1. Introduction
Over the last 20 years, professional sport (as a source of entertainment and business) has undergone spectacular growth, in large part due to the development and exploitation of one of the essential rights of human personality: the right to one’s own image. Paradoxically, a right with a basically philosophical content, inherent to the legal and social status of the human personality as an external element, has become the financial engine of spectator sport, which today is something more than that.

As stated by Professor Paco Alonso in the prologue of the main book on image rights in Sport ("Los derechos de imagen en el deporte profesional /Especial referencia al Fútbol") by the professors Palmar Olimeda and Desealo González; mainly due to the evolution of technology, economic exploitation rights deriving from the right to one’s own image have driven the spectacular evolution that sport in general and football in particular have experienced over the past few years, becoming a matter of enormous social and economic importance, due to television and other forms of media.

Therefore the significance of this comparative study of sport image rights is obvious, particularly if we take into account the incomplete and sector-specific regulation of them in Spain, which the different operators in the sector have taken advantage of, using legal cunning, to fill in the gaps by means of complex and unusual legal formulas that serve their own interests. Therefore the patrimonial aspect of this right has been developed privately through hiring (employment and commercial), by means of which the different operators in the sport market (sportspeople, clubs, Sports Corporations, companies, etc.) have managed to perfect complex legal relationships, always tending to reduce the tax pressure on the income they receive from their respective image rights.

Hence the difficulty of this study, not only because it is more about casuistry than doctrine, but also because of the nature of the concept of "image rights", which, in the majority of the so-called personalities rights, far from having a universal and pacific definition, is often confused with other related fundamental rights, such as the right to dignity and personal and family privacy.

2. The right to one’s own image: delimitation, content and regulation.
As already stated, there is not a single unequivocal concept of what is understood as the right to one’s own image and it can be said that its content and definition varies depending on the level of scientific autonomy that different authors attribute to this right. In this sense, some consider that the right to one’s own image forms part of a person’s right to dignity, whilst others state that it forms part of the right to privacy, and others include it within the more general principle of respect for human beings. These divergences have sometimes even transcended the case law of the Spanish Constitutional Court.

As stated by the professor Blasco Gasco, this confusion may have been added to by the fact that "the right to one’s own image is not expressly recognized in all constitutions or in general in the European constitution, including the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and the Charter of Fundamental Rights of the European Union dated 27th December 2000, but rather, as has been stated, it is protected by the general principle of respect for human beings or respect for one’s own life and matters related to personal privacy (article 8 of the Convention and article 7 of the Charter)."

Therefore, although it is true that de legge latu it appears that there is a legal lack of definition with regard to the right to one’s own image, this should not lead us to erroneously think that it does not have its own legal autonomy as, it does not only have this characteristic but rather, as explained by professor BLASCO GASCO in the aforementioned work, is manifested in different ways, given that (i) the right to one’s own image has its own nonnull status, (ii) its own conceptual autonomy (developed by means of the Case Law of the Supreme Court and the Constitutional Court) and, furthermore (iii) it also has legal autonomy not only as a right-concrete in article 18.1 of the Spanish Constitution, but also due to its development by means of Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one’s own image.

This autonomy has also been declared by the Constitutional Court on several occasions, among others in its Decisions 368/1994, 1/2000, 2/2002, where, after acknowledging that there is a link between the right to one’s own image and the right to dignity and privacy, in all cases the right to one’s own image "is an autonomous constitutional right which has a specific level of protection with regard to..."
replications of a person's image that, whilst affecting the personal sphere of its owner, do not damage or render it unfit for realisation; or reveal their private life, constituting a deprivation of a personal and reserved area (although not protected) with regard to the action and knowledge of others. Therefore individuals are attributed the power to prevent the unconditional distribution of their physical appearance, as it constitutes the primary element of the personal sphere of any individual, as a basic instrument for identification and exterior projection and an essential factor for their own recognition as an individual person."

It is not a trivial matter as, given the number of ways of capturing and reproducing images that exist today, the autonomous constitution of the right to one's own image is a guarantee against all of the illegitimate intiminations to which a person can be subjected.

2.1. Definition and constitutional regulation of the right to one's own image

Within the set of fundamental rights incorporated within the Spanish Constitution (hereinafter, "SC" or "Constitution"), which are considered fundamental rights because "they are the basis for political order and social peace" (article 10.1 of the SC) serving the essential values of our State under the rule of law, is the fundamental right to one's own image. In this sense, article 31.3 of the Spanish Constitution declares: "The Constitution guarantees the right to dignity, the right to personal and firstly privacy and one's own image."

Furthermore, after regulating a series of fundamental public freedoms in article 30.1 (freedom of expression, information and scientific and artistic creation) point 4 of the SC states: "These freedoms are limited by respect for the rights recognised in this document, the precepts of the laws that develop them and, in particular, the right to dignity, to privacy to one's own image and the protection of youth and childhood."

This right is such an important part of the Constitution that it even constitutes a limit on the execution of other fundamental rights, such as freedom of expression, that are so important in a modern democratic society.

In short, in contrast with other constitutional rights that "guarantee" legislative, political and judicial action, the right to one's own image is a fundamental right and is set apart from the actions of public authorities and particularly legislative power, in the sense that the exercise of this right can only be regulated by law (article 53.2 of the SC) whilst always respecting its essential content.

Before explaining the legal regulation of the right to one's own image, we should try to define it. As we have seen, the lack of a legal definition regarding this right means that its conceptualisation varies depending on the authority that defines it. In this sense, as this right has (as we shall see) two aspects, in order to define it we can either consider its "negative aspect" (the power to prevent a third party from capturing or exploiting one's own image without authorisation) or its "positive aspect" (the right of each person to freely create their personal image, as another part of their personality).

It is also possible to define the right to one's own image based on either the constitutional aspect of the right (which shall be the case whenever the illegal intromission affects the personal sphere -not property- of the person concerned), or the property aspect of it (all of the rights related to the commercial exploitation of image of an individual).

In short, in accordance with the doctrine of the Constitutional Court, from an ecletic point of view, the right to one's own image can be defined as the personality right that gives its holder the power to freely determine their appearance and external physical characteristics, to publish and reproduce them freely and to prevent unauthorised third parties from obtaining, reproducing or publishing recognisable physical characteristics of their physical image without their consent.

Therefore, as with other personality rights, the holder of the image right is the physical person whose image is reproduced and, in principle, it is not possible for the holder to be a legal entity, as in this case their image is protected by other legal precepts, related to their trading name or trademark. However, as stated by Pina Sánchez and Ferrero Muñoz, "it is possible for the resulting ownership of these rights to be acquired "by virtue of a contractual assignment by an individual."

The right to one's own image, therefore, also has legal protection at two levels:

a. Constitutional protection, in accordance with its status as a fundamental right (and therefore there is the possibility of appealing to the Constitutional Court).

This protection empowers the holder of the right to prevent the obtention, reproduction or graphic communication of one's own image by an unauthorised third party, regardless of their purpose (informative, commercial, scientific, cultural), in order to protect the moral aspect of their holder.

b. Ordinary protection, that is not recognised as constitutional, and

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4 That, in accordance with the provisions of article 10.1 of the SC must be an Organic Law that "guarantees that the Constitution directly in essential areas for the defence of this fundamental right" (Constitutional Court Ruling 125/1999, dated 9th May).

5 This is the slogan, for example, of professor Carrasco Serrà ("Deseo capital de la Información") Publishers UOC, 2006, page 232, for whom "from a biographical point of view, we can define the right to one's own image as the right that empowers people to reproduce their own image, to present it publicly, to reproduce or publish one's own image without authorisation."

6 In this respect, review De La Rúa Cobos R, "Regarding the right to one's own image (with regard to the Constitutional Court Ruling number 125/1999, dated 9th October)" in the Judicial Magazine (Revista del Poder Judicial) number 20, 1998, page 371, which explains that the content of the right to one's own image cannot be reduced to a right of non-interference, i.e., to prevent others from using it, because, as professor账号Garcia explica (page 23 of the work cited), "the right to one's own image is the pre-eminent aspect of a person's image acquires different legal interests from those of a personality right and therefore, although they derive protection and are protected, they do not form part of the context of the fundamental right to one's own image of article 23.2 of the SC. In other words, despite the growing establishment of property rights over one's own image, and the secondary protection of the right to one's own image given the growing development of the media and procedures for the capture, publication and distribution of images."

(Court of Constitutional Ruling 230/1998, dated 26th October Constitutional Court Ruling 125/1999, dated 9th May, article 23.2 of the SC, due to its "complementar- ly personal" nature (Constitutional Court Ruling 230/1998, page 35), limits its protection to a person's image as an element of the personal sphere of the subject, as an essential factor for their own recognition as an individual."

7 According to which the right to one's own image can be defined as a "personality right that gives to each person the power to control the representation of their own image and dignity and guaranteeing a personal and freely of external intimations. The protection of the concept, property and commercial aspect of a person's image affects different legal interests from those of a personality right and therefore, although they derive protection and are protected, they do not form part of the context of the fundamental right to one's own image of article 23.2 of the SC."

8 In this respect, review Pina Sánchez y Ferrero Muñoz, "The right to publication and the prohibition of falsification" Commentary regarding the ETS, 224, 2012, 120, Enext Legal Magazine (www.enext.net), Working Paper number 843.

9 Pina Sánchez, G., "La socialización de la imagen en el deporte profesional," in the joint work "El deporte profesional," directed by Palma Chacón, A., Publisher Bosch, 2005, page 618.
whose scope of protection is limited to the property aspect of the right to one's own image, which has the protection of an ordinary civil right.

This protection empowers the holder of the right to prevent the use of the name, the voice or the image of a person for advertising, commercial or similar purposes. I.e. the right is protected as an object of legal trade.

2.2. Legal regime of the right to one's own image: Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image. 

Aware of the importance of the right to one's own image in a modern society, Spanish legislators soon developed and protected this right by means of Organic Law 1/1982, dated 5th May, regarding civil protection of the right to dignity, personal and family privacy and one's own image (hereinafter, "OL 1/1982" or "OL").

The main objective of OL 1/1982 was to regulate the civil protection of the fundamental rights established in article 16.1 of the SC, including the right to one's own image. Therefore this regulation developed the provisions contained in article 53.2 of the SC, determining the legal channel for defence against the illegitimate interference or intimations that may affect these rights, as well as determining the injured party's rights in the event of these intimations (including the right to compensation for the damages suffered, which must always be set in accordance with the provisions of this OL).

After declaring in its First article, point One, that the right to one's own image "shall be given civil protection from all types of illegal intimations" (specifically by means of "the legal protection procedure envisaged in article 9 of this Act"); according to the current text of article 1.25 of the OL, article 2.3 of the OL then proclaims that this right is "unrenounceable, indestructible and impalpable" and therefore "The renunciation of the protection envisaged in this Act shall be invalid, without prejudice to the cases of authorisation or consent referred to in the second article of this Act."

OL 1/1982 has the virtue of condensing or at least anticipating all of its regulatory content in a single article (the First article), by outlining the fundamental concepts of the legal regime of the right to one's own image I.e.:

- The right to one's own image is protected against illegal intimations.
- The protection is granted by means of the legal protection procedure envisaged in article 9 of the OL.
- The right to one's own image is an unrenounceable, indestructible and impalpable right (which does not mean that, within the limits mentioned below, it cannot be ceded).
- In turn, the scope of the protection excludes cases in which authorisations or consents are given for the exploitation of the right to one's own image by a third party, which cannot be considered an "illegal intimation."

Before going on to study the specific regime applicable to the image rights of professional sportspersons, it is necessary to briefly describe (as a more extensive description would be outside of the scope of this study) the scope of two fundamental concepts of the legal regime of image rights: the express consent required for its use by third parties (which is necessary so that sportsperson can assign their image rights) and the concept of "illegal intimations" contemplated by the OL.

a) Express consent

After establishing (Second article, One) that the scope of protection of the right to one's own image is limited "by laws and social customs taking into account the area that, by their own acts, each person maintains reserved for themselves or their family," the OL prescribes that "The existence of an illegal intimation in the protected area shall not be considered taken when it has been expressly authorised by law or when the holder of the right has granted their express consent." (Second article, Two).

This express consent, in accordance with the next point of this article, "shall be revocable at any moment, but any damage and loss caused in this case must be compensated, including those for justified expectations." (Second article, Three, of the OL).

As can be seen, despite the fact that the right to one's own image is an unrenounceable, indestructible and impalpable right given the possible value of this right as property which makes it tradable (as in the case of professional sportspersons), the OL expressly allows the holder of the right to authorise third parties to exercise some of the powers that it confers on its holder. I.e. the OL allows its holder to freely dispose of their right, although within the limits envisaged in the SC and the OL itself (for example, not allowing the renunciation of the right).

This means that, in the event that a third party exploits the image of a professional sportsperson without their consent, this illegal intrusion shall be covered by constitutional protection (ordinary and constitutional, as we shall explain in section 6 of this work) whereas, if for example there is a contract for the assignment of image rights (express consent), but the assignee goes too far when exercising them, violating the terms of this assignment, any disagreement in this respect shall be considered to be of a merely contractual nature and this circumstance shall not be considered illegal intrusion, therefore receiving only ordinary legal protection.

As the form in which this consent must be provided has not been determined (without prejudice to how it has been said it should be expressed) this may be provided in any of the ways envisaged in the Civil Code, i.e. it may be provided verbally, although this is not recommended (not only because it is difficult to prove, but also due to the problems that may arise related to the limits and exact content of consent provided verbally).

A good example is the Decision of the Constitutional Court number 113/5/2000 (Courtroom I) dated 24th December 2000, in which the proven facts consist in the verbal consent provided by a young person for the capture of his image and its publication in a report regarding fashionable night clubs in Madrid. However, the photograph taken ended up being included in a very different report about drug and alcohol consumption by young people on the so-called "Balsas Route" in Valencia. While the young person stated that he had not given his consent for the inclusion of his photo in this report, the published claimed that he had given his verbal consent for his photo to be taken and therefore it was not necessary to get any further consent for its publication in the aforementioned report. In the end the Supreme Court ruled in the young person's favour, declaring that the consent given had been diverted and used by the publisher, exceeding what was consented to, as the young person only "authorised the taking of his photograph to illustrate an advertising campaign about fashionable bars in Poza del Alcoron and not to be inserted in reports that the aforementioned newspaper published on young people, synthetic drugs, alcohol and fast driving of motor vehicles, as he was not informed about this at all and therefore could not have authorised it."

It is why this is recommended that this consent should always be given in writing.

Therefore, one of the essential elements of any contract or agreement for the assignment of image rights, whether in exchange for payment...
ment or for free, is the express consent or the authorisation that must be provided by its holder for the assignee to obtain, reproduce, publish and exploit their image. Furthermore, this consent must have a content that is limited by its holder, specifying what the consent authorises, which powers are granted and which powers are not granted.

Lastly, it is worth remembering that, as we have already stated, the consent provided may be revoked at any time, without prejudice to the consequences in terms of compensation that this revocation may have in the event that it caused damage and losses to a third party.

b) Illegal Intromissions
Together with the general concept of "illegal intromission," Organic Law 1/1982 (Seventh article) specifically lists the actions that shall always be considered illegal intromissions that, for our purposes (image rights) shall be:

- Seventh Article, section Five: "The capture, reproduction or publication using photography, films or any other procedure of the image of a person in places or moments related to their private life or outside of them, except in the cases envisaged in article eight, nor, which shall be commented on below.

- Seventh Article, section Six: "The use of the name, voice or the image of a person for advertising, commercial or similar purposes," i.e., that the image is not limited to the physical appearance of a person, but goes further, thereby including any other characteristics that, such as their voice or name, enable the person to be recognised by third parties.

These declarations must be considered taking into account the exceptions that the Law establishes in its Eighth article regarding illegal intromissions where, after excluding from the scope of the protection exceptions that are authorised or agreed by the competent Authority, or that have relevant historic, scientific or cultural interest, the regulation expressly declares (Eighth article, Two) that "the right to use one's own image shall not prevent: a) its capture, reproduction or publication by any means in the case of people that have a public position or a profession with notoriety or public exposure when their image is captured during a public act or in places that are open to the public." And in the same sense, in accordance with the aforementioned article, an illegal intromission can not be considered to have been constituted by (b) the "use of the caricature of these people, in accordance with social customs," or (c) "graphic information about a public incident or event, when the image of a particular person appears merely as its accessory."

If we apply these exceptions to the specific case of professional sportspersons, it can be concluded that:

- As professional sportspersons have undeniable fame and public exposure, illegal intromission shall not be considered to be constituted by the capture, reproduction or publication of their image when it is captured in a public act or in a location open to the public, as long as it is not used for commercial and advertising purposes.

- Illegal intromission shall also not be considered to be constituted by the caricature of professional sportspersons.

- Furthermore, the publication of photographs of professional sportspersons that accompany news related to sport events shall not be considered illegal intromissions.

3. Legal protection of Image rights
As we have seen, Article 13.2 of the Constitution states that all citizens are protected by the fundamental rights "before ordinary Courts through a proceeding based on the principles of preference and a preliminary hearing and (if applicable) through an appeal to the Constitutional Court."

This precept consecrates the principle of subsidiarity in the protection of the fundamental rights, in accordance with which these first have a direct and immediate protection before the Ordinary Courts and Tribunals, i.e. the ordinary protection of these rights and, additionally, when this protection fails, they can appeal to the Constitutional Court, which shall give constitutional protection to these fundamental rights. In this respect, the Constitutional Court has two functions: one is subjective, related to the protection of the fundamental rights of citizens, and the other is objective and related to upholding the Constitution, as it creates a legal doctrine with regard to the interpretation of the Constitution, which ordinary Courts must comply with.

Within this procedural framework, the right to one's own image is covered by the civil protection proceeding envisaged in OL 1/1982, which incorporates certain material and procedural specialties into the ordinary protection proceeding.

In accordance with article 9.2 of OL 1/1982, legal protection shall be provided against the illegal intromissions that we have already explained, whilst studying the legal system contained in Organic Law 1/1982. To do this (article 9.2) it is possible to take "all of the measures necessary in order to end the illegal intromission concerned and to re-establish the injured party's full enjoyment of their rights, as well as to prevent or impede subsequent illegal intromissions. These measures may include precautionary measures aimed at achieving an immediate cease to the illegal intromission, as well as the acknowledgement of the rights to reply, the declaration of the judgement and the order to compensate the losses caused."

One of the pillars of this legal protection consists of the legal consecration of a jus in actu legal presumption: it shall be assumed that there has been a loss whenever an illegal intromission is proven (article 9.3). Furthermore, this intromission shall generate a right to be compensated, that "shall cover the moral damage evaluated based on the circumstances of the case and the seriousness of the injury actually caused, taking into account (if applicable) the distribution or audience of the media through which it has occurred." And in the same sense, article 9.3 concludes that the profit obtained by the party causing the injury as a consequence of it shall also be taken into account.

Finally, section five, article 9 of the OL 1/1982 establishes a period of validity of 4 years for actions related to protection from illegal intromissions, to be counted from the date that the person entitled is able to exercise them.

The main peculiarity of this proceeding is based on the position that is normally adopted by the defendant that, rather than adopting a defensive attitude, normally makes a type of implicit counterclaim: claiming protection against being prevented from exercising one of the freedoms envisaged in articles 16.1 or 20 of the Constitution (freedom of ideology, of information or expression).

This means that the judge must weigh up these rights and fundamental freedoms, in order to determine whether there has been an illegal intromission that damages the image rights of their holder, or whether this intromission, for example, is legitimised by one of the exceptions envisaged in the Eighth Article of OL 1/1982 that were referred to previously.

4. The assignment of image rights within the framework of the employment relationship of professional sportspersons
The multiple disciplines and variations that exist in sport make it necessary to divide the study of image rights into two different categories: (i) on the one hand, that corresponding to sportspersons that carry out their activities and compete within a collective structure (Sports Corporations, clubs, cycling teams, etc.) and (ii) on the other hand, the image rights of individual sportspersons, such as golf or tennis players, that carry out their activities autonomously, not within the scope of employment relationships.

Furthermore, with regard to the first group (team sportspersons) it is also necessary to differentiate the regime applicable to their collective rights (resulting from the sum of the image rights of all of the members of the team, the team itself and the organiser of the competition, league or championship), which are generally granted through a work contract, from the individual rights that, at the same time, can be exploited by the sportsperson individually (generally through commercial contracts, as shall be analysed later).
extent, their image to the aesthetic directives of the company, without this in itself representing a violation of the workers’ rights to their own image. In this sense, for example, it is normal for a football club to require all of its players to wear the same kit.

This is the case of certain activities, such as sporting activities, that due to their very nature involve a certain restriction of the right to one’s own image, which implies the capture and reproduction of the image of this type of employee. Although the Statute of Workers’ Rights does not contain express regulations in this regard (except for the general rules regarding the privacy of workers, contained in article 4.2.5 of this regulation), this has been confirmed by the Constitutional Court, (among others) in its well-known Decision number 39/1994, dated 11th April (First Chamber), according to which: “It is clear that there are activities that involve, due to a relationship of necessary connection, a restriction of the image rights of those that must carry them out, due to their very nature, such as activities that involve having contact with or being accessible to the public. When this occurs, persons that agreed to carry out this type of tasks cannot later invoke the fundamental right to avoid carrying them out, if the restriction imposed is not aggravated by damaging important parts of the person’s dignity (article 21.1 of the SCC or their primary).”

Consequently, whenever the nature of a job requires the capture and reproduction of the image of a worker for the effective performance of this job, it is not even necessary to gain the worker’s consent, as this is a consequence of the work carried out in accordance with the employment relationship. This is the case of the majority of professional sportspeople (the main actors at any sports event), without which there could not be any competition at all.

The general rule applicable to the exploitation of the image rights of professional sportspeople can be found in Royal Decree 1006/1985, dated 26th June, regulating the special employment relations of professional sportspeople (hereinafter, “RD 1006/1985”), which, when regulating the rights and obligations of the parties of a work contract (article 7.2) states: “With regard to the sharing of the profits resulting from the commercial exploitation of the image of sportspeople, this shall be as determined by Collective agreement or individual pact, except in the event of contracting by commercial companies or firms envisaged in point 3 of article 2 of this Royal Decree.”

I.e. the regime applicable to the image rights of professional sportspeople shall be that envisaged in the Collective Agreement applicable, or that agreed between the sportsperson and the employer in the corresponding work contract.

Finally, it should be noted that the aforementioned article 7.3 is incomplete in terms of its content and format, leaving certain doubts as to its interpretation. Firstly, due to its general lack of definition, in that it does not specify the extent of the assignment that the professional sportsperson grants to their employing club or sports corporation, or what limits or powers are included therein. Furthermore, it also fails to determine the legal nature of the financial income resulting from the exploitation of the image rights of sportspeople, which may or may not be considered part of their salary.

In fact, one of the main discussions regarding doctrine that have arisen regarding the interpretation of article 7.3 of RD 1006/1985 is related to the legal nature of the financial provisions received by professional sportspeople for the exploitation of their image rights by their employing club / Sports Corporation. In this sense, according to some doctrines, this contribution is not considered part of their salary, but rather it is considered financial compensation for the use of the image rights of the sportsperson by the club, due to the non-contractual profits that are generated for the latter, which should be shared with the sportsperson.

On the other hand, other doctrines have considered image rights as a salary, arguing that the amounts received by professional sportspeople for the assignment of the rights to exploit their image when this assignment is a product and direct consequence of sporting activity are fully incorporated into the salary, regardless of whether their work contracts or collective agreements make a distinction in this regard, and regardless of whether this assignment is carried out by means of an independent work contract.

In any case, as explained by professor González Del Río, mention the position of professor Violes Mora, “the reference that article 7.3 of RD 1006/1985 makes to a particular pact between the parties or what is agreed within the framework of a Collective agreement means that it can be concluded that the regulation does not contain any actual rule regarding the possible financial exploitation of image rights and that it simply recognizes a possibility, which must be expressly developed using a Collective agreement or an individual contract between the sportsperson and their sporting entity as a legal instrument.”

Furthermore, the literal content of the article appears to mean that there is no particular legal obligation to share with the professional sportspeople the profits that their employer may obtain from the exploitation of their image rights, which can undoubtedly lead to unfair situations where there is no applicable agreement (or an agreement that does not mention this matter) or individual pact, especially in the cases of medium-level sportspeople, who do not enjoy the privileges of superstars and the so-called "cracks.”

As explained by Palomar Olmeda and Desclaou González, the aforementioned regulation means that professional sportspeople may assign their image within the scope of the collective regulation or that of the work contract. Furthermore, a contrario sensu interpretation of article 7.3 makes it possible to consider that image rights can be left outside the employment relationship, as they cannot be assigned or be assigned partially (as is common). Therefore, the mere signing of a work contract between a professional sportsperson and a team, club or Sports Corporation is not sufficient to allow the commercial exploitation of the sportsperson’s image, but rather, in accordance with the regulation envisaged in OL 7/1982, there should be express consent empowering this assignment and commercial exploitation.

All of this brings us to an initial conclusion: that, given the lack of a clear and uniform legal regime applicable to professional sportspeople regarding image rights, we should study the general regulations envisaged in the collective agreements that exist for each of the different sports, always taking into account that this regime should be supplemented with the specific legal relationship that each sportsperson has with their employing club / Sports Corporation.

4.2. Main Collective Agreements

4.2.1. Collective Agreement for professional football activity signed between the National Professional Football League (LPNF) and the Spanish Footballers’ Association (AEF) (Official State Gazette number 268, Thursday 4th November 2004)

The current Collective agreement signed between the LPNF and the AEF (applicable until the end of the 2010/2011 season) stated that “The salary items that constitute the remuneration of a Professional

27 This is also the case with so-called exclusivity rights, regarding which, in general, each sportsperson assigns their image rights to the club or employment relationship with the club, Sports Corporation or professional team that employs them. The combined value of all of them (footballers, clubs, sports corporations and so on) is the object of those audiovisual rights. However, despite being closely related to image rights, audiovisual rights are a different matter completely.

28 Which states "The scope of application of this Royal Decree includes relationships of a relatively narrow admitted between professional sportsperson and companies in which the company object consists of the organisation of sports events, as well as the assignment of image rights to commercial companies or firms, for the commercial, in each case, of the sporting activity in accordance with the terms of the preceding point."

29 This is how it is considered by the ACF-ABP Collective Agreements, which shall be modified in section 5.2.5.2, below.


Footbll for Engagement / Signing Bonus, Game Bonus, Monthly Wages, Extraordinary Payments, Seniority Bonus and Image EXPloitation Rights (If applicable)."

The proviso "If applicable" is clarified by article 38 of the Agreement (image exploitation rights) that states that in the event that the Footbll club exploits their image rights on their own behalf, as these have not been temporarily or indefinitely assigned to third parties, the amount that the Club / Sports Corporation pays the latter for the use of their image, name or figure for financial purposes shall be considered part of their salary. In accordance with the provisions of article 20. In this case, the amount agreed should be recorded in writing, either at an individual or Club / Sports Corporation worksite level.

Two conclusions can be made from this precept. Firstly, that when image rights are exploited directly by the player (by means of their assignment to the employing club / Sports Corporation), the amounts received shall be considered part of their salary. On the other hand, if the player has assigned their image rights to a company, the profits that this company receives for their exploitation shall be considered, in principle, of a commercial nature. In this case, this assignment shall always be unrelated to the professional footballer's work contract.

Furthermore, although it is not common, this regulation does not prevent the professional sportsperson from autonomously exploiting their image rights, without assigning them to any Club / Sports Corporation or any third party.

Finally, as an exception to this general regime, the Agreement envisages an optional collective assignment that agreed for the commercialization by the ABP and the LNPB of stickers, collections, Stickers, Stacks, Pop Ups, Trading Cards and similar items. In this sense, in its article 38.1, the Agreement establishes that: "The ABP and the LNPB agree, during the season of validity of this Collective Agreement, to the joint exploitation for commercial purposes of the image of the different names and emblems of the Clubs and Sports Corporations affiliated with the LNPB, as well as the image of the footballers on each team of the aforementioned Clubs / Sports Corporations, with regard exclusively to the manufacture, distribution, promotion and sale of stickers, stick stacks, pop ups, trading cards and similar items, with the respective contracts to collect them, containing the images and names of the aforementioned footballers with the clothing, emblem and symbols of the Clubs that they belong to."

The profit obtained from this exploitation shall be shared between the LNPB and the ABP at a ratio of 65% and 35%, respectively.

Again, the brevity of this regulation means that it is easy for there to be conflicts related to the exploitation of the image rights of the professional footballers, as, because the Agreement does not specify the scope of the image rights which (if applicable) the professional player assigns to the employing Club / Sports Corporation, it is possible for there to be conflicts between the image rights that have been assigned to the Club / Sports Corporation and those that the player may exploit by themselves or by means of a third party. Therefore, the regulations that the parties establish in the contracts governing the assignment of the footballer's image rights (regardless of whether this is done via a work or commercial contract) are key, as they should determine the scope and the content of this assignment, in order to avoid the type of conflicts mentioned above.

4.2.2. Collective Agreement signed between the Basketball Clubs Association (ACB) and the Professional Basketball Players Association (ABP). (Official State Gazette number 29, dated 3rd February 1998).

Without any doubt, the ACB-ABP Collective Agreement is the clearest, most complete and most detailed set of regulations regarding the exploitation of the image rights of sportspersons (in this case basketball players) of those described here.

The General Provisions (article 11) of the Agreement state that "Remuneration paid by the Clubs / Sports Corporations to players, either for their professional services or (if applicable) the express assignment of the exploitation of their image rights, shall be legally considered a salary for all purposes, except for items that are excluded due to current legislation."

It is surprising that, in the case of men's basketball the Agreement applicable determines that the remunerations paid for the exploitation of image rights is considered part of the players' salary, whilst the Collective Agreement applicable to women's basketball expressly states the opposite ("except as otherwise legally provided this amount shall not be considered part of their salary").

Furthermore, the Agreement (First Additional Provision) clarifies that, for the purpose of calculations regarding annual remunerations, extensions, compensations, etc. envisaged within, and also with regard to the calculation of the financial penalties envisaged in the Disciplinary regime; calculations shall include both amounts paid by the Club / Sports Corporation by virtue of work contracts, as well as others paid by virtue of "other additional contracts for the assignment of the exploitation of a player's image rights (signed with the same or any other company that (if applicable) is granted the aforementioned image rights), covering all of the amount received." That is, these amounts shall be calculated both in the event that this assignment is carried out directly in the work contract, as well as when there is a double assignment (by the player to a company, and by the company to the employing Club / Sports Corporation).

Regardless of the two preceding general provisions (which almost exceed the regulations contained in the other employment agreements studied), the system for the exploitation of the image rights of the ACB is expressly regulated in Annex III of the Agreement, which basically envisages two types of exploitation: on the one hand the joint exploitation of the collective rights, which is carried out by ACB as the organizer of the competition, and on the other hand, the exploitation of the individual rights, which is carried out by each player, within the limits established in the Agreement.

This Annex III begins with a very significant general statement ("As is the firm with the parties for the legal regime applicable to the commercial exploitation of the image rights to be fully defined"), stating the wish of the parties to fully regulate the exploitation of image rights, in order to avoid differences in the interpretation of the articles agreed.

Regarding this desire to avoid different interpretations, Annex III starts (Article 1) with a definition of the main concepts regarding the subject matter. I.e.:

2. Sponsorship contract: This shall be understood as a contract in which the party sponsored, in exchange for financial assistance, for the conduct of sporting activities, undertakes to cooperate with the sponsor's advertising.

For the purposes of this Agreement, or any other related agreement, it shall be considered legally equivalent to a patronage contract.

3. Sponsor: This is an individual or legal entity that, by means of a sponsorship contract, undertakes to pay a certain amount of money in exchange for the public exhibition of the trademark or product that they own.

3.1. Sponsored Party: This is the Club / Sports Corporation or the ACB that, by means of a sponsorship contract, undertakes to publicly exhibit a certain trademark or product belonging to the sponsor.

4. Merchandising: This is a type of commercial exploitation of images that, through the signing of merchandising contracts, allow
commercialization and sale of photographs, posters or videos of
the team, their figures and moments of the matches, as well as
the appearance of their image in collections of picture cards, stickers
or board games, also including all types of objects that can be sold on
the market such as t-shirts, hats, caps, scarves, flags, pens, pens,
key rings, dolls, ashtrays and any other object on which an image
can be reproduced [. . .].

1.5 Collective Rights: These apply when the image of the player appears
related to the team to which they belong in an official competition,
wear the team's kit, or when they participate in public acts
organized by the Club / Sports Corporation or by the ACB.

1.6 Individual Rights: These are rights directly related in the image of
the player as a person (their privacy) or their image as a sportsperson
in general (e.g., wearing sports uniform and appearing before the
public outside of their working hours, as long as they are not wearing
the emblem and kit of the Club / Sports Corporation that they have
signed a contract with, or any other that could be confused with them),
and

1.7 Competing Companies: These shall be considered as any companies
whose products are similar to those of the companies that sponsor the
ACB and its Clubs / Sports Corporations or that carry out activities
that directly compete with the companies that sponsor the ACB
and in Clubs / Sports Corporations.

Next, after defining the conceptual framework applicable to the
image rights of basketball, the Agreement regulates 3 specific types of
exploitation:

a) Collective Image rights: Article 2 of the Agreement exclusively
attributes A CB the right to commercially exploit the collective rights
of players when "acting as members of a Club / Sports Corporation, they
participate in official competitions and when they wear the official kit of
the Club / Sports Corporation, regardless of the provisions of individual
work contracts."

This exclusivity also applies to the financial income deriving from the
commercial exploitation of collective image rights that, in accordance
with this Agreement, shall all go to the A CB.

The A CB has the exclusive right to the commercial exploitation of
the advertising activities related to merchandising, which cover not
only by the objects listed in the preceding definition but "any other object
on which an image can be reproduced."
The only exception envisaged from this exclusive exploitation of merchandising is that envisaged in Article 2.3 of the Agreement, by virtue of which it expressly excludes the commercialization and sale of picture cards, which correspond exclusively to the ABI, which shall also receive the totality of the financial income derived from this exploitation.

With regard to the form in which this commercial exploitation
should be carried out, the Agreement makes this the exclusive choice
of A CB and the players undertake to cooperate in the execution of the
form of exploitation chosen, as long as it respects the players' rights to
holidays and rest, and as long as this exploitation does not adversely
affect the individual image rights of the players.

Furthermore, with regard to this form of exploitation, the Agreement
specifically contemplate the possibility that it is carried out by means
of the figure of sponsorship and in this case the Agreement obliges the
players to cooperate in the execution of any sponsorship contracts that
may be signed by the A CB or the Clubs / Sports Corporations as a
result of this obligation "deriving directly from the assignment of their
image rights and that must be compatible with the individual rights of
the players regarding their image as people and sportspersons in general" (Article 3.4 of Annex III of the Agreement).

b) Individual image rights: Rights whose commercial exploitation cor-
responds exclusively and individually to the player, as long as they do
not wear the official kit of the Club / Sports Corporation to which they
belong, or any other clothing that could be confused with it (Article 3 of Annex III of the Agreement).

Without prejudice to this exclusivity, in accordance with the prin-
ciple of contractual good faith, the Agreement puts a limit on the use
of this right of exploitation, stating that players must abstain from
participating in the advertising of products that compete with other
similar products sponsored by the A CB and its Clubs / Sports
Corporations, and from promoting companies that carry out activities
that directly compete with the companies that sponsor the A CB
and its Clubs / Sports Corporations.

c) Television match broadcasting rights.

Finally, with regard to the exploitation of the audiovisual rights relat-
ed to competitions, the Agreement determines that "All income from
the broadcasting or re-broadcasting (live or as a latter time, total or par-
tial) of basketball matches on television shall correspond exclusively
to A CB, in accordance with the provisions of Act 26/99, dated 25th
October, regarding Sport."

4.2.3. Collective agreement for the activity of professional cycling
(Official State Gazette number 79, Thursday 1st April, 2010).

The current Collective Agreement for the activity of professional
cycling, published by means of the Resolution of the General
Directorate of Work, dated 17th March 2010 (Official State Gazette
number 79, 1st April, 2010), appears to put an end to discussions
regarding the legal nature of financial payments resulting from the
exploitation of image rights from cycling. This discussion is due to the
fact that preceding Collective Agreements regarding cycling did not
explicitly determine whether the remuneration of image rights was
considered salary, as the article that listed the financial entries consid-
eregarded salary did not expressly include amounts deriving from image
rights.

On the other hand, the current Collective agreement clarifies the
status as salary of image rights, when it establishes in article 37 that
"The salary items that constitute the remuneration of a professional
sportsperson are: monthly wages, image rights, extraordinary payments
and engagement / signing bonuses."

Furthermore, in the following article 23, the Agreement contains a
definition of image rights, stating that: "This is the amount received by
a racer for the assignment of their image rights for advertising purposes,
the specific conditions of which are stipulated in an individual pact," in
which the remuneration of the cyclist for this concept should be
established.

In turn, in its Technical Regulations, the Royal Spanish Cycling
Federation (RFEC) has regulated the clothing and advertising of
cycling teams.

In conclusion, we should refer to the contract signed between the
cyclist and the team in order to find out the extent of and the regime
applicable to the assignment of image rights by a professional cyclist.

4.2.4. Collective agreement for professional baseball (Official State
Gazette number 219, 9th September 2009).

After stating (Article 21.1) that "The remuneration paid to professional
baseball players by the clubs shall be considered a salary for all purposes,
except for items that are excluded from this consideration by current
legislation," in the subsequent Article 22, the Agreement lists the items
that are always included in the salary received by players, which are:

Article 22. Salary items.

The salary items that constitute the remuneration of a professional base-
ball player are: monthly wages, extraordinary remuneration, signing
bourses, special bourses, match bourses and (if applicable), Image exploitation rights." 

Therefore, in this case, the regulations envisaged by Collective agreement are only concerned with establishing that the amounts that the handball players receive for the exploitation of their image rights shall be considered a salary without establishing a regime for the exploitation of these rights, which is therefore left outside of the Agreement and, in accordance with the provisions of the aforementioned article 7.3 of Royal Decree 1006/1985, shall be as the parties determine contractually.

4.3. Some considerations regarding the assignment of professional sportspeople to the National Selections

A particularity of the aforementioned legal regime is in cases of the assignment of sportspeople to the Spanish national selection for their participation in or preparation for international competitions. In these cases, there is an essential difference with regard to the legal relationships described up until now; the players that are taken on by the national team do not sign any type of work contract with the corresponding sports Federation and therefore, between them (the national selection and the players taken on) there cannot be an employment relationship. This means that the regime described above cannot be applied.

Due to these circumstances, in the case of participation of sportspeople in the Spanish national selection, the legal formula used is based on a type of forced free exploitation (uncompensated). In this sense, the assignment of image rights in this case is carried out as follows:

• The player cedes part of their image rights to the employing Club / Sports Corporation through the corresponding work contract.
• In turn, in accordance with Act 10/1990, dated 25th October, regarding Sport (hereinafter, "The Sport Act") and in accordance with the Articles of Association of the different Sports Federations, the clubs are obliged to assign their players to the national selection for free.

Although it is true that this obligation to assign their players can be found in article 29.1 of the Sport Act ("Sports Corporations and other sports clubs, in order to form the national selection, must provide the members of their sports teams to the corresponding Spanish Federation in the conditions that shall be determined") on the other hand, the free nature of this assignment does not have any legal justification. The only thing that the Act says in this regard is that clubs must cede players to the national selection, but in no case does it state that this must be for free.

However, the fact is that the various Spanish Sports Federations were quick to establish the free nature of this assignment. In this sense, for example, the General Regulations of the Royal Spanish Football Association (RFEF) (July 2009 Version), after stating that participation in the national selection is "a special honours and an important duty" (article 352.2), states that "Clubs are obliged to provide their cooperation and installations and to assign, without the right to any payment, any of their youth players that are asked for" (article 352.2).

Therefore some doctrines consider this obligation of free assignment

27 Regarding which, we repeat the statement made in the preceding footnote number 25.
28 This link has been defined by the Court of Justice of the European Communities (Decision dated 16th April 2000) as an autonomous link of a fiscal nature between the sportsperson and the Federation.
29 Compensation is only envisaged when the player demands it, for example, some type of injury that generates direct financial issues with the sportsperson (the club / sports corporation that has assigned them (this compensation, therefore, has nothing to do with that envisaged by the Spanish Constitution for cases of forced exploitation). In this sense, for example, article 352.2 of the aforementioned General Regulations of the Royal Spanish Football Association (RFEF), after requiring the free assignment of players to the national selection, states that "for whatever cause of any of the National Selections must be issued by the RFEF as the essence of the letter, for the whole period during which they are under the discipline of the National Selection, and the clubs must always be the beneficiaries of this insurance."
Essentially, the main legal formulas used nowadays for the assignment of the image rights of professional sportspeople are:

5.2. Assignment of image rights through third parties (work and commercial contracts).

This formula, which is possibly the most commonly used for team sports, takes the form of a double contract with the Club / Sports Corporation:

- On the one hand, the player signs a work contract with the club that employs them, through which they are paid for their professional services.
- On the other hand, the player signs a contract for the assignment of image rights with a third party (normally a company).
- In turn, this third party assigns these rights to the employing Club / Sports Corporation, by virtue of a contract for the assignment of image rights of a commercial nature.

This system benefits both the sportsperson and the sporting entity that hires them, as: (a) the professional negotiates their salary in "net" amounts, (b) the Club / Sports Corporation reduces the tax payable on the amounts paid to the sportsperson.

Sometimes clubs and sportspeople, when using the aforementioned contractual system (which is completely legal) have gone too far when applying it and have committed excesses (simulation of contracts, assignment of rights without a price or at a ridiculously low price, etc.) which have led to problems with the Spanish Tax Authorities. An example is the judgement passed by the Supreme Court on 3rd July 2008, regarding a particular case in which the implementation of this system was actually a contractual simulation, in which the High Courts stated that:

"The Club benefits from the use of nominee companies. The sportspeople, particularly foreigners, negotiate their overall remuneration with the club in net terms, i.e. after tax, which means that they demand higher payments if a withholding tax is applied; in short, they transfer the tax charge for withholdings to the Club. If, by means of nominee mechanisms, this withholding can be avoided it is obvious that this benefits the Club. Apart from this circumstantial evidence, there are specific cases that immediately demonstrate the Club's participation in the creation and use of nominee companies."

This observation is important as it proves that the Club is not unaware of the simulating mechanism created and that its statements regarding its lack of knowledge of these relationships is not credible.

Another variation of this legal formula is that: (a) the sportsperson signs a work contract with Club / Sports Corporation; (b) in turn, the sportsperson assigns their image rights to a company; on the other hand, (c) the company granted the rights assigns their exploitation to another third party (normally a television channel or a producer) so that the latter can exploit them in exchange for the corresponding financial remuneration.

With regard to the problems that may arise from this contractual formula (apart from tax problems, which shall be analysed in the corresponding section) it has been said, and in theory it is possible (although in practice it is not very common) for there to be a dissociation or difference between the period of validity of the work contract and the validity of the contract for the assignment of image rights by the third party to the club, so that, during the period of validity of the contract for the assignment of image rights, the player may have been transferred to a new Club / Sports Corporation and therefore their work contract has been included.

Apart from the fact that, as far as we know, in practice this has proved to be very uncommon, we do not share the opinion of some authors that state that this possible contractual dissociation may make it impossible to exercise the power of unilateral resolution of a work contract that employment legislation attributes to professional sportspeople (article 13.6 of Royal Decree 2006/1893). And we do not share this opinion29 because, this being the case, we believe that the sportsperson could also renounce the contract for the assignment of image rights, as this is, as we have seen, a power conferred by the Second article, section Three, of Organic Law 1/1982. This is without prejudice to any compensation payment that may apply in this case.

5.2. Assignment to the employing Club / Sports Corporation of all of the Image rights of the professional sportspeople.

Apart from the aforementioned formula, since the beginning of the 2006/2007 season, some Clubs / Sports Corporations (mostly football) have started to directly exploit all of the image rights of some of the players in their ranks. This formula, rather than a system for the assignment of rights, is actually more of a business model that is normally used by more important football teams with higher incomes. In the case of Spain, we could even call this model the "Florentino model" as it was the president of Real Madrid, Florentino Pérez, who made it famous in Spain by implementing it at Real Madrid CR.

As explained by Ferran Soriano, the former Financial Vice-president of FC Barcelona, from the point of view of this model, the profit and loss account of a football club looks more like that of a global entertainment company such as Walt Disney or Warner Bros, which have content in the form of characters (Mickey Mouse or Bugs Bunny, for example) - they make films, arrange merchandising, and operate theme parks. In the case of football the characters are the players, the films are the 90 minute television programmes, the merchandising are shirts, caps and various objects and lastly, the theme parks are the sports installations rented to companies.

This means that the teams that use this model consider footballers (or rather, certain footballers) as financial investments and expect them not so much to score goals, but rather to result in a fast increase to the Club's income, thanks to the exploitation of their image rights.

In this way and in contrast to the normal procedure during the hiring of sportspeople (who normally assign the collective aspect of their image rights, reserving those of an individual nature for themselves), here the assignment of image rights is almost complete and the Clubs / Sports Corporations exploit most aspects of the image rights of their players. By doing so, the Clubs / Sports Corporations try to offset the high signing bonuses of their players, receiving in exchange any remuneration that they generate, directly or indirectly, through the commercialisation of their individual and collective images.

Obviously, as explained by Palomar Olmeda y Descalzo González30, "the system is real and acceptable if it is selective and focused on footballers that, due to their importance or social or sporting relevance, really have the capacity to generate an image that can be commercialised and this, obviously, is not the case with all of them."

Although nothing prevents the total assignment of these rights being carried out through the work contract between the player and the Club / Sports Corporation (in which case this shall be considered an employment agreement and the remuneration received by the player for this concept shall definitively be considered a salary), this assignment is normally carried out by means of a double contract system, through an exclusive contract for the assignment of image rights that the sportsperson signs with the Club / Sports Corporation that employs them.

This assignment contract, as it is an unusual type of contract, shall be regulated by the provisions of the Civil Code for contracts and obligations and, in this regard, must set out in detail the scope of the assignment of the image rights, defining in detail the content of the rights provided by the sportsperson for the commercialisation of their image rights.
6. The taxing of image rights.

These operations related to the assignment of image rights shall generate income subject to taxation by the Personal Income Tax (IRPF) or by the Non-Residents Income Tax (IRNR), depending on whether the individual that obtains the income is a resident in Spain or a non-resident.

Income from the assignment of image rights shall be considered working income from investments or economic activities. Furthermore, Act 9/2006, dated 28th November, regarding IRPF (the IRPF Act), envisages a system of distribution of income in accordance with a special regime created in order to avoid the use of formulas for tax evasion by taxpayers subject to IRPF by tracking the income from the assignment of an individual’s own image (always sportspeople) with which there is an employment relationship.

As noted in the preceding paragraphs, the tax problem related to the assignment of image rights was a consequence of the search, mainly by football clubs, for alternative remuneration formulas that reduced the tax burden applicable to the hiring of elite sportspeople. This practice became more widespread during the period in which the hiring of players started to represent a large monetary and tax cost for clubs, given the common practice of both resident sportspeople and foreigners of negotiating their remuneration in net amounts, i.e., tax free.

Remuneration for the services provided by players to clubs is considered to be of an employment nature and is therefore taxed as working income at marginal rates and a large amount is withheld. Consequently, the assignment of image rights to nominee companies that carry out their exploitation represents, as stated above, an option that makes it possible to obtain income and, to greatly reduce the tax burden, both for the players and for the clubs.

However, the classification of the income generated by this type of assignment of image rights has generated enormous difficulties (both legal and tax-related). Due to these difficulties and creative practices related to image rights, Act 33/1996 implemented a tax regime, as a Solomonic solution for resident sportspeople with an employment relationship that is based on the 85/5 rule, which shall be discussed further below.

6.1. Taxation on income from the assignment of image rights.

Individuals with tax residence in Spain that obtain income from the assignment of their image rights (normally sportspeople) shall pay tax on their worldwide income in Spain. As an exception to this rule, non-residents that, due to their transfer to Spain and even if they become Spanish tax residents, may choose instead to pay Income Tax for Non-Residents (IRNR), as non-residents, during the year in which they obtain Spanish tax residence and the following five years, if they comply with the requirements envisaged in the IRPF Act.

The type of income that is obtained from the assignment of image rights depends on the conditions in which the assignment is carried out and the type of income that is obtained by the person that assigns them for the conduction of the activities that enable them to obtain income from the assignment of their image. Taxpayers that obtain income from the assignment of their image rights are almost always sportspeople. Income for the assignment of one’s own image can be obtained as a worker, businessperson or from the mere assignment of income from an investment or, alternatively, the special tax system may apply. Below is a brief description of these four types of income:

a) Obtaining income from work

Sportspeople linked to a sports club obtain income that fits within the category of income from work. Within the range of types of income that they can obtain due to their status as workers, such as wages, bonuses, incentives, extraordinary payments, etc., players may also obtain income from the assignment of their own image. The aforementioned Royal Decrees 2002/1985 or 2005/1997 expressly envisaged in article 7.9.7 that the remuneration of the work of sportspeople can include income from the commercial exploitation of their image rights.

This classification, which appears irrefutable when the assignment of their image to the club is inherent to and a consequence of the services provided by a sports person within the framework of a work contract, is more dubious, at least in theory, when the IRPF Act classifies the assignment of image rights in its article 55.4.d) as income from equity investments. Therefore it appears that there are alternatives to the taxation of these rights as income from work. If classified as working income, the income from the assignment of image rights is subject to taxation based on the general scale, at the highest rate, and is subject to the corresponding withholding.

The evolution of the tax treatment of image rights and the implementation of the 85/5 rule by the Act 13/1996, was a result of the need to give legal coverage to the treatment as working income of the income obtained from the assignment of image rights, given the widespread practice of Spanish clubs (that began in the 90s) of reducing the tax burden on the hiring of elite sportspeople by means of the assignment of image rights by them to nominee companies (normally non-resident), which greatly reduced the amount of tax payable, given the fact that the commercial exploitation was carried out by the nominee company rather than the player.

The conflict between the Tax Authorities and the clubs has been resolved in an unsatisfactory manner by the Courts, as they have recognised the possibility that there may be an assignment of the rights to a nominee company and that the income obtained by it from their exploitation are not included within the work remuneration obtained by the worker, but, in the formulas used during the years in conflict, prior to 1997 year in which the Act 13/1996 entered into force) this alternative possibility of taxation is not allowed as it is argued that the contracts for the assignment of image rights were simulated with the sole purpose of reducing the tax burden for items that were previously included in the payroll of players.

In turn, the legislator reacted by introducing the 85/5 rule, so that it is permitted to receive income from the assignment of image rights as another type of income or via a nominee company, as long as these do not exceed 35% of the total compensation received from the club for the services provided by the player.

b) Obtaining income from economic operations

This type of income is produced when the party assigning the image rights obtains income that is not related to an employment relationship, but rather resulting from an economic activity for which it has its own material and human resources to exploit. This is the case of sports people that carry out their activities in these conditions, such as tennis or golf players, that receive payments for their activities during (always with regard to the legislation in force when the events occurred).

35 In one epistle, a much better explanation of these conclusions is provided by Oris Catts, if: "The income deriving from the assignment of the image rights of professional sportspeople to controversial Legal and Tax Clarifications, Sport and Entertainment Law Magazine, number 26, 2009, pages 213 to 216", when he states that, "regarding the "functional nature" of the practice, the only relevant legal and financial effect of this double assignment is the reduction of the tax cost of the operation, as it would be a taxable transaction with the resulting deduction in the tax burden. And the fact is that there is no valid economic motive (according to the business purpose test) that actually justifies this triangular relationship, as the commercial exploitation of the image rights is carried out by the Club at which the player provides their services and therefore the prior assignment of these rights by the footballer to the nominee company is unnecessary, i.e., the behaviour does not have any business purpose other than to make a tax saving."
their participation in sports events, trophies, etc. as well as (particularly in the case of elite sportspeople) for the assignment of their image rights.

In this case, it can be more easily stated that income from the assignment of one's own image constitutes income from activity rather than equity investments, as article 54.4.d) of the IRPF Act specifically excludes from the concept of equity investments income from assignments obtained within the scope of an economic activity. Therefore, the economic activity when the right to one's own image is exploited by its holder, at its own cost and risk, and they have the resources to obtain the maximum possible income from its exploitation.

d) Income from investments

In accordance with the aforementioned article 54.4.d) of the IRPF Act, income from the assignment of the right (to exploit a person's image or consent or authorisation for its use) generate income from investments.

This type of income arises when the holder of the image rights assigns them to a third party that carries out their exploitation in return for payment. Obviously, this is the case as long as this assignment is not carried out within the framework of a work activity or an economic exploitation, as explained previously.

It should be highlighted that, due to the application of the rules for the determination of the tax base of IRPF set out in articles 45 and 46 of the IRPF Act, income from investments related to the assignment of image rights are included in the general tax base rather than the savings tax base and are likely to be taxed at the marginal rate (45%) rather than the reduced rate applicable to savings (30%).

d) Special tax regime for the taxation of income from the assignment of image rights. The 85% rule

This special regime was introduced by Act 13/1996, dated 30th December, regarding Tax, Administrative and Social Measures, as a reaction by the legislator to the aforementioned practice of interfacing a company between the club and the player and coding it as a service, in order to substantially reduce the amount of taxation, so that part of the income that the worker should have received as working income was received by the nominal company. This resulted in a reduction of the sportsperson's working income and the corresponding withholding, transferring the taxation of part of their remuneration to a company (resident or non-resident) that paid substantially less tax and the player only had to pay tax again if they obtained income from the nominal company, but in this case the tax was paid as income from investments, in the form of dividends or similar items.

Given the proliferation of these practices, the Administration reacted, on the one hand, by inspecting the clubs and classifying amounts obtained by the company coded the exploitation of the sportsperson's image as the sportsperson's working income. The final argument used by the inspection to reach this conclusion was that the whole process of assignment of rights was a simulation, as in reality what was being paid to the sportsperson was remuneration for the assignment of image rights, which was previously received as a salary. This criteria has been confirmed by various decisions of the Supreme Court such as those dated 25th June 2006, 25th and 30th July 2007, as well as the more recent decision dated 19th October 2009. On the other hand, the legislator introduced, with effect from 1st January 1997 onwards, the special tax regime to prevent these practices and this regime has stayed almost unchanged up to the current date. It is currently set out in article 91 of the IRPF Act and applies when:

1. The worker (the player) has assigned their right to the exploitation of their image or has consented to or authorized its use by another person or entity (resident or non-resident). For these purposes, it is irrelevant whether the assignment, consent or authorization has taken place when the individual was not a taxpayer.

2. The player provides services to a person or entity within the scope of an employment relationship (the Club).

3. The person or entity (the Club) with which the taxpayer has an employment relationship, or any other person or entity linked to them in accordance with the terms of article 16 of the Consolidated Text of the Corporation Tax Law, has obtained, by means of arranged acts with resident or non-resident persons or entities, the assignment of the right to the exploitation of (or consent or authorization for the use of) the image of the individual.

4. The taxation shall not apply when the working income obtained during the tax period by the player within the framework of the employment relationship are not less than 85% of the sum of the aforementioned income, plus the total payment made by the club for the assignment of image rights.

In practice, with this regulation the legislator is allowing the assignment of image rights to companies, even if they are in territories with low or no taxation but, in turn, limiting the amount that can be coded to 15% of the sum of the working income and that obtained from the assignment of the image rights. If this limit is exceeded, the taxation rule applies.

If the taxation of income applies for remuneration in cash or in kind, the entity with which the player has an employment relationship (the Club) must make a pre-payment for the value of the income subject to taxation (currently at the rate of 15%)..

The amount taxed shall be the value of the payment received by the entity granted the assignment of image rights. In cash or in kind, plus the value of the pre-payment, minus the value of the payment received by the player for the assignment of image rights to the entity granted the assignment, as long as it was obtained during a tax period in which the player was a Spanish resident.

The taxation of income shall be applied to the general tax base of the player during the tax period in which it is received. If it is obtained in a foreign currency, the exchange rate valid on the date of payment or receipt of the income shall apply.

There are two types of temporary taxation that are subject to controversy: (i) In the case of income received by non-residents prior to the time at which the sportsperson was a Spanish resident, the taxation shall be carried out during the first tax period in which the player is considered a resident. Another controversial case occurs (ii) if the payments are made once the player has ceased to be a resident - these are allocated to the last business year in which the player was a resident. Consequently, the time limits of the taxation rules are extended enormously and their practical application is complicated when there have been assignments before or after the obtaining or loss of residency, such as in cases in which the player was resident, stopped being so, and then recovered tax residency after a period of time.

When appropriate, the tax allocation shall deduct from the player's Personal Income Tax (IRPI) tax liability, apart from the pre-payments, (ii) any income tax similar to Spanish income tax that has been paid by the entity granted the assignment of the rights corresponding to the income attributed, (i) the IRPF or Corporation Tax paid in Spain by the first person or entity granted the assignment, that corresponds to the income subject to taxation, (iii) the amount paid for the distribution of dividends by the first entity granted the assignment, (iv) the tax paid in Spain by non-resident players for the payment obtained for the first assignment of the right to exploit their image, and (v) any tax that is similar to an IRPF paid abroad for the first assignment of the right to exploit their image. In no case shall tax be paid in countries or territories considered tax havens be considered deductible.
The application of the regime is carried out without prejudice to the provisions of the international treaties and conventions signed by Spain (Double Taxation Agreements, DTA). When the entity granted the assignment is a resident of a country with which Spain has signed a DTA, the rules established in the DTA shall have priority.

In this respect, according to article 17 of the OECD Model Tax Convention (OETC MCD), the income of artists and sportspersons is taxed in the State in which their activities are carried out. Furthermore, Article 17 includes an anti-tax avoidance clause in section 2, which envisages that, when nominee companies are used by sportspersons subject to the employment regime, income shall not pay tax in the state of residence of the entity granted the assignment, but rather in the state in which the activities are carried out. This anti-tax avoidance clause is included in most DTAs signed by Spain, the most well-known exception being the DTA signed with Holland.

Despite this regime, other similar forms have appeared that try to avoid its application, mainly by means of the assignment of celebrity rights or registration rights. Another alternative used to avoid the tax regime is to involve other entities, such as sponsors or television channels that break the simple scheme envisaged by the special regime.

6.2. Taxation of the assignment of image rights obtained by non-residents subject to Income Tax for Non-Residents (IRNR).

Sportspersons that are not considered Spanish tax residents shall pay tax as non-residents, along with those that, although they are subject to Personal Income Tax (IRPF), choose to opt for the special regime of paying tax as Non-Residents envisaged in Article 93 of the IRPF Act, also considered as the tax regime for imperialists. In the event that there is a DTA with the country of residence, this shall be applied in order to determine the taxation in Spain, and if there is none, the IRNR Act shall apply.

39 As with the conflicts due to the assignment of image rights outside of employment relationships, the Adjudication argues, confirmed by the Resolution of the Central Administrative Economics Court dated 18th November 2009, that it is necessary to take into account their true legal nature and, although these operations are classified as transfers of celebrity rights, what they really represent is the assignment of image rights. This is also the conclusion of the Decision of the National High Court dated 29th April 2009.

40 According to the text of article 93 of the IRPF Act due to the last provision (93.1) of Act 17/2009, dated 31st December, effective from 21st January 2010, the application of the tax regime for imperialists is limited to individuals whose remuneration envisaged deriving from their work contracts in each of the tax periods in which the special regime is applied which do not exceed 600,000 Euros per year.

41 Note that the tax regime for imperialists, under Article 93 of the IRPF Act, does not allow the deduction from the resulting tax bill of amounts paid in other States for the obtaining of income from the assignment of image rights.

Robert Siedmann Newly Appointed Sports Law Chairholder in Rotterdam

On 1 August 2010, Dr Robert C.R. Siedmann, Director of the ASSER International Sports Law Centre, was appointed Professor of International and European Sports Law at the Faculty of Law of the Erasmus University Rotterdam.

The special Chair was established by a Foundation to which inter alia belong representative of the Netherlands Olympic Committee, the Municipalities of The Hague and Rotterdam and the Province of Southern Holland. Both cities contribute essential financial support which makes it possible to create an extra PhD assistantship at the University in Rotterdam.

One of the core areas of the Chair's research programme concerns the study of legal aspects related to the organization and participation in Olympic Games, European and World Championships and international club competitions.