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THE INTERACTION BETWEEN EU LAW AND *LEX SPORTIVA*: TRENDS OF EVOLUTION

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ABSTRACT

Lex Sportiva is an autonomous de-territorialised legal system, derived from the specific nature of sport. Nevertheless, it is subject to interactions with other legal systems, including the EU Law. As these two legal systems are essentially transnational, their interaction has a great impact on sport. During the last fifty years, this interaction has developed significantly, due to continuous case law, soft law and hard law produced by EU institutions about sport-related matters. Therefore, the historical evolution of that interaction is assessed, highlighting its three stages and the key cases and norms that marked each of them. Subsequently, current issues of the tension between *Lex Sportiva* and EU Law are assessed, based on very recent cases. Following this, it will be possible to identify the trends of evolution on the interaction between the two legal systems.

KEYWORDS

Lex Sportiva; European Union; Sports Law; Specificity; Autonomy; Bosman; Meca-Medina; White Paper on Sport; Lisbon Treaty; CAS; Pechstein; TPO; ISU; Sports Governance

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ABBREVIATIONS

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
CONCACAF	Confederation of North, Central American and Caribbean Association Football
ECHR	European Court of Human Rights
EU	European Union
FIFA	Fédération Internationale de Football Association
FINA	Fédération Internationale de Natation
FIVB	Fédération Internationale de Volleyball
IAAF	International Association of Athletics Federations
IF	International Federation
IOC	International Olympic Committee
ISU	International Skating Union
IWF	International Weightlifting Federation
RSTP	Regulations on the Status and Transfer of Players
TFEU	Treaty on the Functioning of the European Union
TPO	Third-Party Ownership
UCI	Union Cycliste Internationale
UEFA	Union of European Football Associations
WADC	World Anti-Doping Code

1 INTRODUCTION: *LEX SPORTIVA* AND EU LAW

Although there are still debates about its classification as a specific field of law[1], Sports Law has clearly developed in the past decades, mostly as a consequence of sport's growth as an important economic activity worldwide – which currently requires highly specialised professionals in order to deal with its specificities. Therefore, Sports Law has been consolidated as a unique vertical law subject[2], once it comprises several different fields of (horizontal) law which are applicable to a specific human activity: sport.

Part of Sports Law uniqueness derives from the recognition that "sport is special". This statement is very well approached by Weatherill[3] and reflects sport's status as a singular activity that consequently requires particular legal treatment. Another key aspect, though, is the outstanding legal framework that surrounds Sports Law.

On one side, state law can be a key factor. Depending on one nation's policy about sport, it can be highly regulated by national legislation, which thus affects sport-related activities on a greater level. Nevertheless, whenever the state's policy on sport is more liberal, national legislation does not play a vital role in Sports Law legal framework. While state law influence varies from country to country, another fundamental legal system related to Sports Law is applicable independently of each state policy: *Lex Sportiva*.

Lex Sportiva is an expression inspired by *lex mercatoria*, in the sense that it refers to a law that does not emerge from state, but from transnational relations established by private parties. The reference to *lex mercatoria* is just one of the different conceptions that Latty[4] mentions to define *Lex Sportiva* as transnational, but it probably provides the best description

[1] Timothy Davis, 'What is Sports Law?' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012)
[2] Robert C. R. Siekmann, 'What is Sports Law? A Reassessment of Content and Terminology' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012) 366
[3] Stephen Weatherill, 'Introduction' in Stephen Weatherill (ed) *European Sports Law: Collected Papers* (T.M.C. Asser Press 2014)
[4] Frank Latty, 'Transnational Sports Law' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012)

of *Lex Sportiva* as the legal system which emanates from the sport bodies[5] to regulate sports activities under their management. In this regard the comparison to *lex mercatoria* is very precise considering that those sport bodies are private entities regularly incorporated in accordance with the law of the states where they are seeded; in other words, *Lex Sportiva* comprises rules and principles that do not originate from state, but from private legal persons, and must be complied with transnationally. Therefore, it is a very unique and de-territorialised legal system[6].

Once *Lex Sportiva* is briefly defined, the question arises: what is its relation to EU Law – a distinct legal system constituted by norms and decisions emanating from EU institutions and applicable in all EU member states? Firstly, it can be argued that both are essentially transnational, in the sense that the applicability of their rules extrapolates national borders. But the core of their relation is well described by the theory of secant circles, which indicates that there is an area of intersection between these two legal systems.

It is true that there is also an intersection between *Lex Sportiva* and national legislation in most countries; nonetheless, differently from national legislation, EU Law applies to a wide range of nations – which include, specifically regarding sports, some of the most reputable players, clubs, leagues and national teams around the world. It means that a very significant part of the sport economic activity throughout the world is directly subject to EU Law.

Whilst this could be enough to demonstrate the importance of the interaction between EU Law and *Lex Sportiva*, another key factor must be taken into account. While national courts' decisions (as well as decisions issued by national regulatory and administrative authorities) usually produce effects only on a national level, the decisions issued by EU institutions, such as the Commission and the CJEU, have transnational range and must be observed in all member states. In this regard, the CJEU is by far the court whose

[5] Non-governmental entities duly incorporated as private legal persons in accordance with the legislation of the country in which each of them is seeded. In this thesis, we mostly refer to the IOC and the IFs as the main sports bodies regulating sport worldwide.
[6] Wladimyr Vinycius de Moraes Camargos, *Constituição e esporte no Brasil* (Kelps 2017) 133-143

decisions on sport-related matters are more comprehensive[7], thus more likely to affect *Lex Sportiva*.

This intersection between EU Law and *Lex Sportiva*, which has constantly been under the scrutiny of EU institutions, is the basis of the present thesis. As conflicts between their rules have arisen in the last decades, EU Law have proven to be a key moderator of *Lex Sportiva*; nevertheless, such interaction has evolved during this period, and different approaches have been developed by the EU institutions.

Following this introduction, the second chapter will present the historical interaction between the EU Law and *Lex Sportiva* so far, examining how it evolved in different stages and assessing the decisions and documents that mark each of them. In the third chapter, the most recent points of tension between both legal systems will be examined. Finally, based on the assessment of those past and current issues, we intend to identify the trends of future evolution in the interactions between EU Law and *Lex Sportiva*.

2 THE HISTORICAL TENSION BETWEEN EU LAW AND *LEX SPORTIVA*

Even though sport is an ancient activity, its characteristics have changed a lot especially during the last century. While amateurship dominated the beginning of 20th century, nowadays the vast majority of high level athletes are professionals. The Olympic Games' eligibility rules illustrate this evolution: only amateurs were eligible to participate in the Olympic Games until 1991, when the Olympic Charter finally removed the objection to professional athletes[8].

This progress clearly affected the interaction between EU Law and *Lex Sportiva*. Although their connection is much more recent (as the "continental community" roots date

[7] Some international courts' decisions might be even more comprehensive as their jurisdictions are not limited to EU member states. However, the amount of sports-related cases under their appreciation is not significant, which prevent them to generate the same impact the CJEU does on sports normativity.
[8] Alexandre Miguel Mestre, *Direito e Jogos Olímpicos* (Almedina 2008) 115-118

back to the late 1940's[9]) if compared to the history of sport, this period has been remarkable in terms of consolidation of professionalism and exponential progress of sport as an important economic activity, mainly in the last fifty years.

As a consequence, different challenges regarding sport have been presented to EU institutions during this period, with several key decisions and norms generating indisputable effects on *Lex Sportiva*. Just as sport itself, the level of interaction between these legal systems has also developed in the last half century – based on the evolution of EU jurisprudence, soft law[10] and hard law[11] –, with three different stages being noticed.

2.1 1st Stage: The Bosman Era

The first interactions between EU Law and sport date back to the 1970s. At that time, sport had never been mentioned by the TFEU, nor been subject of any Commission document yet. Despite that, in 1974 the CJEU[12] issued its first decision[13] on a sport-related matter.

Two cycling athletes filed a claim before a Dutch Court against a rule that had just been changed by the UCI, and which had basically created nationality restriction for cyclers to compete internationally as a team. The athletes argued that the new rule was against the EU Treaty, so the case was referred to the CJEU to decide mainly (i) if the EU Law was applicable to sport activities and (ii) if the Treaty's provisions related to freedom of movement of workers were applicable to sport activities.

The CJEU's decision established a new paradigm: the Court considered EU Law to be generally applicable to sport "in so far as it constitutes an economic activity within the

[9] <https://europa.eu/european-union/about-eu/history/1945-1959_en> accessed 5 June 2018
[10] Non-binding instruments and norms, which are though generally observed as a legal guidance.
[11] Binding rules, such as the ones provided by the TFEU.
[12] At that time, the CJEU was called as European Court of Justice. Nevertheless, for simplification purposes, all references on this document are made to CJEU, based on the nomenclature currently established by the Lisbon Treaty.
[13] Case 36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1417-1422

meaning of Article 2 of the Treaty"[14]; on the other side, it stated that a rule that is "of purely sporting activity and as such has nothing to do with economic activity"[15] is not subject to the Treaty provisions. The concept that sport, as an economic activity, was subject to EU Law was further confirmed on the following sport-related cases judged by the CJEU – Doná v. Mantero (1976)[16] and UNECTEF vs. Heylens (1987)[17].

These first CJEU decisions set the tone of that stage: the clear definition that EU Law could only override *Lex Sportiva*[18] whenever an economic activity was affected by the rule at stake; therefore, purely sporting rules were considered to be out of EU Law's scope. This approach probably derived from the absolute lack of EU norms with express reference to sport – an omission that may be explained by the fact that sport was still beginning to develop its economic potential, and was then considered to be merely a secondary, amateur and recreational activity.

This is probably one of the most remarkable aspects of the interaction established between EU Law and *Lex Sportiva* during this its first stage of evolution: no soft law or hard law was needed for the CJEU to decide upon sport-related matters and recognise the general validity of rules issued by sport organisations – stating that only those related to economic activities were subject to possible limitations. That jurisprudence thus ratified the sport organisations' autonomy to issue rules and manage sports, confirmed Sports Law's horizontal nature and indirectly consolidated *Lex Sportiva* as a specific, independent, valid and efficient legal system.

Despite their importance, the aforementioned cases did not have a great impact on sports normativity, in the sense they did not lead to any major changes to the rules issued by

[14] *B.N.O. Walrave* (n 13), para 4
[15] *B.N.O. Walrave* (n 13), para 8
[16] Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 1333
[17] Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097
[18] Is must be noticed that there was no reference to the expression *Lex Sportiva* yet during that 1st stage, as all mentions were purely to rules adopted by sporting organisations. It reflects the fact that Sports Law had not reached a high level of development at that time, and consequentially *Lex Sportiva* had not established itself academically as a specific legal system. Nevertheless, it is evident that the mentions made then by the CJEU to the rules adopted by sporting organisations referred to *Lex Sportiva* as it is currently known.

the respective sport organisations. This would happen only in the 1990s, after a landmark case: *Bosman*[19].

At that time, football regulations comprised mechanisms through which a player often depended on the club's agreement in order to be transferred to other club, even if the contract between them had already expired[20]. Moreover, most of the national football federations based in Europe used to follow UEFA's rules and limit the participation of non-national players; they usually applied the 3 + 2 rule, by which "clubs could play not more than three non-nationals in the team and two 'assimilated' players who have played in the country in question for five years uninterruptedly, including three years in junior teams"[21].

That is the summarized background of the claim filed by the Belgian football player Jean-Marc Bosman before the Liège Court, in 1990. After a sequence of decisions by the Belgian Court[22], in 1993 the case was finally brought to the CJEU to decide if the federations' rules which (i) disabled a player whose contract is expired to transfer without the club's consent and (ii) limited the participation of non-national players were both in accordance with the EU Law. The Court then stated:

> 114. (…) Article 48 of the Treaty precludes the application of the rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.
>
> (…)
>
> 137. (…) Article 48 of the Treaty precludes the application of the rules laid down by sporting associations under which, in matches in competitions which

[19] 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* [1995] ECR I-4921

[20] Actually, the Belgian Football Association had a "compulsory transfer" rule, which enabled players to be transferred without their clubs consenting in case the contract expired, since another club agreed to pay a fixed transfer price which was calculated on the basis of the player's last wage. However, in practical terms, that fixed price was often excessive, which meant that the player was unable to get the transfer and was therefore forced to stay with the previous club – event if not playing and not receiving wages due to the expiry of the contract.

[21] Richard Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 92

[22] ibid 94

> they organize, football clubs may field only a limited number of professional players who are nationals of other Member States. [23]

The decision could not be clearer: sport bodies (and consequently *Lex Sportiva*) are subject to EU Law, in an evident sign of the permanent interaction between both legal systems. The nationality clause and the attachment of a player to a club after the contract expiry, as then regulated by national football federations and UEFA, were thus considered to be against EU Law – mainly under the non-discrimination and freedom of movement principles. As Weatherill[24] argued, that decision was vital for recognition of sport's special nature and concurrently to define that its autonomy is not unlimited, as *Lex Sportiva* is subject to interactions with external legal systems.

Differently from the previous CJEU's decisions, the effects of *Bosman* ruling were not limited to the claimant. Following it, FIFA implemented substantial changes on its transfer system, enabling players to freely transfer between clubs whenever their employment contracts expire. Moreover, UEFA and the national federations abolished the non-national player limits regarding nationals of EU member states.

Those were the first – and probably the most important so far – signs of EU Law effect on sports normativity. By stating that those rules related to an economic activity and were inadequate to EU fundamental freedoms, the CJEU decision led to changes in *Lex Sportiva*, as FIFA, UEFA and European national federations were compelled to amend their rules so as to adapt them to EU Law.

The sport bodies' attitude is justified by the fact that EU member states comprise some of the most important athletes, clubs, leagues and national teams, especially concerning football. Therefore, the maintenance of rules which were notoriously contrary to EU Law meant that they could be subsequently challenged before the CJEU several times.

[23] *Union royale belge des sociétés de football association ASBL* (n 19), paras 114 and 137

[24] Stephen Weatherill, 'The Lex Sportiva and EU Law: The Academic Lawyer's Path Before and After Bosman' in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (T.M.C. Asser Press 2016)

Furthermore, there was a significant political aspect involved in this matter; in this regard, Duval points out the complex law-making process that involved EU institutions and FIFA in both legal and political fields, and resulted in changes to the RSTP, with CJEU ruling on Bosman case proving to be an "instrumental" part of it:

> (…) the Bosman ruling was instrumental in providing the impetus for the negotiation of the current transfer system. The ruling offered a window of opportunity to launch a complex transnational law-making process involving a multiplicity of actors. This process, triggered by the European Commission, took place in the shadow of EU competition law and was concluded with a seemingly soft agreement that paved the way to the introduction of the FIFA RSTP as we know it. Arguably, it constitutes a remarkable example of the complexity and entanglement of the new transnational public/private law-making processes at play in a globalizing world.[25]

This statement ratifies another main aspect of the interaction between EU Law and *Lex Sportiva*: the range of EU institutions' decisions. As they may cause transnational effects to entities and individuals in all EU member states, their impact is much wider and may potentially affect great part of the most significant stakeholders in sport. Except for the United States[26], it is not an exaggeration to state that Europe is the center of professional sports worldwide. This is confirmed by the fact that most of the IFs recognized by the IOC (and the IOC itself) are headquartered in the continent.

Therefore, the first stage of interaction concerning EU Law and *Lex Sportiva* was marked by the absence of soft law and hard law, as well as by the first sport-related cases decided by the CJEU. The Court then established that the verification of economic activity was the key for EU Law to impact *Lex Sportiva*, and the effects of *Bosman* ruling constituted a landmark in Sports Law.

2.2 2nd Stage: Meca-Medina and The White Paper on Sport

[25] Antoine Duval, 'The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman' in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (T.M.C. Asser Press 2016)

[26] Where sport system, based on franchises, is generally different form the one adopted in the vast majority of the world.

The aforementioned scenario stably prevailed until the beginning of the current century. Sport organisations seemed comfortable with the jurisprudence developed during the first stage, which prevented several of their rules – the so-called "purely sporting" ones – from being challenged on the grounds of EU Law breach. However, a new decision issued by the CJEU in 2006 reformulated the previous understanding and inaugurated the second stage of interaction between *Lex Sportiva* and EU Law.

The swimmers David Meca-Medina and Igor Majcen were both suspended for violating anti-doping rules, after decisions from the FINA's doping panel and the CAS. The athletes then filed a complaint before the Commission, challenging the anti-doping rules in question and arguing that they infringed "the athletes' economic freedoms" and rules of Competition Law. The complaint was unsuccessful though.

The athletes then filed a claim before the European Court of First Instance, which dismissed the case. As they appealed, the case was finally brought to the CJEU. Despite having also dismissed the case, the decision took into consideration a new interpretation about sporting rules subject to EU Law, detaching them from the purely economic perspective that had previously been taken as fundamental:

> In light of all these considerations, 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.
>
> (…)
>
> Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity (Walrave and Koch and Doná), that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles. [27]

The new solution adopted by the CJEU was fundamentally based on the premise that even the "purely sporting" rules were subject to EU Law in principle. Therefore, whenever

[27] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-7006, paras 27 and 31

contested, they must be examined so as to verify if they are in accordance with EU Law; if they are not, the court will assess if their existence is justified, necessary and adequate to achieve broader objectives in the benefit of sport. Weatherill described that reasoning:

> (…) the overall context in which sports regulation occurs, built around pursuit of a broad objective of fair competition, produces effects which though apparently restrictive of competitions are nonetheless inherent in the pursuit of those objectives and therefore permitted. It is this route that is chosen by the CJEU in *Meca-Medina*. Anti-doping rules cannot simply be excluded from the scope of review by reference to their role in ensuring "fair play". They must be examined in their proper context, including recognition of their economic effect. But placing the rules within the ambit of the Treaty does not mean they will be forbidden by it. The general objective of the rules was to combat doping in order for competitive sport to be conducted on a fair basis; and the effect of penalties on athletes' freedom of action is inherent in the anti-doping rules. This contextual examination of the rules was crucial in the Court's conclusion that rules affected the athletes' freedom of action but that they did not constitute a restriction of competition incompatible with EU competition law. [28]

In practical terms, the new ruling moved away the idea that great part of *Lex Sportiva* – the so-called "purely sporting rules" – was not at EU Law's range. The intersection area between both systems thus grew significantly, as any sport rule became subject to assessment under EU Law.

From the sports bodies' perspective, such movement represented a potential impact on the stability of their regulations. Mestre[29] emphasised the risk it created to sports legal certainty, arguing its inadequacy to sports autonomy and specificity. Indeed, sport was still considered as special, but its specificity was not enough to prevent EU institutions from interfering on any of their rules whenever understood as contrary to EU Law. In this regard, Infantino (currently FIFA's president, but then acting as UEFA's director of legal affairs) expressed the sports bodies' concern:

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[28] Stephen Weatherill, 'Case C-519/04 P Meca-Medina [2006] ECR I-6991' in Jack Anderson (ed) *Leading Cases in Sports Law* (T.M.C. Asser Press 2013)

[29] Alexandre Miguel Mestre, 'Bosman – 20 anos depois. E agora?' (15 December 2015) <http://www.sabado.pt/opiniao/convidados/alexandre_mestre/detalhe/bosman___20_anos_depois_e_agora.html > accessed 11 June 2018

> (…) it is not difficult to see how the position adopted by the Court may still open up a "Pandora's box" of potential legal problems. For a start, almost any sports disciplinary measure for any offence (e.g. doping, match-fixing, gambling, bad conduct, etc) might be described as representing a condition "for engaging in" sporting activity (in the sense that such measures may restrict somebody from "working"). Thus, all disciplinary measures (especially those imposing significant penalties) could, it seems, now be susceptible to challenge under EU competition law. It may also be assumed that the view taken by the Court applies to the position of clubs as well as players. There are a myriad of sports rules and regulations concerning the eligibility of clubs to participate ("engage in") sporting competition. Should all of them be subject to review under EU law? The judgment of the ECJ seems to indicate that the answer is yes, even though it seems difficult to imagine the ECJ would have wished for such a result.[30]

Despite criticism, Meca-Medina decision proved to be of great importance for the evolution of interaction between EU Law and *Lex Sportiva*, playing a key role on its second stage. Besides innovating on the application of EU Law to sports normativity, the CJEU's ruling also served as basis[31] for part of the most important sport-related document produced by The Commission until then: the White Paper on Sport[32].

Differently from the CJEU, the EU Commission has not always been so much effective regarding sport issues[33]. However, it can't be said that it has been unconcerned about the subject. For example, even before *Bosman* ruling, it negotiated with UEFA in order to remove – or at least minimize – the non-national restrictions on European and national competitions. The parties reached a (non-binding) agreement, but UEFA failed to fully comply with it, and the Commission was not capable of enforcing it[34].

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[30] Gianni Infantino, 'Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?' (2 October 2006) <https://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf> accessed 20 July 2018

[31] Weatherill (n 28) 144-146

[32] White Paper on Sport [2007] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0391&from=EN> accessed 20 July 2018

[33] This statement refers specifically to the Commission's more passive attitude related to the issuance of decisions involving sports-related matters. We do not disregard the Commission's importance on the political arrangements established with sports organisations which contributed to the interaction between EU law and *Lex Sportiva*.

[34] Steven Stewart, 'The Development of sports law in the European Union, its globalisation, and the competition law aspects of European sports broadcasting rights' [2009] 16 Sports Law Journal 183, 189

So it can be said that the Commission has been involved in sport matters since the abovementioned 1st stage, even though on a different perspective if compared to CJEU. The Commission was more concerned about sport's specificities and its potential contribution to other European policies, instead of enforcing direct application of the Treaty. It led to a number of initiatives[35], such as: (i) creation of European Sport Forum, in 1991; (ii) Declaration on sport annexed to the Amsterdam Treaty[36], in 1997; (iii) issuance of the Commission staff working paper "The Development and Prospects for Community Action in the Field of Sport"[37], in 1998; and (iv) Helsinki report on sport[38], in 1999.

The Commission then became more active on dealing with sport issues when they were related to specific EU competences, and situations involving Competition Law turned to be the most evident example of that attitude – which was later ratified by the ISU case, as assessed in Chapter 3. Several decisions have been issued on media rights, ticket sales arrangements, sport goods, state aids and even on organisational matters.

Nevertheless, only in 2007 the Commission issued the White Paper on Sport, its most important and comprehensive document regarding sport. The paper itself recognised that the initiative "marks the first time that the Commission is addressing sport-related issues in a comprehensive manner"[39] and defined its objective:

> Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of the sector.[40]

[35] Joana Freire Pais de Almeida, 'Desporto e União Europeia. A venda colectiva dos direitos de transmissão televisiva de eventos desportivos e a concorrência. O mercado português: a televisão e o futebol.' [2013] Maio/Agosto Desporto & Direito – Revista Jurídica do Desporto 249, 256-258

[36] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on sport [1997] OJ C 340/136

[37] The development and prospects for Community action in the field of sport [1998] <http://ec.europa.eu/assets/eac/sport/library/documents/doc252_en.pdf > accessed 20 July 2018

[38] Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework: The Helsinki Report on Sport [1999] <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF > accessed 20 July 2018

[39] White Paper on Sport (n 32) 2

[40] ibid 2

The Commission then provided several proposals and guidelines on sports, approaching it through three different perspectives: (i) the societal role of sport, (ii) the economic dimension of sport, and (iii) the organization of sport.

The inclusion of the societal role of sport represented an important innovation, as the Commission finally expanded from sport's economic and organisational dimensions, which had been highly predominant until then, and recognized its multiple social roles: "in addition to improving the health of European citizens, sport has an educational dimension and plays a social, cultural and recreational role"[41]. In this regard, several social aspects were contemplated by the paper, such as (i) the development of physical activity to enhance public health, (ii) the fight against doping, (iii) the relation between sport and education (and training), (iv) the utility of sport for social inclusion, (v) the fight against racism and violence and (vi) sustainable development.

As far as the economic dimension of sport was concerned, the White Paper on Sport did not innovate, recognising sport as "a dynamic and fast-growing sector with an underestimated macro-economic impact, (…) [which] can contribute to the Lisbon objectives of growth and job creation"[42].

Regarding organisation of sport, the Commission expressed its concern about the development of good governance and prevention of corruption, among many other significant subjects that are intrinsically related to sport organisations autonomy. More importantly, the White Paper on Sport endorsed the CJEU's decision on *Meca-Medina* and reinforced that the analysis of sporting rules must be done on a case-by-case basis so as to verify if they comply with EU Law, hence underlining the impossibility to formulate "general guidelines on the application of Competition Law to the sport sector"[43].

[41] ibid 3
[42] ibid 10
[43] ibid 14

The White Paper on Sport thus played a significant role in the relationship between *Lex Sportiva* and EU Law; as Siekmann[44] stated, it was the first document issued by the Commission which provided assistance on the meaning of specificity of sport – mostly grounded on Meca-Medina decision. Such specificity is revealed by the White Paper in two aspects: (i) specificity of sporting activities and of sporting rules, and (ii) specificity of the sport structure. Both are fundamental to *Lex Sportiva*, with the latter proving to be vital so as to ensure sports organisations' autonomy.

Furthermore, the White Paper on Sport can also be interpreted as an express recognition of *Lex Sportiva* existence by the Commission, as it exemplifies specific sporting rules which are not subject to EU Law in principle:

> Examples of such rules would be "rules of the game" (e.g. rules fixing the length of matches or the number of players on the field), rules concerning selection criteria for sport competitions, "at home and away from home" rules, rules preventing multiple ownership in club competitions, rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods.[45]

This 2nd stage was thus marked by an apparent paradox: whilst the specificity of sport was largely recognised and ratified, a different way of dealing with it was provided, expanding the possibility of EU intervention on sporting rules. The test created by the CJEU on *Meca-Medina* and later endorsed by the White Paper on Sport raised concerns among sport organisations[46], with complaints about legal uncertainty. Moreover, it can also be argued that this 2nd stage had a great impact on sport bodies' autonomy, as their organisation (and *Lex Sportiva* as a whole) became more easily subject to assessment by EU institutions.

Nevertheless, those limitations to sport organisations' autonomy are a natural consequence of the interaction between EU Law and *Lex Sportiva*. In other words, their autonomy has never been meant to be unlimited or untouchable, and has always been subject to external interference whenever *Lex Sportiva* norms affected rules emanating from other

[44] R. C. R. Siekmann, *Introduction to International Sports Law* (T.M.C Asser Press 2012) 78-79
[45] White Paper on Sport (n 32) 13-14
[46] Stephen Weatherill, 'The White paper on Sport as an Exercise in 'Better Regulation'' in Stephen Weatherill (ed) *European Sports Law: Collected Papers* (T.M.C. Asser Press 2014) 439-440

legal system. In this regard, the 2nd stage "simply" provided a different solution to handle with that interaction – while effectively expanding in practice the intersection area between EU Law and *Lex Sportiva*.

2.3 3rd Stage: Lisbon Treaty and Olivier Bernard

It is interesting to notice that the interaction between EU Law and *Lex Sportiva* enjoyed a strong development during decades (1st and 2nd stages) despite sport not being contemplated in the TFEU. It means that both the CJEU and the Commission so far based their decisions exclusively on non-sporting grounds (in other words: grounded on EU rules which were not directly destined to sport, but were applicable due to the horizontal nature of Sports Law – i.e. Competition Law, Intellectual Property Law, Labour Law…) and on EU soft law which provided some guidance on sport aspects.

One of the paramount soft law sources in this regard was the so-called Nice Declaration[47]: the Declaration on "the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies". This Declaration, issued in 2000 (still during the 1st stage of evolution) by the European Council, stated that "even though not having any direct powers in this area, the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special". It thus constituted an important source of soft law, as it expressly recognised the specificity of sport and the "support for the independence of sports organisations and their right to organise themselves through appropriate associative structures" – which would be later ratified by the White Paper on Sport.

[47] Conclusions of the Presidency: Annex IV - Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies [2000] <http://www.europarl.europa.eu/summits/nice2_en.htm#an4> Accessed 24 July 2018

After unsuccessful previous attempts of incorporating sport to EU's legal framework[48], it finally happened through the Lisbon Treaty. Therefore, since December 1, 2009 (when the Lisbon Treaty entered into force), the TFEU has been providing specific regulation on sport in its Article 165. Interestingly, the article comprises education, youth and sport together, which clearly points to one of the fundamental virtues of sport: its societal aspect, which had already been highlighted by the White Paper on Sport. Nonetheless, the TFEU provisions are not restricted to that facet; in fact, they also present interesting guidance on the economic dimension and on the organisation of sport, following the categories previously established by the White Paper.

Weatherill[49] described the inclusion of sport in the Treaty as "an attempt to make clearer the relationship between the EU and sport". In this regard, he argued that Article 165 created a merely supporting competence for the EU (indicating that it did not assume a central role on sports regulation) but simultaneously provided legitimacy for the EU institutions to act in sport-related matters.

Despite representing an important mark on Sports Law – which was finally lifted to hard law status in the EU –, the Treaty did not create any new paradigm on the interaction between EU Law and *Lex Sportiva*, basically following the White Paper logic. Furthermore, Siekmann reminded that Treaty provisions about sport "'codified' in fact the philosophy and phraseology of the Sport Declarations of Nice and Amsterdam, referring to the social and educational functions of sport and taking account of its specific nature"[50].

Still, it is vital to notice that Article 165(1) expressly ratifies the specific nature of sport: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport (…)". This can be understood as an endorsement of the path taken by the CJEU so far, which basically lied on specificity of sport as the fundamental premise for all its rulings, independently of the differences between 1st and 2nd stages.

[48] Richard Parrish, Borja García García, Samuli Miettinen and Robert Siekmann, *The Lisbon Treaty and EU Sports Policy* (European Parliament 2010) 15
[49] Stephen Weatherill, 'EU Sports Law: The Effect of the Lisbon Treaty' in Stephen Weatherill (ed) *European Sports Law: Collected Papers* (T.M.C. Asser Press 2014) 519
[50] Siekmann (n 44) 80

Therefore, the legitimacy mentioned by Weatherill is not only related to future cases, but also conferred to the previous jurisprudence consolidated by the CJEU.

It is not by coincidence that Article 165 is expressly mentioned by the CJEU in *Bernard*[51], one of the most recent Sports Law landmark cases. That was the first time[52] the CJEU could rely on the Treaty to assess the specificity of sport – or even the "specificity of (professional) football", as argued by Mestre[53] – and use it as the basis for a decision. Moreover, the ruling went beyond specificity and was grounded on the social role of sport, as Pijetlovic stated:

> (…) the Court accepted the objective of encouraging recruitment and training of young players as legitimate. The social importance of sport played a crucial role in legitimating this objective and it would probably not be accepted as such in (m)any other employment sectors. Unlike in *Bosman*, the compensations fees in *Bernard* were deemed capable of attaining the said objective. Thereafter, the Court referred for the first time to Article 165(1) TFEU; it set out the standard of application of the proportionality principle in the objective justification framework, according to which account must be taken of the specific characteristics of sport and its social and educational function. The same standard of application of proportionality test, it is submitted, applies in the interpretation and application of EU competition law to sport. [54]

The Bernard case thus revealed the essence of 3rd stage of interaction between EU Law and *Lex Sportiva*, already influenced by the introduction of sport in the TFEU. The rule adequacy to EU Law is not mandatory for it to be considered as valid by the Court; even if it does not fit entirely into EU Law (in *Bernard*, the fundamental freedom of movement of workers was at stake, and the Court initially indicated that the training compensation restricted it), it can be considered as valid as long as it pursues a legitimate objective and is necessary and proportionate to achieve such objective. Therefore, it follows the *Meca-Medina* ruling – but now based on a Treaty provision.

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[51] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-02177
[52] Siekmann (n 44) 74
[53] Alexandre Miguel Mestre, 'The Olivier Bernard judgment and article 165 TFUE: Towards a "Specificity of (professional) football"?' [2010] January-May EPFL Sports Law Bulletin 57-62
[54] Katarina Pijetlovic, 'EU Competition Law and Organisational Rules' in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (T.M.C. Asser Press 2016) 124

This is exactly where EU Law and *Lex Sportiva* stand in the present. The development of their interaction brought different solutions for the unavoidable tensions during the last decades, but consistently preserved specificity of sport as the fundamental characteristic to be observed.

3 CURRENT ISSUES AND FUTURE PERSPECTIVES

The different stages presented in Chapter 2 show that the interaction between EU Law and *Lex Sportiva* has been continuous, as new sources of soft law and hard law have evolved, and mainly the CJEU has developed new interpretations to settle the conflicts presented to it. In this regard, it is interesting to notice that such interaction seems to be more intense as long as sport solidifies as an important economic activity. For example, European football market revenue in 2016/2017 season exceeded €25 billlion[55] – an amount that surpasses the GDP of almost 100 nations[56]. Although most of the other sports have not reached such economic magnitude yet, all of them have pointed to professionalism direction, so that the potential conflicts between their rules and the EU Law have been growing too.

As a consequence, new points of tension between EU Law and *Lex Sportiva* have been continuously arising, and the evolution is ongoing. Despite apparently living the third stage of such development, we have recently seen signs of a possible change of paradigm, which can potentially lead to a brand new fourth stage. These signs derive from a diversity of new cases which have been presented before EU institutions – or that have not even been presented yet, but already demonstrated their potential to impact *Lex Sportiva*.

Three different important cases will be studied: the first one is specifically related to football, presenting some similarities with *Bosman*; the second one comprises a case regarding skating, but with potential impact on every single sport discipline; and the third one is probably the most comprehensive in terms of sports organisation. Hence very diverse

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[55] Deloitte, 'Roar power: Annual Review of Football Finance 2018' (June 2018) <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html> accessed 24 July 2018

[56] Jamil Chade, 'Receita do futebol supera R$ 100 bi e esporte já é maior que PIB de 95 países' (*Estadão*, 6 June 2018) <https://esportes.estadao.com.br/noticias/futebol,receita-do-futebol-supera-r-100-bi-e-esporte-ja-e-maior-que-pib-de-95-paises,70002340625> accessed 24 July 2018

issues, with different possible consequences, but a fundamental similarity: the potential to make a strong impact on *Lex Sportiva*.

But before analysing them, it is vital to assess a case that has already been established as a landmark in state recognition of *Lex Sportiva* validity and CAS's competence – which are intimately related to each other.

3.1 The Pechstein Case

Throughout this thesis, we have been dealing with the dialogue between two transnational legal systems: EU Law and *Lex Sportiva*. Nevertheless, this is not the only interaction that each of them faces regarding different systems; both have continuous contact with national legal systems, generally constituted by positive law[57] emanating from the state and enforced by national courts. The Pechstein case is a recent and remarkable example of such interaction: it refers to sporting rules, which were questioned before national courts though.

It started in 2009, when the German speed skater Claudia Pechstein was sanctioned by the ISU for anti-doping violation, thus becoming ineligible to compete for two years. As a consequence, the athlete and the German national federation[58] appealed to CAS against the ISU Disciplinary Committee decision; however, in 2010 the arbitral panel dismissed both appellations, hence upholding the ineligibility sanction. Subsequently, Pechstein appealed before the Swiss Federal Tribunal, aiming the annulment of CAS award – but her request was rejected once again.

Therefore, at that time (September 2010) the regular jurisdictional instances provided by *Lex Sportiva*[59] were exhausted. Despite that, the athlete was still unsatisfied about the sanctions imposed to her, and then brought the case to German courts. The claim filed before the Regional Court of Munich comprised requests for "a declaratory judgement stating that

[57] At least in Civil Law jurisdictions.
[58] *Deutsche Eisschnellauf Gemeinschaft e.V.*
[59] The possibility of recourse against the arbitral award is stipulated by rule R46 of the Code of Sports-Related Arbitration: "The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the original award". Therefore, it can be considered to be the final instance provided by *Lex Sportiva*.

her ban due to doping was unlawful, and a decision ordering the Defendants to pay compensation for the material damage suffered by her, as well as compensation for her pain and suffering"[60].

At that lawsuit, the subject matter was not just the anti-doping violation anymore, but mainly the validity of the arbitration agreement which led the case to be ruled by CAS. This is precisely the fact that underlines the importance of the case: besides putting at stake the arbitration agreement which was applicable in a concrete situation involving the two parties (Pechstein and ISU), the lawsuit examined CAS's competence in a broader sense, as it frequently derives from similar agreements.

The significance of such discussion for *Lex Sportiva* is immeasurable, as CAS is fundamental for its stability as an autonomous legal system: the arbitral awards frequently represent a source of law, supporting the development, interpretation and consolidation of sporting rules[61]; and CAS plays a key institutional role which ensures enforceability of those rules within the system. In other words, CAS tops a jurisdictional system built within *Lex Sportiva*, which is duly capable of enforcing sanctions of sporting nature. This whole jurisdictional system (and *Lex Sportiva* itself) could thus be undermined if CAS's competence was rejected.

That possibility temporarily became reality during Pechstein case. In 2015, the Higher Regional Court of Munich issued a decision that considered the arbitration agreement entered into by the athletes as invalid and, moreover, stated that CAS did not constitute a proper arbitral tribunal. The invalidity of such agreement was held on the grounds that "the fact that ISU required from Pechstein to sign an arbitration agreement in favour of CAS is an abuse of dominant position"[62]; regarding CAS, the Tribunal stated that it comprised an unjustified imbalance in favour of sports organisations due to the mechanism provided to nominate and select arbitrators, which compromised its neutrality and independence.

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[60] Excerpt of the German Supreme Court decision, in an English translation available at <https://www.isu.org/claudia-pechstein-case> .

[61] Lorenzo Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012) 157-163

[62] Antoine Duval, 'The Pechstein Ruling of the OLG München (English Translation)' (6 February 2015) para 86 <http://ssrn.com/abstract=2561297> accessed 4 July 2018

Despite denying that the arbitration agreement was invalid *per se* as a consequence of the athlete lacking free will, the decision eventually echoed some of the criticism directed by a few experts, such as Foster, to CAS's current structure:

> Arbitration systems ultimately get their legitimacy from the contractual agreement of the parties. When the issues before the Court of Arbitration for Sport are appeals against the exercise of disciplinary power over athletes, who are forced to agree to its jurisdiction, then a contractual model is inoperative.
> Mandatory arbitration has many dangers. The power differential between athletes and the federations is obvious. The procedure for choosing arbitrators remains opaque. There are specialised counsels, who are themselves often past arbitrators, and as such have an advantage when they represent federations. Awards are still not universally published, thereby giving the repeat players additional advantages.[63]

But that ruling did not resist to the appeal filed by the ISU before German Supreme Court. This Court's decision, issued in June 2016, set the Regional Court decision aside, confirming the legitimacy of the arbitration agreement, validating CAS as a proper independent and neutral arbitral tribunal, and expressly ratifying its importance:

> The request for an arbitration agreement designating the CAS as the Court of arbitration is definitely justified from an objective point of view and does not contradict the general values enshrined in the law. In particular, this request is in no way contrary to the Plaintiff's right of access to the courts, her rights of professional freedom (Art. 12 of the German Constitution) and her rights under Art. 6 ECHR. This also means that the arbitration agreement cannot be considered invalid pursuant to sec. 138 of the German Civil Code.
> (…)
> Only an independent and fair sports arbitration can expect to be recognised and respected worldwide, and every athlete wishing to participate in fair competition must be interested in having alleged violations of anti-doping rules cleared up and sanctioned on an international level in accordance with uniform standards, and in ensuring equal treatment for all the athletes from different countries against whom such violations may have been alleged.
> (…) If this task were left to the courts in the individual states, the goal of international sporting arbitration would be jeopardised. (…) The statutes of the CAS, as they currently stand, contain procedural rules for the appointment of arbitrators which can be considered as acceptable. [64]

[63] Ken Foster, '*Lex Sportiva* and *Lex Ludica*: the Court of Arbitration for Sport's Jurisprudence' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012) 147-148

[64] Excerpt of the German Supreme Court decision, in an English translation available at <https://www.isu.org/claudia-pechstein-case> 16

It is important to notice, though, that the Pechstein saga is not over yet: after another appeal, the case was brought to German Constitutional Court[65]; and there is a pending complaint before the ECHR[66] as well.

Despite that, and even though being called as a "surrealist ruling" by Duval[67], that decision indeed constituted a key endorsement of *Lex Sportiva* (by indirectly recognising the legitimacy of one of its pillars – the jurisdictional system topped by CAS) by the German legal system – which is highly reputable and inspiring for many other national legal systems, especially in Civil Law countries. Therefore, *Pechstein* must be duly considered when assessing the possible trends of *Lex Sportiva*'s future interaction with the other legal system that pervades this thesis: EU Law.

3.2 TPO Prohibition

As already mentioned in Chapter 2, after Bosman case FIFA had to deploy deep changes to its transfer system. In order to adjust it to EU Law, FIFA designed a new system based on two pillars: federative and economic rights. The first has always necessarily referred to the labour relationship between the player and the club he is employed by. Nevertheless, the latter one did not necessarily refer entirely to the employer club, as FIFA regulations had no objection to the possibility of third parties owning a player's economic rights – the TPO[68].

TPO was very much used by several clubs as a way to sign (or retain) players they would not be able to afford if they needed to acquire their economic rights (especially in countries such as Brazil[69], Portugal, Spain, Greece, Belgium, Holland and Turkey[70]). In other

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[65] Peter Bert, 'Sports Law: Update on the Pechstein Case' (*Dispute Resolution in Germany*, 31 May 2017) <http://www.disputeresolutiongermany.com/2017/05/sports-law-update-on-the-pechstein-case/> accessed 24 July 2018

[66] Claudia Pechstein v Switzerland (Case no. 67474/10)

[67] Antoine Duval, 'The BGH's Pechstein Decision: A Surrealist Ruling' (*Asser International Sports Law Blog*, 8 June 2016) <http://www.asser.nl/SportsLaw/Blog/post/the-bgh-s-pechstein-decision-a-surrealist-ruling> accessed 12 July 2018

[68] As van Maren and Duval explain in Oskar van Maren, Antoine Duval, La Liga, Raffaele Poli, Ariel N. Reck, Daniel Geey, Christian Duve and Florian Loibl, 'Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium'. [2016] Int Sports law J 15: 234, the expression "TPO" is often criticized by some experts, who understand that "third-party investment" or "third-party entitlement" would more accurately describe the legal situation. Nevertheless, FIFA reasonably justify the reference to TPO on the grounds that the ownership is related to the economic rights, not to the player himself.

[69] Marcos Motta and Pedro Fida, 'TPO in Brazil: The Implementation of a Ban' (November 2015) < http://www.bicharaemotta.com.br/artigos/tpo-in-brazil-the-implementation-of-a-ban/> accessed 14 July 2018

words, it used to be a very important financing mechanism for numerous clubs in a global market, as they compete with wealthier clubs form the same league or even from wealthier leagues.

In contrast, TPO used to be criticised as the investors were considered to influence clubs' and players' decisions regarding transfers – which was alleged to be an undesirable interference from third parties on football market. In order to avoid this, in 2007 FIFA inserted Article 18bis on its RSTP, preventing clubs from entering "into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams".

Notwithstanding, FIFA apparently found it was insufficient to avoid third-party influence on player transfers. Then, in 2015, a new rule was included in FIFA RSTP: Article 18ter, which expressly banned TPO. From then on, TPO prohibition has been in force – but not without intense legal controversy.

The origin of such dispute resides precisely on the conflict between FIFA RSTP and EU fundamental freedoms and Competition Law – which naturally raises comparisons with *Bosman*. In this regard, while addressing *Bosman*, Siekmann explained why the transfer system is so susceptible to the tension between *Lex Sportiva* and EU Law:

> The transfer system of players is an example of the specificity of sport. (…) Transfer rules aim to protect the integrity of sporting competition and to avoid problems such as money laundering, but they must be in compliance with EU law. In its Bosman ruling, the Court of Justice unequivocally stated that 'nationals of a Member State have, in particular, the right, which they derive directly from the Treaty, to leave their country of origin, to enter the territory of another Member State and reside there in order to pursue an economic activity. Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to free movement therefore constitute an obstacle to that freedom, even if they apply without regard to the nationality of the workers concerned.' Restrictive transfer rules may also constitute an infringement of EU competition law.[71]

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[70] Luís Villas-Boas Pires, 'A review of FIFA's TPO ban and alternative financing models for clubs' (15 March 2016) <https://www.lawinsport.com/topics/articles/item/a-review-of-fifa-s-tpo-ban-and-alternative-financing-models-for-clubs> accessed 24 July 2018

[71] Siekmann (n 44) 82-83

The debate about TPO prohibition was brought to practice by the Belgian club RFC Seraing before CAS, in a case[72] that clearly revealed the legal reasoning behind clubs' and FIFA's positions. After being sanctioned for violating Articles 18bis and 18ter of FIFA RSTP, RFC Seraing appealed to CAS and alleged that TPO ban was illegal. It claimed that Article 18ter violated EU Competition Law and especially three of the fundamental freedoms established by the TFEU: movement of workers, provision of services and movement of capital. On the other side, FIFA sustained that TPO prohibition was fully compliant with EU Law, and that it aimed five objectives: (i) stability of players' contracts, (ii) players' and clubs' autonomy, (iii) transparency, (iv) integrity and equity, and (v) avoidance of conflicts of interest.

The CAS Panel admitted that Article18ter comprised restriction to the aforementioned fundamental freedoms, but interestingly applied the *Bernard* reasoning to state that the restriction did not necessarily lead to the illegality of the rule: it could be considered valid once it pursued legitimate objectives and was necessary and proportionate to achieve them. Therefore, based on these grounds elaborated by the CJEU, the CAS Panel concluded that Article 18ter was valid as long as TPO prohibition was adequate and proportional to achieve the legitimate objectives argued by FIFA.

This CAS ruling in principle strengthened FIFA's position, but it did not represent a final and unchanging decision about the validity of TPO prohibition under EU Law (despite CAS's importance for the making of *Lex Sportiva*, already mentioned in section 3.1). Firstly, because of a particular characteristic that is inherent to arbitration: the same controversy can be brought to CAS by another club, and a different Panel would not necessarily come to the same conclusion reached by that first one. And more importantly, because RFC Seraing case is still being discussed before the Brussels Court of Appeal.

The claim filed by the club before the Belgian court questioned the validity of Article 18ter among other issues, and was decided in favour of FIFA in first instance. Nevertheless, a decision on RFC Seraing's appeal is still pending, with the club having asked the court to refer the case to the CJEU.

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[72] TAS 2016/A/4490, RFC Seraing c. FIFA (9 March 2017) <http://www.tas-cas.org/fileadmin/user_upload/Sentence_4490__FINALE__internet.pdf> accessed 24 July 2018

If this claim is accepted, it is possible that the CJEU adopts a stricter and more EU Law-oriented approach on the matter, which could undermine TPO ban's validity. Even though the Commission already dismissed a complaint lodged against TPO prohibition[73] and expressed its opinion in favour of such ban[74], a CJEU decision on the subject could easily point to another direction – mostly because FIFA's alleged objectives are questionable, and the proportionality and adequacy of such measure to achieve them are (at least) controversial[75].

Therefore, the debate regarding TPO is still pretty much alive[76] and it will not be surprising if the CJEU (once again) have the final word to solve this point of tension between *Lex Sportiva* and EU Law. If so, there will be high expectations regarding the reasoning to be adopted by the Court on its decision: Will the CJEU adopt the test established in *Bernard* and replicated by CAS, as expected? If so, will the Court rule the case just as CAS did? Or will it come to a different conclusion, either based on the same test or creating a new paradigm?

The answers are uncertain, and we may never know them if the subject is not brought to the CJEU. However, the controversy regarding legality of TPO prohibition before EU Law does have potential to become a landmark case in the CJEU, possibly leading to a new demand for changes on FIFA RSTP almost thirty years after *Bosman* ruling did.

3.3 The ISU Case

As exhaustively mentioned throughout this thesis, the CJEU has evolved as the EU institution whose decisions make more impact on *Lex Sportiva*. Nevertheless, it was the Commission who played the key role in examining one of the most important recent cases and issuing a decision whose impact can also become comparable to *Bosman*'s.

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[73] 'European body upholds FIFA ban on 3rd party transfer deals' (*Associated Press*, 13 October 2017) <https://www.apnews.com/92891e18d0894c429d02976624b08ea5> accessed 24 July 2018

[74] European Commission, *An update on change drivers and economic and legal implications of transfers of players* (Publications Office of the European Union 2018) 56

[75] Pedro Henrique Rebello de Mendonça, 'Third-party ownership prohibition in football and European Union fundamental freedoms: CAS decision on RFC Seraing case' (2018) International Sports Law Journal <http://rdcu.be/ESX4> accessed 22 July 2018

[76] FIFA.com, 'Latest decisions of the FIFA Disciplinary Committee in relation to third-party rules' (26 Jun 2018) <https://www.fifa.com/governance/news/y=2018/m=6/news=latest-decisions-of-the-fifa-disciplinary-committee-in-relation-to-third-party-r.html?cid=twitter_button> accessed 24 July 2018

In June 2014, two Dutch speed skaters filed a complaint before the Commission against ISU's 2014 eligibility rules; the norm in question provided that any person who skated or officiated in an event not sanctioned by the ISU or one of its affiliated members would become ineligible to participate in ISU activities and competitions – without any possibility of being reinstated as an eligible person. They alleged that those rules were in breach of EU Competition Law, as they could not participate in speed skating events organised by non-ISU members, and hence lost the opportunity to earn alternative revenues. After three years, in December 2017 the Commission issued the following decision:

> The International Skating Union has infringed Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area by adopting and enforcing the Eligibility rules, in particular Rules 102 and 103 of the ISU 2014 General Regulations and the ISU 2016 General Regulations, with regard to speed skating. The infringement started in June 1998 and is still ongoing.
> (…)
> The International Skating Union shall, within 90 days of the date of notification of this Decision, bring to an end the infringement referred to in Article 1 and shall, within that period of time, communicate to the Commission all the measures it has taken for that purpose.[77]

This decision thus expressly recognized that the eligibility rules adopted and enforced by the ISU consisted on a direct violation to EU Competition Law, and determined the proper amendment so as to remedy the infringement. And the reasoning embraced by the Commission to come to that conclusion was very interesting.

Firstly, the case was assessed purely under EU Competition Law perspective. In order to do so, the worldwide market for the organisation and commercial exploitation of international speed skating events was defined as the relevant market (considering both product and geographic aspects), in which the ISU (an association of undertakings) was considered to have a strong position; furthermore, the Commission concluded that the eligibility rules at stake constituted a decision of an association of undertakings.

[77] *International Skating Union's Eligibility rules* (Case AT 40208) Commission Decision C/148/9 [2018] OJ C 148/9

With all those premises being settled, the Commission established that the eligibility rules restricted competition on the relevant market by object and by effects. Regarding object, one important aspect taken into consideration was the content of the rules, which expressed that "the condition of eligibility is made for the adequate protection of the economic and other interests of the ISU"[78]; on this ground, the Commission concluded that the objectives of the rules were not of sporting nature only, but also to refrain competition and preserve the ISU's economic interests[79]. With regards to the effects of the rules, the Commission determined that the ineligibility sanction prevented high level athletes from participating of competitions held by third parties and hence limited the "sources of supply" of potential new organisers – which generated an adverse effect on consumer choice and innovation potential.

Based on those arguments, the assessment of any non-sport case would have been concluded by then, with the violation to EU Competition Law being immediately declared. However, due to specificity of sport, the Commission settled the additional aspects which needed to be examined in order to substantiate any conclusion:

> The Eligibility rules relate to the organisation of competitive sport. In Meca-Medina, the Court of Justice ruled that such rules are generally subject to EU competition law. They may fall outside the application of Article 101 TFEU in certain circumstances, taking into account (i) the overall context in which the rules were taken or produce their effects and notably their objectives, (ii) whether the consequential effects restrictive of competition are inherent in the pursuit of the objectives and (iii) whether they are proportionate to them.[80]

In other words, the Commission executed the test created in *Meca-Medina* and ratified in *Bernard* – also applied by CAS in *RFC Seraing*. The case-by-case analysis established by the CJEU thus extrapolated the court's competence and was consolidated by the Commission as the "golden rule" to solve any tensions between EU Law and *Lex Sportiva*.

The application of the test in *ISU* resulted in the disapproval of the eligibility rules provided by the IF: the Commission did not consider the protection of economic interests as a legitimate objective, and the effects of the eligibility rules were found to be neither inherent

[78] Rule 102(1) a) (ii) of the ISU General Regulations 2014
[79] The quoted rule was later altered in 2016 version of the ISU General Regulations, but the Commission considered that it still comprised an illegitimate object of restricting competition.
[80] Commission Decision C/148/9 (n 77) para 20

nor proportionate to achieve those objectives – so that, even if there was not a financial objective, the rules would not be valid under EU Law.

At first sight, the grounds in which the Commission based its decision do not suggest any greater impact by EU Law on *Lex Sportiva*; it strictly followed the reasoning implemented in *Meca-Medina* and *Bernard*, and imposed changes exclusively on ISU regulations[81]. Nonetheless, the importance of this ruling derives from the nature of eligibility rules. This kind of sporting rule is extremely comprehensive[82], as most IFs and even the Olympic Charter contain eligibility rules (whose importance is highlighted, for example, by the fact that for almost a century those norms prevented professional athletes from competing in the Olympic Games). But more importantly, those rules represent the power emanating from the IFs in the sport pyramidal system.

The pyramidal system works on a monopolist basis, which can be explained by the roots of organised sport: groups of athletes founded clubs; these clubs constituted a national federation to organize national competitions between them; different national federations associated themselves to create an IF; and finally, the IOC recognised one IF responsible for each sport (or group of sports). Therefore, from the IOC to the athletes (going through IFs, national federations and clubs, besides continental associations, leagues, etc.), a monopolist chain of sports bodies – following the *Ein-Platz-Prinzip*[83] – is constituted, and in principle it is not possible for any of the parties involved to participate of events outside this pyramid. Rules similar to the ones enacted by the ISU are fundamental to preserve such monopoly and are part of a vicious circle in this regard.

On one side, those rules generally preclude athletes and clubs from participating of unauthorised events (in the meaning of "events which are not authorised by the IF or one of

[81] The required amendments were approved by the ISU Congress held on June 201, as informed in the ISU website: <https://www.isu.org/news/145-news/12111-decisions-of-the-congress?templateParam=15> and <https://www.isu.org/communications/17037-isu-communication-2156/file>.

[82] Stefano Bastianon, 'The ISU Commission's Decision and the Slippery Side of Eligibility Rules' (*Asser International Sports Law Blog*, 5 January 2018) <http://www.asser.nl/SportsLaw/Blog/post/the-isu-commission-s-decision-and-the-slippery-side-of-eligibility-rules-by-stefano-bastianon-university-of-bergamo> accessed 23 July 2018

[83] In English, the "one place principle", due to which the IOC recognizes only one IF responsible for each sport or group of sports, and the IFs usually admit just a single national federation per country as their affiliated. Therefore, these "recognized" entities (the IF transnationally and the national federations in their respective countries) hold exclusive competence to govern their respective sport.

its affiliated"). This prohibition thus enhances the IF's monopoly once it avoids competition for the organisation of the respective sport – since potential alternative organisers cannot attract the most traditional clubs and players, who are locked into the IF's chain.

On the other side, it is exactly the power conferred by such monopoly that ensures enforceability of those restrictive eligibility rules: as the IF does not have competitors in the market, clubs and athletes have no choice but to stick with the IF's system. Therefore, the monopoly is simultaneously the cause and the consequence of those eligibility rules, and vice versa.

This analysis raises the paradox involving the *Ein-Platz-Prinzip* and its foundation on the clubs' and athletes' free will to adhere to the pyramidal system managed by the respective IF. On one side, the monopoly derives from the practice, as clubs and athletes voluntarily decide to opt in such system; however, on the other side, it is the usual absence of an alternative organiser that induces athletes and clubs to submit themselves to the IF rules.

Based on this finding, the Commission decision may prove to be more than a mere continuation of previous CJEU jurisprudence. Whilst the ruling expressly preserves the specificity of sport by following *Meca-Medina* and *Bernard*, it points to the mitigation of another *Lex Sportiva* pillar: the pyramidal system, which "operates to reinforce the commercial power and income generation of the governing bodies"[84]; but once monopoly is broken, the whole group of norms enacted by the governing bodies have their efficacy and enforceability at risk, as their affiliated become able to opt out from that system and migrate to another one. In other words, the contractual legal order[85] that sets the pyramid becomes vulnerable.

Finally, the ISU case may also become a cornerstone from an institutional perspective, by signalling a possible new attitude by the Commission. This expectation derives from the fact that "the Commission tends not to intervene in cases dealing with regulatory and

[84] Stephen Weatherill, 'The Influence of EU Law on Sports Governance' in Stephen Weatherill (ed) *European Sports Law: Collected Papers* (T.M.C. Asser Press 2014) 467
[85] Ken Foster, 'Is There a Global Sports Law?' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press 2012) 37

organizational aspects of sport"[86] – which was indeed confirmed in the TPO case, as above mentioned. As a consequence, the Commission's different willingness expressed on its *ISU* decision may indicate the beginning of a new stage on its approach to *Lex Sportiva*, possibly marked by higher activity and more severe application of EU Law.

3.4 Corporate Governance Crisis

The professionalization of sport practice in the last decades has vastly changed the way sport organisations are managed. Since business has become a key aspect of high level sport, the management of clubs and federations has been requiring increasing level of professionalism. Moreover, the search for financing mechanisms led to major modifications regarding the legal nature of several clubs.

Nowadays, numerous clubs are legally established as companies, either by legal obligation[87] or by choice in order to enhance external investment. Football has become a fertile land for mergers and acquisitions, with investors taking control of clubs (from the smallest to the most traditional ones) and conglomerates being formed.

Although these examples are intimately related to football, the approximation to Corporate Law is a tendency followed by all sports as a consequence of sport development as a business. Consequently, Sports Law has welcomed Corporate Law principles and concepts in order to deal with the current reality. In this regard, it is expected from sports bodies that they be managed in accordance with the best corporate governance practices.

The first registers about corporate governance as a specific Corporate Law matter arose in the 1970s, in the United States[88]. Initially, its regulation by the state was surrounded by large controversy as some understood that would represent inadequate public intervention on private matters. Despite that, corporate governance still developed academically, aiming to

[86] Bastianon (n 82)
[87] In Portugal, i.e., Decree-Law n. 10/2013 determines that only clubs established as sports corporations or sports companies are eligible to participate of professional competitions – such as first and second divisions of Portuguese Football League.
[88] Brian R. Cheffins, 'The History of Corporate Governance' (*European Corporate Governance Institute, Working Paper n. 184/2012*, January 2012) 2 <http://ssrn.com/abstract=1975404> Accessed 11 July 2018

mitigate the greatest challenges posed by the modern corporations[89]. By providing solutions to these issues, corporate governance surpassed the initial discussions about the convenience of state regulation regarding a private subject: the state interest in protecting national economy and ensuring capital market integrity prevailed.

When it comes to sport, the discussion is different: the autonomy of governing bodies is one of the pillars of *Lex Sportiva,* which assumes a transnational character as a result of being a de-territorialized legal system. Therefore, the debates about corporate governance in sport organisations do not refer to state interference in private matters, but generally to the possibility of external intervention in sports bodies' autonomy.

Another difference is that corporate governance is a relatively new issue regarding sport – or at least a subject that did not develop significantly until few years ago. The IOC, for example, presented the first debates about the subject only in 2008 (nearly ten years after the first reports of corruption in the election of Olympic Games host city[90]), when the "Basic Universal Principles of Good Governance"[91] were approved. More recently, the Olympic Agenda 2020[92] ratified the recommendation that the stakeholders of the Olympic Movement were supposed to comply with the good governance principles provided by the document issued in 2008.

Although these measures indicate the IOC efforts in establishing good governance guidelines, their efficacy is highly questionable. The documents through which the IOC chose to promote governance lack greater representativeness and enforceability, as they are not seen by the Olympic Movement as binding rules and the IOC does not make any action in order to enforce them in practice. If these rules were inserted in the Olympic Charter – which is duly recognised as a binding statute[93] –, they could be much more effective in promoting better

[89] The concept of "modern corporation" was introduced by Berle and Means in Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (MacMillan 1932).
[90] 'Suborno vira "vilão" do esporte mundial' (*Folha de São Paulo,* 16 January 1999) <http://www1.folha.uol.com.br/fsp/esporte/fk16019923.htm> accessed 24 July 2018
[91] IOC, 'Basic Universal Principles of Good Governance of the Olympic and Sports Movement' <https://stillmed.olympic.org/Documents/Conferences_Forums_and_Events/2008_seminar_autonomy/Basic_Universal_Principles_of_Good_Governance.pdf> accessed 24 July 2018
[92] IOC, 'Olympic Agenda 2020: 20 + 20 Recommendations' <https://stillmed.olympic.org/Documents/Olympic_Agenda_2020/Olympic_Agenda_2020-20-20_Recommendations-ENG.pdf> accessed 24 July 2018
[93] Mestre (n 8) 26-33

governance practices in sports organisations; however, they do not currently have this status, and consequently figure as mere general and abstract values which have not generated the expected practical effects yet.

This example involving the IOC reflects a great challenge to *Lex Sportiva*: the enforceability of corporate governance rules. The sport system does not provide incentives for the IFs managers to improve governance and transparency, as they are not sanctioned by not complying with those principles; moreover, better governance rules may make it more difficult and expensive to manage the entity; and finally, the creation of better and more transparent rules of governance may threaten the position of managers who are theoretically responsible for their implementation.

Furthermore, it is important to distinguish the theoretical and the practical terms. The statutory provision of better corporate governance systems do not necessary mean that their implementation will be satisfactory. FIFA recently provided a very good example of this difference by approving new rules on good governance but failing to make them effective, as reported by its governance committee ex-members:

> We have concluded that FIFA cannot reform from within. Those responsible for leading such reform are politically dependent on the associations and officials they need to reform, and may remove members of the judicial and supervisory independent committees at a whim.
> (…)
> What can be done? We advocate decisive external action. Parliamentary inquiries are good starting points, but it is necessary for them to produce concrete results. No country on its own – including Switzerland which hosts many of the world governing bodies – has the effective power to regulate such transnational organisations. The European Union is, though, in a privileged position: it brings together 28 member states – while the UK is still a member – which, collectively, these governing bodies cannot ignore. We believe the EU should take the lead. [94]

This joint statement exposes the sport corporate governance crisis currently in course. Several corruption scandals have arisen, involving different sports[95], and *Lex Sportiva* has

[94] Miguel Poiares Maduro, Navi Pillay and Joseph Weiler, 'Our sin? We appeared to take our task at Fifa too seriously' (*The Guardian*, 21 December 2017) <https://www.theguardian.com/football/2017/dec/21/our-sin-take-task-fifa-seriously?CMP=share_btn_tw> accessed 24 July 2018

[95] Roger Pielke Jr refers to scandals in the IOC, FIFA, IWF, FIVB, UCI, IAAF and CONCACAF, in Roger Pielke Jr, 'Obstacles to accountability in international sports governance' <https://www.transparency.org/files/content/feature/1.4_ObstaclesToAccountability_Pielke_GCRSport.pdf> accessed 23 July 2018

proven to be ineffective to mitigate them so far. Self-regulation has been failing to ensure minimum level of transparency in sports governance[96], and external intervention has been increasingly demanded – with the current model of sport autonomy, well described by Chappelet[97], being put at stake[98]. Pielke Jr summarised the problem:

> Recent decades have seen greater attention being devoted to achieving best practices of governance on the part of states, businesses and non-profits, but sport organisations have lagged behind. They will continue to face pressures to improve their governance. Athletes, sponsors, supporters, governments and other parties all have interests in participating in this process. To date, however, progress has been slow. If sport organisations prove incapable of introducing effective reform, they may find change being forced upon them. So far, at least, change has proved difficult. [99]

As proposed by Maduro, Pillay and Weiler, EU institutions could play an important role in externally promoting better governance in IFs – a suggestion that confirms the idea exposed in Chapter 2, in which the transnational effects of EU Law were mentioned as key for its impact on *Lex Sportiva*. Their statement seems correct as the current IOC and IFs context does not indicate any effective development on sports corporate governance; however, EU has already assessed this subject, and pointed to a different direction.

In 2013, an EU Expert Group on Good Governance, established after the Council Resolution on an EU Work Plan for Sport 2011-2014, issued the "Principles of good governance in sport"[100]. Regarding the implementation of those principles, the document provided the following:

> (…) it is important that good governance principles are embraced voluntarily by sports bodies in the wider interest of promoting effective sporting regulation and development. Enforcement by national governments or European institutions via contract and/or funding conditions might have the potential to compromise the

[96] Antoine Duval, 'The rules of the game: The need for transparency in sports governance' (1 July 2016) <http://www.playthegame.org/news/comments/2016/034_the-rules-of-the-game-the-need-for-transparency-in-sports-governance/> accessed 23 July 2018
[97] Jean-Loup Chappelet, *The autonomy of sport in Europe* (Council of Europe Publishing 2010)
[98] Ravi Mehta, 'The future of sports governance: Will sport sustain its traditional model of autonomy?' (3 January 2017) <https://www.sportslawbulletin.org/future-sports-governance-will-sport-sustain-its-traditional-model-autonomy/> accessed 23 July 2018
[99] Pielke Jr (n 95)
[100] European Commission Expert Group on Good Governance, 'Deliverable 2: principles of good governance in sport' (September 2013) <http://ec.europa.eu/assets/eac/sport/library/policy_documents/xg-gg-201307-dlvrbl2-sept2013.pdf> accessed 24 July 2018

> autonomy of sports bodies and create tensions in the wider international sporting framework.
> Autonomous self-regulation by the sport movement remains the best option and is consistent with the structure of the international sport movement. All parties should have an interest in ensuring effective governance structures are in place as this is more likely to result in better sports policy and minimise disputes or challenges both from within a sport or outside.
> The role of the EU should consist in encouraging compliance with the agreed principles and rules.

This excerpt interestingly reveals the recognition of autonomy and self-regulation as fundamental grounds for a proper ruling on sport corporate governance. The initial measures suggested by the Expert Group to be taken by the EU were limited to (i) funding educational programs and (ii) monitoring and benchmarking activities, with other alternatives (such as conditionality of funding subject to respect of the principles) being held for a second moment, just in case "the application of good governance principles is considered as being not satisfactory". Thereby, the Expert Group clearly rejected the idea of a direct and effective intervention through creation of binding rules to be complied with by sports bodies.

Later on, the Commission launched a "Declaration for sport federations and organisations in the EU"[101], signed by more than forty national or European sports bodies by June 2018. The Declaration basically recognises the importance of good governance for integrity and reputation of sport, and then comprises a voluntary commitment by the signatories to "implement the basic principles of Good Governance in Sport – Integrity, Accountability, Transparency, Democracy, Participation and Inclusivity". Once again, the Commission's action is limited to a non-binding document, which provides mere generic principles instead of effectively impacting the improvement of sport governance.

The Commission seems to be conditioned by the specific nature of sport, provided by Article 165(1) of the TFEU; therefore, it probably understands that any external rules regarding sports bodies' governance would violate their autonomy and, naturally, such specificity. This reasoning is just partially correct: sport autonomy indeed must be preserved once *Lex Sportiva* is recognised as a proper legal system which derives from specificity of sport; notwithstanding, that autonomy is neither unlimited nor immune to possible interactions with other legal systems.

[101] Following the "pledge to implement Good governance in European Sport", as provided in <https://ec.europa.eu/sport/policy/organisation-of-sport/pledge_en>.

Therefore, eventual measures adopted by any EU institution to enhance corporate governance in sports bodies shall not be seen as an improper threat to their autonomy. On the contrary, they may constitute a necessary intervention to preserve sport, as a mere consequence of the permanent interaction between the two legal systems: EU Law and *Lex Sportiva*.

Moreover, the TFEU itself provides the grounds for such initiative. Article 165(2) determines that EU action shall aim at "*developing the European dimension in sport, by promoting fairness and openness in sporting competitions (…)*". The lack of transparency in governing bodies' management represents a real threat to these values, as sport integrity and IFs' reliability are put at stake. The numerous scandals involving sport governance create a negative effect to sport, which turns to be associated to corruption and other illegal practices – the opposite to the fairness and openness intended in the Treaty.

This is why the EU may take appropriate initiatives in order to promote better corporate governance in IFs. It is true that there still are other alternatives which may provide the necessary regulations and incentives for sports bodies to effectively enhance their corporate governance levels without any EU interference – the Sport Integrity Global Alliance (SIGA)[102] is a good example. Nevertheless, EU's legitimacy to act on this subject is clear and justifiable as well: just as the CJEU has always weighed the specificity of sport and EU Law, the Commission (as well as other EU institutions) can perfectly ponder whether the promotion of fairness and openness in sporting competitions is in danger due to the poor governance verified in several sport bodies. The result of such analysis will probably indicate the best available solution that EU Law can provide for this long sport corporate governance crisis.

Once again, it is vital to mention that we do not hereby suggest that the autonomy of sports bodies or the specificity of sport be refused; but if the sport bodies are not capable to self-regulate through *Lex Sportiva*, the interaction with EU legal system may become unavoidable – an the presence of an external player enforcing effective measures to establish

[102] SIGA is a non-for-profit association incorporated in Switzerland, whose declared mission is "to provide global leadership, promote good governance and safeguard the integrity of sport through a set of universal standards operated by an independent, neutral and global body". By July 2018, it had forty members, including National Olympic Committees, IFs and private companies. More information is available on <http://siga-sport.net/>.

good governance may be key for the maintenance of sport core values (mainly its integrity). In this regard, we agree with Weatherill:

> EC law is not constitutionally capable of being used to devise detailed anti-doping procedures or to fix the sum that is due to a club releasing a player for international duty or to stipulate general or detailed rules requiring participation in sports governance by actors currently excluded from the business of organising international football tournaments. Nor indeed do the EU's institutions possess the technical expertise required to engage in such detailed shaping of sports governance. Nevertheless by treating particular features of sports governance as incompatible with the demands of the Treaty, EC law is plainly capable of steering choices in particular directions.[103]

4 CONCLUSION: TRENDS OF EVOLUTION

Despite relatively recent, the evolution of the interaction between EU Law and *Lex Sportiva* has been exceptional so far. The numerous sport-related cases brought before EU institutions clearly demonstrate that EU Law has been playing a vital role in the development of sport normativity.

The cases, norms and documents assessed throughout this thesis revealed that such evolution has been really surprising at some points. *Meca-Medina* is the greatest example: when its decision was issued, sport community was sure that "purely sporting rules" were away from EU Law's purview, and could not see that change of paradigm coming.

Meca-Medina also illustrates how the EU institutions are occasionally inconsistent on their rulings. Mestre[104] put light on the fact that the decisions issued by the Commission, the European Court of First Instance and the CJEU on the case were contradictory between themselves, and pointed that the CJEU judgment "seeks to innovate, by adopting an approach contrary to the preceding case-law, but at the same time defending the case-law which it seeks to overturn". Furthermore, after also assessing the White Paper on Sport, he concluded that the EU institutions were consistently contradictory when applying EU Law to sport:

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[103] Weatherill (n 84) 467

[104] Alexandre Miguel Mestre, 'Contradictions in the application of EU competition law to sport: a never ending story?' [2009] March EPFL Sports Law Bulletin 18-20

> (…) there appears to be no doubt that, as yet, no minimally coherent case law and decision making practice has been developed. The impression gained is that of an ad hoc or casuistic approach, with no pragmatic and scientific criteria, which obviously results in divergent solutions contrary to the principle of the uniformity of EU law.
> Unless a new route is followed, we will keep on having a "never ending story" of contradictions, which jeopardises both the "specificity of sport" and the European integration process (through sport).

The final part of Mestre's statement reveals the most worrying aspect of those EU contradictions: they may directly affect *Lex Sportiva*. Consequently, a more straightforward approach is demanded so as to ensure not only the "uniformity of EU Law", but also the stability of sport normativity.

It is true that after *Meca-Medina*, no equivalent turnaround has occurred. Even the most surprising decisions since then (i.e. the *ISU* ruling) have always followed the reasoning created by the CJEU at that time (with the significant contribution of the White Paper on Sport to consolidate it) – which has been used by CAS as well, as we could notice concerning TPO.

Still, contradictory attitudes keep occurring. It is hard to understand, for example, why the Commission deeply examined the complaint against ISU's eligibility rules but, on the other side, refused to even start proceedings regarding TPO ban. This continuous unexpectedness can be partially explained by the nature of Law as a social science, directly influenced by volatile social, economic and (mostly) political factors. Therefore, it is very difficult to predict the future of the EU Law and *Lex Sportiva* interaction – as *Meca-Medina* once proved.

Despite that, the analysis of the historical progress of that interaction, combined with the assessment of the most important issues that currently involve the subject, allows us to identify interesting trends of such evolution.

Firstly, the latest cases have signalled changes on the balance among EU institutions and their level of action. Whilst in the 1st stage of interaction the CJEU largely dominated EU's interference on sport, from the White Paper on Sport on we have seen the Commission's increasing willingness to address sport-related matters. As above mentioned, this tendency

has not been as straightforward as it would be desirable; notwithstanding, the Commission's decision in *ISU* points to a new role that it may play from now on.

Besides the institutional balance perspective, the confirmation of this trend may also be welcome with regards to the Commission's approach to sport-related matters: it used to follow a predominantly political strategy to deal with sport bodies, either celebrating non-binding agreements or launching declarations to be voluntarily signed by those sport organisations who wish so.

The latter strategy was already mentioned in section 3.4, and has not been effective in order to promote better governance in practice yet. On its turn, the policy of signing non-binding agreements can be illustrated by consecutive Arrangements for Cooperation concluded between UEFA and the Commission, in order to achieve common objectives shared by the parties, such as "(a) promote values and principles common in Europe", "(b) strengthen cooperation in matters of long-term interest to football and sport in Europe, such as the principles of good governance" and "(c) improve the overall financial health of European football"[105].

We do not deny the importance of this approach by the Commission: as above referred, the political aspect is fundamental to construe law in a broader sense, and the complex rules-changing process occurred throughout *Bosman* confirms it. Moreover, it often results in significant pieces of soft law – which have already proved to impact the interaction between EU Law and *Lex Sportiva*.

Nonetheless, that strategy has not been enough to manage some key issues, as demonstrated especially regarding corporate governance. Therefore, the Commission's decision in *ISU* is encouraging, since it indicates its inclination to tackle important issues more assertively while still observing the specific nature of sport.

[105] 'Arrangement for Cooperation between the European Commission and the Union of European Football Associations' (21 February 2018) <https://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/EuropeanUnion/02/53/98/34/2539834_DOWNLOAD.pdf> accessed 20 July 2018

Finally, besides the institutional and strategical aspects, another substantial trend must be observed: the continuous expansion of the interaction between EU Law and *Lex Sportiva*. This trend has been consolidating since the 2nd stage of evolution, and the comparison between the first and the latest cases hereby mentioned leaves no room for doubts: when the CJEU issued its decision in *Walrave*, nobody could expect that the Commission would ever declare the invalidity of eligibility rules issued by an IF, as it did in *ISU*.

In between these two cases, the applicable law (including all its sources) was severely modified: the CJEU jurisprudence changed, the White Paper on Sport was published, and sport was finally raised to Treaty status. During all these decades, though, the specificity of sport remained intact – and *Lex Sportiva*'s status as a legal system too. Despite that, the solutions provided by EU institutions to deal with such specificity vastly changed, and the interaction between EU Law and *Lex Sportiva* significantly broadened, with sporting rules that in the past would not be affected by EU Law becoming subject to it.

In the introduction to this thesis, we referred to the image of two secant circles as a good description of the relation between EU Law and *Lex Sportiva*. The expansion of their interaction during the last decades can thus be translated into a substantial growth of the intersection area between those circles, to a point in which the intersection currently represents almost the entire circle corresponding to *Lex Sportiva*. If this trend continues evolving, in the future we may reach the limit of the theory of the secant circles, with just a minimal part of *Lex Sportiva* not interacting with EU Law: the so-called "rules of the game".

The sport bodies would certainly consider this possibility as a heavy loss at first sight, because their rules would continue to be increasingly subject to EU Law (as they did after *Meca-Medina*). Nevertheless, once specificity of sport is preserved, the interaction between EU Law and *Lex Sportiva* has been presenting positive results to protect key principles enshrined by both legal systems, i.e. the integrity, fairness and openness of sport. Therefore, we really hope this trend can be confirmed and this interaction continues to expand: in our opinion, it would represent a major win for sport and all its stakeholders.

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