



**EU Integration and Citizens' Rights**  
Jean Monnet Centre of Excellence



# Report on academic seminar “Experiencing sports (broadcasts) without frontiers”.

20<sup>th</sup> September 2023 19:00-21:00 (Hybrid event)

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## Panel contributors



Dr Robert Butler is a senior lecturer in the Department of Economics at University College Cork (UCC). He is a founding member of the World Interdisciplinary Network for Institutional Research (WINIR). His research interests are focused on institutional economics and the economics of sport. He is an associate editor at *Economic Inquiry* dealing with submissions in the economics of sport and the *Economic and Social Review*.

Dr Seán Ó Conaill is a lecturer at the School of Law at UCC. He is also co-director of the “Sports Law Clinic”. His research interests are in the areas of Constitutional Law, the Law of Sport, Language Law and Irish Studies generally.



Niamh O'Mahony is the Chief Operating Officer and Head of Governance at Football Supporters Europe (FSE). She has over twenty years of experience in the sports, media, technology, non-profit and retail industries in Ireland and the EU.

## Context and Opening of the Seminar

### Introduction of the event – Dr Robert Butler

Dr Butler opened the seminar by thanking the participants and contributors of the event. He stressed that the seminar focuses on the legal and economic dimensions of sports broadcasting in Europe.

### Link to JMCE EUICR – Dr Luigi Lonardo

Dr Luigi Lonardo introduced the seminar in the wider context of the action of the Jean Monnet Centre for European Integration and Citizens' Rights (hereafter JMCE EUICR). He recalled the complex challenges faced by the EU, such as the EU economic crisis, the migrant crisis, and the conflict in Ukraine, which contributed to a “legitimacy crisis”. Therefore, he highlighted that the JMCE EUICR is exploring the potential of EU-derived rights to restore this legitimacy by redefining rights beyond traditional legal boundaries and focusing on how citizens can use these rights in both legal and political ways.

Dr Lonardo referred to the upcoming events of the [JMCE EUICR](#), with the last event in collaboration with the Glucksman Gallery.

## Academic Discussion

### Contribution of Dr Seán Ó Conaill

Dr Ó Conaill highlighted how sports have always been cautious about broadcasting, starting from the early days of radio. He noted that broadcasting became more prominent with the professionalization of sports, citing examples like the professionalization of baseball in the United States during the 1890s and the formalization of football. Initially, players weren't full-time athletes, often identified by nicknames related to their day jobs, like "the brewer" or "the stealer." There was a close link between players and industries like factories and mines.

Dr Ó Conaill pointed out that key figures in sports, like factory owners, were hesitant about broadcasting as they believed it could reduce the number of people coming to watch live, which was more financially beneficial. Therefore, this resistance to broadcasting stemmed from the perception that it might affect their profitably.

Furthermore, politicians strongly pushed for sports to be excluded from the scope of competition law. Dr Ó Conaill illustrated this argument with a famous baseball case. If a team from one state plays a match in another state, the competition laws that apply to the same team will be different in each state. This complexity led judges to avoid applying competition laws to sports altogether. Dr Ó Conaill stressed the uniqueness of this exception. This exception was recognized in the United States and Britain, especially as international matches began to be broadcast. At the core, the fear of decreased attendance and subsequent loss of profit participated in the decision to exempt sports from certain competition laws.

Dr Ó Conaill then drew the framework of sport in the EU. He referred to Article 165 TFEU which stipulates that "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function".

He emphasised the special nature of sport, which still today is an exception in many areas. He referred to the consideration of risks, that are essentially different in sport, as hurting someone does not have the same consequences.

To illustrate how judges keep their distance with sport-related issues, Dr Ó Conaill referred to Clarke in the recent case *Fox v The Minister for Justice*.<sup>1</sup> The case does not concern sport, but we can see a reference to Sport, where Judge Clark emphasised the non-legal character of the match in question and considered that "However, no-one would think that a court should make declarations on such issues even where hotly disputed".<sup>2</sup>

Dr Ó Conaill stressed the necessity for a separation between law and sport. This idea has been confirmed by the Irish Supreme Court, even if it has certain limits. He referred to the case of *O'Connell v Turf Club*<sup>3</sup> where it was confirmed that the law applies to sport but only on an exceptional basis.

He then referred to the famous *Bosman* case where it was argued that the imposition of transfer fees on a football player where incompatible with the right of free movement and that such restrictions on

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<sup>1</sup> *Fox v The Minister for Justice* [2021] IESC 61.

<sup>2</sup> *Ibid*, para.11.4.

<sup>3</sup> *O'Connell v Turf Club* [2015] IESC 57.

a foreign player constituted discrimination on the ground of nationality.<sup>4</sup> The ECJ applied the right of free movement to professional football players, and by implication other sportsmen by allowing them to transfer to another club at the end of their existing contract. Thus, while the ECJ recognised the special character of sport, certain rules are still applied.

As for broadcasting, Dr Ó Conaill referred to the United States “Sport Broadcast Act 1961” which restricted widely the broadcasting of sport with a particular emphasis on American football. They follow the same idea, that broadcasting would lower the attendance at the game. He emphasised the adoption of a specific schedule still followed today, with high school games on Fridays, College games on Saturdays and professional football games on Sundays.

Dr Ó Conaill highlighted the practice of "blackouts," where broadcasts were restricted to certain times, regulated by specific statutes and rarely changed over time. He questioned these exceptions from a competitive law standpoint, arguing that some games should be broadcast more widely, especially when they hold cultural or national significance. He raised the point: if people are told what they can or cannot watch, is that genuinely a free market?

He came back to article 165 TFEU and referred to the active role of the Commission. He brought up the issue of piracy, noting how broadcasters pay substantial amounts for exclusive content rights to attract subscriptions, making piracy a significant concern. The EU aimed to address this with upcoming legislation.

Dr Ó Conaill concluded by underlining how sports have influenced law and expressed interest in how the legal landscape might evolve. He pondered how the law could protect people's rights to watch specific programs and whether exceptions in competition law could potentially lower broadcasting prices.

### Contribution of Dr Robert Butler

Dr Robert Butler provided the economic perspective of the interdisciplinary seminar, focusing on how sports broadcasting impacts consumers. He began by sharing a personal experience of how in recent years his viewing habits changed, leading to multiple subscriptions for sports content.

He emphasized the extensive number of decisions regarding the collective arrangements of football broadcast rights by the European Commission (EC) and the EU Member States since the 1990s. These decisions focused notably on determining if the collective arrangements constituted a cartel and whether they limited competition in subsequent broadcast markets, potentially leading to territorial exclusivity.

He referred to a situation in 1996, where the Office of Fair Trading brought a case against the Premier League, BSkyB and the BBC after claiming that fans were being cheated because of the small number of live games on television. The Office of Fair Trading argued that the Premier League clubs operated an unlawful, anti-competitive cartel by negotiating as one block rather than giving clubs the individual right to negotiate their own television deals. The case was dismissed for the benefit of the defendant.

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<sup>4</sup> C-415/93, Bosman, ECLI:EU:C:1995:463.

He then stressed how the EC initially objected to the collective selling arrangement for the UEFA Champions League arguing “the reduction in competition caused by the joint selling arrangement”.

Dr Butler further examined how the territorial exclusivity in sports broadcasting evolved with the single market. He referenced the 2016 resolution on the Digital Single Market Act, noting that the European Parliament emphasized the significance of territorial exclusivity within the EU copyright system. They cautioned against advocating for mandatory pan-European licenses, fearing it could reduce the content accessible to users.

He also mentioned a February 2017 decision by the European Parliament that supported the selling of TV rights based on a centralized, exclusive, and territorial approach. However, there were exceptions for online content subscriptions, like sports fixtures, music, games, or films.

However, Dr Butler pointed out the inconsistency between previous EC considerations and later stances. For instance, he referenced December 2002, when the EC deemed collective selling arrangements as anti-competitive and violating Article 101 TEU. However, in 2018, the EC's view changed, interpreting territorial exclusivity agreements between audiovisual sports rights-holders and media content providers as allowing absolute territorial protection.

Dr Butler supported his argument by examining the broadcasting of football and the Gaelic Athletic Association (GAA). He highlighted how football broadcasting began growing after World War II and gained significant coverage in the 1950s. Live football on TV started in the 1960s. Consequently, the attendance at Ireland's league matches decreased substantially, with a significant decline in the 1990s. He noted that Ireland once had a type of monopoly on Sundays, but the introduction of football broadcasting disrupted this arrangement.

Between 2003 and 2007, a pay-per-view system emerged, allowing viewers to pay per game. The European Commission (EC) opposed this system and sought its dissolution. Subsequently, from 2007 to 2013, only one subscription was necessary. However, the current situation demands multiple subscriptions to follow sports, often at least three.

Dr Butler made a compelling argument challenging the traditional belief that a monopoly always harms consumer interests. He pointed out that in the present scenario, breaking the monopoly in sports broadcasting has worsened conditions for consumers. Prices have risen notably, especially since the European Commission intervened to dismantle the monopoly. Instead of breaking a big monopoly, the EC has instead created smaller monopolies, that exist in different markets, forcing customers to pay more for the products they were once able to access with a single subscription.

Dr Butler applied the same analysis to the Gaelic Athletic Association (GAA), concluding that the large monopoly in broadcasting was more advantageous for consumers than the smaller monopolies that now exist. This has now extended beyond television to streaming services and is likely to continue in the years ahead as traditional television services and programming migrate to streaming platforms.

### Contribution of Niamh O'Mahony

Niamh O'Mahony shared insights from her civil society perspective, drawing from her experience at the FSE. She highlighted the staggering financial scope of UEFA, emphasizing that a seemingly minor

percentage actually involves vast sums of money. Her focus was on supporters, clarifying that FSE primarily supports stadium-related issues.

Discussing the post-COVID landscape, Niamh O'Mahony pointed out that comparing subscriptions reveals how broadcasting rights significantly shape and limit the market, leading to market fragmentation. She emphasized that these broadcasting rights are often approached without considering them as “rights” for consumers.

She highlighted a recent discussion about the human rights of fans with UEFA, noting instances of fan discrimination and police violence. Referring to the Case of European Super League Company v. UEFA and FIFA,<sup>5</sup> she questioned the extent of this monopoly's reach.

Niamh O'Mahony concluded by advocating for solidarity and equality in the sport, stressing the importance of considering competitive balance. While acknowledging the significance of accessible game broadcasts, she urged not to overlook the experience of fans who physically attend matches. She highlighted the need to preserve the match-day experience amidst the focus on broadcasting rights.

### Closing of the Seminar

Dr Robert Butler reflected on Niamh O'Mahony's contribution and emphasised that the COVID-19 pandemic has been eye-opening on the importance of fans during games, as they are creating a sort of spectacle. The broadcaster had to make fake noises to give the impression that the stadium was full. Thus, he questioned, should fans pay for what they are actually creating?

Niamh O'Mahony stressed how fans have been used for economic reasons, and that we often forget the social and community-building aspect of games.

### Literature and further reading

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- Ó Conaill, S. (2018) 'Sustainable Financing in Football and the EU' In: Jack Anderson, Richard Parrish, Borja Garcia (eds). *Research Handbook on EU Sports Law and Policy*. Cheltenham: Edward Elgar.

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<sup>5</sup> C-333/21.