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Rules Governing Athletes' Eligibility in National Teams in the Context of European Union Law

J.D. Thesis

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"Cooperation, coordination and consultation are the best way for sporting organisations to preserve their autonomy."[1]

Introduction

"When I wear the national team shirt, its sole contact with my skin makes it stand on an end,"[2] once said one of the best players in the history of football Diego Maradona. To wear a national jersey and represent their country in international competitions is the big sporting dream and top of effort of the majority of athletes. Some of them represent one country for their whole life. Other athletes might want to change the country that they represent in international competitions during their careers. They can opt for another country due to their birthplace, parentage, ancestry, residence or for many other reasons. In any of these cases, they must comply with the rules of international sporting governing bodies[3] determining their sporting nationality. In other words, they must abide by rules governing their eligibility in national teams.

Rules governing sporting nationality form a noticeable part of "lex sportiva",[4] international sporting governing bodies' own normative order, which is autonomous from state legal orders until these two concepts clash

[1] Basic Universal Principles of Good Governance of the Olympic and Sports Movement (International Olympic Committee, Seminar on Autonomy of Olympic and Sport Movement, 11- 12 February 2008).
[2] „Maradona at Dundee!!", *BBC*, 10 January 2001, retrieved 22 September 2017.
[3] Also referred to as international sports associations, international sports federations or international sports organisations.
[4] For more information on this context, see R. Siekmann, J. Soek (Eds.), *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012).

together.[5] Even though sports federations have "the right to establish autonomous decision-making processes within the law",[6] they must also comply with respective national laws as well as with other legal orders binding on countries of their residence or activity. While honouring the alliance and respecting sports federations' regulatory autonomy, national and international decision-making and judicial bodies do not hesitate to rule on their rules if they interfere with legal orders that these bodies protect. In such cases, the collaboration between law and sports becomes rather a dangerous liaison.

It is the European Union where athletes often contest international sporting governing bodies' rules before administrative decision-making bodies and courts. The reason for this is that athletes, as European Union (EU) citizens and undertakings, enjoy, as well as rights guaranteed by national laws of their Member States, the rights conferred upon them by the EU legal order. When disputing sporting rules, such athletes often raise arguments stemming from their rights as EU citizens, freedom of movement for persons or competition law.

The EU decision-making bodies, primarily the Court of Justice of the European Union (CJEU)[7] and European Commission have developed a rich line of sports-related case law, which has had great influence on both European and world sporting associations. There are two outstanding examples of this. In the famous *Bosman* judgment of 1995, the Court of Justice (ECJ) hold nationality

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[5] J. Exner, "Sportovní národnost ve světle práva Evropské unie" (2013) Právník, Year 152, Number 10, p. 1031.

[6] European Sports Charter (1992, revised 2001), article 3. See also Olympic Charter (2016), Fundamental Principles of Olympism, Principle 5.

[7] The Court of Justice of the European Union (CJEU) shall include the Court of Justice and the Tribunal. See the Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

clauses and transfer fees imposed by the Union of European Football Associations (UEFA) incompatible with the provisions of EU law protecting the freedom of movement for workers.[8] Consequently, both the UEFA and the FIFA adjusted their rules to the judgment's requirements.[9]

In 2006, the European Commission, the Tribunal and consequently the ECJ dealt with anti-doping regulation imposed by the International Olympic Committee (IOC) and subsequently adopted by the Fédération Internationale de Natation (FINA) in the *Meca-Medina & Majcen* judgment.[10] These two cases as well as many other rulings illustrate that the EU institutions' decisions apply to athletes, EU citizens and undertakings and sports federations based in the EU, but they also simultaneously influence the whole sporting world. International sporting governing bodies tend to harmonise their rules globally and they do not want to leave Europe as a solitary island applying different regulations.[11]

I have submitted that after the 2006 ECJ's judgment in *Meca-Medina & Majcen*, the vast majority of sporting governing bodies' rules determining athletes' eligibility in their national teams have fallen within the scope of European Union law.[12] Stefaan Van den Bogaert puts it right when he

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[8] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463.

[9] On the meaning, significance and consequences of the *Bosman* ruling, see, inter alia, S.C.G. Van den Bogaert, "Editorial. Bosman: One for All ..." (2015) Maastricht Journal of European and Comparative Law, Year 2015, Number 2, pp. 175-176.

[10] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492.

[11] Certain provisions of the FIFA Regulations on the Status and Transfer of Players provide an exception when they apply only to the EU and the European Economic Area (EEA) – Articles 19.2.b and Article 6 of Annex 4. On the other hand, a vast majority of international sporting governing bodies' regulations do not include such an exception and apply to all member federations all around the world.

[12] J. Exner (2013), op. cit.; J. Exner, *Sporting nationality in the light of European Union law*, (Prague, 2016, master's thesis, Charles University, Faculty of Law).

claims that "[s]port is and remains primarily and largely an affair of the sporting associations, but their autonomy is conditional, for due account must be taken of the exigencies of EU law."[13] Therefore, sporting governing bodies must respect EU law requirements with the aim of escaping the Court of Justice's power to proclaim their rules incompatible with EU law.[14]

In my master's thesis on this topic, I have drawn inspiration from works of authors who have covered partial aspects of the relationship between EU law and sporting nationality. At this point, it is convenient to mention at least Jean-Philippe Dubey,[15] Stefaan Van den Bogaert,[16] Yann Haffner,[17] Denis Oswald,[18] Richard Parrish[19] or Stephen Weatherill.[20] Following their conclusions and researching unexplored areas, I have tried to come up with a comprehensive work covering all different sides of this issue and bring together its complex overview.

In the analytical part of my master's thesis, I have consequently divided the regulations determining sporting nationality into three groups according to the future attitude of the CJEU, which might be expected towards the background of its case law. The first group of rules comprise sporting regulations falling outside the scope of EU law and therefore out of reach of EU

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[13] S.C.G. Van den Bogaert (2015), op. cit., pp. 175-176.

[14] J. Exner (2016), op. cit., p. 3.

[15] J.-P. Dubey, "Nationalité sportive : une notion autonome" in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005* (Editions CIES, 2004).

[16] S.C.G. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, (The Hague: Kluwer Law International, 2005).

[17] Y. Hafner, "Athletes' eligibility in national teams and EU law : What can we learn from two doped swimmers ?" in A. Rigozzi, D. Sprumont, Y. Hafner (Eds.), *Citius, Altius, Fortius - Mélanges en l'honneur de Denis Oswald*, (Helbing & Lichtenhahn (Bâle), 2012).

[18] D. Oswald (2004), op. cit., p. 200; D. Oswald, *La nationalité dans le sport, Contributions pour le XIIème Congrès Olympique* (Lausanne, 2009), p. 58.

[19] R. Parrish, "Case C-36/74 *Walrave and Koch* [1974] ECR 1405" in J. Anderson (Ed.), *Leading Cases in Sports Law*, (T.M.C. Asser Press, 2013).

[20] S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (T.M.C. Asser Press, 2014).

institutions. On the other hand, as submitted above, rules governing sporting nationality fall within the scope of EU law and the restriction on athletes' rights under EU law, which I believe that they constitute, must therefore be justified. In the second group, I have discussed those sporting nationality regulations, which might be and proportionate and thus justified. The last group, however, contains those rules governing athletes' eligibility in national teams, which, in my opinion, go beyond what is necessary in order to achieve their objective and are therefore potentially void under EU law.[21]

The central research question, which this J. D. thesis seeks to answer, is where the balance between international sporting governing bodies' interests and values regarding sporting nationality on one hand, and athletes' rights under EU law on the other hand, lies. The central research question stems from the hypothesis presented in my master's thesis that certain sporting nationality rules constitute a disproportionate restriction on the rights that athletes derive from EU law, primarily the prohibition of discrimination on grounds of nationality in the fields of EU citizenship, free movement of persons and competition.[22] If I confirm the aforementioned hypothesis throughout this J. D. thesis, I will simultaneously try to find an ideal model formulating concrete recommendations to sporting governing bodies in order to better adapt their rules to EU law requirements.

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[21] J. Exner (2016), op. cit.

[22] I am aware of the fact that, especially regarding competition law, this J. D. thesis contains many elements and conlusions which concern sporting governing bodies as undertakings or their associations. However, I primarily focus on athletes as individuals and deal with EU citizenship, free movement of persons and competition mainly from the point of view of athletes as citizens, workers, providers of services or self-employed persons and undertakings performing their freedom of establishment and undertakings engaging in free competition. Since this J. D. thesis concerns mainly athletes' rights stemming from EU citizenship, free movement of persons and competition, I further refer to these three undoubtedly specific categories of EU law generally also as to athletes' rights under EU law or the rights that athletes derive from EU law.

My motivation to further focus on this topic in my J. D. thesis covers my desire to enrich contemporary jurisprudence with even more elaborated, comprehensive and detailed work on the relationship of EU law and rules governing sporting nationality. I have always had inside me the inner drive to walk the extra mile. I would like this J. D. thesis to be a suitable basis not only for ensuing academic discussion in this field, but primarily a useful and applicable tool for international sporting governing bodies on how to grasp rules determining athletes' eligibility in national teams not only in the EU. My long-standing interest in EU law and my passion for sport further illustrate and underline my decision to devote my J. D. thesis to this area.

I divide this J. D. thesis in five chapters. I initially assess the legal status, functioning and organisation of international sporting governing bodies and I pay close attention to their decision and rule making process. Consequently, I discuss the binding character of sporting rules on athletes and other persons engaging in an activity governed by a concrete international sports federation in general. Lastly, I examine the concrete conditions under which athletes can represent their country in international competitions in particular on individual athletes (Chapter 1).

Thereafter, I switch to EU law and I present the general framework for assessing the compliance of sporting nationality rules with provisions of EU legal order regarding the prohibition of discrimination on grounds of nationality in the fields of EU citizenship, free movement of persons and competition, including the case law of the CJEU (Chapter 2). I then devote a special chapter to the turning judgment of the Court of Justice (ECJ) in *Meca-Medina & Majcen* from 2006 and point to its key parts and aspects (Chapter 3).

In the following chapters, I present my answers to the central research question of this J. D. thesis. First, I develop the aforementioned analytical division of rules governing athletes' eligibility in national teams into three groups (Chapter 4). Most importantly, I then formulate concrete recommendations to international sporting governing bodies and propose concrete modifications in their sporting nationality regulations in order to comply with requirements imposed by EU law (Chapter 5).

1. Legal Status and Autonomy of International Sporting Governing Bodies and Rules Governing Sporting Nationality

Regarding the notion of sporting nationality, international sporting governing bodies play a vital role since they set up and enforce rules governing athletes' eligibility for national teams. Before discussing the character of concrete rules determining sporting nationality, I discuss legal status, organisation and functioning of international sports organisations. I mostly focus on their regulatory autonomy that they possess while regulating both the internal issues and enacting rules applying externally (Chapter 1.1.).

Consequently, I examine the reasons why athletes, members of their accompanying teams, officials and other persons must abide by an international sporting governing body's rules in general (Chapter 1.2.). Thereafter, I shift my concentration to those sporting rules governing conditions under which athletes can represent their country at the international level. I assess regulations determining sporting nationality, their key aspects as well as their relation and difference in comparison with legal nationality rules (Chapter 1.3.).

1.1. Legal Status and Autonomy of International Sporting Governing Bodies

International sports federations[23] are non-governmental organisations, private entities, which govern one or more sports primarily at international level. The Olympic Charter[24] defines international sports federations as "international non-governmental organisations administering one or several

[23] Annex I to this J. D. thesis provides a list of all international sports organisations.
[24] Olympic Charter, as in force from 2 August 2016.

sports at world level and encompassing organisations administering such sports at national level."[25] Pursuant to the Council of Europe's Convention on the Manipulation of Sports Competitions, a sports organisation is "any organisation which governs sport or one particular sport […] as well as its continental and national affiliated organisations […]."[26]

International sporting governing bodies, as private entities or non-governmental organisations, function either in the form of an unregistered contract between the organisation's members as foundations, trusts or societies or are registered according to the national law of a country where they are established or where they undertake their activities.[27] As such, international sports organisations must comply with the respective national laws as well as with other legal orders binding on their countries. In the case of EU Member States, these organisations must thus comply also with requirements imposed on them by the EU legal order.[28] While it is true that a considerable amount of international sporting governing bodies, including the IOC, have their seat in Switzerland[29] as a non-EU country, but EU authorities have the power to scrutinize them to the extent their rules apply to EU citizens or in EU territory.[30]

The character and powers of international sports federations are elaborated in detail in the Olympic Charter, the codification of the fundamental

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[25] Olympic Charter (2016), rule 25.
[26] Council of Europe Convention on the Manipulation of Sports Competitions (2014), article 3.2.
[27] J. Exner (2016), op. cit., p. 6.
[28] Ibid., p. 7.
[29] Switzerland is home to more international sports federations and governing bodies than anywhere else in the world. Since 1915, when Lausanne was chosen as the seat of the International Olympic Committee (IOC), more than 50 international sports organisations have established their headquarters in Switzerland.
[30] On the legal status of the most important international sporting governing body – the International Olympic Committee (IOC), see *inter alia* A. M. Mestre, *The Law of the Olympic Games*, (T.M.C. Asser Press, 2009), pp. 256; see also D. J. Ettinger, "The Legal Status of the International Olympic Committee", (1992) Pace International Law Review, Volume 4, Issue 1, 97-121.

principles of Olympism and the rules and bye laws adopted by the IOC as the "the supreme authority of the Olympic Movement, which brings together the various international sporting federations."[31] The fifth fundamental principle of Olympism, recognising that sport occurs within the framework of society, provides that sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport. They shall also freely determine the structure and governance of their organisations and enjoy the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance are applied.[32]

Rule 26 of the Olympic Charter expresses the concrete mission and the various roles of international federations within the Olympic Movement. International sporting governing bodies, amongst others, establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and ensure their application. They shall also ensure the development of their sports throughout the World and contribute to the achievement of the goals set out in the Olympic Charter, in particular by way of the spread of Olympism and Olympic education. Finally, international sports federations shall also support the IOC in the review of candidatures for organising the Olympic Games concerning their respective sports and assume the responsibility for the control and direction of their sports at the Olympic Games.[33]

Regarding other international multisport competitions held under the patronage of the IOC, international sports federations shall firstly assume or

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[31] Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, [2004] EU:T:2004:282, paragraph 1; see also Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 2.
[32] Olympic Charter (2016), Fundamental Principles of Olympism, principle 5.
[33] Ibid., rule 26.

delegate responsibility for the control and direction of their sports. They shall also provide technical assistance in the practical implementation of the Olympic Solidarity programmes and shall encourage and support measures relating to the medical care and health of athletes. In addition, international sporting governing bodies have the right to formulate proposals addressed to the IOC concerning the Olympic Charter and the Olympic Movement. Lastly, they shall collaborate with the IOC in the preparation of Olympic Congresses and shall participate, on request from the IOC, in the activities of the IOC commissions.[34]

There are also international sports federations regulating sports of which disciplines do not make part of the Olympic programme. The IOC, as well as national Olympic committees, recognize non-Olympic international and national sporting governing bodies and endow them with certain, honestly but less extensive rights and obligations. For example, in the Czech Republic, national sports federations regulating non-Olympic sports can become members of the Czech Olympic Committee (COC), but their rights within the Olympic Movement are restricted. For instance, they are not all members of the Plenary Session and cannot decide on matters regarding the Olympic Games.[35] Nevertheless, international and national sporting governing bodies regulating non-Olympic sports possess similar powers and responsibilities regarding the governance of their respective sports as Olympic federations.[36]

International sporting governing bodies constitute a part of and operate within the, so called, "pyramidal structure of sport". Within the Olympic Movement, the IOC sits atop the pyramid. It stands above international sports federations governing Olympic sports and these federations must comply with

[34] Ibid.
[35] The Statutes of the Czech Olympic Committee, as in force from 24 April 2017, are available here: https://www.olympic.cz/upload/files/Stanovy-COV-24-4-2017.pdf.
[36] J. Exner (2013), op. cit., p. 1030.

the IOC's decisions. The IOC recognises even international organisations regulating non-Olympic sports, which must also respect the IOC's regulations to the certain extent. International sporting governing bodies further unify continental organisations governing certain sport at continental level. At the bottom of the pyramid structure, there are national sports federations endowed with the task of regulating the sport in their respective countries.[37]

Football is a good example of how the sports pyramid functions in practice. The FIFA is the football world governing body, which recognizes six continental confederations that oversee the game in the different continents and regions of the World.[38] However, 209 national associations standing at the bottom of the pyramid, and not the continental confederations, are members of the FIFA.[39] Interestingly, the FIFA has more members than the United Nations as it recognizes certain entities as distinct nations, such as the four Home Nations within the United Kingdom[40] and politically disputed territories such as Palestine.[41]

The FIFA is an association established under Swiss law, with its seat in Zürich. The FIFA Congress is the organisation's supreme and legislative body.[42] It is an assembly composed of representatives from each affiliated national member association, which each have one vote. The FIFA Congress makes

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[37] J. Exner (2016), op. cit., p. 8.
[38] FIFA Statutes (2015), rule 20. These confederations are Asian Football Confederation (AFC; 46 members), Confederation of African Football (CAF; 54 members), Confederation of North, Central American and Caribbean Association Football (CONCACAF; 41 members), Confederación Sudamericana de Fútbol, (CONMEBOL; 10 members), Oceania Football Confederation (OFC; 11 members) and Union of European Football Associations (UEFA; 53 members).
[39] FIFA Statutes (2015), definition 10.
[40] These four Home nations of the United Kingdom are England, Northern Ireland, Scotland and Wales.
[41] „Palestine Football: Escape to Victory?", *Bruisedearth*, 27 October 2008, retrieved 10 April 2017.
[42] FIFA Statutes (2015), definition 8.

decisions relating to the FIFA's governing statutes and their method of implementation and application. Furthermore, the FIFA Congress approves the annual report, decides on the acceptance of new national member associations and holds elections. Lastly, the FIFA Congress also elects the President of the FIFA, its General Secretary and the other members of the FIFA's Executive Committee on the year following the FIFA World Cup.[43]

The FIFA's Executive Committee is the main decision-making and executive body of the FIFA.[44] It is composed of 25 people: the President, 8 Vice Presidents and 16 members, of whom at least one must be a woman. The Executive Committee is the body that decides which country will host the World Cup.[45] The President and the General Secretary are the FIFA’s main officeholders who are in charge of its daily administration carried out by the General Secretariat with its staff of approximately 280 members.[46] Furthermore, the FIFA's organisational structure consists of several other bodies under the authority of the Executive Committee or standing committees created by the Congress. Amongst those bodies, there are the FIFA Emergency Committee, the FIFA Finance Committee, the FIFA Disciplinary Committee, and the FIFA Referees Committee.[47]

Decisions of international sporting governing bodies, including the FIFA, are binding on their affiliated continental or national associations as well as on any athlete or player engaging in sport in an official competition recognized by the governing body. Within the pyramid structure of a respective sport, international sporting governing bodies’ rulings are final. However, the Court

[43] Ibid., rules 22-29.
[44] Ibid., definition 9.
[45] Ibid., rules 30-31.
[46] Ibid., rules 32 and 71-72.
[47] Ibid., rules 33-60.

of Arbitration for Sport (CAS),[48] an institution established with the idea of being the "Supreme Court of World Sport",[49] can reverse the international sports organisations' decision during an appeal procedure. The CAS is independent of any international sports federation and provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.[50]

International sporting governing bodies dispose of limited regulatory autonomy. In order to exercise their rights and obligations, these federations may set up their own governing bodies and establish "autonomous decision making processes"[51] pursuant to the law of the country where they were established or where their seat is situated.[52] In other words, they are equipped with regulatory power to define their respective rules.[53]

Within the boarders set by law, international sporting governing bodies are free to establish rules that govern their sports at international level and that are binding on national sports organisations responsible for such a sport at

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[48] Article 75 of the Swiss Civil Code, which is a mandatory provision of the Swiss law, allows for an appeal to a court or an arbitral tribunal. International sporting governing bodies may decide whether the CAS has jurisdiction to rule on a specific issue. On the other hand, if the dispute in question is not covered by the arbitration clause, the Swiss courts have jurisdiction to rule on the dispute.

[49] Former IOC President Jean Antonio Samaranch initiated the foundation of the CAS as the "Supreme Court of World Sport". See for example R. MacLaren, "Twenty-Five Years of the Court of Arbitration for Sport: A look in the rear-view mirror" (2010), Marquette Sports Law Review, p. 306.

[50] For the status and functioning of the CAS see Code of Sports-related Arbitration (in force as from January 2016) and the CAS's website: http://www.tas-cas.org/en/index.html; regarding the relationship of EU law and the CAS, see A. Duval, "The Court of Arbitration for Sport and EU Law. Chronicle of an Encounter" (2015) Maastricht Journal of European and Comparative Law, Year 2015, Number 2.

[51] European Sports Charter (1992, revised 2001), article 3.

[52] J. Exner (2016), op. cit., p. 9.

[53] Ibid., p. 6.

national level as well as on all persons engaging in an activity under the patronage of such an international sporting governing body. The last mentioned aspect, namely the obligatory effect of international sporting governing bodies' rules on athletes, members of accompanying teams, officials and other persons deserves further exploration.

1.2. Binding Effect of International Sporting Governing Bodies' Rules on Athletes and Other Persons

The rules of international sporting governing bodies bound athletes and other persons engaging in an activity governed by such a sporting body. The reason is that the sports organisation and the athlete or other persons are parties to either registered or unregistered contract, which grants them mutual rights and imposes on them reciprocal obligations. Athletes or other persons enter into a contractual relationship with the sports organisations usually by explicitly declaring to obey certain rules or by simply behaving according to such rules while participating in the organisations' activities.

As has been illustrated above, international sporting governing bodies originate and function as private entities or non-governmental organisations in the form of foundations, trusts or societies. They are often registered or in a country where they are established or where they undertake their activities.[54] These private entities set up their statutes and other internal regulations, which athletes and other persons must respect if they want to be members of these entities and engage in their activities, including organisation of national and international competitions in their respective sports.

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[54] Ibid.

Some athletes have challenged the nature of a contract with international sporting governing bodies, which they consider forced because there is a lack of consent on their side. Simply, they have no other choice then to accept the organisation's conditions if they want to practice their sport at international level. Such athletes usually claim that the international sporting governing body in question abuses its dominant position by enacting and imposing on athletes rules, which they have no possibility to influence and they must still obey them.

For example, the most successful German Olympian of all times, the speed skater Claudia Pechstein has been challenging the regulations of the International Skating Union (ISU) and the procedural rules of the CAS since 2009, when she was accused and consequently condemned for taking prohibited substances. She failed before the competent ISU authorities, the CAS, the Federal Supreme Court of Switzerland and so far before German national courts. Claudia Pechstein, as well as the sporting world, awaits now the final decision of the German Constitutional Court, with which she lodged a complaint. There is also her complaint lodged with the European Court of Human Rights after the final ruling of the Federal Supreme Court of Switzerland.[55]

Claudia Pechstein has claimed, amongst other, that the ISU abuses its dominant position by imposing on her an arbitration clause to the CAS. In other words, she challenges the lack of consent in her contract with the ISU because

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[55] All the relevant legal documents are available on her website at http://www.claudia-pechstein.de/gerichtsunterlagen.php. On the complained lodged with the ECHR see Complaint no. no 67474/10. On the dispute see also D. McArdle, "Longitudinal profiling, sports arbitration and the woman who had nothing to lose: some thoughts on Pechstein v. International Skating Union" in M. McNamee, V. Møller (Ed.), *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives* (Ethics and Sport, Abingdon, Oxon: Taylor & Francis, Routledge), pp. 50-65.

the ISU Constitution imposes a binding arbitration before the CAS on all ISU members.[56] The German Federal Tribunal, so far the last instance in this case, accepted the arbitration clause stating that Claudia Pechstein voluntarily accepted the jurisdiction of CAS. The court added that the monopolistic situation of the ISU, the acceptance by athletes of the ISU regulations and of the arbitration clause in favour of CAS do not constitute an abuse of a dominant position in the sense of German competition law. According to the court, the CAS is a genuine arbitral tribunal in the sense of German law.[57]

In my opinion, the current setting in which athletes, members of accompanying teams, officials and other persons consent to respect and abide by international sporting governing bodies' rules when they want to engage in their activities is legal. Even though the athletes' contractual freedom seems limited, I believe that it is necessary that a sports organisation, which is responsible for the conduct of a sport and all related activities, enacts and enforces rules governing such activities. Nevertheless, the nature of athletes' consent deserves further discussion, in which the German Constitutional Court and the European Court of Human Rights will hopefully participate.

To proceed, international sporting governing bodies enact rules, which are binding on athletes as well as on any other person engaging in the activity shielded by the sports organisation in question. These sporting rules include a broad range of regulations comprising those determining conditions under which athletes can represent their country in international competitions. I thoroughly discuss rules governing athletes' eligibility in national teams in the following paragraphs.

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[56] ISU Constitution (2016), articles 26 and 27.

[57] BGH, 7. 6. 2016 - KZR 6/15, *Pechstein v. International Skating Union* [2016].

1.3. International Sporting Governing Bodies' Rules Governing Athletes' Eligibility for National Teams

The history of sport offers an infinite number of examples of athletes who could change or have changed the country that they represent in international competitions during their careers. Siblings litter the recent history of football. There may not be a more intriguing brotherhood than that of George, Kevin-Prince and Jérôme Boateng. They were all born in Germany and they have all played football since their childhood. While the career of George was restricted to a handful of appearances for a local amateur outfit, Kevin-Prince and Jérôme Boateng shot to fame as professionals.

Jérôme Boateng is a defender of Bayern Munich and the German national team, of which he was one of the key figures at the winning 2014 the Fédération Internationale de Football Association World Cup in Brazil. A talented attacker, Kevin-Prince Boateng had been a regular fixture in the German youth set-up. However, following several disagreements with the German football association, he turned his back on his country of birth and instead opted to represent Ghana, the birthplace of his father. In 2010, the two brothers lined up on different sides of the pitch in a group D match at the Fédération Internationale de Football Association (FIFA) World Cup in South Africa.[58]

The 22 year-old football player Adnan Januzaj could choose to play at international level for five countries. Januzaj's Albanian father Abedin moved from Kosovo to Belgium in 1992 to avoid recruitment by the Yugoslav's People's Army. The family of Abedin's wife and Adnan's mother, Ganimete

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[58] „George, Kevin-Prince and Jérôme Boateng: football's intriguing brothers", *Guardian*, 22 April 2015, retrieved 10 April 2016; see also J. Exner, Sporting nationality in the light of European Union law, (Prague, 2016, master's thesis, Charles University, Faculty of Law), p. 2.

Sadikaj, was deported by the Serbs from Kosovo to Turkey with the aim of suppressing Albanian nationalism. Adnan Januzaj's family later moved to Belgium, where Abedin and Ganimete met. Adnan was born in Brussels on 5 February 1995 and spent most of his career in Belgium before moving to England in 2011 to play for Manchester United.[59] All in all, he had been eligible to play for Albania, Belgium, England[60], Kosovo[61] and Turkey. Out of the five possible sporting nationalities, he opted for the Belgian one and committed himself to local national team in 2014.[62]

The handball goalkeeper Danijel Šarić has played for four national teams in the course of his career. He was born in 1977 in Boboj, Bosnia and Herzegovina. Thanks to his family roots, Danijel Šarić firstly played for the national team Serbia and Montenegro from 2004 to 2007 and, when the federation broke up in 2006, he decided to represent Montenegro. In 2010 and 2011, Danijel Šarić played for his original country Bosnia and Herzegovina before he was naturalised by Qatar and started representing his new country in 2014. He helped the Qatari team to step nearly on top of the world handball

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[59] „Inside Adnan Januzaj's world: Owned by United, chased by England... the wonder boy whose parents escaped the Kosovo war to move to Belgium. Read his amazing story", *Mail Online*, 16 October 2013, retrieved 10 April 2016.

[60] Januzaj's eligibility in the national team of England is disputable. Januzaj's eligibility relates in this respect to the relationship between Articles 6(2) and 7(d) of the Regulations Governing the Application of the Fédération Internationale de Football Association (FIFA) Statutes. Januzaj does not meet the criteria set out in the aforementioned Article 7(d) and he would therefore need an exception from the FIFA in order to be eligible to play for England.

[61] Kosovo is not a member of the FIFA. Therefore, the Regulations Governing the Application of the FIFA Statues do not apply. As a consequence, Kosovo may field any citizen of Kosovo, even if he elected a national team pursuant to Article 5(2). When Kosovo becomes a full member of the FIFA, such a player will no longer be eligible to play for the country.

[62] „Belgium 1-0 Tunisia: Adnan Januzaj wins his first cap in hailstorm delayed victory... but Romelu Lukaku limps off with injury", *Mail Online*, 7 June 2014, retrieved 10 April 2016.

stage getting silver medal at the 2015 World Handball Championships in Qatar.[63]

Biathlon is a great example of an individual sport in which athletes often change the country that they represent in international competitions. The Russian-born athlete Anastasia Kuzmina, originally Shipulina, married her current coach and the Israeli cross-country skier Daniel Kuzmin in 2007. They later moved to Slovakia and Anastasia started representing her new nation in December 2008, winning the sprint competition at both 2010 and 2014 Winter Olympics. Her brother Anton Shipulin continues to wear the Russian national jersey in which he became both the Olympic and the World Champion.[64]

Another biathlete Jakov Fak was born in Croatia in 1987 and got one bronze medal for his original country at the 2010 Winter Olympics in Vancouver where he had the honour of carrying the Croatian flag in the opening ceremony. Later that year, Jakov Fak announced the change of his country of representation and obtained Slovenian passport on 24 November 2010. At the 2011 World Cup races in the United States, he suffered frostbite to his trigger finger, which endangered his future career. Fortunately, Jakov Fak managed to recover and he has, up to the present day, managed to win for Slovenia two gold medals at the 2012 and 2015 World Biathlon Championships.[65]

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[63] Danijel Šarić Profile, European Handball Federation, archived from the original on 10 June 2017, retrieved on 10 June 2017,

[64] Anastasiya Kuzmina Profile, International Biathlon Union, archived from the original on 9 June 2017, retrieved on 10 June 2017; Anton Shipulin Profile, International Biathlon Union, archived from the original on 9 June 2017, retrieved 9 June 2017.

[65] Jakov Fak Profile, International Biathlon Union, archived from the original on 9 June 2017, retrieved 9 June 2017.

The Boateng brothers, Adnan Januzaj, Danijel Šarić, Anastasia Kuzmina, Jakov Fak, as well as many others,[66] are examples of a long row of athletes who could change or have changed the country that they represent in international competitions during their careers. Athletes can opt for another country due to their birthplace, parentage, ancestry, residence or for many other reasons. In any of these cases, they must comply with the rules of international sporting governing bodies[67] determining their sporting nationality. Rules coming under this category are most importantly quotas of naturalised athletes, waiting periods, rules determining the election of sporting nationality or prohibiting its change as well as all other regulations influencing the possibility for an athlete to represent a country of her or his choice.[68]

One of the main tasks of international sporting governing bodies in the process of regulation of a sport at international level is to establish criteria pertaining to athletes' eligibility for their national teams. In other words, international sports federations are responsible for determination of requirements that athletes need to fulfil in order to be able to represent their countries in international competitions.[69] When doing so, international

[66] Examples of other athletes who have changed their national teams in the course of their careers: Alpine skiing – Kilian Albrech (Austria to Bulgaria); biathlon – Nathalie Santer-Bjørndalen (Italy to Belgium), Michael Rösch (Germany to Belgium); cycling – Christopher Froome (Kenya to United Kingdom); figure skating - Aljona Sawtschenko (Ukraine to Germany); football – Diego Costa (Brazil to Spain), Miroslav Klose (Poland to Germany), Pepe (Brazil to Portugal), Lukas Podolski (Poland to Germany); ice hockey - Peter Šťastný (Czechoslovakia to Canada to Slovakia); nordic skiing – Kateřina Smutná (Czech Republic to Austria to Czech Republic), Johann Mühlegg (Germany to Spain); tennis – Ivan Lendl (Czechoslovakia to USA), Martina Navrátilová (Czechoslovakia to USA).

[67] Also referred to as international sports associations, international sports federations or international sports organisations.

[68] J. Exner (2016), op. cit., p. 2.

[69] Ibid., p. 10.

federations and organisers of multi-sport competitions must seek to balance their interest and values with the legitimate rights of athletes.[70]

In the 20th century, legal nationality was the exclusive criteria for determining athletes' eligibility in their national teams.[71] International Court of Justice (ICJ) defined legal nationality in 1955 in the famous *Nottebohm* case as "legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[72] According to the ICJ, legal nationality constitutes the juridical expression of the fact that an individual, upon whom the legal nationality is conferred either directly by the law or by an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state.[73]

However, primarily the increased athletes' cross-border mobility[74] at the turn of the 20th and the 21st century,[75] undermined the exclusivity of the criterion of legal nationality in determination of conditions that athletes must fulfil in

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[70] Y. Hafner, "Change in Sporting Nationality : the "Next Bosman"?" (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3.
[71] H. Iorwerth, A. Hardman, C. R. Jones, "Nation, State and Identity in International Sport" (2014) National Identities, 16:4, p. 329; on the influence and implications of legal nationality in sports see M. Pautot, *Sport et nationalité. Quelle place pour les joueurs étrangers?*, (L'Harmattan, 2014), pp. 269; A. Calmat, "Sport et nationalisme" (1992) Pouvoirs n°61 - Le sport, pp. 51-56; A. Hervé, "Les problèmes éthiques de la nationalité dans le sport" (2009) Colloque international Ethique et sport en Europe, Université Rennes II, Rennes : France, pp. 1-10.
[72] *Nottebohm* (*Liechtenstein* v. *Guatemala*), ICJ Reports 1955: 4, 23; see European Convention on Nationality, article 2, for a very similar definition.
[73] Ibid.
[74] M. Lajous, "Jeux et enjeux autours des questions de nationalité sportive" in M. Attali, N. Bazoge (Ed.), *Diriger le sport. Perspectives sur la gouvernance du sport du xxe siècle à nos jours*, (CNRS Editions, 2012), p. 286.
[75] Athletes' eligibility in national teams became an issue even earlier. There are examples of athletes changing their eligibility during the ancient Olympic Games in Greece (To this end, see Y. Hafner, "Sporting Nationality in the Ancient and Modern Olympic Games" (2009) Proceedings of the 17th International Seminar on Olympic Studies for Postgraduate Students, International Olympic Academy, Ancient Olympia).

order to be eligible to participate in international competitions in their national jersey.[76] Moreover, many countries have been attracting highly skilled athletes - migrants, including providing fast-tracks for acquiring citizenship,[77] as a part of an ambitious vault onto the world sporting stage[78] with the aim of gaining prestige through their athletes' success at international level.[79] They have therefore been naturalising top athletes and welcoming those who are interested only in being sporting mercenaries.[80]

For example, at the 2015 World Handball Championships, the Qatari team marked a historical result finishing second. However, only four of the 17 players in the squad were native to Qatar.[81] A large number of players in the Qatari team had been naturalised in the years leading up to the championship. The respective rules of the International Handball Federation allowed several foreign-born players, including Spanish-born Borja Vidal, Goran Stojanović and Jovo Damjanović from Montenegro, and Bertrand Roiné, who previously played for France, to play for Qatar at the championship.[82]

Only one year later, At the 2016 Summer Olympics in Rio de Janeiro, 38 Qatari athletes represented their nation in 10 sports, the high jumper Mutaz Essa Barshim being the most successful one winning the first silver medal at the country's ninth consecutive appearance at the Summer Olympics. Looking closely at the Qatari Olympic team, 23 out of 38 athletes were born outside

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[76] CAS 2007/A/1377, *Mélanie Rinaldi v. Fédération Internationale de Natation (FINA)*, [2007].

[77] A. Shachar, R. Hirschl, "Recruiting "Super Talent": The New World of Selective Migration Regimes" (2013) Indiana Journal of Global Legal Studies, Vol. 20, Issue 1.

[78] J. Exner, "European Union Law and Sporting Nationality: Promising Alliance or Dangerous Liaison? (2017) LexisNexis.

[79] A. M. Mestre (2009), op. cit., p. 75.

[80] Y. Hafner (2008), op. cit., p. 1.

[81] „Falsche Fans simulieren Stimmung", *Frankfurter Allgemeine*. 20 January 2015, retrieved 10 June 2017.

[82] „Qatar's foreign legion primed for handball date with Germany", *DW*, 27 January 2015, retrieved 10 June 2017.

Qatar. For example, 11 out of 14 handball players gained Qatari nationality by naturalisation.[83]

It is exactly this trend that raises concerns with respect to eligibility for international sporting representation, which traditionally relies on citizenship/legal nationality as a main tying factor.[84] This is especially true as many countries provide citizenship to athletes without apllying even the most basic residency and genuine-cultural link requirements.[85] Therefore, the assumption, according to which citizenship is a straightforward criterion to establish a genuine link between the involved athlete and the state in question,[86] can no longer be upheld.[87]

Reflecting the aforementioned new factors, international sporting governing bodies have consequently started including in their regulations other requirements determining athletes' eligibility for national teams.[88] "[E]ach international federation and every organiser of multi-sports competition, including the IOC, have adopted their own rules regarding athletes' [eligibility in national teams], each with their own aims of providing continuity for their competitions but also to avoid issues linked to mercenaries and athletes' mobility.[89] The conditions determining athletes' country of representation relate typically to the place of birth[90] or the place of residence.[91] Another example of

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[83] T. Finn, „Qatar's recruited athletes stir debate on citizenship", *Reuters*, 25 August 2016, retrieved 11 December 2016.

[84] H. Iorwerth, A. Hardman, C. R. Jones (2014), op. cit., p. 329.

[85] A. Shachar, "Picking Winners: Olympic Citizenship and the Global Race for Talent" (2011) 120 Yale L. J. 2088, p. 2108.

[86] G. R. De Groot, "Sporting Nationality: Remarks on the Relationship between the General Legal Nationality of a Person and His "Sporting Nationality" (2006) International Sports Law Journal, No. 1-2, p. 4.

[87] H. Iorwerth, A. Hardman, C. R. Jones (2014), op. cit., p. 335.

[88] J. Exner (2016), op. cit., p. 12.

[89] Y. Hafner (2008), op. cit., p. 1.

[90] J.-P. Dubey (2004), op. cit., p. 37.

these rules is the "waiting period", requiring from an athlete having changed his nationality to abstain from participation in international competitions for a certain period of time.[92]

The complex set of rules governing athletes' eligibility for national teams constitutes "sporting nationality". Even though there is no common definition of this concept within international sports federations,[93] the CAS recognized this notion for the first time in 1993 in *B. v. International Basketball Federation (FIBA)*. The CAS stated that sporting nationality is a "uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competitions."[94] This notion, however, does not concern only athletes. In fact, some international sports federations, for example the ISU, have established eligibility rules also for officials, referees and judges.[95]

Sporting nationality is a different notion from that of legal nationality and these two concepts do not always necessarily need to overlap.[96] Sporting nationality, as a concept of international sporting governing bodies as private entities, differs from a public law concept of legal nationality, which concerns rather "the personal status deriving from citizenship of one or more states."[97] From 1993 on, the CAS panels have consistently upheld this dualism when

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[91] J. A. R. Nafziger, *International Sports Law*, 2nd ed. (Martinus Nijhoff, 2004), p. 133.
[92] J. P. McCutcheon, "National eligibility rules after Bosman" in A. Caiger (Ed.), *Professional Sport in the EU:Regulation and Re-Regulation*, (T.M.C. Asser Press, 2001), p. 127.
[93] Y. Hafner (2008), op. cit., p. 1.
[94] CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards 1986–1998*, (1998, Staempfli Editions), Number 15, p. 304; Y. Hafner (2012), op. cit., p. 216.
[95] ISU Special Regulations & Technical Rules, Single and Pair Skating & Ice Dance (2016), rules 411, 412, 413.
[96] J. Exner (2016), p. 12.
[97] CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998), op. cit., p. 304. Y. Hafner (2012), op. cit., p. 216.

concluding that legal and sporting nationalities may differ.[98] Therefore, two specific situations can occur. An athlete can be legally a national of a certain country but not be eligible to represent that country at international level. On the other hand, an athlete does not have to be a national of a country but can still be eligible to represent it in international competitions.[99]

Even though the IOC establishes unique criteria for the participation in the Olympic Games, each international sports federation can set its own set of rules regarding athletes' eligibility in national teams. Rule 40 of the Olympic Charter provides that a competitor must respect and comply with, amongst others, the conditions of participation established by the IOC, as well as with the rules of the relevant international sports federation.[100] The Bye-law to Rule 40 of the Olympic Charter specifies that "each (international federation) establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval."[101]

Therefore, sporting nationality rules of various international sports federations may be and in many cases are different. The fact that there is no "harmonization" amongst international sports organisations, which independently set their eligibility criteria, brings some complicated situations.[102]

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[98] CAS 98/2009, *Spanish Basketball Federation (FEB) / International Basketball Federation (FIBA)*, [1999], M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 1998 – 2000*, (Kluwer Law International, 2002), Number 9, p. 503; CAS 98/215, *International Baseball Association (IBA)*, Advisory Opinion, [1999].
[99] J.-P. Dubey (2004), op. cit., p. 37.
[100] Olympic Charter (2016), rule 40.
[101] Olympic Charter (2016), by-law 1 to rule 40.
[102] A. S. Wollmann, O. Vonk, G. R. de Groot, "Towards a sporting nationality?" (2015) Maastricht journal of European and comparative law, Vol. 22, Number 2, p. 305-306.

For example, an athlete who may qualify in a country for one sport might not be eligible to qualify under the same conditions for a different sport.[103]

Different authors have proposed different solutions in order to simplify this issue. Yann Hafner claims that sporting world should refine the concept of sporting nationality and adopt a more comprehensive and integrated set of rules. He suggests that if an athlete has gained eligibility under a certain set of rules, other international sports organisations should equally recognise such eligibility.[104] A Swiss professor Denis Oswald proposes the creation of the Olympic sporting nationality that would exclusively govern athletes' eligibility in their national teams within the Olympic Movement.[105]

Dora Kostakopoulou and Annette Schrauwen introduce a "participatory growth model" with relatively flexible naturalization criteria and residence requirements.[106] Finally, Anna Sabrina Wollmann, Olivier Vonk and Gerard-René de Groot advocate a "sporting licence" of the country of which athletes are nationals that would avoid confusions as to whether a sporting nationality includes some of the rights and obligations linked to the concept of legal nationality.[107]

I tackle different aspects of the aforementioned arguments in various parts of this J. D. thesis. Nevertheless, this theoretical dispute is not as such an object of this work, which rather focuses on the compliance of sporting

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[103] R. Siekmann, "Sport and Nationality: « Accelerated' Naturalisation for National Representative Purposes and Discrimination Issues in Individual Team Competitions under EU law" (2011) The International Sports Law Journal 85, Vol. 3-4, p. 241-268.
[104] Y. Hafner (2012), op. cit., pp. 215-238.
[105] D. Oswald, "Nationalité dans le sport" in P. Cholley (Eds.), *Treizième [XIIIe] Congrès olympique, Copenhague 2009 : contributions*, (Comité International Olympique, 2009), pp. 71-74.
[106] D. Kostakopoulou, A. Schrauwen, "Olympic Citizenship and the (Un)Specialness of the National Vest: Rethinking the Link between Sport and Citizenship Law" (2014), 10 International Journal of Law in Context, pp. 143-162.
[107] A. S. Wollmann, O. Vonk, G. R. de Groot (2015), op. cit., p. 305-321.

nationality with the requirements imposed by the EU legal order. Therefore, having discussed the legal status, organisation and functioning of international sporting governing bodies, their regulatory autonomy and nature and character of rules determining athletes' eligibility to play for national teams, I will now move to the general framework for assessing the compliance of sporting nationality rules with respective provisions of EU law, including the case law of the CJEU.

2. European Union Law and Sporting Nationality: Scope, Restriction, Justification

I submit that the CJEU, the European Commission and other EU bodies and institutions follow a three-step test, which is generally used for an assessment of compliance of any measure with EU law in the internal market,[108] when they assess the compliance of sporting rules, including those governing athletes' eligibility in national teams, with EU law. The CJEU, the European Commission and other EU bodies and institutions firstly consider whether sports rules fall within the scope of EU law and therefore cannot escape review of EU authorities (Chapter 2.1).

If so, they then assess whether the sporting rules constitute a restriction to the citizenship, free movement and competition law provisions (Chapter 2.2). Thirdly, they examine justification and the proportionality of the restrictions (Chapter 2.3.).[109] The CJEU, the European Commission and other EU bodies and institutions would engage in the same analysis when dealing with rules determining athletes' eligibility for national teams since they apply a very similar approach to all sporting rules without greatly distinguishing them according to their specificities.[110]

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[108] For a general overview of the application of this test to the free movement of persons and services, see C. Barnard, *The Substantive Law of the EU, The Four Freedoms, 5th ed.* (Oxford University Press, 2016).

[109] This division is nicely illustrated for example in Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, First, the ECJ assesses whether Mr Lehtonen and respective basketball rules fall within the scope of EU law (paragraphs 32-46). Thereafter, the existence of an obstacle to freedom of movement for workers is examined (paragraphs 47-50). Finally, the ECJ engages in exploring whether such a restriction can be justified (paragraphs 51-59).

[110] J. Exner (2016), op. cit., p. 15.

2.1 Do Rules Governing Sporting Nationality Fall Within the Scope of European Union Law?

The opening step on the journey of assessing the compliance of rules determining conditions of athletes' eligibility for national teams with EU law consists of answering the question as to whether EU law actually applies to these rules. If I answer this question in the affirmative, I will discuss concrete provisions of EU legal order, which are applicable to rules governing sporting nationality.

The CJEU's case law towards sporting rules in general and those regarding national teams in particular have developed in two historical periods. Firstly, the CJEU have for a long time considered such rules as having no economic impact or effect and thus falling outside the scope of EU law (Chapter 2.1.1). In 2006, however, the CJEU reflected economic dimension of contemporary sports and pulled them into the field of application of EU law in *Meca-Medina & Majcen* (Chapter 2.1.2).[111]

2.1.1 Before *Meca-Medina & Majcen*: National Teams Exception

The ECJ started a line of its case law pursuant to which issues regarding the composition of national teams have fallen outside the sphere of competence of EU institutions for their purely sporting nature in the 1974 judgment in *Walrave*.[112] The ECJ articulated the existence of an exemption for national teams while dealing with a rule of the International Cycling Union (UCI) requiring pacemakers to be of the same nationality as track cyclists.[113] In general, the ECJ

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[111] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492.

[112] Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140; see also J. Exner (2016), op. cit., p. 33.

[113] Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140.

decided that sport falls within the scope of EU law in so far as it constitutes an economic activity.[114]

Regarding national teams, however, Advocate General Warner invited the ECJ to decide that "rules of organisations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent" are compatible with EU law.[115] The ECJ, seemingly following the Advocate General's opinion, held that the prohibition of discrimination on grounds of nationality "does not affect the composition of sports teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity."[116]

Apart from acknowledging the exception for national teams, the judgment in *Walrave* is important also for it recognized the horizontal direct effect of the provisions concerning free movement of workers and services. The ECJ ruled that this prohibition of discrimination "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed in regulating in a collective manner gainful employment and the provision of services."[117] The ECJ therefore enabled athletes to invoke such provisions also against international sporting governing bodies.[118]

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[114] Ibid., paragraph 4.
[115] Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, Opinion of the Advocate General Warner, 1st col., p. 1526.
[116] Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, paragraph 8.
[117] Ibid., paragraph 17; on the horizontal direct effect see, in general, M. Tomášek, V. Týč (Eds.) (2013), pp. 65-74.
[118] J. Exner (2016), op. cit., p. 33.

Two years later, the ECJ faced direct nationality discrimination in professional football for the first time in *Donà*.[119] According to respective Italian rules, only those football players affiliated with the Italian Football Federation (FIGC) could play in professional matches.[120] The ECJ held that rules governing a sport must have complied with provisions on the free movement of persons and services in so far as the sport was practiced as economic activity.[121]

On the other hand, the ECJ accepted rules excluding "foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only such as, for example, matches between national teams from different countries."[122] As in *Walrave*, the ECJ underlined that such rules must have remained limited to their proper objectives.[123] In the end, however, the ECJ found the Italian national measure incompatible with EU law unless it excludes foreign players from participation in certain matches for reasons that are of sporting interest only.[124]

The judgment in *Donà* led to a gentlemen's agreement between the European Commission and the UEFA, under which national associations had to allow every first division team to field at least three foreign players and two players who have played in the country for an interrupted period of five years.[125] It is interesting that just this so-called "3+2" rule approved by the European Commission was challenged alongside transfer fees between clubs in

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119 Case C-13/76, *Dona* v. *Mantero*, [1976] EU:C:1976:115.
120 Ibid., paragraph 5.
121 Ibid., paragraphs 12-13.
122 Ibid., paragraph 14.
123 Ibid., paragraph 15; see also C. Barnard (2016), op. cit.
124 Case C-13/76, *Dona* v. *Mantero*, [1976] EU:C:1976:115, paragraph 19.
125 C. Barnard (2016), op. cit.

1995 in *Bosman*, the ECJ's probably most famous sports-related judgment to this day. [126]

In *Bosman*, the ECJ began by stating that "rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches" could be exempt from the scope of EU law, when they remain limited to their "proper objective".[127] However, the ECJ added that this fact cannot "be relied upon to exclude the whole of a sporting activity from the scope of the Treaty."[128] In this particular case, the ECJ ruled that the aforementioned nationality clauses were not limited to their proper objective since they did not concern specific matches between teams representing their countries but applied to all official matches between clubs and thus to the essence of the activity of professional players.[129]

In this judgment, the ECJ confirmed the horizontal direct effect of provisions of EU law regarding the freedom of movement for workers arguing that the principle of non-discrimination applied to clauses contained in the regulations of sporting associations that restricted the rights of players to take part in football matches. The ECJ stated that if EU law did not apply to this situation, what is now Article 45 of the Treaty on the Functioning of the European Union (TFEU) would be "deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the (EU) rendered nugatory."[130]

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[126] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463.
[127] Ibid., paragraph 76.
[128] Ibid.
[129] Ibid., paragraph 128.
[130] Ibid., paragraph 129; see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 30-32.

Having decided that these rules fell within the scope of EU law, the ECJ swiftly considered that this restriction to the freedom of movement for workers could not be justified. Regarding the reasons that could possibly vindicate discrimination on grounds of nationality, the authors of the Study on the equal treatment of non-nationals in individual sports competitions submit that the ECJ seemed to consider other reasons than public policy, public health and public security enshrined in Article 45(3) TFEU. They claim that the ECJ was prepared to take into consideration the inherent nature of a club's links with the Member State in which it plays or its subnational region.[131] The ECJ, however, rejected this because such a link did not in fact exist.[132] The ECJ accepted as a legitimate reason the need to protect competitive balance between professional clubs, but in the end considered the rule disproportionate since it was not necessary for reaching this objective.[133]

Regarding the second contested rule in *Bosman*, notably transfer fees between clubs, the ECJ went beyond the discrimination model and focused rather on the concept of market access.[134] According to the ECJ, these rules were not discriminatory since they applied equally to nationals of different Member States.[135] Nevertheless, the ECJ held that since the transfer rules "directly affect players' access to the employment market in other Member States", they were capable of impeding the freedoms of movement for workers.[136] Finally, the

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[131] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 29.
[132] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraphs 130-133.
[133] Ibid..
[134] J. Exner (2016), op. cit., p. 36.
[135] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 103.
[136] Ibid., paragraphs 103; see also C. Barnard (2016), op. cit.

transfer rules did not pass the justification phase and the ECJ held them incompatible with EU law.[137]

The *Bosman* ruling has had great influence on international sports organisations and their regulatory autonomy.[138] In this respect, Stefaan Van den Bogaert notes that, as a result of the judgment, "[t]he sporting associations had no option but to adapt to the new reality *Bosman* created: athletes have rights under EU law, and they can have them enforced before the ordinary courts."[139] Stefaan Van den Bogaert further adds that sporting governing bodies have definitely and irrevocably lost their aura of immunity under EU law. Even though sport remains primarily their affair, their "regulatory autonomy is conditional, for due account must be taken of the requirements of EU law."[140]

In 2000, the ECJ dealt with rules regarding the limit on the number of athletes from every national judo federation allowed to participate in each international tournament. A judoka Christelle Deliège argued that she engaged in an economic activity and that these rules restricted her freedom to provide services. The ECJ ruled once again that EU law does prevent "rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries."[141] Recalling its previous sports related case law, the ECJ nevertheless stressed that such a restriction

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[137] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraphs 105-114.
[138] J. Exner (2016), op. cit., p. 36.
[139] S.C.G. Van den Bogaert (2015), op. cit., pp. 175-176.
[140] Ibid. On the practical consequences of the *Bosman* ruling see also P. Hamerník, Sportovní právo. Hledání rovnováhy mezi specifickou sportovní úpravou a platným právem, (Praha: Ústav státu a právu AV ČR, 2012), pp. 50-53; see also P. Hamerník, "O vlivu práva EU na status sportovce" in J. Pichrt (Ed.), *Sport a (nejen) pracovní právo*, (Wolters Kluwer, 2014), pp. 49-58.
[141] Joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199, paragraph 43.

"must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity" from the scope of EU law.[142] Finally, the ECJ decided that the contested regulation did not in itself breach the freedom to provide services.[143]

Only two days later, the ECJ reached a similar conclusion in *Lehtonen*.[144] In this case, the rules of a Belgian basketball association prohibited a basketball club from fielding in national championship matches players from other Member States who had been transferred outside of mandated "transfer windows".[145] The ECJ decided that these rules restricted the freedom of movement for workers and therefore constituted an obstacle to such freedom.[146] In the end, the ECJ left it to the national court to consider the extent to which objective reasons, concerning only sport as such, justify such treatment.[147]

In *Kolpak*, *Simutenkov* and *Kahveci*, the ECJ considered discrimination against non-EU nationals who were protected by the association agreement clauses analogous to the fundamental freedoms of EU citizens.[148] In these particular cases, the ECJ concluded that the reasons put forward by international sporting governing bodies to justify such discrimination went beyond the *Walrave* purely sporting exception. The reason was that the clauses did not concern specific matches between teams representing their countries

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142 Ibid.

143 Ibid., paragraph 69; on the reasoning and the implications of the judgment see also S.C.G. Van den Bogaert, "The European Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?", (2000) European Law Review 25, pp. 554-563.

144 Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201.

145 The transfer window is the period during the year in which a football club can transfer players from other countries into their playing staff.

146 Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraph 49.

147 Ibid., paragraph 59; see also C. Barnard (2016), op. cit.

148 Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255; Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213; Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450.

but applied to all official matches between clubs and thus to the essence of the activity of professional players.[149]

In the light of the abovementioned, it was not easy to determine the exact approach of the ECJ towards national teams. According to Yann Hafner, the differences in the wording of the clauses regarding the exemption of national teams from the scope of EU law are the primary source of the problem.[150] In the first place, the ECJ seemed to uphold the claim that national teams fell outside the scope of EU law.[151] However, it took a more restrictive attitude in *Donà* when it held that the exemption "might be limited not to the composition [of national] teams as such, but merely the exclusion of [foreign] players from certain matches."[152]

Another change of direction came with *Bosman* where the ECJ ruled that the "whole of a sporting activity" can no longer be excluded from the scope of EU law.[153] In this respect, Richard Parrish and Samuli Miettinen conclude that rules determining conditions of athletes' eligibility for national teams fall within the scope of EU law.[154] I submit that the ECJ made another step on this way towards the capture of sporting rules into the EU net in 2006 in *Meca-Medina & Majcen*.[155]

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149 Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255, paragraph 54; see also Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213, paragraphs 38-39 and Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450, paragraphs 31-32.
150 Y. Hafner (2012), op. cit., p. 224.
151 S.C.G. Van den Bogaert (2005), p. 340.
152 R. Parrish, S. Miettinen, *The Sporting Exception in European Union Law*, (T.M.C. Asser Press, 2008), p. 84.
153 Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 76.
154 R. Parrish, S. Miettinen (2008), op. cit., p. 88.
155 J. Exner (2016), op. cit., p. 38.

2.1.2 After Meca-Medina & Majcen: Focus on Justification

In *Meca-Medina & Majcen*, the ECJ put an end to the controversy as to whether purely sporting rules fall within the scope of EU law by answering the question in the affirmative. The judgment is crucial when it comes to the assessment of compliance of sporting rules with EU law. That is why I will present its facts and findings of the ECJ as well as I will analyse it in detail in a separate chapter (Chapter 3). At this moment, I will limit myself to the parts of the judgment relevant for determining conditions under which EU law applies to sporting rules.

The ECJ began by restating its traditional phrase that "sport is subject to Community law in so far as it constitutes an economic activity."[156] However, and this is where the judgment's added value comes, the ECJ specified that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[157] From that point on, EU law applies even to athletes or other persons acting under a purely sporting rule as well as to sporting governing bodies as their authors.[158]

Before *Meca-Medina & Majcen*, a sporting rule that had an economic effect was immune from EU law merely because it was a sporting rule. Currently, sporting governing bodies will have to show that any sporting rule restricting competition has effects proportionate to its legitimate objectives. In this regard, I agree with Richard Parrish and Samuli Miettinen that eligibility rules fall

[156] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 22.
[157] Ibid., paragraph 27.
[158] Ibid.; J. Exner (2016), op. cit., p. 39.

within the scope of EU law and must therefore be justified in order to survive the CJEU's scrutiny.[159]

Being subject to EU law, sporting rules must comply with all obligations that result from the various provisions of EU legal order. In this respect, the ECJ specified in *Meca-Medina & Majcen* that "the rules which govern [sporting] activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition."[160] Therefore, even though this particular case concerned the compliance of anti-doping regulations with EU competition law, one can similarly apply its conclusions to other branches of EU law.[161]

The prohibition of discrimination on the grounds of nationality, enshrined in Article 18 of the TFEU and further specified in the following provisions of TFEU, sometimes accompanied by the market access element, is a leading principle when it comes to the assessment of the compliance of sporting rules, including those governing athletes' eligibility in national teams, with EU law (2.1.2.1). In this context, the provisions specifying the general principle of equal treatment and non-discrimination are the citizenship of the Union (2.1.2.2), the freedom of movement for workers (2.1.2.3), the freedom to provide services (2.1.2.4), the freedom of establishment (2.1.2.5) and competition law (2.1.2.6).

[159] R. Parrish, S. Miettinen (2008), op. cit., p. 88.
[160] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 28.
[161] J. Exner (2016), op. cit., p. 40.

2.1.2.1 The Principle of Equal Treatment and Non-discrimination

The general principle of equal treatment and non-discrimination is "one of the fundamental principles of EU law"[162] and one of the most important substantive rights that EU law has conferred on its beneficiaries from the historical perspective.[163] The principle of equal treatment was one of the first targets of European legislative authorities within the process of the European integration together with the prohibition of discrimination on grounds of sex today enshrined primarily in Article 157 TFEU.[164] It is only in the last twenty years that the attention has shifted also to equal treatment based on race, religion, sexual orientation or age.[165]

For the purpose of this J.D. thesis, the general prohibition of discrimination on grounds of nationality enshrined in Article 18 TFEU is the most important part of this crucial principle of EU law. Article 18 TFEU provides that "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." Despite the quite general wording of Article 18 TFEU, the ECJ has progressively specified that this rule has always had a vertical and sometimes even a horizontal direct effect.[166] In that case, the prohibition of discrimination on grounds of nationality binds EU institutions

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[162] Joined cases C-117/76 and C-16/77, *Ruckdeschel and Others* v. *Hauptzollamt Hamburg-St. Annen*, [1977] EU:C:1977:160, paragraph 7.
[163] T. Tridimas, *The general principles of EU law*, 2nd ed. (Oxford University Press, 2006), p. 118.
[164] Treaty establishing the European Economic Community (1957), Article 7: „Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited." The right to equal remuneration without discrimination based on sex was enshrined in Article 119 of the Treaty establishing the European Economic Community.
[165] P. Craig, G. de Burca, *The Evolution of EU Law*, 2nd ed. (Oxford University Press, 2011), p. 612.
[166] T. Tridimas (2006), op. cit., p. 119. On the horizontal direct effect see, in general, M. Tomášek, V. Týč (Eds.), *Právo Evropské unie – 2. aktualizované vydání (Leges, 2017).*

and other bodies, Member States' authorities, but private entities including international sporting governing bodies.[167]

Regarding affairs falling within the scope of EU law, "comparable situations must not be treated differently and […] different situations must not be treated in the same way."[168] The prohibition of discrimination on grounds of nationality seeks to prevent arbitrary or unjustifiable unequal treatment between nationals of the host and the other Member States as well as such a treatment when one Member State treats nationals of a concrete Member State more favourably than nationals of another Member State in comparable situations falling under EU law.[169]

Article 18 TFEU and other discrimination-prohibiting provisions of EU law forbid not only direct discrimination on grounds of nationality, but they simultaneously aim at preventing indirect discrimination. Direct discrimination represents different treatment of persons in comparable situations explicitly on a particular ground, in this case nationality. In other words, a directly discriminatory measure results in prohibited different treatment in law and in fact.[170] On the other hand, indirect discrimination covers different treatment of persons in comparable situations based on an apparently neutral ground. Distinctively from direct discrimination, indirectly discriminatory measures are equally applicable in law, but result in different factual treatment. Residence requirements, which many international sporting governing bodies apply, are

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[167] J. Exner (2016), op. cit., p. 17.
[168] Case C-148/02, *Garcia Avello*, [2003] ECLI:EU:C:2003:539, paragraph 31.
[169] C. Barnard (2016), op. cit.
[170] M. Davies, *Nationality Discrimination in the European Internal Market*, (Kluwer Law International, 2003), p. 22-31.

an example of an indirectly discriminatory measure and thus require further scrutiny from the EU law perspective.[171]

Having seen the difference between direct and indirect discrimination, the ECJ consequently broadened the scope of application of the free movement provisions in order to include also genuinely non-discriminatory measures, comprising the important element of market access. In many cases, including *Bosman*, the ECJ has held that a measure which is liable to hamper, or make less attractive the exercise of the right to free movement may amount to a restriction to the freedom of movement guaranteed in EU law.[172] Therefore, even non-discriminatory measures may conflict with EU law and require justification.[173]

The general prohibition of discrimination on grounds of nationality under Article 18 TFEU finds its *lex specialis* in specific EU law provisions regarding EU citizenship, free movement and competition law. The CJEU's settled case law provides that the general principle of equal treatment contained in Article 18 TFEU is applicable independently only where no specific provision applies.[174] On the other hand, one must interpret these specific provisions regarding the prohibition of discrimination, such as citizenship, free movement or competition, in the light of Article 18 TFEU. Therefore, such measures violating these specific provisions are also automatically incompatible with the general principle contained in Article 18 TFEU.[175] I separately discuss each of

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[171] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 20.
[172] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraphs 92-104.
[173] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 20.
[174] See *inter alia* Case C-10/90, *Masgio* v. *Bundesknappschaft*, [1982] EU:C:1991:107; Case C-419/92, *Scholz* v. *Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECLI:EU:C:1994:62.
[175] See *inter alia* Case C-305/87, *Commission* v. *Greece*, [1989] EU:C:1989:218, paragraph 12.

the aforementioned specific provisions of EU law prohibiting discrimination on grounds of nationality in the following sections. While doing so, I pay particular attention to the question of the application of these principles on rules of international sporting governing bodies.

2.1.2.2 Citizenship of the European Union

The citizenship of the EU, which is destined to be "the fundamental status of nationals of the Member States"[176], has become an important complex of rights granting equal treatment even to those who are not directly economically active. This concept first appeared in EU law with the Treaty of Maastricht of 1992, in effect from 1993, and since then, the EU has witnessed "a glorious march of European citizenship from a "meaningless addition" to the Treaties to one of the key concepts of [EU] law."[177] Since it is neither suitable nor possible to give a complex overview of EU citizenship in this limited space, I further limit myself to the importance of EU citizenship for the regulation of sport.

Originally, individuals fell under EU law to such an extent as they engaged in an economic activity. They could have done so either as workers, providers of services or self-employed persons and undertakings performing their freedom of establishment. With EU citizenship, however, they also find themselves within the scope of EU law by exercising their citizenship rights under Articles 20 and 21 TFEU, most importantly the right to free movement to and residence in another Member State than that of their origin. In other words,

[176] See *inter alia* Case C-184/99, *Grzelczyk*, [2001] EU:C:2001:458, paragraph 31.
[177] D. Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights" (2009), Columbia Journal of European Law 2, p. 173.

they no longer need to exercise an economic activity in order to find shelter under an EU umbrella.[178]

In the light of the foregoing, the EU citizenship has a particular importance for amateur sportsmen who not only possess the rights guaranteed directly by EU citizenship, but they also have the right to equal treatment contained in Article 18 TFEU.[179] In this respect, even national regulation of amateur sportsmen must ensure equal treatment in situations falling within the scope of EU law.[180] Regarding third country nationals, they enjoy derived rights as family members of EU citizens who have performed their rights under the Directive No. 2004/38, the so called "citizens' rights directive".[181]

2.1.2.3 Free Movement of Workers

Freedom of movement for workers, like the general prohibition of discrimination on grounds of nationality, is one the fundamental principles of EU law.[182] Article 45 (2) TFEU, the elementary provision of EU law governing this freedom, provides that it "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." The wording of this provision makes it clear that the principle of equal

[178] J. Exner (2016), op. cit., p. 19.

[179] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 24.

[180] Ibid.: 28.

[181] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123.

[182] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 93.

treatment constitutes the conceptual basis for the freedom of movement for workers within the EU.[183]

Article 45 (3) TFEU further specifies that the free movement of workers shall entail the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made and to move freely within the territory of Member States for this purpose. The provision further guarantees the right to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action. It also encompasses the right to remain in the territory of a Member State after having been employed in that State, subject to conditions laid down by implementing regulations.[184]

Article 45 TFEU has the horizontal direct effect and athletes can therefore invoke their right as workers against international sporting governing bodies.[185] The settled case law of the ECJ provides that Article 45 TFEU does not cover solely the actions of public authorities, but it extends also to any other rules or measures aimed at regulating gainful employment in a collective manner.[186] The limitation of the application of Article 45 TFEU only to acts of public authorities would risk the outcome of inequality in its application, since working conditions in various Member States are governed not only by law or

[183] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 18.
[184] Primarily the Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, pp. 1–12.
[185] J. Exner (2016), op. cit., p. 21.
[186] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 82.

regulation, but sometimes also by collective agreements and other acts of private persons.[187]

The ECJ applied this general principle to international sporting governing bodies in its landmark ruling in *Bosman* deciding that the freedom of movement for workers applies equally to regulations of the UEFA.[188] Furthermore, the Advocate General Lenz shows that the conclusions of this judgment do not have to remain limited only to football, but can be also transmitted to other sports.[189]

Many athletes who undertake their activities in Europe are third country nationals and as such, they enjoy limited protection under EU law. As to the freedom of movement for workers, third country nationals have in particular derived rights as family members of EU citizens who have performed their rights under the Directive No. 2004/38[190] in conjunction with the Regulation No. 492/2011 on freedom of movement for workers within the EU.[191] They may also benefit directly from the rights conferred upon them in international agreements concluded between EU and their respective countries. In *Simutenkov*, the ECJ decided that a Russian football player, who legally resided

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[187] For a landmark judgment of the ECJ illustrating the application of this principle see Case C-281/98, *Angonese*, [2000] EU:C:2000:296; see also Study on the equal treatment of non-nationals in individual sports competitions (Brussels: European Commission, 2010): 17.

[188] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463. See also O. Poruban, "Priama diskriminácia na základe štátnej príslušnosti pri výkone športovej činnosti" (2015), Učená právnická spoločnosť [online], 6 May 2015.

[189] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, Opinion of the Advocate General Lenz.

[190] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123.

[191] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, pp. 1–12.

and was legally employed in Spain, could directly benefit from the prohibition of discrimination regarding working conditions set by the Partnership Agreement with Russia in relation to host Member State nationals.[192] The ECJ reached similar conclusions in *Kolpak*[193] and *Kahveci*[194].

2.1.1.4 Freedom to Provide Services

Freedom to provide services is another special reflection of the general prohibition of discrimination on grounds of nationality in EU law. Article 56 TFEU states that "[w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended." Subsequently, Article 57 TFEU provides that [w]ithout prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

The prohibition of discrimination lies at the centre of the freedom to provide services. There can be some initial doubts or ambivalence concerning the functioning of the principle of equal treatment in this regard caused by the general wording of Articles 56 and 57 TFEU. On the other hand, Article 61 TFEU provides that "[as] long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 56."

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[192] Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 17.
[193] Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255.
[194] Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450.

Moreover, the CJEU has regularly perceived the freedom to provide services as a specific expression of the general principle of equal treatment or non-discrimination.[195]

According to the settled case law of the CJEU, provisions on the free movement of services have direct effect and private entities can therefore rely upon them.[196] In the sporting context, the ECJ ruled in *Walrave* that the prohibition of discrimination "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed in regulating in a collective manner gainful employment and the provision of services."[197] In *Laval*, the ECJ ruled that "[t]he abolition […] of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law."[198] The ECJ therefore enabled athletes to invoke such provisions also against international sporting governing bodies.[199]

2.1.1.5 Freedom of Establishment

A further internal market freedom, which specifically reflects the general prohibition of discrimination on grounds of nationality, is the freedom of establishment. Article 49 TFEU provides that "[w]ithin the framework of the provisions set out below, restrictions on the freedom of establishment of

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[195] Case C-33/74, *Van Binsbergen* v. *Bedrijfsvereniging voor de Metaalnijverheid*, [1974] EU:C:1974:131; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 19.
[196] See, inter alia, Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, paragraph 17; Case C-341/05, *Laval un Partneri*, [2007] EU:C:2007:809, paragraph 98.
[197] Case C-36/74, *Walrave and Koch* v. *Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, paragraph 17.
[198] Case C-341/05, *Laval un Partneri*, [2007] EU:C:2007:809, paragraph 98.
[199] See also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 28-30.

nationals of a Member State in the territory of another Member State shall be prohibited […].” The same provision further specifies that the freedom of establishment shall also include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings in a Member State under the conditions laid down by law for its own nationals.

As in the case of the free movement of workers and the freedom to provide services, the prohibition of discrimination on grounds of nationality represents a conceptual basis for the freedom of establishment. Articles governing the freedom to provide services and the freedom of establishment have a parallel structure and use identical concepts, which leads to the conclusion that similar observations apply to these two provisions.[200] Furthermore, the case law of the CJEU confirms the character of the freedom of establishment as a specific projection of the general principle of equal treatment between nationals of different Member States.[201]

Pursuant to the settled case law of the CJEU, the provisions on the freedom of establishment have the horizontal direct effect and private entities can therefore make use of them. In *Viking*, the ECJ decided that Article 43 EC [today's article 49 TFEU] "may be relied on by a private undertaking against a trade union or an association of trade unions."[202] In the light of the foregoing, athletes may analogically invoke Article 49 TFEU in a dispute against international sporting governing bodies.[203]

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200 Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 19.
201 Case C-2/74, *Jean Reyners* v. *Belgian State*, [1974] EU:C:1974:68.
202 Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*, [2007] EU:C:2007:772, paragraph 61.
203 J. Exner (2016), op. cit., p. 24.

2.1.1.6 Competition Law

Regarding EU law provisions on competition law,[204] the prohibition of cartels, the prohibition to abuse a dominant position and, in some cases, the prohibition to grant illegal state aid provided for in Article 101 to 107 TFEU, are of particular relevance to sporting rules in general and rules governing athletes' eligibility in national teams in particular. The connection between competition law and sport encompasses areas including agencies, doping, media rights, multiple ownership of clubs, ticketing, transfer rules, state aids or sporting goods.[205] Following this reasoning, rules of international sporting governing bodies governing athletes' eligibility in national teams would also fall under EU competition law.[206]

What is more, the ECJ applied EU competition law, in particular the prohibition of cartels contained in Article 101 TFEU, to the doping regulation adopted by the IOC in 2006 in its turning sports-related judgment in *Meca-Medina & Majcen*.[207] In this judgment, the ECJ confirmed the application of EU competition law to sports and, as has been previously illustrated, broadened the group of sporting rules that now fall within the scope of EU law. The ECJ also slightly modified its approach in assessing the compliance of sporting rules

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[204] I am aware of the fact that, especially regarding competition law, this J. D. thesis contains many elements and conlusions which concern sporting governing bodies as undertakings or their associations. However, I primarily focus on athletes as individuals and deal with competition law mainly from the point of view of athletes as undertakings engaging in free competition or consumers.

[205] To this extent see B. Kennelly, T. Richards, A. Lewis, "EU and UK Competition Law Rules and Sport" in A. Lewis, J. Taylor (Eds.), *Sport: Law and Practice*, 3rd ed. (Bloomsbury Professional, 2014), pp. 1124-1232.

[206] Y. Hafner (2012), op. cit., p. 222.

[207] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492.

with EU law shifting its focus on their context, objectives, inherence and proportionality.[208]

Having established that sporting rules may fall under various provisions of EU law, including namely EU citizenship, free movement of workers, freedom to provide services, freedoms of establishment and competition law, I will now move to the question of whether sports rules in general, and those regarding sporting nationality in particular, constitute a restriction to athletes' rights under EU law.

2.2. Sporting Nationality Rules as a Restriction to European Union Law

I claim that rules of international sporting governing bodies that determine conditions under which athletes can represent their country in international competitions constitute a restriction to EU law. According to the case law of the ECJ, the concept of a limitation, an obstacle or a restriction to EU law is very broad and covers a wide group of measures including sporting rules.[209] EU citizens have, in general, a right to leave their Member State of origin to enter the territory of another Member State and reside there freely in order to, for example, pursue an economic activity.[210]

EU law, namely Article 45 TFEU in particular, preclude such measures, which might place nationals of a Member State at a disadvantage when they wish to pursue an economic activity as workers in the territory of another

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[208] J. Exner (2016), op. cit., p. 25.

[209] Ibid.

[210] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 95; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228.

Member State.[211] National provisions, which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his freedom of movement for workers, constitute therefore a restriction on that freedom despite of applying without regard to the nationality of the workers concerned.[212]

Regarding the freedom to provide services, a restriction to such a freedom is "any measure which (…) prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned."[213] Therefore, any rule or provision that precludes or at least deters EU citizens from exercising their rights to free movement constitutes an obstacle to EU law.[214]

Thereafter, sporting rules constitute obstacles to EU law when they hinder athletes in exercising their rights under EU law. In *Lehtonen*, for example, the ECJ held that the basketball rule, which allows a transfer of players to other clubs only during a limited period of "transfer windows", provides for a restriction to the free movement of workers.[215] In a similar way, sporting nationality rules limit athletes' opportunities "to offer [their] services to other national teams within the European Union."[216] Moreover, these rules "restrict

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[211] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 94; Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 33.

[212] Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 34; see also Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 96.

[213] General Programme for the abolition of restrictions of freedom to provide services of 18 December 1961, Official Journal of 15 January 1962, Special Editions, Second Series, IX, p. 32.

[214] On derogations, limitations, conditions and justifications of free movement of persons, see, in general C. Barnard (2016), op. cit.

[215] Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraphs 47-50; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 229-230.

[216] J. P. McCutcheon (2001), op. cit., p. 131.

the ability of teams to select and therefore to employ or engage the services of national of the other [EU] states who are not eligible with reference to the relevant criterion […],"[217] in this respect namely nationality.[218]

In the light of the aforementioned, I believe and I will show that it is not very beneficial to spend much time on examining whether a measure constitutes a limitation or not. On the other hand, I will submit that it is more appropriate to concentrate on a much broader and much more complex question of justification and especially proportionality. Before dealing with the concrete rules determining athletes' eligibility in national teams, I will examine the interconnected concepts of justification and proportionality in a broader sense regarding sporting rules in general.

2.3. Justification and Proportionality of Sporting Nationality Rules as a Restriction to European Union Law

In this subchapter, I examine the question as to whether a sporting restriction to EU law in the fields of EU citizenship, free movement and competition law provisions can be justified. Regarding the justifications, two important issues deserve closer attention. First, I will look at which types of justifications I can use and, more importantly, which types of restrictive measures can be justified by which forms of justifications.[219] There are two types of justifications: the Treaty derogations (2.3.1) and the public-interest requirements adjudicated by the CJEU by using the rule of reason doctrine

[217] Ibid.
[218] Y. Hafner (2012), op. cit., p. 220.
[219] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230.

(2.3.2).[220] I devote special part to the principle of proportionality, which is crucial when it comes to justifications not only in the context of EU law (2.3.3).

2.3.1 Treaty Derogations

The Treaty of Lisbon provided the EU with an explicit contributory power regarding sport by amending the TFEU. Article 165 TFEU states, in particular, that the EU "shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." Nevertheless, this provision does not contain any derogations or justifications of restrictions or obstacles to EU law,[221] which I will therefore look for elsewhere.[222]

The Treaties provide an exhaustive list of derogations regarding the specific rights enjoyed by EU citizens, migrant workers, the self-employed persons and providers or receivers of services. These express general derogations include public policy, public security and public health. While discussing the elements narrowing the scope of EU law, I will also examine the specific exemption concerning the employment in the public service.[223] Importantly, derogations contained in the Treaties are able to justify direct discrimination on grounds of nationality as well as indirectly discriminatory measures and indistinctly applicable measures.[224]

The public policy exception deserves further attention in the sporting context, in spite of the fact that rules governing sporting nationality would

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[220] C. Barnard (2016), op. cit.

[221] The notion of a restriction or an obstacle refers to any measure, rule or provision that precludes or at least deters athletes from exercising their rights stemming from EU law rules on EU Citizenship, free movement of persons or competition.

[222] J. Exner (2016), op. cit., p. 28

[223] See *inter alia* C. Barnard (2016), op. cit.; S.C.G. Van den Bogaert (2005), op. cit., p. 338.

[224] See in general C. Barnard (2016).

probably not fall within its scope in the end.[225] The ECJ acknowledged for the first time in *Bosman* that private persons, including international sporting governing bodies, may rely on the public policy exception.[226] In the light of this claim, the question arises as to whether there is a sporting public policy in the EU. The authors of the Study on equal treatment of non-nationals in individual sports competitions submit that this policy could include, for example, the inherent links between a club and the Member State or the sub-national region where it is located, or the protection of competitive balance.[227]

Be that as it may, the rules determining athletes' eligibility for national teams would probably not fall under the public policy exception since they are not set up following exclusively a personal conduct of athletes.[228] On one hand, practices governing states' actions regarding the use of the public policy justification must apply *mutatis mutandis* to international sporting governing bodies for the sake of uniformity of EU law.[229] On the other hand, "measures taken on grounds of public policy must be based exclusively on the personal conduct of the individual concerned."[230] Therefore, general rules, such as those governing sporting nationality, constituting a restriction to EU law would not be compatible with the EU legal order in this regard, as they would not fall under the public policy exception.[231]

Not even the public service justification enshrined in Article 45(4) TFEU regarding the freedom of movement for workers or the official authority

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[225] J. Exner (2016), op. cit., p. 28.
[226] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 86.
[227] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 29.
[228] J. Exner (2016), op. cit., p. 28.
[229] J.-P. Dubey, *La libre circulation des sportifs en Europe*, (Staempfli Editions, 2000), p. 441.
[230] S.C.G. Van den Bogaert (2005), op. cit., p. 338.
[231] Y. Hafner (2012), op. cit., p. 221.

exception stipulated in Article 51 TFEU concerning the freedom of establishment and the freedom to provide services seem to play any role regarding eligibility rules. On one hand, Yann Hafner claims that one cannot automatically rule out the public service justification set forth in Article 45(4) TFEU since some national sporting governing bodies are equipped with certain authorities under public power. Yann Hafner uses an example of a rule of the Fédération Française de Football (FFF) obliging a player to join the national team when nominated and subjecting him to sanctions if he refuses to do so.

Nevertheless, I submit that the public service justification and the official authority exception do not have much relevance in the sporting context. In this respect, I agree with Stefaan Van den Bogaert who claims that it is "hard to sustain that representative national teams participate in the exercise of powers conferred by public law."[232] While athletes wearing a national jersey definitely represent their country, I do not consider their performance a public service or an act of the official authority within the meaning of the stipulated provisions of the Treaties.

If there are some uncertainties about the public service or the official authority exceptions, it seems that the remaining two exceptions, public security and public health, are clearly irrelevant in the sporting context since "they have nothing to do *in se* with" sports.[233] Therefore, I have concluded that rules determining athletes' eligibility in national teams cannot rely on the exemptions provided in the Treaties since the public policy and the public

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[232] S.C.G. Van den Bogaert (2005), op. cit., p. 339.
[233] Ibid., p. 338.

services or the official authority exemptions are probably not applicable while the public security and the public health exceptions are irrelevant.[234]

2.3.2 Public Interest Requirements

Even though international sporting governing bodies cannot probably rely on the statutory exemptions provided for in the Treaties, they can nevertheless use public interest requirements, also referred to as overriding reasons in public interest, objective justifications or legitimate objectives,[235] an open-ended category of justifications recognized by the ECJ.[236] Settled case law of the ECJ explores the so-called "rule of reason" doctrine, under which an exemption for national teams is admissible despite of non-existence of any statutory exemption in EU law concerning rules determining sporting nationality.[237]

In sports-related issues, the ECJ has already accepted as legitimate objectives, for example, the need to ensure the training and development of young players, the need to maintain a certain sporting equilibrium between clubs and the need to preserve regularity of a sporting competition.[238] I believe that the nature and the integrity of international sporting competitions between national teams constitute an overriding reason in public interest that international sporting governing bodies can use to justify their rules constituting a restriction to EU law.

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[234] J. Exner (2013), op. cit., p. 1035.

[235] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230.

[236] See also Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano,* [1995] EU:C:1995:411.

[237] J. Exner (2016), op. cit., p. 30.

[238] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463; Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraph 53; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230.

At this point, an interesting issue arises with the doctrinal controversy regarding the question of what types of restrictions can be defended by what types of justifications. Traditionally, the public interest requirements could only justify indirectly discriminatory and non-discriminatory measures as well as those rules preventing or impeding market access. However, Catherine Barnard submits that, in more recent but not consistent case law of the CJEU, there are signs that these types of justifications can also defend directly discriminatory measures.[239] If so, the introduction of the specific public interest requirement in the field of sport based on "respect for representation of culture and national identity through sports" is at stake.[240]

Article 165 TFEU providing that "[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function" might have a great importance in this respect. The EU would recognize the impact of nationality in sports and therefore contribute to the further eradication of all negative forms of discrimination.[241] However, it is not clear whether the CJEU would be willing to adopt such an approach having seen the inconsistencies in its case law in this matter.

If a rule governing sporting nationality falls within the scope of EU law, it constitutes a restriction to respective parts of the EU legal order and if such a restriction can be justified by an overriding reason of public interest, the rule must ultimately comply with the principle of proportionality in order to be compatible with EU law. While all aforementioned elements are undoubtedly important, I have submitted and I will further demonstrate that the principle of

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[239] C. Barnard (2016), op. cit.

[240] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230-231.

[241] Ibid.

proportionality is predominantly the decisive one.[242] Furthermore, since this principle is a general principle of law inherent to many legal orders around the world, I believe that athletes as well as international sporting governing bodies can rely on its application and therefore on the application of my conclusions in the following chapters even outside the EU.

2.3.3 Principle of Proportionality

The principle of proportionality often decides the outcome of the compatibility or incompatibility of sporting rules with EU law. Essentially, the principle of proportionality in a broader sense requires first that the measures must be "suitable for securing the attainment of the objectives which they pursue."[243] In practice, the CJEU first verifies whether the means chosen to achieve the end are appropriate.

Moreover, proportionality *stricto sensu* requires that the measure must not go beyond what is necessary in order to attain the objective that it seeks.[244] Having assessed the suitability of a measure to achieve its goal, the CJEU afterwards considers whether it is not possible to conceive an alternative measure that is capable of producing the same result but is less restrictive upon the freedom of movement under the given circumstances.[245] All in all, the test of proportionality consists of a balancing exercise between the aims pursued by the restrictive measure and its restrictive effects on the exercise of the right at stake.[246]

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[242] J. Exner (2017), op. cit.
[243] See *inter alia* Case C-55/94, *Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] EU:C:1995:411, paragraph 37.
[244] Ibid.
[245] C. Barnard (2016), op. cit.
[246] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 24.

Consequently, the final word of the CJEU concerning any claimed justification and the application of the principle of proportionality depends upon the level of scrutiny that it is willing to grant to the respective body and its rules presenting restrictions to EU law. In this respect, the CJEU's case-by-case analysis and the level of scrutiny that it applies are two important issues. A body has higher chances while defending its measure if the CJEU applies to it more moderate level of scrutiny and grants it a wider margin of appreciation.[247]

In general, sport belongs amongst those sectors where the CJEU grants respective authorities with a significant margin of appreciation. Nevertheless, there are exceptions to this rule.[248] The judgment of the ECJ in *Olympique Lyonnais* represents a good example of the strict approach to the principle of proportionality. In this case, the ECJ recognized the legitimate objective of the education and training of young players, but subsequently ruled that where the value of damages exceeded the costs of training, these damages would not meet the requirements of the principle of proportionality.[249]

I will further discuss the extent of margin of appreciation, which the CJEU grants to international sporting governing bodies while enacting their rules, in the following chapters when dealing with different rules determining athletes' eligibility under EU law. Before that, I will present and discuss in detail the ECJ's turning judgment in *Meca-Medina & Majcen*,[250] which set the path for future cases regarding the compliance of sporting rules with EU law (Chapter 3).

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[247] C. Barnard (2016), op. cit.
[248] J. Exner (2016), op. cit., p. 32.
[249] Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 46-48.
[250] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 28.

3. Meca-Medina & Majcen: A New Way Forward

Before analysing the rules governing sporting nationality in the context of EU law, I will devote a special chapter to the ECJ's judgment in *Meca-Medina & Majcen*,[251] which is significant from several perspectives. First, it definitely brought sporting rules into the scope of EU law while demising the purely sporting rules exception (Chapter 3.1). Second, the ECJ summarised and clarified the up to date case law regarding the assessment of the compatibility of sporting rules with EU law. Therefore, I claim that the principles contained in *Meca-Medina & Majcen* can serve as a useful tool for EU institutions and bodies, which will deal with sporting rules in the future. Even more importantly, such principles present a beneficial manual for international sporting governing bodies on how to set up their rules in order to make them compatible with EU law (Chapter 3.2).

3.1. Demise of the Rule of Purely Sporting Interest

The case concerned two professional long-distance swimmers. The Spanish David Meca Medina is a double World champion and a multiple medallist from both World and European long-distance swimming Championships.[252] The Slovenian Igor Majcen is a three time Olympian, achieving his best result by finishing sixth in the men's 1500 freestyle event at the 1992 Summer Olympics. He became Slovenian sportsman of the year in 1993, after having won the bronze medal in the men's 1500 m freestyle event at the 1993 European Championships.[253]

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[251] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 28.
[252] „Meca outsprints Capell for gold", *BBC*, 23 July 2005, retrieved 22 July 2017.
[253] Sports Reference, Igor Majcen, retrieved 22 June 2017.

On 31 January 1999, David Meca Medina and Igor Majcen finished first and second respectively at the World Cup in long-distance swimming at Salvador de Bahia in Brazil. In an anti-doping test carried out following the competition, both swimmers tested positive for Nandrolon, while the level found for David Meca-Medina was 9.7 ng/ml and that for Igor Majcen 3.9 ng/ml, in both cases beyond the permitted level of 2 ng/ml. On 8 August 1999, the FINA's Doping Panel suspended both swimmers for a period of four years. David Meca Medina and Igor Majcen appealed to the CAS, which, however, confirmed the suspension by arbitration award of 29 February 2000.[254]

In January 2000, certain scientific experiments showed that the human body can endogenously produce Nandrolone's metabolites at a level, which may exceed the accepted limit when athletes consume certain foods, such as boar meat. Having in mind such development, the representatives of the FINA and the two swimmers consented to refer the case anew to the CAS for reconsideration by an arbitration agreement of 20 April 2000. The CAS panel, ruling by arbitration award of 23 May 2011, reduced the period of ineligibility for both swimmers to two years. David Meca Medina and Igor Majcen did not make use of their procedural right to appeal against the award to the Federal Supreme Court of Switzerland.[255]

Rather, the two swimmers filed a complaint with the European Commission on 30 May 2001. In their complaint, they challenged the compatibility of the anti-doping regulations adopted by the IOC and implemented by the FINA and certain related practices with EU law, namely

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[254] Case COMP/38158, *Meca-Medina and Majcen* v. *International Olympic Committee* [1 August 2002], paragraphs 5,6; case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 3.

[255] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 3.

with rules on competition guaranteed by present Articles 101 and 102 TFEU and the freedom to provide services under Article 56 and the following TFEU.[256]

According to the two swimmers, the fixing of the limit of Nandrolone at 2 ng/ml is a concerted practice between the IOC and the 27 laboratories accredited by it. David Meca Medina and Igor Majcen claimed that the limit was scientifically unfounded and could lead to the exclusion of innocent or merely negligent athletes. In their case, the excesses could have been the result of the consumption of a dish containing boar meat. Second, the IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration, such as the CAS, which are insufficiently independent of the IOC, underlined the anti-competitive nature of that limit.[257]

Having analysed the anti-doping rules at issue according to the assessment criteria of competition law, the European Commission rejected the swimmers' complaint by decision of 1 August 2002 stating, in overall, that those rules did not fall foul of the prohibition under Articles 101 and 102 TFEU. Regarding the freedom to provide services under Articles 56 and the following TFEU and the prohibition to abuse the dominant position under Article 102 TFEU, the European Commission swiftly concluded that the anti-doping rules did not breach these provisions partially on substantive grounds and partially

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[256] Case COMP/38158, *Meca-Medina and Majcen* v. *International Olympic Committee* [1 August 2002]; case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 3.

[257] Case COMP/38158, *Meca-Medina and Majcen* v. *International Olympic Committee* [1 August 2002], paragraphs 19-25; case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 3.

since the swimmers did not provide the European Commission with sufficient arguments.[258]

It is interesting to note, however, that the European Commission analysed in detail the compatibility of the contested anti-doping regulation with the prohibition of anti-competitive business practices under Article 101 TFEU. Therefore, the European Commission implicitly acknowledged that the anti-doping regulation fell within the scope of EU law – the fact that the General Court later denied. In the end, however, the European Commission concluded that the contested anti-doping regulations relate to the progress of sporting competitions, that they are necessary for the effective fight against doping and that the limitation to athletes' freedom of action does not go beyond what is necessary in order to achieve their objective.[259]

The swimmers, unsatisfied with the European Commission's decision, appealed to what was then the Court of First Instance and asked for the annulment of the decision. While quoting the case law of the ECJ, the Court of First Instance observed that, on one hand, the provisions of the Treaties regarding the freedom of movement for workers and the freedom to provide services apply to sporting rules with economic aspect. On the other hand, those provisions "do not affect purely sporting rules, that is to say rules relating to questions of purely sporting interest and, as such, having nothing to do with economic activity."[260]

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[258] Case COMP/38158, *Meca-Medina and Majcen* v. *International Olympic Committee* [1 August 2002], paragraphs 70 – 71.
[259] Ibid., paragraphs 32 – 55.
[260] Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, [2004] EU:T:2004:282, paragraphs 40 – 41; Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraphs 7.

The Court of First Instance further observed that since purely sporting rules may have nothing to do with economic activity, they do not fall within the scope of EU law. Therefore, they also do not fall within the scope of present Articles 101 and 102 TFEU.[261] The Court of First Instance continued that the prohibition of doping leans on purely sporting considerations and therefore has nothing to do with any economic consideration. It concluded that the rules to combat doping consequently do not come within the scope of EU law regarding the freedom to provide services and competition.[262] In the light of the aforementioned arguments, the Court of First Instance dismissed the swimmers' action.[263]

David Meca Medina and Igor Majcen continued on their legal challenge and appealed against the decision of the Court of First Instance to the ECJ.[264] Before the ECJ's ruling, Advocate General Léger delivered his opinion and suggested to reject the appeal, which he described as "muddled". He concluded that the anti-doping regulations concerned the ethical aspects of sport and were not subject to the prohibitions of EU law, even if they had some ancillary economic consequence.[265] Gianni Infantino, the current president of FIFA, submits that the Advocate General was aware of the fact that high-level sport could involve big money, but it did not mean that sports rules, such as

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[261] Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, [2004] EU:T:2004:282, paragraphs 42; case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraphs 8.

[262] Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, [2004] EU:T:2004:282, paragraphs 44 - 47; case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraphs 9.

[263] Case T-313/02, *Meca-Medina and Majcen* v. *Commission*, [2004] EU:T:2004:282.

[264] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492.

[265] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, opinion of the Advocate General Philippe Léger, paragraphs 20, 28; see also G. Infantino, "Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?" (2006), p. 5.

anti-doping rules, fell within the rigours of EU law. The reason being that any economic aspect of the rules was clearly secondary to their sporting aspect.[266]

The ECJ, however, took a stricter line. It began by restating its traditional phrase that "sport is subject to Community (EU) law in so far as it constitutes an economic activity."[267] Therefore, a sporting activity falls within the field of application of Articles 45 and 56 and the following where it takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of the semi-professional and professional athletes.[268] On the other hand, the aforementioned provisions do not affect rules regarding questions of purely sporting interest, which have nothing to do with economic activity.[269]

Following its judgment in *Donà*,[270] the ECJ addressed the difficulty of severing the economic aspects from the sporting aspects of a sporting activity. It concluded that the provisions of EU law determining the freedom of movement for persons and freedom to provide services "do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events."[271] On the other hand, the ECJ underlined that such a restriction on the scope of EU law must remain limited to its proper objective. Therefore, international sporting governing bodies cannot rely on

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[266] G. Infantino (2006), op. cit., p. 5.
[267] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 22.
[268] Ibid., paragraph 24.
[269] Ibid., paragraph 25.
[270] Case C-13/76, *Dona* v. *Mantero*, [1976] EU:C:1976:115, paragraphs 14, 15.
[271] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 26.

such a restriction "to exclude the whole of a sporting activity from the scope of the Treaty.[272]

This is where the judgment's contribution comes. The ECJ, having assessed the aforementioned considerations, further specified that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[273] From that point on, EU law applies even to athletes or other persons acting under a purely sporting rule as well as to sporting governing bodies as their authors.[274] Gianni Infantino concludes that in most cases sporting activity will fall under the scope of EU law. While EU law certainly covers professional sports, it may even include amateur sport after *Meca-Medina & Majcen*.[275] The European Commission had already indicated that it was minded to launch an action against Spain because of alleged discrimination regarding access to amateur sports events.[276]

Before *Meca-Medina & Majcen,* a sporting rule having an economic effect was immune from EU law merely because it was a sporting rule. Currently, sporting governing bodies will have to show that any sporting rule, which restricts competition, has effects proportionate to its legitimate objectives. I believe that, in this matter, the ECJ's judgment in *Meca-Medina & Majcen* represents a good step towards better and more flexible assessment of the compatibility of sporting rules with EU law. The ECJ observed that the purely

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[272] Ibid.; see also case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 76, and joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199, paragraph 43.
[273] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 27.
[274] Ibid., paragraph 27 and the following; J. Exner (2016), op. cit., p. 39; S. Weatherill, "On Overlapping Legal Orders: What is the 'Purely Sporting' Rule?" in S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (2014, T.M.C. Asser Press), pp. 401-424.
[275] G. Infantino (2006), op. cit., p. 5.
[276] Commission Press Release, IP/04/1222.

sporting and the economic elements of sporting rules are in practice hardly differentiable to automatically conclude on the inapplicability of EU law to these rules.[277] Therefore, I believe that it is more suitable to take the purely sporting nature of a rule into consideration when justifying a potential restriction to EU law rather than to exclude automatically the rule from the material scope of EU law.

3.2. Context, Objective, Inherence and Proportionality

Apart from confirming that most of sporting activities fall within the scope of EU law, the judgment in *Meca-Medina & Majcen* is important also since the ECJ clarified the test of the compliance of a sporting rule with EU law. It summarized and explained the elements that the EU bodies and institutions take into consideration while assessing sporting rules under EU law and that international sporting governing bodies should have in mind when they enact their rules in order to ensure their compatibility with the EU legal order.

Having assessed that the contested anti-doping regulation fell under the EU law umbrella, the ECJ continued by the examination of their conformity with respective provisions of EU law. Once the sporting activity is subject to EU law, "the conditions for engaging in it are then subject to all the obligations which result from the various provisions of (EU law)."[278] Therefore, the rules governing the sporting activity in question must satisfy "the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition."[279] Consequently, even though this particular case concerned the compliance of anti-doping regulations with EU competition law, its outcomes

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[277] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 26.
[278] Ibid., paragraph 28.
[279] Ibid.

are similarly applicable to other branches of EU law, notably the free movement provisions.

Having seen that a sporting rule is subject to EU law and having presented concrete applicable EU law provisions, the focus shifts to the question whether such a rule constitutes a restriction of the rights guaranteed by the EU legal order. In *Meca-Medina & Majcen*, the ECJ recognised that the contested anti-doping regulations restrict the athletes' freedom of action thus limiting their rights under EU law.[280] More particularly, the threshold of Nandrolone, which, when exceeded, constitutes a violation of the anti-doping regulations, imposes a restriction on professional sportsmen.[281] I will further argue that sporting rules in general, and those governing sporting nationality in particular, constitute a limitation on athletes' rights under EU law and must therefore be justified.

Regarding the final part of the three-step test, namely justification, the ECJ started in *Meca-Medina & Majcen* by ruling that "the compatibility of rules with the [EU] rules on competition cannot be assessed in the abstract."[282] The ECJ continued, while applying general principles set out in *Wouters*[283], that "account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives."[284] In this particular case, the ECJ recognized as legitimate objective the combat against doping in order to ensure the fair conduct of competitive sport, the need to safeguard equal chances for athletes,

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[280] Ibid., paragraph 45.
[281] Ibid., paragraph 54.
[282] Ibid., paragraph 42.
[283] Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.
[284] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 42.

athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[285]

Consequently, the ECJ stressed that it had to consider whether "the consequential effects restrictive of competition are inherent in the pursuit of those objectives […] and are proportionate to them."[286] In *Meca-Medina & Majcen*, the ECJ ruled that anti-doping penalties are necessary to ensure enforcement of a doping ban and their effect on athletes' freedom of action is inherent in the anti-doping rules.[287] Since the two swimmers have not pleaded the excessiveness of the penalties imposed in their cases, the ECJ could not establish that the anti-doping rules at issue are disproportionate.[288] Therefore, David Meca Medina and Igor Majcen lost their case before the ECJ.

In the post-*Meca-Medina & Majcen* period, the ECJ dealt once again with transfer rules in professional football. In *Olympique Lyonnais*, a young football player, Mr Bernard, refused the offer of a professional contract from his original club Olympique Lyonnais and rather concluded a contract with the English club Newcastle United FC. Pursuant to the French Charter for "joueurs espoirs", he should have signed his first professional contract with the club, which had trained him. Olympique Lyonnais therefore sought an award of damages against Mr Bernard and Newcastle United FC equivalent to the remuneration, which Mr Bernard would have received over one year if he had signed the contract.[289]

During the examination of questions for preliminary ruling referred by the French Court of Cassation, the ECJ first found that the obligation imposed

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[285] Ibid., paragraph 43.
[286] Ibid., paragraph 42.
[287] Ibid., paragraph 44.
[288] Ibid., paragraph 55.
[289] Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 7-15.

by the Charter on the "joueur espoir" to conclude his first professional contract with the club that had trained him is a restriction on freedom of movement for workers.[290] The ECJ nevertheless noted that such a restriction could be justified by the objective of encouraging the recruitment and training of young players if it is actually capable of attaining that objective and is proportionate.[291] However, the ECJ held that the rules at issue, which provide for the payment of damages calculated not in relation to the training costs incurred by the club, but in relation to the total loss suffered by the club, go beyond what is necessary to encourage the recruitment and training of young players and cannot therefore be justified.[292]

While the ECJ has not had the opportunity to confirm its findings from *Meca-Medina & Majcen*, I submit that the three-step test clarified in this judgment is suitable for the general assessment of the compliance of sporting rules with EU law. This is why I further proceed from the principles set out primarily in *Meca-Medina & Majcen*, taking into account also other decisions regarding internal market in general and sport in particular, when assessing the compliance of the concrete rules determining conditions of athletes' eligibility in national teams with EU law (Chapter 4).

[290] Ibid., paragraphs 27-37.
[291] Ibid., paragraph 38.
[292] Ibid., paragraph 50.

4. European Union Law and Sporting Nationality: Dangerous Liaison?

In this chapter, I divide rules determining conditions of athletes' eligibility for their national teams into three groups according to the possible future attitude of the CJEU and other EU bodies and institutions, which I expect towards the background of their current case law and decision-making practice. This division reflects the three-step test that the CJEU and other EU bodies and institutions follow while assessing the compliance of sporting rules with EU law.

Firstly, I deal with a group of sporting rules which, in my opinion, do not fall within the material scope of EU law and which thus escape the scrutiny of EU judicial authorities (Chapter 4.1.). Secondly, I assess rules governing athletes' eligibility in their national teams, which fall within the scope of EU law, constitute a restriction to athletes' rights under EU law but may be justified and proportionate (Chapter 4.2.). Finally, I examine athletes' eligibility rules that constitute an unjustifiable and disproportionate restriction to athletes' rights under EU law and are thus incompatible with EU law (4.3.).

I submit that some international sporting governing bodies create a dangerous liaison between their rules and EU law because they enact such rules, which excessively interfere with athletes' rights that they derive from EU law. These rules include some waiting periods dealt with in Chapter 4.2, and especially quotas of naturalised athletes and the prohibition of the sporting nationality modification examined in Chapter 4.3. On the other hand, I believe that there can exist a promising alliance between the sporting world and EU law if international sporting governing bodies balance better their values and

interests with athletes' rights. Therefore, I propose concrete recommendations for sports organisations on how to better their rules to EU law requirements (Chapter 5).

4.1. Sporting Rules that Fall outside the Scope of European Union Law

In this first group, I present those sporting rules that do not fall under the EU law umbrella even after the ECJ's judgment in *Meca-Medina & Majcen*.[293] Therefore, international sporting governing bodies are free to establish respective criteria without any interference by the CJEU or other EU bodies and institutions, at least from EU law perspective. The authors of the Study on the equal treatment of non-nationals in individual sports competitions submit that only sporting rules that have "no or a merely marginal or in any event clearly subordinate or secondary economic impact or effect" are likely to fall under the purely sporting rules exception after *Meca-Medina & Majcen*.[294]

The category of sporting rules called "rules of the game" includes those rules that are purely sporting and thus fall outside the scope of EU law.[295] For example, it is difficult to imagine a rule determining swimmers' turnover position during a medley competition[296] or a rule enumerating fouls for which

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[293] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492.

[294] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228.

[295] Ibid.: 228.

[296] The US swimmer Ryan Lochte might not share the same opinion. In the 200 meters individual medley final at the 2015 World Aquatics Championships in Kazan, Russia, he used a new turn technique when he pushed off on his back and kicked underwater for ten meters to start his freestyle leg. He then surfaced and swam what swimmers know as freestyle. The rules allow this turnover in freestyle-only races and the officials discussed the possibility of disqualifying Lochte in the 200 meters individual medley race. In the end, the officials did not disqualify Lochte who therefore won his fourth-straight World title in this discipline. However, FINA later made this new turn illegal in individual medley races. If Lochte were disqualified, he would be also deprived of the gold medal and related prize money and the sporting rule in

a football referee awards a red card to have such a noticeable economic impact or effect to fall under EU law. International sporting governing bodies are the most competent in establishing technical rules determining form of a game or a competition and they should therefore keep their regulatory autonomy when enacting these rules.[297]

Nevertheless, I claim that all rules determining conditions of athletes' eligibility for their national teams have an economic impact, are not of a purely sporting nature, and thus fall within the scope of EU law. J. Paul McCutcheon argues that "[i]n some circumstances money is the predominant consideration underlying national representation especially where international fees represent the bulk of an athletes' income."[298] He further adds that eligibility rules often determine "the conditions under which athletes are permitted to pursue their livelihoods."[299]

The ECJ seemingly reflected today's economic reality of international competitions in its aforementioned *Meca-Medina & Majcen* judgment when it partially overruled its case law on the application of EU law to sporting rules and practically dismantled the purely sporting rules exception.[300] "The mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[301] Therefore, the ECJ broadened the group of sporting rules, which are subject to EU law scrutiny.[302]

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questions would have an economic impact on him ("FINA Officially Makes "Ryan Lochte Turn" Illegal In IM Races", *Swimming World*, 8 September 2015, retrieved 10 April 2016).

[297] J. Exner (2013), op. cit., p.1039.

[298] J. P. McCutcheon (2001), op. cit., p. 123.

[299] Ibid., p. 133.

[300] Y. Hafner (2012), op. cit., p. 232.

[301] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 27.

[302] J. Exner (2016), op. cit., p. 45.

I submit that the analogy with EU citizenship can help to draw the hypothetical borderline between the absolute regulatory autonomy of international sporting governing bodies and situations in which they must reflect EU law requirements. In *Rottmann*, the ECJ ruled that, even though Member States have the exclusive competence to lay down the conditions for the acquisition and loss of nationality,[303] the national rules concerned must have due regard to EU law in situations falling within its material scope.[304]

In a similar way, international sporting governing bodies are exclusively competent and best equipped for establishing conditions of athletes' eligibility for national teams. On the other hand, these sports organisations must have due regard of the requirement imposed by EU law when they enact rules that fall within the scope of EU law for they have an economic impact or effect and influence rights that athletes derive from EU law. Otherwise, international sporting governing bodies would risk having their rules proclaimed incompatible with EU law.[305]

As I will further discuss, the sporting nature of rules governing athletes' eligibility to participate in international competitions should be reflected in the subsequent phase of the CJEU's test of compatibility of these with EU law, notably when the CJEU justifies a restriction to respective EU law provisions that sporting rules constitute.[306] The ECJ itself ruled that, "the provisions of [EU

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[303] Case C-135/08, *Rottmann*, [2010] EU:C:2010:104, paragraph 39.
[304] Ibid., paragraph 41. In the paragraph 42 of this judgment, the ECJ rules that: "It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.
[305] J. Exner (2016), op. cit., p. 45.
[306] Ibid.

law] concerning freedoms of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events."[307]

4.2. Rules Governing Sporting Nationality which Constitute a Restriction to European Union Law that May Be Justified and Proportionate

In the second group, I explore sporting rules governing conditions of athletes' eligibility for their national teams, which fall within the scope of EU law, namely provisions on EU citizenship, free movement of persons, freedom to provide services and competition. Furthermore, rules contained in this group constitute a restriction on the aforementioned provisions of EU law, which, however, may be eventually justified and proportionate. I present rules governing the election of sporting nationality and the waiting periods as examples of rules falling into this group.

The notion of a restriction, an obstacle or a limitation to EU law is very broad. Pursuant to internal market freedoms, EU citizens have in particular the right that they derive directly from the Treaties, to leave their Member State of origin to enter the territory of another Member State and reside there freely in order to pursue an economic activity.[308] Therefore, any rule or provision that makes the free movement less attractive, precludes or at least deters EU citizens from exercising their right to free movement constitutes an obstacle to EU law,

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[307] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 26; see also Case C-13/76, *Dona* v. *Mantero*, [1976] EU:C:1976:115, paragraphs 14 and 15.

[308] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 95; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228.

which must be justified in order to survive the CJEU and other EU bodies and institutions' scrutiny.[309]

The ECJ marked in its case law, for instance, selection rules or anti-doping regulation as examples of sporting rules setting an obstacle to athletes' rights under EU law.[310] In *Deliège*, the ECJ stated that the contested selection rules "inevitably have the effect of limiting the number of participants in a tournament," despite of having finally accepted these rules for their inherence in the conduct of an international high-level sports event."[311] In *Meca-Medina & Majcen*, the ECJ did not declare the contested anti-doping rules contrary to EU competition law, but it still recognized on several places in the judgment that these rules had ancillary effects that restricted competition.[312]

The authors of the Study on the equal treatment of non-nationals in individual sports competitions employ the criteria of context, objectives, inherence and proportionality, set by the ECJ in *Wouters*[313] and applied to sporting rules in *Meca-Medina & Majcen*,[314] in the phase of the test during which the CJEU would examine whether a restriction to EU law exists or not.[315] However, I would suggest to rather examine these criteria as a matter of justification of limitations of athletes' rights under EU law, rather than

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[309] On derogations, limitations, conditions and justifications of free movement of persons, see, in general C. Barnard (2016), op. cit.
[310] J. Exner (2016), op. cit., p. 47.
[311] Joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199, paragraph 64.
[312] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraphs 47, 54.
[313] Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.
[314] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraphs 47, 54.
[315] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228, 229.

a question of existence of such a restriction, no matter how marginal the restriction is.[316]

It is true that this theoretical dispute might be caused by the confusing usage of the word "restriction" in the case law of the ECJ and therefore in many academic works. The ECJ is sometimes not very clear whether it considers a restriction as a limitation of rights that can be justified, or whether it deems a restriction as a measure that ultimately violates EU law. For the sake of legal certainty, I suggest that the ECJ should be clearer in differentiating between these two concepts in order to facilitate the reading and understanding of its judgments for the broad public. In any case, I esteem the notion of restriction as a justifiable limitation and work with it in this way further throughout this J. D. thesis.

I believe that it is more convenient to concentrate rather on a much broader and much more complex question of justification of a restriction of athletes' rights under EU law rather than on existence or nonexistence of the restriction. From my point of view, it is nowadays very difficult or rather practically impossible to imagine a rule governing sporting nationality that does not in any way restrict an athlete – EU citizen's or undertaking's right under EU law to run his or her business freely in a Member State different from the one of her/his origin.[317] I will further deal with rules determining sporting nationality focusing on their justification and proportionality.

I advocate this approach of focusing on justification and proportionality rather than on the question of factual existence or nonexistence of a restriction. Furthermore, I believe that such approach does not decrease the level of legal

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[316] J. Exner (2016), op. cit., p. 47.
[317] Ibid., pp. 47-48.

certainty, even though it can make such an impression on the first glance. I understand that the assumption, according to which nearly any rule or provision that precludes or at least deters an EU citizen from exercising his rights under EU law constitutes a restriction, practically dismisses measures that are not restrictions to EU law and that almost all rules must be justified.

On the other hand, the CJEU generally dedicates far more arguments and paragraphs to the question of whether a restriction is justified or not, compared to the space devoted to the question of existence or non-existence of such a restriction. In particular, while the CJEU often only briefly discusses the character of a restriction in not many paragraphs, it often dedicates a majority of its sports-related judgments to the questions of justifications and proportionality.[318] Therefore, legal certainty of international sporting governing bodies and other actors in sporting world contrarily increases in this respect since they have much more detailed direction how to set their rules in order to pass successfully the justification phase of the three steps test.[319]

In this regard, I have gradually corrected my preceding opinion regarding the division of rules governing conditions of athletes' eligibility for their national teams from the EU law point of view. Following the division proposed by the authors of the aforementioned Study on the equal treatment of

[318] See *inter alia* Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201. First, the ECJ assesses whether Mr Lehtonen and respective basketball rules fall within the scope of EU law (paragraphs 32-46). Thereafter, the existence of an obstacle to freedom of movement for workers is examined (paragraphs 47-50). Finally, the ECJ engages in exploring whether such a restriction can be justified (paragraphs 51-59); see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143: scope (paragraphs 27-32), restriction (paragraphs 33-37), justification (paragraphs 38-50); Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492: scope (paragraphs 22-34), restriction (45,54), justification (41-56).
[319] J. Exner (2016), op. cit., p. 48.

non-nationals in individual sports competitions[320] or Yann Hafner,[321] I also originally worked with a group of sporting rules that fall within the scope of EU law but do not constitute a restriction to athletes' rights under EU law. I initially placed rules excluding foreign nationals of representative team rosters into that group.[322] However, given my abovementioned arguments on the notion of a restriction, I have further put these rules into this second category of possibly justifiable measures.[323]

I submit that the manual to pass the CJEU's test of the compliance of rules governing athletes' eligibility in national teams with EU law leans on four key words – context, objective, inherence and proportionality. In this respect, the ECJ provided a sporting community with a useful tool in its doping related judgment in *Meca-Medina & Majcen* while applying to the specific field of sport general principles set out in the *Wouters* case, which related to the regulation of the exercise of advocacy in the Netherlands.

Dealing with the contested anti-doping regulation in the light of EU competition law, the ECJ decided in *Meca-Medina & Majcen* that "account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produced its effects and more specifically, of its objectives."[324] According to the ECJ, the question then shifts to the evaluation "whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them."[325] When assessing

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[320] Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010).
[321] Y. Hafner (2012), op. cit.
[322] J. Exner (2013), op. cit., p. 1039.
[323] J. Exner (2016), op. cit., pp. 48-49.
[324] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 42; see also Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98, paragraph 97.
[325] Ibid.

these criteria in the field of sport, the CJEU's task is to balance individual interests of athletes with the general interest protected by international sporting governing bodies.[326]

Having presented the abovementioned general considerations, I will apply them to two rules determining sporting nationality proposed by Yann Hafner, which deserve further attention as to their compliance with the *Wouters* criteria. Firstly, I will deal with rules governing the election of sporting nationality, which are in my opinion less problematic when it comes to their compliance with EU law (Chapter 4.2.1). Thereafter, I will proceed with waiting periods, which collide possibly with EU law, especially in the case of some international sporting governing bodies (Chapter 4.2.2).[327]

4.2.1 Rules Governing the Election of Sporting Nationality

International sporting governing bodies' rules that determine the election of sporting nationality provide that an athlete, selected for a national team, can no longer be selected for another national team.[328] In this regard, the Olympic Charter provides that "[a] competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect."[329] Generally speaking, "[…] dual sporting nationality is not accepted".[330] Those athletes who possess dual nationality according to respective national laws

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[326] P. Gillon, R. Poli, "La Naturalisation de sportifs et fuite des muscles. Le cas de Jeux Olympiques de 2004" in D. Oswald (Ed.) (2004), op. cit., pp. 47-72.
[327] Y. Hafner (2012), op. cit., pp. 233-234.
[328] CAS 2001/A/357, *Nabokov & Russian Olympic Committee (ROC) & Russian Ice Hockey Federation (RIHF) / International Ice Hockey Federation (IIHF)*, [2002]; M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 2001 – 2003*, (Kluwer Law International, 2004), p. 503; see also Y. Hafner (2012), op. cit., p. 233.
[329] Olympic Charter (2016), bye-law 1 to rule 41.
[330] Y. Hafner (2008), op. cit., p. 2.

must choose only one country that they wish to represent in international competitions.[331]

The Olympic Charter presents an interesting case of the election of sporting nationality for the purpose of the Olympic Games in situations, in which the legal status of a country changes. "[If] an associated State, province or overseas department, a country or colony acquires independence, […] a country becomes incorporated within another country by reason of a change of border, […] a country merges with another country, or […] a new [national Olympic committee] is recognised by the IOC […].,"[332] an athlete may continue to represent the country to which he belongs or belonged. He may also elect to enter in the Olympic Games with his new national Olympic committee if one exists. However, the athlete can make this particular choice only once.[333]

I submit that these rules, which govern single sporting nationality, formally restrict EU citizens' and undertakings' rights by preventing them from being eligible to represent more countries in one moment. On the other hand, these rules simultaneously seek a logic and legitimate objective of "the regularity and integrity of international competitions."[334] They also aim at safeguarding "the principle of continuity of competitions and ability to compare the performance amongst competitors.[335] Furthermore, the CAS holds the opinion that athletes may have only one sporting nationality at a time and that the election of sporting nationality is a legitimate mechanism to prevent

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[331] Ibid., p. 2.
[332] Olympic Charter (2016), bye-law 1 to rule 41.
[333] Ibid.
[334] A. Goetschy, *La nationalité sportive. Eléments pour une étude du droit applicable à l'éligibilité des athlètes en équipe nationale representative*, (S.I., 2007), No. 88, p. 56.
[335] P. Collomb, "Qu'est-ce qu'une équipe nationale?" in M. Maisonneuve (Ed.), *Droit et Coupe du monde* (Economica, 2011), p. 56.

athletes having dual nationality to modify their eligibility at their own convenience.[336]

Based on the abovementioned considerations, I conclude that rules that require an athlete to have a single sporting nationality at a time are inherent to the proper conduct of international sporting competitions. Without these rules, international sport would lose its character, purpose and magic. It is clear that if an athlete could wear a national jersey of more national teams at a time, sport would lose a substantial part of its social importance. Sport does not include only excellence and aiming high, but its important element is also identity to a group or a society.[337]

Even EU law and the EU bodies, institutions and their members recognize the social role of sport. Article 165 TFEU mentions "the specific nature of sport, its structures based on voluntary activity and its social and educational function." The ECJ recognized "the considerable social importance of sporting activities" in a number of its sports-related judgments.[338] The Commissioner for Education, Culture, Youth and Sport Tibor Navracsics knows that sport "is about having fun, being healthy and feeling good about yourself."[339] He nevertheless very well realised that it is also about something much bigger. "Sport and physical activity bring people from different

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[336] CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998), op. cit., p. 304.

[337] J. Exner (2016), op. cit., p. 51.

[338] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463, paragraph 106; see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 39.

[339] „Building communities: the role of sport", speech of Tibor Navracsics, Commissioner for Education, Culture, Youth and Sport, Brussels, 9 September 2015.

backgrounds together, helping to create friendships and building communities."[340]

The development of modern sport has had influence even on the structuring of the idea of the nation, the most important of all communities.[341] In this respect, I believe that sport forms part of national identity of Member States from the sociological point of view. The European Commission acknowledged in the European Model of Sport that international competitions are a tradition in Europe since "national teams are seen as representing a nation."[342] It goes even further and reiterates that sport is one of the last national passions and that a psychological need to confront each other exists in Europe. Moreover, sport is a way of doing this without bloodshed. International competitions present an opportunity for Member States to demonstrate their culture and tradition, including sport, thus safeguarding the cultural diversity, which is one of the characteristics of the EU.[343]

Luc Desaunettes goes in his work even further and explores the intersection between sport, EU citizenship and the sense of belonging to the European Union. He shows that sport has enabled the progressive structuring of a public European area and looks into some ideas that might, by using sport as a lever, lead to the development of a political sense of belonging to the EU.

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[340] Ibid.

[341] F. Archambault, L. Artiaga, "Les significations et les dimensions sociales du sport" (2004) Sport et société, Cahiers français, n°320, 2004, p. 38. See also, for example, the movie Invictus (2009): The film tells the inspiring true story of how Nelson Mandela joined forces with the captain of South Africa's rugby team to help unite their country. Newly elected President Mandela knows his nation remains racially and economically divided in the wake of apartheid. Believing he can bring his people together through the universal language of sport, Mandela rallies South Africa's rugby team as they make their historic run to the 1995 Rugby World Cup Championship match.

[342] The European Model of Sport, Consultation document of DG X, (Brussel: European Commission, 1998): 5.

[343] Ibid.

He discusses, for example, the possibility of playing the European anthem in conjunction with the national anthem when a European team is playing, a special prize for the European champions in the form of the possibility to wear a badge with the European colours on their jerseys or stepping up the number of youth sports exchanges.[344] However this concept might go against the purely national attitudes of certain athletes and fans, I think that this idea deserves further exploration.

Be that as it may, the social importance of sport certainly concerns not only athletes, who feel united with their teammates under one national flag fighting for the glory of their countries and pursue the idea of fair-play together with their rivals. Moreover, sporting community also includes passionate fans and other people feeling national pride and cheering for their national teams.[345] In the light of the foregoing, I submit that the election of single sporting nationality is inherent in international sports. I believe that it is also a logical and proportionate measure compared to its objectives since I cannot see any comparable measure that would achieve the set objectives with the same intensity and would be at the same time less restrictive to EU citizens' and undertakings' rights.[346]

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[344] L. Desaunettes, "Citizenship, Sport and the sense of belonging to the European Union" (2014) Fondation Robert Schuman, European issues, Number 322, p. 1-4.

[345] At this point, I dare one personal remark. In the Czech Republic, sport in general, and ice hockey in particular, are tools that bring the Czech nation together. Every year in May, the crowd that fills the whole Old Town Square in Prague cheers for the Czech national team in its pursuit of the World title at the IIHF World Championships. At that time, every Czech is proud of the Czech Republic and feels truly "Czech", which cannot be unfortunately said about the national pride of Czechs in general. In other words, the Czech Republic is a good example of a country where sport fulfils its social role and helps in creating a national identity.

[346] J. Exner (2016), op. cit., p. 52.

4.2.2 Waiting Periods

International sporting governing bodies usually include in their eligibility rights the so called waiting periods, otherwise called also cooling-off periods[347], non-competition periods[348] or periods of inactivity[349] in order to prevent athletes from changing their sporting nationality at their own convenience. Under waiting periods, an athlete who has represented one country in international competitions and who has changed his nationality or acquired a new nationality, the athlete may participate in international competitions to represent his new country if certain time, usually from two to four years, has passed since the competitor last represented his former country.

In my opinion, waiting periods constitute a restriction of athletes' rights that they derive from EU law. On one hand, waiting periods do not constitute any sanction and they only limit athletes in competing in international competitions. On the other hand, "money is the predominant consideration underlying national representation especially where international fees represent the bulk of an athlete's income".[350] Therefore, waiting periods restrict athletes' rights under EU law by limiting the possibility to run their business for some time in other Member States.[351]

Regarding the justification of the aforementioned restriction, I accept that rules determining waiting periods seek a legitimate objective and are inherent in the proper conduct of international sporting competitions. These rules aim at ensuring that athletes have "a genuine, close, credible and established national

[347] Y. Hafner (2012), op. cit., p. 234.
[348] A. S. Wollmann, O. Vonk, G. R. de Groot (2015), op. cit., p. 318.
[349] Y. Hafner (2008), op. cit., p. 1.
[350] J. P. McCutcheon (2001), op. cit., p. 123.
[351] J. Exner (2016), op. cit., p. 53.

link with the country […] for which they have been selected."[352] Therefore, waiting periods protect the regularity and fairness of international competitions thus protecting their integrity.[353]

At the same time, they prevent "muscle drain" from one country to another one[354] as well as they help to monitor athletes' naturalisations[355] Clearly, if an athlete were allowed to compete one year for Germany, the following year for the Czech Republic and the third year for France, international competitions would certainly lose their integrity. In the light of the foregoing, the objectives protected by waiting periods seem legitimate and these rules are equally inherent in the proper conduct of international competitions.[356]

The test of proportionality is the decisive phase of the assessment of the compliance of waiting periods with EU law. In this regard, I submit that the lengths of cooling-off periods, as well as some related conditions, represent the crucial elements. I believe that the waiting periods of two or sometimes even three years, depending on related conditions, comply with the requirement of proportionality in respect to their legitimate aims. Consequently, I claim that the cooling-off periods of four or more years go beyond what is necessary in order to protect the integrity of international competitions are thus potentially void under EU law.[357]

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[352] World Rugby Regulations (2016), Explanatory guidelines on the implementation of regulation 8, Eligibility to play for national representative teams, explanation 1.
[353] IIHF Statutes and Bylaws (2014-2018), rule 406; Y. Hafner (2012), op. cit., p. 234.
[354] R. Siekmann (2011), op. cit., pp. 241-268.
[355] J. A. R. Nafziger (2004), op. cit., p. 133.
[356] To this end see also J. Exner, "Čekací lhůty v ledním hokeji versus právo EU" (2013), Jiné právo [online], 25 November 2013.
[357] J. Exner (2013), op. cit., p. 54.

Waiting periods differ from one sport to another and generally range from periods of one to four years.[358] There is only one globally imposed cooling-off period set by the Olympic Charter for the purpose of the Olympic Games, which is three years long. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant international sporting governing body and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games for his new country. However, at least three years must pass since the competitor last represented his former country.[359]

I believe, contrary to some of my learned colleagues, that the waiting period of three years is not in itself excessive. In this respect, Stefaan Van den Bogaert claims that "the relatively frequently used waiting period of three years appears to be excessive" compared to the duration of a sporting career.[360] However, the summer and winter Olympics take place at four years intervals and this rule therefore allows athletes to participate in next Olympics if they change their sporting nationality within one year of the end of the previous Olympic Games.

In my opinion, the real problem comes with some international sporting governing bodies imposing cooling-off periods, which athletes must respect even with regard to the Olympics and the waiting periods amount therefore to another condition of the Olympic eligibility.[361] The International Ice Hockey

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[358] M. Lajous (2012), op. cit., p. 296.
[359] Olympic Charter (2016), bye-law 2 to rule 41. This provision further provides that "[t]his period may be reduced or even cancelled, with the agreement of the [national Olympic committees] and [international federations] concerned, by the IOC Executive Board, which takes into account the circumstances of each case.
[360] S.C.G. Van den Bogaert (2005), op. cit., pp. 358.
[361] J. Exner (2016), op. cit., p. 54.

Federation (IIHF) is an example of international sporting governing bodies, which impose, in my opinion, disproportionate waiting periods. The IIHF Statutes and Bylaws allow a player who "has represented a country in any IIHF championship, or in the Olympic competition or in the qualification to these competitions […] to represent another country" under very strict cumulative conditions.

Such a player shall be a citizen of that new country. Furthermore, he shall have an international transfer, which the IIHF approved at least four years before the start of the IIHF competition in which he wishes to participate. Thirdly, such a player must have participated, on a consistent basis, for at least four consecutive years (1460 days) in the national competitions of his new country during which period he has neither transferred to another country nor played ice hockey for a team registered/located within any other country. Lastly, this player must have not played for his previous country in an IIHF competition either during this four-year period or between completion of this four-year period and the start of the IIHF championship, in which he wants to participate.[362]

The connection of the Olympic and the ice hockey waiting periods constitutes, in my opinion, a disproportionate restriction to players' rights under EU law. The combination of the Olympic waiting period with the IIHF regulations excludes an ice hockey player, who has changed his sporting nationality, from the whole Olympic cycle and he must therefore wait, in extreme cases, for eight years before he can represent his new country in the Olympics. Given the fact that the Olympics represent, in most cases, the top of

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[362] IIHF Statutes and Bylaws (2014-2018), rule 406.1.3.

players' effort, I consider it unjust and disproportionate to take from a player's hands the possibility to play for his new country under the five interlaced rings.

Moreover, the IIHF World Championships takes places regularly with a one-year period. Furthermore, there are other prestigious ice hockey tournaments, as for example the World Cup or the Euro Hockey Tour for four European Teams,[363] which form a noticeable part of every year ice hockey calendar. In the light of the aforementioned, I claim that is grossly disproportionate to prevent a player who has modified his sporting nationality from playing for his national team for four consecutive years.[364] In conclusion, I agree with Yann Hafner who claims that this long ban rather discourages players from modifying their eligibility rather than to confirm and strengthen the genuine link to their country of representation.[365]

The International Table Tennis Federation (ITTF) amounts to another, even more onerous example of an international sporting governing body, which imposes rules that, in my opinion, breach EU law.[366] I believe that the general ineligibility period of three years[367] is not as such disproportionate regarding the aim to prevent players being only mercenaries without any genuine link with their country of representation.

Nevertheless, the ITTF imposes progressive waiting periods on younger athletes who wish to modify their sporting nationality. The concrete table tennis rules exclude these players from international competitions for the period of three, five or seven years depending on their age in the moment of their

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363 Czech Republic, Finland, Sweden and Russia.
364 J. Exner (2016), op. cit., p. 55.
365 "Change of nationalities: the case of Table Tennis" (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3.
366 J. Exner (2016), op. cit., p. 55.
367 ITTF Handbook (2017), rule 3.8.5: "A player shall not represent different Associations within a period of 3 years."

registration.[368] The shortest three-year waiting period applies to players under the age of fifteen taking into consideration the moment of their registration.[369] It therefore prevents these players from representing their new country for three years in a period of their sporting growth, during which they often decide whether to practice table tennis at a top level in the future. I think that such exclusion rather discourages them from playing table tennis than encourages them in waiting for three years before they get another chance.

For example, I can imagine a fourteen-year old player who has already played for his former country in a regional championships and who has changed his nationality, for instance for genuine family reasons. It is neither fair nor reasonable to make him the subject of a ban in the form of three-year waiting period. In the light of the foregoing, I claim that, in this particular case, even a three-year waiting period is excessive. In the same way, I submit that five and seven years long cooling-off periods go clearly beyond what is necessary to protect the proper conduct of international competitions.[370]

4.3. Sporting Nationality Rules that Constitute an Unjustifiable and Disproportionate Restriction to European Union Law

Having seen international sporting governing bodies' rules governing athletes' eligibility in their national teams that constitute a restriction to athletes' rights under EU law, which may be justified depending to related conditions and the case-by-case consideration, I will now turn to an area, in which the liaison of international sports organisations and EU law becomes even more dangerous. This last group of sporting nationality rules contains

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[368] ITTF Handbook (2017), rules 4.1.3.3.1, 4.2.3.5, 4.3.6.2.1, 4.4.6.2.1, 4.5.1.3.3, 4.6.1.3.3, 4.1.3.3.2, 4.3.6.2.2, 4.4.6.2.2, 4.1.3.3.3, 4.3.6.2.3, 4.4.6.2.3.
[369] ITTF Handbook (2017), rule 4.1.3.3.1.
[370] J. Exner (2016), op. cit., p. 56.

those rules that are not compatible with EU since they fall within its scope and, in my opinion, constitute an unjustifiable and disproportionate restriction to the rights that athletes derive from EU law.

Regarding sporting rules in general, the *Bosman* judgment is the most famous example of the ECJ's condemnation of sporting regulations so far. In this case, the ECJ held the long-standing transfer rules and the "3+2" nationality clauses in professional football incompatible with EU law for violating the free movement for workers. Following this decision, professional football players are entitled to move to another club in the EU after the expiry of the contract with their club of affiliation without any compensation being due to the former club. Regarding the "3+2" nationality clauses in sport, they are no longer applicable to EU citizens.[371]

Similar major challenges to the one that faced European football after the *Bosman* judgment might also affect other rules in many different sports. Some international sporting governing bodies keep rules determining conditions of athletes' eligibility for national teams, which I believe go beyond what is necessary for the proper conduct of a sport and are therefore potentially void under EU law. In particular, I have in mind quotas of naturalised athletes (Chapter 4.3.1) and rules that prevent absolutely athletes from changing their sporting nationality (Chapter 4.3.2). Many authors throughout the World agree that these rules and related practices of international sporting governing bodies

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[371] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 231.

do not comply with EU law since they provide for an unjustifiable restriction to the rights that athletes derive from EU law.[372]

4.3.1 Quotas of Naturalised Athletes

The sporting world is sometimes a witness to a performance by national team, which is composed mostly from players who were born outside their country in representation. The aforementioned case of Qatar is a great example of a country that fields many naturalised athletes.[373] Some international sporting governing bodies tend to limit the number of players in national teams who have acquired a citizenship of their country by naturalisation and/or who have previously represented another country in international competitions. They enact quotas of such players who can take part in a competition.

In general, international sporting governing bodies that regulate team sports have a stricter approach to quotas of naturalised athletes compared to international sports federations responsible for individual sports.[374] Yann Hafner believes that a closer connection of team sports with national sentiment might explain such a difference. "The playing of national anthems prior to competition" is a nice illustration of this approach.[375] I think that the reason is also that in individual sports, athletes compete much more often alone than as members of a group or a team.

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[372] Y. Hafner (2012), op. cit., p. 235; Y. Hafner, "La qualification des joueurs en équipe représentative au regard de la réglementation de la FIFA : le cas de la Coupe du Monde 2010" (2010) Jusletter, 1-12; F. Latty, *La lex sportiva. Recherche sur le droit transnational* (Martinus Nijhoff Publishers, 2007), p. 684; A. M. Mestre (2009), op. cit., p. 78; D. Oswald, Y. Hafner, "Les limites du pouvoir réglementaires des fédérations internationales en matière de nationalité sportive : la jurisprudence Auer" (2008) Sport et Citoyenneté, Number 3, pp. 18-19.
[373] See pages 23 - 24.
[374] Y. Hafner (2008), op. cit., p. 1.
[375] Ibid.

In extreme cases, countries, other athletes or fans can perceive athletes who have changed their sporting nationality as national traitors. Yann Hafner uses the example of the basketball player Becky Hammon, who originally played for the United States of America. Later, Becky Hammon opted for Russian nationality and represented her new country at the Summer Olympics in 2008 and in 2012. Many American media and sports officials criticised her behaviour as traitorous.[376] Quite interestingly, Becky Hammon is now an assistant coach for the San Antonio Spurs of the National Basketball Association (NBA).[377]

Basketball and volleyball are two examples of sports in which competent authorities apply quotas of naturalised athletes. The FIBA's Internal Regulations provide that a national team participating in a competition recognized by the FIBA may have "only one player on its team who has acquired the legal nationality of that country by naturalisation or by any other means after having reached the age of sixteen […]."[378] Similarly, the Sports Regulations of the International Volleyball Federation (FIVB) provide that "only one player having previously played for another national team of the same age category can be part of a team, for a given event."[379] In the light of the foregoing, quotas of naturalised athletes clearly restrict athletes' rights under EU law.[380]

I argue that quotas of naturalised athletes are incompatible with EU law, in particular because they breach the principle of proportionality. In this regard, my argumentation follows two lines. The first one considers the CJEU's case

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[376] Ibid., p. 2.
[377] Sports Reference, Becky Hammon, retrieved 25 June 2017.
[378] FIBA Internal Regulations (2017), book 3, chapter 1, article 21.a.
[379] FIVB Sports Regulations (2016), article 2.2.1.
[380] J. Exner (2016), p. 60.

law prohibiting discrimination on grounds of the time at which or the manner in which EU citizens acquired their nationality and its applicability to rules governing sporting nationality. I believe that it would be fatal for rules imposing quotas of naturalised athletes if the aforementioned case law applies to these sporting rules, which requires legal and sporting nationality to overlap. Alternatively, I examine whether these sporting rules constituting restriction to athletes' rights under EU law can be justified in the light of the elements of context, objectives, inherence and proportionality found and confirmed by the ECJ in *Meca-Medina & Majcen*.[381]

Regarding the first line of my argumentation, the findings of the ECJ in *Auer* provide an interesting point of reflection regarding quotas of naturalised athletes. According to the ECJ, there is no provision of EU law that makes it possible to treat nationals of Member States differently in situations falling within the scope of EU law, according to the time at which or the manner in which they acquired the nationality of the state. Such a rule applies at the time at which they rely on the benefit of the provision of EU law as long as they possess the nationality of one of the Member States and that the other conditions for the application of the rule on which they rely are fulfilled."[382]

I submit that it is very likely that the CJEU marks quotas of naturalised athletes as incompatible with EU law if it applies the criteria set out in *Auer* to them.[383] The decisive question is whether the concepts of legal and sporting nationality overlap. The case law of the CAS provides that legal and sporting nationality are two different concepts.[384] According to the CAS, legal nationality

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[381] Ibid.

[382] Case C-136/78, *Ministère public* v. *Auer*, [1979] EU:C:1979:34, paragraph. 28.

[383] Y. Hafner (2012), op. cit., p. 235.

[384] CAS 98/2009, *Spanish Basketball Federation (FEB) / International Basketball Federation (FIBA)*, [1999], M. Reeb (Ed.) (2002), op. cit., p. 503; CAS 98/215, *International Baseball Association (IBA)*,

represents "the personal status deriving from citizenship of one or more states"[385] while sporting nationality is a "uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competitions."[386] The majority of scholars, including for example Jean-Philippe Dubey[387] or Stefaan Van den Bogaert[388], advocate the same view.[389]

On the other hand, I believe that there is a significant overlap of legal and sporting nationalities. First, many international sporting governing bodies use citizenship as the basic criteria of the constitution of sporting nationality in their rules.[390] Moreover, Austrian and French courts refuse to accept the distinction between legal and sporting nationalities since they uphold athletes' claims based on the overlap of these two concepts.[391] I believe that the two notions permeate and that the *Auer* line of case law is applicable to rules governing athletes' eligibility in national teams. Therefore, these regulations would need to survive the CJEU's proportionality test, which, as I will further discuss, is hardly imaginable.[392]

Secondly, I submit that even if the CJEU did not apply its findings from Auer to quotas of naturalised athletes, these rules would anyway not survive its test of the compliance with EU law having regard to their context, objectives,

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Advisory Opinion, [1999], M. Reeb (Ed.) (2002), op. cit., p. 701, M. Reeb, "La nationalité dans la jurisprudence du TAS" in D. Oswald (Ed.) (2004), op. cit., pp. 83-136.

[385] D. Oswald, Y. Hafner (2008), op. cit., p. 18.

[386] CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998), op. cit., p. 304; Y. Hafner (2012), op. cit., p. 216.

[387] J.-P. Dubey (2000), op. cit., pp. 631, J.-P. Dubey (2004), op. cit., pp. 31 – 45.

[388] S.C.G. Van den Bogaert (2005), op. cit., pp. 448.

[389] D. Oswald, Y. Hafner (2008), op. cit., p. 18.

[390] See for example FIVB Sports Regulations (2016), article 1.3, FIBA Internal Regulations (2017), book 3, chapter 1, article 15.

[391] Conseil d'Etat, Number 101894, *Olympique d'Antibes Juan-les-Pins c. Fédération Française de Basket-ball*, [1989]; OGH, 2Ob232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

[392] J. Exner (2016), op. cit., p. 61.

inherence and proportionality. I do not contest that these rules follow a legitimate objective. International sporting governing bodies seek to prohibit "that certain states that wish to promote themselves on the international scene naturalise large numbers of athletes in order to achieve their desired recognition."[393] Conversely, they also aim at preventing athletes from comporting themselves as mercenaries participating in international competitions representing countries with which they have no objective link.[394]

However, quotas of naturalised athletes are, in my opinion, neither inherent in the proper conduct of international competitions nor proportionate to their objectives. The aforementioned FIBA rule applies also "to any player having the right to acquire a second nationality at birth but who did not lay claim to this right until after having reached the age of sixteen."[395] However, it is perfectly possible that an athlete loses his previous legal nationality or changes it for another, for example in the case of marriage or naturalisation.[396] Nowadays, many countries do not recognize double nationality. Therefore, these rules then exclude from international competitions athletes who have changed their nationality.[397]

Furthermore, Yann Hafner correctly points out that the aforementioned rule affects also, for instance, a player who has never represented another country at international level.[398] Even more curiously, such a rule can concern, for example, a minor whose legal nationality changed as consequence of the change of legal nationality of its parents.[399] In the light of the foregoing, the

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[393] D. Oswald, Y. Hafner (2008), op. cit., p. 18; J. Exner (2016), op. cit., p. 62.
[394] Ibid.
[395] FIBA Internal Regulations (2017), book 3, chapter 1, article 21.a.
[396] S.C.G. Van den Bogaert (2005), op. cit., pp. 448.
[397] D. Oswald, Y. Hafner (2008), op. cit., p. 18.
[398] Y. Hafner (2012), op. cit., p. 236.
[399] D. Oswald, Y. Hafner (2008), op. cit., p. 18.

FIBA's regulation is unnecessary since other measures less restrictive on players' rights under EU law are capable of achieving the same result.[400] I have previously claimed that a rule can exist which would not restrict a player's eligibility to play for his new national team when he had never before played for another country in international competitions.[401]

Moreover, quotas of naturalised athletes lack proportionality *stricto sensu*. In this regard, I agree with Denis Oswald and Yann Hafner, who claim that it is unacceptable to "differentiate and fix quotas for naturalised athletes already having participated for another national federation, whereas those who have never been selected a priori are not subject to the same restrictions."[402] Furthermore, "this discrimination is all the more regrettable in so far as it does not allow the prohibition of abusive naturalisations from the sporting point of view - whether they result from the action of the state or the athlete."[403]

Having assessed the abovementioned arguments, I claim that the FIBA's regulation, which allows only one player on a national team who has acquired the legal nationality of that country by naturalisation or by any other means after having reached sixteen years of age, is disproportionate. In a similar way, the FIVB's rule, allowing only one player having previously played for another national team of the same age to be part of a team, goes beyond what is necessary to secure the integrity of international competitions. Therefore, the CJUE could potentially declare these rules incompatible with EU law.[404]

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[400] Ibid.
[401] J. Exner (2013), op. cit., p. 1042. J. Exner (2016), op. cit., p. 63.
[402] D. Oswald, Y. Hafner (2008), op. cit., p. 18.
[403] Ibid.
[404] J. Exner (2006), op. cit., p. 63.

4.3.2 Rules Prohibiting the Modification of Sporting Nationality

I am convinced that the prohibition of the change of sporting nationality clearly breaches rights that athletes derive from EU law. Athletes who want to modify their eligibility for whatever reasons cannot sometimes do so simply because the international body governing their sport forbids such a change.[405] No matter how may the denial of athletes' right to change their sporting nationality secure the integrity of international competitions, I submit that the aforementioned prohibitions lack proportionality and are therefore potentially void under EU law.

In the majority of sports, athletes may change the country they represent in international competitions during the course of their careers. Kevin-Prince Boateng, Adnan Januzaj, Danijel Šarić, Anastasia Kuzmina or Jakov Fak, athletes whose stories I briefly introduced in this J. D. thesis, have modifiend their sporting nationality in the course of their sporting careers.[406] Some athletes change their legal and subsequently sporting nationality as consequence of events, which would not have always resulted from their voluntary choices, for example for family reasons or because of war. The others change their sporting nationality simply because of the competition in their original national teams.[407]

Nevertheless, from the EU law point of view, at least when it comes to the freedom of movement for workers, the motive that led an athlete to change his sporting nationality is irrelevant. On one hand, there are opinions calling for a stricter approach of international sporting governing bodies towards those athletes who have changed their eligibility by their own choice driven by

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[405] Ibid., p. 64.

[406] See Chapter 1.3.

[407] J. Exner (2016), op. cit., pp. 63-64.

a sporting reason, for example because of the aforementioned competition in their former team, without any serious reasons of a personal nature.[408]

On the other hand, the ECJ has held on several occasions that the freedom of movement for workers must not depend on the objectives that a national of Member state pursues in applying to enter the territory of a host Member State, provided that he pursues or wishes to pursue effective and genuine employment activities."[409] According to the ECJ, "the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration […]."[410] Therefore, EU authorities will not take into account the reason leading an athlete to modify his sporting nationality.

In any case, athletes who wish to change their eligibility for whatever reasons cannot sometimes do so simply because the international sporting governing body prevents such a change.[411] As I have illustrated above, international sports federations' approach the question of parameters allowing athletes to change their eligibility in national teams differs depending on whether they govern an individual or a team sports. Sports federations regulating individual sports tend to permit athletes to change their sporting nationality. Contrarily, most team sports do not show much tolerance towards athletes wishing to change their eligibility in national teams. If these international sporting governing bodies allow athletes to change their sporting

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[408] Gerhardt Bubník, an advocate and a leading Czech expert in the field of sports law, expressed this view regarding the modification of sporting nationality during our personal discussion held on 11 February 2016.

[409] Case C-46/12, *N.*, [2013] ECLI:EU:C:2013:97, paragraph 47; Case C-53/81, *Levin* v. *Staatssecretaris van Justitie*, [1982] EU:C:1982:105, paragraphs 21 and 22; Case C-109/01, *Akrich*, [2003] ECLI:EU:C:2003:491, paragraph 55.

[410] Ibid.

[411] J. Exner (2016), op. cit., p. 64.

nationality, they usually apply very strict rules including quotas of naturalised athletes dealt with above, or they completely forbid the modification of sporting nationality.[412]

Basketball, football, table tennis or rugby are examples of sports in which players, under certain circumstances, cannot change their eligibility in national teams. The FIBA's Internal Regulations provide that "[a] player who has played in a main official competition of the FIBA after having reached his seventeenth birthday may not play for a national team of another country."[413] There are two minor exceptions to this prohibition. Apart from the age limit of seventeen years,[414] the Secretary General of the FIBA may authorise an a priori ineligible player to play for the national team of his country of origin if this is in the interest of the development of basketball in this country.[415] Peter J. Spiro aptly compares these no-transfer regimes to "the feudal perpetual allegiance premise to nationality under which birth nationality could never be severed."[416] In the light of the foregoing, it is clear that the rule preventing athletes from modifying their sporting nationality in basketball constitutes a restriction on the right that they derive from EU law.[417]

Coming from a basketball court to a football pitch, the FIFA Statutes provide that "[…] any Player who has already participated in a match (either in full or in part) in an Official Competition of any category or any type of football for one Association may not play an international match for a representative

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[412] Y. Hafner (2008), op. cit., p. 1.
[413] FIBA Internal Regulations (2017), book 3, chapter 1, article 3.23.
[414] Ibid., book 3, chapter 1, articles 3.22 and 3.23.
[415] Ibid., book 3, chapter 1, article 3.23.
[416] P. J. Spiro, "The End of Olympic Nationality" in F. Jenkins, M. Nolan, K. Rubenstein (Ed.), *Allegiance and Identity in a Globalised World*, (Cambridge University Press, 2014), p. 488.
[417] J. Exner (2016), op. cit., p. 65.

team of another Association."[418] On one hand, it is true that this rule is not absolute. "If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another Country of which he holds nationality […]."[419]

Nevertheless, such an exception is subject to the following conditions. Firstly, the player must have not played a match (either in full or in part) in an official competition at "A" international level for his current association. Moreover, he must have already had the nationality of the representative team for which he wishes to play at the time of his first full or partial appearance in an international match. Second, the player cannot play for his new association in any competition in which he has already played for his previous Association.[420] Be that as it may, these provisions limit players' right to play for another Member State's national team of their choice and as such, they constitute a restriction to their rights under EU law.[421]

The ITTF is another international sporting governing body that, in my opinion, restricts athletes' rights under EU law with its regulations practically excluding a change of sporting nationality. It is true that table tennis is one of the sports where the modification of sporting nationality belongs to the biggest concerns. Yann Hafner states that governments of some countries were expediting the naturalisation process for promising athletes in order to get their

[418] FIFA Statutes (2016): Regulations Governing the Application of the Statutes, rule 5.2.
[419] Ibid., rule 8.1.
[420] Ibid., rule 8.1.
[421] J. Exner (2016), op. cit., p. 65.

services in the shortest time possible.[422] As a reaction, the ITTF has prevented athletes over the age of 21 from participating in international competitions for a new association.[423] This rule raises serious questions as to its validity under EU law since it clearly limits table tennis players – EU citizens and undertakings – in exercising their rights that they derive from EU law.[424]

Lastly, World Rugby Regulations provide that "[a] Player who has played for the senior fifteen-a-side National Representative Team […] is not eligible to play for the senior fifteen-a-side National Representative Team […] of another Union."[425] This regulation applies equally to Rugby Sevens[426] thanks to which rugby appeared again in the Olympic program of the 2016 Summer Olympics in Rio de Janeiro after having absented from the games for 92 years.[427] As in the case of basketball, football and table tennis, the rugby regulation clearly limits athletes' rights under EU law.[428]

No matter how may the denial of athletes' right to modify their sporting nationality secure the integrity of international competitions, I claim that the aforementioned prohibitions lack proportionality and are therefore potentially void under EU law. "One cannot totally preclude the right to change one's sporting nationality and with it the possibility to represent a second country," since "many changes of nationality are legitimate and are imposed by circumstances and not all are the result of economic, or, occasionally,

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[422] "Change of nationalities: the case of Table Tennis" (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3.
[423] ITTF Handbook (2017), rules 4.1.3.4, 4.3.6.3, 4.4.6.3.
[424] "Change of nationalities: the case of Table Tennis" (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3.
[425] World Rugby Regulations (2016), regulation 8, rule 8.2.
[426] Rugby sevens, also known as seven-a-side, Sevens or VIIs, is a variant of rugby in which teams are made up of seven players, instead of the usual 15, with shorter matches.
[427] World Rugby Regulations (2016), regulation 8, rule 8.6; „Golf & rugby voted into Olympics", *BBC Sport*, 9 October 2009, retrieved 10 April 2016.
[428] J. Exner (2016), op. cit., p. 67.

money-making considerations."[429] Many legal experts, including representatives of sporting governing bodies, claim that the prohibition is indeed illegal. In spite of this fact, many international sporting governing bodies continue to apply such rules. In the light of the foregoing, I would suggest to international sports federations to loosen up a bit and broaden the possibilities for athletes to change their sporting nationality.

In this chapter, I have shown that some rules governing athletes' eligibility in national teams in their current state, notably certain waiting periods, quotas of naturalised athletes and rules prohibiting the change of sporting nationality are potentially void under EU law. They are often not inherent to their legitimate objectives and disproportionate since they go beyond what is necessary to achieve their goals. As such, the relationship of international sporting governing bodies with EU law becomes a dangerous liaison.

Nevertheless, I believe that international sports federations and EU law can co-exist under a promising alliance, which is very desirable since the EU bodies and institutions' decisions clearly influence the global sporting scene, as has been illustrated throughout this J. D. thesis. In fact, I think that EU law can serve as a useful tool for these federations on how to better adapt their rules not only to EU law requirements but also to the requirements set by other world legal orders. In order to do so, international sporting governing bodies should follow certain general principles and concrete recommendations regarding rules determining sporting nationality (Chapter 5).

[429] D. Oswald (Ed.) (2004), op. cit., p. 201.

5. European Union Law and Sporting Nationality: Creating a Promising Alliance

In this chapter, I formulate concrete recommendations for international sporting governing bodies in order to better adjust their rules regarding sporting nationality to EU law requirements. First, I will make observations regarding the relation of international sports federations to EU law in general (Chapter 5.1.). Consequently, I will suggest specific recommendations regarding concrete rules determining athletes' eligibility in national teams introduced in this J. D. thesis (Chapter 5.2.).

5.1. General Recommendations for International Sporting Governing Bodies with Regard to EU Law

I believe that the key to a promising alliance of international sporting governing bodies and EU law rests on the harmonious equilibrium of their different characters and aims. In other words, "international federations and organisers of multi-sport competitions must balance their interests and their values with the legitimate rights of athletes."[430] International sporting governing bodies cannot blindly follow only the best interest of sport and forget about human and other rights that athletes derive from EU law. International sports federations should be more attentive to EU law since otherwise they risk a potential decision of EU bodies and institutions holding their rules incompatible with EU law, which could represent another *Bosman* judgment and have major and disruptive impacts on a number of world sporting governing bodies.

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[430] Y. Hafner (2008), op. cit., p. 3.

Moreover, international sporting governing bodies do not have to fear EU law as the Jedi sense the dark side of the Force.[431] Rather, they should perceive it as an ally from which they can learn since "cooperation, coordination and consultation are the best way for sporting organisations to preserve their autonomy."[432] The EU bodies and institutions offer to international sporting governing bodies a helping hand and their goal is definitely not to destroy what sports federations have created. I believe that the EU bodies and institutions respect the specific nature of sport and honour international sports federations' regulatory autonomy. They understand that international sporting governing bodies are the most competent in establishing their respective rules. Therefore, they limit themselves in interfering with these rules only as long as they breach athletes' rights under EU law.[433]

Furthermore, the EU bodies and institutions' decisions contain a valuable set of principles and instructions for international sporting governing bodies on how to better adapt their rules to EU law requirements and balance their interests with athletes' rights. In general, both the CJEU and the European Commission responsibly justify their conclusions while pointing out the most problematic issues and show what is and what is not acceptable under EU law. Therefore, they provide addressees of their decisions with ideas on what they should do in order to ensure compatibility of their rules with EU law.

The justification part of the EU bodies and institutions' judgments is the most valuable one since it contains the most important conclusions and useful

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[431] Star Wars (film series since 1977).

[432] Basic Universal Principles of Good Governance of the Olympic and Sports Movement (International Olympic Committee, Seminar on Autonomy of Olympic and Sport Movement, 11- 12 February 2008).

[433] For example in Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463.

principles for future cases. While the CJEU universally only briefly discusses the character of a sporting rule as a restriction in not many paragraphs on one hand, it often dedicates a majority of its sports-related judgments to the questions of justifications and proportionality on the other hand. In other words, the CJEU generally dedicates far more arguments and paragraphs to the question of whether a restriction is justified or not, compared to the space devoted to the question of existence or non-existence of such a restriction.[434]

As I have illustrated earlier in this J. D. thesis, I advocate this approach of focusing on justification and proportionality rather than on the question of factual existence or nonexistence of a restriction since it increases the level of legal certainty of international sporting governing bodies and other sporting actors.[435] On one hand, international sports federations might argue that with this approach, nearly all sporting rules constitute a restriction to EU law and must therefore be complicatedly justified. I believe, however, that this approach provides international sporting governing bodies and other actors in the sporting world with much more detailed direction on how to set their rules up in order to successfully pass the test of their compliance with EU law.[436]

I have claimed that the manual to pass the test of the compatibility of a sporting rule with EU law leans on four key words – context, objective, inherence and proportionality. In this regard, the ECJ provided international

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[434] See *inter alia* Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201. First, the ECJ assesses whether Mr Lehtonen and respective basketball rules fall within the scope of EU law (paragraphs 32-46). Thereafter, the existence of an obstacle to freedom of movement for workers is examined (paragraphs 47-50). Finally, the ECJ engages in exploring whether such a restriction can be justified (paragraphs 51-59); see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143: scope (paragraphs 27-32), restriction (paragraphs 33-37), justification (paragraphs 38-50); Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492: scope (paragraphs 22-34), restriction (45,54), justification (41-56).
[435] See Chapter 4.
[436] J. Exner (2016), op. cit., p. 48.

sporting governing bodies with a beneficial tool in *Meca-Medina & Majcen* while applying general principles set out in *Wouters*[437] to sport. The ECJ ruled in *Meca-Medina & Majcen* that "account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produced its effects and more specifically, of its objectives."[438] Therefore, international sporting governing bodies must carefully choose their interests, which the EU bodies and institutions can accept as legitimate aims.

While dealing with sporting rules, the ECJ has already accepted as legitimate objectives, for example, the need to ensure the training and development of young players, the need to maintain a certain sporting equilibrium between clubs and the need to preserve regularity of a sporting competition.[439] In *Meca-Medina & Majcen*, the ECJ added the combat against doping in order to ensure the fair conduct of competitive sport, the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.[440] I believe that the nature and the integrity of international sporting competitions between national teams is equally an overriding reason in public interest that international sporting governing bodies can use to justify their rules constituting a restriction to EU law.

If the EU bodies and institutions accept the legitimate objective offered by international sporting governing bodies, the question then shifts to the

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[437] Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.

[438] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 42; see also Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98, paragraph 97.

[439] Case C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others*, [1995] EU:C:1995:463; Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraph 53; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230.

[440] Case C-519/04 P, *Meca-Medina and Majcen* v. *Commission*, [2006] EU:C:2006:492, paragraph 43.

evaluation "whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them."[441] When assessing these criteria in the field of sport, the CJEU balances individual interests of athletes with the general interest protected by international sporting governing bodies.[442]

Therefore, international sporting governing bodies should seek to find the equilibrium between the best interest of sport and the rights that athletes derive from EU law. I understand that it is not always an easy job to do. On the other hand, I believe that decisions and recommendations of EU bodies and institutions as well as an active interaction with them can be very helpful. In this regard, I further formulate concrete recommendations for international sporting governing bodies on how to balance their interests enshrined in rules determining sporting nationality with EU law so that they stand a chance of surviving the EU bodies and institutions' scrutiny, in particular the proportionality test (Chapter 5.2.).

5.2. Concrete Recommendations for International Sporting Governing Bodies on How to Adapt Their Sporting Nationality Rules to EU Law Requirements

The aim of this chapter is to formulate concrete recommendations for international sporting governing bodies and to suggest modifications in their rules on sporting nationality in order to secure the compatibility of these rules with EU law. I will be the advocate of both sides trying to find the greater balance between interests and values of sports organisations on one hand and athletes' rights under EU law on the other hand.

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[441] Ibid., paragraph 42; see also Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98, paragraph 97.
[442] P. Gillon, R. Poli (2004), op. cit., pp. 47-72.

In this chapter, I will primarily deal with those sporting nationality rules, which, in my opinion, constitute unjustifiable and disproportionate restrictions to rights that athletes derive from EU law and are therefore potentially void under EU law. Some athletes cannot modify their sporting nationality because the sporting governing bodies completely deny it (Chapter 5.2.1). If the sports organisations allow for the change, they often set an obstacle in the form of the waiting periods (Chapter 5.2.2). Finally, when an athlete waits long enough, some international sporting governing bodies come with quotas of naturalised athletes (Chapter 5.2.3).

5.2.1 Recommendations on Rules Prohibiting the Modification of Sporting Nationality: Let Athletes Change Their Eligibility

In this J. D. thesis, I have claimed that rules that prevent athletes from changing their sporting nationality are potentially void under EU law. No matter how the complete prohibition to field any player, who has previously played for another national team and consequently changed his nationality, may secure the integrity of international competitions, I believe that such a prohibition lacks proportionality. I have submitted that international sporting governing bodies cannot totally preclude athletes from changing their eligibility in national teams since many changes of nationality are legitimate.[443]

In the light of the foregoing, I would suggest to international sports federations to loosen up a bit and broaden the possibilities for athletes to change their sporting nationality. Not all changes of nationality are the result of economic considerations. Some athletes change their legal nationality and subsequently eligigibility in national teams as consequence of events, which would not have always resulted from their voluntary choices, for example for

[443] See Chapter 4.3.2.

family reasons or because of war. Therefore, it is harsh, disproportionate and, in my opinion, illegal to totally preclude the right to change athletes' sporting nationality and with it the possibility to represent another country.

Furthermore, I would also suggest excluding minors from the prohibition to modify sporting nationality. The thing is that their change of nationality and consequent will to modify their sporting nationality may occur irrespective of their will, for instance as a consequence of the change of nationality of their parents. Furthemore, I believe it goes beyond what is necessary to secure the integrity of international competitions to prevent young athletes from wearing a national jersey of an adult team of the country, of which nationality they acquired.

I would also recommend to international sporting governing bodies to enact a rule allowing for a case-by-case assessment, which would enable relevant bodies to take into account circumstances of particular cases. The critised FIBA rule preventing a player who has played in a main official competition after having reached his seventeenth birthday from playing for another national team[444] has a got two minor exceptions. Apart from the age limit of seventeen years,[445] the Secretary General of the FIBA may exceptionally authorise an a priori ineligible player to play for the national team of his country of origin, if this is in the interest of the development of basketball in this country.[446]

I would recommend to the FIBA not to limit the aforementioned power of the Secretary General or any other respective body to situations regarding basketball development in the athlete's original country. Contrarily, I would

444 FIBA Internal Regulations (2017), book 3, chapter 1, article 3.23.
445 Ibid., articles 3.22 and 3.23.
446 Ibid., book 3, chapter 1, article 3.23.

suggest to empower these bodies with the possibility to conduct a broader case-by-case assessment taking into consideration all circumstances of specific cases. In a similar way, I would encourage all international sporting governing bodies to include a similar provision in their rules so that their bodies can decide individual cases while taking into account their specificities.

5.2.2 Recommendations on Waiting Periods: Harmonise or Shorten

Regarding waiting periods, I believe that unique and harmonized short waiting periods of, for example, two years would be the best, although not a perfect solution to secure the compatibility of these rules with EU law. The thing is that such a solution would require international sporting governing bodies to lose their exceptionality and to agree on one common set of rules, as for example in the case of the three-year waiting period set by the Olympic Charter.

If such an agreement is not possible, I have claimed the length of cooling-off periods, as well as some related conditions, represent the crucial elements. I believe that the waiting periods of two or sometimes even three years, depending on connected conditions, comply with the requirement of proportionality. On the other hand, I submit that the cooling-off periods of four or more years go beyond what is necessary in order to protect the integrity of international competitions and are thus potentially void under EU law.[447]

Starting with the ideal option, I suggest unified short waiting periods in order to ensure compliance not only with EU law but also to prevent discrimination amongst athletes with different sporting nationalities practicing different sports. Diverse international sporting governing bodies have

[447] See Chapter 4.2.2.

divergent attitudes to eligibility rules, including waiting periods.[448] Consequently, athletes having the same sporting nationality are subjects to different waiting periods depending on a sport they practice.[449]

While trying to deal with the aforementioned problems, I must take into account the basic discrimination assumption. In this respect, "comparable situation must not be treated differently and […] different situations must not be treated in the same way."[450] In other words, to discriminate means to "make un unjust and prejudicial distinction in the treatment of different categories of people" on various grounds.[451] In conclusion, the prohibition of discrimination seeks to prevent acts or omissions in which one treats a person less favourably than another person in a comparable situation.[452]

Exploring all possible options seeking to prevent problems caused by divergences between different international sporting governing bodies imposing different cooling-off periods, I have originally been thinking about the system of waiting periods of which length would be based on the average length of an athlete's career. The longer the average length of an athlete's career in a respective sport is, the more time the athlete has to practice the sport and the longer the waiting period could be. This solution would therefore allow to take into consideration the specificities and different characteristics of diverse

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[448] A. S. Wollmann, O. Vonk, G. R. de Groot (2015), op. cit., p. 305-306.
[449] Y. Hafner (2012), op. cit., pp. 233-234.
[450] Case C-148/02, *Garcia Avello*, [2003] ECLI:EU:C:2003:539.
[451] Definition of discrimination, Oxford Dictionaries, Oxford University, retrieved 10 April 2016: http://www.oxforddictionaries.com/definition/english/discrimination.
[452] On the general definition of discrimination, see also the Universal Declaration of Human Rights (1948), Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

sports. Conversely, this proposal would once again treat athletes in different sports differently. Moreover, it would require each international sporting governing body to have well-founded and justified statistics taking into account wide and complex data in a particular sport.[453]

In the light of the aforementioned, I believe that unique and harmonized short waiting periods would be the best, although not perfect solution to difficulties caused by different international sporting governing bodies imposing different cooling-off periods. Short and mandatory waiting periods would ensure greater consistency and subsequent equality of treatment among athletes.[454] This equality would, however, be only partial, since athletes in sports with a shorter average length of career, as for example gymnasts, would perceive unique waiting periods as unfair compared to other sports in which athletes compete, on average, for a longer period of time.[455]

It is difficult to think about a system that would meet in all of its aspects every requirement of the prohibition of discrimination. Therefore, even though the solutions proposed above are not ideal, it is in my opinion useful to address them in order to encourage a global discussion on this topic.[456] International sporting governing bodies should gather together, for example at the occasion of the Olympics, discuss this issue and to try to find a common position that would enable the sporting World to more easily face the challenges connected to the prohibition of discrimination.[457]

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[453] J. Exner (2016), op. cit., p. 57.
[454] See, inter alia, Cruz Blanco, Dewaele, *Sporting Nationality Conflicts: Towards Harmonization?* (S.I., 2004-2005), p. 58; Y. Hafner (2012), op. cit., p. 234.
[455] J. Exner (2016), op. cit., p. 58.
[456] Ibid., p. 57.
[457] Ibid., p. 58.

If international sporting governing bodies cannot agree on one harmonised short waiting period and continue to enact waiting periods different from one sport to another, they should nevertheless still not forget about ensuring their compatibility with EU law. I have claimed that proportionality is the key word in ensuring such compliance and that the length of cooling-off periods, as well as some related conditions, represent the crucial elements.

To be more concrete, I believe that the waiting periods of two or sometimes even three years, depending on connected conditions, comply with the requirement of proportionality and would survive EU law scrutiny. On the other hand, I have submitted that the cooling-off periods of four or more years go beyond what is necessary in order to protect the integrity of international competitions. Therefore, such long waiting periods are potentially void under EU law.[458]

Addressing the longer cooling-off periods, I would recommend to international sporting governing bodies, which impose waiting periods of four or more years, to rethink their attitude, amend their regulations and shorten their cooling-off periods. I would address the same suggestion even to those international sports federations that impose a three-year waiting period combined with some aggravating conditions, as for example the ITTF, of which the shortest three-year waiting period applies to players under the age of fifteen in the moment of their registration.[459]

I have demonstrated that such long waiting periods go beyond what is necessary to ensure the genuine link between an athlete and his or her country

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[458] See Chapter 4.2.2.
[459] ITTF Handbook (2017), rule 4.1.3.3.1.

of representation as well as the integrity of international competitions. Therefore, such regulations are disproportionate and potentionally void under EU law.[460] I would advise international sporting governing bodies applying these waiting periods to choose one, two or, depending on related conditions, three-year waiting periods, which would still be suitable to achieve desired goals but would be at the same time much more athletes' rights friendly.

Moreover, I would suggest to immune minors from the applicability of waiting periods. Their change of nationality may eventually occur irrespective of their will, for example as a consequence of the modification of nationality of their parents, and it would therefore be unjust to impose such a burden on young athletes. Furthemore, I believe it is not necessary to secure the integrity of international competitions to put such a strain on athletes in the period of their human and sporting growth when they often consider whether to continue with a sport on the top level or whether to take another way.

Furthermore, I believe that regulations of international sporting governing bodies regarding sporting nationality in general and those concerning waiting periods in particular should contain a provision allowing for a case-by-case assessment, which would enable respective bodies to take into consideration specific circumstances of particular cases. As such, the relevant bodies could soften occasional firmness caused by automatic application of waiting periods to athletes without taking into account their specific situation and elements including, for example, the link to their new country of representation or age. Even though it is irrelevant from the point of

[460] See Chapter 4.2.2.

view of EU law provisions on the freedom of movement for workers,[461] the competent bodies could also take into consideration the reason leading an athlete to change his or her sporting nationality.

The Olympic Charter provides an example of such a case-by-case assessment regarding the waiting period set for the purpose of the Olympic Games. The Bye-law to Rule 41, paragraph 2, of the Olympic Charter sets a general Olympic waiting period of three years. However, the same provision further specifies that "this period may be reduced or even cancelled, with the agreement of the (national Olympic committees) and (international federation) concerned, by the IOC Executive Board, which takes into account the circumstances of each case."[462] Furthemore, "the IOC Executive Board may take all decisions of a general or individual nature with regard to issues resulting from nationality, citizenship, domicile or residence of any competitor, including the duration of any waiting period."[463]

The approaching XXIII Olympic Winter Games in PyeongChang in 2018 offer several examples of the practical application of the abovementioned rule to athletes wishing to participate in the games for their new countries. Having represented Austria for ten years, the Czech cross-country skier Kateřina Smutná heard her parents' plea and decided to continute with her career while racing for her original country in 2016, less than two years before the 2018 Winter Olympics. Jan Hudec, the Czech-born alpine skier, won the Olympic bronz medal in Super-G in Vancouver in 2010 for Canada but did not make it to the Canadian national team for the Olympic season. Therefore, he also decided

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[461] Case C-46/12, *N.*, [2013] ECLI:EU:C:2013:97, paragraph 47; Case C-53/81, *Levin* v. *Staatssecretaris van Justitie*, [1982] EU:C:1982:105, paragraphs 21 and 22; Case C-109/01, *Akrich*, [2003] ECLI:EU:C:2003:491, paragraph 55.

[462] Olympic Charter (2016), rule 41, bye-law 2.

[463] Ibid., rule 41, bye-law 4.

to represent his country of birth during the Olympic waiting period of three years.[464]

Both of them having the Czech nationality, they first applied for an agreement of the International Ski Federation. Once the agreement granted, Smutná and Hudec consequently asked the IOC Executive Board for the cancellation of the Olympic waiting period in their cases. The IOC Executive Board agreed and, if qualified, both Smutná and Hudec will represent the Czech Republic at the XXIII Olympic Winter Games in PyeongChang in 2018, even though they did not complete the whole three-year waiting period.[465]

Some international sporting governing bodies have a similar provision in their eligibility regulations allowing their respective bodies to reduce or waive the waiting period while taking into consideration circumstances of particular cases. For example, the IIHF regulations provide that "cases involving exceptional circumstances can be submitted to Council for a Council exception."[466] Moreover, "all other IIHF eligibility decisions can be appealed to the IIHF Disciplinary Board within 7 days of the IIHF eligibility notification in accordance with the Disciplinary Code." [467] I would advise all international sporting governing bodies to include a similar provision in their rules so that their bodies can deal with individual incidents on a case-by-case basis.

5.2.3 Recommendations on Quotas of Naturalised Athletes: Up to Half of the Team and not Minors

I have argued that some of the quotas of naturalised athletes in national teams are incompatible with EU law, in particular because they are

[464] „Canadian Hudec allowed to ski for Czech Republic at 2018 Olympics", CBC, 7 December 2016, retrieved 11 August 2017.
[465] Ibid.
[466] IIHF Statutes and Bylaws (2014-2018), rule 406.1.10.
[467] Ibid.

disproportinate. I believe that the majority of regulations, which allow only one player on a national team who has acquired the legal nationality of that country by naturalisation or by any other means, go beyond what is necessary in order to secure the integrity of international competitions. Similarly, I have claimed that rules allowing only one player having previously played for another national team to be part of a team are disproportionate and therefore potentionaly void under EU law.[468]

I understand that international sports federations cannot open the door to unlimited number of naturalised players or players having previously played for other national teams since such a step would jeopardize the integrity and nature of international competitions. In this regard, I comprehend the critique of, for example, the Qatari handball team at the 2015 World Handball Championships, which was composed of only four native Qatari athletes out of 17 players in the squad. At the 2016 Summer Olympics, 11 out of 14 handball players on the team gained Qatari nationality by naturalisation.[469]

On the other hand, rules strictly limiting number of such players on a team interfere with the rights that athletes derive from EU law as citizens, workers, service providers, societies exercising their freedom of establishment, undertakings or consumers. Therefore, international sporting governing bodies must aim at finding a balance between their interests and athletes' rights under EU law. As a compromise, I would first recommend to international sporting governing bodies to enable national teams to field more naturalised players or players who have previously played for another country.

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[468] See Chapter 4.3.1.

[469] „Qatar's foreign legion primed for handball date with Germany", *DW*, 27 January 2015, retrieved 10 June 2017; T. Finn, „Qatar's recruited athletes stir debate on citizenship", *Reuters*, 25 August 2016, retrieved 11 December 2016.

To be more concrete, I would suggest to these bodies to allow up to half of a team to be composed of athletes who have acquired the legal nationality of that country by naturalisation or athletes having previously worn another national jersey. I believe that such a measure would still be suitable to achieve the desired goal of securing the integrity of international competitions and would, at the same time, much rather comply with the principle of proportionality.

Moreover, I would also suggest excluding minors from the quotas' scope of application. The reason is that their change of nationality may eventually occur irrespective of their will, for example as a consequence of the nationality modification of their parents. Furthemore, I believe it is not necessary to secure the integrity of international competitions to put such a strain on athletes who have competed for youth or junior teams of their previous countries and who now want to wear a national jersey of an adult team of the country, of which nationality they acquired.

In addition to that, as in the case of other sporting nationality rules, I suggest that regulations of international sporting governing bodies determining quotas of naturalised athletes or athletes having previously played for another national team contain a provision allowing for a case-by-case assessment. It would enable respective bodies to take into consideration specific circumstances of particular cases and to moderate occasional harshness caused by automatic application of rules on the quotas to athletes without taking into account their specific situations.

Before concluding, I would like to point out that academics throughout the world are aware of issues arising in the intersection between rules governing sporting nationality and EU law and discuss possible solutions in

this respect. At the 2009 Olympic congress held in Copenhagen, a renowned professor Denis Oswald suggested a creation of the brand new concept of "Olympic nationality", which would be independent from legal nationality and would govern sporting nationality within the Olympic Movement.[470] Yann Hafner claims that this motion would undermine legal challenges under EU law since it would fall within the scope of EU law but would not constitute a restriction.[471] Given my findings in this J. D. thesis, I doubt the non-restrictive nature of this measure, but this concept is definitely worth further discussion.

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[470] D. Oswald (2009), op. cit., pp. 71-74.
[471] Y. Hafner (2012), op. cit., p. 238.

Conclusion

In this J. D. thesis, I sought to answer the central research question of where the balance between international sporting governing bodies' interests and values on one hand, and athletes' rights under EU law on the other hand, lies. I started from the hypothesis that certain sporting nationality rules constitute a disproportionate restriction on the rights that athletes derive from EU law, primarily the EU citizenship, free movement of persons and competition. As I confirmed this hypothesis throughout this J. D. thesis, I have simultaneously formulated concrete recommendations to sporting governing bodies in order to better adapt their sporting nationality rules to EU law requirements and to secure their compatibility with EU law.

International sporting governing bodies and EU law can co-exist under a promising alliance, which is very desirable since the EU bodies and institutions' decisions clearly influence the global sporting scene, as I have illustrated throughout this J. D. thesis. The EU bodies and institutions take into account the specific nature of sport, respect sports organisations' legal autonomy and therefore limit themselves in interfering with the sporting rules only as long as they breach athletes' rights under EU law. Moreover, the EU bodies and institutions' decisions contain a valuable set of principles and instructions for the sports federations how to better balance their interests with athletes' rights that they derive from EU law.

Nevertheless, I have argued in this J. D. thesis that some rules governing athletes' eligibility in national teams rather turn the relationship between international sporting governing bodies and EU law into a dangerous liaison. Some of the sporting nationality rules in their current state, notably certain waiting periods, quotas of naturalised athletes or athletes having previously

competed for another national team and rules prohibiting the change of sporting nationality breach EU law provisions on EU citizenship, free movement of persons and competition. Therefore, these rules are potentially void under EU law.

I submit that proportionality is the fundamental principal upon which the justifiable and equitable solution to ensure the compliance of rules governing athletes' eligibility in national teams with EU law rests. The context of sporting nationality rules is not a problem as such since these rules usually seek a legitimate objective. However, they are often not inherent to these objectives and disproportionate since they go beyond what is necessary to achieve their goals. International sporting governing bodies should be more attentive to EU law since a potential ruling of the CJEU or a decision of the European Commission holding their rules incompatible with EU law could represent another Bosman judgment flipping the world organisation of sport upside down.

Therefore, I sought to find the ideal model balancing objectives, interests and values protected by international sporting governing bodies on one hand, and the rights that athletes derive from EU law on the other hand, in Chapter 5. With this aim in mind, I first made observations regarding the relation of international sports federations to EU law in general. Consequently, I formulated concrete recommendations for international sporting governing bodies on how to better adapt their sporting nationality rules to EU law requirements. In brief, I suggested broadening the possibilities for athletes to change their sporting nationality, to shorten and unify waiting periods, to allow up to half of naturalised players or player having previously competed for another national team on a team and to exlude minors from the applicability of these regulations.

In conclusion, international sporting governing bodies have a choice. They can either blindly rely on their seemingly boundless legal autonomy while enacting rules governing athletes' eligibility in national teams, enforce only their sporting interests and values and keep ignoring the rights that athletes derive from EU law while deeping the dangerous liaison with EU law and risking EU bodies and institutions striking their rules down. Or, they can stop perceiving the EU as an enemy pushing them to respect its rules, learn from EU law and its valuable set of legal rules and principles and grab the helping hand that EU law offers to them in seeking the balance between their interests and athletes' rights under EU law. I would suggest picking the second option, which can save international sporting governing bodies many troubles and turn their relationship with EU law into a mutual promising alliance.

List of Abbreviations / Seznam zkratek

CAS	Court of Arbitration for Sport
COC	Czech Olympic Committee
CJEU	Court of Justice of the European Union
EU	European Union
ECJ	European Court of Justice
FFF	Fédération Française de Football
FIBA	International Basketball Federation
FIFA	Fédération Internationale de Football Association
FIGC	Italian Football Federation
FINA	Fédération internationale de natation
FIS	Fédération Internationale de Ski
FIVB	International Volleyball Federation
ICJ	International Court of Justice
IIHF	International Ice Hockey Federation
IOC	International Olympic Committee
IRB	International Rugby Board
ISU	International Skating Union
ITTF	International Table Tennis Federation
Member States	Member States of the European Union
NBA	National Basketball Association

TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UCI	International Cycling Union
UEFA	Union of European Football Associations

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Annexes / Přílohy

Annex No. 1: List of International Sporting Governing Bodies

International sports organisations can be divided into four groups:

1) International Sports Federations Recognized by the International Olympic Committee (IOC)

a) Association of Summer Olympic International Federations (ASOIF)

Aquatics : Fédération Internationale de Natation (FINA), Archery: World Archery Federation (WA), Athletics : International Association of Athletics Federations (IAAF), Badminton: Badminton World Federation 2012 (BWF), Basketball: International Basketball Federation (FIBA), Boxing (amateur): International Boxing Association (AIBA), Canoeing: International Canoe Federation (ICF), Cycling: Union Cycliste Internationale (UCI/ICU), Equestrianism: International Federation for Equestrian Sports (FEI), Fencing: Fédération Internationale d'Escrime (FIE), Football: Fédération Internationale de Football Association (FIFA), Golf: International Golf Federation (IGF), Gymnastics: Fédération Internationale de Gymnastique (FIG/IFG), Handball: International Handball Federation (IHF), Hockey: International Hockey Federation (FIH), Judo: International Judo Federation (IJF), Modern Pentathlon: Union Internationale de Pentathlon Moderne (UIPM), Rowing: International Federation of Rowing Associations (FISA), Rugby: World Rugby (WR), World Sailing, Shooting: International Shooting Sport Federation (ISSF), Table Tennis: International Table Tennis Federation (ITTF), Taekwondo: World Taekwondo Federation (WTF), Tennis: International Tennis Federation (ITF), Triathlon: International Triathlon Union (ITU), Volleyball and Beach Volleyball:

Fédération Internationale de Volleyball (FIVB), Weightlifting: International Weightlifting Federation (IWF), Wrestling: United World Wrestling (UWW).

b) Association of International Olympic Winter Sports Federations (AIOWF)

Biathlon: International Biathlon Union (IBU), Bobsleigh and skeleton: International Bobsleigh and Skeleton Federation (IBSF), Curling: World Curling Federation (WCF), Ice hockey: International Ice Hockey Federation (IIHF), Ice skating (including figure skating, speed skating, and Short-track speed skating): International Skating Union (ISU), Luge: Fédération Internationale de Luge de Course (FIL), Skiing (including Alpine, Nordic combined, cross-country, freestyle, ski jumping and snowboarding): Fédération Internationale de Ski (FIS).

c) Association of the IOC Recognised International Sports Federations (ARISF)

Air sports (including aerobatics, air racing, ballooning, gliding, hang gliding, and parachuting/skydiving): Fédération Aéronautique Internationale (FAI), Auto racing: Fédération Internationale de l'Automobile (FIA), Bandy: Federation of International Bandy (FIB), Baseball and softball: World Baseball Softball Confederation (WBSC), Basque pelota: Fédération Internationale de Pelota Vasca (FIPV), Billard sports (including carom billiards, pocket billiards/pool, and snooker): World Confederation of Billiard Sports (WCBS), Carom: Union Mondiale de Billard (UMB), Pool: World Pool-Billiard Association (WPA), Snooker: International Billiards and Snooker Federation (IBSF), Boules sports: Confédération Mondiale des Sports de Boules (CMSB), Bocce: Confederazione Boccistica Internazionale (CBI), Bowls: World Bowls (WB), Boule Lyonnaise: Fédération Internationale de Boules (FIB), Pétanque:

Fédération Internationale de Pétanque et Jeu Provençal (FIPJP), Bowling (Ten-pin): Fédération Internationale des Quilleurs (FIQ), Bridge: World Bridge Federation (WBF), Chess: Fédération Internationale des Échecs (FIDE), Cricket: International Cricket Council (ICC), DanceSport: International DanceSport Federation (IDSF), Floorball: International Floorball Federation (IFF), Flying disc: World Flying Disc Federation (WFDF), Karate: World Karate Federation (WKF), Korfball: International Korfball Federation (IKF), Life saving: International Life Saving Federation (ILSF), Motorcycle sport: Fédération Internationale de Motocyclisme (FIM), Mountaineering: Union Internationale des Associations d'Alpinisme (UIAA), Netball, International Federation of Netball Associations (IFNA), Orienteering: International Orienteering Federation (IOF), Polo: Federation of International Polo (FIP), Powerboating: Union Internationale Motonautique (UIM), Racquetball: International Racquetball Federation (IRF), Roller sports (including inline hockey, roller racing, rink hockey, roller derby and artistic): International Federation of Roller Sports (FIRS), Squash: World Squash Federation (WSF), Sports climbing: International Federation of Sport Climbing (IFSC), Sumo: International Sumo Federation (ISF), Surfing and bodyboarding: International Surfing Association (ISA), Tug-of-war: Tug-of-War International Federation (TWIF), Underwater sports: Confédération Mondiale des Activités Subaquatiques (CMAS), Water skiing: International Water Ski Federation (IWSF), Wushu: International Wushu Federation (IWUF). On all federations recognized by the International Olympic Committee (IOC), see also the IOC's website: http://www.olympic.org/content/the-ioc/governance/affiliate-organisations/all-recognised-organisations/.

2) *Federations Recognized by the International Paralympic Committee (IPC)*

There are 11 international federations recognized by the IPC, while the IPC itself serves as the international federation for 9 sports.

Alpine Skiing: IPC Alpine Skiing (IPC AS), Archery: World Archery Federation (WA), Athletics: IPC Athletics (IPC AT), Badminton: Parabadminton World Federation (PBWF), Badminton World Federation (BWF), Boccia: Boccia International Sports Federation (BISFed), Cycling: Union Cycliste Internationale (UCI), Equestrian: International Federation for Equestrian Sports (FEI), Flying disc: World Flying Disc Federation (WFDF), Ice Sledge Hockey: IPC Ice Sledge Hockey (IPC ISH), Nordic skiing (including Biathlon and Cross-Country Skiing): IPC Nordic Skiing (IPC NS), Powerlifting: IPC Powerlifting (IPC PO), Rowing: International Rowing Federation (FISA), Sailing: International Federation for Disabled Sailing (IFDS), Shooting: IPC Shooting (IPC SH), Swimming: IPC Swimming (IPC SW), Table Tennis: International Table Tennis Federation (ITTF), Volleyball: World Organisation Volleyball for Disabled (WOVD), Wheelchair basketball: International Wheelchair Basketball Federation (IWBF), Wheelchair Dance Sport: IPC Wheelchair Dance Sport (IPC WDS), Wheelchair curling: World Curling Federation (WCF), Wheelchair rugby: International Wheelchair Rugby Federation (IWRF), Wheelchair tennis: International Tennis Federation (ITF), Disability specific organisations: Football 7-a-side: Cerebral Palsy International Sports and Recreation Association (CPISRA), Football 5-a-side: International Blind Sports Federation (IBSA), Goalball: International Blind Sports Federation (IBSA), Judo: International Blind Sports Federation (IBSA), Wheelchair Fencing: International Wheelchair and Amputee Sports Federation (IWAS), Inas for athletes with an intellectual disability.

3) SportAccord (GAISF)

Federations which are members of the IOC (ASOIF, AIOWF and ARISF) are members of SportAccord, formerly known as General Association of International Sports Federations (GAISF). Moreover, several other federations which are not IOC members are members of the AGFIS, even if this is not a governing body of a sport.

Aikido: International Aikido Federation (IAF), Bodybuilding: International Federation of Bodybuilding & Fitness (IFBB), Casting: International Casting Sport Federation (ICSF), College athletics: Federation Internationale du Sport Universitaire, Commonwealth Games: Commonwealth Games Federation, Dragon boat racing: International Dragon Boat Federation (IDBF), Draughts: World Draughts Federation (FMJD), Fishing: International Confederation of Sport Fishing (CIPS), Fistball: International Fistball Association (IFA), Floorball: International Floorball Federation (IFF), Flying disc: World Flying Disc Federation (WFDF), Football (American and Canadian): International Federation of American Football (IFAF), Go: International Go Federation (IGF), Ju-jitsu: Ju-Jitsu International Federation (JJIF), Kendo: International Kendo Federation (IKF), Kickboxing: World Association of Kickboxing Organisations (WAKO), Lacrosse: Federation of International Lacrosse, Labour Sport: International Labour Sports Federation, Masters Games: International Masters Games Association, Military Sports: International Military Sports Council (Conseil International du Sport Militaire), Miniature golf: World Minigolfsport Federation (WMF), Muaythai: International Federation of Muaythai Amateur, Panathlon: Panathlon International, Paralympic: International Paralympic Committee: Cerebral Palsy International Sport and Recreation Association, International Blind Sports Federation, International Sports Federation for Persons with Intellectual Disability, International Wheelchair and Amputee

Sports Federation; Powerlifting: International Powerlifting Federation (IPF), WUAP, GPC, WPC, Sambo: Federation International of Amateur Sambo (FIAS), Savate: Federation International De Savate, School Sport: International School Sport Federation, Sepak Takraw: International Sepaktakraw Federation (ISTAF), Ski mountaineering: International Ski Mountaineering Federation (ISMF), Sled dog sports: International Federation of Sleddog Sports, Soft Tennis: International Soft Tennis Federation (ISTF), Special Olympics: Special Olympics, Inc., Sports Chiropractic: Fédération Internationale de Chiropratique du Sport; or International Federation of Sports Chiropractic, Sports Facilities: International Association for Sports and Leisure Facilities, Sports fishing: Confédération Internationale de la Pêche Sportive, Sports for the Deaf: International Committee of Sports for the Deaf, Sports Press: Association Internationale de la Presse Sportive, Timekeepers: Fédération Internationale des Chronométreurs, World Games: International World Games Association, Wushu: International Wushu Federation (IWUF)

4) Other international sport federations

O-sport: World O-Sport Federation (WOF), Arm wrestling: World Armwrestling Federation (WAF), Ham Radio Contesting, Amateur Radio Direction Finding & High Speed Telegraphy: International Amateur Radio Union (IARU), Australian rules football: AFL Commission, Bowling (Canadian five-pin): Canadian 5 Pin Bowlers Association (C5PBA), Beach Soccer: Beach Soccer Worldwide (BSWW), Fédération Internationale de Football Association (FIFA), Behcup: World Behcup Federation (WBF), Broomball: International Federation of Broomball Associations (IFBA), Bodyboarding: International Bodyboarding Association (IBA), Bowls: Professional Bowls Association (PBA), Boxing: World Professional Boxing Federation (WPBF), Hapkido Boxing:Hapkido Boxing International Organisation (HBIO), Correspondence

Chess: International Correspondence Chess Federation (ICCF), Croquet: World Croquet Federation (WCF), Sqay: International Council Of Sqay (ICS), Darts: World Darts Federation (WDF), Electronic Sports: International e-Sports Federation (IeSF), Elephant Polo : World Elephant Polo Association (WEPF), Foosball: International Table Soccer Federation (ITSF), Rugby Fives: Rugby Fives Association (RFA), Football (Gaelic): Gaelic Athletic Association (GAA), Goalball: International Blind Sports Federation (IBSA), Golf: The R&A; United States Golf Association (USGA), Greyhound racing: American Greyhound Track Operators Association (AGTOA), National Greyhound Racing Club (NGRC), Handball (court): Irish Handball Council, United States Handball Association (USHA), Harness horse racing: Harness Horsemen International (HHI), European Trotting Union (UET), Horse racing: International Racing Bureau (IRB), Horseshoes: National Horseshoe Pitchers Association of America (NHPA), Hurling: Gaelic Athletic Association (GAA), Intercrosse: Fédération Internationale d'Inter-Crosse (FIIC), International Federation of Kitesports Organisations (IFKO), International game International Ball game Confederation (CIJB) (Confederation Internationale du Jeu de Balle), International game International game confederation, International Game Fish Association (IGFA), International Gay Bowling Organisation (IGBO), International Rope Skipping Federation (IRSF), International Pitch and Putt Association (IPPA), Jujutsu: World Ju-Jitsu Federation, Tchoukball: Fédération Internationale de Tchoukball, Kabaddi: International Kabaddi Federation (IKF), Lacrosse: Federation of International Lacrosse (FIL), Mallakhamb: Mallakhamb Confederation of World (MCW), Mixed martial arts: International Sport Combat Federation (ISCF), Modern Arnis: International Modern Arnis Federation (IMAF), Mountainboarding: International Mountainboard Riders Association (IMRA), Muay Thai: International Kickboxing Federation (IKF),

Mountain running: World Mountain Running Association (WMRA), Paddleball: National Paddleball Association (NPA), Parkour: World Freerunning Parkour Federation (WFPF), Pesäpallo: Pesäpalloliitto, Pigeon racing: Royal Pigeon Racing Association (RPRA), Poker: International Federation of Poker (IFP), Pole dance: International Pole Sports Federation (IPSF), Practical shooting: International Practical Shooting Confederation (IPSC), Quidditch: International Quidditch Association (IQA), Quizzing: International Quizzing Association (IQA), Racketlon: International Racketlon Federation (FIR), Radio-controlled car racing: International Federation of Model Auto Racing (IFMAR), Rafting: International Rafting Federation (IRF), Rogaining: International Rogaining Federation (IRF), Rounders: National Rounders Association (NRA), Rock-It-Ball: International Rock-It-Ball Federation (IRIBF), Rope skipping: World Rope Skipping Confederation (WRSC), Rubik's Cube: World Cube Association (WCA), Rugby league: Rugby League International Federation (RLIF), Shinty: Camanachd Association, Shuttlecock: International Shuttlecock Federation, Skateboarding: World Skateboarding Federation (WSF); International Skateboarding Federation (ISF), Skibobbing: International Skibob Federation (FISB), Slot car racing: International Slot Racing Association (ISRA), Sport stacking: World Sport Stacking Association (WSSA), Table hockey: International Table Hockey Federation (ITHF), Table Soccer: International Table Soccer Federation (ITSF), Tent Pegging : International Tent Pegging Federation (ITPF), Throwball: International Throwball Federation (ITF), Boot throwing: International Bootthrowing Association (IBTA), Touch football: Federation of International Touch (FIT), Villowo: International Villowo Federation (IVF), Vovinam: International Vovinam Federation (IVF)/The Vovinam-VietVoDao World Federation (WVVF), VX (sport): Global VX, Yoga:Yogasports Confederation of World (YCW).

Shrnutí rigorózní práce - Abstrakt / Klíčová slova

Shrnutí rigorózní práce - Abstrakt:

Hlavní výzkumná otázka této rigorózní práce zní, kde leží rovnováha mezi zájmy mezinárodních sportovních organizací v podobě pravidel upravujících příslušnost sportovců k národním týmům na straně jedné a právy, které těmto sportovcům garantuje právo EU, na straně druhé. Závěry této rigorózní práce vycházejí z hypotézy, že některá pravidla upravující příslušnost sportovců k národním týmům představují nepřiměřená omezení práv sportovců jako občanů EU, pracovníků, poskytovatelů služeb, osob samostatně výdělečně činných a/nebo podniků.

Mezinárodní sportovní organizace a právo EU mohou spolužít v harmonickém vztahu, který je velmi důležitý vzhledem k tomu, že rozhodnutí unijních orgánů a institucí jednoznačně ovlivňují globální sportovní scénu. Unijní orgány a instituce berou v potaz specifický charakter sportu, respektují právní autonomii sportovních organizací a zasahují do sportovních pravidel jen do té míry, do které tato pravidla porušují práva sportovců. Rozhodnutí unijních orgánů a institucí navíc obsahují užitečná pravidla, principy a instrukce pro mezinárodní sportovní organizace, jak lépe přizpůsobit jejich pravidla právu EU a vyvážit jejich zájmy s právy a zájmy sportovců.

Některá pravidla upravující příslušnost sportovců k národním týmům však přetvářejí vztah mezinárodních sportovních organizací a práva EU v nebezpečné spojení. Některá z těchto pravidel v jejich současné podobě, zejména určité čekací doby, kvóty naturalizovaných sportovců nebo sportovců dříve reprezentujících jinou zemi a zákazy změny příslušnosti k jinému

národnímu týmu představují nepřiměřená omezení práv, které sportovcům garantují pravidla upravující občanství EU, volný pohyb osob a svobodnou hospodářskou soutěž. Tato sportovní pravidla tak potencionálně porušují právo EU.

Magickou formulí k zajištění souladu pravidel upravujících příslušnost sportovců k národním týmům s právem EU je přiměřenost. Uvedená pravidla jsou často nepřiměřená, jelikož jdou nad rámec toho, co je nezbytné k dosažení jejich jinak legitimních cílů. Z tohoto důvodu zakončuji tuto rigorózní práci formulací konkrétních doporučení pro mezinárodní sportovní organizace, jak zajistit rovnováhu mezi jejich legitimními zájmy a hodnotami na straně jedné a právy, která sportovcům garantuje právo EU, na straně druhé.

Klíčová slova:

Právo Evropské unie

Vnitřní trh

Občanství Evropské unie

Soutěžní právo

Meca-Medina a Majcen

Sport

Příslušnost sportovců k národním týmům

Mezinárodní sportovní organizace

J. D. Thesis Resumé - Abstract / Key Words

J. D. Thesis Resumé - Abstract:

This J. D. thesis's central research question asks where the balance between international sporting governing bodies' interests and values enshrined in rules regarding sporting nationality on one hand, and athletes' rights under EU law on the other hand, lies. This J. D. thesis's conclusions stem from the hypothesis that certain rules governing athletes' eligibility in national teams constitute a disproportionate restriction on the rights that athletes derive from EU law as EU citizens, workers, providers of services, self-employed persons and/or undertakings.

I submit that international sporting governing bodies and EU law can co-exist under a promising alliance, which is very desirable since the decisions of EU bodies and institutions clearly influence the global sporting scene. I show that EU bodies and institutions take into account the specific nature of sport, respect sports organisations' legal autonomy and limit themselves in interfering with sporting rules only as long as they breach athletes' rights under EU law. Moreover, EU bodies and institutions' decisions contain a valuable set of principles and instructions for international sporting governing bodies on how to better adapt their rules to EU law requirements and balance their interests with athletes' rights.

Nevertheless, some rules governing sporting nationality rather make the relationship between international sporting governing bodies and EU law a dangerous liaison. Some of these rules in their current state, notably certain waiting periods, quotas of naturalised athletes or athletes having previously

played for another country and rules prohibiting the change of sporting nationality constitute a disproportionate restriction on athletes' rights under EU citizenship, free movement of persons and competition. Therefore, these rules are potentially void under EU law.

Proportionality is the magic formula in ensuring the compliance of rules governing athletes' eligibility in national teams with EU law. These rules are often disproportionate as they go beyond what is necessary to achieve their otherwise legitimate goals. Therefore, I conclude this J. D. thesis by formulating concrete recommendations to internationals sporting governing bodies on how to secure the balance between their legitimate interests and values on one hand, and the rights that athletes derive from EU law on the other.

Key Words:

European Union law

Internal market

Citizenship of the Union

Competition

Meca-Medina and Majcen

Sport

Sporting nationality

International sports federations