONI,
- By allowing CONI to financially contribute to the national sports federations as much as possible,
- By providing the national sports federations with services of high added value,
- By developing own know-how, which is unique in Italy, in the field of sports,

- By attaching value to the present professional and material resources.

3.4. The financing of the sports sector

In Italy the central authorities do not directly take part in the financing of the sports sector. No yearly contributions are made. The sports sector is partially financed by more local authorities, such as the regions, provinces and municipalities. The bulk of the income of the sports sector comes from the revenue of lotteries. In 2002 the Italian government decided that part of the income earned from lotteries and sports betting (such as the *Lotto*, *Totocalcio* and *Super Enalotto*) should be invested in the development of sport. In this way, smaller-scale sports and sports facilities also stand a chance of survival. Between 2005 and 2008 approximately 450 million Euros have been invested in the development of sport⁶⁴.

3.5. The national sports federations and their relationship with the CONI

Besides providing clarity regarding the legal position of the *Federazioni Sportive Nazionali* (FSN), the *Decreto Melandri* also describes the relationship between the CONI and the national sports federations.

According to the *Decreto Melandri*, the national sports federations are organs of the CONI, of which the primary objective is identical to that of the general sports systems⁶⁵. The national sports federations furthermore have a duty to compete with the CONI in both the area of the organization and the development of national sports and the area of preparing delegations of athletes for the Olympics or other significant sports events⁶⁶. The important competence of recognizing and introducing to the FSN such associations that wish to take part in the organization of sports has also been delegated by the CONI to the national sports federations. In this way the associations obtain the status of *Società Sportiva*, which allows them to offer to individuals the possibility of participating in an activity that is part of the national sports organization. Without this status, associations would not be entitled to act as sports associations.

Even though sports federations are private entities with legal personality according to Article 18 of the *Decreto Melandri*, they still also have a public aspect. The sports federations remain under the supervision of the CONI, which is a public entity. The CONI in this respect has a duty - amongst other things - to produce the annual balance sheets of the sports federations and to arrange the financial contributions.

The fact that the national federations have both private and public features has created much turbulence in the Italian legal arena. According to many authors, entities should either belong in the private sector or the public sector. A combination of both is not considered desirable. Authors who argue in favour of the public sector⁶⁷ state that

55 S. N. Calzone, *Il Comitato Olimpico Nazionale Italiano. Istituzione, Organizzazione, Federazione*. Catanzaro, 1999, p. 12.

56 See Article 2 of the *Decreto Melandri* which states that: "The CONI is the Confederation of the national sports federations and adapts itself to the international principles of sports regulation, in cohesion with the decisions and the guidelines of the International Olympic Committee. The CONI provides for the organization and the development of the national sport and especially the preparation of athletes and preparing the proper tools for the Olympics and for all other national sports events".

57 Federazioni Sportive Nazionali.

58 Article 8, *Decreto Melandri*.

59 Article 7, *Decreto Melandri*.

60 Article 12, *Decreto Melandri*.

61 *Decreto Legislativo*, 8 July 2002, n. 138. *Interventi urgenti in materia tributaria,*

di privatizzazione, di contenimento della spesa farmaceutica e per il sostegno dell'economia anche nelle aree svantaggiate.

62 Chaker, 2004, p. 71.

63 <http://coniservizi.coni.it>

64 E. Campofreda, *CONI, la crisi dietro le medaglie*, Rivista Aprileonline.info, 2008.

65 I.e. the realization of a programmatic competitive sport that ensures the continuous improvement of the sports sector. See: M. Tortora, G. Guarino, *I soggetti dell'ordinamento sportivo*, Diritto dello Sport, giurisprudenza sistematica civile e commercial, W. Bigiavi, Torino, 2007, p. 25.

66 As also becomes apparent from Articles 2 and 3 of law n. 426 of 1942.

67 G. Morbidelli, *Gli enti nell'ordinamento sportivo*, Torino, 1994, p. 171; L. Trivellato, *Considerazioni sulla natura giuridica delle Federazioni Sportive*, Rivista di Diritto Sportivo, 1986, n. 172.

the organs of the CONI listed in Article 5 of the *Decreto Melandri* are public entities, like the CONI itself. Furthermore, the CONI's supervisory tasks towards the national federations are considered evidence of a public relationship between the two parties. They further consider the sports federations' authority to recognize sports associations to be a public task as well. The fact that the objectives of the CONI and those of the sports federations show remarkable similarities is also argued to underline the public nature of the national federations.

Authors who consider the national federations as private entities⁶⁸ argue that if an entity falls under the supervision and control of a public entity this makes that entity a private entity. This they consider to be further supported by the fact that for the majority of their duties the sports federations make use of employees who are employed through a private employment contract⁶⁹.

Article 16 of the *Decreto Melandri* provides that national sports federations should be "governed by statutory and obligatory standards based upon the principle of internal democracy, the principle of free and equal participation for all in sporting activity, and in accordance with national and international regulations". This objective is to be achieved by acting in accordance with CONI and IOC guidelines. Furthermore, the objectives which the sports federations strive to achieve are of considerable public interest⁷⁰.

Article 20.5 of the CONI's articles of association provides that "the national sports federations shall carry out their sporting activities in accordance with the guidelines and directives enacted by the International Sport Federation to which each national sports federation is affiliated, provided that these do not conflict with CONI and IOC guidelines and directives". In the light of these principles, national sports federations adopting regulations governing professional competitions do so within the limits that are in the end established by the CONI and the IOC⁷¹.

4. Three Dutch situations

The Dutch sports sector is currently grappling with a number of legal problems that have led to much debate. These problems urgently need to be solved. Below I will further explain 3 cases that have led to problems in the Dutch sports sector.

4.1. The collective agreement in sport

4.1.1. The Flexwet

In 1998 the Flexibility and Security Act⁷² (the *Flexwet*) came into force. This Act was intended to provide employers with increased flexibility in labour relations and to provide employees with increased security regarding their appointment⁷³. The *Flexwet* provides that employment contracts that have been entered into for a definite period of time may by operation of law turn into employment contracts for indefinite duration in the following two cases:

- when the employee has been given three consecutive fixed-term employment contracts with no more than 3 months elapsing between contracts, the fourth contract to be offered him within 3 months after the expiry of the last will be considered to be a contract for indefinite duration;

68 R. Caprioli, *Le Federazioni Sportive Nazionali fra diritto pubblico e privato*, Direttorio Generale, 1989, n. 6.

69 Article 14 sub 4 *Decreto Melandri*.

70 Article 20.4 of the articles of association of the CONI.

71 *The Role of Member States in the organizing and functioning of professional sport activities*, Report for the European Commission, tender n. VT/2008/106, T.M.C. Asser Instituut, Den Haag, 2009.

72 Law of 14 May 1998 amending the Dutch Civil Code, the *Buitengewoon Besluit Arbeidsverhoudingen 1945* and several other laws (Flexibility and Security), Stb. 1998, 300.

73 Trade Union 'de Unie', www.unie.nl, 19 April 2004.

74 Court of Breda, 22 October 2007, LJN: BB 609.

75 The parties eventually reached a settlement. See: Ktr. Utrecht, 5 December, 2007, LJN: BB 9399 and Hof Arnhem, 27 May 2008, rekestnummer: 104008091.

76 E. Lankers, *Een wereld te winnen. Professionalisering van de arbeidsverhoudingen van de beroepssporters in Nederland*, Deltahage, Den Haag, 2009, p. 37.

77 Sub-district court of Rotterdam, 5 April 1967, NJ 1967, 418 (Sparta/Laseroms).

78 C. A. Segaar, *Over twee jaar terugkomen: het nieuwe transfersysteem voor beroepsvoetballers*, *Arbeidsrecht* 2001, n. 52.

- when the added duration of several consecutive fixed-term employment contracts with no more than 3 months elapsing between contracts is longer than 36 months (not counting the intervals) the contract turns into a contract for indefinite duration from the moment that the limit of 36 months is reached.

Employment contracts for indefinite duration cannot be terminated without consequences. The employer must first seek either the permission of the public employment service (UWV Werkbedrijf) or the approval of the court.

4.1.2. The Flexwet and sport

In the sports sector, contracts with athletes are always entered into for a definite period of time, given that the athlete provides sports services as a profession and given that the competition is mostly a seasonal affair and because the athletes' pay is usually provided from income derived from sponsorship agreements that are themselves temporary. Like all employment contracts, employment contracts in sport are subject to the provisions of the Dutch Civil Code, which means that the *Flexwet* also applies. Athletes signing their fourth contract with the same club are thus entitled to a contract of indefinite duration.

This situation gave rise to many disputes. Sports clubs argue that for sports-related reasons it should be possible to terminate a contract with a sports employee as soon as the term of the contract has expired, but athletes expect (and hope for) job security. In all this, the *Flexwet* has not always been correctly applied as the example from case-law below will clarify.

4.1.3. The Veneberg case

In 1999, professional cyclist Thorwald Veneberg was contracted by the professional cycling team Rabo. In 2007, a legal dispute arose between the parties, when Rabo did not intend to prolong Veneberg's contract due to a lack of notable achievements in official races on his part with no progress being foreseen⁷⁴. Furthermore, Veneberg would simply have become too old to actively participate in competitive professional cycling. Because Veneberg had already been given more than three consecutive contracts for a definite period, he claimed to be entitled to a contract of indefinite duration. The court agreed with Veneberg and Rabo had to provide him with severance pay⁷⁵.

Obviously, the Veneberg case is not unique in the sports sector, but no specific legal provisions have yet been drawn up that do justice to the special position of professional sportsmen in employment relationships. The *Flexwet* thus remains applicable, even though employers often fail to heed this fact. Only the negotiation of a collective agreement determining that the *Flexwet* cannot be applied to employment contracts in professional sports could put a stop to the situation⁷⁶.

4.1.4. The Collective Agreement for Professional Football Players

Where employment contracts are concerned the situation in football is more advanced than in other sports. The football sector already made use of professional employment contracts between clubs and players as far back as 1967⁷⁷. Where other sports still have to apply the entire *Flexwet*, the Dutch football sector has managed to reduce the scope of application of the *Flexwet* by declaring it inapplicable to football by means of the Collective Labour Agreement for Professional Football Players (CAO voor Contractspelers Beraald Voetbal) agreed between the Dutch Federation of Professional Football Organizations (FBO), the Association of Contracted Football Players (VVCS) and the ProProf in 1999. The agreement set aside Article 7:668a of the Dutch Civil Code to the effect that contracts entered into for a definite period by the same parties will remain contracts for a definite period. Article 6.2 of the collective agreement provides that the duration of the contracts and the number of consecutive contracts are irrelevant⁷⁸.

4.1.5. Solution

The Dutch Employers' Organization for the Sports Industry (WOS)⁷⁹ came up with a number of recommendations to resolve the situation. According to the WOS a collective agreement should be drafted that

applies to the entire sports sector. Such a collective agreement would have to regulate the employment relationship between the professional athlete and his employer. Furthermore, clear agreements would have to be reached concerning the non-application of the *Flexwet* to the sports sector⁸⁰.

4.2. Social security

4.2.1. Pensions

The active working career of a professional sportsman is considerably shorter than that of a 'regular' person. When athletes end their active sports careers they are no longer receive a salary from employment, but like all other Dutch employees, professional sportsmen are entitled to a pension from the age of 65. However, most professional sportsmen have not made any provisions for the period in between, leaving them without a regular income during this time.

4.2.2. The Pension Plan for Professional Football Players of the Royal Dutch Football Association

One of the few sports sectors that has made provisions for the period following the termination of an active sports career is professional football. In 1972 already arrangements were made for this period in the Pension Plan for Professional Football Players of the Royal Dutch Football Association (CFK) stating that professional footballers had to contribute approximately half their income so as to be able to receive a fiscally lucrative monthly payment during this period until retirement age⁸¹. The contribution may also include bonuses and income earned from sponsoring deals⁸².

4.2.3. Social security

In 2003, the Athlete's Committee of the NOC*NSF (the Dutch Olympic Committee) published a report which stated that medical care was insufficiently accessible to professional sportsmen⁸³ due to financial aspects of the preventive medical care needed to keep athletes in healthy condition. Furthermore, it turned out that large numbers of athletes are underinsured against specific costs relating to sport as most insurance policies only offer partial coverage of medical treatment as a result of sports injuries. There is as yet no specific health insurance plan for sportsmen even though this would be highly desirable⁸⁴.

In the Netherlands, the football sector is again ahead of other sports sectors in the matter of health insurance. In professional football a collective insurance contract (created after an initiative of the FBO) covers the costs of matters such as rehabilitation and physiotherapy⁸⁵.

4.3. The distinction between professionals and amateurs

Almost every Dutchman practices some form of sport. The majority practice sport as a hobby and therefore as an amateur. But when should an individual sportsman be considered an amateur and when a professional athlete?

4.3.1. The professional

A professional is an individual who practices sport as a profession. The professional can either work as an employee or be self-employed. Professional athletes who perform sports activities as an employee often have a contract with a sports club in a field of sport that is practiced as a team. Such a contract logically provides that the athlete is entitled to a monthly salary and to other rewards like bonuses and expense allowances. The employment relationship between a professional athlete and a sports club consists of all the essential elements of an employment contract under Article 7:610 (1) of the Dutch Civil Code: personal labour, remuneration and a relationship of authority.

Professional athletes who practice an individual sport are usually self-employed. A self-employed person derives his income from prize money earned through his participation in sports tournaments or from sponsor contracts.

4.3.2. The amateur

An individual who does not practice sport as a profession is generally considered an amateur. The amateur cannot be remunerated for his

sporting activity and cannot have an employment contract with the amateur sports club. However, amateurs can be paid expense allowances for their participation in matches or training⁸⁶.

4.3.3. In practice

The difference between professionals and amateurs is however not as simple as it seems. A grey area exists between the two types of relationship between the athlete and the sports club. In the sports sector, and most notably in football, it is a well-known phenomenon that amateur sportsmen may receive compensation for expenses that considerably exceeds actual costs. In such cases it is difficult how these sporting activities should be qualified legally. Recent case-law has made clear that the fact that an amateur receives compensation for expenses does not automatically imply that he has an employment contract with the club paying the expenses⁸⁷.

5. Dutch problems, Italian solutions?

In Italy, law n. 91 of 1981 is often consulted for a solution to specific sports problems. It is therefore interesting to examine how Italy would handle the legal problems that plague the Dutch sports sector. Below, I will first discuss some essential differences between the Dutch and the Italian legal system in the field of sport and then I will describe how the three Dutch situations mentioned above would be dealt with in Italy.

5.1. Interventionism

This article has already revealed that Italy already has ample experience in the operation of a specific sports act, while this is not the case in the Netherlands. The mere presence of a sports act however does not necessarily imply that sports policy develops along the right lines and the mere lack of a sports act does not automatically means that the sports sector in a certain country is lagging behind. It cannot be denied however that a sports act can be a useful tool for shaping the sports sector and that the presence of a sports act can provide a country with a certain status and credibility in its international dialogue with the sports organizations of other countries⁸⁸.

Sports legislation comes in two categories: interventionist and non-interventionist⁸⁹. An interventionist model implies that a country has specific sports legislation in place regulating the structure and the mandate of a substantial part of the national sports sector. All other models are to be considered non-interventionist.

The Dutch model concerning sports legislation is non-interventionist. This becomes clear from the fact that the Netherlands does not have a sports act and that the main parties involved in the sports sector are private. The sports organizations (such as the NOC*NSF or the sports federations) are furthermore supported by the government.

The advantage of a non-interventionist model is flexibility. No amendment of the law has to take place in order to change agreements in the sports sector. This way, policy makers are able to intervene quickly if necessary.

Italy has an interventionist model. This article has already described the role played by law n. 81 of 1981, as well as the important

79 The WOS is a non-profit employers' organization that looks after its members' interests in the area of labour relations. The members are sports organizations at regional and national level, associations of sports councils and associations of owners of sports accommodations. See: www.w-o-s.nl.

80 Lankers, 2009, p. 37.

81 The CFK arrangement is made compulsory by the Collective Labour Agreement for Professional Football Players (2008-2011). See Articles 25 and 26. However, not all professional football players are satisfied with this agreement, see for example: 'Profvoetballers leggen een bom onder gedwongen pensioenregeling' in the *Volkscrant* of 10 January 1999 regarding the dispute between Ferdi Vierkdu and

his employer A.F.C. Ajax; or 'Prof's uit binnenland mijden CFK' in the *Volkscrant* of 10 November 2004.

82 www.cfk.nl

83 Atletencommissie NOC*NSF,

Toegankelijkheid sportmedische zorg voor topsporters, APE, Den Haag, 2003, p. 7.

84 *Klachten bij topsporters over 'zorg'*, *Volkscrant*, 21 November 2003.

85 Lankers, 2009, p. 39.

86 Cf. Article 3 of the Official KNVB Regulations on Amateurs for the football sector.

87 District Court of Roermond, 23 July 2008, LJN: BE 9354.

88 Chaker, 2004, p. 9.

89 According to Chaker in his research for the European Council.

function that the CONI fulfils in the Italian sports sector. CONI duties are regulated by the *Decreto Melandri* and under CONI supervision a prominent position is also reserved for the sports organizations.

The main advantage of an interventionist model is the legal certainty which it provides. Rules that are laid down in a sports act ensure the stability and continuity which the sports sector requires⁹⁰.

5.2. Contracts for a definite period in sports

Like the Netherlands, Italy is aware of the atypical character of the employment relationship between an athlete and his employer. It is a characteristic feature of the sports sector that it makes use of contracts for a definite period of time⁹¹. As mentioned before, Article 5 of law n. 91 of 1981 provides that the employment contract between an athlete and a sports club may not be concluded for longer than five years. If the parties involved agree, this period can be prolonged or altered in the course of time. This provision does not mention contracts for an indefinite period, which means that law n. 230 of 1962 is not applicable to employment contracts concluded by athletes. Law n. 230 of 1962⁹² provides - amongst other things - that the third consecutive contract entered into by an employer and an employee for a definite period must be considered to be a contract for an indefinite period, thereby closely resembling the rules of the Dutch *Flexwet*.

The situation in Italy is thus that the parties to a contract in an employment relationship between an athlete and his employer can only enter into contracts for a definite period with the possibility of prolonging these contracts as many times as desired. In sport, a contract for a definite period cannot become a contract for an indefinite period, because contracts for an indefinite period do not exist in the Italian sports sector⁹³.

5.3. Social security: law n. 91 of 1981, Articles 7-9

In Italy professional sportsmen are obliged to make financial provisions for the period between the end of their active professional sports career and their retirement age under Article 9 of law n. 91 of 1981 which refers to law n. 366 of 1973 according to which athletes must take part in the ENPALS pension plan covering invalidity, old-age and survivors.

Law n. 366 of 1973 provides that professional athletes who have ended their active sports careers are thereafter entitled to a monthly payment from a specific fund. Male athletes are entitled to this pension from the age of 45 and female athletes from the age of 40, provided that the athlete in question has contributed to the specific fund for at least twenty years⁹⁴. The costs of the fund do not have to be completely borne by the athletes: the sports association is obliged to contribute two-thirds of the fund⁹⁵.

Article 7 of law n. 91 of 1981 states that the sporting activities of professional athletes are subject to medical controls which are carried out in accordance with standards that have been established by the national sports federations and the Italian Ministry of Health. In order to guarantee the optimal wellness of athletes, sports associations must ensure that their athletes undergo medical controls at least once

every six months. The data that originate from these controls must be recorded in a health dossier (the so-called *scheda sanitaria*)⁹⁶. This dossier thus includes comprehensive information concerning the medical care that the athlete has received and gives a sports medical overview of the actual state of health of the athlete⁹⁷. The athlete carries this dossier with him during his entire active sports career, so as to ensure his optimal state of health in competitions in his chosen field of sport.

According to Article 8 of law n. 91 of 1981, sports associations are obliged to provide all their athletes with insurance covering the risks involved in practising professional sport⁹⁸. The sports clubs are responsible for financing these policies. As of the year 2000, legal provisions are in force stating that all professional athletes have to be registered with the *Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro* (INAIL)⁹⁹. This insurance company provides the athletes with standard insurance that provides full coverage of the expenses made in the area of, inter alia, medical treatments and rehabilitation.

5.4. The distinction between professionals and amateurs in Italy

As mentioned above, Article 2 of the Italian law n. 91 of 1981 gives criteria for determining who can be considered professional athletes. Under this article, professionals must have permission from a national sports federation to operate as professionals and must be remunerated for their sporting activities. These sporting activities must also constitute the athlete's main working activity. This is the principal difference with regard to amateur athletes, who practice sport as a means of recreation while having a career in another field as their primary source of income.

In Italy amateur athletes are also sometimes remunerated for their sporting activities in the form of expense allowances or other allowances. The phenomenon of the remunerated amateur athlete appears to be difficult to qualify legally in Italy as well. Neither in Italian legislation, nor in the sports organization have legal rules been established regarding the remunerated amateur athlete. Only in the specific area of taxation have certain arrangements been made¹⁰⁰.

Article 2 of law n. 91 of 1981 is not the only provision determining when a sportsman is to be considered a professional. The legal qualification of the professional status of an athlete is brought about by a series of formal acts performed by stakeholders in sports such as the CONI and the various national sports federations, who are guided by the directives of the CONI itself concerning the distinction between amateur and professional athletes¹⁰¹. Article 31 of the CONI's articles of association states that athletes are persons who "participate in the association and the recognized sports federations (except in cases where the national sports federations have allowed individual registration) and in the united sports organizations and the organs that promote the sport". This article also shows that the CONI can recognize both the athlete who is employed and works under the authority of his employer and the athlete who is self-employed.

The professional status of an athlete is also brought about through the signing of a contract with a sports club that is allowed to conclude contracts. According to Article 10 of law n. 91 of 1981 a professional athlete can only sign a professional sports contract with an association that has the legal form of a limited liability company or a joint stock company. An athlete who is a member of an association that is neither a limited liability company, nor a joint stock company can therefore not be considered a professional¹⁰².

A disadvantage of the fact that the phenomenon of the remunerated amateur athlete has not yet been legally regulated is that the interests of such athletes are insufficiently protected. For example, the remunerated amateur athlete is not entitled to the safeguards applied to professional contracts under Article 4 of law n. 91 of 1981 or to the social security facilities provided by Articles 7 to 9 of that law¹⁰³.

Given that Article 2 of law n. 91 of 1981 cannot possibly apply to a remunerated amateur athlete a solution for this problem has been sought in Article 409(3) of the Italian Code of Civil Procedure¹⁰⁴ concerning the legal form of the *parasubordinato*. A *parasubordinato* is an individual who does not have a subordinate employment relationship

90 For more arguments in favour and against, see: Chaker, 2004, p. 10.

91 Duranti, 1983, p. 700.

92 Legge 18 aprile 1962, *Disciplina del lavoro di contratto a tempo determinato*. Announced in the *Gazzetta Ufficiale* on 17 May 1962, n. 125.

93 G. Nicoletta, *Il contratto di lavoro sportivo*, Altalex, 27 September 2007.

94 Law n. 91 of 1981, Article 9, sub 7.

95 Law n. 91 of 1981, Article 9, sub 4.

96 Law n. 91 of 1981, Article 7, sub 2.

97 See Article 2, Decreto Ministeriale,

Norme sulla tutela sanitaria degli sportivi professionisti, 13 March 1995.

98 Article 8 explicitly mentions death and (chronic) injuries that may intervene with a professional's sports career.

99 Decreto Legislativo, 23 February 2000, n. 38.

100 Articles 51 and 90 of law n. 289 of 27 December 2002. *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato*. Announced in the *Gazzetta Ufficiale* on 31 December 2002, n. 305. See: P. d'Onofrio, *Manuale operativo di diritto sportivo. Casistica e responsabilita*, Rimini, 2007, p. 51.

101 Deliberazione del Consiglio Nazionale CONI, 23 March 2004, n. 1256.

102 K. Guerini Rocco, *Il rapporto lavorativo sportivo dilettantistico*, Altalex, 23 April 2009.

103 D'Onofrio, 2007, p. 54/55.

104 Il Codice di Procedura Civile.

with an employer, but can nevertheless be considered a subordinate, because this individual carries out his activities on a continuous basis for remuneration and in a relationship of authority¹⁰⁵. According to Article 806(2) of the Italian Code of Civil Procedure however a remunerated amateur athlete cannot be considered as a *parasubordinato* as this would also have to be agreed upon in a collective agreement for the sector in question¹⁰⁶. As of yet, no collective agreement concerning the remunerated amateur athlete has been concluded in Italy.

6. Conclusion

The present article discusses the Italian law n. 91 of 1981 in some detail. It also pays attention to the influence of the Italian Constitution on the sports sector and the role of the CONI and the national sports federations.

Currently, there are several problematic situations plaguing the Dutch sports sector for which no simple solution is at hand. In this article three of these situations have been discussed: the problems caused by the *Flexwet* in sport, the problem of the lack of social security provisions for athletes, and the problematic difference in the legal position between professional and amateur athletes. In order to examine which lessons the Dutch sports sector could learn from Italy's experience in regulating sport, the present article offers a hypothesis on how Italy would handle these three problematic situations.

Some observations can be made regarding the proposal of the WOS to introduce a general collective agreement in the area of sports. First it must be noted that the organization of the conclusion of a collective agreement that applies to the whole sports sector takes manpower and money. It also takes a stable representation of all employees in the sports sector. Moreover, the (legal) support that would have to be made available to the parties to such an agreement is also a matter of some expense. The parties concerned themselves often lack the expertise that would be required¹⁰⁷. It would also be time consuming to bring together all the parties that have an interest in a collective agreement (such as the NOC*NSF, the sports federations, the sports organizations and the Ministry of Health, Welfare and Sport). In the light of these arguments, it would perhaps be less complicated to amend the *Flexwet* in such a manner that it would cease to apply to the sports sector in general.

In the previous chapter it was demonstrated that the Italian law n. 91 of 1981 can solve the problem of the *Flexwet* in sport as this law provides that employment contracts between athletes and their employers can only be concluded for a definite period of time.

Where a large part of the Dutch sports sector has made insufficient provisions regarding the medical care and retirement of athletes, Italy had already organized this matter through law n. 91 of 1981. This law could serve as an example to the Netherlands, as it includes rules concerning medical insurance, pension plans and the protection of the athlete's health. The biggest advantage of law n. 91 of 1981 as opposed to the way in which social security has been arranged in the Netherlands is that all of the relevant provisions have been laid down in the same piece of legislation. The fact that these matters have been regulated centrally provides for legal certainty and a comprehensive overview.

According to Articles 7 to 9 of law n. 91 of 1981, the costs of the measures contained in these provisions shall for the most part be borne by the sports associations of which the athlete is a member. The

sports associations are also responsible for athletes' insurance and pension plans and for ensuring that they undergo medical controls. This allows the athlete to focus completely on the practice of his sport while the association, which will usually have more expertise than the athlete, takes care of the organizational matters.

It seems that the Italian sports sector could solve the problem of the difference in treatment between professional athletes on the one hand and (remunerated) amateur athletes on the other by a definition in a collective agreement of the amateur athlete as a *parasubordinato*. The remunerated amateur could then enjoy the same amount of protection that other persons have in an employment relationship with a legal person. The same solution could solve the Dutch problem of the 'grey area' in which the remunerated amateur athlete presently finds himself.

Can the Netherlands learn something from the Italian regulation of sports? This does indeed seem to be the case as Italy would be able to present a solution for the three Dutch sports problems or at least provide an option for a solution.

In the introduction to this article it was noted that professor Van Staveren in his report on the matter saw no immediate need for a specific sports act in the Netherlands. According to Van Staveren, such an act would only be necessary when "the current legislation provides insufficient options to fight the problems encountered". However, one may wonder whether this situation where the legislation provides insufficient options does not already exist in the Netherlands. No simple solution has yet been found for the three Dutch sports problems discussed. When Italian sports law is applied to these situations however it becomes clear that a solution is not unimaginable, which provides a further argument for concluding that the Netherlands may take an example from Italy's experience in this area.

In the past, the European authorities have shown little interest in sports-related matters. In the recently entered into force Lisbon Treaty the topic of sport was included for the first time. Article 6 of the Lisbon Treaty states that the European Union has the competence to carry out actions to support, coordinate or supplement the actions of the Member States in the areas of education, youth, sport and vocational training. This concept has been further elaborated in Article 165(2) which states: "Union action shall be aimed at (...) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen". At this moment it is still too early to say what impact these two provisions will have on sports practice in the European Union, but it can be reasonably assumed that the EU is now able to intervene in sports-related matters (by means of the Lisbon Treaty), even though sporting activity is not directly defined as an economic activity¹⁰⁸. This development at the level of the EU and the abovementioned advantages of having a sports act may possibly lead to further consideration of the matter in the Netherlands.

105 Zoli, 1985, p. 2088.

106 V. Frattarolo, *Il rapporto di lavoro sportivo*, Milano, 2004, p. 126/127.

107 Lankers, 2009, p. 33/34.

108 'Europa en Sport', www.parlement.com