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Special Report: Third Party Ownership (TPO)

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Special Report: Financial Controls of Football Clubs

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EDITORIAL



The evolution of modern professional football has transformed the issue of minors into a major one.

While this issue is very topical, it is also extremely complex.

It is topical as evidenced by the recent cases involving *Barca*, *Real Madrid* and *Atlético Madrid* as well as the other cases in progress.

It is complex as there are two opposing philosophies regarding the FIFA ban on the transfer of minors. The ban can be perceived as an attack on the freedom of movement of persons and a loss of opportunity for many young people (and their families), for whom football is a way out of monetary instability and towards a better future. However, the ban can also be seen as the only way to protect minors from unscrupulous practices dictated by financial greed.

The sporting and commercial stakes are major.

For these reasons, Football Legal devotes a Special Report to the topic of Minors in Football with the aim to give the opportunity to every football stakeholder to share their outlook. This overview is striking and of great interest to those interested in the matter.

Ronan DAVID
Chief Editor

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Publishing Director

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The Certification of Intermediaries in the Netherlands



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→ **Royal Dutch Football Federations (KNVB) – National Regulations – Intermediary**

A topic that is currently being discussed between the main stakeholders in Dutch football is the implementation of a certification for organisations of intermediaries. The idea is not that individual intermediaries will be certified, but that the organisation to which they are affiliated will be. The rationale behind this system of certification is obviously to ensure the quality and reliability of intermediaries,

since the warranties that were previously in place, such as the mandatory insurance policy and the need to pass a knowledge test in order to be licensed as an intermediary, were abandoned with the implementation of the FIFA Regulations on Working with Intermediaries (FIFA RWI).

The discussions

A working group with representatives of the Dutch Football Association (KNVB), *ProAgent* (the union representing the interests of intermediaries in Dutch football), *VVCS* and *ProProf* (the unions representing the interests of players in Dutch football) was created to discuss the requirements that would be necessary for certification.

During a meeting held on 9 June 2015, the working group found a common ground regarding the following requirements:

1. Permanent education. The relevant organisation would have to require its affiliated intermediaries to participate in permanent education.
2. Insurance. The relevant organisation would have to make sure that each of its affiliated intermediaries has an insurance policy in place similar to the insurance policy that was mandatory under the previous regulations.
3. Legal assistance. The organisation needs to provide legal advice/support to its affiliated intermediaries.

4. Code of conduct. The organisation needs to have a code of conduct in place that is applicable to all its affiliated intermediaries.
5. Pre-registration. The organisation may only allow intermediaries to join the organisation if they are registered as intermediaries with the KNVB.
6. Minimum number of members. The organisation would need to have at least 50 members or be an officially recognised union.
7. Independent assessment committee. The organisation would need to have an independent assessment committee in place in order to assess the compliance of its affiliated members with the code of conduct, with the authority to suspend membership.
8. Financial transparency. Certain minimum requirements regarding financial transparency of the organisation may be added.

In October 2016, an agreement was reached in the working group regarding a licensing system for

organisations of intermediaries. The final step to be taken before the formal implementation of the licensing system is the ratification by the Council of the KNVB, which occurred in March 2017. The KNVB follows the project closely and has a large say in establishing the minimum requirements for the certification. The KNVB will also conduct an annual review of the system.

The main feature of the licensing system is that certified organisations of intermediaries will implement a Code of conduct, applicable to the intermediaries affiliated to it. A first draft of the Code of conduct that will be implemented by *ProAgent*, the sole organisation of intermediaries in the Netherlands, was provided to the author. The wording of this draft-Code of conduct may be interesting for readers as it may prove to be a benchmark of a system that could be implemented on a larger scale in the future within the Netherlands and abroad. Indeed, should every country have such licensing system in place, it would be easier to verify whether an unknown intermediary encountered in international dealings is a reliable partner or not.



If associations of intermediaries prove to be able to effectively eradicate the “bad apples”, a system of mutual recognition between licensed organisations of intermediaries from different countries may turn out to be an effective tool in governing the business of intermediaries in football.

The Code of conduct

The introduction to the Code of conduct (freely translated into English) reads as follows:

“The code of conduct expresses today’s social norms and values that in Pro Agent’s prevailing opinion should be observed when conducting the profession of authorized agent (registered intermediary). Proper care must be devoted to the entrusted interests; this also involves the interests of minors.

Observing this code of conduct by the members of Pro Agent also justifies the quality label that the KNVB (Royal Netherlands Football Association) has granted to Pro Agent as an organization. The rules are mandatory for Pro Agent’s members, and for their conduct in performing their daily work. The agent must seek to be regarded as a person whose interest representation has added value and with whom business can be transacted. For example, the agent may not use inappropriate means, such as announcing or taking steps that bear no relation to the envisaged objective.

Experience has proven that a proper mutual relationship among the agents in general promotes the proper representation of the interests entrusted to them. Without losing sight of the interests entrusted to them and the interest of football in general, agents should seek a relationship of mutual goodwill and trust; in line with this, they should not publicly express any negative opinions regarding one another.

Taking the foregoing into account, the agent can be faced with conflicting duties. He will have to resolve this carefully, subject to the provisions of the regulations that apply to his activities, specifically the regulations of the KNVB

and FIFA.

The following rules of conduct can be viewed as an elaboration of the norms and values formulated above; if there is uncertainty in any situation regarding the manner in which these rules must be applied, they must be assessed on the basis of those norms. The terms ‘agent’ and ‘intermediary’ are both used to indicate the same capacity.”

The actual provisions of the Code of conduct (freely translated into English) are the following:

“Article 1

The agent’s conduct must be such that the trust in his own professional conduct is not damaged.

Article 2

The agent must prevent jeopardizing his independence in conducting his profession in any way.

Article 3

Each year, the agents must maintain and develop their knowledge and professional skills, taking the fact that they frequently work with minors and the international dimension of their profession into account; at a minimum, the agents must attend the annual KNVB knowledge conference for intermediaries.

Article 4

The agent has a valid certificate of good conduct and has taken out professional liability insurance that covers generally accepted risks.

Article 5

In his contacts with third parties, the agent must consistently provide clarity regarding the capacity in which he is acting in the given situation.

Article 6

The agent must at all times refrain from actively approaching minors, as defined in the KNVB Regulations on Working with Intermediaries. Agents do not make any (private) agreements with players or their family members and/or other representatives regarding intermediary activities for minors. Antedating

agreements are strictly forbidden; an agent who commits unauthorized activities in the sense of this article will be held to account by the Dispute Resolution Committee.

Article 7

Negotiations regarding the establishment and/or amendment of an employment contract in football and negotiations regarding an agreement for the transfer of a player are conducted exclusively by the agent who is registered as an intermediary.

Article 8

The agent must refrain from providing any factual data that he knows or at least should know are incorrect.

Article 9

In the interest of the client (player or club) and of football in general, agents must maintain a mutual relationship that is based on goodwill and integrity.

Article 10

The agent must not make any hurtful comments in words or in writing.

Article 11

In the event that an agent and his client terminate their collaboration and the client is represented by a new certified agent, the agent must cooperate if the new agent or his formal client requests that he provides specific information that is relevant for the proper representation of the former client.

Article 12

The agent only contacts a party regarding an affair in which the agent knows or should know that this party is already assisted by an agent by means of an agency agreement through the intermediary of this agent, unless the latter permits the agent to contact the party directly. This also applies if the party in question directly approaches the agent.

Article 13

- 1.** *The agent must exercise transparency in his invoicing.*
- 2.** *The agent arranges his invoice in such a way that the client (player or club) can clearly identify the amounts of the fee and*



value added tax being charged. The agent must take an active stance and inform his client of his fee at his own initiative.

3. In the event that an advance of payment has been received or if payments on any other account have been received or made for the client (player or club), the agent must separately specify such amounts in the invoice and settle such amounts where necessary and possible.

Article 14

1. The agent is required to exercise accuracy and due care in financial affairs.
2. The agent should avoid incurring unnecessary costs. This also applies in respect of the client's counterparty (club or player).

Article 15

In the event that in dealing with a case, the agent issues instructions to a third party, he must guarantee the allowances and fees to which this third party is entitled.

Article 16

1. The agent must exercise due care in handling the duties with which he is charged.
2. The agent is required to record any oral agreements in writing.
3. The agent must ensure that the organization and arrangement of his office and website (if any) support a proper performance of his work.

Article 17

The interest of the client at all times determines the manner in which the agent must handle his affairs.

Article 18

1. The agent is required to observe the requisite confidentiality; he must remain silent regarding the details of any cases he handles, the person of his client (player or club) and the nature and scope of his client's interests, unless this information must be disclosed for the proper performance of his work.
2. The agent imposes the same degree of confidentiality on his assistants and personnel.
3. In the event that the agent has promised confidentiality to a counterparty or if this confidentiality results from the nature

of his relationship with a third party, the agent will also observe this confidentiality in respect of his client (player or club).

Article 19

The agent may not accept the representation of the interests of two or more parties if the interests of these parties conflict or are likely to conflict. The agent will always act in accordance with the regulations of both the KNVB and FIFA regarding a possible conflict of interest.

Article 20

The agent must inform his client (player or club) of any important information, facts and agreements. To prevent any misunderstanding, uncertainty or dispute, where required, the agent must confirm important information and agreements in writing to his client (club or player).

Article 21

1. In providing information to third parties regarding a case that the agent is handling or has handled, the agent will always take the interests of the client (player or club) into account. The agent does not provide any information without express consent from the client (player or club) and avoids any misunderstanding regarding the capacity in which he is acting.
2. During arbitration or criminal proceedings, the agent will not provide any copy of case documents to the media. The agent takes a reticent stance in granting access to those documents.

Article 22 (Non-compliance)

In the event of non-compliance with one or more of the rules of conduct set out above, fellow members and/or one or more board members of Pro Agent, or other interested parties can summon a Pro Agent member to appear before the Dispute Resolution Committee to be held accountable for his compliance with the code of conduct in accordance with the provisions of Article 23 up to and including Article 26.

Article 23 (Dispute Resolution Committee)

The Dispute Resolution Committee has the task of rendering a binding decision on a complainant's complaint that has

been filed in writing.

Article 24 (Composition of the Dispute Resolution Committee)

The Dispute Resolution Committee is comprised of two independent persons who are familiar with the sector and a third person, who will be elected by the two persons mentioned above.

Article 25 (Possible measures)

If it finds that the rules of conduct have been violated, the Dispute Resolution Committee can impose the following disciplinary measures:

- a warning;
- a reprimand;
- a fine;
- a suspension of up to six months as a Pro Agent member, and a possible prohibition to represent himself in any way as being a member of the association during the suspension;
- a definitive termination of the membership;
- the disclosure of any of the measures set out above in a manner to be determined by the competent agency, possibly in collaboration with the KNVB;
- a combination of the sanctions mentioned above.

Article 26 (Suspension or expulsion)

Any failure to comply with the code of conduct can lead to suspension of the membership or expulsion from the association. The possibility of suspension or expulsion of a Pro Agent member exists in the following cases:

- a. the agent repeatedly violates the code and/or
- b. the agent fails to implement regulations in the code, even after having been urgently requested to do so by the board and/or
- c. the agent violates the code in such a serious manner that this may directly cause damage for another member or other members."



Progress

It remains to be seen how such certification system will finally be implemented, but the initiative is certainly laudable since it undoubtedly provides clubs and players with more warranties regarding the quality and reliability of intermediaries as the system currently in place. Particularly the ethical standards adopted and financial warranties, such as the required insurance cover, will ensure clubs and players that intermediaries affiliated to a certified organisation of intermediaries are, in principle, more trustworthy than intermediaries that are not. An important remark is that intermediaries affiliated to ProAgent remain fully independent in their dealings, they only share their membership of ProAgent as the organisation representing the interests of intermediaries at national and international level.

However, at the same time and although the system that will finally be implemented may still be subject to change, one could place some critical remarks in respect of the present draft of the Code of conduct:

- No Dispute Resolution Committee is in place yet and it remains to be seen whether it will finally comprise of credible personalities with knowledge of the particularities of the market;
- Although referred to as a Dispute Resolution Committee, considering the nature of the disputes that will be referred to this committee, a denomination such as “*internal disciplinary body*” would probably be more appropriate, since the actual contractual disputes will still be dealt with by the arbitration committee of the KNVB;
- Although the implementation of the Dispute Resolution Committee would enhance the reliability of intermediaries affiliated to certified organisations, it offers no solution in providing a forum for settling contractual disputes between intermediaries and clubs or players;

- In the Netherlands, *ProAgent* is currently the only organisation of intermediaries. Whereas the KNVB establishes certain minimum requirements for the issuance of a license, *ProAgent* indicates that it aims at implementing higher standards than the minimum requirements established by the KNVB. It is however feasible that new organisations of intermediaries will be created in the future and that such organisations will thus exist concurrently. In such a situation, the Codes of conduct and the internal Dispute Resolution Committees of these organisations may differ, with a possible lack of coherence and uniformity as a result, which may be a matter of concern. However, the minimum standards established by the KNVB will probably aid in creating a level playing field.

Artificial grass and health risks

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→ Stadium - Player's health



In 2016, doubts were raised about whether the rubber granules in the fields involved health risks. The rubber granules predominantly consist of grinded (car) tires. It has been determined that one football field contains about 120 tons of rubber granules. This is a substantial amount, because it equals about 20,000 (car)tires. The alleged problem with the rubber granules is that they may contain carcinogenic substances, including “polycyclic aromatic hydrocarbons” (PAHs).

Introduction

Artificial grass was first produced in the early 60's. The first football club which played on artificial grass was *Queens Park Rangers* in England in 1981. They were followed by several other clubs, but in 1988 the English Football Association (FA) banned artificial grass because playing football on this kind of grass was too different from playing on natural grass. Nevertheless, the development of artificial grass has not stopped and nowadays lots of football clubs are playing on artificial grass.

Current artificial grass fields consist of softer material, combined with rubber granules. In the Netherlands, there are about 2000 of such fields. In 2016, doubts were raised about whether the rubber granules in the fields involved health risks.

The rubber granules predominantly consist of grinded (car)tires. It has been determined that one football field contains about 120 tons of rubber granules. This is a substantial amount, because it equals about 20,000 (car) tires. The alleged problem with the rubber granules is that they may contain carcinogenic substances, including “*polycyclic aromatic hydrocarbons*” (PAHs).

Results of the research conducted

In the Netherlands, additional research was conducted in 2016, determined that 58 of the 60 examined pitches with rubber granules contained one or more carcinogenic substances. The concentrations measured were higher than permitted for consumer products. This is alarming because athletes often make skin contact with the rubber granules and (especially) children can inadvertently ingest the granules orally. The European Parliament in Brussels is currently considering whether the rubber granules on the fields must be qualified as a consumer product.



If so, stricter standards would apply to the granules. In the Netherlands, it is decided that tire recyclers must comply to a stricter standard for the amount of PAHs in rubber granules and producers of rubber granules receive a certificate if they comply with the European consumers directive. In this way it becomes possible for an athlete to find out whether the fields are safe. It has been found that currently over 90% of the Dutch artificial grass fields meet the European standards.

Possible legal action

If an athlete is nevertheless confronted with health effects, it is important to reflect on possible tort actions against the club and/or the owner/operator of the sports field. The key to success of such legal action will mainly depend on whether the player can prove a (medical) causal relationship between the health effects and the exposure to the rubber granules. A matter of discussion will also be whether the club or owner/operator of the sports field has met the (minimum) standards and whether - with regard to the non-deductible health risks - proactive investigation is conducted. Concerning the liability of the producer, it will be decisive whether, by virtue of the state of the (medical) scientific and technical knowledge at the moment it brought the rubber granules into circulation, it could have been aware of the defects, i.e. of the harmful effects to the human health.



The fight of ADO Den Haag against Mr WANG

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→ **Sport entities – Financial control – Club licensing – Royal Dutch Football Federations (KNVB) – National Regulations**

*Amsterdam Court of Appeal, 19 December 2016,
ECLI:NL:GHAMS:2016:5338*

On 2 December 2016, the club of ADO invoked its right of investigation before the Enterprise Division of the Amsterdam Court of Appeal (EDACA). In a decision dated 19 December 2016, the EDACA granted most of ADO's requests, which specifically meant that an investigation on the policy and the course of events of ADO was ordered, its Chinese owner Mr WANG was suspended as president - yet not as a member - of the Supervisory Board and a new president of the Supervisory Board was appointed. For now, the club is out of trouble.

Facts and circumstances

ADO Den Haag (ADO) is a professional football club registered with the Royal Netherlands Football Association (KNVB), playing in the Dutch Premier League. Based on an extract from the Commercial Register kept by the Chamber of Commerce, the Supervisory Board consists of the following members: Mr WANG (President), Mr JOL and Mr DEETMAN. United Vansen International Sports Co. Ltd (UVS) holds the entire ordinary shares.

Before the purchase of the shares of ADO, UVS drafted a document for the purpose of executing a transfer of the shares. The document stated: "The purchaser guarantees the club a financially stable situation throughout the future. The goal is that by means of a substantial financial investment, of which the purchaser envisions this to be in the area of € 5 million to € 10 million extra investment, the club can be brought to a higher level, dependent on the actual needs and targets.

(...) The investment purchaser envisions will not only come from his own means

and abilities, in addition there will be Chinese and Dutch multinationals willing to sponsor the "new ADO", several companies have expressed their interest after hearing the intention."¹

The minutes of the meeting of the Supervisory Board state, inter alia, the following: "(...) Mr WANG agrees to have UVS paying to NV ADO Den Haag the following additional funding as further explained in attachment 2 hereto:

- First installment € 731.000 to be paid September 30, 2015
- Second installment € 1.183.000 November 30, 2015
- Third installment € 1.814.000 December 31, 2015
- (...)

The Additional Funding will be paid to NV ADO Den Haag as share premium."²

In a letter dated 1 September 2015 the aforementioned was confirmed by ADO to UVS.³

¹ Amsterdam Court of Appeal, 19 December 2016, ECLI:NL:GHAMS:2016:5338, legal ground 2.6

² *Ibid.*, legal ground 2.7

³ *Ibid.*, legal ground 2.8



However, UVS failed to make the payments on time. As a result, *ADO* was unable to pay the rent for the stadium. Furthermore, the Licensing Committee of the KNVB placed *ADO* under intensive supervision since *ADO* was unable to meet the financial requirements of the KNVB in order to obtain a license to play in the Dutch Premier League.

It was clear that *ADO* was facing significant financial difficulties and risked bankruptcy. Although the other members of the Supervisory Board tried to contact Mr *WANG* very often, Mr *WANG* allegedly failed to answer and/or reply to their calls, e-mails and letters. He even did not answer the invitation for the meeting of the Supervisory Board.

Mr *WANG* did not attend the general meeting of shareholders of 26 October 2016, where the adoption of the 2015/2016 financial statements was scheduled. The minutes of this general meeting of shareholders clarified that the auditor needed to know whether UVS acknowledged the agreement as otherwise the auditor could not continue with the documents he had at his disposal.

Consequently, the 2015/2016 financial statements could not be adopted. Without the adoption, *ADO* could not submit those statements in time to the KNVB Licensing Committee. The KNVB Licensing Committee gave *ADO* until 1 December 2016 to submit the duly adopted 2015/2016 financial statements.⁴ On 29 November 2016, a general meeting of shareholders was held, with UVS being represented by Mr *WANG*'s son and another person whose name and position at UVS is unknown. After the general meeting of shareholders, the 2015/2016 financial statements were not adopted in time, with the consequence that no adopted financial statements were submitted to the KNVB within the deadline granted.

Consequently, the KNVB decided to impose a fine of EUR 10,000, to place *ADO* under increased surveillance, and to give *ADO* until 1 February 2017 to

4 *Ibid.*, legal ground 2.26

submit adopted financial statements for 2015/2016.⁵

Enterprise Division of the Amsterdam Court of Appeal: the procedure

On 2 December 2016, *ADO* invoked its right of investigation before the Enterprise Division of the Amsterdam Court of Appeal (EDACA).⁶ As such, *ADO* requested the EDACA to order an investigation on the policy and the course of events of *ADO* when UVS expressed its interest in purchasing the majority of shares of *ADO*.⁷

Furthermore, *ADO* requested the following immediate measures to be accepted:

- Primarily, to decide that the ordinary shares of *ADO* held by UVS are to be put in administration of a supervisor who is to be appointed by the EDACA, or, subsidiarily, to prohibit UVS to intervene in the composition of the Supervisory Board and the Board of Directors;
- To appoint an independent person as president of the Supervisory Board;
- To suspend Mr. *WANG* as president of the Supervisory Board;
- To suspend the decisions of 29 November 2016 to appoint two new members of the Supervisory Board and two new members of the board of directors.⁸

However, in its statement of defence, UVS tried to turn the claim around. UVS requested the EDACA to order

5 *Ibid.*, legal ground 2.32

6 Article 345 of Book 2 of the Dutch Civil Code. Under the right of investigation, *ADO* could request the EDACA to appoint one or more persons to will carry out an investigation on the policy and the course of events of a legal entity. Depending on what type of legal entity the organisation is, it can or cannot request such investigation to be ordered. The requirements are further stated in articles 346 and 347 of Book 2 of the Dutch Civil Code.

7 Amsterdam Court of Appeal, 19 December 2016, ECLI:NL:GHAMS:2016:5338, legal ground 1.2. UVS expressed its interest in purchasing a majority of the shares in *ADO* on 27 January 2015.

8 *Ibid.*, legal ground 1.2

an investigation on the policy and the course of events of *ADO* when UVS expressed its interest in purchasing the majority of shares of *ADO*.⁹

Enterprise Division of the Amsterdam Court of Appeal: the decision

When assessing the claim brought forward by *ADO*, the EDACA found that the communication between Mr *WANG*, as president of the Supervisory Board, and the other supervisory directors was progressing very slowly. Mr *WANG* was (almost) never available and was not present at important meetings of the Supervisory Board, at a time when *ADO* was facing severe financial difficulties and was placed under intensive supervision of the KNVB.¹⁰

Consequently, matters that are crucial for the continuity of *ADO*, like the adoption of the financial statements, establishing the budget for the upcoming season and the liquidity shortfall could not be discussed substantively. A solution for the acute financial problems in which *ADO* found itself, did not get any closer. As a result of this, the EDACA found legitimate reasons to doubt the policy and the course of events of *ADO*.¹¹

Therefore, the EDACA granted most of *ADO*'s requests, which specifically meant that an investigation on the policy and the course of events of *ADO* was ordered, Mr *WANG* was suspended as president - yet not as a member - of the Supervisory Board and a new president of the Supervisory Board was appointed.¹²

In the underlying case, besides the procedure before the EDACA, *ADO* started interlocutory proceedings seeking to recover the money that UVS had allegedly failed to pay.

9 *Ibid.*, legal ground 3.2

10 *Ibid.*, legal ground 3.5

11 *Ibid.*, legal ground 3.6

12 *Ibid.*, legal ground 3.23



The claim amounted to more than EUR 2,300,000.¹³ This amount was fully granted by the judge in interlocutory proceedings in the beginning of January 2017.¹⁴

By the end of January 2017 the amount was fully paid by UVS.¹⁵ A sigh of relief for *ADO*, after months of uncertainty. For now, the club is out of trouble. However, the financial stability should be maintained as the club is still under supervision by the KNVB.

Relevance of the ADO-decision in Dutch football

As set out in the above paragraphs, the procedure to investigate the policy and the course of events of a legal entity infringes on the commercial freedom of a club. However, it could be very useful once, as in the present case, the Supervisory Board (or other bodies of the club) is not acting the way it is supposed to act.

Since clubs very rarely use this possibility of the Enterprise Division of the Amsterdam Court of Appeal, the *ADO*-decision could be very relevant for Dutch football clubs. Since many clubs lack sufficient finances, they might not have the legal expertise - or the financial means - to initiate legal proceedings. In the worst-case scenario, the club does not even know such procedure exists. The media exposure changed the clubs' awareness in this respect.

In addition, the *ADO*-decision clarifies that a professional football club should conduct a policy that is in accordance with national corporate legislation.

Furthermore, the decision could be conceived as a message for clubs to conduct proper policy and for federations to supervise their member clubs for internal issues not to escalate.

¹³ *Ibid.*, legal ground 2.36

¹⁴ NOS, 5 January 2017, <http://nos.nl/artikel>

¹⁵ J. RIJPKER, 'Eigenaar ADO Den Haag betaalt toegezegde miljoenen', NRC, 27 January 2017 www.nrc.nl/nieuws