EDGE HILL UNIVERSITY

PHD THESIS

THE IMPACT OF THE EU ON THE EUROPEAN MODEL OF SPORT

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ABSTRACT

EU's primary aim and objective is to achieve further integration within the internal market and to ensure cross border trade between the Member States is not distorted by restrictive measures. The EU requires compliance with its fundamental provisions under the Treaties to reach its aims and objectives. With this mind set, the EU regulates any sector constituting economic activity and affecting cross border trade within the internal market. Initially autonomous self-regulated world of sport faced with a difficult challenge under the organisational structures of the EU towards its traditional values because of growing commercial interests of sport, such as broadcasting and sponsorship.

No sector, including sport, is exempt from the application of EU law. While sport is entitled to have its specificity recognised, this status must be earned. EU and sport are not mutually exclusive. Established case law in the area provides guidance on how EU law is applicable to sporting practices and rules. In line with the established case law, the specificity and autonomy of sport is recognised, but it could not be construed to justify a general exemption from the application of EU law to sport. Nevertheless, defining the boundaries of the European model of sport and the EU law has not been easy. However, with the recent developments in EU sports law it has become clear that the organisational structures of the EU and the European model of sport can co-exist on dual condition of complying with the fundamental provisions of EU law and accepting supervision of the EU through policy and dialogue to achieve European standards of good governance in sport. Currently, European model of sport enjoys supervised conditional autonomy under the organisational structures of the EU.

Turkish Republic of Northern Cyprus (TRNC) model of sport sets an example on the recognition of the autonomy of sport in a deeply divided region within Europe. TRNC is under international isolation and the organisational structures of the EU does not have any impact on the TRNC model of sport. Nevertheless, TRNC model of sport would not have been treated differently than the European model of sport under the organisational structures of the EU.

CONTENTS

INTRODUCTION CHAPTER

I. General Introduction; II. Research Questions; III. Methodology; IV. Structure of the Thesis

I. General Introduction

This research intends to identify the impact of the EU on the European model of sport. The term sport in everyday language refers to an activity characterised by a significant physical effort and skill[1]. The meaning of the term 'sport' has undergone substantial changes since the first Olympic Games in Greece in ancient times and the 21st century. Originally, when the term was introduced into the English language in the 14th century, 'sport' meant 'leisure'[2]. Meaning of sport involving physical effort was first recorded in 1520s. In 2012, Council of Europe defined sport as all forms of physical activity aiming to improve health[3]. Physical element of sport is demonstrated as a condition[4]. However, this definition of sport involving physical effort is not universal[5]. In 2011, the SportAccord Council has developed a pragmatic definition of sport to verify whether an applicant federation would qualify as a sport federation and whether sport require physical effort and skill. Sport is defined as an activity with an element of competition which does not rely on luck or equipment that is provided by a single supplier and it is not harmful to living creatures[6]. The International Olympic Committee (IOC) expressly include mental sports or endorse activities without a physical element such as chess[7]. Where a physical element is not necessary, sport is defined by competition and not relying on an equipment provided by one supplier excluding activities with commercial products designed for pure consumption such as

[1] Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/sport> accessed on 7 July 2020.
[2] Online Etymology Dictionary, <https://www.etymonline.com/search?q=sport> accessed on 06 July 2020.
[3] Council of Europe, 'Committee of Ministers Recommendation' No. R (92) 13 Rev, <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804c9dbb> accessed on 7 July 2020.
[4] *Ibid.*
[5] Opinion of A.G. Mr Szpunar - Case C-90/16 The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs [2017] ECLI identifier: ECLI:EU:C:2017:814 at para 37.
[6] SportAccord International Sports Federations, <http://www.sportaccord.com/en/members/index.php?idIndex=32&idContent=14881> accessed on 7 July 2020.
[7] <IOC, Recognised Federations List, https://www.olympic.org/recognised-federations> accessed on 7 July 2020.

video games[8]. Chess is a unique game. However, even though IOC considers chess as a sport, it is not included in the Olympic games[9]. Instead chess has its own international league held bi-annually under Fédération Internationale des Échecs (FIDE)[10]. This demonstrates the lack of thorough uniformity towards the definition of sport in the sporting world[11]. Nevertheless, legal meaning of sport in Europe is recently defined under the *Bridge*[12] case. The Directive referred to under the case did not define sport. Therefore, sport had to be defined by considering its usual meaning in everyday language, while considering the context in which it is used and the purposes of the Directive[13]. From this point, the European Court of Justice (ECJ) favoured an interpretation where the concept of sport is limited to activities satisfying the ordinary meaning of the term sport and characterised by a not negligible physical element[14].

In today's world, millions of people are being distracted, carried away and amused by the love of sport. Sport is a natural outcome of a universal love of play and man's innate desire to compete with and to outshine others.[15] After the Second World War, with the emergence of rapid globalisation of the world, sport has created one of the most significant self-organised international civil societies. Sport has established its own specific set of rules and remedies both at national and international levels. Sport has become one of the most important business sectors and an inalienable part of the popular culture in the world.[16] KPMG[17] estimated that the worldwide sport industry, including sports infrastructure, sports hospitality, training, and manufacturing and retailing sports products, is worth around $700 billion a year and it forms one per cent

[8] Opinion of A.G. Mr Szpunar - Case C-90/16 The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs [2017] ECLI identifier: ECLI:EU:C:2017:814 at para 38.
[9] IOC, List of Olympic Games, <https://www.olympic.org/sports> accessed on 7 July 2020.
[10] International Chess Federation <https://www.fide.com/> accessed on 7 July 2020.
[11] Opinion of A.G. Mr Szpunar - Case C-90/16 The English Bridge Union Limited v Commissioners for Her Majesty's Revenue & Customs [2017] ECLI identifier: ECLI:EU:C:2017:814 at para 38.
[12] *Ibid.*
[13] *Ibid* at para 18.
[14] *Ibid* at para 22.
[15] *Ibid.*
[16] Blake, A, *The Body Language: The Meaning of Modern Sport* (Lawrence & Wishart, 1996) at p 11.
[17] Klynveld Peat Marwick Goerdeler (KPMG in short) is a multinational professional services network, and one of the Big Four accounting organizations. Headquartered in Amstelveen, the Netherlands, KPMG is a network of firms in 147 countries, with over 219,000 employees and has three lines of services: financial audit, tax, and advisory. Its tax and advisory services are further divided into various service groups.

of the world GDP[18]. Sport exercised self-governance via self-organising interorganisational networks characterized by interdependence, resource exchange, rules of the game and noteworthy autonomy from the state without significant interference or challenge[19]. However, in the last 20 years, sport has commercially evolved dramatically. High commercialisation and publicity of the sport market has pulled the attention of the global capitalism and exposed serious governance failures in the organisation of sport[20]. In the recent years, accumulation of scandals in sport has increased greatly and shook the credibility of sport while its organisation threatened the public trust and the social importance of sport[21]. Therefore, the traditional system of hierarchical self-governance and autonomy of the European model of sport enjoyed for over a century faced serious challenge under the organisational structures of the EU.

This research aims to discover the impact of the EU on the European model of sport. The EU's primary aim and objective is to achieve integration within the internal market and to ensure cross border trade between the Member States is not distorted by restrictive measures. The EU requires compliance with its fundamental provisions under the EU Treaties to reach its aims and objectives. With this mind set, the EU regulates any sector constituting economic activity and affecting cross border trade within the internal market. No sector, including sport, is exempted from this application. The general objective of this thesis is to understand and analyse the relationship between the organisational structures of the EU and the European model of sport to establish the effect of the EU on sport. This consists of analysing the approach of the EU Institutions, the EU law, and the EU policy towards the organisation of sport in Europe, including the deeply divided island of Cyprus.

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[18] KPMG, 'The Business of Sport' <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf > accessed on 7 July 2020.
[19] European Commission, Developing the European Dimension in Sport, COM (2011) 12 Final, 18.1.2011, p 3.
[19] M Mrkonjic, Sport Organisations, Autonomy and Good Governance, Working Paper for Action for Good Governance in Internatinal Sport Organisations (AGGIS) Project, Danish Institute for Sport Studies, January 2013 p 133.
[20] The Guardian, '2002 Winter Olympic Bid Scandal in Salt Lake City' <https://www.theguardian.com/sport/1999/mar/17/ioc-expels-members-bribes-scandal> accessed on 7 July 2020.
[21] Action for Good Governance in International Sport (AGGIS), Jens Alm (eds), Action for Good Governance in International Sport Organisations, (2013) p 2.

II. Research Questions

Based on the general objective stated above, this research aims to answer three fundamental questions:

1. To what extent are the organisational structures of the EU and the European model of sport mutually exclusive?
2. What is the impact of EU law and policy on the twin principles underpinning the European Model of Sport, namely the specificity and autonomy of sport?
3. To what extent can the organisational structures of EU and the European model of sport co-exist?
4. What is the impact of the EU on the Turkish Republic of Northern Cyprus (TRNC) model of sport which exists under international isolation in the deeply divided European island of Cyprus?

III. Methodology

This research has adopted a black letter law approach to answer the research questions and to provide an original contribution to knowledge. A common feature of legal research, a black letter law approach is essentially doctrinal research that analyses Court judgments and statutes to explain the law[22]. A black letter law approach focuses on the law itself as an internal self-sustaining set of principles which can be accessed through reading Court judgments and statutes with little or no reference to the world outside the law[23]. It mainly analysis the case law, derives principles and values while compiling the cases into a coherent structure to achieve order, rationality, and theoretical structure[24]. It aims to remedy, organise, and clarify the law on the topic while analysing primary and secondary sources[25]. Much of the past and current legal research has adopted the doctrinal research approach which asks the simple question of what the law is in a particular area and how does it apply?[26] The answer to this question is sought by

[22] Action for Good Governance in International Sport (AGGIS), Jens Alm (eds), Action for Good Governance in International Sport Organisations, (2013) p 3.
[23] M McConville, et al., *Research Methods for Law* (Edinburgh University Press, 2010) p 1.
[24] *Ibid.*
[25] *Ibid* at p 4.
[26] *Ibid* at p 19.

analysing the primary sources which are accepted as the body of case law and any relevant legislation. However, secondary sources such as journal articles and written commentaries on the case law and on the legislation could be included[27]. After analysing the sources, the law is explored to demonstrate how it has been developed through judicial reasoning and legislative enactment. Therefore, this type of research could be said to be purely theoretical and as King and Epstein state not empirical[28]. However, it has been stated that it is not important whether the legal research is empirical or not especially when the main aim is to consider the application of law[29].

A black letter law methodology consists of a critical legal analysis of relevant legislation, including European Treaties, policy measures, case law and decisional practice concerning the area under study. In the proposed area of research, a black letter law approach means analysing European Court of Justice judgments, European Commission decisions, the EU treaties and the key constitutional foundations of the European model of sport which are essentially rules promulgated by private sport bodies. In addition, relevant reports, press releases and academic literature is used to interpret the main sources mentioned. Therefore, this research has relied on primary and secondary sources obtained from the libraries and the official websites of the institutions and the sport governing bodies (SBGs). The research has implemented both deductive, inductive, and analytical reasoning. The findings of law are applied to factual scenarios in a deductive logic, the reasoning from specific cases are used to create a framework of the general rules to fill the gap in the law in an inductive logic[30] and the principles drawn from a set of cases are used under another set of events in an analytical reasoning.[31] In this way the research questions are answered under the thesis.

[27] *Ibid*.
[28] L Epstein and G King, 'Empirical Research and the Goals of Legal Scholarship: The Rules of Inference' (2006) University of Chicago Law Review 1 p 2-3.
[29] M McConville, et al., *Research Methods for Law* (Edinburgh University Press, 2010) p 1.
[30] P Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), Advanced Research Methods in the Built Environment, (Wiley-Blackwell, 2008) p 33.
[31] J H Farrar, Legal Reasoning, (Thomson Reuters 2010) p 92.

IV. Structure of the Thesis

Due to the methodology adopted in this research, the comprehensive literature review undertaken is presented throughout the research rather than being discussed in a separate chapter.

Chapter I examines the organisational structures of the EU to determine whether the organisational structures of the EU and the European model of sport are mutually exclusive. The chapter explores the theories behind the European integration, the development and status of European integration, the nature and effect of EU law and the identification of the fundamental treaty provisions applicable to sport.

Chapter II analysis the organisational structures of the European model of sport. It establishes whether the commercialised organisational features of the European model of sport could conflict with the organisational structures of the EU eliminating the possibility of both being mutually exclusive. This chapter comprises of identifying the features of the European model of sport and the EU supervision on it to demonstrate difficulties of the organisation of sport under the EU law.

Chapter III has the objective to establish the impact of European sports policy on the European model of sport to understand whether the organisational structures of EU and sport are mutually exclusive. This intends to answer the first research question together with Chapter I and Chapter II. This chapter comprises of analysing the aim, establishment, and development of European sports policy in the European Union. The horizontality and impact of Article 165 TFEU on sport will be discussed to discover whether it has altered the historical approaches taken by the EU institutions towards the significance and autonomy of sport.

Chapter IV aims to establish the impact of EU law on the European model of sport in relation to the specificity and autonomy of sport through analysing the ECJ judgments. The chapter attempts to establish the ECJ jurisprudence on sport to develop an

understanding of the EU's approach towards sport with an intention to prepare the ground of answering the second research question collectively with Chapter V.

Chapter V seeks to establish the impact of the EU law on the organisation of sport. This intends to prepare the ground of answering the second research question of what the impact of EU law and policy on the governance of the European Model of Sport regarding the specificity and autonomy of sport is together with Chapter IV. The chapter analyses the application of EU law to individual sporting rules on unsanctioned and rival events, home and away rule, club location, breakaway leagues, club ownership, mandatory player release rules, licensing requirements, and third party ownership under the organisation of the European model of sport.

Chapter VI explores to what extent the organisational structures of EU and the European model of sport could co-exist. This intends to answer the third research question. The chapter comprises of defining good governance and proposes supervised conditional autonomy of sport as a dual solution for the European model of sport to co-exist with the EU.

Chapter VII aims to discover the impact of the EU on the Turkish Republic of Northern Cyprus (TRNC) model of sport which exists under international isolation in the deeply divided European island of Cyprus. This chapter explores the autonomy of sport in TRNC, the Cyprus issue, existence of the TRNC model of sport under international isolation and restrictions, the key features of the TRNC model of sport, and the differences between the European model of sport and TRNC model of sport.

CHAPTER I: ORGANISATIONAL STRUCTURES OF THE EU

I. Introduction; II. Neofunctionalism of EU Sports Law; III. European Integration; IV. Sports policy during European Integration; V. Nature and Effect of EU Law; V.I. Principle of Conferral; V.II. Principle of Subsidiarity and Proportionality; V.III. Categories and Areas of Union Competences; V.III.I. Exclusive Competence; V.III.II. Shared Competence; V.III.III. Supporting, Coordination or Supplementary Action; **VI. Identification of Fundamental Treaty Provisions;** VI.I General Principles and Founding Principles of EU; VI.II Internal Market; VI.III. Fundamental Freedoms; VI.III.I Scope of Application of the Fundamental Freedoms; VI.III.II. Broadening of Application through ECJ Judgments; VI.III.III. Direct Effect: Personal Scope of Application; VI.III.IV. Justification of Restrictions of the Fundamental Freedoms; VI.III.V. Proportionality Test; VI.IV. European Citizenship Provisions; VI.V. Equal Treatment and Non-Discrimination Provisions; VI.VI. Competition Law Provisions; VI.VI.I. Basic Definitions; **VII. Chapter Conclusion.**

I. Introduction

The objective of this chapter is to establish the organisational structures of the EU to help determine whether the organisational structures of the EU and the European model of sport are mutually exclusive. The chapter explores the theories behind the European integration, the development and current status of European integration, the nature and effect of EU law and the identification of the fundamental treaty provisions applicable to sport with a brief introduction to the EU sports policy under Article 165 TFEU.

II. Neofunctionalism of EU Sports Law

European integration can be analysed under different stages and theoretical explanations, commencing with the functionalism of the 1950s[32]. Initially, it was believed that the European integration would best be developed by concentrating first

[32] D Chryssochoou, *Theorizing European Integration* (Routledge, 2nd edn, 2009); A Wiener and T Diez (eds), *European Integration Theory* (Oxford University Press, 2nd edn, 2009).

on separate economic sectors, which could be supervised efficiently and technocratically by supranational institutions, and not being dominated by politics[33]. In 1960s, after the shift from the European Coal and Steel Union towards the more expansive economic union, neofunctionalist theory, most notably explained by Ernst Haas[34], materialized as a substitute way of describing the evolving integration process[35]. Functionalists and neofunctionalists have a similar foundation in their devotion to achieve peace in Europe through the mutual pursuit of equally beneficial goal of economic prosperity . Both claim that competitive economic and political bodies *mediate* in the process and become main players while actively involving in the system[36]. However, neofunctionalists assume that integration is a process initiated by political and economic elites who accept that significant difficulties could not be handled beneficially at the level of Member States and consequently they encourage political powers to be transferred to supranational institutions[37]. Once such powers are transferred a new *self-reinforcing dynamic* depending on the spill-over mechanism is triggered[38]. Neofunctionalists consider that integration is an ongoing process based on *spill-over* from one initially agreeable and technical area to other areas of possibly greater political controversy. The concept of spill-over is one of the most arguable aspects of the neofunctionalist approach[39]. It has a crucial role for the neofunctionalists in describing how the integration process could take place without an *explicit proactive choice* by Member State governments to increase the Union's competences[40]. Spill-over is an automatic process where economic interests would join in with supranational players and direct politics towards further integration[41]. Once the sovereignty in a policy area had been pooled to the Union, supranational players look for further integration

[33] P Craig and G De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) p 2.
[34] EB Haas, *Beyond the Nation State* (Stanford University Press, 1964).
[35] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) p 2.
[36] Juliet Lodge, *The European Union, and the Challenge of the Future* (Pinter, 1993) Introduction, xix.
[37] EB Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stevens & Sons 1958).
[38] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 10.
[39] A Warleigh-Lack and R Drachenberg, 'Spillover in a soft policy era? Evidence from the Open Method of Co-ordination in education and training' [2011] Journal of European Public Policy 999, p 1001.
[40] *Ibid.*
[41] B Rosamond, *Theories of European Integration* (Macmillan, 2000) p 59-65.

grounds starting with connected areas[42]. The literature on the European integration agrees that the supranational players, especially the ECJ and the European Commission have dynamically enlarged competences of the Union in central policy areas[43]. Mainly, ECJ judgments demonstrated that *supranational actors drive forward the integration process[44]*. The ECJ not only supported the interpretation and *constitutionalisation* of European law, but it also created the principle of direct effect which offered the European institutions an uncodified means for imposing and developing Union law[45].

The emergence of EU sports law has supported the classical approach of neofunctionalist spill-over of European law into a policy area not predicted and/or intended by the Member States[46]. The European institutions initially only interfered with the sporting practices due to the competences conferred to them to control and facilitate the functioning of the single market[47]. Initially, the ECJ in *Walrave[48]* ruled that EC law is applicable to sporting practices in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty[49]. In the case, the ECJ expanded its *integrationist judicature into sport domain[50]* while establishing that EC law is applicable to sport with a condition of the presence of economic activity. The foundations set by the ECJ for the EU law to regulate the activities of the sporting bodies were supported by the European Parliament and the Commission[51]. Prior to the

[42] A Warleigh-Lack and Ralf Drachenberg, 'Spillover in a soft policy era? Evidence from the Open Method of Co-ordination in education and training' [2011] Journal of European Public Policy 999, p 1001.
[43] MD Aspinwall and G Schneider, 'Same Menu, Separate Tables: The Institutionalist Turn in Political Science and the Study of European Integration' [2001] European Journal of Political Research 1.
[44] AM Burley and W Mattli, 'Europe before ECJ: A Political Theory of Legal Integration', [1993] International Organization 41; JHH Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of ECJ in the Arena of Political Integration' [1993] Journal of Common market Studies 417; N Fligstein, 'Participation and Policy-Making in the EU' [1998] Journal of Common market Studies 445.
[45] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 11.
[46] S Weatherill, ' "Fair Play Please!": Recent Developments in the Application of EC law to Sport' [2003] Common market Law Review 40, 51; L Barani, 'The Role of ECJ as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' [2005] Journal of Contemporary European Research p 42.
[47] B Garcia, 'From Regulation to Governance and Representation: Agenda-Setting and the EU's Involvement in Sport' [2007] Entertainment and Sports Law Journal 5.
[48] Case C-36/74 *Walrave & Koch* [1974] ECR 1405.
[49] *Ibid* at para 4.
[50] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 11.
[51] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and*

development of a post-Bosman EU sports policy, a study on *The Impact of European Union Activities on Sport* undertaken by Coopers and Lybrand for the European Commission, anaylsed the EU involvement in the European model of sport[52]. The study demonstrated the extensive involvement of the EU in regulating European model of sport without a co-ordinated policy approach[53]. However, the study also exposed a growing institutional awareness towards this difficulty and revealed progress designed to encounter this through the increase in the numbers of sporting institutions[54]. Nevertheless, the lack of a Treaty competence to develop a common sports policy formed an obstacle to achieve a uniform EU sports policy[55].

As a response to the Member States reluctance towards the Union's interference in the sporting practices, the Commission chose a cautious approach towards the sporting practices and the ECJ criticised the approach of the Commission in the *Bosman* judgment[56]. In the case, the ECJ defined the legal limits for sporting practices in the Union while establishing the application of the competition law principles against sporting bodies[57]. With *Bosman*[58], the spill-over of EU law to sport governance was triggered. After *Bosman*, besides the European Parliament, the Commission attempted to promote sport as a method to encourage European integration and set an agenda for *positive integration* in sport[59].

Representation (TMC Asser Press 2009) 12; European Parliament, 'Resolution of the European Parliament on the free movement of professional football players in the Union, Rapporteur: James L. Jassen van Raay (A2-415/88), C69 OJ (1989) .

[52] Coopers and Lybrand, 'The Impact of European Union Activities on Sport' (Study for DG X of the European Commission, 1995).

[53] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 62.

[54] *Ibid*.

[55] *Ibid*.

[56] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) 12; Zuleeg, 'Der Sport im Europaischen Gemeinschaftsrecht' [Sport within Union Law], in M R Will, eds., *Sportrecht in Europa* (Muller 1993) 1.

[57] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) 12; Zuleeg, 'Der Sport im Europaischen Gemeinschaftsrecht' [Sport within Union Law], in M R Will, eds., *Sportrecht in Europa* (Muller 1993) 1.

[58] Case C-415/*93Union Royale Belge Societes de Football Association v Bosman* [1995] ECR I-4921.

[59] Ad hoc Committee 'On People's of Europe', 'Report to the European Council: Adonnino report', 85 A 10.04 COM (1985); European Parliament, 'Resolution of the European Parliament on the Free Movement of Professional Football Players in the Union, Rapporteur: James L. Janssen van Raay (A2-415/88)', C 69 OJ (1989), 33; European Parliament, 'Report on the Commission Report to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport within the Union Framework: The Helsinki Report on Sport, Rapporteur: Pietro-Paolo Mennea (A5-0208/2000)', (2000).

Member States have been reluctant towards the EU's policy making motivations in sport and argued against classical attempts of supranational *competence creeping*[60]. Sport challenged the theory of neofunctionalism since technical spill-over has not evolved into a political spill-over due to the Member States reluctance of transferring competences to the Union until the Lisbon Treaty[61]. However, the Member States continuous resistance towards European sporting regulation and classifying it as an unintended and superfluous consequence of market integration did not prevent the EU from regulating sport. The Commission's attempts in the White Paper 2007[62] has been noted as demonstrating more supranational involvement in the process of identifying the Union's legal framework for sporting practices[63]. This forms an *empirical evidence* for the neofunctionalist approach in the Union[64]. With the Lisbon Treaty, under Article 6 TFEU on supporting competences and Article 165 TFEU on sport, the Union has acquired a formal competence in sport for the first time since its founding. Consequently, the technical spill-over has translated into a political spill-over. This has strengthened the neo-functionalist explanation of the development of EU sports policy.

III. European Integration

European integration commenced in the early 1950s with six sovereign founding members who wished to create more peaceful relations post-WWII. This integration came into being by way of freely agreed international law treaties having economic inspirations as well as an effort to restore relations between France and Germany[65]. The European Coal and Steel Union (ECSC) was established under the Treaty of Paris for a limited period of fifty years, expiring in 2002. The supporters of the ECSC Treaty

[60] S Weatherill, ' "Fair Play Please!": Recent Developments in the Application of EC law to Sport' [2003] Common market Law Review 40, p 51.
[61] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 13.
[62] European Commission, 'White Paper on Sport', COM (2007) 391 final (2007).
[63] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 12.
[64] L Barani, 'The Role of ECJ as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' [2005] Journal of Contemporary European Research p 42.
[65] M Holland, *European Integration form Union to Union* (Pinter, 1993) p 23.

considered it as the first steps for European integration aiming to achieve a European Federation instead of a simple economic unity of coal and steel[66]. Nevertheless, the period between 1951 and 1957 was difficult for European integration[67]. The European Defence Community (EDC) which would have a European army, a common budget and joint institutions had to be put on hold when its ratification was refused by the French National Assembly due to German remilitarization[68]. Consequently, the integration process to achieve defence and political union was put on hold for thirty-nine years until the Member States signed the Maastricht Treaty in 1992 and established the EU[69].

Meanwhile, the progress to achieve economic integration has not discontinued. Instead, to obtain economic integration, the object moved towards low politics which paved the way for the establishment of the European Atomic Energy Union (EURATOM) and the European Economic Community (EEC) under the Treaty of Rome in 1957[70]. Even though EURATOM and the EEC were politically encouraged, their sole focuses were economic and unlike the ECSC, there was no limited lifespan for the treaties. The economic focus of the treaty was clearly stated and political objectives which were previously expressed under the draft EDC were excluded due to national resistance[71]. Primary Treaty objectives identified in the preamble of the Treaty mainly were *to lay the foundations of an ever-closer union and to ensure the economic and social progress of the Member States* and similar[72]. These objectives were achieved with the establishment of a common market as well as a customs union and by developing common policies.

For the time being, the European Community has enhanced its competences paving its way to achieve economic and monetary union while political integration had mainly

[66] F Duchene, *Jean Monnet: The First Statesman of Interdependence* (Norton, 1994) p 239.
[67] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) 5.
[68] J Pinder, *The Building of the EU* (Oxford University Press, 3rd edn, 1998).
[69] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) 5.
[70] Tanja A. Borzel, 'Mind the Gap! European Integration between Level and Scope' [2005] Journal of European Public Policy 217, p 219.
[71] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) 6.
[72] Treaty of Rome 1957, Preamble http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm [Accessed 4th of March 2015].

been suspended[73]. The Single European Act was prepared to encourage completion of the internal market. To achieve this, decision making processes at the Council, which required unanimity for the harmonisation of legislation, needed to be amended. The SEA may not be considered as a dramatic improvement, but it made important institutional amendments to establish the internal market over a period expiring on 31 December 1992[74]. The Single Market was defined clearly as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty[75]. This drive of the SEA to realise the Single European Market project created an unprecedented functional link with sport[76]. The ideology behind the legal foundations of the Single European Market exposed that no sector, including sport, can be exempted from the application of EU law[77]. On the other hand, EU's legal framework took into account the specificity of sport as long as it did not hinder the application of EU law in the Single Market[78].With the SEA, sport constituting economic activity within the single market operated under the regulatory system of the EU[79].

The impetus created by the SEA continued after its adoption. To achieve economic and monetary union, the European Council held an intergovernmental conference (IGC) and later a second one on political union with an aim to balance economic integration with political integration[80]. Following the IGCs, the draft treaty prepared and signed by the Member States in 1992 became known as the Maastricht Treaty, Treaty on EU (TEU)[81]. The TEU sought to achieve five key goals of strengthening the democratic legitimacy of the institutions; improving the effectiveness of the institutions; establishing economic and monetary union; developing the Union social dimension; and, establishing a

[73] Tanja A. Borzel, 'Mind the Gap! European Integration between Level and Scope' [2005] Journal of European Public Policy 217, p 219.
[74] Then article 18 EC.
[75] *Ibid*.
[76] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 106.
[77] R Parrish, 'The Birth of European Union Sports Law' (2003) Entertainment Law, Vol. 2, no. 2 p 24.
[78] *Ibid.*
[79] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 106.
[80] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) p 13.
[81] R Cornett, *The Treaty of Maastricht* (Longman, 1993).

common foreign and security policy[82]. To achieve these goals, the concept of European citizenship was introduced while the powers of the directly elected Parliament were increased. In addition, the name of the organisation changed from European Community to European Union demonstrating a shift away from a Community founded on economic grounds to a Union supported by social values[83]. Maastricht Treaty demonstrated an attempt to change the cultural context of integration[84]. With the Maastricht Treaty, the EU has acquired a greater socio-cultural expression in its policy remit where sport sat more comfortably within the EU's policy architecture[85]. Sport was considered as one of the tools to bring European citizens closer to EU[86]. With the adoption of the TEU, EU evidently went beyond its original economic objective, which was mainly the establishment of a common market, and its desire towards political integration surfaced.

The following intergovernmental conference (IGC) in 1996 led to the adoption of the Amsterdam Treaty with a declaration on sport. The Treaty was about consolidation rather than extending the powers of the Union[87]. The main idea behind it was to facilitate the expansion in number of the Member States which was later postponed until the Nice IGC. The Nice Treaty made certain amendments to the EC Treaty in relation to the Union's institutional structure. The main political success was the consensus obtained on the issues of enlargement regarding weighting of votes in the Council, the distribution of seats in the European Parliament, and the composition of Commission[88]. The Amsterdam Declaration on Sport and the Nice Declaration together with the jurisprudence of the ECJ and Competition Policy DG reflected the effective functioning and sensitivity of the EU institutions to sport[89]. After Bosman, sport governing bodies lobbied for a legal base, a sport article, which would limit the application of EU law to sport while providing the EU with a tool to develop a sociocultural common sports

[82]Treaty of Maastricht on EU <http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_maastricht_en.htm> accessed on 4th March 2015.
[83] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 208.
[84] *Ibid*.
[85] *Ibid* at p 218.
[86] *Ibid* at p 175.
[87] Paul Craig and Grainne De Burca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press, 2011) p 17.
[88] *Ibid*.
[89] R Parrish, 'The Birth of European Union Sports Law' (2003) Entertainment Law, Vol. 2, no. 2 p 25.

policy[90]. Member States responded to calls for sport to be granted a legal base within a European Treaty by annexing a non-binding Declaration on Sport to the Amsterdam Treaty which invited the EU to acknowledge the social significance of sports[91]. While the Declaration failed to meet the expectations to have a legal competence for sport within the EU, it was significant that Bosman was indirectly criticised. This helped to politicise sport and the law in the EU[92]. Member states complied with the Amsterdam Declaration and published guidelines on the necessity to recognise the specificity of sport within the EU's legal framework[93]. The series of Presidency Conclusions of the EU on this subject resulted in the publication of the Nice Declaration. This declaration recognised that while the EU does not have direct powers in this area, the Community must, in its action under the various Treaty provisions, consider the social, educational and cultural functions of sport which are making it special[94]. The Nice Declaration indicated that sporting rules designed to maintain a competitive balance should be treated differently under the EU law[95].

In 2001, the European Council meeting in Laeken achieved a consensus on the method of reform, which would be a convention, and the agenda was set for discussion. However, due to difficulties of ratification of the Constitutional Treaty in the Netherlands and France, the European Council launched a *period of reflection* on the future of Europe and the Constitutional Treaty never recovered and did not become law[96]. Consequently, to find an alternative way to reform the founding Treaties of the EU, an IGC was organised in Lisbon in July 2007. The plan for achieving a European Constitution was discarded and further discussions undertaken with the object of preparing an amending Treaty[97]. The new amending Treaty of Lisbon was drafted and signed in 2007 and came into force in 2009.

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[90] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 15.
[91] Declaration 29, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, 1997.
[92] *Ibid* 15.
[93] R Parrish, 'The Birth of European Union Sports Law' (2003) Entertainment Law, Vol. 2, no. 2 p 25.
[94] European Council, 'Conclusions of the Presidency' (Nice, 7-10 December 2000).
[95] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 209.
[96] Treaty of Nice.
[97] *Ibid.*

The Treaty of Lisbon made changes on the composition of institutions, simplified the legislative procedure and amended the decision making of the Council by reformulating the qualified majority voting system. In addition, the Treaty terminated the three-pillar structure of the Union and set up a formulation for the distribution of competences between the Member States and the EU to achieve clarity and increase the functioning of EU[98]. Generally, the adoption of the Treaty of Lisbon received positive reactions[99]. The current standpoint of European integration fulfils the standard of being a *constitutional form of a union*[100]. Initially, the European integration was established under an international agreement administered through by the ECSC Treaty. However, after 60 years since its founding, it has evolved greatly from having only an economic focus to having an overreaching range of goals both in legal and political areas[101]. Based on de Burca's findings, the EU was established as a kind of pilot project of limited economic integration with a view to securing greater peace and prosperity for the Member States[102]. However, the EU has evolved into something much larger, more complex, and more ambitious[103]. The EU is now a legally and politically autonomous supranational entity established by the two founding constitutionalised treaties[104].

The Lisbon Treaty has played an important for the development of the EU sports policy. The interaction between sport and the EU law pre-dates the adoption of Article 165 TFEU under the Lisbon Treaty in 2009. However, for the first time since the founding treaties, with the Lisbon Treaty, sport has been brought under the coverage of the European Treaty framework. Under Article 165 TFEU sport gained a supporting competence within the EU and sport has legally been brought under the coverage of the EU law. Even though this competence has been regarded as less remarkable[105], for not

[98] Treaty of Lisbon.
[99] G De Burca, 'Europe's raison d'etre' in D Kochenov and F Amnetbrink, *The EU's Shaping of the International Legal Order* (CUP 2014) p 28.
[100] M Avbelj, 'Theory of EU' (2011) European Law Review 818 p 835.
[101] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the EU' (2014) International and Comparative Law Quarterly 935 p 945.
[102] G De Burca, 'Europe's raison d'etre' in D Kochenov and F Amnetbrink, *The EU's Shaping of the International Legal Order* (CUP 2014) p 21.
[103] *Ibid.*
[104] M Avbelj, 'Theory of EU' (2011) European Law Review 818 p 835.
[105] Stephen Weatherill, *European Sports Law: Collected Papers*, ASSER International Sports Law Series (2nd Edition, T.C.M. Asser Press, 2015), p 528.

creating a dramatic change in the field, it has established that sport is explicitly and unambiguously affected and regulated by the application of EU law[106]. Therefore, governance of sport enjoyed conditional autonomy under the organisational structures of the EU.

IV. Sports policy during European Integration

The development of EU sports policy is discussed thoroughly in the following chapters. However, it is beneficial to make an introduction in this chapter while the European integration process and the European Treaties are analysed. During its establishment in the 1950s, the EU did not have an official sports policy. Nevertheless, many other EU policies had an influence on sporting practices constituting economic activities. The EU's legal framework approach to sport has been greatly formed by the ECJ's judgments that sporting practices should comply with EU law if it constitutes an economic activity. It was the ECJ who established the means to connect sport with the EU's legal framework[107]. As European integration has deepened to cover many policy areas, the institutions have regulated sporting practices more often through judgments and decisions, and, lately through Article 165 TFEU.

Sport has attracted the interest of Member States mainly after *Bosman* and the urge to have a legal competence for sport under a Treaty has deepened[108]. The supporters for the Union to have a sport competence have acknowledged that obtaining a legal base would provide the means to develop a social and cultural common sports policy. However, they also feared that this would limit the wide application of general European law to sporting practices[109]. As a result, the heads of state and government of the Member States meeting in Amsterdam in 1997 agreed to obtain a non-binding Declaration on Sport, attached to the Amsterdam Treaty, mainly to promote acknowledgement of the specific nature of sport by the European institutions. Even though sport did not achieve legal competence within the Union, it served the need to

[106] S Weatherill, 'Fairness, Openness and the Specific Nature of Sport: Does Lisbon Treaty Change EU Sports Law?' (2010) The International Sports Law Journal 11 p 11.
[107] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 15.
[108] *Ibid*.
[109] *Ibid.*

politicise sport and the law in EU[110]. The Amsterdam Treaty was the first European Treaty to officially mention sport. Following this, the Helsinki Report on Sport was published forming the framework for applying EU law to sport[111]. The Helsinki report was the first attempt to co-ordinate the single market and socio-cultural policy strands of its involvement in sport, although it was not attached to the Treaty[112]. In 2007, the Commission's White Paper on Sport provided the means to develop a comprehensive European sports policy in anticipation of sport's inclusion into the Lisbon Treaty. With the adoption of the Lisbon Treaty in 2009, the EU achieved definite competence to carry out actions to support, coordinate or supplement the actions of the Member States for sport under Article 6 and 165 TFEU. With this, European sports policy has started to gain a *momentum* in progress and new initiatives were adopted[113]. The European Commission has accepted a Communication on *Developing the European Dimension in Sport* in January 2011 while the EU Sport Ministers approved EU Work Plan on sporting practices[114]. The EU sports law and policy shall be discussed with further details in the following chapters.

V. Nature and Effect of EU Law

The initial objective of achieving permanent peace in Western Europe has bonded with the ultimate objective of creating a union and consequently European integration's legal and political nature had gone through a serious transformation[115]. Subsequently, it has become clear that by deepening the integration of Europe, the Communities had moved away from ordinary international organisations with *repercussions for the nature of their legal order as well as their objectives*[116]. To achieve the original largely economic

[110] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 15.
[111] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final section 2.
[112] R Parrish, *Sports Law and Policy in the EU* (Manchester University Press 2003) p 16.
[113] The European Olympic Committees, 'Guide to EU Sport Policy' [2011] EOC EU Office 4.
[114] European Commission, 'Developing the European Dimension in Sport' (2011) Brussels, 18.1.2011 final12 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF> accessed on 24 April 2017; Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on a European Union Work Plan for Sport) 2011–2014 (2011) OJ C; Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport) 2014–2017 (2014) OJ C 183/12.
[115] M Avbelj, 'Theory of EU' (2011) European Law Review 818 p 824.
[116] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the EU' (2014) International and Comparative Law Quarterly 935 p 940.

objectives of the Communities, deeper integration with more politically charged domains became necessary. This was the effect of spill-over which has ultimately transformed the nature of the Communities[117]. This dynamic is a main denominator in the traditionally leading integration theory of neo-functionalism[118]. The powers of the EU have been stretched by the conferral of new powers to the Union through successive Treaty amendments mainly triggered by an extensive legal interpretation of the Treaty provisions, most importantly by a teleological view of old Art 308 EC (now 352 TFEU) which stated that if an action is necessary to achieve the objectives of the Union and the Treaties do not confer the necessary powers, then the Council acting unanimously could adopt the appropriate measures[119]. Moreover, the ECJ and the Commission could adopt a broad judicial interpretation of the Treaty provisions[120]. The ECJ has played an important initiative role during this transformation especially through the decisions in *Van Gend*[121] and *Costa*[122] by developing the notion that the Union has a new legal order[123] and it has its own source of law with a special and original nature[124]. Union law is independent of both the national and international legal order[125]. The ECJ further ruled that the existence of the Union's own supranational autonomous legal order is created by its own hierarchically supreme legal act, which is the Treaty, unlike international organisations. The Treaty is separate from the national legal orders and could ultimately be interpreted by the ECJ itself[126]. The impact of the Union's organisational structures has continued to develop through the emerging case law of the

[117] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the EU' (2014) International and Comparative Law Quarterly 935 p 941.
[118] B Rosamond, *Theories of European Integration* (Macmillan, 2000) p 50-73; E Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stanford University Press, 1968); W Sandholtz and A Stone Sweet, 'Neofunctionalism and Supranational Governance' in E Jones, A Menon and S Weatherill (eds), *The Oxford Handbook of the EU* (OUP, 2012) p 18.
[119] P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) European Law Review p 324.
[120] *Ibid.*
[121] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.
[122] Case C-6/66 Costa v ENEL [1964] E.C.R. 585; [1964] C.M.L.R. 425.
[123] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.
[124] Case C-6/66 Costa v ENEL [1964] E.C.R. 585; [1964] C.M.L.R. 425.
[125] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.
[126] Case C-314/85 Firma Foto Frost v Hauptzollamt Lubeck Ost [1987] E.C.R. 1129; [1988] 3 C.M.L.R. 57.

ECJ. The ECJ has established the principles of direct effect[127], supremacy[128], consistent interpretation[129], effectiveness and equivalence[130], and state liability[131]. These principles make sure that once a Union measure is adopted it could not be disregarded by the Member States and domestic Courts should apply them in practice[132]. However, the ECJ was established as an EU institution and in its core, there has been the desire to facilitate the European integration rather than limiting it[133]. It has been argued the ECJ has considerably neglected to take seriously the principles of conferral and subsidiarity outlined in Article 5 EC[134] to facilitate persistent growth of the European integration to achieve an *ever-closer union*[135].

V.I. Principle of Conferral

The EU is established under the *principle of conferral*. Unlike sovereign states, the EU has no inherent powers[136]. It is constitutionally rooted that the EU can only act within the limits of powers which has been assigned to it by the Member States. Therefore, the Union operates under conferred competences only. Article 4 TEU states that *competences not conferred* to the Union under the Treaties stay with the Member States. Article 5(1) TEU reaffirms Article 4(1) TEU and states that the boundaries of Union competences are administered by the principle of conferral and the use of Union competences is administered by the principles of subsidiarity and proportionality. The EU is founded on the principle of attributed powers and it does not enjoy unlimited

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[127] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.
[128] Case C-6/66 Costa v ENEL [1964] E.C.R. 585; [1964] C.M.L.R. 425.
[129] Case C-14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen [1984] E.C.R.1891; [1986] 2 C.M.L.R. 430; and Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305.
[130] Case C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] E.C.R. 1989; [1977] 1 C.M.L.R. 533.
[131] Case C-6/90 Francovich v Italy [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66.
[132] J Snell, ' "European Constitutional Settlement", an Ever-Closer Union, and the Treaty of Lisbon: Democracy or relevance?' [2008] European Law Review 619 p 626.
[133] G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) Common market Law Review 63 p 64-65.
[134] M. Saphiro, 'ECJ' in P Craig and G de Burca (eds), *The Evolution of EU Law* (OUP, 1999) p 345; Snell, ' "European Constitutional Settlement", an Ever-Closer Union, and the Treaty of Lisbon: Democracy or relevance?' [2008] European Law Review 619 p 626.
[135] A Dashwood, 'The limits of European Union Powers' (1996) European Law Review 113 p 114-115; M Cappelletti, 'Is ECJ 'Running Wild'?' (1987) European Law Review 3 p 8-10.
[136] Barnard, C, 'Competence Review: The Internal Market' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf > accessed on 22 December 2014, 31.

competence to act and it must respect the limits of powers conferred to it by the Member States under the Treaties[137]. In addition to the competences granted by the Treaties to the Union, the competences need to be exercised as demanded by the principles of subsidiarity and proportionality[138]. This provides slight protection to the rights of the Member States as well as a limited shield against constantly rising transfer of power from the Member States to the Union[139]. Before the adoption of the Lisbon Treaty, the EU did not have a competence of sport and could not regulate sporting activity solely based on the principle of conferral. Nevertheless, the EU regulated sport indirectly through the ECJ judgments and Commission decisions under the application of the fundamental treaty provisions since certain aspects of sport constituted economic activity and caught under the EU law.

V.II. Principle of Subsidiarity and Proportionality

Various justifications could be identified for the presence of the principle of subsidiarity within the EU framework. The most important role of subsidiarity is to ease the disputes over the separation of competence between the Union and the Member States[140]. It is a tool to improve the competence problem. Secondly, it clarifies the division between the exclusive and shared competence[141]. Thirdly, it helps the fears of Member States and prevents over centralization of the Union[142]. Finally, it encourages *pluralism* and *diversity* of national values[143]. The principle of subsidiarity is an essential tool during the decision-making process of EU since it regulates the Union's competence to legislate[144]. It is laid down in Article 5 of the TEU alongside two other essential principles of conferral and proportionality. Subsidiarity and proportionality are *corollary* principles of the principle of conferral[145]. Together, they decide on the extent to which the EU could employ the competences attained to it by the Treaties.

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[137] S Weatherill, 'Better Competence Monitoring' (2005) European Law Review 23 p 23.
[138] *Ibid.*
[139] P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) European Law Review p 324.
[140] P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) Journal of Common Market Studies 72 p 72.
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid*.
[144] The European Parliament, 'The Principle of Subsidiarity', Introduction <http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0017_en.htm> accessed on 6 March 2015.
[145] *Ibid.*

Subsidiarity justifies whether the EU should exercise those powers and the principle of proportionality justifies to what extend those powers should be exercised[146]. Likewise, the principle of proportionality monitors the exercise of conferred competences by the EU and makes sure that the actions taken are necessary to achieve the objectives of the Treaties[147].

V.III. Categories and Areas of Union Competences

It has always been difficult to distinguish the boundaries of competence[148]. One of the main reasons behind the competence problem, or the competence creep, is the Union, since its founding, has always had attributed competences which it could only action within the limits of these competences granted to it by the Member States[149]. On the other hand, it has been argued that the protection provided to the Member States under Article 5 TEU does not provide sufficient safeguards against an ever-increasing shift of power from the Member States to the Union[150]. This shift of powers resulted in unwarranted arrogation of power by the Union's institutions to the detriment of the Member State's while Article 5 TEU is considered as not capable in protecting the interests of the Member States[151]. With the ratification of the Lisbon Treaty, competences are re-organised and clarified while a system for monitoring competence creep is introduced[152].

V.III.I. Exclusive Competence

Article 2(1) TFEU establishes the category of exclusive competence in a specific area which ensures that only the Union could legislate and adopt legally binding acts in the particular area while the Member States could only act should the Union empowers them or to implement the Union acts. The specific areas where the Union has an

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[146] C Barnard, 'Competence Review: The Internal Market' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf > accessed on 22 December 2014 p 31.

[147] The European Parliament, 'Proportionality Principle' <http://europa.eu/legislation_summaries/glossary/proportionality_en.htm> accessed on 6 March 2015.

[148] P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) European Law Review p 324.

[149] *Ibid.*

[150] *Ibid.*

[151] *Ibid.*

[152] Mainly under Articles 1-17 of the TFEU.

exclusive competence is set out under Article 3(1) TFEU. The areas which fall under the category of EU's exclusive competence are least in amount and quite distinct in nature[153]. Yet, there could possibly be difficulties in setting a boundary between certain policy areas which fall under the shared competence of the Union[154]. For example, the customs union is established as an exclusive competence for the Union. However, it could easily fall under the policy area of the internal market which has been identified under Article 4(2) TFEU as a shared competence. In addition, further ambiguities are present regarding the competition rules which are expressed as exclusive competence yet could come under the internal market which is a shared competence[155].

V.III.II. Shared Competence

Article 2(2) TFEU establishes the category of shared competence and states that when the Union has a shared competence with the Member States in a specific area, the EU and the Member States could legislate and adopt legally binding acts in that area provided that the Member States only exercise their competence to the extent that the Union has not exercised its competence. Article 4 TFEU explains the specific policy areas which fall under the category of shared competence. Shared competence is the *general residual category*[156] and the Union shall share competence with the Member States if it does not relate to exclusive competence and supporting competence. The category of shared competence has always been and still is central to the policy making of the Union[157]. Member States could only exercise its powers under shared competence if the Union has opted not to. This eventually decreases the powers of the Member States[158]. On the other hand, the scope of and arrangements for exercising the EU's competences shall be determined by the provisions of the Treaties relating to each other[159].

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[153] P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) European Law Review p 327; P Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' [2008] European Law Review 137 p 145.
[154] *Ibid.*
[155] *Ibid.*
[156] Article 4(1) TFEU; Paul Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' [2008] European Law Review 137, 146.
[157] P Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' [2008] European Law Review 137 p 146.
[158] *Ibid*.
[159] Article 2(6) TFEU

V.III.III. Supporting, Coordination or Supplementary Action

Article 2(5) TFEU establishes the third general category of competences which states that the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States without thereby superseding their competence in these areas. Since Lisbon, sport falls into this area of competence which is discussed in following chapters this thesis. Acts of Union under these areas shall not entail harmonisation of Member States' laws or regulations. Article 6 TFEU further lists the areas, and the Union has powers of influence in these areas but no powers of harmonisation[160].

VI. Identification of Fundamental Treaty Provisions

At the launch of European integration, the core of the challenge and the objectives of the Treaties were at developing an extensive perception of Europe[161]. This approach has lost its persuasiveness in due course while the objectives have increased in numbers. Lately, by abolishing the specific goals of the Union which were previously expressly stated under Article 2 EC, the Lisbon Treaty has opted for a principle based approach as a useful alternative to facilitate an independent legal analysis, enrich the autonomy of Courts and allow for an internal advancement of EU law[162]. Principles such as direct effect and supremacy developed by the ECJ form the fundamental bases for the constitutionalisation of EU law. While the course to achieve European integration has initiated as a neo-functional move and the objectives of integration were determined clearly under the Treaties, the ECJ has gradually adopted the principles of proportionality, good administration, legal certainty and the protection of fundamental rights limiting the powers of the Union[163].

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[160] P Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' [2008] European Law Review 137 p 147.
[161] A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) European Law Journal 95 p 99.
[162] *Ibid* at p 102.
[163] J Rawls, *A Theory of Justice* (Clerdon Press, 1st edn, 1972) 52; Dworkin, *Taking Rights Seriously* (Duckworth, 1977), 22; J Habermas, *Between Facts and Norms* (Polity Press, 2008), 132, 168, 197.

VI.I. General Principles and Founding Principles of EU

Principles are special legal norms within the complete legal framework[164] which consist of a degree of innate generality in the sense of a borderless, hypothetical, non-conclusive or orientative character[165]. Principles are commonly not found in written form and generally they are not a part of legislation despite subsequent codification. They commonly encompass values and morality and may reflect ideologies[166]. It has been commonly accepted that there is no systematic legal framework for general principles of the EU law[167]. General principles of EU law are accepted as unwritten, yet subsequently codified judge made norms which often lack a clearly defined content[168]. On the other hand, founding principles are a general standard of framework of reference for all primary law within the entire EU legal system[169]. It is essential to understand the founding principles as constitutional principles and to manage them appropriately[170]. The EU has transformed and developed into a political union at the beginning of 1990s, and, in 1997, the Amsterdam Treaty, after lengthy discussions, established the EU on the fundamental principles of *liberty, democracy, respect for human rights and fundamental freedoms and the rule of law*[171]. The founding principles of the EU were expressed under Article 6(1) EU and areas regarding the allocation of competences, loyal cooperation, structural compatibility and principles regarding the relationship between the EU and the Member States, have been acknowledged under Title I TEU[172].

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[164] A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) European Law Journal 95 p 105.
[165] Dworkin, *Taking Rights Seriously* (Duckworth, 1977), 26; O Wiklund and J Bengoetxea, 'General Constitutional Principles of Union Law' (Kluwer, 2000), 119-142.
[166] C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) European Law Journal 457 p 460.
[167] M Herdegen, 'The Origins and Development of the General Principles of Union Law' in U Brenitz and J Nergelius (eds), *General Principles of European Union Law* (Kluwer, 2000), 24; J Bengoetxea, 'Review Essay on Xavier Groussot, General Principles of EC Law: The Wider European Law and Jurisprudence Debate' (2006) Common market Law Review 1279 p 1284.
[168] C Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value' (2013) European Law Journal 457 p 461.
[169] A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) European Law Journal 95 p 105.
[170] ECJ speaks of constitutional principles of the EC Treaty in Cases C-402/05 P and C-415/05 P, *Kadi v Council* [2008] ECR I-0000, para 285.
[171] A Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) European Law Journal 95 p 106.
[172] *Ibid.*

VI.II. Internal Market

Internal market philosophy has been accepted as the main idea behind European integration and has formed both the essence and course of law making in the EU[173]. It has been defined as an *engine for building a stronger and fairer EU economy*[174]. With the adoption of the Treaty of Rome, the common market was established aiming to abolish trade barriers between Member States to facilitate economic prosperity and contribute to *an ever-closer union among the peoples of Europe*[175]. Furthermore, in 1986, under the Single European Act, the objective of the internal market has been described as *an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured*[176]. It has been noted that while the legal framework of the internal market has now been positioned, current discussions on the internal market has focused on the *effectiveness* and *impact* of EU legislation[177]. Beginning as a neo-functionalist entity of economic integration, the primary normative component of the EU's political action has been nourished by its economic purpose to establish the common or internal market[178]. Eventually, this objective has facilitated an extensive body of knowledge which has provided the intellectual base of its political rationality[179]. Starting from the activation of EU integration, European institutions had to clarify and interpret what the common market is and what it needs, and, how to intervene in the market[180]. The fabrication of an extensive body of knowledge, through reports, impact assessments, policy documents and expert opinions, is the consequence of this demand for interpretation to clarify and identify the problems of the internal market, such as barriers to trade or what is a transaction cost, and propose possible solutions, such as harmonisation, learning, empowerment and mutual recognition[181].

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[173] M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) European Law Journal **, 1.
[174] European Commission, http://ec.europa.eu/priorities/internal-market_en [01/09/2017]
[175] M Maciejewski and K Pengelly, 'Free movement of establishment and freedom to provide services' (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.4.html> accessed on 06 January 2017.
[176] *Ibid.*
[177] *Ibid.*
[178] M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) European Law Journal **, 2.
[179] *Ibid.*
[180] *Ibid* p 3.
[181] *Ibid.*

The ECJ encouraged the negative integration method of market integration through its judgments on free movement provisions by applying internal market laws to strike down national laws having an adverse effect on the free circulation of economic resources on interstate trade[182]. The development of the internal market law through negative integration and the acceptance of the principle of mutual recognition have created a conflict between social policy at the national level and the principles of the internal market[183]. Policy areas originally maintained under the sole autonomy of the Member States at the national level have come to be caught in the ideology of internal market[184]. Sporting practices in the EU is caught under the same ideology of the Union to ensure proper functioning of the internal market. Even though sport has distinct character compared to other market sectors, it has not been granted a general exception from the application of EU law if it constitutes an economic activity. Further discussion will take place in the following chapters.

VI.III. Fundamental Freedoms

Free movement of goods, persons, services, and capital are considered as the fundamental principles of primary law and they have significant importance in the legal framework of the EU[185]. The free movement principles and the competition law principles are often considered as two separate and crucial areas of Union law which regulates the effective functioning of the internal market while aiming to avoid the *compartmentalisation* of the market[186]. While competition law provisions prohibit anti-competitive agreements having the effect or object of preventing, restricting or distorting competition and abuse of dominant position in the internal market, the free movement principles prohibit restrictions on the free movement of goods, services and workers between Member States[187]. The ECJ has gradually expanded the respective

[182] Commission Report of the European Communities, *Second Biennal Report on the Application of the Principle of Mutual Recognition in the Single Market,* COM(2002) 419 final.
[183] D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) European Law Journal 303 p 310.
[184] *Ibid*.
[185] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 293.
[186] R O'Loughlin, 'EC competition rules and free movement rules: an examination of the parallels and their furtherance by ECJ Wouters decision' (2003) European Competition Law Review, 62 p 63.
[187] *Ibid*.

scope of the application of the free movement provisions by not only applying them in the most diverse fields of law but also by applying them to the extensive category of parties[188]. As a result, the ECJ has broadened the obligations which were initially laid under these provisions[189].

VI.III.I. Scope of Application of the Fundamental Freedoms

The TFEU provisions on the fundamental freedoms expressly states that Member States are prohibited from discriminating against goods, persons, services and capital on imports and exports between Member States. Moreover, custom duties on imports and exports between Member States and charges having equivalent effect are prohibited in principle[190], as well as non-fiscal quantitative restrictions and measures having equivalent effect[191] on trade in goods originating both in Member States and third-countries[192] which are in free circulation[193]. In addition, discrimination based on nationality between the workers[194] or self-employed and the companies or the firms[195] of Member States is not allowed. Besides, discriminatory restrictions on the freedom to provide services by nationals, companies, or firms of another Member State[196] are in principle forbidden. The same applies to restrictions on the movement of capital between Member States, and, between Member States and third countries[197].

Firstly, free movement of goods is one of the four fundamental freedoms of the internal market and is defined under article 28 of the TFEU. This protects the right to free movement of goods originating in Member States as well as goods originating from

[188] R O'Loughlin, 'EC competition rules and free movement rules: an examination of the parallels and their furtherance by ECJ Wouters decision' (2003) European Competition Law Review, 62 p, 294.
[189] *Ibid.*
[190] Article 30 TFEU.
[191] Article 34 and 35 TFEU.
[192] Case C-28/09 Commission v Austria (judgment of 21 December 2011) at [113]; Case C-320/03 Commission v Austria [2005] ECR I-9871; [2006] 2 CMLR 12 at [65]; Case C-173/05 Commission v Italy [2007] ECR I-4917; [2008] Env LR D3 at [31]; Case C-266/81 SIOT Ministero delle finanze [1983] ECR 731 at [16].
[193] Article 29 TFEU.
[194] Article 45(2) TFEU.
[195] Article 49(1) and 54 TFEU.
[196] Article 56(1) and 62 TFEU.
[197] Article 63 TFEU.

third countries which are imported in the Member States[198]. Secondly, freedom of movement and residence for persons in the EU is the foundation of Union citizenship[199] and it is secured and defined under Article 3(2) of the Treaty on EU (TEU), Article 21 of the TFEU (TFEU), Titles IV and V TFEU. Freedom of movement for workers is one of the founding principles of the EU and it is explained under Article 45 of the TFEU. It regulates the rights of workers eliminating any nationality-based discrimination between workers of the Member States during employment. The free movement of persons has altered in definition since its establishment[200]. However, the term worker has not been defined under the Treaty. Nevertheless, the ECJ ruled that, to have a consistency, defining the meaning of a worker is a matter of EU law[201] and defined worker as any person pursuing employment activities which are effective and genuine, to the exclusion of small scale marginal and ancillary activities, is treated as a worker[202]. Thirdly, the freedom to provide services and establishment secures movement of businesses and professionals within the EU. Proper functioning of these two freedoms are important for the achievement of the internal market[203]. Freedom to provide services and establishment is secured and defined under Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the TFEU. The objectives of these freedom indicate avoiding discrimination on the grounds of nationality and, to facilitate the exercise of these freedoms effectively by implementing measures, including but not limited to the harmonisation of *national access rules* or their mutual recognition[204]. Finally, the free movement of capital is the last freedom which has joined all other Treaty freedoms and it is considered as the broadest of all free movement provisions

[198] M Maciejewski and K Pengelly, 'Free movement of establishment and freedom to provide services' (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.4.html> accessed on 06 January 2017.
[199] D Neville, Free movement of persons (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html> accessed on 06 January 2017.
[200] *Ibid.*
[201] Case C-75/63 Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten [1964] ECR 177 at 184.
[202] Case C-337/97 C.P.M. Meeusen v. Hoofddirectie van de Informatie Beheer Groep [1999] ECR I-3289.
[203] M Maciejewski and K Pengelly, 'Free movement of establishment and freedom to provide services' (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.4.html> accessed on 06 January 2017.
[204] *Ibid*.

because of its third-country element[205]. Free movement of capital is defined and secured under Articles 63 to 66 of the TFEU, supplemented by Articles 75 and 215 TFEU for sanctions. At the beginning, the Treaties did not interfere with the movement of capital but only regulated that the Member States remove all the restrictions necessary for the functioning of the internal market. However, as the economic and political conditions evolved in Europe, the European Council accomplished the Economic and Monetary Union (EMU) in 1988[206]. This required intensified harmonisation of national economic and monetary policies. As a result of the initiation of EMU, the Union has announced absolute freedom for capital transactions. After this introduction, the Treaty abolished any restriction on capital movements, both between Member States and between Member States and third countries[207].

VI.III.II. Broadening of Application through ECJ Judgments

Effective expansion of fundamental freedoms scope of application has been facilitated by the series of important judgments of the ECJ on the Treaty provisions on freedom of movement as well as increase in the freedom's relevance and similarity between the legal frameworks of the Member States[208]. One of the most important milestone rulings of the ECJ within the area is considered to be the case *Van Gend & Loos*[209] where the ECJ introduced a new dimension of the Treaty provisions on free movement and ruled that duties imposed under the fundamental freedoms provisions not only bind Member States but are also directly applicable rights of citizens which are enforceable against Member States in domestic Courts[210]. The adopted approach and introduced legal principle of direct effect in the *Van Gend & Loos* judgment has been confirmed and applied in the later judgments of ECJ on the other fundamental freedoms of the free

[205] D Kolassa, Free Movement of Capital (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.1.6.html> accessed on 06 January 2017.
[206] *Ibid.*
[207] *Ibid.*
[208] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 296.
[209] Case C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR I.
[210] *Ibid.*

movement of capital[211], free movement of goods[212], freedom of movement of workers[213] and freedom of establishment[214]. The *Van Gend & Loos* judgment has initiated the ability of EU law to generate direct effect on the legal orders of the Member States by bestowing rights on citizens which need to be safeguarded and respected by domestic Courts[215].

The ECJ has taken another important action in the judgment of *Dassonville*[216] and has relocated the protection of the fundamental freedoms, based on the Treaty's non-discrimination rules, to extensive prohibitions on restrictive measures[217]. The ECJ has held that *all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade are to be considered as measures having an effect equivalent to quantitative restrictions*[218] on imports and exports in the similar implication of Article 34 and 35 of the current TFEU. Subsequently, the *Dassonville* understanding and explanation on the free movement of goods provisions has *spilled over* to include other fundamental freedoms to provide services[219], freedom of movement for workers[220] and free movement of capital[221]. This development was followed by a flood of diverse judgments by the ECJ regarding the interpretation of the term *goods* under the free movement of goods provisions of the Treaty[222], the interpretation of the freedom to provide services to include the freedom to receive services on cross border elements[223] and the broadening of the free movement

[211] Joined cases C-163/94, C-165/94 and C-250/94 Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu [1995] ECR I-04821.
[212] Case C-74/76 Iannelli & Volpi SpA v Ditta Paolo Meroni [1977] ECR 557.
[213] Case C-83/78 *Pig Marketing Board v Redmond [*1978*]* ECR 2347.
[214] Case C- 2/74 *Reyners v Belgium* [1974] ECR 631.
[215] B de Witte, 'The Continuous Significance of Van Gend & Loos' in *The Future of EU Law* (2010), 9; S Prechal, 'Does Direct Effect Still Matter?'(2000) Common market Law Review 1047.
[216] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.
[217] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 296.
[218] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837 at [5].
[219] Case C-76/90 *Sager v Dennemeyer & Co Ltd* [1991] ECR I-4221; [1993] 3 CMLR 639 at [12]; Case C-55/94 *Gebhard v Consiglio dell'Ordine* [1995] ECR I-4165; [1996] 1 CMLR 603 at [37].
[220] Case C-415/93 *Union Royale Belge* des *Sociétés* de *Football Association ASBL v* Jean-Marc *Bosman* [1995] ECR I-4921; [1996] 1 CMLR 645 at [93] – [96].
[221] Case C-483/99 *Commission v France* [2002] ECR I-4781 at [40] – [41].
[222] Case C-7/68 *Commission v Italy* [1968] ECR 423 at [428].
[223] Case C-56/09 *Zanotti v Agenzia delle Entrate – Ufficio Roma 2* [2010] 3 CMLR 34 at [41].

of capital to heritages[224], monetary donations and donations with a cross border situations[225].

A further major step was taken in the case *Factortame*[226] where ECJ held that Member States, including the areas where they have exclusive competences, must exercise their powers and competences in harmony with the general EU law and fundamental freedoms provisions of the Treaty[227]. Therefore, the ECJ ruled that Member States must exercise their powers in consistency of and with due respect to the fundamental freedoms' provisions of the Treaty. Finally, it should also be stated here that as expressed under the Article 114 and 115 TFEU, it is crucial to remember that there must be a cross border element for the application of free movement provisions[228]. Additionally, they do not apply to the measures which their effect is too indirect or uncertain[229], and they accord rights only to the market participants who engage in economic activity[230]. As long as an activity has an economic element, it will be caught and regulated under EU law. Sport in Europe has been caught under EU regulations if it constituted economic activity[231].

VI.III.III. Direct Effect: Personal Scope of Application

Initially, only Member States could seek their rights under the Treaty provisions. However, the ECJ was willingness to extend the scope of application of the free movement provisions *to produce legal effects* between the Member States and the citizens, and, the case law on direct effect of EU law has triggered the application of vertical direct effect of the fundamental freedoms[232]. Moreover, the ECJ has developed

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[224] Case C-31/11 *Scheunemann v Finanzamt Bremerhaven* [2012] 3 CMLR 51 at [22].
[225] Case C-10/10 *Commission v Austria* [2011] 3 CMLR 26 at [24] – [27].
[226] Case C-221/89 *R v Secretary of State for Transport Ex P Factortame Ltd* [1991] ECR I-3905; [1991] 3 CMLR 589.
[227] *Ibid* at [14].
[228] H Jarass, 'Elemente einer Dogmatik der Grundfreiheiten' [1995] EuR 202 p 204-208.
[229] A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) European Law Review 36 p 38.
[230] PC de Sousa, 'Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) European Law Journal 499 p 501.
[231] Case C-63/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo [1974] ECR 1405 at para 4.
[232] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 297-298.

an overly broad definition of Member State's actions to catch actions of private organisations or individuals under certain circumstances[233]. Furthermore, the ECJ has broadened the scope of the application of the fundamental freedoms to include private individual's actions even when they have not been exercising similar powers to Member States[234]. The ECJ has further expanded the rules of direct effect to have horizontal direct effect on the fundamental freedoms to rules adopted by private bodies.

After its sport related judgment in *Walrave*[235], it is established that freedom of movement for workers, freedom of establishment, freedom to provide services and free movement of goods not only covers the actions of public authorities but also applies to the rules aiming to regulate collectively to achieve gainful employment and services in order to protect individuals from discrimination on the grounds of nationality[236]. Moreover, in *Bosman*[237] the ECJ held that even though the rules under scrutiny did not discriminate on grounds of nationality they were still directly affecting player access to the employment market in another Member State[238]. In 2007, under the *Viking* and *Laval* cases, the ECJ ruled that a trade union's right of joint action is within the jurisdiction of the Treaty provisions on the fundamental freedoms[239]. Therefore, it has been observed that the ECJ has ruled under the principle of horizontal direct effect on the cases relating to the fundamental freedoms where the measures were discriminatory on the grounds of

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[233] Case C-292/92 *Hunermund v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787 at [12] –[16]; Case C-325/00 *Commission v Germany* [2002] ECR I-9977; [2003] 1 CMLR 1 at [14] – [20].

[234] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 297-298.

[235] Case C-63/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405.

[236]Case C-63/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405; Later rapidly confirmed in Case C-13/76 *Gaetano Donà v Mario Mantero* [1976] ECR I-1333; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union (Viking Line)* [2007] ECR I-10779; [2008] 1 CMLR 51 at [33]; Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC* [2010] 3 CMLR 14 at [30]; Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities*[2006] ECR I-6991 at [24]; 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 at [82]; Case C-171/11 *Fra.bo SpA* v *Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) - Technisch-Wissenschaftlicher Verein [*2012*]* 3 CMLR 38 at [21] – [32].

[237] 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.

[238] *Ibid* at [133].

[239] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* (Viking Line) [2007] ECR I-10779; [2008] 1 CMLR 51 at [33]; C-341/05 *Laval* [2007] ECR I-11767.

nationality and organisations engaged in collective regulation while exercising their legal autonomy[240]. It is yet to be seen in the future judgment of ECJ whether the horizontal direct effect application of the fundamental freedoms is limited with the above mentioned two requirements of discrimination and/or collective regulation or not. However, it is worth noting here that sport has not been treated differently than other sectors within the legal framework of EU.

VI.III.IV. Justification of Restrictions of the Fundamental Freedoms

In time, the improvement on the scope of application of the fundamental freedom provisions through case law has been complimented and balanced by expanding the basis for justification of restrictions on the free movement provisions[241]. Accordingly, the ECJ has ruled that restrictions on the free movement provisions, which are forbidden in principle, can be justified with reference not only to the written grounds expressly stated in the Treaty[242], but also on the basis of public interest[243]. In the case of *Casis de Dijon*, the ECJ held that national obstacles to the free movement of goods must be accepted in so far as the national provisions at issue may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence on the consumer[244]. This justification of public interest to a restriction provided a reasonable explanation to a national restriction of the free movement provisions under the Treaty and this resolution was later identified as the 'rule of reason' and since been applied to all free movement provisions[245]. In specific cases regarding restrictions of the free movement provisions by collective regulations with a non-public law character, the ECJ has scrutinised private interest for the

[240] H Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provision in EU Law' (2012) European Law Journal 177 p 178.
[241] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 299.
[242] Article 36 TFEU for the free movement of goods; Article 45(3) TFEU for the freedom of movement for workers; Article 52 TFEU for the freedom of establishment; Article 62 TFEU for the freedom to provide services; Article 65 TFEU for the free movement of capital.
[243] Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] 3 CMLR 494.
[244] *Ibid* at [8].
[245] V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedom and Fundamental Rights in the Case-law of the CJEU' (2013) European Law Review 293 p 299.

evaluation of the legitimacy of restrictions[246]. In the case of *Bernard*[247] the ECJ considered the possibility of relying on the objective of promoting the recruitment and training of young players in order to justify the regulation of a football association which restricted freedom of movement for workers[248]. Also in *Bosman*[249], the ECJ scrutinised the possibility of justifying the transfer regulations of football associations which restricted freedom of movement for workers by relying on the objective of guaranteeing a balance among the clubs, while preserving a certain degree of equal opportunity and uncertainty of results, and to promote the recruitment and training of young players[250]. The ECJ has adopted the same line of reasoning for different types of market sectors and the rule of reason adopted by the Court under *Casis de Dijon* is applied to the above-mentioned sport related cases without exception.

VI.III.V. Proportionality Test

Nevertheless, the scrutiny of the ECJ under the above mentioned cases seem to provide an exception to the general rule that justification of a restriction of the free movement provisions by collective regulations of a non-public law nature either needs to be expressly stated under the TFEU or needs to provide evidence of public interest[251]. Justification of a restriction stage in the Court's assessment consists of two parts. First, the measure which poses a restriction on the fundamental freedoms needs to have a legitimate aim to have an acceptable ground for justification. Secondly, the measure needs to be proportionate[252]. In *Gebhard*[253], the ECJ ruled that national measures which hinder or make less attractive the exercise of free movement provisions guaranteed by

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[246] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC* [2010] 3 CMLR 14; 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.
[247] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC* [2010] 3 CMLR 14.
[248] *Ibid* at [38] – [39].
[249] 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
[250] *Ibid* at [106] – [110].
[251] Case C-379/09 *Casteels* [2013] 1 CMLR 26 at [30] – [32]; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union (Viking Line)* [2007] ECR I-10779 at [75].
[252] S Enchelmaier, 'Always at your service (within limits): ECJ's Case Law on Article 56 TFEU (2006-2011)' (2011) European Law Review 615 p 634.
[253] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at [37].

the Treaty can only be justified by *imperative requirements in the general interest if they are applied in a non-discriminatory manner*.[254] The *Gebhard* method of 1995 has since been used by the ECJ to determine whether a restriction could be justified and accepted as legal. Restrictions of fundamental freedoms can only be justified if four conditions are fulfilled. First, a restriction must be applied in a non-discriminatory manner. Secondly, it must be justified by overriding reasons based on the general interest. Thirdly, it must be suitable for securing the attainment of the objective which it pursues. Lastly, it must not go beyond what is necessary to attain that objective[255]. The ECJ has summarised this test in subsequent judgments as *an obstacle can be justified under Union law only if it is based on objective considerations independent of nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions*[256].

VI.IV. European Citizenship Provisions

The citizenship of the EU has been inspired by the freedom of movement for persons. Advocate General Poiares Maduro explained in *Alfa Vita*[257] that the harmonisation of free movement provisions is essential to achieve genuine objectives of European Citizenship since it would be ideal for the same approach to be applied to the citizens wishing to benefit from the fundamental market rights of free movement[258]. As a response, it seems from the approach adopted by the ECJ that the fundamental market freedoms are on the road for convergence to answer the needs of European Citizenship in the most effective way[259]. Even though this understanding of convergence mainly concerns market freedoms, it has been identified that there is no reason why it should

[254] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 at [37].
[255] Case C-514/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-963 at [26]-[28]; Case C-515/08 *Criminal proceedings against Vítor Manuel dos Santos Palhota and Others* [2011] 1 CMLR 34 at [45]; Case C-64/08 *Criminal proceedings against Ernst Engelmann* [2011] 1 CMLR 22 at [47].
[256] Case C-382/08 *Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen* [2011 2 CMLR 33 at [35]; Case C-56/09 *Emiliano Zanotti v Agenzia delle Entrate - Ufficio Roma 2* [2010] 3 CMLR at [43].
[257] Joined Cases C-158 & 159/04 *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135; [2007] 2 CMLR 2.
[258] Cases C-158 & 159/04 Alfa Vita v Greece [2006] ECR I-8135; [2007] 2 CMLR 2 at [51]
[259] A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) European Law Review 36 p 42.

not relate to the European Citizenship[260]. Even though there are significant *substantive normative* differences between the two, the ECJ has applied a common methodological approach to both[261]. Fundamental freedoms under the EU law generate *subjective public rights*[262] and protect public and private rights while imposing obligations on public authorities which could be enforced by individuals[263].

EU citizenship concerns the rights, duties and political involvement of the EU citizens while regulating the relationship between the citizens and the EU[264]. EU citizenship is stated and defined under Articles 9 to 12 and 18 to 25 of the TFEU (TFEU). The citizenship provisions play an important part in creating European identity and is considered as a *complement* to the citizenship of a Member State[265]. The main difference between the citizenship of EU and a citizenship of a Member State is that European citizenship rights are not matched with duties[266]. The Union law on the economic fundamental free movement provisions has reached a level of maturity[267]. Therefore, the ECJ became willing to re-evaluate certain central doctrines and principles of the free movement provisions initially developed by the Court to facilitate the proper functioning of the internal market[268]. After the Union opted to become an organisation with certain non-economic objectives and established the concept of Citizenship, the notion to create an internal market has no longer been treated as *the lone and spoiled* child of the Union policy[269]. The internal market has started to be regarded as a broader concept which needs to function in harmony with non-economic objectives, such as the

[260] PC de Sousa, 'Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) European Law Journal 499 p 499.
[261] *Ibid.*
[262] J Drexel, 'Competition Law as Part of the European Constitutions', in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, 2006), at 64-645.
[263] S Holscheidt, 'Abschied vom subjecktif-offentlichen Recht?' [2001] EuR 376, 379.
[264] S Honnefelder, 'Think Tank' (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.1.html> accessed on 09 January 2017.
[265] *Ibid.*
[266] *Ibid*.
[267] A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) European Law Review 36 p 39.
[268] *Ibid*.
[269] *Ibid.*

social and consumer policy, environmental protection, human rights, and European Citizenship[270].

The personal application of the EU law matured in time and taken the form of European Citizenship under the Maastricht Treaty. This is an example of a natural spill-over inherently related to the functioning of the internal market[271]. The ECJ has clarified that the simple exercise of free movement provisions by an individual does not necessarily give rise to the application of EU law. There must be a connection between the free movement rights as expressed under the Treaty and the rights exercised[272]. Nevertheless, the ECJ has not relied on this condition strictly in cases relating to the free movement of individuals[273]. As an example, in cases related to the family re-unification rights[274] and cases where the cross-border activity did not relate to an economic activity,[275] the ECJ ruled that these situations fall within the application of fundamental provisions of free movement rights. The Court has extended the main rights which were originally attached only to the individuals' activities which constituted an economic activity to economically inactive individuals who are European Citizens[276]. In practice, it has been identified that the free movement provisions on people reveal fundamental human right provisions and they are combined with the European Citizenship.[277] In *D'Hoop*[278] the ECJ dealt with free movement provisions and Citizenship in a similar manner by examining whether a national measure restricts Treaty provisions, and if it does, whether it could it be justified[279]. This is the same

[270] A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) European Law Review 36 p 39.
[271] D Kochenov and Richard Plender, 'EU Citizenship: from an Incipient to an Incipient Substance? The Discovery of the Treaty Text' (2012) European Law Review 369 p 372.
[272] Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265, para 5 of AG Tesauro's Opinion.
[273] PC de Sousa, 'Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) European Law Journal 499 p 502.
[274] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.
[275] Case C-152/03 *Ritter-Coulais* and Monique *Ritter-Coulais v Finanzamt Germersheim* [2006] ECR I-1711; Case C-527/06 *Renneberg v Staatssecretaris van Financiën* [2008] ECR I-7735; Case C-470/04 N [2006] ECR I-7409; Case C-464/05 Geurts [2007] ECR I-9325; Case C-152/05 *Commission v Germany* [2008] ECR I-00039.
[276] A Tryfonidou, 'Further Steps on the Road to Convergence among the Market Freedoms' (2010) European Law Review 36 p 39.
[277] PC de Sousa, 'Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) European Law Journal 499 p 506.
[278] Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191.
[279] A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) European Law Review 787.

approach adopted by the ECJ to give a ruling on the cases relating to the fundamental rights. In addition, in *Brickel and Franz* the ECJ combined the right of free movement and European Citizenship and held that Article 18 TFEU on the prohibition of discrimination on the grounds of nationality applies equally to both free movement of services and to European Citizenship[280]. Moreover, in *Ursula Elsen*, the ECJ gave a judgment without ruling whether the situation was regulated under the free movement provisions of workers or European Citizenship[281]. Recently in *TopFit*[282] the ECJ held that sporting rules with no economic interests falls under the application of EU law and they are regulated under Article 21 on non-discrimination and citizenship provision of the EU. Moreover, Article 21 TFEU may horizontally be applied by an EU citizen exercising his/her right to free movement within the meaning of Article 21 TFEU. Nevertheless, this horizontal application would depend on the nature of the relationship and power irregularity between the parties. The more unbalanced the relationship, the more likely Article 21 TFEU might be relied on horizontally[283]. Future decisions might provide clarification in the area. However, meanwhile, such an interpretation of the horizontal direct effect of Article 21 TFEU is in line with the relatively limited horizontal direct effect described by de Mol for Article 18 TFEU that concerns private relations in which one party is weaker than the other party[284].

VI.V. Equal Treatment and Non-Discrimination Provisions

Ever since its introduction under the Treaty of Rome, the principle of equal treatment and non-discrimination has *deepened and widened* into a sophisticated principle of EU law with the involvement of the ECJ[285]. Equality between women and men has been one of the main objectives of the EU. The concept of equality and non-discrimination was introduced in the Treaty of Rome simply for economic reasons to avoid Member

[280] Case C-274/96 *Brickel and Franz* [1998] ECR I-7637, at [15].
[281] Case C-135/99 *Ursula Elsen* [2000] ECR I-10409 at [35] –[36].
[282] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497.
[283] T Terraz, 'A New Chapter for EU Sports Law and European Citizenship Rights? The TopFit Decision' (Asser International Sports Law Blog, 29/06/2019) https://www.asser.nl/SportsLaw/Blog/post/a-new-chapter-for-eu-sports-law-and-european-citizenship-rights-the-topfit-decision-by-thomas-terraz accessed on 29 June 2020.
[284] M de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU law?' (20119 Maastricht Journal of European and Comparative Law 109.
[285] M Bell, 'The Principle of Equal Treatment: Widening and Deepening' in P Craig and G de Burca (eds), *The Evolution of EU Law* (OUP, 2012), 611-639.

States achieving a *competitive advantage* over others by offering lower salaries conditions of work to women[286]. The key aim behind the equal treatment and non-discrimination objectives were to maximise the efficiency of the workforce and to achieve greater amount of economic involvement in the Union[287]. As a result of this logical approach, equal treatment has spilled over across various areas of the Union.

The Court has established and developed the principles of direct and indirect discrimination. Direct discrimination applies to situations where an individual is treated less favourably compared others based on specific grounds such as gender. The principle of indirect discrimination applies to situations where a measure or a practice causes an effect which has a disproportionately adverse impact on an individual or on a certain group of individuals[288]. The indirect discrimination principle is considered as the Court's greatest achievement in gender equality[289]. This principle, while accepting the presence of social and material differences between individuals, contains elements of genuine equality and seeks to achieve actual equality[290]. Therefore, based on this approach of the ECJ to achieve actual equality, an important distinction is made regarding the justification of a discriminatory measure or action. In cases of direct discrimination, justification is achieved only in *limited circumstances* and it must be *carefully reasoned*[291]. On the other hand, in cases of indirect discrimination, justification is possible through the method of objective justification[292] discussed earlier under fundamental freedoms. While some sport cases, such as *Lehtonen* and *Bernard* are classic examples of objective justification test undertaken by ECJ to decide on the validity of a discriminatory sporting rule, recently *TopFit* provided a room for direct nationality discrimination of a sporting rule to be justified based on the social

[286] B Olhin, 'Social Aspects of European Economic Co-operation: Report by Group of Experts' (1956) International Labour Review 99; C Barnard, 'The Economic Objectives of Article 119' in T Hervey and D O'Keeffe (eds), *Sex Equality Law in the EU* (Wiley, 1996), 321-334.
[287] C O'Brien, 'Equality's False Summits: New Varieties of Disability Discrimination, "Excessive" Equal Treatment and Economically Constricted Horizons' (2011) European Law Review 26 p 28.
[288] E Caracciolo do Torella, 'No Sex Please: we're Insurers' (2013) European Law Review 638 p 639.
[289] C Kilpatrick, 'Union or Communities of Courts in European Integration? Sex Equality Dialogues between UK Courts and ECJ' (1998) European Law Journal 121.
[290] E Caracciolo do Torella, 'No Sex Please: we're Insurers' (2013) European Law Review 638 p 640.
[291] Opinion of AG Kokott in Case C-236/2009 *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-773 at [37].
[292] C Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination Under EC Law* (Social Europe Series, 2005).

importance of sport promoting further integration[293]. In the case ECJ observed that the EU law does now clearly mention sport under Article 165 TFEU and the right of EU citizens to reside in another Member State without discrimination[294] do not dependent on the exercise of an economic activity[295]. Therefore, discrimination provisions of the EU law[296] should be read in conjunction with Article 165 TFEU and be interpreted as amateur sport, as well as participation in sporting competitions at all levels, allows EU citizens to create bonds with the society of another State which he is residing[297].

VI.VI. Competition Law Provisions

Competition law consists of rules intending to protect the system of competition to safeguard and increase consumer welfare[298]. Competition law deals with practices which are distorting the competitive process. Competition law is concerned with anti-competitive agreements, abusive behaviour, mergers, and public restrictions of competition[299]. Competition law in the EU fulfils a unique function. The primary goal of European integration was to create a common market and establish the necessary circumstances to ensure the highest level of productivity and the lowest level of price for the steel and coal[300]. Competition law has played an important role in achieving the single market integration on the EU[301]. The method to reach this goal was identified as the establishment of the competition law principles[302] which had to be the *means to an end*[303]. Secondly, it was called upon to ensure a competitive production to benefit consumers in terms of both price and quality while ensuring product prices within the

[293] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497., para 33 as highlighted in Declaration No 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam.
[294] See Articles 18, 20 and 21 TFEU.
[295] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 at para 19.
[296] Specifically referred to Article 21(1) TFEU in the TopFit case at para 34.
[297] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 at para 34.
[298] R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012).p 19.
[299] *Ibid* p 2.
[300] R Schulze and T Hoeren *Dokumente zun Europaischen Recht* (Springer, 2000), 46 cited in; Anca D Chirita, 'A Legal-Historical Review of the EU Competition Rules' (2014) International and Comparative Law Quarterly 281.
[301] See Ehlermann 'The Contribution of EC Competition Policy to the Single Market' (1992) 29 CML Rev 257; the Commission's XXIXth Report on Competition Policy (1999), point 3; R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 23.
[302] *Ibid.*
[303] A D Chirita, 'A Legal-Historical Review of the EU Competition Rules' [2014] International and Comparative Law Quarterly 281, 289.

Common market are not discriminatory based on nationality[304]. Finally, competition principles aimed at protecting manufacturers against unfair competition while ensuring normal functioning of competition with no distorted discriminatory practices and, ideally, to develop a policy for exploitation and protection of the natural resources within the common market[305]. It was identified that to achieve a logical distribution of production at the highest level of productivity, elimination of barriers is not enough on its own. The establishment of expanding competition within the common market was crucial and, therefore, provisions which would ensure that *the game of competition is not distorted* must have been introduced[306].

Until the ratification of the Lisbon Treaty, the competition law provisions were never altered. Competition law provisions under the Article 81-89 EC remains untouched under the new Articles 101-109 TFEU and the European Council agrees to attach a new protocol to the Treaties to make sure that internal market is a system which ensures competition is not distorted[307]. Articles 101 to 109 of the TFEU consists of the provisions on competition within the internal market and they abolish the anti-competitive agreements between undertakings to make sure that an undertaking with a dominant position does not abuse its position in a way which would unfavourably disturb trade between Member States[308]. These provisions should be interpreted in conjunction with the objectives and principles laid down in the TFEU and the Treaty on European Union ('TEU')[309]. Article 3(3) TEU states that one of the EU's objectives is to achieve a highly competitive social market economy[310]. Article 3(3) TEU also states that the EU shall establish an internal market, in accordance with Protocol 27 on the

[304] A D Chirita, 'A Legal-Historical Review of the EU Competition Rules' [2014] International and Comparative Law Quarterly 281 p 288.
[305] *Ibid.*
[306] R Schulze and T Hoeren *Dokumente zun Europaischen Recht* (Springer, 2000), 138 cited in Anca D Chirita, 'A Legal-Historical Review of the EU Competition Rules' (2014) International and Comparative Law Quarterly 281, 290.
[307] Protocol no 27 on the Internal Market and Competition.
[308] S Honnefelder, 'Think Tank' (European Parliament) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.1.html> accessed on 09 January 2017.
[309] R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 50.
[310] Article 3(3) TEU.

internal market and competition attached to the TEU and the TFEU and ensure that competition is not distorted. The Protocol has the same force as a Treaty provision[311].

Within Chapter 1 of Title VII of Part Three of the TFEU, Article 101(1) prohibits agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition, although this prohibition may be declared inapplicable where the conditions in Article 101(3) are satisfied. Article 102 prohibits the abuse by an undertaking or undertakings of a dominant position. Article 106(1) imposes obligations on Member States in relation to the Treaty generally and the competition rules specifically, while Article 106(2) concerns the application of the competition rules to public undertakings and private undertakings to which a Member State entrusts responsibilities. Articles 107 to 109 prohibit state aid to undertakings by Member States which might distort competition in the internal market. An important additional instrument of EU competition law is the EU Merger Regulation ('the EUMR') which applies to concentrations between undertakings that have a Community dimension.

VI.VI.I. Basic Definitions

It is necessary to define certain terms which will be referred to in this research under the organisational structures of the EU to understand the approach of the EU competition law to sport. The Treaty does not define an undertaking. Therefore, it has been a task for the ECJ to clarify its meaning[312]. However, defining an undertaking is crucial since only agreements and concerted practices between undertakings are caught by Article 101, and Article 102 applies only to abuses committed by dominant undertakings[313]. Under the EU law, the term undertaking is interpreted by the Office of Fair Trading (OFT) to include any natural or legal person capable of carrying on commercial or economic activities relating to goods or services and an entity may

[311] See Article 51 TEU.
[312] See Case T- 99/04 *AC-Treuhand v Commission* [2008] ECR II- 1501, [2008] 5 CMLR 962, para 144: 'the gradual clarification of the notions of "agreement" and "undertaking" by the Community judicature is of decisive importance in assessing whether their application in practice is definite and foreseeable'.
[313] See Articles 101 and 102 TFEU.

engage in economic activity in relation to some of its functions but not others[314]. The ECJ has granted broad meanings to an undertaking and to an economic activity. In the case of *Hofner and Elser*[315], the ECJ stated that the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed. Sport Governing Bodies and Sport Clubs falls under this definition of an undertaking if they are engaged in an economic activity. Therefore, there activities are regulated under the application of the EU competition law. In the case of *Pavlov*[316], the ECJ defined economic activity to include any activity consisting in offering goods or services on a given market is an economic activity. The ECJ ruled that the competition provisions of the EU law does not apply to an activity where its nature, aim and rules does not belong to the sphere of economic activity and it is connected with the exercise of the powers of a public authority[317]. Activities provided based on solidarity and exercise of public power is not classified as an economic activity[318]. In addition, Whish explains that procurement pursuant to a non-economic activity is not economic[319].

Apart from others, competition law is concerned with the problems that occur where one undertaking possess the market power[320]. Market power has the possibility of profitably raising prices over a period by limiting output, suppressing innovation, reducing the variety or quality of goods or services or by depriving consumers of choice and therefore damaging the consumer welfare[321]. In an ideal competitive market, market power should not be controlled absolutely by a single undertaking. Competition law attaches particular significance to 'substantial market power' which often equated with a 'dominant position'[322]. While pure monopoly is rare, an undertaking or undertakings

[314] Agreements and concerted practices, OFT 401, para 2.5.
[315] Case C- 41/90 *Hofner and Elser v Macrotron GmbH* [1991] ECR I- 1979, [1993] 4 CMLR 306, para 21.
[316] Cases C- 180/98 *Pavlov* etc. [2000] ECR I- 6451, [2001] 4 CMLR 30, para 75.
[317] Case C- 309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I- 1577, [2002] 4 CMLR 913, para 57.
[318] R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 87.
[319] *Ibid* p 87.
[320] *Ibid* p 25.
[321] See Landes and Posner 'Market power in antitrust cases' (1981) 94 Harvard Law Review 937; Vickers 'Market power in competition cases' (2006) 2 European Competition Journal 3; R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 25.
[322] For example, in Article 102 TFEU; R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 25.

collectively may have significant power over the market to enjoy certain benefits which would be only available to a true monopoly[323]. Since the notion of 'power over the market' is essential to analysing competition issues, it is necessary to define 'the market' or, the 'relevant market' for this purpose[324]. Relevant market definition is an analytical tool which assists to determine whether an undertaking or undertakings have market power. The relevant market concept is an economic one. The European Commission has defined the concept[325]. While determining the relevant market, the relevant product market, the relevant geographic market, and the relevant temporal market, where applicable, must be analysed. Details of this analysis is beyond the reach of this research.

Based on the basic definitions provided, sport organisations are considered as undertakings if they are engaged in economic or commercial activities even if their activities do not generate any profit[326]. Moreover, sporting rules relating to the sporting practices, such as transfer of players, constitute agreements between the undertakings[327]. Besides, apart from the rules with minor effect on competition, vertical and horizontal sporting agreements have the potential to prevent or distort competition law provisions[328]. Finally, many sports rules have international implications, and they have the potential to infringe cross border trade between the Member States. Therefore, sport will be open for a challenge under the competition law provisions of the EU.

To conclude, requirements of the competition law provisions of the EU is not the same as the free movement provisions[329]. In *Meca-Medina*[330] on the anti-doping rules of the

[323] R Whish and D Bailey, Competition Law (7th edn, Oxford University Press, 2012) p 27.
[324] *Ibid*.
[325] OJ [1997] C 372/5; more specific guidance on market defi nition can be found in the Commission's Guidelines on the application of Article [101 TFEU] to technology transfer agreements OJ [2004] C 101/2, paras 19–25; Guidelines on Vertical Restraints OJ [2010] C 130/1, paras 86–95 and Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ [2011] C 11/1, paras 112–126, 155–156, 197–199, 229 and 261–262.
[326] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) p 117.
[327] *Ibid.*
[328] *Ibid.*
[329] S Perchal and S De Vries, 'Seamless Web of Judicial Protection in the Internal Market?' (2009) European Law Review 5.
[330] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991.

IOC, the Court held that to ensure compatibility of sporting rules with the EU law they need to be tested under both free movement and competition law provisions[331]. Even though anti-doping rules of the IOC did not form a restriction on the free movement provisions, they were caught under the application of the competition law provisions[332].

VII. Chapter Conclusion

This Chapter has explored the aims and objective of the EU through analysing the theories behind the European integration. The nature and effect of EU law is established and the fundamental treaty provisions applicable to sport is identified. The chapter discovered the organisational structures of the EU which would challenge the European model of sport. The chapter concluded that the main aim and objective of the Union has been to establish and ensure the proper functioning of the internal market in accordance with the Treaties with no exceptions. EU legal framework is designed to regulate all markets which could put it at odds with how sport is organised under the European model.

[331] Case C-519/04 *P David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991 at [30]-[32].
[332] *Ibid.*

CHAPTER II: ORGANISATION OF SPORT

I. Introduction; II. Organisation of Sport; II.I. Specificity of Sport; II.II. Autonomy of Sport; II.III. Specific Character of Sport; II.IV. Today's Sport; II.V. Lex Sportiva; **III. European Model of Sport;** III.I.The Pyramid System of the European Model of Sport; III.II. Promotion and Relegation System; III.III. Delegated Duties; III.IV. European Model of Sport *v.* American Model of Sport; **IV. Alternative Dispute Resolution**; V. **EU Supervision on the European Model of Sport**; **VI. Chapter Conclusion**

I. Introduction

The objective of this chapter is to establish whether the commercialised organisational features of the European model of sport could conflict with the organisational structures of the EU eliminating the possibility of both being mutually exclusive. This chapter comprises of identifying the features of the European model of sport and the EU supervision to demonstrate difficulties of the organisation of sport under the EU law.

II. Organisation of Sport

Europe has always been the seat for the development of modern sport such as International Olympic Committee, European Athletics, UEFA, and FIFA [333]. Since the birth of the ancient Olympic Games until the present, organizational innovations have been developed and implemented in Europe and later distributed around the world. This historical leadership in the development of sport provides the European Union with a great opportunity to set the trend in the formulation and articulation of the rules and management system[334]. The EU interest in sport is two-fold. First the EU regulates economic activity, and sport is an economic sector. Second, sport performs many public interest functions, such as health and social inclusion. Therefore, the EU could help define what amounts to public interest thus shaping the margin of appreciation it can offer to sport while regulating it.

[333] V. Zuev, I. Popova, *The European model of sport: Values, Rules, and Interests,* International Organisations Research Journal, Vol. 13. No 1 (2018), p. 52.
[334] *Ibid*.

The EU's leading role in shaping the regulatory basis of sport has been ensured by the size of the sports market in Europe[335]. According to a recent study[336], sport accounts for 2.12% of the EU GDP and sport-related employment is accountable for 5.67 m people (2.72% of EU employment). The results also show that, when the economy was suffering, sport was a very resilient sector, generating growth and jobs[337]. The involvement of the EU institutions in regulating European model sports plays an important role in deepening regional integration processes, the promotion of the European values and interests outside the region and the EU's transformation into one of the major drivers of the global sports management system[338]. In Europe, before the end of the cold war there were two different models of sport. In Eastern Europe, highly state-regulated communist model of sport was present. The Eastern European model of sport played an important ideological role in the Soviet Union and the old Eastern bloc political and ideological propaganda[339]. Under the Soviet's ideology of sport, the sport movement was not implemented as a civilian device bringing the society together, but rather as a military device[340]. Programs created during the growth of Soviet Russia, such as the *Vsevobuch, Red Star International* and *All-Union Sports Committee* pushed the emerging nation toward political autonomy, military readiness, and athletic dominance[341]. The political, military, and civilian sectors of society melded together for the promotion of the idea of the physical culture[342]. Physical culture meant physical health for purposes of sport, work, and leisure; however, it also meant, mental, political, and military control[343]. On the other hand, in Western Europe, a privately regulated

[335] V. Zuev, I. Popova, *The European model of sport: Values, Rules, and Interests*, International Organisations Research Journal, Vol. 13. No 1 (2018), p. 52.
[336] European Commission, 'Study on the economic impact of sport through Sport Satellite Accounts' (2018) <https://op.europa.eu/en/publication-detail/-/publication/865ef44c-5ca1-11e8-ab41-01aa75ed71a1/language-en> accessed on 16 July 2020.
[337] Also confirmed in: http://www.oecd.org/mcm/C-MIN(2013)1-ENG.pdf.
[338] V. Zuev, I. Popova, *The European model of sport: Values, Rules, and Interests*, International Organisations Research Journal, Vol. 13. No 1 (2018), p. 52.
[339] L Halgreen, *European Sports Law: A comparative analysis of the European and American models of sport*, (2nd edn, Forlaget Thomson, 2009), p 65.
[340] S David. "The Workers' Sport Internationals 1920-28." Journal of Contemporary History, Vol. 13, No. 2 (April 1978) p 233-251.
[341] *Ibid.*
[342] S Grant, Physical Culture and Sport in Soviet Society: Propaganda, Acculturation, and Transformation in the 1920s and 1930s (Routledge Research in Sports History, 2013) Chapter II.
[343] S Grant, Physical Culture and Sport in Soviet Society: Propaganda, Acculturation, and Transformation in the 1920s and 1930s (Routledge Research in Sports History, 2013) Chapter II; R Service, *A History of Modern Russia: From Tsarism to the Twenty-first Century* (United Kingdom, Penguin, 2009).

model of sport was present where democracies developed a mixed sports model[344]. After the fall of the communist regime, while the idea of state regulation of sport still survived in certain counties such as Poland[345], Eastern bloc countries have largely adopted the Western European model of sport[346].

Today, the European model of sport is the continuance of the former Western European model of sport. It is based on the system created by the English Football Association during the final decades of the 19th century[347]. This model was characterised by a hierarchical pyramid structure which run from the local levels to national levels to continental levels and to global levels[348]. Generally, International sports federations stand at the apex of a vertical chain of command for each individual sport[349]. Continental sports federations stand under global federations, national federations stand under the continental organisations. These mostly private organisations have a competence in regulating their sport while they are subordinate to the organisations standing above them[350]. At the base of the pyramid stand the athletes and clubs who must conform to the rules adopted by the organisations standing higher up in the pyramid. International sports governance is very intricately connected to and defined by the European model of sport[351] which is acknowledged as the powerhouse of the world sport[352].

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[344] L Halgreen, *European Sports Law: A comparative analysis of the European and American models of sport*, (2nd edn, Forlaget Thomson, 2009), p 65.
[345] A J. Szwarc, 'Legislation on sport in Poland' in Andrew Caiger and Simon Gardiner (eds) *Professional Sport in the EU: Regulation and Re-regulation* (Asser Press, 2000) p 241.
[346] L Halgreen, *European Sports Law: A comparative analysis of the European and American models of sport*, (2nd edn, Forlaget Thomson, 2009) p 65.
[347] A Geeraert, *The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA* (Palgrave macmillan, 2016) p 52.
[348] A Geeraert, 'The Governance of International Sport Organisations' in B. Houlihan and D. Malcolm (eds) *Sport and Society* (Sage, 2016) p 413.
[349] A Geeraert, *The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA* (Palgrave macmillan, 2016) p 52.
[350] *Ibid.*
[351] Commission of the European Communities, 'Working Paper on the Development and Prospects for Community Action in the Field of Sport' (1998) p 5.
[352] *Ibid*.

II.I. Specificity of Sport

Sport has been one of the most important business sectors in the world[353]. As Blake explains, sport is an important part of popular culture.[354] Many people around the world either participate in sport or observe it. Sport is a way in which we understand our bodies as well as our minds and sport is the crucial component of contemporary society.[355] This is true not only because of mass participations and observations but also sport infuses the language around us. Sporting activity is continuously reported in newspapers, magazines, books, and electronic media. Sport is one of the most powerful presences within the broadcasting[356]. As a result, sport is the background noise of the contemporary culture and therefore it is different than other economic sectors[357]. After the Second World War, with the rapid globalisation of the world, sport has created one of the most significant self-organised international civil societies. Sport has established its own specific set of rules and remedies both at national and international levels. Particularly through the arbitral resolution of disputes, sports law has been developed as a set of unwritten legal principles and consolidated along the years[358]. Sport is the biggest social movement in Europe with nearly 700,000 sport clubs and associations within the EU while taking its place in a global arena[359]. Within the last two decades, sports policy has been developing at the EU level[360]. A non-binding Declaration was annexed to the Amsterdam Treaty in 1997 and the December 1999 Nice European Council adopted conclusions giving a mandate for sport to be examined at Community level. The European Commission issued a White Paper on Sport in July 2007[361]. Nevertheless, until the Treaty of Lisbon, the EU had no competence for sport in general to initiate a legal framework to supervise but only to regulate through the EU's general decisional practice. The Lisbon Treaty introduced sport as a new area of competence within the EU and emphasised the specific character of sport while recognising the distinctive contribution of sport to the European society.

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[353] Blake, A, *The Body Language: The Meaning of Modern Sport* (Lawrence & Wishart, 1996) p 11.
[354] *Ibid*.
[355] *Ibid.*
[356] *Ibid* p 12.
[357] *Ibid.*
[358] CAS 98/200 *AEK Athens and Slavia Prague v UEFA* at [165].
[359] Blake, A, *The Body Language: The Meaning of Modern Sport* (Lawrence & Wishart, 1996) p 11.
[360] *Ibid*.
[361] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final.

II.II. Autonomy of Sport

The autonomy of sport is an important tool where the inherent values of sport, in other words specificity of sport, is protected from political, legal, and commercial influences[362]. Sporting autonomy embraces a range of sporting competences including the ability of a sport organisation, without facing an undue external influence, to establish, amend and interpret sporting rules, to select sporting leaders and governance styles and to secure and use public funding without disproportionate obligations[363]. One of the main challenges against the sporting autonomy is the application of the laws of the land. Sporting authorities have long argued against the intervention of the EU institutions to sustain their autonomy over regulating sport[364]. Sporting organisations have claimed that due to the specificity of sport, justice and redress in sport is better bestowed by those with expertise in the practical know-how, rather than the judiciary through the application of the laws of the land such as the EU law[365]. The autonomy of sport is curtailed as much as the law of the land interferes to regulate it.

SGBs have identified three main strategies to protect their regulatory autonomy from mainly the interference of the EU law. These are contractual, legislative, and interpretative in nature[366]. The most effective way for SBGs to defend their autonomy is through the contractual solution which involves inserting a clause into the contracts of sports participants to the effect that disputes must be resolved through arbitration rather than litigation[367]. Where the contractual route somehow fails to protect sporting autonomy through arbitration, the second-best available solution is to persuade the EU to adopt lex sportiva within the Treaties to ensure a certain amount of autonomy to the SGBs[368]. The inclusion of the Article 165 TFEU was intended as a legislative solution.

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[362] R Parrish, 'Autonomy of Sport: Legal Analysis' <https://www.sportetcitoyennete.com/en/articles-en/the-autonomy-of-sport-a-legal-analysis> accessed on 19 October 2018.
[363] J L Chappelet, *Autonomy of Sport in Europe* (Strasbourg: Council of Europe Publishing, 2010).
[364] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 238-239.
[365] R Parrish, 'Autonomy of Sport: Legal Analysis' <https://www.sportetcitoyennete.com/en/articles-en/the-autonomy-of-sport-a-legal-analysis> accessed on 19 October 2018.
[366] Stephen Weatherill, *Principles and Practice in EU Sports Law* (2017 OUP) p 7.
[367] *Ibid*.
[368] *Ibid*.

This treaty-based solution sought to achieve an autonomy from the application of the fundamental EU law. However, it has not worked out well for the SGBs. The interpretative approach has been the least attractive to the SGBs of the three available options due to the fact that it is quite difficult for them to convince the adjudicator to interpret and yield the EU law in favour of the SGBs[369]. Even though, these solutions have helped, they have not provided an absolute means to the organisation of sport to avoid the EU's intervention[370].

II.III. Specific Character of Sport

While being subject to the general law of the EU, the specific characteristics of sport is acknowledged during the application of EU law[371]. This specific characteristic is inherent in the nature of sporting activities and rules, such as; separate competitions for men and women; limitations on the number of participants in competitions; the need to ensure uncertainty of outcomes; the maintenance of competitive balance between teams in a league; the autonomy and diversity of sport organizations; a pyramid competition structure from grass roots to the elite level; solidarity measures between different levels and operators; the national organisation of sport; and the principle of a single federation per sport[372]. These rules inherent in the sport's identity are collectively named as *the rules of the*. These rules do not have economic intentions and they are necessary for the proper functioning of sport[373]. These rules are motivated by a desire to ensure sporting values prevails over the self-serving economic interests[374]. Rules of the game with no economic effects on the cross-border trade between the Member States in the internal market do enjoy autonomy under the organisational structures of the EU. Further discussion is present under the following chapters. In addition, the sport sector operates differently compared to other market sectors. In most sectors, the financial failure of an actor is positive for the remaining competitors and to society at large since the actor is

[369] Stephen Weatherill, *Principles and Practice in EU Sports Law* (2017 OUP) p 48.
[370] Under Article 6 ECHR, everyone affected have the right to initiate legal proceedings through litigation in the ECJ and/or file a claim under the European Commission.
[371] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final.
[372] L Freeburn, 'European Football's Home-Grown Players Rules and Nationality Discrimination under the European Community Treaty' (2009) Marquette Sports law Review 177 p 187.
[373] S Weatherill, 'The Helsinki Report on Sport' (2000) European Law Review 282 p 287.
[374] R Parrish, 'Lex Sportiva and EU Sports law' [2012] European Law Review 716 p 719.

considered as a victim of its own inefficiency[375]. Sport is different as the victory of one team is based on the survival of other teams with which it can compete[376]. Sport teams, clubs and athletes have a direct interest not only in there being other teams, clubs, and athletes, but also in their economic viability as competitors[377]. The EU recognises the specific nature of sport. However, specificity does not justify a general exemption from the application of EU law to sport[378].

Nevertheless, the world of sport has been tracking objectives to justify specific treatment for sport under the application of EU law[379]. Certain objectives put forward by the SGBs approved by the EU as legitimate and necessary to ensure fairness of sport competitions, uncertainty of results, protect health of sportsmen, protect the safety of spectators, promote the training of young sportsmen, and ensure the financial stability of sport clubs[380]. However, the question of whether sport is special and should be treated differently to other economic sectors under the EU law has been much debated[381]. Should there be no difference between sport sector and the general market sectors, then, writing about free movement and sport would be no different than writing about *free movement and short people*[382]. Weatherill summarises that sport has a special character, and this special character lies in its eccentric cultural and economic nature[383]. In theory, the European Parliament considers that European sport is an inalienable part of the European identity, European culture and citizenship[384]; that sport has a special role in society as an instrument of social inclusion and integration; that due to the special characteristics of sport, certain allowance or exceptions should be made in the

[375] J E Levine, 'The Legality and Efficiency of the National Basketball Association Salary Cap' [1992] Cardozo Arts and Entertainment Law Journal 71 p 79-80.
[376] *Ibid*.
[377] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final at 4.1.
[378] *Ibid.*
[379] V Alexandrakis, 'EU and Sport: A New Beginning?' (2012) International Sports law Review Pandektis 305 p 312.
[380] See for example C-519/04 P *Meca Medina* I-7018; Case 36/74 Walrave and Koch [1974] ECR 1405; Case 13/76 Donà [1976] ECR 1333; Case C-415/93 Bosman [1995] ECR I-4921; Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549; and Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681.
[381] B Keane, 'Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC (C-325/08)' (2011) International Sports law Review 3 p 5.
[382] G Davies, 'Book Review of Practical Regulation of the Mobility of Sportmen in the EU Post Bosman by Van den Bogaert' (2006) Common Market Law Review 892 p 893.
[383] S Weatherill, ' "Fair Play Please!": Recent Developments in the Application of EC law to Sport' (2003) Common market Law Review 40.55.
[384] European Parliament, 'Parliament Resolution of 8 May 2008 on the White Paper on Sport' (2007) INI/2007/2261.

application of general EU law to sport[385]. Besides, the European Parliament comments that in certain circumstances, in view of the specific characteristics and essential and singular features of sport, it should not be compared with an ordinary economic activity[386].

II.IV. Today's Sport

Modern SGBs have become complex organisations which should not be immune from the application of the laws of land, specifically the EU law. Currently, sporting organisations do not only act as sport regulators, but also follow commercial ambitions. This dual role has given rise to conflicts of interest and abusive conduct[387]. The commercialisation of sport has brought with it the need to protect the interests of economically active athletes and undertakings which have not been fully respected by the sport organisations[388]. Since *Bosman*, the EU has attracted criticism from the sporting organisations for purportedly exchanging the knowledge and expertise of the SGBs with its own mechanism to ensure application and enforcement of the EU law[389]. Unlike SGBs main aims and objectives, the EU regulates sport for the sake of the proper functioning of the internal market based on its own aims and objectives and not for the sake of the sporting sector. Both the EU and the European model of sport have diverse approaches and objectives. However, in case of conflict between the organisational structures of the European model of sport and the EU law, the latter prevails, and the former cannot exist [390].

While the ECJ and the Commission accepted that sport is different to other sectors, they have not been as sensitive as the SGBs would have liked. The EU institutions have opted to adopt a narrow approach towards the specific nature of sport than the sporting

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[385] L Freeburn, 'European Football's Home-Grown Players Rules and Nationality Discrimination under the European Community Treaty' (2009) Marquette Sports law Review 177 p 187.
[386] European Parliament, 'Parliament Resolution of 8 May 2008 on the White Paper on Sport' [2007] [INI/2007/2261] European Parliament 96.
[387] R Parrish, 'Autonomy of Sport: Legal Analysis' <https://www.sportetcitoyennete.com/en/articles-en/the-autonomy-of-sport-a-legal-analysis> accessed on 19 October 2018.
[388] *Ibid*.
[389] *Ibid*.
[390] For further discussion see Supremacy of EU law.

authorities have long desired[391]. The SGBs could not manage to convince the EU institutions that sport could not be of any interest to EU but succeed in securing that some sporting practices, known as the rules of the game with no negative effect on the cross border trade between the Member States in the internal market, are compatible with the EU law[392]. This has been the most rational strategy of the SGBs to convince the EU institutions that not all sporting practices are incompatible with the EU law[393]. Engagement and co-operation with the EU softened the effects of EU law on the autonomy of sport. UEFA summarised their strategy of co-operation with the EU as the most promising way to promote awareness of sporting exceptionalism in the decisional practice of EU institutions[394]. This strategy of accepting supervision of the EU to restrain the interventionist bite[395] of the EU institutions has led to the negotiations between the SGBs and the EU institutions leading the way to the adoption of Article 165 TFEU[396].

With the emergence of the EU's governance strategy in sport, sporting autonomy, while not an absolute autonomy, is supervised by the European institutions involvement and conditioned on sporting organisations to implement and respect the EU standards of governance and fair dispute resolution. Without these adaptations, disputes involving sporting organisations would end up in the decisional practice of the EU institutions through the general application of the EU law with no difference in application to sport.

II.V. Lex Sportiva

An area of law evolves after it is treated as a distinct part of the general law depending on the history, economic development, and political preferences[397]. Whether sport has completed its development to be classified as a substantial area of law or it remains as an esoteric area of law is outside the coverage of this thesis. Lex sportiva is the term

[391] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 239.
[392] *EXMAPLE CASES*
[393] *Ibid.*
[394] Garcia, B, 'UEFA and the EU: From Confrontation to Co-operation and the EU's involvement in Sport' [2007] Journal of Contemporary European Research 202.
[395] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 242.
[396] *Ibid* 239.
[397] J Anderson, *Modern Sports Law* (2010 OUP) p 21.

referred to when defending autonomy of sport[398]. Lex sportiva defines the co-existence of various internal administrative regulations and dispute-resolving mechanisms of sport under domestic, supra-national and international law[399]. Sports law on the other hand defines the intersection of two types of legal order: lex sportiva and the laws of the land[400]. Therefore, sports law contains a claim to certain degree of autonomy of sport from the application of the ordinary laws of land under lex sportiva and retains coherence and procedural integrity to be treated as a legitimate system of ordering[401]. EU sports law discovers the approach of the organisational structures of the EU towards lex sportiva. Intellectually, European sports law examines ways to achieve a normative assessment on the strengths of the claims in favour of the autonomy of sport[402]. The EU sports law explores to what extent the organisational structures of the EU and sport co-exist.

III. European Model of Sport

There is no one standard organisational structure for sport[403]. Even though there are certain common features, sport is organised based on its own characteristic and ideology[404]. Each sport usually has an international federation responsible for promoting, establishing the laws of the game, and regulating the sport at an international level while imposing certain requirements to be fulfilled by their member associations at national level[405]. The international federation is the association of all the national federations. It exists to provide a set of uniform rules for sport and to ensure these are enforced[406]. In the areas of developed sports, there will be a layer of continental association standing under the international federation[407]. The national federation will also be a member of the continental association for the continent. The continental association will be responsible for representing national federations and for organising

[398] S Weatherill, *Principles and Practice in EU Sports Law* (2017 OUP) p 6.
[399] J Anderson, *Modern Sports Law* (2010 OUP) p 20-21.
[400] Stephen Weatherill, *Principles and Practice in EU Sports Law* (2017 OUP) p 6.
[401] *Ibid*.
[402] *Ibid*.
[403] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 91.
[404] *Ibid*.
[405] *Ibid*.
[406] *Ibid*.
[407] *Ibid*.

competitions within its geographic area[408]. Consequently, there might be tensions throughout different sports due to the presence of interlocking associations responsible for sport's governance at each level. The involvement of the ECJ and the Commission in regulating European sport creates a further tension by affecting the uniformity of sporting rules[409].

III.I. The Pyramid System of the European Model of Sport

The European model of sport is characterised by two main features: the pyramid structure and the promotion and relegation system. Perhaps the main distinctive feature of the European model of sport is the way sport is organized under a pyramid structure[410]. This structure is traditionally described as a monopolistic pyramid, with one federation per sport and per country[411]. In this system, federations organise competitions, promote and regulate their sport at their respective levels. They operate under the umbrella of a single regional, a single national, a single European and a single global federation that sits at the top of the pyramid. Amateur, semi-professional and professional athletes and local clubs are at the bottom of the pyramid. They are members of their respective national federations and participate in various leagues according to their sporting achievements. National federations organise sports competitions and select national teams[412]. The pyramid structure implies interdependence between the levels, not only on the organisational front, but also on the competitive side, because competitions are organised on all levels[413]. These federations in turn are members of European and International federations[414]. Even though the pyramid notion brings with it the ideas of hierarchy, the European model has the idea of participation and

[408] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 92.
[409] *Ibid* p 93.
[410] E Szyszczak, 'Is Sport Special?' in Barbara Bogus et al. (eds) *The Regulation of Sport in the European Union* (Edward Elgar, 2007) p 6.
[411] V Zuev, I. Popova, *The European model of sport: Values, Rules, and Interests*, International Organisations Research Journal, Vol. 13. No 1 (2018), p. 52.
[412] E Szyszczak, 'Is Sport Special?' in Barbara Bogus et al. (eds) *The Regulation of Sport in the European Union* (Edward Elgar, 2007) p 6.
[413] I Blackshaw, 'European and US Models of Sport' in Ian S. Blackshaw (eds) *International Sports Law: An Introductory Guide* (Asser Press, 2017) p 6.
[414] E Szyszczak, 'Is Sport Special?' in Barbara Bogus *et al.* (eds) *The Regulation of Sport in the European Union* (Edward Elgar, 2007) p 6.

representation at each layer of authority in the hierarchy[415]. On the other hand, the autonomy of lower-ranking sports organisations of the pyramid is restricted by the higher-ranking ones. For example, a club is bound by the rules of its national federation (NF), which is itself bound by those of the international federation (IF) for its sport and of the national Olympic committee (NOC) for its country[416].

Even though there is no uniform organisational structure of European sports, the architecture of most sports corresponds to this broad pyramid[417]. SGBs have an extensive mandate to regulate their discipline. They pass the rules concerning the access to competitions, take care of disciplinary and integrity matters, guarantee uniform rules of the game, ensure the rules relating to safety at events are in place and promote their sport at all levels. At the same time, they are also commercial actors with economic interests in the sport they regulate[418]. In their role as organisers of competitions, they enter several business deals to sell merchandise, tickets, hospitality packages, media, and other commercial rights in sporting events. This intermingling of regulatory and commercial functions in a single body could lead to potential conflicts of interest and could cause a detriment to actual or potential competitors in the relevant market[419]. For example, sports federations strive to maintain monopoly via the market restrictions in their statutes and rulebooks seeking to prevent the operation or even emergence of a rival, competing league or other organisational market for 'their' sporting events. In doing so, they could infringe fundamental EU law provisions such as free movement, nationality discrimination and competition law.[420]. From the organisational structures of EU law point of view, the pyramid structure creates one of the main weaknesses of the European model of sport. The application of one federation for each sport creates an automatic monopoly and a dominant position for the SGB regulating each sport[421]. This

[415] E Szyszczak, 'Is Sport Special?' in Barbara Bogus et al. (eds) The Regulation of Sport in the European Union (Edward Elgar, 2007) p 6.
[416] J L Chappelet, *Autonomy of Sport in Europe* (Strasbourg: Council of Europe Publishing, 2010) p 41.
[417] K Pijetlovic, 'The European model of sport: alternative structures' in Jack Anderson et al (eds) *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing, Incorporated, 2018) p. 326.
[418] *Ibid*.
[419] *Ibid*.
[420] *Ibid*.
[421] E Szyszczak, 'Is Sport Special?' in Barbara Bogus et al. (eds) The Regulation of Sport in the European Union (Edward Elgar, 2007) p 6.

segments the single market notion into national market paving the way for a potential conflict of EU competition law. Therefore, the organisation of sport under the pyramid structure creates possible conflict with the EU and it is open to be challenged under EU law.

III.II. Promotion and Relegation System

The second distinctive feature of the European sport model is the system of promotion and relegation. There is strong interdependence between amateur and professional sport in Europe. It is designed to reward merit and promote equality of opportunity and balance competition among teams. The promotion and relegation system also perform an ethical function by mandating relegation to a lower tier of any team that has engaged in specified questionable practices[422]. It creates the formal link between professional and amateur sport[423]. SGBs aim to control both professional and semi-professional sport and amateur sport. This facilitates the distribution of revenue from top-level sport to grassroots sport[424]. This is consolidated through the system based on promotion and relegation. At the end of the season, the worst performing teams are demoted to a league one level below and the best performing teams are promoted to replace the ones demoted. Perhaps this is the strongest feature of the European model of sport since it encourages promotion of fairness and equal opportunities in compliance with the general application of EU law.

III.III. Delegated Duties

The third distinctive feature of the European model of sport is the fact that SGBs delegates duties to international bodies[425]. SGBs and the organisations under them participate under international regulatory regimes such as the Olympic movement, sport arbitration (CAS) and anti-doping agency (WADA). Therefore, SGBs are subject to the rules and regulations of these international regulatory regimes. Consequently, all other

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[422] I Blackshaw, 'European and US Models of Sport' in Ian S. Blackshaw (eds) International Sports Law: An Introductory Guide (Asser Press, 2017) p 6.
[423] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 52.
[424] *Ibid*.
[425] *Ibid*.

organisations lower in the pyramidal hierarchy are also subject to these rules and regulations. In practice, global SGBs delegate the duty to organise Olympic Games to the International Olympic Committee (IOC) who has acquired an international legitimacy by associating with the United Nations (UN)[426]. In return, the IOC distributes 90% of its revenue to organisations throughout the Olympic Movement, to support the staging of the Olympic Games and to promote the worldwide development of sport. The IOC retains 10% of its revenue for the operational and administrative costs of governing the Olympic Movement[427]. The UN acknowledged the contribution of sport for development and peace and collaboration between the IOC and the UN has played a crucial part in spreading the acceptance of sport to promote internationally agreed development goals[428]. In 2015, sport was officially recognised as an *important enabler* of sustainable development and included in the UN's Agenda 2030[429]. This was a historic moment for sport and the Olympic Movement. Unlike under the US model of sport, this feature of the European model of sport secures the global impact of the European model of sport.

III.IV. European Model of Sport *v.* American Model of Sport

The European model of sport has been contrasted with an American model of sport by many scholars[430]. The US model of sport does not have a pyramidal structure and it operates independently from the international regulatory regimes[431]. In US, sport has long been regarded as a commercial activity and the top leagues were established under profit oriented managerial control without the presence of any international regulatory body[432]. US anti-trust law has proven to be tolerant to the pro-competitive nature of the

[426] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 53.
[427] IOC, 'Olympic Marketing Fact File 2020 Edition' <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File.pdf> accessed 10 February 2020.
[428] IOC, 'Cooperation with the UN' <https://www.olympic.org/cooperation-with-the-un> accessed on 17 July 2020.
[429] *Ibid.*
[430] See for example Arnaout Geeraert, Lars Halgreen, Lewis Taylor, Erica Szyszczak, Stefan Szymanski.
[431] S Szymanski and A Zimbalist, National pastime: how Americans play baseball, and the rest of the world plays soccer (The Brolings Institution, 2005).
[432] M Van Bottenburg, 'Why are the European and American sports worlds so different? Path-dependence in European and American sports history' in A Tomlinson *et al* (eds.) *Transformation of modern Europe: states, media and markets 1950-2010* (Routledge, 2011) p 205-255.

US model of sport organisations[433]. Unlike under EU law, US regulators have acknowledged the special economic nature of sport and allows exemptions to be made under the application of anti-trust law to certain sporting activities in US[434]. In contrast to the regulatory issues creating problem under EU competition law, a variety of restrictive practices are exempted in US through collective agreements between the stakeholders to ensure competitive and commercial nature of sport leagues. As an example, restrictive transfer clauses, salary caps, revenue sharing, payroll taxes and a draft system allocating new talent to poorly performing teams are used to counter natural market power[435].

US leagues have their own arbitration systems and anti-doping agencies. Consequently, WADA and CAS have had a limited impact on the rules governing competition in US leagues[436]. Moreover, the US model of sport does not have a formal promotion and relegation system. Unlike in Europe, sports competitions at the top leagues takes place in closed leagues implying a clear-cut separation between amateur and professional sports avoiding redistribution which would link the top level and lower level sports competitions[437]. In 2017, Miami FC and Kingston Stockade FC submitted a claim to Court of Arbitration for Sport's (CAS) against FIFA challenging the closed league system in the US which prevents promotion and relegation[438]. CAS decided that FIFA does not require the principle of promotion and relegation to be implemented in US professional soccer[439]. The CAS decision demonstrated that FIFA is not legally required to enforce promotion and relegation within the US football pyramid. This has raised some questions over the FIFA's ability to interpret and enforce its statutes[440]. Therefore,

[433] E Szyszczak, 'Is Sport Special?' in Barbara Bogus et al. (eds) The Regulation of Sport in the European Union (Edward Elgar, 2007) p 8.
[434] *Ibid* p 8.
[435] *Ibid*.
[436] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 53.
[437] *Ibid*.
[438] A Warshaw, 'US Club Owners go to CAS Demanding End to Closed MLS League System' Inside World Football (4 August 2017).
[439] CAS 2017/O/5264, 5265 & 5266 *Miami FC & Kingston Stockade FC v. FIFA, CONCACAF & USSF*, award of 3 February 2020, page 68.
[440] B Williams, US office, 14 February 2020, *CAS pro/rel ruling raises questions over Fifa's reluctance to force initiative in US* <https://www.sportbusiness.com/2020/02/cas-pro-rel-ruling-raises-questions-over-fifas-reluctance-to-force-initiative-in-us/> accessed on 21 July 2020.

the European model of sport is applied globally throughout the world and the US model of sport is only applied in North America. Lately it is put forward that the European model of sport has increasingly resembled the American model of sport especially in football[441]. Increasing numbers of independently operating national level leagues and new actors intending to establish continental leagues ECA which are not formally separated from national football governing bodies is the main reason for this criticism[442]. However, unlike US anti-trust law, EU law does not automatically exclude sporting rules from the scope of EU law. In the EU context, each sporting rule must be tested by the Court on a case by case basis, taking into consideration the proportionality of the measure, in order to identify whether it qualifies to fall under the specificity of sport and therefore establish if it should be protected under EU law. Moreover, considering the current strong presence of the pyramidal structure and the role of SBGs under the European model of sport there remains serious distinctions between the two models of sport[443].

IV. Alternative Dispute Resolution

During the 1980s, the steady increase in the number of international sport related disputes and the lack of impartial organisation concentrating in sport related issues with an authority to take binding decisions guided the top sport federations to consider possible ways for dispute resolution in sport[444]. Therefore, the notion to establish an arbitral jurisdiction specialised on resolving international disputes directly or indirectly related to sport with flexibility, speed and low costs was launched[445]. In 1982, IOC President H.E. Juan Antonio Samaranch[446] with the notion of establishing sport specific jurisdiction supported a working group with an aim of drafting the statutes of what become known as the Court of Arbitration for Sport (CAS). CAS is based in Lausanne, with sub-offices elsewhere, under the guidance of IOC in 1983 as a unique and sole

[441] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 53.
[442] *Ibid*.
[443] *Ibid*.
[444] CAS <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed on 07 July 2020.
[445] *Ibid.*
[446] IOC Session held in Rome, IOC member H.E. Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired the working group.

global international arbitration body dedicated to resolve sport disputes[447]. All Olympic federations under IOC[448], as well as certain non-Olympic federations, consent to CAS jurisdiction. Since 2004, the World Anti-Doping Code[449] has instructed all the rule violation appeals to be made to CAS.

Until the first years of 1990s, a variety of cases were filed to CAS regarding the nationality of athletes and contracts concerning employment, television rights, sponsorship, and licensing[450]. In 1991 CAS published a guidance to arbitration which initially was encouraged to be incorporated into the statues of its member federations and later made a mandatory requirement of the IOC Charter[451]. This guidance clause established that any dispute arising from the rules of the member federation and cannot be settled amicably shall be settled by the Court of Arbitration for Sport[452].
After the adoption of this clause, various doping cases were filed to CAS which facilitated the structure of CAS to evolve[453]. The International Equestrian Federation (FEI) was the earliest sport federation to implement this clause which resulted in several "appeals" procedures even though formally such a procedure did not yet exist. Other sport federations adopted this clause which caused an important increase in the workload of the CAS[454].

In 1994, CAS issued a decision in *Gundel v FEI*[455] regarding a doping offence. Soon after, Gundel filed proceedings before the Swiss Federal Tribunal claiming CAS is an organ of IOC and it did not satisfy the conditions of impartiality and independence required from an arbitral body under Swiss Law. Even though the tribunal ruled against Gundel's claim, in obiter dicta it signalled that different judgment would take place in respect of proceeding where the IOC was a party[456]. As a result of this obiter dicta, CAS

[447] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1036.
[448] For exmaple, FIFA introduced under Articles 66-67 in July 2012 edition providing for appeals to CAS.
[449] Article 13 of the World Anti-Doping Code (2009).
[450] CAS <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed on 07 July 2020.
[451] Rule 61, Olympic Charter (2011).
[452] CAS <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed on 07 July 2020.
[453] *Ibid*.
[454] *Ibid.*
[455] CAS 92/63 *Gundel v FEI* September 101992, CAS Digest I, p 115.
[456] *Gundel v FEI* Swiss Federal Tribunal Marck 15, 1993, ATF 119 11 271/, also reported in CAS Digest I, p 566.

was re-structured in 1994. To improve efficiency and avoid unacceptable IOC control, supervision and funding was delegated to a new body, the International Council of Arbitration (ICAS)[457]. CAS has revised its code multiple times since, and currently the 2019 Code applies. However, the 1994 Code was accepted as sufficiently independent of IOC and its awards were recognised and enforced by the Swiss Courts[458]. The autonomy of CAS was challenged in 2000 under the *Raguaz*[459] case in Court of Appeal of New South Wales. The New South Wales CA agreed with CAS and dismissed the challenge stating that CAS arbitration proceedings were not domestic proceedings since CAS arbitration proceedings is in Lausanne, Switzerland. Even though, in principle, CAS is accepted as an independent arbitral institution, each arbitrator needs to be reviewed to ensure each CAS panel established meets the necessary standards required under specific cases including independence and lack of conflict of interest,[460]. The European Court of Human Rights involved in regulating and supervising independence and impartiality of CAS to ensure fairness under mainly Article 6(1) ECHR on the right of a fair trial. In the case of *Mutu and Pechstein*[461] the European Court of Human Rights (ECtHR) considered the lawfulness of proceedings of CAS on independence and impartiality and the right to have a public hearing and did not find a violation. However, recently in *Riza*[462] case, the ECtHR ruled that Turkey violated Article 6(1) ECHR. The Court made a finding that the independence and impartiality required by Article 6 of the Convention was not fulfilled by the Turkish Football Federation (TFF)[463]. As a result, the respondent state was ordered to take general measures to address the underlying systemic problem concerning the Arbitration Committee of the TFF which violated Article 6(1) ECHR[464]. The Judgment is likely to have a wider impact on the structure and governance of sports tribunals at other federations and in other jurisdictions[465].

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[457] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1037.
[458] *Latsutina et al v IOC and FIS* Swiss Federal Tribunal of 27 May 2003, AFT 129 III 445,in CAS Digest III, p 651.
[459] *Raguaz v Sullivan & Ors* judgment dated 1 September 2000 of the New South Wales Court of Appeal (Australia), Case 40650, reported in CAS Digest II, p 783.
[460] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1039.
[461] Case of Mutu and Pechstein v Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018)
[462] Case of Ali Riza And Others V. Turkey (Applications nos. 30226/10 and 4 others) at para 201-223
[463] *Ibid* at para 213.
[464] *Ibid*.
[465] D Mavromati, 'Riza V Turkey: European Court of Human Rights Gives Further Guidance on Establishing Independent Arbitral Tribunals' Published on Wednesday, 05 February 2020 <https://www.lawinsport.com/topics/item/riza-v-turkey-european-Court-of-human-rights-gives-further-guidance-on-establishing-independent-arbitral-tribunals#_ftn4> accessed on 21 July 2020.

Arbitration proceedings require a foundation in a specific legal system's arbitration laws regulating conditions where the proceedings must operate for the final award to be recognised and enforceable in the Courts around the world[466]. The seat of arbitration determines the applicable arbitration law and the grounds for challenge. CAS is in Lausanne and arbitration laws of Switzerland apply to CAS proceedings and challenges can only be bought before the Swiss Federal Tribunal. A sport dispute may be submitted to CAS only when the parties to an agreement have undertaken that CAS will have a jurisdiction to resolve disputes[467]. Enforceability and validity of arbitration clauses in the agreements could be questioned since there is no real choice on the athletes' side. Provided that an athlete refuses to sign up to the rule, (s)he will not be eligible to compete[468]. However, the Swiss Federal Tribunal held that the need for a quick and uniform dispute resolution system in international sports prevails over the right of an athlete to have their case adjudicated by ordinary Courts as long as the dispute resolution system strictly observes the fundamental requirements of due process[469]. Although the Swiss Court would not enforce an indirect waiver of the right to challenge an arbitration award in Courts it was happy to enforce the provision in the rules providing for arbitration of the underlying dispute in the first place[470]. Moreover, in the *Stretford* case, the UK Court of Appeal held that the arbitration agreement in the FA's Rule K is valid and compatible with Article 6 ECHR, because of firstly the content of the arbitration scheme under the FA Rules and the contents of the 1996 Act including the possibility of appeals and applications for removal of arbitrators for lack of impartiality and secondly the waiver constituted by the arbitration agreement and subsequent conduct of the parties. Moreover, the CA ruled that the waiver also satisfied the relevant Convention jurisprudence, being neither equivocal, nor made by undue compulsion, a concept adequately addressed by the relevant rules of the common law and equity, none of which applied to the facts, nor contrary to any public interest[471]. The scope of the

[466] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1046.
[467] *Ibid* p 1048.
[468] *Ibid* p 1049.
[469] *ATP and CAS*, Decision of the Swiss Federal Tribunal on 22 March 2007, ATF 133 III 235.
[470] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1049.
[471] Case *Stretford v The Football Association Ltd & Another* (CA) [2007] EWCA Civ 238; [2007] 2 Lloyd's Rep 31; (2007) Bus LR 1052; (2007) 1 CLC 256; The Times, 13 April 2007.

obligation to arbitrate and the scope of review of the CAS will depend on the wording of the arbitration agreement. The arbitration clause should carefully be analysed to determine whether CAS is competent to decide on a dispute[472].

The CAS panel is competent to rule upon any challenge to its own jurisdiction while Swiss Fedaral Tribunal accepts appeals challenging CAS decision. However, under the organisational structures of EU law, an applicant is free to not appeal against the CAS award to the Swiss Federal Court. Here it is necessary to reference *Meca Medina*, a case discussed more fully in subsequent chapters. In 2006 in *Meca Medina*, the applicants challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices relating to doping control with the Community rules on competition and freedom to provide services[473] under then Articles 81 and 82 of the EC Treaty. Initially the Court of First Instance dismissed the appeal and apart from other conclusions, held that, challenging sporting rules fell within the jurisdiction of the sporting dispute settlement bodies[474]. The ECJ set aside this judgment of the Court of First Instance and held that having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of then Article 2 EC[475]. Where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities, it falls within the coverage of EU[476].

Arbitration procedure in sport has been criticised by the EU. The Commission decision in the ISU case acknowledged that arbitration is a generally accepted method of binding dispute resolution in sport and agreeing on an arbitration clause does not necessarily

[472] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1049.
[473] Case C-519/04 David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991.
[474] *Ibid at* para 11.
[475] *Ibid at* para 22; (see Case 36/74 Walrave and Koch [1974] ECR 1405, paragraph 4; Case 13/76 Donà [1976] ECR 1333, paragraph 12; Case C-415/93 Bosman [1995] ECR I-4921, paragraph 73; Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549, paragraph 41; and Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681, paragraph 32)
[476] Case C-519/04 David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991 at para 23. (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73).

restrict competition[477]. However, eligibility rules of ISU did restrict competition[478] and were declared incompatible under the EU law. Nevertheless, EU law has no automatic application over sporting disputes and for it to regulate a sporting dispute application must be made to European institutions. However, once an application is made to the EU to regulate a sporting dispute, an arbitration clause under an agreement will not be binding on the EU. In the *Eco Swiss* case, after an application for a preliminary ruling on the possibility of an annulment of an arbitration award being contrary to Article 101 TFEU (ex-Article 85 EC) the ECJ ruled that national Court must annul the arbitration award if it is in fact contrary to a fundamental provision[479], based on its failure to observe national rules of public policy[480]. Therefore, arbitration awards do not have a binding effect on the EU and in case of incompatibility with the EU law, arbitration awards are annulled.

V. EU Supervision on the European Model of Sport

Until the 1990s sports economics and the anti-trust analysis of sport was primarily a concern under the American model of sport. Europe was mainly dominated by a single sporting activity, football, which had a little financial significance[481]. Revenue sharing was not known, broadcasting income was insignificant and joint merchandise was not recognised[482]. Competition policy was only used to avoid labour market restrictions. Since 1974[483] the European Union has been dealing with sport and observing these changes from an economic point of view. The impact of EU law, including provisions and decisions, on sporting practices and activities have triggered problems for sport in Europe[484]. During the 1990s, sport in Europe has developed rapidly because of its increasing economic and commercial importance triggered by technological

[477] Case AT.40208 International Skating Union's Eligibility Rules Commission Decision, C(2017) 8240 final 8.12.2017 at para 269.
[478] *Ibid* .
[479] Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV Ursula Elsen [2000] ECR I-10409 at para 36.
[480] *Ibid* at para 41.
[481] S Szymanski et al, Transatlantic Sport (Edward Elgar, 2002) p 6.
[482] *Ibid* p 6.
[483] Ruling of Case C-63/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo [1974] ECR 1405.
[484] European Commission, 'The European model of sport' (Consultation Paper of DGX, 1998) p 1.

developments and the broadcasting of sporting events[485]. The Commission in its 1998 working paper identified sport as a rapidly growing sector accounting for 3% of world trade and one of the sectors most likely to generate new employment opportunities while executing educational, public health, social, cultural and recreational functions[486]. With the commercialisation of sport in Europe, the ECJ and the Commission have taken an interest in regulating European sport. In 1998, the European Commission used the term *The European model of sport*, to describe the long-standing pyramid structure of sport governance and regulations in Europe[487]. Mainly, after the *Bosman* ruling, until mid-1998, the Directorate-General for Competition (DG IV) of the European Commission, received 55 complaints relating to sport, on matters such as the role of sports organisations, television rights or commercial sponsoring[488]. This increase in the number of actions revealed that there was a gap between the real world of sport and its regulatory framework[489]. Consequently, in September 1998, the Commission issued a working paper in which it identified its policy on sport. The paper recognised that sport is not only an economic activity but also a social activity forming part of European identity[490]. The Commission acknowledged that involvement of EU law in sport raised questions regarding the future organisation of sport in Europe and demonstrated a willingness to help sport organisations to find solutions on the basis of their own initiatives to reflect on the future development of sport in Europe[491].

The EU rejected the free market model for the future of European sport, resisting the pressures of 'Americanisation' which is seen as the ultimate evil of excessive commercialism leading to the destruction of European sporting values, the only true sporting values[492]. In the Opinion given by the Committee of Regions on the European model of sport, the special characteristics of the European model was emphasized and stressed that the inclusion of an economic factor should not be allowed to jeopardise

[485] European Commission, 'The European model of sport' (Consultation Paper of DGX, 1998) p 1.
[486] *Ibid.*
[487] *Ibid*.
[488] *Ibid*.
[489] *Ibid*.
[490] *Ibid*.
[491] *Ibid*.
[492] L Halgreen, *European Sports Law: A Comparative Analysis of the European and American Models of Sport* (Forlaget Thomson 2004) p 64.

these traditional values[493]. This social function of sport was also identified by the Intergovernmental Conference set up to revise the Maastricht Treaty, and a Declaration on sport was annexed to the Treaty of Amsterdam[494]. A political consensus regarding the need to preserve the structures of sport in Europe was apparent also in other policy documents, notably in the 1999 Commission Helsinki Report[495]. The 2007 Parliament Report on the future of professional football in Europe (Committee on Culture and Education) noted in a similar spirit that European sport, and football, is an inalienable part of the European identity [496]. The growing concentration of economic wealth and power was a threat to the future of professional sport in Europe[497].

EU policy statements were based on the desire to preserve fundamental values such as the societal role of sport for all, self-regulation, and solidarity between professional and amateur levels, as well as the highly beneficial effects that sports have on youth, health and social inclusion policies[498]. The Commission Staff Working Paper annexed to the White Paper repeated the previous policy statements on the pyramid structure and labelled certain values and traditions of European sport as worthy of support which would fall under the specificity of sport and worthy of protection from the application of EU law. For a long time, the governance of European sport remained unchanged with a pyramidal structure that reinforced the vertical authority of international, European, and national governing bodies over other stakeholders[499]. However, recent years have seen the EU institutions adopt numerous papers explicitly touching on good governance in sport[500]. To generalise, these documents defined the relationship between public authorities and sports organisations as one of supervised autonomy. Supervised autonomy implies that self-regulation is permitted on condition to have a proper rule of

[493] C-374/56 Official Journal of the European Communities, The European model of sport: Opinion of the Committee of the Regions (1999/C 374/14).
[494] *Ibid.*
[495] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final.
[496] European Parliament Resolution, 'Future of Professional Football in Europe' (2007) 2006/2130 (INI).
[497] *Ibid* at para 1.
[498] L Halgreen, *European Sports Law: A Comparative Analysis of the European and American Models of Sport* (Forlaget Thomson 2004) p 64.
[499] B García, 'Sport Governance After the White Paper: The Demise of the European Model?' (2009) 3 (1) IJSPP 267.
[500] These include the European Commission's 2007 White Paper[500] and the 2011 communication on 'Developing the European dimension of sport'.

law system of governance[501]. The European Commission has consistently described EU standards of good governance as a condition for the autonomy and self-regulation of sport organisations. EU standards of good governance in sport underpins autonomy within the limits of the law, democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders[502].

More recently, the Council of the European Union has become the key actor in this endeavour. In the 2011–2014 EU Work Plan for Sport, the Council specified 'good governance' as one of the key priorities in EU sports policy. To that end, the Council established an Expert Group on 'Good Governance in Sport', which was tasked with developing 'principles of transparency concerning good governance' by mid-2012[503]. The Expert Group on good governance released its deliverable in September 2013 in the form of a lengthy text defining 'Principles for the good governance of sport in the EU'[504]. These principles are underpinned, again, by the idea of 'supervised autonomy', stating that 'sports bodies that do not have in place good governance procedures and practices can expect their autonomy and self-regulatory practices to be curtailed'[505] under the application of EU law which will form a threat to such sporting rules. While intended for universal use, the recommendations are also limited: they represent minimum standards that can be flexibly implemented at various levels. The principles are addressed to governments and to the sports movement at three different levels: grassroots sport organisations; national sports governing bodies; and European/ international federations[506]. Among the recommendations is the principle that all organisations should adopt a 'code of ethics' and that the respective roles, responsibilities and objectives of sports bodies and their stakeholders should be

[501] K Foster, 'Can Sport Be Regulated by Europe? An Analysis of Alternative Models' in A Caiger and S Gardiner (eds) *Professional Sport in the European Union: Regulation and Re-Regulation* (Asser Press 2000) p 64.
[502] European Commission, Developing the European Dimension in Sport [2011] COM (2011) 12 final, 10.
[503] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a European Union Work Plan for Sport for 2011–2014 [2011] OJ C 162/01, 4.
[504] Expert Group Good Governance, 'Deliverable 2: Principles of good governance in sport' (European Commission, September 2013) http://ec.europa.eu/assets/eac/sport/library/policydocuments/xg-gg-201307-dlvrbl2-sept2013.pdf (accessed 4/1/2019).
[505] *Ibid* 3.
[506] B Garcia and Mads de Wolf, *European Law and the Governance of Sport*, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., Edward Elgar Publishing, Incorporated, 2018, p. 303.

codified[507]. At the same time, the EU Member States have actively sought to disseminate these principles of good governance. The key development in this regard is the adoption of the second EU Work Plan for Sport for 2014–2017[508]. Here, the Council of the EU again identified good governance as one of its main priorities in the field of sport[509]. This decision includes a proposal for a new mechanism in EU sports policy, namely the establishment of so-called 'pledge boards'. A pledge board is defined as an 'instrument where mainly sport organisations can voluntarily make public their commitment to certain issues'[510]. Importantly, in the 2014–2017 Work Plan, the Council agreed to continue the promotion of the good governance principles, 'possibly followed by a pledge board'[511]. Indeed, the EU has already had some success in this regard. Thus, as reported by the European Commission in 2016, so far 31 sports organisations have signed the pledge board on good governance, a list which includes numerous national Olympic committees and sports federations, most notably perhaps UEFA[512]. Pledge boards did not directly represent a curtailment of the autonomy of sport organisations. Rather, they represent an implementation of the logic of 'sincere cooperation' between European public authorities and the sports movement as enshrined in the Treaties[513]. While the effects were limited, pledge boards nonetheless represented a new stage in systemic European sport governance, namely, a phase where European public authorities not only see their roles as providing normative guidance, but also expect a role in monitoring compliance[514].

[507] B Garcia and Mads de Wolf, *European Law and the Governance of Sport*, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., Edward Elgar Publishing, Incorporated, 2018, p. 303.
[508] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport (2014–2017) [2014] OJ C 183/12.
[509] B Garcia and Mads de Wolf, *European Law and the Governance of Sport*, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., Edward Elgar Publishing, Incorporated, 2018, p. 303.
[510] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport (2014–2017) [2014] OJ C 183/12, 13.
[511] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport (2014–2017) [2014] OJ C 183/12, 15.
[512] 'A Pledge to Implement Good Governance in European Sport' (European Commission September 2016) https://ec.europa.eu/sport/policy/organisation-ofsport/ pledge_en (accessed 4/1/2019).
[513] B Garcia and Mads de Wolf, *European Law and the Governance of Sport*, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., Edward Elgar Publishing, Incorporated, 2018, p. 304.
[514] *Ibid*.

Under its third Work-Plan 2017-2020, the Council agreed to prioritise any possible new developments for the integrity of sport by promoting good governance including the safeguarding of minors, the specificity of sport, combatting corruption and match fixing, as well as fighting doping while ensuring a follow-up of the recommendations produced by the previous Expert Group[515]. However, no reference was made to the pledge boards. Instead, the Expert Group would exchange best practices in a report after applying internationally recognised general good governance and anti-corruption standards and initiatives to the field of sport[516]. Meanwhile, the Council and its preparatory bodies will make recommendations on possible future actions against corruption in sport at the EU level. The outcome is yet to be seen.

SGBs have consistent rules for their respective sports and consolidates their monopolistic status as global regulating bodies[517]. Sport was accepted by the public as a cultural and amateur activity until the commercialisation of sport within the past three decades[518]. Consequently, the governance of international sport has long remained private and the sporting world still claimed it is best kept private[519]. In the recent years, with the involvement of the EU institutions in regulating sporting rules, SGBs sacrificed certain decision-making autonomy. However, they mostly remained unrestrained by public interventions of the legislative and the judiciary mainly because they operate beyond the reach of the states at an international level[520]. SGBs picked a favourable regulatory environment as their home base for their international activities, mainly Switzerland where they benefited from quasi-unregulated system[521] and enjoyed a world without accountability and regulation. This was until the EU legal interventions

[515] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the European Union Work Plan for Sport (1 July 2017 - 31 December 2020) 8938/17 SPORT 33, p 5.
[516] Council of the European Union, Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on the European Union Work Plan for Sport (1 July 2017 - 31 December 2020) 8938/17 SPORT 33, p 13.
[517] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 7.
[518] *Ibid*.
[519] *Ibid*.
[520] A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 15.
[521] *Ibid p* 16.

took place in sport [522] where a variety of sporting rules were identified as potentially infringing especially under the competition laws of the EU[523]. EU sports law remains a powerful and important element to understand the structures of sport in Europe. It is sometimes the threat of a legal challenge that may generate changes. The intervention of the EU, both legally and politically, has controlled the behaviour of sport governing bodies to a level that no other public institution in the world has been able to achieve to date[524].

VI. Chapter Conclusion

This Chapter has attempted to demonstrate the main features of the European model and establish possibility of conflict with the EU. It is established that the main features of the European model of sport have the potential to create conflict with the fundamental treaty provisions of the EU regulating the internal market. To avoid conflict, organisation of sport should adopt good governance standards supervised by the EU. In the following Chapter III, European sports policy is outlined to discover the answer of the first research question of whether the organisational structures of the EU and the European model of sport are mutually exclusive.

[522] ECJ has developed a solid body of case law after *Bosman*. *Bosman* has terminated the presumption of being free from public intervention and demonstrated that sport is subject to the application of EU law.
[523] *Bosman* and *Meca-Medina*; A Geeraert, The EU in International Sports Governance: A Principle-Agent Perspective on EU Control of FIFA and UEFA (Palgrave macmillan, 2016) p 16.
[524] B Garcia and Mads de Wolf, *European Law and the Governance of Sport*, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., Edward Elgar Publishing, Incorporated, 2018, p. 304.

CHAPTER III: EUROPEAN SPORTS POLICY

I. Introduction; II. European Sports Policy; II.I Background of Article 165 TFEU: Policy Developments; II.I.I. Adonnino Report; A People's Europe; II.I.II. Bosman; II.I.III. Amsterdam Declaration on Sport; II.I.IV. Helsinki Report; II.I.V. Nice Declaration; II.I.VI. *Meca Medina*; II.I.VII. The Convention and the Constitution; II.I.VIII. White Paper; **III. Background of Article 165 TFEU: Sporting Authorities**; III.I. Article 6 TFEU; III.II. Article 165 TFEU; III.II.I. Analysis of Article 165 TFEU; III.II.II. Impact of Article 165 TFEU on the Sporting Practices; **IV. Horizontal Obligation**; IV.I. Article 26 TFEU; IV.II. Article 151 TFEU; IV.III. Article 191 TFEU; IV.IV. Article 195 TFEU; IV.V. Article 167 TFEU; IV.VI. Article 165 TFEU; **V. The Impact of Article 165 TFEU on the European Model of Sport; VI. Criticisms on the Article 165 TFEU; VII. Chapter Conclusion.**

I. Introduction

The objective of this chapter is to establish the impact of European sports policy on the European model of sport to understand whether the organisational structures of EU and sport are mutually exclusive. This chapter intends to answer the first research question together with Chapter I and Chapter II. The chapter comprises of analysing the aim, establishment, and development of European sports policy in the European Union. The horizontality and the overall impact of Article 165 TFEU on sport will be discussed to discover whether it has altered the historical approaches taken by the EU institutions towards the significance and autonomy of sport.

II. European Sports Policy

Prior to the ECJ's first judgment on sport, the *Walrave*, sport was regarded as a self-regulating sector immune from legal intervention[525]. EU policy discussions on sport followed the *Bosman* judgment of the ECJ. It was only during 1990s that academic and

[525] K Pijetlovic, EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series (T.C.M. Asser Press, 2015) p 12.

legal commentaries first appeared in the area[526]. The EU's involvement in regulating sporting rules to ensure compliance with EU law has been *reactive* and *indirect*[527]. The EU became involved in regulating sport in Europe due to the steady determination of task expansion to achieve the main objective of creating and maintaining a single internal market within the union[528]. This involvement of the EU is an example of *spill-over* of European legal framework in an area outside the scope of EU but necessary to regulate to ensure the establishment and proper functioning of the internal market.

Sport was not an aim nor an objective of the founders of the EU. There was neither a legal base and nor an intention to achieve an EU sports policy. Sport was anticipated as an activity mainly practiced by amateurs as a leisure activity and was not a priority on the EU's political agenda[529]. The founding Treaties did not make any reference to the specificity or autonomy of sport. European Sports policy emerged in the absence of a legal base or competence under the founding treaties as an activity-led rather than rule-led discipline. Prior to the adoption of Article 165 TFEU under the Lisbon Treaty, sport did not enjoy a legal competence. European sports law has been established and developed through the ECJ judgments and the Commission decisions while ensuring compliance with EU law and safeguarding establishment and functioning of the internal market as opposed to rules and regulations adopted by the SGBs[530].

II.I. Background of Article 165 TFEU: Policy Developments

II.I.I. Adonnino Report; A People's Europe

During 1980s-1990s the role of sport in supporting the development of the European identity as well as the sense of belonging to the Union has been accepted in *A People's Europe*[531]. In the report, the committee took the view that the best contribution to the

[526] K Pijetlovic, EU Sports Law and Breakaway Leagues in Football, ASSER International Sports Law Series (T.C.M. Asser Press, 2015) p 12.
[527] M de Wolff, *EU Sports policy after Lisbon: The Implementation of Article 165 TFEU*, Conference Paper, Evolving Europe: Voices of the Future, (Loughborough University, 2013) p 1; B Garcia and H Meier, *Limits of Interest Empowerment in the European Union: The Case of Football* [2012] Vol.34 Journal of European Integration 359.
[528] *Ibid.*

[530] M de Wolff, *EU Sports policy after Lisbon: The Implementation of Article 165 TFEU*, Conference Paper, Evolving Europe: Voices of the Future, (Loughborough University, 2013) p 1.
[531] European Parliament Adonnino's Report, '*A People's Europe',* (1985, S7/85).

People's of Europe should be by a combination of specific proposals to be implemented and long-term objectives to promote Community as a reality for its citizens. While stressing the need to simplify administration and avoid over regulation, the Community responded to the views of its citizens effectively by close cooperation and by providing channels for their ideals. One of these channels identified was sport along with youth, education, and exchanges[532]. Sport was considered as an essential element in encouraging the involvement and interest of young people to facilitate further integration of the Union. With this report, to facilitate further integration of the Union the social and cultural significance of sport was acknowledged as an EU policy for the first time[533]. Sport was considered as an important element contributing for the citizens of Europe to have an active role as a participant in a Community. This would offer real influence on the citizens of Europe on matters of importance for his life, such as sport. At this stage, giving credit to the specific characteristics of sport benefited the EU to achieve further integration. Under the report, no express reference was made to the specificity of sport. However, sport was promoted due to its specific character beneficial to help achieve the main aim and objective of the Union which was to achieve further integration. Meanwhile, autonomy of sport under the EU law was not disputed. The report made no reference to the autonomy of sport. Therefore, Adonnino report did not have an impact on the autonomy or the specificity of sport.

II.I.II. Bosman

During 1990s-2000s, right after *Bosman,* sport attracted the attention of the Member States. The ECJ and the Commission labelled certain aspects of sport as an economic activity and accepted that these fall under the jurisdiction of the Union. According to Article 2 of the Treaty on European Union[534] the EU regulates economic activities operating within the internal market. This was adopted as a base line by the ECJ for

[532] European Parliament Adonnino's Report, '*A People's Europe',* (1985, S7/85).
[533] *Ibid.*
[534] Article 2 of the Treaty on European Union states: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

sport[535] and declared that sport is subject to the EU law if it constitutes an economic activity within the meaning of Article 2 of the Treaty'[536]. The freedom of movement for workers was directly applicable to football players, if they participated in an economic activity in the sense of Article 2 of the Treaty[537]. Purely social, cultural, or educational aspects of sport could have the nature of an economic activity due to their marketing[538]. Therefore, the principle of applicability of EU law to sport was established. Sport was since subjected to EU law if it constitutes an economic activity independent of the existence of an original sports policy of the European Union.[539] *Bosman* changed the climate and brought sport and law together[540]. Within three years after the judgment, Directorate General IV of the Commission received more than 60 relevant complaints[541]. However, *Bosman* judgment was not alone to open the floodgates. It is true that the Court's decision forced change in the governance of sport and reminded the role of litigation as one part of the battle to restructure markets in sport[542]. On the other hand, intense competition has forced up prices for broadcasting rights to club and international sports events, mainly football in Europe, to unprecedented levels. Income generation through sponsorship and sale of merchandise has accelerated. With the commercialisation of sport, for professional sportsmen and women, *Bosman* ensured better placed to claim their slice of the expanding cake[543]. In contrast, the SGBs framed sport as a socio-cultural activity emphasizing the social, cultural, and educational characteristics of sport while arguing for the specificity of sport and the diversity of sport from other sectors[544]. The birth of EU sports policy aroused because of the battle between the EU institutions and the SGBs. In *Bosman*, a football player was successful in confronting a sporting rule which limited player mobility and held incompatible with the fundamental right of freedom of movement under the EU law. This has been the

[535] Case C-415/93 Bosman [1995] ECR I-4921 at para 73.
[536] The Court referred in paragraph 73 of its judgment to its Case 36/74, *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4.
[537] A Vahrenwald, 'Am I so round with you as you with me? The Bosman case before the European Court of Justice' Entertainment Law Review 1996 p 152.
[538] *Ibid.*
[539] *Ibid.*
[540] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 165.
[541] *Ibid.*
[542] *Ibid.*
[543] *Ibid.*
[544] B Garcia, *From Regulation to Governance and Representation: Agenda Setting and the EU's Involvement in Sport* (2007) Entertainment and Sports Law Journal 5.

landmark where the sport moved beyond regulation and become a political issue[545]. After *Bosman,* it became clear that sport operates under the legal framework of the EU law and sport must objectively justify why it should be treated differently from the application of EU law under certain circumstances[546].

Bosman was attacked by the SGBs. Gerhard Aigner, UEFA's former chief executive, said that *Bosman* ruling had a disastrous effect on the European football.[547] While the challenge faced at the Court was certainly balancing commerce, money and political influence of sport, after *Bosman*, football has grown out of its world where it operated into the parallel world in which sporting practices constituting economic activity must be regulated under the organisational structures of the EU. Accordingly, sport was going to be challenged at the political and legal sphere, and maintaining its integrity, credibility and structures were the biggest challenges faced[548]. The ECJ was criticised by the SGBs on the lack of institutional competence in matters of proportionality[549]. This was inherent within the EU's adjudication process or could arise from the limits of personal and professional expertise in sport of the judiciary and the lack of intelligent speculation and plausible intuition in sport[550]. Even though this criticism of the SGBs was challenged by Weatherill, arguing that the practice of the European Court and Commission reveals a thorough concern to piece together a sports policy at EU level which combines respect for the special needs of sport with an appreciation for the difficult balance to be struck between the need for a broad interpretation of the scope of EU trade law[551], it was difficult for the ECJ to deny that the governing bodies of world football have greater institutional competence in matters of sporting activity[552]. Since then the urge to have a legal competence to validate EU's involvement in sport has been

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[545] B Garcia, *From Regulation to Governance and Representation: Agenda Setting and the EU's Involvement in Sport* (2007) Entertainment and Sports Law Journal 5.
R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003).
[547] M Scott, 'Bosman a 'disaster' for football' (07 January 2004 The Guardian) <https://www.theguardian.com/football/2004/jan/07/newsstory.sport7> accessed on 05 June 2018.
[548] *Ibid.*
[549] D Dixon, 'The long life of Bosman' (2008) Entertainment and Sports Law Journal <https://www.entsportslawjournal.com/articles/10.16997/eslj.60/> accessed on 05 June 2018.
[550] *Ibid.*
[551] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 505.
[552] D Dixon, 'The long life of Bosman' (2008) Entertainment and Sports Law Journal <https://www.entsportslawjournal.com/articles/10.16997/eslj.60/> accessed on 05 June 2018.

initiated[553]. *Bosman* decision has triggered intensified efforts of SGBs to achieve recognition of sport under the European Treaties[554].

II.I.III. Amsterdam Declaration on Sport

After Bosman SGBs sought to reduce the regulatory activity of the EU in sport. They longed to have a softer application of the EU law to sport and this to be introduced under a Treaty if not a complete exemption from it[555]. However, the sporting authorities were not able to present a unified front[556]. Big commercial sporting authorities, mainly UEFA and FIFA, wanted a blanket exemption from the application of the EU law and requested a protocol to prevent all involvement of the EU in sport[557]. Small sporting authorities, mainly amateur sport wanted to have a sports policy developed by the EU through an adoption of a Treaty article which would consider the special characteristics of sport and not only its economic effects[558]. The Commission published a statement explaining the tensions it felt in this area in a Press Release issued in February 1999 and summarised a draft communication on the EU law and sport. The four main topics on the communication were: (i) the application of the competition rules, (ii) the development of a European sport model, (iii) sport as an instrument of social and employment policies and (iv) the fight against doping[559]. This sensitivity of the Community's incursion into the sport was reflected under the Declaration on Sport which was attached to the Amsterdam Treaty. The Commission was neither competent nor anxious to impose solutions on sport[560] . The main idea was to identify common features of European sport to ensure that some room was allowed by the EU for the maintenance of sport. This was a permissive rather than a compulsory agenda and whether this model would be tolerated rested with the SGBs[561].

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[553] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) p 15.
[554] B Garcia and Mads de Wolf, European Law and the Governance of Sport, Research Handbook on EU Sports Law and Policy, edited by Jack Anderson et al., (Edward Elgar Publishing, 2018) p 2.
[555] Borja Garcia, The European Union, and Sport, rescuing the nation-state? Page 13 accessed on 11/06/2018 https://ecpr.eu/Filestore/PaperProposal/86bc8bfd-09f7-49a5-af23-991dc2e1a06c.pdf
[556] R Parrish, Sports Law and Policy in the European Union (Manchester University Press 2003) p 69.
[557] *Ibid*.
[558] *Ibid.*
[559] European Commission press release, SPEECH/99/26, Marcelino OREJA on February 1999 <http://europa.eu/rapid/press-release_SPEECH-99-26_en.htm> accessed on 25 June 2018.
[560] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 166.
[561] *Ibid.*

The lobbying of the SGBs achieved a modest result of a declaration which was attached to the Treaty of Amsterdam in 1997. The heads of Member States meeting in Amsterdam agreed to adopt a non-binding Declaration on Sport, mainly to promote acknowledgement to the specific nature of sport by the European institutions. The Declaration on Sport provided that the social significance of sport is mainly its role in forging identity and bringing people together. It concluded that it is particularly important to listen to sport governing bodies when important issues concerning sport is analysed and special consideration should be given to the characteristics of amateur sport[562]. The supporters for the EU to have a sport competence have acknowledged that obtaining a legal base would provide the means to develop a social and cultural common sports policy. However, they feared that having a legal base for sport might limit the wide application of the general EU law to sporting practices[563]. As a result, even though sport had not achieved a legal competence within the Union under the Amsterdam Treaty, it has served the need to politicise sport and law in the European Union by adopting a declaration[564]. The Amsterdam Treaty was the first European Treaty to officially mention sport and it was cited under ECJ judgments. The autonomy of sport under the organisational structures of the EU was not disputed. The declaration attached made no reference to the autonomy of sport. The social significance of sport, in particular its role in forging identity and bringing people together was emphasised and called the European Union to acknowledge sports associations when important questions affecting sport are at issue with special consideration to the particular characteristics of amateur sport. The social and cultural significance of sport was acknowledged again to facilitate further integration of the Union. Giving credit to the specific characteristics of sport benefited the EU to achieve further integration.

II.I.IV. Helsinki Report

Shortly after the Amsterdam Declaration on Sport, the Sports Unit within the Commission's Education and Culture DG emerged as a key actor to find the equilibrium

[562] Declaration on sport, accompanying the Amsterdam Treaty (1997) C 340/136.
[563] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 15.
[564] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003) 15.

between the commercial side of sport and a better attention to the amateur and educational dimension[565]. The Sports Unit initiated a process of dialogue and consultation with the sports world. Part of it were two working documents in which the Commission analysed the characteristics of the 'European Model of Sport'[566] and it explored the possible Community actions in the field of sport[567]. The Sports Unit identified the two main problems the European model of sport was facing because of the economic and commercial development of professional sport[568]. First was the effect of increased competition for financial resources, such as doping and second was the distortions to other markets that the commercial activities of the SGBs could cause, such as the selling of TV rights can affect the TV and entertaining market[569]. As a result, the European Council decided to invite the Commission 'to submit a report to the Helsinki European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework'[570]. Consequently, the Commission adopted the so-called Helsinki Report on Sport in December 1999. The Helsinki Report was prepared to preserve sports structures and the social function of sport within the Community framework[571]. The Report identified that the rise in the popularity of sport, the internationalisation of sport and the unprecedented development of the economic dimension of sport created a risk of weakening the educational and social function of sport[572]. To safeguard the sports structures and maintain the social function of sport, Commission proposed to preserve integrity and autonomy of sport while recognizing the role of sport in Europe[573]. The focus of the Commission's Helsinki Report was on safeguarding current sports structures and on maintaining the social function of sport within the Community framework[574]. The Report analysed recent developments in sport in Europe, particularly its growing commercialisation, and

[565] R Parrish, Sports Law and Policy in the European Union (Manchester University Press 2003) p 178-179.
[566] European Commission, 'The Development and Prospects for Community Action in the Field of Sport' (Commission staff working paper 29 September 1998).
[567] *Ibid*.
[568] B Garcia, 'The European Union, and Sport, rescuing the nation-state?' <https://ecpr.eu/Filestore/PaperProposal/86bc8bfd-09f7-49a5-af23-991dc2e1a06c.pdf> accessed on 11 June 2018.
[569] *Ibid.*
[570] European Council, 'Presidency Conclusions' (no. 95 and 96, Vienna European Council. 11-12 December 1998).
[571] European Commission Press Release, 'Xenophobia' <http://europa.eu/rapid/press-release_IP-99-918_en.htm> accessed on accessed on 11 June 2018.
[572] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final p 3, 4.
[573] *Ibid* p 10.
[574] S Weatherill, European Sports Law: Collected Papers (2nd Edition, Asser Press, 2015) p 166.

its positive effect on the society as an instrument of social democracy, helping to integrate the disadvantaged and to combat racism and to preserve educational and social function of sport in Europe. The Commission proposed to enhance the role of sport in education and training[575].

The Commission insisted that the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports associations, provided that these measures are objectively justified, non-discriminatory, necessary, and proportional[576]. Therefore, the report was designed to leave space for sporting associations to abandon their confrontational attitude to the incursion of Community law on to their territory[577]. FIFA and UEFA welcomed the Helsinki Report and declared that it was in fact the first time that an official statement issued by the European Commission sympathised with the football authorities. FIFA interpreted the report as constituting significant progress in acknowledging for the first time that the *Bosman* judgment has created problems for clubs training young players and in general, it had negative consequences on football in Europe with serious side effects on the rest of the world[578].

The report clearly demonstrated the impact of EU policy on the governance of the European model of sport regarding the specificity and autonomy of sport for the first time. The EU and sport were not mutually exclusive, and sport is subject to EU law. The report re-affirmed the previous ECJ judgments and stated that in terms of the economic activity that sport generates, the sporting sector is subject to the EU law, like the other sectors of the economy. There would be no difference of application of the EU law to sport. Nonetheless, the application of the Treaty's competition rules to the sporting sector must take account of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates,

[575] European Commission Press Release, 'Xenophobia' <http://europa.eu/rapid/press-release_IP-99-918_en.htm> accessed on accessed on 11 June 2018.
[576] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final p 9.
[577] S Weatherill, European Sports Law: Collected Papers (2nd Edition, Asser Press, 2015) p 174.
[578] FIFA media releases accessed on 11/06/2018 https://www.fifa.com/news/y=1999/m=12/news=fifa-and-uefa-welcome-helsinki-report-sport-from-the-european-commissi-71582.html.

the principle of equal opportunities and the uncertainty of the results[579] which contributes towards the sporting competition. Therefore, the specificity of sport which would contribute towards competition in sport sector would play an effective role in obtaining compliance with the EU law. The report hinted that the specificity of sport would be insufficient for a sporting rule to be granted an exemption from the application of the EU law but some room was provided for it to be justified under the organisational structures of the EU. On the other hand, the report also expressly referred to the necessity to preserve the integrity and autonomy of sport to encourage the promotion of sport in European society, while respecting sporting values[580]. However, the report acknowledged that sport is regulated under the organisational structures of the EU and sporting rules must comply with the EU law. The report validated that sport enjoys conditional autonomy under the organisational structures of the EU, while the specificity of sport, especially contributing towards competition in sport, would play an important role for sport to meet the conditions set by the EU to have a standing within the EU.

II.I.V. Nice Declaration

Shortly after the Helsinki Report, under the Nice Treaty, the Declaration on the specific characteristics of sport and its social function in Europe was adopted. During the IGC for the adoption of Nice Treaty, the demands of the sport world to include a reference to sport in the Treaty of Nice was denied. Instead, the European Council adopted the Nice Declaration on Sport, where its aims were outlined by its title *Declaration on the specific characteristics of sport and its social function in Europe,* which included the characteristics needed to be considered while implementing common policies[581]. The Nice Declaration on Sport established that even though the EU did not have any direct powers in the area, while taking action under the various Treaty provisions, social, educational and cultural functions inherent in sport and making it special, should be taken into account. In addition, sport federations must continue to be the key feature of

[579] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final p 8.
[580] *Ibid* p 10.
[581] European Council, Nice Declaration (2000).

the organisation providing a guarantee of sporting cohesion and participatory democracy.

The declaration demonstrated the impact of EU policy on the governance of the European model of sport regarding the specificity and autonomy of sport. There would be no difference of application of the EU law to sport. Nonetheless, the organisational structures of the EU must consider the specific characteristics of sport[582]. However, specificity of sport would not grant an exemption to a sporting rule from the application of the EU law but provide some room for it to be justified under the organisational structures of the EU. On the other hand, the report also expressly referred to the necessity of a form of sporting autonomy[583]. However, sport is regulated under the organisational structures of the EU and sporting rules must comply with the EU law. The declaration confirmed that sport enjoys conditional autonomy under the organisational structures of the EU, while the specificity of sport, would play an important role for sport to meet the conditions set by the EU to have a standing within the EU.

II.I.VI. *Meca Medina*

The Amsterdam Declaration refers to the "social significance of sport", especially "particular characteristics of amateur sport". The Helsinki Report: in its entitlement refers to "safeguarding current sports structures and maintaining the social function of sport within the Community framework" and then stresses inter alia "the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results". And the Nice Declaration in its entitlement refers to "the specific characteristics of sport and its social function in Europe". This starting-point implies that in principle exemptions from the EU law are possible[584]. However,

[582] HE Meier, 'Emergence, Dynamics and Impact of European Sport Policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., EU, Sport, Law and Policy Regulation, Re-Regulation and Representation (TMC Asser Press 2009) p 701.
[583] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final p 10.
[584] B Garcia, 'The European Union, and Sport, rescuing the nation-state?' <https://ecpr.eu/Filestore/PaperProposal/86bc8bfd-09f7-49a5-af23-991dc2e1a06c.pdf> accessed on 11 June 2018.

reference to the Amsterdam Declaration on Sport and the Helsinki Report on Sport only had been made by the Court and the Commission until the *Meca Medina* judgment and never been repeated since. The appeal decision by the Court in *Meca-Medina* refused the traditional general concept of *sporting exception* and declared that sporting rules shall be analysed and tested under the EU law.

II.I.VII. The Convention and the Constitution

After the adoption of the Nice Declaration on Sport, the dialogue between sport and the European institutions deepened to find a way to fulfil the aims and objectives of the Declaration. After the Laeken Declaration assigned the duty to draft a new Treaty in the form of a European Constitution[585], the sporting movement saw it could be the last chance to get political recognition for sport in the Treaty[586]. Primarily, sport was presented under the Convention's first draft as a part of a common article on Youth, Education and Vocational Training. Even though there were demands to place sport under a specific sport article on its own during the IGC[587], the Commission, dissented to this opinion. The Commission accepted that sport deserves some special treatment due to its characteristics. However, under the organisational structure of the EU it was not possible to create an article which could be interpreted as a blanket exception from the application of the EU law and more importantly this could end up creating unintended precedents for other sectors[588]. In the end, sport was given political recognition, but not a degree of independence for governing bodies as they were demanding[589]. Despite the Constitutional Treaty not entering into force, the commitment of the Member States to place sport under the EU was at hand. To conclude, conditional autonomy was granted to sport and specificity of sport was not enough to grant it an exemption from the application of the EU law.

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[585] European Council, 'Declaration on the Future of the European Union' (Laeken European Council, 14-15 December 2001) <https://www.consilium.europa.eu/media/20950/68827.pdf> accessed on 12 June 2018.
[586] R Parrish, 'The Birth of European Union Sports Law' (2003) Entertainment Law, Vol. 2, no. 2 p 20-39.
[587] J Hill, 'Interview with Head of UEFA's Brussels Office' (Brussels, 2006.)
[588] J Andreu, 'Interview with former Head of Unit 'Sport', (DG Education and Culture, European Commission, Brussels, 2006).
[589] B Garcia, 'The European Union, and Sport, rescuing the nation-state?' <https://ecpr.eu/Filestore/PaperProposal/86bc8bfd-09f7-49a5-af23-991dc2e1a06c.pdf> accessed on 11 June 2018.

II.I.VIII. White Paper

In 2007, the Commission's White Paper on Sport provided the means to develop a comprehensive European sports policy and paved the way for sport to attain a competence under the Lisbon Treaty. The White Paper on Sport demonstrated that the wording of the sport competence is causally related to the pre-existing practice of EU sports jurisdiction[590]. In the White Paper, the Commission analysed the sport related practice in the EU according to the specificity of sport and stated that the case law of the European Courts and decisions of the European Commission show that the specificity of sport has been recognized and considered[591]. The paper, at paragraph 4.1 stipulated that the specificity of EU sports practice could be approached under two separate aspects. Firstly, the specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions, and secondly, the specificity of sporting structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organized solidarity mechanisms between different levels and operations, the organisations of sport on a national basis, and the principle of a single federation per sport. The European Commission emphasized that in line with the established case law, the specificity of sport will continue to be recognized but the specificity of sport cannot be construed so as to justify a general exemption from the application of the EU law[592]. With the adoption of the Lisbon Treaty in 2009, the EU achieved a definite competence to carry out actions to support, coordinate or supplement the actions of the Member States for sport under Article 6 TFEU and 165 TFEU in contrast to exclusive and shared competences. After the official sport competence of the Union, European sports policy has started to gain a *momentum* in progress and new initiatives are adopted[593].

[590] Case C-519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities [2006] ECR I-6991.
[591] The Commission, 'White paper on Sport', (2007 391 final) 221.
[592] *Ibid,* 13.
[593] The European Olympic Committees, 'Guide to EU Sports policy' [2011] EOC EU Office, 4.

III. Background of Article 165 TFEU: Sporting Authorities

Sporting authorities have long resisted the intervention of EU Institutions into sport due to the concerns that this would limit the autonomy of sport[594]. It has been argued that the autonomy of sport is curtailed as much as the EU Treaties apply to sport and consequently two separate territories are created. These two territories have been explained as a territory for sporting autonomy and a territory for legal intervention[595]. Even though the ECJ and the Commission have accepted that sport is different to other sectors, they have been criticized for being insensitive and adopting a narrow approach towards the specific nature of sport than the sporting authorities have desired[596]. However, even though the sporting authorities could not convince the EU institutions that sporting activity should not be of any interest to the Union, they succeeded in convincing them that certain sporting practices are compatible with the EU Law[597]. After the *Mecca Medina* case, this has been accepted as the most rational strategy for the sporting authorities to convince the EU institutions that sporting practices are not necessarily incompatible with the EU law[598]. As a result, the sporting authorities decided to engage and co-operate with the EU to soften the effects of the EU law on the autonomy of sport. For the sporting bodies, UEFA in particular, a strategy of co-operation with the EU has been accepted as the most promising way to promote awareness of sporting exceptionalism in the decisional practice of EU institutions[599]. This strategy of restraining the interventionist bite[600] of the EU institutions has led to the negotiations between the sporting world and the EU Institutions and eventually a new sporting competence was adopted under the Lisbon Treaty, Article 165 TFEU[601].

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[594] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 238-239.
[595] R Parrish, *Sports Law and Policy in the European Union* (Manchester University Press 2003).
[596] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 239.
[597] *Ibid.*
[598] *Ibid.*
[599] Garcia, B, 'UEFA and the European Union: From Confrontation to Co-operation and the EU's involvement in Sport' [2007] Journal of Contemporary European Research 202.
[600] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 242.
[601] *Ibid* 239.

III.I. Article 6 TFEU

Before analysing Article 165 TFEU, it is necessary to identify three distinct types of competences the Union enjoys. Article 2 TFEU outlines that the Union enjoys an exclusive competence, shared competence and supporting competence depending on the policy area. These areas are detailed under Article 3 TFEU, Article 4 TFEU and Article 6 TFEU. In certain areas, the Treaties confer on the Union exclusive competence where only the Union may legislate and adopt legally binding acts while the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union (areas stated under Article 3 TFEU). In certain areas the Treaties confer on the Union a competence shared with the Member States in a specific area, where the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence (areas stated under Article 4). While in certain areas the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. More importantly, legally binding acts of the Union adopted on the basis stated under this provision shall not entail harmonisation of Member States' laws or regulations (areas stated under Article 6 TFEU). Sport has been given a soft competence under the Union and placed under Article 6 TFEU. Article 6 TFEU states that the Union shall have competence only to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at the EU level, be protection and improvement of human health; industry; culture; tourism; education, vocational training, youth, and sport; civil protection; and administrative cooperation.

III.II. Article 165 TFEU

Article 165(1) TFEU states that the Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity. The Union shall contribute to the promotion

of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function[602]. Article 165(2) TFEU provides that Union action shall be aimed at developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States; encouraging mobility of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study; promoting cooperation between educational establishments; developing exchanges of information and experience on issues common to the education systems of the Member States; encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe; encouraging the development of distance education; developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen[603].

Moreover, Article 165(3) TFEU states that The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe[604]. Finally, Article 165(4) TFEU stipulates that in order to contribute to the achievement of the objectives referred to in this Article: the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States; the Council, on a proposal from the Commission, shall adopt recommendations[605].

[602] Article 165 (1) TFEU.
[603] Article 165 (2) TFEU.
[604] Article 165 (3) TFEU.
[605] Article 165 (4) TFEU.

III.II.I. Analysis of Article 165 TFEU

One can certainly argue that the development of the European sports law has been triggered by the involvement and decisions of the European Court of Justice[606] and the European Commission. It has been accepted that the EU has long been regulating sporting activities to enforce Treaty articles governing free movement and competition law provisions[607]. However, the *confluence* of the EU law and sport has generated challenging questions to be answered. First, does sport benefit from an exception in the application of the EU law? Second, are there aspects of sport that make it necessary for the EU law to treat it in a particular way[608]. The first two of these questions have found their answers in the Lisbon Treaty under Article 165. Firstly, the article does not grant any general exception for sporting activity mainly due to the objections of the Commission during the discussions for the adoption of a sport competence under the EU as well as the Commission decisions and Court judgments adopted in the area as explained earlier. Granting a general exemption would challenge the aims and objective of the EU. Secondly, under Article 165(1) TFEU the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. There are certain aspects of sporting rules which contain the specific nature of sport which makes it different than other sector operating within the Union and these characteristics of sport should be acknowledged while applying the general EU law to sport. However, in case of conflict between the specificity of sport and the EU law, judgments and decisions of the EU institutions demonstrated that the EU law prevails. Therefore, EU and sport are not mutually exclusive, and sport enjoys a conditional autonomy under the organisational structures of the EU.

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[606] S Boyes, 'Sports Law: its history and growth and the development of key sources' (2012) Legal Information Management, 86 p 88.
[607] S Weatherill, 'Fairness, Openness and the Specific Nature of Sport: Does Lisbon Treaty Change EU Sports Law?' (2010) The International Sports Law Journal 11 p 11.
[608] S Boyes, 'Sports Law: its history and growth and the development of key sources' (2012) Legal Information Management, 86, 88-89.

III.II.II. Impact of Article 165 TFEU on the Sporting Practices

Article 165 TFEU achieved a considerable development in sport within the European legal framework[609]. It has mainly legalised the involvement of the EU institutions in the area. However, to what extent does the existence of sporting context affect the approaches of the EU institutions towards sport has found no definite answers under the wording of the Article 165 TFEU. The wording adopted under the Article is not strong enough to dictate the European institutions to act in a certain way while challenging sporting rules. Article 165(1) declares that the Union shall consider the specific nature of sport, its structures based on voluntary activity and its social and educational function. However, it does not require the institutions to respect specificity of sport blindly. Reading in between the lines, sporting rules will be challenged by the EU institutions under the EU law to ensure compliance with the EU legal framework. In doing so, the specific nature of sport shall be considered. However, specificity of sport shall not prevail over other provisions unconditionally. The article demonstrates that the governance of the European model of sport regarding the specificity and autonomy of sport is greatly affected by the EU. Sport enjoys conditional autonomy, and the specificity of sport does not have a significant effect in assuring mutual exclusivity to sport with the EU.

IV. Horizontal Obligation

Examination by the EU institutions, mainly by the Court, on the horizontal obligation of other policy areas in relation to Article 165 TFEU would play a significant role in clarifying the extent of the impact of Article 165 TFEU on sport. Horizontal obligation determines the strength of each Treaty provision over another in case of conflict and identifies which one shall prevail during a legal assessment. The EU is an economic and social union with the fundamental aim and objective of establishing the internal market, ensuring integration, and protecting the proper functioning of the market[610]. The EU seeks to achieve sustainable development based on balanced economic growth, price stability, competitive social market economy, full employment, social progress, and a

[609] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 530.
[610] Article 3 TEU (3).

high level of protection and improvement of the quality of the environment[611]. Moreover, the EU promotes scientific and technological advancement, combats social exclusion and discrimination, and promotes social justice and protection, equality between women and men, solidarity between generations and the protection of the rights of the child[612]. While the horizontal obligation is analysed, specific attention must be devoted to the identified aims and objective of the Union to assess in case of conflict which provision shall prevail over the other provision in the Treaty. The important criteria of each provision which needs to be considered are whether the provision is one of the fundamental aims and objectives of the Union – such as the establishment of the internal market; whether the provision facilitates or ensures the proper functioning of the main aims and objectives of the Union; and whether the provision has an economic, social or civil intention.

IV.I. Article 26 TFEU

It is useful to provide an analysis of the horizontal obligation of the sport provisions compared to other provisions under the Treaty. To begin with, the Union has an exclusive competence in the areas of customs union, competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy[613]. Article 26 TFEU establishes that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties[614]; the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties[615]; and the Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned[616]. This provisions clearly outlines the fundamental aim and objective

[611] Article 3 TEU (3).
[612] Article 3 TEU.
[613] Article 3 TFEU.
[614] Article 26(1) TFEU.
[615] Article 26(2) TFEU.
[616] Article 26(3) TFEU.

of the Union. It has an economic intention. Moreover, last section of the Article emphasises the need to ensure compliance and progress in other sectors to fulfil the aims of Article 26 TFEU with the involvement of the Council and the Commission. This gives the power to the Union to adopt harmonising legislation. Therefore, Article 26 TFEU is a strong provision and has a horizontal obligation. It shall prevail over other provisions established under the Treaty which have aims other than establishing or ensuring the functioning of the internal market.

IV.II. Article 151 TFEU

The Union have shared competence between the Union and the Member States in the areas of internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters, for the aspects defined in this Treaty[617]. A horizontal obligation analysis will be provided under the competence for internal market social policy. Article 151 TFEU establishes that the Union and the Member States, having in mind the fundamental social rights, shall have as their objectives the promotion of employment, improved living and working conditions, harmonisation of laws while improving and maintaining proper social protection, dialogue between management and labour, the development of human resources to achieve lasting high employment and the combating of exclusion. They shall implement measures considering diverse forms of national practices. Such a development will succeed not only in the functioning of the internal market, which favours the harmonisation of social systems, but also in the approximation of provisions[618]. This provision outlines one of the aims and objectives of the Union, out of many, in order to achieve proper functioning of the internal market, as promotion of employment, improved living standards and social protection during labour and ensure proper functioning of it. It has both an economic and social intention. Moreover, to ensure proper functioning of the internal market, it has the power to adopt

[617] Article 4(2) TFEU.
[618] Article 151 TFEU.

harmonising laws within the Union. Therefore, from the horizontal obligation perspective, this article reads out as a strong provision which shall prevail over other provisions established under the Treaty with aims and objectives other than establishing the internal market and ensuring proper functioning of it.

IV.III. Article 191 TFEU

To have a better understanding on horizontal obligation, another policy area covered under shared competence should be analysed. Article 191 TFEU establishes the environmental policy approach of the Union. The Article outlines the Union's objectives on environment as preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change[619]. Union policy on the environment shall aim at a high level of protection considering the diversity of situations in the various regions of the Union. Harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union[620]. This provision does not outline one of the fundamental aims and objectives of the Union and makes no referral to the establishment or the functioning of the internal market. Even though the environmental protection Article has no economic desires, it forms a social right and Union is intended to be an economic and social union[621]. Environmental protection is considered as an important policy area for the Union and placed under the shared competence area and it has the power to adopt harmonising legislation. Therefore, from the horizontal obligation perspective, this article reads out as a strong provision.

[619] Article 191 (1) TFEU.
[620] Article 191 (2) TFEU.
[621] Article 3 TEU and Article 26 TFEU.

IV.IV. Article 195 TFEU

The Union have a supporting, coordinating or supplementing competence to the actions of the Member States. The areas are protection and improvement of human health; industry; culture; tourism; education, vocational training, youth, and sport; civil protection; and administrative cooperation[622]. Initially, an analysis will be provided for the competence of tourism. Article 195 TFEU establishes that the Union shall complement the action of the Member States in the tourism sector by promoting the competitiveness of Union undertakings[623]. The Union shall encourage the creation of a favourable environment for the development of undertakings in this sector and promote cooperation between the Member States. The European Parliament and the Council, excluding any harmonisation of the laws and regulations of the Member States, shall complement actions within the Member States to achieve the objectives referred[624]. This provision outlines one of the economic aims and objectives of the Union, which is the promotion of competition between the undertakings for the proper functioning of the market in the tourism sector. However, unlike social policy provision (Article 151 TFEU) which declares it necessary to harmonise the laws of Member States, Article 195 TFEU does not allow harmonisation of tourism laws. The provision of tourism outlines one of the requirements, out of many, for the proper functioning of the internal market by referring to the necessity of competition between undertakings operating in the market. However, it is not a strong provision due to lack of harmonisation powers. Therefore, from the horizontal obligation perspective, this article reads out as it might prevail over non-economic provisions established under the Treaty which have civil and political aims. However, the tourism provision shall not prevail over other provisions established under the Treaty with harmonising powers and which have the aims and objectives of both establishing the internal market and ensuring proper functioning of it.

[622] Article 6 TFEU.
[623] Article 195(1) TFEU.
[624] Article 195 (2) TFEU.

IV.V. Article 167 TFEU

Article 167 TFEU provides another example under the competence of culture. The union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage[625]. The Union shall aim to encourage amongst other things non-commercial cultural exchange[626]. The Union shall adopt incentive measures and recommendations excluding any harmonisation of the laws and regulations of the Member States[627]. This provision does not outline any of the economic or social aims of the Union. Moreover, it does not allow harmonisation of Member States' domestic laws. The culture provision under the Treaty is a civil policy which is secondary to the main aims and objectives of the Union. Civil and political rights are not expressed as the main aim and objective of the Union but are secondary aims within the Union to achieve approximation of the provisions[628]. It has no intention to develop or ensure the proper functioning of the internal market. Therefore, from the horizontality obligation perspective, this provision is not a strong provision. Consequently, it shall not prevail over other provisions established under the Treaty with economic and social objectives aiming to establishing or develop the internal market and ensuring proper functioning of it.

IV.VI. Article 165 TFEU

Article 165 TFEU acquired a competence of education, vocational training, youth, and sport[629]. Article 165 TFEU does neither refer to an internal market aim and objective nor to an economic or social right. The provision has no powers to adopt harmonising legislation within the Union. More importantly, unlike Article 151 TFEU[630], it has no horizontal obligation requiring it to be considered in the exercise of other EU powers[631]. On the sporting perspective, Article 165 TFEU has limited impact on the Union's legal

[625] Article 167(1) TFEU.
[626] Article 167(2) TFEU.
[627] Article 167(5) TFEU.
[628] Article 151 TFEU.
[629] Article 6 TFEU.
[630] Article 151 TFEU states that "…… so as to make possible their harmonisation while the improvement is being maintained.".
[631] Article 165 (4) states that "...excluding any harmonisation of the laws and regulations of the Member States".

framework over sport, particularly in relation to the fundamental internal market laws[632]. The economic and social aspects of the sporting sector have not been credited under the Article. The sport competence has been drafted and worded as merely a civil right with no economic or social intention and no main effect on the functioning of internal market. Its social function is expressly stated as the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function[633]. However, the wording of the Article lacks creating a social aim as it is created under Article 191 TFEU for environmental policy. Besides, the importance of competitiveness of the sporting market for the internal market has not been referred to as it is expressed under Article 195 TFEU for tourism. Moreover, unlike Article 191 TFEU which is a social right with no economic intention and no effect on internal market aim, Article 165 TFEU specifically excludes harmonisation of laws of Member States[634].

Article 165 TFEU, as set out above, outlines none of the economic aims and objectives of the Union, which are necessary for the proper functioning of the internal market. No social and economic objectives have been outlined under the article. Therefore, from the horizontal obligation perspective, this article reads out as it will not prevail over economic and/or social provisions established under the Treaty which have an internal market aim. On the other hand, it is important to consider whether Article 165 TFEU would prevail over other provisions of similar strength such as Article 167 TFEU. Article 167 TFEU on culture has no harmonisation effect, no economic or social aim and no effect on internal market aim. Both are simply drafted as a civil provision of the Treaty. Both Article 165 TFEU and Article 167 TFEU have a similar power and in case of conflict it is difficult to decide which one should prevail over the other. Therefore, from the horizontal obligation aspect, it remains within the discretion of the Court of

[632] R Parrish, 'Directorate General for Internal Policies Policy Department B: Structural And Cohesion Policies Culture And Education' (2010) <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/9388/5/Lisbon%20treaty-Garcia.pdf,> accessed on 26 June 2018 p 10.
[633] Article 165 (1) TFEU.
[634] Article 165(4) TFEU.

Justice to interpret the provisions under the Treaty on a case-by-case analysis to discover which one should prevail.

Until now, the ECJ has referred to Article 165 under *Bernard, Murphy* and *Topfit* cases. Initially in *Bernard*, the ECJ has referred to the article with an aim to emphasise the specific characteristics of sport in general, and football, and of their social and educational function. The relevance of those factors was corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU and no analysis towards the horizontality of the article was made[635]. Shortly after, in *Murphy*, the ECJ took a similar stance and noted that, under the second subparagraph of Article 165(1) TFEU, the European Union contributes to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function[636]. Nevertheless, in its recent judgment of *Topfit* on sport, the ECJ provided a guidance on the horizontality of the article. The ECJ not only referred to the specific nature of sporting issue but broaden its analysis on the application of Article 165. The court held that with the adoption of Article 165 TFEU, EU law does now explicitly refer to sport. Therefore, the right of EU citizens to reside in another Member State without discrimination under Articles 18, 20 and 21 TFEU, does not only depend on the exercise of an economic activity[637]. The court stressed the social importance of sport in the European Union and interpreted it as an important factor for integration in the European society[638]. Therefore, discrimination provisions, should be read in conjunction with Article 165 TFEU[639]. Article 165 does not have an express wording linking sport with other provisions governing the internal market for it to be integrated and implemented within the EU policies, such as Articles 11 and 12 TFEU. Nevertheless, after the *TopFit* judgment of the ECJ, Article 165 deserves to be read in a horizontal manner with other treaty provisions[640]. It is yet to be seen under the

[635] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC* [2010] E.C.R. I-2196.at para 40.
[636] Case C-403/08 Football Association Premier League Ltd and Others v QC Leisure and Others and Case C-429/08 Karen Murphy v Media Protection Services Ltd [2011] E.C.R. I-09083 at para 101.
[637] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 at para 19.
[638] *Ibid* at para 33.
[639] *Ibid* at para 34.
[640] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 158.

future case law whether the ECJ interpretation on the necessity to read discrimination clauses in conjunction with Article 165 TFEU will extend to cover internal market rules, such as free movement and competition law provisions.

Relying on the emergence of the EU sports law through the spill-over mechanism adopted by the EU into a policy area which was not initially predicted or intended by the Member States, it is possible for Article 165 TFEU to extend its application to be read in conjunction with other treaty provisions. However, currently, the wording of Articles 6 and 165 TFEU suggests that in case of conflict with a fundamental treaty provision, Article 165 TFEU does not have a strong horizontal effect which would necessitate sporting matters to have a priority over other powers, such as free movement and competition law. Therefore, from a constitutional perspective the inclusion of the Article 165 TFEU does not change the present approach of the organisational structures of EU to sport[641]. Sport and EU are not mutually exclusive, and sport enjoys conditional autonomy under the organisational structures of the EU.

V. The Impact of Article 165 TFEU on the European Model of Sport

The EU enjoys the competence over sport as its members opted for it. The competence it enjoys was chosen to be a negative competence with no powers of harmonisation but a supporting competence. Supporting competence is the weakest of all the three types of competences the EU enjoys, and the EU cannot develop uniforming legislation on sport under Article 165 TFEU. Provided that the Member States desired the Union to have a stronger power in the area of sport, they could have drafted the provision in another way, as it is done for the social policy, environmental policy or tourism. The strength of competence the EU enjoys over sport represents current intentions of the Member States. Should the intentions change in the future, Member States could give more powers to sport by amending the wording of the provision and upgrade it to one of the stronger competence areas the EU enjoys. For the time being, the strength of Article 165 TFEU is as explained. On the other hand, alternatively, even though

[641] *Ibid.*

harmonisation is expressly prohibited under the sport article[642], harmonising measures can always be taken under other policy areas with harmonising powers established under the Treaty[643]. Despite similarly worded prohibitions of harmonisation in the fields of social policy, education, vocational training, culture, and public health, the EU has in practice achieved convergence in legislation through other legal bases[644]. Should the Union require to adopt sport related uniforming legislation, other policy bases need to be consulted for sector specific powers[645]. The Article 165 TFEU's impact on the organisational structures of the EU towards sport is limited compared to other fundamental internal market rules[646]. However, after *Topfit*, it is certain that it will be read in conjunction with discrimination provisions while it remains possible for it to have a similar effect on the fundamental internal market rules.

The Union prohibits sporting activities which are contrary to the fundamental principles of the Treaty and impedes cross border economic activity between the Member States within the internal market. Therefore, any economic activity which is in breach of harmonising, economic and/or social provision with an aim and objective of establishing and ensuring proper functioning of the internal market, such as free movement provisions, competition law provisions or anti-discriminatory provisions, will be caught and declared incompatible under the organisational structures of the EU. Consequently, even though Article 165 TFEU does not change the *basic pattern* of the application of the EU law to sport established by the ECJ and the Commission, it clarifies the strength of sport under the EU law compared to other Treaty provisions based on the horizontal obligation analysis. Sport, like any other market sector, is subject to the control rooted in the fundamental provisions of the EU law. Therefore, the article re-affirms that sport enjoys conditional autonomy under the organisational structures of the EU.

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[642] Article 165(4) TFEU
[643] S Weatherill, European Sports Law: Collected Papers (2nd Edition, Asser Press, 2015) p 531.
[644] R Parrish, 'Directorate General For Internal Policies Policy Department B: Structural And Cohesion Policies Culture And Education' (2010) <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/9388/5/Lisbon%20treaty-Garcia.pdf,> accessed on 26 June 2018 p 13.
[645] S Weatherill, European Sports Law: Collected Papers (2nd Edition, Asser Press, 2015) p 531.
[646] R Parrish, 'Directorate General For Internal Policies Policy Department B: Structural And Cohesion Policies Culture And Education' (2010) <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/9388/5/Lisbon%20treaty-Garcia.pdf,> accessed on 26 June 2018 p 8.

Article 165 TFEU does not imply or express any guidance or suggestion on the status of autonomy of sport governing bodies but it emphasizes the importance in contributing to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function[647]. However, the Court of Justice has often referred to the specificity of sport in its judgments before the adoption of Article 165 TFEU and the article did not alter the approach of European institutions to sport. The specificity of sport is recognised by the European legal framework and by the European institutions if it complies with the EU's fundamental economic and social aim and objective of establishing and ensuring proper functioning of the internal market. The lack of horizontal obligation powers on Article 165 TFEU has not altered or had any effect on the EU institutions approach to sport while applying EU legal framework to sport. Nevertheless, it will be read in conjunction with discrimination provisions while it is possible for it to have a similar effect on the fundamental internal market rules[648]. Therefore, while the Article 165 TFEU did not alter the *status quo* of sport thoroughly under the organisational structures of the EU, its contribution towards the recognition of the specificity of sport cannot be denied. To conclude, as established under the ECJ judgment and Commission decisions, sport continues to enjoy a conditional autonomy within the EU based on an assessment of compliance of sporting rules with the EU law and during the assessment, specificity of sport will be acknowledged.

V.I. Criticisms on the Article 165 TFEU

The impact of the Article 165 TFEU on sport was both *profound* and *trivial*[649]. The sport article's effect was trivial because the content of the Article 165 was drafted with caution representing Member States' hesitation in conferring powers to the EU for

[647] Article 165(1) TFEU.
[648] *Case C-22/18 TopFit v Deutscher Leichtathletikverband ECLI identifier: ECLI:EU:C:2019:497*
[649] S Weatherill, 'Fairness, Openness and the Specific Nature of Sport: Does Lisbon Treaty Change EU Sports Law?' (2010) The International Sports Law Journal 11, 11.

sport[650]. However, this was a good start to trigger the spill-over mechanism of the EU[651]. Secondly, the EU has long regulated sport and possessed substantial control on the autonomy of sport[652]. On the other hand, Article 165 has a profound effect because it provided a legal base to the EU to involve with sport. Sport acquired a legal base under the Treaties and sport is legally subject to the application of the EU law. More importantly, it legitimised the EU's former actions in the field of sport. With Article 165, the official involvement of the EU institutions in the field of sport provided the possibility to encourage finding an appropriate balance between the wishes of the sporting world and the requirements of the EU law through supervision[653]. The EU institutions could support, co-ordinate or compliment sport actions with an acknowledgement towards the primary role of the sporting associations. More importantly, recently, sport has found a way to be read conjunctively with provisions on discrimination, and possibly with other fundamental treaty provisions[654]. Therefore, there is no reason for it not to be welcomed[655].

VI. Chapter Conclusion

This chapter has attempted to establish the impact of European sports policy on sport to determine whether EU and European Model of Sport are mutually exclusive. The organisational structures of the EU aim to establish and ensure the proper functioning of the internal market in accordance with the Treaties with no exceptions. On the other hand, the main features of the European model of sport have the possibility to create conflicts with this aim. Therefore, European model of sport is vulnerable to be challenged under the organisational structures of the EU and the EU law will regulate and supervise the European model of sport to ensure compatibility. Hence, it is established that EU and sport is not mutually exclusive. Sport enjoys conditional

[650] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 507.
[651] *Topfit* judgment of the ECJ is an exmaple of the begining of the spill over effect of the Article 165 over other policy areas. However, it is too soon to make clear cut conclusion and worth to wait for future judgments to have certaninty.
[652] S Weatherill, *European Sports Law: Collected Papers* (2nd Edition, Asser Press, 2015) p 507.
[653] S Van den Bogaert, *et al.*, 'Sport and the EC Treaty: A Tale of Uneasy Bedfellows?' (2006) European Law Review 821, 839.
[654] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 case.
[655] *Ibid.*

autonomy under the organisational structures of EU and sport is subject to the application of EU law with no general exception.

CHAPTER IV: THE IMPACT OF EU ON THE SPECIFICITY AND AUTONOMY OF SPORT

I. Introduction; II. ECJ's Jurisprudence on Sport; II.I. *Walrave v Union Cycliste Internationale*; II.I.I. Facts and Judgment of the Case; II.I.II. Significance: Sporting Exception; II.II. *Doná v Mantero*; II.II.I. Facts and Judgment of the Case; II.II.II. Significance; II.III. *Union Royale Belge des Societes de Football Association (ASBL) v Bosman*; II.III.I. Facts and Judgment of the Case; II.III.II. Restriction and Objective Justification; II.III.III. Significance; II.IV. *Christelle Deliège V Ligue Francophone De Judo Et Disciplines Associées* ASBL; II.IV.I. Facts and Judgment of the Case; II.IV.II. Significance: Inherency Exception; II.V. *Jyri Lehtonen and Castors Canada Dry Namur-Braine* ASBL; II.V.I. Facts and Judgment of the Case; II.V.II. Significance; II.VI. Expanding the Application of European Law; II.VI.I. *Kolpak and Simutenkov*; II.VI.I.I. *Deutscher Handballbund eV v Maros Kolpak*; II.VI.I.I.I. Facts and Judgment of the Case; II.VI.I.I.II. Significance; II.VI.I.II. *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*; II.VI.I.II.I. Facts and Judgment of the Case; II.VI.I.II.II. Significance; II.VII. Introduction of Competition Provisions to Sporting Practices; II.VII.I. *David Meca-Medina and Igor Majcen v* Commission; II.VII.I.I. Facts and Judgment of the Case; II.VII.I.II. Significance; II.VII.I.III. After the *Meca Medina* Judgment; II.VIII. *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko* Dimosio; II.VIII.I. Facts and Judgment of the Case; II.VIII.II. Significance of the Case; II.IX. Case Law after the adoption of Article 165 TFEU; II.IX.I. *Olympic Lyonnais SASP v Bernard*; II.IX.I.I.Facts and Judgment of the Case; II.IX.I.II. Significance; II.X. *Football Association Premier League Ltd and others v QC Leisure and Others and Karen Murphy v Media Protection Services* Ltd; II.X.I. Facts and Judgment of the Case; II.X.II. Significance; II.XI. *Sky Österreich GmbH v. Österreichischer* Rundfunk; II.XI.I. Facts and Judgment of the Case; II.XI.II. Significance; II.XII. *UEFA v European* Commission; II.XII.I. Facts and Judgment of the Case; II.XII.II. Significance; II.XIII. *TopFit v Deutscher Leichtathletikverband;* II.XIII.I. Facts and Judgment of the Case; II.XIII.II. Significance; **III. Chapter Evaluation; IV. Chapter Conclusion.**

I. Introduction

The research is limited to achieve the impact of the EU law on sport through analysing the ECJ judgments and Commission decisions on sport regarding the twin principles of the specificity and autonomy of sport underpinning the European Model of Sport. The impact of EU law on sport is presented under two chapters, current Chapter IV, and following Chapter V. This chapter aims to establish the impact of EU law on the European model of sport in relation to the specificity and autonomy of sport through analysing the ECJ judgments.

II. ECJ's Jurisprudence on Sport

As outlined in Chapter I, since its founding, the core of the European Union's activities has been the construction of the internal market[656]. With the aim and objective of establishing a common market the EU has been progressively approximating the economic policies of the Member States and seeking to unite national markets in a single market[657]. Mainly, the Treaty on the Functioning of the European Union (TFEU), and initially the European Economic Community (EEC) Treaty, have offered the context for achieving this aim. The EU Treaty provides provisions which prohibit Member States from having or creating unjustified barriers to the free movement of goods, persons, services, and capital to achieve negative integration[658]. Moreover, the Treaty empowers the EU to legislate to eliminate obstacles to free movement present in the domestic laws of the Member States, to facilitate positive integration[659]. The Treaty provisions on the freedom of movement are centred on the principle of non-discrimination or equal treatment[660]. The ECJ interprets the principles of the European Union to ensure aim and objectives of the EU is properly met without discrimination[661]. ECJ, while interpreting the fundamental provisions to ensure proper functioning of the internal

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[656] C Barnard, 'Competence Review: The Internal Market' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226863/bis-13-1064-competence-review-internal-market.pdf > accessed on 22 December 2014 p 3.
[657] Case 207/83 *Commission v UK* [1985] ECR 1202.
[658] *Ibid.*
[659] *Ibid 3.*
[660] *Ibid 15.*
[661] *Ibid 15.*

market, un-intentionally interfered to regulate sport constituting economic activity in the EU.

II.I. *Walrave v Union Cycliste Internationale*

The foundations of EU sports law were established in *Walrave* and have been subsequently developed through the judgments of the ECJ.

II.I.I. Facts and Judgment of the Case

In *Walrave*, reference was made to the ECJ from the District Court of Utrecht, to receive a preliminary ruling in the action pending before that Court. In the case, the plaintiffs Walrave and Koch were Dutch nationals who wanted to offer their services in return for remuneration to act as pacemakers on motorcycles in cycle races, but were refused based on their nationality since the first defendants had a rule that the pacemaker must be of the same nationality as the stayer. The plaintiffs argued that this nationality provision was incompatible with the Treaty.

After considering the objectives of the Community, the Court held that the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty[662]. Secondly, the Court ruled that the prohibition on discrimination based on nationality does not affect the composition of sport teams, in particular national teams, since the formation of them is a question of purely sporting interest and has nothing to do with economic activity[663]. Thirdly, it was stated that the prohibition on such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at collectively regulating gainful employment and services[664]. Finally, the Court concluded that the rule on non-discrimination applies to all legal relationships which by reason either of

[662] Case C-63/74 B.*N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405 at para 36.
[663] *Ibid* at 1421 at para 36.
[664] *Ibid* at 1421.

the place where they are entered into or of the place where they take effect can be located within the territory of the Community[665].

II.I.II. Significance: Sporting Exception

Walrave judgment ruled that

> Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. The prohibition on discrimination based on nationality contained in Articles 7, 48 and 59 of the Treaty does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity[666].

Walrave established that rules of purely sporting interest which are limited to their proper objectives and do not constitute economic activity, such as the composition of sport teams, were classified as falling outside the scope of the Treaty[667]. This rule was named as the sporting exception rule under the Community law[668]. This rule however does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity[669]. This ruling was the landmark establishing that the Community law would not be applicable to purely sporting rules with no economic interest. Only the sporting rules constituting an economic activity would be tested under the application of the Community law to discover compatibility[670]. A distinction between purely sporting rules and economic aspects of sport was made while immunity from the application of Community law to purely sporting rules was created under the sporting exception rule[671]. This indicated that sport's special characteristics should be

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[665] *Case C-63/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo [1974] ECR 1405 at para* 1421.
[666] *Ibid.*
[667] *Ibid* at para 8 and 9.
[668] *Ibid* at para 4-8.
[669] *Ibid* at para 8.
[670] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 240.
[671] Case C-63/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405 at para 8.

recognised during the application of Community law to sport. This required acknowledgement that there is a portion of sporting autonomy which should be free from EU intervention such as the composition of sport teams[672].

The nationality discrimination is fundamentally against the Community's aims and objectives as well as the Community law. However, the ECJ considered this as a purely sporting rule under the nature of sport and exempted it from the application of Community law. Nationality discrimination in the composition of national teams has been accepted as legitimate and it has formed the core of the interpretative or adjudicative strategy for securing sporting autonomy from the application of EU law[673]. The ECJ demonstrated the possibility for sport to explain why it is different or special from other industries to be exempted from the application of the Community law[674]. Consequently, in *Walrave* the ECJ interfered to regulate sport for the first time but it did not violate autonomy of sport directly since a potentially broad basis of review to sport was provided against the standards required under the Community law[675]. Even though the ECJ refused to grant absolute autonomy from the application of EU law, it demonstrated sensitivity to the specificity of sport[676]. Therefore, sport was granted an opportunity to demonstrate its subjection to the application of EU law regarding the specificity of sport[677].

To conclude, the case demonstrated European Community's initial impact on the organisation of sport. However, this impact was minor. Even though expressly not referred to, due to specificity, purely sporting rules were exempt from the application of EU law. Only sporting rules with an economic interest were subject to the application of EU law. This demonstrated that, initially, organisation of sport enjoyed two distinct forms of autonomy. Purely sporting rules enjoyed autonomy while sporting rules with an economic interest were introduced to enjoy conditional autonomy under the

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[672] *Ibid.*
[673] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 77-78.
[674] B Garcia and S Weatherill, 'Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon'(2012) Journal of European Public Policy 238 p 240.
[675] *Ibid*.
[676] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 77.
[677] *Ibid*.

organisational structures of the EU. The ECJ declared conditional autonomy for the sporting rules with an economic interest, while specificity of purely sporting rules achieved an exemption from the application of EU law. However, the ECJ failed to provide a tool to separate purely sporting rules from economic activity. It was difficult to understand the nature of sporting rules let alone to separate economic grounds from purely sporting grounds of the activity. As a result, the case introduced an unfortunate ambiguity to the juridification of sport. In addition, purely sporting rules definition established in the case formed a broad exception of sporting rules and the reasoning behind it was very concise and immature[678]. The ECJ subsequently advanced the scope of the sporting exception in its future judgments[679]. Nonetheless, the *Walrave* judgment has secured its place in the literature as the first source of EU sports law having an impact on the autonomy of sport while acknowledging the specificity of purely sporting rules.

II.II. *Doná v Mantero*

In *Doná*[680], the ECJ reaffirmed that, sport is subject to Community law so far as it constitutes an economic activity, and further expanded this approach to the activities of professional or semi-professional football players[681].

II.II.I. Facts and Judgment of the Case

In *Doná*, a reference to the ECJ was made. Mantero had delegated Doná, the plaintiff, to inquire in football circles abroad to discover players willing to play in the Rovigo team[682]. Consequently, Doná arranged for the publication of an advertisement in a Belgian sporting newspaper in this regard. Mantero refused to consider the offers and to pay Doná. Mantero referred to the combined provisions of the 'Rules of the Italian Football Federation' according to which only players who are affiliated to that federation may take part in matches. Doná argued that the

[678] L Freeburn, 'European Football's Home-Grown Players Rules and Nationality Discrimination under the European Community Treaty' (2009) Marquette Sports law Review 177 p 200.
[679] *Ibid*.
[680] Case C-13/76 *Doná v Mantero* [1976] E.C.R. 1333 at 14-15.
[681] *Ibid* at para 13.
[682] *Ibid.*

provisions were discriminatory on nationality and contrary to the Treaty[683].

After referring to the related provisions under Community law which seek to abolish any nationality discrimination against a person providing a service, the ECJ held that the rules or national practices adopted by a sporting organisation which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question, are incompatible with the Treaty, unless such rules or practice exclude foreign players participation in certain matches for reasons which are not of an economic nature and are thus of sporting interest only[684]. Furthermore, the ECJ held that these provisions have a direct effect and confer rights on individuals which national Courts must protect[685]. Besides, the ECJ revisited the sporting exception and refined it as a purely sporting rule with no economic nature but constituting a restriction should be limited to its proper objective in order to be exempted from the application of Community law[686]. Finally, the ECJ expanded the application of nationality-based discrimination to the rules of any other nature aimed at collectively regulating gainful employment and services including the actions of public authorities[687].

II.II.II. Significance

Two years later *Doná* ruling has offered no amplification to the ruling in *Walrave*[688]. The approach of the Community to regulate sport was still centred on the economic impact of sport[689]. *Doná* limited and altered the sporting exception established under Walrave. In its judgment, the Court ruled that

> … those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature

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[684] Case C-13/76 Doná v Mantero [1976] E.C.R. 1333 at 14.
[685] *Ibid*.
[686] *Ibid.*
[687] *Ibid* at para 18.
[688] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 78.
[689] S Weatherill, European Sports Law: Collected Papers(2nd Edition, Asser Press, 2015) p 508.

> and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. This restriction on the scope of the provisions in question must however remain limited to its proper objective[690].

Doná established that purely sporting rules must stay limited to their proper objectives to be compatible with the Community law. To conclude, the case demonstrated the EU's minor impact on the organisation of sport.

After *Doná*, for the following twenty years, there was a break in the ECJ case law on sport until the milestone judgment of *Bosman*. This break was not random but indicated the resistance of sporting bodies towards the application of ordinary law to sport[691]. Bringing a case against SGBs at Court has not been easy since a sporting career is short, and litigation is lengthy as well as costly. Moreover, SGBs have been powerful and they have global reach. An unsuccessful challenge would easily end a sportsmen's career. *Bosman*'s referral to the EU's Court of First Instance (CFI), and the ECJ judgment on the case has changed the perception of everyone involved in the activity of sport[692]. Unlike an unpopular sport of cycling, *Bosman* has involved a Belgian football player, and it has energised the development of EU sports law[693].

II.III. *Union Royale Belge des Societes de Football Association (ASBL) v Bosman*

The *Bosman* case was the second milestone decision of the ECJ in regulating sporting practices under EU law. In *Bosman*, the Court re-addressed the difficulty of separating the economic grounds of a sporting activity from its purely sporting context. In addition, the Court demonstrated willingness to discover the special aspects of sport which would be considered legitimate. The Court acknowledged the importance of maintaining a degree of equality and uncertainty as well as

690 Case C-13/76 Doná v Mantero [1976] E.C.R. 1333 at 14-15.
691 S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 78.
692 S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 78.
693 *Ibid.*

encouraging the recruitment and training of young players in sport[694]. Nevertheless, the sporting exception rule of *Walrave* was narrowed down to interpret and limit the specificity of sport[695]. However, the Court could not offer a clear definition of what constitutes the specificity of sport[696]. Consequently, the hopes of SGBs for a generous view of *Walrave* exception were drained[697] and the ruling in *Bosman* has been widely accepted as turning point in the EU's approach to sport[698]. *Bosman* changed the path of EU sports law initially established under *Walrave*.

II.III.I. Facts and Judgment of the Case

In *Bosman*, reference was made to the ECJ by the Cour d'Appel, Belgium, for a preliminary ruling. In the case, Bosman, a professional footballer of Belgian nationality, was employed in 1988 by RC Liege, a Belgian club, under a contract expiring on 30 June 1990, which assured him an average monthly salary of BFR 120 000, including bonuses[699]. On 21 April 1990, RC Liege offered Bosman a new contract for one season, reducing his pay to BFR 30 000, the minimum permitted by the URBSFA federal rules. Bosman refused to sign and was put on the transfer list. The compensation fee for training was set, in accordance with the said rules, at BFR 11 743 000[700]. Since no club showed an interest in a compulsory transfer, Bosman made contract with US Dunkerque, a club in the French second division, which led to his being engaged for a monthly salary in the region of BFR 100 000 plus a signing-on bonus of some BFR 900 000[701]. On 27 July 1990, a contract was also concluded between RC Liege and US Dunkerque for the temporary transfer of Bosman for one year, against payment by US Dunkerque to RC Liege of a compensation fee of BFR 1 200 000 payable on receipt by the Federation Française

[694] 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 at para 106.
[695] *Ibid* at para 32.
[696] S Weatherill, European Sports Law: Collected Papers (2nd Edition, Asser Press, 2015) p 4.
[697] L Freeburn, 'European Football's Home-Grown Players Rules and Nationality Discrimination under the European Community Treaty' (2009) Marquette Sports law Review 177 p 200.
[698] E Szyszczak, 'Competition and Sport' (2007) European Law Review 95 p 97.
[699] Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1995] ECR I-4921 at para 28.
[700] *Ibid* at para 29.
[701] *Ibid* at para 30.

de Football ('FFF') of the transfer certificate issued by URBSFA. The contract also gave US Dunkerque an irrevocable option for full transfer of the player for BFR 4 800 000[702]. Both contracts, between US Dunkerque and RC Liege and between US Dunkerque and Bosman, were however subject to the suspensive condition that the transfer certificate must be sent by URBSFA to FFF in time for the first match of the season, which was to be held on 2 August 1990[703]. RC Liege had doubts as to US Dunkerque's solvency and did not ask URBSFA to send the said certificate to FFF. As a result, neither contract took effect. On 31 July 1990, RC Liege also suspended Bosman, thereby preventing him from playing for the entire season[704]. On 8 August 1990, Bosman brought an action against RC Liege before the Tribunal de Premiere Instance (Court of First Instance), Liege.

The ECJ reaffirmed its previous judgment in *Walrave* and after considering the objectives of the Community, reaffirmed that sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of the Treaty[705]. This principle applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service[706]. The Court further explained that it is not necessary, for the purposes of the application of the Community provisions on freedom of movement, for the employer to be an undertaking and all that is necessary is the existence of, or the intention to create, an employment relationship[707]. The Court reaffirmed that this principle not only applies to the action of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner[708].

II.III.II. Restriction and Objective Justification

Moreover, the ECJ established the importance of considering whether the restriction, which were the transfer rules, form an obstacle to freedom of movement

[702] *Ibid* at para 31.
[703] *Ibid* at para 32.
[704] *Ibid* at para 33.
[705] *Ibid* at para 73.
[706] Case C-415/93 Union Royale Belge des Societes de Football Association (ASBL) v Bosman [1995] ECR I-4921 at para 73.
[707] *Ibid* at para 74.
[708] *Ibid* at para 82.

for workers and could they be justified[709]. The freedom of movement for workers is one of the fundamental principles of the Community and has a direct effect[710]. The ECJ held that the transfer rules constituted an obstacle to freedom of movement for workers because they obstruct workers' activity to play as professional footballers[711]. The rules would still amount to a restriction, but such a restriction may be justified in the pursuit of legitimate objective. But even if that were so, the application of those rules must not go beyond what is necessary for that purpose[712]. The transfer rules could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest[713]. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose[714]. The Court examined the considerable social importance of sporting activities, in particular football, and accepted the aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty and encouraging the recruitment and training of young players as legitimate[715]. However, the prospect of receiving transfer fees cannot be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs[716]. The Advocate General expressed in his Opinion that the similar aims can be attained as efficiently by other means which do not impede freedom of movement for workers[717]. Firstly, by a collective wage agreement certain limits for the salaries to be paid to the players by the clubs could be set[718]. Secondly, it would be possible to allocate the clubs' earnings between the clubs[719]. This would mean that part of the income earned from the sale of tickets for its home matches by a club is to be

[709] *Ibid* at para 92.
[710] *Ibid* at para 93
[711] *Ibid* at para 100
[712] *Ibid* at para 104.
[713] *Ibid* at para 104.
[714] *Ibid* at para 104.
[715] Case C-415/93 Union Royale Belge des Societes de Football Association (ASBL) v Bosman [1995] ECR I-4921 at para 106.
[716] *Ibid* at para 109.
[717] *Ibid* at para 110.
[718] AG Opinion in Bosman, para 226.
[719] AG Opinion in Bosman, para 226.

shared with the other clubs. Likewise, the earnings received for awarding the broadcasting rights of the matches on television, could be shared between all the clubs[720].

The Court ruled that Article 54 TFEU (ex-Article 48 TEC) prohibits the application of rules laid down by sporting associations where 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[721]. The Court emphasised that the freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment[722]. After establishing the existence of an obstacle, the Court considered whether that obstacle may be justified[723]. The Court ruled that the restriction on the scope of the provisions in question must remain limited to its proper objective[724]. None of the arguments put forward were accepted as legitimate by the Court[725].

Moreover, the Court further established that Article 48 prohibits the application of rules laid down by sporting associations under which, in competitions they organise, football clubs may field only a limited number of professional players who are nationals of other Member States[726]. The sporting rule of UEFA which restricted the number of foreign players who could be fielded by clubs in competitions infringe the freedom of movement provisions of the Treaty[727]. This reasoning of the

[720] AG Opinion in Bosman, para 226.
[721] *Ibid* at para 114.
[722] *Ibid* at para 117.
[723] *Ibid* at para 121, 123, 124, 125, 126. First, they argued, those clauses serve to maintain the traditional link between each club and its country, a factor of great importance in enabling the public to identify with its favourite team and ensuring that clubs taking part in international competitions effectively represent their countries (para123). Secondly, those clauses are necessary to create a sufficient pool of national players to provide the national teams with top players to field in all team positions (para124). Thirdly, they help to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players (125). Finally, UEFA points out that the '3 +2' rule was drawn up in collaboration with the Commission and must be revised regularly to remain in line with the development of Community policy (para126).
[724] *Ibid* at para 127.
[725] *Ibid* at para 130.
[726] *Ibid* at para 137
[727] *Ibid* at 137.

Court established that free movement of workers principle prevails over nationality rules except when the competition is taking place between national teams at the national level[728].

II.III.III. Significance

Bosman has destroyed the widespread opinion of the sporting authorities that they were immune from legal interference in their affairs. The Court ruled that

> It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose[729].

This had a gigantic effect on the autonomy of sport[730]. Long standing sporting practices of requiring a payment for players after completion of their contract as a training compensation; rules restricting professional footballers from moving freely between clubs once their contracts ended; limits imposed on the number of foreign players permitted to represent club teams all declared illegal under EU law[731]. On the other hand, the ECJ limited the scope of restrictions only to catch rules affecting players' access to the employment market in other Member States and are thus

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[728] R Parrish and S Miettinen, *The Sporting Exception in European Union Law* (TMC Asser Press, 2008) 49 p 88.
[729] Case C-415/93 Union Royale Belge des Societes de Football Association (ASBL) v Bosman [1995] ECR I-4921 at para 103.
[730] SVD Bogaert, 'The ECJ on the Tatami: Ippon, Waza-Ari or Koka?' (2000) European Law Review 554 p 554.
[731] S Boyes, 'Sports Law: its history and growth and the development of key sources' (2012) Legal Information Management, 88 p 88.

capable of impeding freedom of movement for workers [732]. Sporting rules in its entirety, including purely sporting rules, were granted a conditional autonomy under the organisational structures of EU[733]. Nevertheless, the ECJ demonstrated reluctance in applying competition law principles to sporting rules, realising that their potential impact on sport would be much heavier than free movement provisions[734].

The judgment became one of the most well-known European Court cases, not only for shaping specifically transfer matters in European football but also for European sports law in general. *Bosman* introduced the necessity of considering whether sporting rules form an obstacle to freedom of movement within the internal market and whether they could be justified. *Bosman* established that main practices of the sporting industry could be declared incompatible under the EU law. Whereas the specificity of sport was not assessed or expressly referred to under the ECJ's reasoning, special characteristic of sport was emphasised to consider whether this would grant sport specific treatment under the application of the EU law. However, the specific nature of sport could not grant an immunity to sport under the application of the EU law. The restriction on freedom of movement of the workers which affected cross border trade was declared incompatible because it did not remain limited to its proper objective. *Bosman* can be identified as the first case demonstrating evidence of conditional autonomy of the organisation of sport under the organisational structures of EU. *Bosman* demonstrated that the EU had a considerable impact on the organisation of sport restricting freedom of movement between the Member States within the internal market[735]. The organisation of sport was not immune from the application of EU law and the organisational structures of sport in Europe should comply with EU law. Therefore, while the specificity of sport was considered under the organisational structures of the EU during regulating

[732] Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1995] ECR I-4921 at para 103.
[733] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 85.
[734] *Ibid* at 557.
[735] Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1995] ECR I-4921 at para 104.

sport, SGBs autonomy was declared conditional upon compliance with EU law [736].

To conclude, in *Bosman*, the ECJ rather than insisting for a restrictive sporting rule to be considered valid under EU law should fall under a Treaty exemption, applied a market access analysis. After the analysis, the Court held that restrictive rules are valid if they are objectively justified by pursuing a legitimate aim compatible with the Treaty and justified by pressing reasons of public interest [737]. The ECJ, while outlawing transfer and foreign player limitation rules, accepted that there are novel categories of objective justification relevant to sport rules even when they have direct discrimination[738]. For example, the Court accepted the aim of maintaining a balance between the clubs to preserve equality and uncertainty towards the competition results as well as encouraging to recruit and train young players as legitimate[739]. However, other grounds of maintaining the traditional link between each club and its country[740] and maintaining sufficient pool of players to be selected to the national teams[741] were rejected by the Court based on the facts of the case[742]. Nevertheless, these grounds could possibly be justified if supported by the facts of another appropriate case in the future[743]. After *Bosman*, sportspersons sought to ascertain their rights under EU law. The two example cases for this approach are *Deliège* and *Lehtonen*.

II.IV. *Christelle Deliège V Ligue Francophone De Judo Et Disciplines Associées ASBL*

II.IV.I. Facts and Judgment of the Case

In *Deliège,* reference was made to the ECJ by the Tribunal of Belgium, for a preliminary ruling[744]. Deliège was a judoka who had been declared Belgian

[736] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 98.
[737] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 93.
[738] *Ibid* at para 89.
[739] Case C-415/93 *Union Royale Belge des Societes de Football Association (ASBL) v Bosman* [1995] ECR I-4921 at para 104.
[740] *Ibid* at para 123.
[741] *Ibid* at para 124.
[742] *Ibid* at para 131-132, 134.
[743] L Freeburn, 'European Football's Home-Grown Players Rules and Nationality Discrimination under the European Community Treaty' (2009) Marquette Sports law Review 177 p 203.
[744] Case C-51/96 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000] E.C.R. I-2549.

champion on several occasions. The parties had a disagreement on Deliège 's status. Deliège claimed she practiced judo professionally or semi-professionally whilst the LBJ and the LFJ claimed that judo is a sport which is practiced by amateurs[745]. Deliège claimed that the LFJ and the LBJ improperly frustrated her career development by preventing her from participating in certain tournaments while the LFJ claimed that Deliège lacked discipline[746].

Initially the Court ruled that amateur sport is not subject to Community law[747]. Furthermore, the information supplied by the referring national Court did not enable the ECJ to give an informed ruling as to the existence and extent of trade between Member States or as to the possibility of such trade being affected by the rules for the selection of judokas[748]. The referring Court did not provide sufficient information to enable the ECJ to give an informed ruling on the interpretation of the competition rules applicable to undertakings[749]. Nevertheless, based on the freedom of movement provisions, a sports association or federation unilaterally classifying its members as amateur athletes did not in itself mean that those members do not engage in economic activities within the meaning of the Treaty[750]. Deliège was sponsored and pursued an activity as an employed person or provider of services for remuneration. This was considered as an economic activity within the meaning of Article 2 TEC[751]. The selection system in the case could prove more favourable to one category of athletes than another and inevitably could have the effect of limiting the number of participants in a tournament. However, this fact alone did not constitute a restriction on the freedom to provide services[752]. Sporting activities were of considerable social importance in the Community and special consideration to the characteristics of sport should be afforded.[753] such limitation is inherent in the

[745] Case C-51/96 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000] E.C.R. I-2549 at para 6.
[746] *Ibid* at para 8.
[747] *Ibid* at para 25.
[748] *Ibid* at para 36.
[749] *Ibid* at para 37, 38.
[750] *Ibid* at para 46.
[751] *Ibid* at para 53.
[752] *Ibid* at para 66
[753] *Ibid* at para 41.

conduct of an international high-level sports event and requires certain selection rules to be adopted[754]. Nevertheless, sporting rules must remain limited to their proper objective[755].

II.IV.II. Significance: Inherency Exception

In *Deliège* the Court did not follow the classic example of an objective justification approach. Instead, a new form of exclusion for sporting rules under inherency was introduced. The selection rules in the case had the effect of limiting the number of applicants in a tournament. The Court stated that

> […] the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. […] however, that that restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity[756].

In the case, the selection rules were declared inherent in the conduct of international high-level sports event. Therefore, it was not classified as a restriction on the freedom to provide services under the EU law[757]. The information provided to the ECJ by the referring national Court was not enough for the ECJ to give a judgment on the competition law provisions. To conclude, the case demonstrated that EU had a general impact on the organisation of sport through regulating freedom of movement to provide services. Sporting rules did not enjoy a general exception under the application of EU law and each sporting rule should be tested under the market access analysis. However, sporting rules which were inherent in the sporting activity and limited to their proper objective may not be regarded as constituting a

[754] *Ibid* at para 64.
[755] Case C-51/96 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo [2000] E.C.R. I-2549 at para 43.
[756] *Ibid.*
[757] *Ibid* at 64.

restriction on the freedom to provide services prohibited by the Treaty.

Even from a different angle compared to the above demonstrated objective justification analysis, *Deliège* re-affirmed that sport is subject to control under the organisational structures of EU and does not have exclusive autonomy. On the other hand, introduced inherency exception demonstrated the acknowledgement of the specificity of sport which makes it different from other sectors.

II.V. *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL*

II.V.I. Facts and Judgment of the Case

In Lehtonen, reference was made to the ECJ by the Tribunal of Brussels, for a preliminary ruling. Lehtonen was a basketball player of Finnish nationality. During the 1995/1996 season he played in a team which took part in the Finnish championship, and after that was over he was engaged by Castors Braine, a club affiliated to the FRBSB (Belgian Federation), to take part in the final stage of the 1995/1996 Belgian championship. The parties concluded a contract of employment for a remunerated sportsman. That engagement was registered with the FRBSB who informed Castors Braine that if FIBA (the International Basketball Federation) did not issue the license the club might be penalised and that if it fielded Lehtonen it would do so at its own risk[758]. For the European zone, the deadline for the registration of non-EU players was 28 February, whereas for a player from a federation in the European zone was 31 March. The deadline for registration had passed and Lehtonen was not registered. Lehtonen had taken part in breach of the FIBA rules on transfers of players within the European zone. As a result, Castors Braine dispensed with the services of Lehtonen for the play-off matches[759].

In the case, the ECJ initially noted that the information supplied by the national Court referring did not enable the ECJ to give an informed ruling as to the existence and extent of trade between Member States or as to the possibility of such trade

[758] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL (FRBSB)* 2000 E.C.R. I-2681 para 12.
[759] *Ibid* at para 13.

being affected by the rules for the selection of judokas[760]. The referring Court did not provide sufficient information to enable the ECJ to give an informed ruling on the interpretation of the competition rules applicable to undertakings[761]. Accordingly, the Court answered the question referred to by interpreting the Treaty rules on the principle of the prohibition of discrimination on grounds of nationality and on freedom of movement for workers[762]. The ECJ reaffirmed that sport is subject to Community law in so far as it constitutes an economic activity[763] and sport has social importance which deserves to be granted a special consideration[764]. Yet, EU law prohibits discrimination on grounds of nationality[765]. Therefore, the existence of an obstacle to freedom of movement for workers and possible justification needed to be analysed. The Court held that participation in matches is essential for players and a rule restricting participation restricts the chances of employment for the player[766]. Therefore, the rule under scrutiny formed an obstacle to freedom of movement of workers. Unlike the inherency principle adopted under *Deliège,* the Court adopted the classic objective justification test and ruled that to justify such a rule measures taken by sports federations with an intention to secure the proper functioning of competitions must not go beyond what is necessary for achieving the aim pursued[767]. The difference of application on the transfer period rules between the players from a federation outside and inside of the European zone at the detriment of the former did not have an objective justification[768]. Therefore, the rule in the case was declared as going beyond what it was necessary to achieve the aim pursued.

[760] *Ibid* at para 36.
[761] *Ibid* at para 28.
[762] *Ibid* at para 30.
[763] *Ibid* at para 32.
[764] *Ibid* at para 33, the Court referred to the case law which is supported by Declaration No 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam.
[765] Case C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL (FRBSB) 2000 E.C.R. I-2681 at para 37.
[766] *Ibid* at para 50.
[767] *Ibid* at para 56.
[768] *Ibid* at para 59.

II.V.II. Significance

Lehtonen judgment demonstrates that sport governing authorities could limit the time of movement of players between clubs as part of their legitimate aim to ensure the regularity of sporting competitions[769]. Therefore, a transfer window is not in breach of EU law. However, as outlined in *Bosman*[770], measures taken by sports federations with a view to ensure the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued[771]. This period should not be contaminated by arbitrary or discriminatory features[772]. Therefore, even though the Court has accepted the need to restrict the mobility of players at the end of a season, the discriminatory transfer window rules have been found contrary to EU law. The ECJ followed the analytical market access approach adopted under *Bosman*, and examined the existence of an obstacle to trade, objective justification, and the proportionality of the rule. After establishing the existence of an obstacle to freedom of movement of workers, the Court considered whether that obstacle may be objectively justified[773] and ruled that the rule went beyond what is necessary to achieve the aim pursued. Therefore, it was not compatible under the EU law.

To conclude, the case demonstrated that EU had an impact on the organisation of sport. The case re-affirmed that sport enjoys conditional autonomy under the organisational structures of EU. On the other hand, the ECJ expressed the need to give special consideration to the characteristics of amateur sport[774]. Therefore, ECJ acknowledged the specificity of sport by expressly referring to the existence of legitimate sporting justifications, such as the social importance of sport.

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[769] *Ibid* at para 53.
[770] Case C-415/93 Union Royale Belge des Societes de Football Association (ASBL) v Bosman [1995] ECR I-4921 at para 104.
[771] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL (FRBSB)* 2000 E.C.R. I-2681 at para 56.
[772] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 240.
[773] Case C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL (FRBSB) 2000 E.C.R. I-2681 at para 51.
[774] *Ibid* at para 33.

II.VI. Expanding the Application of European Law

II.VI.I. *Kolpak and Simutenkov*

In *Kolpak*[775], on the interpretation of Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, and in *Simutenkov*[776] on the interpretation of Article 23(1) of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, the ECJ expanded the application of European law in sport to non-European Union citizens. The Court established that workers who are not citizens of Member States but who are lawfully employed in the territory of a Member State have a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty[777].

II.VI.I.I *Deutscher Handballbund eV v Maros Kolpak*

II.VI.I.I.I. Facts and Judgment of the Case

In the case of *Kolpak*, reference was made to the Court by the German Court for a preliminary ruling. *Kolpak* was a Slovak national who entered a fixed-term employment contract for the post of goalkeeper with the German handball team TSV Ostringen eV Handball, receiving a monthly salary. He was a resident in Germany and held a valid residence permit[778]. The DHB, which organised league and cup matches at federal level, issued to him, under Rule 15 of the SpO, a player's licence marked with the letter A on the ground of his Slovak nationality[779]. Kolpak, who had requested that he be issued with a player's licence which did not feature the specific reference to nationals of non-member countries, brought an action.

The ECJ, initially referred to the Article 1 (2) of the Association Agreement with Slovakia and stated that the aims of the Agreement were, to provide an appropriate

[775] C-438/2000 *Deutscher Handballbund eV v Maros Kolpak* 2003 ECR I-4135
[776] Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* (2005) ECR I-2579.
[777] *Ibid*.
[778] C-438/2000 *Deutscher Handballbund eV v Maros Kolpak* (2003) ECR I-4135 at para 9.
[779] *Ibid* at para 10.

framework for political dialogue between the Parties, allowing the development of close political relations between them, to promote the expansion of trade and harmonious economic relations between the Parties in order to foster dynamic economic development and prosperity in the Slovak Republic, and to provide an appropriate framework for the Slovak Republic's gradual integration into the Communities[780]. After establishing the direct effect of the association agreement, the Court established that the football regulation under scrutiny forms an obstacle to trade under the EU law. After this finding, the ECJ examined whether there is an objective justification to the rule and referred to the previous case law[781]. The Court concluded that the discrimination arising in the present case from the particular rule of the SpO cannot be regarded as justified on exclusively sporting grounds in as much as it follows from those rules that, during matches organised by the DHB, clubs are free to field an unlimited number of nationals of EEA Member States[782].

II.VI.I.I.II. Significance

In *Bosman*, the Court held that rules restricting free movement of workers between Member States are contrary to EU law. This decision has removed discriminatory practices protecting nationals and facilitated competition in the common market by enabling workers in one-Member State to find employment in another Member State[783]. Similar arguments were raised in *Kolpak* based on the Association Agreement. The case concerned a Slovak national and the Association Agreement with Slovakia which was not a Member State at the time. The restrictive rules in the case were discriminatory at club level but were held inadmissible under EU law because they restricted freedom of movement of workers. The Court indicated that the employment market of all Member States should be open for access and must encourage competition based on ability and not nationality[784]. This approach adopted by the Court has neglected to recognise the specificity of sport compared

[780] *Ibid* at para 3.
[781] See *Bosman* and *Doná.*
[782] C-438/2000 *Deutscher Handballbund eV v Maros Kolpak* (2003) ECR I-4135 at para 56.
[783] Case C-415/93 Union Royale Belge des Societes de Football Association (ASBL) v Bosman [1995] ECR I-4921 at para 134.
[784] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 184.

to other market sectors[785]. Instead, the Court contributed to ensure the main aim and objective of the Union to achieve and ensure proper functioning of the internal market and cross border trade is protected[786]. The ECJ demonstrated that under the application of the freedom of movement for workers, the employment markets in all Member States will be open with no reservations to competition within the internal market based on ability and not nationality[787].

The other important significance of *Kolpak* is that it is one of the first cases decided on nationals of a state outside the EU/EEA who sought equal treatment as national players under an Association Agreement between the EU and Slovakia. With the Kolpak case, the aim and objective of the EU to abolish discrimination on the grounds of nationality including workers of Member States regarding employment conditions[788] has for the first time spilled over to regulate equal treatment to workers of States which are a party to an Association Agreement which contains non-discrimination clauses with the EU States and are legitimately employed in a Member State[789]. Consequently, for the first time, the conditional autonomy of sport in the EU spread outside the borders of the Union and demonstrated the possible impact of the EU on the lex sportiva.

To conclude, the case demonstrated that the EU had a considerable impact on the organisation of sport by regulating freedom of movement to provide services between a Member and non-Member State who are party to an association agreement. Sporting rules did not enjoy a general exception under the EU law and each sporting rule must be tested under the market access analysis. Thus, the case re-affirmed that sport enjoys conditional autonomy under the organisational structures of EU. On the other hand, under the case, the specificity of sport was not acknowledged. Instead, the Court expressed the importance of the employment market of all Member States to be open for access and encouraged competition

[785] *Ibid*.
[786] For detailed discussion, visit Chapter I.
[787] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 184.
[788] Article 45(2) TFEU.
[789] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 14-15 section 4.2.

based on the ability and not the nationality of the workers[790]. The Court contributed to ensure the main aim and objective of the Union to achieve and ensure proper functioning of the internal market and cross border trade[791]. The Court demonstrated eagerness to ensure cross border trade is not affected between the Member States and to protect the proper functioning of the internal market. Therefore, apart from confirming the conditional autonomy of sport, the ECJ acknowledged the importance of market access over the specificity of sport.

II.VI.I.II. *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación*

Española de Fútbol

II.VI.I.II.I. Facts and Judgment of the Case

In *Simutenkov*[792], reference was made by the Spanish Court to the ECJ for a preliminary ruling. In the case, Simutenkov, a Russian national living in Spain, had a residence and a work permit. Simutenkov was employed as a professional football player under an employment contract with Club Deportivo Tenerife and he held a federation licence as a non-Community player[793]. In January 2001, Simutenkov submitted, through that club, an application to the Real Federación Española de Fútbol (Royal Spanish Football Federation) (RFEF) for it to replace the federation licence which he held with a licence that was identical to that held by Community players. In support of that application, he relied on the Communities Russia Partnership Agreement which ensured that the treatment accorded to Russian nationals legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals[794]. RFEF turned down that application[795]. Simutenkov argued that this was incompatible with Article 23(1) of

[790] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 184.
[791] For detailed discussion, visit Chapter I.
[792] Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* (2005) ECR I-2579.
[793] Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* (2005) ECR I-2579 at para 6.
[794] *Ibid* at para 3 and 7.
[795] *Ibid* at para 8.

the Communities-Russia Partnership Agreement[796].

The ECJ established the direct effect of the particular provision since an agreement concluded by the Communities with a non-member State must be regarded as being directly applicable[797]. The Court cited Article 1 of the Agreement and emphasised that the purpose of the Agreement was to establish a partnership between the parties with a view to promoting, inter alia, the development between them of close political relations, trade and harmonious economic relations, political and economic freedoms, and the achievement of gradual integration between the Russian Federation and a wider area of cooperation in Europe[798]. After referencing *Bosman* and *Kolpak*, the Court ruled that nationality discrimination provisions of EU law applies to rules laid down by sporting associations which determine the conditions of which professional sportsmen can engage in gainful employment[799]. They also preclude any limitation, based on nationality, on the number of players who may be fielded at the same time[800]. In the case, the limitation based on nationality did not relate to specific matches between teams representing their respective countries but applied to official matches between clubs and thus to the essence of the activity performed by professional players. The Court ruled that such a rule which limits the number of professional players from non-member countries who may take part in national competitions cannot be justified on purely sporting grounds[801].

II.VI.I.II.II. Significance

The approach of the ECJ adopted in *Kolpak* was approved in *Simutenkov*. Generally, the two cases are accepted as demonstrating that *Bosman* has implications beyond the borders of the EU[802]. To conclude, *Simutenkov* demonstrated that the EU had a considerable impact on the organisation of sport by regulating freedom of movement to provide services between a Member and non-Member State who are

[796] *Ibid* at para 13.
[797] *Ibid* at para 21.
[798] *Ibid* at para 27.
[799] *Ibid* at para 33.
[800] Case C-265/03 Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol (2005) ECR I-2579 at para 33.
[801] *Ibid* at para 38.
[802] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 222.

party to an association agreement. Sporting rules did not enjoy a general exception under EU law and each sporting rule must be tested under the market access analysis. Thus, the case re-affirmed that sport enjoys conditional autonomy under the organisational structures of the EU. On the other hand, the specificity of sport was affected under the application of EU law and it was not acknowledged in the judgment. Instead, the Court expressed the importance of promoting the development of close political relations, trade and harmonious economic relations, political and economic freedoms, and the achievement of gradual integration between the non-Member State and a wider area of cooperation in Europe. The Court contributed to ensure the main aim and objective of the Union to achieve and ensure the proper functioning of the internal market and cross border trade[803]. The Court ensured that cross border trade was not affected between the Member States and protected proper functioning of the internal market between Member and non-Member States. Therefore, apart from confirming the conditional autonomy of sport, the ECJ acknowledged the importance of market access over the specificity of sport. More importantly, the autonomy of sport was limited to a conditional autonomy under the organisational structures of the EU not only within the borders of the Union with 27 Member States territories but also to other non-Member States which has entered into an Association Agreement with a Member State to facilitate competition within the internal market.

II.VII. Introduction of Competition Provisions to Sporting Practices

Above demonstrated rulings of ECJ demonstrated the application of free movement law in sport. Since *Bosman* and *Deliège* most of the sport related cases are decided under the application of competition law rather than free movement[804]. Competition law does not operate under the same lines as free movement law since competition law relies on finding concerted practices and free movement law relies on the adoption of measures. Market analysis is more heavily relied on under the competition law then it is under the free movement law[805]. For example, de minimis

[803] For detailed discussion, visit Chapter I.
[804] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 104.
[805] *Ibid*.

principle for the application of EU law applies to competition law but not to the free movement law. On the other hand, even though there are there are difference in their application, they are practically aligned for the purpose of shaping EU sports law while establishing and maintaining the internal market[806]. Free movement law is devoted to achieving the internal market without internal frontiers in which the free movement of, persons, services and capital is ensured in accordance with the provisions of the Treaties[807]. Whereas competition law is devoted to ensuring maintenance of effective competition within the internal market[808]. Therefore, both are part of a broader scheme and their similarities out weights their differences[809].

II.VII.I. *David Meca-Medina and Igor Majcen v Commission*

Unlike the European Commission[810], it was not until *Meca- Medina*[811] judgment that the ECJ examined the application of competition law to sport. ECJ has set the scene for the future judgments in the area[812].

II.VII.I.I. Facts and Judgment of the Case

In the case, the applicants were two professional athletes who compete in long-distance swimming[813]. In an anti-doping test carried out during the World Cup the applicants tested positive for Nandrolone[814]. Consequently, FINA's Doping Panel suspended the applicants for a period of four years[815], later reduced to two[816]. Initially, *Meca Medina* appealed to CAS and by an arbitration award dated 23 May 2001, CAS reduced to two years the suspension of the swimmers. The applicants did not appeal against that award to the Swiss Federal Court but filed a complaint with the Commission, alleging a breach of then Article 81 EC and/or Article 82 EC, now Article 101 and 102 TFEU. After analysing the particular anti-doping rules

[806] *Ibid* p 105.
[807] Article 26 TFEU.
[808] Article s101 and 102 TFEU.
[809] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 105.
[810] COMP 37.806. ENIC/UEFA, IP/02/942, 27 June 2002.
[811] Case C- 519/04 *Meca-Medina v Commission of the European Communities* [2006] E.C.R.I-6991.
[812] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 99.
[813] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 at para 3.
[814] *Ibid* at para 3.
[815] *Ibid* at para 3.
[816] *Ibid* at para 3.

according to the assessment criteria of competition law, the Commission, concluded that those rules did not form a prohibition under the then Articles 81 EC and 82 EC, now Article 101 and 102 TFEU, since they were solely inherent in the objectives of safeguarding the integrity of competitive sport and athletes' health and rejected the applicants' complaint[817]. The applicants appealed the Commission decision to the Court of First Instance. After analysing the previous case law of the ECJ, the Court of First Instance held that the prohibitions laid down by Articles 39 EC and 49 EC apply to the rules adopted in the field of sport if they constitute an economic activity. On the other hand, the Court of First Instance held that those prohibitions do not affect purely sporting rules which have nothing to do with economic activity[818]. Therefore, the Court reasoned that purely sporting rules have nothing to do with the economic relationships of competition. The Court ruled that the anti-doping rules at issue, which have no discriminatory aim, are intimately linked to sport, and does not constitute an economic activity. Consequently, the rules to combat doping do not fall within the scope of Articles 81EC and 82 EC[819]. The Court of First Instance dismissed the action applicants.

Meca Medina filed another appeal to ask the European Court of Justice to set aside the judgment of the Court of First Instance. The ECJ first of all visited the objectives of the EU law and reaffirmed that sport is subject to EU law in so far as it constitutes an economic activity; that where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of EU law[820]; that EU provisions on freedom of movement for persons and freedom to provide services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment[821]. More importantly, the Court established that the mere fact that a rule is purely sporting in nature does not provide an immunity from the application

[817] *Ibid* at para 20.
[818] *Ibid* at para 7.
[819] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 at para 8 - 10.
[820] *Ibid* at para 23.
[821] *Ibid* at para 24.

of general EU law. The Court established that the sporting rules under scrutiny must satisfy the requirements of fundamental freedom of movement provisions as well as competition law provisions[822]. Consequently, even though certain rules do not constitute restrictions on freedom of movement based on the fact that they concern questions of purely sporting interest and have nothing to do with economic activity, they do not have an immunity from the application of competition law provisions[823].

After applying competition law provisions to sporting rules, it is established that the anti-doping rules which have a legitimate objective do not necessarily constitute a restriction on competition and should not be regarded as incompatible with the common market objectives. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes[824]. On the other hand, it must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable, are capable of producing adverse effects on competition by unwarranted exclusion of athletes from sporting events[825]. Consequently, the restrictions imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport[826]. Under the case, the threshold did not appear to go beyond what is necessary to ensure that sporting events take place and function properly[827].

II.VII.I.II. Significance

In this landmark decision, the Court ruled that

> […] 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 *Donà*), 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[828].

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[822] *Ibid* at para 28.
[823] *Ibid* at para 31.
[824] *Ibid* at para 45.
[825] Case C-519/04 David Meca-Medina and Igor Majcen v Commission [2006] ECR I-6991 at para 46.
[826] *Ibid* at para 47.
[827] *Ibid* at para 54.
[828] *Ibid* at para 31.

In this decision, the ECJ not only scrutinized sport under the EU competition law but also rebutted the presumption of the sporting exception established in *Walrave*, and ruled that even if a rule does not constitute a restriction on the freedom of movement because it concern questions of purely sporting interest and, has nothing to do with economic activity, it does not mean that the sporting activity in question necessarily falls outside or within the scope of EU competition law[829]. There is a possibility that a purely sporting rule might have an economic aspect in its purpose and effect. Consequently, each sporting rule should be analysed on a case-by-case approach to establish whether it is compatible with competition law provisions to ensure cross border trade between Member States in the internal market is not affected[830].

Meca Medina established the legal framework of interpretation of the EU competition law provisions to the organisational features of the European model of sport. The case matters greatly because the ECJ firmly established that sporting rules have an economic effect, and they fall under the scope of the EU law. However, they are not declared incompatible if they have a real effect on securing sport's effective organisation[831]. Sporting rules with direct or indirect economic effects on the internal market should be assessed under the EU competition law provisions to discover whether they can be justified and proportionate under the market access analysis[832]. The Court ruled that

> […] even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes[833].

[829] *Ibid* at para 31.
[830] *Ibid* at para 32, 33.
[831] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 110.
[832] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 110.
[833] Case C- 519/04 *Meca-Medina v Commission of the European Communities* [2006] E.C.R.I-6991 para 45.

The sporting rule with an economic effect will not form a restriction on condition that the consequential effects restrictive of competition are inherent in the pursuit of the legitimate objectives and are proportionate to them[834]. A restrictive sporting rule might not necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 101 TFEU, if they are justified by a legitimate objective. Such a limitation would be inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes[835]. At this point, EU law provided a room, a conditional autonomy, to the sporting authorities to demonstrate why and how sporting rules are necessary for the proper functioning of sport[836]. With a deeper look, the Court indicated that a restrictive sporting rule would not be declared incompatible under the organisational structures of the EU if it facilitates competition within the sport sector operating under the internal market. Such a sporting rule would not impede cross border trade between the Member States but indirectly contribute towards the further integration and proper functioning of the internal market while protecting integrity of sport and ensuring conduct of sport. The specificity of sport is acknowledged to understand different circumstances of competition in sport and to help maintain it.

Meca Medina demonstrated that the EU has a gigantic impact on the organisation of sport during the application of competition law provisions to it. The main aim and objective of the EU to ensure further integration and proper functioning of the internal market surfaced and competition law provisions provided the tool for it to regulate sport. The case showed that the autonomy of sport under the EU law depends on the condition to demonstrate sufficient reason for the existing pattern of sport governance to the ECJ[837]. The shape of EU sports law is developed during the interpretation of competition law provisions of the Treaty under the case. Moreover, the preference of the ECJ for a case-by-case examination of sporting rules under the

[834] Case C- 519/04 *Meca-Medina v Commission of the European Communities* [2006] E.C.R.I-6991 para 42.
[835] *Ibid* at para 45.
[836] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 146.
[837] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 110.

competition law provisions instead of the purely sporting rule notion deserves an attention. In the future for the interpretation of the free movement provisions the ECJ might prefer to adopt the same approach to achieve a consistent application of the EU law to sport[838].

II.VII.I.III. After the *Meca Medina* Judgment

The *Meca Medina* judgment is one of the most important sport related cases together with *Bosman* and *Walrave* since they formed the boundaries of EU sports law. The case has effectively eliminated the *Walrave* judgment's purely sporting interest rule[839]. In addition, the case has demonstrated the approach of the EU to sport. This is a reflection visualised on a case-by-case analysis while requiring compliance with the EU law and paying attention to the competitive sport. However, the case has not provided a legal framework formulating the EU's approach to sport and created uncertainty[840]. This has raised the concerns of SGBs[841]. Prior to *Meca-Medina*, the application of EU law in the sporting activities had a distinction between the purely sporting rules, which are required for the proper functioning of the sporting activity, and the economic activities emerging as a result of sporting practice. The European Commission in its *Meca-Medina* made a finding that the disputed sporting rule was inherent in the objectives of safeguarding the integrity of competitive sport and athletes' health[842]. On the other hand, the CFI preferred the purely sporting rule approach and held that the disputed sporting rule was a purely sporting rule and has nothing to do with economic activity. CFI wrongfully ruled that competition law provisions did not apply to the purely sporting rules[843]. The ECJ in *Meca-Medina* rebutted this view and expressed that a rule which is of purely sporting interest will not be exempted from the application of the EU law[844]. The sporting rule of purely sporting interest which is found

[838] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 123.
[839] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 59.
[840] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final at [4.1]; R Parrish and S Miettinen, *The Sporting Exception in European Union Law* (TMC Asser Press, 2008) p 44.
[841] Infantino, Director of Legal Affairs at UEFA 2006 and Zylberstein 2007.
[842] Case C- 519/04 *Meca-Medina v Commission of the European Communities* [2006] E.C.R.I-6991 para 40.
[843] K Lefever, 'New Media and Sport' (eds), *Specificity of Sport: The Important Role of Sport in Society*, ASSER International Sports Law Series, (T.C.M. Asser Press, 2012) p 33.
[844] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 at para [27].

compatible with the free movement provisions would not be automatically exempted from the application of competition law[845]. Therefore, a case-by-case application of the provisions is necessary under the proportionality test to discover if the requirements of the competition provisions are met since every case is different[846].

While the uncertainty of the case-by-case approach to deal with compatibility of a sporting rule has been criticised as unsatisfactory by the European Parliament[847], it is considered necessary by the Commission and required by the Court in *Meca-Medina*. The judgment inflamed both the long-standing serious concerns of the sporting authorities on the autonomy of sport due to the EU institution's interference and practical difficulties of uncertainty and unpredictability aroused as a result of case-by-case applied proportionality test[848]. The judgment has overturned the presumption of sporting autonomy for the purely sporting rules while causing practical difficulties[849]. The specificity of a purely sporting rule would not provide a protection to it from the application of the EU competition law. Therefore, specificity of sport would not fall outside the coverage of the EU and each sporting rule would be evaluated under EU law to determine compatibility and standing in sport. The organisational structures of EU law demonstrated that they have significant impact on both the autonomy and the specificity of sport. Consequently, the judgment has attracted serious criticism from the sport governing organisations[850]. Infantino[851], criticised the ECJ for failing to clarify the scope and nature of the specific sporting rules that fall outside the scope of EU law. Moreover, he declared that the Court has taken a major step backwards by applying an open-ended legal test which would create legal challenges to rules and practices in the world of sport. He concluded that *Meca Medina* created considerable difficulty in

[845] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991at para [31].
[846] K Lefever, 'New Media and Sport' (eds), *Specificity of Sport: The Important Role of Sport in Society*, ASSER International Sports Law Series, (T.C.M. Asser Press, 2012), p 33.
[847] European Parliament (INI/2007/2261), 'Parliament Resolution of 8 May 2008 on the White Paper on Sport' [2007] at [F.4].
[848] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 146.
[849] *Ibid*.
[850] Infantino, Director of Legal Affairs at UEFA 2006 and Zylberstein 2007.
[851] Director of Legal Affairs at UEFA in 2006.

identifying specific sporting rules which will not be challenged under EU law[852].

Soon after, the European Parliament called on the European Commission to provide more legal certainty by creating clear guidelines on the applicability of the EU law to sport in Europe and by implementing a range of other administrative initiatives[853]. The implication of *Meca Medina* is initially felt in the Arnaut Report published in 2006[854]. The report was published nearly two months after the ECJ judgment in *Meca Medina* which overruled the CFI decision. However, the report underestimated the impact of the *Meca Medina* by referring to the CFI finding only. Nevertheless, the report emphasized the significance of the case by stressing that before *Meca Medina*, Courts undertook more individual assessment and considered whether a rule in question had an economic character to bring it within the scope of EU law[855]. However, in *Meca Medina*, the Court directly examined whether the anti-doping rules under scrutiny were based on purely sporting considerations and held that such rules were subject to the EU law if they did not remain limited to their proper scope or objective and if they impeded cross border trade between the Member States within the internal market[856]. However, the Report failed to reflect the ECJ's judgment in favour of conditional sporting autonomy on demonstrating compliance with EU law and supported the status quo in sport and centred its analysis on the Court of First Instance's judgment which was set aside before the publication of the Report[857]. Therefore, the Report was possibly a motivated propaganda to promote the ambitions of sporting federations to ease the involvement of the European institutions with sporting activity[858].

The European Commission's White Paper published in July 2007, ignored the Arnaut Report, and placed a heavy reliance on the ECJ judgment of *Meca-Medina* and identified the case as a landmark decision. The Commission placed heavy

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[852] INF, 02.10.2006 *Meca Medina; a step backwards for the European Sports Model and the Specificity of Sport?* P 2
[853] *Ibid.*
[854] José Luis Arnout, 'The Independent European Sport Review', (2006) <http://eose.org/wp-content/uploads/2014/03/independant_european_sports_review1.pdf> accessed on 06 March 2018 at para 6.30 p 106.
[855] *Ibid.*
[856] *Ibid.*
[857] S Weatherill*, Principles and Practice in EU Sports law* (OUP 2017) p 120.
[858] *Ibid* at 121.

reliance on the ECJ's reasoning in *Meca Medina*[859] and adopted the case as the focal point of the legal analysis in the White Paper[860]. The paper acknowledged the ECJ judgment and re-affirmed by confirming that compatibility of a certain sporting rule with the EU competition law could only be decided after a case by case analysis[861]. Conditional autonomy is provided to sporting rules and practices under the organisational structures of the EU. This judgment invalidated the presumption of specificity of purely sporting rules providing immunity from the application of the EU law[862]. The judgment inflamed the disputes[863] and the White Paper on Sport paved the sport competence's way into the Lisbon Treaty. The sport competence adopted under Article 165 TFEU provided the legal grounds for the organisations of the union which has modestly transformed the shape of the European sports law and legalised the interventions of the EU in the decisions of the sporting authorities[864].

II.VIII. *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*

The next decision of the ECJ in sport was *MOTOE*[865]. The case received a great interest given its proximity to the landmark judgment of *Meca Medina*[866].

II.VIII.I. Facts and Judgment of the Case

In the case, a reference for a preliminary ruling was made by the Greek Court. MOTOE was a non-profit-making body which organised motorcycling competitions in Greece. ELPA requested MOTOE, first, to communicate to it specific rules for each of the planned events two months before the date upon which it would take place and second, it asked the clubs organising the events to lodge a

[859] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 15.
[860] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 139.
[861] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 15.
[862] *Ibid.*
[863] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 20. A mandate was given by the European Council of June 2007 for the Intergovernmental Conference, which foresaw a Treaty provision on sport.
[864] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 148; S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 140
[865] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] E.C.R. I-04863.
[866] S Weatherill, Leading Cases in Sports Law (Asser Press, 2013) p 146; S Weatherill*, Principles and Practice in EU Sports law* (OUP 2017) p 140.

copy of their statutes with Ethniki Epitropi Agonon Motosykletas. MOTOE completed what was requested and send them to ELPA[867]. In reply to MOTOE's request, the competent ministry communicated to MOTOE that it had not received a document from ELPA with its consent under Article 49 of the Greek Road Traffic Code[868]. Pleading the unlawfulness of that implicit rejection, MOTOE brought an action seeking compensation[869].

In the case, the Court engaged with sport governance which incurred economic effects. The ECJ initially stated that EU competition law refers to the activities of undertakings and more specifically, to undertakings holding a dominant position[870]. Any entity engaged in an economic activity must be categorised as an undertaking[871]. In addition, any activity offering goods or services on a given market is an economic activity and the fact that an activity has connection with sport does not impede the application of the EU competition law[872]. The Court ruled that activities of a legal person consisting not only taking part in administrative decisions but also in organising sport events including sponsorship, advertising and insurance contracts, fall within the scope of the competition law provisions of the EU[873].

II.VIII.II. Significance of the Case

The judgment was given by the Grand Chamber of the European Court of Justice, thereby constituting high level of authority. The system of undistorted competition, as provided under the Treaty, can only be guaranteed if equality of opportunity is secured between various economic operators[874]. The ECJ advocated a power of review of the institutional structures of the EU over sport governance[875]. The main problem in *MOTOE* was the conflict of interest where a SGB used its regulatory power to achieve a commercial advantage at the expense of another sport

[867] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio [2008] E.C.R. I-04863 at para 8.
[868] *Ibid* at para 10.
[869] *Ibid* at para 11.
[870] *Ibid* at para 20.
[871] *Ibid* at para 21.
[872] *Ibid* at para 22.
[873] *Ibid* at para 54.
[874] *Ibid* at para 51.
[875] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 254.

stakeholder lying lower down in the pyramid. While EU law provides a conditional autonomy to the European model of sport, sport can maintain its preferred model of governance, such as having a single federation for a single territory and having a single global authority at the top of the pyramid of governance. However, when challenged, it needs to demonstrate the necessity in having such a model for governance in sport. Therefore, EU does provide a room for the legitimate and distinctive concerns of sport while being a force for reform in sports governance[876]. While Article 165TFEU declares that specificity of sport should be acknowledged, specific nature of sport falls under the competition law provisions of the Treaty. *MOTOE* required an adaptation of the disputed sporting rule in the case. However, it did not invalidate the long-standing model of sport governance. A close examination of each aspect of the system is specifically necessary rather than a generalised assessment of compatibility of a sporting rule. This is in line with the *Meca Medina* judgment on a case-by-case examination. In *Meca Medina* entire doping control rules were not declared incompatible with the EU law but were found excessive. Similarly, in *Bosman,* transfer rules were not treated as incompatible but the system which victimised Bosman was condemned[877]. *MOTOE* demonstrated that if SGBs enjoy a dual role and undertake commercial activity as well as a regulatory activity they will be regulated by the internal market rules of the EU without exception. As Weatherill suggests, surrendering commercial activity is the best way for the SGBs to enjoy autonomy of sport[878].

Therefore, interpreting the case, any entity undertaking economic activity within the internal market, irrespective of its nature, is subject to the application of EU law to have a standing within the organisational structures of the EU. The specificity of sport, including those rules which could be identified as purely sporting rules, due to the possibility of having an economic effect, will not be protected from the application of the EU competition law. Therefore, sport, irrespective of its specificity, does not enjoy different treatment from the application of EU law from

[876] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 254.
[877] *Ibid* at 257.
[878] *Ibid.*

which other market sectors enjoy. The specificity of sport does not grant sport autonomy if it has an economic effect impeding cross border activity of the Member States within the internal market. Therefore, the autonomy of sport governance is conditional on compliance with the application of the EU law. Whereas sport governance with no economic effect on the cross-border trade will not relate with the internal market regulations.

To conclude, the case demonstrated that the EU had an important impact on the organisation of sport during the application of competition law provisions to it. The main aim and objective of the EU is to ensure further integration and proper functioning of the internal market surfaced and competition law provisions provided the tool for it to regulate sport. To ensure competition within the internal market, access of Member States to cross border trade must not be affected. Thus, the case re-affirmed that sport enjoys conditional autonomy under the organisational structures of the EU. On the other hand, the specificity of sport was not expressly acknowledged in the judgment as a factor of determination under the application of EU competition law provisions to sport.

II.IX. Case Law after the adoption of Article 165 TFEU

One of the most significant cases decided after the adoption of Article 165 TFEU is *Bernard*[879].

II.IX.I. *Olympic Lyonnais SASP v Bernard*

II.IX.I.I. Facts and Judgment of the Case

In *Bernard*, reference was made during proceedings brought by Olympic Lyonnais SASP against Bernard who was a professional football player, and Newcastle United FC which was a club incorporated under English law. The case concerned the payment of damages for unilateral breach of his obligations under Article 23 of the Charte du football professionnel. Olivier Bernard signed a 'joueur espoir' contract with Olympic Lyonnais for three seasons[880]. Before that contract was due to expire, Olympic Lyonnais offered him a professional contract for one year[881].

[879] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC* [2010] E.C.R. I-2196.
[880] *Ibid* at para 7.
[881] Case C-325/08 Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC [2010] E.C.R. I-2196 at para 8.

Bernard refused to sign that contract and signed a professional contract with Newcastle United FC[882]. On learning of that contract, Olympic Lyonnais sued Bernard before the Conseil de prud'hommes (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and Newcastle United FC[883]. The Conseil de prud'hommes in Lyon ordered him and Newcastle United FC jointly to pay Olympic Lyonnais damages[884]. The Cour d'appel, Lyon, quashed that judgment[885].

The ECJ found that national provisions precluding or deterring a national of a Member State from leaving his country of origin to exercise his right to freedom of movement constitutes a restriction on that freedom even if they apply without regard to the nationality of the workers concerned[886]. Rules such as those requiring an individual to sign a professional contract with the club which trained him to not to be sued for damages at the end of training period are likely to discourage players from exercising their right of free movement[887]. Consequently, those rules form a restriction on freedom of movement for workers and they are incompatible with the EU law[888]. It is re-affirmed that whether there are any justifications to the restriction established can only be accepted if it pursues a legitimate aim compatible with the Treaty and is justified in the public interest. Furthermore, the measure should not go beyond what is necessary to achieve that purpose[889]. In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken to the specific characteristics of sport in general, and football in particular, and of their social and educational function[890]. Here, the Court cited the new sport competence and stated that the relevance of those factors is also corroborated by their being mentioned in the second

[882] *Ibid* at para 9.
[883] *Ibid* at para 10.
[884] *Ibid* at para 11.
[885] *Ibid* at para 12.
[886] *Ibid* at para 34.
[887] *Ibid* at para 35.
[888] *Ibid* at para 37.
[889] *Ibid* at para 38.
[890] *Ibid* at para 40.

subparagraph of Article 165(1) TFEU[891]. The scheme providing for the payment of compensation for training is in principle identified as justifiable by the objective of encouraging the recruitment and training of young players. However, such a scheme must be capable of attaining that objective and be proportionate[892]. Yet in the case, damages were not calculated in relation to the training costs but were calculated in relation to the total loss suffered by the club[893]. Consequently, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players[894].

II.IX.I.II. Significance

Bernard is the first case decided after the adoption of the Article 165 TFEU. The case analysis provided the standard of application of the proportionality principle in the sport sector and this provides guidance to the future cases filed to the ECJ[895]. When considering the standing of a sporting rule under the free movement principles, account must be taken to the specific characteristics of sport and its social and educational function. The social importance of sport played an important role in legitimising the objective of the sporting rule which would not be considered as legitimate in other employment sectors apart from sport[896]. Even though the rule formed a restriction on the freedom of movement of workers, considering the specific nature of traineeship and the importance to promote football clubs to continue seeking new talent and training, the Court ruled that football clubs should reasonably be compensated for the training fees if trainee players end up signing their first professional contract with a club from another EU country. The rule is justified under the need to encourage investment in young players[897].

The application of the proportionality test in this judgment deserves serious

[891] Case C-325/08 Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC [2010] E.C.R. I-2196 at para 40.
[892] *Ibid* at para 45.
[893] *Ibid* at para 47.
[894] *Ibid* at para 48.
[895]K Pijetlovic, 'Another Classic of EU Sports Jurisprudence: Legal Implications of Olympique Lyonnais v Oliver Bernard and Newcastle UFC (C-325/2008)' (2010) European Law Review 857 p 860.
[896] *Ibid* p 861.
[897] S Kesenne, 'Youth Development and Training After the Bosman Verdict (1995) and the Bernard Case (2010) of the ECJ' (2011) European sport Management Quarterly, Vol.11, No.5, 547 p 550.

attention. The Court accepted the social and educational function of sport and referred to sport as area which requires specific feature to be considered during the scrutiny of possible justifications[898]. On the other hand, unlike under competition law related sport cases, it is obvious that the ECJ has not departed from applying free movement provisions on case-by-case basis and expressly referring to the specificity of sport during this application. Therefore, it can be concluded that the approach of the organisational structures of EU towards sport and granting it a conditional autonomy only has not lost its standing and remained unaffected after the implementation of Article 165 TFEU[899].

To conclude, the case demonstrated that the EU had a considerable impact on the organisation of sport by regulating freedom of movement to provide services between the Member States. Sporting rules did not enjoy a general exception under the EU law and each sporting rule must be tested under the market access analysis. Thus, the case re-affirmed that sport enjoys conditional autonomy under the organisational structures of the EU. On the other hand, the specificity of sport was not affected.

II.X. *Football Association Premier League Ltd and others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd*

After the adoption of the sport competence under Article 165 TFEU, the case-by-case inquiry adopted by the ECJ under *Meca Medina* did not change[900]. Article 165 TFEU states that while deciding on a sport related case, sports special character should be considered. This guidance has been re-adopted by the ECJ again under the application of freedom of movement provisions in *Murphy* after *Bernard*.

II.X.I. Facts and Judgment of the Case

In *Murphy*[901], a reference to receive a preliminary ruling was made to the ECJ. The

[898] K Pijetlovic, 'Another Classic of EU Sports Jurisprudence: Legal Implications of Olympique Lyonnais v Oliver Bernard and Newcastle UFC (C-325/2008)' (2010) European Law Review 857 p 861.
[899] S Weatherill, *Leading Cases in Sports Law* (Asser Press, 2013) p 149.
[900] *Ibid.*
[901] Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Case C-429/08 Karen Murphy v Media Protection Services Ltd* [2011] E.C.R. I-09083.

reference was concerning the marketing and use in the United Kingdom of decoding devices which give access to the satellite broadcasting services of a broadcaster, are manufactured and marketed with that broadcaster's authorization, but are used, in disregard of its will, outside the geographical area for which they have been issued ('foreign decoding devices').

In the case, the ECJ stated that based on the previous case law, where a national measure relates to both the free movement of goods and the freedom to provide services, the Court will in principle examine it in the light of one only of those two fundamental freedoms. Therefore, the Court found that it is appropriate to examine that activity in the light of the freedom to provide services alone[902]. The Court sought to discover whether the particular provision forms a restriction on the freedom to provide services and if it does could it be justified[903]. The Court found that the legislation concerned constitutes a restriction on the freedom to provide services under the EU law unless it is objectively justified[904]. The Court referred to the Article 165(1) TFEU and stated that the EU shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function[905]. The Court held that even if the objective of encouraging attendance of public to stadiums could justify a restriction on the fundamental freedoms, the means taken were not proportionate to meet the aim[906]. Therefore, the Court ruled that the restriction on freedom to provide services which consists in the prohibition on using foreign decoding devices cannot be justified by the objective of encouraging the public to attend football stadiums[907].

For the first time, even though incompatibility was established under free movement provisions, the Court moved on to assess the compatibility of the same rule under competition law provisions. The Court reaffirmed that an agreement falls within the

[902] *Ibid* at para 80.
[903] *Ibid* at para 83.
[904] *Ibid* at para 89.
[905] *Ibid* at para 101.
[906] *Ibid* at para 123.
[907] *Ibid* at para 124.

prohibition laid down in Article 101(1) TFEU when it has as its object or effect the prevention, restriction, or distortion of competition within the internal market. In order to assess whether the object of an agreement is anti-competitive, the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part needed to be analysed[908]. Under this analysis, neither Article 165 TFEU nor specificity of sport was expressed by the ECJ. Instead, market restriction analysis was undertaken. After the analysis, the Court ruled that clauses of exclusive licence agreements had an anti-competitive object, and they constituted a restriction on competition under Article 101(1) TFEU[909].

II.X.II. Significance

It is the first case under the competition law provisions to be decided after the adoption of Article 165 TFEU. The ECJ analysed the case through the obstacle to trade, objective justification and proportionality under the competition law provisions while there was a possibility of analysis under the freedom of movement provisions. Even though the ECJ did not reference *Meca-Medina,* the case demonstrated that *Meca-Medina* guidance prevails as an authoritative judgment as how and why EU law applies to sporting practices. For the first time the ECJ analysed a case regarding sport under both freedom of movement and competition law principles. In the case, Advocate General Kokott referred to Article 165 TFEU and emphasized that while EU law respects the specificity of sport, sport does not fall outside the scope of the EU law[910]. This has reaffirmed standing of the organisation of the EU on the autonomy of sport that it is conditional on compliance with EU law and the specificity of sport does not provide a shield to sport from the application of the EU law. The approach taken under *Meca Medina* towards the organisation of sport and the legal framework of the EU on how and why it applies to sport did not change after the adoption of the Article 165 TFEU[911]. The case clarified that the effect of Article 165 TFEU on acknowledging the specificity of

[908] Case C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Case C-429/08 Karen Murphy v Media Protection Services Ltd* [2011] E.C.R. I-09083 at para 136.
[909] *Ibid* at para 144.
[910] *Ibid* at para 165.
[911] S Weatherill, *Leading Cases in Sports Law* (Asser Press, 2013) p 150.

sport played a minor role and could not provide a shield to sport from the application of the EU law. Initially, while the Court analysed compliance of the rule under the free movement provisions it expressly referred to Article 165 TFEU and the specificity of sport. However, while the Court analysed compliance of the rule under the competition law provisions no consideration was made to the specificity of sport. Instead, the functioning of the internal market and ensuring cross border trade between the Member States is not affected played a vital role. The ECJ aimed to protect market access. Therefore, the difference of application by the ECJ to sport under the free movement and competition law provisions regarding the specificity of sport has not been altered. The effects of this judgment are likely to be felt not only under the broadcasting of sporting events but also under other sectors[912].

To conclude, the case demonstrated that the EU had a considerable impact on the organisation of sport. Sporting rules did not enjoy a general exception under the EU law and each sporting rule must be tested under the market access analysis. While the specificity of sport was considered under the freedom of movement provisions, it did not influence the application of the competition law provisions. Thus, the case re-affirmed that sport enjoys conditional autonomy under the organisational structures of the EU. The EU would not tolerate sport to impede cross border trade between the Member States within the internal market.

II.XI. *Sky Österreich GmbH v. Österreichischer Rundfunk*

In *Sky Osterrich*, the ECJ considered the compliance of an EU Member State with an EU regulation concerning the audio-visual media services.

II.XI.I. Facts and Judgment of the Case

In *Sky Osterrich*[913], a request for a preliminary ruling on the validity of Article 15(6) of Directive 2010/13/EU on the coordination of certain provisions in Member States concerning the provision of audio-visual media services was made by the Austrian

[912] M Hayland, *The football association premier league* (2010) p 10.
[913] Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI identifier: ECLI:EU:C:2013:28.

Court[914]. The Court ruled that, the article is perfectly valid, and the EU is lawfully entitled to impose limitations on the freedom to conduct a business. The disadvantages resulting from that provision are not disproportionate in the light of the aims which it pursues and are such as to ensure a fair balance between the various rights and fundamental freedoms at issue in the case[915].

II.XI.II. Significance

Although the domestic Court case had relevance to sport channels, compliance of a sporting rule under EU law was not analysed by the ECJ. Therefore, the contribution of the case towards the impact of EU law on the specificity or autonomy of sport cannot be interpreted.

II.XII. *UEFA v European Commission*

II.XII.I. Facts and Judgment of the Case

In the case, by appeal, UEFA requested the ECJ to set aside the judgment of the General Court of the European Union in Case T-55/08 *UEFA v Commission* [2011] ECR II-271 by which the General Court dismissed its application for annulment in part of Commission Decision 2007/730/EC of 16 October 2007 on the compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities[916].

The Court stated that EU law authorises the Member States to designate certain events which they consider to be of major importance to the society in a Member State and expressly authorises obstacles to the freedom to provide services, the freedom of establishment, the freedom of competition and the right to property, which are an unavoidable consequence of such a designation[917]. Pursuing such an objective has been recognised as legitimate even though the marketing on an

[914] Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk at para 2.
[915] *Ibid* at para 67.
[916] Case C-201/11 P *Union des associations européennes de football (UEFA) v European Commission*.
[917] Case C-201/11 P Union des associations européennes de football (UEFA) v European Commission at para 10.

exclusive basis of events of high interest to the public is liable to restrict considerably the access of the general public to information relating to those events. However, the Court emphasised that in a democratic and pluralistic society, the right to receive information is of importance[918]. Pursuant to Article 3a (2) of Directive 89/552, it is for the Member States alone to determine the events which are of major importance and they have a broad discretion in that respect[919]. Instead of harmonising the list of such events, the EU Directive is based on the premise that considerable social and cultural differences exist within the European Union in so far as it concerns their importance to the public. Consequently, the Court ruled that the EU Directive allows each Member State to draw up a list of designated events 'which it considers to be of major importance' to the society in that State[920]. On the other hand, the Commission has the power to examine the legality of national measures designating events of major importance, which would enable it to reject any measures which are incompatible with the European Union law[921]. The ECJ dismissed the appeal and order the UEFA to pay the costs[922].

II.XII.II. Significance

The case was analysed under the EU competition law. Competition law provisions were opted to apply to broadcasting rights related to sport cases. This is no surprise considering that broadcasting has been the major element in converting sport into an important economic activity within the Europe[923]. The advancement and privatization of the broadcasting industry sector played an important role in the development of EU sports law. The case demonstrated that market access analysis is applied to sporting rules while discovering compatibility with the competition law provisions. Agreements between a broadcasting company and a SGB should comply with the competition law provisions of the EU law. Therefore, it has been reaffirmed that sport enjoys conditional autonomy under the organisational

[918] *Ibid* at para 11.
[919] *Ibid* at para 12.
[920] *Ibid* at para 13.
[921] *Ibid* at para 16.
[922] *Ibid* at para 117.
[923] S Stewart, 'The Development of Sports Law in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights' (2009) Vol.16 Sports Lawyers Journal 183 p 202.

structure of EU. No express reference was made to the specificity of sport. However, allowing each Member State to list events of major importance to society underlines the specificity of sport. The ECJ allowed a broad discretion to Member States to choose what to place on their list and respected considerable social and cultural differences which existed in the EU[924]. It can also be assumed that the EU did not prefer to harmonise the practice. Even so, it could be concluded that both the freedom of movement provisions and competition law provisions of the EU law have a considerable effect on the autonomy of sport. They both limit the autonomy of sport to conditional autonomy. Whereas specificity of sport is only recognised under the application of the freedom of movement provisions of the EU.

II.XIII *TopFit v Deutscher Leichtathletikverband*

II.XIII.I. Facts and Judgment of the Case

In the case, request for a preliminary ruling was made for the interpretation of Articles 18, 21 and 165 TFEU on the conditions governing participation in the national amateur sports championships of another Member State in the senior category[925]. Biffi was an Italian national who lived in Germany for 15 years and was a member of TopFit sports association established in Berlin. Deutscher Leichtathletikverband (DLV) was an umbrella association at federal state which organised national athletics championships consisting of rules prohibiting other Member States nationals from participating in national championships[926]. Biffi's participation in the finals was rejected and he filed legal action. The referring Court was uncertain whether nationality requirement constitutes unlawful discrimination contrary to the EU law.

The ECJ held that Articles 18, 21 and 165 TFEU prohibits rules of a national sports association precluding an EU citizen who resided for many years in another Member State to participate in the national championships in the same way as nationals unless it

[924] S Weatherill, *Principles and Practice in EU Sports law* (OUP 2017) p 351.
[925] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497.
[926] *Ibid* at para 9, 10.

has a legitimate aim which can be objectively justified, and it is proportionate[927]. The Court ruled that

> Articles 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only 'outside classification' or 'without classification', without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify[928].

The ECJ firstly referred to the previous case law and established that rules of the national sports association which govern the access of EU citizens to sports competitions, are subject to the EU law under Articles 18 and 21 TFEU[929]. Biffi was treated differently from nationals and this difference of treatment restricted his freedom of movement as an EU citizen[930]. Such a restriction on the freedom of movement of EU citizens can be justified only where it is based on objective justification and is proportionate to the legitimate aim pursued[931]. The free movement of persons and services do not preclude rules or practices justified on grounds of certain sports matches between national teams from different countries. However, such a restriction must remain limited to its proper objective and cannot be relied upon as a general exemption[932]. Referring to *Meca-Medina*, the ECJ re-affirmed that purely sporting rules

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[927] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* at para 67, 68.
[928] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* at para 68.
[929] *Ibid* at para 40. These cases were cited: *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 17; of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 82; of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 98; and of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 30.
[930] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 at para 44.
[931] *Ibid* at para 48. To that effect, judgment of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 31).
[932] *Ibid* at para 49. To that effect, see judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 76 and 127.

are not exempted from the application of EU law, but specific justifications needed to be examined[933]. Neither of the two justifications put forward by the DLV were founded on objective justification and the ECJ held that it is up to the referring Court to verify whether there are other justifications[934].

II.XIII.II. Significance

The case has been analysed under the non-discrimination and citizenship provisions of the EU to discover whether EU citizens could participate under national championships. Previously in *Walrave*, the ECJ analysed the issues of nationality discrimination in sport under the application of the free movement provisions to ensure that certain sporting practices do not interfere with the operation of internal market. However, under the *TopFit* case, freedom of movement rights was practiced by Biffi without a restriction since they were not dependant on economic activity being carried out. Instead, the case was based on the prohibition on the non-discrimination of nationality emerging from the EU citizenship rights. These rights were triggered under sport for the first time where other more specific rights, such as free movement rights, were not relevant[935].

Since the Lisbon Treaty, the EU law explicitly refers to sport in Article 165 TFEU. Therefore, the right of an EU citizen to reside in another Member State without discrimination under Articles 18, 20 and 21 TFEU does not dependent on the exercise of an economic activity[936]. In the sporting context, this could be interpreted as non-economic sporting activity, such as amateur level sports with zero economic benefits derived from it, falls under the scope of EU law and Article 21 TFEU may be invoked by EU citizens against the private associations which are more often than not ruling sports at a local, regional and national level in the Member States. Therefore, economic, and non-economic sports activity from now on will be subjected to the control of EU

[933] *Ibid* at para 53, 55.
[934] *Ibid* at para 58, 59.
[935] T Terraz, 'ISLJ International Sports Law Conference 2019 - Conference Report' (Asser International Sports Law Blog, 26/04/2019) <https://www.asser.nl/SportsLaw/Blog/post/can-european-citizens-participate-in-national-championships-an-analysis-of-ag-tanchev-s-opinion-in-topfit-e-v-daniele-biffi-v-deutscher-leichtathletikverband-e-v-by-thomas-terraz> accessed on 11 March 2020.
[936] Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 at para 19.

law under the discrimination provisions of the Treaty[937]. This issue was discussed by the AG Mr Tanchev in his opinion. He has made a finding that should ECJ choose to expand its case-law on Article 21 TFEU and the component elements of European citizenship to the horizontal context of a dispute between private parties than non-State actors would be obliged to comply with them[938].

The case demonstrated that during the compatibility analysis of the sporting rules with the EU citizenship provisions, the objective of the gradual integration of the EU citizens played a vital role. Therefore, market access analysis adopted under *Meca Medina* was applied. The autonomy of the market restrictive sporting rule is on condition of the objective justification and the proportionality. Once again, conditional autonomy of sport under the organisational structures of the EU is confirmed. On the other hand, even though specificity of sport was not expressed separately in the judgment, the Court outlined Article 165 TFEU initially during its analysis. The case established that the EU citizenship is there to promote integration of the internal market and sporting rules should comply with it. To conclude, the case created the possibility of horizontal application of the discrimination provisions to sport. This demonstrated that EU had a considerable impact on the organisation of sport. The EU would not tolerate sport to impede cross border trade between the Member States within the internal market.

III. Chapter Evaluation

To date, EU sports law which discovers the approach of the organisational structures of the EU to sport is shaped under four turning points[939]. Three of these have been established under the judgments of the ECJ, in the *Walrave*, *Bosman* and *Meca Medina*. The fourth one is Article 165 TFEU which has introduced a legal competence for sport for the first time under the EU law and legitimise the EU institutions' involvement in sport. The contribution of Article 165 TFEU will be

[937] T Terraz, 'A New Chapter for EU Sports Law and European Citizenship Rights? The TopFit Decision' (Asser International Sports Law Blog, 29/06/2019) https://www.asser.nl/SportsLaw/Blog/post/a-new-chapter-for-eu-sports-law-and-european-citizenship-rights-the-topfit-decision-by-thomas-terraz accessed on 29 June 2020.
[938] Opinion of Mr Tanchev — Case C-22/18 *TopFit v Deutscher Leichtathletikverband* at para 56.
[939] S Weatherill, Principles and Practice in EU Sports law (OUP 2017).

discussed under Chapter VI. However, the role of the ECJ judgments in establishing and developing EU sports law as well as shaping the significance and autonomy of sport is analysed under this chapter. In *Walrave*[940], the Court established that sport is subject to EU law if it constitutes an economic activity[941]. 20 years later the ECJ in *Bosman*[942] established that sporting rules in general do not have absolute or unconditional autonomy but only conditional autonomy under the EU law[943]. The autonomy of sporting rules and the specificity of sport was declared conditional on compliance with the fundamental free movement provisions of EU law. However, the EU law was not insensitive to sport and provided a room for purely sporting rules to prove its case for special treatment under the specificity of sport[944]. Prior to the *Meca-Medina* judgment, the Court was reluctant to analyse sporting practices under the competition law provisions. In *Meca Medina* the Court did not follow the route to pursue the fictional concept of purely sporting rules but found an intellectually more credible basis to express special character of sport under the application of the EU law[945]. The case formed a rejection of the purely sporting rule perception and appreciated that a purely sporting rule should be tested against the demands of EU law where it has economic effects on the internal market[946]. Sport enjoyed no difference of application under the EU law, but it did have a room to show specificity and necessity.

Recent judgments of the ECJ demonstrate slight difference in impact of organisational structures of the EU between the specificity of sport and on the autonomy of sport. Under the application of the free movement provisions, it is established that specificity of sport is acknowledged but it does not provide a general exemption to the sporting rules. The specificity of sport is conditional on compliance with the fundamental free movement provisions of the EU law. On the other hand, the specificity of sport is mainly impliedly recognised under the market

[940] Case 36/74 *Walrave and Koch* [1974] ECR 1405.
[941] *Ibid* at para 8.
[942] Case C-415/*93Union Royale Belge Societes de Football Association v Bosman* [1995] ECR I-4921.
[943] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 85.
[944] *Ibid.*
[945] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 116.
[946] *Ibid.*

access analysis of competition law and citizenship provisions. Either way, if a sporting rule is tested under the application of EU law and declared compatible under the organisational structures of EU it could be interpreted as this compatibility is due to the specificity of sport. Therefore, it could be concluded that the specificity of sport is conditional upon compliance with EU law. Under the EU competition law and citizenship provisions, the fundamental aim is to promote gradual integration and ensure proper functioning of the internal market and no difference of application is granted to sport due to its specificity. Therefore, currently, the specificity of sport is affected under the organisational structures of the EU and could not play any role contributing to the autonomy of sport under the competition law and the citizenship provisions.

The ECJ demonstrated a similar impact of organisational structures of the EU on the autonomy of sport. Both the freedom of movement provisions and the competition law provisions of the EU have a considerable effect on the autonomy of sport. They both limit the autonomy of sport to conditional autonomy. To conclude, currently, sport enjoys autonomy on condition that it complies with EU law. Should there be a variation of analysis in the future is yet to be seen in the upcoming judgments of the ECJ. To have more certainty, there seems to be a need for more judgments in the area.

IV. Chapter Conclusion

This chapter has attempted to establish the ECJ jurisprudence on sport to develop an understanding of the EU's approach towards sport with an intention to prepare the ground of answering the second research question collectively with Chapter V. This chapter demonstrated that ECJ judgments had a gigantic impact on the organisation of sport, especially during the application of competition law provisions to it. The main aim and objective of the EU, which is ensuring further integration and proper functioning of the internal market, demonstrated and competition law provisions provided the tool for the EU to regulate sport. To ensure competition within the internal market, access of Member States to cross border trade must not be affected. Under the organisational structures of the EU, the

European model of sport enjoys a conditional autonomy[947] where each rule needs to be tested under a case-by-case examination to determine compatibility within the EU and its validity. Sporting rules do not enjoy a general exception under EU law and each sporting rule must be tested under the market access analysis. The specificity of sport is expressly or impliedly acknowledged. However, specificity of each sporting rule needs to be evaluated within the organisational structures of EU to determine compatibility and standing. The specificity of sport does not provide an autonomic shield of protection to the sport related rule restricting practice within the internal market. Therefore, it could be concluded that specificity of sport, like autonomy of sport, is conditional upon compliance with the EU internal market provisions.

[947] S Weatherill, Principles and Practice in EU Sports law (OUP 2017) p 116.

CHAPTER V: IMPACT OF EU ON THE GOVERNANCE OF SPORT

I. Introduction; II. Impact of EU on the Organisation of European Model of Sport; II.I. The Impact of EU Commission on the Organisation of European Model of Sport II.II. Assessing the Impact of EU Law on the Governance of the European Model of Sport; II.II.I. Unsanctioned and Rival Events; II.II.I.I. *Formula One (FIA)* Decision; II.II.I.I.I. Facts and Decision of the Application ; II.II.I.I.II. Significance of the Decision; II.II.I.II. *MOTOE* Case; II.II.I.II.I. Facts and Judgment of the Case; II.II.I.II.II. Significance of the Case; II.II.I.III. *ISU* Decision; II.II.I.III.I. Facts of the Application; II.II.I.III.II. Decision of the Application; II.II.I.III.II. Significance of the Decision; II.II.I.IV. Pending FIBA/Euro League Complaint; II.II.I.IV.I. Facts of the Complaint; II.II.I.IV.II. Possible Judgment on the Complaint; II.II.I.IV.III. Possible Significance of the Complaint; II.II.II. Home and Away Rule and Club Location; II.II.II.I. *Mouscron* Decision; II.II.II.I.I. Facts and Decision of the Application ; II.II.II.I.II. Significance of the Decision ; II.II.III. Breakaway Leagues; II.II.III.I. Compliance Analysis of the Breakaway Leagues with the EU; II.II.III.II. Possible Impact of EU on the Breakaway Leagues ; II.II.IV. Club Ownership; II.II.IV.I. *ENIC/UEFA* Decision; II.II.IV.I.I. Facts and Decision of the Application; II.II.IV.I.II. Significance of the Decision; II.II.V. Mandatory Player Release Rules; II.II.V.I. Compliance Analysis of the Mandatory Player Release Rules with the EU; II.II.V.II. *Charleroi/Oulmers* Case; II.II.V.III. Possible Impact of EU on the Mandatory Player Release Rules; II.II.VI. Licensing Requirements; II.II.VI.I. Compliance Analysis of the Licensing Requirements with the EU; II.II.VI.II. Possible Impact of EU on the Club Licensing Rules; II.II.VII. Third Party Ownership; II.II.VII.I. Compliance Analysis and Possible Impact of EU on the Third-Party Ownership; **III. Chapter Evaluation; IV. Chapter Conclusion.**

I. Introduction

Under the previous chapter, the impact of the EU on the specificity and autonomy of sport is established. The objective of this chapter is to establish the impact of the EU

law on the organisation of sport with reference to the European model of sport. This is intended to prepare the ground of answering the second research question of what is the impact of EU law and policy on the governance of the European Model of Sport regarding the specificity and autonomy of sport together with Chapter IV. This chapter analyses the application of EU law to individual sporting rules on unsanctioned and rival events, home and away rule, club location, breakaway leagues, club ownership, mandatory player release rules, licensing requirements, and third party ownership under the organisation of the European model of sport.

II. Impact of EU on the Organisation of European Model of Sport

Many sport governing bodies, such as the IOC, FIFA, and UEFA, are in Switzerland which is not a member of the European Union. Even so, EU law influenced the functioning of sport in Europe[948]. Since the birth of the ancient Olympic Games until the present, Europe has always been a major centre for sports development[949]. Organizational innovations initially developed and implemented in Europe later distributed around the world. This historical leadership of Europe in sports development provided the European Union (EU) with a great opportunity to set the trend in the formulation and articulation of the rules and management system within its territory[950]. The size of the European sports market ensured the EU's leading role in shaping the regulatory basis of sport[951]. With the commercialisation of sport in Europe, the organisational structures of the EU have taken an interest in regulating European sport operating within the EU territory[952]. Currently, any form of sporting activity generating gainful employment or not[953], falls under the coverage of EU[954]. Consequently, the organisational structures of EU have a considerable impact on the autonomy and

[948] Since Case 36/74 *Walrave and Koch* [1974] ECR 1405.
[949] V. Zuev, I. Popova, *The European model of sport: Values, Rules, and Interests*, International Organisations Research Journal, Vol. 13. No 1 (2018), p. 52.
[950] *Ibid*.
[951] *Ibid*.
[952] See ECJ judgments in C-438/2000 *Deutscher Handballbund eV v Maros Kolpak* (2003) ECR I-4135 and Case C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol* (2005) ECR I-2579 Cases.
[953] See Case C-22/18 *TopFit v Deutscher Leichtathletikverband* ECLI identifier: ECLI:EU:C:2019:497 case.
[954] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991 at para 23. (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73).

specificity of sport[955]. Meanwhile, to maintain the organisation of the European model of sport, International Federations have adopted sporting rules aimed at discouraging participants from disturbing the model and limiting the role of the EU.

II.I. The Impact of EU Commission on the Organisation of European Model of Sport

Some aspects of sport governance have raised concerns under the EU competition law. The Commission has acquired significant experience in applying competition rules to sporting practices. However, the Commission's methods in applying competition rules to sport has not been thoroughly reviewed by the ECJ[956]. Within the governance standards of European model of sport, SGBs pursue certain legitimate objectives such as establishing the rules of the game, ensuring proper organisation and conduct of sport, protecting competitive balance and uncertainty of results, maintaining the integrity of sport, ensuring the health and safety of the athletes and promoting youth development[957]. While these are examples of the features of European model of sport, not every restriction to protect these features would be regarded as pursuing a legitimate aim under the application of EU law. To have a protection from the application of EU law, these rules should have a legitimate aim and must be objectively justified[958]. The European model of sport enjoys conditional autonomy under the organisational structures of EU and the border is *patrolled* with *vigilance*[959].

The pyramid structure of the European model of sport represents the organisation of sport in Europe, while the notion of governance covers the whole range of practices conducted by SGBs for the sake of proper regulation of 'their' sport[960]. This is the fundamental area where claims to sporting autonomy are commonly made[961].The

[955] Established under Chapter IV.
[956] R Parrish and S Mittinen, 'Legal Issues in the Governance of Sport', in Richard Parrish and Samuli Mittinen (eds), *Sporting Exception in European Union Law,* (Asser Press, 2008) p 205.
[957] *Ibid*.
[958] *Ibid*.
[959] S Weatherill, 'Is the Pyramid Compatible with EC law?' in Stephen Weatherill (eds), *European Sports Law Collected Papers*, (Asser Press, 2007), p 264.
[960] Stephen Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), page 245.
[961] *Ibid*.

pyramid structure does operate as a base for shaping the basic pattern of sport[962]. However, number of matters covered under the pyramid structure of sport organisation forms less obviously necessary elements of sport governance but more noticeable commercial elements[963]. This raises the doubt on whether the role of SGBs in decision-making of sporting organisations is justifiable under the law entitling only a conditional autonomy in sport.

II.II. Assessing the Impact of EU Law on the Governance of the European Model of Sport

II.II.I. Unsanctioned and Rival Events

The EU provides conditional autonomy to sport which includes the matters of governance. This type of conditional autonomy enjoyed by the governance of sport is under the shadow of the EU law and depends on the case-by-case examination of each rule specifically[964]. Sport governing bodies often have a dual role which result in a conflict of interest[965]. They attempt to preserve exclusivity in regulating sport and organising events[966]. To avoid the development of rival organisations they attempt to tie players in by prohibiting them participating in other events as well as preventing rival event organisers from setting up thereby challenging the regulatory power of the SGB. Failure to comply with these restrictions on taking part in other competitions results in exclusion from official events organised by the SGBs. These restrictive rules could be more indirect than an express ban[967]. Nevertheless, they have been the subject of challenge and required to demonstrate an adequate reason for choice of governance patterns in sport.

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[962] S Weatherill, 'Is the Pyramid Compatible with EC law?' in Stephen Weatherill (eds), *European Sports Law Collected Papers*, (Asser Press, 2007), p 266.
[963] *Ibid*.
[964] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), page 246.
[965] for example, see *MOTOE* case.
[966] A Lewis QC and J Taylor, *Sport: Law and Practice* (3rd eds, Bloomsbury Professional, 2014) p 762.
[967] *Ibid* p 764.

II.II.I.I. *Formula One (FIA)* Decision

II.II.I.I.I. Facts and Decision of the Application

The FIA[968] decision is one of the first decisions concerning a key issue of conflict of interest between a regulatory and a commercial role of SGBs. In the decision, the FIA was the organiser and promoter of motor sport championships including Formula One. It issued pre-requisite licenses to parties wishing to compete in international motor sport organisations or organise motor sport events. Participants in unauthorised events by FIA would lose their license and would not be able to take part in any commercial activity in motor sport. The preliminary conclusion of the Commission found these rules of the FIA contrary to EU competition law, Article 101 (1) and 102 TFEU for not allowing or having the possibility of blocking competing motor sport events with the ones organised or promoted by FIA.

The European Commission concluded an investigation on how international motor sports is organised and commercially exploited. The Commission found that the FIA was abusing its dominant position and restricting competition. Consequently, the Commission sent the same statement of objections to both Formula One Administration Ltd (FOA), which sold the television rights to the Formula One championship, and International Sports world Communicators (ISC), which marketed the broadcasting rights to a number of major international motor sport events. Many of the contracts concerning the commercial exploitation of international motor sports, particularly those involving broadcasters, found unlawful under EU competition law. The Commission identified four competition problems; (a) FIA used its power to block series which compete with its own events, (b) FIA used this power to force a competing series out of the market, (c) FIA used its power abusively to acquire all the television rights to international motor sports events, and (d) FOA and the FIA protected the Formula One championship from competition by tying up everything that was needed to stage a rival championship[969]. After reaching a settlement with FIA to remove certain conflicts of interest and limit its role as a motor sport regulator without influence over the

[968] FIA IP/01/1523, 30 October 2001.
[969] FIA IP/99/434, 30 June 1999.

commercial exploitation and generally removing anti-competitive clauses from its agreements, the Commission closed the decision without a final verdict [970].

II.II.I.I.II. Significance of the Decision

The decision generally demonstrated that the main objective of the Commission in tackling competition law provisions in sport related disputes is to ensure a healthy competitive environment in economic activities, specifically related to motor sport, and to minimise the risk of possible future abuses of dominant position. Rules introducing separation of commercial and regulatory activities in sport was identified as adequate structural remedy to avoid abuses within the market[971]. This separation was proposed as a solution rather than a requirement. Under EU competition law, it is not tolerated that SBGs abuse their regulatory powers and distort competition to achieve commercial gains. However, based on the market access analysis, a sporting rule would not prevent or impede competition if it could have been justified on the substantive grounds of safe, fair, and orderly conduct of motor sport[972]. To conclude, the decision demonstrated that EU had a considerable impact on the organisation of sport regarding restrictions on taking part in other competitions. This fact demonstrated that the organisation of sport enjoys conditional autonomy under the organisational structures of EU. The specificity of the sport was not assessed or referred to under the Commission's reasoning to grant sport specific treatment under the application of EU law. Apart from confirming the conditional autonomy of sport, the Commission provided supervision to the sport governing body to revise and amend their rules having restrictive effect to comply with the EU law. This decision can be identified as one of the first decisions demonstrating evidence for the supervised conditional autonomy of the organisation of sport under the organisational structures of EU.

[970] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final at para 2.2.2.1.
[971] FIA IP/99/434, 30 June 1999, para 6.
[972] FIA IP/99/434, 30 June 1999, para 5; S Weatherill, 'Fair Play Please!', in Stephen Weatherill (eds), *European Sports Law Collected Papers*, (Asser Press, 2007), p 185.

II.II.I.II. *MOTOE* Case

II.II.I.II.I. Facts and Judgment of the Case

MOTOE[973] is one of those cases which has enabled ECJ to closely analyse organisation of sport in unsanctioned and rival events with a direct commercial consequence. In the case, MOTOE argued abuse of dominant position by ELPA violating EU law. ELPA engaged in the organisation and commercial exploitation of motorcycling event, it was an undertaking, it did have a dominant position in the market for supply and the commercial exploitation of motorcycling events and it did abuse its dominant position under Article 102 TFEU.

In the case, the ECJ stated that Article 86(2) EC (now Article 106(2)TFEU) enables Member States to confer exclusive rights which may hinder competition in so far as restrictions on competition are necessary to ensure the performance of the sporting activity[974]. However, an undertaking whose activities consist of both administrative decisions authorising the organisation of events, and entering into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC[975] (now Article 102 and 106TFEU). Therefore, ELPA was not afforded a protection from the application of EU law. The ECJ did not rule that the whole system of regulated access to the market for staging sport events are incompatible under EU law. But the system under the case was declared unlawful due to the presence of intermingling of regulatory and commercial powers which is found as an abusive conduct under the EU competition law.

II.II.I.II.II. Significance of the Case

MOTOE demonstrates the impact of the EU over sport governance arrangements[976]. The Court held that

> […] a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events,

[973] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio* [2008] ECR I – 4906.
[974] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio [2008] ECR I – 4906 at para 44.
[975] *Ibid* at para 54.
[976] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), page 254.

> but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC. Those articles preclude a national rule which confers on a legal person, which organises motorcycling events and enters, in that connection, into sponsorship, advertising and insurance contracts, the power to give consent to applications for authorisation to organise such competitions, without that power being made subject to restrictions, obligations and review[977].

The main problem identified was the conflict of interest over the dual role of the organisation where the regulatory powers were used to achieve commercial advantage. Measures giving rise to a risk of an abuse of a dominant position are not permitted under the EU law[978]. Un-distortion of competition could only be guaranteed where equal opportunity is ensured between various economic operators. The Court identified that where a legal person's activities consist of both taking part in administrative decisions authorising the organisation of motorcycling events and organising such events itself falls within the scope of EU law. Such powers must be subject to restrictions, obligations, and review[979]. Otherwise, this forms an example of intermingling of powers by the sporting authority which distorts competition within the internal market and would not be tolerated under EU law.

Sport does not operate in vacuum it is subjected to the application of EU law. However, EU law does not prohibit SBGs to adopt a model of governance favoured by them. The single federation for a single territory with a single global authority at the top of the pyramid structure of the European model of sport can be sustained under EU law provided that it can be justified that such a model is necessary for the proper functioning of sport with a legitimate aim [980]. The pyramid structure under the European model of sport governance is essential to deliver uniform rules and timetable for sport and sport

[977] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio [2008] ECR I – 4906 at para 53.
[978] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio* [2008] ECR I – 4906 at para 50.
[979] Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio [2008] ECR I – 4906 at para 53.
[980] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), page 254.

should be regulated[981]. However, EU law will not tolerate SGBs to use their power to promote their own economic interest at the detriment of other potential service provider where the possibility of objective justification disappears, and abuse of sport governance arises[982]. At this point individual analysis of each aspect of the system is required and a generalised analysis would not be suitable[983]. Therefore, the case demonstrated that EU law does have a significant impact on sport governance, but it is not insensitive to the legitimate and significant concerns of sport which does not distort competition within the market[984]. Again, the ECJ demonstrated its objective of ensuring the functioning of the internal market.

To conclude, the case demonstrated that the EU had a considerable impact on the governance of European model of sport regarding unsanctioned and rival events with a direct commercial consequence of distorting competition within the internal market. This demonstrated that organisation of sport enjoys conditional autonomy under the organisational structures of EU. This autonomy is conditioned on compliance with the EU law, especially non-distortion of the proper functioning of the internal market. Whereas the specificity of the sport was not assessed or referred to under the Commission's reasoning to grant sport specific treatment under the application of EU law.

II.II.I.III. *ISU* Decision

II.II.I.III.I. Facts of the Application

ISU is the first decision in which the EU institutions have analysed restrictions on participation in rival sport events. In the decision, the Commission analysed the International Skating Union's Eligibility rules relating to the proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement[985]. The infringement consisted of the adoption and enforcement

[981] Advocate General Kokott in Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) V Elliniko Dimosio* [2008] ECR I – 4906 at para 91-96.
[982] *Ibid* at para 91-96.
[983] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), page 256.
[984] *Ibid* p 254.
[985] Case AT.40208 International Skating Union's Eligibility Rules Commission Decision, C(2017) 8240 final 8.12.2017.

of rules that constitute a prohibited restriction of competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement. According to the ISU's Eligibility rules, a speed skater became ineligible for a period up to a lifetime to participate in the ISU's international speed skating events if he or she participated in any speed skating events not authorised by the ISU or one of its Members[986]. Under the ISU's Eligibility rules adopted in 2016, a speed skater participating in events that are not authorised by the ISU or one of its Members is subject to sanctions ranging from a warning to periods of ineligibility from an unspecified minimum to a maximum of a lifetime ban. Until 2015, there were no pre-established criteria on the basis of which the ISU authorised third party events, and, although the ISU introduced authorisation criteria afterwards, those criteria were not objective, transparent and non-discriminatory, and went further than necessary to protect legitimate aims[987]. The ISU's Eligibility rules created significant barriers to finding skaters for third parties wishing to start organising and commercially exploiting international speed skating events in competition with the ISU and its Members because professional skaters could not risk becoming ineligible and foregoing the possibility of competing in important international speed skating events such as the Olympic Games, the ISU World Cup and the ISU Championships[988]. The Eligibility rules thus not only limited the skaters' commercial freedom to participate in events that were not authorised by the ISU, but they also prevented potential competitors from organising and commercially exploiting international speed skating events.

The ISU's Appeals Arbitration rules provided that all decisions of the CAS shall be final and binding[989]. Judicial recourse against CAS arbitral awards was possible, but only before the Swiss Federal Tribunal on a limited number of grounds, which did not include a violation of the Union or EEA competition rules. Furthermore, athletes had no choice

[986] See in particular Rules 102(1) a) (ii), 102(2) c), 102(7) and 103(2) of the General Regulations adopted by the 55th Ordinary Congress, June 2014 ("ISU General Regulations 2014").
[987] See, Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, Section 8.5.2.
[988] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, Section 8.5.2. para 4, p 6.
[989] ISU 2014 Constitution and General Regulations, Article 25(2); ISU 2016 Constitution and General Regulations, Article 26(2).

but to accept the Appeals Arbitration rules and the exclusive competence of the CAS[990]. The hurdles that the Appeals Arbitration rules imposed on athletes, in obtaining effective judicial protection against potentially anti-competitive ineligibility decisions of the ISU, reinforced the restriction of their commercial freedom and the foreclosure of third-party organisers of speed skating events. Those rules protect potentially anti-competitive decisions issued under the Eligibility rules by curtailing the reach of Union and EEA competition law to those decisions[991].

II.II.I.III.II. Decision of the Application

The commission initially analysed the regulatory framework in sport and referred to Article 165 of the Treaty. It expressed the need for the specificity of sport to be recognised and considered for its characteristics making it special, such as the interdependence between competing adversaries or the pyramid structure of open competitions[992]. Moreover, the Commission emphasised the ECJ caselaw[993], the 2007 White Paper on Sport[994] and the 2011 Communication of the Commission "Developing the European Dimension in Sport"[995] and made it clear that, while respecting the specific nature of sport, sporting rules are subject to the application of the EU law, including competition law[996]. The sporting rules normally concern the organisation and proper conduct of competitive sport and they are under the responsibility of sport organisations to ensure compatible with the EU law. To assess their compatibility with EU law, in line with the judgment of the Court of Justice in *Meca-Medina*, the Commission considered the legitimacy of the objectives pursued, whether any restrictive effects of those rules

[990] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, para 5, p 6.
[991] *Ibid* para 1, p 5 and para 8.7, p 67.
[992] Referring to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final, pages 10-11.
[993] Case 36/74 *Walrave and Koch* ECLI:EU:C:1974:140, paragraph 4, case 13/76 *Donà,* ECLI:EU:C:1976:115, paragraph 12.; Case C-415/93 *Bosman,* supra, paragraph 73; Case C-176/96 *Lehtonen,* supra, paragraph 32, Joined Cases C-51/96 and C-191/97 *Deliège,* supra, paragraph 41, Case C-519/04 P *Meca-Medina,* ECLI:EU:C:2006:492, paragraph 22, Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, paragraph 22; Case C-325/08 Olympique Lyonnais SASP v Olivier Bernard and Newcastle United UFC [2010] E.C.R. I-2196 paragraph 27.
[994] "White Paper on Sport" of 11 November 2007, COM (2007) 391 final, {SEC (2007) 932} {SEC (2007) 934} {SEC (2007) 935} {SEC (2007) 936}.Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final.
[995] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final.
[996] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, para 5.1, p 9.

were inherent in the pursuit of the objectives and whether those rules were proportionate to such objectives[997]. The Commission expressly referred to the specificity of the sport structure and stated that the specificity of European sport could be approached through two prisms: one being the specificity of the structure of sport and the other the specificity of sporting activities and of sporting rules. The specificity of the structure of sport, including notably the autonomy and diversity of sport organisations, can be described as a pyramid of competitions from grassroots to elite level, with organised solidarity mechanisms between the different levels and operators. In addition, it includes the organisation of sport on a national basis, and the principle of having a single federation per sport[998]. There are differences in the scope and importance of the sporting pyramid depending on the sport. In particular, the system of open competitions is generally limited to team sports, while in motor sports and cycling, professional competitions are totally or partially closed[999]. The Commission concluded that speed skating is one of the individual sports where there is a pyramid structure regarding national championships and the selection of national athletes. The ISU was the exclusive international sport federation acknowledged by the International Olympic Committee administrating Figure Skating and Speed Skating Sports throughout the world and administered speed skating at the international level, whereas its Members administered speed skating at the national level. In that function, the ISU set specific rules for the speed skating competitions of the Winter Olympic Games and all other international skating competitions organised within the pyramid structure[1000].

After examining the eligibility and arbitration rules of the ISU, the Commission identified the relevant product market and relevant geographic market and analysed the position and the significance of the ISU in these markets under Article 101 TFEU and Article 53 EEA Agreement in the field of sport[1001]. The Commission reaffirmed that

[997] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Developing the European Dimension in Sport", Brussels, 18.1.2011, COM (2011) 12 final, page 11.
[998] " Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 13.
[999] The Commission, "Commission staff working document – The EU and sport: Background and context", SEC (2007) 935, page 41.
[1000] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, para 5.2, p 11.
[1001] *Ibid at* para 8, p 35.

sport fulfils particularly important educational, public health, social, cultural, and recreational functions and has some distinctive features. However, restrictions relating to the area of sport are not generally excluded from the application of EU competition law[1002]. To assess whether sporting rules adopted by an international sport association come within the scope of Article 101(1) of the Treaty, account must first of all be taken to the overall context of its objectives and whether the consequential effects restricting competition are inherent in the pursuit of those objectives and are proportionate to them[1003].

The ISU argued for the necessity to have ex ante control over all international speed skating competition events and the pre-authorisation system. The ISU claimed that the Eligibility rules are part of the ISU's pre-authorisation system and this is central to the functioning of the pyramid model of sport which allows the ISU to regulate sport pursuant to uniform rules throughout the world. Whilst the ISU argued that this exclusive ex-ante control system is the norm for regulating organised sport, the Commission noted that alternative systems exist[1004]. Nevertheless, while a governing body could adopt stricter rules for its sport than other governing bodies, this should be justified on the specific facts and the features of the sport to be inherent in the pursuit of legitimate objectives and proportionate to them[1005]. The ISU provided certain possibilities for justification based on the health and safety of skaters deriving from the characteristics of speed skating. However, this was not enough to justify why the risks to integrity, such as match-fixing or doping failures, or to the proper running of competitions, such as rules of the game and calendar, are higher in skating than in other sports[1006].

[1002] Case 36/74 *Walrave and Koch,* ECLI:EU:C:1974:140, paragraph 4; Case 13/76 *Donà,* ECLI:EU:C: 1976:115, paragraph 12; Case C-415/93 *Bosman,* ECLI:EU:C:1995:463, paragraph 73. Joined Cases C-51/96 and C191/97 *Deliège,* ECLI:EU:C:2000:199, paragraph 41; Case C-176/96 *Lehtonen and Castors Braine,* ECLI:EU:C:2000:201, paragraph 32 and Case C-519/04 P *Meca-Medina* ECLI:EU:C: 2006:492, paragraph 22.
[1003] Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492, paragraph 42.
[1004] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, para 8.3.2, p 63.
[1005] *Ibid* at para 8.3.2, p 64.
[1006] *Ibid* at para 8.3.2, p 65.

The Commission made a finding the eligibility rules, *inter alia* having regard to their content, objectives and the legal and economic context, have the object of restricting potential competition on the relevant market within the meaning of Article 101(1) of the Treaty[1007]. They imposed severe sanctions, including a lifetime ban, on athletes who participate in un-authorised speed skating events, and, they inherently aimed at preventing athletes from participating in events not authorised by the ISU which resulted in the foreclosure of competing event organisers[1008]. To conclude, the Commission made a finding that the consequential effects of the eligibility rules, especially the restriction of the athletes' commercial freedom to participate in international speed skating events organised by third parties and the foreclosure of potential competitors in the market for organisation and commercial exploitation of international speed skating events, were not inherent in the pursuit of legitimate objectives, and, in any event, not proportionate to[1009]. Therefore, the eligibility rules were not compatible with the Article 101 of the Treaty and had an effect of restricting of competition within the meaning of Article 101(1) of the Treaty[1010].

II.II.I.III.II. Significance of the Decision

The Commission decided that the ISU's rules imposing severe penalties on athletes participating in speed skating competitions not authorised by the ISU were contrary to EU law. The ISU had to change those rules[1011]. The decision required the ISU to stop its illegal conduct within 90 days and to refrain from any measure that has the same or an equivalent object or effect. To comply, the ISU could abolish or modify its eligibility rules to have legitimate objectives with no economic interest which are inherent and proportionate to achieve those objectives[1012]. While the Commission did not consider it necessary or appropriate to impose a fine in this decision, if the ISU failed to comply

[1007] *Ibid* at para 8.3.2, p 42.
[1008] *Ibid* at para 8.3.2.2., p 44.
[1009] *Ibid* at para 8.5.2., p 67.
[1010] *Ibid* at para 8.6., p 67.
[1011] IP/17/5184 European Commission, Press Release, Antitrust: International Skating Union's restrictive penalties on athletes' breach EU competition rules, 8 December 2017.
[1012] *Ibid.*

with the Commission's decision, it would be liable for non-compliance payments of up to 5% of its average daily worldwide turnover[1013].

Commissioner Margrethe Vestager, in charge of competition policy, acknowledged that International sports federations play an important role in athletes' careers by protecting their health and safety as well as the integrity of competitions they participate in[1014]. However, they adopt severe penalties, as it was imposed on skaters by the ISU to protect its own commercial interests and prevent others from setting up their own events. She made a finding that this decision directed ISU to modify its rules and open new opportunities for sport stakeholders which would benefit all ice-skating fans[1015]. The European Commissions' ruling defends the freedom of athletes to participate in the speed skating competition of their choice, even if such a competition is not organised by the international federation (ISU). This freedom of choice would be supported by sport clubs and individual athletes while the integrity of the European model of sport, the pyramid structure, would be facing a challenge. The decision is likely to modify the classic structure of the European model of sport[1016]. Whether the decision of the European Commission will be a precedent to ensure freedom of choice for athletes across all sports, as well as clubs and competition organisers, to stop its illegal conduct and not to impose or threaten to impose unjustified penalties on athletes will be confirmed in the FIBA/Euro League complaint pending in front of the Commission. However, it is a possibility that the impact of this decision will extend beyond skating and the general structure of organisational markets in all other sports in Europe, such as emergence of alternative cross border European football leagues and the status of UEFA, will be affected[1017].

The decision demonstrated the considerable impact of EU law on the organisational structures and governance of European model of sport. The Commission referred to the

[1013] *Ibid*.
[1014] *Ibid*.
[1015] *Ibid*.
[1016] K Pijetlovic, 'European Model of Sport: alternative structures', in Jack Anderson (eds), *Research Handbook on EU Sports Law*, (Edward Elgar Publishing, 2018), p 350.
[1017] K Pijetlovic, 'European Model of Sport: alternative structures', in Jack Anderson (eds), *Research Handbook on EU Sports Law*, (Edward Elgar Publishing, 2018), p 350.

specificity of sport thoroughly and has not been insensitive to the legitimate and significant concerns of sport which do not distort competition within the market. However, it has defended the main aim and objective of the organisational structures of EU and ensured proper functioning of the internal market through competition law principles. The Commission found the rules of ISU incompatible with the EU competition law and supervised the ISU to modify its rules according to the EU law. This is a direct interference with the governance of sport and the ISU had no authority to reject. It is also a demonstration of supervised conditional autonomy of European model of sport within the EU. Sport enjoys autonomy on condition of compliance with the EU law and sporting rules are supervised by the EU institutions to ensure compliance.

To conclude, the decision demonstrated that EU had a direct impact on the governance of European model of sport regarding restrictions on taking part in other un-sanctioned competitions. This is considered as a direct commercial interference which distorts competition within the internal market. To avoid this, the commission supervised the ISU to modify its rules in line with the EU law. This demonstrated that organisation of sport enjoys conditional autonomy under the organisational structures of EU. This autonomy is conditioned on compliance with the EU law, especially non-distortion of the proper functioning of the internal market. Even though, the specificity of the sport was acknowledged and assessed thoroughly under the Commission's reasoning, it did not grant sport a specific treatment under the application of EU competition law. Once again it is confirmed that every sporting rule is subject to the application of EU law with no exception and distortion of the internal market will not be negotiated.

II.II.I.IV. Pending FIBA/Euro League Complaint

II.II.I.IV.I. Facts of the Complaint

Like the ISU decision, FIBA/Euro League Complaint demonstrates the EU Law challenge on the governance of the European Model of Sport. Under the complaint, Euroleague Basketball has filed a complaint to the Commission against FIBA and FIBA Europe as a consequence of the repeated pressures that European basketball clubs are

suffering at the hands of the international federation and its affiliated national federations with the objective of forcing them to renounce their participation in European competitions[1018]. The complaint concerns the threats and pressures that FIBA and its member federations are making against clubs, players, and referees to force them to abandon the Euroleague and the Eurocup and only participate in FIBA competitions[1019]. The objective of the complaint is to ensure that clubs, players, and referees can freely make the choice to participate in the competitions that they consider appropriate without being subject to threats or pressures. It is argued that FIBA is violating EU law by enforcing restrictive rules and sanctions against those who are involved in competitions not approved by FIBA[1020]. The decision is pending before the Commission. However, there are the FIA, MOTOE and ISU decisions and case precedents demonstrating that, under the application of EU law to the organisation of sport, the rule will highly likely be classified as contrary to EU law. It is worth mentioning here that FIBA has filed a counter complaint against Euroleague arguing abuse of dominant position[1021].

II.II.I.IV.II. Possible Judgment on the Complaint

Based on the established previous judgments and decisions, the Commission would be considering the legitimacy of the objectives pursued, whether any restrictive effects of those rules were inherent in the pursuit of the objectives and whether those rules were proportionate to such objectives[1022]. The Commission may or may not refer to the specificity of the sport. However, it will not tolerate any sporting rule which has the potential of distorting competition within the internal market to gain commercial advantage. The consequential effects of the rules have the potential to restrict the athletes' commercial freedom to participate in other national or international events organised by third parties and the foreclosure of potential competitors in the market

[1018] Euroleague Basketball, <https://www.euroleaguebasketball.net/euroleague-basketball/news/i/6p8c54yjk66qsitp/euroleague-basketball-presents-a-complaint-before-the-european-commission-against-fiba-and-fiba-europe> accessed on 01/05/2019.
[1019] *Ibid*.
[1020] *Ibid.*
[1021] FIBA Basketball, 'FIBA files a complaint against Euroleague' (Press release on 05 April 2016) <https://www.fiba.basketball/news/fiba-files-complaint-against-euroleague> accessed on 02 August 2020.
[1022] European Commission, 'Developing the European Dimension in Sport' [2011] COM (2011) 12 final, page 11.

which probably will not be classified as inherent in the pursuit of legitimate objectives, and, in any event, proportionate[1023]. Therefore, the rules probably will not be compatible with the Article 101 of the Treaty and will have an effect of restricting of competition within the meaning of Article 101(1) of the Treaty[1024]. More importantly, after this finding, it is highly likely for the Commission to supervise FIBA to modify its rules to separate commercial and regulatory activities of sport to ensure compliance with the EU law.

II.II.I.IV.III. Possible Significance of the Complaint

Unless the EU changes its approach towards the organisational structures of the European model of sport, the Commission will, very likely, reaffirm the incompatibility of the restrictions on taking part in other competitions and supervise FIBA to modify its rules accordingly. While the contribution of the specificity of sport principle towards achieving protection under EU law in case of distortion of competition is minor if any, the complaint will be demonstrating again that the EU has a direct impact on the governance of the European model of sport regarding restrictions on taking part in other un-sanctioned competitions. This would confirm once more that organisation of sport enjoys supervised conditional autonomy under the organisational structures of EU. This autonomy is conditioned on compliance with the EU law, especially non-distortion of the proper functioning of the internal market. Every sporting rule is subject to the application of EU law with no exception and distortion of the internal market will not be negotiated.

II.II.II. Home and Away Rule and Club Location

Within Europe, generally sport is organised on national basis where teams from one country compete each other in domestic leagues. Only successful teams are qualified to enter cross border competitions which are indirectly representing their country of origins[1025]. The Commission has previously acknowledged that competition rules

[1023] Case AT.40208 – International Skating Union's Eligibility rules, Commission Decision, C (2017) 8240 final 8.12.2017, para 8.5.2., p 67.
[1024] *Ibid* at para 8.6., p 67.
[1025] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1155.

should not be applied to create a single market for sport in EU since there was no economic need for such unification and it is crucial for sport to maintain national identity for the sake of competition in sport[1026]. This geographical restriction could be identified as an aspect of the specificity of sport with no economic interest but necessary for the proper conduct of sport[1027]. The below stated case is the unpublished precedent in this area took place two decades ago.

II.II.II.I. *Mouscron* Decision

II.II.II.I.I. Facts and Decision of the Application

In *Mouscron*[1028], the Commission rejected the complaint lodged by the Communauté Urbaine de Lille against UEFA stating that the UEFA Cup rule that each club must play its home match at its own ground is a rule which is contrary to the scope of EU competition law. The Commission concluded that there is no Community interest that would justify looking more closely into whether UEFA has abused any dominant position it might have by applying exceptions to that rule without taking account of the integration that exists between certain frontier regions[1029].

II.II.II.I.II. Significance of the Decision

The Commission published a press release in 1999 relating to the *Mouscron* decision concerning the temporary relocation of a club, and home and away rule stating that there are limits to the application of the EU competition rules to sport. The three key aspects of the Commission's approach to sport was first, the regulatory powers of sport organisations on the non-economic aspects linked to the specific nature of the sport did not fall under the application of EU law. Secondly, the rules of sport organisations that are necessary to ensure equality between clubs, uncertainty to results, and the integrity and proper functioning of competitions were not, in principle, incompatible with the EU competition provisions. Finally, the Commission only investigated applications which

[1026] *Ibid*.
[1027] *Ibid*.
[1028] *Case 3651, C.U. de Lille/UEFA (Mouscron)* Unpublished Commission Decision of 9 December 1999.
[1029] European Commission Press Release, 'Limits to application of Treaty competition rules to sport: Commission gives clear signal', IP/99/965.

had a Community dimension and would significantly affect trade between Member States[1030].

Under the application, the Commission considered that the contested matter had a limited effect on cross border trade, that it was *de minimis* and consequently there was no considerable Community interest in intervening[1031]. Secondly, even though there was a minor Community interest, if the rule pursues a legitimate objective, such as to ensure competitive balance, the restriction would be considered as inherent in the organisation of club competitions so long as it remained proportionate[1032]. Thirdly, even in the absence of inherency, based on the fact that the rule contributes to the production of sporting contest by allowing consumers to benefit from the locality of the club where its supporters lived would fall under the exemption laid down in article 101(3)[1033]. *Mouscron* was brought to the attention of the Commission two decades ago and EU integration has since developed. Nevertheless, the legal grounds of the competition provisions remain the same. In the future, the club relocation and the home and away rules might be challenged under the organisational structures of EU to discover whether they could be objectively justified as an inherent rule and are proportionate. Depending on the facts of the application, it is highly likely that similar conclusion would be made.

II.II.III. Breakaway Leagues

The formation of a breakaway league, which is an alternative private league, is a structural threat to the classic pyramidal model of sport[1034]. A breakaway league is set up without the authorisation of the official national or international governing body for the sport and it generally lacks the recognition of the governing body[1035]. Such a league has no organisational control. It can be a closed, or a partly open, private league created by a group of clubs sharing common commercial interests[1036]. A closed breakaway league is not integrated into the system of promotion and relegation with other

[1030] *Ibid.*
[1031] R Parrish and Si Mittinen, 'Legal Issues in the Governance of Sport', in Richard Parrish and Samuli Mittinen (eds), *Sporting Exception in European Union Law,* (Asser Press, 2008), p 210.
[1032] *Ibid*.
[1033] *Ibid*.
[1034] K Pijetlovic, *EU Sports Law and Breakaway Leagues in Football*, (Asser Press, 2014), p 53.
[1035] *Ibid*.
[1036] *Ibid* p 48.

leagues[1037]. Clubs in closed leagues tend to have a comparable financial and competitive standing with high market values for their broadcasting rights and general merchandise. Due to their solidarity, their sport governing bodies do not want to lose control over them and consequently, elite clubs receive great bargaining powers over their sport governing bodies[1038].

II.II.III.I. Compliance Analysis of the Breakaway Leagues with the EU

The main objective of the EU is to enhance the integration process and ensure the proper functioning of the internal market. Based on the previous precedents, the EU has not granted an exception to sport due to specificity and sports autonomy is on condition of compliance with the EU law as well as not distorting trade between Member States. Under the *Media Partners* proposal regarding the formation of G-14 alliance consisting of 14 elite European football clubs, then stood up at 18, a breakaway league was presented for the good of the game to promote the cooperation, amicable relations and unity of the member clubs; to promote and improve professional football in all its aspects and safeguard the general interests of the member clubs; to promote cooperation and good relations between G-14 and sport governing bodies[1039]. However, the reality behind the G-14 alliance was to maximize commercial gain and obtain regulatory independence[1040].

The complaint resulted in UEFA Champions' League reform revealing the role of increasingly active stakeholders in sport[1041]. On the other hand, the Commission did not formed a judgment on the complaint. The possible approach of the EU under the complaint could be predicted through the analysis of the previous judgment and decisions. To begin with, under the *Meca-Medina* case, the EU would not grant any exception to sport due to its specificity and examine compatibility of each sporting rule on a case by case analysis. The EU acts when commercial cross border activity, trade

[1037] *Ibid*.
[1038] *Ibid*.
[1039] K Pijetlovic, *EU Sports Law and Breakaway Leagues in Football*, (Asser Press, 2014) p 61.
[1040] *Ibid* p 62.
[1041] Independent, Football: UEFA winning `super league' war (24 October 1998) <https://www.independent.co.uk/sport/football-uefa-winning-super-league-war-1180341.html> accessed on 04 August 2020.

and/or movement, is affected between Member States[1042]. The EU would not interfere with domestic commercial matters[1043]. Once the complaint falls within the jurisdiction of EU, the sporting rule, in this case breakaway league prohibition, would be challenged to find out whether it forms a restriction on the internal market, whether it could be justified due to inherence and/or legitimate aim, and whether it is proportionate. The specificity of sport may or may not be expressly relied on. However, the specificity of sport will not change the rule from being classified as a restriction should it likely to distorts competition within the internal market and affect cross-border trade between the Member States.

A breakaway league is against the pyramid of the European model of sport requiring one federation in each layer of the pyramid for each sport. The political consensus on the necessity to preserve the structures of sport in Europe was emphasized in EU policy documents to protect social significance sport[1044]. The Nice Declaration noted the unprecedented developments of sport while acknowledging the necessity for the federations to continue to be the key feature of a form of organisation protecting and preserving sporting cohesion, participatory democracy, and solidarity at every level[1045]. These policy statements demonstrate the willingness of the EU to preserve the fundamental values of sport such as solidarity, self-regulation, societal role of sport for all and its beneficial effects on youth, health, and social inclusion[1046]. The 2007 Parliament Report on the future of professional football emphasised that sport is an inalienable part of the European identity characterised by open competitions within a pyramid structure where countless amateur clubs and volunteers form the base for top professional clubs. The attachment of European sport with the relationship between amateur and professional sport was emphasised[1047]. The Commission Communication on Developing European Dimension in Sport identified specificity of sport as all the

[1042] *Case 3651, C.U. de Lille/UEFA (Mouscron)* Unpublished Commission Decision of 9 December 1999.
[1043] See competences of EU.
[1044] Helsinki Report, Amsterdam Declaration on Sport and Nice Declaration.
[1045] European Council, Nice Declaration (2000).
[1046] K Pijetlovic, *EU Sports Law and Breakaway Leagues in Football*, (Asser Press, 2014), p 49.
[1047] Motion for the Parliament Resolution in the European Parliament Report on the Future of European Professional Football in Europe (2006/2130(INI)), Committee on Culture and Education, final A6-0036/2007.

characteristics which makes sport special including the interdependence between competing adversaries of the pyramid structure of open competitions[1048].

Sanctioning breakaway leagues do find a firm support under the EU law[1049]. However, each rule should be considered within its own merits against the requirements of the EU law. The policy documents above provide a guidance that the pyramid structure of sport with open leagues falls under the specificity of sport and therefore should be acknowledged under the EU law. However, it is for the ECJ to interpret the law.

II.II.III.II. Possible Impact of EU on the Breakaway Leagues

Currently, the European model of sport sanction breakaway leagues. The impact of EU on the breakaway leagues is yet to be seen. Even though closed breakaway leagues might not be compatible with the EU law, an open break away league would contribute towards cross border competition and trade between Member States within the internal market. On the other hand, like club location rules, the presence of an open breakaway league might affect cross boarder competition and trade between Member States within the internal market. Nevertheless, the impact of the breakaway league on the internal market will be assessed through the market access analysis on a case by case examination by the organisational structures of EU. This challenge would demonstrate that EU has a direct impact on the governance of European model of sport where the cross-border trade between Member States is affected. This would confirm once more that the organisation of sport enjoys conditional autonomy, supervised through the Commission decisions, under the organisational structures of the EU. This autonomy is again conditioned on compliance with the EU law, especially under non-distortion of the proper functioning of the internal market. Once again it would be confirmed that every sporting rule is subject to the application of EU law and distortion of the internal market will not be negotiated.

[1048] COM (2011) 12 final, 18.1.2011 at para 4.2
[1049] K Pijetlovic, *EU Sports Law and Breakaway Leagues in Football*, (Asser Press, 2014), p 49.

II.II.IV. Club Ownership

SGBs recognised that common ownership of competing clubs undermines the prerequisite features of successful sport. Uncertainty of results is necessary for the public confidence towards the integrity of sport and authenticity of the competition[1050]. Both sides of the competition should be perceived as competing with best of their abilities to win free from any external constraints. Therefore, it is legitimate for the sake of competition for the SGBs to have proportionate rules to prevent conflict of interest which may lead to the manipulation of sporting results. This ensures the public's perception that the results are not influenced by any factor apart from the sporting skills of the sides competing[1051]. Organisational structures of the European model of sport adopted rules and regulations to prevent such conflicts occurring[1052]. Such rules have the potential to restrict competition by prohibiting the same entity or person from investing in more than one participating team in the same competition. These rules have been challenged under the organisational structures of the EU to discover whether club ownership rules are motivated by legitimate sporting interests or tainted by conflict of interest of the SGBs to achieve commercial gain.

II.II.IV.I. *ENIC/UEFA* Decision

UEFA has adopted the rule on the Integrity of the EUFA Club competitions: Independence of clubs' in 1998 which became effective in 2000/1 season. The rule prohibited two clubs or more directly or indirectly controlled by the same entity or managed by the same person participating in a UEFA club competition [1053]. To ensure the integrity of the competition, only one club is admitted to a UEFA Club competition[1054]. The main aim behind this rule is to avoid any suspicion of match fixing and protect the integrity of competition.

[1050] A Lewis QC and Jonathan Taylor, Sport: Law and Practice, (3rd eds, Bloomsbury Professional, 2014) p 1170.
[1051] *Ibid* p 1171.
[1052] For example, see UEFA article 5 on the integrity of the competition prohibiting possibility of simultaneously be involved, either directly or indirectly, in any capacity whatsoever in the management, administration and/or sporting performance of more than one club participating in a UEFA club competition.
[1053] Currently Regulations of the UEFA Champions League 2018-21 Cycle, 2018/19 Season, Article 5 regulates Integrity of Competition.
[1054] UEFA Champions League 2018-21 Cycle, 2018/19 Season, Article 5.02.

II.II.IV.I.I. Facts and Decision of the Application

The club ownership rule was challenged by ENIC[1055], which was an investment company with shares in six different football clubs. ENIC filed a complaint to the Commission. The Commission rejected ENIC's complaint and concluded that even though the rule was capable of being caught under the application of EU competition law provisions, the object of the particular rule was not to distort competition but to protect competition in sport[1056]. The rule might have influenced the freedom of action of clubs and investors. However, it is found inherent to the very existence of credible UEFA competitions. Furthermore, the rule did not lead to a limitation on the freedom of action of clubs and investors that goes beyond what is necessary to ensure its legitimate aim of protecting the uncertainty of the results and giving the public the right perception as to the integrity of the UEFA competitions with a view to ensure their proper functioning[1057]. Therefore, the rule did not qualify as a restriction of competition and therefore fell outside the scope of Article 101(1) (Ex81(1) of the EC) of the Treaty. Furthermore, the rule did lead to the application of Article 102 (Ex81(1) of the EC)[1058].

II.II.IV.I.II. Significance of the Decision

The Commission assessed whether the effect of the rule is restrictive and, if it is, is it inherent in the pursuit of the objective to ensure the very existence of credible pan European football[1059]. This reasoning of the Commission is remarkably like the one previously adopted by the ECJ in *Deliège*[1060] regarding freedom of movement. Nevertheless, the Commission relied on *Wouters*[1061] in connection with competition law while it had no connection with sport. Since *ENIC* decision, *Wouters* case has established itself as mainly important in the development of European sports law[1062]. By applying the *Wouters* test, the Commission considered whether the consequential

[1055] COMP 37.806. ENIC/UEFA, IP/02/942, 27 June 2002.
[1056] *Ibid*.
[1057] *Ibid* at para 47.
[1058] *Ibid*.
[1059] COMP 37.806. ENIC/UEFA, IP/02/942, 27 June 2002 at para 30.
[1060] Case C-51/96 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000] E.C.R. I-2549 at para 64.
[1061] Cases C- 180/98 *Pavlov* etc. [2000] ECR I- 6451, [2001] 4 CMLR 30, para 75.
[1061] Case C- 309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I- 1577, [2002] 4 CMLR 913, at para 97 and 110
[1062] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017), p 106.

effect of the rule was inherent in the pursuit of the credible sport. The Commission agreed that the aim of the rule was to achieve clean competition necessary for the credible competition.[1063] The decision significantly demonstrates that rules forbidding multiple ownership of clubs are indispensable to the maintenance of a credible competition requiring uncertainty of results in all games[1064]. Moreover, the decision hinted that sport is socially special, but it is economically special as well. To ensure credible competition there is a need to limit the power of investors in sport leagues which may not be necessary in other market sectors unless there is abuse of dominant position[1065]. While *Wouters* demonstrates the sensitivity of EU competition law generally to specificities of each sector, *ENIC* demonstrated EU competition law's sport specific application[1066].

II.II.V. Mandatory Player Release Rules

Player release rules are central to the European model of sport. They provide a clear example on the difference of sport compared to other market sectors. SGBs have rules to release players from their clubs to play in their national teams for international competitions. These sporting rules regulate the mandatory release of players by clubs to allow them play in international representative competitions. These rules are mandatory on the players as well who are required to reply affirmatively when called up by the association subject to exceptional cases of injury or illness. Sanctions may be imposed in case of non-compliance. Moreover, clubs releasing a player are not entitled to receive a renumeration or financial compensation. In addition, it is the responsibility of the releasing club to insure the player against possible injuries during the entire release period[1067]. This is a demonstration that sport is different compared to other market sectors[1068] where the requirement for an employer to release a highly trained employee is often very highly paid. This can be interpreted as SGBs are using their regulatory power in sport governance to force other competing undertakings, clubs, to achieve

[1063] COMP 37.806. ENIC/UEFA, IP/02/942, 27 June 2002 at para 29, 38.
[1064] Stephen Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017) p 107.
[1065] *Ibid* p 108.
[1066] *Ibid* .
[1067] FIFA Regulations on the Status and Transfer of Players, Annex 2 on the Release of Players to Association Teams.
[1068] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017) p 259.

vitality towards its business model at the expense of clubs[1069]. This problem was visible in *MOTOE*, where a conflict of interest arose between the governance choices and direct commercial interests.

II.II.V.I. Compliance Analysis of the Mandatory Player Release Rules with the EU

In light of the *ENIC* decision , the overall effect of the release rule is open for a challenge under the EU law to determine whether sport is so special to withstand the of abuse of dominant position under the Article 102 TFEU. To begin with, the EU acts when commercial cross border activity, trade and/or movement, is affected between Member States[1070]. The EU would not interfere with domestic commercial matters[1071]. Once the complaint falls within the jurisdiction of EU, the sporting rule, in this case mandatory players release, would be challenged to find out whether it forms a restriction on the internal market, whether it could be justified due to inherence and/or legitimate aim, and whether it is proportionate.

Mandatory release of players rule enforced by FIFA is capable of being considered as an abuse of dominant position. However, it might not distort competition within the internal market. A player release system is inherent in sporting activity due to the need to underpin the international game's viability and supra-national competition in Europe. This is one of the differences of sport compared to other sectors. Quite like the club ownership rule analysed above, it can be objectively justified if interpreted as facilitating proper functioning of supra-national sport competition and integrity of sport in Europe. The object of the rule could be considered as not an abuse of dominant position restricting competition but facilitating competition within the internal market. Therefore, the mandatory release of players rule might not form a restriction of competition if it is considered inherent and necessary for the integrity and proper competition in sport. On the other hand, the rule might go too far in protecting one sides commercial interests, the regulators, at the expense of others, the clubs. Under the case

[1069] *Ibid* p 261.
[1070] *Case 3651, C.U. de Lille/UEFA (Mouscron)* Unpublished Commission Decision of 9 December 1999.
[1071] See competences of EU.

scenario, like the *Formula One (FIA)* decision the Commission could directly involve with modifying or altering the rule through supervision. This type of supervision establishes a direct impact of EU on the governance of the European model of sport.

II.II.V.II. *Charleroi/Oulmers* Case

This rule so far has not been tested by the organisational structures of EU to discover whether it would be classified as an abuse of dominant position or unjustifiable restriction. However, under the discontinued litigation of *Charleroi/Oulmers*[1072], a referral was made to the ECJ to consider whether mandatory player release rules of FIFA without compensation constituted an unlawful restriction of competition or an abuse of dominant position or obstacle to fundamental freedoms under the application of EU law[1073]. The ECJ did not answer these questions and decided to wait for the pending resolution of the Belgian appeal. However, the case was settled out of Court and the case was removed from the ECJ's registrar. The club *Charleroi* has received support from G-14 alliance for solid commercial reasons. G-14 had a much greater long-term interest in challenging FIFA rules favouring its own commercial interest over the clubs. The of court settlement prevented the ECJ from taking a stance[1074]. The threat led the governing bodies in football to allocate funds to establish a compensation scheme for player release. In addition, governing bodies established a new institution called European Club Association (ECA)[1075] which allowed clubs to have a say in governance matters at international level[1076]. Even though the case was discontinued at the Court, the clubs won concessions associated with governance by using litigation through the application of EU law to put pressure on governing bodies. The ECA has achieved a formal integration within the pyramid structure as a representative of the clubs.

[1072] Case-C-243/06 *Charleroi/Oulmers,* OJ C 212, 2 September 2006.
[1073] *Ibid* p 11.
[1074] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017) p 263.
[1075] Further details can be found on www.ecaeurope.com Accessed on 17/05/2019.
[1076] S Weatherill, *Principles and Practice in EU Sports law,* (OUP, 2017) p 263.

II.II.V.III. Possible Impact of EU on the Mandatory Player Release Rules

Mandatory player release rules' impact on the internal market would be assessed through the market access analysis by the organisational structures of EU. The rule might have been declared as inherent and necessary for the proper conduct and international competition in sport with no adverse effect on the cross-border trade and competition between Member States. However, it had a weakness of unjust enrichment of the regulator at the expense of clubs. Therefore, this weakness would be required to be remedied for the rule to comply with the EU law. Nevertheless, the rule demonstrates the specificity of sport compared to other market sectors. The *Charleroi* settlement has altered the governance structures of sport in Europe to a less aggressive point in seeking the commercial interests of the governing bodies[1077]. EU law has facilitated the means to achieve a change in the governance of sport without forming a threat to the pyramid structure of the European model of sport but securing an adaptation in the application of sporting rules[1078]. The stand of the governing bodies to alter sporting rules in accordance with the EU law meets the demands of conditional autonomy while sustaining the pyramid structure under the European model of sport.[1079]

II.II.VI. Licensing Requirements

Licensing systems aims to ensure that all clubs respect the same basic rules on financial management and transparency. Typically, such systems include provisions regarding discrimination, violence, protection of minors and training[1080]. However, licensing systems must comply with competition and Internal Market provisions of the EU and should not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organisation and conduct of sport[1081]. The European Commission acknowledged that robust licensing systems for professional clubs at European and national level are a useful tool to promote good governance in sport[1082]. Currently, the UEFA club licensing and financial fair play regulations 2018 outlines minimum

[1077] *Ibid* p 268.
[1078] *Ibid* p 263.
[1079] *Ibid* p 268.
[1080] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final at para 4.7.
[1081] *Ibid*.
[1082] *Ibid*.

licensing requirements under the headings of sporting criteria, infrastructure criteria, personnel and administrative criteria, legal criteria, and financial criteria[1083].

II.II.VI.I. Compliance Analysis of the Licensing Requirements with the EU

Bearing in mind the Commission's previous approaches stated previously, the overall effect of the licensing requirement rule is open for challenge under the competition law provisions of the EU to determine whether it distorts competition and/or constitutes abuse dominant position by the SGBs is prohibited under the EU law. Mandatory club licensing rules enforced by SGBs are capable of being considered as an abuse of dominant position since they form a barrier to entry into the market. However, they might not necessarily distort competition within the internal market since these criteria have a sporting objectives to promote and improve the standards of football in Europe while promoting training of young players, to ensure adequate level of management and organisation within clubs, to adapt clubs' sporting infrastructure in accordance with health and safety requirements, to protect integrity of competition and to allow development of benchmarking for clubs in financial sporting, legal, personnel, administrative, and infra-structure related criteria throughout Europe[1084]. Quite like the club ownership rule and the mandatory player release rule analysed above, club licensing rules could be inherent to facilitate proper functioning of sport competition and integrity of sport in Europe. These rules do have a legitimate aim under the specificity of sport which is not found under other market sectors[1085]. The object of the rule could be considered as not an abuse of dominant position restricting competition but facilitating competition within the internal market by protecting integrity of sport. Therefore, the licensing rule might not form a restriction of competition if it is considered inherent and necessary for the integrity and proper competition in sport. On the other hand, the rule might go too far in protecting one sides commercial interests and could not be considered as proportionate and compatible with the EU law. The means used under the rule might not be proportionate since these rules place heavy

[1083] UEFA Club Licensing and Financial Fair Play Regulations 2018 edition.
[1084] *Ibid* Article 2.
[1085] S Weatherill, Principles and Practice in EU Sports law, (OUP, 2017) p 273.

burdens on clubs[1086]. If declared incompatible with the EU law, like the *Formula One (FIA) Case,* the Commission could directly involve with modifying or altering the rule through supervision. This type of supervision certainly establishes a direct impact of EU on the governance of the European model of sport.

II.II.VI.II. Possible Impact of EU on the Club Licensing Rules

Currently, the legal status of the licensing rules is uncertain[1087]. However, it is open for challenge under the EU law. Even though the rule might have a legitimate aim to address the problems which do not arise in other sectors, it does place a burden on the employees[1088]. The suspicion behind the rule is that it might be used as a shield for anti-competitive agreement aiming to limit employer's expenditure to maximise profit[1089]. Therefore, the means used might not be justifiable.

II.II.VII. Third Party Ownership

Third party ownership (TPO) of a player is describing the situation where the economic value of a player's registration belongs to one or more third party as well as, if not at all, to the club. Under the TPO, a player is registered under a club but the club has an obligation to a third party who has provided funding for the acquisition of the player in return for a right to a share in the player's future transfer of registration. TPO provides the possibility of investment in sport labour. The third party invests in talent hoping that he will improve and increase in value. On the other hand, the club wins by acquiring a

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[1086] *Ibid*.

[1087] See, taking the view the arrangements are lawful, C Davies, 'Labour Market Controls and Sport in the Light of UEFA's Financial Fair Play Regulations' [2012] ECLR 435; A Mestre, There Striani Case: UEFA's Break-Even Rule and EU Law' July 2013 World Sports Law Report 3; that they are probably lawful, C Flanagan, 'A Tricky European Fixture: An Assessment of UEFA's Financial Fair Play Regulations and their Compatibility with EU Law' (2013) 13 Intl Sports LJ 148; that they may be unlawful, S Bastianon, 'The Striani Challenge to UEFA Financial Fair Play. A new Era after Bosman or Just a Washout?' (2015)11 Competition Law Review 7; that they are unlawful, T Peeters and S Szymanski, 'Vertical Restraints in Soccer: Financial Fair Play in the English Premier League', Department of Economics, University of Antwerp (2012) <http://ideas.repec,org/p/ant/wpaper/2012028.html> accessed 29 November 2016; N Petit, 'Fair Play Financier ou Oligopoleague de clubs rentiers?: Elements d'analyse en droit European de la concurrence' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438399> accessed 29 November 2016; V Kaplan, 'UEFA Financial Fair play Regulations and European Union Antitrust Complications' (2015) 29 Emory International Law Review 799.

[1088] S Weatherill, Principles and Practice in EU Sports law, (OUP, 2017) p 273.

[1089] See the revenue distribution outlined on the UEFA web page for 2019/2020 < https://www.uefa.com/insideuefa/stakeholders/news/0253-0f8e6d83afa2-0904576faee6-1000--2019-20-uefa-club-competitions-revenue-distribution-system/> accessed on 05 August 2020; S Weatherill, *Principles and Practice in EU Sports law*, (OUP, 2017) p 273.

better player which would have been not affordable otherwise and the player wins by acquiring to play for a higher profile. TPO is applied in Europe. The problem lies in the risk that the third party might pursue to influence the club's decision making on sporting matters with an intention to make greater profit[1090]. As a result, economic incentives might suppress the integrity of the sporting competition[1091]. Nevertheless, SGBs adopt rules to preclude the third-party influence over the club's decisions. As an example, FIFA regulates TPO under the players economic rights on the status and transfer of players[1092] and prohibits any third-party influence on clubs imposes disciplinary measures on clubs that do not observe the obligations set out[1093]. Moreover, any club or player who enters an TPO agreement may be imposed disciplinary measures[1094]. These rules do not prohibit TPO. However, they do limit the role of a third-party owner.

II.II.VII.I. Compliance Analysis and Possible Impact of EU on the Third-Party Ownership

The approach of the organisational structures of EU towards TPO rules shall be determined based on the fact whether they are genuinely necessary to achieve the legitimate aim they are pursuing and if the means taken are proportionate. The EU would provide a room for the sporting rules to preserve the integrity of sport from the commercial and damaging influence of the third-party owners. Therefore, even though TPO rules could have a restrictive effect on the competition for players market, they might be constituting a genuine need for sport governance[1095]. Should TPO rules be classified as tolls to protect sporting integrity, they would be compatible with the EU law.

[1090] S Weatherill, *Principles and Practice in EU Sports law*, (OUP, 2017) p 280.
[1091] *Ibid*.
[1092] FIFA Regulations on the Status and Transfer of Players, < https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-2018-2925437.pdf?cloudid=c83ynehmkp62h5vgwg9g> accessed on 21/05/2019.
[1093] FIFA Regulations on the Status and Transfer of Players, Article 18bis.
[1094] FIFA Regulations on the Status and Transfer of Players, Article 18ter.
[1095] S Weatherill, *Principles and Practice in EU Sports law*, (OUP, 2017) p 281.

III. Chapter Evaluation

In this chapter the impact of the EU law on the organisation of sport with reference to the European model of sport is attempted to be established. The chapter analysed the application of EU law to individual sporting rules on unsanctioned and rival events, home and away rule, club location, breakaway leagues, club ownership, mandatory player release rules, licensing requirements, and third party ownership under the organisation of the European model of sport to determine the role of the Commission decisions in establishing and developing EU sports law as well as shaping the significance and autonomy of sport. It is established that the Commission approaches each individual complaint with an objective of enhancing the integration process and ensuring proper functioning of the internal market. Similar to the ECJ's approach established in the previous chapter, the Commission does not grant any exception to sport due to its specificity and instead it examines compatibility of each sporting rule on a case by case analysis as guided under the *Meca Medina* judgment. The Commission acts when commercial cross border activity, trade and/or movement, is affected between Member States[1096] and it would not interfere with domestic commercial matters due to lack of competence[1097]. Once the complaint falls within the jurisdiction of EU, the sporting rule in question would be challenged by the Commission under the market access analysis to find out whether it forms a restriction on the internal market, whether it could be justified due to inherence and/or legitimate aim, and whether it is proportionate. During its analysis, specificity of sport will not be enough to protect the sporting rule from the application of EU law and to be classified as a restriction should it distorts competition within the internal market and affect cross border trade between the Member States. The effect of the specificity of sport argument to achieve protection under EU law in case of distortion of competition and/or abuse of dominant position is minor if any. This creates a direct impact on the specificity and autonomy of sport.

[1096] *Case 3651, C.U. de Lille/UEFA (Mouscron)* Unpublished Commission Decision of 9 December 1999.
[1097] See competences of EU.

IV. Chapter Conclusion

Commission decisions demonstrated the considerable impact of organisational structures of the EU on the governance of sport on the specificity of sport and on the autonomy of sport. Case by case analysis of each sporting rule without any exception demonstrates that the EU has a direct impact on the governance of the European model of sport. This analysis takes place once the sporting rule affecting the cross-border movement or trade between Member States or competition within the internal market. This confirms that organisation of sport enjoys conditional autonomy, supervised through the Commission decisions where possible, under the organisational structures of the EU[1098]. The autonomy of sport is conditioned on compliance with the EU law, especially under non-distortion of the proper functioning of the internal market. Every sporting rule is subject to the application of EU law with no exception and distortion of the internal market will not be negotiated.

Therefore, it is established that organisational structures of the EU have a significant impact on the organisation of sport regarding the autonomy and specificity of sport. Currently, sport enjoys conditional autonomy under the organisational structures of EU. While the specificity of sport is acknowledged, it does not play a major role in contributing towards the autonomy of sport. The organisation of sport does not enjoy a general exception under the EU and its existence is conditional upon compliance with the EU law.

[1098] See for example ISU complaint referred to under this chapter.

CHAPTER VI: SUPERVISED CONDITIONAL AUTONOMY OF SPORT IN EUROPE

I. Introduction; II. Good Governance; II.I. Good Governance in Sport; II.II. Good Governance in Sport under the Organisational Structures of the EU; II.III. Good Governance Policy of EU as a Condition for Autonomy of Sport; **III. Supervised Conditional Autonomy of Sport under the EU Policy**; III.I. EU Competence for Taking Action to Achieve Good Governance in Sport; III.II. Formal Supervision though Article 165 TFEU; **IV. Chapter Conclusion.**

I. Introduction

The objective of this chapter is to establish to what extent can the organisational structures of EU and the European model of sport co-exist. This chapter comprises of defining good governance and supervised conditional autonomy of sport as a solution for European model of sport to co-exist with the organisational structures of the EU .

II. Good Governance

The concept of governance is as old as human civilization. Governance defines the process of decision-making and implementation or non-implementation of decisions[1099]. Good Governance is the responsible conduct of public affairs and management of public resources. It is summarised in the Council of Europe's *12 Principles of Good Governance*[1100]. These twelve principles of good governance identified by the Council of Europe are; (1) Participation, Representation, Fair Conduct of Elections; (2) Responsiveness; (3) Efficiency and Effectiveness; (4) Openness and Transparency; (5) . Rule of Law; (6) Ethical Conduct; (7) Competence and Capacity; (8) Innovation and Openness to Change; (9) Sustainability and Long-term Orientation;

[1099] United Nations Economic and Social Commission for Asia and the Pacific *What is Good Governance?* <https://www.unescap.org/sites/default/files/good-governance.pdf> Accessed on 19 August 2020.
[1100] Council of Europe, 12 Principles of Good Governance <https://www.coe.int/en/web/good-governance/12-principles> accessed on 19 August 2020.

(10) Sound Financial Management; (11) Human Rights, Cultural Diversity and Social Cohesion and; (12) Accountability[1101]. At all levels, good governance is fundamental to economic growth, political stability, and security. It forms the key factor for stability and security[1102]. Good governance leads to improved economic benefits in a globalised world and it accelerates economic transitions[1103]. Nevertheless, good governance is an ideal which is difficult to achieve in its entirety[1104]. However, to ensure sustainable human development, actions must be taken to achieve good governance in a society. Good governance ensures that policies and procedures are adopted to ensure an organisation is well run[1105]. Apart from rules and regulations, good governance reflects an organisation's ethical culture[1106]. Under the sporting context, good governance represents the framework and culture within which a sports body sets policy, delivers its strategic objectives, engages with stakeholders, monitors performance, evaluates and manages risk and reports to its constituents on its activities and progress including the delivery of effective, sustainable and proportionate sports policy and regulation[1107].

II.I. Good Governance in Sport

Good governance in sport has emerged as a condition for the autonomy of sport. Action for good governance under international sport has identified four types of good governance dimensions. These are transparency and public communication, democratic process, checks and balances, and solidarity. First, transparency is regarded as the main condition for good governance of sport since failures of governance are often connected to disclosure of information mainly on monetary matters[1108]. The sport sector heavily relies on public support and SGBs are charged with taking care of a public good.

[1101] Council of Europe, '12 Principles of Good Governance' <https://www.coe.int/en/web/goodgovernance/12-principles> accessed on 19 August 2020.
[1102] Organisation for Security and Co-operation in Europe (OSCE), Good Governance <https://www.osce.org/oceea/446335> accessed on 19 August 2020.
[1103] *Ibid.*
[1104] United Nations Economic and Social Commission for Asia and the Pacific, what is Good Governance? <https://www.unescap.org/sites/default/files/good-governance.pdf> accessed on 19 August 2020.
[1105] World Economic Forum, 'what do we mean by governance?' (26 February 2016)
[1106] European Parliament, 'Good Governance in Sport' Briefing (January 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf> accessed on 19 August 2020.
[1107] EU expert group on good governance, Recommendations on principles of good governance in sport, p.5
[1108] Action for Good Governance in International Sport (AGGIS), Jens Alm (eds), Action for Good Governance in International Sport Organisations, (2013) p 6.

Therefore, they are accountable to the public and must disclose their inner workings, including financial reports and activities, for public scrutiny[1109]. Secondly, on the democratic process, while the high degree of autonomy allowed sport to function according to its own priorities and set of rules, the governing organisations mainly lacked the necessary internal democratic process resulting in lack of legitimacy[1110]. Therefore, democratic legitimacy can be achieved provided that the governing bodies and actors within the system complies with rules and norms inherent in a democratic grammar of conduct[1111]. Thirdly, the corner stone of a democratic system is the operation of checks and balances which limit and separate the powers of legislative, executive and judiciary in a state[1112]. Checks and balances within the sport sector is the main element to prevent a concentration of power and ensure robust, independent, and free from improper influence decision making[1113]. The final dimension to achieve good governance in sport is solidarity. Sport organisations are facing increasing high demand for socially, ethically, and environmentally responsible behaviour. Apart from their responsibility towards their stakeholders, sport organisations have a responsibility towards the public[1114]. Considering the sociocultural values and impact of sport, it has a massive impact on wider society and it is only fair for governing organisations to give something back to society since it relies heavily on public financial support and public funds on sport activities to build stadiums, infrastructure on public transport, public television contracts for competition, investments in training centres, security and traffic regulation during sport events[1115].

Likewise, Henry and Lee, suggests that transparency in procedures and decision-making, particularly in resource allocation; accountability in relation to financial investors and other investors; democracy in access to representation in decision-making for those who make up the organisation's internal constituencies; responsibility

[1109] Action for Good Governance in International Sport (AGGIS), Jens Alm (eds), Action for Good Governance in International Sport Organisations, (2013) p 6.
[1110] *Ibid*.
[1111] *Ibid*.
[1112] *Ibid*.
[1113] *Ibid* p 7.
[1114] *Ibid*.
[1115] *Ibid*.

regarding the sustainable development of the organisation and the sport; equity in treatment of constituencies, notably gender equity; effectiveness in establishing and monitoring of measures of effectiveness with measurable and attainable targets; and efficiency regarding the achievement of such goals with the most efficient use of resources possible are the important elements of good governance in sport[1116].

II.II. Good Governance in Sport under the Organisational Structures of the EU

Traditionally, sport has exercised self-governance via self-organising interorganisational networks characterized by interdependence, resource exchange, rules of the game and noteworthy autonomy from the state without significant interference or challenge[1117]. In the last 20 years, sport has evolved dramatically. The commercialisation of the sport market has attracted the attention of the global capitalism and has exposed serious governance failures, organisational corruption, and match-fixing within the organisation of sport[1118]. Media interest in sport has risen to new highs and the recent emergence of social media networks means sport is now subject to a greater and swifter level of scrutiny and public interest than ever before[1119]. In the past, while serious questions about the governance of sport surfaced in the public eye with irregular intervals, recently, accumulation of scandals in sport has increased greatly and shook the credibility of sport and its organisation threatening the public trust and the social importance of sport[1120]. The traditional system of hierarchical self-governance of sport authorities enjoyed for over a century faced serious pressure after the ECJ's initial involvement in regulating sport in the *Walrave* judgment. Since then, the ECJ has challenged the legal autonomy of SGBs through the application of fundamental EU law provisions. After the *Bosman* judgment involvement of the EU to regulate sport, this

[1116] I Henry and PC Lee, 'Governance and ethics in sport', The Business of Sport Management, (Pearson Education, Harlow, 2004) p. 31.
[1117] European Commission, 'Developing the European Dimension in Sport' [2011] COM (2011) 12 final, p 3.
[1117] M Mrkonjic, Sport Organisations, Autonomy and Good Governance, Working Paper for Action for Good Governance in Internatinal Sport Organisations (AGGIS) Project, *Danish Institute for Sport Studies*, January 2013, p 133.
[1118] 2002 Winter Olympic Bid Scandal in Salt Lake City.
[1119] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on a European Union Work Plan for Sport) 2011–2014 (2011) OJ C.
[1120] Action for Good Governance in International Sport (AGGIS), Jens Alm (eds), Action for Good Governance in International Sport Organisations, (2013) p2.

challenge has become certain[1121]. While after *Walrave* lobbying by SGBs ensured them that the EU institutions will respect their political autonomy[1122], the past two decades demonstrated otherwise and as a condition for autonomy that the demand for good governance surfaced against the traditionally closed, self-governing network of the SGBs[1123]. While the EU has recognised the social and economic role of sport in the European society and that it has a specific nature, it did not provide an exemption from the application of the EU law to sport. In 2009, the EU acquired a degree of legal legitimacy in the steering of sport governance with incorporation of sport competence provision under Article 165 TFEU [1124].

II.III. Good Governance Policy of EU as a Condition for Autonomy of Sport

Historically, sports organisations have enjoyed considerable autonomy in regulating sport which safeguarded the inherent sporting values from external influence. This strongly defended autonomy by sports authorities has increasingly been challenged under the organisational structures of the EU as demonstrated under this research. As a result, the autonomy of sport has been conditional on compliance with the EU law and policy. Conditional autonomy of sport under the EU law is established under the previous chapters. This chapter focuses on the conditional autonomy of sport under the EU policy. Under the EU policy, autonomy of sport is conditioned upon compliance with the EU guided good governance principles of democracy, transparency, accountability in decision-making, and representative inclusiveness[1125]. Sport organisations have taken steps to improve their governance standards accordingly. While EU work plan reports suggest that much remains to be done[1126], the EU's action for good governance in sport, mainly in the form of recommendations and financial

[1121] Garcia, B, 'From Regulation to Governance and Representation', *Entertainment and Sports law Journal,* 5, 1.
[1122] R Parrish, Sports Law and Policy in the European Union (Manchester University Press 2003).
[1123] M Mrkonjic, Sport Organisations, Autonomy and Good Governance, Working Paper for Action for Good Governance in International Sport Organisations (AGGIS) Project, *Danish Institute for Sport Studies*, January 2013, p 133.
[1124] B Garcia, 'Sport Governance After the White Paper: The Demise of the European Model?' (2009) 3 (1) IJSPP 267.
[1125] European Parliament, 'Good Governance in Sport' Briefing (January 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf> accessed on 19 August 2020.
[1126] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on a European Union Work Plan for Sport) 2011–2014 (2011) OJ C.

support for specific initiatives, has delivered some concrete outcome such as producing a set of principles applicable to organisations across the whole sport movement[1127].

III. Supervised Conditional Autonomy of Sport under the EU Policy

In the post-*Bosman* period, during the Helsinki Report[1128], the Committee of the Regions referred to the concept of European Model of Sport to preserve the social function and the current structures of the organisation of sport in Europe. There was a need to formulate a comprehensive approach towards sport to answer challenges on sport, both at EU and Member States level, in compliance with the Treaty, especially with the principle of subsidiarity, and the autonomy of sport[1129]. Initially the statement of good governance in sport was introduced in Europe's first conference on the governance of sport in 2001 by the FIA[1130]. SGBs realised that good governance was an essential condition for sport to justify and claim its autonomy. The intention behind was to prevent outside intervention in sporting affairs[1131]. With this intention IOC's Basic Universal Principles on Good Governance of the Olympic and Sports Movement 2009, which was later incorporated in the IOC's Code of Ethics, forms an integral part of the Olympic Charter[1132]. Moreover, the Olympic Agenda of 2020 launched in December 2014 encourages acceptance and compliance with the good governance principles by all member organisations of the Olympic Movement and holds them accountable for undertaking regular self-evaluation on this matter[1133].

III.I. EU Competence for Taking Action to Achieve Good Governance in Sport

Since Lisbon Treaty, the EU has a supporting competence in sport to carry out actions supporting, coordinating, or supplementing measures taken by the Member States[1134].

[1127] European Parliament, 'Good Governance in Sport' Briefing (January 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf> accessed on 19 August 2020.
[1128] Commission of The European Communities, 'The Helsinki Report on Sport' COM(1999) 644 final.
[1129] Opinion of the Committee of the Regions on "The European model of sport", CdR 37/99, 15.9.99.
[1130] H Smith, 'Rules of the Game: Europe's first conference on the Governance of Sport Conference Report and Conclusions' (Brussels, 26 and 27 February 2001).
[1131] *Ibid.*
[1132] European Parliament, 'Good Governance in Sport' Briefing (January 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf> accessed on 19 August 2020.
[1133] *Ibid*.
[1134] Article 6 TFEU.

Nevertheless, the EU does not have a legislative power in the field of sport. Since Article 165 TFEU expressly removes the possibility of harmonisation of the laws and regulations of the Member States, the policy tool available for the EU is limited to incentive measures and recommendations. Nevertheless, the EU has the power to regulate sport through its internal market powers. As initially established under *Walrave*[1135], sport is subject to EU law, mainly free movement, and competition law provisions, if it constitutes an economic activity. Based on this, the ECJ and the Commission have increasingly been involved in solving disputes on sporting rules adopted by the SGBs. In certain cases, sporting rules had to be altered to comply with the EU law as demonstrated under the previous chapters of this research[1136].

III.II. Formal Supervision though Article 165 TFEU

In 2007, the EU Commission White Paper had three main policy discussions on the social value, economic value, and the organisation of sport. Under the organisation of sport, good governance of sport was proposed as a condition for the autonomy of sport. Consequently, with the supervision initiated to be provided by the EU to European sport, the European model of sport was supervised to have a form of autonomy, under the organisational structures of the EU. This was an introduction of the supervised conditional autonomy status of sport in Europe. Following the White Paper on Sport, with the adoption of Article 165 TFEU, the EU institutions gained a power to coordinate or support the area of sport ideally to achieve uniformed governance. With the articulation of Article 165 under the Lisbon Treaty, while the Union acquired a competence in the area it also gained the ability to obtain information through social dialogue and to supervise regulations for good governance to be implemented. This certainly helps to obtain reliable empirical evidence directly from the sport organisations on the difficulties with the internal workings of them. In addition, through Article 165, the Union supervises the governance choices of sport to develop necessary regulations to achieve European standards of governance in sport. Article 165 granted a formal supervisory power to the EU to contribute towards the improvement of the

[1135] Case 36/74 *Walrave and Koch* [1974] ECR 1405.
[1136] Case C-415/93Union Royale Belge Societes de Football Association v Bosman [1995] ECR I-4921 is a good example.

European model of sport through obtaining recommendations and incentive measures helping sport to enjoy supervised conditional autonomy in Europe. For the last 45 years, through ECJ jurisprudence, the Union had an un-codified and informal supervisory role over sport to ensure that European model of sport complies with the EU law[1137]. Article 165 TFEU did not have a radical effect on the EU's powers in this effect. However, it did formalise the EU's supervisory powers on the European model of sport. Since then, the European model of sport enjoys a supervised conditional autonomy under the organisational structures of the EU. Autonomy of sport's current existence in the EU is on condition to accept supervision of the EU to apply good governance standards and comply with the EU law.

After the adoption of the Lisbon Treaty, Sport Directors in their first meeting concluded that the Treaty implied a change in the decision-making process in the field of sport with clearly defined roles for the different EU institutions[*1138*]. In 2008, the Parliament, while approving an annual budget to develop the European sporting dimension in sport, requested from the Commission to have due respect for the specificity of sports and to provide more legal certainty to supervise SGBs by creating clear guidelines on the applicability of European law to sports in Europe[1139]. In 2011, the Council in the European Union Work Plan for Sport stated that the working methods and procedures should be formalized to supervise SGBs in the light of implementing Article 165 TFEU[1140]. Further, the Council while promoting the achievements on sport through informal working structure prior to the Lisbon Treaty, emphasized the necessity to strengthen cooperation between the Member States and the Commission and ensure that all sport related activities in the EU should concentrate on the priority themes, actions and working methods listed in the Work Plan[1141]. On the other hand, in 2010, the European Commission initiated a public consultation on the EU's choices of

[1137] A Geeraert, A Rationalist Perspective on the Autonomy of International SGBs, *International Journal of Sports policy and Politics*, 2014, p 476
[1138] Spanish presidency 2010 presidency conclusions from the informal meeting of EU Sport Directors in Barcelona, 25-26 February 2010.
[1139] European Parliament, 'Parliament Resolution of 8 May 2008 on the White Paper on Sport' (2007) INI/2007/2261.
[1140] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on a European Union Work Plan for Sport) 2011–2014 (2011) OJ C.
[1141] *Ibid*.

implementation of Article 165 TFEU to obtain future proposals for effective supervision. This consultation is followed by the adoption of the first communication on sport; Developing the European Dimension in Sport. This communication approves the White Paper on Sport for facilitating the EU level cooperation and social dialogue in the area. On the other hand, the communication has proposals to strengthen the societal, economic, and organizational dimensions of sport[1142]. The Commission has stressed that they shall respect the autonomy of the sporting organisations as well as the competences of the Member States in sport[1143]. The Commission has further distilled the approaches taken under the juridification of the ECJ and concluded that sport is considered special due to its certain characteristics and social importance and would enjoy a conditional autonomy on complying with the EU law. To achieve compliance, the EU would provide supervision to the SGBs. In 2011, the specificity of sport has been defined under the Staff Working Document and explained its main characteristics as to be interdependence between competing adversaries, uncertainty as to result, freedom of internal organisation, and sport's educational, public health, social, cultural and recreational functions[1144]. The European Commission has adopted a Communication on *Developing the European Dimension in Sport* in January 2011 while the European Union Sport Ministers approved European Union Work Plan on sporting practices for further supervision[1145].

In 2011, the Commission reaffirmed that good governance in sport is a condition for the autonomy of sport within the EU which facilitates sport to address challenges under the EU legal framework. To achieve good governance, sport should be within the limits of law, democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders[1146] through exchange of good practice and targeted support to specific initiatives[1147]. Further in 2013 the importance of good

[1142] European Commission, 'Rapid press releases' 2011, IP/11/43.
[1143] *Ibid.*
[1144] Commission Staff Working Document, 'Sport and Free Movement' (Brussels, 18.1.2011) SEC(2011) 66 final Staff Working Document < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011SC0066&from=EN> accessed on 04 February 2017.
[1145] European Commission, Developing the European Dimension in Sport [2011] COM (2011) 12 final p 7.
[1146] *Ibid* p 10.
[1147] *Ibid* p 13.

governance principles and their implementation is repeated and declared that unless they are fulfilled as supervised, the conditional autonomy of sporting organisations will be threatened under the application of the legal framework of the EU[1148]. In 2016 the EU published the challenges they are facing while supervising the European model of sport to promote good governance under the organisational structures.[1149] The EU emphasised that good governance is a prerequisite condition for the recognition of the autonomy of sport under the organisational structures of the EU[1150]. However, the progress made in supervising the European model of sport to achieve good governance was little and there was still much work to be done. There was a pressing need for continuous monitoring of how the principles of good governance in sport were being implemented and promoted[1151]. Meanwhile, the good governance principles needed to evolve to answer and confront changing challenges faced under the European model of sport[1152].

The promotion of good governance in sport is placed high on the EU sports policy agenda[1153]. EU Under the Work Plan for Sport 2011-2014, the EU opted for a concentrated definition for the EU standards of good governance in sport. The Expert Group on the good governance of sport defined good governance as the framework and culture within which a SGB sets policy, delivers its strategic objectives, engages with stakeholders, monitors performance, evaluates and manages risk and reports to its constituents on its activities and progress including the delivery of effective, sustainable

[1148] Expert Group Good Governance, 'Deliverable 2: Principles of good governance in sport' (European Commission, September 2013) <http://ec.europa.eu/assets/eac/sport/library/policydocuments/xg-gg-201307-dlvrbl2-sept2013.pdf > accessed 4 January 2019.

[1149] First, there have been a very low response rate by the sport organisations to the questionnaires they have published which created a challenge in measuring the implementation of the good governance principles suggested earlier. Consequently, the expert group has suggested complementary external monitoring or auditing and follow-up is recommended to ensure that the effect of any likely shortfalls is minimized. Secondly, there have been an administrative burden which could be associated with the implementation of good governance. Therefore, they have emphasized that Governments and public authorities could play an important role for the implementation and promotion of good governance in sport, with respect to autonomy of sport.

[1150] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport) 2014–2017 (2014) OJ C 183/12 p 5.

[1151] *Ibid* p 6.

[1152] *Ibid* p 6.

[1153] European Parliament, 'Good Governance in Sport' Briefing (January 2017) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595904/EPRS_BRI(2017)595904_EN.pdf> accessed on 19 August 2020.

and proportionate sports policy and regulation[1154]. Good governance essentially comprises of a set of standards and operational practices leading to the effective regulation of sport while the application of good governance principles should facilitate the development and implementation of more effective sport regulation[1155].

Following the first work plan for 2011-2014, the Council supported a new framework to facilitate the improvement of sport policies in its second work plan for 2014-2017. In their resolution, the Council recognised three areas as main concerns for the EU. These are the integrity of sport, its economic dimension and the relationship between sport and society[1156]. Further, the Council established five 'expert groups' to deal with match-fixing, good governance, the economic dimension of sport, health-enhancing physical activity (HEPA) and human resources development in sport[1157]. Moreover, the Council summoned the EU to ratify the Convention on the Manipulation of Sports Competitions to prevent, detect, punish and discipline the manipulation of sports competitions, as well as enhancing the exchange of information and national and international cooperation between the public authorities concerned, and with sports organisations and sports betting operators[1158].

Recently, the EU Ministers responsible for sport adopted the third work plan for sport supervision for 2017-2020. In the work plan, priority topics for the Commission and the Member States are set out as integrity of sport, the economic dimension of sport and sport and society. There are two expert groups on the integrity and skills and workforce development in sport, and new working methods such as cluster meetings shall be adopted. In addition. The Commission is invited to monitor the two expert groups on

[1154] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on a European Union Work Plan for Sport) 2011–2014 (2011) OJ C p 5.
[1155] *Ibid*
[1156] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport) 2014–2017 (2014) OJ C 183/12 p 5.
[1157] *Ibid*.
[1158] Council of Europe, 'Council of Europe Convention on the Manipulation of Sports Competitions' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cdd7e> accessed on 24 April 2017.

sport diplomacy and grassroots sport[1159]. In the third work plan for 2017-2020, after stressing the need for appropriate cooperation with the sport stakeholders inter alia through the structured dialogue, the Council outlined supervising objectives or further developing the European dimension in sport[1160]. Here, the governance of sport was identified as a priority of the EU under the Work Plan on the sports policy for 2017-2020 apart from integrity of sport, support for grassroots sport, sport as a health enhancing activity, societal role of sport, and protection of property rights.

Supporting good governance in sport and the recognition of the European model and its specificities is currently one of the fundamental aims of the EU under sport. To achieve these, first, the unique role of the organised sport structures and the benefits for various areas, such as the fight against physical inactivity, should be paid attention. Second, the European Sport Model and the specific nature of sport in Europe should be recognised and supported. A differentiation should be made between non-profit organisations and commercial providers of sport services. The final point is, with good governance being a pre-condition for the autonomy of sport, sport organisations welcome a detailed dialogue with the EU institutions to promote good governance. Therefore, the EU should acknowledge the ongoing developments in different sport organisations such as the International Olympic Committee, European Athletics and FIFA while supporting and encouraging them to the use of practical tools developed by the Olympic movement as a result of the implementation of Recommendations 28 on the autonomy of sport and 27 on the good governance of Olympic agenda 2020 and the Support the Implementation of Good Governance in Sport (SIGGS) Project of the EOC EU Office[1161]. The general objective of the SIGGS project is to promote and support good governance in sport through providing practical guidance to National Olympic Committees (NOCs) and national sport federations (NFs) on the proper way to adopt

[1159] European Commission, <https://ec.europa.eu/sport/news/20170524-council-approves-new-work-plan-for-sport_en> accessed on 25/06/2018,
[1160] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, on the European Union Work Plan for Sport (1 July 2017 - 31 December 2020)) 8938/17 SPORT 33.
[1161] The House of European Sport, Priorities EU Sports policy 2017-2020, July 2017.

principles of good governance in to improve their governance[1162].Certain values and traditions of the European model of sport should be promoted to ensure the proper functioning of the sporting activity. However, sport structures are diverse and complex. Therefore, it would be unrealistic to define a unified model of organisation of sport in Europe[1163]. Consequently, the reform process in sport is a challenging one. Nevertheless, if a SGB does not implement reforms, it risks losing not only its autonomy and reputation but also its most valuable sources of income. Conversely, through the EU supervision, by embracing good governance principles within the organisation, SGBs can create new opportunities to gain new revenues, new participants, and renewed standing in the community[1164] while sustaining their long fought conditional autonomy.

IV. Chapter Conclusion

This chapter has attempted to define current EU policy on sport to discover under which circumstances organisational structures of the EU and the European model of sport could co-exist. In the chapter it is established that sporting practices do not operate in a vacuum but in a legal environment and they are, like any other body, subject to law[1165]. EU sports policy is currently formally supervising the European model of sport for it to achieve the EU standards of good governance. Conditional autonomy of sport under the EU law, which is demonstrated under the previous chapters of this thesis, is supervised through the EU policy on sport. Therefore, this research collectively concludes that currently the European model of sport enjoys supervised conditional autonomy under the organisational structures of the EU. The European model of sport and the organisational structures of the EU could only co-exist on dual condition that sport complies with the supervision of the EU to achieve good governance in sport while complying with the fundamental provisions of the EU law.

[1162] Support the Implementation of Good Governance in Sport (SIGGS) Project <https://www.siggs.eu/project> accessed on 23 July 2020.
[1163] Commission of the European Communities, 'White Paper on Sport' COM (2007) 391 final p 12.
[1164] Council of the European Union, 'Resolution of the Council and of the Representatives of the Governments of the Member States' (Meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport) 2014–2017 (2014) OJ C 183/12 p 5.
[1165] V Alexandrakis, 'EU and Sport: A New Beginning?' (2012) International Sports law Review Pandektis 305 p 311.

CHAPTER VII: THE MYTH OF AUTONOMY FOR SPORT IN DEEPLY DIVIDED ISLAND OF CYPRUS

I. Introduction; II. The "Myth" of Sport Autonomy in Deeply Divided Regions; II.I Governance of Sport in Deeply Divided Regions; II.II Cyprus Issue; II.III TRNC: Unilateral Declaration of Independence (UDI); II.IV Current Status of Cyprus Issue; **III. Sport in Cyprus;** III.I The Myth of Sport Autonomy for Cyprus; III.II TRNC Model of Sport: Under the Shadows of the Cyprus Issue; III.III. Key Features of the TRNC Model of Sport; III.IV Organisation of the TRNC Model of Sport; **IV. TRNC Model of Sport v European Model of Sport; V. Chapter Conclusion.**

I. Introduction

The objective of this chapter is to discover the impact of the EU on the Turkish Republic of Northern Cyprus (TRNC) model of sport which exists under international isolation within the deeply divided European island of Cyprus. This chapter explores the autonomy of sport in TRNC, the Cyprus issue, existence of the TRNC model of sport under international isolation and restrictions, the key features of the TRNC model of sport, and the differences between the European model of sport and TRNC model of sport.

II. The "Myth" of Sport Autonomy in Deeply Divided Regions

Sport is a persistent part of modern life and has the ability to affect societies all around the world in ways that traditional forms of diplomacy rarely can. In the last century, sport has become bigger, grander and more diverse than ever[1166]. The diffusion and redistribution of economic and political power is visible in international sport and its global media coverage. Sport is a multi-billion dollar global business which is worth around $700 billion a year and it forms one per cent of the world GDP[1167]. This precise

[1166] Ed Smith, 'Has sport ever had it so good?' (29 December 2015) <www.espncricinfo.com/magazine/content/story/956239.html> accessed on 2 March 2016.
[1167] KPMG, 'The Business of Sport' <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf > accessed on 7 July 2020.

global reach of sport through mega sport events, such as the FIFA World Cup and the Olympic Games, is the main reason for it to appeal to actors seeking to use sport to achieve their diplomatic goals[1168]. Nevertheless, the role of sport in global diplomacy is underestimated and often disregarded[1169]. While it is commonly believed that sport and politics are distinct in nature, it has been stated that this is a "myth of autonomy" for sport and it does not stand up to scrutiny[1170]. Whether this preposition is true or false, sport deserves an understanding within the realm of diplomacy[1171]. National governments are the main actors seeking to use sport to achieve their diplomatic goals. They do not only share the visual imagery of the competitors but also they reach millions if not billions of people across the world though mega sport events. Through these events, states disseminate public diplomacy with an aim to conqure the hearts and minds of foreign audiences. This dissemination of public diplomacy through sport is on a grande scale and more persuasive than individually or nationally focused means[1172]. Due to its popularity, it has been used to promote a particular, often national, international image of the state[1173]. Apart from states, individuals have also prefered sporting events to stage a protest when traditional diplomacy fails to provide the grounds for change[1174].

The practice of diplomacy through sport represents the adoption of *soft power* to achieve public diplomacy and nation branding. While it is rarely linked with the global sport, the concept of soft power has received great scholarly attantion. Nye Jr. has argued that

[1168] J S Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 1.
[1169] *Ibid.*
[1170] L Allison, *The Politics of Sport* (Manchester University Press 1986), 17–21.
[1171] J S Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 1.
[1172] *Ibid*.
[1173] *Ibid* p 3.
[1174] Political protests have included John Carlos and Tommie Smith's actions on the podium in 1968 at Mexico City supporting the American civil rights movement; teams from the National Basketball Association and Women's National Basketball Association supporting Black Lives Matter and protesting the killings of unarmed African American citizens by law enforcement agencies in recent years; and the 2016 Olympic silver medallist Feyisa Lilesa making an X with his arms above his head as he crossed the marathon finish line to show his solidarity with his persecuted Oromo people in Ethiopia. The en masse African boycott of the 1976 Olympic Games in Montreal contributed to the Gleneagles Agreement which ensured the sporting exclusion of apartheid states in Africa – and also that African states would participate in and not boycott the 1978 Commonwealth Games in Edmonton, Canada. Aviston D. Downes, 'Forging Africa-Caribbean solidarity within the Commonwealth? Sport and diplomacy during the anti-apartheid campaign', in Heather L. Dichter and Andrew Johns (eds), Diplomatic Games: Sport, Statecraft and International Relations since 1945 (University Press of Kentucky, 2014) p 117–49.

soft power of a state largely depends on three basic sources. These are its culture, where it is attractive to others, its political values, at home and abroad, and its foreign policies where it receives legitimacy[1175]. States and other actors across the world have used sport to reach their aims. In many cases states directly and indirectly use sport programmes for development and peace[1176]**.** Sport exchanges even at the most basic level, organised by individuals or states, have contributed to the *winning of hearts and minds* of people. On the other hand, withholding the opportunity to compete in global sport, often referred to as "boycott", or just the threat of such deprivation has been used by a variety of actors and states[1177]. Sport has been and still remains to be an integral part of diplomacy[1178].

II.I. Governance of Sport in Deeply Divided Regions

Sport has been associated in both inter-state and intra-state conflicts, as demonstrated by the examples of the *soccer war* between Honduras and El Salvador in 1969 and the uprising between Dynamo Red Star Belgrade and Zagreb fans in Maksimir at Zagreb stadium in May 1990, where it has been identified as the symbolic begining of the violent dissolution of Yugoslavia[1179]. During intra-state conflicts, violence ruptures sport along linguistic, religious, national and ethnic lines[1180]. Nevertheless, sport is often seen as a tool of bringing people together and healing wounds in post-conflict societies. This is either facilitated through a traditional form or through more institutionalised "sport for development and peace" projects. These projects are undertaken by non-governmental organisations mainly with the support of international organisations[1181].

[1175] J S Nye, Jr, 'Hard, soft, and smart power', in A F Cooper, J Heine and R Thakur (eds), The Oxford Handbook of Modern Diplomacy (Oxford University Press, 2013) p 566.
[1176] J S Nye, Jr, 'Public diplomacy and soft power', (2008) Annals of the American Academy of Political and Social Science Public Diplomacy in a Changing World, Vol. 616:94 p 108.
[1177] J S Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 4.
[1178] *Ibid*, p 7.
[1179] See R Kapuściński, The Soccer War (Cambridge: Granta, 1990); A. L. Sack and Z. Suster, 'Soccer and Croatian nationalism: a prelude to war', Journal of Sport & Social Issues, 24:3 (2000); D. Brentin, '"A lofty battle for the nation": the social roles of sport in Tudjman's Croatia', Sport in Society, 16:8 (2013) p 996.
[1180] J S Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 13.
[1181] *Ibid*.

The institutional design of sport in deeply divided regions takes a form on a scale ranging between integration and accomodation[1182]. The integration approach disregards differences of people within the society, arguing that political instability and conflict arises as a result of group-based partisanship in political institutions[1183] while rejecting the idea of ethnic difference reflecting into political differences[1184]. On the other hand, the accommodation approach advocates the recognition of more than one religious, ethnic, national and/or linguistic community in the society and promotes to maintain the coexistence of different communities within the society[1185]. The accommodation approach accepts that in certain cases divisions of identities are resilient and political prudence and morality requires adaptation of the needs and fears of a people[1186]. Therefore, institutional design should aim to provide guarantees to these people based on their distinct identity[1187].

Sport, being a constitutive element of everyday life in popular culture, does not operate in a vacuum, immune from the effects of conflict in a region that are deeply divided along national, ethnic, religious or linguistic lines[1188]. In contrast with "sport for development and peace" projects undertaken by non-governmental organisations, sport highlights existing divisions[1189]. Sport in general, and football in particular, have demostrated to form significant grounds for national unity and mobilise nationalism[1190].

[1182] J McGarry, B. O'Leary and R. Simeon, 'Integration or accommodation? The enduring debate in conflict regulation', in S. Choudhry (eds), Constitutional Design for Divided Societies: Integration or Accommodation? (Oxford University Press, 2008) p 45. To be strictly accurate, the end points of this scale are assimilation at the integration end and secession/partition at the accommodation end, though McGarry et al. consider these beyond the scope of their analysis, and in contemporary situations they are rarely employed (with some notable exceptions, such as Kosovo).

[1183] J McGarry, B. O'Leary and R. Simeon, 'Integration or accommodation? The enduring debate in conflict regulation', in S. Choudhry (eds), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) p 45.

[1184] S Choudhry, 'Bridging comparative politics and comparative constitutional law: constitutional design in divided societies', in Choudhry (eds), *Constitutional Design for Divided Societies* (Oxford University Press 2008) p 27.

[1185] J McGarry, B. O'Leary and R. Simeon, 'Integration or accommodation? The enduring debate in conflict regulation', in S. Choudhry (eds), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, 2008) p 52.

[1186] *Ibid* p 52–3.

[1187] J Simon Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018), p 15.

[1188] A Tomlinson, *Sport and Leisure Cultures* (University of Minnesota Press, 2005) p xiv.

[1189] J Hoberman, 'The myth of sport as a peace-promoting political force', SAIS Review of International Affairs, 31:1 (2011); J. Coakley, *Nationalism, Ethnicity, and the State: Making and Breaking Nations* (Sage, 2012) p 131.

[1190] J Sugden and A. Tomlinson, *FIFA and the Contest for World Football: Who Rules the People's Game?* (Cambridge: Polity, 1998) p 8.

Indeed, some state that sport is one of the most powerful platforms where national performance can take place[1191]. Nevertheless, while in deeply divided regions sport has been the subject of a few research, with little attention being paid to how sport is governed in such circumstances[1192].

II.II. Cyprus Issue

The division of sport on the island of Cyprus has a history which dates back to 1950s. Profound sporting competition actually involving both Greek Cypriots and Turkish Cypriots ended in 1950s which is long before the formal and definite partition of the island in 1974[1193]. Cyprus is a difficult and complex international political problem. It has a long history and remains unresolved today. Nevertheless, the dispute revolves around one central fact which is the existence of two distinct peoples on the island, the Turkish Cypriots and the Greek Cypriots. Their language, culture, national origin, religion, history and aspirations are different. Hence, the issue of Cyprus is based on the issue of the relationship between these two people. Turkish Cypriot existence on the island dates to the conquest of Ottomans in 1571 and the Greek existence pre-dates this. Ottomans ruled the island until British colonisation in 1878. The British controlled the island until Turkish Cypriots and Greek Cypriots received their right of self-determination and independence from the colonisation and mutually agreed to establish the partnership of Republic of Cyprus in 1960.

After the end of the Second World War, with the process of decolonization, the British terminated their colonial administrations and mandates in Pakistan, India, Transjordan and Palestine[1194]. In the mid-1950s, in colonial Cyprus, Greece and Greek Cypriots intensified their struggle for independence and the unification of the island with Greece

[1191] T Edensor, *National Identity, Popular Culture and Everyday Life* (Oxford: Berg, 2002), cited in A. Bairner, 'Assessing the sociology of sport: on national identity and nationalism', International Review for the Sociology of Sport, 50:4–5 (2015) p 376.
[1192] J S Rofe, 'Introduction: Establishing the Field of Play' in J S Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 16.
[1193] *Ibid* p 20.
[1194]/ J Darwin, *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (Macmillan, 1988) p 95-97, 117-119.

to achieve Enosis[1195]. The right to self-determination was the main argument of Greece and Greek Cypriots for independence from Britain. In 1952, the UN General Assembly invited Member States to promote the right of self-determination of people under resolution 637. This paved the way for the Greek Cypriots and Greece to have a legitimate demand for the liberation of Cyprus from the colonial rule of Britain[1196]. In 1956, Lord Radcliffe, who was a British expert preparing the constitution, suggested a form of diarchy which required a sensitive balance between the numerical minority, where political will had to be safeguarded, and, the numerical majority, where the political will of the minority would not be allowed to impose its will on the majority[1197]. This was a "narrow jacket" for the internal dynamics of the island[1198]. Nevertheless, Lord Radcliff reserved the option of partition should the two communities of the island be unsatisfied with the constitutional order prepared by him[1199]. The British Government was very well aware of the fact that dual right of self-determination, where each community had the right to exercise it independently, would eventually necessitate partition as a strong option where two ethnic communities, Turkish and Greek, prevailed on the island[1200]. Nevertheless, the British were reluctant to couple the right of self-determination with the option of partition which would possibly agitate the Irish secessionism in the UK[1201]. On the other hand, the possibility of partition of the island, between the two major communities, gave London a good card to play against the Greeks to discourage them in demanding Enosis[1202]. Hence, the British cabinet did not offer Turkish and Greek partition as its ideal option, but as a premature and unrealistic alternative to the Cyprus issue[1203]. The 1960 independence constitution of Cyprus was

[1195] P J Vatikiotis, 'Between Arabism and Islam', (1986) Middle Eastern Studies Vol. 22, No. 4 p 576–586, p 579–580).
[1196] S G Xydis, *Cyprus: Conflict and Conciliation, 1954-1958* (Ohio State University Press, 1967) p 8–9.
[1197] Cyprus 'Constitutional proposals for Cyprus, Cover note', Memo by SSC, 16 November 1956, CP (56) 264, TNA – CAB 129/84 https://api.parliament.uk/historic-hansard/commons/1956/dec/19/cyprus-lord-radcliffes-proposals accessed on 4 April 2021.
[1198] *Ibid.*
[1199] United Kingdom, HC Deb., vol 562 cc1267-79 (19 December 1956) Cyprus (Lord Radcliffe's Proposals). <https://api.parliament.uk/historic-hansard/commons/1956/dec/19/cyprus-lord-radcliffesproposals> accessed on 4 April 2021.
[1200] 'Cyprus', Memo by SSC, 26 November 1956, CA (56) 33, TNA – CAB 129/84.
[1201] 11 December 1956, CM (56) 98, minute 1, p.3, TNA – CAB 128/30.
[1202] 12 December 1956, CM (56) 99, minute 2, pp.3–4, TNA – CAB 128/30.
[1203] 17 December 1956, CM (56) 102, minute 1, p.4, TNA – CAB 128/30.

established based on the equal status of both sides, and none of the sides had superiority over the other[1204].

The separationist approach between the two communities of the island has long been deeply rooted within the social and cultural structure of Cyprus. Turkish and Greek Cypriots have had detrimental differences in their religion, language, culture, ethnic origin and alliance with mother countries of Turkey and Greece[1205]. Greek and Turkish Cypriot identities are based on national memories contained in the history of Greece and Turkey, more specifically dating back to the independence of Greece from the Ottoman Empire in 1821[1206]. Both peoples of Cyprus have celebrated, and still celebrate, the national holidays of their respective mother country, raising Greek or Turkish flags while adhering to each other as traditional rivals[1207]. This sets the scene to understand the lack of people's *raison d'etre* where there was no sense of belonging and nationhood, underlining the main reason behind the failure of the bi-communal constitutional order of the Republic of Cyprus in 1963, only three years after its establishment[1208].

On 30th November 1963, Greek Cypriot President, Archbishop Makarios, sought to amend 13 clauses of the constitution ensuring equal rights of the two establishing partners of the "Republic of Cyprus" and to remove constitutional guarantees[1209]. The Turkish Cypriots objected and the Greek Cypriots by force of violence[1210], invaded the partnership Government. As a result, a UN peacekeeping force was positioned on the island to stop the violence by separating the Turkish and Greek Cypriots. At this point, the international community engaged with the Cyprus issue for the first time[1211]. Since then, the "Republic of Cyprus" is a de facto partitioned state under the sole control of

[1204] 1960 Republic of Cyprus Constitution Establishment Treaties, original.
[1205] N Crawshaw, *The Cypriot Revolt* (London, George Allen and Unwin 1978).
[1206] C Hitchens *Cyprus* (London, Quarted Books 1984) p 151.
[1207] V D Volkan, *Cyprus: War and Adaptation. A Psycoanalytic History of Two Ethnic Groups in Conflict* (Charlottesville, VA, University Press of Virginia 1979); P Lozios, 'Intercommunal Killing in Cyprus Man' (1988) 23(4), 639-653 p 645.
[1208] P Oberling, *The Road to Bellapais* (New York, Colombia University Press 1982).
[1209] Archbishop Makarios, President of the Republic of Cyprus, 13 Points (30 November 1963) <https://www.pio.gov.cy/assets/pdf/cyproblem/13%20points.pdf> accessed on 9 August 2021.
[1210] H S Gibbons, *The Genocide Files* (Charles Bravos 1997).
[1211] UNSC Resolution 186, 1964.

the Greek Cypriots[1212]. In a very short time, the island converted into ethnically and administratively divided structure between the two peoples. The talks between the two peoples of the island started in 1968 under the auspices of the UN and until now all the plans to resolve the conflict failed. Inter-communal violence took place between 1963-1974, to the detriment of the Turkish Cypriots[1213]. Extreme Greek Cypriot nationalists invaded the unlawfully converted Greek Cypriot Government on the 15th of July 1974 for Enosis to unite the island with Greece. Turkey interfered on the 20th of July 1974 with its rights secured under the Treaty of Guarantee to ensure the non-alignment of the island and to protect the island's independence during a threat of Enosis. Since then, Cyprus is a bi-zonal island, with borders, Greek Cypriots living in the south, under the still disputed "Republic of Cyprus", which is a sole Greek Cypriot Government, and Turkish Cypriots living in the north of the island, under the unilaterally declared State of Turkish Republic of Northern Cyprus, which is a sole Turkish Cypriot Government. Cyprus is an example of communal partition which was not partitioned once but actually twice. The first partition was the outcome of 1963 coup d'état of the constitutional order by the Greek Cypriot side. This was not a stable partition, where it resulted in an intense security dilemma[1214]. The second partition was the outcome of 15 July 1974 coup d'état ended with the military interference of Turkey[1215]. 250,000 people from both communities, constituting forty per cent of the island population, became refugees and this action separated the two parties of the island completely[1216]. Since then, Greek Cypriots live in the South of the island under the administration of the "Republic of Cyprus" and Turkish Cypriots live in the North of the island under the TRNC administration[1217]. The Cyprus issue started as an intra-state conflict and evolved into an inter-state dispute.

[1212] N Kliot and Y Mansfield, 'The Political Landscape of Partition: The Case of Cyprus' (1997) Vol.16, No.6, 495-521 p 497.
[1213] C Kaufmann, 'An Assessment of the Partition of Cyprus' (2007) International Studies Perspective, Vol.8, 206-223 p 206.
[1214] *Ibid* p 207.
[1215] *Ibid*.
[1216] *Ibid*.
[1217] D Isachenko, 'The Production of Recognized Space: Statebuilding Practices of Northern Cyprus and Transdniestria' (2008) Journal of Intervention and Statebuilding, Vol 2 No.3, 353-368 p 356.

II.III. TRNC: Unilateral Declaration of Independence (UDI)

Traditionally, the international community has refused to accept unilateral declarations of independence of states. Secessionist states, out of necessity or not, by their nature, which falls apart from the established international order, are not tolerated to avoid opening the flood gates for partition in other states with ethnic diversity. Having been established without the consent of the recognised state is the main reason for not being regarded as a recognised state[1218]. Consequently, de facto states, which have unilaterally declared independence, could not become a member of the United Nations and have been stigmatised[1219]. Nevertheless, there is no common treatment towards the de facto states where some enjoy a high degree of international interaction with the UN Member States while not being recognised officially. Systematic factors, contextual factors and national factors affect the stigma attached to them[1220]. More importantly, the stigma attached to de facto states can change in time depending on the international political circumstances and consequently, the degree of engagement with the de facto state can change[1221]. Therefore, a recognised state can easily justify its intention on interaction or no interaction with a de facto state based on the notion of engagement without recognition[1222].

TRNC is established by a unilateral declaration of independence and the international community has expressly refused to recognise it. In 1983, UN Security Council condemned its unilateral declaration of independence, classified it as a secessionist action and called upon all states not to recognise or assist TRNC[1223]. Besides, the UN called upon all states to respect the sovereignty, territorial integrity, and non-alignment of the "Republic of Cyprus"[1224]. TRNC has been recognised by Turkey and exchanged ambassadors while the UN Security Council declared this illegal and invalid and called for their immediate withdrawal to no avail[1225]. Since then, TRNC is under political,

[1218] J K Lindsay, The Stigmatisation of de facto States: Disapproval and 'Engagement without Recognition' (2018) Ethnopolitics Vol.17, No.4, 367-372 p 362.
[1219] *Ibid*.
[1220] *Ibid*.
[1221] *Ibid*.
[1222] *Ibid* p 363.
[1223] UNSC Resolution 541, 1983 and UNSC Resolution 550, 1983.
[1224] UNSC Resolution 541, 1983 and UNSC Resolution 550, 1983
[1225] UNSC Resolution 541, 1983 and UNSC Resolution 550, 1983.

economic, social and cultural isolation by practice. While direct flights to and direct trade with TRNC are withheld by the "Republic of Cyprus", sport is also under isolation in TRNC depriving the right of sport, youth development and participation in international sporting activities and competitions.

II.IV. Current Status of Cyprus Issue

International recognition of the "Republic of Cyprus" as the sole authority over the island constitutes an impediment in the way of TRNC model of sport. This impediment denies the right of sport as well as sport development and interaction with the international community to Turkish Cypriot people. The Cyprus issue has been on the agenda of the UN since 1968. During these years, numerous settlement proposals have been drafted by the UN. However, non of these yieled any results due to the Greek Cypriots unwillingness to share the power and prosperity of the island based on equity with Turkish Cypriots, and Turkish Cypriots not willing to give up on their inherent right of equal status. Therefore, the two States of the island still inhabite major difficulties where the TRNC is a non-recognised de facto State and the "Republic of Cyprus" is under Greek Cypriot administration having an agenda within the UN. Recently, under the Cyprus conference hosted by the UNSG in Geneva, the Turkish side proposed a settelement consisting of the cooperation of two States of the island based on sovereign equality and equal international status to achive a realistic, just and sustainable settlement ensuring peace and stability not only for Cyprus but for the region[1226].

III. Sport in Cyprus

Communal sporting division in Cyprus pre-dates the political and physical division of the island[1227]. In 1930s seven Greek Cypriot teams together with one Turkish Cypriot team, Çetinkaya, founded Cyprus Football Association (CFA) which has become a

[1226] Turkish Cypriot Proposal for Sustainable Settlement, 28 April 2021 Proposal made by the Turkish Cypriot side during the 5+UN Informal Meeting at Gevena between 27-29 April 2021.
[1227] N L Kartakoullis and C Loizou, 'Is sport (football) a unifying force or a vehicle to further separation? The case of Cyprus' (2009) International Journal of the History of Sport, 26:11 (2009) p 1656–7.

member of FIFA in 1948. Çetinkaya won 1951-1952 CFA championship[1228] while the last match held between Çetinkaya and a Greek Cypriot team, Pezoporikos, was in the spring of 1955[1229]. During those days, Greek Cypriots intensified anti-colonial and nationalistic movements towards British and Turkish Cypriot teams were no longer allowed to play in Greek football stadia[1230]. Since then, Turkish Cypriot football teams did not compete in competitions organised by CFA[1231]. Greek Cypriots prevented Turkish Cypriot participation in competitions justified on the grounds of "maintaining good community relations" during the Greek Cypriot anti-colonialist struggle initially towards British[1232]. Withholding the opportunity to participate in sporting competitions by the Greek Cypriots towards Turkish Cypriots was claimed to be temporary but ended up being permanent. Consequently, Turkish Cypriot teams established their own football federation, the "Kıbrıs Türk Futbol Federasyonu" (Cyprus Turkish Football Association (CTFA)) in October 1955 out of necessity. After its establishment, CTFA requested to become a member of FIFA and UEFA but never received a membership. FIFA and UEFA opted to recognise CFA, which soley represents Greek Cypriot football, as the legitimate Cypriot football federation, and failed to acknowledge the existence of Turkish Cypriots and Turkish Cypriot football on the island. Nevertheless, under a special agreement, Turkish Cypriot teams were able to play friendly matches with foreign teams until the unilateral declaration of independence of the TRNC[1233]. With the declaration of TRNC as an inependent State in 1983, CTFA was placed under absolute isolation and no matches could be organised with teams from other countries[1234].

[1228] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 265.
[1229] Y N Yashin, 'De-ethnicizing the Ethnography of Cyprus: Political and Social Conflict Between Turkish-Cypriots and Settlers from Turkey' (eds), *Divided Cyprus: Modernity and an Island in Conflict* Y. Papadakis, N. Peristianisand G. Welz (Bloomington: Indiana University Press 2006) p 84–99.
[1230] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 265.
[1231] N L Kartakoullis and C Loizou, 'Is sport (football) a unifying force or a vehicle to further separation? The case of Cyprus' (2009) International Journal of the History of Sport, 26:11 (2009) p 1656–7.
[1232] *Ibid.*
[1233] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 266.
[1234] *Ibid.* FIFA 2019 statues No 11 Admission: 'Any association which is responsible for organising and supervising football in all of its forms in its country may become a member association. In this context, the expression "country" shall refer to an independent state recognised by the international community.')

At the begining of the 2000s, significant attempts were made to settle the Cyprus issue through the United Nations-led negotiations. These negotiations resulted in a proposed plan, known as the Annan Plan, to settle the dispute. The plan went through a few revisions before being put to a referendum in April 2004. During the public vote, 65 per cent of Turkish Cypriots approved the plan, but 76 per cent of Greek Cypriot rejected it[1235]. The Annan Plan would have established a constitutional structure for Cyprus, based on the principles of federalism and consociationalism, but it was not ratified[1236]. Nevertheless, shortly after the referendum, attempts were made to unify the organisation of Cyprus football. Following the Greek Cypriot vote against the Annan Plan, the CTFA made another attempt to join FIFA. During the meetings between the Turkish Cypriots and FIFA officials, ways to re-organise Cyprus football were addressed. Turkish Cypriot officials were seeking cooperation between the two sides football federations while Greek Cypriot officials were seeking to implement CTFA under the CFA. Consequently, the attempt failed with no progress towards CTFA's sporting rights, representing the miniature of the Cyprus conflict but in a different context, in sport[1237]. In 2007, FIFA hosted negotiations between CFA and CTFA in an effort to help Turkish Cypriots end their isolation. However, it was made clear to the CTFA that their isolation could only come to an end if it became a CFA member[1238]. This would mean accepting the authority of CFA over CTFA. While the economic benefits for CTFA to join the CFA umbrella were tempting, this would indirectly mean accepting the 'hegemonic' power of the Greek Cypriots as a sole legitimate authority on the island. CTFA could not have been a patch to CFA since Turkish Cypriot institutions cannot be placed under Greek Cypriot institutions[1239]. On the other hand, CFA had to negotiate the matter to avoid the looming risk of CTFA's international recognition[1240]. Under these realities, similar initiatives were doomed to fail.

[1235] C Christophorou, 'South European briefing: the vote for a united Cyprus deepens divisions: the 24 April 2004 referenda in Cyprus' (2005) South European Society and Politics, 10:1.
[1236] J S Rofe, 'Introduction: Establishing the Field of Play' in J. Simon Rofe (eds) *Sport and Diplomacy Games Within Games* (Manchester University Press, 2018) p 1.
[1237] N L Kartakoullis and C Loizou, 'Is sport (football) a unifying force or a vehicle to further separation? The case of Cyprus' (2009) International Journal of the History of Sport, 26:11 (2009) p 1657–8.
[1238] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 266.
[1239] M A Talat, *Kıbrıs Gazetesi* (14 January 2009).
[1240] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 266.

A 'new' football initiative surfaced in December 2012/January 2013 and October 2013 with the change in general political and economic conditions, and the relative position of the two communities in international organisations[1241]. In early 2013, the Greek Cypriots elected a new president who was a strong supporter of the Annan Plan and had to deal with both the country's present economic crisis and the Cyprus problem which had not been abandoned by the UN. Most importantly, the Greek Cypriots were, and still are, struggling to ascertain their hydrocarbon rights in the Mediterranean in order to finance their economic crisis problem. The large natural gas reserves that were discovered within Cyprus's territorial boundaries constitute now an incentive for settling the Cyprus dispute and sharing the wealth between the two parties of the island[1242]. Within this environment, FIFA-facilitated further talks between the parties. In November 2013, the CFA and the CTFA agreed on a provisional agreement which would eventualy result in unifying football governance on the island by the CTFA becoming a member of the CFA[1243]. This proposal, again, attracted criticisms from both the Turkish and Greek Cypriot politicians[1244]. Moreover, this proposal would have impared the independence and equality between the Turkish and Greek Cypriots on the island. Recent past conflict history of Cyprus, which has started as an intra-state conflict and eventually evolved into inter-state dispute, does not provide the right climate to have a unified representation due to the ethnic, religion, national and language barriers. Nevertheless, Turkish Cypriots are not against a cooperation between the two associations as equal entities. The need to achieve stability within the region due to hydrocarbon could possibly facilitate cooperation between the two sides of the island. Regarding Cyprus sport, estbalishing a new sport confederation with the involvement

[1241] *Ibid* 268.
[1242] N Lekakis, 'Can football loosen the "Gordian Knot" in Cyprus?' (2015) International Journal of Sport Policy and Politics, 7:2 255 p 269.
[1243] FIFA, 'Cyprus Football Association and Cyprus Turkish Football Association sign landmark arrangement' (Zurich: Fédération Internationale de Football Association, 5 November 2013) <www.fifa.com/governance/news/y=2013/m=11/ news=cyprus-football-association-and-cyprus-turkish-football-associationsign-2218369.html> accessed on 27 May 2015.
[1244] A Warshaw, 'CFA votes in favour of next steps to Cypriot football's reunification', Inside World Football, 25 November 2013, < www.insideworldfootball.com/ world-football/europe/13673-cfa-votes-in-favour-of-next-steps-to-cypriot-football-sreunification> accessed on 7 December 2015.

of both CFA and CTFA based on their equal status could be a miniature trial paving the way for a settlement in Cyprus.

At the moment, Turkish Cypriot football remains isolated internationally[1245]. This political isolation interferes with the right of sport and the autonomy of sport which needs to be independent from the political power. CTFA's international isolation represents the international isolation of Turkish Cypriot football under the TRNC. This represents that in a conflict zone, the autonomy of sport is not respected but sport is used as a tool by the powerful State to achieve its political aims through the desperation of the less powerful State. Consequently, it is not wrong to claim that this situation could represent an example of interference of politics with sporting autonomy. Therefore, sport enjoys autonomy or conditional autonomy only in conflict free regions of the world where politics are not bothered to achieve their aims through sport diplomacy. This area is beyond the scope of this thesis. However, further research is necessary to enlighten whether sport "boycott" is adopted as a soft power by the recognised State, the "Republic of Cyprus" to achieve its political aims over Turkish Cypriots interfering with the autonomy of sport.

III.I. The Myth of Sport Autonomy for Cyprus

Cyprus is a member of the EU. However, due to political difficulties present between the two States of the Island, EU law applies in the South under the administration of the "Republic of Cyprus" while it is suspended in the North under the administration of Turkish Republic of Northern Cyprus (TRNC) until a settlement is reached between the two parties of the island. Meanwhile, TRNC is only recognised by Turkey and it is not politically recognised by the rest of the international community. Moreover, TRNC is under economic isolations due to the "Republic of Cyprus" practices. This has a direct effect on TRNC sport withholding the right to engage in international sporting activities and affiliation with regional and international federations. On the domestic scale, this situation has a significant negative effect on the development of youth as well as the

[1245] N L Kartakoullis and C Loizou, 'Is sport (football) a unifying force or a vehicle to further separation? The case of Cyprus' (2009) International Journal of the History of Sport, 26:11 (2009) p 1657.

athletes who are not even allowed to play friendly matches with international clubs. However, more importantly, on the global scale, this represents direct interference of politics with the autonomy of sport by a state to achieve political desires through sport "boycotts". These practices contribute to yield the equilibrium towards the "myth" or no existence of autonomy of sport for TRNC. Nevertheless, at the domestic scale, the autonomy of sport is worth to be analysed through identifying the key features of the TRNC model of sport.

III.II. TRNC Model of Sport: Under the Shadows of the Cyprus Issue

The TRNC model of sport evolved under tough international isolation and grew apart from the European model of sport. The EU regulates sectors carrying out economic activity and affecting cross border trade within the internal market and sport is not exempted from the application of EU law. Nevertheless, as has been discussed elsewhere in this thesis, the specificity and autonomy of sport is recognised, while defining the boundaries of the European model of sport and EU law has not been easy. This thesis has demonstrated that the organisational structures of the EU and the European model of sport can co-exist on dual condition of complying with the fundamental provisions of EU law and accepting the supervision of the EU. Therefore, sport enjoys supervised conditional autonomy under the organisational structures of the EU. On the contrary, in general, sport does not enjoy autonomy in Cyprus where political aims of a stronger party have prevailed over the inferior due to lack of international recognition.

III.III. Key Features of the TRNC Model of Sport

The TRNC model of sport does not have a pyramidal structure and it operates independently from the international regulatory regimes due to the non-recognition of the State. TRNC sport federations are founded under Cyprus Sport Office Directorate within the Deputy Prime Ministry and Economy and Energy Ministry. There are 33 national sport federations registered under the Office, one federation for each sport. This sporting rule is expressly established under the Physical Education and Sport Act of the

TRNC Parliament[1246]. The legislation also expressly requires complience with international lex sportiva in all sporting activities in TRNC[1247]. Sport federations and sport clubs are established and governed according to the acts of Parliament[1248]. Sport clubs, as well as federations, are estbalished as non-profit associations. Each federation has its own set of rules responsible for promoting, establishing the laws of the game, ensuring uniformity and regulating the sport while imposing certain requirements to be fulfilled by the member clubs. Each federation is responsible for organising competitions under various league structures depending on the merits of each club. Federations decide which club will be participating in which league yearly, based on the merits and the points received by each club. This selection is transparently made by each federation. The TRNC model of sport consists of solely amateur sport. Sport is only enjoyed at an amateur level because development of professional sport has not been possible due to international isolation and restrictions placed on the TRNC.

The TRNC model of sport does have a three compartment pyramid structure where the Sport Office of the Government sits at the top, national federations in the middle and clubs and amateur atheletes at the bottom. The pyramid has no room to grow, develop and interact with the international federations due to the non-recognition of the State. Nevertheless, locally developed federations[1249] have created an internal pyramidal structure. Under this structure, various leagues of competition have been created where clubs are placed yearly based on their merits. These league structures are based on promotion and relegation. They have an open league structure where at the end of each season, successful clubs are promoted and unsuccesful clubs are relegated to lower leagues. This structure demonstrates interdependence between different league levels on the competitive sides since competitions are organised on all league levels. This system, while rewarding merit, also promotes equality of opportunity and balance of competition amongst the competing teams. This creates a formal link between all the clubs registred under the federations.

[1246] Clause 13, Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1247] Clause 12, Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1248] Mainly Physical Education and Sport Act 67/1999 and specifically with each Federations Regulations approved by the Government.
[1249] Cyprus Turkish Football Federation.

Even though at the top of the pyramid sits the Sports Office of the Government, each federation has an extensive authority to regulate their discipline. Based on the fact that these federations are established under the Sports Office and they are non-profit organisations, while promoting, regulating and guaranteeing uniform rules for their sport, they are not commercial actors with economic interests. Under the TRNC model of sport, federations are only acting as the regulatory bodies. Therefore, eventhough one federation for each sport might have created a monopolistic structure, non-profit organisation characteristic of sport in TRNC leaves no room for intermingling of regulatory and commercial powers which would yield inherent abuse of dominant position at the detriment of the inferior party.

Nevertheless, the TRNC model of sport cannot delegate any duty to international bodies due to the non-recognition of the State. However, under each federation, there are various boards responsible for arbitration, anti-doping, ethical matters and dispute resolution. Therefore, the clubs and athletes are subject to the rules and regulations of the federations and federations are subject to the Sport Office of the Government established under the Acts of Parliament requring complience with lex sportiva. Each federation has a separate arbitration body and anti-doping agencies. Consequently, WADA and CAS have no direct impact on the TRNC model of sport. Nevertheless, arbitration and anti-doping rules of each federation are in compliance with the rules and principles set under the international lex sportiva but applied locally. Until now, all the sport disputes which arose in the TRNC have been handled by the relevant federation's arbitration body and none have been to the courts. On the other hand, the TRNC constitution and laws do not allow the denial of the right to have a fair hearing at the courts should any of the parties are not happy with the arbitration process or its decision and prefers litigation.

III.IV. Organisation of the TRNC Model of Sport

The organisation of sport in the TRNC is led by the Government. The Physical Education and Sport Act establishes that physical education and sport are placed under

the authority of the related Ministry for *auditing* and ensuring compliance with the Act[1250]. SGBs are required to obtain permission from the Ministry[1251]. Failure to obtain permission may result in closure[1252]. Within this organisation, while the Government establishes the framework, SGBs closely cooperate with the Ministry to fill in the blanks[1253]. Sport federations are responsible for organising sporting activities amongst its members[1254]. Federations are established under the Act as non-profit organisations participating under only one specific area of sport[1255]. Each federation commences operation once its regulation is adopted and published in the Official Gazette[1256]. There can only be one federation for each sport and establishing alternative federation for the same sport is expressly not prohibited under the law[1257]. Provided that a federation fulfils all the requirements of the Act, it can be registered under the Ministry and officially be approved by the Government to operate[1258]. Federations are entitled to regulate, organise, promote, develop and teach their sport in line with international sporting rules and regulations, *lex sportiva*, while representing the state internally or externally[1259]. The President of each federation should be impartial and cannot be a member of any club during his term[1260]. Institutions of the federations and board members are served voluntarily without remuneration[1261]. Federations are under a strict duty to exhibit its financial statements and bookkeeping by the end of March and request monetary aid, if needed, by the end of August annually to the Ministry. On the other hand, sport clubs are established under the Associations Act[1262] as non-profit associations and they cannot be privately owned[1263]. Clubs are required to become a member of one of the established federations and approved by the Ministry[1264]. Clubs

[1250] Clause 10(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1251] Clause 10(2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1252] Clause 10(2)(D), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1253] Clause 11(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1254] Clause 11(2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1255] Clause 12(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1256] Clause 13(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1257] Clause 13(2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1258] Clause 14(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1259] Clause 12(2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1260] Clause 12(5), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1261] Clause 15(4), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1262] Associations Act 23/2016 of the TRNC Parliament.
[1263] Clause 19(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1264] Clause 19(2-3), Physical Education and Sport Act 67/1999 of the TRNC Parliament.

are under a duty to exhibit its financial statements, operations and activities yearly at the General Assembly and file it with the Government District Office[1265].

Sport betting is allowed under the TRNC model of sport. However, all sorts of sports betting are organised by the Ministry as regulated under the Physical Education and Sport Act[1266]. Moreover, sport funds are available under the Ministry and the Ministry can only use these funds to help and promote sport. These include providing economic support to federations and clubs, developing, constructing or maintaining infrastructure, supplying equipment, supporting training and courses[1267]. In addition, sponsorship is allowed, and it is regulated under the Act to promote athlete development and training. Athlete licences are issued by the relevant federation, and in absence of a federation, by the Sport Office of the Ministry[1268]. Athletes without a valid licence cannot participate in any events organised by the federations[1269]. Moreover, athletes with a valid licence can only participate in alternative events, not organised by the federation, with permission[1270]. Transfers of players are regulated by the regulations of the federations. However, the Act prohibits the prevention of the transfer of licenced players after a certain age or experience[1271]. Athletes are entitled to complain against the rules and regulations of the federations through arbitration[1272]. Moreover, the right to have a fair hearing through litigation at the district courts is permitted and cannot be prohibited by the federations[1273]. Sport is not undertaken professionally in TRNC. As a result, athletes and players are not professionals and they are not full time employed by the SGBs. Nevertheless, the Act provides the base for athletes and sport persons to be released mandatorily to participate in events considered necessary by the Ministry where remuneration for service and health insurance is covered by the Ministry[1274].

[1265] Clause 19, 21 Associations Act 23/2016 of the TRNC Parliament.
[1266] Clause 26, Associations Act 23/2016 of the TRNC Parliament.
[1267] Clause 27, Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1268] Clause 31(1), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1269] Clause 31(3), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1270] Clause 31(5), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1271] Clause 32(1-2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1272] Clause 36, Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1273] Clause 36, Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1274] Clause 37(1-2), Physical Education and Sport Act 67/1999 of the TRNC Parliament.

The Cyprus issue is *sui generis* and a long-standing problem. As a result, the TRNC model of sport is a *sui generis* model which has adapted to the political environment and realities of the ground. It has fundamental differences with the European model of sport. The TRNC model of sport is a government led model which is regulated with the acts of Parliament and is under international isolation. Nevertheless, fundamental sport legislation[1275] of the Government expressly acknowledges and promotes the *lex sportiva.* This provides internal autonomy to sport under the TRNC model of sport while respecting and protecting specificity of sport.

IV. TRNC Model of Sport *v.* European Model of Sport

In the TRNC, sport has since been regarded as a leisure activity and undertaken only amateurly which has not yielded into commercially profitable market. Federations and clubs are established under the laws of TRNC as non-profit associations. These associations have absolute autonomy to regulate sport based on the specificity of each sport. There has not been a single case where TRNC model of sport is challenged in the TRNC courts. The TRNC model of sport is based on amateurly played leisure activity where it could not provide a room for a full-time employment. It is not a party to any of the regional or international federations due to non-recognition of the State. Each sport is regulated under the regulations of the respective federation, a non-profit association, registered at the sport office of the related ministry and established under the TRNC laws. Even though this is a government led model of sport and federations are attributable to the laws of government directly, due to their sole purpose of acting as a regulatory body, each federation enjoys absolute autonomy to regulate their respective sport as long as they are in line with international *lex sportiva*.

Similar to the European Model of Sport but in a domestic scale, the TRNC model of sport does have a three-compartment monopolistic pyramid structure where each sport has one federation. On the other hand, unlike under the European model of sport, breakaway leagues and alternative federations for the same sport are strictly

[1275] Physical Education and Sport Act 67/1999 of the TRNC Parliament.

forbidden[1276]. Nevertheless, this monopolistic structure of the TRNC model of sport does not allow any room for the abuse of dominant position where each federation is established as a non-profit association free from commercial aspirations and operates as sole regulators of their sport. In terms of promotion and relegation, similar to the European model of sport, the TRNC model of sport does have a formal promotion and relegation system. However, unlike European model of sport, the TRNC sport model operates only at national levels. Similar to Europe, sports competitions take place in open leagues implying interdependence between all levels.

The organisation of sport under the TRNC model of sport is limited due its sole local application. While unsanctioned and rival events, home and away rule, club location, and third-party ownership are not relevant due to the non-profit, amateur, and domestic only structure of the TRNC model under international isolation, breakaway leagues are forbidden to protect the integrity of sport under the Physical Education and Sport Act[1277].

The European model of sport is influential throughout the world and the TRNC model of sport is only applied in North Cyprus. In the EU context, in order to identify whether the sporting rule qualifies to fall under the specificity of sport and therefore be protected under the EU law, it must be tested by the Court on a case-by-case analysis, taking into consideration the proportionality of the measure. The organisation of sport under the European model of sport enjoys conditional autonomy, supervised through the EU Institutions. The autonomy of the European model of sport is conditioned on compliance with the EU law, especially under non-distortion of the proper functioning of the internal market. Every sporting rule is subject to the application of EU law with no exception and distortion of the internal market will not be negotiated. While the specificity of sport is acknowledged, it does not play a major role in contributing towards the autonomy of sport. The organisation of sport does not enjoy a general exception under the EU and its existence is conditional upon compliance with the EU law.

[1276] Clause 13(2) Physical Education and Sport Act 67/1999 of the TRNC Parliament.
[1277] Physical Education and Sport Act 67/1999 of the TRNC Parliament.

Under the TRNC model of sport, the international *lex sportiva* is an utmost priority and it is protected by the Government. Even though it is a government led and approved model, due to its amateur and non-profit characteristic, sport enjoys absolute autonomy and specificity of sport is automatically respected within the TRNC. TRNC model of sport is transparent, attributable, and based on equality and fairness. Based on its key features identified in this chapter, the TRNC model of sport would have been compatible with the EU law. Nevertheless, TRNC model of sport would not have been treated differently than the European model of sport under the organisational structures of the EU.

As established under this thesis, sport does not enjoy automatic autonomy under the organisational structures of the EU. The organisational structures of the EU have a significant impact on sport, and both are not mutually exclusive. The European model of sport enjoys exclusivity under the organisational structures of the EU on condition that it does not step in the boundaries of the EU law. Once it does, the European model of sport is challenged without an exception under the organisational structures of the EU and EU law will enjoy supremacy over the European model of sport. Moreover, this research demonstrated that sport enjoys conditional exclusivity under the organisational structures of the EU and the organisational structures of the EU have a significant impact on the organisation of sport regarding the autonomy and specificity of sport. In addition, EU sports policy is currently formally supervising sport for it to achieve the EU standards of good governance. Therefore, conditional autonomy of sport under the EU law is supervised though the EU policy on sport. TRNC model of sport would not have been treated differently and would only co-exist within the organisational structures of the EU based on the dual condition that TRNC sport would accept supervision of the EU to achieve good governance standards in its organisation and would comply with the fundamental provisions of the EU law.

V. Chapter Conclusion

TRNC model of sport sets an example on the recognition of the autonomy of sport in a deeply divided region within Europe. TRNC model of sport is under international isolation and the organisational structures of the EU does not have any impact on the organisation of the TRNC model of sport at the moment. Internally, TRNC sport enjoys absolute autonomy and specificity of sport is respected. Externally, TRNC sport does not have interaction with the EU. Provided that it does in the future, TRNC model of sport would not be treated differently than the European model of sport under the organisational structures of the EU. Therefore, TRNC model of sport could only co-exist with the organisational structures of the EU based on the dual condition, which is applicable to the European model of sport, that TRNC sport accepts supervision of the EU to achieve good governance standards in its organisation while complying with the fundamental provisions of the EU law. To conclude, TRNC model of sport would enjoy supervised conditional autonomy under the organisational structures of the EU.

CONCLUSIONS:
RECONCILING THE IMPACT OF THE EU ON THE EUROPEAN MODEL OF SPORT

The objective of this conclusion chapter is to evaluate the findings of this thesis and summarise the impact of the organisational structures of the EU on the organisational structures of the European model of sport. This comprises of briefing the findings of the thesis on the aims and objectives of the European integration, the reason for the EU's involvement with the organisation of sport, establishment and current status of the European sports law, and the impact of the EU on the European model of sport.

The European Union was established as an economic union to achieve an economic integration in Europe. The Union aimed to establish and ensure the functioning of the internal market, in accordance with the Treaties[1278]. The EU's political action was nourished by its economic purpose to establish the internal market[1279]. Eventually, the economic objective of the Union generated an extensive body of knowledge which provided the intellectual base for its political rationality[1280]. From the beginning of the integration, the ECJ and the Commission clarified and interpreted EU law for further integration and the proper functioning of the internal market. The aim and objective of the Union to establish and ensure the proper functioning of the internal market in accordance with the Treaties has been promoted mainly through the free movement and the competition law principles. Apart from these two fundamental provisions certain non-economic objectives have been included within the EU to ensure harmonious functioning of the internal market. On the other hand, the integration became an evolving one to achieve magnified economic prosperity through the mutual pursuit of equally beneficial goals. Member States accepted that significant difficulties could not be handled beneficially unless political powers were transferred to the Union[1281]. From

[1278] Article 26(1) TFEU.
[1279] M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) European Law Journal **, 2.
[1280] *Ibid.*
[1281] EB Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stevens & Sons 1958).

thereon, with the transfer of such powers, new self-reinforcing dynamic relying on the spill-over mechanism was triggered[1282]. Integration within the Union became an ongoing process based on spill-over from one initially agreeable technical area to other areas of possibly greater political controversy. The process took place without an explicit proactive choice by the Member State governments to increase the Union's competences[1283]. Further integration was an automatic process where economic interests joined politics[1284]. Once the sovereignty in a policy area was transferred to the Union, supranational institutions looked for further integration grounds starting with connected areas[1285]. The EU dynamically enlarged competences of the Union in central policy areas[1286] especially though the ECJ and the European Commission judgments and decisions which demonstrated that supranational actors drove forward the integration process[1287]. The emergence of the EU sports law is an example of the spill-over of the EU law into a policy area which was not predicted or intended by the Member States[1288]. The EU interfered with the organisation of sport in Europe to ensure cross border trade between the Member States within the internal market is not hindered.

The EU sports law discovers the approach of the organisational structures of the EU to the European model of sport under four main turning points. These are the *Walrave* judgment, the *Bosman* judgment, the *Meca Medina* judgment and the adoption of the Article 165 TFEU. Initially, the Union did not have a sport competence. The foundations of the EU sports law were established under *Walrave* and developed through the judgments and the decisions of the ECJ and the

[1282] HE Meier, 'Emergence, Dynamics and Impact of European Sports policy – Perspectives from Political Science' in S Gardiner, R Parrish, RCR Siekmann, eds., *EU, Sport, Law and Policy Regulation, Re-Regulation and Representation* (TMC Asser Press 2009) p 10.
[1283] Alex Warleigh-Lack and Ralf Drachenberg, 'Spillover in a soft policy era? Evidence from the Open Method of Co-ordination in education and training' [2011] Journal of European Public Policy 999 p 1001.
[1284] B Rosamond, *Theories of European Integration* (Macmillan, 2000) p 59-65.
[1285] Alex Warleigh-Lack and Ralf Drachenberg, 'Spillover in a soft policy era? Evidence from the Open Method of Co-ordination in education and training' [2011] Journal of European Public Policy 999 p 1001.
[1286] MD Aspinwall and G Schneider, 'Same Menu, Separate Tables: The Institutionalist Turn in Political Science and the Study of European Integration' (2001) European Journal of Political Research 1.
[1287] AM Burley and W Mattli, 'Europe before ECJ: A Political Theory of Legal Integration', (1993) International Organization 41; JHH Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of ECJ in the Arena of Political Integration' (1993) Journal of Common market Studies 417; N Fligstein, 'Participation and Policy-Making in the EU' (1998) Journal of Common market Studies 445.
[1288] S Weatherill, ' "Fair Play Please!": Recent Developments in the Application of EC law to Sport' (2003) Common market Law Review 40 p 51; L Barani, 'The Role of ECJ as a Political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling' (2005) Journal of Contemporary European Research p 42.

Commission. In *Walrave*[1289], the ECJ established that sport is subject to the EU law if it constitutes an economic activity[1290]. The ECJ created a sporting exception of purely sporting rules and separated sporting and economic aspects of the activity. This demonstrated the initial reluctance of the ECJ to interfere with the autonomy of sport. While the ECJ refused the absolute autonomy of sport from the application of the EU law, specificity of sport was recognised. 20 years later, this initial approach of the EU to sport was analysed by the ECJ in *Bosman*[1291] and established that sporting rules do not have an absolute autonomy but only a conditional autonomy under the organisational structures of the EU law[1292]. The autonomy and specificity of sport declared to be conditional on compliance with the fundamental free movement provisions of the EU law [1293] based on objective justification and proportionality[1294]. On the other hand, the EU was not insensitive to sport and provided a room for purely sporting rules to prove its case for a special treatment due to the specificity of sport. Therefore, with *Bosman* sport enjoyed conditional autonomy while specificity of sport was recognised by the Court.

The development of the EU sports policy entered the third phase of development[1295] with *Meca-Medina*[1296]. Until the *Meca-Medina* judgment, the ECJ demonstrated reluctance to analyse organisation of sport under the competition law provisions. In *Meca-Medina*, the ECJ rejected the argument of a purely sporting rule and ruled that a purely sporting rule with economic effects on the cross-border trade between the Member States in the internal market must also be tested against the demands of the EU law[1297]. The ECJ adopted the market access analysis approach which is adopted under the general application of the EU competition law on rules having restrictive effect of competition to ensure the completion and proper function of the internal market. The case demonstrated that rules with purely sporting interest in

[1289] Case 36/74 *Walrave and Koch* [1974] ECR 1405.
[1290] *Ibid* at para 8.
[1291] Case C-415/*93Union Royale Belge Societes de Football Association v Bosman* [1995] ECR I-4921.
[1292] S Weatherill, Principles and Practice in EU Sports law, (OUP, 2017) p 85.
[1293] *Ibid.*
[1294] *Ibid* p 92.
[1295] S Stewart, 'The Development of Sports Law in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights' (2009) Vol.16 Sports Lawyers Journal 183 p 220.
[1296] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991.
[1297] S Weatherill, Principles and Practice in EU Sports law, (OUP, 2017) p 116.

nature could have an economic effect. This possibility formed the intersection between the sporting rules and the EU law. The case indicated that sport does not enjoy a difference of application under the organisational structures of the EU. However, it has a room to prove specificity and necessity to achieve competitive sport within the internal market.

The Commission approached each individual complaint with an objective of enhancing the integration process and ensuring proper functioning of the internal market. Sport has not been treated differently. The Commission did not grant any exception to sport due to its specificity and instead it examined the compatibility of each sporting rule on a case-by-case analysis as guided by the ECJ under the *Meca Medina* judgment. The Commission acts only when commercial cross border activity, trade and/or movement, is affected between Member States[1298]. The Commission approached sport related complaints from the market access perspective. During its analysis, the specificity of sport may or may not be expressly relied on by the Commission. However, even if the specificity of sport is expressly referred to and acknowledged, it is not enough to protect the sporting rule from the application of the EU law. A rule is classified as a restriction if it distorts competition within the internal market and affect cross border trade between the Member States. Moreover, the Commission supervises the SGBs to achieve compliance under the EU law where possible. Therefore, Commission decisions demonstrates the considerable impact of organisational structures of the EU on the governance of sport on the specificity of sport and on the autonomy of sport.

The development of the EU sports policy entered the fourth phase with the adoption of the Article 165 TFEU under the Lisbon Treaty. The article did not change the impact of the EU law on the European model of sport. Sport enjoys a conditional autonomy while the specificity of sport gained a combined reading with discrimination provisions and achieved a possibility to have a same effect on the internal market rules. Nevertheless, the Article did not have any effect in achieving an exemption to sport from the application of the EU law. On the other hand, Article 165 TFEU provided a formal

[1298] *Case 3651, C.U. de Lille/UEFA (Mouscron)* Unpublished Commission Decision of 9 December 1999.

competence on sport to the EU. Moreover, it had a significant effect on supervising structures of the European model of sport through contributing, supporting, and supplementing sporting issues to ensure compliance with the EU law. The article effectively supervises structures of the European model of sport through contributing to the development of sport and, if necessary, supports and supplements European sporting issues. Consequently, the time for the supervised conditional autonomy of sport emerged under the organisational structures of the EU. Currently, the organisation of sport enjoys supervised conditional autonomy of sport under the organisational structures of the EU.

TRNC model of sport sets an example on the recognition of the autonomy of sport in a deeply divided region within Europe. TRNC model of sport is under international isolation and the organisational structures of the EU does not have any impact on the organisation of the TRNC model of sport at the moment. Internally, TRNC sport enjoys absolute autonomy and specificity of sport is respected. Externally, TRNC sport does not have interaction with the EU. Provided that it does in the future, TRNC model of sport would not be treated differently than the European model of sport under the organisational structures of the EU. Therefore, TRNC model of sport could only co-exist with the organisational structures of the EU should it accept supervision of the EU to achieve good governance standards and comply with the fundamental provisions of the EU law.

Therefore, this research accomplishes that, first, the organisational structures of the EU have a significant impact on the European model of sport, and both are not mutually exclusive. The European model of sport enjoys exclusivity under the organisational structures of the EU on condition that it does not step in the boundaries of the EU law. Once it does, the European model of sport is challenged without an exception under the organisational structures of the EU and EU law will enjoy supremacy over the European model of sport. Therefore, it is established that the European model of sport enjoys conditional exclusivity under the organisational structures of the EU. Second, the decisions and judgments of the ECJ and the Commission demonstrated that the

organisational structures of the EU have a significant impact on the organisation of sport regarding the autonomy and specificity of sport. Third, it is demonstrated that EU sports policy is currently formally supervising the European model of sport for it to achieve the EU standards of good governance. Therefore, conditional autonomy of sport under the EU law is supervised though the EU policy on sport. Fourth, TRNC model of sport would not have been treated differently than the European model of sport and would only co-exist with the organisational structures of the EU based on the supervised conditional autonomy.

Therefore, this research collectively concludes that currently the European model of sport enjoys supervised conditional autonomy under the organisational structures of the EU. The organisational structures of the EU and sport could co-exist on dual condition that sport accepts supervision of the EU to achieve good governance standards in its organisation while complying with the fundamental provisions of the EU law.

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