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Sporting nationality in the light of European Union law

Master's thesis

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“Sport is and remains primarily and largely an affair of the sporting associations, but their autonomy is conditional, for due account must be taken of the exigencies of EU law.”¹

Introduction

The football player Adnan Januzaj could choose to play at international level for five countries. Januzaj’s Albanian father Abedin moved from Kosovo to Belgium in 1992 to avoid being recruited by the Yugoslav’s People’s Army. Abedin’s wife and Adnan’s mother, Ganimete Sadikaj, was also the victim of repression from the part of the Serbs and her original family was deported from Kosovo to Turkey under a plan to suppress Albanian nationalism. The family later moved to Belgium where Abedin and Ganimete met. Adnan was born in Brussels on 5 February 1995 and spent most of his career in Belgium before moving to England in 2011 to play for Manchester United. 2014.² To sum it up, he had been eligible to play for Albania, Belgium, England³, Kosovo⁴ and Turkey. Out of the five possible sporting nationalities, he finally chose the Belgian one and committed himself to the Belgian national team in April 2014. He made his official debut in the Belgian jersey in a game against Tunisia on 7 June 2014.⁵

The recent history of football is littered with siblings. There may not be a more intriguing brotherhood than that of George, Kevin-Prince and Jérôme Boateng. They were all born in Berlin and have played football since their childhood. While the career of George was restricted to a handful of appearances for a local amateur outfit, Kevin-

¹ S.C.G. Van den Bogaert, “Editorial. Bosman: One for All ...” (2015) *Maastricht Journal of European and Comparative Law*, Year 2015, Number 2, pp. 175-176.

² „Inside Adnan Januzaj's world: Owned by United, chased by England... the wonder boy whose parents escaped the Kosovo war to move to Belgium. Read his amazing story”, *Mail Online*, 16 October 2013, retrieved 10 April 2016.

³ Januzaj’s eligibility in the national team of England is disputable. Januzaj’s eligibility relates in this respect to the relationship between Articles 6(2) and 7(d) of the Regulations Governing the Application of the Fédération Internationale de Football Association (FIFA) Statutes. Januzaj does not meet the criteria set out in the aforementioned Article 7(d) and he would therefore need an exception from the FIFA in order to be eligible to play for England.

⁴ Kosovo is not a member of the FIFA. Therefore, the Regulations Governing the Application of the FIFA Statutes do not apply. As a consequence, Kosovo may field any citizen of Kosovo, even if he elected a national team pursuant to Article 5(2). When Kosovo becomes a full member of the FIFA, such a player will no longer be eligible to play for the country.

⁵ „Belgium 1-0 Tunisia: Adnan Januzaj wins his first cap in hailstorm delayed victory... but Romelu Lukaku limps off with injury“, *Mail Online*, 7 June 2014, retrieved 10 April 2016.

Prince and Jérôme Boateng shoot to fame as professionals. Jérôme plays for Bayern Munich and the German national team whom he was the key figure at the winning 2014 the FIFA World Cup in Brazil. A talented forward, Kevin-Prince had been a regular fixture in the Germany youth set-up. However, following several disagreements with the German football association, he turned his back on his country of birth and instead opted to represent Ghana, the birthplace of his father. The 2010 FIFA World Cup in South Africa witnessed a group D match between Ghana and Germany where the two brothers lined up on different sides of the pitch.⁶

Adnan Januzaj and the Boateng brothers are examples of a long succession of athletes who could change or have changed the country they represent in international competitions during the course of their careers. Athletes can choose to represent another country due to their birthplace, parentage, ancestry, residence or for many other reasons. In any of these cases, they must comply with the respective international sporting governing bodies' rules governing their eligibility in national teams. Rules coming under this category are most importantly quotas of naturalized athletes, waiting periods, rules determining the election of sporting nationality or prohibiting its change as well as all other regulations influencing the possibility for an athlete to represent a country of his choice.

The rules governing athletes' eligibility in international competitions form a noticeable part of "lex sportiva",⁷ international sporting governing bodies' own normative order autonomous from state legal orders until these two concepts clash together.⁸ National courts attach to these autonomous sporting rules certain value since they uphold claims of athletes based on these rules.⁹ It seems, however, that the case

⁶ „George, Kevin-Prince and Jérôme Boateng: football's intriguing brothers”, *Guardian*, 22 April 2015, retrieved 10 April 2016.

⁷ For more information on this context, see R. Siekmann, J. Soek (Eds.), *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012).

⁸ J. Exner, “Sportovní národnost ve světle práva Evropské unie” (2013) *Právník*, Year 152, Number 10, p. 1031.

⁹ Conseil d'Etat, Number 101894, *Olympique d'Antibes Juan-les-Pins c. Fédération Française de Basketball*, [1989]; OGH, 2Ob232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

law of the Court of Justice of the European Union (CJEU)¹⁰ regarding rules governing sporting nationality is neither homogenous nor unequivocal.¹¹

I submit that after the 2006 Court of Justice's judgment in *Meca-Medina & Majcen*,¹² the vast majority of sporting governing bodies' rules governing athletes' eligibility in their national teams fall within the scope of European Union (EU) law. As Stefaan Van den Bogaert puts it, "[s]port is and remains primarily and largely an affair of the sporting associations, but their autonomy is conditional, for due account must be taken of the exigencies of EU law."¹³ Therefore, sporting governing bodies must adjust their rules to EU law requirements with the aim of escaping the Court of Justice's power to proclaim the rules incompatible with EU law. Even though these sporting governing bodies might be established in a non-EU country, the Court of Justice is competent to decide on their rules once they apply to EU citizens or in EU territory.

The aim of this master's thesis is to answer the question of how to grasp and categorize rules governing athletes' eligibility in national teams in the EU. The thesis assesses the compliance of the rules determining sporting nationality with the concrete provisions of EU law regarding primarily the prohibition of discrimination on grounds of nationality in the fields of EU citizenship, free movement of persons and competition.¹⁴ This master's thesis simultaneously formulates concrete recommendations to sporting governing bodies in order to better adapt their rules to EU law requirements.

The reasons why I have decided to write my master's thesis right on this topic combine my desire to enrich contemporary jurisprudence with a comprehensive work on the relationship of EU law and rules governing sporting nationality with my interest in EU law and my passion for sport. A lot has been written about the compliance of general sporting rules with EU law with regard especially to the judgment of the Court

¹⁰ The Court of Justice of the European Union (CJEU) shall include the Court of Justice, the General Court and specialised courts; see the Treaty on the European Union (TEU), article 19.

¹¹ J. Exner (2013): op. cit., p. 1031; see also J. Guillaumé, "L'autonomie de la nationalité sportive" (2011) *Journal du droit international*, Number 2, pp. 313-336.

¹² Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

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

¹⁴ Since this master's thesis concerns mainly athletes' rights stemming from EU citizenship, free movement of persons and competition, I further refer to these three undoubtedly specific categories of EU law generally also as to athletes' rights under EU law.

of Justice in *Bosman*¹⁵ in 1995. As to the relation of specific rules governing athletes' eligibility in their national teams with EU law, some of its partial aspects have been covered by authors, namely Jean-Philippe Dubey,¹⁶ Stefaan Van den Bogaert,¹⁷ Yann Haffner,¹⁸ Denis Oswald,¹⁹ Richard Parrish²⁰ or Stephen Weatherill²¹ whose work I draw my inspiration from in this master's thesis. On the other hand, no comprehensive work covering all different sides of this issue and bringing its complex overview exists up to now to my knowledge. My concern for EU law and sport as well as my determination to enrich current state of jurisprudence with a work on partially unexplored topic are my main reasons to write this master's thesis.

This thesis is divided into six chapters. Legal status of international sports federations and their rules governing athletes' eligibility in national teams is initially discussed (Chapter 1). Subsequently, the general framework for assessing the compliance of rules determining sporting nationality is introduced (Chapter 2). Close attention is then paid to the case law of the CJEU in the domain of these specific sporting rules with the focus on the turning judgment of the Court of Justice *Meca-Medina & Majcen* from 2006 (Chapter 3).

The main focus of this master's thesis lies in Chapter 4, which, employing the analytical method of research, divides rules governing sporting nationality into three categories according to the future attitude of the CJEU to these rules, which might be expected towards the background of its current case law. This thesis firstly considers whether sports rules fall within the scope of EU law and therefore cannot escape review of EU judicial authorities. If so, it is assessed whether the sporting rules constitute a

¹⁵ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463.

¹⁶ J.-P. Dubey, "Nationalité sportive : une notion autonome" (2006) in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004).

¹⁷ S.C.G. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, (The Hague: Kluwer Law International, 2005).

¹⁸ Y. Hafner, "Athletes' eligibility in national team and EU law : What can we learn from two doped swimmers ?" in A. Rigozzi, D. Sprumont, Y. Hafner (Eds.), *Citius, Altius, Fortius - Mélanges en l'honneur de Denis Oswald*, (Helbing & Lichtenhahn (Bâle), 2012).

¹⁹ D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), p. 200; D. Oswald, *La nationalité dans le sport, Contributions pour le XIIème Congrès Olympique* (Lausanne, 2009), p. 58.

²⁰ R. Parrish, "Case C-36/74 *Walrave and Koch* [1974] ECR 1405" in J. Anderson (Ed.), *Leading Cases in Sports Law*, (T.M.C. Asser Press, 2013).

²¹ S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (T.M.C. Asser Press, 2014).

restriction to the citizenship, free movement and competition provisions. Finally, the justification and the proportionality of the restrictions are discussed (Chapter 4).

1. The legal character of international sporting governing bodies and their rules governing sporting nationality

Regarding the concept of sporting nationality, international sporting governing bodies play a crucial role since they set up and enforce rules governing athletes' eligibility in national teams. In this chapter, legal status of international sporting governing bodies is discussed along with regulatory autonomy that they possess while regulating both their internal issues and enacting rules applying externally (1.1.). Subsequently, the legal character of rules governing athletes' eligibility in national teams is examined (1.2.).

1.1. The legal status of international sporting governing bodies

International sports federations²² are non-governmental organisations – private entities, which govern one or more sports at international level and, in order to do so, they are equipped with regulatory power to define their respective rules. The Olympic Charter defines international sports federations as “non-governmental organisations administering one or several sports at World level and encompassing organisations administering such sports at national level.”²³ Pursuant to the Council of Europe's Convention on the Manipulation of Sports Competitions, a sports organisation is “any organisation which governs sport or one particular sport [...] as well as its continental and national affiliated organisations [...]”²⁴ In order to pursue their goals, sporting governing bodies have “the right to establish autonomous decision-making processes within the law”, as provided for by the European Sports Charter.²⁵

International sporting governing bodies are private entities or non-governmental organizations, which are established in the form of an unregistered contract between the organization's members as foundations, trusts or societies or registered according to the national law of a country where they are established or where they undertake their activities. As such, these international sports federations must comply with the respective national laws as well as with other legal orders binding on their countries. In

²² Annex I to this master's thesis provides a list of all international sports organizations.

²³ Olympic Charter (2015), rule 25.

²⁴ Council of Europe Convention on the Manipulation of Sports Competitions (2014), article 3.2.

²⁵ European Sports Charter (1992, revised 2001), article 3.

the case of EU Member States, these organizations must therefore comply also with EU law. It is true that a lot of international governing bodies, including the International Olympic Committee (IOC), have their seat in Switzerland²⁶ – a non-EU country, but EU authorities have the power to scrutinize them to the extent they apply to EU citizens of on EU territory.²⁷

The character and powers of international sports federations are elaborated in detail in the Olympic Charter - the codification of the fundamental principles of Olympism and the rules and bye-laws adopted by the International Olympic Committee, which is “the supreme authority of the Olympic Movement, which brings together the various international sporting federations.”²⁸ The fifth fundamental principle of Olympism, recognising that sport occurs within the framework of society, provides that sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport. They shall also freely determine the structure and governance of their organisations and enjoy the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance are applied.²⁹

The mission and the various roles of international federations within the Olympic Movement are expressed in the rule 26 of the Olympic Charter. Their tasks are, amongst others, to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application; to ensure the development of their sports throughout the World; to contribute to the achievement of the goals set out in the Olympic Charter, in particular by way of the spread of Olympism and Olympic education; to support the IOC in the review of

²⁶ Switzerland is home to more international sports federations and governing bodies than anywhere else in the world. Since 1915, when Lausanne was chosen as the seat of the International Olympic Committee (IOC), more than 50 international sports organizations have established their headquarters in Switzerland.

²⁷ On the legal status of the most important international sporting governing body – the International Olympic Committee (IOC), see *inter alia* A. M. Mestre, *The Law of the Olympic Games*, (T.M.C. Asser Press, 2009), pp. 256; see also D. J. Ettinger, “The Legal Status of the International Olympic Committee”, (1992) *Pace International Law Review*, Volume 4, Issue 1, 97-121.

²⁸ Case T-313/02, *Meca-Medina and Majcen v. Commission*, [2004] EU:T:2004:282, paragraph 1; see also Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 2.

²⁹ Olympic Charter (2015), Fundamental Principles of Olympism, principle 5.

candidatures for organising the Olympic Games for their respective sports or to assume the responsibility for the control and direction of their sports at the Olympic Games.³⁰

Regarding other international multisport competitions held under the patronage of the IOC, international sports federations can assume or delegate responsibility for the control and direction of their sports. They are also called upon to provide technical assistance in the practical implementation of the Olympic Solidarity programmes and to encourage and support measures relating to the medical care and health of athletes. In addition, they have the right to formulate proposals addressed to the IOC concerning the Olympic Charter and the Olympic Movement; to collaborate in the preparation of Olympic Congresses and to participate, on request from the IOC, in the activities of the IOC commissions.³¹ International sporting governing bodies regulating non-Olympic sports are endowed with similar powers and responsibilities.³²

International sporting governing bodies constitute a part of and operate within the pyramidal structure of sport. Within the Olympic Movement, the IOC sits atop the mountain. It stands above international sports federations governing Olympic sports and these federations are bound by the IOC's decisions. International organisations regulating non-Olympic sports are themselves placed at the top of the pyramid. They further unify continental organizations governing certain sport at continental level. At the bottom of the pyramid structure, there are national sports federations endowed with the task of regulating the sport in their respective countries.

Football can be used as a good example of how the sports pyramid functions in practice. The FIFA³³ is the football World governing body, sitting at the top of the pyramid. One level down, there are six continental confederations recognized by the FIFA, which oversee the game in the different continents and regions of the World.³⁴ The continental confederations are provided for in the FIFA's statutes and membership of a confederation is a prerequisite to the FIFA membership. However, 209 national

³⁰ Olympic Charter (2015), rule 26.

³¹ Ibid.

³² J. Exner (2013): op. cit., p.1030.

³³ FIFA's website is available on <http://www.FIFA.com>.

³⁴ FIFA Statutes (2015), rule 20. These confederations are Asian Football Confederation (AFC; 46 members), Confederation of African Football (CAF; 54 members), Confederation of North, Central American and Caribbean Association Football (CONCACAF; 41 members), Confederación Sudamericana de Fútbol, (CONMEBOL; 10 members), Oceania Football Confederation (OFC; 11 members) and Union of European Football Associations (UEFA; 53 members).

associations standing at the bottom of the pyramid, and not the continental confederations, are members of the FIFA.³⁵ Interestingly, the FIFA has more members than the United Nations as it recognizes certain entities as distinct nations, such as the four Home Nations within the United Kingdom³⁶ and politically disputed territories such as Palestine.³⁷

In order to exercise their rights and obligations, international sports federations may set up their own governing bodies and establish “autonomous decision-making processes”³⁸ pursuant to the law of the country where they were established or where their seat is situated. The FIFA, for example, is an association established under Swiss law, with its seat in Zürich. The FIFA Congress is the organisation’s supreme and legislative body.³⁹ It is an assembly composed of representatives from each affiliated member association, which each have one vote. The FIFA Congress makes decisions relating to the FIFA's governing statutes and their method of implementation and application. The congress approves the annual report, and decides on the acceptance of new national associations and holds elections. Congress also elects the President of the FIFA, its General Secretary, and the other members of the FIFA's Executive Committee on the year following the FIFA World Cup.⁴⁰ FIFA's Executive Committee is the main decision-making and executive body of the FIFA.⁴¹ It is composed of 25 people: the President, 8 Vice Presidents and 16 members, of whom at least one must be a woman. The Executive Committee is the body that decides which country will host the World Cup.⁴² The President and General Secretary are the main officeholders of the FIFA and are in charge of its daily administration carried out by the General Secretariat with its staff of approximately 280 members.⁴³ Furthermore, the FIFA's organizational structure consists of several other bodies under authority of the Executive Committee or created by Congress as standing committees. Amongst those bodies, there are the FIFA

³⁵ FIFA Statutes (2015), definition 10.

³⁶ These four Home nations of the United Kingdom are England, Northern Ireland, Scotland and Wales.

³⁷ „Palestine Football: Escape to Victory?“, *Bruisedearth*, 27 October 2008, retrieved 10 April 2016.

³⁸ European Sports Charter (1992, revised 2001), Article 3.

³⁹ FIFA Statutes (2015), definition 8.

⁴⁰ FIFA Statutes (2015), rules 22-29.

⁴¹ FIFA Statutes (2015), definition 9.

⁴² FIFA Statutes (2015), rules 30-31.

⁴³ FIFA Statutes (2015), rules 32 and 71-72.

Emergency Committee, the Finance Committee, the Disciplinary Committee, and the Referees Committee.⁴⁴

Decisions of international sporting governing bodies are binding on their affiliated continental or national associations as well as on any athlete or player engaging in sport in an official competition recognized by its governing body. Within the pyramid structure of a respective sport, international sporting governing bodies' rulings are final. However, their decision can still be reversed by an appeal to a court or to the CAS,⁴⁵ an institution established with the idea of being the "Supreme Court of World Sport"⁴⁶ that is independent of any international sports federation, which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports World.⁴⁷

1.2. Rules governing sporting nationality

One of the main tasks of international sporting governing bodies in the process of regulation of sport at international level is to establish criteria pertaining to athletes' eligibility for their national teams. In other words, international sports federations are responsible for determination of requirements that athletes need to fulfil in order to be able to represent their countries in international competitions. When doing so, international federations and organisers of multi-sport competitions must seek to balance their interest and values with the legitimate rights of athletes.⁴⁸

⁴⁴ FIFA Statutes (2015), rules 33-60.

⁴⁵ Article 75 of the Swiss Civil Code, which is a mandatory provision of the Swiss law, allows for an appeal to a court or an arbitral tribunal. International sporting governing bodies may decide whether the CAS has jurisdiction to rule on a specific issue. On the other hand, if the dispute in question is not covered by the arbitration clause, the Swiss courts have jurisdiction to rule on the dispute.

⁴⁶ Former IOC President Jean Antonio Samaranch initiated the foundation of the CAS as the "Supreme Court of World Sport". See for example R. MacLaren, "Twenty-Five Years of the Court of Arbitration for Sport: A look in the rear-view mirror" (2010), *Marquette Sports Law Review*, p. 306.

⁴⁷ For the status and functioning of the CAS see Code of Sports-related Arbitration (in force as from January 2016) and the CAS's website: <http://www.tas-cas.org/en/index.html>; Regarding the relationship of EU law and the CAS, see A. Duval, "The Court of Arbitration for Sport and EU Law. Chronicle of an Encounter" (2015) *Maastricht Journal of European and Comparative Law*, Year 2015, Number 2.

⁴⁸ Y. Hafner, "Change in Sporting Nationality : the "Next Bosman"?" (2008) *Olympic Capital Quarterly*, October 2008, Vol. 3, Number 4, p. 2.

In the 20th century, legal nationality was the exclusive criteria governing athletes' eligibility in their national teams.⁴⁹ International Court of Justice (ICJ) defined legal nationality in 1955 in the famous *Nottebohm* case as “legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁵⁰ According to the ICJ, legal nationality constitutes the juridical expression of the fact that an individual, upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state.⁵¹

However, primarily the increased athletes' cross-border mobility at the turn of millennium⁵² undermined the exclusivity of the criterion of legal nationality in determination of athletes' eligibility in their national teams.⁵³ Moreover, certain states have been determined to gain prestige through their athletes' success at international level⁵⁴ and they have therefore been naturalising top athletes and welcoming those who are interested only in being sporting mercenaries.⁵⁵ These factors, even including “nation shopping”, lead to the conclusion that nowadays, legal nationality can no longer be considered the sole ratio for determining the criteria of eligibility of athletes to compete for their national teams at international level.⁵⁶

⁴⁹ On the influence and implications of legal nationality in sports see M. Pautot, *Sport et nationalité. Quelle place pour les joueurs étrangers?*, (L'Harmattan, 2014), pp. 269; A. Calmat, “Sport et nationalisme” (1992) *Pouvoirs* n°61 - Le sport, pp. 51-56; A. Hervé, “Les problèmes éthiques de la nationalité dans le sport” (2009) *Colloque international Ethique et sport en Europe*, Université Rennes II, Rennes : France, pp. 1-10.

⁵⁰ *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955: 4, 23; see European Convention on Nationality, article 2, for a very similar definition.

⁵¹ *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955: 4, 23.

⁵² Athletes' eligibility in national teams became an issue even earlier. There are examples of athletes changing their eligibility during the ancient Olympic Games in Greece (To this end, see Y. Hafner, “Sporting Nationality in the Ancient and Modern Olympic Games” (2009) *Proceedings of the 17th International Seminar on Olympic Studies for Postgraduate Students*, International Olympic Academy, Ancient Olympia).

⁵³ CAS 2007/A/1377, *Mélanie Rinaldi v. Fédération Internationale de Natation (FINA)*, [2007].

⁵⁴ A. M. Mestre (2009): *op. cit.*, p. 75.

⁵⁵ Y. Hafner (2008), *op. cit.*, p. 1.

⁵⁶ D. Oswald (2004): *op. cit.*, p. 200; M. Lajous, “Jeux et enjeux autour des questions de nationalité sportive” in M. Attali, N. Bazoge (Ed.), *Diriger le sport. Perspectives sur la gouvernance du sport du xxe siècle à nos jours*, (CNRS Editions, 2012), p. 286.

Reflecting these new factors, international sporting governing bodies⁵⁷ have consequently started including in their regulations other requirements determining athletes' eligibility for national teams. "[E]ach international federation and every organiser of multi-sports competition, including the IOC, have adopted their own rules regarding athletes' [eligibility in national teams], each with their own aims of providing continuity for their competitions but also to avoid issues linked to mercenaries and athletes' mobility.⁵⁸ The conditions determining athletes' country of representation relate typically to the place of birth⁵⁹ or the place of residence.⁶⁰ Another example of these rules is the "waiting period", requiring from an athlete having changed his nationality to abstain from participation in international competitions for a certain period of time.⁶¹

The practice of international sporting governing bodies consisting in creating new elements of rules governing athletes' eligibility for national teams led to the creation of "sporting nationality". Even though there is no common definition of sporting nationality within international sports federations,⁶² the Court of Arbitration for Sport (CAS) recognized this notion for the first time in 1993 in *B. v. International Basketball Federation (FIBA)* and stated that sporting nationality is a "uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competitions."⁶³ What is more, some international sports federations, for example the International Skating Union (ISU), have established eligibility rules not only for athletes but also for officials, referees and judges.⁶⁴

Sporting nationality is a different notion from that of legal nationality and these two concepts do not always necessarily need to overlap. Sporting nationality, as a concept of international sporting governing bodies as private entities, differs from a

⁵⁷ Also referred to as international sports associations, international sports federations or international sports organisations.

⁵⁸ Y. Hafner (2008): op. cit., p. 1.

⁵⁹ J.-P. Dubey (2006): op. cit., p. 37.

⁶⁰ J. A. R. Nafziger, *International Sports Law*, 2nd ed. (Martinus Nijhoff, 2004), p. 133.

⁶¹ J. P. McCutcheon, "National eligibility rules after Bosman" in A. Caiger (Ed.), *Professional Sport in the EU: Regulation and Re-Regulation*, (T.M.C. Asser Press, 2001), p. 127.

⁶² Y. Hafner (2008): op. cit., p. 1.

⁶³ CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards 1986–1998*, (1998, Staempfli Editions), Number 15, p. 304. Y. Hafner (2012): op. cit., p. 216.

⁶⁴ ISU Special Regulations & Technical Rules, Single and Pair Skating & Ice Dance (2014), rules 411, 412, 413.

public law concept of legal nationality, which concerns rather “the personal status deriving from citizenship of one or more states.”⁶⁵ From 1993 on, CAS panels have consistently upheld this dualism when concluding that legal and sporting nationalities may differ.⁶⁶ Therefore, one can be presented with two specific situations. An athlete can be legally a national of a certain country but not be eligible to represent that country at international level. Conversely, an athlete does not have to be a national of a country but can still be eligible to represent it in international sporting events.⁶⁷

The fact that there is no “harmonization” amongst the IOC and international federations who independently set their eligibility criteria brings some complicated situations.⁶⁸ For example, an athlete who may qualify in a country for one sport, might not be eligible to qualify under the same conditions for a different sport.⁶⁹ Different authors have proposed different solutions in order to simplify this issue. Yann Hafner claims that sporting world should refine the concept of sporting nationality and adopt a more comprehensive and integrated set of rules. He suggests that if an athlete has gained eligibility under a certain set of rules, this acquisition should be recognised by other international sporting governing bodies.⁷⁰ A Swiss professor Denis Oswald proposes the creation of the Olympic sporting nationality that would govern athletes’ eligibility in their national teams within the Olympic Movement.⁷¹ Dora Kostakopoulou and Annette Schrauwen introduce a “participatory growth model” with relatively flexible naturalization criteria and residence requirements.⁷² Finally, Anna Sabrina Wollmann, Olivier Vonk and Gerard-René de Groot advocate a “sporting licence” of the country of which athletes are nationals that would avoid confusions as to whether a

⁶⁵ Ibid.

⁶⁶ CAS 98/2009, *Spanish Basketball Federation (FEB) / International Basketball Federation (FIBA)*, [1999], M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 1998 – 2000*, (Kluwer Law International, 2002), Number 9, p. 503; CAS 98/215, *International Baseball Association (IBA)*, Advisory Opinion, [1999], M. Reeb (2002): op. cit., p. 701.

⁶⁷ J.-P. Dubey (2006): op. cit., p. 37.

⁶⁸ A. S. Wollmann, O. Vonk, G. R. de Groot, “Towards a sporting nationality?” (2015) *Maastricht journal of European and comparative law*, Vol. 22, Number 2, p. 305-306.

⁶⁹ R. Siekmann, “Sport and Nationality : « Accelerated’ Naturalisation for National Representative Purposes and Discrimination Issues in Individual Team Competitions under EU law” (2011) *The International Sports Law Journal* 85, Vol. 3-4, p. 241-268.

⁷⁰ Y. Hafner (2012): op. cit., pp. 215-238.

⁷¹ D. Oswald, “Nationalité dans le sport” in P. Cholley (Eds.), *Treizième [XIIIe] Congrès olympique, Copenhague 2009 : contributions*, (Comité International Olympique, 2009), pp. 71-74.

⁷² D. Kostakopoulou, A. Schrauwen, “Olympic Citizenship and the (Un)Specialness of the National Vest: Rethinking the Link between Sport and Citizenship Law” (2014), *10 International Journal of Law in Context*, pp. 143-162.

sporting nationality includes some of the rights and obligations linked to the concept of legal nationality.⁷³ However, this theoretical dispute is not an object of this master's thesis, which rather focuses on the compliance of sporting nationality with EU law.

⁷³ A. S. Wollmann, O. Vonk, G. R. de Groot (2015): *op. cit.*, p. 305-321.

2. General framework for assessing the compliance of rules governing sporting nationality with European Union law

This chapter provides a general overview of the framework within which the CJEU operates when it assesses the compliance of sporting rules with EU law. Even though the CJEU has not yet decided upon the concrete rules governing athletes' eligibility in national teams,⁷⁴ it is my opinion that it will engage in the same analysis when dealing with these rules as it has used in past cases, since it applies a very similar approach to all sporting rules without greatly distinguishing them according to their specificities. In this respect, the CJEU follows a three-step test that is generally used for an assessment of compliance of any measure with EU law in the internal market.⁷⁵ The CJEU firstly considers whether sports rules fall within the scope of EU law and therefore cannot escape review of EU judicial authorities (2.1). If so, it is assessed whether the sporting rules constitute a restriction to the citizenship, free movement and competition law provisions (2.2). Finally, the justification and the proportionality of the restrictions are examined (2.3.).⁷⁶

2.1 Do sports rules fall within the scope of European Union law?

The opening step on the journey of assessing the compliance of rules governing athletes' eligibility in national teams with EU law is the determination as to whether EU law actually applies to these rules and if so, what provisions of EU law must be taken into account. In chapters 2, 3 and 4, I will demonstrate why I believe that rules set by international sporting governing bodies that control athletes' sporting nationality fall within the scope of EU law. In the 1974 judgment in *Walrave*, the Court of Justice started a line of its case law pursuant to which issues regarding the composition of national teams have fallen outside the sphere of competence of EU institutions for their

⁷⁴ J. Exner (2012), op. cit., p. 1031.

⁷⁵ For a general overview of the application of this test to the free movement of persons and services, see C. Barnard, *The Substantive Law of the EU, The Four Freedoms, 4th ed.* (Oxford University Press, 2013), pp. 229-576.

⁷⁶ This division is nicely illustrated for example in Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, First, the Court of Justice assesses whether Mr Lehtonen and respective basketball rules fall within the scope of EU law (paragraphs 32-46). Thereafter, the existence of an obstacle to freedom of movement for workers is examined (paragraphs 47-50). Finally, the Court of Justice engages in exploring whether such a restriction can be justified (paragraphs 51-59).

purely sporting nature.⁷⁷ In Chapters 3 and 4 of this thesis, I will present arguments to show why I consider this statement to be no longer relevant.

In 2006, the Court of Justice, reflecting the contemporary economic character and impact of sporting rules switched its approach and decided that “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty⁷⁸ the person engaging in the activity governed by that rule or the body which has laid it down.”⁷⁹ In *Meca-Medina & Majcen*, the Court of Justice broadened the category of sporting rules, which have been, from that point on, subject to potential EU law scrutiny.⁸⁰

In *Meca-Medina & Majcen*, the Court of Justice further added that “[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.”⁸¹ The prohibition of discrimination on the grounds of nationality, enshrined in Article 18 of the Treaty on the functioning of the European Union (TFEU) and further specified in the following provisions of TFEU, sometimes accompanied by the market access element, is a leading principle when it comes to the assessment of the compliance of sporting rules with EU law (2.1.1). In this context, the provisions specifying the general principle of equal treatment and non-discrimination are the citizenship of the Union (2.1.2), the freedom of movement for workers (2.1.3), the freedom to provide services (2.1.4), the freedom of establishment (2.1.5) and competition law (2.1.6).

2.1.1 The principle of equal treatment and non-discrimination

The general principle of equal treatment and non-discrimination is “one of the fundamental principles of EU law”⁸² and one of the most important substantive rights

⁷⁷ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140.

⁷⁸ The term “Treaty” covers not only the Treaty on the European Union (TEU) and the Treaty on the functioning of the European Union (TFEU), but it rather compresses EU law in general including also secondary legislation and the case law of the Court of Justice of the European Union (CJEU).

⁷⁹ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 27.

⁸⁰ P. Hamerník, “Jaká je míra tolerance práva EU vůči sportovním asociacím?” (2009) *Právník*, Year 150, Number 5, pp. 482-483.

⁸¹ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 28.

⁸² Joined cases C-117/76 and C-16/77, *Ruckdeschel and Others v. Hauptzollamt Hamburg-St. Annen*, [1977] EU:C:1977:160, paragraph 7.

that EU law has conferred on its beneficiaries from the historical perspective.⁸³ The principle of equal treatment was one of the first targets of European legislative authorities within the process of the European integration together with the prohibition of discrimination on grounds of sex today enshrined primarily in Article 157 TFEU.⁸⁴ It is only in last twenty years that the attention has shifted also to equal treatment based on race, religion, sexual orientation or age.⁸⁵

Nowadays, this crucial principle of EU law is specified, in particular, in the general prohibition of discrimination on grounds of nationality enshrined in Article 18 TFEU. This provision states that “[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.” In the most general sense of the principle of equal treatment between national of different Member States, “comparable situation must not be treated differently and [...] different situations must not be treated in the same way.”⁸⁶ The prohibition of discrimination on grounds of nationality seeks to prevent arbitrary or unjustifiable unequal treatment between nationals of the host and the other Member States as well as such a treatment when one Member State treats nationals of a concrete Member State more favourably than nationals of another Member State in situations falling under EU law.⁸⁷ Despite the quite general wording of Article 18 TFEU, the Court of Justice has progressively specified that this provision has always a vertical and sometimes even a horizontal direct effect.⁸⁸ In that case, the prohibition of discrimination on grounds of nationality is directed towards the EU institutions and other bodies, Member States’ authorities, but also towards private entities including international sporting governing bodies.

Article 18 TFEU and other discrimination-prohibiting provisions of the Treaties forbid not only direct discrimination on grounds of nationality, but they simultaneously

⁸³ T. Tridimas, *The general principles of EU law*, 2nd ed. (Oxford University Press, 2006), p. 118.

⁸⁴ Treaty establishing the European Economic Community (1957), Article 7: „Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited.” The right to equal remuneration without discrimination based on sex was enshrined in Article 119 of the Treaty establishing the European Economic Community.

⁸⁵ P. Craig, G. de Burca, *The Evolution of EU Law*, 2nd ed. (Oxford University Press, 2011), p. 612.

⁸⁶ Case C-148/02, *Garcia Avello*, [2003] ECLI:EU:C:2003:539, paragraph 31.

⁸⁷ C. Barnard (2013): op. cit., pp. 17-18.

⁸⁸ T. Tridimas (2006): op. cit., p. 119.

aim at preventing indirect discrimination. Direct discrimination represents different treatment of persons in comparable situations explicitly on grounds of nationality. A directly discriminatory measure results in prohibited different treatment in law and in fact.⁸⁹ Conversely, indirect discrimination covers different treatment of persons in a comparable situations based on an apparently neutral ground. Distinctively from directly discriminatory measures, indirectly discriminatory measures are equally applicable in law, but result in different factual treatment. Residence requirements, which can be found in many international sporting governing bodies' regulations, are an example of an indirect discriminatory measure and therefore require further scrutiny from the EU law point of view.⁹⁰

Having seen the distinction between direct and indirect discrimination, the Court of Justice subsequently broadened the scope of application of the free movement provisions so as to include also genuinely non-discriminatory measures, comprising the element of market access. In many cases, including *Bosman*, the Court of Justice hold that a measure which is liable to hamper, or make less attractive the exercise of the right to free movement may amount to a restriction to the freedom of movement guaranteed in the Treaty. As a result, even non-discriminatory measures may conflict with the Treaty right to free movement, requiring a justification under EU law.⁹¹

The general prohibition of discrimination under Article 18 TFEU finds its *lex specialis* in specific treaty provisions regarding EU citizenship, free movement and competition law elaborated on in detail in the following sections. It is settled case law of the CJEU that the general principle of equal treatment contained in Article 18 TFEU can be invoked independently only where no specific provision applies.⁹² On the other hand, these specific provisions regarding the prohibition of nationality, such as citizenship, free movement or competition, must be interpreted in the light of Article 18

⁸⁹ M. Davies, *Nationality Discrimination in the European Internal Market*, (Kluwer Law International, 2003), p. 22-31.

⁹⁰ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 20.

⁹¹ *Ibid.*

⁹² See *inter alia* Case C-10/90, *Masgio v. Bundesknappschaft*, [1982] EU:C:1991:107; Case C-419/92, *Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECLI:EU:C:1994:62.

TFEU and such measures violating these specific provisions are also automatically incompatible with the general principle contained in Article 18 TFEU.⁹³

In the following parts, each of the aforementioned specific provisions of the Treaties prohibiting discrimination on grounds of nationality is separately discussed. Particular attention is paid to the question of the application of these principles on rules of international sporting governing bodies.

2.1.2 Citizenship of the European Union

The citizenship of the EU, which is destined to be “the fundamental status of nationals of the Member States”⁹⁴, has become an important new complex of rights granting equal treatment even to those who are not directly economically active. This concept first appeared in the Treaties with the Treaty of Maastricht of 1992, in effect from 1993, and since then, the EU has witnessed “a glorious march of European citizenship from a “meaningless addition” to the Treaties to one of the key concepts of [EU] law.”⁹⁵ Since it is neither suitable nor possible to give a complex overview of EU citizenship in this limited space, I further limit myself to the importance of EU citizenship for the regulation of sport.

Originally, individuals fell under EU law in so far as they engaged in an economic activity, which was needed for the application of the provisions of the Treaties regarding the free movement of workers, services and the freedom of establishment. With EU citizenship, however, they find themselves within the scope of EU law by exercising their citizenship rights under Articles 20 and 21 TFEU, most importantly the right to free movement to and residence in another Member State than that of their origin. In other words, they no longer need to exercise an economic activity in order to find shelter under an EU umbrella.

In the light of the foregoing, the citizenship of the Union has a particular importance for amateur sportsmen⁹⁶ who not only possess the rights guaranteed directly

⁹³ See *inter alia* Case C-305/87, *Commission v. Greece*, [1989] EU:C:1989:218, paragraph 12.

⁹⁴ See *inter alia* Case C-184/99, *Grzelczyk*, [2001] EU:C:2001:458, paragraph 31.

⁹⁵ D. Kochenov, “Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights” (2009), *Columbia Journal of European Law* 2, p. 173.

⁹⁶ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 24.

by EU citizenship, but they also have the right to equal treatment contained in Article 18 TFEU. In this respect, even national regulation of amateur sportsmen must ensure equal treatment in situations falling within the scope of EU law.⁹⁷ Regarding third country nationals, they enjoy derived rights as family members of EU citizens who have made use of their rights under the Directive No. 2004/38, the so called “citizens’ rights directive”.⁹⁸ Thus, national regulation of amateur sportsmen may in that regard also need to ensure equal treatment of EU citizens as well as of their family members - third country nationals.⁹⁹

2.1.3 Free movement of workers

Freedom of movement for workers, like the general prohibition of discrimination on grounds of nationality, is one of the fundamental principles of EU law.¹⁰⁰ Article 45 (2) TFEU, the elementary provision of the Treaties governing this freedom, provides that it “shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.” The wording of this provision makes it clear that the principle of equal treatment constitutes the conceptual basis for the free movement of workers within the EU.¹⁰¹

Article 45 (3) TFEU further specifies that the freedom of movement for workers shall entail the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made and to move freely within the territory of Member States for this purpose. It further guarantees the right to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action and the right to remain in the territory of a Member

⁹⁷ Ibid.: 28.

⁹⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123.

⁹⁹ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 28.

¹⁰⁰ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 93.

¹⁰¹ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 18.

State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the European Commission.

Article 45 TFEU has the horizontal direct effect and can therefore be invoked by athletes against international sporting governing bodies. It is the settled case-law of the Court of Justice that Article 45 TFEU does not cover solely the actions of public authorities, but it extends also to any other rules or measures aimed at regulating gainful employment in a collective manner.¹⁰² The limitation of the application of Article 45 TFEU only to acts of public authorities would risk the outcome of inequality in its application, since working conditions in various Member States are governed not only by law of regulation, but sometimes also by collective agreements and other acts of private persons.¹⁰³

The Court of Justice applied this general principle to international sporting governing bodies in its landmark ruling in *Bosman* confirming that the freedom of movement for workers applies equally to regulations of the Union of European Football Associations (UEFA).¹⁰⁴ As the comprehensive opinion of the Advocate General Lenz shows, the conclusions of this judgment do not have to remain limited only to football, but can be transmitted also to other sports.¹⁰⁵ Therefore, the horizontal direct affect of Article 45 TFEU can be simultaneously invoked against all international sporting governing bodies.

Many athletes who undertake their activities in Europe are third country nationals and as such, they enjoy limited protection under EU law. As to the freedom of movement for workers, third country nationals have in particular derived rights as family members of EU citizens who have made use of their rights under the Directive No. 2004/38¹⁰⁶ in conjunction with the Regulation No. 492/2011 on freedom of

¹⁰² Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 82.

¹⁰³ For a landmark judgment of the Court of Justice illustrating the application of this principle see Case C-281/98, *Angonese*, [2000] EU:C:2000:296; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 17.

¹⁰⁴ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463; see also O. Poruban, “Priama diskriminácia na základe štátnej príslušnosti pri výkone športovej činnosti” (2015), Učená právnická spoločnosť [online], 6 May 2015.

¹⁰⁵ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, opinion of the Advocate General Lenz.

¹⁰⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the

movement for workers within the EU.¹⁰⁷ They may also benefit directly from the rights conferred upon them in international agreements concluded between EU and their respective countries. In *Simutenkov*, the Court of Justice decided that a Russian football player, who legally resided and was legally employed in Spain, could directly benefit from the prohibition of discrimination regarding working conditions set by the Partnership Agreement with Russia in relation to host Member State nationals.¹⁰⁸ The Court of Justice reached similar conclusions in *Kolpak* and *Kahveci*.¹⁰⁹

2.1.4 Freedom to provide services

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

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

Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123.

¹⁰⁷ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, pp. 1–12.

¹⁰⁸ Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 17.

¹⁰⁹ Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255; Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450.

the CJEU has regularly perceived the freedom to provide services as a specific expression of the general principle of equal treatment or non-discrimination.¹¹⁰

It is the settled case law of the CJEU that the provisions on the free movement of services have direct effect and can therefore be relied upon by private entities. In this respect, the Court of Justice ruled in *Walrave* that the prohibition of discrimination “does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed in regulating in a collective manner gainful employment and the provision of services.”¹¹¹ In *Laval*, the Court of Justice ruled that “[t]he abolition [...] of obstacles to the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.”¹¹² The Court of Justice therefore enabled athletes to invoke such provisions also against international sporting governing bodies.¹¹³

The Court of Justice’s judgment in *Donà* provides an example of the application of the freedom to provide services to sport. This case concerned direct nationality discrimination in professional football. The Court of Justice held that in so far as sport was practiced as economic activity, nationality discrimination was in principle prohibited. On the other hand, the Court of Justice accepted rules excluding “foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only [...]”¹¹⁴ The Court of Justice nevertheless underlined that such rules must remain limited to their proper objectives.¹¹⁵ In this particular case, the Court of Justice found that the Italian national measure went beyond what was necessary to attain its objectives and hold the rule incompatible with EU law.¹¹⁶

¹¹⁰ Case C-33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, [1974] EU:C:1974:131; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 19.

¹¹¹ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, paragraph 17; on the horizontal direct effect see, in general, M. Tomášek, V. Tyč (Eds.), *Právo Evropské unie* (Leges, 2013), pp. 65-74.

¹¹² Case C-341/05, *Laval un Partneri*, [2007] EU:C:2007:809, paragraph 98.

¹¹³ See also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 28-30.

¹¹⁴ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, paragraph 14.

¹¹⁵ *Ibid.*, paragraph 15; see also C. Barnard (2013), *op. cit.*, p. 254.

¹¹⁶ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, paragraph 19.

2.1.5 Freedom of establishment

A further internal market freedom, which specifically reflects the general prohibition of discrimination on grounds of nationality, is the freedom of establishment. Article 49 TFEU states that “[w]ithin the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited [...]” According to the same article, the freedom of establishment shall also include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

As in the case of the free movement of workers and the freedom to provide services, the prohibition of discrimination on grounds of nationality represents a conceptual basis for the freedom of establishment. Articles governing the freedom to provide services and the freedom of establishment have a parallel structure and use identical concepts, which leads to the conclusion that similar observations apply to these two provisions.¹¹⁷ What is more, the case law of the CJEU confirms the character of the freedom of establishment as a specific projection of the general principle of equal treatment between nationals of different Member States.¹¹⁸

Pursuant to the settled case law of the CJEU, the provisions on the freedom of establishment have the horizontal direct effect and can therefore be relied upon by private entities. In *Viking*, the Court of Justice decided that Article 43 EC [today’s article 49 TFEU] “may be relied on by a private undertaking against a trade union or an association of trade unions.”¹¹⁹ In the light of the foregoing, athletes may analogically invoke Article 49 TFEU in a dispute against international sporting governing bodies.

2.1.6 Competition law

Regarding the provisions of the Treaties on competition law, the prohibition of cartels enshrined in Article 101 TFEU, the prohibition to abuse a dominant position

¹¹⁷ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 19.

¹¹⁸ Case C-2/74, *Jean Reyners v. Belgian State*, [1974] EU:C:1974:68.

¹¹⁹ Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*, [2007] EU:C:2007:772, paragraph 61.

contained in Article 102 TFEU and, in some cases, the prohibition to grant illegal state aid provided for in Article 107 TFEU, are of particular relevance to sporting rules in general and rules governing athletes' eligibility in national teams in particular. The connection between competition law and sport encompasses areas including agencies, doping, media rights, multiple ownership of clubs, ticketing, transfer rules, state aids or sporting goods.¹²⁰ Following this reasoning, rules of international sporting governing bodies governing athletes' eligibility in national teams would fall under EU competition law.¹²¹

What is more, the Court of Justice applied EU competition law, in particular the prohibition of cartels contained in Article 101 TFEU, to the doping control regulation adopted by the IOC in 2006 in its turning sports-related judgment in *Meca-Medina & Majcen*.¹²² In this judgment, the Court of Justice confirmed the application of EU competition law to sports and, as will be further illustrated in detail, broadened the group of sporting rules that now fall within the scope of EU law. The Court of Justice also slightly modified its approach in assessing the compliance of sporting rules with EU law shifting its focus on their context, objectives, inherence and proportionality.

Having established that sporting rules may fall under various provisions of the Treaties concerning EU citizenship, free movement and competition law, I will now focus on the question whether sports rules in general, and those regarding sporting nationality in particular, constitute a restriction to athletes' rights under EU law.

2.2. Sports rules as a restriction to European Union law

The notion of a limitation, an obstacle or a restriction to EU law is very broad and covers a wide group of measures including sporting rules. EU citizens dispose of a right, which they derive directly from the Treaties, to leave their Member State of origin to enter the territory of another Member State and reside there freely in order to pursue

¹²⁰ To this extent see B. Kennelly, T. Richards, A. Lewis, "EU and UK Competition Law Rules and Sport" in A. Lewis, J. Taylor (Eds.), *Sport: Law and Practice*, 3rd ed. (Bloomsbury Professional, 2014), pp. 1124-1232.

¹²¹ Y. Hafner (2012): op. cit., p. 222.

¹²² Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

an economic activity.¹²³ EU law in general and Article 45 TFEU granting the freedom of movement for workers in particular preclude measures which might place nationals of a Member State at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.¹²⁴ Moreover, national provisions which precluding or deterring a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute restrictions on that freedom despite of applying without regard to the nationality of the workers concerned.¹²⁵

When it comes, for example, to the freedom to provide services, a restriction is deemed to be “any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned.”¹²⁶ In the light of the aforementioned, any rule or provision that precludes or at least deters EU citizens from exercising their rights to free movement constitutes an obstacle to EU law.¹²⁷

The same logic applies to sporting rules that constitute obstacles to EU law provided that they hinder athletes in exercising their rights under EU law. In *Lehtonen*, for example, the Court of Justice held that the basketball rule which allow a transfer of players to other clubs only during a limited period of “transfer windows” provides for a restriction to the free movement of workers.¹²⁸ In a similar way, rules governing athletes’ eligibility in national teams limit athletes’ “opportunit[ies] to offer [their]

¹²³ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 95; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 228.

¹²⁴ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 94; Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 33.

¹²⁵ Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 34; see also Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 96.

¹²⁶ General Programme for the abolition of restrictions of freedom to provide services of 18 December 1961, Official Journal of 15 January 1962, Special Editions, Second Series, IX, p. 32.

¹²⁷ On derogations, limitations, conditions and justifications of free movement of persons, see, in general C. Barnard (2013), *op. cit.*, p. 496-537.

¹²⁸ Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraphs 47-50; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 229-230.

services to other national teams within the European Union.”¹²⁹ Moreover, sporting nationality “restrict[s] the ability of teams to select and therefore to employ or engage the services of national of the other [EU] states who are not eligible with reference to the relevant criterion [...],”¹³⁰ in this respect namely nationality.¹³¹ Such restrictions must be justified in order to be compatible with EU law.

In the following sections of this thesis, notably in the part dealing with sporting nationality rules which fall within the scope of EU law, constitute a restriction to EU law but may be justified and proportionate (4.2.), I will claim that rather than on existence of nonexistence of a restriction, it is more convenient to concentrate on a much broader and much more complex question of justification and proportionality. Before dealing with the concrete rules governing athletes’ eligibility in national teams, I will entertain in exploring the interconnected concepts of justification and proportionality in a broader sense regarding sporting rules in general.

2.3. Justification and proportionality of sports rules as a restriction to European Union law

In this subchapter, the question as to whether a sporting restriction to EU law in the fields of EU citizenship, free movement and competition law provisions can be justified is examined. Regarding the justifications, two important issues deserve closer attention. First, I will look at which types of justifications can be used. What is even more important, however, is the matter of which types of restrictive measures can be justified by which forms of justifications.¹³² There are two types of justifications: the Treaty derogations (2.3.1) and the public-interest requirements adjudicated by the CJEU by using the rule of reason doctrine (2.3.2).¹³³ The principle of proportionality, which is crucial when it comes to justifications, is examined at the end of this chapter (2.3.3).

¹²⁹ J. P. McCutcheon (2001): op. cit., p. 131.

¹³⁰ Ibid.

¹³¹ Y. Hafner (2012), op. cit., p. 220.

¹³² Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 230.

¹³³ C. Barnard (2013), op. cit., p. 496.

2.3.1 Treaty derogations

The Treaty of Lisbon provided the EU with an explicit contributory power regarding sport. Article 165 TFEU provides that the EU “shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.” On the other hand, this provision does not contain any derogations or justifications of restrictions to EU law, which must therefore be found elsewhere.

The Treaties provide an exhaustive list of derogations regarding the specific rights enjoyed by migrant workers, the self-employed, providers or receivers of services and citizens. These express general derogations cover public policy, public security and public health. The specific exemption concerning the employment in the public service must also be examined while discussing the elements narrowing the scope of EU law.¹³⁴ In this context, it should be envisaged that derogations contained in the Treaties are able to justify direct discrimination on grounds of nationality as well as indirectly discriminatory measures and indistinctly applicable measures.¹³⁵

The public policy exception deserves further exploration in the sporting context even though rules governing sporting nationality would probably not fall within its scope in the end. The Court of Justice acknowledged for the first time in *Bosman* that individuals, such as international sporting governing bodies, can rely on this exception.¹³⁶ Following this claim, the question arises as to whether there is a sporting public policy in the EU. The authors of the Study on equal treatment of non-nationals in individuals sports competitions state that this policy could include for instance the inherent links between a club and the Member State or the sub-national region where it is located or the protection of competitive balance.¹³⁷

Be it as it may, the rules determining sporting nationality would probably not fall under the public policy exception since they are not set up following exclusively a personal conduct of athletes. Practices governing states’ actions regarding the use of the

¹³⁴ See *inter alia* C. Barnard (2013): op. cit., p. 496; S.C.G. Van den Bogaert (2005): op. cit., p. 338.

¹³⁵ See in general C. Barnard (2013): op. cit., p. 496-537.

¹³⁶ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 86.

¹³⁷ Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 29.

public policy justification must apply *mutatis mutandis* to international sporting governing bodies for the sake of uniformity of EU law.¹³⁸ The issue is that “measures taken on grounds of public policy must be based exclusively on the personal conduct of the individual concerned.”¹³⁹ This leads to the conclusion that general rules, such as those governing athletes’ eligibility in national teams, would not be compatible with EU law in this regard, as they would not fall under the public policy exception.¹⁴⁰

Not even the public service exception under Article 45(4) TFEU regarding the freedom of movement for workers or the official authority exception under Article 51 TFEU concerning the freedom to provide services seem to play any role regarding eligibility rules. I believe that these exceptions do not have much relevance in this context since it is “hard to sustain that representative national teams participate in the exercise of powers conferred by public law.”¹⁴¹ Exceptions to this claim can be found in the sports structures in some countries, for example in France, where national sporting governing bodies are equipped with certain authorities under public power.¹⁴² Yann Hafner, using an example of a rule of the Fédération Française de Football (FFF) obliging a player to join the national team when nominated and subjecting him to sanctions if he refuses to do so, claims that one cannot automatically rule out the public service justification set forth in Article 45(4) TFEU in the context of sports.¹⁴³ The same reasoning applies equally to the official authority exception under Article 51 TFEU.

If there are some doubts about the public service or the official authority exceptions, it seems that the remaining two exceptions, public security and public health, are clearly irrelevant in the sporting context since “they have nothing to do *in se* with” sports.¹⁴⁴ Therefore, rules governing athletes’ eligibility in national teams cannot rely on the exemptions provided in the Treaties since the public policy and the public services or the official authority exemptions are probably not applicable while the public security and the public health exceptions are irrelevant.¹⁴⁵

¹³⁸ J.-P. Dubey, *La libre circulation des sportifs en Europe*, (Staempfli Editions, 2000), p. 441.

¹³⁹ S.C.G. Van den Bogaert (2005): op. cit., p. 338.

¹⁴⁰ Y. Hafner (2012): op. cit., p. 221.

¹⁴¹ S.C.G. Van den Bogaert (2005): op. cit., p. 339.

¹⁴² F. Buy, J.-M. Marmayou, D. Poracchia, F. Rizzo, *Droit du sport*, 2e edition (LGDJ, 2009), p. 117.

¹⁴³ Y. Hafner (2012): op. cit., p. 221.

¹⁴⁴ S.C.G. Van den Bogaert (2005): op. cit., p. 338.

¹⁴⁵ J. Exner (2013): op. cit., p.1035.

2.3.2 Rule of reason doctrine

The Court of Justice has regularly held that an exemption for national teams is admissible under the so-called “rule of reason” doctrine despite of non-existence of any statutory exemption in respect of the rights of free movement of persons and to provide services or competition law concerning international sporting governing bodies’ rules governing athletes’ eligibility in national teams. The rule of reason doctrine covers the public interest requirements, also referred to as overriding requirements or objective justifications,¹⁴⁶ which form an open-ended category of justifications recognized by the Court of Justice.¹⁴⁷

Regarding sporting rules, an interesting issue arises with the doctrinal controversy regarding the question of what types of restrictions can be defended by what types of justifications. Traditionally, the public interest requirements could only justify indirectly discriminatory and non-discriminatory rules as well as those rules preventing or impeding market access. However, Barnard claims that, in more recent but not consistent case law of the CJEU, there are signs that these types of justifications can also be used to defend directly discriminatory measures.¹⁴⁸ If so, the introduction of the specific public interest requirement in the field of sport based on “respect for representation of culture and national identity through sports” could be considered.¹⁴⁹

Article 165 TFEU providing that “[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function” might play a role in this respect. The EU would recognize the important role of nationality in sports thus contributing to the further eradication of all negative forms of discrimination.¹⁵⁰ However, it is not clear whether the CJEU would be willing to adopt such an approach referring to the inconsistencies in its case-law on this question.

¹⁴⁶ Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 230.

¹⁴⁷ See also Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] EU:C:1995:411.

¹⁴⁸ C. Barnard (2013): op. cit., p. 496.

¹⁴⁹ Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 230-231.

¹⁵⁰ *Ibid.*

In sports-related issues, the CJEU has already accepted as legitimate objectives, for example, the need to ensure the training and development of young players, the need to maintain a certain sporting equilibrium between clubs and the need to preserve regularity of a sporting competition.¹⁵¹ These legitimate objectives are elaborated upon in detail in Chapter 3, which presents the CJEU's sports-related judgments. Before assessing the concrete case law, I will briefly address the principle of proportionality, which is one of the most important principles of EU law.

2.3.3 The principle of proportionality

A contested measure must ultimately comply with the principle of proportionality in order to be justified. Essentially, the principle of proportionality requires that the measures must be “suitable for securing the attainment of the objectives which they pursue and must not go beyond what is necessary in order to attain it.”¹⁵² In practice, the CJEU first verifies whether the means chosen to achieve the end are appropriate. Afterwards, it considers whether it is not possible to conceive an alternative measure that is capable of producing the same result but is less restrictive upon the freedom of movement under the given circumstances.¹⁵³ In general, the test of proportionality consists of a balancing exercise between the aims pursued by the national measure and its restrictive effects on the exercise of the right at stake.¹⁵⁴

The final word of the CJEU concerning any claimed justification also depends upon the level of scrutiny that it is willing to exert when assessing the respect for the principle of proportionality. The CJEU's case-by-case analysis and the level of scrutiny that the CJEU applies are two important issues regarding the application of the proportionality principle. The judgment in *Olympique Lyonnais* represents a good example of the CJEU's strict approach to the principle of proportionality. In this case, the Court of Justice recognized the legitimate objective of the education and training of

¹⁵¹ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463; Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraph 53; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 230.

¹⁵² See *inter alia* Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] EU:C:1995:411, paragraph 37.

¹⁵³ C. Barnard (2013): *op. cit.*, pp. 534-536.

¹⁵⁴ Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 24.

young players, but subsequently ruled that where the value of damages exceeded the costs of training, these damages would not meet the requirements of the principle of proportionality.¹⁵⁵ On the other hand, sport belongs, in general, amongst those sectors where the CJEU grants respective authorities with a significant margin of appreciation. This rule will be further illustrated on the CJEU's case-law regarding sporting rules.

¹⁵⁵ Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 46-48.

3. Sports rules in the case law of the Court of Justice of the European Union

This chapter discusses the case law of the CJEU regarding discrimination on the grounds of nationality and other restrictions on athletes' rights under EU law in the context of sport, with a particular attention paid to rules concerning national teams. First, the pre-2006 case law of the CJEU, which has helped to establish rules regarding national teams, and in which circumstances they may be excepted from the material scope of EU law under the “rule of reason” doctrine referring to their purely sporting nature is explored (3.1.). In 2006, however, the Court of Justice’s judgment *Meca-Medina & Majcen* established a new test of the compliance of sporting rules, including those governing the composition of national teams, with EU law focusing rather on their context, objectives, inherence and proportionality (3.2.).

3.1. Before Meca-Medina & Majcen: national teams exception

The Court of Justice articulated the existence of an exemption for national teams for the first time in 1974 in *Walrave* where a rule of the International Cycling Union (UCI) requiring pacemakers to be of the same nationality as competitors was at stake.¹⁵⁶ The Court of Justice decided that sport falls within the scope of EU law in so far as it constitutes an economic activity.¹⁵⁷ Regarding national teams, however, Advocate General Warner invited the Court of Justice to rule that “rules of organisations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent” are not incompatible with EU law.¹⁵⁸ The Court of Justice, seemingly following the Advocate General’s opinion, held that the prohibition of discrimination on grounds of nationality “does not affect the composition of sports teams, in particular national teams, the formation of

¹⁵⁶ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140.

¹⁵⁷ *Ibid.*, paragraph 4.

¹⁵⁸ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, opinion of the Advocate General Warner, 1st col., p. 1526.

which is a question of purely sporting interest and as such has nothing to do with economic activity.”¹⁵⁹

Apart from acknowledging the national teams exceptions, the judgment in *Walrave* is important also for it recognized the horizontal direct effect of the provisions concerning free movement of workers and services. The Court of Justice ruled that this prohibition of discrimination “does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed in regulating in a collective manner gainful employment and the provision of services.”¹⁶⁰ The Court of Justice therefore enabled athletes to invoke such provisions also against international sporting governing bodies.¹⁶¹

Two years later, the Court of Justice faced direct nationality discrimination in professional football for the first time in *Donà*. According to respective Italian rules, only those football players affiliated to the Italian Football Federation (FIGC) could play in professional matches, affiliation being open to Italian players only.¹⁶² As a general rule, the Court of Justice held that rules governing a sport must have complied with provisions on the free movement of persons and services in so far as the sport was practiced as economic activity.¹⁶³ On the other hand, the Court of Justice accepted rules excluding “foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only such as, for example, matches between national teams from different countries.”¹⁶⁴ As in *Walrave*, the Court of Justice underlined that such rules must have remained limited to their proper objectives.¹⁶⁵ In end, the Court of Justice found the Italian national measure incompatible with EU law unless it excludes foreign players from participation in certain matches for reasons that are of sporting interest only.¹⁶⁶

¹⁵⁹ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, paragraph 8.

¹⁶⁰ *Ibid.*, paragraph 17; on the horizontal direct effect see, in general, M. Tomášek, V. Týč (Eds.) (2013), pp. 65-74.

¹⁶¹ See also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 28-30.

¹⁶² Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, paragraph 5.

¹⁶³ *Ibid.*, paragraphs 12-13.

¹⁶⁴ *Ibid.*, paragraph 14.

¹⁶⁵ *Ibid.*, paragraph 15; see also C. Barnard (2013): op. cit., p. 254.

¹⁶⁶ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, paragraph 19.

The judgment in *Donà* led to a gentlemen's agreement between the European Commission and the UEFA under which national associations had to allow every first division team to field at least three foreign players and two players who have played in the country for an interrupted period of five years. This rule became known as the so-called "3+2" rule.¹⁶⁷ It is interesting that it was just this rule approved by the European Commission, alongside transfer fees between clubs, that was challenged by the Court of Justice in its probably most famous sports-related judgment to this day *Bosman*.¹⁶⁸

In *Bosman*, the Court of Justice kicked off by stating that "rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches" could be exempt from the scope of the Treaties, when they remain limited to their "proper objective".¹⁶⁹ However, the Court of Justice added that this fact cannot "be relied upon to exclude the whole of a sporting activity from the scope of the Treaty."¹⁷⁰ In this particular case, the Court of Justice ruled that nationality clauses were not limited to their proper objective since they did not concern specific matches between teams representing their countries but applied to all official matches between clubs and thus to the essence of the activity of professional players.¹⁷¹

The Court of Justice confirmed the horizontal direct effect of Article 45 TFEU arguing that the principle of non-discrimination applied to clauses contained in the regulations of sporting associations that restricted the rights of players to take in part in football matches. The Court of Justice said that if EU law did not apply to this situation, Article 45 TFEU would be "deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the [EU] rendered nugatory."¹⁷² Having decided that these rules fell within the scope of the Treaty, the Court of Justice shifted to whether this restriction to the freedom of movement for workers could be justified.¹⁷³

¹⁶⁷ C. Barnard (2013): op. cit., p. 254.

¹⁶⁸ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463.

¹⁶⁹ *Ibid.*, paragraph 76.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, paragraph 128.

¹⁷² *Ibid.*, paragraph 129; see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 30-32.

¹⁷³ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 29.

The Court of Justice swiftly answered the question in the negative. Regarding the reasons that could possibly justify discrimination on grounds of nationality, the authors of the Study on the equal treatment of non-nationals in individual sports competitions submitted that the Court of Justice seemed to consider other reasons than public policy, public health and public security enshrined in Article 45(3) TFEU. They claimed that the Court of Justice was prepared to take into consideration the inherent nature of a club's links with the Member State in which it plays or its subnational region.¹⁷⁴ The Court of Justice, however, rejected this because such a link did not in fact exist.¹⁷⁵ The Court of Justice accepted as a legitimate reason the need to protect competitive balance between clubs, but in end, the rule was disproportionate since it was not necessary for reaching this objective.¹⁷⁶

Regarding the second contested rule in *Bosman*, notably transfer fees between clubs, the Court of Justice went beyond the discrimination model and focused rather on the concept of market access. According to the Court of Justice, these rules were not discriminatory since they applied equally to nationals of different Member States.¹⁷⁷ Nevertheless, the Court held that since the transfer rules “directly affect players’ access to the employment market in other Member States”, they were capable of impeding the freedoms of movement for workers and as such breached Article 45 TFEU.¹⁷⁸ Finally, the transfer rules did not pass the justification phase and the Court of Justice held them incompatible with EU law.¹⁷⁹

The *Bosman* ruling has had great influence on international sporting governing bodies and their regulatory autonomy. In this respect, Stefaan Van den Bogaert notes that, as a result of the judgment, “[t]he sporting associations had no option but to adapt to the new reality *Bosman* created: athletes have rights under EU law, and they can have them enforced before the ordinary courts.”¹⁸⁰ He further adds that sports organizations have definitely and irrevocably lost their aura of immunity under EU law. Sport remains

¹⁷⁴ *Ibid.*: 29.

¹⁷⁵ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraphs 130-133.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, paragraph 103.

¹⁷⁸ *Ibid.*, paragraphs 103; see also C. Barnard (2013): *op. cit.*, p. 256.

¹⁷⁹ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraphs 105-114.

¹⁸⁰ S.C.G. Van den Bogaert (2015): *op. cit.*, pp. 175-176.

primarily an affair of the sporting associations, but their regulatory autonomy is conditional, for due account must be taken of the requirements of EU law.”¹⁸¹

In 2000, the Court of Justice dealt with rules regarding the limit on the number of athletes from every national judo federation allowed to participate in each international tournament. Christelle Deliège argued that, as a judoka, she was engaged in an economic activity and that these rules restricted her freedom to provide services. The Court of Justice found once again that “the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.”¹⁸² Recalling its previous sports-related case law, the Court of Justice nevertheless stressed that such a restriction on the scope of the provisions in question “must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity.”¹⁸³ Finally, the Court of Justice decided that the contested regulation did not in itself breach the freedom to provide services.¹⁸⁴

Only two days later, the Court of Justice reached a similar conclusion in *Lehtonen*. In this case, the rules of a Belgian basketball association prohibited a basketball club from fielding in national championship matches players from other Member States who had been transferred outside of mandated “transfer windows”.¹⁸⁵ The Court of Justice decided that these rules restricted the freedom of movement of players and therefore constituted an obstacle to freedom of movement for workers.¹⁸⁶ In

¹⁸¹ Ibid.; on the practical consequences of the *Bosman* ruling see also P. Hamerník, *Sportovní právo. Hledání rovnováhy mezi specifickou sportovní úpravou a platným právem*, (Praha: Ústav státu a právu AV ČR, 2012), pp. 50-53; see also P. Hamerník, “O vlivu práva EU na status sportovce” in J. Pichrt (Ed.), *Sport a (nejen) pracovní právo*, (Wolters Kluwer, 2014), pp. 49-58.

¹⁸² Joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199, paragraph 43.

¹⁸³ Ibid.

¹⁸⁴ Ibid., paragraph 69; on the reasoning and the implications of the judgment see also S.C.G. Van den Bogaert, “The European Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?”, (2000) *European Law Review* 25, pp. 554-563.

¹⁸⁵ The transfer window is the period during the year in which a football club can transfer players from other countries into their playing staff.

¹⁸⁶ Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, paragraph 49.

the end, the Court of Justice left it to the national court to consider the extent to which objective reasons, concerning only sport as such, justify such treatment.¹⁸⁷

In *Kolpak*, *Simutenkov* and *Kahveci*, the Court of Justice was invited to consider discrimination against non-EU nationals who were protected by the association agreement clauses analogous to the fundamental freedoms of EU citizens. In these particular cases, the Court of Justice concluded that the reasons put forward by international sporting governing bodies to justify such discrimination went beyond the *Walrave* purely sporting exception. The reason was that the clauses did not concern specific matches between teams representing their countries but applied to all official matches between clubs and thus to the essence of the activity of professional players.¹⁸⁸

In the light of the foregoing, it is quite difficult to determine the exact approach of the Court of Justice towards national teams. According to Yann Hafner, these problems are notably caused by the differences in the wording of the clauses regarding the exemption of national teams from the scope of EU law.¹⁸⁹ In the first place, the Court of Justice seemed to uphold the claim that national teams fell outside the scope of EU law.¹⁹⁰ However, the Court of Justice took a more restrictive attitude in *Donà* when it held that “the rule might be limited not to the composition [of national] teams as such, but merely the exclusion of [foreign] players from certain matches.”¹⁹¹ Another change of direction came with *Bosman* where the Court of Justice ruled that the “whole of a sporting activity” could no longer be excluded from the scope of EU law.¹⁹² In this respect, Richard Parrish and Samuli Miettinen conclude that eligibility rules fall within the scope of EU law and must therefore be justified in order to survive the CJEU’s scrutiny.¹⁹³ I submit that the Court of Justice made another step on this way towards the capture of sporting rules into the EU net in 2006 in *Meca-Medina & Majcen*.

¹⁸⁷ *Ibid.*, paragraph 59; see also C. Barnard (2013): *op. cit.*, p. 256.

¹⁸⁸ Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255, paragraph 54; see also Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213, paragraphs 38-39 and Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450, paragraphs 31-32.

¹⁸⁹ Y. Hafner (2012): *op. cit.*, p. 224.

¹⁹⁰ S.C.G. Van den Bogaert (2005): *op. cit.*, p. 340.

¹⁹¹ R. Parrish, S. Miettinen, *The Sporting Exception in European Union Law*, (T.M.C. Asser Press, 2008), p. 84.

¹⁹² Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 76.

¹⁹³ R. Parrish, S. Miettinen (2008): *op. cit.*, p. 88.

3.2. After Meca-Medina & Majcen: context, objectives, inherence and proportionality

In *Meca-Medina & Majcen*, the Court of Justice put an end to the controversy as to whether purely sporting rules fall within the scope of EU law by answering the question in the affirmative. The case concerned two professional long-distance swimmers who were banned for two years for taking a prohibited substance Nandrolone. They complained to the European Commission claiming that the anti-doping rules at stake infringed their economic freedoms under Article 56 TFEU on the free movement of services and Articles 101 and 102 TFEU regarding competition law. The European Commission, however, rejected their complaints.¹⁹⁴ The swimmers' appeal to the General Court for the European Commission's decision to be annulled was dismissed¹⁹⁵ so they appealed to the Court of Justice.¹⁹⁶

While the General Court and Advocate General Léger, adopted a generous approach towards the regulatory autonomy of international sporting governing bodies, once again making reference to the purely sporting nature of their rules exempting them from the scope of EU law,¹⁹⁷ the Court of Justice took a stricter line. It began by restating its traditional phrase that “sport is subject to Community law in so far as it constitutes an economic activity.”¹⁹⁸ However, and this is where the judgment's added value comes, the Court specified that 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.”¹⁹⁹ From that point on, even rules of purely sporting interest, including those governing athletes' eligibility in national teams, fall within the scope of EU law, whether or not they have economic impact.

¹⁹⁴ Case COMP/38158, *Meca-Medina and Majcen v. International Olympic Committee* [1 August 2002].

¹⁹⁵ Case T-313/02, *Meca-Medina and Majcen v. Commission*, [2004] EU:T:2004:282.

¹⁹⁶ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

¹⁹⁷ Case T-313/02, *Meca-Medina and Majcen v. Commission*, [2004] EU:T:2004:282, paragraphs 68; Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, opinion of the Advocate General Philippe Léger, paragraphs 20, 29.

¹⁹⁸ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 22.

¹⁹⁹ *Ibid.*, paragraph 27; see also S. Weatherill, “On Overlapping Legal Orders: What is the ‘Purely Sporting’ Rule?” in S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (2014, T.M.C. Asser Press), pp. 401-424.

Once the sporting rules are subject to EU law, they must comply with all the obligations that result from the various provisions of the Treaty. The Court of Justice specified in *Meca-Medina & Majcen* that “the rules which govern [sporting] activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition.”²⁰⁰ Therefore, even though this particular case concerned the compliance of anti-doping regulations with EU competition law, its outcomes can be applied equally to other branches of EU law, notably the free movement provisions.

Having seen that these rules are subject to EU law, the crucial question then shifts to whether they are in compliance with the respective provisions of the EU legal order. The Court recognized in *Meca-Medina & Majcen* that the contested anti-doping regulations restrict the athletes’ freedom of action thus limiting their rights under EU law.²⁰¹ More particularly, the threshold of Nandrolone, which, when exceeded, constitutes a violation of the anti-doping regulation, imposes a restriction on professional sportsmen.²⁰² It will further be argued that sporting rules in general, and those governing athletes’ eligibility in national teams in particular, constitute a limitation on athletes’ rights under EU law and must therefore be justified in order to order to ensure compliance with the CJEU’s approach.

Regarding the question of justification, the Court of Justice started by stating that the “the compatibility of rules with the [EU] rules on competition cannot be assessed in the abstract.”²⁰³ The Court continued, while applying general principles set out in *Wouters*²⁰⁴, that “account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives.”²⁰⁵ Consequently, “[i]t has [...] to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives [...] and are proportionate to them.”²⁰⁶ Even though the two long-distance swimmers lost their case in the end, *Meca-Medina & Majcen* entered history as

²⁰⁰ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 28.

²⁰¹ *Ibid.*, paragraph 45.

²⁰² *Ibid.*, paragraph 54.

²⁰³ *Ibid.*, paragraph 42.

²⁰⁴ Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.

²⁰⁵ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 42.

²⁰⁶ *Ibid.*

a case in which the Court of Justice broadened the group of sporting rules being subject to EU law and extracted four crucial elements that need to be taken into consideration when assessing the compliance of these rules with EU law – context, objectives, inherence and proportionality.

It is true that the Court of Justice does not always uses the test imposed in *Meca-Medina & Majcen* in its more recent sports-related cases, as for example in *Olympique Lyonnais*. The case concerned a young football player, Mr Bernard, who refused the offer of a professional contract made by his original club Olympique Lyonnais and rather concluded a contract with the English club Newcastle United FC. Pursuant to the French Charter for “joueurs espoirs”, he should have however signed his first professional contract, at the end of his training, with the club which had trained him, in this case Olympique Lyonnais. This club therefore sought an award of damages against Mr Bernard and Newcastle United FC equivalent to the remuneration which this player would have received over one year if he had signed the contract proposed to him by the club.²⁰⁷

During the examination of questions for preliminary ruling referred by the French Court of Cassation, the Court of Justice first found that the obligation imposed by the Charter on the “joueur espoir” to conclude his first professional contract with the club that has trained him is a restriction on freedom of movement for workers.²⁰⁸ The Court of Justice nevertheless noted that such a restriction could be justified by the objective of encouraging the recruitment and training of young players, provided that it is actually capable of attaining that objective and is proportionate.²⁰⁹ In the end, however, the Court of Justice held that the rules at issue, which provide for the payment of damages which are calculated not in relation to the training costs incurred by the club, but in relation to the total loss suffered by the club, go beyond what is necessary to encourage the recruitment and training of young players and cannot therefore be justified.²¹⁰ In this judgment, the Court of Justice therefore followed the classical three steps test – scope of EU law, existence of restriction and finally justification and proportionality.

²⁰⁷ Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraphs 7-15.

²⁰⁸ *Ibid.*, paragraphs 27-37.

²⁰⁹ *Ibid.*, paragraph 38.

²¹⁰ *Ibid.*, paragraph 50.

It is submitted that the elements given by the Court of Justice in *Meca-Medina & Majcen* can be generally used to test the compliance of any sporting rules with EU law. The ground-breaking claim broadening the group of sporting rules falling within the scope of EU law²¹¹ and the general nature of the elements of justification extracted by the Court of Justice in *Meca-Medina & Majcen* leads me to such a conclusion. This is why I further proceed from the principles set out primarily in this judgment, taking into account also other decisions regarding internal market in general and sport in particular, when assessing the compliance of the concrete rules governing athletes' eligibility in national teams with EU law (Chapter 4).

²¹¹ P. Hamerník (2009): op. cit., pp. 482-483.

4. Sporting nationality in the light of European Union law

This chapter divides rules governing athletes' eligibility in their national teams into three groups according to the future attitude of the CJEU to these rules, which might be expected towards the background of its current case law. This division reflects the practice of the CJEU in assessing the compliance of certain rules with EU law provisions in the field of the internal market. Under this test, the CJEU first looks at whether a rule falls within the scope of the concrete freedom. If the CJEU responds in the affirmative, it then considers whether this rule constitutes a restriction to the freedom. If so, the question of justification and proportionality is examined as a final step before deciding on potential compliance of the rule with EU law.²¹² The Court of Justice showed in *Meca-Medina & Majcen* that it is willing to apply the same test while assessing the compliance of sporting rules with EU law provisions concerning competition.²¹³

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

4.1. Sporting rules that fall outside the scope of European Union law

The first group contains sporting rules that do not fall under the scope of EU law. Regarding these rules, international sporting governing bodies are free to establish respective criteria, at least from EU law perspective. The authors of the Study on the equal treatment of non-nationals in individual sports competitions claim that only those sporting rules having “no or a merely marginal or in any event clearly subordinate or

²¹² See in general C. Barnard (2013): op. cit., pp. 229-576.

²¹³ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraphs 22-56; see also S. Weatherill, “Anti-doping Revisited: The Demise of the Rule of “Purely Sporting Interest”?” in S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (2014, T.M.C. Asser Press), pp. 379-399.

secondary economic impact or effect” are likely to fall under the purely sporting rules exception after *Meca-Medina & Majcen*.²¹⁴ The category of sporting rules called “rules of the game” is a good example of rules that can still be regarded as purely sporting and thus falling outside the scope of EU law.²¹⁵ It is difficult to imagine a rule governing swimmers’ turnover position during a medley competition²¹⁶ or a rule enumerating fouls for which a yellow card is awarded in football matches to have such a strong economic impact or effect to fall under the decision-making scrutiny of EU judicial authorities. Sports federations and their bodies are the most competent in establishing technical rules determining form of a game or a competition and should keep their regulatory autonomy when setting these rules up.²¹⁷

It is submitted, however, that basically all rules governing athletes’ eligibility in their national teams have an economic impact, are not of a purely sporting nature anymore and thus fall within the scope of EU law. J. Paul McCutcheon submits that “[i]n some circumstances money is the predominant consideration underlying national representation especially where international fees represent the bulk of an athletes’ income.”²¹⁸ Moreover, eligibility rules often determine “the conditions under which athletes are permitted to pursue their livelihoods.”²¹⁹ In this respect, Stefaan Van den Bogaert calls for a better legal explanation for the Court of Justice’s receptiveness in the context of sporting rules governing matches between national teams.²²⁰ Since in practice, purely sporting and economic elements of sporting rules are hardly differentiable to automatically conclude on the inapplicability of EU law to these rules,

²¹⁴ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228.

²¹⁵ *Ibid.*: 228.

²¹⁶ The US swimmer Ryan Lochte might not have the same opinion. In the 200 meters individual medley final at the 2015 World Aquatics Championships in Kazan, Russia, he used a new turn technique when he pushed off on his back and kicked underwater for ten meters. He then surfaced and swam what is commonly known as freestyle. Though not illegal in freestyle-only races, officials discussed the possibility of disqualifying Lochte in the 200 meters individual medley race when he pushed off on his back to start the freestyle leg. Lochte was finally not disqualified and therefore won his fourth-straight World title in this discipline. Fédération internationale de natation (FINA) later made this new turn illegal in individual medley races. If Lochte were disqualified, he would be also deprived of the gold medal and related prize money and the sporting rule in questions would have an economic impact on him (“FINA Officially Makes “Ryan Lochte Turn” Illegal In IM Races”, *Swimming World*, 8 September 2015, retrieved 10 April 2016).

²¹⁷ J. Exner (2013): *op. cit.*, p.1039.

²¹⁸ J. P. McCutcheon (2001): *op. cit.*, p. 123.

²¹⁹ *Ibid.*, p. 133.

²²⁰ S.C.G. Van den Bogaert (2005): *op. cit.*, p. 455.

it is in my opinion more suitable to take the purely sporting nature of a rule into consideration when justifying a potential restriction to EU law rather than to automatically exclude the rule from the material scope of EU law.

The Court of Justice seemingly reflected today's economic reality of international competitions in its *Meca-Medina & Majcen* judgment when it partially overruled its case law on the application of EU law to sporting rules and practically dismantled the purely sporting rules exception.²²¹ In this ground-breaking judgment, the Court of Justice decided 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.”²²² Therefore, the Court of Justice broadened the group of sporting rules which are subject to EU law scrutiny.

The borderline between the absolute regulatory autonomy of international sporting governing bodies and situations in which they must reflect EU law requirements can be *mutatis mutandis* drawn by using the analogy of EU citizenship. In *Rottmann*, the Court of Justice held that, even though Member States have the exclusive competence to lay down the conditions for the acquisition and loss of nationality,²²³ the national rules concerned must have due regard to EU law in situations falling within its material scope.²²⁴ In the same way, it is primarily for each international sporting governing body to set up rules governing athletes' eligibility in national teams. On the other hand, since their rules have an economic impact or effect and influence rights that athletes derive from EU law, these rules fall within the scope of EU law and international sports federation must have due regard to EU law.

As will be further discussed, the purely sporting nature of sporting nationality rules should be reflected in the subsequent phase of the CJEU's test of compatibility of certain rule with EU law when the CJEU justifies a restriction to respective EU law

²²¹ Y. Hafner (2012): op. cit., 232.

²²² Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 27.

²²³ Case C-135/08, *Rottmann*, [2010] EU:C:2010:104, paragraph 39.

²²⁴ *Ibid.*, paragraph 41. In the paragraph 42 of this judgment, the Court of Justice rules that: “It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.

provisions. The Court of Justice itself ruled that, since it is difficult to sever the economic aspects from the sporting aspects of a sport, “the provisions of [EU law] concerning freedoms of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events”.²²⁵ Such a restriction on the scope of the Treaty provisions must however remain limited to its proper objective, and cannot therefore be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.²²⁶

4.2. Sporting nationality rules which fall within the scope of European Union law, constitute a restriction to European Union law but may be justified and proportionate

A second group of sporting rules contains rules governing athletes’ eligibility in their national teams, which fall within the scope of EU law, constitute a restriction to EU law provisions regarding the prohibition of discrimination in the fields of EU citizenship, free movement rules and competition, but may be eventually justified. Rules governing the election of sporting nationality and waiting periods are presented as examples of rules falling into this group.

The concept of a restriction or an obstacle to EU law is very broad. Pursuant to internal market freedoms, EU citizens have in particular the right that they derive directly from the Treaties, to leave their Member State of origin to enter the territory of another Member State and reside there freely in order to pursue an economic activity.²²⁷ Therefore, any rule or provision that precludes or at least deters an EU citizen from exercising his right to free movement constitutes an obstacle to EU law.²²⁸

²²⁵ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 26; see also Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, paragraphs 14 and 15.

²²⁶ See, *inter alia*, Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 76; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 227.

²²⁷ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 95; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 228.

²²⁸ On derogations, limitations, conditions and justifications of free movement of persons, see, in general C. Barnard (2013): *op. cit.*, p. 496-537.

Selection rules or anti-doping regulation are examples of sporting rules setting an obstacle to athletes' rights under EU law that can be found in the case law of the Court of Justice. In *Deliège*, despite of finally concluding on the compliance of the contested selection rules with EU law for their inherence in the conduct of an international high-level sports event, the Court of Justice nevertheless stated that these rules "inevitably have the effect of limiting the number of participants in a tournament."²²⁹ In *Meca-Medina & Majcen*, the Court of Justice did not declare the contested anti-doping rules contrary to EU competition law, but it still recognized on several places in the judgment that these rules had ancillary effects that restricted competition.²³⁰

It is argued that, when it comes to limitations of athletes' actions, the questions of inherence, objectives and context of sporting rules, as well as their proportionality and other criteria set out by the Court of Justice in *Wouters*²³¹, should rather be examined as a matter of justification of these limitations rather than a question of existence of such a restriction, no matter how small the restriction is. At this point, I do not agree with the findings of the authors of the Study on the equal treatment of non-nationals in individual sports competitions who see this questions rather as the phase of the test during which the CJEU would examine whether a restriction to EU law exists or not.²³²

I believe that it is more convenient to concentrate rather on a much broader and much more complex question of justification of a restriction limiting athletes' rights under EU law rather than on existence or nonexistence of the restriction. For the sake of legal certainty, I believe that the Court of Justice's judgments' structure should be a little clearer in the way it expresses the shape of the three steps test (scope, restriction, justification) in order to prevent ambiguity in sorting individual criteria into one of the test's categories. From my point of view, it is nowadays very difficult or rather practically impossible to imagine a rule governing sporting nationality that does not in any way restrict an athlete – EU citizen's right under EU law to run his or her business

²²⁹ Joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199, paragraph 64.

²³⁰ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraphs 47, 54.

²³¹ Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.

²³² Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 228, 229.

freely in a Member State different from the one of her/his origin. I will further work with these rules focusing on their justification and proportionality.

I advocate the approach of focusing on justification and proportionality rather than on the question of factual existence or nonexistence of a restriction to EU law despite of the decreased level of legal certainty, which is necessarily connected to this attitude. I agree that the assumption, according to which any rule or provision that precludes or at least deters an EU citizen from exercising his rights under EU law constitutes a restriction, practically dismisses measures that are not perceived as a restriction to EU law. On the other hand, the sports-related judgments of the CJEU dedicate far more arguments and paragraphs to the instructions how to justify a restriction compared to the space devoted to the question of existence or non-existence of a restriction. While the CJEU often only briefly discusses the character of a restriction in not many paragraphs, it often dedicates a majority of its judgment to the questions of justifications and proportionality.²³³ Therefore, legal certainty of international sporting governing bodies contrarily increases in this respect since these bodies have much more detailed direction how to set their rules in order to successfully pass the final phase of the three steps test.

At this point, I would also like to correct my previous opinion regarding the division of rules governing athletes' eligibility in national teams from the EU law point of view. I originally, following the division proposed by the authors of the aforementioned Study on the equal treatment of non-nationals in individual sports competitions²³⁴ or Yann Hafner²³⁵, also worked with a group of sporting rules that fall within the scope of EU law but do not constitute a restriction to athletes' rights under EU law and I placed rules excluding foreign nationals of representative team rosters into

²³³ See *inter alia* Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201. First, the Court of Justice assesses whether Mr Lehtonen and respective basketball rules fall within the scope of EU law (paragraphs 32-46). Thereafter, the existence of an obstacle to freedom of movement for workers is examined (paragraphs 47-50). Finally, the Court of Justice engages in exploring whether such a restriction can be justified (paragraphs 51-59); see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143: scope (paragraphs 27-32), restriction (paragraphs 33-37), justification (paragraphs 38-50); Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492: scope (paragraphs 22-34), restriction (45,54), justification (41-56).

²³⁴ Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010).

²³⁵ Y. Hafner (2012): op. cit.

that group.²³⁶ In this master's thesis, I situate these rules into this second category since I believe that they constitute a restriction to EU law, which may be eventually justified.

The manual to pass the CJEU's test of the compliance of rules governing sporting nationality with EU law leans on three key words – objective, inherence and proportionality. In this regards, the Court of Justice provided a sporting community with a useful tool in its doping related judgment in *Meca-Medina & Majcen* while applying to the specific field of sport general principles set out in the *Wouters* case, which related to the regulation of the exercise of the profession of advocates in the Netherlands. Dealing with the contested anti-doping regulation in the light of EU competition law, the Court of Justice decided in *Meca-Medina & Majcen* that “account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produced its effects and more specifically, of its objectives.”²³⁷ According to the Court of Justice, the question then shifts to the evaluation “whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.”²³⁸ When assessing these criteria in the field of sporting rules, the Court of Justice's task is to balance individual interests of athletes with the general interest protected by international sporting governing bodies.²³⁹

In this respect, I will further follow and discuss in detail two rules governing sporting nationality proposed by Yann Hafner, which deserve further attention as to their compliance with the *Wouters* criteria: rules governing the election of sporting nationality (4.2.1) and waiting periods (4.2.2).²⁴⁰

4.2.1 Rules governing the election of sporting nationality

According to rules that govern the election of sporting nationality, an athlete is no longer eligible to be selected by any national team once he was previously selected

²³⁶ J. Exner (2013): op. cit., p. 1039.

²³⁷ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, paragraph 42; see also Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98, paragraph 97.

²³⁸ Ibid.

²³⁹ P. Gillon, R. Poli, “La Naturalisation de sportifs et fuite des muscles. Le cas de Jeux Olympiques de 2004” in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 47-72.

²⁴⁰ Y. Hafner (2012): op. cit., pp. 233-234.

by another national team.²⁴¹ An example can be drawn from the aforementioned football player Adnan Januzaj who opted for Belgium and who thus can no longer play for other national teams at international level.²⁴² The same ratio applies to the eligibility of athletes in the Olympic Games. The Olympic Charter provides that “[a] competitor who is a national of two or more countries at the same time may represent either one of them, as he may select.”²⁴³ Generally speaking, “[...] dual sporting nationality is not accepted”.²⁴⁴ Those athletes who possess dual nationality according to respective national laws must choose only one country that they wish to represent in international competitions.²⁴⁵

An interesting case of the election of sporting nationality is presented in the Olympic Charter for the purpose of the Olympic Games aiming at the situation in which “[...] an associated State, province or overseas department, a country or colony acquires independence, [...] a country becomes incorporated within another country by reason of a change of border, [...] a country merges with another country, or [...] a new [national Olympic committee] is recognised by the IOC [...]”²⁴⁶ In such a case, an athlete may continue to represent the country to which he belongs or belonged. However, he may elect to represent his country or be entered in the Olympic Games by his new national Olympic committee if one exists. This particular choice may be made only once.²⁴⁷

Even though rules governing the election of sporting nationality formally restrict EU citizens’ rights by preventing them from being eligible to represent more countries in one moment, they simultaneously seek a logic and legitimate objective of “the regularity and integrity of international competitions.”²⁴⁸ Rules governing the election of a single sporting nationality also seek to safeguard “the principle of continuity of

²⁴¹ CAS 2001/A/357, *Nabokov & Russian Olympic Committee (ROC) & Russian Ice Hockey Federation (RIHF) / International Ice Hockey Federation (IIHF)*, [2002]; M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 2001 – 2003*, (Kluwer Law International, 2004), p. 503; see also Y. Hafner (2012): op. cit., p. 233.

²⁴² „Explained: Why Manchester United’s Adnan Januzaj can’t play for England“, *STV Sport*, 6 October 2013, retrieved 10 April 2016; „Belgium 1-0 Tunisia: Adnan Januzaj wins his first cap in hailstorm delayed victory... but Romelu Lukaku limps off with injury“, *Daily Mail*, 7 June 2014, retrieved 10 April 2016.

²⁴³ Olympic Charter (2015), bye-law to rule 41, 1.

²⁴⁴ Y. Hafner (2008): op. cit., p. 2.

²⁴⁵ Ibid.

²⁴⁶ Olympic Charter (2015), bye-law to rule 41, 3.

²⁴⁷ Olympic Charter (2015), bye-law to rule 41, 3.

²⁴⁸ A. Goetschy, *La nationalité sportive. Eléments pour une étude du droit applicable à l’éligibilité des athlètes en équipe nationale représentative*, (S.I., 2007), No. 88, p. 56.

competitions and ability to compare the performance amongst competitors.²⁴⁹ Furthermore, the CAS holds the opinion that athletes may have only one sporting nationality at a time and that the election of sporting nationality is a legitimate mechanism to prevent athletes having dual nationality to change their eligibility at their own convenience.²⁵⁰

Rules that require an athlete to have a single sporting nationality at a time are, in my opinion, inherent to the proper conduct of international sporting competitions. Without these rules, international sport would lose its character, purpose and magic. Sport is not only about excellence and aiming high, but also about identity to a group or a society. Article 165 TFEU mentions “the specific nature of sport, its structures based on voluntary activity and its social and educational function.” Even the Court of Justice recognized “the considerable social importance of sporting activities.”²⁵¹ As the Commissioner for Education, Culture, Youth and Sport Tibor Navracsics puts it: „Of course sport is about having fun, being healthy and feeling good about yourself. But it is also about something much bigger. Sport and physical activity bring people from different backgrounds together, helping to create friendships and building communities.”²⁵²

The development of modern sporting practice has had influence even on the structuring of the idea of the nation, the most important of all communities.²⁵³ In this respect, sport can be seen as forming part of national identity of Member States. The European Commission acknowledged in the European Model of Sport that international competitions are a tradition in Europe since “[n]ational teams are seen as representing a nation.”²⁵⁴ The European Commission goes even further and reiterates that sport is one of the last national passions in Europe and that a psychological need exists to confront

²⁴⁹ P. Collomb, “Qu’est-ce qu’une équipe nationale?” in M. Maisonneuve (Ed.), *Droit et Coupe du monde* (Economica, 2011), p. 56.

²⁵⁰ CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (2008): op. cit., p. 304.

²⁵¹ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, paragraph 106; see also Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143, paragraph 39.

²⁵² „Building communities: the role of sport“, speech of Tibor Navracsics, Commissioner for Education, Culture, Youth and Sport, Brussels, 9 September 2015.

²⁵³ F. Archambault, L. Artiaga, “Les significations et les dimensions sociales du sport” (2004) *Sport et société*, Cahiers français, n°320, 2004, p. 38.

²⁵⁴ The European Model of Sport, Consultation document of DG X, (Brussels: European Commission, 1998): 5.

each another. Sport is a way of doing this without bloodshed. International competitions are an opportunity for Member States to demonstrate their culture and tradition, thus safeguarding the cultural diversity, which is one of the characteristics of Europe.²⁵⁵

The social importance of sport certainly applies to athletes who pursue the idea of fair-play together with their rivals and who feel united with their teammates under one national flag fighting for the glory of their countries. Moreover, sporting community also connects passionate fans and other people feeling national pride and cheering for their representative teams.²⁵⁶ It is clear that if an athlete could wear a national jersey of more national teams at a time, sport would lose a substantial part of its social importance. In the light of the foregoing, I conclude that the election of a single sporting nationality is inherent in international sports. Setting up a rule requiring from an athlete to be eligible to play at a time only for one national team is, in my opinion, logical and proportionate to its objectives since I cannot see any comparable measure that would achieve the set objectives with the same intensity and would be at the same time less restrictive to EU citizens' rights.

4.2.2 Waiting periods

Rules imposing waiting periods are another example of sporting nationality rules, which fall within the material scope of EU law, which ordinarily constitute a restriction to such provisions, but which may be eventually justified. Waiting periods (otherwise called also cooling-offs periods²⁵⁷, non-competition periods²⁵⁸ or periods of inactivity²⁵⁹) belong to the sporting rules that have not been scrutinized by the CJEU yet.²⁶⁰

²⁵⁵ Ibid.

²⁵⁶ At this point, I dare one personal remark. In the Czech Republic, sport in general, and ice hockey in particular, are tools that bring the Czech nation together. Every year in May, the crowd that fills the whole Old Town Square in Prague cheers for the Czech national team in its pursuit of the World title at the IIHF World Championships. At that time, every Czech is proud of the Czech Republic and feels truly "Czech", which cannot be unfortunately said about the national pride of Czechs in general. In other words, the Czech Republic is a good example of a country where sport fulfils its social role and helps in creating a national identity.

²⁵⁷ Y. Hafner (2012): op. cit., p. 234.

²⁵⁸ A. S. Wollmann, O. Vonk, G. R. de Groot (2015): op. cit., p. 318.

²⁵⁹ Y. Hafner (2008), op. cit., p. 1.

²⁶⁰ J. Guillaumé (2011): op. cit., pp. 313-336.

Under waiting periods, an athlete who has represented one country in international competitions recognized by the relevant international federations, and who has changed his nationality or acquired a new nationality, may participate in international competitions to represent their new country provided that certain period of time has passed since the competitor last represented their former country. Waiting periods do not constitute a sanction and they only limit athletes in competing in international competitions. However, since “money is the predominant consideration underlying national representation especially where international fees represent the bulk of an athlete’s income”,²⁶¹ waiting periods restrict an athlete’s rights under EU law by limiting the possibility to run their business in other Member States for some time.

Rules governing waiting periods seek a legitimate objective and are inherent to the functioning of international sports scene. These rules prevent athletes from changing their eligibility in national teams at their own convenience. At the same time, they help to monitor athletes’ naturalisations.²⁶² Equally, they prevent “muscle drain” from one country to another one.²⁶³ To sum it up, these rules protect the regularity and fairness of international competitions thus protecting their integrity.²⁶⁴ Clearly, if an athlete were allowed to compete one year for Germany, the following year for the Czech Republic and the third year for France, international competitions would certainly lose their integrity. In the light of the foregoing, the objectives protected by waiting periods seem legitimate and inherent to the proper conduct of international competitions.²⁶⁵

The match for the compliance of rules imposing waiting periods with EU law must be decided through the test of proportionality. In this respect, I believe that the length of cooling-offs periods, as well as some related conditions, represents the crucial issue. In the following paragraphs, I will show that the relatively frequently used waiting periods of two or sometimes even three years, depending on related conditions, comply with the requirement of proportionality in respect to the legitimate objectives that they seek. On the other hand, I believe that cooling-offs periods of four or more

²⁶¹ J. P. McCutcheon (2001): *op. cit.*, p. 123.

²⁶² J. A. R. Nafziger (2004): *op. cit.*, p. 133.

²⁶³ R. Siekmann (2011): *op. cit.*, pp. 241-268.

²⁶⁴ IIHF Statutes and Bylaws (2014), rule 406; Y. Hafner (2012): *op. cit.*, p. 234.

²⁶⁵ To this end see also J. Exner, “Čekací lhůty v ledním hokeji versus právo EU” (2013), *Jiné právo [online]*, 25 November 2013.

years go beyond what is necessary in order to protect the integrity of international competitions are thus void under EU law.

Waiting periods, which differ from one sport to another, generally range from periods of one to four years.²⁶⁶ A general cooling-off period set for the Olympic Games is three years. In this regard, the Olympic Charter states that “[a] competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant [international federation], and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country.”²⁶⁷ With regard to the Olympic Games, a three year waiting period is also often confirmed in respective international federations’ regulation.²⁶⁸

In this respect, Stefaan Van den Bogaert claims that “the relatively frequently used waiting period of three years appears to be excessive” compared to the duration of a sporting career.²⁶⁹ I believe, however, that the Olympic waiting period of three years is not in itself excessive. Summer and Winter Olympic are held at four year intervals and this rule therefore allows an athlete to participate in next Olympics provided that they change their sporting nationality within one year of the end of the previous Games. The real problem comes, in my opinion, with some international sports federations imposing cooling-off periods, which must be respected even with regard to the Olympics and amount therefore to another condition of Olympic eligibility.

Regarding international sporting governing bodies, the International Ice Hockey Federation (IIHF) and the International Table Tennis Federation (ITTF) represent examples of federations, which impose, in my opinion, an excessive and therefore disproportionate waiting periods. The IIHF Statutes and Bylaws allows a player who “has represented a country in any IIHF championship, or in the Olympic competition or in the qualification to these competitions [...] to represent another country” under the

²⁶⁶ M. Lajous (2012): op. cit., p. 296.

²⁶⁷ Olympic Charter (2015), Bye-law to rule 41, 2. This provision further provides that “[t]his period may be reduced or even cancelled, with the agreement of the [national Olympic committees] and [international federations] concerned, by the IOC Executive Board, which takes into account the circumstances of each case.

²⁶⁸ See, for example, World Rugby Regulations (2016), Regulation 8, rule 8.10.

²⁶⁹ S.C.G. Van den Bogaert (2005), pp. 358.

following cumulative conditions: a) he is a citizen of that country; b) he has an international transfer that was approved by the IIHF and dated at least four years before the start of the IIHF competition in which he wishes to participate; c) he has participated, on a consistent basis, for at least four consecutive years (1460 days) in the national competitions of his new country during which period he has neither transferred to another country nor played ice hockey for a team registered/located within any other country; and d) he has not played for his previous country in an IIHF competition either during this four year period or between completion of this four-year period and the start of the IIHF championship he wishes to compete.²⁷⁰

Even though the aforementioned general Olympic period is set at three years, the combination with the IIHF regulations exclude an ice hockey player who has changed his sporting nationality from the whole Olympic cycle and he must therefore wait, in extreme cases, for eight years before he can represent his new country in the Olympics. What is more, the IIHF World Championships and other international competitions are held regularly with a maximum one-year period. In the light of the aforementioned, it seems to me unjust and disproportionate to prevent a player who has modified his sporting nationality from playing for his national team for four consecutive years.

Eligibility rules in general and ineligibility periods in particular are imposed in order to ensure that athletes have “a genuine, close, credible and established national link with the country [...] for which they have been selected.”²⁷¹ However, taking into consideration the character of the Olympic as the top of athletes’ efforts, I agree with Yann Hafner that this long ban rather discourages players from modifying their eligibility rather than to confirm and strengthen the genuine link to their country of representation.²⁷²

The ITTF amounts to another, in this case even more extreme example of an international federation the rules of which, in my opinion, breach EU law. General ineligibility period of three years²⁷³ is not as such disproportionate regarding the aim to

²⁷⁰ IIHF Statutes and Bylaws (2014), rule 406.1.3.

²⁷¹ World Rugby Regulations (2016), Explanatory guidelines on the implementation of regulation 8, Eligibility to play for national representative teams, explanation 1.

²⁷² “Change of nationalities: the case of Table Tennis” (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3.

²⁷³ ITTF Handbook (2016), rule 3.08.05: “A player shall not represent different Associations within a period of 3 years.”

prevent players being only mercenaries without any genuine link with their country of representation. However, the ITTF imposes progressive waiting periods on younger athletes who wish to modify their sporting nationality. They are excluded from international competitions for the period of three, five or seven years depending on their age in the moment of their registration.²⁷⁴ The least serious three-years waiting period applies to players under the age of 15 at the moment of their registration.²⁷⁵ These players are therefore excluded from international competitions for three years in a period of their sporting growth, during which they often decide whether to practice table tennis at a top level in the future. I can imagine that such exclusion rather discourages them from playing table tennis than waiting for three years before they get another chance. Let's imagine an example of a 14-year-old player who has already played for his former country in a regional championships and who has changed his nationality for genuine family reasons. It is neither fair nor reasonable to make him the subject of such a ban. All these reasons lead me to the conclusion that in this particular case, even a three year waiting period is excessive. Five and seven year long cooling-off periods clearly go, in my opinion, beyond what is necessary to protect the proper conduct of international competitions.

At this point, the question arises about the need to unify waiting periods throughout the sporting world in order to ensure compliance with law and prevent discrimination amongst athletes with different sporting nationalities practicing different sports. Diverse international sporting governing bodies have divergent attitudes eligibility rules that also include waiting periods.²⁷⁶ There is no unique duration of waiting periods imposed by the Olympic Movement on international federations with binding effect and even less there is no common level playing field among international sporting governing bodies. This implies that athletes having the same sporting nationality are subjects to different waiting periods depending on a sport they compete in.²⁷⁷

²⁷⁴ ITTF Handbook (2016), rules 4.01.03.03.01, 4.02.03.05, 4.03.06.02.01, 4.04.06.02.01, 4.05.01.03.03, 4.06.01.03.03, 4.01.03.03.02, 4.03.06.02.02, 4.04.06.02.02, 4.01.03.03.03, 4.03.06.02.03, 4.04.06.02.03.

²⁷⁵ ITTF Handbook (2016), rule 4.01.03.03.01.

²⁷⁶ A. S. Wollmann, O. Vonk, G. R. de Groot (2015): *op. cit.*, p. 305-306.

²⁷⁷ Y. Hafner (2012): *op. cit.*, pp. 233-234.

The basic discrimination assumption must be taken into account in the discussion about possible ways to deal with problems caused by different regulations imposed by different international sporting governing bodies. In this respect, “comparable situation must not be treated differently and [...] different situations must not be treated in the same way.”²⁷⁸ In other words, to discriminate means to “make an unjust and prejudicial distinction in the treatment of different categories of people” on various grounds.²⁷⁹ All in all, prohibition of discrimination seeks to prevent acts or omissions in which one person is treated less favourably than another person in a comparable situation.²⁸⁰ It is difficult to think about a system that would meet in all of its aspects all requirements of the prohibition of discrimination. Therefore, even though the solutions proposed below are not ideal, it is in my opinion useful to address them in order to encourage a global discussion on this topic.

I am of the opinion that unique and harmonized short waiting periods would be the best solution out of all options seeking to prevent problems caused by divergences between different international sporting governing bodies’ regulations regarding cooling-offs periods. I firstly thought about the possibility of a case-by-case assessment regarding the average length of an athlete’s career, which could be the decisive criteria to be assessed when an international sporting governing body imposes a waiting period. Athletes in different sports have careers of different duration. This solution would therefore allow to take into consideration the specificities and different characteristics of diverse sports. On the other hand, this proposal would once again treat athletes in different sports differently. Moreover, it would require each international federation to have well-founded and justified statistics taking into account wide and complex data in a particular sport.

Since the system based on the average length of athletes’ career in different sport would still be discriminatory, technically very difficult to set up and since other

²⁷⁸ Case C-148/02, *Garcia Avello*, [2003] ECLI:EU:C:2003:539.

²⁷⁹ Definition of discrimination, Oxford Dictionaries, Oxford University, retrieved 10 April 2016: <http://www.oxforddictionaries.com/definition/english/discrimination>.

²⁸⁰ On the general definition of discrimination, see also the Universal Declaration of Human Rights (1948), Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

controversies could arise as to the methodology and form of statistics, unique waiting periods seem a more suitable, although not a perfect solution. Authors calling for harmonization of waiting periods²⁸¹ argue that a short and mandatory waiting period would ensure greater consistency and subsequent equality of treatment among athletes.²⁸² However, this equality would be only partial, since athletes in sports with a shorter average length of career, as for example gymnastics, would perceive unique waiting periods as unfair in comparison to athletes in other sports where athletes compete, on average, for a longer period of time.

Moreover, it is nowadays hardly imaginable that international sporting governing bodies throughout the World would easily agree on one common period of ineligibility. Even though I actually perceive the “harmonised” option as slightly more suitable solution, it is incumbent upon international sporting governing bodies to gather together, for example at the occasion of the Olympics, to discuss this issue and to try to find a common position that would enable the sporting World to more easily face the challenged connected to the prohibition of discrimination.

4.3. Sporting nationality rules that constitute an unjustifiable and disproportionate restriction to European Union law

This last group of rules governing athletes’ eligibility in national teams contains those rules that are not compatible with EU since they fall within its scope and constitute a restriction that cannot be justified under EU law. Regarding sporting rules in general, the *Bosman* case is the most famous example of the Court of Justice’s condemnation of sporting regulations. In this judgment, the Court of Justice held the long-standing transfer rules and the “3+2” nationality clauses in professional football incompatible with EU law for violating the free movement for workers. Thanks to this decision, professional football players are entitled to move to another club after the expiry of the contract with their club of affiliation without any compensation being due

²⁸¹ See, inter alia, Cruz Blanco, Dewaele, *Sporting Nationality Conflicts: Towards Harmonization?* (S.I., 2004-2005), p. 58.

²⁸² Y. Hafner (2012): op. cit., p. 234.

to the former club. Regarding the “3+2” nationality clauses in sport, they are no longer applicable to EU citizens.²⁸³

An earthquake similar to the one that struck European football after the *Bosman* ruling might as well affect other sports since some international federations keep their rules governing athletes’ eligibility in national teams, which go beyond what is necessary for the proper conduct of a sport and are therefore non-compliant with EU law. Quotas of naturalized athletes (4.3.1) and rules absolutely preventing athletes from changing their sporting nationality (4.3.2) fall under this category of EU law breaching rules. Many authors throughout the World agree that these rules and related practices of international sporting governing bodies do not comply with EU law since they provide for an unjustifiable restriction to athletes’ rights under EU law.²⁸⁴

4.3.1 Quotas of naturalized athletes

Rules concerning quotas of naturalized athletes limit the number of players in national teams who have acquired legal nationality by naturalization and/or who have previously played for another national team. In general, sporting governing bodies that regulate team sports have a stricter approach to rules setting up quotas of naturalised athletes in comparison to individual sports.²⁸⁵ Yann Hafner submits that the difference in these approaches might be explained by a closer link of team sports to national sentiment. “This is observed by the playing of national anthems prior to competition.”²⁸⁶ In extremis, the decision of athletes to change their sporting nationality can be perceived as treason. Yann Hafner uses the example of the basketball player Becky Hammon who, originally from the United States of America, opted for Russian

²⁸³ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463; see also Study on the equal treatment of non-nationals in individual sports competitions, (Brussel: European Commission, 2010): 231.

²⁸⁴ Y. Hafner (2012): op. cit., p. 235; Y. Hafner, “La qualification des joueurs en équipe représentative au regard de la réglementation de la FIFA : le cas de la Coupe du Monde 2010” (2010) Jusletter, 1-12; F. Latty, *La lex sportiva. Recherche sur le droit transnational* (Martinus Nijhoff Publishers, 2007), p. 684; A. M. Mestre (2009): op. cit., p. 78; D. Oswald, Y. Hafner, “Les limites du pouvoir réglementaires des fédérations internationales en matière de nationalité sportive : la jurisprudence Auer” (2008) Sport et Citoyenneté, Number 3, 18-19.

²⁸⁵ Y. Hafner (2008): op. cit., p. 1.

²⁸⁶ Ibid.

nationality, and who represented her new country at the Beijing Olympics. Her conduct was criticized by American media and sports officials as traitorous.²⁸⁷

Basketball and volleyball are two sports in which quotas of naturalized athletes are applied. The FIBA's Internal Regulations provide that a national team participating in a competition recognized by the FIBA may have "only one player on its team who has acquired the legal nationality of that country by naturalization or by any other means after having reached the age of sixteen [...]."²⁸⁸ In a similar way, the Sports Regulations of the International Volleyball Federation (FIVB) state that "[o]nly one player having previously played for another national team of the same age category can be part of a team, for a given event."²⁸⁹ In this respect, quotas of naturalized athletes clearly restrict athletes' rights under EU law.

My argumentation further follows two lines. The first one considers whether the CJEU's case law prohibiting discrimination on grounds of the time at which or the manner in which EU citizens acquired their nationality can be applied to rules governing athletes' eligibility in national teams. The positive answer to this question, which requires legal and sporting nationality to overlap, would be fatal for rules imposing quotas of naturalized athletes. The second line of argumentation examines whether these sporting rules constituting restriction to athletes' rights under EU law can be justified in the light of the elements of context, objectives, inherence and proportionality extracted by the Court of Justice in *Meca-Medina & Majcen*.

Starting with the first line, it is useful to look at the findings of the Court of Justice's judgment in *Auer*, which provides an interesting point of reflection regarding quotas of naturalized athletes. In *Auer*, the Court of Justice held that "[t]here is no provision of the Treaty which, within the field of application of the Treaty, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of the state, as long as, at the time at which they rely on the benefit of the provision of community law, they possess the nationality of one of the Member State and that, in addition, the other conditions for the

²⁸⁷ Ibid., p. 2.

²⁸⁸ FIBA Internal Regulations (2014), Article 3.21.a.

²⁸⁹ FIVB Sports Regulations (2015), Article 41.2.1.

application of the rule on which they rely are fulfilled.”²⁹⁰ It is likely that the CJEU holds quotas of naturalized athletes incompatible with EU law if it applies the criteria set out in *Auer* to them.²⁹¹ The question is whether the concepts of legal and sporting nationality overlap.

The CAS is of the opinion that legal nationality and sporting nationality constitute two different concepts.²⁹² The majority of scholars, including for example Jean-Philippe Dubey²⁹³ or Stefaan Van den Bogaert²⁹⁴, advocate the same view.²⁹⁵ According to the CAS, legal nationality represents “the personal status deriving from citizenship of one or more states”²⁹⁶ while sporting nationality is a “uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competitions.”²⁹⁷ Be it as it may, legal nationality or citizenship are used as the basic criteria of the constitution of sporting nationality in rules of many international sporting governing bodies, namely the FIBA and the FIVB.²⁹⁸ On the other hand Austrian and French courts refuse to accept the distinction between legal and sporting nationalities since they uphold athletes’ claims based on the overlap of these two concepts.²⁹⁹ I believe that if legal and sporting nationality overlap, as is the case of the FIBA and the FIVB, the *Auer* line of case-law is applicable to their rules governing athletes’ eligibility in national teams. If so, these regulations would need to survive the CJEU’s proportionality test, which, as will be further discussed, is hardly imaginable.

²⁹⁰ Case C-136/78, *Ministère public v. Auer*, [1979] EU:C:1979:34, paragraph. 28.

²⁹¹ Y. Hafner (2012): op. cit., p. 235.

²⁹² CAS 98/2009, *Spanish Basketball Federation (FEB) / International Basketball Federation (FIBA)*, [1999], M. Reeb (Ed.) (2002): op. cit., p. 503; CAS 98/215, *International Baseball Association (IBA)*, Advisory Opinion, [1999], M. Reeb (Ed.) (2002): op. cit., p. 701, M. Reeb, “La nationalité dans la jurisprudence du TAS” in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 206, pp. 83-136.

²⁹³ J.-P. Dubey (2000): op. cit., pp. 631, J.-P. Dubey (2006): op. cit., pp. 31-45.

²⁹⁴ S.C.G. Van den Bogaert (2005): op. cit., pp. 448.

²⁹⁵ D. Oswald, Y. Hafner (2008): op. cit., p. 18.

²⁹⁶ Ibid.

²⁹⁷ CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998): op. cit., p. 304. Y. Hafner (2012): op. cit., p. 216.

²⁹⁸ See for example FIVB Sports Regulations (2015), Article 41.1, FIBA Internal Regulations (2014), book 3, chapter 1, Article 15.

²⁹⁹ Conseil d’Etat, Number 101894, *Olympique d’Antibes Juan-les-Pins c. Fédération Française de Basket-ball*, [1989]; OGH, 20b232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

In the second line of my argumentation, I submit that even if the CJEU did not apply its findings from *Auer* to quotas of naturalized athletes, these rules would anyway not survive the CJEU's test of the compliance with EU law having regard to their context, objectives, inherence and proportionality. I do not contest that these rules follow a legitimate objective. Through their application, international sporting governing bodies seek "the homogeneous nature, regularity and the interest of the international competitions they organise."³⁰⁰ The goal of the aforementioned rules is to "prohibit on the one hand that certain States that wish to promote themselves on the international scene naturalise large numbers of athletes in order to achieve their desired recognition, and on the other hand, that athletes comporting themselves as mercenaries participate in international competitions representing countries with which they have no objective link."³⁰¹

Even though quotas of naturalized athletes might seek to protect the integrity of international competitions, these rules are in my opinion neither inherent in the proper conduct of international competitions nor necessary and proportionate. The aforementioned FIBA rule applies also "to any player having the right to acquire a second nationality at birth but who did not lay claim to this right until after having reached the age of sixteen."³⁰² However, it is possible that an athlete loses his previous legal nationality or changes it for another,³⁰³ for example in the case of marriage or naturalization. Nowadays, many States do not recognize double nationality. Therefore, these rules then exclude from all participation in international competitions the athlete who has changed his or her nationality.³⁰⁴ Moreover, Yann Hafner points out that this rule affects also, for example, a player who has never represented another country in international competitions.³⁰⁵ Even more curiously, this example can concern, for instance, a minor whose legal nationality changed as a consequence of the change of legal nationality of its parents.³⁰⁶ In the light of the foregoing, the FIBA's regulation is unnecessary, since other measures less restrictive on players' rights under EU law are

³⁰⁰ D. Oswald, Y. Hafner (2008): op. cit., p. 18.

³⁰¹ Ibid.

³⁰² FIBA Internal Regulations (2014), Article 3.21.a.

³⁰³ S.C.G. Van den Bogaert (2005): op. cit., pp. 448.

³⁰⁴ D. Oswald, Y. Hafner (2008): op. cit., p. 18.

³⁰⁵ Y. Hafner (2012): op. cit., p. 236.

³⁰⁶ D. Oswald, Y. Hafner (2008): op. cit., p. 18.

capable of achieving the same result.³⁰⁷ I have previously claimed that one could imagine a rule that would not restrict a player's eligibility to play for his new national team when he had never before worn a jersey of his previous national team in international competitions.³⁰⁸

Moreover, quotas of naturalized athletes lack proportionality *stricto sensu*. In this regard, I agree with Denis Oswald and Yann Hafner, who claim that it is unacceptable to “differentiate and fix quotas for naturalised athletes already having participated for another national federation, whereas those who have never been selected a priori are not subject to the same restrictions.”³⁰⁹ These two authors further add that “this discrimination is all the more regrettable in so far as it does not allow the prohibition of abusive naturalisations from the sporting point of view - whether they result from the action of the State or the athlete.”³¹⁰

In the light of the above, I am of the opinion that neither the FIBA's regulation allowing only one player on a national team who has acquired the legal nationality of that country by naturalization or by any other means after having reached the age of sixteen, nor the FIVB's rule allowing only one player having previously played for another national team of the same age to be part of a team are proportionate. Therefore, the CJUE could potentially declare these rules incompatible with EU law.

4.3.2 Rules preventing athletes from changing their sporting nationality

Athletes change their legal and subsequently sporting nationality for various reasons by their own choice or as a result of circumstances independent of their will. The football players Adnan Januzaj and the Boateng brothers, whose stories opened this thesis, represent examples of athletes who could change or have changed sporting nationalities during their careers for genuine reasons. There are, of course, many more athletes who could undergo or have completed the modification of their eligibility. Some of them have done so as a consequence of events, which would not have always resulted from their voluntary choices, for example for family reasons or because of war.

³⁰⁷ Ibid.

³⁰⁸ J. Exner (2013): op. cit., p. 1042.

³⁰⁹ D. Oswald, Y. Hafner (2008): op. cit., p. 18.

³¹⁰ Ibid.

Others have changed their sporting nationality simply because of the competition in their original national teams.

From the EU law point of view, at least when it comes to the free-movement for workers, the reason that led an athlete to change his sporting nationality is irrelevant. There are opinions calling for a stricter approach of international sporting governing bodies towards those athletes who have changed their eligibility by their own choice driven by a sporting reason, for example because of the aforementioned competition in their former team, without any serious reasons of a personal nature.³¹¹ However, the Court of Justice has held on several occasions, for the first time in *Levin* and recently in *L. N.*, that the freedom of movement for workers must not be “contingent on which objectives are being pursued by a national of a Member State in applying to enter the territory of a host Member State, provided that he pursues or wishes to pursue effective and genuine employment activities.”³¹² The Court of Justice further clarified that “the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration [...]”³¹³ Therefore, EU authorities will not take into account the reason leading an athlete to change his sporting nationality. Be it as it may, athletes who want to change their eligibility for whatever reasons are sometimes prevented from doing so simply because the international body governing their sport forbids such a modification.

International sporting governing bodies approach the question of parameters allowing athletes to change their eligibility in national teams in a different way depending on whether they govern an individual or a team sports. Sports federations regulating individual sports tend to permit athletes to change their sporting nationality. Contrarily, most team sports do not show much tolerance towards athletes wishing to change their eligibility in national teams. If these federations allow athletes to change their sporting nationality, they usually apply very strict rules including quotas of

³¹¹ Gerhardt Bubník, an advocate and a leading Czech expert in the field of sports law, expressed this view regarding the modification of sporting nationality during our personal discussion held on 11 February 2016.

³¹² Case C-46/12, *N.*, [2013] ECLI:EU:C:2013:97, paragraph 47; Case C-53/81, *Levin v. Staatssecretaris van Justitie*, [1982] EU:C:1982:105, paragraphs 21 and 22; Case C-109/01, *Akrich*, [2003] ECLI:EU:C:2003:491, paragraph 55.

³¹³ *Ibid.*

naturalised athletes dealt with above or they completely forbid the modification of sporting nationality.³¹⁴

Basketball, football, table tennis or rugby are examples of sports in which players, under certain circumstances, are prevented from changing their eligibility in national teams. The FIBA completely denies athletes' right to change their sporting nationality. Its Internal Regulations provide that "[a] player who has played in a main official competition of the FIBA after having reached his seventeenth birthday may not play for a national team of another country."³¹⁵ There are two minor exceptions to this prohibition. Apart from the age limit of seventeen years,³¹⁶ the Secretary General of the FIBA may, in exceptional circumstances, authorize an a priori ineligible player to play for the national team of his country of origin if this is in the interest of the development of basketball in this country.³¹⁷ Spiro aptly compares these no-transfer regimes to "the feudal perpetual allegiance premise to nationality under which birth nationality could never be severed."³¹⁸ In the light of the above, it is clear that the rule preventing athletes from changing their sporting nationality in basketball constitute a restriction on their rights under EU law.

Coming from a basketball court to a football field, the FIFA Statutes: Regulations Governing the Application of the Statutes provide that "[...] any Player who has already participated in a match (either in full or in part) in an Official Competition of any category or any type of football for one Association may not play an international match for a representative team of another Association."³¹⁹ The exception allowing players to once change their sporting nationality is provided for in the rule 8.1.: "If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another Country of which he holds

³¹⁴ Y. Hafner (2008): op. cit., p. 1.

³¹⁵ FIBA Internal Regulations 2010, Article 3.23.

³¹⁶ FIBA Internal Regulations 2010, Article 3.22.

³¹⁷ FIBA Internal Regulations 2010, Article 3.23.

³¹⁸ P. J. Spiro, "The End of Olympic Nationality" in F. Jenkins, M. Nolan, K. Rubenstein (Ed.), *Allegiance and Identity in a Globalised World*, (Cambridge University Press, 2014), p. 488.

³¹⁹ FIFA Statutes (2015): Regulations Governing the Application of the Statutes, rule 5.2.

nationality [...].”³²⁰ This exception is, however, subject to at least one of the following conditions – the player “has not played a match (either in full or in part) in an Official Competition at “A” international level for his current Association, and at the time of his first full or partial appearance in an international match in an Official Competition for his current Association, he already had the nationality of the representative team for which he wishes to play” or “he is not permitted to play for his new Association in any competition in which he has already played for his previous Association.”³²¹ In any case, these provisions limit players’ right to play for another Member State’s national team of their choice and as such, they provide for a restriction to their rights under EU law.

The ITTF is another international sporting governing body that, in my opinion, violates EU with its regulations practically excluding sporting nationality modification. Table tennis is one of the sports where the modification of sporting nationality belongs to the biggest concerns. Yann Hafner points out that some national governments were expediting the naturalization process for promising athletes in order to get their services in the shortest time possible.³²² As a reaction, the ITTF prevents athletes over the age of 21 from participating in international competitions while representing a new association.³²³ Regarding athletes who have naturalized and have never represented any country in World events, this rule arises serious questions as to their validity under EU law since it clearly limits table tennis players – EU citizens – in exercising their rights.³²⁴

Last but not least, World Rugby Regulations provide that “[a] Player who has played for the senior fifteen-a-side National Representative Team [...] is not eligible to play for the senior fifteen-a-side National Representative Team [...] of another Union.”³²⁵ This regulation applies equally to Rugby Sevens³²⁶ thanks to which rugby appears again in the Olympic program of the Games of the XXXI Olympiad in 2016 in

³²⁰ FIFA Statutes (2015): Regulations Governing the Application of the Statutes, rule 8.1.

³²¹ FIFA Statutes (2015): Regulations Governing the Application of the Statutes, rule 8.1.

³²² “Change of nationalities: the case of Table Tennis” (2008): op. cit., p. 3.

³²³ ITTF Handbook (2016), rules 4.01.03.04, 4.03.06.03, 4.04.06.03.

³²⁴ “Change of nationalities: the case of Table Tennis” (2008): op. cit., p. 3.

³²⁵ World Rugby Regulations (2016), Regulation 8, rule 8.2.

³²⁶ Rugby sevens, also known as seven-a-side, Sevens or VIIs, is a variant of rugby in which teams are made up of seven players, instead of the usual 15, with shorter matches.

Rio de Janeiro after having absented from the games for 92 years.³²⁷ As in the case of basketball, football and table tennis, the rugby regulation clearly limits athletes' rights under EU law.

No matter how the integrity of international competitions may be secured by denying athletes' right to change their sporting nationality, aforementioned prohibitions lack proportionality and are therefore potentially void under EU law. In November 2005, a conference panel, including some of the leading experts in the field of sports law concluded that "one cannot totally preclude the right to change one's sporting nationality and with it the possibility to represent a second country" since "many changes of nationality are legitimate and are imposed by circumstances and not all are the result of economic, or, occasionally, money-making considerations."³²⁸ Participants in the aforementioned conference, including representatives of many sporting governing bodies, came to the conclusion that the prohibition was indeed illegal. In spite of this fact, many federations continue to apply these rules.³²⁹

³²⁷ World Rugby Regulations (2016), Regulation 8, rule 8.6; „Golf & rugby voted into Olympics”, *BBC Sport*, 9 October 2009, retrieved 10 April 2016.

³²⁸ D. Oswald (Ed.) (2004): op. cit., p. 201.

³²⁹ „Change of nationalities: the case of Table Tennis” (2008): op. cit., p. 3.

Conclusion

In 2006, the Court of Justice switched the points and launched a new way of assessing the compliance of sporting rules with EU law. Starting from the first thematic judgment in *Walrave* in 1974, the Court of Justice had constantly applied to rules determining the composition of national teams the exception from the scope of EU law. It claimed that these rules, if limited to attain their proper objective, have only sporting interest without any economic impact or effect that would pull them into the competence of EU authorities. In the 2006 *Meca-Medina & Majcen* judgment, however, the Court of Justice decided that a purely sporting nature of a rule does not have the effect of removing from the scope of EU law the person engaging in the activity governed by that rule or the body which has laid it down. I have demonstrated that from that point on, sporting rules, including those regulating athletes' eligibility in national teams, come under the scrutiny of EU judicial authorities, even though the CJEU has not ruled on these specific rules yet.

In this master's thesis, I have shown that a vast majority of sporting rules constitute a restriction to EU law since they limit athletes' rights under respective provisions of the EU legal order and must therefore pass the justification phase in order to be held compatible with EU law. In this regard, the CJEU equipped international sporting governing bodies with a useful tool once again in *Meca-Medina & Majcen*, employing general principles set out in *Wouters*, when it extracted the elements to be taken into account. First, the overall context in which the rule was enacted or produced its effects must be taken into account with a particular attention to its objectives. Thereafter, the inherence of the rule to the proclaimed objectives must be examined and measured with the principle of proportionality in the end. I have demonstrated that the CJEU would consider the same criteria if a case regarding rules governing athletes' eligibility in national teams came to the court.

Throughout this thesis, I have argued that some rules determining sporting nationality in their current state, notably certain waiting periods, quotas of naturalized athletes and rules prohibiting the change of sporting nationality, would probably not pass the CJEU's test and would therefore be deemed void under EU law. In most cases, the context of rules governing athletes' eligibility in national teams is not a

problem as such. Moreover, these rules usually seek a legitimate objective. However, they are often not inherent to their objectives and disproportionate since they go beyond what is necessary to achieve their goals. International sporting governing bodies should be more attentive to EU law since a potential ruling of the CJEU holding their rules incompatible with EU law could represent another *Bosman* judgment flipping the world organization of sport upside down.

Academicians throughout the world are aware of issues arising in the intersection between rules governing athletes' eligibility in national teams and EU law and propose possible solutions in this regard. At the 2009 Olympic congress held in Copenhagen, a renowned professor Denis Oswald suggested a creation of "Olympic nationality". This new concept would be independent from legal nationality and would govern sporting nationality within the Olympic Movement.³³⁰ Yann Hafner submits that this motion would undermine legal challenges under EU law since it would fall within the scope of EU law but would not constitute a restriction.³³¹ In the light of the findings of this master's thesis, I am not sure about the non-restrictive nature of this measure, but this concept is definitely worth further discussion.

And what if sporting identity was connected not to a country, but rather to an international organization? Luc Desaunettes ponders in his work upon a concept that could, with a certain level of exaggeration, be called "the European Union sporting nationality". He shows that sport has enabled the progressive structuring of a public European area and looks into some ideas that might, by using sport as a lever, lead to the development of a political sense of belonging to the EU. As examples of these ideas, he talks about the European anthem being played in conjunction with the national anthem when a European team is playing or a special prize for the European champions in the form of the possibility to wear a badge with the European colours on their jerseys.³³² However might this concept go against the purely national attitudes of certain athletes and fans, I think that this idea also deserves further exploration.

³³⁰ D. Oswald, "Nationalité dans le sport" in P. Cholley (Eds.), *Treizième [XIIIe] Congrès olympique, Copenhague 2009 : contributions* (Comité International Olympique, 2009), pp. 71-74.

³³¹ Y. Hafner (2012), p. 238.

³³² L. Desaunettes, "Citizenship, Sport and the sense of belonging to the European Union" (2014) Fondation Robert Schuman, European issues, Number 322, p. 1-4.

Be it as it may, international sporting governing bodies should carefully think their moves over in the game of chess against EU law. They play with white pieces. Therefore, they have the right to make the first move. They must simultaneously pay attention to the moves of EU law, notably the case law of the CJEU, and adapt their style of playing to that of their opponent. They are free to establish respective criteria of athletes' eligibility in national teams throughout the whole game. At least, unless a court checkmates them.

Teze diplomové práce v českém jazyce / Master's thesis summary in Czech

1. Mezinárodní sportovní organizace a jejich pravidla upravující příslušnost sportovců k národním týmům

Mezinárodní sportovní organizace plní svoji roli ve světě sportu tím, že „spravují jeden nebo více sportů v celosvětovém měřítku a zajišťují organizaci a správu takových sportů na národní úrovni.“³³³ Za tímto účelem přijímají tyto „mezinárodní nevládní organizace“³³⁴ v rámci své regulační autonomie konkrétní pravidla stanovující kritéria příslušnosti sportovců v mezinárodních soutěžích. Stejná pravomocí mají i organizace zajišťující neolympijské sporty. Tato pravidla jsou zakotvena v jejich zakládajících dokumentech či v jimi později přijatých předpisech.³³⁵

Ve 20. století bylo výlučným kritériem určujícím příslušnost sportovců k jejich národním týmům jejich státní občanství, jehož charakteristickým prvkem je podle Mezinárodního soudního dvora „skutečné spojení“ mezi jednotlivcem a státem.³³⁶ Ústavní soud ČR definoval státní občanství jako „časově trvalý, místně neomezený právní vztah fyzické osoby a státu, který je proti vůli fyzické osoby zpravidla nezrušitelný, na jehož základě vznikají jeho subjektům vzájemná práva a povinnosti, spočívající zejména v právu fyzické osoby na ochranu ze strany státu na jeho území i mimo ně, v právu pobytu na jeho území a v právu účasti na jeho správě veřejných záležitostí.“³³⁷ Především výrazné zvýšení přeshraniční mobility sportovců po celém světě však vedlo na začátku nového milénia přední světové odborníky na sportovní právo k tomu, aby s hlediskem státního občanství jako jediným kritériem pro určení sportovní příslušnosti polemizovali.³³⁸

Sportovní organizace začaly základní kritérium státního občanství při stanovení příslušnosti sportovců k jejich národním týmům postupně měnit nebo doplňovat. Mnoho

³³³ *Olympijská charta* (2015), pravidlo č. 25.

³³⁴ *Olympijská charta* (2015), pravidlo č. 25.

³³⁵ Např. *IOF Statutes and IOF Foot Orienteering Competition Rules* Mezinárodní orientační federace.

³³⁶ *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955: 4, 23.

³³⁷ Nález Ústavního soudu ČR, *Nabývání státního občanství ČR státními občany SR - právo opce občanů zaniknuvší ČSFR*, 13. 9. 1994, sp. zn. Pl. ÚS 9/94, č. 207/1994 Sb.

³³⁸ D. Oswald (Ed.) (2004): op. cit., s. 207. Viz také Y. Hafner (2012): op. cit., s. 217.

mezinárodních sportovních organizací vložilo do svých regulí požadavky, které se týkají například místa narození či místa trvalého pobytu.³³⁹ Například mezinárodní ragbyový výbor ve svých pravidlech uvádí, že hráč může nastoupit pouze za národní tým země a) ve které se narodil, b) ve které se narodil jeden z jeho rodičů nebo prarodičů, nebo c) ve které pobýval v průběhu 36 měsíců předcházejících času zápasu.³⁴⁰ Občanství již nadále není jediným kritériem pro určení příslušnosti sportovce k jeho národnímu týmu, který je pro účely této práce pojímán ve vztahu k mezinárodním sportovním soutěžím.³⁴¹

Uvedená praxe mezinárodních sportovních organizací vytvořila „sportovní národnost“, kterou podle Arbitrážního soudu pro sport rozumíme „unikátní sportovní koncept definující pravidla sportovní příslušnosti jednotlivých hráčů z pohledu jejich účasti v mezinárodních soutěžích.“³⁴² Ve stejném arbitrážním nálezu *B. v. Mezinárodní basketbalová federace* z roku 1993 Arbitrážní soud pro sport zároveň podotkl, že - v kontrastu ke sportovní národnosti - státní příslušnost „zahrnuje osobní status odvozený z občanství jednoho nebo více států“.³⁴³ Sportovní národnost není v každém případě nutně shodná s občanstvím či státní příslušností sportovce.

Rozhodující panel, kromě odlišení zmíněných konceptů, definoval i jejich vzájemný vztah, když uvedl, že „sportovci se setkávají se dvěma odlišnými normativními řády, jedním vycházejícím z veřejného a druhým ze soukromého práva, které se vzájemně nepřekrývají a nejsou ve vzájemném konfliktu.“³⁴⁴ Může tedy dojít k situaci, kdy je sportovec dle příslušného právního řádu občanem jedné země, kterou však nesmí reprezentovat na mezinárodní scéně, a na druhé straně k situaci, kdy sice není občanem, ale smí i přesto závodit pod vlajkou daného státu.³⁴⁵ Arbitrážní soud dále doplnil, že výkon pravomocí mezinárodních sportovních organizací je omezen pouze

³³⁹ J. A. R. Nafziger (2004): op. cit., s. 133.

³⁴⁰ *IRB Regulations of the Game* (Explanatory Guidelines on the implementation of Regulation 8 Eligibility to play for national representative teams, Regulation 8.1).

³⁴¹ Například Mezinárodní federace fotbalových asociací FIFA definuje ve svých pravidlech mezinárodní utkání jako „*utkáni mezi dvěma týmy patřícími k různým členům [FIFA]*.“ (FIFA Regulations Governing International Matches 2014, art. 4).

³⁴² CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998): op. cit., s. 304.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Y. Hafner (2012): op. cit., s. 217.

obecnými právními principy,³⁴⁶ čímž prakticky vyloučil aplikaci velké části dalších pramenů práva, například i práva Evropské unie (EU).³⁴⁷

Mezinárodní sportovní organizace vytvářejí vlastní normativní řád „lex sportiva“³⁴⁸, který je nezávislý na právních řádech jednotlivých států až do chvíle případného střetu s nimi. Předpisy těchto organizací, které jsou součástí zmíněného konceptu, nezasahují do výlučné kompetence států určit práva a povinnosti, které je nutno splnit za účelem nabytí státního občanství. Praxe dokládá, že soudy obecně, především ty francouzské a rakouské, přiznávají autonomním sportovním pravidlům poměrně velkou váhu.³⁴⁹ Mezi tato pravidla patří například kvóty naturalizovaných sportovců, čekací lhůty i další kritéria, která musejí sportovci respektovat, aby mohli reprezentovat svou zemi na mezinárodní úrovni.

Vzhledem k velkému počtu sportovních utkání, která se odehrávají mezi kluby z jednotlivých členských států Evropské unie či mezi jejich národními reprezentacemi, mají pravidla upravující sportovní národnost bezprostřední vliv na unijní právní prostředí. Institucí, která by měla hrát hlavní roli při určování vztahu sportovních pravidel a práva Evropské unie, je bezpochyby Soudní dvůr Evropské unie (SDEU)³⁵⁰ jako vrcholný unijní soudní orgán. Zdá se však, že judikatura SDEU není v tomto specifickém případě doposud úplně jednotná ani jednoznačná.³⁵¹

Cílem této práce je vymezení vztahu pravidel upravujících příslušnost sportovců k jejich národním týmům, stanovených jednotlivými sportovními organizacemi, a práva EU. Otázkou, na niž tato práce hledá odpověď, je, zda jsou tato pravidla v souladu s unijním právním řádem. Sportovní národnost bude zkoumána ve světle primárního i sekundárního práva EU a důraz bude kladen především na bohatou sportovní judikaturu Soudního dvora Evropské unie.

³⁴⁶ G. Simon, “Tribunal Arbitral du Sport. Chronique de sentences arbitrales” (2001) 1 *Journal du Droit International* 242.

³⁴⁷ Právev Evropské unie se rozumí rovněž právo EU či unijní právo.

³⁴⁸ Více k tomuto konceptu viz R. Siekmann, J. Soek (Eds.) (2012): op. cit.

³⁴⁹ Conseil d’Etat, Number 101894, *Olympique d’Antibes Juan-les-Pins c. Fédération Française de Basket-ball*, [1989]; OGH, 2Ob232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

³⁵⁰ Soudní dvůr Evropských společenství (SDES) byl Lisabonskou smlouvou přejmenován na Soudní dvůr Evropské unie (SDEU). Ten se v současné chvíli skládá ze Soudního dvora (ESD), Tribunálu a Soudu pro veřejnou službu.

³⁵¹ J. Guillaumé (2011): op. cit., s. 313-336.

2. Právo na rovné zacházení bez ohledu na státní příslušnosti v právu Evropské unie a jeho vliv na pravidla mezinárodních sportovních organizací upravující příslušnost sportovců k jejich národním týmům

Právo Evropské unie, respektive judikatura SDEU, urazily již poměrně dlouhou cestu v oblasti klubového sportu. V následujících odstavcích jsou vymezeny základní právní zásady řídící tuto oblast a jejich význam a spojitost se sportovní národností, jejíž zkoumání ve světle unijního práva je předmětem této práce.

Principem, který je dle některých autorů³⁵² jedním z nejdůležitějších hmotných práv přiznaných z historického hlediska právem Evropské unie jeho beneficentům a který sehrał v úpravě klubového sportu ústřední roli, je koncept práva na rovné zacházení bez ohledu na státní příslušnost. Na tuto právní oblast se legislativní činnost orgánů Evropských společenství (dnešních orgánů EU) zaměřila nejdříve³⁵³, společně se zásadou nediskriminace na základě pohlaví. Až v posledních zhruba dvaceti letech se pozornost více soustředí také na rovné zacházení bez ohledu na rasu, náboženství, sexuální orientaci či věk.³⁵⁴

Ve Smlouvě o fungování Evropské unie (SFEU) je spatřován význam tohoto principu především v minimální garanci otevřenosti trhů jednotlivých členských států.³⁵⁵ První odstavec čl. 18 SFEU uvádí, že „v rámci použití Smluv³⁵⁶, aniž jsou dotčena jejich zvláštní ustanovení, je zakázána jakákoli diskriminace na základě státní příslušnosti.“ Ačkoliv je jeho věcný rozsah stanovený relativně obecně, dle judikatury Soudního dvora (ESD) má čl. 18 SFEU vždy vertikální, a v některých případech i horizontální přímý účinek.³⁵⁷ V takovém případě směřuje jeho ustanovení kromě orgánů EU a členských států také k osobám soukromého práva, mezi které patří i sportovní organizace. Čl. 18 SFEU je subsidiárním článkem ke speciálním zákazům diskriminace,

³⁵² Srov. např. T. Tridimas (2006): op. cit., s. 118.

³⁵³ Čl. 7 Smlouvy o založení Evropského hospodářského společenství z roku 1957: „V rámci působnosti této Smlouvy a bez ohledu na jakékoliv související speciální ustanovení je zakázána jakákoliv diskriminace na základě státní příslušnosti.“

³⁵⁴ P. Craig, G. de Burca (2011): op. cit., s. 612.

³⁵⁵ J. Wouters, “The principle of non-discrimination in European Community law” (1999) EC Tax Review, Number 2, s. 101.

³⁵⁶ Lisabonská smlouva pozměnila Smlouvu o EU a Smlouvu o ES a přejmenovala druhou uvedenou smlouvu. Nyní je EU založena na Smlouvě o Evropské unii (SEU) a Smlouvě o fungování Evropské unie (SFEU), Úřední věstník 2008, C 115, s. 1.

³⁵⁷ T. Tridimas (2006): op. cit., s. 119.

kteře jsou obsaženy v dalších ustanoveních SFEU. Jedná se především o ustanovení upravující unijní občanství a volný pohyb zboží, osob, služeb a kapitálu.

Podle judikatury ESD zakazuje čl. 18 SFEU nejen zjevnou diskriminaci na základě státní příslušnosti, ale také diskriminaci nepřímou, tedy jiná opatření, která vedou za použití jiných rozlišovacích kritérií ve skutečnosti ke stejnému výsledku. Tyto restrikce, mezi které patří například požadavek trvalého bydliště na území daného členského státu nebo registrace vozidla v daném členském státě, jsou pro cizince stejně diskriminační a byly by slučitelné s čl. 18 SFEU pouze tehdy, pokud by byly objektivně zdůvodnitelné a přiměřené.³⁵⁸

Princip zákazu diskriminace na základě státní příslušnosti promítl ESD ve svém rozhodnutí *Bosman*³⁵⁹ z roku 1995 také na klubový sport, jemuž tím z pohledu evropského práva vytyčil do budoucna jasné směřování. V tomto rozsudku odmítl ESD akceptovat cizinecké kvóty v klubovém profesionálním fotbalu, které dle jeho názoru snižují šanci hráčů uplatnit se na pracovním trhu, a jako takové představují neospravedlnitelné omezení volného pohybu osob, respektive pracovníků.³⁶⁰ ESD se vyjádřil jasně pro zákaz takových opatření, která představují diskriminaci na základě státní příslušnosti a brání svobodám vnitřního trhu.³⁶¹

3. Obecný rámec pro posuzování souladu pravidel upravujících příslušnost sportovců k národním týmům s právem Evropské unie

Pravidla upravující příslušnost sportovců k jejich národním týmům omezují možnost sportovců nabídnout své služby libovolné zemi v rámci Evropské unie.³⁶² Tento závěr vyvolává otázku, zda jsou pravidla upravující sportovní národnost v souladu s právem EU.³⁶³ Stejně jako v oblasti klubového sportu, i v případě pravidel upravujících sportovní národnost je řídicím principem zákaz diskriminace na základě státní příslušnosti. Jelikož se však tato obecná zásada uplatňuje pouze „v rámci působnosti Smluv“, je nutné postupovat za účelem posouzení souladu určitého pravidla

³⁵⁸ C. Barnard (2013): op. cit., s. 249.

³⁵⁹ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463.

³⁶⁰ C. Barnard (2013): op. cit., s. 255.

³⁶¹ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, body 99 a 100.

³⁶² Y. Hafner (2012): op. cit., s. 220.

³⁶³ S.C.G. Van den Bogaert (2005): op. cit., s. 324.

s právem EU podle testu tří základních kroků, který je nejčastěji využíván v případě svobod vnitřního trhu a aplikuje se i v oblasti sportovních pravidel.³⁶⁴

Nejprve je nutné zjistit, zda tato pravidla spadají do působnosti práva EU či nikoliv. Pokud ne, unijní soudní orgány nemají pravomoc o nich rozhodovat. Pokud se na ně však unijní právo vztahuje, je druhým krokem posouzení, zda tato opatření představují či nepředstavují omezení svobod vnitřního trhu. V případě kladné odpovědi je nutno zkoumat, zda jsou taková omezení ospravedlnitelná a přiměřená, a představují tak výjimku z pravidel vnitřního trhu.³⁶⁵ Tyto výjimky, které budou zkoumány v následujících kapitolách, jsou obsaženy jednak přímo v primárním právu, především v SFEU, a jednak také v judikatuře SDEU. Na základě uvedeného testu jsou v závěru této práce sportovní pravidla rozdělena do tří základních skupin vzhledem k tomu, jak se k nim pravděpodobně v budoucnu ve svém rozhodovacím procesu postaví SDEU.

3.1. Výjimky ze zákazu diskriminace na základě státní příslušnosti ve Smlouvách

Právní úpravě sportu v EU se explicitně věnuje čl. 165 SFEU, který zmiňuje jeho „zvláštní povahu“, avšak neobsahuje možné ospravedlnění omezení volného pohybu. Relevantními články Smluv jsou tak v tomto kontextu především čl. 45 a 56 SFEU, které rozšiřují a specifikují působnost obecného čl. 18 SFEU v rámci volného pohybu pracovníků a služeb. Jelikož se však pravidla upravující sportovní národnost mohou týkat rovněž soutěžního práva, je třeba věnovat pozornost i čl. 101 a 102 SFEU, které tvoří páteř této oblasti v rámci Smluv. V tomto kontextu je důležité zmínit, že výjimky ve Smlouvách mohou ospravedlnit jak přímou diskriminaci na základě státní příslušnosti, tak také diskriminaci nepřímou.³⁶⁶

Čl. 45 SFEU obsahuje čtyři důvody, pro které je možné omezit volný pohyb osob, respektive pracovníků. Těmi jsou veřejný pořádek, veřejná bezpečnost a ochrana zdraví dle odst. 3 a výkon veřejné správy dle odst. 4. Pro účely této práce jsou důležitá

³⁶⁴ Ibid., s. 323 a násl.

³⁶⁵ C. Barnard (2013), op. cit., s. 534 a násl.

³⁶⁶ Ibid., str. 528.

především kritéria veřejného pořádku a veřejné správy, jelikož zbylá dvě kritéria jsou ve sportovním kontextu irelevantní.³⁶⁷

V kontextu výjimky spočívající ve veřejném pořádku sehrál důležitou roli ESD, který ve svém rozhodnutí *Bosman* v roce 1995 judikoval, že fyzické i právnické osoby, mezi které patří i mezinárodní sportovní organizace, se ve svých argumentech mohou spolehnout právě na toto kritérium.³⁶⁸ Dle sekundárního práva a judikatury SDEU však musejí být opatření přijatá z důvodu veřejného pořádku „založena výlučně na osobním chování dotyčné osoby.“³⁶⁹ Z tohoto hlediska by obecná pravidla upravující příslušnost sportovců k jejich národním týmům stanovená sportovními organizacemi byla v rozporu s právem EU, jelikož by se na ně výjimka veřejného pořádku nevztahovala.

Ospravedlnění omezení svobod vnitřního trhu spočívající v kritériu zaměstnání ve veřejné správě nemá vzhledem ke sportu žádnou relevanci, jelikož reprezentace země ve sportovním utkání se až na výjimky³⁷⁰ nedá označit za výkon veřejné správy. Na činnost sportovních organizací se nevztahuje ani výjimka z povinnosti nebránit volnému pohybu služeb dle článku 56 SFEU. Toto ospravedlnění se dle článku 62 SFEU ve spojení s článkem 51 SFEU uplatňuje pouze na činnosti, které „jsou v příslušném členském státě spjaty, i když jen příležitostně, s výkonem veřejné moci“.³⁷¹

Pravidla upravující sportovní národnost spadající do působnosti práva EU, která určitá práva garantovaná právním řádem EU omezují, se nemohou spolehnout na výjimky explicitně stanovené ve Smlouvách. Kritéria veřejné bezpečnosti a ochrany zdraví nejsou v tomto kontextu relevantní a veřejný pořádek a výkon veřejné správy nejsou aplikovatelné.

³⁶⁷ S.C.G. Van den Bogaert (2005): op. cit., s. 338.

³⁶⁸ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, body 99 a 100., bod 86.

³⁶⁹ Čl. 27 odst. 2 Směrnice Evropského parlamentu a Rady 2004/38/ES ze dne 29. dubna 2004 o právu občanů Unie a jejich rodinných příslušníků svobodně se pohybovat a pobývat na území členských států; Case C-348/96, *Calfa*, [1995] ECLI:EU:C:1999:6, bod 24.

³⁷⁰ Pravidlo Francouzské fotbalové federace stanoví, že v případě nominace má hráč povinnost reprezentovat. Pokud tak neučiní, následují sankce stanovené veřejným právem. (Y. Hafner (2012): op. cit., s. 222).

³⁷¹ J.-C. Séché, “Quand les juges tirent au but : l’arrêt Bosman du 15 décembre 1995” (1996) *Cahier de droit européen* 355, Year 32, Number 3-4.

3.2. Výjimky ze zákazu diskriminace na základě státní příslušnosti v judikatuře Soudního dvora Evropské unie

Důležitým pravidlem, které dle SDEU představuje v určitých případech výjimku ospravedlňující omezení svobod vnitřního trhu spočívající v nepřímé diskriminaci, je takzvané „rule of reason“.³⁷² Základní tezí této doktríny je, že při posuzování jinak protiprávního jednání musejí být zváženy okolnosti, za kterých k jednání došlo. V následující části této práce jsou představeny jednotlivé rozsudky unijních soudů, které lemovaly cestu judikatury v oblasti sportovních pravidel až k přelomovému případu *Meca-Medina & Majcen* z roku 2006, který určil aktuální pohled ESD na tuto problematiku.

ESD se otázky pravidel upravujících sportovní národnost dotkl poprvé v roce 1974 v rozsudku *Walrave*,³⁷³ kdy posuzoval soulad stanov Mezinárodního cyklistického svazu s tehdejší Smlouvou o EHS. ESD v rozsudku judikoval, že pokud má sportovní činnost charakter zaměstnání za úplatu, vztahují se na ni veškerá ustanovení Smluv zakazující diskriminaci na základě státní příslušnosti.³⁷⁴ Zároveň však dodal, že se takový zákaz „nedotýká sestavování sportovních závodních družstev, zejména národních družstev, protože při sestavování těchto týmů jde o otázky, které sledují výlučně sportovní zájmy, a jako takové nemají nic společného s ekonomickou činností“.³⁷⁵

Ve fotbalovém rozsudku *Dona*³⁷⁶ z roku 1976 ESD stanovil, že ustanovení o volném pohybu osob a služeb „nebrání pravidlům nebo praxi vylučující cizí hráče z možnosti účasti v určitých utkáních, a to z důvodů, které nemají ekonomickou povahu, a které se vztahují ke konkrétní povaze a kontextu takových utkání a jsou tím pádem čistě ve sportovním zájmu, jako například utkání mezi národními týmy z různých zemí“.³⁷⁷

³⁷² Soudní dvůr poprvé aplikoval pravidlo „rule of reason“ ve svém rozsudku C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.

³⁷³ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140.

³⁷⁴ *Ibid.*, body 5 a 6.

³⁷⁵ *Ibid.*, bod 8.

³⁷⁶ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115.

³⁷⁷ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, bod 14.

Z rozsudku *Bosman* je v tomto kontextu podstatný výrok ESD, ve kterém uvedl, že „ustanovení práva Společenství týkající se volného pohybu osob a ustanovení o volném pohybu služeb nebrání pravidlům a praxi, které jsou ospravedlněny neekonomickými důvody vztahujícími se ke konkrétní povaze a kontextu určitých sportovních utkání“.³⁷⁸ ESD navíc ve stejném bodě doplnil, že veškerá sportovní aktivita již nadále nemůže vzhledem k jejímu vzrůstajícímu ekonomickému dopadu spadat mimo oblast aplikace Smluv, a vyhnout se tak posouzení souladu s právem Společenství (dnešním právem EU) ze strany SDEU.³⁷⁹

V této tendenci pokračoval ESD i ve svých rozsudcích z počátku nového tisíciletí *Deliège*³⁸⁰, *Lehtonen*³⁸¹, *Kolpak*³⁸² a *Simutenkov*³⁸³. Ani rozhodnutí *Bernard*³⁸⁴ z roku 2010, v němž měl Soudní dvůr první příležitost reflektovat změny, které přinesla do unijního právního řádu Lisabonská smlouva, nepřineslo v tomto ohledu žádnou změnu. ESD s odkazem na rozsudek *Bosman* uvedl, že „s ohledem na cíle Unie spadá výkon sportovní činnosti do působnosti práva Unie tehdy, pokud představuje hospodářskou činnost“.³⁸⁵

V případech ospravedlnění překážek svobod vnitřního trhu je důležité, že ESD již od rozhodnutí *Walrave* s poukazem na princip proporcionality konstantně judikoval, že výjimky týkající se národních týmů jsou takovými ospravedlněními pouze v případě, kdy zůstávají „omezeny na svůj řádný účel“.³⁸⁶ Aby mohl být takový požadavek naplněn, musejí být na jedné straně vymezeny metody interpretace takových pravidel a na straně druhé musí být vyjasněn koncept národního týmu.³⁸⁷ V případě pravidel upravujících sportovní národnost lze do té míry, do níž představují omezení svobod vnitřního trhu, využít *mutatis mutandis* stejné metody vztahující se například na zaměstnání ve veřejné správě. Dle generálního advokáta Trabucchiho musejí být

³⁷⁸ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, bod 76.

³⁷⁹ *Ibid.*

³⁸⁰ Joined cases C-51/96 and C-191/97, *Deliège*, [2000] EU:C:2000:199.

³⁸¹ Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201.

³⁸² Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255.

³⁸³ Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213.

³⁸⁴ Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143.

³⁸⁵ *Ibid.*, bod 27.

³⁸⁶ Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140, bod 9.

³⁸⁷ Y. Hafner (2012): op. cit., s. 229.

takové výjimky vykládány restriktivně ve světle pravidel konkrétní sportovní organizace a musejí být přiměřené vzhledem k zamýšlenému účelu.³⁸⁸ ESD specifikoval limity výjimek týkajících se národních týmů, když judikoval, že na dané výjimky „se nelze spoléhat v tom rozsahu, že by (z působnosti Smluv) vylučovaly veškerou sportovní činnost“.³⁸⁹ Toto tvrzení ESD dále rozvedl v přelomovém rozhodnutí *Meca-Medina & Majcen* z roku 2006.³⁹⁰

4. Revoluce ve vztahu pravidel mezinárodních sportovních organizací a práva Evropské unie: rozsudek Soudního dvora Meca-Medina & Majcen

Rozsudek Soudního dvora ve věci *Meca-Medina & Majcen* představuje významný mezník v historii posuzování souladu sportovních pravidel s právem Evropské unie. ESD tímto rozhodnutím rozšířil okruh pravidel, která spadají do sféry aplikace práva EU. ESD rovněž přesněji vymezil podmínky, které musejí být splněny, aby mohla být konkrétní sportovní úprava představující překážku svobodám vnitřního trhu či hospodářské soutěži označena za souladnou s právním řádem EU.

Do roku 2006 se pravidla hájící čistě sportovní zájmy těšila své autonomii a právo EU se v této oblasti neaplikovalo. Po rozhodnutí *Meca-Medina & Majcen* již tento předpoklad automaticky neplatí. ESD na úvod potvrdil svoji předchozí judikaturu, podle níž „výkon sportovní činnosti spadá pod právo Společenství tehdy, pokud představuje hospodářskou činnost“. Přelomový okamžik přišel v bodě 27 rozsudku, kde ESD uvedl, že „pouhá okolnost, že pravidlo má čistě sportovní povahu, nevede k tomu, že se na osobu vykonávající činnost upravenou tímto pravidlem nebo na subjekt, který je vydal, nevztahuje působnost Smluv“.³⁹¹ Soudní dvůr tímto výrokem posílil svou rozhodovací pravomoc ve sportovní oblasti³⁹² a naznačil, že při zkoumání dopadu unijního práva na sportovní pravidla je nutné vzít v úvahu nejenom konkrétní pravidlo, ale i širší kontext, v němž daná úprava působí. V tomto případě se jednalo o soulad antidopingových pravidel se soutěžním právem EU. Celkový dopad rozsudku je však

³⁸⁸ Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115, opinion of the Advocate General Trabucchi, bod 2.

³⁸⁹ Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201, bod 34.

³⁹⁰ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

³⁹¹ *Ibid.*, bod 27.

³⁹² G. Infantino, “Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?” (2006), s. 2.

pro právní úpravu sportu daleko významnější i vzhledem k možnosti aplikace jeho závěrů na oblast svobod vnitřního trhu.³⁹³

V důsledku rozhodnutí *Meca-Medina & Majcen* se pod jurisdikci soudních orgánů EU dostala ještě širší skupina sportovních pravidel. Ve skutečnosti je oproti dřívějšímu v současné době mnohem složitější posoudit, která ze sportovních pravidel sledují čistě sportovní zájem, nemají ekonomický dopad, a nejsou tak způsobilá právního posouzení ze strany SDEU.³⁹⁴ Bývalý předseda Mezinárodního olympijského výboru Jacques Rogge se před přijetím Lisabonské smlouvy snažil o to, aby byl sport jako takový z působnosti Smluv vyloučen s cílem zachování jeho specifické povahy. Členské státy však pod vědomím stále narůstajícího ekonomického dopadu sportu takový krok neučinily.³⁹⁵

Fakt, že zmíněná sportovní pravidla spadají do působnosti Smluv, respektive pod ustanovení upravující soutěžní právo, ještě automaticky neznamená, že by unijní právo porušovala. Je třeba posoudit, zda jsou tato pravidla v souladu se zmíněnými předpisy. Vodítko k tomuto posouzení poskytl ESD právě ve svém rozhodnutí *Meca-Medina & Majcen*, když konstatoval, že stěžejní je zjištění, zda byla pravidla ve svém kontextu omezena na to, co je nezbytné k dosažení jejich legitimního cíle v souvislosti s organizací dané sportovní aktivity.³⁹⁶ ESD tak následoval názor již dříve vyslovený v rozsudku *Wouters*.³⁹⁷ Ten se primárně týkal problematiky výkonu advokacie, ale jeho závěry SDEU často využívá i při rozhodování v jiných oblastech. Cílem antidopingových pravidel je chránit zdraví sportovců a zajistit soutěžení za stejných podmínek pro všechny, což je jistě legitimní. Principu přiměřenosti však musejí odpovídat i prostředky dosažení tohoto cíle, tedy sankce za užití zakázaných látek.³⁹⁸

Závěry ESD z rozsudku *Meca-Medina & Majcen* je možné aplikovat na ustanovení Smluv týkající se ochrany svobod vnitřního trhu. ESD totiž ve svém rozhodnutí dále uvedl, že „jestliže sportovní činnost spadá do působnosti Smluv, pak se na její podmínky vztahují veškeré povinnosti, které jednotlivá ustanovení Smluv

³⁹³ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, bod 28.

³⁹⁴ G. Infantino (2006): op. cit., s. 2.

³⁹⁵ M. Beloff QC, “The Canniness Of The Long Distance Swimmers” (2008) Blackstone Chambers, s. 2.

³⁹⁶ N. Beale, G. Duhs, “Meca-Medina & Majcen: Perspectives on how to apply the EC Treaty to the rules of sporting bodies” (2007) International Sports Law Review, Issue 2.

³⁹⁷ Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98.

³⁹⁸ M. Beloff QC (2008): op. cit., s. 2.

obsahují. Pravidla, která takovou činnost upravují, musejí vyhovovat všem požadavkům takových ustanovení, jejichž cílem je zejména zabezpečit volný pohyb pracovníků, svobodu usazování, volný pohyb služeb či svobodu hospodářské soutěže.³⁹⁹ Analytická konstrukce Studie o rovném zacházení s osobami bez státní příslušnosti v individuálních sportovních soutěžích tento trend potvrzuje. Její autoři tvrdí, že závěry ESD v rozsudku *Meca-Medina & Majcen*, ačkoliv se v tomto případě specificky týkaly pouze soutěžního práva, mohou být v budoucnu využity při posuzování souladu pravidel upravujících příslušnost sportovců k jejich národním týmům s ustanoveními práva EU týkajícími se pravidel upravujících svobody vnitřního trhu.⁴⁰⁰ Toto zjištění umožňuje předpovědět, jak může SDEU v budoucnu o těchto sportovních pravidlech rozhodnout.

5. Regulační autonomie mezinárodních sportovních organizací při stanovení kritérií příslušnosti sportovců k národním týmům z pohledu práva Evropské unie

V následujících odstavcích jsou vymezeny tři skupiny sportovních pravidel s ohledem na to, jak by se k nim pravděpodobně postavil SDEU v okamžiku, kdy o takových pravidlech bude rozhodovat. Kritérium rozdělení je určeno podle toho, zda pravidla upravující sportovní národnost spadají do působnosti práva EU v oblasti vnitřního trhu a zda v takovém případě představují omezení volného pohybu. Pokud ano, je dále zkoumáno, zda jsou tato omezení ospravedlnitelná.

5.1. Pravidla mezinárodních sportovních organizací, která nespádají do působnosti práva EU

V návaznosti na rozsudek ESD ve věci *Meca-Medina & Majcen* spadají dle autorů Studie o rovném zacházení s osobami bez státní příslušnosti v individuálních sportovních soutěžích do této skupiny pouze sportovní pravidla „s žádným nebo pouze okrajovým nebo v jakékoli situaci pouze podpůrným a vedlejším ekonomickým

³⁹⁹ Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, bod 28.

⁴⁰⁰ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 29. V rozhodnutí C-309/99, *Wouters and Others*, [2002] EU:C:2002:98 ESD poprvé judikoval, že pro výjimky v oblastech hospodářské soutěže a svobod vnitřního trhu mohou být uplatněny stejné ospravedlnující důvody.

dopadem nebo efektem. [...] Takzvaná „pravidla hry“ jsou dobrou ilustrací pravidel, která v tomto ohledu sledují čistě sportovní zájem.“⁴⁰¹

Stanovení technických pravidel upravujících průběh hry či soutěže je záležitostí spadající čistě do působnosti mezinárodních sportovních organizací. Jen ony odpovídají za stanovení rozměrů hřiště nebo charakteru nedovolených zákroků, za které se uděluje žlutá nebo červená karta. Reprezentace země je však činností, která určitý ekonomický efekt má,⁴⁰² a pravidla upravující příslušnost sportovců k jejich národním týmům se tak nemohou octnout mimo sféru aplikace práva EU.

5.2. Pravidla mezinárodních sportovních organizací upravující příslušnost sportovců k národním týmům, spadající do působnosti práva Evropské unie a představující omezení práv občanů Evropské unie, která mohou být ospravedlnitelná

Tato skupina obsahuje ta pravidla upravující sportovní národnost, která spadají do sféry aplikace práva EU a představují omezení zákazu diskriminace na základě státní příslušnosti v oblastech unijního občanství, volného pohybu pracovníků, služeb, svobody usazování nebo soutěžního práva. Otázkou k posouzení je míra, se kterou sledují legitimní sportovní cíle, aby měly šanci projít testem SDEU z hlediska jejich souladu s právem EU.

Koncept omezení nebo překážky v právu EU je velmi široký. Z pohledu svobod vnitřního trhu mají občané EU především právo pohybu a pobytu ve všech členských státech, ať už bez ekonomické motivace jako občané, nebo za účelem provozování ekonomické aktivity díky volnému pohybu pracovníků, služeb a svobody usazování.⁴⁰³ V důsledku toho představuje každé pravidlo nebo opatření bránící občanům EU v plném využívání jejich práv omezení těchto práv, a musí být tudíž ospravedlněno.⁴⁰⁴ Příkladem pravidel sportovních organizací spadajících do této kategorie jsou pravidla upravující volbu unikátní sportovní národnosti a takzvané čekací lhůty.

⁴⁰¹ Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): 228.

⁴⁰² A. M. Mestre (2009): op. cit., s. 78.

⁴⁰³ Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463, bod 95.

⁴⁰⁴ C. Barnard (2013): op. cit., s. 456-537.

Při volbě jediné sportovní národnosti si sportovec vybírá, jakou zemi bude reprezentovat na mezinárodní scéně. Když si sportovní národnost zvolí, nemůže být již nadále vybrán do jiného národního týmu. Arbitrážní soud pro sport je toho názoru, že každý sportovec by měl mít v jednom momentu pouze jednu sportovní národnost a že její volba je legitimním mechanismem zabraňujícím tomu, aby si sportovci mohli dle libosti měnit svou sportovní národnost, či aby mohli být dokonce reprezentanty dvou zemí zároveň.⁴⁰⁵ Toto pravidlo chrání legitimní cíl v podobě regulérnosti a integrity mezinárodních sportovních soutěží a prostředky směřující k dosažení tohoto cíle jsou dle mého názoru přiměřené.⁴⁰⁶

Dalším pravidlem spadajícím do této kategorie jsou takzvané čekací lhůty, jejichž účelem je zabránit sportovcům v libovolné změně příslušnosti od jednoho k jinému národnímu týmu v krátkém časovém horizontu. Hráč, který již některý národní tým na mezinárodní scéně reprezentoval, musí čekat určitou dobu, než může reprezentovat jiný národní tým. Toto pravidlo se snaží předejít situacím, kdy by se hráč pokusil změnit sportovní národnost krátce před důležitou sportovní událostí.

Čekací lhůty se liší sport od sportu a pohybují se v rozmezí od jednoho do čtyř let.⁴⁰⁷ Z toho plyne, že v určitých sportech čekají sportovci déle než v jiných i přesto, že mají stejnou sportovní národnost. Přední evropský odborník na sportovní právo Stefaan Van den Bogaert tvrdí, že „poměrně často užívané tříleté čekací lhůty se zdají být přehnané“ vzhledem k délce trvání sportovní kariéry.⁴⁰⁸ Tato pravidla by při posuzování ze strany SDEU byla konfrontována s principem přiměřenosti. Důležitým měřítkem by byla periodicita, se kterou se opakují vrcholné soutěže v konkrétním sportu. Například čtyřletá lhůta v ledním hokeji se zdá vzhledem k organizaci mistrovství světa každý rok zjevně nepřiměřená.

SDEU se zatím žádným případem, v němž by figurovala pravidla upravující unikátní sportovní národnost nebo čekací lhůty, nezabýval.⁴⁰⁹ Vzhledem k výše zmíněnému kritériu užitému v rozsudku *Wouters* není jisté, zda by čekací lhůty testem

⁴⁰⁵ CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993], M. Reeb (Ed.) (1998): op. cit., s. 304.

⁴⁰⁶ A. Goetschy (2007): op. cit., s. 56.

⁴⁰⁷ Příkladem sportu, kde je čekací lhůta čtyřletá, je lední hokej. *IHF Statutes and Bylaws 2014-2018*, Bylaw 406, 1.3 (b).

⁴⁰⁸ S.C.G. Van den Bogaert (2005): op. cit., s. 358.

⁴⁰⁹ J. Guillaumé (2011): op. cit., s. 313-336.

proporcionalita prošly či nikoliv. Pokud by je SDEU označil za rozporné s právem EU, potvrdil by v tomto ohledu praxi francouzských a rakouských soudů zmíněných v úvodu, a to i přesto, že v těchto případech byla sportovní pravidla nahlížena optikou pravidel upravujících státní občanství, a ne pravidel zajišťujících volný pohyb v rámci svobod vnitřního trhu EU.⁴¹⁰

5.3. Pravidla mezinárodních sportovních organizací upravující příslušnost sportovců k národním týmům, která představují neospravedlnitelná omezení práv občanů Evropské unie

Absolutní zákaz změny sportovní národnosti a kvóty naturalizovaných sportovců v národních týmech jsou společně s některými čekacími lhůtami pravidly, která jsou vzhledem k porušení principu přiměřenosti s velkou pravděpodobností v příkrém rozporu s právem EU.⁴¹¹

Soudní dvůr ve svém rozhodnutí *Auer* v roce 1979 uvedl, že „neexistuje žádné ustanovení Smluv, které v rámci působnosti Smluv umožňuje zacházet se státními příslušníky členského státu odlišně na základě času nebo způsobu, jakým získali státní příslušnost daného státu, pokud v době, v níž požívají výhod ustanovení práva Společenství, jsou držiteli státní příslušnosti jednoho z členských států a pokud splnili ostatní podmínky pro aplikaci pravidla, kterého se dovolávají“.⁴¹² Pro posouzení souladu sportovních pravidel s právem EU je důležitou otázkou, zda jsou státní příslušnost a sportovní národnost koncepty, které se překrývají. V kladném případě by totiž bylo možné závěry ESD z rozsudku *Auer* aplikovat i na pravidla sportovních organizací, která by v takovém případě porušovala právo EU. S kladnou odpovědí přichází Arbitrážní soud pro sport, zatímco francouzské a rakouské národní soudy zmíněné v úvodu tuto myšlenku zavrhnou.⁴¹³

⁴¹⁰ Conseil d'Etat, Number 101894, *Olympique d'Antibes Juan-les-Pins c. Fédération Française de Basket-ball*, [1989]; OGH, 2Ob232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

⁴¹¹ A. M. Mestre (2009), op. cit., s. 78, viz také F. Latty (2007): op. cit., s. 684.

⁴¹² Case C-136/78, *Ministère public v. Auer*, [1979] EU:C:1979:34, bod 28.

⁴¹³ Conseil d'Etat, Number 101894, *Olympique d'Antibes Juan-les-Pins c. Fédération Française de Basket-ball*, [1989]; OGH, 2Ob232/98a, *Emanuel V. v. Österreichischer Eishockey-Verband and International Ice Hockey Federation*, [1998]; LG Wien, 26 Cg 94/87, *Deutsche Eishockeybund DEB v. International Ice Hockey Federation*, [1987].

Mezinárodní basketbalová federace (FIBA) a Mezinárodní volejbalová federace (FIVB) jsou příklady organizací, jejichž pravidla obsahují kvóty naturalizovaných sportovců – hráčů, kteří již dříve nastoupili za jiný národní tým a poté změnili státní občanství a tudíž i sportovní národnost. Tyto dvě organizace neumožňují národním týmům mít ve svých řadách více než jednoho naturalizovaného reprezentanta.⁴¹⁴ Pokud by na tyto kvóty SDEU aplikoval své závěry z rozsudku *Auer*, musel by zákonitě konstatovat jejich rozpor s právem EU z důvodu porušení zákazu diskriminace na základě státní příslušnosti. Pokud by však SDEU dospěl ke stejnému závěru jako výše uvedené soudy ve Francii a Rakousku, na základě porušení práva na rovné zacházení by pravděpodobně rozpor s unijním právem neshledal.

V neprospěch dotčených sportovních pravidel je však dále třeba uvést, že například pravidla FIBA se uplatňují i na hráče, kteří nikdy nereprezentovali svou původní zemi na mezinárodní úrovni.⁴¹⁵ Podobným případem může být sportovec, kterému není umožněno reprezentovat jeho zemi proto, že ke změně jeho státní příslušnosti došlo v důsledku změny státní příslušnosti jeho rodičů v době, kdy byl nezletilý. Ve světle výše uvedených faktů je zřejmé, že pravidla FIBA, respektive FIVB, nejsou omezena pouze na svůj náležitý sportovní účel dle kritéria z rozsudku *Wouters*. Jiná opatření představující menší omezení pro sportovce jsou jistě způsobilá dosáhnout stejného výsledku. V tomto ohledu lze uvést například takové opatření, které nebude bránit naturalizovanému sportovci reprezentovat jeho zemi proto, že dres té původní na mezinárodní scéně nikdy ve svém životě neoblékl.

Mezinárodními sportovními organizacemi, které odmítají právo sportovců na změnu jejich sportovní národnosti, jsou například Mezinárodní ragbyový výbor (IRB) či FIBA. Ve druhém uvedeném případě je jedinou výjimkou, že se tento zákaz nevztahuje na hráče, kteří byli v době reprezentace své původní země mladší šestnácti let.⁴¹⁶ Otázkou je, zda jsou taková omezení přiměřená. Odpověď naznačil celkem přímočaře na kongresu v Lausanne v roce 2005 profesor Denis Oswald, který řekl, že „změny sportovní národnosti jsou legitimní [...] a ne všechny jsou výsledkem ekonomických [...]

⁴¹⁴ FIBA Internal Regulations (2014), Article 3.21.a, FIVB Sports Regulations (2015), Article 41.2.1.

⁴¹⁵ FIBA Internal Regulations (2014), Article 3.21.a.

⁴¹⁶ FIBA Internal Regulations (2014), Article 3.21.a.

zájmů. Nikomu tak nemůže být bráněno ve změně jeho sportovní národnosti a možnosti reprezentovat jinou zemi.⁴¹⁷

V případě, kdy by byl SDEU konfrontován s těmito pravidly a praktikami, pravděpodobně by si vyžádal od mezinárodních sportovních organizací důkazy, které by demonstrovaly natolik vysokou úroveň nezbytnosti, aby umožnila těmto pravidlům projít testem přiměřenosti dle kritérií z rozsudku *Wouters*. Ty si však lze jen těžko představit a na základě výše uvedených zjištění je nutné konstatovat, že zmíněná pravidla upravující příslušnost sportovců k jejich národním týmům jsou v rozporu s právem EU.

6. Závěr

Rozsudek Soudního dvora ve věci *Meca-Medina & Majcen* z roku 2006 dal nový rozměr posuzování souladu pravidel upravujících sportovní národnost s právem EU. Vydláždil totiž cestu pro nový test pravidel upravujících příslušnost sportovců k jejich národním týmům v kontextu svobod vnitřního trhu.⁴¹⁸ Ve světle současné judikatury ESD je pravděpodobné, že některá pravidla mezinárodních sportovních organizací by byla shledána jako rozporná s právem EU, pokud by se stala předmětem rozhodování SDEU. Pravidla upravující čekací lhůty, kvóty naturalizovaných sportovců či pravidla absolutně zakazující sportovcům měnit jejich sportovní národnost jsou v případě jejich nepřiměřenosti v rozporu se stanovenými ustanoveními Smluv upravujícími svobody vnitřního trhu, k jejichž ochraně je SDEU povolán.

Soudní dvůr již ve své rozhodovací praxi ukázal, že se nebojí vyslovit rozpor sportovních pravidel s právem EU, pokud představují neospravedlnitelnou překážku svobod vnitřního trhu. V rozhodnutí *Bosman* shledal ESD přestupová pravidla ve fotbale v rozporu s volným pohybem osob, respektive pracovníků. V důsledku tohoto rozhodnutí došlo k výrazné změně organizace mezinárodních sportovních soutěží. Ačkoliv se v rozsudku *Bosman* jednalo o klubový sport, SDEU by pravděpodobně ve světle rozhodnutí *Meca-Medina & Majcen* dospěl ke stejnému závěru i v případě pravidel upravujících příslušnost sportovců k jejich národním týmům.

⁴¹⁷ D. Oswald (Ed.) (2004): op. cit., s. 201.

⁴¹⁸ Y. Hafner (2012): op. cit., s. 237.

V návaznosti na takové rozhodnutí by byly mezinárodní sportovní organizace nuceny změnit svá pravidla a nahradit sportovcům škodu vzniklou jejich aplikací. Důsledkem by byla další výrazná změna v organizaci sportu na národní i mezinárodní úrovni.⁴¹⁹ Organizace zaštiťující jednotlivé sporty jsou nyní na tahu. Jejich úkolem je přijmout komplexnější a jednotnější soubor pravidel upravující sportovní národnost ještě předtím, než Soudní dvůr shledá tato pravidla v rozporu s právem EU.

Pravidla upravující sportovní národnost spadají do působnosti práva Evropské unie, a nemohou tak uniknout jurisdikci unijních soudních orgánů. Opatření, která představují překážku svobodám vnitřního trhu, musejí být ospravedlnitelná a přiměřená. V opačném případě porušují unijní právo. Každá mezinárodní sportovní organizace má pravomoc stanovit samostatně pravidla upravující příslušnost sportovců k jejich národním týmům ve sportu, který zaštiťuje. Alespoň do té doby, než soud rozhodne jinak.

⁴¹⁹ Y. Hafner (2008): op. cit.

Seznam zkratk / List of abbreviations

Seznam zkratk:

ESD	Soudní dvůr
EU	Evropská unie
SDEU	Soudní dvůr Evropské unie
SEU	Smlouva o Evropské unii
SFEU	Smlouva o fungování Evropské unie

List of abbreviations:

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
EU	European Union
FFF	Fédération Française de Football
FIBA	International Basketball Federation
FIFA	Fédération Internationale de Football Association
FIGC	Italian Football Federation
FINA	Fédération internationale de natation
FIVB	International Volleyball Federation
ICJ	International Court of Justice
IIHF	International Ice Hockey Federation
IOC	International Olympic Committee
IRB	International Rugby Board
ISU	International Skating Union
ITTF	International Table Tennis Federation
Member States	Member States of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UCI	International Cycling Union
UEFA	Union of European Football Associations

Seznam použité literatury / Bibliography

Legal documents

- Council of Europe Convention on the Manipulation of Sports Competitions (2014)
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC
- European Convention on Nationality (2000)
- European Model of Sport, Consultation document of DG X (1998)
- European Sports Charter (2001)
- FIBA Internal Regulations (2014)
- FIFA Statutes (2015)
- FIVB Sports Regulations (2015)
- General Programme for the abolition of restrictions of freedom to provide services (1961)
- IIHF Statutes and Bylaws (2014)
- ISU Special Regulations & Technical Rules, Single and Pair Skating & Ice Dance (2014)
- ITTF Handbook (2016)
- Olympic Charter (2015)
- Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April on freedom of movement for workers within the Union
- Swiss Civil Code (2012, as amended)
- Treaty establishing the European Economic Community (1957)
- Treaty on European Union (2012)
- Treaty on the Functioning of the European Union (2012)
- Universal Declaration of Human Rights (1948)
- World Rugby Regulations (2016)

Cases

Court of Arbitration for Sport

- CAS 92/80, *B. v. International Basketball Federation (FIBA)*, [1993]
- CAS 98/2009, *Spanish Basketball Federation (FEB) / International Basketball Federation (FIBA)*, [1999]
- CAS 98/215, *International Baseball Association (IBA)*, Advisory Opinion, [1999]
- CAS 2001/A/357, *Nabokov & Russian Olympic Committee (ROC) & Russian Ice Hockey Federation (RIHF) / International Ice Hockey Federation (IIHF)*, [2002]
- CAS 2007/A/1377, *Mélanie Rinaldi v. Fédération Internationale de Natation (FINA)*, [2007]

Court of Justice of the European Union

- Case C-2/74, *Jean Reyners v. Belgian State*, [1974] EU:C:1974:68, cited as “Case C-2/74, *Jean Reyners v. Belgian State*, [1974] EU:C:1974:68”
- Case C-33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, [1974] EU:C:1974:131, cited as “Case C-33/74, *Van Binsbergen v. Bedrijfsvereniging voor de Metaalnijverheid*, [1974] EU:C:1974:131”
- Case C-36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, [1974] EU:C:1974:140, cited as “Case C-36/74, *Walrave and Koch v. Association Union Cycliste Internationale and Others*, [1974] EU:C:1974:140”
- Case C-13/76, *Gaetano Donà v. Mario Mantero*, [1976] EU:C:1976:115, cited as “Case C-13/76, *Dona v. Mantero*, [1976] EU:C:1976:115”
- Joined cases C-117/76 and C-16/77, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen ; Diamalt AG v Hauptzollamt Itzehoe*, [1977] EU:C:1977:160, cited as “Joined cases C-117/76 and C-16/77, *Ruckdeschel and Others v. Hauptzollamt Hamburg-St. Annen*, [1977] EU:C:1977:160”
- Case C-136/78, *Criminal proceedings against Vincent Auer*, [1979] EU:C:1979:34, cited as “Case C-136/78, *Ministère public v. Auer*, [1979] EU:C:1979:34”
- Case C-53/81, *D.M. Levin v. Staatssecretaris van Justitie*, [1982] EU:C:1982:105, cited as “Case C-53/81, *Levin v. Staatssecretaris van Justitie*, [1982] EU:C:1982:105”

- Case C-305/87, *Commission of the European Communities v. Hellenic Republic*, [1989] EU:C:1989:218, cited as “Case C-305/87, *Commission v. Greece*, [1989] EU:C:1989:218”
- Case C-10/90, *Maria Masgio v. Bundesknappschaft*, [1982] EU:C:1991:107, cited as “Case C-10/90, *Masgio v. Bundesknappschaft*, [1982] EU:C:1991:107”
- Case C-419/92, *Ingetraut Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECLI:EU:C:1994:62, cited as “Case C-419/92, *Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, [1994] ECLI:EU:C:1994:62”
- Case C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] EU:C:1995:411, cited as “Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] EU:C:1995:411”
- Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*, [1995] EU:C:1995:463, cited as “Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others*, [1995] EU:C:1995:463”
- Case C-348/96, *Criminal proceedings against Donatella Calfa*, [1995] ECLI:EU:C:1999:6, cited as “Case C-348/96, *Calfa*, [1995] ECLI:EU:C:1999:6”
- Joined cases C-51/96 and C-191/97, *Christelle Delière 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, cited as “Joined cases C-51/96 and C-191/97, *Delière*, [2000] EU:C:2000:199”
- Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basketball ASBL (FRBSB)*, [2000] EU:C:2000:201, cited as “Case C-176/96, *Lehtonen and Castors Braine*, [2000] EU:C:2000:201”
- Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, [2000] EU:C:2000:296, cited as “Case C-281/98, *Angonese*, [2000] EU:C:2000:296”
- Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] EU:C:2001:458, cited as “Case C-184/99, *Grzelczyk*, [2001] EU:C:2001:458”
- Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap*, [2002] EU:C:2002:98, cited as “Case C-309/99, *Wouters and Others*, [2002] EU:C:2002:98”

- Case C-438/00, *Deutscher Handballbund eV v. Maros Kolpak*, [2003] EU:C:2003:255, cited as “Case C-438/00, *Deutscher Handballbund*, [2003] EU:C:2003:255”
- Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich*, [2003] ECLI:EU:C:2003:491, cited as “Case C-109/01, *Akrich*, [2003] ECLI:EU:C:2003:491”
- Case C-148/02, *Carlos Garcia Avello v. Belgian State*, [2003] ECLI:EU:C:2003:539, cited as “Case C-148/02, *Garcia Avello*, [2003] ECLI:EU:C:2003:539”
- Case T-313/02, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, [2004] EU:T:2004:282, cited as “Case T-313/02, *Meca-Medina and Majcen v. Commission*, [2004] EU:T:2004:282”
- Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, [2005] EU:C:2005:213, cited as “Case C-265/03, *Simutenkov*, [2005] EU:C:2005:213”
- Case C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, [2006] EU:C:2006:492, cited as “Case C-519/04 P, *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492”
- Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] EU:C:2007:772, cited as “Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union*, [2007] EU:C:2007:772”
- Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, [2007] EU:C:2007:809, cited as “Case C-341/05, *Laval un Partneri*, [2007] EU:C:2007:809”
- Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci v. Consejo Superior de Deportes and Real Federación Española de Fútbol*, [2008] EU:C:2008:450, cited as “Case C-152/08, *Real Sociedad de Fútbol and Kahveci*, [2008] EU:C:2008:450”
- Case C-135/08, *Janko Rottman v. Freistaat Bayern*, [2010] EU:C:2010:104, cited as “Case C-135/08, *Rottmann*, [2010] EU:C:2010:104”
- Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*, [2010] EU:C:2010:143, cited as “Case C-325/08, *Olympique Lyonnais*, [2010] EU:C:2010:143”
- Case C-46/12, *L. N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* [2013] ECLI:EU:C:2013:97, cited as “Case C-46/12, *N.*, [2013] ECLI:EU:C:2013:97”

European Commission

- Case COMP/38158, *Meca-Medina and Majcen v. International Olympic Committee* [1 August 2002]

International Court of Justice

- *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955: 4, 23

National courts

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

Bibliography

Books

- J. Anderson (Ed.), *Leading Cases in Sports Law*, (T.M.C. Asser Press, 2013), pp. 395, ISBN: 978-90-6704-908-5
- M. Attali, N. Bazoge (Ed.), *Diriger le sport. Perspectives sur la gouvernance du sport du xxe siècle à nos jours* (CNRS Editions, 2012), pp. 348, ISBN: 978-2-271-07355-6
- C. Barnard, *The Substantive Law of the EU, The Four Freedoms*, 4th ed. (Oxford University Press, 2013), pp. 800, ISBN: 978-0-19-967076-5
- F. Buy, J.-M. Marmayou, D. Poracchia, F. Rizzo, *Droit du sport*, 2e edition (LGDJ, 2009), pp. 922, ISBN-13: 978-2275032962
- A. Caiger (Ed.), *Professional Sport in the EU: Regulation and Re-Regulation*, (T.M.C. Asser Press, 2001), pp. 370, ISBN: 978-90-6704-126-3
- P. Cholley (Eds.), *Treizième [XIIIe] Congrès olympique, Copenhague 2009 : contributions* (Comité International Olympique, 2009), pp. 256, ISBN: 92-9149-133-0
- P. Craig, G. de Burca, *The Evolution of EU Law*, 2nd ed. (Oxford University Press, 2011), pp. 984, ISBN: 978-0199592968
- Cruz Blanco, Dewaele, *Sporting Nationality Conflicts: Towards Harmonization?* (S.I., 2004-2005)
- M. Davies, *Nationality Discrimination in the European Internal Market*, (Kluwer Law International, 2003), pp. 244, ISBN: 9789041119988
- J.-P. Dubey, *La libre circulation des sportifs en Europe*, (Staempfli Editions, 2000), pp. 631, ISBN: 978-2802714477
- A. Goetschy, *La nationalité sportive. Eléments pour une étude du droit applicable à l'éligibilité des athlètes en équipe nationale représentative*, (S.I., 2007)
- P. Hamerník, *Sportovní právo. Hledání rovnováhy mezi specifickou sportovní úpravou a platným právem*, (Praha: Ústav státu a právu AV ČR, 2012), pp. 88, ISBN: 978-80-87439-07-4
- F. Jenkins, M. Nolan, K. Rubenstein (Ed.), *Allegiance and Identity in a Globalised World*, (Cambridge University Press, 2014), pp. 688, ISBN: 9781107074330
- F. Latty, *La lex sportiva. Recherche sur le droit transnational*, (Martinus Nijhoff Publishers, 2007), pp. 850, ISBN: 9789004156975
- A. Lewis, J. Taylor (Eds.), *Sport: Law and Practice*, 3rd ed. (Bloomsbury Professional, 2014), pp. 2080, ISBN: 978-1780431130

- M. Maisonneuve (Ed.), *Droit et Coupe du monde*, (Economica, 2011), pp. 480, ISBN: 978-2-7178-6065-8
- A. M. Mestre, *The Law of the Olympic Games*, (T.M.C. Asser Press, 2009), pp. 256, ISBN: 978-90-6704-304-5
- M. Pautot, *Sport et nationalité. Quelle place pour les joueurs étrangers?*, (L'Harmattan, 2014), pp. 269, ISBN: 978-2-343-02591-9
- J. A. R. Nafziger, *International Sports Law*, 2nd ed. (Martinus Nijhoff, 2004), pp. 376, ISBN: 978-1571051370
- D. Oswald, *La nationalité dans le sport, Contributions pour le XIIème Congrès Olympique* (Lausanne, 2009)
- D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 206, ISBN: 9782940241170
- R. Parrish, S. Miettinen, *The Sporting Exception in European Union Law*, (T.M.C. Asser Press, 2008), pp. 318, ISBN: 978-90-6704-262-8
- J. Pichrt (Ed.), *Sport a (nejen) pracovní právo*, (Wolters Kluwer, 2014), pp. 288, ISBN 978-80-7478-655-6
- M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards 1986–1998*, (1998, Staempfli Editions, 1998), Number 15
- M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 1998 – 2000*, (Kluwer Law International, 2002), Number 9
- M. Reeb (Ed.), *Recueil des sentences du TAS Digest of CAS Awards II 2001 – 2003*, (Kluwer Law International, 2004)
- A. Rigozzi, D. Sprumont, Y. Hafner (Eds.), *Citius, Altius, Fortius - Mélanges en l'honneur de Denis Oswald*, (Helbing & Lichtenhahn (Bâle), 2012), pp. 801, ISBN: 9783719033330
- R. Siekmann, J. Soek (Eds.), *Lex Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012), pp. 391, ISBN: 978-90-6704-828-6
- M. Tomášek, V. Týč (Eds.), *Právo Evropské unie* (Leges, 2013), pp. 494, ISBN: 978-80-87576-53-3
- T. Tridimas, *The general principles of EU law*, 2nd ed. (Oxford University Press, 2006), pp. 714, ISBN: 978-0199227686
- E. Trova, V. Alexandrakis, P. Skouris, *The Olympic Games of the European Union* (Nomos Publishers, 2011), pp. 300, ISBN: 978-3832963729
- S.C.G. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, (The Hague: Kluwer Law International, 2005), pp. 448, ISBN: 9789041123275
- S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (T.M.C. Asser Press, 2014), pp. 573, ISBN: 978-90-6704-938-2

Book chapters

- P. Collomb, “Qu’est-ce qu’une équipe nationale ?” in M. Maisonneuve (Ed.), *Droit et Coupe du monde* (Economica, 2011)
- J.-P. Dubey, “Nationalité sportive : une notion autonome” (2006) in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 31-45
- P. Gillon, R. Poli, “La Naturalisation de sportifs et fuite des muscles. Le cas de Jeux Olympiques de 2004” in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 47-72
- Y. Hafner, “Athletes’ eligibility in national team and EU law : What can we learn from two doped swimmers ?” in A. Rigozzi, D. Sprumont, Y. Hafner (Eds.), *Citius, Altius, Fortius - Mélanges en l’honneur de Denis Oswald*, (Helbing & Lichtenhahn (Bâle), 2012), pp. 215-238
- P. Hamerník, “O vlivu práva EU na status sportovce” in J. Pichrt (Ed.), *Sport a (nejen) pracovní právo*, (Wolters Kluwer, 2014), pp. 49-58.
- B. Kennelly, T. Richards, A. Lewis, “EU and UK Competition Law Rules and Sport” in A. Lewis, J. Taylor (Eds.), *Sport: Law and Practice*, 3rd ed. (Bloomsbury Professional, 2014), pp. 1124-1232
- M. Lajous, “Jeux et enjeux autour des questions de nationalité sportive” in M. M. Attali, N. Bazoge (Ed.), *Diriger le sport. Perspectives sur la gouvernance du sport du xxe siècle à nos jours* (CNRS Editions, 2012)
- J. P. McCutcheon, “National eligibility rules after Bosman” in A. Caiger (Ed.), *Professional Sport in the EU: Regulation and Re-Regulation*, (T.M.C. Asser Press, 2001)
- R. Parrish, “Case C-36/74 *Walrave and Koch* [1974] ECR 1405” in J. Anderson (Ed.), *Leading Cases in Sports Law*, (T.M.C. Asser Press, 2013), pp. 45-64
- M. Reeb, “La nationalité dans la jurisprudence du TAS” in D. Oswald (Ed.), *La nationalité dans le sport: enjeux et problèmes : actes du Congrès des 10 et 11 novembre 2005*, (Editions CIES, 2004), pp. 206, pp. 83-136
- P. J. Spiro, “The End of Olympic Nationality” in F. Jenkins, M. Nolan, K. Rubenstein (Ed.), *Allegiance and Identity in a Globalised World*, (Cambridge University Press, 2014), pp. 478-496
- S. Weatherill, “Anti-doping Revisited: The Demise of the Rule of “Purely Sporting Interest”?” in S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (2014, T.M.C. Asser Press), pp. 379-399
- S. Weatherill, “On Overlapping Legal Orders: What is the ‘Purely Sporting’ Rule?” in S. Weatherill, *European Sports Law - Collected Papers*, 2nd ed. (2014, T.M.C. Asser Press), pp. 401-424

Articles

- F. Archambault, L. Artiaga, “Les significations et les dimensions sociales du sport” (2004) *Sport et société*, Cahiers français, n°320, 2004, pp. 38-42.
- N. Beale, G. Duhs, “Meca-Medina & Majcen: Perspectives on how to apply the EC Treaty to the rules of sporting bodies” (2007) *International Sports Law Review*, Issue 2
- M. Beloff QC, “The Canniness Of The Long Distance Swimmers” (2008) Blackstone Chambers, pp. 1-2
- A. Calmat, “Sport et nationalisme” (1992) *Pouvoirs* n°61 - Le sport, pp. 51-56
- L. Desaunettes, “Citizenship, Sport and the sense of belonging to the European Union” (2014) *Fondation Robert Schuman, European issues*, Number 322, pp. 1-4: <http://www.robert-schuman.eu/en/european-issues/0322-citizenship-and-the-sense-of-belonging-to-the-european-union>
- J.-P. Dubey, “Case C-438/00, *Deutscher Handballbund eV v. Maros Kolpak*” (2005) *42 Common Market Law Review*, Issue 2, pp. 499–522
- A. Duval, “The Court of Arbitration for Sport and EU Law. Chronicle of an Encounter” (2015) *Maastricht Journal of European and Comparative Law*, Year 2015, Number 2, pp. 224-255
- D. J. Ettinger, “The Legal Status of the International Olympic Committee”, (1992) *Pace International Law Review*, Volume 4, Issue 1, pp. 97-121
- J. Exner, “Čekací lhůty v ledním hokeji versus právo EU” (2013), *Jiné právo* [online], 25 November 2013: <http://jinepravo.blogspot.cz/2013/11/jan-exner-cekaci-lhuty-v-lednim-hokeji.html>
- J. Exner, “Sportovní národnost ve světle práva Evropské unie” (2013) *Právník*, Year 152, Number 10, pp. 1029-1044
- J. Guillaumé, “L’autonomie de la nationalité sportive” (2011) *Journal du droit international*, Number 2, pp. 313-336
- Y. Hafner, “Change in Sporting Nationality : the “Next Bosman”?” (2008) *Olympic Capital Quarterly*, October 2008, Vol. 3, Number 4, pp. 1-3
- Y. Hafner, “La qualification des joueurs en équipe représentative au regard de la réglementation de la FIFA : le cas de la Coupe du Monde 2010” (2010) *Jusletter*, pp. 1-12
- Y. Hafner, “Sporting Nationality in the Ancient and Modern Olympic Games” (2009) *Proceedings of the 17th International Seminar on Olympic Studies for Postgraduate Students*, International Olympic Academy, Ancient Olympia, pp. 1-16.
- P. Hamerník, “Jaká je míra tolerance práva EU vůči sportovním asociacím?” (2009) *Právník*, Year 150, Number 5, pp. 482-498

- A. Hervé, “Les problèmes éthiques de la nationalité dans le sport” (2009) Colloque international Ethique et sport en Europe, Université Rennes II, Rennes:France, pp. 1-10
- G. Infantino, “Meca-Medina: a step backwards for the European Sports Model and the Specificity of Sport?” (2006), UEFA, pp. 1-11
- D. Kochenov, “Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights” (2009), Columbia Journal of European Law 2, pp. 169-237.
- D. Kostakopoulou, A. Schrauwen, “Olympic Citizenship and the (Un)Specialness of the National Vest: Rethinking the Link between Sport and Citizenship Law” (2014), 10 International Journal of Law in Context, pp. 143-162
- R. MacLaren, “Twenty-Five Years of the Court of Arbitration for Sport: A look in the rear-view mirror” (2010), Marquette Sports Law Review, pp. 305-333
- D. Oswald, Y. Hafner, “Les limites du pouvoir réglementaires des fédérations internationales en matière de nationalité sportive : la jurisprudence Auer” (2008) Sport et Citoyenneté, Number 3, pp. 18-19
- O. Poruban, “Priama diskriminácia na základe štátnej príslušnosti pri výkone športovej činnosti” (2015), Učená právnická spoločnosť [online], 6 May 2015: http://www.ucps.sk/PRIAMA_DISKRIMINACIA_NA_ZAKLADE_STATNEJ_PRISLUSNOSTI_PRI_VYKONE_SPORTOVEJ_CINNOSTI
- J.-C. Séché, “Quand les juges tirent au but : l’arrêt Bosman du 15 décembre 1995” (1996) Cahier de droit européen 355, Year 32, Number 3-4, pp. 369-370.
- R. Siekmann, “Sport and Nationality : Accelerated’ Naturalisation for National Representative Purposes and Discrimination Issues in Individual Team Competitions under EU law” (2011) The International Sports Law Journal 85, Vol. 3-4, pp. 241-268
- G. Simon, “Tribunal Arbitral du Sport. Chronique de sentences arbitrales” (2001) 1 Journal du Droit International 242
- S.C.G. Van den Bogaert, “Editorial. Bosman: One for All ...” (2015) Maastricht Journal of European and Comparative Law, Year 2015, Number 2, pp. 175-178
- S.C.G. Van den Bogaert, “The European Court of Justice on the Tatami: Ippon, Waza-Ari or Koka?”, (2000) European Law Review 25, pp. 554-563
- A. S. Wollmann, O. Vonk, G. R. de Groot, “Towards a sporting nationality?” (2015) Maastricht journal of European and comparative law, Vol. 22, Number 2, pp. 305-321
- J. Wouters, “The principle of non-discrimination in European Community law” (1999) EC Tax Review, Number 2, pp. 98-106
- “Change of nationalities: the case of Table Tennis” (2008) Olympic Capital Quarterly, October 2008, Vol. 3, Number 4, p. 3

Studies

- Study on the equal treatment of non-nationals in individual sports competitions, (Brussels: European Commission, 2010): http://ec.europa.eu/sport/library/studies/study_equal_treatment_non_nationals_final_rpt_dec_2010_en.pdf
- The European Model of Sport, Consultation document of DG X, (Brussels: European Commission, 1998): http://www.bso.or.at/fileadmin/Inhalte/Dokumente/Internationales/EU_European_Model_Sport.pdf

News Articles

- „Belgium 1-0 Tunisia: Adnan Januzaj wins his first cap in hailstorm delayed victory... but Romelu Lukaku limps off with injury“, *Mail Online*, 7 June 2014, retrieved 10 April 2016: <http://www.dailymail.co.uk/sport/Worldcup2014/Article-2651568/Belgium-1-0-Tunisia-Adnan-Januzaj-wins-cap-hailstorm-delayed-victory-Romelu-Lukaku-limps-off.html>
- “FINA Officially Makes “Ryan Lochte Turn” Illegal In IM Races”, *Swimming World*, 8 September 2015, retrieved 10 April 2016: <http://www.swimmingWorldmagazine.com/news/fina-officially-makes-ryan-lochte-turn-illegal-in-im-races/>
- „George, Kevin-Prince and Jérôme Boateng: football's intriguing brothers“, *Guardian*, 22 April 2015, retrieved 10 April 2016: <http://www.theguardian.com/football/englische-woche/2015/apr/22/jerome-george-kevin-prince-boateng-football-brothers>
- „Golf & rugby voted into Olympics“, *BBC Sport*, 9 October 2009, retrieved 10 April 2016: http://news.bbc.co.uk/sport2/hi/olympic_games/8292584.stm
- „Inside Adnan Januzaj's world: Owned by United, chased by England... the wonder boy whose parents escaped the Kosovo war to move to Belgium. Read his amazing story“, *Mail Online*, 16 October 2013, retrieved 10 April 2016: <http://www.dailymail.co.uk/sport/football/Article-2463191/Adnan-Januzaj-special-report--background-Manchester-United-star.html>
- „Palestine Football: Escape to Victory?“, *Bruisedearth*, 27 October 2008, retrieved 10 April 2016: <https://web.archive.org/web/20110427021948/http://www.bruisedearth.org/?p=137>

Speeches

- „Building communities: the role of sport“, speech of Tibor Navracsics, Commissioner for Education, Culture, Youth and Sport, Brussels, 9 September 2015: http://www.europa.eu/rapid/press-release_SPEECH-15-5619_en.pdf

Přílohy / Annexes

Příloha č. 1 /Annex No. 1: List of international sports organizations

International sports organizations can be divided into four groups:

1) International sports federations recognized by the International Olympic Committee (IOC)

a) Association of Summer Olympic International Federations (ASOIF)

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

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

Biathlon: International Biathlon Union (IBU), Bobsleigh and skeleton: International Bobsleigh and Skeleton Federation (IBSF), Curling: World Curling Federation (WCF), Ice hockey: International Ice Hockey Federation (IIHF), Ice skating (including figure skating, speed skating, and Short-track speed skating): International Skating Union

(ISU), Luge: Fédération Internationale de Luge de Course (FIL), Skiing (including Alpine, Nordic combined, cross-country, freestyle, ski jumping and snowboarding): Fédération Internationale de Ski (FIS).

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

Air sports (including aerobatics, air racing, ballooning, gliding, hang gliding, and parachuting/skydiving): Fédération Aéronautique Internationale (FAI), Auto racing: Fédération Internationale de l'Automobile (FIA), Bandy: Federation of International Bandy (FIB), Baseball and softball: World Baseball Softball Confederation (WBSC), Basque pelota: Fédération Internationale de Pelota Vasca (FIPV), Billiard sports (including carom billiards, pocket billiards/pool, and snooker): World Confederation of Billiard Sports (WCBS), Carom: Union Mondiale de Billard (UMB), Pool: World Pool-Billiard Association (WPA), Snooker: International Billiards and Snooker Federation (IBSF), Boules sports: Confédération Mondiale des Sports de Boules (CMSB), Bocce: Confederazione Boccistica Internazionale (CBI), Bowls: World Bowls (WB), Boule Lyonnaise: Fédération Internationale de Boules (FIB), Pétanque: Fédération Internationale de Pétanque et Jeu Provençal (FIPJP), Bowling (Ten-pin): Fédération Internationale des Quilleurs (FIQ), Bridge: World Bridge Federation (WBF), Chess: Fédération Internationale des Échecs (FIDE), Cricket: International Cricket Council (ICC), DanceSport: International DanceSport Federation (IDSF), Floorball: International Floorball Federation (IFF), Flying disc: World Flying Disc Federation (WFDF), Karate: World Karate Federation (WKF), Korfball: International Korfball Federation (IKF), Life saving: International Life Saving Federation (ILSF), Motorcycle sport: Fédération Internationale de Motocyclisme (FIM), Mountaineering: Union Internationale des Associations d'Alpinisme (UIAA), Netball, International Federation of Netball Associations (IFNA), Orienteering: International Orienteering Federation (IOF), Polo: Federation of International Polo (FIP), Powerboating: Union Internationale Motonautique (UIM), Racquetball: International Racquetball Federation (IRF), Roller sports (including inline hockey, roller racing, rink hockey, roller derby and artistic): International Federation of Roller Sports (FIRS), Squash: World Squash Federation (WSF), Sports climbing: International Federation of Sport Climbing (IFSC), Sumo: International Sumo Federation (ISF), Surfing and bodyboarding: International Surfing

Association (ISA), Tug-of-war: Tug-of-War International Federation (TWIF), Underwater sports: Confédération Mondiale des Activités Subaquatiques (CMAS), Water skiing: International Water Ski Federation (IWSF), Wushu: International Wushu Federation (IWUF). On all federations recognized by the International Olympic Committee (IOC), see also the IOC's website: <http://www.olympic.org/content/the-ioc/governance/affiliate-organisations/all-recognised-organisations/>.

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

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

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

3) *SportAccord (GAISF)*

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

Aikido: International Aikido Federation (IAF), Bodybuilding: International Federation of Bodybuilding & Fitness (IFBB), Casting: International Casting Sport Federation (ICSF), College athletics: Federation Internationale du Sport Universitaire, Commonwealth Games: Commonwealth Games Federation, Dragon boat racing: International Dragon Boat Federation (IDBF), Draughts: World Draughts Federation (FMJD), Fishing: International Confederation of Sport Fishing (CIPS), Fistball: International Fistball Association (IFA), Floorball: International Floorball Federation (IFF), Flying disc: World Flying Disc Federation (WFDF), Football (American and Canadian): International Federation of American Football (IFAF), Go: International Go Federation (IGF), Ju-jitsu: Ju-Jitsu International Federation (JJIF), Kendo: International Kendo Federation (IKF), Kickboxing: World Association of Kickboxing Organizations (WAKO), Lacrosse: Federation of International Lacrosse, Labour Sport: International Labour Sports Federation, Masters Games: International Masters Games Association, Military Sports: International Military Sports Council (Conseil International du Sport Militaire), Miniature golf: World Minigolfsport Federation (WMF), Muaythai: International Federation of Muaythai Amateur, Panathlon: Panathlon International, Paralympic: International Paralympic Committee: Cerebral Palsy International Sport and Recreation Association, International Blind Sports Federation, International Sports Federation for Persons with Intellectual Disability, International Wheelchair and Amputee Sports Federation; Powerlifting: International Powerlifting Federation (IPF), WUAP, GPC, WPC, Sambo: Federation International of Amateur Sambo (FIAS), Savate: Federation International De Savate, School Sport: International School Sport Federation, Sepak Takraw: International Sepaktakraw Federation (ISTAF), Ski mountaineering: International Ski Mountaineering Federation (ISMF), Sled dog sports: International Federation of Sleddog Sports, Soft Tennis: International Soft Tennis Federation (ISTF), Special Olympics: Special Olympics, Inc., Sports Chiropractic: Fédération Internationale de Chiropratique du Sport; or International Federation of

Sports Chiropractic, Sports Facilities: International Association for Sports and Leisure Facilities, Sports fishing: Confédération Internationale de la Pêche Sportive, Sports for the Deaf: International Committee of Sports for the Deaf, Sports Press: Association Internationale de la Presse Sportive, Timekeepers: Fédération Internationale des Chronométrateurs, World Games: International World Games Association, Wushu: International Wushu Federation (IWUF)

4) *Other international sport federations*

O-sport: World O-Sport Federation (WOF), Arm wrestling: World Armwrestling Federation (WAF), Ham Radio Contesting, Amateur Radio Direction Finding & High Speed Telegraphy: International Amateur Radio Union (IARU), Australian rules football: AFL Commission, Bowling (Canadian five-pin): Canadian 5 Pin Bowlers Association (C5PBA), Beach Soccer: Beach Soccer Worldwide (BSWW), Fédération Internationale de Football Association (FIFA), Behcup: World Behcup Federation (WBF), Broomball: International Federation of Broomball Associations (IFBA), Bodyboarding: International Bodyboarding Association (IBA), Bowls: Professional Bowls Association (PBA), Boxing: World Professional Boxing Federation (WPBF), Hapkido Boxing: Hapkido Boxing International Organization (HBIO), Correspondence Chess: International Correspondence Chess Federation (ICCF), Croquet: World Croquet Federation (WCF), Sqay: International Council Of Sqay (ICS), Darts: World Darts Federation (WDF), Electronic Sports: International e-Sports Federation (IeSF), Elephant Polo : World Elephant Polo Association (WEPF), Foosball: International Table Soccer Federation (ITSF), Rugby Fives: Rugby Fives Association (RFA), Football (Gaelic): Gaelic Athletic Association (GAA), Goalball: International Blind Sports Federation (IBSA), Golf: The R&A; United States Golf Association (USGA), Greyhound racing: American Greyhound Track Operators Association (AGTOA), National Greyhound Racing Club (NGRC), Handball (court): Irish Handball Council, United States Handball Association (USHA), Harness horse racing: Harness Horsemen International (HHI), European Trotting Union (UET), Horse racing: International Racing Bureau (IRB), Horseshoes: National Horseshoe Pitchers Association of America (NHPA), Hurling: Gaelic Athletic Association (GAA), Intercrosse: Fédération Internationale d'Inter-Crosse (FIIC), International Federation of Kitesports Organisations (IFKO), International game International Ball game Confederation

(CIJB) (Confederation Internationale du Jeu de Balle), International game International game confederation, International Game Fish Association (IGFA), International Gay Bowling Organization (IGBO), International Rope Skipping Federation (IRSF), International Pitch and Putt Association (IPPA), Jujutsu: World Ju-Jitsu Federation, Tchoukball: Fédération Internationale de Tchoukball, Kabaddi: International Kabaddi Federation (IKF), Lacrosse: Federation of International Lacrosse (FIL), Mallakhamb: Mallakhamb Confederation of World (MCW), Mixed martial arts: International Sport Combat Federation (ISCF), Modern Arnis: International Modern Arnis Federation (IMAF), Mountainboarding: International Mountainboard Riders Association (IMRA), Muay Thai: International Kickboxing Federation (IKF), Mountain running: World Mountain Running Association (WMRA), Paddleball: National Paddleball Association (NPA), Parkour: World Freerunning Parkour Federation (WFPF), Pesäpallo: Pesäpalloliitto, Pigeon racing: Royal Pigeon Racing Association (RPRA), Poker: International Federation of Poker (IFP), Pole dance: International Pole Sports Federation (IPSF), Practical shooting: International Practical Shooting Confederation (IPSC), Quidditch: International Quidditch Association (IQA), Quizzing: International Quizzing Association (IQA), Racketlon: International Racketlon Federation (FIR), Radio-controlled car racing: International Federation of Model Auto Racing (IFMAR), Rafting: International Rafting Federation (IRF), Rogaining: International Rogaining Federation (IRF), Rounders: National Rounders Association (NRA), Rock-It-Ball: International Rock-It-Ball Federation (IRIBF), Rope skipping: World Rope Skipping Confederation (WRSC), Rubik's Cube: World Cube Association (WCA), Rugby league: Rugby League International Federation (RLIF), Shinty: Camanachd Association, Shuttlecock: International Shuttlecock Federation, Skateboarding: World Skateboarding Federation (WSF); International Skateboarding Federation (ISF), Skibobbing: International Skibob Federation (FISB), Slot car racing: International Slot Racing Association (ISRA), Sport stacking: World Sport Stacking Association (WSSA), Table hockey: International Table Hockey Federation (ITHF), Table Soccer: International Table Soccer Federation (ITSF), Tent Pegging : International Tent Pegging Federation (ITPF), Throwball: International Throwball Federation (ITF), Boot throwing: International Bootthrowing Association (IBTA), Touch football: Federation of International Touch (FIT), Villowo: International Villowo Federation (IVF), Vovinam:

International Vovinam Federation (IVF)/The Vovinam-VietVoDao World Federation (WVVF), VX (sport): Global VX, Yoga:Yogasports Confederation of World (YCW).

Abstrakt / Abstract

Abstrakt:

Tato diplomová práce hodnotí jev označovaný jako sportovní národnost z pohledu práva EU. Jejím cílem je posoudit soulad pravidel mezinárodních sportovních organizací, která upravují příslušnost sportovců k národním týmům, s konkrétními ustanoveními unijního práva. Jedná se především o ta ustanovení, která rozvíjejí zákaz diskriminace na základě státní příslušnosti v oblastech unijního občanství, svobod vnitřního trhu a hospodářské soutěže. Tato diplomová práce zároveň formuluje konkrétní doporučení pro mezinárodní sportovní organizace, jak lépe přizpůsobit jejich pravidla požadavkům práva EU.

Tato diplomová práce ukazuje, že právo EU je aplikovatelné na pravidla upravující příslušnost sportovců k národním týmům vzhledem k jejich ekonomickému dopadu. Tato pravidla navíc představují překážku konkrétním oprávněním, které garantuje sportovcům unijní právní řád. V důsledku toho je třeba zvážit jednotlivé důvody a způsoby ospravedlnění těchto překážek. Soudní dvůr nabídl sportovnímu světu užitečný návod jak překonat test souladu sportovních pravidel s právem EU ve svém rozsudku *Meca-Medina & Majcen* z roku 2006. Soudní dvůr se v tomto rozsudku částečně odchýlil od své předchozí judikatury, rozšířil skupinu sportovních pravidel spadajících pod právo EU a stanovil čtyři kritéria, která je třeba vzít v úvahu při posuzování souladu sportovních pravidel s unijním právem – jejich kontext, cíle, inherentnost a přiměřenost.

S vědomím těchto obecných závěrů rozděluje analytická část této diplomové práce pravidla upravující sportovní národnost do tří skupin podle toho, jak se k nim pravděpodobně v budoucnu postaví SDEU. Autor této diplomové práce dochází k závěru, že některá z těchto pravidel, konkrétně čekací lhůty, pravidla stanovující kvóty naturalizovaných sportovců a absolutní zákaz změny sportovní národnosti, porušují ve své současné podobě právo EU. Mezinárodní sportovní organizace by měly klást větší důraz na požadavky unijního práva, jelikož rozsudek SDEU prohlašující tato pravidla za neslučitelná s unijním právem by mohl znamenat nový rozsudek *Bosman*, který v roce 1995 převrátil organizaci světového sportu naruby.

Abstract:

The aim of this master's thesis is to answer the question of how to grasp and categorize the concept of sporting nationality in the EU. Its goal is to consider compliance of the rules set up by international sporting governing bodies determining athletes' eligibility in national teams with the concrete provisions of EU law. The provisions under scrutiny are mostly those laying down the prohibition of discrimination on grounds of nationality in the fields of EU citizenship, internal market freedoms and competition. The master's thesis simultaneously aims at suggesting concrete recommendations to international sporting governing bodies in order to better adapt their rules to EU law requirements.

The authors of this master's thesis first claims that rules governing athletes' eligibility in national teams fall within the scope of EU law since they have economic impact and effect. Secondly, it is submitted that these rules limit athletes' rights under EU law and constitute therefore a restriction to respective provisions of the EU legal order. That is why the question whether such a restriction to EU law may be justified is examined. In this respect, the Court of Justice provided sporting world with a useful manual on how to pass EU law scrutiny in *Meca-Medina & Majcen* in 2006. The Court of Justice switched the points of its previous case law, broadened the group of sporting rules coming under EU law and extracted four important elements that need to be taken into account when assessing sporting rules' compliance with EU law – their context, objectives, inherence and proportionality.

Working with the aforementioned general considerations, the analytical part of the master's thesis divides the rules governing sporting nationality into three groups according to the future attitude of the CJEU to these rules, which might be expected towards the background of its current case law. The master's thesis shows that some of these rules, notably certain waiting periods, quotas of naturalized athletes and rules prohibiting the change of sporting nationality, would probably be held incompatible with EU law in their current state. International sporting governing bodies should be therefore more attentive to EU law requirements since such a ruling of the CJEU declaring their rules contrary to EU law could represent another *Bosman* judgment flipping the world organization of sport upside down.

Klíčová slova / Key words

Klíčová slova:

Právo Evropské unie

Vnitřní trh

Občanství Evropské unie

Soutěžní právo

Bosman

Meca-Medina a Majcen

Sport

Sportovní národnost

Mezinárodní sportovní organizace

Key words:

European Union law

Internal market

Citizenship of the Union

Competition

Bosman

Meca-Medina and Majcen

Sport

Sporting nationality

International sports organizations