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Faculty of Law

Karolína Paterová

Application of EU Law in International Sports Arbitration

Master's Thesis

Thesis Advisor: JUDr. Jan Exner

Department of European Law

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Content/Obsah

Introduction

When two professional swimmers David Meca-Medina and Igor Majcen[1] failed the doping test, they certainly did not expect their case to take so long neither did they expect to become famous because of their doping issue. During the World Cup in swimming, these two swimmers finished first and second respectively, they tested positive for Nandrolone. Based on the results of testing, FINA[2] Doping panel suspended the applicants for four years. Applicants appealed to the Court of Arbitration for Sports ("CAS"), yet the decision on the suspension was confirmed. However, at the time of ongoing procedure before CAS, scientific research showed that Nandrolone could be produced by human body to the extent which could exceed the accepted limits of this substance. Based on these findings, FINA and applicants consented to refer the case to the CAS again. The following year, in 2001, CAS reduced the penalty to two years. If the applicants had followed a standard procedure, they would have appealed to the Swiss Federal Court after the CAS's final decision because of the procedural reasons.

However, they rather filed a complaint with the Commission, challenging primarily the compatibility of certain regulations implemented by FINA with the Community rules on competition and freedom to provide services. Commission accepted that FINA was an undertaking but at the same time pointed out that the anti-doping rules fell out of scope of economic activity and thus EU law was not applicable. After obtaining the same results at the EU General Court in Luxembourg, they further appealed to the Court of Justice of the European Union ("CJEU").

CJEU came to the opposite conclusion and said that sport disciplinary rules (and anti-doping rules among them) need to be assessed under EU competition law. Mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty,[3] the rules which govern that activity must satisfy the requirements of those provisions, which seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition, following the *Wouters test*.[4] The Commission then

[1] Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.
[2] Fédération Internationale De Natation.
[3] Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, para 27.
[4] Burden of proving an infringement of art. 101(1) TFEU shall rest on the party or the authority alleging the infringement. However, Wouters formula is reversed – „*those who want to challenge a regulation by a sport body find that the Wouters formula is reversed: they will have to show that the consequential effects restrictive of competition go beyond what is inherent in the pursuit of the practice's objectives, for only then there is a violation of article 101(1) TFEU. Given the burden of proof, it is for the applicant, challenging a sport regulation, to demonstrate coherent alternative governance structures*." See GEERAERT, Arnout. *Limits to the autonomy of sport: EU law* [online], Danish Institute for Sports Studies, 2013, pp. 21-22 [retrieved on 5.2.2022]. Available at: https://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS-report_-_14Limits_to_the_autonomy_of_sport__p_151-184_.pdf

acknowledged that the anti-doping rules and severity of penalties could indeed restrict competition if penalties were ultimately to prove unjustified.[5]

Even though the appellants lost the case in the end, as they did not prove that the threshold adopted was set at an excessively low level and failed to specify at what level the threshold in question should have been set at the material time, the way this case was decided opened space for athletes to navigate through the "jungle" of a pretty closed system of sports disputes which are handled by sports governing bodies and appealed to the Court of Arbitration for Sports with its seat in Switzerland.

This system has been implemented and developed through the ages because of the fact that sport is a very specific field which also needs to have very specific rules and therefore, some say that any disputes arising from sport should be handled separately, effectively, within a sport family and without external interference. In the past, the EU played merely supportive role when it came to sport as sports governing bodies are cautiously guarding their autonomy. At the same time the Court of Justice of the European Union has been ambitiously increasing the protection of athletes. In this thesis, I don't claim that this should be otherwise, I fully accept the role of CAS as well as of sports governing bodies. However, in my opinion, there should be wider access to take some next steps in case "something goes wrong" in the procedure, after a CAS arbitral award is issued and the only official possibility is to appeal to the Swiss Federal Tribunal and protect their rights through the provisions of EU law. An EU competence in sport first arose from decisions of the European Court of Justice in which the Court pronounced that sporting rules are subject to the economic freedoms and competition law.

However, for its specific characteristics, sports cases shall receive special treatment. The applicability of EU law provisions has been confirmed from the side of the CJEU many times, but sports governing bodies still have huge range of autonomy when it comes to making decisions about athletes' rights. As Stephan Weatherill encapsulates, the EU's sporting competence is limited and lacks concrete shape.[6]

At the same time, I submit that since the *Meca-Medina* ruling and other cases which followed and which are also analysed in this thesis, the situation is becoming little bit more optimistic for athletes for the procedure which might follow CAS award. My hypothesis is that

[5] Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, para 47.
[6] WEATHERIL, Stephen. *Is there such a thing as EU sports law?* [online]. Sports Law J 1–2:39, 2011 [retrieved on 4.1.2021]. DOI:10.1007/978-90-6704-829-3_15.

thanks to the recent jurisprudence of the CJEU, athletes will have generally more options to seek the protection under EU law as well as higher chance to succeed.
Therefore, the main question of this thesis is - what can an individual athlete do after a CAS award is issued and the result is dissatisfying? I illustrate two distinctive lines of how an athlete can proceed.

First, following the example of Meca-Medina and Majcen, an athlete might file a complaint with the Commission and claim the violation of EU competition law provisions. However, the Commission has a wide discretion when it comes to launching an investigation and moreover, the investigation cannot be enforced. At the same time, there is a strong background in the case law of the CJEU as well as positive evolution in the approach of the Commission towards sports related cases. I see a big potential in this approach and my opinion was encouraged even more by a recent decision of the Commission in the case of *International Skating Union*[7] ("ISU") according to which the ISU's rules on eligibility are contrary to EU competition law. The decision of the Commission was then upheld by the General Court of the EU.[8] The whole issue of this case is much more complicated and is further discussed in detail in the thesis. Both cases the *ISU* and *Meca-Medina* are used in this thesis as case studies to illustrate the procedure before the Commission.

Secondly, an athlete might challenge a CAS arbitral award before a national court which opens the possibility that a national court will request a preliminary ruling from the CJEU. This approach was opted for by a famous speed skater Claudia Pechstein who, apart from referring herself to the European Court of Human Rights ("ECHR"), took her case to a national court in Germany, claiming the invalidity of the CAS arbitration agreement alleging that it had been imposed on her. Moreover, a very recent and scandalous case of the *Super League* is going in this direction. A national court in Spain requested a preliminary ruling in this matter from the CJEU and the request is currently pending. These two cases are used as case studies for the procedure before a national court.

I am going to deal with both questions during this thesis as they are tightly related to each other. Firstly, it is necessary to deal with the proceedings before CAS and in case of failure, which is highly probable to occur at this stage, launch a complaint with the Commission and possibly appeal to the CJEU. Or they can challenge the CAS arbitral award before a national court.

[7] Case AT. 40208 - *International Skating Union's Eligibility rules*, final decision C (2017) 8240 [8 December 2017].
[8] Case T-93/18, *International Skating Union v European Commission* [2020] ECLI:EU: T:2020:610.

By discussing these two options, I hope to justify my hypothesis that sports professionals could seek effective remedied within the scope of application of EU law and outside the structure of international sports arbitration.

This is also the main motivation why I have decided to write the thesis on this topic. I believe this area of sports law should be analysed more so that sports professionals are able to defend their rights and get effective remedies in their cases. Obviously, I will also consider opposite points of view on this problematic (e. g. Gianni Infantino considers *Meca-Medina* to be "a major step backwards and reasoning of the court flawed[9]).

Finally, the structure of this thesis is as follows. After the introduction, the thesis deals with the procedure before CAS, briefly describing the course of the procedure itself and CAS's jurisdiction and legitimacy, with a particular focus on limits and controversial questions from the perspective of individual athletes. In the next part, I analyse the two above-mentioned options and for each of them include relevant case studies. In the last part, I further develop on the idea and provide implications for the future and my own predictions.

[9] INFANTINO, Gianni. *Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?* [online], UEFA, 2006, p. 2 [retriever on 4.1.2021]. Available at UEFA: https://www.uefa.com/multimediafiles/download/uefa/keytopics/480391_download.pdf

1. Procedure before sports governing bodies – where it all begins

In this first chapter, I would like to briefly describe how sports governing bodies operate, their legal status as well as decision-making process. This chapter is closely tied to the following one which analyses the Court of Arbitration for Sport ("CAS"). CAS often is an appeal instance for members of these sports governing bodies (mostly athletes and clubs) but this sequence does not occur unconditionally. Therefore, for the purpose of this thesis, it is crucial to understand the relation between them, CAS and possible steps outlined in the Introduction which athletes might follow the decision (or CAS arbitral award) is rendered.

1.1. The status of sports governing bodies

The Olympic Charter defines sports federations as "non-governmental organisations administering one or several sports at World level and encompassing organisations administering such sports at national level."[10] From the definition, it is possible derive a few key characteristics. First, sports federations (as well as sports governing bodies within their structure) are non-governmental organisations, in other words private law entities. Therefore, the activity is conducted under private law terms.

All the parties of the pyramidal structure are bound by the rules of their international federation, based on their free will and consent. The free will and consent were, among others, disputed in the famous case of *Pechstein* which is analysed further in the thesis.[11] Second, they create their own system of rules. Pursuant the Olympic Charter, sports organisations within the Olympic Movement are autonomous, with their proper right and obligations and may determine their own principles of governance.[12] Those regulating non-Olympic sports are entitled with similar rights and responsibilities.[13]

For majority of sports, there is solely one national sports association, which is a part of a pyramid of associations and organizations operating on regional and worldwide level. For football, there is a national association in every state, then UEFA as the football association for the European region, and at the highest level of the football pyramid is FIFA (Fédération Internationale de Football Association), international governing body for all football associations and organizations. The hierarchical system of associations has a significant impact

[10] Olympic Charter (2015), rule 25.
[11] European Court of Human Rights, Requêtes nos 40575/10 et 67474/10, *Mutu et Pechstein c. Suisse* [2018].
[12] Olympic Charter (2015), Fundamental Principles of Olympism, principle 5.
[13] EXNER, Jan. *Sportovní národnost ve světle práva Evropské unie*. Právník, Year 152, Number 10, 2013, p. 1030.

on rights of individual athletes or sports clubs.[14] It is a system of exclusivity which ensures monopolistic position for the association at each level.[15]

Another problematic surrounding the status of sports governing bodies is the fact that most of them have their seat in Switzerland and thus governed by Swiss law. Swiss law grants them a large autonomy and they are fully taking advantage of that, creating elaborate and intricate regulations which are applicable from the top to the bottom of the pyramid. This altogether creates a monstruous structure of rules, containing numerous references to the rules of other organizations (sports governing bodies very often refer to the rules of the World Anti-Doping Agency) as well as to the conflict settlement, mostly through arbitral tribunals.[16]

While I understand the reasoning behind this system of high degree of self-regulation and arbitration mechanism which enables to handle effectively and rapidly sports-related cases while taking into account the complexity and specificity of sport, on the other hand, I can completely relate to the opinion of Margareta Baddeley who claims in the abstract to her article[17] that although this system serves primarily for the smooth organization of sports, however, "the specific interests of the subjects of their rules, in particular those of the lower level sports organizations and of athletes, are of secondary importance or may fall completely by the way-side."[18] In other words, I claim that some sports governing bodies are performing their "solo venture" while somehow neglecting the interests of athletes. However, in my opinion, these organizations were founded mainly for those athletes and ultimately, they could not exist without them. Whereas it is necessary to ensure an effective functioning of sport governing bodies within a particular field of sports, it must be done so under the condition that rights are interests of all parties, and especially weaker parties, are considered and respected.

1.2. Decision-making process of sports governing bodies

As explained in the section 2.1., majority of sports federations are registered in Switzerland. They act with the legal form of an association.[19] Not only do they have a large

[14] LEWANDOWSKI, Wojciech. *The Implications of the Recent Jurisprudence of the Court of Justice of the European Union for the Protection of the Fundamental Rights of Athletes and the Regulatory Autonomy of Sporting Federations* [online], 25 Tilburg Law Review, 2020 [retrieved on 22.2.2022]. DOI: http://doi.org/10.5334/tilr.193

[15] PODSZUN, Rupprecht. *The Pechstein Case: International Sports Arbitration versus Competition Law. How the German Federal Supreme Court Set Standards for Arbitration* [online], SSRN, 2018, p. 13 [retrieved on. 22.2.2022]. DOI: https://dx.doi.org/10.2139/ssrn.3246922

[16] BADDELEY,Margareta. *The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn* [online], The International Sports Law Journal 20 (1-2), 2019 [retrieved on 22.2.2022]. DOI: http://dx.doi.org/10.1007/s40318-019-00163-6

[17] Ibid.

[18] Ibid.

[19] Article 60 ff. of the SCC (1907).

space for setting up their autonomous rules and regulations thanks to Swiss law, but they are also entitled to impose sanctions over persons who are subject to their jurisdiction in case of violation of their rules. This was also explicitly confirmed by the Swiss Federal Tribunal.[20]

At this point, I would like to briefly discuss the decision-making of sports governing bodies which is basically the first step when it comes to deciding on athletes' rights in a particular matter. Often, the whole process is terminated at this stage, however, many decisions are also appealed to CAS (Chapter 3), but CAS might not take part in the procedure (see the case of the *ISU* which is further analysed in this thesis). For this purpose, I decided to use the example of the e Fédération Internationale de Football Association ("FIFA").

The main objective of the FIFA is stipulated in Article 2 of the FIFA Statutes. According to this Article, the FIFA aims to improve the game of football by unifying, educating, and preserving humanitarian values. It promotes integrity, ethics, and fair play while striving to prevent practices such as doping, corruption and other forms of abuse.[21] These shall be achieved by creating autonomous regulations and ensuring their enforcement by having power to launch a disciplinary procedure in case of infringements of the Statutes and impose a binding decision over subjects to FIFAs' regulations.[22]

In order to support the above-mentioned objectives, FIFA has established three judicial bodies, the Disciplinary Committee, the Appeal Committee and the Ethics Committee, and these bodies are entitled to take disciplinary measures defined in the FIFA Statutes.[23]

FIFA Statutes, and this is what goes for the majority of other sports governing bodies, introduce specific clauses in which they devolve disputes to the CAS.[24] The reason why they wanted to strengthen the role of CAS was to support the autonomy of sports institutions and preserve the approach of resolving sports disputes only "within the sports family"[25] and limiting the intervention of domestic courts and non-sports institutions.[26] While it undoubtedly contributes to harmonize the sports legal system of different federations founded to regulate a particular field of sport as well as transnational and national sports law and to development

[20] Decision of the Swiss Federal Tribunal, 4P. 240/2006.
[21] Article 2 of the FIFA Statutes (2019).
[22] Ibid.: Article 2 lit. c) and d).
[23] Ibid.: Article 56.
[24] Ibid.: Art. 62, para. 3.
[25] FOUCHER, Bernard. *La Conciliation comme Mode de Règlement des Conflits Sportifs en DroitFrançais*. paper presented at the Court of Arbitration for Sport Symposium on Mediation in Lausanne, Switzerland, 2000; see also DUVAL, Antoine. *The Court of Arbitration for Sport and EU Law. Chronicle of an Encounter* [online], Maastricht Journal of European and Comparative Law, Number 2, 2015 [retrieved on 22.2.2022]. DOI: http://dx.doi.org/10.1177/1023263X1502200205
[26] BURGER, C.J. *Taking Sports Out of The Courts: Alternative Dispute Resolution and the International Court of Arbitration for Sport* [online], Journal of Legal Aspects of Sport, Vol. 10 No. 2, 2000 [retrieved on. 22.2.2022]. DOI: https://doi.org/10.1123/jlas.10.2.123

of common legal principles, I claim that the robust system might as well impede the rights of athletes and work strongly in their disadvantage as it is further explored in this thesis.

2. Court of Arbitration for Sports – studying a legal bumblebee[27]

2.1. Background of creating the "Supreme Court of World Sport"

In 1981, Juan Antonio Samaranch, a president of the International Olympic Committee ("IOC") at that time, had an idea to establish an international body which would handle sports-related disputes.[28] The reasoning behind this idea was to have an institution which would be able to handle issues and disputes related to sports and its specifics as well as provide a quick resolution of the sports cases which, according to the opinion of the IOC, should not have been settled by normal courts in their standard proceedings.[29] Therefore, in 1983, the IOC ratified the statutes of the Court of Arbitration for Sport ("CAS") and a year later, CAS began its activities in Lausanne, Switzerland, where it is located up until now.

Having been founded by the IOC, CAS was, in the beginning, strongly dependent on the IOC, before the first reforms in 1994 were implemented.[30] These reforms modified the CAS Statute and Regulations but more importantly, the International Council of Arbitration for Sport was created ("ICAS") and overtook the responsibility of IOC. The ICAS's role nowadays is to safeguard the independence of CAS and is responsible for all the administration and financing.[31] These important changes were approved by the 'Paris Agreement' which was signed in 1994 in Paris by the highest authorities in the sports word and since its approval the majority of the International Federations and the National Olympic Committees have included in their statutes an arbitration clause based on which all the disputes shall be referred to CAS.[32]

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[27] The expression was used by Johan Lindholm.

[28] *LINDHOLM, Johan. The Court of Arbitration for Sport and Its Jurisprudence – An Empirical Inquiry into Lex Sportiva.* Edition 1. Hague: T.M.C. Asser Press, 2019, p. 3. ISBN 978-94-6265-284-2.

[29] HŰLSKŐTTER, Tim. *Sports arbitration agreements under review: should they be considered invalid under English national law?* [online], International Sports Law Journal, Vol. 17, No. 1–2, 2017, p. 23 [retrieved on 22.2.2022]. DOI: http://dx.doi.org/10.1007%2Fs40318-017-0110-y

[30] On 15 March 1993, CAS was recognized as autonomous arbitral body in the case of Gundel, a horse rider, who disputed the validity of the CAS award before the Swiss Federal Tribunal, claiming that CAS was neither impartial, not independent. The Swiss Federal Tribunal emphasized close links between CAS and the IOC. See Recueil Officiel des Arrêts du Tribunal Fédéral [Official Digest of Federal Tribunal Judgements] 119 II 271.; See also BLACKSHAW, Ian. *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport* [online], Entertainment and Sports Law Journal 2(2), 2003 [retriever on 22.2.2022]. DOI: http://dx.doi.org/10.16997/eslj.139

[31] BLACKSHAW, Ian. *The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport* [online], Entertainment and Sports Law Journal 2(2), 2003, p. 68 [retriever on 23.2.2022]. DOI: http://dx.doi.org/10.16997/eslj.139

[32] Ibid.: p. 66.

At that time, CAS became another arbitral body, falling into the framework governing also other arbitral courts. As Mbaye says "*in a way, CAS was and still is but one among several international arbitration institutions*."[33]

However, I claim that its position is quite exceptional. Its main activity nowadays consists in being an appeal body for the majority of sports governing bodies which even supports its ambition to become a world centre for all sports disputes and thus its character is indeed different from other arbitral bodies.[34] As I further discuss in this chapter, especially with regards to the fact that CAS is considered an independent body which was created to provide a quick, effective, and fair dispute resolution of cases but as it is possible to see in practice, this is not always and entirely true. During its practice, there have been a few cases when its independence or even fairness (especially towards individual sports professionals) have been questioned, often related to EU law provisions.

Therefore, in this Chapter, I explain the problematics of international sports arbitration before CAS from the perspective of an individual athlete who has a CAS arbitral award issued at the end of the procedure and needs to decide about the next steps which is the main topic of this thesis. I present the fundamentals of how CAS operates, explain the issue of its jurisdiction and the procedure until the point of a final CAS arbitral award. CAS itself is a very extended topic and thus this chapter is focused solely on the points relevant for this thesis.

2.2. Concept of Judicialization for Arbitration Institutions

As I have mentioned in the previous section, CAS became one of many arbitral bodies in the world. The key feature of arbitration is based on party consent, in other words, parties give their consent to access a neutral forum of arbitration which replaces state-based courts. Arbitration should therefore serve exclusively to the interests of the parties, providing them discretion to reach the decision.[35] Arbitrators become agents for the parties as their jurisdiction is given by the autonomy and voluntary agreement of those parties to arbitrate.[36]

However, during the years of practice, these arbitration institutions have developed their own case-law, transforming themselves from working merely based on contractual

[33] BLACKSHAW, Ian, SIEKMAN R, SOEK, J. *The Court of Arbitration for Sport 1984–2004*, Hague: T.M.C. ASSER PRESS, 2006, pp. 6–20. ISBN: 978-90-6704-204-8.
[34]CAS 96/153, *Watt/ACF and Tyler-Sharman* [1996], para 9, published in Recueil des sentences du TAS/Digest of CAS Awards 1986–1998. Berne: Editions Staempfli, 1998, p. 340.
[35] BLACKABY, N., PARTASIDES, C., REDFERN, A., & HUNTER, M. *Redfern and hunter on international arbitration*, Edition 6, Oxford: Oxford University Press, 2015, pp. 28-31. ISBN: 9780198714248.
[36] YU, Hong-lin. *A theoretical overview of the foundations of international commercial arbitration* [online], Contemporary Asia Arbitration Journal, 1 (2), 2008, p. 268 [retrieved on 3.2.2022]. Available at STORRE: http://www.law.ntu.edu.tw/center/wto/NewsDetail.asp?tb_index=97

consent to becoming the beating heart at the centre of translational legal orders[37], gaining their own authority as well as autonomy, with their proper normative activity. This was undoubtedly one of the founders' ambitions for CAS to become an institution which goes far beyond the contractual model when it comes to decision making and create "Supreme Court for World Sports".[38] Nowadays, it is possible to say that the visions were successful as CAS engages extensively in de facto precedent setting and precedent following, establishing rules and principles governing sports. Arbitrators shall take this into account the consequences which their decisions might have on a systemic level[39] and in a few cases, CAS itself well expressed the opinion that every decision ought to follow the precedents based on the systematic interests of foreseeability and consistency[40] and thus fulfilling the need for uniformity in decisions while balancing the duty to the parties to take into account any specifics of individual dispute.

Finally, CAS also exercise the power over sports governing bodies (Chapter 2) which possess executive and regulatory power over particular fields of sport. Its activity is especially crucial towards the subjects which are at the bottom of the sports pyramid, namely athletes and possibly clubs that have, however, much stronger position than. CAS mainly observes whether sports governing bodies act within their competences, respecting the principle of legality[41] and fundamental rights as well as proper procedure.[42]

2.3. Legitimacy of CAS

Addressing legitimacy of CAS is one of the very important issues I should question in this thesis. As the main part of this work deals with various steps each of sports professionals who has the CAS arbitral award issued can take, there is a certain premise that the arbitral award is not always sufficient to protect rights of sports professionals neither does it always bring a desired outcome. Legitimacy of CAS was definitely one of the starting points for many disputes which later on grew into well-known cases before the Court of Justice of the European Union.

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[37] BLACKABY, PARTASIDES, REDFERN, HUNTER (2015), p. 138.
[38] H YI, Daniel. *Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal* [online], Asper Review of International Business and Trade Law 289, 2006, CanLIIDocs 550, p. 290 [retrieved on 3.2.2022]. Available at CanLII: https://canlii.ca/t/t1rs
[39] LINDHOLM (2019), p. 121.
[40] Ibid. See, e.g., CAS 96/149, *Cullwick*, para. 22; CAS 97/176, *Jogert*, para. 40; CAS 2004/A/628, *Young*, para. 19; CAS 2008/A/1545, *Anderson*, para 55; CAS 2008/A/1574, *D'Arcy*, para 33.
[41] See, e.g., CAS 94/129, *Quigley*, para. 34; CAS 2001/A/330, *Reinhold*, para. 17; CAS 2000/A/274, *Susin*, para. 72; CAS 96/157, *FIN v. FINA*, para. 22.
[42] See, e.g., CAS 98/185, *RSC Anderlecht v. UEFA*, para. 5; OG 98/002, *Rebagliati*, para. 26; OG 04/009, *Kaklamanakis*, para. 24.

The author Jan Paulsson in the chapter "*Assessing the Usefulness and Legitimacy of CAS*"comes to the conclusion that CAS promotes public policy, favours fair competition and refuses how athletes and their supporters are highly critical towards the decisions of CAS (especially sanctions).[43] He suggests that the sports world and sports law would become a huge chaos without CAS. While I absolutely agree with the fact that CAS plays an important role in the field of sports law and indeed, inexistence of CAS would create significant discrepancies in sports law disputes, at the same time I claim that CASs 'decisions are not always fair and legitimate, mainly in the relation to individual sports professionals who then need to seek for remedies which are, after the CAS's award is issued, still very limited.

The legitimacy of CAS is given parties' free consent. Typically, these parties are sports governing bodies and an individual athlete performing professionally an activity which is governed by that particular body. In theory, the parties are equal and free to consent to the arbitration. However, sports governing bodies have de facto power to force actors on the lower level of the sporting pyramid to submit the dispute resolution to CAS.[44] Legitimacy of CAS related to the voluntary nature of CAS arbitration was undermined in the famous case of *Mutu & Pechstein* in which the European Court of Human Rights ("ECHR") in the final stage held that the CAS's jurisdiction is for many athletes not free and unequivocal but a compulsory condition for their professional activities.[45] This case is one of the most important examples on how a professional athlete defended her rights after CAS by accessing a national court as well as the European Court of Human Rights and it is analysed this case in the next chapter of this thesis.

Apart from individual legitimacy given by the contract of the parties, it is also important to look at the legitimacy of CAS from the perspective of the whole system in which CAS presents an institution having certain impact on all sport stakeholders, all the way down to individual athletes. The legitimacy of CAS and its functioning should not be, in my opinion, *generally* criticised. CAS undoubtedly has its own place in the mechanism of sports institutions. I submit that it certainly fulfils the majority of its objectives (professional and quick dispute resolution, etc.). However, on the other side, legitimacy of CAS should be questioned with regards to individual athletes and especially for every particular case when issues similar to those in *Pechstein* case arise. In other words, legitimacy of CAS from the

[43] PAULSSON, Jan. *Assessing the Usefulness and Legitimacy of CAS. In: Yearbook of International Sports Arbitration 2015*, Hague: T.M.C. Asser Press, 2016, pp. 3-15. ISBN: 978-94-6265-128-9.
[44] MRKONJIC, Michaël, GEERAERT, Arnout. *Sports organisations, autonomy, and good governance* [online]. In: Sports organisations, autonomy and good governance, Danish Institute of Sports Studies, 2013, p. 134 [retrieved on 3.2.2022]. Available at Mosa: https://explore.lib.uliege.be/discovery/fulldisplay/alma9920679174602321/32ULG_INST:MOSA
[45] Requêtes nos 40575/10 et 67474/10, Mutu et Pechstein c. Suisse [2018], paras 92–115.

perspective of the whole system should be acknowledged, however, legitimacy for a particular case, and especially when some doubts whether the rights of athletes receive enough protection appear, should not be blindly accepted.

2.4. Jurisdiction

As it was already implied above, CAS's jurisdiction is given by the scope of a valid arbitration agreement. This agreement is not, in most cases, created and signed separately but is found in the documents created by a particular sports governing body, e. g. statutes, rules and other agreements. To give an example, CAS is provided with exclusive jurisdiction over "*any dispute arising on the occasion of, or in connection with, the Olympic Games*"[46] as well as jurisdiction to challenge individual decisions of IOC. Therefore, CAS's decision-making process over these types of disputes is in the space of law, which is specific and special legal regime, and independent on any state.[47]

In general, as it was already mentioned, it is up to parties to form their arbitration agreement, however, when it comes to the arbitration before CAS, the majority of disputes is based on CAS's model arbitration clauses in which case parties do not have an impact on the provisions and the agreement itself might miss certain specificity,[48] usually to the disadvantages of a weaker party (which is an individual athlete entering into a dispute with a sports governing body). Therefore, here, the main factor is the form of the acceptance of an arbitration agreement. If an athlete disagrees with the dispute being settled by CAS, he or she needs to express this disagreement according to the procedural rules of CAS, before the dispute commence.[49]

The jurisdiction of CAS is divided into two different types of arbitration procedure (each of them having distinguishable type of arbitration agreement). The first type is called "Ordinary Arbitration Procedure" and basically consist of CAS being the first and usually also final instance of the dispute. The second type is "Appeal Arbitration Procedure" in which CAS serves as an appeal body for "*disputes concerning the decisions of federations, associations or other sports-related bodies.*"[50]These cases are considerably more common, and the award

[46] Article 61 of the IOC Charter.
[47] MESTRE, Miguel. *The Law of The Olympic Games*. The Hague: T.M.C. Asser Press, 2009, p. 16. ISBN: 9067043044.
[48] However, as illustrated by e.g., Cour d'appel Bruxelles's decision 29 August 2018 in case 2016/AR/2048 (*Doyen Sports et al. v. URBSFA et al.*), paras 14–17, national courts may decline to recognize and enforce overly broad general arbitration clauses.
[49] MAVROMATI, Despina, REEB, Matthieu. *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Hague: Kluwer Law International, 2015, p. 34. ISBN 978-90-411-3873-6.
[50] Rule S12 of the CAS Code.

issued in the course of this type of procedure is also the subject of following parts of this thesis. The specific nature of the agreement creating CAS's jurisdiction in Appeal Arbitration Procedure consist in the fact that although it can be considered consensual, it is grounded in sport rules and participation agreements of a particular sports governing body and an individual athlete or club has in practice has barely any power to negotiate the provisions of the agreement.[51] This problematics has been subject to many cases, already above-mentioned *Pechstein* case which will be further discussed in this thesis.

For Appeal Arbitration procedure, the CAS adjudication is intended to be subsidiary to the resolution by a particular sports governing body as a party must exhaust all available remedies before appealing to CAS.[52] This is the first requirement to be even able to take the dispute before CAS. Apart from that, another requirement is that a dispute is a "sport- related one."[53]

2.5. CAS award

For each new case being submitted to CAS, a new panel of arbitrators is formed to resolve that one specific dispute, working independently on other panels while operating under the umbrella of the same organization and regulatory framework. As it is explained above, CAS was recognized by the Swiss Federal Tribunal as independent body and through some systematic changes it gained autonomy and power to issue binding and enforceable awards.[54] Therefore, regular CASs' independent panels as well as CAS Ad Hoc Divisions, which have been specifically formed in connection with particular sporting events (e. g. Olympic Games or FIFA World Cups) are binding for the parties in 30 days from the moment it was communicated to them.[55]

Since CAS is seated in Switzerland[56], following the principle of *lex arbitri*, the procedure is governed by Swiss law, following the Private International Law Act of 1987

[51] See SFT's decision 22 March 2007 in case 4P.172/2006, ATF 133 III 235 (Cañas v. ATP Tour), at p. 243 ("*Ainsi l'athlète qui souhaite participer à une compétition organisée sous le contrôle d'une fédération sportive dont la réglementation prévoit le recours à l'arbitrage n'aura-t-il d'autre choix que d'accepter la clause arbitrale, notamment en adhérant aux statuts de la fédération sportive en question dans lesquels ladite clause a été insérée, à plus forte raison s'il s'agit d'un sportif professionnel. Il sera confronté au dilemme suivant: consentir à l'arbitrage ou pratiquer son sport en dilettante*."), para 70; ECtHR's decision of 2 October 2018 in *Mutu & Pechstein v. Switzerland*, app. no. 40575/10 & 67474/10, paras 113–115. See also RIGOZZI, Antonio. *Challenging Awards of the Court of Arbitration for Sport* [online], Journal of International Dispute Settlement, Vol. 1, No. 1, 2010, pp. 226–228 [retrieved on 3.2.2022]. DOI: https://doi.org/10.1093/JNLIDS%2FIDP010

[52] LINDHOLM (2019), p. 37.

[53] Article R27 CAS Code.

[54] LINDHOLM (2019), p. 31.

[55] Art. R59 of the CAS Code.

[56] Article R28 of the CAS Code.

("PILA").[57] Consequently, the CAS award can be annulled by the Swiss Federal Tribunal.[58] However, overruling of CAS award from the side of the Swiss Federal Tribunal is very rare. Since 1992, only about 150 cases have been appealed to the SFT[59] and only "a single-digit percentage" of those have been successful.[60]Interestingly, a recent case of Sun Yang, a Chinese swimmer, who got 8-year ban from the WADA which was then confirmed on the appeal of the swimmer by CAS, was overruled by the SFT[61] at the end of 2020. Sun Yang requested the disqualification of the chairman of the panel on the grounds that content he had published on his social media earlier on constituted unacceptable comments about Chinese nationals which could raise legitimate doubts as to his impartiality.[62]

On the ground that CAS is an arbitral institution, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable to awards issued by CAS which gives athletes possibility to challenge the award in Switzerland, however, again, for very limited reasons pursuant the article 190(2) of the Swiss Federal Code, [63] for example lack of jurisdiction, ruling beyond the claims submitted or in case the award in question is incompatible with Swiss public policy.[64] In this sense, the New York Convention does not provide any more possibilities for athletes to challenge the award. However, based on the New York Convention, there is another way for the athletes how to proceed once they are dissatisfied.

According to the article II (3) the New York Convention, national courts cannot re-litigate the disputes falling under the scope of arbitration agreement and at the same time it also means that awards issued in an arbitral proceeding based on the valid arbitral agreement shall be recognized in all signatory states (pursuant the article III of the New York Convention). The obstacle of negative res judicata, however, does not mean that all arbitral awards would completely escape the review of national law (and therefore EU law) or review from the side of national courts because based on the article V of the Convention, "*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement*

[57] PILA; Article 176(1) PILA.
[58] Article 191(2) PILA. See also Kaufmann-Kohler and Bärtsch (KAUFMANN-KOHLER, G, BARTSCH, P. *The Ordinary Arbitration Procedure of the CAS*. In: The Court of Arbitration for Sport 1984–2004, Hague: T.M.C. Asser Press, 2006, pp. 69–98).
[59] Statistics from May 2020, see *Kane: Swiss Tribunal Appeals Like Sun Yang's Rarely Find Success*, SwimSwam, 11 May 2020, retrieved 4 February 2022: https://swimswam.com/kane-swiss-tribunal-appeals-like-sun-yangs-rarely-find-success/ .
[60] Ibid.
[61] Federal Tribunal, decision 4 A_318/2020, 22 December 2020.
[62] *The Case of Sun Yang and Switzerland's International Arbitration Law*, IFLR, 8 March 2021, retrieved 4 February 2022: https://www.iflr.com/article/b1qw74gdydybdh/the-case-of-sun-yang-and-switzerlands-international-arbitration-law .
[63] Swiss Federal Code on Private International Law of 18 December 1987 („PILA ").
[64] 190(2) of the PILA.

is sought, proof that…",[65] providing enumerative list of reasons for which the recognition might be refused. At this point, I would like to emphasize the Article V(2)(b) which includes, among these reasons, violation of the "national public policy".[66] The concept of national public policy has extensive background in the CJEU case-law, namely in the cases of *T-Mobile Netherlands*[67] or *Eco Swiss China Time*.[68] These cases were dealing with competition law issues and the CJEU in its ruling, among other conclusions, confirmed that EU competition law provisions might be a matter of the public policy.[69]

Therefore, what does it mean for athletes? The two facts that CAS is, as any other arbitral tribunal, governed by the New York Convention which gives space to refuse on certain grounds the enforcement of an award, and that among these reasons for refusal is the violation of public policy which, according to the case law of the CJEU, includes the violation of EU competition law provisions, open up a possibility to have the dispute re-litigated before national courts (see more in the Chapter 6). Another point to the procedure before a national court is that in case of violation of EU competition law, one can claim the compensation at a national court and a national court does not have to follow the decision of CAS as the CJEU has already pronounced itself on this matter (see below).

This basically leads to the following Chapter 3 in which I further explore the possibilities according to the EU law of an athlete once the arbitral award is issued in the appeal procedure before CAS.

[65] Article V of the New York Convention.
[66] Article V(2)(b) of the New York Convention.
[67] Case C-8/08, *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343 [4 June 2009], para 49.
[68] Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, EU: C:1999:269 [1 June 1999], paras 36, 39.
[69] For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.

3. Procedure after CAS and how individual athletes can protect their rights within EU law system - Commission and a national court

In this chapter, I describe and analyse which steps an individual athlete might take to deal with a CAS award he or she is dissatisfied with. Any professional athlete performing a particular type of sport on the highest level dedicates the majority of his/her time, energy and effort to the training and competing in sports events, both national and worldwide. I have already explained above the position of both sports governing bodies and CAS and I claim that in case of any issues, an athlete should not become "a victim" of still a pretty closed and strict system of sports institutions, with the only official option to appeal to the Swiss Federal Tribunal (see above) but rather should and could be able to seek the protection with help of EU law.

At this point, imagine that a professional athlete has the CAS arbitral award issued and in his or her point of view, the arbitral award affects his/her rights negatively. The official way would be to appeal to the Swiss Federal Tribunal. However, there are certain limits to this option (see above) and a very low success rate. Alternatively, the athlete might be impacted by rules and regulation of a sports governing body. Therefore, which particular steps could this athlete take to protect his or her rights instead?

Firstly, the athlete could follow the steps taken by two swimmers in the famous case *Meca-Medina & Majcen*.[70] After being suspended by the FINA Doping Panel, based on the arbitration agreement contained in the FINA regulations, they appealed to CAS, yet the decision was upheld by CAS.[71] The swimmers decided to go at that time "off the beaten track" and filed a complaint with the Commission, challenging primarily the compatibility of certain regulations implemented by FINA with the Community rules on competition and freedom to provide services (see 4.3.). The same approach was taken by two speed skaters Mark Tuitert and Niels Kerstholt in the very recent case of the *ISU*.[72] CAS was not a part of the procedure in this case, however, apart from claiming that the ISU sanctions imposed on skaters who would take part in other competitions not organized by ISU are contrary to the EU competition law provisions, they also questioned the CAS exclusive jurisdiction to hear appeals against ISU ineligibility decisions (see 4.4.). Both cases are further analysed in this thesis, providing more details on their background, reasoning of the court and implications for the future.

[70] Case C-519/04 P, *Meca-Medina and Majcen v. European Commission*, [2006] EU:C:2006:492.
[71] The case will be discussed further in this thesis in details.
[72] Case AT. 40208 - *International Skating Union's Eligibility rules*, final decision C (2017) 8240 [8 December 2017].

Nevertheless, at this point, I would like to emphasize that they are considered by many experts to be critical turning points in the context of this problematics. For example, Mark Orth[73] commented on the ISU judgement that it "*is like opening the Berlin Wall for athletes. It puts the long established discretionary actions of sports federations towards their athletes into very tight straits, which opens freedom for athletes*" adding that "*Whenever sport federations want to restrict the freedom of their athletes, they have to prove that such actions do have a predefined legitimate object, which is set out in clear and transparent terms in advance, the practice of using lots of discretion by sports federations when applying their rules has now been stopped by the European General Court.*"[74]

Whereas these two cases certainly contributed to setting limits to sports governing bodies by the application of EU competition law and thus opened freedom for athletes, in practice, unfortunately, it cannot be perceived in such an optimistic way. In the Chapter 4 of this thesis, I analyse more into details the problematics of filing a complaint with the Commission, implications for both athletes and sports governing bodies and at the same time provide my own opinion on this matter.

Secondly, the athlete could take a way of a national court. At this point, I cannot mention anything else but a famous case of *Pechstein* who, after CAS confirmed the ban imposed on her by the ISU disciplinary commission. Consequently, she decided to take "the standard route" and appeal to the Swiss Federal Tribunal but her challenge was refused. There is a reason why the *Pechstein* case is called "*a Hot Potato in the Hands of the Sports Arbitration Community*"[75] or why poignant headings of articles, such as "*Is the Pechstein Saga Coming to an End?*"[76] appeared. After the unsuccessful attempt at the Swiss Federal Tribunal, she decided to go both to Germany to The Munich Regional Court on the ground that the CAS clause was invalid, but the whole case took much longer and made it to the German Federal Supreme Court which, in the end, overruled the promising decision by the Munich Higher Regional Court.[77]At the same time, Pechstein went to the European Court of Human Rights which rendered its final

[73] Leading sports competition lawyer who is constantly defending the idea that sports governing bodies should be regulated more by EU competition law. Apart from commenting on the case of the ISU, he also strongly supported the initiative of the SuperLeague, see further in the thesis, claiming that UEFA did not have a strong legal case against the formation of a new European Super League.

[74] „*Skating body ISU loses appeal against landmark EU penalty ruling. Published on Reuters* ", 16 December 2020, retrieved 4 February 2020: https://www.reuters.com/article/eu-isu-skating-antitrust-idUSL1N2IW0XE

[75] GOERTZ, Dorothée. *Recap of the Pechstein Saga: A Hot Potato in the Hands of the Sports Arbitration Community* [online], Kluwer Arbitration Blog, 2020 [cit. 4.2.2022]. Dostupné z Kluwer Arbitration Blog: http://arbitrationblog.kluwerarbitration.com/2020/02/01/recap-of-the-pechstein-saga-a-hot-potato-in-the-hands-of-the-sports-arbitration-community/

[76] MARTENS, Dirk-Reiner, ELGELHARD, Alexander. *Is the Pechstein Saga Coming to an End? German Federal Court of Justice Ruling on Claudia Pechstein v International Skating Union* [online], Business Law International, London, Vol. 18, n. 1, 2017 [cit. 4.2.2022]. Dostupné z Proquest: https://www.proquest.com/docview/2066610693

[77] BGH, decision of 7 June 2016, KZR 6/15.

decision in 2019, confirming indirectly the validity of the arbitration agreement, but at the same time acknowledging that the CAS arbitration was indeed imposed over her.[78]Adding that the Article 6(1) of the ECHR is applicable to the sports arbitration proceedings.

This is only a very brief summary of the case as it is further analysed in detail in the Chapter 5.2. For the purposes of this chapter, I would like to use it only as an illustration of what this case brought for the future, for athletes who might deal with the same situation as Claudia Pechstein had to, to be able to explain the option of going to a national court.

Therefore, what is the impact of the *Pechstein* case? Thanks to the conclusions of the European Court of Human Right, CAS determined these conclusions and accepted in its statement that first judgments can be appealed to national courts ("…*a non-State dispute resolution mechanism of first and/or second instance, with a possible appeal, even limited, before a State court, as a last instance, is appropriate in this area (of international sport*)."[79]and second "*Considering the particular nature of the CAS arbitration system, with mandatory arbitration clauses inserted in the regulations of sports federations, such arbitration shall offer the guarantees provided by Article 6 § 1 of the European Convention on Human Rights*."[80] In other words, if an athlete was forced to sign an arbitral agreement and signing this agreement was the condition to be able to participate in the elite sport, such agreement cannot be used to force athletes to take all the disputes to CAS.[81]

The approach of going to the national court was recently emphasized and I would say even supported in the widely discussed decision of the ISU (Chapter 4.4.). As I have already mentioned, the speed skaters in the ISU case took the approach of filing a complaint with the Commission. However, in the judgement, the General Court emphasized and developed the idea of referring the case to a national court by recalling the judgement of the *Kone and Others*[82]in which it was expressed that any person is entitled to claim the compensation at the national court for the hard suffered by the violation of the Article 101 TFEU.[83]In the following section, the Court adds that "*the national court is not bound by the CAS's assessment of the compatibility of the ineligibility decision or the refusal of authorisation with EU competition law and, where appropriate, may submit a request for a preliminary ruling to the Court of*

[78] Requêtes nos 40575/10 et 67474/10, Mutu et Pechstein c. Suisse [2018], para 113.
[79] *Statement of the Court of Arbitration for Sport on the Decision Made by the European Court of Human Rights in the Case Between Claudia Pechstein/ Adrian Mutu and Switzerland* [online], media release, 2 October 2018 [cit. 4.2.2022]. Available at CAS: https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf
[80] Ibid.
[81] „*Pechstein ruling represents a small victory for athletes"* [online], Sports Integrity Initiative, 6 February 2019, retrieved 3 February 2022: https://www.sportsintegrityinitiative.com/pechstein-ruling-represents-a-small-victory-for-athletes/
[82] Case C-557/12, *Kone and Others* [2014] EU:C:2014:1317, para 22.
[83] Treaty on the functioning of the European Union.

Justice under Article 267 TFEU."[84]and thus reminding the important institute of preliminary ruling according to the TFEU.

Here, I would like to submit that in case a national court would indeed request the preliminary ruling from the CJEU, in my opinion, an athlete would have a decent chance to receive that preliminary ruling in his or her favour, based on the case-law of the CJEU. However, I cannot strict enough that the request for preliminary ruling is in the gestion of the court which is to give a judgement[85] and cannot be forced from the side of an athlete.

[84] *Kone and Others*, para 159

[85] As the Article 267 says: „*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*."

4. Application of EU Law Provisions to Sports Disputes

This chapter explains a general problematic of application of EU law to sports disputes. Understanding the concept of sporting exception (4.1.) and evolution of the case law of the CJEU (4.2.) are crucial for the context of the CAS arbitral award in the procedure before the Commission or before a national court. Finally, in this chapter, I discuss EU competition law and sport because, as it will be obvious from the case-law analysed below, the provisions of EU competition law are the most relevant in this matter nowadays and, in my opinion, the most pressing and contemporaneous.

The commercialization of sport and sporting events has been putting the relationship of sport and European Union law into a significantly different perspective. Sport undoubtedly is a constantly growing economic sector and cannot avoid the application of EU law. There have been a few important cases that became milestones for its evolution. At the beginning of the application of EU law, the judges at CJEU mainly used provisions of free movement, later the cases of the *Piau* and *Meca-Medina & Majcen* brought competition law provisions into question.

4.1. EU sports law and the concept of sporting exception

First of all, what is the concept of sporting exception? The idea of sporting exception appeared for the first time in cases *Walrave*[86] (1974) and *Donà*[87] (1976). These cases are important milestones as the Court acknowledged that the sport issues are subject to EU law, at the same time it left some space that in certain cases and under certain circumstances sport matters should be excluded from the application of EU law. Therefore, at that time, the question related to sporting exception was in which cases the EU law should have been applicable to sports issues and under which circumstances and conditions.

From one point of view, sport was, and still is, considered to be such a specific field that it should not be subject to EU law in majority of cases and if is assessed as a subject of EU law, it should at least undergo a very specific approach from the side of the Court. This particularly emphasizes that sport should receive a special treatment with regards to EU law due to the specificity of sports and the fact that applying completely all the fundamental

[86] Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974.
[87] Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115.

provisions could endanger the nature of sport as well as its social and cultural aspects.[88] The opposite point of view defends the idea that the sport shall also be subject to EU law fully. Therefore, to decide on the approach in particular case, it shall be necessary to assess when and under which conditions should sports matter receive a special treatment or be excluded completely from the application of EU law.

In 1974, with the judgment of *Walrave*, the CJEU issued its statement that „*the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*".[89] Contrary to this statement, it held that the non-discrimination rule "*does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity*".[90] The second statement rather suggests that sport has some particularities and that if a certain rule falls entirely out of scope of economic activity definition, such rule could be subject to sporting exception. However, according to the Court, these provisions on sporting exception "*must remain limited to its proper objective*".[91]

Since *Walrave*, the scope of economic activity has been significantly extended. In Walrave, it was regarded as gainful employment or remunerated service. In *Dona*, the CJEU made clear that this applied to both professional and semi-professional players. Later on, in Bosman, the CJEU rejected that sport itself was not an economic activity and that only major leagues could be regarded as undertakings. In the case of *Deliège*, the CJEU extended the economic activity to amateur athletes.[92] These days, only rules, such as the number of players in a team, the size of the pitch and so on are uncontroversial and are considered to be a purely sporting exception.[93]

Therefore, in *Walrave*, the CJEU drew a clear line as the first step to assess whether sports rules fall within the scope of EU law. This approach has been maintained since then and the CJEU has been providing more instructions on how to approach this issue, and its tendency certainly is in favour of EU law.

Apart from the sporting exception for "purely sporting rules", the CJEU added another level to this assessment in the *Meca-Medina* judgement (as analysed below in detail). The

[88] See for example PARRISH, R. *Sports Law and Policy in the European Union*, Manchester: Manchester University Press, 2003, p. 68-71. ISBN: 0 7190 6606 9.
[89] Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974, para 4.
[90] ibid., para 8.
[91] ibid., para 9.
[92] PARRISH, R. *Case C-36/74 Walrave and Koch [1974] ECR 1405*. In ANDERSON, J. *Leading Cases in Sports Law*, Hague: T.M.C. Asser Press, 2013, p. 48. 978-90-6704-908-5.
[93] WEATHERILL, Stephen. *On Overlapping Legal Orders: What is the 'Purely Sporting' Rule?* [online], European Sports Law (pp.48-73), 2007. DOI: http://dx.doi.org/10.1007/978-90-6704-939-9_15

CJEU pronounced that even if a rule is considered purely sporting in its nature, it does not have the effect of removing the person who engaged in the activity governed by that rule from the scope of the Treaty.[94] In other words, having an economic impact or not, it still falls within the scope of EU law.

The true is, there have not been that many cases before the CJEU related to sports problematics and although the CJEU indeed managed to provide many details in its famous judgements (see below), there still is a lot of scepticism from many specialists. For example, Stephen Weatherill talks about "*an EU sports law (of sorts)*" which implies its ambivalent nature.[95]I can personally relate to this opinion. Despite the case law of the CJEU, starting from *Walrave* and evolving up until nowadays, I believe there still might and will arise many questions and doubts when it comes to the application of EU law to sports disputes. Some of them will certainly be addressed and answered by the CJEU but at the same time I believe that the term of sporting exception will still remain undefined.

I suggest that European institutions, and especially the Commission, approach this matter proactively, without fearing the myth of specificity of sports. As it is further discussed, EU law and regulations of sports governing bodies are based on the similar core values and principles.

4.2. Evolution of the case- law of the CJEU before Meca-Medina

Before addressing the main chapter, which is the procedure before the Commission that also includes the case-study of *Meca-Medina*, I would like to analyse the case law of the CJEU to illustrate the evolution of relationship of sport and EU law. The *Meca-Medina* case has undoubtedly a great meaning for sports law. However, there is a long history and milestones which led to this famous case.

Starting with *Bosman* because this case of a Belgian footballer was a hurricane in the sports law and especially in the field of football. By this judgement, the CJEU significantly increased the level of protection for individual athletes and created a single market in football which, up until then, was purely a self-regulating sector to which many had assumed the EU law had not applied at all.[96] The CJEU applied the right of free movement to professional footballers and since then they have been allowed to transfer without setting up unnecessary

[94] Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, para 27.
[95] WEATHERIL, Stephen. *Is there such a thing as EU sports law?* [online], The international sports law journal, 2012, para 38 [retrieved on 5.2.2022]. DOI: https://doi.org/10.1007/978-90-6704-829-3_15.
[96] TEASDALE, Anthony. *Bosman case* [online], The Penguin Companion to European Union, 2012 [retrieved on 5.2.2022]. Available at The Penquin Companion: https://penguincompaniontoeu.com/additional_entries/bosman-case/.

obstacles. In 1990, Jean-Marc Bosman did not renew the contract with his team - RC Liège. At that time, there were transfer rules implemented by the UEFA which basically required the new club to pay the former club, on terms laid down in the rules in question, a compensation fee for transfer, training, or development.[97] At the same time, the UEFA implemented so-called *3+2 nationality clause* permitting each national association to limit to three the number of foreign players whom a club may field in any first division match in their national championships, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years.[98] These two rules together made it impossible for Bosman to find another club to play for – therefore, find another employment as the transferring club Liège did not allow Bosman to leave without the transfer fee and the new club, Dunkerque, was not willing to pay.

In *Bosman*, the CJEU concluded that the transfer rules in question were not discriminatory, however, as they "*directly affect players 'access to the employment market in other Member States*"[99], they might impede freedom of movement for workers.[100]Such rules could be justified only by a legitimate aim given by public interest. Moreover, even if this condition was fulfilled, these rules should not go beyond what is necessary for achieving the aim in question.[101]

The great significance of this case consists in not only the application of free movement provisions by the CJEU, but mainly in the fact that it impeded the autonomy of sports governing bodies and increased the protection of individual rights of athletes because it made courts progressively change their approach and grant judicial review in matters which had previously been excluded.[102] Moreover, according to the opinion of the Advocate General Lenz, this was not limited only to UEFA but to all sports governing bodies.[103]Therefore, the Bosman ruling assured the horizontal direct effect of the free movement provisions all across sports world.[104]

However, for a long time since the *Bosman* ruling, the CJEU judges refrained from ruling on the application of EC competition law to sport. In *Bosman* (1995) the Court of Justice did not consider it necessary to pronounce on the interpretation of the competition law

[97] Case C-415/93, *Union royale belge des sociétés de football association and others v. Bosman and Others*, [1995] EU:C:1995:463, para 22.
[98] Ibid, para 27.
[99] Ibid, para 103.
[100] Ibid, para 103.
[101] Ibid, para 104.
[102] BADDELEY, M. *The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn* [online], The International Sports Law Journal 20, 3–17, 2020 [retrieved on 5.2.2022]. DOI: https://doi.org/10.1007/s40318-019-00163-6.
[103] Opinion of the Advocate General Lenz in Case C-415/93, *Union royale belge des sociétés de football association and others v. Bosman and Others*, [1995] EU:C:1995:463.
[104] LEWANDOWSKI (2020), op.cit.

provisions after it had found that the nationality clauses and transfer rules under consideration were contrary to the free movement rules.[105]

Both in *Deliège* (2000) and *Lehtonen*[106] (2000) the Court also declined to rule on the matter because it had not been provided with sufficient information on the factual and legal background of the dispute.[107]

In *Deliège*, the selection criteria in judo and compatibility with freedom to provide services were in question. It is also important to note that Christel Deliège was an amateur, not remunerated, although she was sponsored.[108] The CJEU verified whether, based on these grounds, an activity of the kind engaged in by Ms Deliège is capable of constituting an economic activity.[109] The CJEU stressed that "*provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries*."[110]Still, the restriction must "*limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity*."[111]

Further in the decision, the CJEU came up with the criterion of inherency when it stated that "*such a limitation is inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services.*"[112] In the end, according to the CJEU in this case the regulation in question did not "*as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services*."[113]

Then there was the *Balog case*[114]. This Hungarian professional footballer did not accept to renew his contract after his club had stated in the local newspapers that Balog had not fit into the future plans of the club.[115]

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[105] *Bosman*, para 138.
[106] Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201.
[107] Joined cases C-51/96 and C-191/97, *Christelle Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* (C-51/96) *and François Pacquée* (C-191/97), [2000] EU:C:2000:199, paras 28-30.
[108] Ibid.: para 6.
[109] Ibid.: para 49.
[110] Ibid.: para 43.
[111] Ibid.: para 43.
[112] Ibid.: para 64.
[113] Ibid.: para 69.
[114] Case C-264/98, *Balog v Royal Charleroi Sporting Club ASBL*, [1998] C1998/278/51.
[115] BOGAERT, S. Van den. *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, Hague: Kluwer Law International, 2005, p. 105. ISBN: 904112327X.

Later, Balog challenged these transfer rules before a Belgian court and because of his Hungarian nationality (as Hungary was not at that time a member of the EU), he could not use the Bosman ruling.[116] For this reason, he challenged the transfer rules on the basis of competition law provisions. [117] From the Belgian court, the Balog case was referred to the CJEU as the first case in which competition law was applied to sport. However, the ruling was never delivered because, on the day Advocate General Stickx-Hackl was expected to deliver her opinion on the case, the case was settled and dropped. Consequently, the only instruction on the application of competition provisions resulted from the European Commission's handling of sport related cases in which competition law was applied, and some AGs opinions, including the opinion of Stickx-Hackl which she published after the Balog case.[118]

In 1999, the Commission made first steps to publish some guidelines and divided practices/rules of sporting federations into three groups: (1) practices which, in principle, do not come under competition rules, because they are inherent to sport and/or necessary for its organisation; (2) practices that are, in principle, prohibited by competition rules; (3) practices which are restrictive of competition but likely to be exempted from the competition rules.[119] This guidelines needed to be further developed by the CJEU as well as by courts of the first instance.

Meca-Medina case is considered as a milestone case in sports law because of the fact that the EU competition law provisions were applied (see the analyses of the case in the following chapter) and thus the justification of the CJEU appears to be quite revolutionary.

However, the competition law did not appear in the sports disputes for the first time in *Meca-Medina* case altogether but much earlier which forces me to ask a question whether the application of EU competition law provisions could have ever been avoided?

CAS, as a prophet in this matter, made a reference to anti-doping rules which it put in the light of at that time recent case of *Deliège*. CAS pronounced in its famous case of *ENIC* an opinion that having taken in the account all the determined conditions by the CJEU there would be a very few, if any, cases in practice which would escape the application of EU law. Interestingly, it specifically mentioned EU competition law in this matter:

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[116] Ibid.: p. 105.
[117] Rapport d'audience in *Balog*, para 8
[118]PEARSON, Geoff. *Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System'* [online], European Law Journal 21(2), 2014 [retrieved on 30.1.2022]. DOI: http://dx.doi.org/10.1111/eulj.12110
[119] 'Commission debates application of its competition rules to sport', IP/99/133; Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework ('The Helsinki Report on Sport'), COM (1999) 644.

"*In the light also of the recent opinions of Advocate General Cosmas in the pending Deliège case (…) and of Advocate General Alber in the pending Lehtonen case (…), the Panel wonders whether, applying the Court of Justice tests, it is really possible to distinguish between sporting questions and economic ones and to find sporting rules clearly falling within the "sporting exception" (besides those expressly indicated by the Court, concerning national teams). For instance, among the examples indicated by the Claimants, the reference to anti-doping rules might be misplaced, because to prevent a professional athlete – i.e., an individual who is a worker or a provider of services – from performing his/her professional activity undoubtedly has a lot to do with the economic aspects of sports. The same applies to the size of sporting balls, which is certainly of great concern to the various firms producing them. In conclusion, the Panel is not convinced that existing EC case law provides a workable "sporting exception" and it must, therefore, proceed with a full analysis of the present dispute under Articles 81 (ex85) and 82 (ex 86) of the EC Treaty.*"[120]

These examples of the application of EU competition law both before CAS and the Commission clearly illustrate that there had been a long evolution in the matter before the EU competition law was applied in an CJEU case for the first time. Therefore, in my opinion, the *Meca-Medina* judgement and the reasoning of the CJEU which is often considered revolutionary or surprising created of course an important precedent for sports law, however, at the same time I would consider it as something what could not be avoided sooner or later in the case law of the CJEU.

4. 3. EU Competition Law and Sport

Competition rules were laid down for the first time by the European Community Treaty in the articles 81 and 82 as part of the Treaty of Rome.[121] Also, sport was mentioned in the Declarations of the EU, like Amsterdam which referred to the social impact of sports,[122] and Nice in 2000 which emphasizes that competition rules must take into account the specificity of sport, notably its uncertainty of results.[123]

[120] TAS 98/200, *AEK Athens and Slavia Prague v. UEFA* [20 August 1999], Digest of CAS Awards II 1998-2000, 38, at para 116.
[121] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.
[122] European Union, Treaty of Amsterdam amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997, Declaration on Sport.
[123] SIEKMANN, R. *The specificity of sport: sporting exceptions in EU Law* [online], Collected Papers of the Faculty of Law in Split, 49 (4), 2012, p. 697-725 [retrieved on 23.1.2022]. Available at https://hrcak.srce.hr/94361.

In 2007, when the Treaty of Lisbon was signed to update the Treaty of Rome which later in 2009 generated the Treaty on the Functioning of the European Union ("TFEU"), the articles 81 and 82 became articles 101 and 102 respectively.[124]

The article 101 covers cartels in both horizontal and vertical levels and aims to avoid restriction or distortion of competition within the EU. The second paragraph then emphasizes that agreements falling into the scope of the first paragraph are not legally valid.[125]

The article 102 covers "*the prohibition of abuse of a dominant market position*" that relates abuse to imposing unfair prices and trade conditions, limiting production or setting up unjustified conditions to equivalent transactions.[126] In addition, the abuse falls within the scope when made by "*one or more undertakings of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between the Member States.*"[127]For this provision, the relevant market must be assessed in order to determine whether there is any real dominance.[128] An undertaking will be acting illegally solely when it abuses its dominant position as having a dominant position on the market is not illegal by itself. It is important to note at this point that when it comes to sports field and sports governing bodies, as it was mentioned above, it is possible to say that all of them hold the dominant position in the particular field of sport.

Once I have explained these essential elements of the EU competition law, I will now analyse a few important cases which contributed to the evolution of sport within the EU context because, taking closer look to the above-mentioned treaties, sport was not officially included until the entry of the TFEU. Therefore, the jurisprudence is the area which needs to be further explored for the purposes of this thesis.

[124] Thomson Reuters Practical Law. *Concluded Article 101 and/or Article 102 investigations by the European Commission* [online], Thomson Reuters Practical Law, 2017 [retrieved on 23.1.2022]. Available at Thomson Reuters Practical Law: https://uk.practicallaw.thomsonreuters.com/4-102-5842?__lrTS=20220405061700290&transitionType=Default&contextData=(sc.Default)&firstPage=true.
[125] REINISH, August. Essentials of EU Law, 2 Edition, Cambridge: Cambridge University Press, 2012. DOI: https://doi.org/10.1017/CBO9781139198424.
[126] Ibid.
[127] Article 102 of the TFEU.
[128] FRENZ, Walter. *Handbook of EU Competition Law*, Berlin: Springer, 2016, p. 375. ISBN: 978-3-662-48591-0.

5. Procedure before the Commission

As it was outlined in the previous sections, one of the possible ways any sports professional may use to defend his or her rights is to file a complaint with the Commission. These days, all areas of sports can be a subject to EU competition law[129] and therefore this procedure is nowadays relevant not only in antidoping (the case of *Meca-Medina*) or eligibility rules (the case of the *ISU*).

Alleged infringements of Article 101 or 102 TFEU might be claimed by an undertaking or an individual which can be done either by lodging a formal complaint or by providing the relevant market information to the Commission. Therefore, such action may be performed by an individual athlete or a certain sports organization which claim violation of EU competition law from the side of a sports governing body. After being able to show a legitimate interest to be a complainant, they can enjoy certain procedural rights. The Commission might also open a case on its own initiative. All the cases become subjects to an initial assessment and especially (but not only) a very high percentage of sports cases is discarded.[130]

Therefore, this Chapter deals with the procedure before the Commission for the purposes of professional athletes. Firstly, I analyse the most important cases in this matter as well as their implications for the future. Secondly, I provide my opinion on the efficiency of this procedure and probability to succeed.

In this Chapter, I answer the following questions. Why should a sports professional file a complaint with the Commission? How likely is he or she to succeed in this procedure and possibly, is there any way to increase chances to success?

5. 1. Case study: long swim of Meca-Medina and Majcen

5.1.1. Background of the case

David Meca-Medina and Igor Majcen are two professional long-distance swimmers who tested positive for nandralone. The international swimming federation suspended both athletes for a period of two years. Meca-Medina and Majcen filed a complaint with the European Commission, challenging the compatibility of the International Olympic

[129] BUDZINSKI, Oliver. *The institutional framework for doing sports business: principles of EU competition policy in sports markets* [online], International Journal of Sport Management and Marketing, 11 (1/2), 2012, p. 46 [retrieved on 23.1.2022]. Available at EconPapers: https://econpapers.repec.org/paper/zbwtuiedp/70.htm

[130] European Commission. *DG COMPETITION Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU* [online], 2009 [retrieved on 23.2.2022]. Available at CEP: https://www.cep.eu/Analysen_KOM/Best_Practices/Best_Practices.pdf .

Committee's (IOC) anti-doping regulation with the Community competition rules. In other words, the swimmers argued that the IOC was abusing its dominant position as a sport governing body by adopting unilaterally rules on doping. The Commission concluded that the anti-doping legislation did not fall foul of the prohibition under Articles 81 and 82 EC and rejected the complaint.[131]

Meca-Medina and Majcen brought their action before the Court of First Instance. The Court of First Instance stipulated that purely sporting legislation may have nothing to do with economic activity, and as such does not fall within the scope of Articles 39 and 49 EC. This means also that it has nothing to do with the economic relationships of competition and therefore that it also does not fall within the scope of Articles 81 and 82 EC.[132]

The Court of First Instance did not examine whether the issue could be qualified as an economic activity, nor did it classify whether the international swimming federation had to be considered as undertakings. The CFI directly assessed the 'purely sporting' nature of the anti-doping regulation. It acknowledged that high-level sport has become, to a great extent, an economic activity, but pointed out that the fight against doping does not pursue an economic objective. As the campaign against doping intends to safeguard the health of athletes and to preserve the spirit of fair play, "*it forms part of the cardinal rule of sport*".[133]According to the Court of First Instance, "*sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport*".[134]

The Court of First Instance further stated that the anti-doping legislation concerns exclusively "*a non-economic aspect of that sporting action, which constitutes its very essence*".[135] It came to the interesting conclusion while dismissing the action brought by the two swimmers. According to the opinion of the Court of First Instance, the anti-doping rules are "*intimately linked to sport*" and therefore fall outside the scope of competition law provisions. At the same time, it stated that if the anti-doping legislation would be discriminatory in nature, it would not escape the Treaty provisions.[136] Moreover, the main reasoning behind the dismissal was that even though the International Olympic Committee might had had some economic interests behind the Olympic games when adopting anti-doping regulations, such argument "is not sufficient to alter the purely sporting nature of that legislation".[137]

[131] COMP/38.158, *Meca-Medina et Majcen v CIO*.
[132] Case T-313/02 *Meca-Medina & Majcen v Commission* [2004] ECR II 3291, para 44.
[133] Idem.
[134] Ibid.: para 45.
[135] Idem.
[136] Ibid.: paras 47-49.
[137] Ibid.: paras 51-57.

On appeal, the Court of Justice started with emphasizing that sport is subject to Community law in so far as it constitutes an economic activity, referring to numerous cases, and while the provisions of the Treaty which are of purely sporting interest and, as such, have nothing to do with economic activity, by referring to *Walrave*. As the Court mentioned in its previous cases, no sports rule can be excluded from the scope of the EU law provisions only based on the fact that such particular rule is purely sporting in nature.[138]Regarding the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court confirmed, referring to *Donà*, *Bosman* and *Deliège*, that the provisions on free movement of persons and the 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. However, such a restriction on the scope of the provisions in question must remain limited to its proper objective.[139]

5.1.2. Two new elements brought by the ruling

To these rules which had been already established by the CJEU by its previous case law, the CJEU added two new elements.

In the paragraph 27 of the *Meca-Medina* judgement, it introduces the first element: "*In light of all of these considerations, it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.*"

In this statement, the Court emphasizes two categories - one of them includes the activities of sports professionals and the second one actual rule governing these activities, drawing a clear distinction between them. Any case in sports law can be (and usually is) composed of two aspects - economic and non-economic - while the presence of non-economic aspects themselves is not sufficient to exclude the case from the application of EU law. In addition, followed by the paragraph 28: "*If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that 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*." By this statement, the CJEU says that the Court of First instance should not have automatically excluded the rules from the scope of EU competition law based

[138] Case T-313/02 *Meca-Medina & Majcen v Commission* [2004] ECR II 3291, para 25.
[139] Ibid.: para 26.

on the sole assessment that these rules were of a purely sporting interest without determining first whether the rules fulfilled the specific requirements of Articles 81 and 82 EC.[140]

To assess any activity under EU competition law, it is necessary to determine first, whether the rules governing the activity fulfil the definition of an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States.[141] Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity which was pronounced in *Walrave* and *Donà* that fact means neither that the sporting activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles.[142] In other words, the CJEU disagrees with the assessment which was made by the Court of First instance that if the purely sporting rules have nothing to do with economic activity and thus fall outside the scope of Articles 39 EC, it simultaneously means that these rules also fall outside the scope of Articles 81 EC and 82 EC and therefore the EU competition law provisions are not applicable, either.

The second element that the CJEU added to his previous case law practice. Relying on the reasoning in *Wouters case*, the CJEU examined the anti-doping rules.[143] As the CJEU already pronounced its previous case law, "*the compatibility of rules with the Community rules on competition cannot be assessed in the abstract*".[144] Thus, the CJEU investigated whether the anti-doping rules are intimately linked to the proper conduct of sporting competition, whether they are necessary to combat doping effectively and whether the limitation of athletes' freedom of action does not go beyond what is necessary to attain that objective.[145] The CJEU therefore confirmed that the Commission rightly took the view that that the general objective of the rules was to combat doping for competitive sport to be conducted fairly for athletes and protect them.[146]

Moreover, without penalties, rules could not be enforced and despite the fact that these rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action since they are justified by a legitimate objective.[147] The CJEU in

[140] Ibid.: paras 29-34.
[141] Ibid.: para 30.
[142] Ibid: para 31.
[143] Case C-309/99, *Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
[144] Case C-250/92, *Goettrup-Klim e.o. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AMBA* [1994] ECR I-5641, para 31.
[145] Case C-309/99, *Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 97; Case C-519/04, *Meca-Medina & Majcen v Commission* [2006] ECR I-6991, para 42.
[146] Case C-519/04 P, *Meca-Medina and Majcen v. Commission* [2006] EU:C:2006:492, para 43.
[147] Ibid.: para 45.

this case assessed the anti-doping rules as having legitimate objective which, however, does not exclude them from the scope of the Article 81 because the penal nature of the anti-doping rules at issue and the magnitude of the penalties are capable of producing adverse effects on competition because they could if proved unjustified result in athlete's exclusion from sporting events. In order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport.[148] According to the CJEU, there are two aspects of how these anti-doping rules could be excessive.

Fist of them, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties[149]. For the first reason, the CJEU referred to scientific knowledge and as the appellants did not specify at what level the threshold in question should have been set, the Court found that the restrictions that follow from this threshold for professional sportsmen were not excessive.[150]As to justify the second reason, the CJEU only provided the explanation that "*it has not been established that the anti-doping rules at issue are disproportionate*".[151]

5.1.3. Meca- Medina - won the war, lost the battle[152]- implications for individual athletes and for the application of EU law

To sum up the case and its contribution to the progress of application of EU law on sports cases, it is necessary to understand the main point which were brought up by the CJEU for the first time. The crucial idea to understand is that in *Meca- Medina* case, the CJEU rejected the concept that once a particular rule is assessed as "purely sporting", it does not necessarily mean that it falls outside the scope of EU law provisions. They cannot be simply excluded under justification that they are a part of *lex sportiva* (a specific set of rules in this case) and therefore excluded. On the contrary, their real context in a particular case as well as their effects much be examined.

In this sense, Weatherill talks about the concept of conditional autonomy. *Provided the rules are shown to be necessary for the organization of the sport, they escape control*. This concept, in other words, means that only under certain circumstances can sporting rules escape

[148] Ibid.: para 47.
[149] Ibid.: para 48.
[150] Ibid.: paras 49-54.
[151] Ibid.: para 55.
[152] As BELOFF, Michael, supra note 35, has remarked, the swimmers "*established a new principle, but failed to bring themselves within it. They won the war but lost the battle*".

the application of EU law. Weatherill talks about intent and effect. In other words, a rule or practice might be a purely sporting in its *intent,* but it must follow the demands of the EU trade law to the extent it exerts economic *effects.*[153] This principle was applied in *Meca- Medina* in the way that the objective of the rules was to combat doping to protect a competitive sport and maintain a fair play.[154]Therefore, this is the intent of the rules. Which is, in this case, of purely sporting interest. The effect of penalties is inherent to these anti-doping rules.[155] There certainly is an effect on economic sector as these rules basically disabled these athletes to enter the competition in swimming and therefore, they were unable to earn living. The CJEU did not exclude this practice from the scope of EU law (however, at the same time, it warried of questioning the expertise practised by sports federations).

This judgement awoke a huge discussion about the future development of sports law within the context of EU law. Some said that the decision would only cause many problems in the future,[156] bringing up more questions than giving answers. For others, this case, on the contrary, represented a necessary step forward in protecting rights of individual athletes. I submit that this case was an important turning point to offer athletes a new way to protect their rights and although, as I have noted, it was not the very first case in which the EU competition law was mentioned, I perceive its main impact in the fact that it provided some instructions and guidance on how to approach competition issues within the field of sport, especially for the reason that the CJEU in this case applied EU competition law provisions on a sporting organization rules which undermined the above-mentioned concept of the "purely sporting interest".[157] Further details and implications for individual athletes are analysed in the Chapter 5.3. where I provide general conclusions regarding the procedure before the Commission.

5.2. Case study: ISU

The case of *International Skating Union* ("ISU") is one of the most significant cases for sports law and for application of EU competition law. ISU is the sole federation for administration of figure and speed skating and organization of all international competitions in

[153]WEATHERILL, Stephen. *European Sports Law*, Edition 2, Hague: T.M.C. Asser Press, 2014, p. 5. ISBN 978-90-6704-938-2.
[154] Idem.
[155] Idem.
[156] INFANTINO (2006).
[157] ROMPUY, Ben Van. *Editorial: Competition Law in Leisure Markets* [online], The Competition Law Review, 11 (1), 2015 [retrieved on 24.1.2022]. ISSN: 1745638X.

this area. It is also the sole federation which is recognized by the International Olympic Committee for the purposes of managing figure and speed skating.

All the sports professionals who are members of the ISU are subject to so called "eligibility rules" which is sort of authorization system providing rules for skaters to get authorization from the ISU before they participate in any other events organized by other organizations. Failing to do so, they are imposed by severe penalties. They are often suspended for several years, in worst case a lifetime ban, from any competitions organized by the ISU.

In this particular case, the issue came out because of the competition in speed skating taking part in Abu Dhabi and organized by a private Korean company. Two Dutch speed skaters were prohibited from participating in this competition and lodged a complaint with the European Commission (the "Commission") which started investigating the case in 2014.[158]

5.2.1. Background of the case; investigation of the Commission

Two Dutch speed skaters complained to the Commission that the eligibility rules set by the ISU were incompatible with Articles 101 and 102 TFEU, alleging that those rules prevented them from taking part in a speed skating event that the Korean company planned to organize (the competition was a new format of race that would take place on a special ice track on which long-track and short-track speed skaters would compete together).[159]

The investigation of the matter took more than three years, and the Commission adopted its final Decision on 8 December 2017. In this Decision, the Commission was analysing two issues – first of them were the eligibility rules and the second was the compulsory arbitration mechanism while questioning the position of CAS in sports related disputes.

Relevant market was concluded to be the worldwide market for the organization and exploitation of speed skating while the Commission also emphasized that the eligibility rules themselves would have restricted competition even if the market would have been defined more narrowly.[160] Given the fact that the ISU was the governing body and the only regulator of speed skating, and it had the power to authorize international competitions, including the most important speed skating events, and apart from the ISU, no undertaking had been able to enter

[158] CATTANEO, Andrea. International *Skating Union v Commission: Pre-authorisation Rules and Competition Law* [online], Journal of European Competition Law & Practice, Volume 12, Issue 4, 2021, pp. 318–320. DOI: https://doi.org/10.1093/jeclap/lpab011

[159] Case AT. 40208 - *International Skating Union's Eligibility rules*, final decision C (2017) 8240 [8 December 2017], para 101.

[160] Ibid.: para 115 of the recital.

the relevant market, the Commission observed that the ISU was able to influence competition on the relevant market.[161]

Regarding the first mentioned issue which is the nature of eligibility rules, the Commission stated that those rules restricted the possibilities for professional speed skaters to take part in international events other than those organized by the ISU and therefore deprived those third-party organisers of real possibility to organise any events as no such events could take place without participating athletes. Although those rules were not constituted expressively to exclude third party organisers, based on the objectives, economic and legal context and subjective intention of the ISU, the Commission concluded that they were contrary to the Article 101 (1)[162], restricting competition by object.[163]

The second issue was the assessment of the arbitration rules. According to the Commission, these rules made it both difficult to obtain effective judicial protection against any ineligibility decisions of the ISU that are contrary to Article 101 TFEU and forced athletes to accept the arbitration rules and the exclusive jurisdiction of the CAS.[164]

5.2.2. Procedure at the EU General Court ("Court")

On 19 February 2018, the ISU brought the action against the Commission's decision, more than a year later, the case was referred to a chamber sitting in extended composition.[165] The ISU put forward eight pleas in law. In the next sections, I will discuss the pleas separately, with particular focus on those concerning EU competition law.

1. First plea – *the Commission's decision is vitiated by illegality as it is based on manifestly contradictory reasoning.*[166]

According to the Article 296 TFEU and supported by a rich variety of case law of the CJEU, it is essential to provide all the relevant and adequate reasons which the Commission failed to do so.[167] The Commission concluded that the eligibility rules restricted competition as such without having even questioned whether the pre-authorization system pursued legitimate objectives. At the same time, the Commission stated that the ISU could put an end

[161] Ibid.: para 134 of the recital.
[162] Ibid.: paras 162-188 of the recital.
[163] Ibid.: para 194, also 208.
[164] Ibid.: paras 270-276 of the recital.
[165] Case T-93/18, *International Skating Union v European Commission* [2020] ECLI:EU: T:2020:610, paras 38-46.
[166] Ibid.: para 52.
[167] Ibid.: para 53.

to the infringement while retaining the pre-authorization system which is basically contradictory to the previous statement.[168]

2. The second, third and fourth pleas – *the eligibility rules do not restrict competition by object and effect and fall outside the scope of application of Article 101 TFEU*[169]

"*The concept of restriction of competition by object can be applied only to certain types of coordination between undertakings that reveal, by their very nature, a sufficient degree of harm to the proper functioning of normal competition that it may be found that there is no need to examine their effects*" and it is this necessary to take into account the content of the provision, its objectives and economic and legal context of which it forms part.[170]

In general, there are certain governing bodies which have monopolistic position on the market. Consequently, they exercise regulation of the relevant sector and might in fact also perform an economic activity. The regulation can be performed in many forms and creating authorisation rules to control the structure of the sector can be one of them.[171]

The similar rules were previously discussed in *MOTOE* in which case the CJEU was also assessing their legitimacy. In this case, the Greek Motorcycling Federation required any third-party organizer to obtain authorisation to organise competitions, and at the same time it organized such competitions by itself. Such acting was claimed to constitute an abuse of a dominant position under Article 102 TFEU. According to the Court, competition must be protected when certain rules "*entrust a legal person which itself organises and commercially operates competitions, with the task of designating the persons authorised to organise those competitions and to determine the conditions under which they are organised*."[172] Conditions set like that consequently create conflicts of interest[173]as the body itself has the power to prevent others to enter the market and gives space to inevitable abuse of the market.[174]

Even though MOTOE was argued under Article 102 TFEU, the Court concluded that the same principles could be applied also in the present case concerning the application of Article 101 TFEU.[175] To assess whether the authorization rules are abusive or unlawfully

[168] Ibid.: para 55.
[169] Ibid.: para 67.
[170] Idem.
[171] Ibid.: para 70.
[172] Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] EU:C:2008:376, para 51.
[173] AG Kokott's Opinion in the Case C-49/07, *MOTOE*, para 98.
[174] WEATHERILL, Stephen. *Principles and Practice in EU Sports Law*, Oxford: Oxford European Union Law Library, 2017, p. 253. ISBN: 9780198793656.
[175] Case T-93/18, *International Skating Unin v European Commission* [2020] ECLI:EU: T:2020:610, para 71.

restrict competition, it is necessary to look at their objectives. In this particular case, the Court referred to the Article 165 TFEU, the EU should take into account "*the specific nature of sport, its structures based on voluntary activity and its social and educational function*" while "*promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and ethical integrity of sportsmen and sportswomen*". Both statements have been confirmed by rich variety of case law (see *Meca-Medina*: "*As regards the overall context in which the rules at issue were adopted, the Commission could rightly take the view that the general objective of the rules was, as none of the parties disputes, to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.*")[176]

By default, any governing body can undoubtedly create a set of rules which might consequently have restrictive effects on the market. However, it is further necessary to assess the nature of these rules and whether these effects are inherent and proportionate to the pursuit of the objectives.[177]In this present case, the Court decided that "*even if the restrictions arising from the pre-authorisation system established in the present case are inherent in the pursuit of that legitimate objective of protecting the integrity of speed skating from the risks associated with betting, the fact remains that, in particular for the reasons set out in paragraphs 92 to 95 above, they go beyond what is necessary to achieve such an objective within the meaning of the case-law cited in paragraph 77 above. Accordingly, the applicant's argument that the restrictions arising from the eligibility rules are justified by the objective of protecting the integrity of speed skating from the risks associated with betting must be rejected*."[178]

Moreover, the criteria set by the ISU were not clearly defined, transparent, non-discriminatory, reviewable, and capable of ensuring the organisers of events effective access to the relevant market[179] (analogically to the decision in *Ordem dos Técnicos Oficiais de Contas).* [180] The Court confirms the assessment of the Commission that the pre-authorization rules set by the ISU go beyond what is necessary to pursue the objective of ensuring that sporting competition comply with common standards. The ISU requires other organisers to disclose information of a financial nature and although that could be considered proportionate

[176] Case C-519/04 P, *Meca-Medina and Majcen v. European Commission* [2006] EU:C:2006:492, para 43.
[177] Case C-309/99, *Wouters e.o. v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 97, and Case C-519/04 P, *Meca-Medina and Majcen v. European Commission* [2006] EU:C:2006:492, para 42.
[178] Case T-93/18, *International Skating Unin v European Commission* [2020] ECLI:EU: T:2020:610, paras 103 and 104.
[179] Ibid.: para 88.
[180] See, to that effect and by analogy, Case C-1/12, *Ordem dos Técnicos Oficiais de Contas* [2013] EU:C:2013:127, para 99.

in order to find out whether a particular organisation has enough recourses to organise competition, it is clearly exaggerated to require to disclose the business plan as a whole. The second rule which was found disproportionate was more restrictive time limit for the submission of a request for authorisation in the case of an event organised by a third party. Last but not least, the ISU had broad discretion to accept or reject an application for an open international competition and neither did the rules provide for specific time limits for dealing with requests for authorisation, which could also give rise to arbitrary treatment of such requests.[181]

3. Sixth plea – *Mandatory arbitration rules even reinforce restrictive effect*[182]

In its sixth plea, the applicant claims that the conclusion of the Commission's decision that its arbitration rules reinforce the restrictions of competition caused by the eligibility rules is unfounded and should be ignored[183]. The Commission raises a plea of inadmissibility, alleging that the applicant has in no way sought annulment of the finding relating to the arbitration rules.[184] The Appellant underlines two errors of assessment in the decision of the Commission. First, the Commission wrongly concluded that the arbitration rules made effective judicial protection against a potentially anticompetitive decision of the applicant more difficult. Secondly, it submits that that section is not relevant in so far as the Commission does not consider that recourse to the CAS arbitration procedure constitutes an infringement of Article 101 TFEU.[185] The main point in this Commission's argument is that having concluded that the eligibility rules restricted competition, the arbitration rules reinforced the restrictions created by those eligibility rules.[186]

The Appellant challenges this decision by saying that "*Even if the Commission had, as it maintains, extended the obligations incumbent on the applicant on the basis of the 2006 Guidelines and could thus invoke the application of those guidelines without a substitution of grounds, it must be held that it was wrong to consider that the arbitration rules constituted an aggravating circumstance within the meaning of the 2006 Guidelines*,"[187]providing following

[181] Case T-93/18, *International Skating Union v European Commission* [2020] ECLI:EU: T:2020:610, para 101.
[182] Ibid.: para 131.
[183] Idem.
[184] Ibid.: para 132.
[185] Ibid.: para 141.
[186] Ibid.: para 145.
[187] Ibid.: para 148.

arguments. In general, arbitration is accepted method of binding dispute resolution and that agreeing on an arbitration clause as such does not restrict competition.[188]

Then, the Appellant brings into question the specific nature of the sport by saying that "*binding nature of arbitration and the fact that the arbitration rules confer exclusive jurisdiction on the CAS to hear disputes relating to decisions on ineligibility made by the applicant may be justified by legitimate interests linked to the specific nature of the sport*"[189] by referring to the ruling of the European Court of Human Rights in the case of *Mutu and Pechstein v. Switzerland*[190] in which the ECHR recognized that it was clearly in the interest of disputes arising in the context of professional sport that they could be submitted to a specialised court which is capable of adjudicating quickly and economically. The CAS exclusive jurisdiction does constitute unlawful circumstances which make the infringement found in the present case more harmful and therefore, the Commission was not entitled to consider that the arbitration rules constituted an aggravating circumstance and therefore, it was not entitled to conclude that they reinforced the restrictions of competition created by the eligibility rules.[191]

To sum up, the EU General Court confirmed the breach of EU competition law when it comes to the eligibility rules, constituting a restriction by object. However, it annuls the decision of the Commission prohibiting the ISU from setting up arbitration rules and imposing on ISU a periodic penalty payment.

5.2.3. Significance of the case and implications for sports governing bodies

This case is significant for the development of EU competition law because of two features which appeared for the first time. First, it is for the first time when a particular decision deals with a specific set of rules set by an independent sport governing body. Second, there is another premiere created by the fact that it is for the first time that the General Court has been called upon to rule on an EC Decision finding that a sports body's rules do not comply with EU competition law[192].

[188] Ibid.: para 154.
[189] Ibid.: para 156.
[190] Requêtes nos 40575/10 et 67474/10, *Mutu et Pechstein c. Suisse* [2018].
[191] Case T-93/18, International Skating Union v European Commission [2020] ECLI:EU: T:2020:610, para 163.
[192] TSVETANOVA, Viktoria. *Why The ISU's Eligibility Rules Breached Competition Law and What It Means For Sports Governing Bodies* [online], Law in Sport Journal, 2021 [retrieved on 2.1.2022]. Available at Law in Sport: https://www.lawinsport.com/topics/item/why-the-isu-s-eligibility-rules-breached-competition-law-a-review-of-the-eu-general-court-s-ruling.

As it might seem from the decision in the matter of ISU and in all the above-mentioned decisions, the legal ground is becoming more and more unstable for autonomous sports governing bodies. In general, European courts interfere more with the autonomy of these organizations and thus their legal certainty might be affected.

Following the similar reasoning as in *Meca-Medina*, the Court even in this judgement of *ISU* confirms the autonomy of sports governing bodies. While they might certainly adopt authorisation and similar rules, these implemented rules must pursue legitimate objective. Moreover, it must be ensured that these rules are set in a transparent and non-discriminatory way[193] and that they "*stay clear from any attempts to foreclose the market and advance the commercial interests to the detriment of competitors*".[194]

Yes, despite the fact that no court has ever prohibited sports governing bodies from setting their own rules (and no court ever will), it is possible to determine a few takeaways on how to navigate through a bit unpredictable situation when it comes to the application of EU competition law to sports disputes.

First and foremost, sports governing bodies should not expect that rules which they implemented a long time ago are not violating any EU competition law provisions. Considering the fact that ISU rules in question had existed many years before they were challenged, no rules of any sporting organization can be regarded as out of the reach of courts based only on their "long-term tradition".

Another point is related to sanctions. In this matter, the sanctions were not imposed on the ISU by the Commission. However, this is not to become a precedent as the Commission was clear its decision not to impose a fine on the ISU was the fact that this was the first time an infringement decision was adopted in relation to rules set by a sport governing body.

Finally, sports governing bodies should take into consideration the fact that once the Commission gets involved in the case, any further commitments from the side of sports governing body would likely be scrutinized and may not be accepted if they do not fully address the authority's concerns.[195]

[193] CATTANEO, Andrea. *International Skating Union v Commission: Pre-authorisation Rules and Competition Law* [online], Journal of European Competition Law & Practice, Volume 12, Issue 4, 2021, pp. 318-320 [retrieved on 2.1.2022]. DOI: https://doi.org/10.1093/jeclap/lpab011 .
[194] CATTANEO, Andrea, PARRISH, Richard. *Sports Law in the European Union*, Hague: Wolters Kluwer, 2020, p. 72. ISBN: 9789403526133.
[195] TSVETANOVA (2021).

5.3. Takeaways from the case of Meca-Medina and the ISU for the procedure before the Commission and possibly before the European Court of Justice

Nowadays, there is no dispute about whether EU competition law provision apply to sports cases. Sports governing bodies fulfil the conditions of an undertaking and the Commission has powers to investigate whether practices of a particular sports governing body complain with EU competition law. However, although the Commission is under a duty to reply to all complaints, it is not required to conduct an investigation, having in its disposition to reject a complaint if it does not display a sufficient EU interest.[196]

Apart from the possibility to investigate into a case, the Commission is also entitled to impose sanctions on undertakings for infringements of EU competition law.[197] However, when it comes to sport, the Commission has closed a vast number of cases in a very early stage under the justification of lacking the community interest. Such cases arose even after the judgement in *Meca-Medina*, the case of *Formula One Engine Manufacturers*[198] and *Financial Fair-Play*.[199]

Despite the fact that *Meca-Medina* has a huge impact on the application of EU competition law, it needs to be reminded that this case was dismissed at the Commission and later on the decision of the Commission was rewritten by the CJEU (the reasoning of the Commission was reversed but the swimmers still lost the case because of not being able to, and many cases after had the same destiny. The real turning point in the procedure before the Commission was the case of the ISU which improved not favourable statistics up until then.[200]At the same time, even if the Commission finds an infringement of EU competition law,

[196] Case T-77/92, *Parker Pen v Commission of the European Communities* [1994] E.C.R. II-549, paras 64-65. See European Commission, *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty* (2004/C 101/05).
[197] TELEKI, Christina. *The Procedure for Enforcement of Article 101 and 102 TFEU* [online]. In Due Process and Fair Trial in EU Competition Law, Chapter 10, 2021. DOI: https://doi.org/10.1163/9789004447493_014
[198] Case COMP/39732/BRV/FIA – Certain Formula One engine manufacturers, FIM, Dorna, Honda [4 August 2011]. Available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39732/39732_250_3.pdf
[199] Case AT.40105 - UEFA Financial Fair Play Rules [24 October 2014]. Available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/40105/40105_220_6.pdf
[200] BASTIANON, Stefano. *The ISU Commission's Decision and the Slippery Side of Eligibility Rules* [online], Asser International Sports Law Blog, 2018 [retriever on 5.2.2022]. Dostupné z Asser International Law Blog: https://www.asser.nl/SportsLaw/Blog/post/the-isu-commission-s-decision-and-the-slippery-side-of-eligibility-rules-by-stefano-bastianon-university-of-bergamo

it has always showed willingness to find compromises with sport bodies and never imposed sanctions on them.[201]

I submit that the Commission is too benevolent in its approach to sports governing bodies, having too wide margin of appreciation when it comes to assessing sports related cases which creates an unsecure ground for individual athletes to defend their rights when they suspect EU competition law has been violated. So often provided justification of the lack of community interest is, in my opinion, doubtful and not sufficient. Nowadays, sport is not just for fun, but it is also a business. Therefore, it is why I think that sport related cases should be dealt with in the same way as cases in other fields which does not mean that integrity or specificity of sport will be violated as many sports governing bodies often claim. The Commission is certainly not supposed to become a general referee for sports governing bodies but they must nevertheless assure they rules are in compliance with EU law (they need to pursue a legitimate objective while the restriction is inherent and proportionate to this objective)[202]following the consistent judicature of the CJEU.

In this matter, the above-analysed ISU case stands above other competition related sports cases, and especially the opinion of Commissioner Margrethe Vestager: "*International sports federations play an important role in athletes' careers - they protect their health and safety and the integrity of competitions. However, the severe penalties the International Skating Union imposes on skaters also serve to protect its own commercial interests and prevent others from setting up their own events. The ISU now must comply with our decision, modify its rules, and open up new opportunities for athletes and competing organisers, to the benefit of all ice skating fans*".[203] In this statement, Margrethe Vestager accepted the important role of international sports federation and their autonomy, however, at the same time, defined the clear line of what is acceptable. The sanctions ISU was imposing on the athletes for participating in the competitions of other organizers were disproportionate and the ISU was protecting its own commercial interests. Which is, in my opinion, another line of the whole problematic. Sports governing bodies try to get out of reach of EU competition law under various justification for the sake of protecting their own commercial interests. The criterion of whether a particular

[201] GEERAERT, Arnout. Limits to the autonomy of sport: EU law [online], Danish Institute for Sports Studies, 2013, p. 178 [cit. 5.2.2022]. Available at https://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS-report_-_14Limits_to_the_autonomy_of_sport__p_151-184_.pdf

[202] BASTIANON (2018), op.cit.

[203] „*The European Commission. Antitrust: International Skating Union's restrictive penalties on athletes breach EU competition rules* ", Press Release, 8 December 2017 [retrieved on 5.2.2022]. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5184.

sports governing body is protecting its own commercial interest while being investigated should be taken into account by the Commission.

At this point, I would like to answer the questions which I posed myself at the beginning of this Chapter. Having regards to all the controversialities surrounding the procedure before the Commission, why should an individual athlete even make effort to file a complaint with the Commission? The procedure before the Commission is a pretty straightforward option for anyone who want to claim the violation of EU competition law. A big setback is that the Commission has in its disposition to reject any complaints. This is something what cannot be really influenced from the side of an individual athlete. However, this brings me to two important points. First, after having the complaint rejected by the Commission, a sports professional can go to the CJEU. As I have already showed in this thesis, the CJEU has developed a constant approach in its case-law and this I claim this gives a bigger opportunity to win the case over, especially in comparison with the standard procedure which would be to appeal to the Swiss Federal Tribunal (see Chapter 2).

My second point is that there is a certain margin to improve the reasoning both before the Commission and then possibly before the CJEU. Taking into account the two case studies I discuss in this thesis; it is possible to deduct from them some information. As it is explained in the Chapter of *Meca-Medina* case, the restrictions imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport. Meca-Medina and Majcen lost the case at the CJEU because they did not manage to prove the levels for substance which would be proportionate. Contrary to that, the speed skaters in the case of ISU managed to prove the eligibility rules went beyond of what was necessary to ensure the proper conduct of competitive sport (and the ISU did not manage to reverse the claim in its appeal to the General Court of EU). This basically gives the answer to the second question to be answered in this Chapter. I see a big potential in improving the reasoning when filing a complaint with the Commission. An athlete should strive to suggest in the complaint what would be a proportionate and necessary regulation comparing to the one which, according to the athlete's opinion, violates the competition law provisions. In other words, it could be on point to suggest a coherent alternative to the rule or regulation in question.[204]

[204] As suggested by Stephen Weatherill: „*Given the burden of proof, it is for the applicant, challenging a sport regulation, to demonstrate coherent alternative governance structures*." IN WEATHERIL, Stephen. *Anti-doping revisited – the demise of the rule of 'purely sporting interest'?* [online], European Competition Law Review, 2006. DOI: https://doi.org/10.1007/978-90-6704-939-9_14

To conclude this Chapter. I would like to the Foreword to one of the books written by Stephen Weatherill who has been consistently dismantling the autonomy of sports governing bodies and undermining the idea that sport exemption. I can relate to his ideas that sport and sports governing bodies can comfortably exist within the scope of EU law, honouring their autonomy while respecting the EU law provisions. In other words, the EU legal system is not a “devil” who destroys the nature of sports, it offers sport sympathetic treatment, however, the road of sports governing bodies should navigate through this legal system and not around.

6. The way of a national court and possibility to get a preliminary ruling

The institute of the preliminary ruling is constituted by the Article 267 TFEU. According to this Article, where there is a question raised before any national court which concerns the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, such court might request a preliminary ruling in that matter from the side of CJEU. Only in case such question is raised before a court against whose decisions there is no judicial remedy under national law, this court must request the preliminary ruling.[205]

Keeping that in mind, two ways of how to get to a national court can be defined. First, despite having an arbitration agreement (which sports professionals typically have signed with their sports governing body), one can claim this arbitration agreement to be invalid according to the Article V of the New York Convention (see analyses in the Chapter 3) which enables to re-litigate the same case at a national court in case an athlete is dissatisfied with an arbitral award from CAS. Secondly, pursuant rich judicature of the CJEU in this matter, as stated for example in the case of Kone and Others (see above in the Chapter 3), any person is entitled to claim the compensation at the national court for the hard suffered by the violation of the Article 101 TFEU for which a national court is not bound by the CAS's decision and in case of doubts might request a preliminary ruling.

Therefore, in this Chapter, I take example of two famous cases in which sports professional chose this approach to defend their rights. Then, I provide my personal opinion on taking case to a national court and effectiveness of this approach. I answer the questions why an athlete should pursuit this procedure as well as what the main setbacks are.

6.1. Case study: Pechstein Saga

The case of Claudia Pechstein is another famous case in sports world. Definitely considered revolutionary or controversial, it had also taken almost 10 years before the whole process was terminated on 7 June 2016 at the German Federal Court of Justice[206] and on 2 October 2018 at the European Court of Human Rights.

[205] Article 267 of the TFEU.
[206] BGH, judgment of 7 June 2016 – KZR 6/15.

Five Olympic gold medallist from Germany Claudia Pechstein failed a doping test which showed "irregular" levels of reticulocytes[207] and this result of test was consequently considered as a proof of doping and Pechstein was banned from participating in speed skating events for two years.[208]

Pechstein together with the German Skating Union based on the arbitral agreement signed by Pechstein[209] appealed to CAS which, however, dismissed the appeal.[210]Subsequently, Pechstein challenged the decision before the Swiss Federal Tribunal pursuant the Article 190(2) of the Swiss Private International Law Act (PILA)[211] which was finally dismissed by the SFT in September 2010.[212]

After this procedure, all legal remedies were exhausted in Switzerland and therefore, she could fill an application with the European Court of Human Rights.[213] Later, she also decided to access a national court, submitting a claim to the Regional Court in Munich for the damages having been cause to her by the doping ban which was, according to her reasoning, illegal.[214] The Regional Court of Munich in its decision accepted the Pechstein's reasoning that the arbitration agreement signed by Pechstein was invalid on the grounds that Pechstein had no other option but sign that agreement to be able to participate in ISU competitions.[215] The arbitral agreement was imposed on her, she was forced to sign it and thus a free will to sign an arbitral agreement was missing.

Apart from this, according to the Regional Court of Munich, CAS was contrary to the Article 6 of the European Convention on Human Rights when it came to the independence of the arbitral tribunal because of the way the arbitrators were appointed. In brief, CAS arbitrators for a particular dispute are chosen from a closed list of arbitrators who were appointed by the International Council of Arbitration for Sport which mainly consisted of members of the

[207] Immature red blood cells
[208] Case 01/09, Decision of the ISU Disciplinary Commission, *International Skating Union v Claudia Pechstein and Detsche Eisschnelllauf-Gemeinschaft* [1 July 2009]. Available at https://www.isu.org/claudia-pechstein-case/1596-full-decision-of-the-isu-disciplinary-commission-pechstein1/file
[209] Prior to the speed skating event in Norway which was the doping test for.
[210] CAS 2009/A/1912 P. v. International Skating Union (ISU) & CAS 2009/A/1913
Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU) [2009].
[211] Based on this Article, the Swiss Federal Tribunal has jurisdiction to review decisions of CAS. However, as it was already mentioned in the Chapter 2 of this thesis, the revision by the SFT is performer on a very limited ground.
[212] Swiss Federal Tribunal, judgment 4 A_144/2010 [28 September 2010].
[213] Requêtes nos 40575/10 et 67474/10, *Mutu et Pechstein c. Suisse* [2018].
[214] WILSKE, Stephan, KRAPFL, Claudia. *German Regional Court in Munich decides that arbitration agreements for athletes are invalid* [online], Thomson Reuters Practical Law, 2014 [retrieved on 5.2.2022]. Available at Thomson Reuters Practical Law: https://uk.practicallaw.thomsonreuters.com/2-560-4485?transitionType=Default&contextData=(sc.Default)&firstPage=true
[215] LG München I, judgment 37 O 28331/12 [26 February 2014].

International Olympic Committee and international sports federations.[216] However, despite of these conclusions, the Regional Court of Munich declared the Pechstein's claim inadmissible due to the res iudicata principle. The Court considered itself obliged to respect the final arbitral award based on the New York Convention, justifying that Pechstein prevented herself from challenging the validity of the agreement as she had not raised an objection of invalidity in the CAS proceedings.[217]

After having received the decision on inadmissibility, Pechstein appealed to the Higher Regional Court of Munich which overturned the decision.[218]It was declared that the arbitration agreement signed by Pechstein in favour of CAS violated the German and European antitrust law and therefore was invalid, pursuant the New York Convention and declaring that recognition of the CAS arbitral award would be contrary to German public policy.[219]According to the Higher Court of Munich, although the sports governing bodies had the right to demand athletes to sign arbitration agreement due to the specific needs of sport[220], also in this case the Court referred to the ICAS and its structure which, in combination of forced arbitration agreement in favour of CAS, led to the abuse of a dominant position, violating the Article 102 TFEU.[221]

The ISU challenged this decision before the German Federal Court of Justice[222] which, as the final instance, overturned the decision once again, declaring inadmissibility as the arbitration agreement was, according to its opinion, valid. The German Federal Court upheld that CAS was neutral arbitration body, providing sufficient preservation of rights of athletes despite the structure of the ICAS.[223]Moreover, arbitration agreement was considered justifiable by objective reasons,[224]adding that the system of arbitration was an effective way of how to enforce anti- doping rules of the World Anti-Doping Code whereas had it been done by national courts, it would seriously impede those objectives.[225]

[216] WILSKE, KRAPFL (2014), op. cit.
[217] LG München I, judgment 37 O 28331/12 [26 February 2014], para 42 et seq.
[218] OLG München, judgment U 1110/14 Kart [15 January 2015].
[219] DUVAL, Antoine, VAN ROMPUY, Ben. *The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded* [online], 2015, p. 10 [retrieved on 5.2.20222]. Available at SSRN: https://ssrn.com/abstract=2621983; See also OLG München, judgment U 1110/14 Kart [15 January 2015], p. 26.
[220] Act against Restraints of Competition (GWB), in force until 29 June 2013, p.16.
[221] DUVAL, VAN ROMPUY (2015): op.cit.
[222] Bundesgerichtshof
[223] BGH, judgment KZR 6/15 [7 June 2016], para 25 et seq.
[224] Ibid.: para 48.
[225] Ibid.: para 50.

Second line of the Pechstein saga took place before the European Court of Human Rights ("ECHR"). The ECHR also declared the arbitration agreement valid, however it also acknowledged that in general, an arbitration agreement is not based on the free consent when concluded between athletes and monopolistic sports governing bodies.[226]Therefore, such arbitration proceeding can be deemed forced and must provide the guaranties of the Article 6(1) of the European Convention of Human Rights.[227]

The case of *Pechstein* brought some small victories for the athletes who would possibly deal with the same issue. The European Court of Human Rights confirmed the Pechstein's complaint regarding the public hearing, finding that the right to a fair trial granted under Article 6(1) ECHR was violated.[228]

Despite the fact that all other allegations were dismissed, the case has more implications for the future. After the conclusions of the ECHR, CAS accepted that appeals to the state courts are possible in cases when an arbitration agreement is forced in its reaction to the ECHR judgement.[229]

6.2. Case study: Super League – another scandal in European football

6.2.1. Background of the case and current evolution

On December 16, 2020, this judgement in the case of ISU was delivered by the General Court and it, again as after *Meca- Medina*, awoke a huge discussion in the world of sports and among sports law professionals. However, at that time, nobody could predict that there would be even and definitely more scandalous issue concerning sports law.

This issue is nothing else than a very recent case of the Super League. In April 2021, the Super League was announced in England. In brief, Super League is a new format of

[226] Requêtes nos 40575/10 et 67474/10, Mutu et Pechstein c. Suisse [2018], para. 113; see also BJORN, Hessert. *Invalidity of forced arbitration clauses in organised sport…Germany strikes back!* [online], Asser International Sports Law Blog, 2020 [retrieved on 28.12.2021]. Available at https://www.asser.nl/SportsLaw/Blog/post/invalidity-of-forced-arbitration-clauses-in-organised-sport-germany-strikes-back.

[227] „*La Cour en conclut que, bien qu'elle n'ait pas été imposée par la loi mais par la réglementation de l'ISU, l'acceptation de la juridiction du TAS par la requérante doit s'analyser comme un arbitrage „forcé"au sens de sa jurisprudence (voir, a contrario, Tabbane, décision précitée, § 29). Cet arbitrage devait par conséquent offrir les garanties de l'article 6 § 1 de la Convention* "; Requêtes nos 40575/10 et 67474/10, Mutu et Pechstein c. Suisse [2018], para. 115.

[228] Ibid.: paras 169-188.

[229] *„ …a non-State dispute resolution mechanism of first and/or second instance, with a possible appeal, even limited, before a State court, as a last instance, is appropriate in this area of international sport*. "

competition which was created by twelve European leading football clubs[230], under the governance of these founding clubs.[231] The clubs founded a company European Super League Company, S.L. which basically became a rival to the UEFA Champions League, Europe's premier club football tournament organised by UEFA.[232]

Such a big step was probably more appalling to the sports world than the founders of the Super League might had expected. Fans of the clubs were protesting against and unsurprisingly, the UEFA's reaction was fierce and unapologetic, and UEFA president Aleksander Ceferin did not censure himself in his speeches: "*We didn't know we had snakes working close to us, but now we know. Super League is only about money, money of the dozen, I don't want to call them dirty dozen, but UEFA is about developing football, and about financing what should be financed, that our football, our culture survives, and some people don't understand*."[233]

UEFA did not wait with its actions. Shortly after the Super League fell apart, the Premier League implemented a series of measures to enshrine the core principles of the professional game in order to prevent anything like that from occurring again in the future.[234] The proceeding was launched at the Madrid Commercial Court which issued its preliminary ruling blocking FIFA and UEFA from taking any immediate actions against the Super League which would, according to the judge, "*either infringe Article 101 of the Treaty on the Functioning of the European Union (TFEU) as constituting an unlawful agreement between UEFA and FIFA intended to harm a competitor and/or Article 102 TFEU as an abuse of either of the bodies' dominant positions in the internal market for the organisation of soccer competitions.*"[235]The judge Manuel Ruiz de Lara decided for the same approach as Belgian judge in the famous case of Bosman and referred some questions to the European Court of

[230] The Premier League's big-six clubs – Manchester United, Manchester City, Liverpool, Arsenal, Chelsea and Tottenham – are all involved. AC Milan, Arsenal, Atletico Madrid, Chelsea, Barcelona, Inter Milan, Juventus, Liverpool, Manchester City, Manchester United, Real Madrid and Tottenham Hotspur have all joined as 'Founding Clubs'.

[231] The Super League, Press Release. Available at https://thesuperleague.com/press.html.

[232] „European Super League – the key questions: What is it? Who is involved? How likely? "*Skysport*, 21 April 2021, retrieved 28 December 2021: https://www.skysports.com/football/news/11095/12279788/european-super-league-the-key-questions-what-is-it-who-is-involved-how-likely

[233] „UEFA chief Aleksander Ceferin aims extraordinary 'snakes and liars' attack on Super League clubs including Liverpool", *Liverpool Echo*, 19 April 2021, retrieved 28 December 2021: https://www.liverpoolecho.co.uk/sport/football/football-news/uefa-ceferin-liverpool-super-league-20418685

[234] „Premier League statement ", Premier League, 3 May 2021, retrieved 28 December 2021: https://www.premierleague.com/news/2128084

[235]NEILL, Simon, PIOTROWSKI, Joachim. *European Super League – competition for top-tier football continues* [online], Osborne Clarke, 2021 [cit. 28.12.2012]. Available at Osborne Clarke: https://www.lexology.com/library/detail.aspx?g=92eb9367-4daf-42cd-9846-4295cfa34a54

Justice with the request for preliminary ruling on the compatibility of the contested UEFA regulations with EU competition law.[236]

Despite the fact, UEFA decided to launch disciplinary procedures against three of the clubs which were persisting in the Super League movement. Therefore, the steps taken by UEFA were clearly against the order.

After the UEFA did not follow the instruction in the first order, the Spanish Court issued another decision to cancel these financial and legal sanctions with immediate effect and moreover not to take any steps to try to exclude the three clubs, who are the last ones standing from the 12 teams originally behind the breakaway league, from its different competitions, including the Champions League.[237]

Consequently, UEFA's Appeal Body firstly ordered to suspend the disciplinary proceedings. Later in September, it issued a statement, announcing that in the matter related to violation of UEFA's legal framework with Super League, it would not take any other steps, declaring the proceeding null and void, as if the proceeding had never been opened.[238] The declaration made by UEFA's appeal body came a few days after a formal notification was delivered in which UEFA was requested to clarify its compliance with decisions of the Madrid Commercial Court No. 17.

At the same time, UEFA announced that it understood why the disciplinary proceeding were null and void while maintaining its view that it had always acted in accordance with not only its Statutes and Regulations, but also with EU law, the European Convention on Human Rights and Swiss law in connection with the so-called Super League project. UEFA will further honour and respect all the agreements concluded with the clubs, taking all the necessary steps with strict accordance with EU law.[239]

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[236] Case C-333/21, Request for a preliminary ruling from the Juzgado de lo Mercantil n.o 17 de Madrid (Spain) lodged on 27 May 2021 — European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA) [20 September 2021]. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CN0333&from=EN ; also „La demanda de la Superliga contra la UEFA llega a la justicia europea", *El País*, 12 May 2021, retrieved 28 December 2021: https://elpais.com/deportes/2021-05-12/la-demanda-de-la-superliga-contra-la-uefa-llega-a-la-justicia-europea.html

[237] „Spanish court rules against UEFA in case over European Super League", *Reuters*, 1 July 2021, retrieved 28 December 2021: https://www.reuters.com/lifestyle/sports/spanish-court-rules-against-uefa-case-over-european-super-league-2021-07-01/

[238] UEFA Media Statement, UEFA, 27 September 2021, retrieved 28 December 2021: https://www.uefa.com/insideuefa/mediaservices/mediareleases/news/026d-13587609c3e5-335a9353502e-1000--uefa-media-statement/

[239] Ibid.

6.2.2. Considerations for the future preliminary ruling

As the UEFA's appeal body declared the case null and void, it will remain for now only on the level of theoretical discussion how the case would be approached by the European Court of Justice. Nevertheless, the request for preliminary ruling is still pending at the CJEU, asking the CJEU to assess if EU law is currently being adhered to in how football is being governed in Europe. By that, the monopolistic position of UEFA and FIFA is questioned. Once it is issued, this case could end up being a milestone in European football. Ruling in favour of the Super League could have profound implications for the way football is organized in Europe and may give the legal foundation to establish separated competitions and tournaments.[240]

While this request for preliminary ruling was launched with the CJEU, the Commission took some time to announce its statement. In its first part, it reminded the conditions under which sports federations are subject to EU competition law: "*Sporting rules adopted by sports federations are in principle subject to EU competition rules when the body setting the rules are engaged in an economic activity. Based on the case law of the European Court of Justice, which have underlined the specificity of sports, sporting rules can be compatible with EU competition law if they pursue a legitimate objective and if the restrictions that they create are inherent and proportionate to reaching this objective. An assessment of these sporting rules needs to be performed on a case-by-case basis."*[241]

Subsequently, it referred to the recent case of the ISU in which it took the following approach: "*In its decision on International Skating Union, the Commission sets up a number of principles showing that it respects the autonomy of sports federations, while stressing that good governance based on clearly defined, transparent, non-discriminatory rules and reviewable decisions is a condition for the autonomy and self-regulation of federations. Disputes regarding the application of these principles to concrete cases, or about rules raising issues related to governance of the sport, can usually be handled by relevant arbitration bodies and national courts."*[242]

However, the Commission distanced itself from providing any relevant statement in the case of Super League, opting for a neutral approach: "*The Commission is aware of the*

[240] „Super League clubs tackle 'monopolistic' UEFA on EU law", DW, 29 October 2021, retrieved on 28 December 2021: https://www.dw.com/en/super-league-clubs-tackle-monopolistic-uefa-on-eu-law/a-59645489

[241] Parliamentary questions, *Answer given by Executive Vice-President Vestager on behalf of the European Commission*, Question reference: E 002130/2021, 4 June 2021, retrieved on 28 December 2021: https://www.europarl.europa.eu/doceo/document/E-9-2021-002130-ASW_EN.html

[242] Ibid.

announcement of the creation of a European Super League by twelve European football clubs, as well as the subsequent withdrawal of nine clubs from this project. In view of the developments since the announcement and in absence of detailed information on the initially envisaged project, the Commission is not in a position to comment on the application of EU competition rules to this particular situation. The Commission is nonetheless monitoring the situation bearing in mind the specificity of sports."[243]

6.2.3. Various opinions on the Super League case from the perspective of EU competition law

Many various opinions were expressed in this matter, showing that the issue of the application of EU competition law provisions is alive more than ever, still surrounded by a lot of unclarities. At the same time, this case shows an inconsistent approach of the Commission which indeed did not provide any clear statement on this matter, though I think it should have, considering possible impacts of this case. The justification that the Commission does not consider itself competent to assess this particular situation, with the reference to specificity of sport, is not satisfactory.

Apart from the laid-back opinion of the Commission, there were vivid opinions on this case, especially discussion about the question whether the European Super League would have succeeded in legal disputes if they had taken place.

Tsjalle van der Burg from the University of Twente in the Netherlands expressed an opinion in favour of UEFA, claiming that "*the Super League is illegal from the perspective of European competition law because football clubs compete with one another for consumers (stadium visitors, television viewers, buyers of club merchandise) at the national level (mainly)*", describing the Super League as "*concerted actions to restrict competition and would also violate EU competition law*."[244] According to him, the Commission was fully entitled to put an end to the threats of a Super League.

Contrary to that, Mark Orth of MEOlaw, a specialist in sports competition law, viewed this issue from the perspective of the monopolistic position of UEFA, saying that "*If a monopolist is allowed to prohibit the generation of competition, then you do not need*

[243] Ibid.
[244] „*A European Super League would violate EU competition law – as would UEFA's proposed reforms of the Champions League*", The London School of Economic, 20 February 2021, retrieved 28 December 2121: https://blogs.lse.ac.uk/europpblog/2021/02/20/a-european-super-league-would-violate-eu-competition-law-as-would-uefas-proposed-reforms-of-the-champions-league/

competition law at all. If that is allowed, it touches on the fundamentals of competition law. There should be an opportunity to open the market."

Moreover, Mark Orth would consider the Super League to have a stronger position in a potential legal dispute with UEFA, referring to two very recent cases in which European courts passed judgements overturning similar moves by other sporting federations (between them the case of the ISU which is analysed above).[245] Another case in this matter was based in Germany when a German court took the ISU case as a precedent and prevented international wrestling federations from blocking a new competition.[246]

6.3. Takeaways and considerations for the procedure before national courts in sports cases

There is no doubt an athlete can take his or her case to a national court. None of the sports governing bodies can exclude jurisdiction of national courts. Once EU competition law provisions are violated, one can refer himself or herself to a national court with the request for compensation which has been expressively confirmed by the CJEU many times in its decisions (see above).[247]

Nevertheless, putting this approach into practice is a completely different story. Having closer look at the case of *Claudia Pechstein* which was dragging for long years from one court to another, I reckon that only a very few sports professional would be willing to undergo such a procedure (and even fewer would be able to afford that, taking into consideration their professional career and economic interests). There are significant setbacks of this procedure to be considered. However, at the same time, the two cases analysed above provide a few lessons which could possibly help an individual athlete to defend his or her right at a national court.

Apart from the demanding procedure before a national court, another problem arises from the fact that according to the Article 267 TFEU, a national court is entitled to decide whether it will or will not request the CJEU for a preliminary ruling. Therefore, at this stage of the procedure, one can only *hope* for the desired outcome. However, once a national court

[245]ORTH, Mark. *European Super League: UEFA does not have strong legal case says sports competition lawyer* [online video], Daily Mail, 20 April 2021. Available at https://www.youtube.com/watch?v=4Rooidajh9k

[246] IANC, Sînziana, RUMP, Tobias, SROKA, Colin. German Court Ends *the Anti-Trust Fight Between Rival Wrestling Federations* [online], Law in Sport, 2021 [retrieved on 28.12.2021]. Available at Law in Sport: https://www.lawinsport.com/topics/item/german-court-ends-the-anti-trust-fight-between-rival-wrestling-federations#references

[247] Case C-557/12, *Kone and Others* [2014] EU:C:2014:1317, para 22.

decides to request a preliminary ruling in the particular matter, I claim that chances for an individual athlete to get the results are much higher. The CJEU can only rule on the sporting rules that it gets and then only insofar as the question of their conformity with EU law is part of the constituent elements of the reference for a preliminary ruling made to it. It must answer the questions in the request for preliminary ruling, the only circumstance under which it can refuse is when the question does not fall within its competence. So far, this situation has arrived very rarely.[248]

Having a strong background in the case law of the CJEU when it comes to decisions within the field of sport and application of EU law provisions to sports disputes, I believe an athlete could arrive to desired outcome with help of a national court and its request for preliminary ruling. The CJEU would likely hold the strict line of its case law, not straining itself from applying EU law to a sport dispute as it should be. In this sense, I perceive the approach of the CJEU to be rather positive when it comes to rights of individual athletes.

There is another side of this problematic. In the *Pechstein* case, none of the German national courts requested a preliminary ruling which, in my opinion, should have done so. The case of Claudia Pechstein was dealing with many unclarities regarding the application of EU law that should have been addressed by the CJEU. Neither did Claudia Pechstein ask German courts to request a preliminary ruling. Although this request could have been dismissed by German courts as there is no formal right to ask courts to refer a question for a preliminary ruling to the CJEU, it still was another possible way of how she could improve her position in the proceeding and reverse the result of the case.[249]

As for the request of a national court for a preliminary ruling, I submit that sports world should not neglect the conclusions from the most recent case – the case of the Super League in which the Madrid Commercial Court boldly dealt with approach of UEFA towards the teams participating in the organization of Super League. Of course, one swallow does not make a summer, yet I consider this case to be a good sign and the step in the right direction in the evolution of attitude of national courts to sports related cases.

Subsequently, the time requirements of the procedure before a national court shall not be disregarded. Although Claudia Pechstein had some small victories in her case, she also

[248]GEERAERT (2013): op.cit., p. 175.
[249] After doing the research specifically on the question of whether Claudia Pechstein had asked the German courts to refer the case to the CJEU for a preliminary ruling, I did not find neither any information about it not anything what would be related to it. I therefore came to the conclusion she had not done so.

dedicated the rest of her career to this proceeding. Her case undoubtedly brought some significant changes for the future generation of athletes (e. g. the possibility of a public hearing at CAS), yet I consider quite controversial as to whether this case was her personal victory as well. Yet, this point could be viewed also from another perspective. One thing is she did not ask the court to refer her case for the preliminary ruling. If she had done so, she might have received a positive answer to that and might have had her case referred to the CJEU which would have significantly speed up the whole procedure. Having closer look at the case of Super League, it received quite a fast treatment from the side of involved courts. Once the preliminary ruling was requested, it was predicted that the answer from the CJEU would be available at the end of 2022 or 2023.[250]This obviously should lead us to be overly optimistic as the procedure according to this scenario would still be time consuming, however, it would at least provide the results in more bearable time frame.

To conclude this Chapter, I would like to acknowledge the opinion of Antoine Duval.[251]According to the author's opinion published in relation to the *Pechstein* case, national courts play " *a crucial role to play in exercising a counter-democratic (inherently constitutional) check on the emerging transnational private authorities that regulate vast spaces of our globalizing world. Constitutional review is not anymore exclusively located where we would traditionally expect it: in national constitutional courts. Functional equivalents to constitutional review play out in various national (including civil) courts as a new legal game of power and counter-power shapes up for the global age*. "[252] Certainly, reference of the case after having an arbitral award issued should not be a way for every single case. However, national courts are here to protect individual rights which might not be always sufficiently protected in the proceedings before transnational private authorities. In my opinion, national courts should follow the example of the Commercial Court in Madrid and they should use the institute of the preliminary ruling in similar cases to *Pechstein* or the *Super League*.

[250] „Half-time analysis: what's next for the European Super League?"[online], Osborne Clarke [22 February 2022], retrieved on 23 March: https://www.osborneclarke.com/insights/half-time-analysis-whats-next-european-super-league .
[251] Antoine Duval is Senior Researcher at the T.M.C. Asser Institute in the Hague where he heads the Asser International Sports Law Centre and the Doing Business *Right* project. He published many books and articles on the problematics of the relationship of EU law and sport.
[252] DUVAL, Antoine. *The Pechstein case: Transnational constitutionalism in action at the Bundesgerichtsho*f [online], Verfassungblogsblog, 2016 [retrieved on 7.4.2022]. Available at https://verfassungsblog.de/the-pechstein-case-transnational-constitutionalism-in-action-at-the-bundesgerichtshof/

Conclusion

Generally speaking, relationship between EU law and sport has been evolving for long years. In 1974, with the judgement in *Walrave* case, the CJEU started a line of sports-related cases, resulting in probably the most significant one in the matter of *Meca- Medina and Majcen* in which the Court ruled that the mere fact that a rule is of a purely sporting nature does not automatically exclude the person engaging in the activity from the scope of EU law. However, when it comes to practice, this problematic is definitely not as straightforward for individual athletes. Sports governing bodies fight tooth and nail to protect their autonomy when setting regulations and dealing with individual disciplinary cases. At the same time, as the last piece of the puzzle, there is the Court of Arbitration for Sports ("CAS") which decides the cases referred to him from sports governing bodies in the appeal procedure. Thus, sports world becomes a closed ecosystem, often defending the interests of sports governing bodies which are in the position of strong undertakings in the market while neglecting rights of individual athletes.

In this master's thesis, I do not try to undermine the importance of this sports system by any means. I fully respect the role of sports governing bodies as well as the dispute resolution and appeal to CAS. Indeed, sport has various specifics and *lex sportiva* is absolutely necessary for its proper organization and effective execution. However, I submit that sport is not superior to any other field and definitely not to EU law. From my point of view, it should receive a specific treatment from the side of institutions dealing with sports cases but within the scope of EU law and not beyond. Sports governing bodies have a huge impact on career and life of individual athletes and they should always comply with the requirements of EU law.

Therefore, in this thesis, I have explored and analysed various options of how an individual athlete can defend his or her rights in case of dissatisfaction with the result of the case before sports governing bodies with help of EU law by "taking it outside" the closed sport ecosystem. In this thesis, I proved that an athlete has two main options of how to proceed. First, he or she can launch a complaint with the Commission for the alleged infringements of EU competition law and possibly appeal to the CJEU. Second, it is possible to take the case to a national court and claim either the compensation for violation of EU competition law or invalidity of arbitration agreement in favour of CAS.

Both options are certainly possible, yet unfortunately in practice, I cannot be overly optimistic about either of them as they are strongly two-sided. As it is concluded in the Chapter 5 on the procedure before the Commission, despite all the past evolution through the key cases in sport,

the Commission still is quite hesitant to interfere in sports related cases under a justification that a particular case does not fulfil the requirement of community interest. I submit that this approach of the Commission should be changed for the reason that sports governing bodies have a big economic impact in the sports industry, and sport industry itself is a big business. Therefore, such justification is not relevant. When assessing a particular case, the Commission should look at it from a wider perspective, notably considering whether an investigated sports governing body has not created the regulation in question only for the purposes of defending its own economic interest. At the same time, in the case of the *ISU* (which is analysed in this thesis), the Commission shifted its approach and strictly dealt with the eligibility rules the ISU had set for its members.

As for a national court, I perceive the biggest disadvantage in the time and costs requirements. Taking the example of a speed skater Claudia Pechstein, she spent almost a decade defending her rights and restoring her reputation (as she had been suspended for doping). In this thesis, I concluded that taking the case to a national court upon violation of EU competition law provision (or possibly invalidity of arbitration agreement) could be a way to get a remedy after an unsuccessful arbitral procedure, however, it is crucial to reconsider the costs and time it would consume.

Both procedures could end up before the CJEU. Here, I submit that an athlete has decent chances to succeed. The intensity of scrutiny of sports cases has deepened over the years and the Court, already in the *Meca-Medina* case, showed it would not make compromises when it comes to violation of EU law provisions and provided a clear guidance on how it would assess sports cases in the following years. Moreover, in the case of the ISU in which the Commission found the EU competition law had been violated (which was also confirmed by the General Court of EU), the ISU has appealed to the CJEU, and the case is still pending. I predict that the appeal of ISU will be dismissed and the decision of the Commission on the fact that eligibility rules violated EU competition law provisions will be upheld.

To put it in a nutshell, instead of resisting any interference of EU law, sports governing bodies should rather seek for ways of how to best comply with it while protecting their autonomy which is undisputable. At the same time, I claim that the closed system of international sports arbitration might not always provide individual athletes with enough protection of their rights, and they should have the option to pursuit (and not only a limited appeal system from a sports governing body to CAS and possibly from CAS to the Swiss Federal Tribunal). I do not doubt the functionality and reasons of this system, however, in my opinion it sometimes prioritizes interests of sports governing bodies against those of individual athletes and in such case, they

should be able to get protection from the side of EU law. Especially the unwillingness of the Commission to interfere with sports cases is not acceptable and this approach should be changed. At the same time, despite claiming that, I consider the way of filing a complaint with the Commission to be more effective than going to a national court because of the effectivity of the procedure, taking into consideration the professional career of an individual athlete which is almost in all cases very short from the perspective of whole life and requires absolute focus.

List of abbreviations

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
EU	European Union
EU law	Law of European Union
FIFA	Fédération Internationale de Football Association
FINA	Fédération internationale de natation
IOC	International Olympic Committee
ISU	International Skating Union
TFEU	Treaty on the functioning of the European Union
SFT	Swiss Federal Tribunal
UEFA	Union of European Football Associations
PILA	Federal Act on Private International Law
ECHR	European Court of Human Rights

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- Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115.
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Abstrakt / Abstract

Abstract

The aim of this thesis is to explore and analyse the possibilities for individual athletes of how to defend their rights with help of EU law. The premise of this thesis is the closed system of sports governing bodies and of further procedure at Court of Arbitration of Sports with the possibility to appeal to the Swiss Federal Tribunal is not always sufficient to protect rights of individual athletes.

The author of this master's thesis first claims that if there is a decision in the international sports arbitration (decision of a sports governing body and then the one of CAS), an individual athletes should be able to seek the remedies through EU law. Secondly, two options of how to proceed in such case are provided. The author analyses each of them, especially by referring to the most significant judgements of the CJEU. The author also provides her opinion on both possible ways as well as on approach of sports governing bodies and of the Commission.

The structure of this master's thesis is as follows. It first deals with the procedure in the international sports arbitration – which is the procedure before particular sports governing bodies followed by the appeal procedure at CAS. Then, it dives into the relationship between *lex sportiva* and EU law by exploring the evolution of the CJEU case-law which gives implications for the main topic. The main part of the thesis deals with the two procedures individual athletes can pursuit once he or she receives an arbitral award in sports arbitration– fist of them is filing a complaint with the Commission for violation of EU law provisions and second of them is taking the case to a national court and claiming the compensation for alleged violation of EU competition law with the expectation that a national court will request a preliminary ruling from the CJEU.

The thesis shows that nowadays neither of these ways can be perceived too optimistically, at the same time, once the case gets to the CJEU, it is submitted that individual athletes have decent chance to succeed in their case. Moreover, the author observes a tendency of the CJEU as well as of the Commission in the direction pro-EU law approach in the sports disputes.

Abstrakt

Cílem této práce je vystihnout a analyzovat možnosti pro individuální sportovce, jak hájit svá práva prostřednictvím evropského práva. Vychází se z premisy, že uzavřený systém sportovních organizací, po němž případně následuje proces před Mezinárodním soudem pro

sportovní arbitráž (dále jen „CAS“) s možností odvolat se k Federálnímu tribunálu ve Švýcarsku není vždy dostatečný k ochraně práv individuálních sportovců.

Autorka této diplomové práce nejprve tvrdí, že pokud je vydáno rozhodnutí v rámci mezinárodní sportovní arbitráže (rozhodnutí sportovní organizace a následně CAS), sportovec by měl mít možnost nápravy pomocí evropského práva. Dále pak jsou uvedeny dvě možnosti, jak může dotyčný postupovat. Autorka analyzuje každou z nich, zejména s odkazem na relevantní judikaturu Soudního dvora EU. Autorka také uvádí svůj osobní názor na oba postupy a též na přístup sportovních organizací a Komise k této problematice.

Struktura této diplomové práce je následující. Nejprve se zabývá řízením v rámci mezinárodní sportovní arbitráže – což znamená řízení před konkrétní sportovní organizací, po němž následuje odvolací řízení před CAS. Poté se diplomová práce zabývá vztahem mezi *lex sportiva* a evropským právem tím, že sleduje vývoj případů před Soudním dvorem EU, jež mají význam pro toto téma. Hlavní část této práce analyzuje obě cesty, jimiž se může sportovec vydat, pokud má rozhodčí nález vydaný v rozhodčím řízení – prvním z nich je stížnost ke Komisi na porušení soutěžního práva ze strany sportovní organizace a druhým z nich je obrátit se na vnitrostátní soud s žádostí na náhradu škody z důvodu porušení ustanovení evropského soutěžního práva s očekáváním, že národní soud podá předběžnou otázku k Soudnímu dvoru EU.

Tato práce ukazuje, že ani na jeden ze způsobů nelze pohlížet příliš optimisticky, zároveň je tvrzeno, že jakmile by se sportovec dostal se svým případem před Soudní dvůr EU, má ve své záležitosti slušné šance na úspěch. Autorka totiž pozoruje tendenci Soudního dvora EU a Komise ve prospěch evropského práva při zabývání se sportovními případy.

Key Words

European Union law

Competition law

Court of Arbitration for Sports

Bosman

ISU

International sports arbitration

Arbitral award

Meca-Medina and Majcen

Sport

Sports governing bodies

Klíčová slova

Právo Evropské unie

Soutěžní právo

Sportovní arbitrážní soud

Bosman

ISU

Mezinárodní sportovní arbitráž

Rozhodčí nález

Meca-Medina a Majcen

Sport

Sportovní organizace