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# RESEARCH HANDBOOK ON EU Sports Law and Policy

Edited by

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RESEARCH HANDBOOKS IN EUROPEAN LAW

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## 8. The autonomy of sport and the EU

*Jean-Loup Chappelet*

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### I. INTRODUCTION

Sport's claim for special status within society has led to intense debate between continental and international sports organisations and public authorities such as the European Union (EU). The sports movement's initial focus was to gain recognition for the 'specificity' of sport, a goal it has largely achieved. Thus, in 2009 the EU's core treaty – Treaty on the Functioning of the European Union (TFEU) and specifically article 165 – known as the Treaty of Lisbon, acknowledged 'the specific nature of sport, its structures based on voluntary activity and its social and educational function'. But this was not enough for sports organisations, which were really looking for sport to be given special exemption from EU law. Consequently, international sport began following a new tack to ensure its independence from governmental and intergovernmental authorities, both in Europe and around the world, by advocating the 'autonomy of sport'. These efforts seemed to bear fruit to a certain extent, as documents such as the European Commission's White Paper on Sport in 2007 began to refer to the concept of autonomy without, however, granting exemption from EU law.

This chapter looks at how the autonomy of sport has gradually risen to the top of the agenda in Europe, from the concept's emergence in the decades following the Second World War (section II) to its more recent prominence in the wake of the *Meca-Medina* ruling (section III). It then attempts to provide a more precise definition of a concept whose meaning in declarations by the sports movement and recommendations issued by European intergovernmental organisations is often rather vague (section IV). The final section discusses the viability and limits of the concept within the Rule of Law (*Rechtsstaat*), in Europe and throughout the world, and examines possible arguments for why sport should be granted autonomy (section V).

Voluntary sports organisations have the right to establish autonomous decision-making processes within the law. Both governments and sports organisations shall recognise the need for a mutual respect of their decisions.<sup>3</sup>

In 1984, the IOC decided to pre-empt government interference in sporting disputes by creating the Court of Arbitration for Sport (CAS), based in Lausanne and operated under Swiss law. Over the next two decades, all the world's international sport federations (IFs) gradually recognised the CAS in their statutes, the last IF to do so being FIFA (Fédération Internationale de Football Association) in 2002 (in exchange for the drawing up of a closed list of arbitrators specialising in football).

In fact, as early as 1974 the Court of Justice of the EU (CJEU) – then known as the Court of Justice of the European Communities – had begun hearing cases relating to certain sports regulations, thereby threatening the considerable autonomy then enjoyed by the sport movement. In both the *Walrave* (cycling) and *Dona* (football) cases, the court accepted the plaintiffs' arguments that sport was an economic activity and therefore subject to European/Community law.

Nevertheless, it was not until the famous *Bosman* ruling, handed down by the CJEU in 1995, and a number of other football and sport-related rulings (such as the *Kolpak* ruling in 2003), that the sports movement really began to feel that its autonomy was being called into question. Even though the CJEU had made several other rulings in the sport movement's favour (most notably in the *Deliège* and *Lehtonen* cases, both in 2000), the court's rulings were nevertheless seen as threats to sport's autonomy. Consequently, the sports movement decided to lobby Brussels, notably by setting up the Office of European Olympic Committees in 1994 (financed by a few NOCs and then by the European Olympic Committees (EOC), the umbrella organisation for Europe's NOCs), and by affirming the specificity of sport. The issue was considered important enough for the president of the EOC at this time, the Belgian Jacques Rogge, to make obtaining EU recognition for the specificity of sport his 'hobbyhorse'.<sup>4</sup> Rogge also created the European Youth Olympic Days (now known as the European Youth Olympic Festival – EYOF), a competition for young athletes that inspired a new

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<sup>3</sup> Recommendation No R (92) 13REV of the Committee of Ministers to Member States on the Revised European Sports Charter (Council of Europe 1992) article 3.3.

<sup>4</sup> J Rogge, 'The Olympic Movement and the European Union' (1995) XXV(5) *Olympic Review* 44–5 and J Rogge, 'Recognition of Sport by the European Union' (1997) XXVI (14) *Olympic Review* 15–16.

global event, called the 'Youth Olympic Games', created in 2007 when he was president of the IOC.

The EU reacted favourably to this lobbying and in 2000 it convinced the European Council (of heads of state or government) to issue a declaration on 'the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies'. The 'Nice Declaration', as it became known, went on to state:

The European Council stresses its support for the independence of sports organisations and their right to organise themselves through appropriate associative structures. It recognises that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organisations to organise and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the way which they think best reflects their objectives.<sup>5</sup>

### III. THE REVIVAL OF THE CONCEPT OF THE AUTONOMY OF SPORT

As noted in the preceding section, the Nice Declaration was followed by the adoption of an article (165) of the TFEU recognising the 'specific nature of sport'. Sport had become a centre of interest for the EU.<sup>6</sup> At first, the word 'autonomy' did not appear in any European treaties; its introduction was the result of strenuous lobbying by the IOC, which, in the aftermath of the CJEU's *Meca-Medina* ruling in 2006, hosted two seminars on the autonomy of sport, held in Lausanne in 2006 and 2008. Although the *Meca-Medina* ruling upheld the sanctions the International Swimming Federation and the IOC had imposed on two Romanian swimmers found guilty of doping, the CJEU's judges added: 'If the sporting activity in question falls within the scope of the [TFEU] Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty.'<sup>7</sup> In other words,

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<sup>5</sup> European Council: Conclusions of the Presidency; Nice, Annex V, 7–10 December, point 7.

<sup>6</sup> B García and S Weatherill, 'Engaging with the EU in order to Minimize its Impact: Sport and the Negotiation of the Treaty of Lisbon' (2012) 19 JEPP 238–56 and R Parrish, 'The Politics of Sports Regulation in the European Union' (2003) 10 *Journal of European Public Policy* 246–62.

<sup>7</sup> Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, para 2.



all sporting rules (including anti-doping rules in the *Meca-Medina* case) were potentially subject to EU laws. UEFA's Legal Director, Gianni Infantino, who would later become FIFA President, reacted very strongly, wondering whether the ruling was a 'step backwards for the European sports model and the specificity of sport'.<sup>8</sup>

A study of the autonomy of European sport commissioned by the Council of Europe's Enlarged Partial Agreement on Sport (EPAS) was presented at the 11th Conference of Ministers responsible for Sport in 2008 and published two years later.<sup>9</sup> This study noted several instances of government intervention in sporting affairs in Europe at the end of the 20<sup>th</sup> century and put forward a definition of the autonomy of sport (see section IV below).

By the time of its second seminar on the autonomy of sport, in 2008, the IOC had realised that sports organisations could not expect to keep their autonomy unless they were well governed. Consequently, after intense debate, it adopted its Basic Universal Principles for Good Governance of the Olympic and Sport Movement (BUPs). Principle number 7 is entitled 'Harmonious relations with governments while preserving autonomy'. Although the Olympic Charter published in 2011 does not refer directly to the BUPs, it includes a new principle:

Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.<sup>10</sup>

That same year, a communication issued by the European Commission to the European Parliament and Council noted that good governance in sport is a condition for the autonomy and self-regulation of sports organisations.<sup>11</sup>

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<sup>8</sup> See e.g., G Infantino [at the time Director of Legal Affairs at UEFA, now President of FIFA], *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?* UEFA paper 02/10/06, at [http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391\\_DOWNLOAD.pdf](http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf) accessed 26 Oct 2017.

<sup>9</sup> Chappelet, (n 1).

<sup>10</sup> *Olympic Charter* (IOC 2016) Fundamental Principle 5.

<sup>11</sup> *Developing the European Dimension in Sport* (European Commission 2011).

Following his election as IOC president in 2013, Thomas Bach reiterated the position he had laid out in his speech to the 2009 Olympic Congress and his election manifesto when he presented his (new) doctrine of 'responsible autonomy' to the United Nations General Assembly:

Regardless of where in the world we practise sport, the rules are the same. They are recognised worldwide. They are based on a common 'global ethic' of fair play, tolerance and friendship. But to apply this 'universal law' worldwide and spread our values globally, sport has to enjoy responsible autonomy. Politics must respect this sporting autonomy. For only then can sport organisations implement these universal values amidst all the differing laws, customs and traditions. Responsible autonomy does not mean that sport should operate in a law-free environment. It does mean that we respect national laws which are not targeted against sport and its organisations alone, sometimes for chiefly political reasons. In many UN member countries, the fact that sport can hold its international competitions and promote its values only if enjoying autonomy is not always understood or accepted. For this reason, I ask you all to take this message back to your countries. In the mutual interest of both sport and politics, please help to protect and strengthen the autonomy of sport. Only in this way we can create the win-win situation of a fruitful partnership for the benefit of youth and society in general.<sup>12</sup>

That same year, a working group set up by the European Commission in 2011 to prepare the European Union Work Plan for Sport 2011–2014 adopted a set of Recommendations on the Principles for Good Governance of Sport in the EU and presented them to the European Council.<sup>13</sup> These recommendations recognised the risk that 'Sports bodies that do not have in place good governance procedures and practices can expect their autonomy and self-regulatory practices to be curtailed.' As a result of this preparatory work, the EU decided to use the Erasmus+ programme to support projects that would promote these principles and combat cross-border threats to the integrity of sport.

One year after Thomas Bach's speech to the United Nations, the 69th UN General Assembly adopted a resolution entitled 'Sport as a means to promote education, health, development and peace'. Point 8 of the

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<sup>12</sup> T Bach, 'Statement on the Occasion of the Adoption of the Resolution "Building a peaceful and better world through sport and the Olympic ideal"', 68th Session of the UN General Assembly, New York, 6 November 2013.

<sup>13</sup> Deliverable 2: Principles of Good Governance in Sport, Brussels: EU Work Plan for Sport 2011–2014, Expert Group 'Good Governance', December 2013.

resolution states that the General Assembly 'supports the independence and autonomy of sport as well as the mission of the International Olympic Committee in leading the Olympic movement'.<sup>14</sup> The IOC was quick to issue a press release proclaiming the resolution a 'historic milestone' for sport.<sup>15</sup> However, in 2015, during deliberations over revisions to UNESCO's 1978 International Charter of Physical Education and Sport, the 38th UNESCO General Conference did not want the revised charter to include the notion of the autonomy of sport.<sup>16</sup> Although preparatory drafts of the charter had included the notion, UNESCO's General Conference felt that 'the term "autonomy of sport" is not yet sufficiently defined and would require further contextualization'.<sup>17</sup>

Despite all the principles of good governance, recommendations and reports published at the beginning of the 21st century, the 2000s were a difficult period for international sport, which was afflicted by a succession of corruption scandals within IFs (e.g., taekwondo, volleyball, judo, boxing, weightlifting, handball and, more recently, football, athletics and shooting) and increasing government interference in the autonomy of national sports organisations (in alphabetical order: in Afghanistan, Egypt, Gambia, Ghana, India, Ireland, Kenya, Kuwait, Mexico, Nigeria, Pakistan, Panama, Poland, Sri Lanka, etc.).

In 2014, the IOC suspended the Indian Olympic Association, thereby preventing Indian athletes taking part in the 2014 Sochi Winter Olympics under their national flag (one Indian athlete took part in the luge competition under the Olympic flag). Similarly, Kuwait's national Olympic committee was suspended in 2015 and was unable to send a team to the 2016 Rio Olympics (which did not prevent a Kuwaiti athlete winning a gold medal as an 'independent' athlete). This suspension led a Kuwaiti governmental body to sue the IOC for US\$1 billion in damages, via a legal suit filed in a Lausanne court in 2016.<sup>18</sup> The IOC also criticised

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<sup>14</sup> Resolution adopted by the General Assembly on 31 October 2014, New York: United Nations, A/RES/69/6, 5.

<sup>15</sup> 'Historic Milestone: United Nations Recognise the Autonomy of Sport' International Olympic Committee Press Release, 3 November 2014.

<sup>16</sup> International Charter of Physical Education, Physical Activity and Sport, Paris (UNESCO 2015).

<sup>17</sup> Final Report of the Intergovernmental Committee for Physical Education and Sport, 29–30 January 2015 (CIGEPS/2015/INF.REV) 8.

<sup>18</sup> N Butler, 'Kuwait Body Lodges \$1 billion Lawsuit against IOC' (*Inside the Games*, 9 Nov 2016) <http://www.insidethegames.biz/articles/1043517/exclusive-kuwait-body-lodges-1-billion-lawsuit-against-ioc> (accessed 26 Oct 2017).



threats to sport's autonomy in a number of other countries, including Hungary, Kenya and Mexico, but without taking further action.

Another threat to sport's independence arose within the IOC itself in the summer of 2016, when the IOC member responsible for autonomy, who was also a member of the IOC's Executive Board and president of both the Olympic Council of Ireland and the European Olympic Committees, was arrested in Brazil during the 2016 Olympic Games and charged with ticket touting (he denies the charges). This event shocked observers and revealed the need to take a fresh look at the arguments justifying sport's autonomy.<sup>19</sup>

In 2015 and 2016 four independent reports published by the World Anti-Doping Agency (WADA) substantiated claims made by whistleblowers that Russia was running a state-sponsored doping programme. The evidence was convincing enough for the International Association of Athletics Federations (IAAF) to suspend the Russian Athletics Federation, thereby preventing Russian track and field athletes taking part in the 2016 Rio Olympics. Athletes who could prove they had trained outside the Russian anti-doping system would be eligible to compete in Rio, but only one was able to do so.

Although the International Paralympic Committee (IPC) followed the IAAF's lead, when WADA asked the IOC to ban all Russian athletes from the 2016 Olympics because of the non-compliance of Russia's anti-doping agency and laboratory, the IOC refused to do so. Citing the presumption of innocence of individual athletes and invoking rule 40 of the Olympic Charter, the IOC asked the IF for each Olympic sport to decide whether Russian athletes should be allowed to compete (in the end, only two IFs – athletics and weightlifting – imposed total bans on Russian athletes). Some athletes filed cases with the CAS contesting the bans imposed by the IAAF, IPC and some IFs, but without success. Nevertheless, the CAS, like WADA, does restrict the autonomy of sports organisations, as is shown by the number of IF and IOC decisions it has overruled.<sup>20</sup>

In fact, 2016 turned out to be a very eventful year with respect to the autonomy of sport. In June, following a contradictory decision by a

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<sup>19</sup> N Butler, 'Turmoil of IOC Autonomy Tsar has Struck a Nail in the Coffin of Sport's Crusade for Independence' (*Inside the Games*, 29 Aug 2016) <http://www.insidethegames.biz/articles/1041079/nick-butler-turmoil-of-ioc-autonomy-tsar-has-struck-a-nail-into-the-coffin-of-sports-crusade-for-independence> (accessed 26 Oct 2017).

<sup>20</sup> J Forster, 'Global Sport Organisations' in I O'Boyle and T Bradbury (eds) *Sport Governance: International Case Studies* (Routledge 2013) 260–73.

Bavarian court, Germany's Federal Court of Justice (the country's supreme court) definitively rejected German speed skater Claudia Pechstein's appeal against a ruling by the CAS upholding the sanction she had been given for blood doping.<sup>21</sup> The Federal Court of Justice's decision also confirmed the CAS's independence or autonomy from sports organisations such as the International Skating Union (ISU) and the IOC. In addition, it found that the clause obliging athletes who wish to take part in competitions held under rules set by the ISU (or, by extrapolation, any IF) to take their case in last resort to the CAS is not an abuse of the ISU's dominant position (which would be against German and European competition law).

One of the main arguments underpinning the judges' ruling was that athletes have the opportunity to challenge the CAS's choice of arbitrators and/or to appeal to Switzerland's Federal Supreme Court (which Pechstein did, unsuccessfully). Because Germany has ratified the European Convention on Human Rights (ECHR), Pechstein has been able to file an appeal with the European Court of Human Rights (ECtHR), but the ECtHR had not yet published its decision by January 2017. On the other hand, in September 2016 the European Commission issued a 'statement of objections' informing the ISU that 'the ISU rules under which athletes face severe penalties for participation in unauthorised speed skating events [such as those organised by the Ice Derby company] are in breach of EU antitrust rules'.<sup>22</sup> In December 2017, the European Commission confirmed that the ISU must change these rules within 90 days.

Also in June 2016, the European Commission published a report on the specificity of sport, which reviews recent decisions made by the EU in this area, most notably with respect to the economic dimension of sport and the organisation of sport in Europe.<sup>23</sup> Twenty years after the CJEU's *Bosman* ruling, which had profound repercussions for European sport, this report clarifies current European jurisprudence in areas such as

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<sup>21</sup> P Bert, "German Federal Supreme Court on Pechstein: Update, Peter Bert's Blog about Litigation, Arbitration and Mediation in Germany – Art Law, Case Law, News etc." (*Peter Bert's blog*, 4 October 2016) [www.disputeresolutiongermany.com/2016/10/german-federal-supreme-court-on-pechstein-update](http://www.disputeresolutiongermany.com/2016/10/german-federal-supreme-court-on-pechstein-update) (accessed 26 Oct 2017).

<sup>22</sup> 'Antitrust: Commission sends Statement of Objections to International Skating Union on its Eligibility Rules' European Commission Press Release, 27 September 2016 (IP/16/3201).

<sup>23</sup> *Mapping and Analysis of the Specificity of Sport* (European Commission DG Education & Culture 2016), available at [http://ec.europa.eu/assets/eac/sport/library/studies/mapping-analysis-specificity-sport\\_en.pdf](http://ec.europa.eu/assets/eac/sport/library/studies/mapping-analysis-specificity-sport_en.pdf) (accessed 26 Oct 2017).

sports subsidies, taxation in sport, the media, the protection of sporting rights, agents, player transfers and issues pertaining to nationality. All these areas are subject to numerous sporting rules adopted in an autonomous fashion by sports organisations.

#### IV. TOWARDS A DEFINITION OF THE CONCEPT OF AUTONOMY

Surprisingly, none of the documents produced by sports organisations or intergovernmental bodies such as the EU and Council of Europe between the 1970s and early 2010s attempted to define either the concept of autonomy or related notions such as the independence and self-regulation of sports organisations.

In 2008 an ad hoc study conducted by Chappelet for the Council of Europe put forward the following definition:

The autonomy of sport is, within the framework of national, European and international law, the possibility for non-governmental, non-profit-making sports organisations to:

1. establish, amend and interpret rules appropriate to their sport freely, without undue political or economic influence;
2. choose their leaders democratically, without interference by states or third parties;
3. obtain adequate funds from public or other sources, without disproportionate obligations;
4. use these funds to achieve objectives and carry on activities chosen without severe external constraints;
5. draw up, in consultation with the public authorities, legitimate standards proportionate to the fulfilment of these objectives.<sup>24</sup>

This definition limits the autonomy of non-governmental, non-profit sports organisations to the following rights: to set their own rules (especially statutory rules, the rules of the game and the rules governing competitions); to amend and interpret these rules, to freely select their administrators and to obtain the funds needed to carry out their activities from public bodies, sponsors or broadcasters without having to accept undue constraints.

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<sup>24</sup> Chappelet, (n 1) 49.

<sup>24</sup> These rights are exerted within the framework of international, European or national law, with, in a modern state, the Rule of Law being considered an environment above any legal or juridical person. In other words, 'sporting rules' must respect fundamental legal principles (to be heard, presumption of innocence, etc.), be proportionate and be justified with respect to their objectives. They may not go against common law by, for example, encouraging breaches of the peace or, in the EU and associated countries, restricting the free movement of people, goods or services (a fundamental element of European law, alongside the law on fair competition).

In fact, this definition is no more than a detailed description of a right outlined in article 20 of the 1948 Universal Declaration of Human Rights, which recognises the right to peaceful assembly and association without compulsion. All modern countries have specific laws guaranteeing the right of peaceful association (e.g., articles 60–79 of the Swiss Civil Code). The fifth Fundamental Principle of the current Olympic Charter, first published in 2011 more or less reprises Chappelet's definition, although it does not include point 4 relating to funding or the possible need to take into account non-excessive demands by the public authorities or other outside stakeholders (see section III).

Chappelet deliberately left this final part of his definition vague, while recognising its necessity in a context of exchanges between sports organisations and commercial (sponsors/broadcasters) and public (subsidies) partners. The formulation chosen was designed to establish the idea of funding linked to the provision of specific services, which is increasingly common in public management. However, the Olympic Charter's fifth Fundamental Principle suggests that, rather than being absolute, this right to autonomy is contingent on 'ensuring that principles of good governance be applied'.

For the IOC, these principles of good governance are set down in the BUPs, which are now included in the IOC's code of ethics (see section III). Applying the BUPs is seen as justifying responsible autonomy. By way of contrast, Geeraert *et al* has used the term 'pragmatic autonomy'<sup>25</sup> and defined four dimensions of autonomy: political, legal, financial and

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<sup>25</sup> A Geeraert, M Mrkonjic and J-L Chappelet, 'A Rationalist Perspective on the Autonomy of International Sport Governing Bodies: Towards a Pragmatic Autonomy in the Steering of Sports' (2015) 7(4) *International Journal of Sport Policy and Politics* 473–88.

pyramidal; Chappelet has proposed the term ‘negotiated autonomy’<sup>26</sup> whereas Weatherill suggests ‘conditional autonomy’.<sup>27</sup>

As noted above, many more-or-less similar lists of governance principles have been drawn up, but there are few lists of indicators that can be used to determine whether or not these principles are being followed.<sup>28</sup> A list of such indicators for IFs was produced by the Association of Summer Olympic International Federations (ASOIF) in 2016 (ASOIF 2016) and endorsed by the IOC and by the 14th Council of Europe Conference of Ministers Responsible for Sport, held in Budapest in November 2016. Australia, the UK and Flanders (Belgium) had already adopted similar lists for their national governing bodies, whose government funding is now linked to compliance with the criteria contained in these lists. However, some sports leaders are claiming that such indicators limit the autonomy of sports organisations.

Chappelet completed his descriptive definition of the domains of autonomy by drawing up a classification of types of autonomy.<sup>29</sup> This classification has three main categories according to whether rules apply to: a) the sports organisation’s statutes; b) the rules of the game; or c) the rules of sports competitions controlled by the organisation. Sports organisations have a high degree of autonomy over their statutes (a), which are limited only by the laws governing the legal form (association or other) of sports organisations in the country in which the organisation is based. Switzerland, home to numerous international sports bodies, is known to have more accommodating legislation in this area than many other countries. For example, in Switzerland it is possible to become a legal person, such as an association, without registering as a non-profit association, unlike in France, where, under the Associations Act of 1901, an association must register (at the local prefecture) in order to be considered a legal person.

Autonomy with respect to the rules of the game (b) is also almost total, as sports organisations are free to decide on and apply, within their pyramidal structures, the rules governing the field of play, as long as these rules do not encourage breaches of the peace. For example, boxing would not be allowed to adopt a rule requiring fights to be carried out to

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<sup>26</sup> Chappelet, (n 1).

<sup>27</sup> S Weatherill, ‘On Overlapping Legal Orders: What is the “purely sporting” rule?’ in B Bogusz, A Cygan and E Szyszczak (eds) *The Regulation of Sport in the European Union* (Edward Elgar Publishing 2007) 48–73.

<sup>28</sup> J-L Chappelet, *Beyond Governance* (2017) (20) Sport in Society, *forthcoming*.

<sup>29</sup> Chappelet, (n 1).



the death (as in the time of the gladiators). On the other hand, commercial partners (sponsors and, especially, broadcasters) can have considerable influence over the rules of the game through their desire to ensure the sporting spectacle is as attractive as possible for the audience. Hence, the decision by the boxing's IF to ban protective headgear, presented as a measure to reduce serious injuries, may have been influenced by the wish to allow television viewers to see the boxers' faces more clearly.

The amount of autonomy a sports organisation has when setting the rules for sports competitions (c) depends on the nature of the event. The larger an event's economic dimension, the greater the constraints imposed by common law, especially in Europe. For example, FIFA had to change its rules on player transfers following the *Bosman* ruling. On the other hand, other rules, for example, eligibility criteria for national team selection or restrictions on transfer periods, have been found to be compatible with European law. In addition, as for rules of the game, competition rules, such as the format and timing of competitions, have been adapted to meet the needs of broadcasters and, occasionally, of sponsors. Hence, the finals of the swimming events at the 2008 Beijing Olympics and 2016 Rio Olympics were held early in the morning (Beijing) or late in the evening (Rio) in order to fit in with the prime time scheduling demands of American television networks.

## V. THE VIABILITY OF THE CONCEPT OF AUTONOMY

In his seminal work on the history of moral philosophy, Schneewind showed how Kant and other 17th- and 18th-century philosophers invented the concept of autonomy and justified it with respect to the power of the state and the Church.<sup>30</sup>

More recently, the European Charter for Sport, adopted in 1979 as a recommendation by the Council of Europe, supported the principle of autonomy for volunteer-based sports organisations. In 2000 the CJEU's *Delière* ruling maintained that national sport federations 'normally have the necessary knowledge and experience' to run their affairs autonomously.<sup>31</sup> The European Commission's 2007 White Paper on Sport noted that sports organisations were capable of addressing most challenges

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<sup>30</sup> J B Schneewind, *The Invention of Autonomy* (CUP 1998).

<sup>31</sup> Cases C-51/96 and C-191/97 *Delière v Ligue de Judo* [2000] ECR I-2549.

'through self-regulation respectful of good governance principles' thereby recognising the principle of autonomy, as long as the organisation is governed correctly.<sup>32</sup>

Nevertheless, ten years after the White Paper and in the light of the numerous examples of 'bad governance' exposed in the media, the case for autonomy is no longer self-evident. In fact, even the IOC now advocates 'responsible autonomy', that is, autonomy only for sports organisations that are well governed. With this in mind, in 2014 the IOC set up an Ethics and Compliance Office within its administration in order to ensure members of the Olympic Movement, especially the IFs and NOCs, apply the BUPs of good governance.

Evidently, under the Rule of Law, people and organisations cannot have absolute freedom of action; national and international laws and the legal system that interprets these laws will always limit their autonomy. As sport often involves competitions between athletes from different countries, IFs and the IOC have gradually drawn up rules to be applied around the globe. In 1984 the IOC created the CAS, a specialist tribunal for settling disputes arising from the application of these rules and whose judgments have led to the formation of what is known as the *lex sportiva*.<sup>33</sup> All IFs now recognise the CAS as sport's supreme arbitral body.

Nevertheless, difficulties sometimes arise from differences between the *lex sportiva* and national or European laws, as occurred (and as described above) in the *Bosman*, *Meca-Medina* and *Pechstein* cases. This creates legal uncertainty for everyone and encourages litigation based on different interpretations of laws and regulations. Given the supremacy of national and European courts of justice in resolving litigation, one way in which sports organisations could maintain a degree of (responsible) autonomy would be to ensure their governance and their dispute-resolution mechanisms, including the CAS, respect universal principles of justice and human rights.

It is, in fact, in the public authorities' interest for the non-profit sports movement to remain autonomous, rather than being run by the state or by private enterprise, as it performs several useful tasks in areas such as youth education, public health and social integration. What is more, these tasks are largely self-financed, thanks to volunteers and sport's sponsorship and broadcasting revenues. If they were not carried out by the sports

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<sup>32</sup> White Paper on Sport, COM (2007) 391.

<sup>33</sup> F Latty, *La Lex Sportiva, Recherche sur le Droit Transnational* (Martinus Nijhoff Publishers 2007).

movement, they would fall to either the public sector or the commercial sector. The public sector would probably be unable to entirely accomplish these tasks due to the state having other priorities and the commercial sector would not be able to undertake them without access to specific revenues, unless it created a system of professional leagues, as in the frequently criticised American model (in which professional leagues are fed by 'amateur' leagues at the high school and university levels).

From this point of view, discussions on whether non-profit sports organisations (most of which are associations) should change their statuses to become limited companies or similar for-profit bodies are misguided. Potentially lucrative sports clubs, such as fitness clubs or golf clubs, are already for-profit legal entities. Most IFs are indeed associations, but their missions are to regulate their sport and to reinvest their revenues in 'grassroots' sport (so their objectives are not purely economic, otherwise they would lose their non-profit status). Furthermore, becoming a limited company, the status adopted by many of Europe's professional sports clubs, does not guarantee good governance, as is shown by the number of such clubs that have gone bankrupt.

On the other hand, it would be interesting to examine the possibility of sports organisations becoming cooperatives, a legal form that exists in many jurisdictions, and thereby forming part of the currently very powerful social and solidarity economy movement.<sup>34</sup> As members of the cooperative, athletes within a sport and/or a country would have a much greater say in the decision-making process than they do via the system of general assemblies currently favoured by national and international sport federations, which are generally bodies over which athletes have little influence.

## VI. CONCLUSION

Although the concept of the autonomy of sport, which sports organisations in Europe promoted extensively during the second half of the 20th century, dates back to the birth of modern sport in the 19th century, this autonomy now needs to be justified. Sports organisations can no longer consider autonomy to be a self-evident right, even if they implement appropriate systems of governance. Any justification for

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<sup>34</sup> J S Marques, *Social and Solidarity Economy, Between Emancipation and Reproduction* (UNIRSD 2013).

autonomy must include a more precise definition of its scope and be based on detailed reflections on the independence, legal form and regulation of sports organisations.