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The Asymmetric Integration of Sports Organizations in the Internal Market Law of the European Union

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“An eagle can fly at a low altitude like all the other birds, but only too few birds can follow him at great heights”

Theodoros Zagorakis
European Champion, Captain of the National Football Team of Greece 2004
Member of the European Parliament

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Table of Abbreviations

AG: Advocate General

CAS: Court of Arbitration for Sport

ECHR: European Court of Human Rights

ECJ: European Court of Justice

EGCJ: General Court of Justice of the EU

EU: European Union

FFP: Financial Fair Play

FIFA: Fédération Internationale de Football Association

FINA: Fédération Internationale de Natation

ICU: International Cyclist Union

TECC: Treaty Establishing the European Economic Community

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

UEFA: Union of European Football Associations

I. Introduction

A. Sports Market and the Law

Does the peculiarity of a market change the law or does the law create a peculiar market?

The answer is both. The influence between the market and the legal norms that regulate it is undoubtable and mutual. On the one hand, the legislator has the power to intervene in the market through the law in order to multiply efficiencies and protect particular market actors. Consumer protection,[1] aid towards small and medium size businesses jointly with the merely economic aim of an open and competitive market[2] lead to the adoption of competition rules that can control the power of private actors.

On the other hand, economic data shall be used as an instrument of legal interpretation. The zeal of market prosperity, which is translated in the field of European Law as "workable competition",[3] is considered as one of the fundamental purposes of EU legislation and as a legitimate aim of the provisions of the Treaties.[4] In this context, the economic analysis of law plays a central role during the application of the Treaties' provisions, especially when it comes to the internal market rules.

This mutual influence between the law and the market is mostly apparent in the field of sports. As it will be analyzed further under Chapter IIIA, the sports market has some unique economic features such as the need of credible competition (results should be unexpected, creating a monopolistic club that dominates a league reduces consumer interest) or increased brand

[1] Whish, R. and Bailey, D. (2011). *Competition law*. 7th ed. Oxford: Oxford University Press, pp. 19-21

[2] Odudu, O. (2010). The Wider Concerns of Competition Law. *Oxford Journal of Legal Studies*, 30(3), pp. 599-613.

[3] Judgement of the Court of 25/10/1977, *Metro v Commission*, C- 26/76, ECLI:EU:C:1977:167; Papadopoulou, R.E. (2009). Free competition in the European Community in the light of the democratic principle: convergence and divergence. *Europoliteia*, 2, pp. 373- 392.

[4] The Treaty on European Union, Nice (2007) and the Treaty on the Functioning of the European Union, Nice (2007)

loyalty[5] (for example tickets for the football matches of A.C. Milan are under no circumstances interchangeable for an Italian fun- consumer with those of Inter or Juventus). These features have influenced the legal status of professional sport, creating the need of self- regulation at a global level. Sporting rules need to be universally accepted in order to allow the organization of international events and the multiplication of produced value. As a result, the international sport community created through time an autonomous regime of self- regulation through the rules of international federations and their interpretation from the case law of the Court of Arbitration on Sports, known as *lex sportiva.*[6]

However, *lex sportiva* is not confined in establishing only the rules of the game (for example what is a penalty). A great variety of issues that are related to sporting activity such as players' contracts, broadcasting rights, participation rules are autonomously regulated by the sporting authorities. In specific, sport organizations form an international order with a pyramid- like structure. On top of the pyramid is the international federation under which there are several continental federations that are subsect to its rules. Members of the continental federations are the national federations that are also subjected to both international and continental rules. Finally, sport clubs are members of the national federation and participate in both national and international competitions. Taking the example of football, on top of the ladder is FIFA under which is UEFA and other regional federations, while members of UEFA are the Greek, the English, the French federation etc.

The question, though, is how these private legal persons have the power to create legally binding regulations covering fields such as employment and selling of rights, despite the fact that they do not have legislative delegation. The answer is **contractually.** Sport organizations cannot become members of a federation, unless they sign private contracts including not only the obligation to respect the regulations of the body, but also an arbitration agreement for all potential legal disputes. In this way, sport federations manage to acquire a legislative autonomy to establish rules that sport clubs and athletes must respect in order not to get expelled from their competitions.[7] Simultaneously, the incorporated arbitration clauses prevent national courts from

[5] Szymanski, S. (2006). Uncertainty of outcome, competitive balance and the theory of team sports. In: S. Szymanski and W. Andreff, ed., *Handbook on the Economics of Sport*. Northampton, MA: Edward Elgar, pp.598-599.

[6] Nafziger, J. (2012). Lex Sportiva. In R. Siekmann and J. Soek, ed. *Lex Sportiva: What is Sports Law?* The Hague: T.M.C. Asser Press/ Springer, pp. 56- 62.

[7] Weatherill, S. (2017). *Principles and Practice in EU Sports Law*, Oxford: Oxford University Press, pp. 8- 20.

delivering judgments[8] upon sport related cases. The only competent organs for judicial review, as these clauses dictate, are sports tribunals that are created at the national level, as well as CAS at an international level. In this way, sporting authorities manage to acquire additionally a judicial autonomy, guarantying that sport regulations will be interpreted based on the unique features and needs of the sport industry. In fact, the case law of CAS has created specialized methodological tools such as the principle of "fairness"[9] that are specifically used for the interpretation of sport related legal norms and ensure that a potential judgement will promote the overall interests of the industry.

In specific, a valid arbitration clause creates an obligation to the parties to litigate exclusively before a tribunal and excludes the competence of national courts to deliver a judgement.[10] Thus, the autonomy of sporting organizations is preserved through the case law of CAS. However, one of the main prerequisites for the validity of arbitration clauses is the "commercial character of the difference".[11] This commercial character of sport cases has been recognized through time by multiple national courts which opened the path to sporting autonomy. In Greece, this landmark decision has been delivered by the Greek Court of State during 80s characterizing sport differences ever since as private differences receptive to arbitration.

This well preserved system of autonomy has granted sport organizations (the term includes both clubs and federations) with increasing economic and regulatory power.[12] National governments have been unable to confine the competences of this global governance system under the fear of potential sanctions against the national federation that may lead to a ban for the national team and the national clubs to participate in international competitions. This system, on the contrary, has been successfully challenged before the European Court of Justice since the sports market has been recognized as an integral part of the internal European market.

[8] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958), Article II(3).

[9] Nafziger, J. (2010). The Principle of Fairness in the Lex Sportiva of CAS Awards and Beyond. *International Sports Law Journal*, 10 (3-4), pg. 3 et seq.

[10] *Dean Witter Reynolds, Inc. v. Byrd* , 470 U.S. 213, 218 (U.S. S.Ct. 1985)

[11] Born, G. (2012). *International Arbitration: Law and Practice*. New York: Wolters Kluwer Law and Business, pg. 82.

[12] Rütter Soceco (2013). *Study on the economic importance of international sport organisations in Switzerland*. [online] FIFA.com. Available at: https://www.fifa.com/womensyoutholympic/news/y=2013/m=11/news=study-the-economic-importance-international-sport-organisations-switzerl-2222547.html [Accessed 27 Apr. 2019].

B. Lex Sportiva and the Internal Market Law of the E.U.

Has the European Union law changed the sport market or the specialties of the market have managed to alter the application of the Treaty's provisions in this sector?

The answer is again both. European Union is funded on the principle of conferral as it is enshrined in Article 5 TFEU. As a result, member states confer specific powers to the Union which are exclusive, shared or supportive. [13] Direct consequence of the **principle of conferral** is the fact that secondary Union law cannot regulate fields in which no competence has been granted by member states. In fact, until the conclusion of the Treaty of Lisbon, EU did not have a competence to regulate issues related to sport. Nonetheless, the first judgement of sporting interest was delivered by the European Court of Justice in 1974.[14] The reason behind this phenomenal irregularity is that sporting activities have been gradually understood as part of the internal European market, thus subjected to EU internal market law.

The creation of an internal market based on a "highly competitive social market economy and aiming at full employment and social progress" has been one of the fundamental objectives from the creation of the EU (Article 3.3 TEU). The "**internal market**", successor of the "common market", demonstrates a higher degree of integration and aims at the creation of a single market.[15] According to Article 26 TFEU, the internal market comprises an area without internal frontiers, an area where free movement of goods, persons and services is ensured. In order to achieve this unification of the market, the Treaties establish a set of provisions that aim at eliminating obstacles to the free movement and combating practices that distort competition.[16] On the one hand, the non- discrimination principle (Article 18 et seq. TFEU), the free movement rules (Articles 34- 37 TFEU and Articles 45- 66 TFEU) and illegal state aid prohibition (Articles 107- 109 TFEU) tend to protect the internal market from the practice of public actors, with some exemptions that will be discussed further in the next chapter. On the other hand, competition law

[13] Christianos, V. (2011). *An Introduction to the Law of the European Union* (in Greek), Athens: Nomiki Vivliothiki, pp. 29-31

[14] Judgement of the Court of 12/12/1974, C- 36/74, *Walrave and Koch v. Union Cycliste International*, ECLI:EU:C:1974:140.

[15] *Metro v. Commission*, §20

[16] Lorenz, M. (2013). *An Introduction to EU Competition Law*. Cambridge: Cambridge University Press, pg. 29.

is a means of protection of the internal market[17] against the abusive actions of private actors. These provisions altogether form the economic constitutional law of the EU.[18]

Although sport is mainly an element of culture and a means of entertainment, of physical and spiritual cultivation, it is undoubtable that it is also a highly profitable economic activity. As mentioned above, the Union used to have no conferred competence in the field of sport. On the contrary, sport organizations were the main regulators of the market, benefiting from a regulatory autonomy that was enhanced by a specialized system of international arbitration. At first blush, these were two concrete and emphatically separate systems and this situation would perpetuate if it had not been for the principle of **direct effect**. The case law of the European Court of Justice has created from the early days of the Union a principle according to which the provisions of the Treaties grant rights to individuals directly without the need of transferal state measures. Direct effect, which is a consequence of the principle of supremacy, refers only to those provisions of the treaties that are "clear and unconditional... [without] any reservation on the part of states."[19] Competition law[20] and free movement provisions[21] fall in this category and have direct effect, while regulating the activity of all the actors of the internal market. Thus, since sport is a profitable activity it is unavoidably part of the internal market and subject to internal market law.

As already mentioned, though, sport is a market with economic and regulatory specialties, a market that by its definition cannot be completely integrated in the internal market of the EU. There are some fields of the internal market in which sport organizations are completely integrated. Fields in which they are being treated by the case law of the ECJ as any other undertaking that operates in a regular market. Nevertheless, in other fields of the EU internal market law, the peculiarities of sport organizations have granted them preferential treatment

[17] Judgement of the Court of 1/7/1999, C- 126/97, *Eco Swiss China Time Ltd v Benetton International NV*, ECLI:EU:C:1999:269, §36.

[18] Cruz, J. (2002). *Between Competition and Free Movement: the economic constitutional law of the European community*. Oxford: Hart Pub.

[19] Judgment of the Court of 5/2/1963, C- 26/62, *Van Gen den Loos*, ECLI:EU:C:1963:1

[20] Judgment of the Court of 30/1/1974, C- 127/73, *BRT v. SABAM*, ECLI:EU:C:1974:6.

[21] Judgment of the Court of 17/9/2002, C- 413/99, *Baumbast*, ECLI:EU:C:2002:493; Judgment of the Court of 4/12/1974, C- 41/74, *van Duyn*, ECLI:EU:C:1974:133; Judgment of the Court of 21/6/1974, C- 2/74, *Reyners*, ECLI:EU:C:1974:68.

creating an **asymmetric integration**. As far as today, it has been extensively[22] analyzed how European law has changed the legal status of the sport market leading to a conditional autonomy of sporting authorities.[23] The purpose of this paper is to examine the backwards relationship. **It will be analyzed how the specialty of the sport market has influenced EU internal market law by creating a sport specific interpretation method and some procedural peculiarities that are apparent in sport related cases.**

[22] Weatherill, S. (2013). *European Sports Law*, 2nd ed. Oxford: T.M.C. Asser Press, Springer; Blackshaw, I. (2017). *International Sports Law: An Introductory Guide*. The Hague: T.M.C. Asser Press, Springer; Pijetlovic, K. (2015). *EU Sports Law and Breakaway Leagues in Football*. The Hague: T.M.C. Asser Press, Springer

[23] *Supra* n.7 Weatherill, pg. 157 et seq.

C. A European Sports Law?

Is there a European sports law?

It will be demonstrated in the current research that the EU internal market law was broadly interpreted by the ECJ in a series of cases, in order to cover sport related differences and integrate sport organizations towards the goal of creating a single European market. This was and continues to be a procedure of **negative integration**. Namely, this is a procedure during which the Court, through its case law, aims at eliminating every potential obstacle set either by public or private actors in the internal market.[24] Through the application of the Treaty provisions, all practices that impose restrictions on competition and free movement are considered violations of the European law and declared null and void.

However, the existence of a European sports law demands mainly actions of **positive integration**, namely regulatory measures adopted by the European authorities in order to regulate the market. In contrast with the past, subsequent to the conclusion of the Treaty of Lisbon, EU possesses today a competence to take measures on the field of sports as it is enshrined in Article 165 TFEU. This provision grants EU the competence to adopt "**incentive measures**" concerning the organization of sports, while positive harmonization measures are excluded. This is an extremely narrow competence that protects sporting autonomy by not allowing the Union to take legislatory measures on this domain. For this reason the current research will focus exclusively on negative integration and the principles created due to the special character of the sport market.

Simultaneously, Article 165.4 TFEU has recognized the "special nature of sport" that has been used by the ECJ as an interpretation tool of the internal market law for decades. Moreover it highlighted "fairness and openness" of sporting events as legitimate aims that can justify potential violations of the EU law. The establishment of those principles in Article 165 TFEU is an excellent example of the dynamic relationship between judiciary and legislature.[25] In the case

[24] König, J. and Ohr, R. (2013), Different efforts in European economic integration. *Journal of Common Market Studies*, 51, pp. 1074-1090.

[25] Christianos, V. (2005) Dynamics in the relations between judiciary and legislature in the European Community (in Greek), Athens: Ant. N. Sakkoulas Editions, pp. 138 et seq.

of sport, member states clearly accepted the case law of the Court and adopted a new Treaty provision that recognizes the specialty of sport. But the majority of legal academia agrees[26] that besides the legitimization of the precedent case law, Article 165 TFEU does not change radically the treatment of sport organizations by the Court during the application of EU internal market law provisions. Thus, this research will elaborate further on how the negative integration process took place through this case law and especially what are the sport– specific principles that have been adopted.

In detail, Part A will focus firstly on the case law that gradually rejected the sporting exemption and underlined that almost every sporting activity is subjected to the internal market law as it has economic elements. Furthermore, in the same Chapter, there will be an analysis of those fields of the internal market law, namely free movement and state aid, in which sport organizations are completely integrated and treated as regular market operators. In these fields, as it will be proved, the Court generally uses the same regular formula of application with every other sector of the market. Sport clubs and sport federations have the same treatment with a cement company or a fruit importer. In Part B, it will be firstly demonstrated that the sport market has some regulatory and economic peculiarities that justify special treatment of specific sport law cases. Thus, there will be an analysis of the partially integrated fields of the internal market law, namely the non- discrimination principle and competition law. What will be underlined is the fact that this partial integration is not only a result of exemption from the application of the law, but also a result of sport- friendly interpretation that respects the "special nature of sport". Conclusively, the research will record the procedural and substantial principles that were formulated by the Court and are still applied in sport related cases.

[26] *Supra* n.7 Weatherill, pg. 157 et seq.; *Supra* n.23, Blackshaw, pp. 85- 93; *Supra* n.23, Pijetlovic, pp.126- 134 (for the opposite view).

II. Part A: The Complete Integration of Sport Organizations in E.U. Law

The organization of a sporting event, for example of the English Premier League, presupposes the adoption of rules that regulate an extremely wide spectrum of legal relationships. The conditions of participation of clubs and athletes, the type of the players' contracts, their duration and even the time of their conclusion, as well as the sanctions for potential violations of sporting rules are only some of the issues that are regulated through various legal instruments by sports associations. Those instruments may be *ad hoc* agreements, decisions of the board of the associations or even the statute of an organization.[27] Sport federations, though, are private legal persons. As a consequence, these decisions are legally binding for the clubs and the athletes only at the extent that they are incorporated in a contract.[28]

The aforementioned private law system nourished the belief that the sport market is a distinct, autonomous legal order that escapes from the application of European law. However, it was also undisputable that sport constituted a profitable activity that was part of the internal European market. This antithesis drove ECJ in a statutory judgement that established the so called "sporting exemption", which excluded some sporting activities from the scrutiny of the EU internal market law. In this chapter then, it will be demonstrated how this principle evolved through time before being shrunk in an extremely narrow spectrum of issues which equals to an actual abandonment of an absolute sporting exemption.

Furthermore, the gradual minimization of the sporting exemption led the Court to apply completely and indistinctively the free movement rules and the illegal state aid prohibition against sport clubs and federations. This case law has created two completely integrated fields where the application of the European rules follows the standard legal formula adopted by the Court in non- sport related cases. As it will be analyzed further, in these fields, the specialty of the sport market may stand as a justification of restrictions only if the criteria of a general justification are fulfilled.

[27] Collective Bargaining Agreement Between the National Basketball Association (NBA) and National Basketball Players Association (NBPA), 2017; Regulations on the Status and Transfer of Players by FIFA, Zurich, 2017

[28] Siekmann, R. (2012). *Introduction to International and European Sports Law*. The Hague: T.M.C. Asser Press, Springer, pg. 56- 57.

A. The progressive abandonment of an absolute "sporting exemption"

As already highlighted, EU did not have an explicit competence on sport until recently, following the conclusion of Article 165 TFEU. Subsequently, the Court would have the competence to deliver a judgement over sport law cases only through the application of the internal market law, which thanks to the principle of supremacy[29] overcomes sporting autonomy and applies directly in order to "merge national markets into a single market bringing about conditions as close as possible to those of a genuine internal market".[30] The main questions, though, were whether internal market law is at all applicable to sports and, as the Court answered positively,[31] at which extent the unique features of the sport market influence the application of EU law.

This section, thus, will focus on the first question and will follow the reversal of the Court's case law from the recognition of an extended sporting exemption to its rejection. The first attempt of the Court to delve into the relationship between the sport market and EU law was the landmark case *Walrave and Koch v. Union Cycliste International* concerning participation rules in international games. This was the judgement that clarified the application of internal market law in sport- related cases by stating that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity."[32] Simultaneously, the very same decision established a broad sporting exemption that included any issue of "purely sporting interest".[33] The next step of the Court was realized approximately 25 years later in another case concerning participation in international games, the *Deliège v. Ligue de Judo*. This time, ECJ reached the same conclusion but with a different formula. It did not referred to an exemption of purely sporting issues from the application on EU internal market law, but to "limitations inherent in sport"[34] that serve as a legal justification to the violation of the rules of free movement. Finally, the Court abandoned almost completely the theory of the sporting exemption in the judgement of *Meca-Medina and Majcen v. Commission* by underlining that even the rules who are "purely

[29] Judgment of the Court of 15/7/1964, Case C- 6/64, *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66

[30] Judgment of the Court of 5/5/1982, Case C- 15/81 , *Schul*, ECLI:EU:C:1982:135

[31] *Walrave and Koch v. Union Cycliste International,* §4.

[32] *Ibid* §4.

[33] *Ibid* §8.

[34] Judgment of the Court of 11/4/2000, C- 51/96, *Deliège v. Ligue de Judo,* ECLI:EU:C:2000:199, §64.

sporting in nature… are not removed from the scope of the Treaties."[35] Currently it will be demonstrated on which grounds the Court overruled its previous case law and established the violation- justification formula.

[35] Judgment of the Court of 18/7/2006, C- 519/04, *Meca-Medina and Majcen v. Commission*, ECLI:EU:C:2006:492, §27.

1. *The primary exemption of issues of "purely sporting interest"*

When the first case related to sport reached the Court, it needed to be answered whether EU law is at all applicable in such disputes, as noted above, and additionally at which extent it may be applicable. There were two chronologically related cases that delved in the extent of the integration of sport organizations in the internal market and the relationship between EU internal market law and sporting rules. Firstly, in *Walrave and Koch v. Union Cycliste International* the Court put under scrutiny the legality of participation rules in international games. Subsequently, in *Dona v. Mantero*[36] ECJ examined under the same formula the rules concerning eligibility of participation in club football matches.

Walrave and Koch where Dutch pacemakers that used to participate professionally in a sport called "paced cycling". Athletes participate in this sport in pairs. Every stayer is accompanied by one pacemaker that helps him control and increase his spread and his overall performance. Walrave and Koch wanted to participate in the world championship with Belgian stayers, but the rules of the international federation (UCL) provided that the pacer and the stayer should have the same nationality.[37] For this reason the applicants challenged those provisions before the national courts. The essence of the difference concerned the non- discrimination principle, which according to Article 7 TEEEC (now Article 18 TFEU) applied only within the scope of application of the Treaties. Thus, it was essential for the Court to decide whether EU internal market law is applicable in sports. Despite the fact that the case concerned a game that was not very popular, as GA Warner noted, the judgement was to be of a "general importance in the world of professional sport."[38]

In this context, the dictum of the Court began with the assessment that the practice of sport in general, thus any sport- related case, is subject to EU law (then Community law), **only in so far it constitutes an economic activity**.[39] This first argument was completely coherent with the objectives of the Union, as enshrined in Article 3 TEU and the scope of application of the

[36] Judgment of the Court of 14/7/1976, C- 13/76, *Dona v. Mantero*, ECLI:EU:C:1976:115.

[37] *Walrave and Koch v. Union Cycliste International,* §1.

[38] Opinion of AG Werner, *Walrave and Koch v. Union Cycliste International*, ECLI:EU:C:2006:201, §1.

[39] *Walrave and Koch v. Union Cycliste International,* §4.

internal market law.[40] Afterwards, though, it was highlighted that the composition of national teams is not an issue related to economic activity, but a question of **purely sporting interest.**[41] Finally, the Court recognized that national courts are the competent organs to decide whether an issue is economic or purely sporting, underlining that in any case the prohibition of discrimination applies on every rule "regulating in a collective manner gainful employment."[42] In this way, the Court enlarged admirably the circle of addresses of the non- discrimination principle including not only public authorities but also private actors who have a *de facto* regulatory power in employment rules.

It would be fair to support that *Walrave and Koch* judgement established an extremely broad and unjustifiable exemption. The Court ignored the immense economic importance that participation in international tournaments has for professional athletes. Even though participation in a national team is not directly paid, the reputation increase for the player and the opportunities he has to demonstrate his talent and win an ameliorated contract cannot be overlooked.[43] Moreover, the decision did not offer legal certainty, because there was not an explicit formula concerning which sport practice is an economic activity and which is not. National judges have been granted the competence to decide almost freely upon the issues of purely sporting interest.

The same formula of exempting rules of purely sporting interest was followed in *Dona v. Mantero* judgement concerning participation restrictions in club football and especially the Italian national league. Mr. Dona, a scouter of the Italian team Rovigo, has been sent to Belgium to locate new talented players but recalled without payment by the club's manager because he was not searching for Italian nationals, while the rules of the league prohibited the participation of foreigners. The Court in this reference for a preliminary ruling applied the same method and assessed that the participation rules in club football are also an issue of purely sporting interest that is exempted from the application of the Treaties.[44] In this way, participation rules in both international and national games where granted an undue asylum from EU law. Eventually, the Court would resile from this case law latter on, as analyzed further under Chapter IIIB.

[40] *Supra* n.7 Weatherill, pp.73- 75.

[41] *Walrave and Koch v. Union Cycliste International*, §8.

[42] *Ibid* §17.

[43] Késenne, S. (2007). *The Economic Theory of Professional Team Sports*. Northampton, MA: Edward Elgar, pp.30- 31.

[44] *Dona v. Mantero,* §14.

2. *The favorable treatment of limitations "inherent to sports events"*

The sporting exemption as a legal formula that excludes the integration of specific sport related issues in the internal market of the EU did not survive on the long term. In fact, the very next ruling concerning a sporting case set aside the exemption rule for practices of purely sporting interest. This was the landmark *Bosman*[45] judgement that will be analyzed extensively in the following section relatively with the interpretation of free movement rules. The main issue in *Bosman* concerned the contracts of footballers and the overall transfer system.[46] But the Court with an *obiter dictum* delivered an additional judgement concerning participation rules and especially nationality clauses.

The existing system of team selection in the *Bosman* era is widely known as the 3 + 2 rule, which was much more flexible than the absolute prohibition of foreign players that was declared admissible in the *Dona v. Mantero* ruling. This system allowed every team to register up to three players of foreign nationality, including European citizens. Moreover, clubs were entitled to add two more foreigners that have played in the country for a period of five years.[47] Surprisingly, despite the fact that the Court had accepted in the past that participation rules are issues of purely sporting interest that evade the application of EU law, the 3 + 2 rule was declared restrictive of the free movement of workers and thus a violation of EU law.

What is interesting for the sporting exemption in this ruling is the fact that the Court avoided completely to refer to the distinction between issues of economic and issues of purely sporting interest. It did not reject this distinction either. The judgement was founded on the general rule that sport practices are subject to EU law only in so far they constitute an economic activity, jointly with the admission that the 3 + 2 rule affected indirectly the terms of gainful employment.[48] The reluctance of the Court to accept or to explicitly abolish the theory of the sporting exemption makes *Bosman* a judgement with limited importance for the issue at hand.

[45] Judgment of the Court of 15/12/1995, C- 415/93, *Union Royale Belge des Sociétés de Football Association v. Bosman*, ECLI:EU:C:1995:463.

[46] *Supra* n.23, Pijetlovic, pp. 104-105.

[47] *Union Royale Belge des Sociétés de Football Association v. Bosman,* §27.

[48] *Ibid* §73.

However, it sets the foundation for the shift of the Court's case law and demonstrates the general disapproval[49] against the sporting exemption.

This second phase of the sporting exemption that set the foundations for its permanent abolishment latter on is signaled by the ruling in *Deliège v. Ligue de Judo*. This case is very important, because the Court for the first time altered the sporting exemption theory with a formula of justification of potential restrictions to the free movement rules.

In these joined cases two Belgian athletes of judo were denied participation in a series of international games by the Belgian judo authority because they did not achieve the necessary qualification criteria. The athletes in order to participate in the games had to be selected by the national federation. They could not enter the games on their own.[50] This is a very similar system to the current selection process that is used for the Olympic Games. The Court examined the system's compatibility with EU law and especially with the rules concerning the freedom to provide services (Article 56 TFEU). Even though the employment status of these athletes was not clear, the Court delivered its judgement based on the assumption that this activity was economic.[51]

The *Deliège* case was clearly distinguished by the precedent[52] case law in *Bosman* where the nationality clauses directly prevented athletes with European citizenship from participating in championships. This time it was underlined that nationality was not a reason of bias. The national federation has only adopted specific rules that would allow them to conduct the final selection of the athletes who will participate in international judo championships from the national pool of competent judokas that they had at hand. For this reason the court underlined that such a limitation in the number of participants was **inherent in the organization of international sports events**.[53] As it is impossible for every competent candidate to participate in an international event, the adoption of selection rules is logically the only available path. Especially when these are clear and objective, like in *Deliège*, EU law cannot be violated.

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[49] Anderson, J. (2013). *Leading Cases in Sports Law*. The Hague: T.M.C. Asser Press, Springer, p. 55; Beloff, M., et al. (1999). *Sports law*. 1st ed. Oxford: Hurt, p. 69; *Supra* n.7 Weatherill, pp. 77-78;

[50] *Deliège v. Ligue de Judo,* §3- 5.

[51] *Ibid* §59- 60.

[52] Christianos, V. (1998). *Overruling of prior Judgments in the Case Law of the C.J.E.C. (in Greek).* Athens: Ant. N. Sakkoulas, pp. 125- 126.

[53] *Deliège v. Ligue de Judo,* §64.

What was the most interesting in this case is not the *dictum* it-self, which is self- evident at a great extent, but the legal formula that the Court adopted. This was the first time that ECJ moved clearly from the exemption formula to a justification formula. Participation rules in *Deliège* were not considered under the indefinite term of "issues of purely sporting interest", but as an issue inherent in the organization of sport events. This was the most striking indicator that the Court was about to resile from the sporting exemption and adopt a justification formula. From now on sport regulations deriving from the special character of sport would not be considered as exemptions, but they would have to pass the justification test. That is crucial because justifications of free movement rules have a completely different status from exemptions. Justifications can be Treaty based, like Article 165 TFEU for sport, or may have been created by the case-law of the Court,[54] as happened in sport before the adoption the Treaty of Lisbon. They need to pursue legitimate objectives and most importantly need to be proportionate.[55] Exemptions from the rules of free movement do not follow the same principles. If a practise is considered an exemption from the scope of the Treaties, evades completely the scrutiny of the Court and no potential proportionality test applies. This is the reason why the complete prohibition of EU nationals' participation in football leagues survived the Court's scrutiny in *Dona v. Mantero,* but an even more open system collapsed latter on in *Bosman*. The same rule that could survive as an exemption from EU internal market law could not stand as a justification of a free movement restriction, since it was not proportional.

[54] Judgment of the Court of 20/2/1979, C- 120/78, *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon),* ECLI:EU:C:1979:42.

[55] Weiss, F. and Kaupa, C. (2015). *European Union Internal Market Law*. Cambridge: Cambridge University Press, pp. 32- 35.

3. *The final rejection of the exemption*

The adoption of the justification formula instead of the sporting exemption theory was a tacit reversal of the Court's case law. Case- law reversals are generally tacit or explicit.[56] The method of tacitly overturning case- law is mainly a tool employed to smoothen the transition to a complete rejection of a precedent *dictum.* [57] In this way, the Court manages to maintain its authority and safeguard the consistency of its case law without delivering a completely unexpected judgement that manifestly contradicts with an established theory. In the case of the sporting exemption, though, the incomprehensible theory that was being gradually set aside by ECJ in multiple cases was finally explicitly rejected in the *Meca-Medina and Majcen v. Commission* case.

The main topic of *Meca- Medina* was the legality of anti- doping rules and especially of temporarily suspension for doping violations. Two swimmers have been tracked having high amounts of an illegal substance during periodical anti- doping control examinations and were punished with a four year suspension from all games.[58] The athletes complained in the Commission against the International Olympic Community supporting that FINA's regulations violated EU competition law by restricting their freedom to provide services. The rejection of their complaint by the Commission led to a judgement of the General Court that characterized anti- doping regulations as practises of purely sporting interest without economic aspects.[59] Thus, EGCJ concluded that EU internal market law is not applicable in this type of rules and rejected the application as unfounded. For this reason the applicants appealed before the ECJ claiming an error of interpretation of the law.

Firstly, it needed to be answered whether anti- doping rules are subject to EU internal market law and subsequently if the four year ban from sporting events is an illegal restriction that violates freedom of movement and antitrust provisions. This time the sporting activity under scrutiny was much more related to the core of sporting action and had a very remote and indirect relationship with the provisions regulating gainful employment. Nevertheless, the Court founded

[56] *Supra* n.53 Christianos, pg. 77

[57] *Ibid* pg. 119- 120.

[58] *Meca-Medina and Majcen v. Commission,* §3- 5.

[59] *Ibid* §15- 18.

its verdict on the well- established case law that sport practice is subject to EU internal market law only in so far it constitutes an economic activity.[60] Contrary to GA Léger, though, it did not reach the conclusion that the case at hand referred to an issue of purely sporting interest that evades the application of EU law.[61] This judgement explicitly rejected the sporting exemption admitting the **"difficulty of severing the economic aspects from the sporting aspects of a sport."[62]** The merely sporting nature of a rule does not erase its economic consequences. Sporting and economic elements are interrelated and extremely hard to distinguish, thus, it is impossible to recognise an exemption in the application of EU law.

At this point the application of EU internal market law to anti- doping regulations was declared possible, but the swimmers did not win the case. ECJ recognised that these regulations served the attainment of legitimate objectives, the protection of fairness of sport events and the abolishment of doping practices. Moreover, the sanctions provided were proportionate for the achievement of the aforementioned objectives.[63] Thus, even though anti-doping regulations are restrictions to competition they are justified under Article 101.3 TFEU. The appeal failed.

Meca- Medina is a landmark case as it signals the abandonment of the sporting exemption and the subjection of sport organizations in the internal market law. For a part of the legal academia, this was an endorsement of the American "rule of law" in sport practices and an indication that these cases should be considered *ad hoc*.[64] The admissibility of sporting rules and the potential violation of competition law should be judged on a case by case basis without applying the general formula of EU competition law. This view is not persuasive enough. The reversal of the Court's case law is an apparent effort to adopt the formula of legal justification rather than an absolute exemption. It is an effort to subject the sport market to the internal market law. In fact the special character of sport and the need of fairness and openness in sporting events (Article 165 TFEU) are set to be used as legal objectives that can justify restrictive sporting rules. Sporting rules will not be granted an asylum. But the application of EU law is not always complete due to the special character of sport. In some fields of EU law, like free movement rules and state aid, complete subjection has been possible. In other fields, including non-

[60] *Ibid* §22

[61]Opinion of AG Léger, *Meca-Medina and Majcen v. Commission*, ECLI:EU:C:2006:201.

[62]*Meca-Medina and Majcen v. Commission*, §26- 27

[63] *Ibid* §43- 44.

[64] Blackshaw, I. (2007). EU Competition Law and Sport. *Business Law International*, Vol. 8, pp.107- 114.

discrimination and competition law, the special character of sport led to the adoption of asymmetric formulas that created a partial subjection.

In a nutshell, as demonstrated in this section, the Court rejected gradually the sporting exemption indicating that the practice of sport organizations is integrated in the internal market of the EU and subject to free movement and competition law. This does not mean that the special character of sport in no longer respected. Sport is special, but this peculiarity will be respected only in so far it meets the requirements of a legal justification as established by the Court's case law in the different fields of the internal market law.

B. The adoption of the regular formula in sport cases related to free movement rules

Having gradually abolished the sporting exemption for sport- related cases, the road was wide open for the Court to apply EU law in this integrated part of the internal market. The first category of rules invoked was Articles 45- 66 TFEU concerning the free movement. In particular, EU law aims at eliminating barriers preventing the free movement of goods, persons and services within the internal market. This objective is served among others by the Treaty provisions on free movement. The application of the aforementioned rules has been subject to extensive analysis by ECJ, which adopted, following a series of cases, a general framework and a specific formula of application.[65] Firstly, the Court examines whether the alleged violation is an issue falling under the protective scope of the free movement provision at hand. It analyses, thus, the circle of addresses (the ensemble of those actors who should respect the rule) and the circle of beneficiaries (personal scope) of the specific article that is called for application. Subsequently, follows the examination of the material scope of the provision, namely the practices that shall be considered prohibited obstacles endangering the unity of the internal market. Finally, the Court analyses whether a primary violation of the provision shall be justified because it serves express or implied legitimate aims[66] and is proportionate for the fulfillment of these objectives.

As far as the sport market is concerned, the main provisions coming into application were the free movement of workers and the freedom of establishment. Those provisions constitute a field of complete integration, because the Court chose to employ exactly the same formula for sport practices, which was applied in all free movement cases. Sport organizations did not enjoy preferential treatment, as in the application of competition law and the non- discrimination principle. However, the Court in order to apply the regular free movement formula should adopt a broad interpretation. In the following sector, thus, it will be demonstrated how this broad interpretation altered the circle of addresses, the personal and material scope of free movement provisions. Additionally, there will be analysis on the admissible justifications concerning sport regulations that shall cure primary prohibited restrictions of free movement.

[65] *Supra n.* 57, Weiss and Kaupa, pp. 20- 35

[66] Fairhurst, J. (2010), *Law of the European Union*, 8th ed., Essex: Pearson Education Ltd, pp. 495- 500

1. The extended circle of addressees

According to the traditional theory of international law, the subjects of the international legal order and the recipients of obligations from international rules are only states and international organizations.[67] In this context, obligations cannot be established directly to private entities from international law. Private legal persons are only actors in the international legal order but not subjects. From its early days though, ECJ has underlined that European Union is a "new legal order of international law", including not only the sovereign states, but also their nationals.[68] Even under this framework, the free movement provisions were not generally accepted as a source of obligation for private entities. It was mainly the responsibility of states to eliminate barriers threatening the unity of the internal market and discrimination based on nationality. Thus, the circle of addressees of free movement of workers used to include states and only private actors being entrusted to exercise public authority.[69]

The application of the free movement of workers rule in sport cases was impossible without a broad interpretation of the circle of addressees of Article 45 TFEU. As already mentioned, sports organizations enjoy a regulatory autonomy on the sport market. Regulations on player contracts, league participation, transfer windows and disciplinary measures derive from national federations, continental confederations or the international union in every sport. Those organizations are legal persons governed by private law and their regulations were contractually accepted by the clubs and the athletes participating in sports events. Even if a particular rule was considered to introduce an obstacle to free movement due to the preferential treatment of the nationals of a specific state, the application of this sport regulation could not be *prima facie* prevented as it has not been enforced by an action of public authority.

Walrave and Koch was the first case adopting the doctrine that the non-discrimination principle of today's Article 18 TFEU was addressed to private actors jointly with state authorities. The Court has underlined that the decision of the International Cyclist Union, despite being an action

[67] Oppenheim, L., Jennings, R. and Watts, A. (2008). *Oppenheim's International law*. 9th ed. Oxford: Oxford University Press, pp.331- 332.

[68] *Van Gen den Loos*, §12

[69] De Witte, B. (2011). Direct Effect, Primacy and the Nature of the Legal Order. In: P. Kraig and G. de Búrca, ed., *The Evolution of EU Law*, 2nd ed. Oxford: Oxford University Press, pp. 329- 334.

governed by private law, was regulating in a collective manner the rules of gainful employment.[70] Thus, the effective protection of the internal market called for the expansion of obligations deriving from Article18 TFEU to non- state actors.

In *Bosman* the Court adopted the same case- law, namely that EU law imposes obligations to legal persons governed by private law, for Article 45 TFEU concerning free movement of workers. Apart from the 3+2 registration rule, *Bosman* case mainly concerned the transfer system. In brief, footballers, as well as some other athletes, cannot participate as players of a football team unconditionally. They can sign freely a contract with any employer, any football club, but they also have to be registered to a national association with this club in order to participate in sport events. At the *Bosman* era,[71] though, the regulations of the Belgian Football Association concerning registration were very restrictive. Even after the expiry of his contract, the footballer could not be registered in the league with another club, unless his previous employer granted permission after receiving compensation for the player's training.[72] If the new club used the player in a match without having the right to participate, both the club and the player would face sanctions of sporting and economic nature. Consequently, the risk for an athlete to stay out of contract with his former club, without having permission to join a new club was apparent. The obstacle to the free movement of workers within the Union was obvious, as the athlete was unable to participate at any professional league under the same continental confederation, thus, in any league in Europe without the formal venal consent of his previous employer. Jean- Mark Bosman inquired about the compatibility of these regulations with the free movement of workers provision and the issue of the applicability of Article 45 TFEU to working relationships governed by private law arose.

ECJ, after citing the *Walrave and Koch* judgement, adopted the same principle that sport unions establish in a collective manner the rules of gainful employment and, thus, are subject to free movement law.[73] If the interpretation of today's Article 45 TFEU was confined only in acts of a public authority, there was a risk to treat unequally substantially similar situations. Even the objection that the defendants, as private actors, would not have the possibility to invoke public policy as a justification of a potential restriction was rejected, as nothing precludes them from

[70] *Walrave and Koch v. Union Cycliste International*, § 17.

[71] *Supra* n.23, Pijetlovic, pp.105- 106.

[72] *Union Royale Belge des Sociétés de Football Association v. Bosman*, §10- 17.

[73] *Ibid* §84

this argumentation.[74] Abolishing state barriers of the free movement of workers would be neutralized if associations or organizations with an autonomous status not governed by public law, such as sporting unions, were able to impose restrictions of equal effect.

The circle of addressees of Article 45 TFEU was unavoidably extended. **Free movement of workers has horizontal direct effect.** It imposes obligations to private actors**,** such as sport federations. The Court recognized that these private entities, even without being entrusted the conduct of actions of public authority, have a **quasi-governmental function**. UEFA, FIFA, ICU are placed on top of a pyramid- like structure of sport governance, were decisions are directly imposed to clubs and athletes without private negotiation.[75] Sport regulations are imposed almost unilaterally and are immediately enforced, while disagreeing parties are threatened with severe sporting and financial sanctions that may amount to disqualification from national or international events.

Sports organizations are not the only private actors that enjoy a quasi- governmental competence and that regulate unilaterally the terms of employment. The success and acceptance of the aforementioned case law is proved by the fact that the Court followed it in several other cases,[76] where private authorities "regulated labor in a collective manner." Employers' unions, labor unions or professional associations are also addressees of Article 45 TFEU and must refrain from actions of national protectionism and unlawful discrimination against EU workers in mobility. Conclusively, the horizontal direct effect of the free movement of workers became progressively a rule of general application that was generated from sport- related cases.

[74] *Ibid* §85- 86

[75] *Supra n.* 57, Weiss and Kaupa, pp. 160- 161.

[76] Judgment of the Court of 6/6/2000, C- 281/98, *Angonese*, ECLI:EU:C:2000:296, §30; Judgment of the Court of 10/3/2011, C- 379/09, *Casteels*, ECLI:EU:C:2011:131.

2. The enlarged personal and material scope of free movement rules in sports

Since the free movement of workers has been interpreted as binding for private actors, it was subsequently important for the Court to clarify whether sport cases can fall under the personal and material scope of Article 45 TFEU. Case law in the field of free movement is a convincing argument in favor of the complete integration of sport organizations. The special character of sport and the autonomous worldwide regulatory regime have not been considered to escape the application of EU law as exemptions. This special nature of sport was employed widely as a tool of interpretation, during the application of the regular formula for the free movement. Sport is special,[77] thus it was necessary for ECJ to adopt again a broad interpretation of the provisions' personal and material scope in order to subject the activity of sport to the standard violation-justification formula of free movement rules.

Article 45 TFEU protects the internal market by banishing discriminatory treatment to workers and guaranteeing that they will move freely within the territory of member states. The **personal scope** of the Article entails the notion of worker, who is the beneficiary of the protective regime. According to well- established case law of the Court, the term "worker" is defined broadly and autonomously,[78] independently from the treatment that national law of member states reserves for the various categories of employment. A "worker" is every individual in an employment relationship. The key element for the recognition of a working relationship is the performance of a service for and under the direction of another person and the receipt of remuneration for this service.[79]

In the context of sport, the main sources of objection derived from the nature of the working relationship of the athletes. Especially during the decade of 1980, a great number of athletes used to work under part-time agreements. Sport was mainly a secondary source of income for the majority of participants in sporting events, while there were also some professional players under full-time contracts. Before this complicated system, the Court adopted an extensive interpretative method and treated the variable types of sport contracts as a whole. In *Dona v.*

[77] Vermeersch, A. (2007). All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport, *Journal of Contemporary European Research*, 3(3), pp. 238-254.

[78] Judgment of the Court of 23/3/1982, C- 53/81, *Levin .v Staatssecretaris van Justitie*, ECLI:EU:C:1982:105.

[79] Judgment of the Court of 3/7/1986, C- 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, ECLI:EU:C:1986:284.

Mantero case it was highlighted that both professional and semi- professional footballers shall be considered "workers" since their contracts have the nature of **gainful employment or remunerated service**.[80] Thus, all athletes, even these working on **part- time contracts**, fall within the scope of Article 45 TFEU, provided that they are entitled to a salary. The same case law was reaffirmed in *Bosman case*, where ECJ emphasized that the intensity and the scale of the economic activity of a sport club does not affect the player's status of worker.[81] It is irrelevant for the notion of worker, whether a team shall be considered an undertaking or not. The broad interpretation of the definition of "worker" was very significant and was reproduced by the Court in subsequent judgements,[82] especially in order to support that part- time and temporary employees are beneficiaries of free movement.

The second important issue concerning the personal scope of Article 45 TFEU is connected with the nationality of beneficiaries. Union law mainly applies to European citizens, namely to every person having the nationality of a member state.[83] This principle also applies to free movement provisions, thus, EU nationals are *prima facie* the workers benefiting from Article 45 TFEU. For this reason, sport organizations after the landmark ruling in *Bosman* modified the participation rules in European leagues, in order to treat equally European citizens. The rule that allowed sport clubs to register up to three foreign players and two foreign players that have played at least for five years in the country (3+2 rule) was rendered inapplicable for EU citizens. However, these regulations remain in force for third state nationals in several European leagues. Nowadays there are multiple variations that establish participation restrictions for non- EU nationals.

A major point of interest, though, is the protection of **nationals of third states in bilateral agreements with EU**. In *Kolpak*[84]case the Court interpreted the personal scope of free movement concerning the protection of non- EU nationals with regard to participation rules of the German Handball Federation. Maros Kolpak was a Slovak national, while his country- not

[80] *Dona v. Manter*, §12.

[81] *Union Royale Belge des Sociétés de Football Association v. Bosman,* §72-74.

[82] Judgment of the Court of 7/9/2004, C- 456/02, *Trojani*, ECLI:EU:C:2004:488; Judgment of the Court of 6/11/2003, C- 413/01, *Ninni-Orasche*, ECLI:EU:C:2003:600.

[83] Mei, A. (2003). *Free movement of persons within the European Community*. Oxford: Hart, pg. 53.

[84] Judgment of the Court of 8/5/2003, C- 438/00, *Deutscher Handballbund (Kolpak)*, ECLI:EU:C:2003:255.

yet a member state- was in a bilateral agreement with EU.[85] The player complained that the rule allowing only two foreign handball players in every club violated the freedom of movement of workers, which was directly applicable to him thanks to the bilateral agreement in force. Subsequently, *Simutenkov*[86] and *Kahveci*[87] cases concerning respectively the bilateral agreements of Russia[88] and Turkey[89] with the EU put under scrutiny analogous restrictive participation rules in football. The main argument was that these nationals of third states due to the application of the bilateral agreements should be treated as EU nationals, leading to the abolishment of participation restrictions for them. The Court followed again a broad interpretation supporting that those **bilateral agreements have direct effect** and entitle third state nationals to the protection of Article 45 TFEU et seq. However, this treatment is reserved **only for those workers who are already in the market** and are currently under contract. It cannot be invoked by potential workers, who plan to move and work in Europe.

Therefore, as far as the personal scope of free movement provisions is concerned, the Court did not refrain from using the established regular formula of application. But it adopted a broad interpretation technique both on the definition of worker and the treatment of third state nationals. This is the first example of complete integration of sport practice in EU law, an excellent proof that the special nature of sport is not a reason of exemption, but a methodological interpretative tool.

The Court after interpreting broadly the personal scope of the free movement of workers fostered the same attitude concerning the **material scope** of the provision. The material scope refers to the nature and type of legal situations that fall under the protective regime of Article 45 TFEU. In fact, the freedom of movement of workers used to have a relatively narrow material scope in comparison with other provisions such as the free movement of goods (today's Article 34 TFEU et seq.). It prohibited discriminatory treatment of EU nationals falling under the

[85] European Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, Luxembourg (1993).

[86] Judgment of the Court of 12/4/2005, C- 265/03, *Simutenkov*, ECLI:EU:C:2005:213.

[87] Order of the Court of 25/7/2008, C- 152/08, *Real Sociedad de Fútbol and Kahveci*, ECLI:EU:C:2008:450.

[88] Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, Corfu (1994)

[89] Additional Protocol annexed to the Agreement establishing an association between the European Economic Community and Turkey, Ankara (1970)

definition of worker, on condition that they have exercised their right of mobility.[90] Both direct and indirect discriminatory measures were considered a violation of the Treaty, but the existence of discrimination was essential. On the other hand, as far as the freedom of goods is concerned, the Court had from early on adopted the broad Dassonville formula. "Any trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra- community trade" are to be treated as measures of an equivalent effect to a quantitative restriction.[91] Trading rules did not have to be discriminatory against foreign products in order to be inadmissible. Article 34 TFEU et seq. was applicable even if the measures were indistinctively implemented. This broad interpretation was introduced to the free movement of workers as well, as a result of its application to the peculiar market of sport.[92]

In the landmark *Bosman* judgement the Court examined, as already mentioned, the legality of two different systems that existed in European football at that time, the transfer system and the registration system (nationality clauses). The transfer system, which was the main object of the difference, was excessively restrictive for footballers, as out-of- contract players did not have the right to move freely to another club. They were entitled to be offered a new contract by their current club with potentially different terms and lower salary or they could move to another club after compensation has been paid to their former employer.[93] Belgian footballer Jean- Marc Bosman after the expiry of his contract with RFC Liège, concluded terms with the French side Dunkerque, but was unable to join them as they have not paid compensation to his former employer. It was apparent that this system constituted a restriction to the freedom of the athletes and the applicant invoked the protection of Article 45 TFEU. Thanks to the recognition of horizontal direct effect the free movement of workers was rendered applicable to regulate relationships between private actors and the enlarged personal scope included even semi-professional athletes in the definition of worker. However, the measure at hand was indistinctively applicable. A football player could not benefit from a free transfer. All football clubs should have paid compensation even if they are in the same league and the same country, or they are in different European countries. Nationality was not a reason of bias. Thus, in lack of direct or indirect discrimination, it was necessary to interpret broadly the material scope of Article 45 TFEU.

[90] *Supra* n.57, Weiss and Kaupa, pp. 156- 158

[91] Judgment of the Court of 11/7/1974, C- 8/74, *Dassonville*, ECLI:EU:C:1974:82, §5.

[92] *Supra* n.7 Weatherill, pp. 90- 91.

[93] *Union Royale Belge des Sociétés de Football Association v. Bosman*, §6- 13

Under these circumstances, the Court underlined that even when the rules regulating gainful employment, such as those concerning the transfer system, are not discriminatory, they may constitute an **illegal obstacle to the freedom of movement for workers**. The key element is the fact that these rules **affect the access to employment market** by preventing or deterring the athletes from leaving their clubs after the expiry of their contracts and seek for employment elsewhere in the same nation or in another member state.[94] As long as a rule hinders the access to the employment market, it constitutes a violation of Article 45 TFEU, even if it is not discriminatory. The material scope of free movement of workers is therefore enlarged and includes not only discriminatory measures against workers in movement, but also any measure affecting access to employment.

The specialty of the sport market and the structure of sport governance that facilitates the establishment of rules, commonly adopted at a continental or international level in every sport, triggered a fundamental alteration of the internal market law. The material scope of the freedom of movement for workers was broadly interpreted. The Court adopted the argumentation of AG Lenz[95] and delivered a judgement of massive importance not only for the organization of sport, but also for the application of the free movement provisions. It is noteworthy that any restrictive measure can be considered as illegal obstacle, similarly to the Dassonville formula, without an exemption analogous to the *Keck* case law. In this judgement that concerned the free movement of goods, the broad Dassonville formula was restricted to include only trade rules establishing product requirements, while the rules regulating selling arrangements were considered to evade the material scope of the provision. On the contrary, free movement of workers has a broader material scope as the Court rejected the analogy with the *Keck*. The power of the sports market to change the interpretation of EU law is eminent, as the case law in *Bosman* was reproduced in subsequent cases concerning taxation[96] or returning workers,[97] where the obstacle to free movement did not derive from a discriminatory measure.

Another important element concerning the material scope of Article 45 TFEU is relevant to whether sport cases might be subject to an exemption from the scope of free movement. Firstly,

[94] *Ibid* §99- 103

[95] Opinion of AG Lenz, *Union Royale Belge des Sociétés de Football Association v. Bosman*, ECLI:EU:C:1995:293, §201- 203.

[96] Judgment of the Court of 14/2/1995, C- 279/93, *Finanzamt Köln-Altstadt v. Schumacker*, ECLI:EU:C:1995:31.

[97] Judgment of the Court of 16 /2/2006, C- 185/04, *Öberg*, ECLI:EU:C:2006:107.

it was examined whether the sporting rule at hand was of **purely sporting interest**, without economic significance, thus it went beyond the scope of the Treaties. However, as demonstrated analytically in Section IIA this exemption was gradually abandoned. Every sport related case has some economic aspects, thus, even issues connected with the **core of the sporting activity** cannot be *prima facie* excluded from the direct effect of the free movement of workers provision. For instance, even the rules of the game (e.g. what is offside or what is a three point shoot) should not be considered eligible for an exemption from the material scope of Article 45 TFEU.[98] However, it is evident that restrictions relevant to the rules of the game may be easily justifiable, as will be subsequently demonstrated. The rejection of an absolute sporting exemption leads to complete integration in this field of EU law.

Secondly, the general exemption of **purely internal situations** is also a part of the regular violation- justification formula that is applicable to sport cases. In specific, a series of judgements[99] have crystalized the rule that free movement of workers can be invoked only in cases with a cross- border element. It is essential that the beneficiary worker has exercised his right of free movement before seeking protection under Union law. Situations regulated under national law that are confined in the territory of one member state are exempted from this article. In sport cases, though, this exemption is not of high significance since the cross- border element was obvious in the vast majority of cases. International transfers, registration of foreign players, participation in international games are some of the situations submitted before the Court. The involvement of sport clubs from different countries and the fact that potential employers are foreign nationals sets aside the exemption of purely internal situations in the sport context. But it is arguable what would happen in a case where an athlete would be tackled to realize an internal transfer, a transfer between two clubs of the same nation. If the athlete is of the same nationality with the clubs, EI internal market law does not apply. But, the real problem is the transfer system as a whole and not only the part of international transfers.[100] For this reason, the aftermath of *Bosman* entailed a radical change of the transfer system in Europe leading to a less restrictive regime for all types of free transfers as a whole.

[98] Foster, K. (2012). Is there a Global Sports Law?. In R. Siekmann and J. Soek, ed. *Lex Sportiva: What is Sports Law?* The Hague: T.M.C. Asser Press/ Springer, pp. 39- 40.

[99] Judgment of the Court of 28/3/1979, C- 175/78, *The Queen v. Saunders*, ECLI:EU:C:1979:88; Judgment of the Court of 28/6/1984, C- 180/83, *Moser v. Land Baden-Württemberg*, ECLI:EU:C:1984:233.

[100] *Supra* n.7 Weatherill, pp. 85- 86.

Conclusively, the material scope of the freedom of movement of workers has been admirably enlarged, while the exemptions become narrower. The Court while pursuing the goal of market integration applied the regular formula of free movement in sport related cases, but the specialty of sport triggered momentary interpretative alterations that eventually were generally adopted and are considered precedent until today even outside the field of sport.

3. The standard justification approach

The standard formula for free movement violations dictates that having concluded the existence of a restriction to the free movement, it is subsequently imperative to examine whether it can be justified. Justifications may be based on the Treaty and are generally related to reasons of public policy, public security and public health.[101] Additionally, justifications may be founded on "overriding grounds in the public interest" according to the case law of the Court[102] that was established in the context of the free movement of goods, but is considered a rule of general application.[103] In fact, there is a non- exhaustive list of potential legitimate aims that may be served by a specific restriction, while it rests upon the jurisdiction of the Court to decide at which extent these objectives and the measures taken are appropriate and proportionate. The interpretation of potential justifications though, is not a subjective opinion of the Court. It is based on objective indicators, the principle of subsidiarity and the soft law instruments of EU. Thus, it will be demonstrated in the current section how these indicators influenced the case law of the Court and especially the aims that may be accepted today as legitimate to justify a restriction.

In the context of sport, the broad interpretation of Article 45 TFEU has allowed a great amount of sport practices to be characterized as illegal restrictions of the free movement of workers. Following *Bosman* case law, according to which every measure that affects adversely the access of athletes to the employment market is a restriction of free movement, the Court faced the challenge to examine the possible justification of these restrictions. For this reason is was essential to indicate which legitimate objective may be served by each sporting practice and if the restriction was proportionate for the accomplishment of these goals. The main objectives that may allow restrictions of worker mobility are enshrined in Article 165 TFEU. The first is the broad aim of **respecting the special nature of sport** and the second is the protection of **openness and fairness of sporting events**. While the second objective is very concrete and may justify a specific range of sport practices, like anti-doping policy,[104] the "special nature of sport" is an unclear broad term. Thus, the case law of the Court both before and after the adoption of

[101] See for example Articles 36, 45.3, 54.1, 62 TFEU.

[102] *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon),* §6.

[103] *Supra n.57,* Weiss and Kaupa, pp. 168- 169.

Article 165 TFEU is a crucial element in order to interpret this notion and clarify which aims may be considered legitimate.

Before the adoption of the Treaty of Lisbon, there was no specific legal basis recognizing that sport was special. However, some restrictions to the sport employment market due to the nature of the organization of sport were compelling to be considered admissible. The Court needed to find if the special characteristics of sport constitute a legitimate aim to justify restrictions. The first interpretation tool used to explain whether and at which extent the special nature of sport must be protected was the **subsidiarity principle**. ECJ recognized that the argument presented by Germany concerning the application of the principle of subsidiarity would create a complete asylum for sporting autonomy. [105] As the Union enjoys a shared competence in the field of the internal market, the principle of subsidiarity functioned as a protecting mechanism of the sporting autonomy. The Union may adopt measures only in the fields where it has explicit competence, while implicit competences may be existent only at the extent, where collective Union action would be more effective than national, regional or local action.[106] Since in the field of sport, the individual action of private actors, such as sport federations is in general more targeted and effective for the function of the global sport market, it would lead to the assumption that EU is not competent to regulate the internal sport market. But, the regulatory freedom of sport associations could not be absolute. The Court underlined that any intervention from public authorities, such as the EU, must be confined to what is strictly necessary, while it is important to allow sport organizations maneuver space as they are experts in the field and can understand the needs of the market. They could adopt restrictive measures only in so far they are proportionate for the realization of the aforementioned objectives. Subsidiarity as a means of competence conferral would over- protect sport organizations. They key to regulate the sports market was the adoption of the principle of proportionality. Subsequently, thus, it will be demonstrated how the broad term of sport specialty has been interpreted and which actions have been considered proportionate in the case law of the Court.

On the same time, it is important to mention that the special nature of sport has not been established only judicially, thanks to the subsidiarity principle, but it was also cultivated through

[104] *Meca-Medina and Majcen v. Commission* §57-60.

[105] *Union Royale Belge des Sociétés de Football Association v. Bosman* §73.

[106] Chalmers, D., Davies, G. and Monti, G. (2010). *European Union Law: Cases and Materials*. 2nd ed. Cambridge: Cambridge University Press, pp. 208- 211.

instruments of **soft law**. The Helsinki Report on Sport[107] and the White Paper on Sport of 2007[108] are of great value in order to understand the role of sport as an objective of the EU and the extent at which a restriction can be considered justifiable. Soft law is not legally binding and cannot serve on its own as a legal basis of justification. However in *Grimaldi* case,[109] it has been held by ECJ that recommendations of the Commission despite their non-binding effect should be taken under consideration in order to interpret national law. *A fortiori*, they are valuable means of interpretation for Union law provisions, including the articles of the Treaties.[110] In the context of sport, these instruments constituted a means of dialogue and cooperation among the Union and the sport associations[111] and a guide for sporting authorities towards the revision of sport regulations such as the transfer system. The Helsinki Report on Sport underlined, possibly on a wrong basis,[112] the "social function of sport" and the concern that commercialization and market forces may endanger its cultural influence. The Report actually revealed the Commissions conviction that "a more balanced development" of the sport market was needed, influencing the acceptable justifications of free movement restrictions. At this era, the Court developed mainly justifications on non- economic grounds like in *Lehtonen* case.[113] Subsequently, the White Paper on Sport went deeper in the relationship between the sport practice and the internal market underlining that "sport has some specific characteristics", which influence the interpretation and the application of EU law but cannot provide for a general exemption. These soft law instruments were crucial towards the final conclusion of Article 165 TFEU and had an important impact on the justification grounds that the Court adopted in its judgements.

Having understood the legal background that influenced ECJ when applying the regular restriction- justification formula of the free movement rules to sports cases, it is possible now to focus on the particular aims that the Court examined. Firstly, a legitimate aim of economic character was invoked in *Bosman* case[114] in order to justify the transfer system establishing an

[107] Commission Report (EU) of 10/12/1999, *The Helsinki Report on Sport*, COM (1999) 644 final.

[108] Commission (EU) *White Paper on Sport* of 11/7/2007, COM (2007) 391 final.

[109] Judgment of the Court of 13 December 1989, C- 322/88, *Grimaldi v. Fonds des maladies professionnelles*, ECLI:EU:C:1989:646.

[110] *Supra* n.17 Lorenz, pg. 34.

[111] Garcia B. (2007). UEFA and the European Union: From Confrontation to Co- operation. *Journal of Contemporary European Research*, 3, p.202 et seq.

[112] Weatherill, S. (2000). The Helsinki Report on Sport, *European Law Review*, 25, p. 282 et seq.

[113] Judgment of the Court of 13 April 2000, C-176/96, *Lehtonen and Castors Braine*, ECLI:EU:C:2000:201.

[114] *Union Royale Belge des Sociétés de Football Association v. Bosman* §105.

obligatory transfer fee for out- of- contract players. This system, according to some sport associations and governments that submitted their opinions, was a means of **maintaining financial and competitive balance between sports clubs**. It is common sense that there is a huge financial imbalance between sports clubs, especially football clubs, at a top level and smaller teams that finish customarily at the bottom of the national division. Economic inequality between clubs endangers competition, thus, the Court accepted in principle the maintenance of financial balance as a legitimate aim. However, in *Bosman* this justification was not considered an adequate measure to restrict the freedom of movement of footballers, as the restrictive transfer system "neither precludes the richest clubs from securing the services of the best players nor prevents the availability of financial resources from being a decisive factor in competitive sport."[115]

In addition, **encouraging the development of youth players** is a legitimate aim of great importance in order to justify the restrictive results of transfer systems for the free movement of athletes. In *Bosman* the Court recognized the legitimacy of this objective, but underlined that obligatory transfer fees for out- of- contract players is a disproportionate measure. Such a fee is by nature uncertain and impossible to encourage clubs to improve their youth recruitment systems.[116] The future of young players in unpredictable and only too few make it to the top level. Thus, this fee cannot actually motivate clubs to stipulate on the training of youths. The objective of encouraging the development of young athletes was reaffirmed in another judgment, the *Bernard* case.[117] Olivier Bernard was before the time of the ruling a youth player (*jouer espoir*) at Olympique Lyonnais. The rules of the federation provided that at the end of his youth contract, the club was entitled to require him to sign a new professional contract. If the player breached his obligation and signed a contract with a different club, which was Newcastle United F.C. at this case, the club that provided the training was entitled to compensation of damages. [118] Olympique Lyonnais brought an action before the French courts and a reference for a preliminary ruling was sent to ECJ. The Court reiterated its case-law by concluding that this transfer rule was a restriction to free movement and underlined in accordance with AG Sharpston[119] that the development of youth players is a legitimate objective capable of justifying the aforementioned restriction. Contrary to *Bosman* though, the Court acknowledged the

[115] *Ibid* §107.

[116] *Ibid* §109- 114.

[117] Judgment of the Court of 16 March 2010, C- 325/08, *Olympique Lyonnais*, ECLI:EU:C:2010:143

[118] *Ibid* §3- 6.

[119] Opinion of AG Sharpston, *Olympique Lyonnais*, ECLI:EU:C:2009:481, §58.

proportionality of the scheme at hand. As the training of young players induces increased costs for sports clubs, they would be discouraged to recruit new talent if their investment would not be compensated.[120] The structural difference between *Bosman* and *Bernard* rulings is the nature of the measure. In *Bosman* the transfer fee for out- of- contract players is logically considered vague and uncertain to motivate a club, while in *Bernard* compensation of damages is appreciable and proportionate. It is important for a club to know that the training expenses for training a young player will be compensated if he chooses from an early age to leave for another club, even if his youth contract has expired.

Finally, ECJ has examined non-economic reasons and especially the **regularity of sporting competitions** as a legitimate objective justifying restrictions to free movement of workers. In *Lehtonen* case the sport of interest was basketball and the sporting rule under scrutiny established specific and restrictive transfer windows for all players of EU nationality. Basketball clubs in European leagues are not entitled to sign new players at any time, but there are specific periods during the season when new players can be signed and registered in order to maintain the competitiveness of the championship. Jyri Lehtonen, a Finnish basketball player singed a contract with the Belgian side Casters Braine on April 3 1996, while his registration has been conducted on March 30 1996.[121] At that time, transfer windows for EU nationals closed on February 28 and for third state citizens on March 31. The National Basketball Federation did not grant the player permission to participate in the league and his club brought an action before Belgian courts. ECJ following the precedent recognized that transfer windows constitute a restriction to the free movement and went to search for a justification. The Court examined non-economic grounds and concluded that the regularity of sporting competitions is a legitimate objective to restrict the free movement of athletes, as workers. However, yet again this system of transfer windows failed the proportionality test. Especially since the transfer window for non-EU athletes was longer, it was not convincing that an additional period of one month for EU nationals would actually jeopardize the regularity of the championship.[122] Thus, the Court, even if it accepted the legitimacy of the objective, ruled in favor of the alteration of the existing system.

[120] Pijetlovic, K. (2010) Another Classic of EU Sports Jurisprudence: Legal Implications of Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United F.C. (C-325/08). *European Law Review*, 35, pp. 858-869

[121] *Lehtonen and Castors Braine*, §12.

[122] *Ibid* §55- 58.

Justifications of free movement violations, as demonstrated by the Court's jurisprudence, are founded generally in economic or non- economic objectives. An inclination towards non-economic legitimate aims is apparent, as they are more closely related to the cultural nature of sport. However, even if an aim is considered legitimate, the proportionality test is always implemented strictly by the Court, taking under consideration the well- established case law that justifications are exemptions to the rule of free movement that are narrowly interpreted.[123] Today, subsequent to the adoption of Article 165 TFEU, potential legitimate aims are clearer than in the past and enjoy a concrete legal basis. It is undisputable that new legitimate objectives may be progressively created as the Court examines the special nature of every sporting regulation on a case by case basis.

In a nutshell, the analysis of the application of free movement rules on sport demonstrates the persistence of the Court to employ the regular violation- justification formula. The specialty of sport did not lead to an exemption or to beneficial treatment of sports organizations. Even in cases when the application of the regular formula was impossible without a broad interpretation, the Court did not hesitate. The enlargement of the circle of addressees and the personal scope of free movement provisions recognized that they enjoy horizontal direct effect and regulate a wide range of working relationships both of EU citizens and citizens from third states, who have concluded international agreements with the Union. Additionally, the broad interpretation of their material scope allowed every measure restricting the access of workers to the employment market of sport to be considered an illegal restriction of free movement. Finally, the interpretative activism of the Court concerning the adoption of acceptable justifications leaded to the recognition of specific objectives as legitimate and capable of justifying restrictive sport practices. It is evident! The sport market is completely integrated when it comes to the application of free movement law. The Court sticks to the regular formula despite the specialties of the sport market and uses these specialties exclusively as interpretation tools and not as reason of exemption.

[123] Rösler, H. (2012). Interpretation of EU Law. In J. Basedow, K. J. Hopt, & R. Zimmermann (Eds.), *The Max Planck Encyclopedia of European Private Law* (pp. 979-982). Oxford: Oxford University Press, pp. 980- 981

C. The rejection of sport specificity in state aid rules

Additionally to free movement rules, EU has been equipped with a great variety of legal means towards the achievement of creating an internal European market. State aid rules is another weapon in the legal armory of the Commission in order to protect the internal market from state practices that confer financial advantages to specific market actors to the detriment of the remaining undertakings. State aid regulatory framework in its application developed to an effective means of confining States from selectively financing undertaking.[124] Illegal state aid prohibition is centralized. The Commission has the competence to investigate and acknowledge the existence of violations, as well as, to order the retrieval of the prohibited aid. From early on the Court has adopted a very broad definition of aid that is not restricted to the prohibition of subsidies, but includes any measure that mitigates the charges normally included in the budget of an undertaking.[125] Moreover, the aims of the benefiting measures are *prima facie* irrelevant since every practice is examined based on its effects.[126]

In the context of sport, state aid rules, until recently, used to have marginal interest. Contrary to the free movement, these rules do not have horizontal direct effect. They are applied exclusively against state measures and cannot be addressed to private actors, like sport federations. The majority of obstacles to the internal market were supposed to derive from those sporting authorities and their regulations, thus, there was no reason to employ state aid rules. Most sports cases were founded on free movement and non- discrimination or on competition law. Recently, though, the Commission launched investigations[127] against major football clubs in Spain that led to decisions[128] recognizing the existence of illegal state aid of fiscal nature (see *Figure 5*). This shift in policy is not an isolated phenomenon. It demonstrates the eagerness of the Commission to help UEFA with the implementation of a rational system of sport governance that obliges

[124] Micheau, C. (2016). Evolution of State Aid Rules: Conceptions, Challenges, and Outcomes. In: H. Hofmann and C. Micheau, ed., *State Aid Law of the European Union*, 1st ed. Oxford: Oxford University Press, pp.20 -23.

[125] Order of the Court of 24/3/1960, C- 30/59, *De Gezamenlijke Steenkolenmijnen*, ECLI:EU:C:1960:11.

[126] Judgment of the Court of 2/7/1974, C- 173/73, *Italy v. Commission*, ECLI:EU:C:1974:71, §13.

[127] Commission Press Release (EU) of 18/12/13, *State aid: Commission opens in-depth investigation into public funding of certain Spanish professional football clubs*. IP/13/1287.

[128] Commission Decision (EU) of 4/7/2016 on the *State aid SA.29769 implemented by Spain for certain football clubs*. IP/16/2401

football clubs to operate on market terms and abandon precarious financial management. Towards that path, UEFA has adopted the Financial Fair Play (FFP) Regulations,[129] an instrument of good governance that establishes severe penalties of sporting nature, to football clubs demonstrating loses at a specific extent. This system has not only been confirmed to conform to EU law,[130] but it has been supported through an extensive anti- state aid policy in football. The objective of FFP and EU state aid policy on sports is identical. Football clubs have to stand on solid financial ground and invest rationally. In fact, **FFP and state aid complement each other**. The first mechanism prevents irrational investments from private actors by threating sport clubs with severe penalties, while the second put under scrutiny states that support financially football clubs, endangering free competition.

Under the current section it is going to be examined how state aid rules apply to cases of sporting interest and especially, how the sports specialty affected the interpretation of state aid. As already mentioned, the most recent sports cases constitute cases of fiscal state aid; nevertheless measures of different nature can potentially qualify as illegal stated aid. Thus, a holistic view of the subject will be adopted. In particular, it will be demonstrated how the preconditions of stated aid apply in sport cases and at which extent the special nature of the sport market may justify advantages. Furthermore, there will be an analysis on the impact of sports specialty to interim measures against retrieval decisions of illegal aid. State aid is a legal field of complete integration, as the actors of the sport market were treated similarly to the stakeholders of any other market in the Union. Neither asylum, nor beneficial treatment granted, as the Court refused to acknowledge the significant specialties of the sport market as important for the interpretation of this legal field.

[129] UEFA Club Licensing and Financial Fair Play Regulations, Nyon (2018).

[130] Commission (EU) Press Release of 22/3/12, *State aid: Vice President Almunia and UEFA President Platini confirm Financial Fair-Play rules in professional football are in line with EU state aid policy*. IP/12/264

1. Adoption of the regular formula for state aid protection

In applying Article 107 TFEU the Court has identified several preconditions that need to be fulfilled in order for a measure to fall under the scope of illegal state aid prohibition. In particular, the measure needs to confer an advantage to an undertaking that is imputable to a member state and that has been funded through state resources.[131] This measure needs to be selective,[132] within the meaning that it benefits certain undertakings in expense of the other market players, it needs to distort or threaten to distort competition and adversely affect trade in the internal market. These preconditions that need to occur cumulatively are examined by the Commission and have been interpreted by EGCJ following actions of annulment (Article 263 TFEU) and subsequently by ECJ on appeal. In sport cases, the main focus of the litigation was concentrated on the elements of advantage and selectivity. The specialty of the sport market was examined within the scope of the current definition of the aforementioned preconditions. The Court employed the regular formula for state aid, not providing for beneficiary treatment due to the special nature of sport. But the peculiar sport market, being examined as a completely integrated part of the internal market, influenced the application of these preconditions.

In order for a measure to be considered prohibited state aid under Article 107 TFEU it needs to confer an **advantage.** The notion of advantage is broad and fluid, as it evolves through time.[133]The definition of advantage is not confined only in subsidies, measures of direct funding of undertakings by states. It also encompasses any mitigation of costs including fiscal beneficial treatment such as tax exemptions, tax deduction or deferral.[134] The crucial element for the recognition of an advantage is the existence of a difference between the factual situation of an undertaking and the counter- factual situation that it would have been without the interference of the state measure. If the counter- factual situation would be the same with the actual, because e.g. a private operator would have invested the same amount as the state did, then no advantage has been conferred. For this examination the Court adopted the Market Economy Investor

[131] Judgment of the Court of 24/7/2003, C- 280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2003:415, §75.

[132] Judgment of the Court of 13/2/2003, C- 409/00, *Spain v. Commission*, ECLI:EU:C:2003:92

[133] López, J. (2015). *The concept of state aid under EU law*. Oxford: Oxford University Press, p.5.

[134] Schoen, W. (2015). Tax Legislation and the Notion of Fiscal Aid A Review of Five Years of European Jurisprudence. *Max Planck Institute for Tax Law and Public Finance, SSRN Electronic Journal*, pp 1-17.

Principle test, according to which an advantage is conferred if a public investment in an undertaking would not have been realized by a private operator of the market under normal conditions.[135] The same test that also applies to fiscal state aid needs to be invoked by the defendant and not to have been analyzed *a priori* by the Commission.[136]

The existence of an advantage has been crucial concerning these recent sports cases. The Commission after examining the Spanish tax system reached the conclusion that four Spanish football clubs, namely Real Madrid FC, FC Barcelona, Athletic Bilbao and Atlético Osasuna, have been granted an economic advantage due to the beneficial corporate tax for not profit-making legal persons. In particular, a Spanish law forced sports clubs in 1990 to change legal status and become limited sport companies instead of not- profit- making legal persons.[137] However, the aforementioned clubs benefited from an exemption of the Spanish law 10/1990 and were allowed to maintain the not- profit- making status. As a result, these clubs benefited from lower taxation rates that Spanish law provides for not- profit- making legal persons in comparison with corporate tax for limited companies. FC Barcelona successfully challenged the decision before the Court of First Instance as the Commission errored in the application of Article 107 TFEU. The Court underlined that the Commission should have examined the tax system as whole and the cumulative result that it has to the profits of sports organizations. In specific, although not- profit- making sports clubs benefited from lower corporate tax rates, they were entitled to lower tax breaks, which are very important due to the transfer system. Transfers of footballers are an extremely important source of income especially for top level clubs. The fact that Barcelona could benefit from lower tax breaks from the transfer fees outweighs the lower corporate tax rate and eradicates the advantage conferred. The Court insists that **the special nature of the market is a variable for the application of state aid law that should have been examined**.[138] Sports market is not granted an asylum, but the special market techniques should not be overlooked, even if sports clubs are due to operate on purely economic terms. The victory of Barcelona, though, was based on procedural rather than substantial elements. The Court did not affirm that the tax system could not grant an advantage. It only stated that the Commission should have examined the existence of tax breaks, but it failed to do

[135] Judgment of the Court of 10/7/1986, C -234/84, *Belgium v. Commission*, ECLI:EU:C:1986:302.

[136] Order of the Court of 13/12/2018, C -221/18 P, *EDF v. Commission*, ECLI:EU:C:2018:1009.

[137] Judgment of the General Court of 26/2/2019, T- 865/16 - *Fútbol Club Barcelona v. Commission*, ECLI:EU:T:2019:113, §3-6.

[138] *Ibid* §65-66.

so. For this reason, Athletic Bilbao lost on the case concerning the same aid.[139] Invoking that the Commission did not provide sufficient justification for the existence of an advantage, without having illustrated exactly the losses from the transfer system, led the Court to overrule this ground of appeal. The examination of the system on general terms by the Commission is considered sufficient reasoning for the decision,[140] even though some additional issued such as tax breaks from transfer fees, have not been addressed particularly. Athletic Bilbao should have not based their argument on insufficient justification, but on error of application, as Barcelona did.

The notion of advantage in relation to the sports market has also been interpreted in the sports case of Hercules FC.[141] The basis of the difference was the bank guarantees granted by national financial institutions in favor of Hercules FC and other sports clubs in the region of Valencia. These guarantees facilitated the football clubs to receive loaning and constituted an economic advantage compared with the other clubs in the league. The Commission applied the Market Economy Investor principle and examined whether a private operator would have conducted the same investment. Hercules FC failed the test, as it was considered an undertaking in difficulty. The club challenged the allegation of being an undertaking in difficulty on the grounds of the specialty of the sport market. They underlined that in this sector undertakings in difficulty are distinguished based on specific criteria established by UEFA and not on criteria set by the Commission through the guidelines for rescuing and restructuring non-financial undertakings in difficulty.[142] According to UEFA the notion of "undertaking in difficulty" is defined through a comparison of the accounts of the sport clubs playing in the same divisions.[143] Hercules FC financial statements were above average and thus it should not have been considered to be in financial difficulty. The General Court surprisingly sided with the Commission and overruled the allegation, since the UEFA criteria were not concrete enough.[144] Even the practice of sport clubs to easily extract funds through sponsorships was not considered enough to outweigh the

[139] Judgment of the General Court of 26/2/2019, T- 679/16, *Athletic Club v. Commission*, ECLI:EU:T:2019:112, §1-6

[140] *Ibid* §37- 42.

[141] Judgment of the General Court of 20/3/2019, T- 766/16, *Hércules Club de Fútbol v. Commission*, ECLI:EU:T:2019:173.

[142] Commission Guidelines of 31/7/2014 on *State aid for rescuing and restructuring non-financial undertakings in difficulty*, 2014/C 249/01

[143] *Hércules Club de Fútbol v. Commission*, §9- 10.

[144] *Ibid* §46- 53.

financial difficulties of the club. **Sport market is not special enough to influence the notion of "undertaking in difficulty"**. Even a club that manages to pass the test of Financial Fair Play may be considered in difficulty. However, this case law contradicts the statement of UEFA and Commission concerning the joint effort to implement responsible corporate governance in sport. A joint effort demands common definitions of financial insecurity. It is imperative that sports federations are granted a greater maneuver space, since they are closer to the organization of the market and understand its function. Adopting a fixed notion of financial difficulty that applies in every sector of the economy may be catastrophic for sports. A definition that fails to consolidate the peculiarities of the market at hand jeopardizes the system of judicial protection and the function of international sports governance.

Additionally to the existence of an advantage, the precondition of **selectivity** plays a central role in sports cases. A measure is selective when it benefits certain undertakings operating in the market. Selectivity is defined in relation to the effects of the measure, not the aims or the objectives.[145] Thus, only a completely general measure capable of benefiting all potential market operators may be considered non- selective. The case law of the Court has broadened the scope of application of selectivity by accepting the possibility of *de facto* selectivity. [146] General measures may be selective if member states impose concealed barrier to certain undertakings to benefit. Following Commission's Notice on the notion of State Aid, a three step test has been established as a means of examining the selectivity of a measure.[147] Firstly, the Commission has to locate a **system of reference**, namely the set of rules establishing a measure that should generally apply (e.g. state bank guarantees for football clubs). Subsequently it is examined whether there is **derogation** from the system, whether it differentiates between undertakings in the similar factual and legal situation. Finally, it rests to exclude the existence of **justifications** by the nature of the general scheme of the measure.

This regular formula for selectivity has been applied in the aforementioned *Athletic Bilbao* case. As the Court affirmed the existence of an advantage concerning the lower corporate tax for not-profit- making legal persons it continued examining the selective character of the measure. *Prima facie* the lower corporate tax was a general measure for all not- profit- making legal

[145] *Italy v. Commission* (C- 173/73).

[146] Judgment of the Court of 15/11/2011, C-106/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom,* ECLI:EU:C:2011:732.

[147] Commission Notice of 19/7/2016 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262.

persons, but only certain football clubs have been allowed to maintain this legal status, while the majority of football teams were forced to become limited companies. The most important argument concerning the special nature of sport is related to the geographic boundaries of the system of reference. Athletic Bilbao is not a common football club. They are the only professional football club in the historic region of Basque Country, a semi- autonomous province of the Kingdom of Spain. Athletic Bilbao has unique sporting interest as it constitutes a *de facto* national team, where generally only players of Basque origin are allowed to join the club. Besides this peculiarity, Athletic Bilbao is a normal football club that participates in the first Division of the Spanish League and benefited from the fiscal regime for not- profit- making legal persons. Athletic Bilbao claimed that the Commission has miss—applied geographically the system of the reference of the tax measure at hand. The measure should be considered in relation to the Basque Country, where Athletic Bilbao is the only professional club and thus there was no derogation in favor of other clubs in a similar situation.[148] However, **special sporting characteristics of football clubs are not adequate to alternate the region of application of the reference system.** The Spanish law 10/1990 was generally applicable within the territory of Spain and not specifically directed to the Basque Country, thus Athletic Bilbao should be considered is similar situation with all the Spanish football clubs participating in the league.[149] The favorable tax regime for Athletic Bilbao was unavoidably rendered selective and the measure falls under the scope of state aid prohibition.

In a nutshell, it is evident that the special characteristics of the sport market are definitely not adequate to grant an asylum to state practices that illegally benefit sport clubs. However, these unique features should be taken into account in the application of the norms and the interpretation of state aid preconditions. Sport specialty should be taken under consideration by the Court when applying state aid, especially since these rules are complementary to UEFA policy for establishing responsible governance in sport. It is evident that the severe technocratic character of the implementation of state aid needs to be smoothened in order to serve and not destroy the sports market. Sports market needs credible competition in order to exist. Every sports club needs an equally strong opponent in order produce a high value spectacle. Therefore, some state interventions that may save historic clubs from financial devastation and sporting annihilation may confer selective advantages, but on the long term **they do not distort competition in the market**. On the contrary, such measures protect competition, because

[148] *Athletic Club v. Commission*, §44.

[149] *Ibid* §59-61.

bankruptcy in sport clubs is not a restructuring solution as in other market sectors. Bankruptcy leads to relegation to amateur divisions and induces severe sporting penalties. In fact the relegation of historic clubs like Glasgow Rangers in Scotland and AEK Athens in Greece harmed the final product and reduced the attractiveness of the sports market. Constant flows of aid on behalf of the state are obviously not the solution either. However, it is essential to understand the specialty of the sports market before implementing state aid prohibition in sports.

2. Interim measures and sporting damages

Commission decisions imposing financial sanctions to private actors, including decisions on retrieval of illegal state aid, constitute enforcement orders[150] inducing the legal obligation to defray big amounts of money. As an action of annulment against the decision of the Commission does not suspend the enforcement of the retrieval until the delivery of the Court's judgement, the temporary protection of the interests of the parties shall be achieved through an order of interim measures (Article 278 TFEU). The achievement of an application of interim measures depends on both procedural and substantive preconditions that need to occur cumulatively.[151] As far as sport is concerned, the most interesting issues arise relatively to three substantial preconditions. In specific, interim protection is provided only in cases, which have at first sight a reasonable chance of succeeding (*fumus bonis juris*), which are urgent and the applicant's interests outweigh the interests at stake of the other stakeholders (proportionality test).[152]

In sport cases examined by the Court the element of urgency was mainly the missing link leading to dismissal of the application. Urgent is a measure when its absence would lead to serious and irreparable damage of the applicant's interest.[153] Even if damage does not always need to be literally irreparable, it is will established case law that purely financial damages do not fall under this category.[154] Inability to pay standing economic obligations, the potential need of restructuring measures and several other purely economic damages are not considered urgent and cannot lead to interim protection. The threat of the damage needs to be real and the

[150] *Supra* n.14, *Christianos*, pg. 82.

[151] Order of the President of the General Court of 12/12/2011, T- 579/11 - *Akhras v. Council*, ECLI:EU:T:2011:729, §40- 43; Order of the President of the General Court of 17/12/2009, T- 396/09 - *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. Commission*, ECLI:EU:T:2009:526.

[152] Lenaerts, K., Maselis, I., Nowak, J. and Gutman, K. (2014). *EU procedural law*. Oxford: Oxford University Press, pg. 591.

[153] Order of the President of the Court of First Instance of 4/12/2007, C- 60/08 P(R) - *Cheminova and Others v. Commission*, ECLI:EU:T:2007:364, §42

[154]. Order of the President of the Court of First Instance of 4/4/2006, T- 420/05 - *Vischim v. Commission*, ECLI:EU:T:2006:102, §89; Order of the President of the Court of First Instance of 26/10/2006, T- 209/06 - *European Association of Im-and Exporters of Birds and live Animals and Others v. Commission*, ECLI:EU:T:2006:336, pp. 34- 35.

applicant needs to be personally affected. However, financial damage is serious and irreparable, thus, urgent, when the retrieval of the aid jeopardizes the existence of the undertaking, which may eventually cease its function. This case law was reaffirmed by the General Court in the the recent sports case of Elche Club de Fútbol.[155] Elche FC, as one of the parties alleged by the Commission to have received state aid in form of bank guarantees from national financial institutions, applied for interim protection against the aid retrieval decisions. The evaluation of the undertaking's financial position, the outstanding debts, and especially the low value of the club's most important asset, the football players,[156] driven to the conclusion that the existence of the football club would be threatened. These findings were adequate to prove the urgent character of the measure and since the other conditions were also fulfilled, led to the admittance of the application.

It is clear from the above that non- economic damage is treated differently and may more easily be considered irreparable. Not every type of damage can be measured in monetary terms. Damages in fame and reputation of undertakings, for example, are not purely financial, even if they are economically measurable. In the context of sport, sport damages can be extremely severe, while they are difficult to be measured and reparation in not always possible. A sports club may face point deduction, banishment of participation in specific events or even relegation depending on the violation and the regulations of the national sport association. The majority of these penalties, though, are established for financial mismanagement. If sport clubs do not manage to pass the FFP regulations, or they conduct other financial offences, such as non-payment of player's contracts, the aforementioned penalties are activated. Under these circumstances the General Court highlighted in F.C Valencia case, that **sporting damages deriving from financial mismanagement should be treated as financial damages**.[157] After the retrieval of the aid, the club would face relegation to an amateur division and further penalties for non- payment of players' contracts, but this damages are strictly related to the clubs financial condition and not particularly to the state aid decision.[158] Since the club's beneficial owner has offered guarantees of financial support in the past, the sporting damage can be avoided if the club balances its budget. Sport is not special enough to consider sporting damages

[155] Order of the President of General Court of 15/5/2018, T- 901/16 - *Elche Club de Fútbol v. Commission*, ECLI:EU:T:2018:268.

[156] *Ibid* §92- 93.

[157] Order of the Judge hearing the application for interim measures of 22/11/2018, C- 135/18 P (R), *Valencia Club de Fútbol v. Commission*, ECLI:EU:C:2018:951, §45- 46.

[158] *Ibid* §43- 44.

in isolation from their financial causes. Since sport damages result from financial mismanagement they are treated uniformly as financial damages. But it is important not to forget the structure of the sports market and especially the element of time. A regular undertaking will not face severe sanctions, capable of leading him to amateur football if it does not have balanced books in the end of one financial year. On the contrary, this is the case in football, even a financial diversion of one year can lead to disastrous consequences. Thus, it would be wiser for sports damages to be examined in the sporting context that they are imposed, and not as purely financial penalties.

In conclusion, it is evident that in the field of illegal state aid, sport organizations and especially sport clubs are not favored by exemptions from the regular formula of application. The General Court has been in fact very careful in the examination of sport state aid, rejecting the special nature of sport as a crucial element for state aid prohibition. Similarly to the rules of free movement, in sport state aid the regular formula was also adopted. But in state aid cases, judicial review was even more rigorous. **The special nature of sport was definitely not employed as a source of exemption, not even as an interpretation rule, like in free movement provisions**. It was examined as an issue of peripheral importance that was evaluated jointly with the other economic elements. It was only a **piece of evidence** concerning the existence of an advantage and the importance of non-economic damages in interim measures.

III. Part B: The Partial Integration of Sport Organizations in E.U. Law

The integration of the sports market in the internal European market is asymmetric as states the title of the current dissertation. The special nature of sport, namely the independent regulatory regime and the economic peculiarities of this market, led EU law to treat sports organizations differently depending on the Treaties' provisions called for application. In Part A, the current dissertation focused on the fields of complete integration, on the fields where sporting activities are not granted an asylum. In these fields the application of EU law is complete and no general exemptions are granted any more. In specific, sport specialty has been employed as an interpretation tool while applying free movement provisions and not as an obstacle of subjection to EU law. On the same time, in recent sport state aid cases, sport specialty was only evaluated (without success!) as evidence of non-economic damages and non- advantage granting tax systems, while the application of the regular state aid formula was undisputable.

The second part of the current research that follows will focus on the fields of partial integration after firstly analyzing the unique features of sport that lead to this fundamental asymmetry. Particularly, it will be demonstrated that sporting autonomy, is a unique feature that creates a transnational sport legal order, while from an economic perspective the sports market has some peculiarities that need to be taken under consideration by the Court relatively to other market sectors. Subsequently, there will be research on the partial subjection of athletes and sports organizations to the general principle of non- discrimination. In fact, it will be underlined that in football clubs direct discrimination of EU citizens is rejected, while only special indirectly discriminatory schemes are admissible under EU law. On the contrary, national teams are privileged to adopt directly discriminatory rules concerning the selection of players. Finally, this research will demonstrate the partial integration of the sports market in EU antitrust law. Specifically, there will be an analysis of the differential treatment of cases concerning admissibility of sporting regulations such as multi- ownership prohibition, and of cases concerning selling of rights from sporting events including mainly TV broadcasting agreements.

A. The unique characteristics of the sports market

The sports market as stated from the introduction of this research is not identical to other markets of the economy. There are some unique legal and economic peculiarities in sport that influence the function of the market. On the one hand, the sports market is mainly self-regulated. It is widely accepted[159] that sporting authorities are granted a regulatory autonomy. They are allowed to establish not only the rules of the game, but also regulations covering a wide spectrum of relationships including selling of sports rights, conclusion of players' contracts, registration of participants or sporting sanctions. The regulatory power of sports organizations is the first unique feature of sport that will be analyzed in the current chapter. Specifically, it is important to consider the methods that sports organizations adopt in order to preserve their autonomy and the interaction of this autonomous regulatory regime with EU law. In this way, it will be understood that the partial integration of sporting authorities in some fields EU law is an inevitable consequence of global sport.

Subsequently, the current chapter will also emphasize on the special characteristics of the sports market from an economic perspective. In particular, there will be an analysis of the fundamental differences that the sports market demonstrates in relation to other market sectors. The sports labor market, the need of credible competition, the socio- cultural effects of sport are only some of the features that will be discussed As an interpretation of the law on economic terms is a valuable method to approach legal norms,[160] understanding the special conditions of the sports market is vital in order to explain the partial integration of sport organizations in EU law.

[159] *Supra* n.10, Foster In Siekmann and Soek (ed.), pp. 47-49; Berger, K.P. (2000). The New Law Merchant and the Global Market: a 21st century view of Transnational Commercial Law, *International Arbitration Law Review*, 3, pp. 91- 102.

[160] Posner, R. (2007). *Economic analysis of law*. 7th ed. Austin, TX [etc.]: Wolters Kluwer Law & Business, p. 23 et seq.

1. Regulatory peculiarities of the sports market (Sporting Autonomy)

International sport enjoys regulatory autonomy. Sporting authorities have *de facto* acquired the competence to adopt rules covering a great variety of legal relationships. The pyramid- like structure of sports governance leads to a cascading adoption of regulations by sports authorities at a different level that become binding for the lower level organizations through contractual clauses. As already noted, on the top of the pyramid is the international federation for every sport, but this is not the only authority acquired with a *de facto* legislative competence in sport. Lower level federations, such as national federations may also establish specific rules for the championships that fall within their jurisdiction under the condition that they do not contradict with the general rules of the international federation. This competence of sports organizations to autonomously adopt regulations on sport is preserved in three ways· these authorities follow the contractual, the legislative and the interpretative route.[161]

The **contractual** solution has been briefly presented in the introductory part of this paper. The competence of establishing sport regulations is preserved contractually by making those rules an integral part of sporting contracts. Contracts between sports federations and confederations on the realization of a sports event, contracts between the federations and the clubs that participate in the games, contracts between athletes and clubs include specific clauses referring to those regulations. Thus, the violation of a specific sporting rule is actually a contract violation. In addition to this practice, comes the adoption of arbitration clauses. Sporting authorities, in order to preserve their autonomy avoid subjecting themselves and the contracts that they have concluded to national courts. Through the conclusion of arbitration clauses, the jurisdiction of national courts is repealed, while the arbitration tribunal establishes its own jurisdiction.[162] In case of sport, this tribunal is CAS. Arbitration clauses constitute legal means of private dispute resolution that are also accepted under EU law.[163] Especially, in the context of sport, even those clauses that are unilaterally included in athletes' contracts have been considered not to violate their right to judicial protection (Article 6.1 ECHR).[164] CAS is an independent and impartial

[161] *Supra* n.7, Weatherill, pg. 8.

[162] *Supra* n.11, Born, pg. 80.

[163] Judgment of the Court of 6/3/2018, C- 284/16, *Achmea*, ECLI:EU:C:2018:158.

[164] Judgement on the Merits by the Third Chamber, *Mutu and Pechstein vs. Switzerland*, no. 40575/10 and 67474/10, ECHR 2018.

organ even though it has adopted through time a general inclination in favor of sporting autonomy. Such favorable treatment though is reserved on condition that the practice of sporting bodies meets the standards of good governance and is in compliance with the principles of transparency and fair hearing.[165] All these parameters, especially the fact that EU law does not forbid dispute settlement through arbitration, support sporting autonomy and *lex sportiva* as the independently established and applied law of sports practice.

However, the aforementioned system is not as immune as it looks. In fact, the contractual approach allows only for a conditional autonomy of sports organizations. ***Lex sportiva* is valid only in so far it does not violate EU law**. As EU law is equipped with the principle of supremacy and direct effectiveness it becomes *ipso facto* the applicable law in every sports case falling within the scope of the Treaties and especially in cases subject to EU internal market law. Even if the international community has an inclination in favor of the validity of arbitrary awards that permanently resolve commercial differences, there are also reasons to annul such decisions, including reasons of public policy.[166] The violation of EU law falls under this category of reasons of annulment. As long as disrespecting Union law could lead to the annulment of the CAS award, the autonomy of sports organizations is not immune to internal market law. CAS is obliged to apply EU law not only in cases like *AEK Athens and Slavia Prague vs. UEFA*[167] where the parties have chosen it as the applicable law in their dispute, but in every case concerning the internal market. Even the argument that CAS should not apply EU law as it is not entitled to a reference for a preliminary ruling from ECJ is not persuasive enough. The danger of misinterpreting EU law in lack of this right is definitely smaller than the disaster from allowing CAS to completely ignore Union law. Ultimately, it is accepted under EU law, that a national court which has territorial jurisdiction under the Lugano convention[168] (e.g. A court in Norway) may have to apply EU law even though it may not make a reference to the

[165] Mavrommati D., (2014). Autonomy and Good Governance in Sports Associations in Light of the CAS Case Law, *International Sports Law Review*, 71, available at SSRN: https://ssrn.com/abstract=2573303.

[166] Gharavi, H. and Liebscher, C. (2002). *The international effectiveness of the annulment of an arbitral award*. The Hague: Kluwer law international, pg. 127.

[167] CAS arbitration award of 20/8/1999, no. 98/200, *AEK Athens and SK Slavia Prague vs.Union of European Football Associations (UEFA)*

[168] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano (2007), OJ L 339.

ECJ as it is situated in a third state.[169] Similarly, CAS should apply EU law even without being able to make a reference for a preliminary ruling.

Additionally to the contractual solution, sporting authorities follow a **legislative** route in order to preserve their regulatory autonomy. This solution is generally chosen for the realization of mega events. Sports organizations in order to ensure the enforcement of their rules put political pressure on the host- countries to adopt the regulations of the event in form of national laws. In this way *lex sportiva* becomes official law of the host- country and has the same status with other national laws. The protection of these major events is thus succeeded through legislative reforms and guaranteed by the judicial system of the host- state. This legislative solution for example was followed before the Olympic Games of 2012 in London, when the London Olympic and Paralympic Act was enacted in 2006 on behalf of Great Britain, [170] as well as in Athens, Greece before the organization of the 2004 Olympiad.[171] In general, these legislative reforms aim mostly at protecting the commercial rights of all stakeholders engaged in mega events and do not focus on the legal status of the participants (federations, athletes, coaches e.tc.). Briefly, regulations are included about intellectual property rights, ticket selling, ambush marketing avoidance and taxation of income.[172]

The legislative route does not also guarantee an unlimited regulatory autonomy for sporting authorities. Firstly, the extent at which their suggestions will become national law of the host-state is closely related to the bargaining power of the organizing committee. Secondly and mostly importantly, the legislative solution facilitates the application of EU law, since it has supremacy over provisions of national law. Besides, no state is willing to offer sport complete immunity from legal regulations. Even if there are occasional special protective regimes established in favor of the organizers of sports that are in accordance with EU law under Article 165 TFEU,[173] there is no general exemption of *lex sportiva* from the national legislative system. On the contrary, many states have adopted their own legislation on sport and have constitutional

[169] Opinion of the Court of 7/2/2006, Avis 1/03, *Nouvelle convention de Lugano*, ECLI:EU:C:2006:81

[170] Legislation.gov.uk. *London Olympic Games and Paralympic Games Act 2006*. [online] Available at: https://www.legislation.gov.uk/ukpga/2006/12/contents [Accessed 6 Jun. 2019].

[171] Law 2598/ 1998

[172] *Supra* n.7, Weatherill, pg. 37- 40.

[173] Margoni, T. (2016). The protection of sports events in the EU: Property, intellectual property, unfair competition and special forms of protection. *International Review of Intellectual Property and Competition Law*, 47(4), pp. 386-417

provisions partially protecting its special nature.[174] It is widely accepted that some sport specific regulations that are frequently adopted for mega events do not violate constitutional or EU rules. For example, the logical generous treatment of sport income under tax law does not entail tax avoidance and inability of law enforcement.

Finally, the third route followed by sporting authorities in order to protect sporting autonomy is a sport- friendly **interpretative** method. Sport organizations support the adoption of specific interpretative techniques by national and European courts that respect the special nature of sport. This solution actually understands that the autonomy of sports organizations is conditional and aims at formulating the application of Union law in a way that respects *lex sportiva*. Striking example is the notion of "fairness" that was adopted by CAS and has been by now well developed in its procedural dimension.[175] The same notion was transferred firstly in the case-law of ECJ[176] and subsequently in the wording of Article 165 TFEU as a legitimate objective capable of justifying limitations to EU law provisions. However, the interpretative solution cannot also guarantee complete autonomy. Sport is special! The sport specialty can influence the interpretation of the law. But how special sport is? Sport specialty is not powerful. As already underlined in Part A, the special nature of sport was able to change the interpretation of free movement provisions, but it could not set aside the application of the regular violation-justification formula. What is more, in sports state aid, the special nature of sport was not even examined as an interpretation method. On the contrary though, in the following pages we will focus on the cases that sport specialty won· on cases when sport was special enough to receive preferential treatment under EU law.

In a nutshell, either contractually or legislatively or interpretatively, sporting authorities have managed to acquire and preserve at a great extent a regulatory autonomy on issues concerning the organization of sport. However, this sporting autonomy is not immune to the application of EU law. In order to understand its function as a unique feature of the sport market, it is essential to examine the interdependence of *lex sportiva* as the legal order for sport with other national

[174] Soek, J. (2006). Sport in National Sports Acts and Constitutions: Definition, Ratio Legis and Objectives. *International Sports Law Journal*, 6 (3-4), pg. 28 et seq.

[175] Letnar Cernic, J. (2012). Fair Trial Guarantees before the Court of Arbitration for Sport. *Human Rights and International Legal Discourse Journal*, 6, pg. 259 et seq.

[176] *Meca-Medina and Majcen v. Commission*, §51.

and international legal orders at a transnational level.[177] While **sport forms a transnational legal order** that constantly interacts with Union law, it is logically expected that there will be some partially integrated fields of the internal market law, where sport enjoys preferential treatment.

[177] Duval, A. (2013), *Lex Sportiva*: A Playground for Transnational Law. *European Law Journal*, 19, pp. 822- 842; Valero, A. (2014). In search of a working notion of *lex sportiva*. *International Sports Law Journal*, 14, pp. 3-11.

2. Unique economic features of the sports market

Apart from the legal peculiarities of the sports market, it would be also useful to briefly analyze some unique economic features in order to understand the reasons for which sports organizations are partially subjected to EU internal market law. The sports market is a special market that has structural differences and fundamental alterations. The structure of the market is unique and the objectives of the main actors, the sports clubs, are not always the regular objectives of an undertaking. Moreover, the labor sports market has some special features, while public funding of sport businesses is *prima facie* acceptable due to the socio- cultural character of sport. Finally, on the supply side, the interdependence of sports organizations with T.V. broadcasters creates peculiar vertical relationships that test the limits of EU antitrust law.

Firstly, the **structure of the sports market** is unique, because the creation of sports products does not follow the rules of regular markets. In a regular market, the basic production model includes every undertaking launching a production process in order to produce its own product. In sports, the final product, the football match for example, is an "**inverted joint product**" since two undertakings (sports clubs) have to jointly launch their productions processes in order to create one final product.[178] When the final product is not only a single game, but a championship of several matches, it is evident that multiple market actors become co- producers of the final value. This structural specialty leads unavoidably to the admission that the sports market is in need of **credible competition**. Sports clubs cannot aim at annihilating their competitors, in order to acquire their market share and establish a super-dominant or monopolistic position in the market. On the contrary, the attractiveness of sports games is strictly related to how unexpected the outcome of the match can be. The optimal degree of competitive balance is unclear,[179] though, it is evident that sports clubs cannot operate alone in a league. Uncertainty of outcome is very important especially on the long term. When the champion is undisputable from the first half of the season, the remaining matches become less attractive. Product co- production and credible competition are crucial factors that influenced the application of EU competition law and created the need to recognize sports specific exemptions.

[178] Neale, W. (1964). The Peculiar Economics of Professional Sports. *Quarterly Journal of Economics*, 78 (1), pp. 1– 14.

[179] Szymanski, S. (2003). The Economic Design of Sporting Contests. *Journal of Economic Literature*, 41(4), pp. 1137– 1187.

The aforementioned elements influenced sports governance and created also a special sports labor market. In detail, the need of credible competition led sports clubs to create a worldwide system of **sports governance** through federations and confederations that constitute monopolies in every sport. [180] In every country there is usually only one professional league, which may have multiple divisions. The sporting federation in each country has a dominant monopolistic position in the market not only because it establishes the rules that cover the function of the league, but also because it negotiates T.V. broadcasting contracts and acquires a regulatory role in the market. Under this context, the **labor market** is fundamentally different in sports. Even if free agency has dominated after the *Bosman ruling*, the limited mobility of sport clubs and their inability to operate in a different market (e.g. it is unthinkable for Real Madrid to play in French Ligue 1) leads to a great deal of restraints in player mobility. Otherwise, famous clubs in big cities would acquire the best players in the detriment of the competitive balance.[181] In any case the high income of athletes and especially the increased training costs that sports clubs pay for young athletes, make labor an investment. In fact, especially in football, a high amount of a clubs income comprises of transfer fees that the club received in order to allow its players to join competing teams. These practices result from the needs and the special nature of the sports market and should not be ignored when applying EU internal market law.

Another interesting observation about the economic specialties of sports is related to the **objectives** of the undertakings participating in the market. While the goal of profit maximization is generally the fundamental objective of most companies participating in social market economy, in sports this goal characterizes mostly the American sports market.[182] On the other hand, the financial objectives of European sports clubs are more complex and include multiple parameters. *In grosso* European clubs aim at **utility maximization**, which comprises of an increase not only in profit, but also in attendance, game's performance and health of the league.[183] This inclination of European clubs is evident from their market behavior. They are more acceptable towards long- run losses, they operate with inefficiently large squads and they

[180] Késenne, S. (2007). *The Economic Theory Of Professional Team Sports*. Cheltenham: Edward Elgar, pp.3- 4.

[181] Noll, R. (1999). Competition Policy in European Sports after the Bosman Case. In Jeanrenaud C. and Késenne S ed., *Competition Policy in Professional Sports*, Antwerp: Standaard Editions Ltd.

[182] Avgerinou, V. (2007). The Economics of Professional Team Sports: content, trends and future developments. *Choregia Sports Management International Journal*, 3(1), pp.5-18.

[183] Sloane, P. (1971). The economics of professional football: the football club as a utility maximiser. *Scottish Journal of Political Economy*, 17, pp. 121-146.

are willing to pay higher salaries. Not to forget that there are football clubs, like Athletic Bilbao, who operate mostly as representatives of ethnic minorities and less as market actors wishing to increase their profits.

These objectives are actually indicative of another substantial element of the sport market, the **socio- cultural background of sport**. Sports events are not only products directed to consumption. Sport is also a means of expression and an indispensable variable of public health.[184] Sports events, even small like a third division football match or huge like the Olympic Games, are not only an entertainment choice. They are vital in creating health trends and offering young people alternative ways of expression (see *Figure 3*). For this reason, as sports clubs serve an additional social function, they should not be exclusively treated as profit-making companies. The state interest in sport is obvious also from the founding of sport events and the central role that states play in the organization of sports. Even though direct state subsidies in favor of sport clubs are forbidden, the general favorable framework, including the special taxation system benefits all stakeholders of the sports market and manifestly demonstrates the interest of state for the organization of sport. European Union also has a supportive competence in sport according to Article 165.3 TFEU which allows it to encourage cooperation in this sector.[185]

Finally, the specialty of the sports market is witnessed also on the supply side with the activity of broadcasters. **TV Broadcasting** is extremely valuable for sports clubs as it constitutes their greatest source of income. In fact the presence of broadcasters in the sports market is not just an alternative source of revenue for clubs, they actually have the power to influence the competitive balance in the league and enhance the financial condition of sports clubs.[186] Stronger teams have generally larger fun bases and produce higher quality spectacles. Consumers prefer watching these big matches, where their favorite teams participate, rather than all the games of the league. This increased demand for specific matches would create large asymmetries in broadcasting contracts. Big clubs would be able to bargain their contracts and achieve high profits in the expense of smaller clubs. Thus, the inequality of income would harm competitiveness by enlarging the revenue gap between the top and the lower level teams of the league. For this

[184] Szymanski, S. (2010). *The comparative economics of sport*. Basingstoke: Palgrave Macmillan, pg. xiv- xv.

[185] Kouskouna M. (2012). *The Competence of the European Union for Supportive, Coordinative and Supplementary Actions to Member States' Activities (in Greek),* Athens: Nomiki Vivliothiki.

[186] Downward & Dawson (2000). *The Economics of Professional Team Sports*. London: Routledge.

reason, sporting authorities play a central role in T.V. broadcasting contract's negotiation. They actually set the rules of the game, they sell collectively and exclusively to those suppliers who are eager to preserve the competitive balance.

All in all, it has been demonstrated in this chapter the extent at which sport constitutes a special market on terms of legal regulation and economic activity. Sport economics function differently from other markets and the sporting autonomy, has allowed sport federations to create a universal sports legal order that conflicts sometimes with the EU legal order. EU law cannot overlook the peculiarities of the sports market. For this reason the application of the internal market law was asymmetric. On the one hand, there are some fields of complete integration, in which the sport specialty functions marginally either as an interpretation tool or as economic evidence. On the other hand, in the remaining pages of this chapter it will be presented how these special legal and economic features leaded to a partial application of the non-discrimination principle and of competition law. In these fields, while the Court follows the regular formula of application, in some cases it recognized sport specific exemptions from the general rule.

B. The partial implementation of the principle of non- discrimination and the rights deriving from EU Citizenship

The special legal and economic nature of sport affected the application of the general non-discrimination principle and the other rights deriving from EU Citizenship. EU internal market law has granted specific freedoms to European citizens like the freedom of movement of workers. These freedoms protected EU nationals from discriminatory measures of member states, but their scope of application was restricted only in cases where the victims of discrimination had economic activity. Until the conclusion of the Treaty of Maastricht in 1992, there was no general provision against discrimination in the Union that was disconnected from the market. Article 7 of the Treaty Rome was a general provision against intra- community discrimination, but it was applied only within the scope of the Treaties, which was purely economic at that time. Only market actors could benefit from the protection of free movement rules. Under this regime, important population groups, including non-salaried athletes, were left unprotected. The introduction of Union Citizenship (Article 18 TFEU), which is accompanied from a catalogue of specific rights including a general prohibition of discrimination, was a real revolution in the historical path of EU law.[187]

The Court has accepted that the Union citizenship is an autonomous source of rights that creates entitlements to individuals **regardless of economic activity**.[188] EU citizenship constitutes a further source of rights that supplements national citizenships. As a result, the principle of non-discrimination as a personal right of every EU citizen was disconnected from market activity. According to Advocate General Colomer, the Court transformed in this way "the paradigm of *homo economicus* to *homo civitatis*" within the Union.[189] In fact, the non- discrimination principle does not have an ancillary character to free movement rules. It is more or less an *ultimum refugium*. In most cases, as practice indicate,[190] this principle is called for application only when the specific free movement provisions, which are *leges specialis*, cannot offer effective protection.

[187] Wollenschläger, F. (2010). A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration. *European Law Journal*, 17 (1), pp. 1- 34.

[188] Judgment of the Court of 12 May 1998, C- 85/96, *Martínez Sala v. Freistaat Bayern*, ECLI:EU:C:1998:217.

[189] Opinion of AG Colomer, *Petersen*, ECLI:EU:C:2008:281, §15.

[190] Judgment of the Court of 11/9/2007, C- 318/05, *Commission v. Germany*, ECLI:EU:C:2007:495.

The application of non- discrimination principle is general but not without preconditions. The provision is directly effective[191] and is addressed as well to member states and to non- state actors. Similarly to free movement rules, non-discrimination has **horizontal direct effect** and regulates the behavior of sporting authorities that operate under the statues of private legal persons. This interpretation was adopted subsequent to the ruling in *Walrave and Koch v. Union Cycliste International*. Additionally, the principle does not apply to purely internal situations.[192] EU citizens should have exercised their right to mobility before claiming protection under Article 18 and 19 TFEU. They should have moved to another member state or return from another member state and face discriminatory treatment in their home- country due to their mobility. Moreover, the indispensable **cross- border element** is existent in more general cases where a situation engaging EU nationals is treated comparably worse than a domestic situation.

As far as sports is concerned the principle of non- discrimination is very important for the establishment of registration rules. In international games or in national leagues the participation of athletes is not unlimited. For multiple reasons teams are obliged to register a specific number of players that have one nationality (usually the nationality of the home- state) and a restricted number of foreign nationals. On the same time, national teams are comprised exclusively from citizens of the same state, who are the representatives of their country and do not receive remuneration for their services. Especially since the athletes, who participate in their national teams, do not receive a salary, they are not considered workers. As a result these registration rules, also known as nationality clauses, fall within the scope of application of the general prohibition of non-discrimination. Registration rules in club football are connected with economic activity. They will be considered jointly with the provision on the free movement of workers. The main principles applied there, are also important for the interpretation of Article 18 TFEU

In the current pages thus, there will be an analysis of the partial application of non-discrimination principle on registration rules. In fact, there are two types of registration restrictions. Firstly, there are restrictions based on nationality that will be discussed as directly discriminatory schemes. In cases of direct discrimination the Court adopted two different routes leading on an asymmetry. On the one hand, an exemption in favor of national teams from the

[191] Judgment of the Court of 13/2/1985, C- 293/83, *Gravier v. Ville de Liège*, ECLI:EU:C:1985:69.

[192] Judgment of the Court of 2/10/2003, C- 148/02, *Garcia Avello*, ECLI:EU:C:2003:539, §24.

principle of non-discrimination was allowed. On the other hand, the registration rules for clubs were examined under the regular violation- justification formula and rendered inadmissible. Following this case- law the sport community responded by adopting registration restrictions based on training location, which are now considered admissible and will be discussed as indirectly discriminatory measures.

1. Direct discrimination

The objective of European integration is strictly connected with the elimination of discriminatory measures that divide Europe and reinforce national protectionism. As it was widely understood at the political level that eliminating discrimination is easier than persuading states to adopt positive measures, the burden was put on negative integration.[193] Discriminatory measures though do not always have an economic nature and therefore cannot be always combated under free movement provisions. For this reason the conclusion of today's Article18 TFEU plays central role in combating national measures that establish discriminatory schemes. The general non- discrimination principle forbids, firstly, actions of **direct discrimination** among EU nationals. This is the case of measures that explicitly differentiate on the basis of nationality between the nationals of one state and other EU nationals.[194] The case law of the Court has recognized multiple actions that may lead to direct discrimination. As far as sport is concerned the most common violation of non- discrimination occurs when Union citizens actually exercise their right of mobility and immigrate in another European country, where they are treated on worse terms than the nationals of this country.

In fact, the general principle of non- discrimination has created a **right to equal treatment** concerning a great spectrum of activities including but not limited to social benefits,[195] tax rules[196] and access to universities. This general principle is also applicable, as already mentioned, to registration rules that regulate access to international games (e.g. the Olympics, the World Cup) and national leagues (e.g. the English Premier League, the Spanish La Liga). In sports practice there is a great deal of registration rules, as the various federations have adopted their own systems of participation under the general framework established by the international federation of every sport. Under this section, it will be discussed at which extent nationality clauses are permissible under EU law. Nationality clauses constitute actually registration rules that discriminate on the basis of nationality and oblige national teams and sports clubs to register a restricted number of foreign players or even none. In specific, it will be demonstrated how the

[193] Gilbert, M. (2012). *European Integration: A Concise History*, Maryland: Rowman and Littlefield, pg. 85

[194] *Supra* n. 57, Weiss and Kaupa, pp. 110- 111.

[195] Judgment of the Court of 20/9/2001, C- 184/99, *Grzelczyk*, ECLI:EU:C:2001:458.

[196] Judgment of the Court of 23/4/2009, C- 544/07, *Rüffler*, ECLI:EU:C:2009:258.

Court asymmetrically allowed for an exemption from EU law of registration rules for national teams, while it rendered inadmissible the same rules in club football.

National teams are generally considered the representatives of their countries, thus registration rules are severe. For example eligibility rules for participation in the World Cup allow only persons holding a permanent nationality that is not dependent on residence to play for the representative team of a national federation.[197] Simply said· only athletes having the nationality of the country can participate in the national team. This rule seams logic in the eyes of the supporters and is attached to the very nature of international events. International games are "sports battles" between different nations, thus allowing a general participation of multinational teams would end up falsifying the nature of the game. National teams are expected to represent a nation. The rule is simple. An Italian footballer can play only in the national team of Italy and the national team of Italy can register only players that have an Italian nationality.

A rule concerning the composition of national teams was examined by ECJ in the landmark *Walrave and Koch v. Union Cycliste International* case. It was about the regulation of ICU that forced the sitter and the passer who participated as one team in the International Cyclist Championship to have the same the nationality. The judgement of the Court did not just render this directly discriminatory scheme admissible under EU law. It actually admitted that registration rules constitute issues of purely sporting interest falling outside the scope of application of then Article 7 that used to have a purely economic character.[198] This case not only created the sporting exemption, but also it constitutes the only case law on rules concerning the composition of national teams. Thus, registration rules for national teams according to existing case law are entitled to an **exemption from the principle of non- discrimination**. However, the theory of the sporting exemption has been abandoned today as mentioned under Chapter IIA. Would the judgement be the same if it was to be delivered today under the regular violation-justification formula? There are strong indications that the outcome would be the same, with a fundamental differentiation on the Court's reasoning. The Court would have considered the scheme justifiable, not because it is an issue exempted from EU law, but because it pursues a legitimate objective and is proportional to its attainment.[199] It is the very nature of sport that dictates national teams to be comprised exclusively from local players. Thus, this registration

[197] FIFA Statutes, Regulations Governing the Application of the Statutes, Zurich (2016), Article 5.

[198] *Walrave and Koch v. Union Cycliste International*, §8.

[199] *Supra* n.7 Weatherill, pg. 177.

rule actually serves the legitimate objectives of respecting the organization of sport and the openness of sporting events. In this way, every country is allowed to have their own national team and challenge for a position in a mega event. If we imagine a different regime that allowed the existence of multinational teams, would there be place for Andorran or Maltese citizens to play in the World Cup or in the European Championship?

It seems understandable how the general prohibition of discrimination would not force countries to allow any EU national to participate in their national teams. It is unnatural to make the English national football team open to French or German citizens. Actually the exemption that the Court accepted concerning the formation of national teams is in line with the case law concerning equal treatment on employment in public services. ECJ interpreted the power of state authorities to employ exclusively citizens of the host state's nationality in the public sector and reached the conclusion that a small circle of posts should benefit from the exemption of then Article 48.4 TFEU. States are obliged to treat EU citizens equally only in relation with posts that do not entail the exercise of powers conferred by public law.[200] Similarly, participation in national teams constitutes actually a vital cultural public service that cannot be entrusted to non-citizens.

Nationality clauses for national teams as generally justifiable, but there are some additional rules concerning **dual citizens** that could be regarded as an unjustifiable direct discrimination. Athletes with more than one nationality are called to choose the national team with which they prefer to participate, but this choice is permanent. After having made the first official appearance at the senior level with one national team, the athlete is then deprived from the right to change national team. An athlete may have more nationalities but he can have only one sports nationality. What is problematic in these cases however is the frequent scenario that an athlete makes only one appearance with a specific national team and due to a decline in his career rests away from international reckoning and is not called again by the national federation to participate in this squad. In a recent case CAS rejected the appeal of Spanish- Moroccan Munir El Haddadi who has played only for 13 minutes for the national team of Spain and wanted to participate with the Moroccan side in the World Cup of 2018.[201] CAS underlined the legality of

[200] Judgment of the Court of 17/12/1980, C- 149/79, *Commission v. Belgium*, ECLI:EU:C:1980:297, §10- 12.

[201] Law In Sport. (2018). CAS rejects the appeal filed by Munir El Haddadi and the Moroccan Football Federation. [online] Available at: https://www.lawinsport.com/sports-law-news/item/cas-rejects-the-appeal-filed-by-munir-el-haddadi-and-the-moroccan-football-federation [Accessed 10 Jun. 2019].

the regulation, but would have done the same if Munir had two nationalities of EU member states and thus Article18 and 19 TFEU where applicable? If a Bulgarian footballer plays for a few minutes for the national team of France, he would not be allowed to play for Bulgaria ever again in his career after one single appearance. This scheme, even if it protects legitimately the stability of sports events, does not respect the principle of proportionality and should be regarded as a mobility obstacle that violates the rights conferred by the European citizenship.

As far as **sports clubs** are concerned, the registration rules that include nationality clauses are treated differently. The Court actually applies the general violation- justification formula for non- discrimination cases. Firstly it is examined whether there is a discriminatory measure and subsequently if this measure can be justified because it pursues a legitimate objective and respects the principle of proportionality. Participation rules impede football clubs from registering as many EU citizens as they want in their squads and consequently constitute directly discriminatory measures that restrict mobility of persons. As examined bellow the Court following a case- law reversal characterized those rules as inadmissible under Article18 TFEU. It is thus interesting to examine the objectives that these systems serve and which of them was considered legitimate, as well as the reasons why these rules failed the proportionality test.

ECJ firstly examined registration rules at their most restrictive form in *Dona v. Mantero* ruling. The participation rules of the Italian league at that time obliged football clubs to register exclusively Italian nationals. There was obvious direct discrimination against EU nationals that was considered under the general principle of Article 7 of the Treaty of Rome that used to strictly cover only issues related to economic activity. The Court rejected the argumentation of the plaintiffs and did not follow the regular violation- justification formula. It supported that excluding EU nationals from participation may "relate to the particular nature and context of such matches and happens thus for reasons of sporting interest only"[202] and not for reasons which are of an economic nature. It was left upon the national court to decide if the reasons of the scheme where of an economic or a sporting nature. Even if the Court followed the case- law of issues of purely sporting interest, the wording of the judgement shows an effort to gradually adopt a violation- justification method. The word "exemption" was not even used. The Court referred to sporting or economic reasons which actually justify or not the restrictive nationality clauses.

[202] *Dona v. Mantero*, §19

Subsequently, in *Bosman* case the Court would tacitly resile from the sporting exemption theory and would examine the 3 plus 2 registration rule under the regular violation- justification formula. The 3 plus 2 is also a nationality clause that restricts the availability of EU nationals that can play in competitive league matches in Belgium. Every club can register up to 3 foreign players (EU nationals or third state nationals) plus 2 foreign players who have played for at least five years in the country. The scheme was rendered inadmissible under then Article48 TFEU as it was an unjustifiable direct discrimination.[203] There was no need to examine the general principle of non- discrimination, since the case concerned professional athletes who were considered workers and protection under the free movement of workers provision was possible. However the Court's dictum concerning the legitimate objectives that registration rules may pursue and the proportionality of the 3 plus 2 rule is very useful for the interpretation of today's Article18 TFEU as well.

After detecting a violation of the non- discrimination principle or of the other rights deriving from European citizenship, it is then imperative to search for justifications. A measure is justified if it aims at a **legitimate objective** and is proportional to the attainment of this objective. Directly discriminatory registration rules are considered to pursue variable objectives. Firstly, it was supported that they **maintain credible competition** in the market by preventing largest clubs from acquiring all the talented players from third states, but the objective was rejected as the measure actually encourages big clubs to acquire the best players of the domestic market[204] in the detriment of credible competition, while smaller clubs are not even allowed to look for talent abroad. Secondly, Advocate General Trubucchi supported that nationality clauses **protect the link between sports clubs and member states** by allowing the league champion to be in reality the representative of the country where he won the title.[205] This objective, however, was famously dismantled by Advocate General Lenz who underlined that football funs actually care more about the success of their club and less about the composition of the team. The element of nationality is not essential for the identification of the supporters with specific players. To quote AG Lenz's words,[206] "it is not uncommon for [foreign] players to attract the admiration and affection of football fans to a special degree. One of the most popular players ever to play for TSV 1860 München was undoubtedly Petar Radenkovic from what was then

[203] *Union Royale Belge des Sociétés de Football Association v. Bosman,* §137.

[204] *Ibid* §135.

[205] Opinion of AG Trabucchi, *Dona v. Mantero,* ECLI:EU:C:1976:104.

[206] AG Lenz, *Union Royale Belge des Sociétés de Football Association v. Bosman,* §143.

Yugoslavia. The English international Kevin Keegan was for many years a favourite of the fans at Hamburger SV. The popularity of Eric Cantona at Manchester United and of Jürgen Klinsmann at his former club Tottenham Hotspur is well known." Finally the only sustainable objective that may justify direct discrimination is the need of **creating a sufficient pool of national players that will play in the national team**.[207] It is undisputable that this was and continues to be an important objective of every registration system, as it is essential for the competitiveness of the game to have as many strong national teams as possible.

Creating significant national pools of athletes is a legitimate objective, but could not justify direct discrimination since it failed the **proportionality test**. In specific, a registration rule to be proportionate needs to be appropriate for the attainment of a legitimate objective, it should not go beyond what is necessary and should outweigh the other individual and general public interests.[208] Nationality clauses like the 3 plus 2 rule constitute direct discrimination based on nationality and are generally harder to justify.[209] The fact that they have general application for all official matches and not for just specific games witness that they go beyond necessity and pose an unjustified obstacle to the freedom of mobility within the Union. For this reason even under the objective of creating sustainable national pools, nationality clauses for EU nationals could not be considered admissible. The prerequisite of proportionality was not also fulfilled in a recent judgement concerning the participation of EU athletes in in the national German truck championship. The total non- admission of non- German athletes to these championships was declared disproportionate. The goal of not granting non- Germans the title of German national champion since this athlete would be unable to complete with the national team should not lead to a complete ban of EU nationals from German national championships.[210]

Conclusively, it is evident that there is a major irregularity concerning the application of non-discrimination principle. When it comes to the composition of national teams, the rules are unjustifiably exempted from the application of EU law. Even the restrictive provisions that oblige athletes to choose their sporting nationality once, most times at a very young age, are not considered to violate the freedom of mobility and generally the rights deriving from European citizenship. On the contrary, the rules regulating the composition of sports clubs that discriminate directly on nationality are inadmissible under EU law. In this case the Court

[207] *Union Royale Belge des Sociétés de Football Association v. Bosman*, §128.

[208] *Supra n.* 57, Weiss and Kaupa, pg. 115.

[209] *Union Royale Belge des Sociétés de Football Association v. Bosman*, §128

employed the regular violation- justification formula, examined the existence of legitimate objectives but they failed the application of the proportionality test. This is a fundamental asymmetry in the application of EU citizenship's rights. For this reason, sport organizations are partially subjected to these rules.

[210] Judgment of the Court of 13/6/2019, C -22/18, *TopFit and Biffi*, ECLI:EU:C:2019:497, §66.

2. Indirect discrimination

In the aftermath of *Bosman* ruling, sports federations needed to comply with the case- law that characterized illegal all directly discriminatory schemes that impeded the mobility of athletes within the Union. It is not an exaggeration that this case vastly transformed sports industry and affected several issues in sport.[211] The *Bosman* judgement increased player mobility in Europe[212] and favored the integration of national leagues to an internal European sports market. In this new era, sporting authorities adopted new regulations for athlete participation that were not discriminatory on the basis of nationality. These rules discriminate athletes on another criterion, the location of training. Taking the example of the UEFA Champions League,[213] every team is allowed to register a maximum squad of 25 players among which 8 players have to be "locally-trained". At least 4 of these players should be "club- trained", namely trained between the age of 15 and 21 for 3 seasons by the same club that registers them. The remaining 4 (or less) players should be "association- trained", namely trained between the age of 15 and 21 for 3 seasons by the registering club or any other club in the same association (substantially by any club in the same country). These rules that are similarly employed in other competitions such as the English Premier League are widely known as the **home grown rules**.

Home grown rules are not directly discriminatory. Any player of whatever citizenship may be considered home grown if the has been produced through the training system that is established in the country of the sports club. If we take a closer look at the system, it is possible for one player to be eligible as home grown for more than one member states, if for instance he has moved to another club at the age of 18. By using the criterion of **training location** the scheme does not distinguish on the bases of nationality and is not a direct discrimination. Obviously, though, the players who have the nationality of the club's state of origin are more likely to have been trained through the system of this nation and become home grown for their clubs.[214] The

[211] Parrish, R. and Miettinen, S. (2008) *Sporting exception in European Union law*. The Hague:T.M.C Asser Press/ Springer.

[212] Gardiner, S., Welch, R. (2000) "Show me the money: regulation of the migration of professional sportsmen in post-Bosman Europe". In: Caiger. A., Gardiner, S. eds. *Professional sport in the EU: regulation and re-regulation.* The Hague: T.M.C. Asser Press/ Springer, pp. 107–126.

[213] Regulations of the UEFA Champions League 2018-21 Cycle, Nyon (2018), art. 44.

[214] *Supra* n.7 Weatherill, pg. 195.

scheme is **indirectly discriminatory** and should be considered under the violation- justification formula that was analyzed on the previous section.

Firstly it is essential to identify the legitimate objectives that home grown rules pursue and subsequently it must be considered if these rules are proportionate for the attainment of this objective. The **sustainability of national teams** is the first goal that this scheme aims to fulfil.[215] As mentioned in the previous sector, this objective has already been considered legitimate by ECJ. Clubs are obliged to register an adequate number of players that are actually locals, because they have been trained by any club of the same association. As a result, the pool of players available for the national team will be enlarged on the long term. On the same time, this system aims at **encouraging the training of youth players**. Sports clubs under these regulations cannot operate in the market exclusively as buyers. They also have to be at an important extent producers of high- level athletes, since they have to register some players produced by their own academies. The attainment of these objectives is not theoretic. Sports research indicates that home grown rules have managed to increase the use of local players in national and international competitions, while the budget spent on youth training is enlarged (see *Figures 1 and 2*).

Under this context, it is essential to analyze whether this scheme is proportionate for the attainment of these goals, or it exaggeratedly restricts the mobility of athletes. The Commission has already taken position in favor of the admissibility of home grown rules, as they contribute to the promotion of balance in sporting competition.[216] In fact, these rules are effective in the realization of the aforementioned objectives as sports data demonstrate (see *Figures 1 and 2*). They do not do beyond necessity, since athletes are actually allowed to change their home grown status after the age of 18, or earlier, by participating in the youth training system of another club in another country. Finally, since they help maintaining the competitive balance in sport, they create benefits that outweigh potential interests of the remaining stakeholders.

However, home grown rules do not go without criticism. The main skeptic views focus on the distortion of the function of free market. They support that home grown rules create unjustifiably a favored category of players, those who are locally trained, that have increased

[215] *Supra* n.23, Pijetlovic, pp. 116- 117.

[216] Commission Press Release (EU) of 28/5/2008, *UEFA rule on 'home-grown players': compatibility with the principle of free movement of persons*, IP/08/807

bargaining power and may enjoy higher wages relatively to equally qualified players that are not considered home grown.[217] The fact that these players enjoy an advantage does not mean though that competition in sports is adversely affected. On the contrary, smaller clubs that operate mainly as producers of footballers are able to increase their profits through players' transfers and manage important investments either in personnel of infrastructure. We shouldn't judge home grown rules only in relation with their effects on the labor market. It is important to see the big picture and understand the benefits on the long term for the clubs, the national teams and the players to come.

In a nutshell, it is understood that EU law is asymmetrically applied when it comes to discriminatory rules in favor of national teams and sports clubs. Direct discrimination is acceptable for national teams as it is connected with the special nature of sport and the essence of the existence of a national team. Direct discrimination is not acceptable in club football as it illegally constrains player mobility within the EU internal market. But indirectly discriminatory registration rules are admissible under EU law as they entail benefits for the overall function of the market. Discrimination based on training location was an excellent idea that promotes unity in Europe, while it protects the cultural identity of member states as it is expressed through the national team of every nation.

[217] *Supra* n.7 Weatherill, pg. 197.

C. The differential application of competition law

The internal market of the EU is not only threatened by public protectionism, but also from collusive practices of private actors that distort free competition and endanger market prosperity. In order to combat these practices, the legal armory of the EU includes the provisions of Articles 101- 106 TFEU that establish the framework of the European antitrust policy. These provisions jointly with secondary EU law combat mainly two categories of illegal practices· **collusive agreements** among undertakings (Article 101 TFEU) and **abuses of dominance** from one undertaking (Article 102 TFEU).While free movement provisions protect the internal market mainly from actions of member states with the exemption of these provisions that have horizontal direct effect, competition law examines *a priori* the actions of private actors.[218] EU competition law is applicable to all restraints of competition that have their effects within the territory of the Union. The "effects doctrine" that the Court adopted[219] renders competition law applicable against practices of undertakings that have their seat or production facilities outside EU. Especially in sports this is important for those market actors that have their seats in third states but engage in the European sports market.

The enforcement of EU competition law may be public or private and central or decentralized. These differentiations are very important. Most times enforcement in sports is conducted centrally by the Commission, especially because of the bargaining power that the Commission has relatively to national authorities and the importance of reaching a commonly accepted solution. The Union does not have a sporting association, a national team or sport clubs that may be threatened with exclusion from international or continental sports events. Therefore it has a stronger position when negotiating with sporting authorities. Enforcement through Commission decisions is public enforcement. Private enforcement by individuals who invoke the nullity of collusive agreements before national courts[220] is also possible in sports, but due to the public-like organization of international sports governance, public enforcement is more effective.

[218] Marco Colino, S. (2011). *Competition law of the EU and UK*. 7th ed. Oxford: Oxford University Press, pp. 28-29.

[219] Judgment of the Court of 27/9/1988, Joined Cases C- 89/85, C- 104/85, C- 114/85, C- 116/85, C- 117/85, C-125/85, C- 126/85, C- 127/85, C- 128/85, C- 129/85, *Ahlström Osakeyhtiö and Others v. Commission*, ECLI:EU:C:1988:447

[220] *Supra* n.1 Whish and Bailey, pp. 295- 297.

The application of Article101 and 102 TFEU follows generally a violation- exemption formula. Firstly, an activity in order to be considered a violation of EU competition law needs to fulfill the prerequisites of a collusive agreement or an abuse of dominance. As far as Article101 TFEU is concerned, there needs to be an (a) agreement or decision or concerted practice between undertakings that (b) coordinates their behavior (collusion) and has (c) as its object or effect to distort competition (d) appreciably and (e) adversely affect interstate trade.[221] As far Article102 TFEU is concerned, there needs to be an undertaking that has (a) dominant position (b) in the internal market or a substantial part of it and (c) abuses its position causing adverse (d) effects on trade between member states.[222] These criteria should occur cumulatively in order for a practice to full under the prohibitions of EU antitrust law.

Subsequently, having concluded the existence of a violation it rests to examine if the undertaking could benefit from a **block exemption**. Block exemptions concern specific types of agreements that fulfil the conditions of Article101 and 102 but are beneficiary for the free market as they serve important functions. For instance there are regulations that grant an exemption for research and development agreements,[223] specialization agreements,[224] vertical agreements[225] etc. These regulations establish specific criteria that an agreement or a practice should fulfill in order to benefit from the exemption and are considered, not without contestation, that they provide legal certainty.[226] There are no sport specific block exemptions, however agreements between sports organizations may benefit from some of the existing regulations. Especially the selling of broadcasting rights as it constitutes a vertical agreement between the producer of the sports product (supplier) and the buyer of the rights who aims at providing television services at a profit (buyer) may benefit from the regulation exempting vertical agreements.

[221] *Supra* n.17 Lorenz, pg. 63.

[222] *Ibid*, pg. 189.

[223] Commission Regulation (EU) No 1217/2010 of 14/12/2010 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements*, OJ.No.L335

[224] Commission Regulation (EU) No 1218/2010 of 14/12/2010 on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements*, OJ.No.L335.

[225] Commission Regulation (EU) No 330/2010 of 20/4/2010 on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, OJ.No.L102

[226] Atanasiu, I. and Ehlermann, C. (2001). *The modernisation of EC antitrust policy*. Oxford: Hart, pg. 133.

If a block exemption does not apply, then it is examined whether the undertaking may benefit from an individual exemption. **Individual exemptions** are granted due to the efficiencies that a specific agreement or practice entails for the function of the market and the consumers. Article101.3 TFEU establishes the preconditions for individual exemptions that should occur cumulatively.[227] There two positive preconditions· that the agreement should (a) contribute to improving the production or distribution of goods while (b) allowing consumers a fair share of benefit and two negative preconditions that these agreements should (c) not impose non-indispensable restrictions and should (d) not be possible to eliminate competition in respect of a substantial part of products. It is important to mention that these conditions are also applicable in cases of abuse of dominance. Both legal academia[228] and judicial practice[229] agree that it would be irrational if the same efficiencies would be adequate to justify an agreement or concerted practice of multiple undertakings and not the activities of one undertaking with a dominant position in the market. Since there is substantial similarity between these two violations, the individual exception should apply similarly to cases of alleged abused of dominance.

In sports cases, these individual exemptions have played an important role and are actually the reason for another asymmetry in the application of EU law on sports. In the following pages it will be examined how the Court applied and interpreted Article 101 and 102 TFEU when examining the compatibility of sports regulations and the selling of sports broadcasting rights. On the one hand, the Court was more eager to recognize that some sports rules do not at law distort competition, as they are related to the core of sporting autonomy and enjoy the sporting exception. On the other hand, the application of EU competition law on TV broadcasting rights selling was strictly following the regular violation- exception formula even if the specialty of sport was again to be respected.

[227] Judgment of the Court of First Instance of 19/3/2003, T- 213/00 , *CMA CGM and Others v. Commission*, ECLI:EU:T:2003:76, §226

[228] Enchelmaier, S., Conde Gallego, B. and Mackenrodt, M. (2008). *Abuse of dominant position*. New York: Springer, pp.103- 104.

[229] Judgment of the Court of 15/3/2007, C- 95/04 P, *British Airways v. Commission*, ECLI:EU:C:2007:166, §86.

1. Sports regulations and the favorable application of competition law

Sports organizations as already demonstrated have acquired and try to preserve a regulatory autonomy on the establishment of international sports rules. Since EU competition law covers any practice that has effects on the European internal market, unavoidably, sports regulations should be examined in the light of Articles 101 and 102 TFEU as potential restrictions of free competition. The application of Articles 101 and 102 TFEU against sports regulations was favorable.[230] As sports is subject to EU law online insofar it constitutes an economic activity and even after the *Meca-Medina and Majcen v. Commission* ruling many sports regulations even if restrictive, were considered to have a positive effect on competition. What is interesting though is the different approach that was adopted in relation to different rules. Some rules were considered not to violate EU competition law at all, others were considered to be justified violations and others were rendered inadmissible. This chapter, thus, will demonstrate the favourable treatment of some sporting regulations and the different approach against other sporting rules, more economic in nature. In any case it is underlined that Article 165 TFEU manifestly calls EU institutions to adopt an interpretation that is in accordance with the special nature of sport.

The first objection that the application of competition law in sports needs to address is whether sports organizations and especially sports federations fall under the **notion of undertaking**. The Court's case law has adopted an enlarged functional definition that focuses on economic activity. "Every entity engaged in an economic activity regardless of [its] legal status or the way that it is financed"[231] shall be considered an undertaking. The crucial element is the engagement in the market, while it is possible that the same entity may conduct activities that are economic and fall under the scope of EU antitrust law and other activities that are non- economic.[232] In this context, it was supported that sports federations are not undertakings, but associations of undertakings that may have amateur sports clubs as members that do not engage in economic activity. The General Court, being faithful to the wide notion of undertaking, supported that FIFA even if it is not operating directly in the

[230] Fidanoglu, B. (2011). Sporting Exception in the European Union's Sports Policy. *Ankara Bar Review*, (2), pp.67-80.

[231] Judgment of the Court of 23/4/1991, C- 41/90 - *Höfner and Elser v. Macrotron*, ECLI:EU:C:1991:161, §21.

[232] Judgment of the Court of 25/10/2001, C- 475/99, *Ambulanz Glöckner*, ECLI:EU:C:2001:577.

market of players and agents is an undertaking.[233] The international federation by establishing the rules that regulate the sports agent's market acts on behalf of its members and emanates their will, thus it has economic activity.

Another crucial element that affects both the application of Articles 101 and 102 is the **definition of the sports relevant market**. Defining the part of the internal market in which an undertaking operates is crucial for the application of the abuse of dominance prohibition. In order to understand whether the undertaking under scrutiny is dominant or not, it is important to locate the market in which it operates geographically and in relation to the nature of the products or services provided.[234] Defining the relevant market is necessary for the application of Article 101 TFEU as well, because it will demonstrate if the effect on competition is appreciable. The application of the *de minimis* doctrine, according to which restrictive practices that do not have significant effect to competition are not covered by the cartel prohibition,[235] is impossible without having located the relevant market where the undertaking operates.

In legal academia it has been supported that three main markets can be distinguished relatively to the sports products.[236] Firstly there is the **contest market**, in which sports clubs jointly produce sports competitions, the final sports product. Sports federations have a regulatory role in the market by establishing the rules that regulate competition and limit access to third parties. As leagues in Europe are open and use the promotion- relegation system, the contest market is not predetermined and evolves from season to season. Downstream from the contest market is the **exploitation market** in which sports organizations exploit commercial rights that derive from sports spectacles. For instance sports merchandize or tickets selling belong in this market. The third is the **supply market** which essentially is the transfer market. Players in football are assets for their clubs and participate in selling and buying processes that are realized under a rigorous transfer system. Besides product, geography plays also an important role in market segmentation. Since

[233] Judgment of the Court of First Instance of 26/1/2005, T-193/02, *Piau v. Commission*, ECLI:EU:T:2005:22, § 112, 116.

[234]Commission Notice (EU) of 9/12/1997 on *the definition of relevant market for the purposes of Community competition law*, 97/C 372/03, §7.

[235] Judgment of the Court of 9/7/1969, C- 5/69, *Voelk v. Vervaecke*, ECLI:EU:C:1969:35, §5, 7.

[236] Stix-Hackl, C. and Egger, A. (2002). Sports and competition law: a never-ending story? *European Competition Law Review*, 23, pp. 81–91.

relocation of sports clubs is scarcely impossible, the sports market is generally identical with the territory of every member state. **EU's practice on the relevant market is inconsistent, while there is an inclination towards an extreme segmentation of the sports market that is adapted in the demands of the case at hand**. For instance the Court has acknowledged the existence of the general market of "organization and conduct of sport" (contest market).[237] In other cases it referred to the specific market of services of sports agents (part of the supply market).[238] The Commission recognized the existence of an investment sports market where football clubs demand capital and individuals or organizations are eager to invest.[239] Relatively to the tickets of 1998 World Cup the Commission concluded that due to low cross- elasticity, the selling of tickets of this event constituted a separate market.[240] As the sports market is increasingly considered fragmented it becomes easier to establish dominance and overlap the *de minimis* threshold.

The application of Article 101 TFEU encountered also additional objections whether sports rules are **agreements, decisions or concerted practices** that fall within the scope of this provision.[241] As already mentioned sports regulations create an international legal order, but technically they are not laws established by a recognized legislatory body. Their binding effect derives from the conclusion of contractual clauses that make references to the rules of the sporting authorities. These rules are unilaterally concluded by the federation therefore they may be decisions of an association of undertakings or agreements.[242] Thus, they fall under the scope of application of EU competition law.

Moreover, a central issue that led to an asymmetric application of Article 101 TFEU is related with the prerequisite of **distortion of competition**. Agreements, decisions or concerted practices are illegal only in so far they have as an object or effect the distortion of competition and the obstruction of the market's free function. The existence of adverse effects on competition constitutes a factual issue that is founded through a comparison

[237] *Meca-Medina and Majcen v. Commission,* §45.

[238] *Piau v. Commission,* §112

[239] Commission Decision (EU) of 25/6/2002 relating to *UEFA rule on multiple ownership of football clubs (ENIC/UEFA),* Case COMP/37 806 , §10

[240] Commission Decision (EU) of 20/7/1999 relating to *a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (1998 World Cup),* 2000/12/EC, O.J.L005, §74.

[241] *Supra* n.23, Pijetlovic, pg. 169.

[242] *Piau v. Commission*, §75.

between the actual situation and a potential situation in absence of the restrictive practice.[243] In fact the Commission conducts market research and examines each case *ad hoc* in order to understand if there is an adverse anti- competitive effect. When the restrictive practice constitutes a measure of regulatory character, similar to the decision of sporting associations, ECJ has established an additional **proportionality test** to examine whether this measure even if restrictive, is necessary for the function of the market. In *Wouters* case the Court supported that although a prohibition for lawyers to enter in partnership with non- lawyers was restrictive for competition in the market of legal services, it was a regulation established under an act of public authority and should be examined under a proportionality test.[244] In fact the rule passed the proportionality test and was considered "not to go beyond what is necessary to protect the proper practice of the legal profession."[245] Similarly in *Meca-Medina and Majcen v. Commission* case the Court followed the same formula for sports regulations, which are also established unilaterally in similar terms with regulations of public authorities. The rules under examination were the established penalties for doping violations by FINA. The existence of penalties for such violations is a restriction of competition, but it is justified as these rules are inherent in the organization of sports.[246] Sports penalties though should be proportional to the offence conducted,[247] but in any case they constitute a justified competition impediment. As we can see the Court established a violation- justification formula concerning the existence of anti- competitive effect of sports regulations.

Surprisingly, though, the Commission even when it sided next to sporting authorities and rejected complaints against them did not always follow this violation- justification formula. In fact Commission's practice in the application of competition law in sports is very inconsistent and demonstrates the socio- political aspects of these cases. Firstly, in a case concerning the tickets sales for the World Cup of 1998, the Commission acknowledged that FIFA has abused its dominant position by **manipulating the sale of tickets through the choice of distributors**. As a result, French nationals, citizens of the host country, were allocated many more tickets compared to spectators from abroad.[248] This time the

[243] Judgment of the Court of 30/6/1966, C- 56/65, *Société Technique Minière v Maschinenbau Ulm*, ECLI:EU:C:1966:38.

[244] Judgment of the Court of 19/2/2002, C- 309/99, *Wouters and Others*, ECLI:EU:C:2002:98, §34

[245] *Ibid* §109

[246] *Meca-Medina and Majcen v. Commission*, § 45

[247] *Ibid* §53

[248] *1998 World Cup*, §104.

Commission examined potential justifications based on reasons of public interest. They examined the preferential ticket allocation on the basis of safety, which was rejected as inadequate to justify inequality of ticket distribution. The Commission imposed a symbolic fine of 1,000 EUR and not further action followed. On the contrary, in another case concerning the **sports rule about home and away matches** the Commission surprisingly supported that it was a purely sporting rule that does not fall under the scope of EU antitrust law.[249] The decision was an answer to the complaints against UEFA that did not allow the Belgian club Mouscron to play their home game against FC Metz in France and the stadium of Lille-Métropole.[250]

The element of distortion of competition was also examined by the Commission in another important decision concerning a complaint of a company named ENIC against UEFA. ENIC was an investment company and had shares in multiple clubs including AEK Athens, Slavia Prague, Glasgow Rangers, Tottenham Hotspur etc. UEFA established new rules of sports governance that precluded companies from owning shares in more than one football clubs that could potentially participate in the same UEFA competition (UEFA Cup or UEFA Champions League).The regulation under scrutiny was the **prohibition of multi- ownership of sports clubs**. The objective of this rule was connected with the fairness of football competitions as it precluded the possibility of direct or indirect influence to club boards in order to manipulate games. However, the fact that companies were not allowed to invest in more than one major football clubs in the continent of Europe was an obstacle in competition as it impeded capital investments. The Commission understood the restrictive effects on competition and partially followed the *Wouters* formula by stating that such effects may be justified as inherent to the objective of safeguarding the integrity of sports events.[251] Contrary though to the aforementioned cases no proportionality test followed. In fact the Commission adopted the view that there was actually no restriction on competition, as the measure was inherent to the objective of fairness and promoted credible competition instead of impeding it.[252] In ENIC/UEFA case, thus, the Commission supported that a restrictive measure did not have anti- competitive effects.

[249] Perrish, R. (2013). *Sports law and policy in the European Union*. Oxford: Oxford University Press, pg. 144.

[250] Commission Press Release (EU) of 9/12/1999, *Limits to application of Treaty competition rules to sport: Commission gives clear signal*, IP/99/965.

[251] *ENIC/UEFA*, §30- 31

[252] *Ibid*, §40.

Conclusively, it is evident that EU practice against agreements or decisions that restrict competition in the internal market is not consistent. On the one hand, the Court has adopted a violation-justification formula; on the other hand the Commission follows different routes depending on the case at hand. The violation- justification formula was sporadically used, while sometimes the Commission admitted that specific restrictions did not at all fall under the scope of EU antitrust law, or did not at all have anti- competitive effects.

Finally, the application of EU antitrust law on sports influenced the interpretation of the **notion of dominance**. Legal theory underlines that assessing the existence of a dominant position derives mainly from an economic market analysis. [253] The case law of the Court, though, has established some criteria that lead to the assumption that a specific undertaking is dominant in a substantial part of the market.[254] In particular a dominant undertaking has increased market strength as demonstrated by its market share. Additionally, there are substantial barriers of entry or expansion in the market and the countervailing market power is minimal. It logically occurs that an undertaking should operate in a specific market in order to be considered dominant. It should have economic activity in the market and participate as a seller, a buyer or an agent. There are cases though in which more undertakings which have links among them adopt the same conduct and operate as one collectively dominant undertaking.[255] **Collective dominance** is possible under the criteria that today's General Court established in *Airtour* case.[256] In particular there needs to be transparency among the action of the collectively dominant undertakings and sanctions among the members that prevent diversions from the common policy. Finally, the remaining market actors, as well as consumers should be unable to threaten the advantages that enjoy the collectively dominant undertakings.

In sports the notion of collective dominance was interpreted broadly by the Court in order to cover the regulatory rule of sports federations and especially FIFA in the sports market. As already mentioned, we can generally distinguish three sports markets based on sports products. In the competition and the supply market sports federations do not directly operate.

[253] *Supra* n.17 Lorenz, pp. 194- 197.

[254] Judgment of the Court of 13/2/1979, C- 85/76, *Hoffmann-La Roche v. Commission*, ECLI:EU:C:1979:36, §39.

[255] Judgment of the Court of 27/4/1994, C- 393/92, *Gemeente Almelo and Others v. Energiebedrijf IJsselmij*, ECLI:EU:C:1994:171, §41- 42.

[256] Judgment of the Court of First Instance of 6/6/2002, T- 342/99, *Airtours v. Commission*, ECLI:EU:T:2002:146, §62

They do not have a team that participate in sports competitions. They do not buy nor sell players. They do not also mediate in player selling. They only have a regulatory role, by establishing the legal framework in which players, teams and agents operate. In *Piau* case the Court had to examine the compatibility of FIFA's regulations on the occupation of player's agents with EU competition law. In particular, the rule that obliged all agents to acquire a licence from a national sports federation seemed to restrict competition.[257] This scheme was examined under Article 102 TFEU, but the Court could not find any activity of FIFA in the market in order to support the existence of a dominant position. Interestingly, it was underlined that FIFA was operating in the market on behalf of sports clubs as a second-level undertaking and was linked with them in a way that they acted collectively.[258] FIFA officially provided for sanctions against clubs that do not abide by its regulations and the other market actors (agents, footballers) were unable to influence this relationship as they may were expelled from the market. Thus, the Court concluded that FIFA was collectively dominant with the sports clubs that it represented, but it did not violate EU competition law as licencing was a legitimate restriction that promoted credible competition. In fact the Court **enlarged the notion of collective dominance**, as representative undertaking can be considered collectively dominant with their members. The term traditionally included only linked undertakings operating jointly in the market. In sports, this term additionally includes second- level undertakings that do not operate at all in the market, but enjoy a regulatory and supervisory role. FIFA is not a market operator, yet it may be considered collectively dominant. This interpretation seems to go beyond the wording and the purpose of Article 102. Antitrust law protects distortions of competition from private actors that actually participate in the market. Instead of exceedingly broadening the scope of collective dominance, it would be wiser to have considered the same scheme under the freedom of providing services that is horizontally directly effective.

The notion of **super dominance** can also be applied is sports cases as the Court implied in *MOTOE* ruling. Commission has supported that some undertakings that dominate a specific market due to their extremely increased market share may acquire a regulatory role. This regulatory role may be granted also through national legislation as happened in *MOTOE* case. While exercising their regulatory authorities, these undertakings may have additional obligations, against other market actors, like the obligation to adopt equal treatment

[257] *Piau v. Commission*, §14- 16.

[258] *Ibid* §112- 114.

policies.[259] Their regulatory power may render inadmissible some market strategies under Article 102 TFEU that would not otherwise harm competition, or it may acknowledge the legality of specific activities that aim at protecting the structure of the market. In *MOTOE* case, ECJ examined the applicability of **organizational rules for motorcycling events** in Greece and implicitly adopted the theory of super dominance. Generally, in every country there is only one sporting authority that operates in national market and organizes national events for every sport. This is not the case in Greek motorcycling. *MOTOE* was a not- for-profit motorcycling association that wanted to organize a Panhellenic motorcycling championship, but a Greek law provided for authorization from ELPA for such events. ELPA was another not- for- profit association for car and motorcycling racing that organizes its own events and has regulatory powers in the market by granting permission to any potential event organizer. The Court considered that ELPA's denial to grant MOTOE permission for organizing a specific event constituted an abuse of its dominant position. ELPA was granted special exclusive rights to determine which undertaking should have access in a market that operates itself. ELPA cannot ensure equality of opportunities for new entrants due to a conflict of interests.[260] The association was granted a competitive advantage that allowed illegally denying access in the motorcycling event market. This association was actually in a super dominant position. It was operating in the market and on the same time it was holding the keys of entrance. The Court underlined that this super dominant position is not illegal, as distortion of competition is only hypothetical.[261] When, the undertaking exercised his authority in disrespect of its obligation to equal treatment, the violation of EU antitrust law became actual leading the Court to recognize its nullity.

The general conclusion that can be drawn from the implementation of EU Antitrust law against sports regulations is that the special nature of sport has influenced at a great extent the interpretation of applicable rules. In fact the preferential application of these provisions demonstrates that the sports market in only partially integrated in European competition policy. In some cases the practice of EU institutions aimed at enlarging the spectrum of sports cases that could fall under cartel prohibition. The notion of undertaking and the notion of dominance were broadly interpreted in order to adapt to the special structure of the sports

[259] Commission Decision (EU) of 25/7/2001 relating to *a proceeding under Article 82 of the EC Treaty (Deutsche Post AG- Interception of cross-border mail)*, COMP/C-1/36.915, OJ.L.331.

[260] Judgment of the Court of 01/07/2008, C- 49/07, *MOTOE*, ECLI:EU:C:2008:376, §51.

[261] *Ibid* §39.

market. On equal footing the extreme segmentation of sports market in small and specialized subsections serves the same goal of putting under scrutiny the largest possible number of sports regulations and facilitates the establishment of dominance from sports organizations. These practices would actually lead to complete integration of the sports market, if it had not been for the inconsistent application of the criterion of distortion on competition. ECJ established a violation- justification formula for cases including the exercise of regulatory activities of public authority such as the actions of sports associations and federations. If a sports measure is considered a violation of EU law, the Court examines if it can be justified through a proportionality test. However, this formula was not completely adopted. In some cases the Commission did not follow a proportionality test to examine the anticompetitive effect of restrictive measures. They concluded that some sporting rules are totally excluded from the application of EU law and others that do not restrict competition at all. This inconsistence has created an asymmetry in the application of EU antitrust law, leading to partial integration in this field.

2. Sport broadcasting rights and the standard formula of competition law

Sports products need to reach consumers in order to generate profit for sports clubs. Distribution policy is a profit multiplayer and in some cases, like sports, it may constitute a distinct market itself. This is the exploitation sports market, where sports clubs can leverage on the intellectual property rights that derive from sports spectacles. The traditional downstream sports market is the market of ticket selling. Through ticketing, sports events win spectators and create value for sports organizations (see *Figure 4*). Recent technological developments have changed radically the exploitation sports market by introducing sports broadcasting. Through broadcasting coverage, sports events can reach huge audiences, including youths, which are generally hard to reach. For this reason, TV sports broadcasting is very well paid and as Advocate General Jääskinen indicated it constituted the main source of income for sports organizations (clubs and federations) within the Union.[262] On the same time though, sports broadcasting is actually a subsector of the T.V. broadcasting market. The media market goes beyond sports and constitutes a distinct market sector, including films, series, cultural events and generally any television product. ECJ acknowledged that the broadcasting sector in not organized in the form of a public sector, thus free movement provisions are not applicable,[263] while EU antitrust law is called to regulate the actions of private actors. Bearing these considerations in mind, it is evident why the regular competition law formula applies in sports broadcasting cases, while the special nature of sport has marginal interest. This is a completely distinct sector that functions independently from the from the sports market. Any potential exemption from competition law should be based on economic efficiencies that are evident in the broadcasting sector. It is the special characteristics of the broadcasting market that justify the schemes that will be discussed above and not the special nature of sports.

One major issue in sports broadcasting is designating the **relevant sports broadcasting market**. The severe segmentation that is adopted for the sports market is actually transferred in the broadcasting sector as well. On product terms, as sports spectacles are not interchangeable with other T.V. mega events they constitute distinct segments of the broadcasting market.[264] The

[262] Opinion of AG Jääskinen, *FIFA v. Commission*, ECLI:EU:C:2012:787, §33- 34.

[263] Judgment of the Court of 30/4/1974, C- 155/73, *Sacchi*, ECLI:EU:C:1974:40.

[264] Commission Decision (EU) of 3/3/1999, *relating to a proceeding pursuant to Article 85 of the EC Treaty*

same spectator would rarely substitute a national football derby with an opera performance. Sport broadcasting is a unique part of the T.V. communications market. The argument that the relevant market should be considered broadly so as to include both national and international events in all sports disciplines was rejected, because it did not illustrate the actual market practice. Those sports events like FIFA World Cup or European champions league are "stand-alone driver content for pay- T.V. operators."[265] On geographic terms the relevant market for sports broadcasting equals the national market of every member state. ECJ underlined that "broadcasters usually operate on a territorial basis and serve the domestic market".[266] This is mainly for linguistic reasons as sport matches generally have speaking coverage in the native language of the spectators. Therefore, we can conclude that there are several national sport broadcasting markets, for example the Greek sports broadcasting market, the French sports broadcasting market, the Dutch sports broadcasting market etc.

The general prerequisites of Articles 101 and 102 TFEU that were discussed above apply also to cases concerning sport broadcasting. In this sector, the application of competition law follows the general violation- exemption formula, while the special nature of sport events has not been considered adequate reason to transform competition rules in the broadcasting sector. In particular the main practices that restricted competition in sport broadcasting are exclusive and collective selling of rights. **Exclusivity** of selling is considered extremely important for sport broadcasting.[267] In the national sport broadcasting market of every member state only one undertaking should acquire the rights of a specific event. The value of sports events is significantly higher when they are broadcasted live. No undertaking would be willing to pay the high contracts that leagues and associations demand if a competing media would be allowed to broadcast the same spectacle at the same time in another channel. Without exclusivity the selling of broadcasting rights would be severely underpriced in the detriment of sports clubs. Especially for smaller teams a significant decline in revenue from T.V. rights would endanger their existence and financial stability as they do not acquire important supplementary income from other sources such as marketing of products or player's selling. It is evident that exclusive

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(TPS), IV/36.237, OJ.L.90/6, §34.

[265] Commission Decision (EU) of 2/4/2003 *declaring a concentration to be compatible with the common market and the EEA Agreement (Newscorp/ Telepi˘)*,COMP/M.2876, §66.

[266] Judgment of the Court of 4/10/2011, C- 403/08, *Football Association Premier League and Others*, ECLI:EU:C:2011:631, §33.

[267] Blackshaw, I. (2013). Collective Sale of Sports Television Rights in the European Union: Competition Law Aspects, *De Jure*, 46, pp. 401-412.

selling entails efficiencies for the sport market. Since no sport specific exemption exists it rests to examine this scheme under the general violation- exemption formula. This issue was examined by the Commission in relation to two major European leagues, namely the English Premier League[268] and German Bundesliga,[269] as well as the European Champions League.[270] Exclusivity of broadcasting rights selling was considered as a restrictive agreement between undertakings and was granted an exemption under Article 101.3 TFEU due to the efficiencies of the scheme. In fact the problem was not exclusivity *per se* but the size and shape of exclusivity. Exclusive selling of sport broadcasting rights was rendered admissible under specific conditions that agreements must fulfil. Firstly, there are time restrictions prohibiting broadcasting agreements that exceed three years and there is an obligation for transparency and openness in the bargaining procedure. Additionally, the negotiation's procedure should be accessible to the wider possible range of operators.[271] Finally, all unsold rights should be reverted to sports clubs.

The Commission opted for regulation instead of suppression. It is evident that banishing exclusivity would harm the broadcasting sector by reducing the value of T.V. sports products. Exclusivity was confronted, thus, as a problem of the broadcasting sector and not as a problem of the sports market.

Similarly, the Commission examined the legality of another feature of the sport broadcasting sector, the **collectivity** of selling. In regular market conditions, the undertaking that creates a specific product is competent to sell it and negotiate its price. A cement producer can operate in the market individually. He is competent to find potential buyers, to negotiate prices and conclude selling agreements. This is not the case is sport broadcasting rights. The sports clubs, which are the producers of sports products, are in many cases not competent to sell individually the broadcasting rights of their games. As demonstrated in *Figure 6*, sports associations act on behalf of their members, sports clubs, and represent them in negotiating and concluding broadcasting agreements. Collective selling though is a restraint in the free function of the

[268] Commission Decision (EU) of 19/1/2005 *relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53(1) of the EEA Agreement (Joint selling of the media rights to the German Bundesliga)*, COMP/C-2/37.214.

[269] Commission Decision (EU) of 22/32006 *relating to a proceeding pursuant to Article 81 of the EC Treaty (Joint selling of the media rights to the FA Premier League)*, COMP/38.173

[270] Commission Decision (EU) of 23/7/2003 *relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Joint selling of the commercial rights of the UEFA Champions League)*, COMP/C.2-37.398, OJ. L291/25, §200.

[271] *Supra* n.23, Pijetlovic, pg. 177.

market. It is accused to preclude clubs from their own labor and prevent them from achieving higher prices after individual bargaining. Restricting the competition on the supply side entails reduced prices for the buyers of sports products. The scheme was examined under Article 101 TFEU and rendered admissible under EU antitrust law. Once again the Commission underlined that the efficiencies of collective bargaining outweigh potential competition restraints. In *Champions League* decision it was admitted that creating a single point of sale is beneficial for the general value of the event as whole at such an extent that it constitutes a prerequisite for the existence of the competition.[272] Individual clubs are uncertain which stage of the competition will they reach and cannot offer any reassurance to broadcasters on the actual value of their broadcasting rights. For this reason, joint selling in the only road to reassure high profit contracts for sports clubs.

In a nutshell, it is evident that sport broadcasting constitutes a completely distinct market that is not directly affected from the special nature of sports events. Anti- competitive practices in this are uniformly considered under the violation- exemption formula. The efficiencies of these practices have been thoroughly analyzed by the Commission in order to render them admissible. While in cases concerning sports regulation the application of EU competition law was partial, the sector of sport broadcasting is completely integrated in the internal market. This is the final asymmetry that was discussed in the current paper. Sport is special. The application of EU antitrust law cannot overlook the special features of sport. Sport is also a market. EU antitrust law unavoidably is called to regulate its function. This conflict between the market function and the cultural function of sport has generated asymmetries, which are vital in order to protect modern sport from complete commercialization.

[272] *Joint selling of the commercial rights of the UEFA Champions League*, §140.

IV. Findings

The integration of sports organizations in EU internal market law is asymmetric. There are fields that are completely integrated and fields of partial integration, in which the sport exemption remains functional. After gradually abandoning the sporting exemption and subjecting almost every sporting activity in the internal market law, the sports market was integrated in the internal European market. On the one hand, there are completely integrated legal fields, namely free movement and state aid law, where sport organizations are treated as regular market operators. The Court has rejected sporting exemptions and adopted the regular application formula. On the other hand, as the sport market has some regulatory and economic peculiarities, it becomes imperative to adopt special treatment of specific sport law cases in other legal fields. As demonstrated, there are two partially integrated legal fields, namely the non- discrimination principle and competition law. This partial integration was not only a result of exemption from the application of the law, but also a result of a sport- friendly interpretation that respects the "special nature of sport".

This fundamental asymmetry influenced the application of EU law both procedurally and substantially. The burden of proof is inverted in some sports cases, while the Court has adopted a contextual approach of interpretation that is sports specific and respects the peculiar features of the sport market. These alterations are not explicit but can be extracted from judicial practice and are justified as imperative to protect sport specialty.

A. Influence of the sports market on procedural EU law

It is well established that the plaintiff before European Courts needs to provide evidence to support an alleged violation of EU law as he bears the burden of proof of his allegations.[273] In cases concerning competition law the Commission needs to provide evidence that all the prerequisites of Articles 101 and 102 TFEU are fulfilled in order to support a breach of EU law. Similarly, in cases of alleged violation of free movement rules, the plaintiff has to prove the existence of the violation. Defendants on the other hand have to prove the existence of an exemption and provide evidence that the alleged violation is justified. In sports cases the judicial practice, as analyzed in the pages of this paper, has introduced an **inverted burden of proof** while applying free movement rules. The general formula according to which any measure hindering access to the internal employment market violates the free movement of workers enlarged admirably the material scope of Article 45 TFEU and inverted unavoidably the burden of proof. The plaintiffs, athletes in their majority, do not have to prove that a specific sports practice like a contract extension clause or a timely stretched transfer window constitutes a violation of free movement. This is more or less considered self- evident. On the contrary, they have to prove why this violation should be considered unjustifiable, why the special nature of sports in not adequate to render this rule admissible. This inverted burden of proof is not applicable though in sports competition law cases, where the Commission in its decisions continues to analytically address all the prerequisites of Articles 101 and 102 TFEU. Since the application of EU antitrust law is not only a procedure of market integration, but also a rigorous administrative procedure that jeopardizes individual benefits, it is anticipated to be less flexible on procedural discrepancies. This practice is similar to the *pollution theory* that was adopted concerning the application of EU state aid law by European authorities. At the beginning of the financial crises in Europe national rescue plans for the financial sector were considered to grant an advantage without at all applying the Market Economy Operator Test.[274] However, this practice was overruled by the Court.[275] In sports, the Court has been favorable to this inverted burden of proof especially it was created through its case law.

[273] *Supra* n.153 Lenaerts et al., pp. 198, 389, 402.

[274] *Supra* n.134, López, pp. 226- 228.

[275] Judgment of the Court of 3/4/2014, C-224/12 P, *Commission v. Netherlands and ING Groep*, ECLI:EU:C:2014:213.

B. Influence of the sports market on substantial EU law

Analyzing the asymmetric integration of sports organizations in the European internal market law leads logically to an inquiry on how this asymmetry has influenced substantial EU law. Is there an interpretation rule of general application in sports cases that can sum up all the aspects of the special nature of sport? The answer is on the affirmative. EU authorities, including ECJ rulings, have adopted a contextual approach in order to deal with sports cases.[276] Independently on the rules that a particular sport practice violate it is examined if it pursues a legitimate objective that is inherent in sport and protects the special nature of sports events. Additionally, follows a proportionality test to verify if this practice is appropriate for the attainment of this goal. This test was adopted in competition law cases, in cases of discrimination or violation of free movement law. In general the aim of the Court was to reassure that the outcome of this contextual approach will not irreparably harm the organization and the special nature of sport. In fact EU law is interpreted under a sports friendly approach. It is valid to support that there is a general **in dubio pro sportiva** rule. The cases that were analyzed demonstrate an inclination to render inapplicable only the most extreme sports regulations that intensively violate EU law. Borderline cases, schemes that are on the limits of violation are rendered applicable as expressions of the special nature of sport. It is vital to bear in mind that sporting authorities remain autonomous on establishing sports regulations and organizing the sports market. This autonomy is conditional. Sporting authorities have to respect EU internal market law, but yet they are the primary regulators of the sports market. This is the reason why their practices are and should be considered admissible if the Court is in doubt.

[276] *Supra* n.23, Pijetlovic, pp. 182- 183.

C. Epilogue

Can a special market influence the application of the law? Returning to this fundamental question that was posed at the introduction of this paper, a proper answer is now possible to be given. Yes! The peculiar sports market managed to influence EU law at such an extent that created an asymmetry in its application. The special nature of sport, especially the cultural roots of sporting events and the autonomous structure of sports governance, undoubtedly altered the interpretation of EU internal market law, when called for application in this sector. Sport is much more than a market. Sport is self- expression, strength, noble competition. Sport is an integral part of the cultural European identity. Sport is not only a market sector. Investments do not compete in the field. To quote the words of a legendary footballer, Johan Cruyff, which describe perfectly the predominantly non- economic nature of sport: "Why couldn't you beat a richer club? I've never seen a bag of money score a goal"

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17. Commission Decision (EU) of 4/7/2016 on the *State aid SA.29769 implemented by Spain for certain football clubs*. IP/16/2401
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1. Additional Protocol annexed to the Agreement establishing an association between the European Economic Community and Turkey, Ankara (1970)
2. Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, Corfu (1994)
3. Commission Regulation (EU) No 1217/2010 of 14/12/2010 *on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements*, OJ.No.L335

4. Commission Regulation (EU) No 1218/2010 of 14/12/2010 on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements*, OJ.No.L335
5. Commission Regulation (EU) No 330/2010 of 20/4/2010 on *the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, OJ.No.L102
6. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano (2007), OJ L 339
7. European Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, Luxembourg (1993)
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9. The Treaty on the Functioning of the European Union, Nice (2007)

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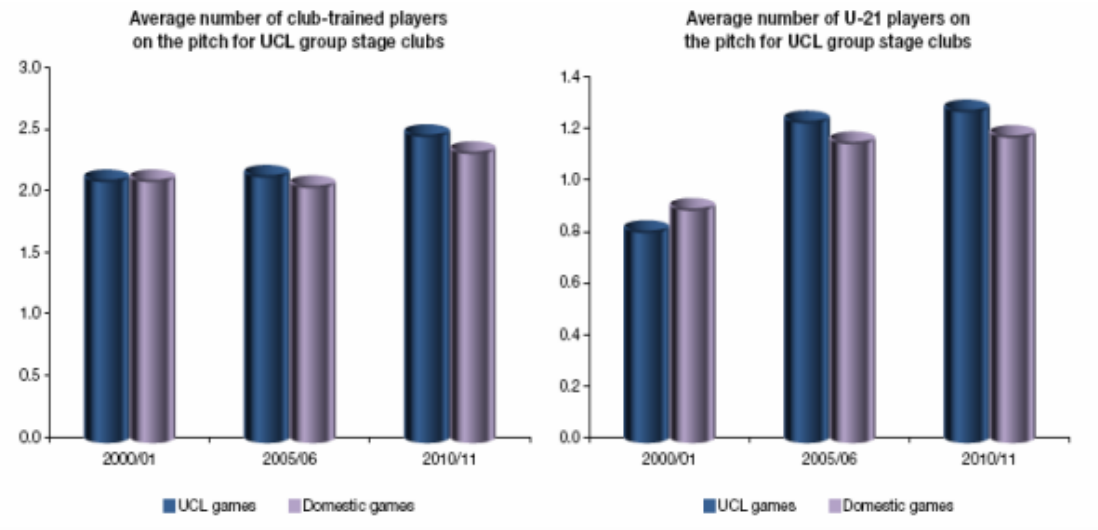
2. FIFA Statutes, Regulations Governing the Application of the Statutes, Zurich (2016)
3. Regulations of the UEFA Champions League 2018-21 Cycle, Nyon (2018)
4. Regulations on the Status and Transfer of Players by FIFA, Zurich (2017).
5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958).
6. UEFA Club Licensing and Financial Fair Play Regulations, Nyon (2018).

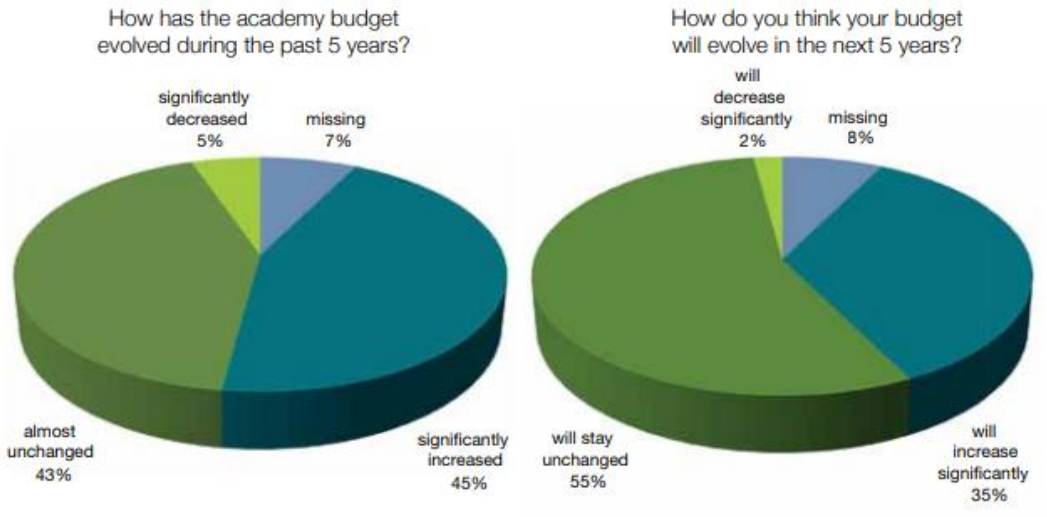
Annex

Figure 1: The increase in participation of locally trained players in European Champions League



(*Study on the Assessment of UEFA's 'Home Grown Player Rule'*, 2013, Negotiated procedure EAC/07/2012)

Figure 2: Evolution of club's budget spent on academies



(*Report on Youth Academies in Europe*, 2012, European Club Association)

Figure 3: Values associated with main sports

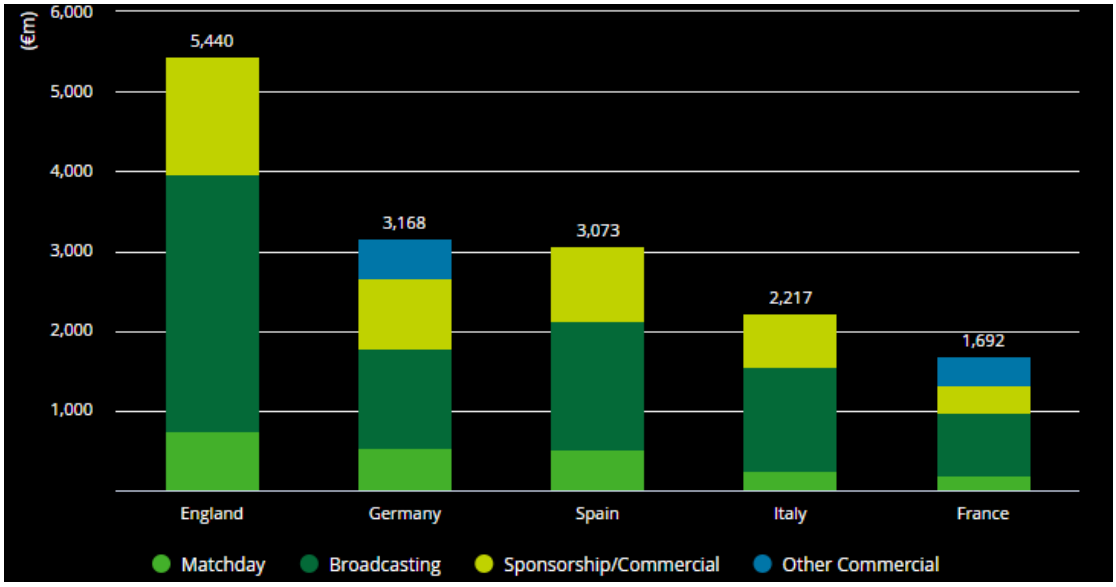
Sport	Conviviality	Elegance	Youth	Virility	Dynamism	Creativity	Surpassing oneself
Athletics	79	**136**	121	110	109	76	127
Basketball	127	93	**128**	126	112	106	98
Cycling	108	79	94	110	107	70	**118**
Climbing	63	123	106	80	90	138	127
Football	123	57	132	159	107	109	93
Formula One	44	78	103	146	100	117	114
Golf	83	**184**	16	49	45	78	43
Handball	128	72	116	132	112	105	94
Judo	101	84	117	**162**	105	105	121
Swimming	59	136	104	79	106	66	103
Figure skating	93	193	130	68	104	182	117
Bowling	**135**	59	33	42	39	59	32
Rally driving	81	44	81	135	104	104	111
Hiking	144	46	44	45	89	66	72
Roller-skating	102	120	126	66	109	157	97
Rugby	136	**46**	117	205	115	91	109
Skiing	86	125	107	**71**	111	102	113
Tennis	68	**141**	105	56	107	69	102
Sailing	97	136	**87**	92	109	136	121
Volleyball	**135**	105	109	73	110	96	85
Mountain biking	108	**42**	123	93	112	68	103

Index of the table :

- The price 100 is considered the average price for every sport for the specific value
- Prices > 100 are considered to exceed average for the specific value
- Prices < 100 are considered to rest below average for the specific value

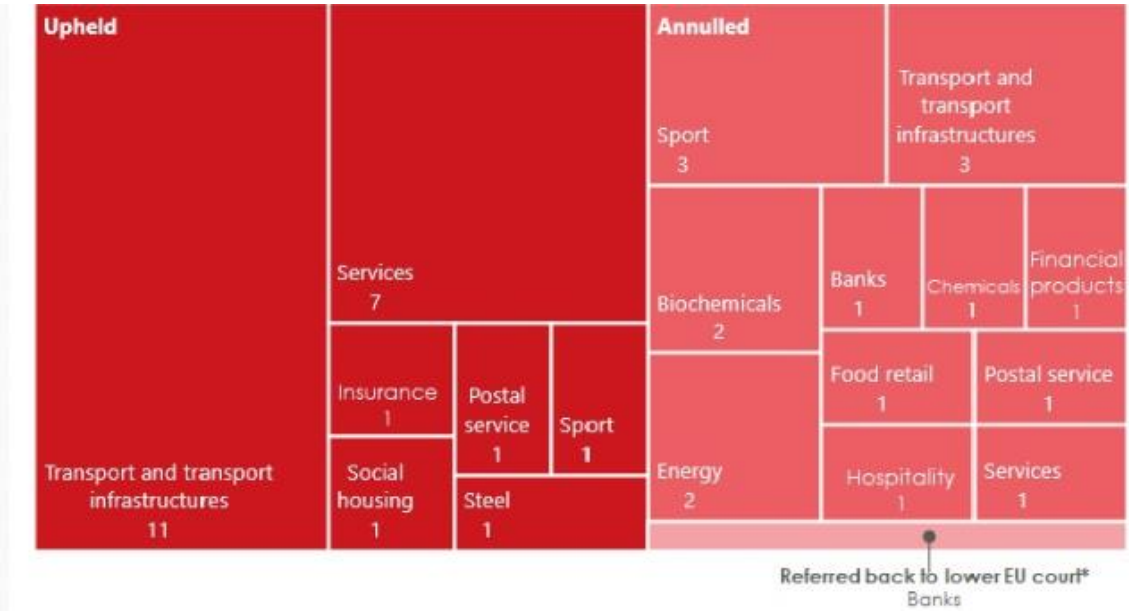
(*Observatoire Sports et Valeurs*, 2003, une étude Occurrence, Hickory, Koroïbos)

Figure 4: 'Big five' European league clubs' revenues and the sources of revenue - 2017/18 (€m)



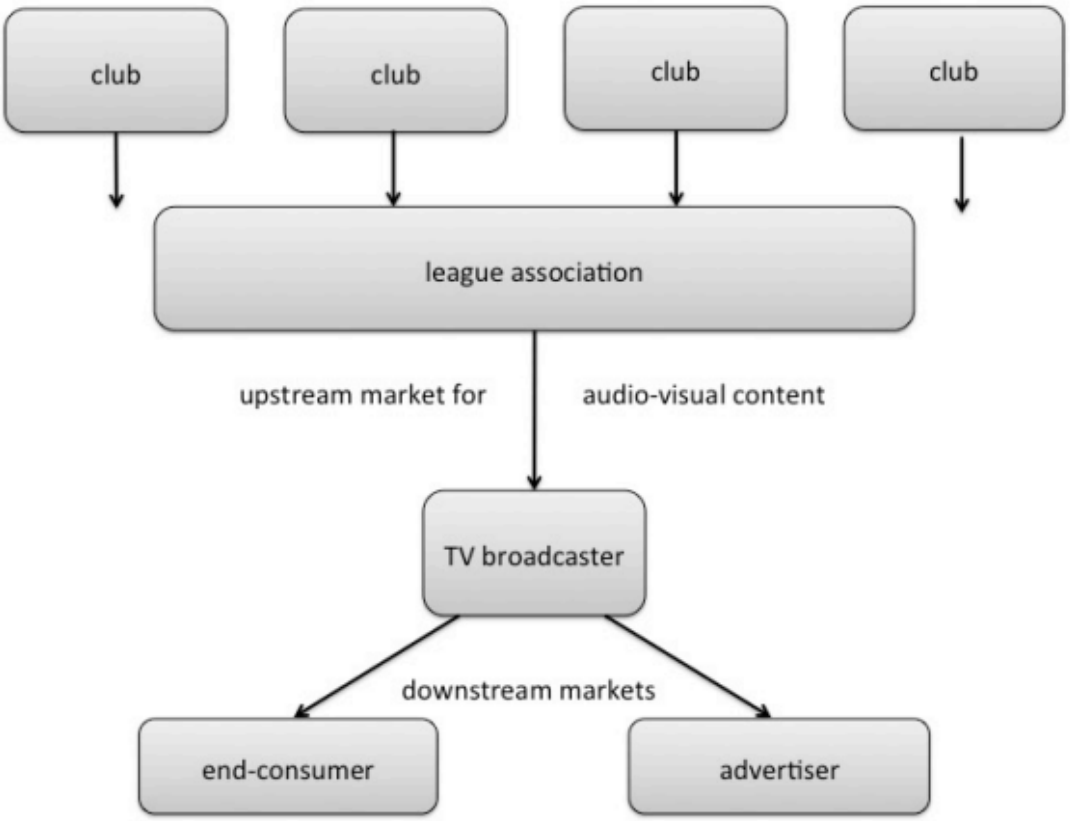
(*Annual Review of Football Finance*, 2019, Deloitte)

Figure 5: Number of state- aid cases brought to courts by appeal decision and sector from November 2018 to May 2019



(www.politico.eu/datapoint)

Figure 6: The market of sport broadcasting and the impact of joint selling of rights



(*Joint selling of television rights – an EU competition law perspective and a comparative analysis of the impact of Regulation 1/2003*, 2018, Schön M.)