

Pavel Hamerník

# AUTONOMOUS LAW OF INTERNATIONAL SPORTS ASSOCIATIONS

AS AN EQUIVALENT TO  
A SUPERSTATE AND BORDERS  
OF LEGALITY OF ITS POWERS

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SPORTS ASSOCIATIONS  
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# 1

**AN INTRODUCTION  
TO THE SPECIFIC REGULATORY  
ENVIRONMENT OF SPORTS**



Sports are special unlike any other industry. Sports officials have to be able to govern “so many different wheelworks of money and expertise”<sup>1</sup>. Sports governing bodies are experts in the creation of the rules of the game, developing the eligibility criteria and doing their job in the difficult areas such as the fight against doping or transfer rules regulating the movement of athletes between clubs. At the same time, they exclusively control the governance and organization of sports competitions, including associated commercial rights, because sports associations are in a unique position. They possess a monopoly. This dominance is based on the pyramid structure of sports. On the top of this sports pyramid, international sports associations were set up. They are commonly called ‘federations’, which is why the abbreviation ‘IFs’ for the term of ‘International Federations’ shall be used in this book. According to law, most of them are associations of civil law.<sup>2</sup> The aim of the IFs is to achieve the uniformity of

1 BUKAČ, L. – SUCHAN, F. *Moje hokejové století*. Brno: Jota, 2018, p. 317.

2 BUBNÍK, G. Mezinárodní sportovní arbitráž a postavení a význam Arbitrážního soudu pro sport v Lausanne v kontextu aktuální judikatury. *Soukromé právo*. 2019, no. 7-8. For example, The International Federation of Association Football (FIFA) is an association governed by Swiss law. It is on the top of the pyramid where members of FIFA are national associations, which are groupings of amateur or professional football clubs. National associations may also form confederations. One of them is UEFA, which is an association of national football associations in Europe. Specific associations of professional leagues can be established by professional clubs. The specifics of the sports pyramid is that only one federation on the national and international level can represent a certain sport (see Van KLEEF, R. The legal status of disciplinary regulations in sports. *The International Sports Law Journal*. 2014, Vol. 14, No. 1-2, p. 25).

sports regulations at all levels of the pyramid, regardless of the borders of States and to ensure compliance with these rules.<sup>3</sup> The pyramid structure of IFs is the backbone of the European model of sports. IFs create regulations and mechanisms they consider as inherent for the existence of this model. The primary objectives of the European model of sports include the promotion of open competitions, which are accessible to all by virtue of a transparent system in which promotion and relegation maintain a competitive balance and give priority to sporting merit, which is also a key feature of the model.<sup>4</sup> In order for the design of this model to work

3 For example, according to the 2021 Commentary on the FIFA Regulations on the Status and Transfer of Players (RSTP). [online]. Available at: <https://digitalhub.fifa.com/m/346c4da8d810fbea/original/Commentary-on-the-FIFA-Regulations-on-the-Status-and-Transfer-of-Players-Edition-2021.pdf>, p. 13, 'to create a level playing field and safeguard the regularity and (sporting) integrity of matches, certain issues and fundamental principles have to be regulated uniformly at a global level, especially when it comes to international or intercontinental competitions. Such issues specifically include the status of players and their eligibility to participate in organised football, including registration requirements and the procedures that need to be followed. Moreover, it is of paramount importance that certain rules should be seen to be applied consistently and fairly all over the world, both to protect players and clubs, and to safeguard association football as a whole.' In other words, according to Freeburn, consistent and uniform categorical rules and disciplinary processes to apply across a sport, regardless of geographic boundaries, is an essential characteristic of international sports, see FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*. Leiden; Boston: Brill/Nijhoff, 2018, p. 33.

4 Para 31 of the Opinion of Advocate General Rantos in the case C-333/21 *European Superleague Company SL v. UEFA*, FIFA, 15. 12. 2022. [online]. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=268624&doclang=EN>. The promotion and relegation is practiced when leagues are structured in clearly defined hierarchies and league rules require that the worst-performing teams, based on some agreed measure, are automatically sent down to their immediately junior league at the end of the season, to be replaced by the best-performing teams in that junior league (see ROSS S. – SZYMANSKI S. *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers*. Stanford: Stanford University Press, 2008,

in practice, IFs also need to safeguard the functional financial solidarity of elite professional sports with the grassroots and amateurs. For example the transfer system was established to encourage small clubs to train and educate young athletes because the transfer rules guarantee financial compensations for the development of new talents. Another important element is sports integrity, protected by the framework of rules, for example combating doping or rules sanctioning athletes participating in competitions not authorized by IFs. At the same time the concentration of jurisdiction at a single forum of Court of Arbitration for Sport (CAS) has the function of preservation of equality before the rules of the participants in international sports competitions, avoiding the risk of various national standards in different States.<sup>5</sup> CAS became known as the ‘World Supreme Court of Sport’ with its seat in Switzerland, established by the Olympic movement.<sup>6</sup>

However methods used by IFs for the functioning of the European model of sports are often very invasive towards athletes and other stakeholders. Being non-state actors, IFs secure the binding effect of their rules mainly by contracts.<sup>7</sup> But in reality athletes and clubs often have no other choice than to consent in the contract to the rules of IFs.<sup>8</sup> It was already mentioned above that IFs possess a monopoly or at least they are

p. 41). *The European model of sports differs from the North American model, which is primarily based on ‘closed’ competitions or leagues, in which the participation of clubs, which are franchised businesses, is guaranteed, pre-determined and based on an entrance fee* (para 33 of the above quoted opinion of Advocate General Rantos).

5 DUVAL, A. Lost in Translation? The European Convention on Human Rights at the Court of Arbitration for Sport. In: ISLJ [online]. 1. 6. 2022. Available at: <https://link.springer.com/article/10.1007/s40318-022-00221-6>.

6 This title for CAS was used by the former judge of the International Court of Justice (ICJ) Kéba Mbaye in *Recueil des sentences du TAS/Digest of CAS Awards III 2001–2003*. Kluwer Law International/Staempfli Publishers Ltd. Berne, 2004, p. xv.

7 See BELOFF, M. – KERR, T. – DEMETRIOU, M. – BELOFF, R. *Sports Law*. 2nd edition. Oxford and Portland: Hart Publishing, 2012, pp. 35–43.

8 According to Freeburn IFs have *de facto* power, see FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 103.

in a dominant position. If one of the two contracting parties has so much bargaining power that it can in fact unilaterally dictate the terms of the contract, it is the task of the law to work towards safeguarding the fundamental rights and positions of both contracting parties in order to prevent the effective elimination of self-determination for one party to the contract.<sup>9</sup> On the other hand IFs defend themselves by the principle of freedom of association, arguing that this is the basis of their autonomy, which is one of the fundamental rights.<sup>10</sup> But according to the Court of Justice of EU (CJEU) ‘all rules laid down by sporting associations cannot be seen as necessary to ensure enjoyment of that freedom by those associations, nor can they be seen as an inevitable result thereof’.<sup>11</sup> Sports sector regulations have been contested in front of the courts in various jurisdictions by those, who are mainly located at the bottom of the sports pyramid (athletes, clubs) or by the third party organizers (rival entrepreneurs who did not receive authorization from IFs to manage some separate sports competitions, independently of IFs). For example the EU law of free

9 Constitutional complaint challenging admissibility of arbitration clause successful. Press Release No. 61/2022 of 12 July 2022 of the German Federal Constitutional Court in the *Pechstein* saga. [online]. Available at: [https://www.bundesverfassungsgericht.de/EN/Presse/Pressemitteilungen/pressemitteilungen\\_node.html](https://www.bundesverfassungsgericht.de/EN/Presse/Pressemitteilungen/pressemitteilungen_node.html). The *Pechstein* saga is covered in part 2.3 of this book below.

10 C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463, para 79. According to Szymanski many sports that we call modern grew out of the form of associativity of the era of European Enlightenment in the eighteenth century, where associations could be created which dealt directly with matters of public interest, but could also operate independently of the state. See SZYMANSKI, S. A Theory of the Evolution of Modern Sport, *Working Papers 06-30, International Association of Sports Economists; North American Association of Sports Economists*. [online]. Available at [http://web.holycross.edu/RePEc/spe/Szymanski\\_Evolution.pdf](http://web.holycross.edu/RePEc/spe/Szymanski_Evolution.pdf).

11 The case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463, para 80.



movement of persons, competition (anti-trust) law or European Convention of Human Rights (ECHR) were applied by the courts in these disputes. The relationship of constitutional equilibrium between court of law and sports decision makers is the foundation of a developing law of sports.<sup>12</sup>

This book therefore focuses on the case-law which sets up limits of IFs' regulation in selected areas, which have remained controversial in practice today and became a model of the determination of borders of legality powers of IFs for the future. Because IFs can expect no complete legislative exception for their activities from States or international organizations like the EU, Weatherill emphasized that IFs by strategy have to defend and justify their rules in courts.<sup>13</sup> This book is part of a project proposal with the same name as the title of the book and is focused namely on the following issues as defined in the project proposal: 1) compulsory jurisdiction of CAS; 2) modern slavery in the transfer system; 3) strict regulation of doping; 4) conflict of interest of IFs in the case of sanctioning athletes for participating in a third parties organizers' sporting events and 5) the freedom of expression. On the other hand the content of this book is applicable to various other situations concerning the legality of IFs in general.

The case-law of the Court of Justice of EU prevails in this book. The vast majority of IFs are based in Switzerland and their regulations affect freedoms guaranteed within EU's territory.<sup>14</sup> CJEU brought some landmark cases, being capable to 'invalidate' a rule of IF 'that is applicable

12 Authors explain that courts 'have firmly established a region of autonomy for decision making bodies in sports, a region within which - unless the reasons for doing so are compelling - the courts decline to intervene. Equally firmly they have charted the outer limits of that region and insisted that those limits be observed by the decision makers in sports, on pain of judicial intervention.' See BELOFF, M. - KERR, T. - DEMETRIOU, M. - BELOFF, R. *Sports Law*, p. 5. WEATHERILL, S. *Principles and Practice in EU Sports Law*. Oxford EU Library, Oxford University Press, 2017, pp. 47-49.

13 WEATHERILL, S. *Principles and Practice in EU Sports Law*, pp. 47-49.

14 CJEU is 'judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community'

in over 100 countries'.<sup>15</sup> CJEU's findings apply to all sports.<sup>16</sup> As Advocate General Rantos stated, cases C-333/21, *European Superleague Company* and C-124/21 P *International Skating Union v Commission* are central to the issue of the relationship and interplay between competition law and sport, and raises questions which, as well as being in some cases legally unprecedented, are also of major importance from an 'existential' perspective for sports federations (para 3 of his opinion to the above quoted *International Skating Union* case, delivered on the 15<sup>th</sup> of December 2022).

Other jurisdictions with substantial influence on IFs include the Swiss Federal Tribunal (SFT) which reviews decisions of CAS.<sup>17</sup> In the European Court of Human Rights (ECtHR) some athletes also invoked rights against compulsory labor in the transfer system, breach of fair trial or the right to privacy concerning doping controls. Judges evaluating the legality of IFs' rules are in a difficult position, because sports also have an important social role in the society, which may justify a difference in treatment in certain respects.<sup>18</sup> At the same time sports dis-

(now EU). See para 28 of the case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140.

15 See discussion of Advocate General Warner, delivered on 24<sup>th</sup> October 1974 in the above quoted *Walrave* case.

16 When the famous *Bosman* case was pending, Wise and Mayer already warned that 'the decision would likely have repercussions on other sports'. See WISE, A. - MEYER, B. *International Sports Law and Business*. Volume 2. Kluwer Law International, 1997, p. 1118.

17 According to Duval, 'in practice its decisions define the life of every athlete worldwide and have a clear transnational dimension and effect'. On the other hand in some cases applicants decided to flee from this Swiss network and submitted their complaint to the EU institutions, see C-124/21 P *International Skating Union* case (avoiding both CAS and SFT) and C-519/04 P *Meca-Medina and Majcen v Commission* case ECLI:EU: C:20006:492 (initially CAS forum used but skipped SFT).

18 See para 34 of the Opinion of Advocate General Rantos in the European Superleague case. Balancing of interests by judges in various sports cases may have substantial effect on the sports sector, including amateurs. According to Advocate General Lenz the local team contributes decisively to the fame

putes require certain expertise. For example judges so far have considered some technical aspects of anti-doping rules or even presumed that they are best-placed to decide what is best for football as far as the contractual stability, competitive balance and training compensations were concerned.<sup>19</sup>

## 1.1 IFS' WORLD: ALMOST A STATE-LIKE SYSTEM?

SFT did acknowledge that the relationship between an athlete and a large (international) sports association bears similarities to the relationship between an individual and a state.<sup>20</sup> Perhaps the title of this book may sound exaggerated by designating IFs as the “Superstate”. However the structure of IFs, with strong enforcement powers backed

of the place (para 219 of his opinion to the *Bosman* case). From a sentimental point of view football is important, he added. In some states ice-hockey has a similar position: ‘I wanted to become part of this attractive and romantic environment of ice-hockey. I was fascinated by the game itself and by the lifestyle hockey players were representing’, Bukač, member of the IIHF Hall of Fame, remembered at p. 230 of his memoirs in BUKAČ, L. – SUCHAN, F. *Moje hokejové století*. See also the documentary about the role of ice-hockey in the society of Czechoslovakia, resp. Czech republic, including the totalitarian era: Hokej!!! *Chronosfilm s.r.o./Czech TV* [online]. 2001. Available at <https://www.ceskatelevize.cz/ivysilani/1039182850-hokej/>.

19 See LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*. Bloomsbury Professional, 2021, 4th edition, p. 1538–1539 in relation to the case of C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECLI:EU:C:1995:463 and C-519/04 *P Meca-Medina and Majcen v Commission* ECLI:EU: C:20006:492 decided by CJEU.

20 See MAVROMATI, E. Selected procedural issues –and questions– arising out the Caster Semenya Judgment of the Swiss Federal Tribunal. In: ISLR Blog [online]. 20. 11. 2020. Available at: <https://www.asser.nl/SportsLaw/Blog/post/selected-procedural-issues-and-questions-arising-out-the-caster-semenya-judgment-of-the-swiss-federal-tribunal-by-despina-mavromati>.

by CAS, does remind of an empire at the international level with the executive, legislative and judicial branches.<sup>21</sup> By the words of Cassini 'the more complex private regimes become, the more they will come to resemble public law regimes'.<sup>22</sup> This book is therefore also related to the general topic of invoking rights by athletes or other stakeholders horizontally against practices put into effect by private parties with significant power (in sports IFs), and evaluating various potential justifications of IFs' actions, depending on which jurisdiction they are confronted.<sup>23</sup>

According to Baddeley the liberal application of Swiss association law is generally considered the main reason why most international IFs have chosen this country as their seat and 'in virtually all sports, rules on the organization of the federations and their subordinate bodies, as well as the rules of their respective game and the rules pertaining to competitions have grown tremendously into elaborate and intricate regulations'.<sup>24</sup> For example according to 2021 FIFA Commentary on the Regulations on the Status and Transfer of Players (2021 Commentary on FIFA

21 Functions carried out by sport associations' governing bodies recall parallels to the constitutional functions of governance by legislative, judicial and executive powers (HOEHN, T. Governance and governing bodies in sport. In: ANDREFF, V. - SZYMANSKI, S. (eds). *Handbook on the Economics of Sport*, Edward Elgar, 2009, p. 228). See also LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1299: 'It follows from the range of ways in which different individuals or businesses or groups of them are affected, that sports governing bodies' actions can be characterized in a number of ways. They may for example be quasi-legislative, administrative, quasi-judicial or commercial.'

22 CASSINI, L. The Making of a *Lex Sportiva* by the Court of Arbitration for Sport. *GLJ*. 2011, Vol. 12, No. 5.

23 See more about the development of this area of sports law in the chapter by WEATHERILL, S. The *Lex Sportiva* and EU Law: The Academic Lawyer's Path Before and After *Bosman*. In: DUVAL, A. - Van ROMPUY, B. (eds). *The Legacy of Bosman. Revisiting the Relationship between EU Law and Sport*. The Hague: T.M.C. Asser Press. p. 237.

24 See BADDELEY, M. The Extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn. *International Sports Law Journal*. 2020, Vol. 19, No. 1-2, p. 5. See also JONSON, P. - THORPE, D. Legal and Regulatory aspects of sports governance. In: SHILBURY, D. - FERKINS, L. *Routledge Handbook of Sport Governance*. London: Routledge, 2019, p. 48.

RSTP) the production of the transfer rules is 'based on the very liberal and flexible legal framework applicable to private associations in Switzerland, it is free to set its own objectives, scope of operations and competences, among other things.'<sup>25</sup>

As far as the Legislative role of IFs is concerned, establishing the rules of sports – these rules must be universally accepted by the participants if there is to be credible competition.<sup>26</sup> This goal of uniformity was demonstrated by CAS in the *Webster* case, which concerned damages for the unilateral breach of contract by a football player based on Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP). CAS reasoned that according to the specificity of sports and in the interest of football, solutions to compensation shall be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. In this case it was not appropriate according to the arbitrators to apply the general principles of Scottish law on damages for breach of contract.<sup>27</sup> According to the 2021 Commentary on FIFA RSTP, p. 146, of the thousands of decisions made at FIFA's competent dispute resolution bodies regarding article 17 of RSTP over the years, almost none make any substantial reference to national law. In other words according to FIFA the diversity of national laws represents a potential obstacle to the legitimate aims of equal treatment and consistency; the establishment of general principles that take precedence

25 The Commentary on FIFA RSTP, edition 2021. [online]. Available at: <https://digitalhub.fifa.com/m/346c4da8d810fbea/original/Commentary-on-the-FIFA-Regulations-on-the-Status-and-Transfer-of-Players-Edition-2021.pdf>, p. 359.

26 HOEHN, T. *Governance and governing bodies in sport*, p. 228. Detailed regulations of sports governing bodies usually include, among others, rules of the game and access to the competitions, definitions of disciplinary offences and sanctions enforced by an independent sports tribunal (see BELOFF, M. – KERR, T. – DEMETRIOU, M. – BELOFF, R. *Sports Law*, p. 30).

27 Arbitration CAS 2007/A/1298 *Wigan Athletic FC v/ Heart of Midlothian* & CAS 2007/A/1299 *Heart of Midlothian v/ Webster & Wigan Athletic FC* & CAS 2007/A/1300 *Webster v/ Heart of Midlothian*, award of 30 January 2008, Para 64. [online]. Available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/1298,%201299,%201300.pdf#search=Webster>.

over national laws is an adequate and justified solution.<sup>28</sup> Similarly the World Anti-doping Code (WADC) shall be according to its Art. 26.3 interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the signatories (IFs, IOC, World-Antidoping Agency and other entities listed at WADA webpage)<sup>29</sup> or governments.

As far as the executive role of IFs is concerned, according to Hoehn it involves, among others, powers like managing and regulating entry into competition, 'impresario' functions, endorsing competitions, scheduling fixtures for championships and competitions, including entering into agreements on the commercial exploitation of these events.<sup>30</sup> The 'gate keeping' of the IFs is a major part of these powers concerning the authorization of eligibility to compete or allowing a rival/alternative third parties organizers to create separate sports competitions outside the scope of IFs.<sup>31</sup>

The Court of Arbitration for Sport (CAS) based in Lausanne, Switzerland, then represents the judicial branch of international sports - the World Supreme Court of Sport. According to Cassini sports tribunals like CAS display many more similarities with public international law regimes than with private ones.<sup>32</sup> The Appeal procedure established at CAS confirms this assertion because the final decisions of IFs may be

28 2021 Commentary on FIFA RSTP, p. 146. According to this commentary CAS has confirmed the legitimacy of this established practice, resp see other additional CAS case-law concerning this topic at p. 146 of the Commentary.

29 See the list of signatories at: <https://www.wada-ama.org/en/what-we-do/world-anti-doping-code/code-signatories>.

30 HOEHN, T. *Governance and governing bodies in sport*, pp. 228-229.

31 See pending cases C-124/21 P *International Skating Union v Commission* and C-333/21 *European Superleague Company*, also discussed in part 6 of this book below.

32 CASSINI L., *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 (5) GLJ 1317, 1340 (2011). CAS itself also remarked that there is an evident analogy between sports-governing bodies and governmental bodies with respect to their role and functions as regulatory, administrative and sanctioning entities, and that similar principles should govern their actions, see CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, Award 20<sup>th</sup> August 1999, para 58, published in REEB, M. *Recueil des sentences du TAS/Digest of CAS Awards*, Vol. II, 1998-2000. Kluwer Law International, 2002, p. 64.

appealed in front of CAS in order to review various decisions of disciplinary nature or other types of verdicts of IFs. SFT confirmed that private enforcement mechanisms of CAS are admissible.<sup>33</sup> On the other hand some critics say that CAS is only a 'Handmaiden' of IFs.<sup>34</sup> The reason for such an assertion is the fact that CAS applies mainly rules of sports associations.<sup>35</sup> Decisions of CAS can be reviewed at SFT but only on the basis of very restricted procedural grounds and that is why it matters how the framework of resolution of disputes by CAS is set up within sports autonomous terrain – the sports pyramid of IFs.

## 1.2 THE STRUCTURE OF THE TRADITIONAL PYRAMID OF WORLD SPORTS

IFs play a key role in the 'European Sports Model', in particular from an organisational perspective, with a view to ensuring compliance with, and the uniform application of, the rules governing the sporting disciplines in

33 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, at p. 1219 and these authors remind that the enforcement by the CAS route is far cheaper and faster than going through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, resp. FIFA covers more jurisdictions than there are member states of the New York Convention.

34 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 153.

35 For example Art. R58 of the CAS Code of Sports-related Arbitration provides that disputes shall be decided according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision. The CAS Code is available at [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Code\\_2021\\_\\_EN\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2021__EN_.pdf). This book shall explore in part 2 of this book below more about CAS and why there are suspicions that CAS is the prolonged hand of IFs.

question.<sup>36</sup> The pyramid system of IFs is featured in the following shape: according to Freeburn ‘the conventional theory proceeds from the notion that individual sports are organized so that athletes become members of local clubs. Those clubs are then affiliated to a regional or national association. The national association in turn is a member of the IF for the particular sport’.<sup>37</sup>

As far as Olympic sports is concerned, it can be regarded as a separate pyramid to those existing in each sport, though it is connected with each other as a consequence of the IF for each sport being part of the ‘Olympic Movement’ with recognition under the Olympic Charter and responsibilities within Olympic sports.<sup>38</sup> The Olympic Charter claims authority for the International Olympic Committee (IOC) over the Olympic movement.<sup>39</sup> World Anti-doping Agency (WADA) is also part of the Olympic regime because its rules are mandatory for the Olympic move-

36 Para 31 of the Opinion of the Advocate General Rantos in the C-333/21 *European Superleague* case.

37 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 6. According to scholars England gave birth to modern sports structure, see ARNAUD, P. – RIORDAN, J. *Sport and International politics. The impact of Fascism and Communism on Sport*. 1<sup>st</sup> edition. Taylor and Francis, 1998, p. 4. For example a world governing body FIFA, modeled on the English FA, was established in 1904 to standardize conduct and promote international competition (see ROSS, S. – SZYMANSKI, S. *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers*. Stanford: Stanford University Press, 2008, p. 122).

38 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 10, resp. Freeburn explains that the Olympic movement consists of organizations, athletes and other persons who agree to be guided by the Olympic Charter, the three main constituents being IOC, the IFs and the National Olympic Committees (NOCs). However, it has to be reminded that members of IOC are only an elite group of individuals, not NOCs or IFs. According to Freeburn the IOC’s structure is undemocratic, see details of his convincing arguments in the above quoted publication FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, pp. 38–41.

39 *Ibidem*, p. 10.



ment by force of the Olympic Charter.<sup>40</sup> The IOC's role is among others to protect its independence, to maintain and promote its political neutrality and to preserve the autonomy of sports.<sup>41</sup>

On the other hand the North American professional leagues are a separate self-governing "capitalist venture", having very little relation with international governing bodies.<sup>42</sup> As it was described above in the introduction to this book, the pyramid system is more global with a hierarchy of governance and regulation up to IFs based on national governing bodies.<sup>43</sup> It is the backbone of the European model of sports. Both systems – North American and the European model of sports coexist next to each other, with some relationships. All of the professional sports leagues in the United States have entered into agreements with foreign leagues or athletic organizations, that regulate the international movement of players.<sup>44</sup> For example in ice-hockey the International Ice-Hockey Federation (IIHF) acts as a mediator, allowing the National Hockey League (NHL) and IIHF member bodies to negotiate players transfer agreements amongst themselves.<sup>45</sup> On the other hand some events might divide the harmonic coexistence of these two worlds of sports regulation, for example disputes whether NHL players can

40 BELOFF, M. – KERR, T. – DEMETRIOU, M. – BELOFF, R. *Sports Law*, p. 9. Details about doping regulation see part 8 of this book below.

41 Rule 2.5 of the Olympic Charter. Taylor and Lewis refer to Rule 25, where the Olympic Charter emphasizes that each IF maintains its independence and autonomy in the governance of its sport, resp. Rule 27.6 of the Olympic Charter requires NOC to preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.

See LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, pp. 4–16.

42 FOSTER, Ken. Can Sport be Regulated by Europe? In: Andrew Caiger, Simon Gardiner. *Professional Sport in the EU: Regulation and Re-regulation*. Den Haag: T.M.C. Asser Press, 2000, p. 57.

43 Ibidem, p. 57.

44 KURLANTZICK, L. The Tampering Prohibition and Agreements between American and Foreign Sports Leagues. *Columbia Journal of Law and the Arts*, 2008–2009, Vol. 32, No. 3, p. 299.

45 ZDROJESKI, K. International Ice Hockey: Player Poaching and Contract Dispute. *Case W. Res. J. Int'l L.* 2010, Vol. 42, No. 3, p. 781.

participate in the Olympics only with consent of the NHL.<sup>46</sup> North American leagues players must also be careful either when they transfer to play sports in Europe or play for their national team, because they often do not realize that they are bound by the World Anti-doping Code (WADC) of WADA in these competitions.<sup>47</sup> On the contrary, WADC does not apply in the North American competitions. Athletes, who are banned based on the conviction of breaking WADC, have an option to participate in the North America in order to continue their professional career, earn money for living and stay in shape for another job after their ban expires. This was the case of Czech professional ice-hockey player J. Mandát, who went to play ice-hockey in North America's ECHL, which is beyond the International Ice-hockey Federations's (IIHF), resp. WADA sphere.<sup>48</sup>

### 1.3 THE BINDING EFFECT OF IFS' RULES: ON WHAT BASIS?

It is not easy to find the right source of the binding power of IFs. For example Lewis and Taylor do admit, that 'it can sometimes be difficult to see exactly how all the elements of the sports pyramid work together. The relationship can be fairly loose. There will be a series of rights and obligations on different sides. Although the relationship between the different

46 See also other topics in: NHL in Europe? President Fasel says 'Over my dead body'. In: *The Hockey News.com* [online] 1. 2. 2019. Available at: <https://thehockeynews.com/all-access/nhl-in-europe-iihf-president-fasel-says-over-my-dead-body>.

47 Discussion at *Anti-Doping Law 2021 Conference*, organized by Law In Sport, 15.-16. 6. 2021.

48 See HEDBÁVNÝ, M. Mandát se po dopingové afěře vrací k hokeji, letí do Ameriky. In: *Hokej.cz* [online], 3. 12. 2021. Available at: <https://www.hokej.cz/mandat-se-po-dopingove-afere-vraci-k-hokeji-leti-do-ameriky/5061230>. This is a typical example of the gap in the universal fight against doping (J. Mandát used cocaine, so perhaps he needed some kind of assistance and cure program, rather than only being sanctioned or banned for years to play ice-hockey, but it is another issue, see discussion about the fight against doping in part 8 of this book below).

elements will usually be contractual, the exact contours of the relationship will all depend on the facts of the individual case'.<sup>49</sup> CJEU in the *Bosman* case stated for example that the UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players.<sup>50</sup> It would seem that, for the purpose of invoking IFs regulations by players or clubs, regulations of FIFA and UEFA need to be incorporated explicitly in the regulations of national associations. Indeed national associations submit the draft of their Statutes to FIFA and UEFA in order to obtain their review and feedback.<sup>51</sup> For this purpose FIFA also created a Standard Statutes document, which includes various prescribed requirements for the national Statutes.<sup>52</sup> It probably also depends on the particular area regulated by a concrete IF, therefore there are various ways IFs try to achieve uniformity within their sport and compliance with the rules. Readers of IFs statutes and regulations have to make sure what is required to be implemented from IF's regulations into the national level and what is not. Otherwise there is a danger of a spillover effect.<sup>53</sup>

As far as a starting point to figure out the IFs' framework, in general we may observe that the national governing body is bound by virtue of their membership in IF to abide by the constitution and rules and regulations of the IF.<sup>54</sup> This includes the scenario that national associations and their members must submit to the authority of the IFs and to

49 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 74.

50 Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463, para 11.

51 My personal experience being a member of the Legislative Council of the Football Association of the Czech Republic during the process of drafting new Statutes of Czech FA in the season 2021–2022.

52 Standard Statutes included in the FIFA's Legal Handbook. [online]. Available at: <https://digitalhub.fifa.com/m/8222fe0e3964060/original/FIFA-LEGAL-HANDBOOK-EDITION-SEPTEMBER-2022.pdf>.

53 For example distinguishing requirements on one hand in international transfers of players and on the other hand what are the conditions for national transfers of players.

54 See LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 74.

mandatory arbitration.<sup>55</sup> It has to be reminded, that as a rule, membership within the sports pyramid is merely between participants and those in the immediately adjacent level.<sup>56</sup> This is important to realize when considering the binding effect of rules of IFs for others, resp. third parties. Therefore in order to achieve the supremacy of IFs' rules within the sports pyramid, an alternative is the contractual method, which means to secure the consent of athletes and other third parties or stakeholders with the rules of IFs.<sup>57</sup>

In practice according to some authors it works a bit differently than by the contractual method and fiction of consent. Freeburn argues, based on a FIFA example, that while on one hand contracts may authorize the exercise of private power, on the other hand FIFA exercises quasi-legislative regulatory power over all participants in sports, not only over the direct members of the federations; that frequently, power is exercised independently of the existence of a contract; and that, even where contracts exist, the nature of the power exercised by IFs such as FIFA is not genuinely consensual and is 'forced'.<sup>58</sup> This model of monopoly over the

55 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 15.

56 *Ibidem*, p. 7.

57 Freeburn describes this scenario that 'it is said that an athlete is bound by the contract that the athlete has with his or her club and this contract effectively imports the contractual obligation to observe rules established by third parties - the IFs and the World Anti-doping Agency - notwithstanding that those rules are usually incorporated by reference, or by successive multiple references, and which may depend on other agreements made between other parties further up the sporting hierarchy' (*Ibidem*, p. 70). According to Freeburn this is so even though IFs are not involved in and typically would not even have any knowledge of the multitude of contracts between participants that incorporate the federations' rules (*Ibidem*, p. 69).

58 *Ibidem*, p. 194. At the same time it has to be reminded, that there are some exceptions. For example according to the FIFA Commentary the jurisdiction of the FIFA's dispute resolution Tribunal is strictly limited to direct and indirect members of FIFA. It cannot simply be extended to third parties, even if these third parties request it. Accordingly, FIFA has jurisdiction over a limited range of parties, specifically those exhaustively enumerated in the Procedural Rules (2021 FIFA Commentary on RSTP, p. 359).

governance and the organisation of sports is now being called into question.<sup>59</sup> The disputed status of the sports pyramid has been demonstrated expressly or impliedly in various examples of complaints by athletes or clubs introduced in this book below.<sup>60</sup> In the following part of the book the first example shall be analyzed: ‘arguably consensual’, resp. compulsory jurisdiction of CAS.

59 Para 31 of the Advocate General Rantos in the C-333/21 *European Superleague* case where big clubs rebel against the conditions of the system of competitions established by FIFA and UEFA, see part 6 of this book below.

60 Athletes were relegated mostly to the bottom of the structure of sports pyramid, without a major say in strategic decisions (see GARCÍA, B. – De WOLFF, M. *European Law and the Governance of Sport*. In: ANDERSON, J. – PARRISH, R. – GARCÍA, B. (eds). *European Law and the governance of sport. Handbook on EU Sports Law and Policy Research*. Cheltenham/Northampton: Edward Elgar Pub. Handbooks in European Law series, 2018, p. 292). No wonder, there are frictions and related complaints.



# 2

**THE SYSTEM OF JUSTICE  
WITHIN SPORTS AUTONOMY  
DESIGNED BY ICAS/IFS:  
THE WORLD SUPREME COURT  
OF SPORT (CAS)**





It was the IOC President Juan Antonio Samaranch in 1981 that first raised the notion of creating an adjudicative body dedicated to the flexible, swift, expert and inexpensive resolution of sports-related disputes.<sup>1</sup> Statutes of the CAS were officially ratified by the IOC on the occasion of its 86<sup>th</sup> session in New Delhi in March 1983 and on 30 June 1984 implementation of the CAS Statutes took place.<sup>2</sup> CAS has the responsibility of resolving disputes arising in the context of sports by arbitration and/or mediation pursuant to the procedural rules of the CAS Code.<sup>3</sup> Later CAS was “inherited” by the International Council of Arbitration for Sport (ICAS), a Swiss foundation. The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation since 1994 instead of IOC in order to safeguard the independence of CAS and the rights of the parties.<sup>4</sup> ICAS is responsible for the administration and financing of CAS.<sup>5</sup> Nevertheless the independence of CAS has been regularly disputed because of the relations of IFs to ICAS, as it will be seen in the text below, despite that ICAS formally exists separately from IOC.<sup>6</sup>

1 LEWIS, A – TAYLOR, J. *Sport: Law and Practice*, p. 1152.

2 Official website of the Court of Arbitration for Sport. [online]. Available at: [www.tas-cas.org/en/general-information/statistics.html](http://www.tas-cas.org/en/general-information/statistics.html).

3 Art. S12 of The *CAS Code of Sports-related Arbitration* (CAS Code), which is the basic document of CAS arbitration procedures, available at: <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

4 Art. S 2 of the CAS Code.

5 Ibidem.

6 The creation of ICAS was approved by the IOC President, by Association of Summer Olympic International Federations, Association of International Winter Sports Federations and Association of National Olympic Committees in Paris on 22<sup>nd</sup> of June 1994 (by the so called Paris Agreement), as a result of

## 2.1 FIELD OF PLAY DECISIONS - AUTONOMY OF SPORTING RULES WHICH ARE IMMUNE FROM JUDICIAL REVIEW

Most cases are heard in Appeals Arbitration proceedings.<sup>7</sup> This is the traditional role of CAS performed at its Appeals Arbitration Division.<sup>8</sup> In this division CAS reviews the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It has to be emphasized in advance that CAS does not review extensively the merit of field of play decisions made during the course of the game because of the need for finality and respect for the authority of referees and match officials.<sup>9</sup> On the other hand this kind of subsidiarity by CAS is not clearly determined. It seems from CAS case-law that field of play decisions are arbitrable, but in a very limited standard of review. Field of play decisions can be reviewed by CAS only in case they were rendered in viola-

*obiter dicta* of SFT in the *Gundel* case, where SFT warned against links which existed between CAS and IOC (namely danger of bias when IOC becomes party in an arbitration dispute in front of CAS). See extract from the *Gundel* judgment of March 15, 1993 published in REEB, M. *Recueil des sentences du TAS/Digest of CAS Awards 1986-1998*. Berne: Editions Staempfli SA, 1998, p. 561.

7 Ibidem, p. 1154. Statistics are available at CAS official webpage.

8 See the comment of the arbitrator in *Watt/ACF and Tyler-Sharman*, CAS 96/153, para 9, that CAS is not “an ordinary court”, published in REEB, M. *Recueil des sentences du TAS/Digest of CAS Awards 1986-1998*, p. 340. CAS does belong to a category of private arbitration.

9 CAS jurisprudence explains that specifically trained officials are best placed, being on-site and that in most cases there is no way to know what would have happened if the decision had gone another way, resp. other factors that support such an approach include the CAS arbitrators' lack of technical expertise, the inevitable element of subjectivity, the need to avoid constant interruption of competitions, the opening of floodgates, and the difficulties of rewriting records and results after the fact. See CAS 2015/A/4208 *Horse Sport Ireland (HSI) & Cian O'Connor v. Fédération Equestre Internationale (FEI)*, award of 15 July 2016, available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/4208.pdf>. The case is invoked by LEWIS, A. - TAYLOR, J. *Sport: Law and Practice* at p. 1209, with reference to other cases.

tion of the general principles of law, e.g. the principle of good faith.<sup>10</sup> The review of field of play decisions might also depend on circumstances of individual cases or the text of the rules. Thus, every person who is bound by such rules may ask an independent authority to verify compliance with individual rights.<sup>11</sup> However the aim of the sports sector seems to be to allow CAS to review decisions taken after the duration of the game, namely to review disciplinary sanctions imposed by sports governing bodies.<sup>12</sup> This approach is similar to the view of the Court of Justice of EU (CJEU) in relation to sporting rules established in the case of *Walrave*<sup>13</sup>, which is elaborated in this book in part 3.

## 2.2 TYPES OF PROCEDURES OF DISPUTE RESOLUTION AT CAS

According to the CAS Code an appeal against the decision of a federation, association or sports-related body may be filed with CAS only if the Appellant has exhausted the legal remedies available to it prior to the appeal.<sup>14</sup> CAS is also the last resort for appeals against disciplinary verdicts concerning doping offences according to The World Anti-Doping

10 See MAVROMATI, D. – REEB, M. *Cases and Materials, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*. Wolters Kluwer Law and Business. 2015, p. 523.

11 OSCHUTZ, F. The Arbitrability of Sport Disputes and the Rules of the Game. In: BLACKSHAW, I. – SOEK, W. – SIEKMANN, R. *The Court of Arbitration for Sport 1984-2004*, p. 209. Whether CAS is indeed independent see part 2.3 in the text of this book below.

12 See commentary and case-law in OSCHUTZ, F. The Arbitrability of Sport Disputes and the Rules of the Game, p. 202. LEWIS, A. – TAYLOR, J. *Sport: Law and Practice* at p. 1206-1211. See also a rare attempt to review the sporting verdicts in: French Lawyer wants World Cup Final Annulled. In: *Novinite.com* [online]. 12. 7. 2006. Available at: <https://www.novinite.com/articles/66396/French+Lawyer+Wants+World+Cup+Final+Annulled>.

13 C-36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140.

14 Art. R 47 of The CAS Code.

Code (WADC). In the area of doping the Appeals Arbitration Division of CAS must be distinguished from another CAS division – The Anti-doping Division (CAS ADD), which was established recently to hear and decide anti-doping cases as a first-instance authority. IOC, IFs and any other signatories to the WADC delegated this authority to CAS ADD.<sup>15</sup> To what extent decisions of CAS ADD may be appealed to the CAS Appeals Arbitration Division is determined by the procedural rules of CAS ADD.<sup>16</sup>

Besides the two divisions above (which tend to remind of a regular court due to appeals procedures), the third one, the Ordinary Arbitration Division of CAS, resolves the type of disputes which are closer to common arbitration disputes as we know it in other arbitrations. In other words this division deals with disputes other than challenges to a decision of a sports governing body.<sup>17</sup> At the same time CAS provides Ad-hoc Division tribunals at Olympic Games.<sup>18</sup> The separate CAS mediation sys-

15 Available at: [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_ADD\\_Rules\\_\\_2021\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Rules__2021_.pdf).

16 In case a three-member arbitration panel decides the case, parties to the dispute cannot appeal to the CAS Appeal Division. In case only one (sole) arbitrator decided the case, parties to the dispute may appeal to the CAS Appeal Division (see Art. A15 of the Arbitration Rules of the CAS Anti-Doping Division, available at: [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_ADD\\_Rules\\_\\_2021\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Rules__2021_.pdf)).

17 See KAUFMANN-KOHLER, G. – BÄRTSCH, P. The Ordinary Arbitration Procedure of the CAS. In: *The Court of Arbitration for Sport 1984–2004*. Hague: T.M.C. Asser Press, 2006. Although parties may agree that the Ordinary Arbitration Division shall resolve some particular decisions of sports governing bodies.

18 These ad hoc tribunals provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games. Disputes from Commonwealth Games, resp. Asian Games or the FIFA World Cup in football are resolved at CAS as well. CAS role has been expanding. New York (replacing Denver in 1999) and Sydney offices of CAS are available for submissions of disputes to make the remedy process more effective for America and Oceania.

tem operates pursuant to the CAS Mediation Rules.<sup>19</sup> CAS used to provide an advisory opinion procedure concerning sports related issues but this procedure was abolished in 2012.

CAS offers the arbitral resolution of sports-related disputes through arbitration conducted by panels composed of one or three arbitrators. CAS maintains closed lists of arbitrators (the list for CAS ADD arbitrators exists separately from the general list of arbitrators for Appeals and Ordinary cases, resp. there is also the list for arbitrators from the football sector and the list of CAS mediators). The idea of this closed list(s) is defended at CAS because there is a need for quality and consistency in the CAS jurisprudence, which is safeguarded only if the arbitrators are experienced in both sports and law and familiar with the case law of CAS.<sup>20</sup> CAS arbitrators are personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sports in general and a good command of at least one CAS working language.<sup>21</sup> Arbitrators are appointed by the ICAS.

19 CAS Mediation rules are available at: <https://www.tas-cas.org/en/mediation/rules.html>.

20 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1158. Arbitrators who appear on the CAS general list may serve on Panels constituted by either of the CAS Divisions. However, arbitrators appearing on the special list of arbitrators for the CAS Anti-doping Division (ADD) may not serve as an arbitrator in any procedure conducted by the CAS Appeals Arbitration Division (Art. S 18 of the CAS Code).

21 Art. S 14 of The CAS Code. ICAS appoints mediators with experience in mediation and a good knowledge of sports in general. When appointing arbitrators (and mediators), continental representation and the different juridical cultures is considered (Art. S 16 of The CAS Code).

### 2.3 IS CAS AN INDEPENDENT AND VOLUNTARY FORUM? DO ATHLETES PARTICIPATE IN THE PROCES OF BUILDING AND FUNCTIONING OF THIS TRIBUNAL?

As a preliminary matter in arbitration, there may be a dispute over whether the parties did in fact agree to arbitrate any future contract disputes, and if so, to what extent.<sup>22</sup> In relation to the position of athletes at CAS this has been a debated issue.<sup>23</sup> It is quite common for sports bodies to provide in their governing statutes that disputes shall be resolved ‘internally’ through arbitration and that recourse to the ordinary courts shall not be pursued (sometimes on pain of sanction).<sup>24</sup> That is why it is important for CAS to be an institution which is transparent and independent because judicial review of CAS decisions in front of SFT is very limited.<sup>25</sup> SFT has repeatedly held that the need for a quick and uniform dispute resolution system in international sports prevails over the right

22 CAMERON, G. III. *International Business Law Cases and Materials*. Van Rye Publishing, 2015, p. 74.

23 HARTMANN, G. Tipping the Scales of Justice - the Sport and its “Supreme Court”, *Play the Game*, 18. 11. 2021. Available at: <https://www.playthegame.org/media/fmxi0jgx/tipping-the-scales-of-justice-the-sport-and-its-supreme-court.pdf>.

24 WEATHERILL, S. *Principles and Practice in EU Sports Law*, p. 10. Weatherill emphasized that the CAS has become prominent in such arrangements.

25 According to Art. 190, para 2 of the Swiss Private International Law (PILS), an arbitration award in international proceedings may only be set aside on very limited grounds, only one of which (incompatibility of public policy) permits a (limited) review of the substantive merits of award (LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1167). Chapter 12 of PILS applies in all CAS proceedings where at least one party has its domicile or habitual residence outside Switzerland (international arbitration), provided the parties have not excluded its application and agreed to the application of part 3 of the ZPO (governing Swiss domestic arbitration), see RIGOZZI, A. - HASLER, E. In: ARROYO, M. (ed.). *Arbitration in Switzerland, The Practitioner’s Guide*. Kluwer Law International, 2018, p. 1427. Swiss domestic arbitration allows for a more extensive review of the substance of an award, including for arbitrariness (LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1167). See also Art. R 46 of The CAS’s Code.

of an athlete to have access to state courts, provided that the dispute resolution system mandated in the applicable regulations strictly observes the fundamental requirements of due process.<sup>26</sup> The reasoning of SFT is true in part. As far as a swift resolution of sports disputes objective is concerned, currently according to CAS Code (version in force since February 2023) the operative part of the award in Appeals arbitration proceedings shall be communicated to the parties within three months after the transfer of the file to the Panel. Such a time limit may be extended up to a maximum of four months after the closing of the evidentiary proceedings by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel. In the past, however, some CAS panels repeatedly prolonged the duration of the proceedings, which was rightly criticized.<sup>27</sup> As far as uniformity is concerned, there has not yet been a precedent system at CAS as we know it from regular courts and not all verdicts are available for the public. According to CAS Code, Art. R 59, in Appeals arbitration procedures the original award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. As far as the observation of the fundamental requirements of the due process at CAS, this became the most visible and debated issue. In order to confront the view of SFT, complainants have no other choice than to continue their case outside Swiss jurisdiction. For example speed-skater, five-time Olympic champion, Claudia Pechstein, after she had exhausted her remedies in Switzerland at CAS and SFT, she decided to confront the system of sports arbitration of CAS at ECtHR. In her complaint against Switzerland she invoked Art. 6 (1) of the ECHR.<sup>28</sup> This article guarantees in the determination of her civil rights and obligations she was entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

26 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1170.

27 For example at Round table *What CAS needs to change to serve football better*, which took place at FIFA Football Law Annual Review 2023. [online] 3. 3. 2023. Available at: <https://www.fifa.com/legal/education/flar>.

28 *Mutu&Pechstein v. Switzerland*. European Court of Human Rights. Applications nos. 40575/10 and 67474/10, judgment of October 2<sup>nd</sup> 2018. Available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-186828"\]}](https://hudoc.echr.coe.int/eng#{).

established by law. At the same time she sued the International Skating Union (ISU) in front of German courts according to competition law. In German jurisdiction she attacked the abuse of the monopoly position of ISU, compelling athletes to resolve disputes at CAS. Both claims arose from the same event. In 2009, when Claudia Pechstein participated in the World championships, she had to sign the form that anti-doping rules shall be binding for her, including compulsory jurisdiction of CAS. She was banned by the Disciplinary commission of ISU to exercise her professional activity based on a conviction of blood doping. Her defense was based on an inherited blood disease but she was unsuccessful in front of ISU Disciplinary commission as well as at the appeal level in front of CAS. She exhausted her remedies in Switzerland in front of SFT, claiming among others, that CAS was not an “independent and impartial tribunal” because the President of the arbitration panel had not been impartial, resp. she speculated that CAS Secretary General corrects verdicts of CAS arbitrators and that CAS denied a public hearing of her case.<sup>29</sup> According to SFT Pechstein was unable to confront CAS independence because she herself appealed to the CAS and signed the procedural order without raising objections with respect to CAS independence or impartiality. SFT reasoned that under these circumstances it is not compatible with the principle of good faith to have raised the issue of the impartiality of the arbitral panel for the first time in an appeal before SFT. CAS was also considered sufficiently independent by SFT. Moreover according to SFT the right to a public hearing does not have to be accepted in private arbitration. Pechstein therefore continued outside Swiss jurisdiction and submitted her complaint to the ECtHR.

29 See CAS 2009/A/1912 *P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)*. Available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/1912,%201913.pdf>; *Claudia Pechstein v. ISU*, 4A\_612/2009. Available at: <http://www.swissarbitrationdecisions.com/sites/default/files/10%20fevrier%202010%204A%20612%202009.pdf>; *Claudia Pechstein v. International Skating Union*, Judgment of September 28, 2010 TF 4A\_144/2010, [https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight\\_docid=aza%3A%2F%2F28-09-2010-4A\\_144-2010&lang=de&type=show\\_document&zoom=YES&](https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F28-09-2010-4A_144-2010&lang=de&type=show_document&zoom=YES&). Orig. text of decisions see [www.bger.ch](http://www.bger.ch).



In front of ECtHR it is possible to sue the State members of the ECHR only (as it is explained later in part 3 of this book). In other words because SFT dismissed the appeals against the CAS verdict, SFT gave the relevant awards force of law in the Swiss legal order and such impugned acts or omissions are thus capable of engaging the responsibility of Switzerland under the ECHR.<sup>30</sup> The Court reiterated that Article 6 § 1 of the ECHR secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. The issue is to what extent art. 6 (1) could be applicable in relation to proceedings in front of a non-state arbitration?

The Court reminded the distinction between voluntary and compulsory arbitration in relation to standards of Article 6 of ECHR. On one hand in the case of voluntary arbitration to which consent has been freely given, no real issue arises under Article 6 of ECHR. The parties to a dispute are free to take certain disagreements arising under a contract to a body other than an ordinary court of law. By signing an arbitration clause the parties voluntarily waive certain rights secured by the ECHR. Such a waiver is not incompatible with the ECHR provided it is established in a free, lawful and unequivocal manner. It was not however the situation in this case. CAS arbitration was considered as compulsory by the ECHR. That is why CAS had to afford the safeguards secured by Article 6 § 1 of the ECHR.<sup>31</sup> This conclusion was made by the ECtHR despite CAS jurisdiction which had not been imposed by law but by the ISU regulations. Athletes were compelled to make a choice between “accepting the arbitration clause and thus earning their living by practicing sports professionally, or not accepting it and being obliged to refrain completely from earning a living from sports at that level”.<sup>32</sup>

As far as the independence of CAS and the impartiality of arbitrators are concerned, the ECtHR was prepared to acknowledge, that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators at ICAS. The CAS list of arbitrators is compiled by the ICAS and at ICAS there is an unbalanced representation of the interests of

30 *Mutu&Pechstein v. Switzerland*, para 62-67.

31 *Ibidem*, para 95 and 115.

32 *Ibidem*, para 113.

athletes in relation to those of IFs.<sup>33</sup> ICAS at the material time was composed of twenty experienced jurists (since November 1<sup>st</sup> 2022 there are twenty two members of ICAS) who were appointed in the following manner: Four members were appointed by the IFs, chosen from within or outside their membership (since November 1<sup>st</sup> 2022 there are six members appointed by IFs). Four members were appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership. Four members were appointed by the IOC, chosen from within or outside its membership. Four members were appointed by the twelve members of ICAS listed above (since November 1<sup>st</sup> 2022 by 14 members), after appropriate consultation with a view to safeguarding the interests of the athletes. Four members were appointed by the sixteen members of ICAS listed above (since November 1<sup>st</sup> 2022 by 18 members), chosen from among personalities independent of the bodies designating the other members of the ICAS.<sup>34</sup> The president of ICAS is also the president of CAS. ICAS appoints presidents of the CAS divisions and their role is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitration are appointed.<sup>35</sup> The presidents are often called upon to issue orders on request for interim measures and may have a role to play in the constitution of the panels of arbitration.<sup>36</sup> If three arbitrators are to be appointed in an Appeal arbitration procedure, the President of the Appeal Division shall appoint the President of the panel following the nomination of the arbitrator by the Respondent and after having consulted the arbitrators, not the parties to the dispute (this process of nomination of the presiding

33 See RIGOZZI, A. Sports Arbitration and the European Convention of Human Rights - *Pechstein* and beyond. In: MÜLLER, CH. - BESSON, S. - RIGOZZI, A. (eds). *New Developments in International Commercial Arbitration 2020*. Bern: Stämpfli Editions, 2020.

34 See amendments to the Art. S 4 of the CAS Code. [online]. Available at: [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Code\\_2022\\_amendments\\_\\_01.11.22\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2022_amendments__01.11.22_.pdf).

35 See MAVROMATI, D. - REEB, M. *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*. Wolters Kluwer Law and Business, 2015, p. 6.

36 *Ibidem*.

arbitrator of the panel was disputed by Claudia Pechstein because this form of appointing the President of the panel can be influenced by IFs at ICAS).<sup>37</sup> At least when selecting presidents of panels, the President of the Division shall consider the criteria of expertise, diversity, equality and turnover of arbitrators.<sup>38</sup> Unfortunately the ECtHR did not elaborate in detail this system of appointment of the President of the panel. While the ECtHR was prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, ECtHR did not conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, *vis-à-vis* those organisations.<sup>39</sup> The majority of judges confirmed that CAS is an independent arbitration despite the arguments of Claudia Pechstein which seemed reasonable and her case was arguable.

It is interesting that the CAS Ordinary Arbitration procedure and CAS ADD arbitration procedure both work in different ways as far as the appointment of the President of the panel is concerned. In Ordinary Arbitration procedure two appointed arbitrators shall select the President of the panel by mutual agreement (Art. 40.2 of the CAS Code). Moreover CAS ADD provides exclusively the list of panel presidents at art. A9 of the CAS ADD arbitration rules (including Sole arbitrators in the light Art. A 16 of the CAS ADD arbitration rules). The President of the panel shall be appointed from the special list of Presidents for CAS ADD, either

37 Art. R 54 of The CAS's *Code of Sports-related Arbitration*. In literature there was also criticism towards the process of appointment of the president of the panel in Appeal Arbitration procedures, see RIGOZZI, A. – HASLER, E. In: ARROYO, M. (ed.). *Arbitration in Switzerland, The Practitioner's Guide*. Kluwer Law International, 2013, p. 1025.

38 Art. R 54 of the CAS Code (in case a special list of arbitrators exists in relation to a particular sport or event, for example football, the Sole Arbitrator or the President of the Panel shall be appointed from such list, unless the parties agree otherwise or the President of the Division decides otherwise due to exceptional circumstances).

39 Para 157.

by mutual agreement of the parties or, failing such agreement, by the President of CAS ADD. The ECtHR nevertheless viewed CAS as an independent and impartial tribunal, resp. Art. 6 of ECHR was not breached in relation to Pechstein in the Appeals arbitration procedure.<sup>40</sup>

Two dissenting judges pointed out in para 13 of their opinion that the ECtHR would not accept an employment tribunal made up (almost) exclusively of employers' representatives, and this would be the case even if the representative in a given case were impartial. In their view, the ECtHR should have carried out a more in-depth analysis as to the legitimate fear of the athletes to be bound by the jurisdiction of a body which has no appearance of independence (para 15 of dissenting opinion). Dissenting judges emphasized that no rule (including Art. S4 of CAS Code) currently provides that athletes must be represented, but for the one fifth of members of the ICAS. The arguments of dissenting judges might be relevant sometime in the future for consideration in a similar case.<sup>41</sup> According to them ECtHR should make an autonomous interpretation of the concepts in dispute, instead of copying the reasoning of the SFT.

40 Paras 150–159. ECtHR decided the case according to the relevant facts at the time of the dispute in front of CAS when the list of CAS arbitrators was established by the ICAS as follows: three fifths of arbitrators selected from among the persons proposed by the IOC, IFs and NOCs, chosen from within their membership or outside; one fifth of arbitrators chosen by the ICAS “after appropriate consultations, with a view to safeguarding the interests of the athletes”; and one fifth of arbitrators chosen, again by the ICAS, from among “persons independent” of the above-mentioned bodies. The ICAS was therefore only required to choose one-fifth of the arbitrators from among persons independent of the sports bodies which could be involved in disputes with athletes before the CAS. The Court further noted that this mechanism of appointment by fifths was abolished in 2012 (see Art. S 14 of CAS Code).

41 Also see para 10 of the dissenting opinion about the CAS system which is “revealing the existence of a certain link between the ICAS and organisations that might be involved in disputes with athletes before the CAS, especially those of a disciplinary nature”. They also suggested that the Court should have dedicated more space to the issue about the conditions in which private entities may be regarded as “tribunals established by law” for the purpose of application of Art. 6 (1) of the ECHR (in this regard see the observation of the

CAS reacted to the ECtHR judgment by creating three special commissions in order to improve the independence and functioning of CAS but these commissions remain composed of ICAS members.<sup>42</sup> If there are legitimate doubts over independence or impartiality of CAS arbitrators, challenges shall be determined by the Challenge Commission, which has the discretion to refer a case to ICAS.<sup>43</sup> As far as conflict of interests is concerned, there are some other rules included in the CAS Code. For example members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.<sup>44</sup> Upon their appointment, CAS arbitrators (and mediators) shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of the CAS Code.<sup>45</sup> Unfortunately it seems that still some numerous links exist between ICAS members and arbitrators.<sup>46</sup>

majority in para 65 of the judgment, admitting that CAS is neither a domestic court nor any other institution of Swiss public law, but an entity emanating from the ICAS, a private-law foundation).

42 See Art. S 7 of the CAS Code establishing The CAS Membership Commission, The Athletes' Commission and The Challenge Commission.

43 Art. 34 of the CAS Code. The text of the article is ambiguous, whether the Challenge Commission or ICAS will decide about the challenge – see the text of the article stating that ‘The Challenge Commission or ICAS shall rule on the challenge’, resp. ‘The Challenge Commission or ICAS shall give brief reasons for its decision and may decide to publish it’. At the same time The CAS Membership Commission may also suggest the removal of arbitrators (and mediators) from the CAS lists (according to Art. S 7 of the CAS Code the CAS Membership Commission is responsible to propose the nomination of new CAS arbitrators and mediators to the ICAS).

44 Art. S 5 of the CAS Code. According to Art. S 18 of the CAS Code CAS arbitrators and mediators may not act as counsel or expert for a party before the CAS.

45 Ibidem, Art. S 18.

46 HARTMANN, G. *Tipping the Scales of Justice – the Sport and its “Supreme Court”*. This work includes a critique of the lack of the CAS independency and transparency by former Advocate General of CJEU, Miguel Maduro, in Chapter two, pp. 8–12. ICAS is a Swiss foundation and I understood from

Nevertheless, Claudia Pechstein did succeed in front of the ECtHR in part by the underestimated argument, that the lack of a public hearing at CAS violated Art. 6 of the ECHR. CAS amended its procedural rules after the judgment of ECtHR and allowed *a physical person who is party to the proceedings* to request a public hearing *if the matter is of a disciplinary nature*.<sup>47</sup> This is a unique feature of CAS sports arbitration because non-disclosure of facts to the public is one of the recognized advantages of arbitration.<sup>48</sup> Apparently CAS Appeals procedure is different because decisions of sports governing bodies are appealed to the compulsory jurisdiction of the CAS in accordance with their statutes or regulations. IFs are in a stronger position and literally dictate the terms of the relationship with athletes, including CAS jurisdiction. That is why guarantees of Art. 6 of the ECHR had to step in. It has to be mentioned also that CAS hears cases in Appeals procedure *de novo*, resp. the panel has full power to review the facts and the law.<sup>49</sup> It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

the lecture titled 'Foundation Governance in Switzerland' by dr. Thomase Sprecher at the Institute of State and Law of the Czech Academy of Sciences (November 22<sup>nd</sup>, 2021) that the Swiss foundation law is very benevolent and it does not offer any strong checks of the foundation's functioning.

47 Art. 57 of the CAS Code: At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such a request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public.

48 In Ordinary Arbitration procedure unless the parties agree otherwise, the hearings are not public (Art. 44.2 of CAS Code).

49 Art. 57 of the CAS Code. However the same article states that the panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Also after consulting the parties, the panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.

Claudia Pechstein in parallel proceedings also sued ISU for damages in front of German courts, which is an interesting step as far as the principle of Comity is concerned. Claudia Pechstein's claim was accepted in front of German courts despite her case was *res iudicata* in Switzerland's SFT.<sup>50</sup> The issue was whether ISU with a monopoly status abused its dominant power in the market, when it compelled athletes to resolve their disputes at CAS. In her battle, step by step in the hierarchy of German courts, she made it to the Federal Constitutional Court which also recognized Claudia Pechstein's right to a public hearing at CAS. The procedural guarantee of public proceedings is intended to protect those involved in a trial against a secret judiciary that is not subject to public control.<sup>51</sup> The acceptance of the right to a public hearing suddenly became a very important step – the case will return to the beginning of the German courts system. German courts may open the door again to resolve CAS independence at the same time.<sup>52</sup>

50 About Comity see SCHAFFER, R. – AGUSTI, F. – DHOOGHE, L. *International Business Law*. 10<sup>th</sup> edition. Boston: Cengage learning, 2017, p. 79.

51 Press release No. 61/2022. [online]. 12. 7. 2022. Available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-061.html>.

52 It will be interesting how much will be changed in the previous view of BGH for example. This court reasoned that ISU was obliged by WADC to insist on arbitration agreements designating the CAS as the court of arbitration. Due to the ratification of the International Convention against Doping in Sport of 19 October 2005 by the Federal Republic of Germany, the principles of the WADC represent contractual law which is binding under international law. Furthermore, the IOC, in compliance with its obligation under WADC, makes its recognition of IFs dependent on their compliance with the rules laid down in the WADC. The German Competition law was not breached according to BGH. The view of BGH was also that the fact that the arbitrators must be chosen by the parties from a closed list drawn up by an international body consisting predominantly of representatives of the IOC, the NOCs and the IFs is no indication that the Rules of Procedure of the CAS are lacking sufficient guarantees to safeguard the rights of the athletes. With regard to questions of anti-doping measures, sports federations and athletes are not, generally

## 2.4 ACCESS TO JUSTICE IS TOO EXPENSIVE?

The Swiss government argued in the *Pechstein* case, that it was important that sports-related disputes, in particular those with an international dimension, could be referred to a specialised body which would be able to give a ruling not only swiftly but also *inexpensively*.<sup>53</sup> However, CAS is no longer a low cost arbitration and because CAS is the compulsory jurisdiction for athletes, the high costs are an obstacle to access sports justice unless some conditions prescribed by the CAS Code are fulfilled. In the Appeal Procedure applicants sometimes had to pay also the advance costs for the work of CAS arbitrators on behalf of Respondent, if the Respondent refused to pay these costs at national level disputes and disputes, which were not appeals against decisions issued by IFs in disciplinary matters.<sup>54</sup> If advance costs were not paid, CAS would then terminate the arbitration and the appeal would be deemed withdrawn according to Art. R64.2 of the CAS Code. The wording of CAS Code states, that if a party fails to pay its share, *another may* substitute for it. CAS Court office in such a scenario informed an Appellant by a letter from the Finance director that in the light of the fact that the Respondent will not pay its share of the advance of costs, and pursuant to Article R64.2 of the CAS Code, CAS is obliged to invite the Appellant to pay the entire advance of costs in order to cover the arbitration costs in this matter.<sup>55</sup> According to Hasler and Rigozzi “it is submitted that, at least in disciplinary matters in appeals arbitrations, sports governing bodies should refrain from engaging in such a tactic, unless it is abundantly

speaking, divided into opposing “camps” pursuing different interests. See the BGH decision at KZR 6/15. 12. 7. 2016. Available in English at: [https://www.tas-cas.org/fileadmin/user\\_upload/Pechstein\\_\\_\\_ISU\\_translation\\_ENG\\_final.pdf](https://www.tas-cas.org/fileadmin/user_upload/Pechstein___ISU_translation_ENG_final.pdf).

53 Para 78 of the *Mutu&Pechstein v. Switzerland*.

54 See below about the special regime of these cases according to R 65 of the CAS Code, which are free of CAS arbitrators costs and other administrative costs. Applicants have to pay only a non-refundable fee 1000 of Swiss francs to the Court Office as in other cases in front of Appeals, Ordinary and CAS ADD divisions.

55 I experienced this when I helped with preparation of one Appeal submitted to CAS by a football player.



clear that the appeal is spurious and the prospects that the appellant(s) will be in a position to honor an award on costs are manifestly nil. In appeals cases, depending on the financial resources of the parties, the obligation to pay advance costs in disputes of national character or in non-disciplinary international disputes can in fact preclude access to arbitration".<sup>56</sup> The amount of fees to be paid to each arbitrator is fixed by the Secretary General of the CAS on the basis of the work provided by each arbitrator and on the basis of time reasonably devoted to their task by the members of each Panel.<sup>57</sup>

56 RIGOZZI, A. – HASLER, E. In: ARROYO, M. (ed.). *Arbitration in Switzerland, The Practitioner's Guide*, p. 1715. The same authors report that the experience shows that when a case does not have a specific value, the advance requested will tend to be between CHF 30 000,- and CHF 40 000,- for a three member panel. In disciplinary cases, the current CAS practice appears to be that the total advance will be fixed at CHF 36 000,-. In case a sole arbitrator is appointed, the amount of the advance is usually CHF 18 000,-, see p. 1714. Also during discussion at my lecture about CAS for the League Assembly of Czech FA on 26<sup>th</sup> January 2010, one professional football club brought the same point and complained about the obligation to pay advance costs on behalf of a Respondent at CAS. As far as other costs are concerned, the practice is also that parties to the dispute may be „advised“ by the Court Office that an ad hoc clerk has been appointed in the case. It makes the dispute resolution more expensive without parties knowing about this appointment in advance. On the other hand according to Hasler and Rigozzi it is understandable in light of the increasing workload of CAS to appoint ad hoc clerks to assist the arbitrators, see RIGOZZI, A. – HASLER, E. In: ARROYO, M. (ed.). *Arbitration in Switzerland, The Practitioner's Guide*, p. 1639. See below an alternative with costs free arbitration at international disciplinary cases and differences at CAS ADD, resp. CAS Ad Hoc Divisions.

57 In principle, the hourly fees listed are taken into account, see <https://www.tas-cas.org/en/arbitration/arbitration-costs.html>. My experience in one case was that the CAS Finance Director sent a letter on final costs 5 months after the award of CAS was made (I assisted only in one case filed to CAS by the player himself so this experience should not be considered as general practice of CAS, I hope it was an exception). The problem was how to contest these calculations since CAS Code was silent about letters from the Finance director of CAS sent after the award was made. The only way was to request

There is a special regime concerning costs according to Article R65 of CAS Code in relation to appeals against decisions which are exclusively of a disciplinary nature and are rendered by the IF or a sports-body (these are in general free of charge). Arbitration costs are set up differently in CAS ADD proceedings.<sup>58</sup> The facilities and services of the CAS Ad hoc Division at Olympic Games, including the provision of arbitrators to the parties to a dispute, are free of charge.<sup>59</sup>

In earlier versions of CAS Code it was stated that ICAS may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund.<sup>60</sup> At that time each reader of the CAS official webpage would assume, that the legal aid fund and the guide-

for detailed information from the CAS Secretary General or ICAS. Namely in case the calculation was either too brief, without detailed list of working hours, or Appellant simply disagreed with it, because the sent bill did not reflect “financial resources of the parties” according to Art. 65.4 of CAS Code. Since November 1<sup>st</sup> 2022, amended CAS Code, Art. R64.4 brought some improvements: the final account of arbitration costs shall contain a detailed breakdown of each arbitrator’s costs and fees and of the administrative costs and shall be notified to the parties within a reasonable period of time.

58 The final costs, if any, depend on circumstances described in A23-A25 of CAS ADD Arbitration rules, for example CAS ADD procedures conducted by three-member Panels are free of charge in cases filed by the IOC, any Olympic IF, or the ITA (on behalf of an Olympic IF delegator). Subject to Article A23, the administrative costs of CAS ADD, the fees and costs of the arbitrators and ad hoc clerk (if any), and the expenses of CAS ADD (arbitration costs) associated with proceedings involving the IOC, any Olympic IF, or the ITA (on behalf of an Olympic IF delegator) and referred to a Sole Arbitrator shall be covered by the budget assigned to the Olympic IFs by the IOC, for up to 4 procedures per annum. Any costs associated with any proceedings filed thereafter (5 or more proceedings), shall be paid by the IOC, Olympic IF, ITA (on behalf of an Olympic IF delegator), as directed by CAS ADD. Art. A 24 also deals with the scenario where a case is submitted by a WADC signatory other than IOC or an Olympic IF. In this case the arbitration costs shall be paid by the WADC signatory.

59 Art. 22 of The Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games.

60 [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Code\\_2013\\_en.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2013_en.pdf).

lines shall exist sometimes in the future, because there was no other information on the CAS website concerning the aid at all. CAS Legal Aid guidelines were then adopted quite later, in force since September 2013 (according to Art. 23 the guidelines apply to cases initiated after September 2013 indicating that the legal aid was not possible in the past).<sup>61</sup> Legal aid may be granted to any natural person, on request, whose income and assets are not sufficient to allow the person to cover the costs of proceedings without drawing on that part of the person's assets necessary to support the person and the person's family.

## 2.5 EX AEQUO AT BONO AND GENERAL PRINCIPLES OF LAW – FAIR FILTERS OF IFS' ACTIONS

In the section above, we dealt with the independence of CAS in light of Art. 6 of the ECHR – the right to a fair trial and access to the court. Freeburn emphasized that the unilateral arbitrariness of the substantive rules that are applied to the settlement of disputes in international sports is overlooked in favour of an approach that merely ensures minimum procedural standards. According to Freeburn CAS does not act as a specialist tribunal but merely applies the rules of IFs, resp. 'in effect the sports governing bodies have combined among themselves to create a tribunal to enforce their own rules, not amongst themselves, but against third parties (eg athletes, sports clubs, NOCs, national federations) who are forced to submit to the regime. CAS is not a court for world sports, but a court for the world's sports governing bodies.'<sup>62</sup> Can an *ex aequo at bono* method of resolution of disputes cure this situation?

61 See the first edition of the commentary of RIGOZZI, A. – HASLER, E. In: ARROYO, M. (ed.). *Arbitration in Switzerland, The Practitioner's Guide* on this mysterious legal aid fund at that time before the Legal Aid Regulations were in force. Were arbitrators or CAS Court Office obliged to inform parties to the dispute that some legal aid fund was available at that time?

62 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 151. In other words according to Freeburn 'all of the unilaterally determined rules of unrepresentative and undemocratic sports governing bodies are imposed without consent and without justification' (p. 150).

Arbitration in equity is opposed to arbitration according to specific laws, and an arbitrator in equity has a mandate to decide based entirely on equity, without regard to legal rules, based on circumstances of the specific case.<sup>63</sup> The CAS Code includes reference to *ex aequo at bono* in the section concerning the Ordinary arbitration.<sup>64</sup> Unfortunately the CAS Code about Appeal Arbitration procedure does not include this reference.<sup>65</sup> Mavromati and Reeb explain the lack of express reference to *ex aequo at bono* in the Appeal arbitration procedure: 'appeal procedures most often oppose athletes to federations and athletes should be equal in front of sporting regulations, and ruling in equity is therefore not appropriate for disputes opposing athletes/clubs to a sports federation'.<sup>66</sup> Similarly Radke states that the overarching purpose of Article R58 of the CAS Code is to guarantee equal treatment of athletes and/or clubs worldwide, by providing a uniform decisional standard in relation to the appealed decisions of sports governing bodies.<sup>67</sup> Therefore, CAS arbitrators shall decide the appeal cases primarily according to the sports regulations that formed the legal basis of the appealed decisions. It could be stated the other way around by some sort of cynical view

63 MAVROMATI, D. - REEB, M. *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, p. 355. It is a concept of justice not inspired by the rules of law in force and which might even be contrary to those rules.

64 R 45 of the CAS's Code: The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.

65 According to R 58 of the CAS's Code, The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

66 MAVROMATI, D. - REEB, M. *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, p. 355.

67 RADKE, H. Sports arbitration *ex aequo et bono*: basketball as a groundbreaker. *Bulletin TAS/CAS Bulletin*. 2019/2. TAS Tribunal Arbitral du Sport/CAS Court of Arbitration for Sport. p. 48. [online]. Available at: [https://www.tas-cas.org/fileadmin/user\\_upload/Bulletin\\_2019\\_2\\_FINAL.pdf](https://www.tas-cas.org/fileadmin/user_upload/Bulletin_2019_2_FINAL.pdf).

that all athletes are equally unequal by this approach because as it was already argued by Freeburn, the imposition of arbitration in sports also involves the application of the arbitrarily determined rules of one of the parties to the dispute.<sup>68</sup> However at least Mavromati and Reeb conclude that it is accepted that the CAS arbitral tribunal could decide *ex aequo at bono* under Appeal procedure as long as both parties agree or the panel may apply the principles of law, which are applicable as a type of *lex mercatoria* for sports regardless of their explicit presence in the applicable regulations.<sup>69</sup>

Despite that the decisionmaking based on *ex aequo at bono* had met with considerable scepticism in the legal profession, it has now been recognised that the advantages of such a choice of law by far outweigh the disadvantages.<sup>70</sup> It aims to reach some fair resolution. It was already argued that some of IFs' regulations have a democratic deficit. Some of IFs' rules also lack legal quality. It would be also very interesting to apply *ex aequo at bono* in doping regulations because CAS panels are often mentioning that anti-doping rules are too strict to athletes who were inadvertent dopers (about doping see part 8 of this book below). For example in *Baxter* case it was emphasized that: "The Panel is not without sympathy for Mr. Baxter, who appears to be a sincere and honest man who did not intend to obtain a competitive advantage in the race. It is unfortunate that, for whatever reason, he did not see the term levmetamfetamine on the package he bought or did not understand its import, and that he did not consult with his team doctor before taking the medication. Nevertheless, because Mr. Baxter took the medication, at the time of his slalom race his body contained a prohibited substance. The consequence for

68 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 108. According to Radke Art. R 58 of the CAS's *Code of Sports-related Arbitration* grants the parties scope for determining the applicable law only subsidiarily, see RADKE, H. *Sports arbitration ex aequo et bono: basketball as a groundbreaker*, p. 48.

69 MAVROMATI, D. - REEB, M. *The Code of the Court of Arbitration for Sport*, pp. 355-356.

70 MARTENS, D. Basketball Arbitral Tribunal - An Innovative System for Resolving Disputes in Sport (only in Sport?). *The International Sports Law Journal*. 2011/1-2, p. 55.

this doping violation must be a disqualification and the loss of his bronze medal'.<sup>71</sup> However during the discussion at one of the parallel sessions of 2022 WADA Symposium, the idea of an application of *ex aequo at bono* in doping cases was refused because the main aim of harmonization of anti-doping sanctioning would disappear.<sup>72</sup>

At least an impressive catalog of the general principles of law has been invoked by CAS panels so far. For example the attempt of the IF to alter the Olympic qualification process with retrospective effect at a late stage – a few months before the Olympic Games – would violate the principle of procedural fairness and the prohibition of *venire contra factum proprium*.<sup>73</sup> Other general principles applied by CAS included, among others: *nulla poena sine lege certa*; legitimate expectation; good faith; fairness; non-discrimination and proportionality.<sup>74</sup> Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a *lex ludica* – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict

71 CAS 2002/A/376 *Baxter v/IOC*, Para 3. 33. Also see the *Lund* case CAS OG 06/001, para 4.15: The Panel arrives at this decision with a heavy heart as it means that Mr. Lund will miss the XX Olympic Winter Games. The Panel found Mr. Lund to be an honest athlete, who was open and frank about his failures. WADA did not suggest otherwise. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organisations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organization.

72 Session 2021 WADC Practical Lessons and Learnings after One Year of Application, Day 1 of the Symposium.

73 CAS 2008/O/1455 *Boxing Australia v/AIBA*.

74 See LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 1203; FOSTER, K. *Lex sportiva and Lex Ludica: the Court of Arbitration for sport's jurisprudence*. In: BLACKSHAW, I. – SIEKMANN, R. – SOEK, J. (eds). *The Court of Arbitration for Sport 1984-2004*.

with any national “public policy” («ordre public») provision applicable to a given case.<sup>75</sup> Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such *lex ludica*.<sup>76</sup>

## 2.6 THE SYSTEM OF SELF-ENFORCING SANCTIONS – AN EXTRAORDINARY POWER OF IFS, BUT NOT UNLIMITED

IFs via CAS have strong enforcing powers. It is a unique system with various forms of sanctions, including an occupational ban, deductions of points, fines, losing a sporting license etc. This may be done without assistance of a State because the lives of athletes or clubs is at stake. However, this power has some limits. SFT in the saga of *Matuzalem* ruled that the abstract goal of enforcing compliance by football players with their duties to their employers is clearly of lesser weight than the occupational ban against the player, unlimited in time and worldwide for any activities in connection with football.<sup>77</sup> It will be described in detail later in this book in part 4 how the transfer system works in practice

75 CAS 98/200 *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*. In: REEB, M. *Recueil des sentences du TAS/Digest of CAS Awards 1986-1998*. Berne: Editions Staempfli, 1998, p. 103.

76 *Ibidem*. Recently ECtHR held that Switzerland failed to provide an effective remedy to Caster Semenya in front of CAS and SFT because substantive human rights according to the ECHR were not considered enough in front of these tribunals and it remains to be seen if in the future both CAS and SFT will have to improve the standard of human rights in their decisionmaking concerning the cases arising from the forced arbitration. For more details about the case see COOPER, J. *Semenya v. Switzerland* (European Court of Human Rights). *Entertainment and Sports Law Journal*. 2023, Vol. 21, No. 1, pp.1-7. Available at: <https://www.entsportslawjournal.com/article/id/1490/>.

77 Judgment of the Swiss Federal Tribunal in 4A 558/2011, of 27<sup>th</sup> March, 2012, para 4.3.4.

concerning high compensations for a breach of contract by players. The professional player Matuzalem had to pay EUR 11,858,934.00 with interest at 5% from the middle of 2007 (strictly liable for the payment with his new club) to his former club when he unilaterally left his club in order to play in Real Zaragoza.<sup>78</sup> Matuzalem and his new club Real Zaragoza were unable to pay this amount of compensation and the FIFA Disciplinary Committee banned Matuzalem from any football related activity until the compensation for the breach of contract is fully paid, backed by CAS decision.<sup>79</sup> However SFT set up the limits of such enforcement tools. FIFA may only select to impose less severe disciplinary sanction and SFT condemned the extra disciplinary sanction as a service of private enforcement of the decision granting damages.<sup>80</sup> In other words according to the SFT in Switzerland protection of the personality of a human being is a fundamental legal value which is protected constitutionally in Art. 10 (2) of the Swiss Federal Constitution (BV) and this unfolding of a personality is also covered by Art. 27 (2) BV, resp. *The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) ZGB [Swiss Civil Code].*<sup>81</sup>

78 The Swiss Federal Tribunal in judgment 4A\_320/2009 of 2nd of June 2010 upheld the CAS verdict.

79 CAS 2010/A/2261 *Real Zaragoza SAD v. FIFA* and CAS 2010/A/2263 *Matuzalem Francelino da Silva v. FIFA*.

80 See LEVY, R. *Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem*, p. 37.

81 Judgement of March 27<sup>th</sup> 2012, *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association (FIFA)*, 4A\_558/2011. [online]. Available at: <http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202012%204A%20558%202011.pdf>. According to the SFT, “*The free unfolding of a personality is not protected merely against infringement by the state but also by private persons (see Art. 27 (f) ZGB which substantiates personal freedom in private law in Switzerland [...]) The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons*”.



# 3

**ECONOMIC FREEDOMS  
AND HUMAN RIGHTS  
VS. SPORTS AUTONOMY  
IN FORUMS OUTSIDE  
THE SPORTS SECTOR**



CAS represents justice *within* the sports autonomy. Earlier in the previous chapter we already saw in the *Pechstein* case how the independence of CAS was confronted in front of SFT or ECtHR – in forums outside the sports autonomy. Athletes may go even further. In other words, according to Stephen Weatherill on one hand we have so called ‘Internal sports law’, which is rules and practices of IFs and the dispute resolutions procedures, which are foreseen by constitutions of sports governing bodies, and ultimately the decisions of CAS, known as *Lex Sportiva*. A lot of time this internal sports law does not touch the so called ‘External sports law’, which is the law applied to sports from the outside – the law of states and the law of international organizations, for example EU. The reason is that CAS is a very well developed internal dispute resolution system.<sup>1</sup> However, occasionally the EU law will claim jurisdiction for example.<sup>2</sup> Sports in our century is no longer a matter of entertainment spontaneously devised by a leisure class; it has become an organized industry.<sup>3</sup> There is no wonder that External sports law questions some regulations made by IFs within the sports autonomy. Athletes or clubs have so far explored horizons of various legal tools – the economic freedoms of EU law or also of other international documents on human rights as a shield

1 See Zoom in ISU v Commission seminar. 20. 1. 2021 [online]. Available at: <https://www.youtube.com/watch?v=H0y8O7XJNAk>.

2 Ibidem.

3 POULSON, J. Arbitration of International Sport Disputes.

In: BLACKSHAW, I. – SIEKMANN, R. – SOEK, J. (eds). *The Court of Arbitration for Sport 1984-2004*.

against the power of IFs.<sup>4</sup> The EU has had the most profound impact on sports governing bodies' autonomy owing to its market competences.<sup>5</sup> The next part explains how.

### 3.1 ENTRY OF EU LAW TO THE SPORTS SECTOR

As will be seen below, the CJEU has become the most visible European institution in forging a link between the EU and Sports.<sup>6</sup> According to CJEU case-law, while sports federations are free to establish their own rules, the autonomy which they enjoy cannot allow them to restrict the exercise of rights conferred by the TFEU Treaty.<sup>7</sup> In order to understand how CJEU has applied European law to sports, the overall objectives of the EU (formerly EC) must first be understood.<sup>8</sup> The EU, formerly EC, has aimed to establish an internal market (now Art. 3 of the Treaty on EU) and this internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (now Art. 26 of the Treaty on the functioning of the

4 Of course some older cases arose prior to CAS existence, resp. in early years CAS was not as popular as we know it today. François Carrard told participants in the workshop *Sport and Law: Current Issues*, organized by Shönherr v.o.s. law office on May 28<sup>th</sup> 2009 in Palladium, Prague, that he was literally asking and convincing sports environment to resolve disputes at CAS instead at regular court jurisdictions. With some sort of sense of humour he said to IFs that refreshment is free of charge during the CAS proceedings in order to gain attention for the CAS forum to be used by the sports world.

5 GEERAERT, A. *The Autonomy of the Olympic and sport movement*, p. 255. Since EU is now by far the largest trading block in the world, its multi-national rules are a very important part of international law (CAMERON, G. III. *International Business Law Cases and Materials*. Van Rye Publishing, 2015, p. 68).

6 PARRISH, R. Reconciling Conflicting Approaches to Sport in EU, In: CAIGER, A. – GARDINER, S. *Professional Sport in the European Union: Regulation and Re-regulation*, p. 26.

7 Advocate General Rantos in *European Superleague* case, para 171.

8 DOWNEY, B. The Bosman Ruling: European Soccer – Above the Law. *Asper Review of International Business and Trade Law*. Vol. 1, 2001, p. 187.

EU – TFEU). Clearly, to obtain this substantial integration, the members must adopt the same policies and abide by them.<sup>9</sup> But what about obstacles resulting from the exercise of the legal autonomy by associations or organizations which do not come under public law, namely IFs? The answer came in the case of *Walrave*.<sup>10</sup>

In November 1970 the Union Cycliste Internationale (UCI) made new rules at the World Championships in motor-paced races. They provided that a pacer should be of the same nationality as his stayer because the World Championships are competitions between national teams. Two Dutch cyclists considered these provisions as discriminatory and in breach of the free movement of persons according to (at that time) European Economic Community (EEC) Treaty, because they were not allowed by the new UCI rules to provide their services to other teams representing different states.

As far as EU's free movement law is concerned now, 'Art. 45 of TFEU confers on workers the right of free movement between member states. Article 49 of TFEU confers a similar right on the self-employed, which permits freedom of establishment. Article 56 of TFEU confers a right freely to provide services across borders. All three sets of provisions envisage the liberation of factors of production within the common market'.<sup>11</sup> These freedoms also existed in the above mentioned EEC Treaty and later in the European Community Treaty (EC Treaty).

At the time of the dispute in the *Walrave* case the EEC Treaty did not mention sports at all.<sup>12</sup> The CJEU had to find some basis to apply European law to sports regulation of the non-state IF – the UCI. Advocate General Warner offered an inspiring view. He elaborated that if an exception should be made from the provisions of the Treaty against discrimination on the grounds of nationality, namely for rules of organizations concerned with sports that are designed to secure that a national team shall

9 Ibidem, p. 188.

10 C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140.

11 WEATHERILL, S. – BEAUMONT, P. *EU Law: The Essential Guide to the Legal Workings of the European Union*. Penguin books. 3<sup>rd</sup> edition, 1999, p. 620.

12 Later the EC Treaty also did not include provisions about sports.

consist only of nationals of the country that that team is intended to represent. He answered that question by saying that such an exception should clearly be made based on an officious bystander test ascertaining *'whether a term should be implied into a contract, and which seems to me equally appropriate in the interpretation of the Treaty'*. He explained that *'Suppose that an officious bystander, at the time of the signing of the EEC Treaty, or, for that matter, at the time of the signing of the Treaty of Accession, had asked those round the table whether they intended that Articles 48 and 59 should preclude a requirement that, in a particular sport, a national team should consist only of nationals of the country it represented. Common sense dictates that the signatories, with their pens poised, would all have answered impatiently 'Of course not' - and perhaps have added that, in their view, the point was so obvious that it did not need to be stated.'*<sup>13</sup>

The CJEU established a different test than the Advocate General. The CJEU reasoned that having regard to the objectives of the Community, the practice of sports is subject to Community law only in so far as it constitutes an economic activity within the meaning of article 2 of the Treaty.<sup>14</sup> Pijetlovic explains that both the sporting rule and its effects must be non-economic to merit this exception and it applies to very small group of rules, such as rules of the game (e.g. offside in football, or the dimensions of a tennis court), which are unlikely to be challenged before the courts.<sup>15</sup>

Then CJEU in *Walrave* interpreted European law in relation to the above described UCI's disputed regulation of national teams in the following way: the free movement provisions of the EEC Treaty do not affect the composition of sports teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity and this restriction on the

13 Articles 48 and 59 of the original version of the EEC Treaty concerned free movement of workers and services.

14 C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140, para 4.

15 See PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*. The Hague: T.M.C. Asser Press/Berlin Heidelberg: Springer, 2015, p. 218.

scope of the provisions in question must however remain limited to its proper objective.<sup>16</sup> This holding became known as the sporting exception in EU Law.<sup>17</sup>

In determining whether a rule is of a purely sporting interest, the CJEU examined the intended impact of the rule.<sup>18</sup> Later in the case of *Dona* CJEU upheld the *Walrave* exemption based on the intent of the rule – those rules adopted for non-economic reasons and related to the “nature and context of [sport] matches” are “of sporting interest only” and, therefore, not subject to European law.<sup>19</sup> From these paragraphs, it is apparent, that it is the *motives* for the rules, and not the rules themselves, that do not produce an economic effect and have nothing to do with economic activity.<sup>20</sup> However, as more cases arose, this exception turned into a justification for restrictions on competition or the free

16 C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140, para 8–9. Pijetlovic clarifies that this single instance of the application of the exception does not mean that it may not be met by other types of rules not involving national teams or issues of direct discrimination (PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 221).

17 *Ibidem*, p. 103.

18 FARZIN, L. On the Antitrust Exemption for Professional Sports in the United States and Europe. *Jeffrey S. Moorad Sports Law Journal*. 2015, vol. 22, no. 1, p. 97.

19 *Ibidem*, p. 98. See the case 13/76 *Gaetano Donà v Mario Mantero* ECLI:EU:C:1976:115.

20 PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 219.

movement of workers, subject to the principle of proportionality.<sup>21</sup> Subsequently the state of that exemption for sporting activities has eroded.<sup>22</sup> The problem is that ‘the effect of the rule is undeniably economic’.<sup>23</sup>

### 3.2 CJEU’S OFFER OF AN OPEN LIST OF JUSTIFICATIONS FOR REGULATION OF IFS UNDER CERTAIN CONDITIONS

It is very important to emphasize that CJEU offered to the sports industry an open list of justifications not provided explicitly by the EEC/EC Treaty, now TFEU. This style of reasoning reminds the approach of CJEU in the area of free movement of goods in the case of *Cassis de Dijon*.<sup>24</sup> This case concerned indistinctly applicable technical rules created by Member States of EU, which on one hand did not discriminate directly based on the origin; nevertheless they did restrict free movement of goods indirectly, but for some very reasonable purpose. That is why the approach of CJEU was softer. CJEU reasoned that pending harmonization in the particular area at stake if indistinctly applicable technical rules were necessary to satisfy an open list of “mandatory requirements”, for exam-

21 KEHRLI, K. The Unspecified Specificity of Sport: A Proposed Solution to the European Court of Justice’s Treatment of the Specificity of Sport. *Brooklyn Journal of International Law*. 2014, vol. 39, no. 1, p. 410.

22 FARZIN, L. *On the Antitrust Exemption for Professional Sports in the United States and Europe*, p. 94. CJEU in the case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* ECLI:EU:C:2019:497 applied EU law even to amateur sports. Lewis and Taylor commented that the traditional limitation on the application of EU Law to the commercial aspects of sporting activities appears to have been substantially relaxed (LEWIS, A. – TAYLOR, J. *Sport: Law and Practice* p. 1304). See also the recent view of Advocate General Rantos in the case-law of this topic in the C-333/21 *European Superleague* case, para 172.

23 PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 219.

24 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. ECLI:EU:C:1979:42. See annotation by WEATHERILL, S. *European Sports Law*, Collected Papers, T.M.C. Asser Press, 2007, p. 96.



ple for consumer protection, such rules were accepted by the CJEU.<sup>25</sup> Thus ‘the notion of mandatory requirements as an aspect of a general principle of reasonable interpretation of EU’s prohibitions manifests a judicial attempt to balance the often competing concerns’.<sup>26</sup>

By a similar style some regulations of IFs were accepted by CJEU as inherent for the sport and therefore compatible with EU law, despite no such justification of inherency was available according to the explicit text of the TFEU, unless rules of IFs impeded access to the market completely. It has to be emphasized that by this style CJEU approaches sporting exceptions differently in the area of either free movement or in competition (anti-trust) law. This difference makes the system difficult for understanding by laymen (although results of cases may be the same, but attained by a different legal route). The debate about achieving

25 In other words the scope of mandatory requirements is broader than the text of the EC Treaty, now TFEU’s provisions, which explicitly justify only direct (distinct) discrimination against origin of the goods. Interestingly, as Pietlovic clarifies at p. 230, the case law of the CJEU towards sport went even further because sport is an exception to the rule according to which *discriminatory* measures normally can only benefit from the exhaustive list of exceptions, such as public policy, public health and public security (and not from an open list of justifications available only to indirect discrimination). For example the direct discrimination based on nationality was accepted in the above described case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140. Some rare examples of this approach happened outside sport as well in the past when discriminatory rules were justified based on other reasons than in the EC Treaty/TFEU’s text based justification, see WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 591, analyzing the case of C-2/90 *Commission v Belgium*, ECLI:EU:C:1992:310 (Wallonia waste case) concerning the justification of restrictions of free movement of goods in the light of environmental policy (this policy was not mentioned as justification for direct discrimination of free movement of goods in the former EC Treaty, now TFEU).

26 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 579.

possible convergence of justifications of restrictions of free movement/competition law is beyond the topic of this book, but sports became very good material for the debate about this convergence.<sup>27</sup>

The EU competition rules to some extent complement the free movement rules in the sense that they may apply to the same type of practice but they may also control practices that escape the reach of the free movement rules, such as price-fixing or other types of anti-competitive arrangements that are not tied to the particular vice at which the free movement rules are targeted, which is the partitioning of the internal market along the national lines.<sup>28</sup> EU competition law is covered by Art. 101 TFEU dealing with cartels and restrictive practices of undertakings. Where two or more colluding firms are involved, Art. 101 is exclusively applicable.<sup>29</sup> Art. 102 TFEU deals with a monopoly of an undertaking, resp. an association of undertakings. Article 102 accepts the existence of dominant firms, but asserts the power to control their conduct by forbidding abuse of that dominance.<sup>30</sup> IFs fulfill the definition of firms – undertakings, resp. they are associations of undertakings.<sup>31</sup>

27 This is in detail elaborated by PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 215.

28 WEATHERILL, S. *Principles and Practice in EU Sports Law*, p. 59.

29 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 849.

30 *Ibidem*, p. 847.

31 It follows from well-established case-law that the concept of an undertaking includes, in the context of competition law, any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, see para 58 of the Advocate General Rantos opinion in the *European Superleague* case where he also explains in para 59 that ‘it is established that FIFA’s and UEFA’s members are national associations, which are groupings of clubs for which the practice of football is an economic activity and which are therefore undertakings within the meaning of Article 101 TFEU. Since the national associations are associations of undertakings and also, on account of the economic activities in which they are engaged, undertakings, FIFA and UEFA, associations which are groupings of the national associations, are also associations of undertakings (indeed even ‘associations of associations of undertakings’) within the meaning of Article 101 TFEU. Furthermore, the statutes adopted by such entities give expression to the intention of FIFA and of UEFA to coordinate the conduct of their members as regards, inter alia,

The application of free movement rules and competition law according to EU Law is only possible if there is some European dimension, which means IFs practice has potential to affect somehow the trade between Member States.<sup>32</sup> If there is no such European dimension, the restrictions belong to the national supervision of each State.

It was in EU competition law where the sporting exception received a new coat - in CJEU's case of *Meca Medina and Majcen*.<sup>33</sup> In order to understand the unique view of the CJEU in the *Meca-Medina and Majcen* case, it is necessary to briefly explain how Article 101 TFEU and 102 TFEU work in practice. Art. 101 prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their *object or effect* the prevention, restriction or distortion of competition within the internal market. On an orthodox application of Art. 101 TFEU, any agreement or practice between undertakings or by associations of undertakings that has its object or effect the prevention, restriction or distortion of competition will automatically breach Art. 101 TFEU unless a respondent can prove that it satisfies the Art. 101 (3) TFEU criteria.<sup>34</sup> The Article 101 (3) envisages a balance between costs and benefits of the restrictive practice.<sup>35</sup> Pietlovic explains that in the provision 101 (3) TFEU there is no scope for non-competition

their participation in international football competitions. The provisions of the statutes of IFs, such as the provisions at issue in the main proceedings, can therefore be regarded as 'decisions by associations of undertakings' within the meaning of Article 101(1) TFEU.'

32 Ibidem, Para 60.

33 Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*. ECLI:EU:C:2006:492.

34 PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 262.

35 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 827. Authors explain that the article comprises four conditions - two positive and two negative. Two positive conditions require 1) that the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress; 2) the consumer benefit criterion insists that the deal shall yield a fair share of its benefits to the consumer. The first negative condition requires that the terms of the deal do not impose restrictions that are not indispensable to

arguments that cannot be translated into economic efficiencies.<sup>36</sup> That is why the *Meca-Medina and Majcen* case criteria described below are valuable for sports, because they reflect non-economic values with a flavor of public interest at stake to justify a potential breach of EU competition law (again beyond the explicit text of the TFEU).

In *Meca-Medina and Majcen* sanctions according to the anti-doping rules of IOC were contested. Two swimmers failed the doping test and they claimed that the anti-doping regulation breached EU competition law because they were unfairly banned from the exercise of their profession by the tied rules of IOC and IFs. The CJEU then reasoned in para 27 of the decision that ‘it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.’<sup>37</sup> In other words the rule may be examined for its compatibility with the Treaty provisions.<sup>38</sup>

CJEU used the new language that resulted in giving the above quoted paragraph 27 the false reputation of severely limiting the scope of the sporting exception concerning the rules of purely sporting interest that originated in paras 8 and 9 in *Walrave* as described above.<sup>39</sup> In reality the CJEU added an important ratio in para 42 of the decision in favor of sports because according to CJEU not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101 (1) TFEU. CJEU emphasized that for the purposes of application of that provision to a particular case, an account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of compe-

the attainment of the objectives. The second negative condition insists that the agreement shall not permit the elimination of competition in respect of substantial part of the products in question.

36 PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 155.

37 Para 27.

38 Ibidem.

39 PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 181.

tion are inherent in the pursuit of those objectives and are proportionate to them. This approach was first time established at the CJEU level in the case of *Wouters and Others*<sup>40</sup> In this case CJEU accepted rules safeguarding the proper administration of justice in the Netherlands and did not condemn them according to EU competition law. In the sports case of the *Meca-Medina and Majcen* in the same style accepted IOC's rules against doping. Weatherill explains the contribution of the *Meca-Medina and Majcen* for the European legal environment of sports:

*Instead of trying to look for the purely sporting rules CJEU accepted that most sporting rules are also economically significant rules and it is therefore necessary to conduct a case-by-case inquiry as to whether the particular sporting rules are necessary for the organization of the sport in question even though they might fall within the scope of EU Law. Meca Medina is an expression not of absolute sporting autonomy but of conditional sporting autonomy – sporting bodies can maintain practices which are necessary for the organization of sports on the condition that they can show just why they need such rules and that the rules in question are limited to the particular objectives on which they are focused and that then gives room for a sensitivity to sporting specificity in the understanding whether the rules are really necessary or not which then connects us to what we now know as Article 165 of the TFEU and its expression of sporting specificity.*<sup>41</sup> In other words an agreement or decision that restricts competition but genuinely pursues a public policy objective and fulfills the *Wouters (Meca-Medina and Majcen)* criteria could thus escape the application of the prohibition provision 101 (1) of TFEU.<sup>42</sup>

The case of *Meca-Medina and Majcen* is also covered in part 8 of this book about doping regulation but it was necessary to explain in summary

40 C-309/99 *J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van der Nederlandse Orde van Advocaten* [2002] ECR I-1577. The *Wouters* test introduced balancing of the Union's competition law objectives against the non-economic public interests that may or may not be a part of the Union's objectives in other areas (PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 153).

41 Zoom in ISU v Commission seminar. 20. 1. 2021 [online]. Available at: <https://www.youtube.com/watch?v=H0y8O7XJNAk>.

42 PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 156.

the development of this sort of sporting exception and its erosion in order to understand in what legal environment the cases described below were developed in order to create the terrain of the relation of EU law towards rules of IFs.

As far as Art. 102 TFEU is concerned, it accepts the existence of dominant firms, but asserts a power to control their conduct by forbidding the abuse of that dominance.<sup>43</sup> Breach of Art. 102 TFEU can be objectively justified. The defence of objective justification under Art. 102 is more related to the specific framework developed by the CJEU in *Wouters* and confirmed in the sporting case of *Meca-Medina and Majcen*, because a dominant undertaking that engages in an abusive but objectively justified and proportionate conduct will be, as a matter of technicality, considered as not having committed an abuse in the first place.<sup>44</sup>

In the above described evaluation of *Meca-Medina and Majcen* case Stephen Weatherill referred to Article 165 of the TFEU. As far as this article is concerned, it can be noted here, that this article shall be without any doubt often used as an attempt in the supportive argumentation to defend the inherency of the current system of the sports pyramid. According to Article 165 TFEU the EU shall contribute to the promotion of European sporting issues, while taking account of *the specific nature of sports*, its structures based on voluntary activity and its social and educational function. The Article 165 TFEU continues stating, that EU shall be aimed at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions'. It was already mentioned above, unlike closed leagues in North America, the European model of sports is based on sporting merit, vertical solidarity of payments from professional competitions to grassroots and the system of a uniform timetable of sports events and the rules. Nevertheless, the real effect and content of Art. 165 seems to be sidelined in the law next to the main stream of the various defences of IFs regulation in EU Law. The intent and effect of Article 165 is to place EU in a strictly subordi-

43 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 847.

44 PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 162.

nate role in the regulation of sports.<sup>45</sup> The real game in town is the EU's internal market.<sup>46</sup> Sports has come under the EU's shadow because its practices may conflict with core assumptions of the internal market.<sup>47</sup> That is why mechanisms of free movement of persons or EU competition law are the crucial determination for the evaluation of legality of actions of IFs according to EU law.

### 3.3 THE IMPORTANCE OF HORIZONTAL DIRECT EFFECT OF SOME EU LAWS

In summary, the direct effect means that unconditional and sufficiently clear provisions of the Treaty can be invoked in front of a national court. Implementation of EU Law into national legal order is not needed for the direct effect of EU Law. The ability of individuals to rely on EU law before their national courts greatly enhances its enforceability.<sup>48</sup> In other words, it is not a condition of the claim based on the direct effect of EU law to exhaust all legal remedies in front of national courts hierarchy within an EU member state in order to invoke EU law. The direct effect of EU law skips this long route. The CJEU then made it clear in *Walrave* and in the *Bosman* case described below as well, that the free movement provisions were not just of a "vertical" direct effect.<sup>49</sup> They do not only apply to the action of public authorities but extend likewise to rules of any other

45 WEATHERILL, S. The EU as a sports regulator. 7. 7. 2021. In: SSRN [online]. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3872699](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872699), p. 2.

46 Ibidem, p. 2.

47 Ibidem, p. 2.

48 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 392.

49 CRAIG, P. - DeBÚRCA, G. *EU Law, Text, Cases and Materials*. OUP. 3<sup>rd</sup> edition, 2003, p. 702.

nature aimed at regulating in a collective manner gainful employment and the provisions of services.<sup>50</sup> Individuals or clubs may use direct effect against IFs.

There is also an alternative connected to the direct effect mechanism that the national court requests CJEU for the preliminary ruling concerning the interpretation of European law. Based on the CJEU's interpretation then national courts decide the merit of the case. Often the published CJEU's ruling clearly identifies what the result of the case in front of a national court is going to be (surprisingly enough, the national courts' verdicts based on the CJEU's interpretation are rarely covered in the legal literature concerning the EU Law. Usually we discover only the Preliminary ruling result at the level of a CJEU's decision).

For those, who do not want to use the direct effect or cannot afford long legal battles, EU Law provides another route of its enforcement according to the Article 258 TFEU, where the European Commission may initiate infringement proceedings against the Member State, if this State is not respecting its duties arising from EU law. The Member State can be also liable under the Article 258 TFEU for the conduct of a private body, if it is subject to a sufficient degree of government control, and for the conduct of a nationalized industry.<sup>51</sup>

The dual system of enforcement of EU law (by the European Commission's infringement proceedings or by the direct effect) exists also in the area of EU competition law dealing with cartels and the abuse of dominant positions according to Articles 101 and 102 TFEU. Individuals may submit a complaint to the European Commission. Then by the action for annulment they may confront the decision of the European Commission in front of the General Court (and possibly the General Court's verdict can be reviewed by the CJEU on questions of law).<sup>52</sup>

50 C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECLI:EU:C:1974:140, para 17 and following paras.

51 WEATHERILL, S. - BEAUMONT, P. *EU Law*, p. 226.

52 See the roots of this system described *Ibidem*, p. 883, where Weatherill and Beaumont explained some advantages/disadvantages, which alternative is better, for example in competition law: 'The Commission's powers of



The above described EU system is different and unique compared to a complaint based on the European Convention on Human Rights (ECHR) submitted to the European Court of Human Rights (ECtHR) in Strasbourg. The exhaustion of remedies at the national level is a pre-condition to submit a case to the ECtHR and only Contracting State parties can be sued, not non-state actors like IFs.<sup>53</sup> The solution to confront non-state actors is at least possible indirectly. According to the established case-law the ECHR does not merely oblige the authorities of the Contracting States to respect the rights and freedoms embodied in it, but in addition requires them to secure the enjoyment of these rights and freedoms by preventing and remedying any breach thereof, and that, therefore the obligation to secure the effective exercise of Convention rights may involve positive obligations on the part of the State, even involving the adoption of measures in the sphere of the relations between individuals.<sup>54</sup> This approach was already demonstrated above by the *Pechstein* case and will be presented again below in some complaints of athletes concerning compulsory labor. Now, however, we shall return to the waters of EU law, where in 1995 in the Court of Justice of EU (CJEU) came arguably the most important sports law decision of all time, the *Bosman* case.<sup>55</sup>

investigation are so much greater than those available to the private litigant that successful identification of unlawful action may not be feasible at national level'.

53 See VAN DIJK, P. - VAN HOOFF, G. J. H. et al. *Theory and Practice of the European Convention on Human Rights*. Intersentia, Antwerpen-Oxford, 4<sup>th</sup> edition, 2006, p. 29.

54 Ibidem, p. 836.

55 SCHWAB, B. When We Know Better, We Do Better: Embedding the Human Rights of Players as Prerequisite to the Legitimacy of Lex Sportiva and Sport's Justice System. *Maryland Journal of International Law*. 2017, Vol. 32, No. 1, p. 23.



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# 4

**MODERN SLAVERY**

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## 4.1 AN EXPIRED PLAYER'S CONTRACT DOES NOT MEAN FREEDOM TO PLAY FOR ANOTHER CLUB?

In the *Bosman* case<sup>1</sup> CJEU decided, that the EU law of free movement of persons precluded payment of transfer, training or development fees at the *end-of-contract* of professional football players, nationals of one Member State of the EU, when moving to a club from another Member State of the EU. The freedom of private associations to adopt their rules cannot restrict the exercise of rights conferred on individuals by the (at that time) EC Treaty (now TFEU).<sup>2</sup> In other words players should not be restrained by an agreement between two clubs which is based on the transfer rules (the system adopted by an IF), that a fee shall be paid by the new club to the previous club as a condition of the transfer after the player's contract has expired.

The case pre-dates the above described CJEU's case of *Meca-Medina and Majcen* from 2006<sup>3</sup>, which established now a more precise scope for the so called sporting exception concerning the relation of sporting rules and economic activity for the purpose of proper application of EU law to sports. In the *Bosman* case in 1995 CJEU did have *the difficulty of severing the economic aspects from the sporting aspects of football* in order to determine if European law is applicable but in the end it brought professional football to the sphere of an economic activity because of

1 Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463.

2 *Ibidem*, para 81.

3 C-519/04 P *Meca-Medina and Majcen v Commission* case ECLI:EU: C:20006:492.

a prevailing commerce taking place in the football industry. Provisions on free movement of persons of EC Treaty (now TFEU) therefore were declared applicable by the CJEU to the transfer system restricting player's movement from the club located in one Member state of the EU to a new club located in the territory of another EU's Member state.

Facts of the *Bosman* case concerned the following scenario. J.M. Bosman's professional contract expired and he had to either accept an offer of a new contract from his club RC Liège (he refused this offer) or transfer to another club, conditioned by the payment of an excessive transfer fee to his previous club. This fee was approximately four times higher than what RC Liège had paid in obtaining him.<sup>4</sup> The concept of transfer fees is rooted in the so called transfer rules. Bosman himself said that 'if it hadn't been me, someone else would have stepped forward to question the system'.<sup>5</sup> So, how does this transfer system work? Beloff et al. explain the basis of the transfer rules in general: they "impose a scheme of player registration such that a player becomes registered with a particular club upon joining it. Registration confers the right to play and must relate to a single club at any one time. Any other club wishing to employ that player must pay the first club a transfer fee in order to purchase the player's registration."<sup>6</sup> Whenever a player moves between two clubs affiliated to different member associations, although we commonly

4 IRVING, J. G. Red Card: The Battle over European Football's Transfer System. *University of Miami Law Review*. 2002, Vol. 56, No. 3, p. 678. Under the association rules, the price was based on the annual income of the player multiplied by a figure between two and fourteen (depending on the players age), see MCHARDY, D. Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance Within the European Soccer Market? *Seton Hall Journal of Sports and Entertainment Law*. 2008, Vol. 18, No. 1, p. 125.

5 Here's Johnny (interview with J. M. Bosman). In: *Champions - UEFA Champions League Official Magazine*. April/May, 2005, p. 98. See also the timeline of the transfer system in football in the FIFA's report named *The Reform of the Transfer System 2017-2022*. [online]. Available at: <https://digitalhub.fifa.com/m/3763fd3a3b4cb319/original/Report-The-reform-of-the-Transfer-System.pdf>, pp. 12-16.

6 BELOFF, M. - KERR, T. - DEMETRIOU, M. - BELOFF, R. *Sports Law*, p. 98.

talk about a player being transferred, it would be more accurate to refer to the player's registration being transferred.<sup>7</sup> In football, a player's registration is certified by means of the International Transfer Certificate (ITC).<sup>8</sup> Players registered with a club affiliated to one member association may only be registered for a club affiliated to a different member association once the new club's member association receives an ITC from the former club's member association.<sup>9</sup> The transfer of ITC certifies that all requirements of the transfer system were fulfilled in relation to the former club (namely the transfer fee was paid).

Article 5 of Bosman's contract stipulated that his club RC Liège was entitled to withhold the player's registration certificate under any circumstances (a common term in most contracts between soccer clubs and players).<sup>10</sup> Despite that Bosman found a French club, which was willing to employ him, the clubs did not agree on the conditions of Bosman's transfer and the ITC was not released. Because Bosman could not transfer to the new club and had refused to sign a reduced deal with Liège, he was caught in limbo.<sup>11</sup> 'What people forget is that when I decided to press ahead with the case, I had no job and no means of income. Nothing', Bosman said in the interview.<sup>12</sup> He was suspended by RC Liège and could not exercise his profession for the entire season.<sup>13</sup> Such a restraint was only able to be made effective by the monopoly or controlling power exercised by the sports governing body, either alone or in combination with other controlling bodies within the sports hierarchy.<sup>14</sup>

7 2021 Commentary on FIFA RSTP, p. 361.

8 Ibidem.

9 Ibidem.

10 McHARDY, D. *Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance Within the European Soccer Market?* p. 125.

11 Ibidem.

12 *Here's Johnny*, p. 96.

13 Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463. Para 33.

14 FREEBURN, L. *Regulating International Sport, Power, Authority and Legitimacy*, p. 92.

## 4.2 TRANSFER RULES NOT INHERENT BUT THEY MAY EXIST IN AN AMENDED FORM

CJEU made clear, that the transfer rules must pursue a legitimate aim compatible with the Treaty and justified by pressing reasons of public interest, resp. application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose.<sup>15</sup> This is a well established principle of EU trade law that both the ends pursued and the means employed by restrictive measures must be justified.<sup>16</sup> Rules preventing market access, even if non-discriminatory rules such as transfer rules in *Bosman*, or training compensation in the below described case of *Bernard*, ‘affect the players’ opportunities for finding employment and the terms under which such employment is offered’ and therefore ‘directly affect players’ access to the employment market in other Member States’.<sup>17</sup> ‘No one wanted to hire me’, *Bosman* said about the restraints.<sup>18</sup> The football sector did not succeed in the *Bosman* case to convince the CJEU of the necessity of the below described aims.

The football federations wanted to justify the transfer rules in order to guarantee a reasonable competitive balance among the clubs in a league by preventing the concentration of all playing talent in a few large-market clubs.<sup>19</sup> Another defense of the transfer system was the objective to encourage small clubs to recruit and develop the training of young players. According to FIFA, small clubs would stop investing in players for fear that they would lose players to large market clubs without any type of compensation once the player was of contract age.<sup>20</sup>

15 Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463. Para 104.

16 WEATHERILL, S. *Collected Papers. European sports law*, p. 96.

17 PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 226, referring to paras 37 and 103 of the *Bosman* case.

18 *Here’s Johnny*, p. 96.

19 KÉSENNE, S. In: ANDREFF, W. – SZYMANSKI, S. *Handbook on the Economics of Sport*. Cheltenham/Northampton: Edward Elgar, 2006, p. 636.

20 EHLERT, A. *Education Fee System Feasibility Study*. IIHF, 2010, p. 58 (unpublished material, copy with the author).



The CJEU admitted, that in view of the considerable social importance of sporting activities and in particular football in the EU, the aims of maintaining a balance between the clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.<sup>21</sup> This was an example of CJEU's offer for the justification of specific sports regulations not based on the explicit text of the Treaty, which is similar to the approach in the *Cassis de Dijon* case described earlier in this book, in part 3. Nevertheless, the aims of the football sector failed the proportionality test under the circumstances. The CJEU ruled against the particular transfer system of which *Bosman* had fallen foul because it went too far to apply collectively enforced restraints to the contractual freedom even of players whose contracts had expired.<sup>22</sup>

The ratio of the *Bosman* case applies only to the rights of professionals to a cross-border move to another club in the EU. The *Bosman* case does not apply to transfers of players, which take place only within one Member State of EU or transfers of amateurs between non-professional clubs.<sup>23</sup> The case also does not apply to the ongoing professional

21 Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, ECLI: EU: C:1995:463. Para 106.

22 WEATHERILL, S. Never let a good fiasco go to waste why and how the governance of European football should be reformed after the demise of the Superleague. In: *ISLC Blog* [online]. 23. 4. 2021. Available at: <https://www.asser.nl/SportsLaw/Blog/post/never-let-a-good-fiasco-go-to-waste-why-and-how-the-governance-of-european-football-should-be-reformed-after-the-demise-of-the-superleague-by-stephen-weatherill>.

23 For example in the Czech ice-hockey parents often paid transfer fees themselves, literally to buy their own child to transfer to another club according to the wish of the child, because the new club was not able to afford the transfer fee payable to an old club. The Czech ice-hockey association plans package of reforms to change this. See Ombudsmanku znepokojila výše odstupného za přestupy dětí. Hokejový svaz se brání. In: *Sport.cz* [online] 5. 6. 2017. Available at: <https://www.sport.cz/clanek/hokej-ostatni-ombudsmanku-znepokojila-vyse-odstupneho-za-prestupy-deti-hokejovy-svaz-se-brani-890371>.

contracts and their termination. Therefore the *Bosman* case did not avoid a certain fragmentation of conditions of transfers at various levels of sports.<sup>24</sup>

### 4.3 CONTRACT STABILITY VS. THE FREEDOM TO MOVE

It was already mentioned that EU competition law complements the free movement provisions. The distortive effect on the wider market of the transfer system as a horizontal agreement between clubs strengthened by the involvement of football's governing bodies brings it within the scope of application to Article 101 (1) TFEU.<sup>25</sup> The European Commission decided to use the EU competition law after the *Bosman* case was decided and pushed football authorities to reform their transfer system. The transfer system was duly amended to apply only to players whose contract has *not* expired, and it lives on today in that slimmed down form.<sup>26</sup> The European Commission oversaw this process of the creation of new transfer rules which were called in its early version as The 2001 FIFA Regulations on the Status and Transfer of Players (RSTP) and they are still called as RSTP now, but regularly amended.<sup>27</sup> FIFA and the EU searched for “a balance between the players” fundamental right to free movement and stability of contracts together with the legit-

24 I already dealt with this issue elsewhere in HAMERNIK, P. The Fragmented Regulation of Transfer System in Sports – a Half Way to Slavery? *The Lawyer Quarterly*. 2021, Vol. 11, No. 4.

25 WEATHERILL, S. *Principles and Practice in EU Sports Law*, p. 222.

26 WEATHERILL, S. *Never let a good fiasco go to waste why and how the governance of European football should be reformed after the demise of the Superleague*.

27 In detail about creation of RSTP see DUVAL, A. *The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman*. pp. 82-116. The latest updated version of 2021 RSTP: In: *digitalhub.fifa.com* [online]. January 2021. Available at: <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-january-2021.pdf?cloudid=g1ohngu7qdbxyo7kc38e>.

imate objective of integrity of the sport and the stability of championships.”<sup>28</sup> It seems that things did not change very much since *Bosman*. The inflated transfer market and the possibility to receive significant financial rewards for the transfer of a player is driving unsavoury practices, which may lead to the exploitation of players.<sup>29</sup>

According to the RSTP, in light of the *Bosman* case ratio, a contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.<sup>30</sup> There is a narrow exception from this rule – a contract between a player and a club can be prematurely and unilaterally terminated before its end with *just cause* for some valid reason.<sup>31</sup> Such a termination of the contract with *just cause* is free from compensation or other sporting sanctions (suspension from the games).<sup>32</sup>

The most controversial category turned out to be the termination of a player’s ongoing (not expired) contract *without just cause* to join a new club. This unilateral breach of the contract by the player and leaving to a new club is only possible provided compensation is paid to his current club. The level of compensation can be determined in the contract itself by provisions on liquidated damages, resp. in buy-out clauses for example.<sup>33</sup> If the parties have not incorporated any specific provision regarding the compensation due in the event of the premature termination of the contract, compensation for the breach of contract will be calculated

28 Commission closes investigations into FIFA regulations on international football transfers. Statement IP/02/824 of 5 June 2002. In: *European Commission* [online]. 5. 6. 2002. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_02\\_824](https://ec.europa.eu/commission/presscorner/detail/en/IP_02_824).

29 KOS, D. *Technical Paper, FIEA Transfer system reform - analysis and recommendations*. Council of Europe. May 2021, p. 32.

30 Art. 13 RSTP. Although this is not always a completely free way to go as far as players up to a certain age (23 years of age) are concerned. On this ‘age discrimination’ see the text below in part 4.5 of this book about training compensations.

31 Commentary on FIFA RSTP, 2006 edition, p. 39.

32 Ibidem.

33 2021 Commentary on FIFA RSTP, p. 141 and 144.

on the basis of Article 17 of the RSTP.<sup>34</sup> This article provides objective criteria for a determination of the level of compensations.<sup>35</sup> One of the criteria is the remuneration and other benefits due to a player under the existing and the new contract. When Brazilian professional player Francelino Matuzalem prematurely terminated and breached his ongoing contract *without just cause* and left FC Shakhtar Donetsk in 2007 in order to sign a new contract with Spanish club Real Zaragoza, FIFA authorities, resp. CAS, ordered the player and his new club to pay EUR 11,858,934.00 with interest at 5% from the middle of 2007.

In determining such a high amount of compensation for a breach of contract arbitrators applied the “Positive Interest” (resp. expectation interest) approach according to which ‘the judging authority will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur’.<sup>36</sup> The market value of Matuzalem was determined by CAS according to his *new* contract (according to arbitrators existing contract may provide only

34 Ibidem, p. 145. The 2021 Commentary on FIFA RSTP also emphasizes that the same principle will apply if the compensation clause is not applicable on the grounds that it is not reciprocal or is disproportionate or abusive and thus it is deemed as invalid.

35 Compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period (about the definition of the Protected period see below).

36 CAS 2008/A/1519 *FC Shakhtar Donetsk v. Matuzalem Francelino da Silva & Real Zaragoza SAD & Fédération Internationale de Football Association (FIFA)* & CAS 2008/A/1520 *Matuzalem Francelino da Silva & Real Zaragoza SAD v. FC Shakhtar Donetsk & Fédération Internationale de Football Association (FIFA)*, award of 19 May 2009, para 40. The CAS version of this award published at: <https://jurisprudence.tas-cas.org/Shared%20Documents/1519,%201520.pdf#search=matuzalem>. This principle is according to arbitrators similar to the praetorian concept of *in integrum restitutio*.

a first indication of Matuzalem's value).<sup>37</sup> CAS also increased the compensation in light of the specificity of sport which is another criteria of Art. 17 of RSTP.<sup>38</sup> CAS in general paid special attention to the "interests of the whole football community".<sup>39</sup>

In the end for the *Matuzalem* case the CAS overruled its previous decision of *Webster*<sup>40</sup>. In the *Webster* case CAS arbitrators adopted a different view than in *Matuzalem*. CAS arbitrators adopted the approach that from an economic perspective, there was no reason to believe that a player's value on the market owes more to training by a club than to a player's own efforts, discipline and natural talent.<sup>41</sup> In *Webster* CAS preferred a predictable level of compensation equal to the remuneration remaining due to the player under the employment contract upon its date of termination (known as the residual value of the contract).<sup>42</sup> In other words the *Webster* case brought therefore the system in line with

37 Ibidem, para 46.

38 Additional damages were awarded in the light of this criteria because the club's legitimate expectation for a player's services was lost and the former club relied on Matuzalem to qualify into the UEFA Champions league.

39 Para 107.

40 CAS 2007/A/1298 *Wigan Athletic FC v/ Heart of Midlothian* & CAS 2007/A/1299 *Heart of Midlothian v/ Webster & Wigan Athletic FC* & CAS 2007/A/1300 *Webster v/ Heart of Midlothian*, award of 30 January 2008, Para 64. [online]. Available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/1298,%201299,%201300.pdf#search=Webster>.

41 The *Webster* case, para 142, in which arbitrators further elaborated that a club cannot simply assume it is the only source of success of a player without bringing any proof (which would be very difficult).

42 See para 152. Taking into account the Matuzalem's remuneration under a new contract simply provides an indication of another club's valuation and not how the former club valued a player's services for the existing contract period, see CZARNOTA, P. FIFA Transfer Rules and Unilateral Termination Without "Just Cause". *Berkeley Journal of Entertainment and Sports Law*. 2013, Vol. 2, No. 1, p. 43. In his article Czarnota also offers a solution for insufficient compensation if a player terminates the contract shortly prior to its expiration. On the other hand Weger argues clubs can claim all sorts of extra damages, see WEGER, F. *Webster, Matuzalem, De Sanctis. ... and the future*. *International Sports Law Journal*. 2011, No. 3-4, p. 55.

that intended by the European Commission.<sup>43</sup> After the *Matuzalem* case Pearson observed that CAS' role in the development of the transfer system has ultimately hampered EU attempts to liberalise the player market and could raise wider concerns about the ability of existing sports arbitration to effectively work within the gap of autonomy granted to governing bodies.<sup>44</sup> Moreover players may also serve a suspension from playing football if they terminate a contract in its early stages.<sup>45</sup> This early stage of contracts is known as the Protected period. With the introduction of the Protected Period, FIFA intended to protect a certain period of the contract by discouraging players and clubs from terminating the contract during this period.<sup>46</sup>

#### 4.4 EACH CASE IS SPECIAL: THE MARTIN HAŠEK SAGA AS AN EXAMPLE

Approaches in CAS case-law often differ as far as the level of compensation for the termination of a contract *without just cause* is concerned.<sup>47</sup> There seems to be no magic formula which would fit all cases of termina-

43 PEARSON, G. Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football Transfer System. *European Law Journal*. 2015, Vol. 21, No. 2, p. 228.

44 Ibidem, p. 229.

45 Ibidem, p. 221.

46 WEGER, F. *Webster, Matuzalem, De Sanctis. ... and the future*, p. 43. The protected period lasts the first three or two years of the contract, depending on the age of the player. In the case of a contract signed up to the player's 28<sup>th</sup> birthday, termination of the contract during the first three years results into the imposition of sporting sanctions as well as financial compensation. The same principle applies to contracts signed after the 28<sup>th</sup> birthday of the player, but if the contract is broken only during the first two years. It is also possible to terminate the contract due to a *sporting just cause*, when an "established professional" in the course of the season appeared in fewer than ten per cent of the official matches in which his club has been involved and in this case compensation may be awarded (2021 Commentary on FIFA RSTP, p. 43).

47 This is my impression based on the cases presented at ISLC's online Masterclass *Mastering the FIFA Transfer System*, 29-30 April 2021.

tion of contract without just cause in the CAS case-law.<sup>48</sup> Official FIFA's RSTP Commentary also explains that the various decisions all took new factors into account that had not been considered in previous judgments.<sup>49</sup> Each case should be dealt with on its own merits.<sup>50</sup> It must be therefore concluded that each case has its own characteristics. The case of Martin Hašek seems to be one of them. The professional player Martin Hašek signed a contract with Sparta Praha in 2019 until 2021 but he terminated the contract without a cause. The case was closely observed by the media because of the high compensation the club demanded for the loss of potential transfer fee of 800, 000 EUR. According to the club this fee could have been obtained according to the planned transfer of the player to another club, Maccabi Haifa, but negotiations at the end failed because of the following events. The relationship between the Sparta club and the player deteriorated prior to departure of the A team to a training camp in Spain. According to the club the player did not fulfill the conditions of the club's prescribed training plan and subsequently the player decided not to travel with the A-team to the above mentioned training camp. So the player was fined and sent to the B-team of the club. The club argued that physical tests revealed a decrease in his physical preparedness, not good enough for the players at the professional level. The player denied these allegations and was not happy with conditions provided at the B-team and so he later decided to unilaterally terminate his professional contract because according to the player, the club did not fulfill conditions of the professional contract. The B-team was considered as a degradation and loss of his value as a professional player because the B-team did not participate in the professional league. The player tried to find a new club but was not successful until December 2020 when he was employed by the German club Würzburger Kickers. The case reached CAS when the player appealed the decision of the

48 According to Weatherill there is now uncertainty associated with the size of the compensation that will be deemed payable, plus the fear that it may turn out to be high, acts as a stern deterrent to the player considering a unilateral breach of his contract WEATHERILL, S. *Principles and Practice in EU Sports Law*, p. 242.

49 2021 Commentary on FIFA RSTP, p. 165.

50 Ibidem.

competent arbitration authority of the Czech FA, which had awarded the club EUR 800, 000 marking his market value (equal to the lost potential transfer fee mentioned above) because the player terminated the contract without a just cause. The official website of Sparta informed, that CAS confirmed the termination of the contract by the player without a just cause, but CAS came to a different level of compensation - EUR 94 000.<sup>51</sup> The number of months remaining till the end of the contract with Sparta were multiplied by the level of the salary earned with the above mentioned German club Würzburger Kickers per month, minus the salary Sparta had saved during the time remaining to the original contract of the player with Sparta from the moment of the player's unilateral termination of the contract with Sparta.<sup>52</sup> Sparta's website also informed that CAS arbitrators decided that only the player shall be liable for the compensation, not the new German club.<sup>53</sup> This is an interesting approach because normally according to FIFA's RSTP and CAS jurisprudence, both the professional and his new club shall be strictly liable for the compensation in order to avoid any debate and difficulties of proof regarding the possible involvement of the new club in a player's decision to terminate his former contract.<sup>54</sup> It is true that this strict liability has been criticized because often the new club had nothing to do with the player's breach of the contract (which was also this case). Events of this dispute concerned a breach of contract at the national level and the case

51 Press release Rozhodnutí CAS ve věci Martin Hašek. [online] 28. 11. 2022. Available at: <https://sparta.cz/cs/clanek/rozhodnuti-cas-ve-veci-martin-hasek-40302>.

52 Ibidem.

53 Ibidem.

54 See 2021 Commentary on the FIFA RSTP explanation at p. 172 that the joint and several liability of the professional player and their new club is automatic. The new club will be responsible, together with the player, for paying compensation to the player's former club, regardless of any involvement in, or inducement to, the breach of contract. This means that the joint and several liability is not dependent on any fault, guilt, or negligence on the part of the new club.



was decided initially by Czech FA's arbitration bodies, where the Czech FA's transfer rules were applied but Czech rules do also contain the principle of strict liability for the compensation by the new club.<sup>55</sup>

#### 4.5 'TRAINING TAX': ANOTHER TIE THAT BINDS PLAYERS TO THEIR CLUBS?

Above we have dealt with the cases of two adult professional players: *Bosman* and *Matuzalem*. Both cases dealt with the aims of the transfer system to achieve contractual stability, resp. some competitive balance and integrity of the competitions. The *Bosman* case opened, among other issues, the transfer fee (compensations) paid at the altar of grassroots football in order to motivate small clubs to educate and train new young talents. This aim was already accepted as legitimate by the CJEU in para 106 of the *Bosman* decision. The new FIFA RSTP rules therefore developed this concept of training compensation, which must be paid to a player's training club when a player signs his first contract as a professional before the end of the season of his 23<sup>rd</sup> birthday and on each transfer of a professional until the end of the season of his 23<sup>rd</sup> birthday.<sup>56</sup> The aim fits the idea of supporting the grassroots within the sports pyramid but its consequences remain controversial. With these rules, young

55 See also the pending case concerning this issue of strict liability regarding the request for a preliminary ruling from the Cour d'appel de Mons (Belgium) lodged on 17 October 2022 - *FIFA v BZ* (C-650/22) asking if Articles 45 and 101 of the TFEU to be interpreted as precluding the principle that the player and the club wishing to employ him are jointly and severally liable in respect of the compensation due to the club whose contract with the player has been terminated without just cause, as stipulated in Article 17.2 of the RSTP, in conjunction with the sporting sanctions provided for in Article 17.4 of those regulations and the financial sanctions provided for in Article 17.1. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=269803&doclang=EN>.

56 DE WEGER, F. *The Jurisprudence of the FIFA Dispute Resolution Chamber*. The Hague: T.M.C. Asser Press, 2008, p. 117. More details about training compensations see Art.20, Annex 4 of RSTP.

players cannot really be free agents until their twenty-fourth birthday.<sup>57</sup> It does not matter if the transfer takes place during or at the end of the contract. This scenario covers situations when a professional is transferred between clubs of two different associations.<sup>58</sup>

The controversy of the training compensation returned to the CJEU's table in the *Bernard* case.<sup>59</sup> CJEU did confirm the aim of encouraging the education and training of players as legitimate. The CJEU affirmed hereby, the principle that training costs may be calculated on the basis of the so-called 'player factor', i.e. the number of players that need to be trained in order to produce a professional player.<sup>60</sup> According to the CJEU, clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at the local level in the recruitment and training of young players are of considerable importance for the social and educational function of sports.<sup>61</sup>

However in the *Bernard* case the individual scheme at stake, as in *Bosman*, failed to fulfill the conditions of justification according to the EU's free movement of persons law despite that the aim of the scheme was considered legitimate by CJEU. The facts of the *Bernard* case con-

57 DROLET, J. Ch. Extra Time: Are the New FIFA Transfer Rules Doomed? In: GARDINER, S. - PARRISH, R. - SIEKMANN, R. (eds). *EU, Sport, Law and Policy. Regulation. Re-regulation and Representation*. The Hague: T.M.C. Asser Press, 2009, p. 182.

58 RSTP, Annex 4, Article 2.

59 Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United FC*, ECLI:EU:C:210:143.

60 Noted by WEATHERILL, S. *Principles and Practice in EU Sports Law*. p. 220. Weatherill explained this is the correct understanding of the *Bernard* case (the CJEU did not spell that out clearly), resp. he argues that were the compensation confined exclusively to the costs of training players who succeed in developing a professional career, the inducement of clubs to invest in training would be small and uncertain.

61 Para 44.

cerned the French football player O. Bernard who was registered in Olympique Lyonnais club in the position of a *joueur espoir*. The club from Lyon provided the player training during the fixed contract. This type of contractual relationship existed in France at the time of the dispute and contracts were signed by players between 16–22 years of age. The French collective agreement (the Charter) in professional football set the condition that the first professional contract must be signed with the club, which had provided the player's training and at the same time this club also offered a professional contract to the player. If the player refused to accept the offer of the professional contract by his training club, he was liable to damages in case he would sign a professional contract with a different club. The player O. Bernard ignored the Charter and escaped to play for the Newcastle United club in the United Kingdom. So he was sued by the French club for damages.

The Charter contained no concrete scheme for compensating the club which had provided the training.<sup>62</sup> CJEU reasoned that rules according to which a '*joueur espoir*', at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which had trained him, are likely to discourage that player from exercising his right of free movement according to the TFEU. The Charter was not justified in the light of free movement of persons rights guaranteed by EU law because it was not actually capable of attaining the above listed objective to encourage the training of young players and be proportionate to it, taking due account of the costs borne by the clubs in training both, future professional players and those who will never play professionally. The Charter was characterised by the payment of damages to the club which provided the training and not by compensation for training. The amount of damages was unrelated to the real training costs incurred by the club.<sup>63</sup> Only the player was liable to the training club for damages and not the new club (employer) and the Charter did not specify how the damages were to be assessed.<sup>64</sup>

62 Para 5.

63 Para 46.

64 Important element noted by authors of LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, distinguishing it from facts in *Bosman* case at p. 1507 and 1534.

Unfortunately the events of the *Bernard* case took place before the above described post-*Bosman* FIFA RSTP regulations were created and that is why the CJEU did not analyze the FIFA RSTP in the *Bernard* case. The FIFA RSTP divides clubs into four categories, depending on their financial investment in their training of players, which is a very different system compared to the Charter in the *Bernard* case.<sup>65</sup> The relevant costs according to the FIFA RSTP regulations are those ‘that would have been incurred by the new club if it had trained the player itself’.<sup>66</sup> How much is going to be paid for training compensation by the new club depends on which of the four categories the club belongs to. In other words, the calculation is based on the time the player was trained by their former club, multiplied by the training costs assigned to the category of their new club.<sup>67</sup> The FIFA RSTP at least attempted to fulfill the requirements of EU law and modified separately in RSTP a special regime of training compensations which concern transfers between clubs from different national associations within EU/EEA.<sup>68</sup> FIFA also planned in the future

65 According to RSTP, Annex 4, Art. 2 (2) four categories of the training costs are established on a confederation basis for each category of clubs, as well as the categorisation of clubs for each association and are published on the FIFA website (www.FIFA.com). They are updated at the end of every calendar year.

66 Annex 4, Art. 5 (1) of RSTP. The training costs correspond to the amount needed to train one player for one year multiplied by an average “player factor”, which is the ratio of players who need to be trained to produce one professional player, see Annex 4, Art. 4 (1) of RSTP.

67 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 1806. At p. 1805 Lewis and Taylor explained that once the category of the club has been established, the training cost allocated to the confederation in which the club participates is multiplied by the number of years over which the club trained and developed the player (except situation according to Art. 5 (3) of Annex 4 to the RSTP, which ensures that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the calendar years of their 12<sup>th</sup> to 15<sup>th</sup> birthdays shall be based on the training and education costs of category 4 clubs).

68 According to Duval in RSTP “Special provisions for the EU/EEA = Fear of the *Olympique Lyonnais/Bernard* case”. Duval summarized that the RSTP provisions for the EU/EEA are “applicable to players (not only EU citizens) moving from one association to another inside EU/EEA territory,

to create new criteria for the levels of training compensations for the four categories reflecting the current financial situation of clubs in various countries but nothing concrete has been communicated yet to the national associations in this regard.<sup>69</sup>

It is interesting that CAS, compared to CJEU, looked at training compensations differently. On one hand CAS said that the system of training compensation is designed to promote solidarity within the world of football. The aim is to discourage clubs from hiring young players in some foreign countries only because the training costs in these countries are lower. Therefore, the clubs that have the resources to sign players from abroad must pay the foreign training clubs according to the costs of their own country. On the other hand in this way the clubs are rewarded for their work done in training young players, and not simply reimbursed for the actual costs incurred in cultivating youth teams. It follows that according to the CAS, training compensation appears to be a reward and an incentive rather than a refund.<sup>70</sup>

At the same time RSTP clarifies the relationship between training compensations and damages for a breach of contract *without just cause*: the obligation to pay training compensation is without prejudice to any obligation to pay compensation for breach of contract.<sup>71</sup> Hence, if a professional prematurely terminates their contract with their club *without just cause*, and thus becomes liable to pay compensation based on Article 17 of the RSTP (the mechanism described above in part 4.3 of this

resp. calculation is based on an average between the training costs of the two clubs (= closer to the real costs incurred). If the player moves from a higher to a lower category, the calculation shall be based on the training costs of the lower-category club” (A. Duval’s power-point presentation titled ‘Regulating the FIFA Transfer Market’ in relation to reflection of RSTP towards EU law’, ISLC’s online Masterclass Mastering the FIFA Transfer System, 29–30 April 2021).

69 Information received by the author at the Legislative Council of the Czech FA on May 16<sup>th</sup> 2023.

70 CAS 2015/A/4257. Available at: <https://jurisprudence.tas-cas.org/Shared%20Documents/4257.pdf>.

71 2021 Commentary on the FIFA RSTP, p. 286.

book), any subsequent move to a new club before the end of the calendar year in which they turn 23 years of age will entitle their training club to training compensation, provided all the other relevant criteria are met.<sup>72</sup>

For the sake of completeness, it needs to be stated that RSTP also provides solidarity payments. If a professional moves *during* the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the club(s) involved in his training and education over the years.<sup>73</sup> This solidarity contribution reflects the number of years (calculated pro rata if less than one year) he was registered with the relevant club(s) between the seasons of his 12<sup>th</sup> and 23<sup>rd</sup> birthdays. The solidarity mechanism is designed to strengthen the notion of solidarity within the football community (the above described training compensation is supposed to reimburse the investment made by clubs in training and devel-

72 Ibidem. The 2021 Commentary on the FIFA RSTP states that ‘the professional will be liable to pay the compensation for breach of contract, while their new club will be liable to pay the training compensation’ but according to other RSTP provisions the new club is also strictly liable together with the player for damages in case of a unilateral breach of contract – see Art. 17 (2) RSTP. The training compensation is not due if the former club terminates the player’s contract without just cause (without prejudice to the rights of the previous clubs). Training compensation is also not due if the player is transferred to a category 4 club or a professional reacquires amateur status on being transferred (see Annex 4, Article 2).

73 The solidarity mechanism only applies if a professional player moves before their contract expires (compared to the training compensation which can be payable if a professional player moves to another club at the end of his contract), see 2021 Commentary on the FIFA RSTP, p. 332. The same Commentary further explains that since the *Bosman* ruling, no transfer compensation will be due if a professional player is transferred at the end of their contract with their previous club except players aged until their 23 years of age concerning training compensation described above. Hence, the most basic precondition for applying the solidarity mechanism is that a professional player must move between two clubs affiliated to different member associations while they are still under contract (p. 335).

oping young players).<sup>74</sup> However, the 5% level is not payable to every relevant club; rather it represents the *maximum cumulative* solidarity payment that can become due in any transfer.<sup>75</sup> Compared to training compensation limited by age, according to the solidarity mechanism even if a professional player is transferred at the age of 34, for example, the clubs that trained that player will be entitled to a solidarity contribution provided all the associated conditions are met.<sup>76</sup>

## 4.6 THIRD PARTY OWNERSHIP OF PLAYERS

The Task Force of FIFA Football Stakeholders Committee is currently working on a transfer system reform.<sup>77</sup> The common denominator of the new initiatives is to ensure greater transparency, fairness and integrity in football transfers. The above described training and solidarity compensations do not work effectively and do not provide to the grassroots

74 2021 Commentary on the FIFA RSTP, p. 332, describing the structural differences between solidarity and training compensation systems.

75 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 1808. See Annexe 5 of RSTP.

76 2021 Commentary on FIFA RSTP, p. 332. Clubs are entitled to solidarity payments for the player's entire training and education between the ages of 12 and 23. RSTP Commentary further explains that: the only compensation which is not subject to the 5% solidarity contribution is training compensation. The training compensation may be payable together with the transfer fee if a player moves while still under contract. This is a consequence of the fact that training compensation is designed to allow a club that has trained and developed a player to recover its training costs if it is not benefitting directly from the player's services. With this aim in mind, it would not be appropriate to reduce the training compensation payment (p. 335).

77 An overview of the main achievements in relation to the reform of the transfer system from October 2017 - May 2021. In: *FIFA* [online]. Available at: <https://img.fifa.com/image/upload/vbykzozs9uhtlgzvf5aa.pdf>. The Council of Europe published in June 2021 the material by KOS, D. *Technical Paper, FIFA Transfer system reform*, which includes some general recommendations.

as expected.<sup>78</sup> According to Weatherill, the European model expects some vertical solidarity to support the grass roots by the elite level of competitions but this commitment to vertical solidarity may be only skin-deep in modern professional sports.<sup>79</sup>

Some clubs therefore focused on other sources of financing from third persons who are acquiring ownership of the players' economic rights. FIFA prohibits this practice.<sup>80</sup> In the mosaic of the transfer system, we therefore distinguish three types of transactions as explained by Lewis and Taylor: a) the employment contract between the club and the player, whereby the player agrees to play for the club; b) the registration right, being the right of the club to register the player with the relevant national federation and to have the player play for the club in the national federation's competitions; and c) the economic right, being the right to receive the proceeds from any transfer of the player's registration to another club.<sup>81</sup> How does the above mentioned third type of transaction work in practice? In summary according to Hock, a third party, other than the two clubs transferring the player from another, is investing into the interest in the future transfer payment. The third party owner can thus earn a return on its earlier investments if the player's transfer fee is higher than the valuation at the time the third party made the investment; the selling club, in its turn, can use the money from the third party owner to sign and develop players it could not afford other-

78 About the failure of RSTP in practice to compensate for education and training of players in small clubs see De MARCO, N. Transfers, agents and minors. In: ANDERSON, J. - PARRISH, R. - GARCÍA, B. (eds). *European Law and the governance of sport*. p. 394, citing KEA-CDES Study on the Economics and Legal Aspects of Transfers of Players, EAC/17/2011, January 2013.

79 WEATHERILL, S. *Principles and Practice in EU Sports Law*. pp. 133-4.

80 See Art. 18ter of RSTP and 2021 Commentary on FIFA RSTP concerning this issue at p. 208. [online]. Available at: <https://digitalhub.fifa.com/m/346c4da8d810fbea/original/Commentary-on-the-FIFA-Regulations-on-the-Status-and-Transfer-of-Players-Edition-2021.pdf>.

81 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 587.



wise.<sup>82</sup> Rather like record companies justifying the profits they make on recording artists, the investors would justify the return they made by reference to the many players whom they brought on who did not succeed.<sup>83</sup> Duval argues that TPO restrictions are legitimate since TPO as a practice is *per se* promoting contractual instability because it is logical, that TPO contracts would include various clauses strongly incentivizing clubs to sell their players".<sup>84</sup> This regulation by FIFA was confronted without success in front of the European Commission, CAS as well as at SFT and other tribunals.<sup>85</sup> SFT confirmed that TPO is legitimate and proportional. SFT emphasized that TPO practice creates many risks. Namely risks associated with the opacity of investors; risks of endangering the professional freedom and the rights of players; risk of conflicts of interest, even match-fixing/match-manipulation, as the same investor can have TPOs in several clubs in the same competition etc.<sup>86</sup> Interestingly, players should not be considered as the third party in contracts with their own clubs which means that they can agree on a share to invest to themselves and participate in the future transfer fee concerning their own transfer.<sup>87</sup>

82 HOCK, B. - GOMTSIAN, S. Private order building: the state in the role of the civil society and the case of FIFA. *The International Sports Law Journal*. 2018, Vol. 17, No. 3-4, p. 196.

83 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 587.

84 DUVAL, A. Unpacking Doyen's TPO Deals: In defence of the compatibility of FIFA's TPO ban with EU law. In: *Asser International Sports Law Blog* [online]. 18. 9. 2015. Available at: <https://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-in-defence-of-the-compatibility-of-fifa-s-tpo-ban-with-eu-law>.

85 See LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 511.

86 4A\_260/2017, Judgment of February 20, 2018, see Swiss International Arbitration Decisions. In: *swissarbitrationdecisions.com* [online]. 20. 2. 2018. Available at: [www.swissarbitrationdecisions.com/sites/default/files/20%20février%202018%204A%20260%202017.pdf](http://www.swissarbitrationdecisions.com/sites/default/files/20%20février%202018%204A%20260%202017.pdf).

87 See FIFA Circular no. 1679, dated July 1<sup>st</sup> 2019. [online]. Available at: <https://digitalhub.fifa.com/m/276108748f7c1231/original/yhpcqh0syjuzaccv1yrz-pdf.pdf>.



**5**

**DOES COMPULSORY LABOR  
EXIST IN THE PRIVATE SPHERE  
OF SPORTS?**



Some players have also attempted to invoke the prohibition of compulsory labor practices according to Article 4 of the European Convention of Human Rights (ECHR) in front of the European Court of Human Rights (ECtHR). In the case *X v. Netherlands*<sup>1</sup> a professional footballer complained that he was not free to leave his current club and transfer to play for another one. The obstacle was the transfer rule adopted by Dutch Football Association (KNVB) and the transfer fee demanded by the player's former club. In fact it would seem that the player was not really complaining of being forced to work for the first club, but about his inability to work for another employer in the same field.<sup>2</sup>

The case was heard by the European Commission of Human Rights, which existed at the time of the dispute and the ECtHR was created later (since the entry into force of Protocol No. 11 on November 1<sup>st</sup> 1998 a new permanent Court took the place of the former European Commission of Human Rights and the ECtHR).<sup>3</sup> In contrast with the direct effect of EU law, in this jurisdiction the complainants must exhaust remedies at the national level first and sue only the State. The European Commission for Human Rights accepted that the State's responsibility for the actions of KNVB is nevertheless possible: It could be argued that the responsibility of the Netherlands Government is engaged to the extent that it is its duty to ensure that the rules, adopted, it is true, by a private association, do not run contrary to the provisions of the Convention, in particular where the Netherlands courts have jurisdiction to examine their application.

1 Application no. 9322/81, *X v. Netherlands*.

2 GARDINER, S. at al. *Sports Law*. 3<sup>rd</sup> ed. Cavendish Publishing Ltd, p. 219.

3 See VAN DIJK, P. - VAN HOOFF, F. et al. *Theory and Practice of the European Convention*, p. 36

In the merit of the case it was decided that in the light of Article 4 of the ECHR the nature of the work was not oppressive and did not cause the victim unavoidable hardship. In order to understand the content of Article 4, in the *Van Der Mussele* case the nature of the compulsory labor was elaborated in the light of various factors, resp. whether there is “the menace of a penalty,” if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of the profession, that the service could not be treated as having been voluntarily accepted beforehand (for example a service unconnected with the profession in question).<sup>4</sup> The issue of another alternative available to the complainant is also relevant in order to evaluate if the labor is compulsory or not.<sup>5</sup>

4 6 E.H.R.R, 163, 23. 11. 1983. In this case an Antwerp-based pupil advocate complained that he was subject to compulsory labor when compelled by the Belgium Bar according to Belgium Judicial Code to provide legal services for free to those who were lacking financial resources for legal representation, arguing if he refused the service, he would be subject of the severe sanctions by the Bar. He blamed Belgium for breach of Article 4 of the ECHR. The Court viewed Belgium responsible for the liberal profession - Belgium Bar of lawyers concerning the exercise of legal aid to indigent people but on the merit of the case complainant was not successful. See in para 36 of the case the evaluation by the European Commission of Human Rights concerning the role of consent. See also *Rantsev v Cyprus and Russia*, complaint no. 25965/04, 7. 1. 2010, Para 277, where the Court reasoned: “[...] However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies.”

5 The question of an alternative available to the complainant was also explained in the *Van Der Mussele v Belgium* case - the pupil lawyer had a possibility to perform profitable services next to the activity in question he complained about. Similarly the US practice according to the 13<sup>th</sup> Amendment of the US Constitution: a player claimed breach of this Amendment by being tied to the club of Philadelphia Phillies, see *Flood v. Kuhn*, 316 F. Supp. 271

Facts of the case were similar to those in the above described *Bosman* case. For comparison Advocate-General Lenz did return to the case of *X. v Netherlands* in his opinion to the *Bosman* case and disagreed with it: 'Moreover, the European Human Rights Commission's reasoning that an infringement of rights could be excluded because the person concerned had by choosing that occupation accepted any restrictions which might be bound up therewith seems to me to be altogether questionable.'<sup>6</sup> Van Dijk at al. argue that among alternatives offered to the person in question should be termination of the contract coupled with the obligation to pay *reasonable* compensation.<sup>7</sup>

Recently another professional football player A. Mutu invoked Article 4 in front of ECtHR, but without any success as well.<sup>8</sup> He argued that according to the rules of FIFA, resp. English FA regulations, he was forced to resolve his dispute at CAS concerning a payment of damages after his dismissal from Chelsea football club. He also disputed sufficient independence of CAS. The facts of the case can be summarized as following: A. Mutu played for the Italian club AC Parma. This club 'sold' Mutu to Chelsea and the English club paid the transfer compensation according to FIFA RSTP regulations. Chelsea later terminated the employment contract with Mutu, because he failed a doping test (the presence of cocaine was detected in his body). Freeburn comments that the judgment of the ECtHR dismissed Mutu's Article 4 complaint with little explanation and it is not clear from the judgment what arguments were put before the

(S.D.N.Y.) 1970, 280-281. The judge in this case refused to apply the 13<sup>th</sup> Amendment (see WONG, G. *Essentials of Sports Law*. 4<sup>th</sup> edition. Santa Barbara: Praeger. 2010, p. 487).

6 Opinion of AG Lenz - the *Bosman* Case, delivered on 20 September 1995, para 211.

7 VAN DIJK, P. - VAN HOOFF, F. et al. *Theory and Practice of the European Convention on Human Rights*. The Hague: Martinus Nijhoff Publishers, 1998, p. 446.

8 Para 190 of *Mutu & Pechstein* Judgment of the ECtHR, October 2, 2018 in Applications no. 40575/10 and 67474/10.

court.<sup>9</sup> Also according to Jean Paul Costa, at the time when *Mutu v. Switzerland* N°40575/10 was pending, the complaint lodged by the applicant football player based on Article 4 was not communicated, which was a strong indication from the Court as to the remote probability of the applicability of Article 4 of ECHR.<sup>10</sup>

### 5.1 THE REAL CONTENT OF COMPULSORY LABOR COMPARED: THE CZECHOSLOVAK NATIONAL ICE-HOCKEY TEAM IMPRISONED IN URANIUM MINES

The above cases showed that claims against non-state entities of IFs based on compulsory labor were not accepted by the ECtHR, resp. by European Commission of Human Rights. Indeed, in history there were much more severe cases, which fulfill the content of the nature of compulsory labor. In sports there was certainly a very unique heartbreaking story of the Czechoslovakian ice-hockey team which deserves attention in this book for comparison with the above described cases, despite the unprecedented intrusion into the lives of athletes came from the side of the State instead of a private association.<sup>11</sup> The unlawful detention of the team took

9 FREEBURN, L. Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in *Pechstein* and *Mutu v. Switzerland*. *Marq. Sports. L. Rev.* 2023, Vol. 31, No. 2, p. 298. Available at: <https://scholarship.law.marquette.edu/sportslaw/vol31/iss2/6>. Freeburn however did emphasize that FIFA rules represented *de facto* power over Mutu, because Mutu was not member of FIFA, only the employee of Chelsea.

10 COSTA, J. P. *Legal opinion regarding the draft 3.0 revision of the World Anti-doping Code*, p. 16-17. [online]. Available at: <https://www.wada-ama.org/en/legal-opinions-and-articles-code>.

11 *Our case was unique, I am not aware of any such case in sports history*, said Augustin Bubník when I spoke to him before his presentation in the cinema of Plassy, West Bohemia, April 9<sup>th</sup> 2013, at the documentary film festival *Mezi dráty*, co-organized by Sdružení Propolis.



place in the same year that the ECHR was created but accession of Czechoslovakia to the document was realized many years later after 1989, thus the detained players could not use ECHR for their defense.

After World War II, the Czechoslovak national team won the World Championships in 1947 and 1949, as well as the silver medal at the 1948 Winter Olympics. According to Bukač, around that time the popularity of ice hockey in Czechoslovakia had grown thanks to its pro-Western image and tradition but this trend was not in line with the communist agenda in Czechoslovakia, whereby unified physical education and sport, directed by the State, had become the norm since 1948.<sup>12</sup> According to Ing. Bohumil Modrý (the respected goaltender, who died at the age of 47 after hard compulsory labor in uranium mines), the success of the Czechoslovak national team was “*salt in the eye of powerful officials*” and as a result the team was subjected to many “*indirect attacks*”.<sup>13</sup>

At the end of 1948 and following the Davos Spengler Cup in Switzerland, the team was approached by Czech exile representatives led by ice-hockey legend Josef Maleček, who persuaded players to emigrate.<sup>14</sup> The players took a vote on whether they should return to undemocratic Czechoslovakia. Their love for their home country prevailed. Government officials became aware of the voting in Davos. The government debated whether to allow or prevent the team to participate at the 1949 World Championships in Stockholm, but finally gave the green light. The team would go on to win that title and returned once again to Czechoslovakia.

In the following year, in March 1950, just a few hours before the players were due to depart for the London World Championships to

12 BUKAČ, L. – SUCHAN, F. *Moje hokejové století*, p. 33.

13 Ing. Modrý's request for release from the prison addressed to President of Czechoslovakia. Reprinted in ŠKUTINA, V. – BAKALÁŘ, R. *Ztracená léta, Příběh hokejového zločinu*. Pardubice: Helios, 1990, p. 127.

14 JOHN, R. Tenhle zápas nemohl vyhrát. K 100. výročí narození hokejového brankáře Bohumila Modrého. *Paměť a dějiny*. 2016/13, p. 6. Maleček and his colleagues made an unusual offer to players, that a new free Czechoslovakian team shall be established to participate in Western European leagues. The negotiations took place and the financing of this project turned out to be its weakness, which contributed to the players' hesitation to accept emigration.

defend the previous title of 1949 World champions, the figure skater Ája Vrzáňová refused to return to Czechoslovakia from the skating championship. It was another hit for the government's reputation.<sup>15</sup> After some long delays and hesitation, suspicious and concerned the ice-hockey team might do the same, State authorities this time made the decision that the team will not participate in the World Championship. State officials manufactured a tale in which Czechoslovakian journalists had been refused visas by UK authorities. The State then maintained that the adequate political response was to halt the national ice hockey team travelling to the UK.

Yet, the players found out that the visas story was a lie. Disappointed and angry, the team met in a small restaurant in Prague. Drunk and disorderly, players began to make it known what they thought of the regime and its officials. It would later become evident that the players had fallen into a trap directed by the secret police. “[...] Some players were provoked to expressions which they would never say under normal circumstances ... this became a signal to arrest the national team [...]”<sup>16</sup> The team members were taken directly into custody on March 13, 1950. Violent interrogations proceeded in order to compel the players into confessing to treason, allegedly due to a planned defection during the Spengler Cup in Davos, as well as espionage against the republic. The indictment was not submitted to the State court until October 2, 1950, months after the players had commenced their time in custody.

Government officials directed the trial. Dr. Lindner, one of the defence lawyers, recalled, “*the trial was prepared like an inscenation*”.<sup>17</sup> The State court focused mainly on the treason offence, the accusation that players wanted to conspire with foreign authorities and to disrupt

15 Some athletes defected individually earlier as well, for example Jaroslav Drobný, 1947 ice-hockey world champion and silver medalist of 1948 Winter Olympics, who became later a Wimbledon Champion in tennis.

16 Ing. Modrý's request for release from the prison, ŠKUTINA, V. - BAKALÁŘ, R. *Ztracená léta, Příběh hokejového zločinu*, p. 127.

17 See ŠKUTINA, V. - BAKALÁŘ, R. *Ztracená léta, Příběh hokejového zločinu*, pp. 97-8. Lawyers of the team knew some confessions were a result of beating and other inhumane treatment. They would try to convince the court that some elements characteristic of the crimes in question were missing.

the socialist republic. The punishment for such political offences could result in a life sentence or the death penalty, based on the Act on the Protection of the People's Democratic Republic (No. 231/1948 Coll.). Players pleaded their innocence, and as Augustin Bubník pointed out "*we were shocked what we were blamed for, we did nothing of these accusations and were scared by the death penalty*".<sup>18</sup> The trial was secret, therefore no information was provided to the public, including the press.<sup>19</sup> Players were unable to read the court file and the indictment in full until April 24, 1990.<sup>20</sup> The verdict was dramatic for the players. For example Bohumil Modrý was sentenced for 15 years; Augustin Bubník 14 years; Stanislav Konopásek 12 years; Václav Roziňák and Vladimír Kobranov 10 years and the rest of the team between 8 months to 6 years. Their appeal to the Highest Court was dismissed on December 22 1950. After initial imprisonment in frightening conditions the players were moved to the uranium mines of Jáchymov and other locations. They were also the victims of various physical abuses by the guards. After 5 years in labor camps the team members obtained amnesty by then President of Czechoslovakia Antonín Zápotocký. These players never returned to the national team and Czechoslovakian ice hockey lost its "Golden Generation". In 1968 the case was reopened. The Highest Court declared that the players were innocent. It reasoned that the State Court overstepped its powers.

As far as a comparative view with this case is concerned, claims of compulsory labor seem indeed exaggerated against non-state IFs despite that I do understand that often athletes may be in the position when they are restricted only because of some regulations made by the monopoly

18 Augustin Bubník during discussion in the cinema of Plasy, West Bohemia, April 9<sup>th</sup> 2013, at documentary film festival *Mezi dráty*, co-organized by Sdružení Propolis.

19 It is interesting, that political processes and exemplary punishments in Czechoslovakia were public and advertised by the propaganda, but not in this case, as it was explained in the research taken by BERANOVÁ, H. *Ztraceni i zatraceni. Mimosoudní perzekuce na pozadí procesu "Modrý a spol"*. Diplomová práce. Technická univerzita v Liberci. 2012, p. 88–89. The team literally disappeared.

20 ŠKUTINA, V. - BAKALÁŘ, R. *Ztracená léta, Příběh hokejového zločinu*, the final part of the book called *Instead of Epilog*.

of IFs. Athletes do have a choice to change their profession and leave the sports industry. The Czechoslovak ice-hockey players for the national team did not have this possibility.

One more additional observation can be made in relation to the topic of autonomy of sports dealt with in this book. It was not until 1949 that the term autonomy first appeared in the Olympic Charter, and with regard not to members of the IOC but to the national Olympic committees (NOCs) and it is therefore clear that what the IOC members had in mind was preserving independence and autonomy from governments, in particular those of Communist countries.<sup>21</sup> The excessive government interference against the Czechoslovak ice-hockey team took place during this era. It was also Pierre de Coubertain, who showed 'a profound aversion for any state intrusion in people's private lives'.<sup>22</sup> Besides the above described example of imprisonment of athletes, there are other examples of government interference 'IOC has noted with disapproval' in the 2006 IOC's Resolutions of the First Seminar on the Autonomy of the Olympic and Sports Movement.<sup>23</sup>

21 CHAPPELET, J. L. *The Autonomy of sport in Europe*, 2010, p. 12.

22 GEERAERT, A. The Autonomy of the Olympic and sport movement, In: CHATZIEFSTATHIOU D. - GARCÍA, B. - SÉGUIN, B. *Routledge Handbook of the Olympic and Paralympic Games*, 1<sup>st</sup> ed., 2020, p. 252, citing CLASTRES, P. Pierre de Coubertain: The Inventor of the Olympic tradition. In: *Global Sport Leaders: A Biographical Analysis of International Sport Management*. New York: Palgrave MacMillan, 1<sup>st</sup> ed. 2018.

23 See LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 11. See current Rule 27. 9. of the Olympic Charter: 'Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered.' Lewis and Taylor provide at pp. 11-12 of their above quoted book the list of cases when the IOC has exercised this power.

# 6

**THE CONFLICT OF INTEREST OF IFS  
AND SANCTIONS OF INELIGIBILITY FOR  
PARTICIPATION OF ATHLETES/CLUBS  
AT UNAUTHORIZED EVENTS OUTSIDE  
THE OFFICIAL CALENDAR OF IFS**



At the time of writing this book EU Law is entering into sports autonomy once again. The European Commission and EU courts evaluate the monopoly of IFs in terms of their conflict of interest in the commercial regulation of sports. IFs' exclusivity of governance of sports and business at the same time has a substantial effect on the position of athletes and clubs. IFs rely on the specificity of sport and its pyramid model in order to justify their position, resp. that this model is inherent for the organization of sports.

One of the pending cases at the time of writing this book is the case of *International Skating Union (ISU)*.<sup>1</sup> It is another legal battle for this organisation after the above described *Pechstein* judgment of the ECtHR. ISU exercises a regulatory activity as the sole IF recognized by the IOC for the disciplines of speed skating as well as figure skating. Two Dutch professional speed-skaters Mark Tuitert and Niels Kerstholt submitted their complaint to the European Commission, that ISU's eligibility rules restricted the possibilities for professional speed skaters to take part freely in international events organized by third parties. ISU eligibility rules deprived potential organizers of competing events of the services of the athletes which are necessary in order to organize those events. Third party organizers had to obtain prior authorization from the ISU if they wished skaters to take part in their events. If the authorization was not granted, ISU had the power to sanction athletes participating in the event by a lifetime ban. In 2016, the system of penalties imposed on skaters was relaxed in so far as it no longer provided for a single penalty of a lifetime ban for all infringements. New sanctions reflected the seriousness of the breach of the eligibility rules. ISU wanted to protect its legitimate and economic interests by the eligibility rules. The rules also aimed to

1 C-124/21 P *International Skating Union v. Commission*.

produce the financial revenues for the administration and development of sports disciplines in order to support ISU members and their skaters. Interestingly, despite that CAS was established by ISU rules as the body, where athletes/third party organizers must appeal, the two speed-skaters went directly to complain in front of the European Commission. They went by the same route as the swimmers in the *Meca-Medina and Majcen* case and confronted ISU regulations in the light of EU competition law.

The ISU was indeed considered by the European Commission as an association of undertakings and the eligibility rules constituted a decision by an association of undertakings within the meaning of EU competition (anti-trust) law – Article 101(1) of the TFEU. In order to determine the violation of Art. 101 TFEU, the relevant market had to be defined. In this case it was the worldwide market for the organization and commercial exploitation of speed-skating where the ISU was the organizer and regulator of the discipline, with authorization power of international competitions for that discipline. Besides eligibility rules sanctioning athletes, the ISU authorization rules imposed strict obligations on the third parties organisers. In order to obtain authorization by ISU, already six months prior to the planned event the third party organizers had to apply to ISU for authorization, plus to submit also a business plan and introduce measures taken against illegal betting. A solidarity payment had to be made for the regional development of sports disciplines governed by ISU.

According to ISU the rules are inherent and proportionate to the objectives of ISU. Namely in the name of the integrity and common standards of the competitions, including fair competition and the protection of ethical and physical integrity of the athletes. ISU rules aimed to avoid on-site betting on results because of the danger of illegal betting and corruption. ISU did not consider its rules to be under the sphere of the Art. 101 of the TFEU, nor breaching it. On the other hand the European Commission decided that the ISU rules were anti-competitive because their object was to restrict competition according to the Art. 101 TFEU.<sup>2</sup> ISU therefore confronted the Commission's decision in front of the EU's General Court by the action of annulment (Art. 263 of the TFEU).

2 Antitrust: International Skating Union's restrictive penalties on athletes who breach EU competition rules, European Commission – Press release,



According to the General Court the content of ISU rules did restrict competition by object. While ISU is both – an operator and the regulator of the relevant market, the ISU’s position was in a conflict of interest and the General Court referred to the CJEU’s case *MOTOE*<sup>3</sup>, where the entity of the Greek Automobile and Touring Club (ELPA), responsible for organization of motorsports in Greece, was authorized by Greek Law to issue authorizations to events of motorsports. *MOTOE*, an independent association in the same sport, did not obtain this authorization from ELPA. In other words, entities like ELPA or ISU have an obvious advantage over its competitors, because they organize and commercially operate the competitions on one hand and on the other hand they exist with the task of designating other third persons authorized to organize the same type of competitions and to determine the conditions under which they are organized. They may prevent access by other operators to the market concerned. The exercise of that regulatory function should therefore be made subject to restrictions, obligations and review in order to avoid a distortion of competition by favouring events which they organize. According to the General Court ISU had to make sure that the third parties organizers are not unduly restricted in their entry to the market of speed-skating events.

The General Court while looking at the case reminded that the restrictions arising from a decision by an association of undertakings escape the prohibition laid down in Article 101 TFEU if they satisfy two cumulative conditions. In the first place, the restriction must be inherent in the pursuit of legitimate objectives and, in the second place, it must be proportionate to those objectives, referring to the judgment of *Meca-Medina and Majcen v Commission*.<sup>4</sup> The above mentioned protection of the integrity of sports competitions is legitimate and objective in the light of wording of Art. 165 of the TFEU according to the General Court in order to avoid illegal betting and to achieve common standards of sports competitions. However, according to the General Court ISU rules went

Brussels, 8 December 2017. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1075](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075).

3 C-49/07*MOTOE*, EU:C:2008:376.

4 C-519/04 P *Meca-Medina and Majcen v. Commission*. EU:C:2006:492, para 42.

too far beyond what was necessary to achieve those objectives, being at the same time not proportionate to the objectives. As far as the pre-authorization system was concerned, there were obligations on third-party organizers to disclose information of a financial nature. In that regard although disclosure of a planned budget could be justified by the need to ensure that a third-party organizer is in a position to organize a competition, the ISU has not adduced any evidence to show that disclosure of the business plan as a whole is necessary in order to achieve such an objective. Secondly, the ISU has not provided any justification as to why the pre-authorization system provides for a longer and more restrictive time limit for the submission of a request for authorization in the case of an event organized by a third party. Thirdly, the requirements are not exhaustive and leave ISU the broad discretion to accept or reject an application for an open international competition. Fourthly, there are not specific time limits for dealing with requests for authorization, which could also give rise to arbitrary treatment of such requests. The General Court then observed that the average length of a skater's career is eight years. It must therefore be held that the penalties set out in the 2016 eligibility rules, even those with a fixed time limit of 5 to 10 years continue to be disproportionate in so far as they apply, inter alia, to participation in unauthorized third-party events. The case did not end in the forum of the General Court. It was appealed to the CJEU and the opinion of the Advocate General Rantos to this pending case was available at the time of writing this book.

Advocate General Rantos was however critical of the method of the General Court in how it approached the evaluation of ISU's eligibility and authorization rules in the light of mechanisms of EU competition (anti-trust) law. The General Court concluded that the ISU's rules create restriction of competition by object. The Advocate General proposed that the case be referred back to the General Court because of the error of law in the evaluation method. The Advocate General disagreed with the General Court's route of 'combined' or 'parallel' analysis of both - the existence of a restriction of competition by object and of the evaluation of an absence of objective justification, resp. proportionality of that restriction. The message of the Advocate General was to set aside the decision of the General Court as regards the finding of a restriction of competition

by object. The restriction of competition by object can survive the 101 TFEU scrutiny only by means of exemption under Art. 101 (3) TFEU (and not by the criteria of *Meca-Medina and Majcen/Wouters*) as the restriction of competition by object carries a conclusive presumption that Art. 101 (1) TFEU has been breached.<sup>5</sup> *Meca-Medina and Majcen* criteria bring the case outside the scope of Art. 101 TFEU if there is a legitimate objective found in the rules at stake. The Advocate General strictly guarded the situation when the rule was marked as a restriction by object – it cannot be justified in the *Meca-Medina* terms at the same time next to the criteria of Art. 101 (3) TFEU.<sup>6</sup> Nevertheless the Advocate General did not refuse the possibility that in the end it may be concluded, by a correct method of evaluation and some additional analysis, that ISU rules have indeed their effect on the restriction of competition within the meaning of Article 101(1) TFEU.<sup>7</sup> The result of the later re-investigation may be therefore the same as the one found by the General Court.

A possible referral back to the General Court will prolong the duration of this case and might give an ammunition to those who claim, that CAS is a better forum than a regular court because it offers a faster dispute resolution in the specific sporting environment. It is not any coincidence that CAS was also the issue in this case. Interestingly, the General Court (as well as the Advocate General) disagreed with the European Commission's view that the compulsory jurisdiction of CAS for athletes and third party organisers reinforced the anti-competitive character of ISU rules. The General Court saw CAS in a similar light as ECtHR or SFT (views of these tribunals at CAS were already explained in part 2.3 of this

5 See PIETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*, p. 262.

6 See the difference between the two ways of evaluation in part 3.2 of this book above.

7 According to WEATHERILL, S. – BEAUMONT, P. *EU Law*, p. 814, object or effect are disjunctive, either will suffice, although both are often present. Authors are referring to various cases, including the cult case C-56, 57/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* ECLI:EU:C:1966:41, 'there is no need to take account of the concrete effects of the agreement once it appears that it has as its object the prevention, restriction or distortion of competition'.

book). In other words, CAS is needed in international sports for its specialization and resolution of disputes quickly and economically, resp. it fits the objective of uniformity of international sports. The General Court emphasized that athletes still may claim damages for a breach of EU Law anyway or submit their claims to competent anti-trust authorities but this language is signaling a too complicated way to justice in practice as far as some form of a specific performance of IFs is concerned.

At the same time another issue is whether athletes may skip the compulsory jurisdiction of CAS because the General Court explained in paras 157–160 of its decision, that a CAS verdict is not binding anyway for national (EU) courts in relation to EU competition law. The two skaters did so in this case in a similar way as the swimmers in the *Meca-Medina and Majcen* case, who skipped the jurisdiction of SFT. They went directly to the EU Commission and via an action of annulment of the Commission's decision, the EU courts became competent for their claims.<sup>8</sup> We shall see if the CJEU shall make some clarification in relation to this issue.<sup>9</sup>

8 The General Court noticed this in para 160: Furthermore, it should be noted that skaters and third-party organisers who have been the subject of an ineligibility decision or a refusal to grant authorisation contrary to Article 101(1) TFEU may also lodge a complaint with a national competition authority or the Commission, *as the complainants have done in the present case*. In the event that the authority dealing with the case had to make a decision, that decision could further, if necessary, be reviewed before the EU Courts.

9 See a powerful analysis by A. Duval of the CAS arbitration in relation to ISU case in Zoom in ISU v Commission seminar. [online]. 20. 1. 2021. Available at: <https://www.youtube.com/watch?v=H0y8O7XJNAk>, including res judicata of CAS awards in the light of EU classics case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* in discussion with S. Weatherill. See also MAVROMATI, D. EU GC Decision (*ISU v. Commission*) – The CAS Arbitration rules do not interfere with the effectiveness of the EU judicial protection. Some thoughts on the EU General Court judgment of 16 December in the matter of the *International Skating Union (ISU) v. Commission* (T-93/18). [online]. 21. 12. 2020. Available at: <https://www.sportlegis.com/2020/12/21/judgment-of-the-eu-general-court-of-16-december-2020-international-skating-union-v-commission/>.

Another case which might contribute to the search for the limits of IFs' regulation within the sports autonomy is the *European Superleague* controversy.<sup>10</sup> Leading professional football clubs plan to establish a breakaway league governed by them separately from UEFA structures. The request for a preliminary ruling reached the CJEU from the Spanish national court via a Preliminary procedure according to Art. 267 of the TFEU. The national court asks, among others, whether Article 102 TFEU and 101 TFEU be interpreted as meaning that these articles prohibit FIFA and UEFA that their prior approval is required in order for a third-party entity to set up a new pan-European club competition. FIFA and UEFA have conferred on themselves the exclusive power to organize or give permission for international club competitions in Europe. The national court is concerned in particular about the fact, that there is no regulated procedure under the circumstances, based on objective, transparent and non-discriminatory criteria and there is the possible conflict of interests of FIFA and UEFA. The preliminary ruling question also includes the issue of FIFA/UEFA's sanctions imposed against clubs and players participating in the European Superleague, namely exclusion from FIFA/UEFA competitions or a prohibition of taking part in national team matches. UEFA and its national member associations are original owners of all of the rights emanating from competitions coming under their respective jurisdiction, thereby the preliminary ruling shall deal also with this point - whether this is depriving participating clubs and any other organiser of an alternative competition of the original ownership of those rights. In other words, if there is a sole responsibility for the marketing of those rights under FIFA/UEFA jurisdiction.<sup>11</sup>

10 C-333/21 *European Superleague Company SL v. UEFA, FIFA*.

11 The preliminary procedure questions are concerned also about the fact that production is substantially limited by FIFA/UEFA. The appearance on the market of products other than those offered by FIFA/UEFA is impeded, and innovation is restricted, since other formats and types are precluded, thereby eliminating potential competition on the market and limiting consumer choice. The preliminary ruling request seeks to clarify whether that restriction be covered by an objective justification which would permit the view that there is no abuse of a dominant position for the purposes of Article 102 TFEU.

According to Advocate General Rantos the conflict of interest of FIFA/UEFA is not anti-competitive as it is hard to imagine to separate both the economic and regulatory powers of these IFs. Advocate General Rantos proposed CJEU to answer the above listed questions that articles 101 and 102 of TFEU (as well as free movement provisions of TFEU) do not preclude FIFA and UEFA to subject the new European Superleague to their prior approval as long as the participating football clubs plan to remain within the structures of competitions of FIFA and UEFA or within national leagues. The reason is, among others, to safeguard the system of the sports pyramid, for example to retain solidarity payments to the grass roots, common standards, resp. integrity of the competitions, which are legitimate principles as defined in the Article 165 of the TFEU. Intervening States during the oral hearing in front of CJEU pleaded in favor of the protection of the current football pyramid but, surprisingly enough, they were not very well informed how the system of football works in practice, namely its financing.<sup>12</sup> The Advocate General also gave the green light to imposing sanctions against European Superleague clubs but at the same time did not agree with sanctions against the players who have no involvement in the project of this European Superleague. The Advocate General then stated that it is up to the referring national court to discover whether exclusive marketing rights possessed by UEFA/FIFA may benefit from the exemption of Art. 101 (3) TFEU or whether it can be objectively justified in the light of Art. 102 TFEU. At the same time he saw these articles not precluding exclusive marketing rights of FIFA/UEFA because this exclusivity is inherent in the pursuit of the legitimate objectives related to the specific nature of sports and fulfilled also the principle of proportionality. The above rules of FIFA and UEFA therefore were not defined within the scope of restriction of competition by object as the rules in *ISU* case concerning ISU's eligibility and authorization rules.

The *European Superleague* case caught more attention in the media than the *ISU* case, because football is a very popular sport but the *ISU* case seems to be more important. It concerned common athletes in a not-so-

12 States were rightly criticized for lack of information of this kind during Sport and EU 'Short-talk', 19. 12. 2022, in online debate of experts on the Advocate General's Opinion in *European Superleague* and *ISU* cases.

over-commercialized sport as football is.<sup>13</sup> Also the added value of the *ISU case* is that it includes the status of the Sports World Supreme Court (CAS) jurisdiction and the finality of its awards in the light of EU competition law. Weatherill warned that academics should not need juicy high-profile cases to work themselves into an intellectual frenzy, resp. a focus on the latest case can be only a very good way to make one's work of ephemeral value.<sup>14</sup> The *European Superleague* high profile case belongs to this category. Advocate General Rantos also repeated on couple of occasions, that the referring national court did not have the possibility of a full hearing with detailed arguments as it was already done in the *ISU case* in front of the European Commission and the General Court (where the case may return again if the CJEU will decide so). Both cases were pending at the time of writing this book.

13 As the General Court noted in para 74, that speed skating provides very limited income opportunities for the great majority of professional skaters and ISU organizes or controls the organization of the most important speed skating events in which skaters who practice that discipline must take part in order to make their living. It must be noted that the eligibility rules laid down in the exercise of the applicant's regulatory function provide for ineligibility penalties in the event that skaters take part in an unauthorized competition. Since skaters cannot miss the opportunity to take part in more important events organized by the ISU, it follows that third party organizers that intend to organize a speed skating event must obtain prior authorization from the applicant if they wish skaters to take part. See observation of the Advocate General Rantos of the clear differences existing in the 'power dynamic' between a sports federation and a single player (whether amateur or professional) and football clubs which include some of the most powerful in the world, given the public support, media exposure and financing from which they benefit (para 185).

14 WEATHERILL, S. *The Lex Sportiva and EU Law: The Academic Lawyer's Path Before and After Bosman*. In: DUVAL, A. - Van ROMPUY, B. (eds). *The Legacy of Bosman. Revisiting the Relationship between EU Law and Sport*. The Hague: T.M.C. Asser Press, p. 244.





# 7

**EU LAW OF SUBSIDIES:  
AN ADDITIONAL LIMIT  
TO THE POWER OF SPORTS  
GOVERNING BODIES**



Sports governing bodies are always willing recipients of public funding.<sup>1</sup> Subsidies for stadium construction generally relate to competitions to host major events such as the World Cup or the Olympic Games, which is a type of phenomenon relating to the monopoly powers of governing bodies.<sup>2</sup> In theory the right to protect Olympic symbols by national law, could be considered as an indirect subsidy.<sup>3</sup> Similarly, Weatherill described legislative reform in preparation of the 2012 Olympic Games in London in such a way that 'the sheer scope of some of the Act's provisions is breathtaking'.<sup>4</sup> In other words 'so too is the extent of the protection of commercial interests and the amount of resources of the state which are placed at the service of the IOC to secure enforcement of their interests. They go far beyond what any ordinary business would expect the state to offer it in support for its normal private law rights.'<sup>5</sup>

According to Article 107 (1) of the TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be

1 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 9.

2 ROSS, S. - SZYMANSKI, S. *Fans of the World Unite! A (Capitalist) Manifesto for Sports Consumers*, p. 195.

3 This conclusion was inspired by the language of the San Francisco Arts case in NOWAK, J. - ROTUNDA, R. *Constitutional Law*, 4<sup>th</sup> edition, West Publishing Co., St. Paul, Minn., 1991, p. 471, text stating that US Olympic Committee *received an indirect subsidy through its right to exclusive use of the word "Olympic" and Olympic symbols*.

4 WEATHERILL, S. *Principles and Practice in EU Sports Law*, p. 37.

5 *Ibidem*.

incompatible with the internal market. The state aid rules do not prevent public authorities from making investments that otherwise comply with market economy principles.<sup>6</sup> There must be a selective advantage conferred upon the undertaking concerned in order for Article 107(1) TFEU to apply.<sup>7</sup>

It is also possible to justify the State aid. In sports the European Commission has been applying Article 107 (3) (c) of the TFEU as one of the derogations to justify subsidies.<sup>8</sup> This provision provided some space for the specificity of sport.<sup>9</sup> The criteria in Article 107 TFEU demand a broad and potentially complex assessment of the factors surrounding the grant of State aid and while judicature is slow to interfere, it is the European Commission who enjoys a broad discretion in the application of State Aid rules.<sup>10</sup> The validity of a particular state aid scheme will have to be investigated on a case-by-case basis and it is difficult to

6 CLAYTON, M. – SEGURA CATALÁN, M. J. State Aid In Spanish Football - EU General Court Annuls European Commission Decision On Valencia CF & Elche CF. In: *LawInSport* [online] 17. 4. 2020. Available at: <https://www.lawinsport.com/topics/item/state-aid-in-spanish-football-eu-general-court-annuls-european-commission-decision-on-valencia-cf-elche-cf>.

7 Ibidem. Authors explain, that the legal test for determining whether such an advantage has been granted is referred to the Market Economy Operator Principle Test. According to this test, economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on their counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions.

8 SA.33754, para 27. Compatible with the TFEU is an aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

9 See case-law examples in GARCÍA, B. – VERMEERSCH, A. – WEATHERILL, S. A New horizon in European sports law: the application of the EU state aid rules meets the specific nature of sport. *ECJ*. 2017.

10 Summary from WEATHERILL, S. – BEAUMONT, P. *EU Law*. Penguin Books. 3<sup>rd</sup> edition. 1999, p. 1021. Authors also comment that the practice of the Commission may become unpredictable and intransparent.

extrapolate a general rule.<sup>11</sup> The European Commission adopted a similar *Bosman*-like balancing compatibility of the aid with the specifics of sports.<sup>12</sup> For example in sports infrastructure cases decided by the European Commission several interests were justified, namely “social return” of the aid<sup>13</sup>; “state responsibility towards the general public”<sup>14</sup> or when financing without the aid is unlikely to be obtained from the market because it is not economically viable.<sup>15</sup> In cases other than sports infrastructure we may observe that in professional football, when clubs were in financial difficulties, the European Commission applied the criteria laid down in the Guidelines on State aid for rescuing and restructuring non-financial undertakings (Hereinunder as The Guidelines).<sup>16</sup>

11 According to Sykes the state aid rules are ‘frequently incoherent’ and ‘it is arguably impossible to fashion general principles for identification, let alone measurement, of undesirable subsidies.’ See SYKES, O. *The Questionable Case for Subsidies Regulation: A Comparative Perspective*. Stanford Law and Economics Olin *Working Paper Series No. 380*. 2009, p. 474.

12 According to Weatherill EU trade Law is ‘porous’, see WEATHERILL, S. *Bosman changed everything: the Rise of EC Sports Law*. In: MADURO M. P. – AZOULAI L. (eds). *The Past and Future of EU Law – The Classics of EU Law revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*. Oxford-Portland: Hart Publishing, 2010, p. 484.

13 SA.37109, para 12.

14 SA.46530, para 46.

15 *Ibidem*, para 51. See also the Block Exemption Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty applicable to state aid in sport, namely its Art. 55, which refers to exemption thresholds in state aid directed to multifunctional recreational sports infrastructure.

16 SA.33584, para 74. In detail about state aid to Dutch and Spanish professional clubs according to the predecessor of the current (2014) version of the Guidelines from 2004, see Van MAREN, O. *How to bail out your local club: the application of the State aid rules to professional football clubs in financial difficulty*. *ISLJ*. 2017, vol. 16, Numbers 3–4. An undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term (Rule 20 of the Guidelines, edition 2014). Undertakings could bypass the application of the Guidelines by arguing that they are not in financial difficulty. This would not

The Guidelines have not been applied at IFs so far. However, the existence of the Guidelines is an important circumstance to be considered in the governance of the sports sector. Big professional clubs may have a significant influence at the IFs in some collective sports and the clubs have been beneficiaries of state aid frequently.<sup>17</sup> Moreover, as it has been seen above, there are attempts to form an alternative league of professional clubs to escape the classic pyramid model of sports, therefore big professional sports clubs may step in as powerful entities in the same position as IFs.<sup>18</sup>

It has to be admitted that the Guidelines are very difficult material when applied to sports. Their latest version, at the time of writing this book, originates in 2014 and it is planned to expire at the end of 2023.<sup>19</sup> This 2014 version of the Guidelines applies to three types of subsidies for undertakings in financial difficulties: restructuring aid, rescue aid and temporary restructuring support offering liquidity by loan and guarantees limited by time. Only the restructuring aid provides some freedom to decide which form aid can have, but an adequate contribution to the restructuring costs is required from the own resources of the beneficiary of the aid.<sup>20</sup> Moreover, States must provide some evidence that a subsidy prevents social hardship or addresses a market failure by restoring

allow them to escape the general conditions of state aid law, but at the same time, according to Sykes, EU rules on state aid are riddled with exceptions (SYKES, O. *The Questionable Case for Subsidies Regulation*, p. 489). See the above mentioned Art. 107 (3) (c) of the TFEU which could be a recourse for the beneficiary of the aid as well as a new Article 165 of TFEU on sport.

17 See Van MAREN, O. *How to bail out your local club: the application of the State aid rules to professional football clubs in financial difficulty*.

18 See PIJETLOVIC, K. *EU Sports Law and Breakaway Leagues in Football*.

19 See Communication from the Commission concerning the prolongation and the amendments of the Guidelines. [online]

8. 7. 2020. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2020.224.01.0002.01.ENG&toc=OJ:C:2020:224:FULL](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.224.01.0002.01.ENG&toc=OJ:C:2020:224:FULL).

20 Point 62 of the 2014 Guidelines. At least according to Point 64 of the 2014 Guidelines the Commission may accept a contribution that does not reach 50% of the restructuring costs, provided that the amount of that contribution remains significant. There is also lower threshold for small aid amounts and small beneficiaries in point 111 of the 2014 Guidelines.

the long-term viability of the undertaking. A State providing the subsidy may be asked by the European Commission to show that the unemployment rate in the region is persistently higher than the Union average and is accompanied by difficulty in creating new employment.

Guidelines also include other requirements unusual for sports. Entities requesting the aid must withdraw from activities, which are loss-making. The reality in sports is rather that clubs aim to win the championship and are very much ready to do it at a loss.<sup>21</sup> According to the Guidelines also return to undertaking's viability cannot be dependent on optimistic assumptions about external factors.<sup>22</sup> The irony is that sports is about uncertainty – who is going to win and often about luck. Also the search for sponsors and an increase in the number of spectators are factors difficult to control.<sup>23</sup> Clubs cannot predict well in advance injuries of players or anticipate the club's final ranking in sports competitions.<sup>24</sup> The Guidelines require adopting measures as well in order to limit the distortion of the market which restricts the capacity of the beneficiary of the aid in relation to those who did not obtain the aid, namely adopting a reduction of the number of players, an introduction of wage caps<sup>25</sup> and in one case such kind of measures resulted in the team's relegation to a lower division league.<sup>26</sup> This is why these measures have to be executed very carefully.<sup>27</sup>

21 As it was stated above, state aid could be accepted as legal if the private hypothetical market investor would provide the financial injection but these investors expect profit. In sports this does not seem to be a reality, see SA.41614 para 51.

22 Point 51 of the 2014 Guidelines.

23 SA.41617, para 78.

24 See on this issue SA.36387, para 110.

25 SA.40168, para 50.

26 SA.40168, para 51.

27 PETZOLD H. A. Rescue and Restructuring Guidelines – Thoughts and Comments on the Commission's Draft. *European State Aid Law Quarterly*. 2014, Vol. 14, No. 2, p. 293. Quigley refers to 2014 Guidelines, point 92, that measures to limit distortions of competition should not lead to deterioration in the structure of the market, resp. should not compromise the prospects of a beneficiary's return to viability and should not come at the expense

In other words, in general, the European Commission will consider State aid compatible with the internal market only if it satisfies each of the following criteria: contribution to a well-defined objective of common interest (in particular, this could be the case where the aid is necessary to correct disparities caused by market failures or to ensure economic and social cohesion); need for State intervention; appropriateness of the measure; incentive effect; proportionality of the aid; avoidance of undue negative effects on competition and trade between member states; and transparency of the aid.<sup>28</sup> On the other hand as it was stated already above, state aid litigations are hardly predicable.<sup>29</sup>

of consumers and competition (QUIGLEY, C. *European State Aid Law and Policy*. Oxford-Portland: Hart Publishing, 3<sup>rd</sup> edition, 2015, p. 419 and 421). Interestingly, when the European Commission was encouraging professional clubs within restructuring to adopt certain measures on the transfers of players, it did not consider the reality of FIFA Regulation on Status and Transfer of Players at all, including the issue of legality of a cap on wages (see para 50 of SA.40168). What is also not clear is if municipalities can be shareholders of professional clubs (ambiguous answer is in para 49, SA.41614).

28 See QUIGLEY, C. *European State Aid Law and Policy*, p. 409. Small amounts of state aid are exempted by the *De minimis* Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid but thresholds in this regulation are too small and of no practical use in professional sports, where large amounts of money are involved. See also regular updates concerning the situation of Covid at the official EU webpage or in academic literature, for example CLAYTON, M. – SEGURA CATALÁN, M. J. How ‘State Aid’ Rules Have Adapted For Covid-19 And What It Means For The Sports Sector. In: *LawInSport* [online]. 17. 3. 2021. Available at: <https://www.lawinsport.com/topics/item/how-state-aid-rules-have-adapted-for-covid-19-and-what-it-means-for-the-sports-sector>.

29 See the Spanish saga in CLAYTON, M. – SEGURA CATALÁN, M. J. *State Aid In Spanish Football – EU General Court Annuls European Commission Decision On Valencia CF & Elche CF*; The CJEU set aside the judgment of the General Court by which the Commission’s decision classifying as State aid the tax scheme of four Spanish professional football clubs had been annulled (C- 362/19 P *Commission v. Fútbol Club Barcelona*).





**THE FIGHT AGAINST DOPING:  
IF THE FOREST IS CUT DOWN,  
SPLINTERS ARE FLYING?<sup>1</sup>**

1 This saying is equal to 'there is no omelette without breaking the eggs'.



## 8.1 WADA GOALS AND GOVERNANCE

In 1999 the World Anti-doping agency (WADA) was created in order to harmonize inconsistent anti-doping rules. At the same time WADA aimed to create a more effective system of fighting against doping. WADA is a not-for-profit foundation according to Swiss law, composed and funded equally by the Sport Movement and Governments of the world, which makes it a unique partnership between sports movements and the public sector. WADA's system replaced the previous framework, where the IOC set the testing procedures and the list of prohibited substances for the Olympic Games.<sup>1</sup> According to Bukač initially IOC deserved credit for the global fight against doping, resp. doing this 'unpopular job' to investigate and sanction wrongdoers. He emphasized in his book how important it is to have a supreme international authority to fight doping and illustrated it by the following example. When he used to be the coach of the Czechoslovakian ice-hockey team, he thought about the dilemma, that his team trained with the same intensity as the Soviet team since the 1960s till 1980s, but it was not enough to achieve the same form on the ice as the Soviets did. They never seemed tired. He realised why, later. He met a drunk Soviet ice-hockey player with a golden medal on his neck in the corridor of the Hotel Sport in Moscow. The player told Bukač, "I am the strongest man in the world" and he invited Bukač to his room to have

1 See FOSCHI, J. A Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport. *Duke Journal of Comparative & International Law*. 2006, Vol. 16, No. 2, p. 460; STRAUBEL, M. Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do its Job Better. *Loyola University Chicago Law Journal*. 2005, Vol. 36, No. 4.

a drink. The player, while being intoxicated, looked for another drink and opened his suitcase which Bukač described as full of “ampules and syringe”. Bukač asked what this is. The player replied that his wife is a doctor and gave him this equipment in order “to become the strongest man”. When the player left to the bathroom, Bukač secretly took one of the samples in order to analyze it in Prague. “Of course the result was that it was anabolics”, Bukač concluded the story but at the same time he admitted it is difficult without evidence to convict others. It is up to some supreme authority to investigate this.<sup>2</sup> However in practice the IOC system was not effective enough. During the break between the Olympic Games, each IF controlled its own testing procedures, created its own prohibited substance list, and regulated the timing and frequency of testing.<sup>3</sup> In case of disputes, the case law of CAS was inconsistent, because rules of each IF were different.<sup>4</sup> Also potential conflicts of interests were everpresent.<sup>5</sup>

WADA was born during a desperate need of the new system to fight against doping and in a very explosive atmosphere. The Salt Lake City Olympics’ corruption scandal and the IOC’s President A. Samaranch’s provocative assertions about doping compelled States to react.<sup>6</sup> They insisted on the representation of States in some new anti-doping agency.<sup>7</sup>

2 BUKAČ, L. *Moje hokejové století*, pp. 217-218.

3 Ibidem.

4 See STRAUBEL, M. *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do its Job Better*, p. 1266.

5 According to Gandert, ‘when the same organization that sets policy wants to sell tickets, it has the incentive to look the other way in instances where it is beneficial for athletes to cheat.’ According to Gandert WADA does not have to worry about decisions that may ruin viewership interest in a sport by suspending top athletes. See GANDERT, D. *The WADA Code: Optimal on Paper*. *Maryland Journal of International Law*. 2017, Vol. 32. Issue 1, p. 294.

6 Samaranch said “doping (now) is everything that, firstly, is harmful to an athlete’s and, secondly, artificially augments his performance. If it’s just the second case, for me that’s not doping. If it’s the first case it is.”

See POUND, R. *The World Anti-Doping Agency: An Experiment in International Law*. *International Sports Law Review*. 2002, p. 54.

7 See ibidem.

According to States the IOC alone had failed to defend successfully its own idea on how to design an appropriate model to fight doping. The creation and structure of WADA was a compromise between IOC, IFs, States and other stakeholders in the Lausanne Conference on Doping in February 1999.<sup>8</sup> In a 38-member Foundation Board (the Board) of the Agency's highest policy-making body, there is an equal number of representatives from the Sport Movement and Governments of the world. At the time of the writing of this book WADA adopted some new further steps to improve its functioning to fulfill the goals of an effective and representative agency to fight doping.<sup>9</sup> Athletes' representation in WADA turned out to be crucial, because as it will be seen below in the following text, anti-doping rules are very strict towards athletes, namely those, who fail a doping test due to unintentional, inadvertent doping. "If we involve athletes in the decisionmaking process we take athletes along the journey".<sup>10</sup> The new Athletes Anti-Doping Rights Act of WADA established

8 In detail see READ, D. – SKINNER, J. – LOCK, D. – SMITH, A. *WADA, The World Anti-doping Agency. A Multi-level Legitimacy Analysis*. London/New York: Routledge, 2021, s. 45.

9 The Board delegates the management and running of the Agency to a 14-member Executive Committee (ExCo). There are four Independent Members of the ExCo, namely the President, Vice President, one Member proposed by the Sports Movement and one Member proposed by the Public Authorities. Independent Members are reviewed and vetted by WADA's Nominations Committee (The Nominations Committee was formed in September 2019, to ensure that the right people in terms of skills and independence serve in senior governance roles within WADA). The ten ordinary members of the ExCo include an equal number of representatives from the Sports Movement and Governments of the World. Members are appointed by their respective constituency groups. Among them, one seat is dedicated to an athlete representing the Sports Movement. In the Board four seats are dedicated to athletes representing the Sports Movement. See [www.wada-ama.org/en/who-we-are/governance](http://www.wada-ama.org/en/who-we-are/governance).

10 Ella Sabljak, member of the WADA Athletes Council, discussing athletes' voices during the session 'Meet WADA's new governing bodies The NADO Expert Advisory Group and the Athlete Council' at the 2023 Annual Symposium of WADA, Lausanne, March 14-15<sup>th</sup> March 2023. There are 20 members in the new Athletes Council elected by their fellow athletes: 5 athletes are appointed

also the office of Ombudsman where athletes get help when they do not feel like they can go to their National Anti-Doping Organisation for example.<sup>11</sup> Ombudsman will work independently of WADA and report to ExCo on the progress, trends and issues of interest.<sup>12</sup>

## 8.2 WIDE CRITERIA FOR INCLUDING SUBSTANCES AND METHODS ON THE PROHIBITED LIST OF DOPING

The word ‘doping’ describes the situation when an athlete uses substances or methods which are on WADA’s Prohibited List.<sup>13</sup> According to Art. 4.3 WADC a substance or method shall be considered for inclusion on the Prohibited List if WADA, in its sole discretion, determines that the substance or method meets any two of the following three criteria: 1) has the potential to enhance or enhances sport performance; 2) the Use of the substance or method represents an actual or potential health risk to the Athlete; 3) the Use of the substance or method violates the spirit of sport described in the introduction to the WADC.

As far as the first criteria is concerned, the enhancement of performance, certainly not all performance enhancing methods are banned, because not all performance enhancements risk health, or violate the

by IOC/Int. Paralympic Committees’ Athletes Commissions; 8 athletes are elected by Athletes Commissions of IFs and 7 athletes are appointed to fill diversity and skills gap. The Chair of the Athletes Committee sits as ExCo member. Two members also sit in the Foundation board and in other WADA standing committees, see <https://www.wada-ama.org/en/athletes-support-personnel/athlete-engagement/athlete-council>.

11 Anna Thorstenson’s presentation ‘The Athletes’ Anti-Doping Ombuds Supporting Athletes’, at 2023 Annual Symposium of WADA. More about the new office of Ombuds see <https://www.wada-ama.org/en/news/wada-announces-inaugural-athletes-anti-doping-ombuds>.

12 Olivier Niggli’s presentation during Opening Remarks by WADA President and Director General at 2023 Annual Symposium of WADA.

13 PETERSEN, T. *Doping in Sport. A Defence*. London/New York: Routledge, 2021, p. 6.

spirit of sport.<sup>14</sup> According to Czarnota, drawing a line between acceptable and unacceptable forms of performance enhancement is a vexed question.<sup>15</sup> The second criteria, the protection of health, is not easy to be determined as well. According to some authors “It smacks of paternalism”.<sup>16</sup> Also damaged health belongs to the reality of professional sports and fans do not read about this hidden aspect of sports in the newspapers.<sup>17</sup> For example, in ice-hockey current practice demands one hundred game performances per year, therefore two hundred and sixty

14 HARD, M. Caught in the net: Athletes' rights and the world anti-doping agency. *Southern California Interdisciplinary Law Journal*. 2010, Vol. 19, No. 3, p. 545.

15 CZARNOTA, P. The World anti-Doping Code, the Athlete's Duty of Utmost Caution and the Elimination of Cheating. *Marquette Sports Law Review*. 2012, Vol. 23, No. 1, p. 63. Czarnota refers to activities, which are not prohibited: the popular technique of altitude training, which involves high-altitude training to produce hypoxia, thereby enhancing sporting performances while at sea level, full-body swimsuits are worn to reduce water resistance, sprinters wear specialised spikes and Tiger Woods even underwent laser-eye surgery to correct near-sightedness.

16 See HARD, M. *Caught in the net: Athletes' rights and the world anti-doping agency*, p. 548, quoting W. M. Brown, Paternalism, Drugs, and the Nature of Sports. *Journal of philosophy of sport*. 1985, Vol. 14, No. 15. On the other hand Hard notes that some paternalistic regulation is justified when the use of doping is involuntary. Petersen describes a provocative alternative when some currently forbidden doping substances in limited and physician-controlled amounts may help to prevent the damage of the health of athletes. He refers to an example of the tough stage of Tour de France when the rider's bodies are drained of, e.g. red blood cells and testosterone. According to him in these situations it may promote health if the riders are given red blood cells artificially instead of letting them continue with a broken body. In other words the quicker the body recovers, the quicker the immune system is reset and the less vulnerable athletes will be to infections and other diseases (PETERSEN, T. *Doping in Sport. A Defence*, p. 17-18).

17 FRYČER, M. – BRABEC, L. *Můj divoký hokejový život*. Vyd. Luboš Brabec 2017, p. 289. Hard also refers to the evidence of injury of long-term effects of chronic training regimes on athletes' bodies.

five days remain for travel, rest, regeneration and training.<sup>18</sup> According to Hard's conclusion without compromise, if "sport" is "health," then it should follow that all things unhealthy are the antithesis of "sport" and should be proscribed.<sup>19</sup> The third criteria – the spirit of sport – is probably the most controversial one. Along with the above described IOC's decision to compromise at Lausanne, the creation of WADA ensured that the spirit of sport and Olympism were privileged within anti-doping regulation to protect the image of sports.<sup>20</sup> Petersen argues that it seems contradictory and highly problematic that WADA allows the principle of the spirit of sport to serve as both, a fundamental rationale for its entire perspective on doping policy and as one out of three equal principles.<sup>21</sup> According to Hard, the first question asked should be: does this substance enhance performance? If the answer is no, then it should not be considered.<sup>22</sup>

Inside the sports community, stakeholders are consulted each year and asked for their opinion concerning the preparation of the draft of the revised Prohibited List.<sup>23</sup> It is important to participate in this survey

18 BUKAČ, L. *Moje hokejové století*, p. 219.

19 HARD, M. *Caught in the net: Athletes' rights and the world anti-doping agency*, p. 546.

20 READ, D. – SKINNER, J. – LOCK, D. – SMITH, A. *WADA, The World Anti-doping Agency. A Multi-level Legitimacy Analysis*, p. 179.

21 PETERSEN, T. *Doping in Sport. A Defence*, p. 31. According to the introduction to the WADC, the spirit of sport is the essence of Olympism and is reflected in the values we find in and through sport, including: Health; Ethics, fair play and honesty; Athletes' rights as set forth in the Code; Excellence in performance; Character and Education; Fun and joy; Teamwork; Dedication and commitment; Respect for rules and laws; Respect for self and other Participants; Courage; Community and solidarity.

22 HARD, M. *Caught in the net: Athletes' rights and the world anti-doping agency*, p. 562. Hard notes at p. 546 that potentially anything that compromises the *spirit of sport* could compromise one of the two other criteria – protection of health and enhancement of performance.

23 Presentation of The 2023 Prohibited List Behind the scenes by Audrey Kinahan, List Expert Advisory Group of WADA at 2023 Annual Symposium of WADA, Lausanne, March 14–15<sup>th</sup> March 2023. According to Audrey Kinahan stakeholders comments are discussed in detail, "I can assure you", she said to



because prohibited substances and methods on the Prohibited List are according to Art. 4.3.3.WADC final and shall not be subject to any challenge by an athlete or other person including, but not limited to, any challenge based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

### 8.3 THE CONTROVERSIAL PRINCIPLE OF STRICT LIABILITY

The following part of the book in relation to doping shall present the strict liability principle establishing sanctions based on Art. 2.1 of the WADC – the offence of presence of a prohibited substance or its metabolites or markers in an athlete’s sample. According to this article it is the athletes’ personal duty to ensure that no prohibited substance enters their bodies, resp. they are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1 of WADC.<sup>24</sup> Gaby Ahrens from the WADA Athlete Council noted that athletes come to the Athlete Council members with all sorts of questions. Gaby Ahrens appreciated when Athletes Council representatives are involved in discussions concerning the process of anti-doping rules because it is important that athletes know why decisions are taken, the way they were taken and it is then a lot easier to understand the idea behind a policy or idea behind regulations and explain it to the athletes in that regard and also to ensure that the perspective of the athlete is taken into consideration.<sup>25</sup> Indeed the rules of

the audience in the auditorium.

24 WADC includes other doping offences as defined in articles of WADC which are not covered in this book, namely articles 2.2–2.3 and 2.5–2.11. of WADC (whereabouts failures by athletes according to Art. 2.4 of WADC shall be also discussed in this book).

25 Discussion during session named ‘A fine balance: privacy in anti-doping’ at 2023 Annual Symposium of WADA, Lausanne, March 14–15<sup>th</sup> March 2023.

antidoping are very complex and athletes may easily get caught into the net if they use some contaminated product inadvertently and not with intention for example. The strict liability violation (presence or use of a prohibited substance) is presumed to have been the fault of the athlete, unless the contrary is proven.<sup>26</sup>

If the violation of Art. 2.1 of WADC was not intentional, the athlete may at least argue, that the sanction may be eliminated completely because the offence occurred without his/her fault or negligence. The definition of this *no fault or negligence* means that a person did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule.<sup>27</sup> If an athlete does not succeed with the above

26 LEWIS, A. - TAYLOR, J. *Sport: Law and Practice*, p. 909.

27 Besides this definition of *no fault or negligence*, WADC also provides the definition of *fault*. Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an athlete's or other person's degree of fault include, for example, the athlete's or other person's experience, whether the athlete or other person is a Protected person (for a definition of this Protected person see below at the end of this footnote), special considerations such as impairment, the degree of risk that should have been perceived by the athlete and the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk. In assessing the athlete's or other person's degree of fault, the circumstances considered must be specific and relevant to explain the athlete's or other person's departure from the expected standard of behavior. The WADA Code also defines in the Appendix I the above mentioned Protected person - an Athlete or other natural person who at the time of the anti-doping rule violation: i) has not reached the age of sixteen years; ii) has not reached the age of eighteen years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation.

argument, he or she may argue according to Art. 10.6 of the WADC, that sanction 'should be materially reduced, because he/she bears *no significant fault or negligence* for the violation.<sup>28</sup>

Therefore, for purposes of determining objectively, whether or not the athlete complied with their duty of 'utmost caution', the athlete is fixed not only with their own acts and omissions but also the acts and omissions of their friends, relatives, coaches, doctors and other members of his entourage to whom they delegated any part of their anti-doping responsibilities.<sup>29</sup> In other words 'the question is not whether the athlete intended to cheat, but rather (since clean sport is the aim) how far the athlete departed from the standard of care imposed on him by the WADC to stay clean of doping substances'.<sup>30</sup>

CAS also in its jurisprudence has explained the principle of strict liability in doping: "It appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for the lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those

28 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 909. No significant fault/negligence in the WADC means that the athlete or other person's establishing that any fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected person or Recreational athlete, for any violation of Article 2.1, the athlete must also establish how the prohibited substance entered the athlete's system (about this condition see below part 8.6 of this book).

29 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 971.

30 *Ibidem*, p. 911.

run on modest budgets – in their fight against doping”.<sup>31</sup> An athlete is undoubtedly in a better position than a sports federation to explain why a specific substance was detected in his or her body.<sup>32</sup>

## 8.4 WHO IS CHEATING WITH INTENT?

According to Art. 10.2.3 WADC the term “intentional” is meant to identify those athletes or other persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The term intentional is very broad. Indeed, according to Art. 26.3 the WADC shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments. This interpretation of the word intentional fits the originality of the anti-doping mosaic. Moreover, any athlete committing an anti-doping rule violation with *dolus eventualis* also acts intentionally.<sup>33</sup>

31 CAS 94/129, *USA Shooting&Q./UIT*, 23. 5. 1995, para 15, published in: REEB, M. *Recueil des sentences du TAS/Digest of CAS Awards 1986-1998*. Berne: Editions Staempfli, 1998, p. 193.

32 See KAUFMANN-KOHLER, G. – RIGOZZI, A. – MALINVERNI, G. Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code. *International Sports Law Review*. 2003, Issue 3, p. 59, where authors further explain that in this regard, it should be emphasized that sports federations are private bodies that lack the powers of coercion necessary to undertake the type of investigation required to discharge such a burden. From this point of view it is clear that the presumption of fault and resulting reversal in the burden of proof is not only appropriate but also essential in order to pursue an efficient anti-doping policy.

33 HAAS, U. The WADA Code 2015: The Most Relevant Changes – the View of the Practitioner, p. 43. See the case of *Querimaj v IWF*, CAS 2012/A/2822, para 8.23 for explanation of this approach by CAS.

## 8.5 SANCTIONING

The starting point is a fixed ban of four years under Art. 10.2.1 of WADC (if the panel is satisfied that the violation was intentional) or two years under Art. 10.2.2 (if the panel is satisfied that the violation was not intentional), but if the violation was not intentional the athlete is also given the opportunity to establish that the two-year ban should be eliminated entirely, because he bears no fault or negligence for the violation, or that it should be materially reduced, because he bears no significant fault or negligence for the violation.<sup>34</sup>

The question whether a substance detected in a sample is ‘Specified’ or not has always been important in relation to the imposition of sanctions.<sup>35</sup> Specified Substances and Methods are more likely to have been consumed or used by an athlete for a purpose other than the enhancement of sports performance.<sup>36</sup> Punishment is therefore not so severe when Specified Substances and Methods are concerned and at the same time the regime of burdens of proof differ on the side of an athlete and the Anti-Doping Organisation. In other words, the violation is presumed to be intentional if the substance in question is not a Specified substance, and therefore a ban of four years will apply unless the athlete or other person rebuts the presumption by persuading the panel that the violation was not intentional (in which case the ban would go down to two years).<sup>37</sup> The standard of proof on the side of an athlete will be the balance of probabilities. On the other hand, if the violation involves a Specified Substance, it is presumed to be unintentional, and therefore a two year ban will apply unless the Anti-Doping Organisation proves that the violation was intentional (in which case it would go up to four years).<sup>38</sup> The standard of proof on the side of ADO is comfortable

34 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 909.

35 DAVID, P. *A Guide to the World Anti-Doping Code. The Fight for the Spirit of Sport*. 3<sup>rd</sup> edition. Cambridge University Press, 2017, p. 99.

36 Art. 4. 2. 2 WADC.

37 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 915.

38 *Ibidem*, p. 915.

satisfaction.<sup>39</sup> Nevertheless, according to Comment to Article 4.2.2 of the WADA Code, the Specified Substances and Specified Methods identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping Substances or Methods.<sup>40</sup>

Further, according to Art. 10.2.3 of the WADC an anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which *is only prohibited in-competition* shall be rebuttably presumed to

39 RIGOZZI, A. – WISNOCKI, E. – VIRET, M. Does the World Anti-Doping Code Revision Live up to its Promises? A Preliminary Survey of the Main Changes in the Final Draft of the 2015 WADA Code. In: *Jusletter*. 11. 11. 2013, p. 20.

40 CAS attempted to develop some criteria on how to determine reductions of sanctions in case of specific substances use: a normal degree of fault includes the sanction of a ban over 12 months and up to 24 months, with a standard normal degree leading to an 18-month period of ineligibility. A light degree of fault covers 0–12 months with a standard light degree leading to a 6-month period of ineligibility (see *Errani v ITF*, CAS 2017/A/5301, para 194–95). These guidelines have origin in the *Cilic* case (*Cilic v ITF* CAS 2013/A/3327), which consisted of three categories of fault instead of two but this was because of different wording of relevant WADC provisions at that time. Arbitrators in *Cilic* case stated that the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault (para 69). Then in para 71 they clarified this in order to determine into which category of fault a particular case might fall. According to them it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The Panel suggested that the objective element should be foremost in determining into which of the three relevant categories a particular case falls (para 72). The subjective element can then be used to move a particular athlete up or down within that category (para 73). Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however (para 74). For a similar view to evaluate fault in relation to non-specified substances see *FIS v Johaug and Norwegian Olymp. and Paralymp. Committee and Confederation of Sports* CAS/2017/A/5015 a 5110, para 169.

be not “intentional” if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance *was used out-of-competition*. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which *is only prohibited in-competition* shall not be considered “intentional” if the substance *is not* a Specified Substance and the Athlete can establish that the Prohibited Substance *was used out-of-competition in a context unrelated to sport performance*.<sup>41</sup>

## 8.6 BURDEN OF ESTABLISHING AN ORIGIN OF PROHIBITED SUBSTANCE BY ATHLETES

When athletes argue that the doping offence occurred without their fault/negligence or significant fault/negligence, ‘it is their duty first to show, how the substance got into their body in order to evaluate their degree of fault. According to CAS jurisprudence this precondition is important and necessary otherwise an athlete’s degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up.’<sup>42</sup> For example a Czech volleyball player asserted that the prohibited Specified substance of morphine found in his body came most probably from his favorite pasta meals with uncooked poppy seeds. Unfortunately the player did not show on the balance of probabilities that the morphine concentration in the athlete’s test sample was a “possible” or “likely”

41 The time-limit when the competition starts, is set up at 23:59 prior to the day of competition, which is a very debatable time-limit as discussed at the conference *Anti-Doping Law 2021, Dealing with Substance of Abuse cases*, organized by LawInSport, 15.-16. 6. 2021.

42 Arbitration CAS 2006/A/1130 *World Anti-Doping Agency (WADA) v. Darko Stanic & Swiss Olympic*, award of 4 January 2007, para 14 (at the same time CAS said that such speculation would undermine the strict liability rules underlying the Swiss Olympic’s doping Statute and the World Anti-Doping Code, thereby defeating their purpose). The requirement to present the origin of the banned substance by the athlete is hidden in the Appendix no. 1 to WADC, p. 172, and it is easily overlooked.

consequence of the consumption of the meal.<sup>43</sup> The only convincing evidence was that it was not intentional doping, therefore a 4 years of ineligibility sanction, previously issued by the Disciplinary commission of the Czech volleyball association, was replaced by a two years of ineligibility by the Arbitration Commission of the Czech National Sports Agency (now National Arbitration Court for Sport). The final sanction was not below two years of ineligibility because it was impossible to determine the potential level of fault – either no fault or no significant fault (or negligence) of the player.<sup>44</sup> The requirement of how the prohibited substance entered the athlete’s system does not apply to Protected persons or Recreational athletes. At the same time it is not a condition to establish the source of the prohibited substance when evaluating whether the violation was intentional or not.<sup>45</sup>

43 See also another ‘poppy’ case *Drug Free Sport New Zealand v. Graham O’Grady*, New Zealand Sports Tribunal, 21. 3. 2011, para 14–15: on the scientific evidence that the morphine concentration in the athlete’s test samples was a “possible” or “likely” consequence of the consumption of poppy seed bread which he had described in his written brief of evidence, however, that was not the end of the enquiry. While the scientific evidence establishes the possibility of the contamination arising from the poppy seed consumption, the Tribunal still has to be satisfied, on a balance of probabilities that the source of the morphine concentration was more likely than not that consumption and, if so satisfied, that Mr. O’Grady could not reasonably have known or suspected that outcome.

44 Hypothetic version of the source in athlete’s body is not enough to determine fault, see *La Barbera v IWAS*, CAS 2010/A/227, para 4.26. The award of the Arbitration Commission in the Czech volleyball case (21. 1. 2022, NSA-0163/2021/K) was not published, copy available with the author of this book, who was one of the arbitrators in this case.

45 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 921: Whereas WADC makes proof of source an express requirement in the context of pleas of no (or no significant) fault or negligence, it does not do so in the context of Art. 10. 2. 3. pleas of lack of intent. Authors refer to the explanation provided by RIGOZZI, A. – HAAS, U. – WISNOCKI, E. – VIRET, M. *Breaking down the process for determining a basic sanction under the 2015 World-Anti-Doping Code*, at pp. 27–28: ‘if the panel accepts that the Athlete did not intend to cheat and



## 8.7 SUBSTANCES OF ABUSE AND CONTAMINATED PRODUCTS AS SPECIFIC RULES OF ANTI-DOPING

### 8.7.1 Substances of Abuse

Article 10.2.4.1 of the WADC introduced an exception to the above rules where the substance found in the athlete's sample is a 'Substance of Abuse', i.e., it is one of 'those prohibited substances which are specifically identified as a Substances of Abuse on the Prohibited List because they are frequently abused in society outside the context of sport'.<sup>46</sup> Prohibition of recreational drugs has long presented a significant challenge to the legitimacy of WADA, because those substances do not reflect doping in the typical sense of cheating to gain an advantage.<sup>47</sup> For example substances of abuse concerning cannabinoids – the status of  $\Delta 9$ -THC remained on the Prohibited list mainly because they are dangerous to the health of athletes as well as against the spirit of sport, meeting two of the above described three criteria for inclusion on the Prohibited List.<sup>48</sup>

finds that the most probable source was inadvertent, applying a 4-year period of ineligibility for failure to establish the origin of the substance *stricto sensu* would inevitably raise proportionality concerns'.

46 LEWIS, A. – TAYLOR, J. *Sport: Law and Practice*, p. 917.

47 READ, D. – SKINNER, J. – LOCK, D. – SMITH, A. *WADA, The World Anti-doping Agency. A Multi-level Legitimacy Analysis*, p. 143. According to Haas the majority of the stakeholders of the 2021 review process were dissatisfied with the situation making it more difficult for athletes to obtain lighter sanctions, because social drugs like cocaine in most instances are not consumed to enhance sporting performance, but because of a drug use or addiction issue. See HAAS, U. *The Revision of the World Anti-Doping Code*. In: HAAS, U. – HEALEY, D. (eds). *Doping in Sport and the Law*. Hart Publishing, 2016, p. 32.

48 The 2023 Prohibited List Behind the scenes, presentation of Audrey Kinahan at the 2023 Annual WADA Symposium. According to her presentation the research concerning cannabinoids – status of  $\Delta 9$ -THC and points in discussion included among others: 1) study of potential health risks by the Health subgroup, including full literature review and external ad-hoc experts. According to experts there is compelling evidence that the use of THC is a risk for health, mainly neurological, that has a significant impact on the health of

Now according to WADC sanctions for the substances of abuse are special. If the athlete can establish that any ingestion or use of substance of abuse occurred *out-of competition* and *was unrelated to sport performance*, then the period of ineligibility shall be three months. In addition, the period of ineligibility calculated under the Article 10.2.4.1 WADC may be reduced to one month if the athlete or other person satisfactorily completes a substance abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility. According to Art. 10.2.4.2. WADC if the ingestion, use or possession occurred *in-competition*, and the athlete can establish that *the context of the ingestion, use or possession was unrelated to sport performance*, then the ingestion, use or possession shall not be considered *intentional*. The Art. 10.2.4.2. of WADC casts a burden on the athlete to prove that the possession, use or ingestion was unrelated to sport performance so as to be eligible for a sanction of two years or less under other provi-

young individuals, a cohort which is overrepresented in athletes. 2) Regarding Spirit of Sport the research was liased with an Ethics Expert Advisory group to provide an opinion/judgment. The Role model aspect is significant. One ought not model behavior that is widely criminalized and at the same time athletes using THC are dangerous for other competitors concerning their safety.

3) In relation to the potential to enhance performance, the scientific literature/ socio-scientific research, including anecdotal reports, were used, plus meetings with external ad-hoc experts. The Athlete Committee was also informed and replied with feedback. Studies in relation to performance enhancement are not of high quality in relation to THC. There is no solid evidence of physical enhancement effects on primary endpoints (e.g. muscle strength, endurance) but only soft evidence on self-reported psychological effects (e.g. reduced stress, anxiety and pain, increased focus, being “in the zone”, improved mental health, helping to forget unpleasant experiences, decreased perception of danger, e.g. makes competitor bolder, increased risk for opponents) and reduced boredom (e.g. ultramarathons).

sions of Art. 10 WADC.<sup>49</sup> Athletes, who cannot prove this requirement, open themselves up to receiving the maximum sanction of four years of ineligibility.<sup>50</sup>

According to some authors by including the spirit of sport as a central assessment criterion, WADA has introduced greater subjectivity into the process of prohibiting the recreational substance.<sup>51</sup> Petersen, a former tennis player, admits he would not mind at all playing against a tennis player who was stoned, as it would only increase Petersen's chances of winning considerably. Being stoned on weed is definitely not something to be recommended, he added, but he asks why is cannabis on the prohibited list when smoke on the brain typically makes an athlete perform poorly?<sup>52</sup> It would be interesting to see similar rules in other closely observed entertainment areas like the music industry, where, as Alan Jourgensen noted, a common theme with artists is that there's this unspoken fear that you're going to lose the ability to write and express yourself if you are not drinking or under the influence of drugs.<sup>53</sup> On the other hand dangerous situations may arise for example when ice-hockey

49 STAR, S. – KAMBHAMPATI, A. Playing True? A critique of the 2021 WADA Code. *International Sports Law Journal*. Vol. 21, Issue 4, 2021, p. 238.

50 Ibidem. Star and Kambhampati remind that in the substances of abuse category there remains a distinction between specified and non-specified substances. Namely cocaine is a non-specified substance. According to the authors this meant that cocaine was placed in the same category as steroids and testosterone for the purpose of anti-doping, despite studies shown that it does not improve performance. They refer to the case of José Paolo Guerro, demonstrating harsh sanctioning, when the source of the cocaine was a Peruvian tea.

51 READ, D. – SKINNER, J. – LOCK, D. – SMITH, A. *WADA, The World Anti-doping Agency. A Multi-level Legitimacy Analysis*, p. 149. About spirit of sport see also KILGORE, A. – MAESE, R. The doping rules that cost Sha'Carri Richardson have a debated, political history. *The Washington Post*. 3. 7. 2021.

52 PETERSEN, T. Preface to his above quoted publication *Doping in Sport. A Defence*, p. 35.

53 JOURGENSEN, A. – WIEDERHORN, J. *Ministry - The Lost Gospels According to Al Jourgensen*, Da Capo Press, 2013, p. 277. See also Petersen about role models in sports and music compared.

players possessed higher aggressivity not because of their motivation or playing effort but for the reason of drugs use, when blades and ice-hockey sticks became violent tools.<sup>54</sup>

### 8.7.2 Contaminated products

A contaminated product is a product that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable internet search.<sup>55</sup> In other words, if the prohibited substance is declared on the product itself or on an accompanying package insert, the qualification “contaminated product” is excluded by definition.<sup>56</sup> The 2015 WADC included this new category for athletes whose case is considered under *No Significant Fault or Negligence* and involves a contaminated product and this provided a major increase to the fairness of the WADC and eliminates the circumstances of many of the past cases where athletes could argue that their penalty was unfair.<sup>57</sup> In cases where the athlete or other person can establish both no significant fault or negligence and that the detected prohibited substance (other than a Substance of Abuse) came from a Contaminated Product, then the

54 BUKAČ, L. *Moje hokejové století*, p. 218. Petersen also warned against drugs in some particular sports, namely motorsports. The safety concern was evaluated by WADA as well as described in the above described presentation of Audrey Kinahan at the 2023 Annual WADA Symposium.

55 Appendix to WADC - Definitions.

56 HAAS, U. The WADA Code 2015: The Most Relevant Changes - the View of the Practitioner, In: BERNASCONI, M. (ed.). *Arbitrating Disputes in a Modern World: 5<sup>th</sup> Conference CAS&SAV/FSA Lausanne, 2014*. Editions Weblaw, 2016, p. 57.

57 GANDERT, D. *The WADA Code: Optimal on Paper*, p. 306. Gandert at the same time explains that in the competition world where hundredths of a second matter, if one knows that one's competitor is taking a supplement that is not prohibited and believes that the competitor may be aided by taking the supplement, it is reasonable to believe that one is at a disadvantage by not taking the supplement.

period of Ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two (2) years ineligibility, depending on the athlete or other person's degree of fault.<sup>58</sup>

## 8.8 ANTI-DOPING RULES AND COMPETITION LAW

The CJEU made a significant decision concerning the saga of *Meca-Medina and Majcen* (in the area of EU competition law already described in part 3.2 of this book)<sup>59</sup> where swimmers in their complaint challenged the compatibility of certain regulations adopted by the IOC, implemented by FINA, concerning practices relating to doping control. First of all, the fixing of the limit at 2 ng/ml was according to athletes' arguments a concerted practice between the IOC and the 27 laboratories accredited by it. Athletes submitted, that this limit is scientifically unfounded and can lead to the exclusion of innocent or merely negligent athletes (in this case the consumption of a dish containing boar meat). The case was brought in the pre-WADA/WADC regulation but contested regulation at that time also included the mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration, which were according to the athletes insufficiently independent of the IOC and this strengthened the anti-competitive nature of the above mentioned limit.<sup>60</sup> Athletes' arguments remain relevant nowadays as it has already been seen above in this book.

58 According to Haas, the inequality of treatment was removed by 2015 WADC because in the past (using the example of the case of *WADA v. Hardy & USADA*, CAS/2009/A/1870) if a non-specified substance was involved, under 2009 WADC CAS panels had only a limited scope to apply a reduced sanction. If, instead, a specified substance had been at stake, then – all factors remaining the same – a much shorter ineligibility period (or maybe even reprimand) might have been possible in this case, resp. the athlete's "criminal energy" or degree of fault is the same in either case'. *Ibidem*, p. 56–57.

59 C-519/04 P, *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

60 Para 16.

The objective of the IOC rules is to combat doping in order for competitive sport to be conducted fairly, including the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.<sup>61</sup> The CJEU concluded that these rules are justified by a legitimate objective. Their limitation on competition is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure a healthy rivalry between athletes.<sup>62</sup>

Although the decision was issued before the WADC's adoption, it nonetheless represents a body of cases holding that proportionality is the paramount conclusion for the validity of restrictions on fundamental rights.<sup>63</sup> According to CJEU it is therefore only if, having regard to scientific knowledge as it stood when the anti-doping rules at issue were adopted or even when they were applied to punish the appellants, the threshold is set at such a low level that it should be regarded as not taking sufficient account of this phenomenon that those rules should be regarded as not justified in light of the objective which they were intended to achieve.<sup>64</sup>

61 Para 43.

62 Para 44.

63 HARD, M. *Caught in the net: Athletes' rights and the world anti-doping agency*, p. 556, citing KAUFMANN-KOHLER, G. - RIGOZZI, A. - MALINVERNI, G. *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, p. 83. See also EXNER, J. *Intent, substances of abuse, aggravating circumstances, protected persons and recreational athletes: does the World Anti-Doping Code 2021 provide proportionate sanctions?* *ISLJ*. 2022, Vol. 22, issue 1.

64 Para 52.

## 8.9 RIGHT TO PRIVACY AND FAMILY LIFE IN THE WHEREABOUTS SYSTEM OF ANTI-DOPING

Since its introduction, the whereabouts system has continually proven to be a controversial component of the anti-doping system.<sup>65</sup> WADC requires that there is a register system set up concerning certain categories of athletes who have to provide concrete information there about their whereabouts at specified times and have to be available for testing each day during one hour determined in the filing in this register. According to Dimeo and Møller, the intrusion into athletes' privacy had already gone too far.<sup>66</sup> Pound in defence of the system explained: 'there are many problems legal and practical, inherent in the system of international sport where a thorough testing program is sought to be imposed. To be effective, such a program must enable testing to occur without advance notice and must be capable of being targeted at those athletes where the risk is highest that doping may have occurred, namely amongst the best of athletes in each sport. This, in turn, requires knowledge of the whereabouts of the athletes on a daily basis, as well as the ability to locate them and to require submission to the tests. If athletes are able to 'disappear' for two, three or four weeks, doping programs may be administered that produce residual performance-enhancing effects'.<sup>67</sup>

ECtHR in the *FNASS* case<sup>68</sup> on one hand accepted that the above regulation of whereabouts is interfering with rights according to Art. 8 of the ECHR, but at the same time the regulation is legitimate and protects

65 READ, D. - SKINNER, J. - LOCK, D. - SMITH, A. *WADA, The World Anti-doping Agency. A Multi-level Legitimacy Analysis*, p. 64.

66 DIMEO, P. - MØLLER, V. *The Anti-Doping Crisis in Sport, Causes, Consequences, Solutions*. Routledge, 2018, p. 14-15, citing other authors about various extreme examples - A Danish athlete who was required to defecate in front of people he did not know in his own house, or the experience of a Luxembourgian triathlete led her to think that her right as an athlete to participate in fair competition was less important than her right to dignity.

67 POUND, R. *The World Anti-Doping Agency: An Experiment in International Law. International Sports Law Review*. 2002, p. 53.

68 Complaint no. 48151/11 and 77769/13, judgement 18. 1. 2018.

the rights and freedoms of others (doping would provide an unfair competitive advantage over others and endanger amateur athletes, resp. the health of young people as well as applicants' health and spectators would not watch a fair competition). The whereabouts rule is accepted at the European and international level to keep unannounced testing according to the ECtHR. At the same time Read at al. remind that the whereabouts system was in the past challenged by many stakeholders, namely FIFA, The Board of Control for Cricket in India (BCCI), a group of Belgian athletes, the ECtHR, numerous athletes from across Olympic sports, The World Tennis Association (WTA) and the Spanish Government.<sup>69</sup>

69 READ, D. - SKINNER, J. - LOCK, D. - SMITH, A. WADA, *The World Anti-doping Agency. A Multi-level Legitimacy Analysis*, p. 68. Authors suggest that WADA's response to the challenges created by the whereabouts system is characterized by coercion and resistance (at p. 63).





**FREEDOM OF EXPRESSION  
VS. THE 'BEST INTEREST' OF IFS**



According to Di Marco the exercise of the freedom of expression in sports seems to be more of a ‘concession’ rather than a ‘right’.<sup>1</sup> In a legal context, the clash between proponents and opponents of free speech in sport, can be detected between freedom of expression as a human right and the ban on athletes’ right to speak by sport governing bodies.<sup>2</sup> The freedom of expression should apply also to other individuals in sports, for example sports officials or fans (for example Wassermann refers to various forms of expressions by fans like heckling, profanity or emotional expressions, many of them having political commentary or stating opinions about social affairs and these expressions should not be banned unless they provoke some violence).<sup>3</sup>

An interesting and popular case in the legal literature so far has been the CAS verdict of 2014/A/3516, *George Yerolimpos v. World Karate Federation*.<sup>4</sup> This is a story about a power struggle within an international

1 Di MARCO, A. Neutrality of the Olympic Movement and Freedom of Expression: Legal and Practical Dilemmas. In: *VerfBlog* [online]. 17. 2. 2022. Available at: <https://verfassungsblog.de/neutrality-of-the-olympic-movement-and-freedom-of-expression/>.

2 SHAHLAEI, F. Athletes and the Human Right to Freedom of Expression: Is it just “Shut Up and Play”? In: *VerfBlog* [online]. 10. 2. 2022. Available at: <https://verfassungsblog.de/athletes-and-the-human-right-to-freedom-of-expression/>.

3 WASSERMAN, H. M. Fans, Free Expression and the Wide World of Sports. *University of Pittsburgh Law Review*. 2006, No. 67.

4 The case was reviewed for example by DIATHESOUPOULOU, T. *Sports Politics before the CAS II: Where does the freedom of speech of a Karate Official end?* [online] Available at: <http://www.asser.nl/SportsLaw/Blog/post/sports->

sporting body.<sup>5</sup> In this dispute the former General Secretary of the World Karate Federation (WKF), G. Yerolimpos, confronted the President of WKF Espinos with the failure to succeed in the campaign to place karate into the program of the Olympic Games. In an e-mail addressed to WKF Treasurer, copying it to all Executive Committee Members, Secretary General Yerolimpos stated, among others that the President *was responsible for decisions*, when unveiled, will reveal a pattern of serious mismanagement by the President that ignored the executive consultation. As a result Secretary General Yerolimpos was subject to disciplinary proceedings and his removal from office.

In summary it was the Panel's impression that Mr. Espinos too readily identified the interests of the WKF with his own. Moreover he had a praetorian guard of key supporters.<sup>6</sup> It was also the Panel's impression that the Appellant for his part too readily used his and others concerns as a means of furthering his own political ambitions and contriving a *coup d'etat*.<sup>7</sup> According to Diathesoupoulou CAS 'Firstly, recognizes the controversial applicability of rights enshrined in the ECHR to disciplinary proceedings of sports governing bodies, which are purely private entities, by indicating that the jurisprudence of ECHR is compulsive in jurisdictions to which it applies, and in any case is at least indicative. Secondly, the panel does not hesitate to take a clear position - from a sports politics point of view - establishing that the members of the sports governing bodies have a fundamental right to exercise their freedom of speech to criticize political authorities.'<sup>8</sup> CAS stated in its rea-

politics-before-the-cas-ii-where-does-the-freedom-of-speech-of-a-karate-official-ends-by-thalia-diathesopoulou. Above quoted Di Marco also refers to the case.

5 Para 1 of the CAS decision.

6 Para 89, resp. in para 91 In the Panel's judgment, Mr. Espinos simply liked to have things his own way and keep his cards close to his chest.

7 Para 92.

8 DIATHESOUPOULOU, T. *Sports Politics before the CAS II*. For an explanation about a rare assessment of the compliance of IFs with a human right enshrined in the ECHR by CAS see DUVAL, A. *Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport*, published on 1<sup>st</sup> June 2022, at International Sports Law Journal, available at: <https://link.springer.com/article/10.1007/s40318-022-00221-6>.

soning: the Panel wishes to emphasise the importance of protecting – of course subject always to the limits imposed by law – freedom of speech and the right to criticize in good faith those in positions of authority even if there may be errors of fact in the criticism.<sup>9</sup> The Panel also wished to emphasise that such critics or aspirants for office must not only act within the law but must show self-restraint. According to CAS ‘the Appellant, by now clearly embarked upon a power struggle ignored the internal procedures open to him to ventilate any grievances, said more than he needed to and was too swift to seek, in the Panel’s judgment, to canvas support among the dissenting constituency. It was all but inevitable that his stringent comments would be transmitted to a wider audience than the addressees of his emails, and damages in consequence the image of the WKF Worldwide. The Panel does not suggest that he acted in bad faith any more than it levels such a charge against Mr Espinos. However, like Mr Espinos, his motives were mixed and to the extent that he was pursuing a proper agenda, went about it in far less than perfect way.’<sup>10</sup> According to Diathesoupoulou this interpretation elaborated by CAS seems to be inspired by the so called ‘balancing exercise’ between Articles 8 and 10 of ECHR, resp. an interference in the internal affairs of a sports governing body can be justified when it is in accordance with the law and is necessary in the interests of the world sports community.<sup>11</sup> The general duty of individuals to act *in the best interest of the WKF*

9 Para 116.

10 Para 117.

11 DIATHESOUPOULOU, T. *Sports Politics before the CAS II*. According to Duval, a CAS panel conducted a constitutional style review of the proportionality of the FIFA decision in another freedom of speech case, CAS 2018/A/6007 *Jibril Rajoub v. FIFA*, award of 18<sup>th</sup> July, 2019, see DUVAL, A. *Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport*, part 3. 3. 6 of his article. It is not an easy task to determine the level of protection of free speech at this level. According to Cem Abanazir, defining an expression as ‘political’, ‘non-political’, ‘inciting’, ‘hate speech’ and ‘defamatory’ almost always will be a controversial matter, subject to the discretion of the CAS arbitrators. See the summary of cases of CAS selected by this author to demonstrate the issue at ABANAZIR, C. *The Court of Arbitration*

was included in the WKF's submission to CAS as well.<sup>12</sup> We may find the argument of the best interest of sports' organization in other jurisdictions in terms of the free speech of athletes, for example in the U.S. concerning an exemplary sanction in boxing against an athlete who broke federal law<sup>13</sup> or his behavior was 'prejudicial or detrimental to the NBA'.<sup>14</sup> In the U.S. the problem is the same as in the case of ECHR, that constitutional rights of freedom of speech can be invoked only against the State. For example, in *San Francisco Arts* case, despite that the United States Olympic Committee (USOC) was chartered by the United States government, having exclusive right to use the word Olympic, there was no state action when San Francisco Arts (SFA) invoked First amendment rights to use the word Olympic, which was denied to the SFA by the USOC, having exclusivity to use the word Olympic.<sup>15</sup> Similarly, like in the case of ECHR's practice above, in the U.S. the State may be at least connected to the asserted deprivation of someone's guaranteed right by its tolerance of the challenged practice as well as by its positive acts.<sup>16</sup>

Rule 50 of the Olympic Charter brings a similar issue. According to this provision no form of advertising or other publicity shall be allowed in and above the stadia, venues and other competition areas which are considered as part of the Olympic sites, except as may be authorised by the IOC Executive Board on an exceptional basis. Commercial installations and advertising signs shall not be allowed in the stadia, venues or other sports grounds. More importantly, no kind of demonstration or political, religious or racial propaganda is permitted in any Olympic

for Sport's Multifarious Views on Freedom of Expression. In: *VerfBlog*. [online]. 23. 2. 2022. Available at: <https://verfassungsblog.de/the-court-of-arbitration-for-sports-multifarious-views-on-freedom-of-expression/>.

12 Para 111.

13 McKINNY, Ch. Professional Sports Leagues and the First Amendment: A Closed Marketplace. *Marquette Sports Law Review*. 2003, Vol. 13, no. 2.

14 Ibidem.

15 NOWAK, J. - ROTUNDA, R. *Constitutional Law*, p. 461.

16 Ibidem, p. 484. See WASSERMANN, H. M. *Fans, Free Expression, and the Wide World of Sports*, p. 554, where the author also describes tests bringing State action applicable to the behavior of non-state actors such as a Symbiotic relationship test, Entwinement or Public Function tests at pp. 538-552.

sites, venues or other areas.<sup>17</sup> On the basis of this ‘golden rule’, while officially promoting the respect of human dignity, the IOC sanctioned harshly the famous ‘black power salute’ of the Olympic athletes Tommie Smith, John Carlos and Peter Norman at the 1968 Mexico City Olympic Games.<sup>18</sup> The IOC has redefined Rule 50 in a limited fashion, in particular, participants may showcase “expressions” on the field of play prior to the competition as long as they are consistent with Olympic principles and rules, not targeted against people or their nations, and not disruptive.<sup>19</sup> Inspired by ECHR case-law, according to Shahlaei any restrictions to freedom of expression must be legitimate, necessary to protect society or other individuals in the light of public interest, to satisfy a pressing social and at the same time proportional to the legitimate aim pursued.<sup>20</sup> According to Shahlaei it is difficult to accept that the peaceful manifestations of athletes mentioned above can amount to a threat to the public interest, resp. it is also unclear whether and if yes to what extent maintaining sports neutrality and keeping the focus on athletes’ performances can be considered legitimate aims.<sup>21</sup> Moreover the term neutrality in sports has not been defined at all (this was also concluded at the 2023 ISLJ Conference, organized by the T.M.C. Asser Instituut in

17 About details on the limits of this rule see <https://olympics.com/athlete365/what-we-do/voice/athlete-expression-rule-50/>.

18 Di MARCO, A. Neutrality of the Olympic Movement and Freedom of Expression: Legal and Practical Dilemmas. In: *VerfBlog* [online]. 17. 2. 2022. Available at: <https://verfassungsblog.de/neutrality-of-the-olympic-movement-and-freedom-of-expression/>.

19 GOH, CH. L. Rule 50 of the Olympic Charter and Freedom of Expression. 22. 3. 2022 [online]. Available at: <https://theregreview.org/2022/03/22/goh-rule-50-of-the-olympic-charter-and-freedom-of-expression/>. See also Rule 50 Guidelines Developed by the IOC Athletes’ Commission. [online]. Available at: <https://www.olympic.org/-/media/document%20library/olympicorg/news/2020/01/rule-50-guidelines-tokyo-2020.pdf>. Rule 50.2 Guidelines for Beijing 2022. [online]. Available at: <https://olympics.com/athlete365/app/uploads/2021/11/Rule-50.2-Guidelines-Olympic-Winter-Games-Beijing-2022-Nov-2021.pdf>.

20 SHAHLAEI, F. *Athletes and the Human Right to Freedom of Expression: Is it just “Shut Up and Play”?*

21 Ibidem.

Den Haag, Netherlands, 26–27. 10. 2023). Similarly FIFA banned to wear poppy symbols by players on the pitch. George Batt, general secretary of the Normandy Veterans' Association, has described according to BBC Sport the decision as sad, commenting "I think it's a bit childish because, after all is said and done, if it wasn't for us blokes, FIFA wouldn't be here."<sup>22</sup> It is amazing that often in stadiums owned by regional/State authorities IFs issue restrictions against free expression which the State itself can't create.<sup>23</sup> Creative lawyers may submit complaints against the State failing to protect guarantees of free expression in the private space.<sup>24</sup>

22 War veterans unhappy over Fifa's poppy ban. In: *BBC Sport* [online]. 5. 11. 2011. Available at: <https://www.bbc.com/sport/football/15606557>.

23 See WASSERMANN, H. M. *Fans, Free Expression, and the Wide World of Sports in the US practice*.

24 Recently additional wording has been included in the Fundamental Principles of Olympism as an overarching commitment to the respect for human rights, specifically in Fundamental Principles of Olympism 1 and 4. At the same time the new wording of Rule 40, Participation in the Olympic Games, which was agreed by the IOC Session, is that all competitors, team officials or other team personnel in the Olympic Games shall enjoy freedom of expression in keeping with the Olympic values and the Fundamental Principles of Olympism, and in accordance with the Guidelines determined by the IOC Executive Board (see Olympic Charter amendments approved by 141<sup>st</sup> IOC Session, 15. 9. 2023. [online]. Available at: <https://olympics.com/ioc/news/olympic-charter-amendments-approved-by-141st-ioc-session>).



## CONCLUDING REMARKS

IFs own significant powers to enforce their regulations in order to secure the integrity and uniformity of sports competitions across the globe, subject to disciplinary sanctions. The sports pyramid puts IFs in a monopoly position. Without any doubt IFs are in a stronger position than athletes or other stakeholders. It is the role of the general law to step in and to ensure that the mechanisms inside the sports autonomy are not taken beyond the status of proportional measures to the aims that the sports sector is defending. Sports is a very specific industry. It seems that the problematic areas dealt with in this book were solved *ex post* after some complainants made the decision to confront the sports sector in the courts. Then sports law books, including this one, are getting to be sort of restatements of the law adopted by the courts to put together some guidelines of trends on how the future cases might be decided and what measures of IFs can be considered as inherent or justified within the sports autonomy. It is highly improbable, that for example the EU would regulate sports by a harmonized EU legislation. On the other hand intergovernmental organizations such as the United Nations and the World Trade Organization have played an important role by producing uniform codes on many business subjects, from food safety to contract law.<sup>1</sup> However the reality is going to be that it will be up to the sports sector to reflect seriously on the cases decided so far in the court rooms of CJEU, ECtHR, SFT or other forums, including sport's own judicial branch of CAS (as long as CAS is going to be considered as

1 SCHAFFER, R. - AGUSTI, F. - DHOOGHE, L. *International Business Law*, p. 37. Andreff proposed the so called Coubertobin Tax concerning transfer of young players to be monitored and supervised by an international organization either an existing one (the UN Development Programme or the World Bank) or an ad hoc one to be created, for instance under the auspices of the UN or IOC. ANDREFF, W. *International Labour Migration*, p. 330. Similarly about an attempt to turn World Anti-doping Agency (WADA) into an International Public Law Agency based on an international convention, see MESTRE, M. *The Law of the Olympic Games*. The Hague: Netherlands. T.M.C. Asser Press, 2009, p. 53, referring to similar examples of public-private partnership in the World Tourism Organization or the Afro-Asian Rural Reconstruction Organization.

independent and trusted by all within the sports sector, resp. CAS should focus on the unification of the inconsistent case-law of various panels as presented in this book in the *Webster/Matuzalem* examples). The current sports pyramid is shaking. As the former lawyer of the athletes of Bosman and Meca-Medina/Majcen J. Dupont remarked during an oral hearing of the *European Superleague* case in front of CJEU, the FIFA pyramid would not receive any awards in architecture. IFs will have to put on their board more seats for athletes and other stakeholders within the governing bodies. WADA is doing this seriously and in its last annual symposiums in 2022 and 2023 the visions of all stakeholders seemed to be optimistic in this regard based on the content of their contributions in speeches on the podium, where athletes presented their views as well, welcoming new a ombudsman or improvements in the WADA governance. This is important because sanctions in the light of strict liability in doping, including a non-intentional breach of the rules, are severe and may end the career of athletes. WADA is kind of a public-private partnership entity because of the involvement of States. It may be more difficult for typical IFs to follow similar steps of governance reforms. In my opinion the focus should also be on reforms at the level of national sports associations which would then produce competent representatives in the IFs. National associations give life to the IFs. It is simple - some good people should be on the governance bodies.<sup>2</sup>

2 The term of 'good people' was mentioned for example by G. Parsons in his presentation at 2022 Play the Game Conference which took place in Odense, Denmark on 27-30 June 2022. The same idea was presented as the outcome of discussion among participants at the Digital International Symposium on NADO Governance 'Governance in Anti-Doping: How to meet the Challenges', organized by Play the Game on 18-19 May 2021.





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## ANOTACE

Vztah mezi sportovcem a velkou mezinárodní sportovní asociací připomíná vztah mezi jednotlivcem a státem. V pozici monopolu tyto asociace zajišťují jednotná pravidla a integritu soutěží bez ohledu na hranice států. Vynucují je prostřednictvím disciplinárních řízení a povinného řešení sporů u sportovní arbitráže. Po odborné stránce jsou tyto asociace experty v boji proti dopingu či regulují způsobilost a kvalifikační kritéria k soutěžím, včetně přestupních pravidel apod. Na druhou stranu mezinárodní sportovní asociace díky své exkluzivitě samostatně a často nerušeně regulují dané sportovní odvětví, včetně využití komerčních práv. Jejich dominance je umožněna tzv. Pyramidovou strukturou mezinárodního sportu, na jejímž vrcholu stojí právě mezinárodní sportovní asociace, jejichž pravidla jsou závazná pro všechny uvnitř sportovního odvětví. Tyto asociace si nárokují vlastní autonomii, avšak řada jejich regulí naráží na platné právo mezinárodních organizací jako je EU či na právo v dalších jurisdikcích. Jedná se o základní lidská práva a ekonomické svobody. Tato publikace se zabývá kontroverzními mechanismy mezinárodních sportovních asociací, jakým způsobem je mohou mezinárodní sportovní asociace obhájit ve světle platného práva a naopak kde leží hranice, kam nesmějí vstupovat na úkor garantovaných svobod osob a dalších subjektů ve sportu. Jmenovitě se jedná o tyto oblasti ve sportu: 1) povinné řešení sporů u sportovní arbitráže na úkor obecných soudů a problematika nezávislosti tzv. Světového sportovního soudu – Mezinárodního rozhodčího soudu pro sport (CAS); 2) tzv. Moderní otroctví omezující přestupy hráčů mezi kluby; 3) přísné podmínky obhajoby a důkazního břemena v dopingu, zejména pokud jde o porušení anti-dopingových pravidel, která nebyla spáchána úmyslně; 4) konflikty zájmů mezinárodních sportovních asociací při udělování licencí k organizaci soutěží jinými organizátory, než jsou zmíněné asociace a trestání sportovců za účast v neautorizovaných soutěžích, pokud není licence udělena mezinárodní sportovní asociací; 5) svoboda projevu sportovců a její potlačování sportovními asociacemi.





**AUTONOMOUS LAW  
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AS AN EQUIVALENT TO A SUPERSTATE  
AND BORDERS OF LEGALITY OF ITS POWERS**  
Pavel Hamerník

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The relationship between athletes and big international sports federations reminds the relationship between an individual and a State. In the position of monopoly these federations secure uniform rules and integrity of their competitions based on specific sports regulations rather than based on provisions of various and different national laws. International sports federations want to achieve compliance with their rules. This is done by disciplinary proceedings and forced sports arbitration. On one hand International sports federations are experts in the field of sport concerning fight against doping or eligibility rules. On the other hand they are in the dominant position in commercial matters related to sports due to the Pyramid structure of sports. International sports federations are on the top of this pyramid. Their rules are binding for national sports associations, clubs, athletes and other stakeholders. International sports federations claim the autonomy concerning regulation of sports but their quasi-legislation is often in conflict with general law, namely EU law and law of human rights. This publication deals with the scope of the sports autonomy. In other words what the law can accept and which specific rules of sports sector are not acceptable in the light of the economic freedoms and human rights. This evaluation is made based on examples of selected controversial mechanisms of international sports federations, namely 1] compulsory jurisdiction of sports arbitration and issue of fair trial at Court of Arbitration for sport; 2] modern slavery of transfer rules; 3] strict rules of fight against doping; 4] sanctioning of athletes for participation at unauthorized competitions; 5] freedom of expression.