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Participating in the Olympic Games: Lights, camera and – *legal* – action?

An inquiry into the compatibility of Rule 40 of the Olympic Charter concerning the commercial opportunities of Olympic participants with EU competition law ahead of Tokyo 2021

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List of Abbreviations

GENERAL

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
DOSB	Deutscher Olympischer Sportbund
EFTA	European Free Trade Association
EU	European Union
FIFA	Fédération Internationale de Football Association
FINA	Fédération Internationale de Natation (International Swimming Federation)
IOC	International Olympic Committee
ISF	International Sports Federation
ISU	International Skating Union
MOTOE	Motosykletistiki Omospondia Ellados (Greek Motorcycling Federation)
NCA	National Competition Authority
NOC	National Olympic Committee
NSF	National Sports Federation
OC	Olympic Charter
OCOG	Organising Committee for the Olympic Games
TFEU	Treaty on the Functioning of the European Union
UEFA	Union of European Football Associations

JOURNALS

Case W Res JL Tech & Internet	Case Western Reserve Journal of Law, Technology and the Internet
EL Rev	European Law Review
ELJ	European Law Journal
ESJL	Entertainment and Sports Law Journal
Harv J Sports & Ent L	Harvard Journal of Sports and entertainment Law
IJSPP	International Journal of Sports Physiology and Performance
Int Sports LJ	The International Sports Law Journal

Int'l Comp, Policy & Ethics L Rev	International Comparative, Policy & Ethics Law Review
J Consum Cult	Journal of Consumer Culture
J Eur Integr	Journal of European Integration
J Glob Mark	Journal of Global Academy of Marketing
JCULR	James Cook University Law Review
JECL&Pract	Journal of European Competition Law & Practices
JL&Soc	Journal of Law & Society
MJ	Maastricht Journal of European and Comparative Law

INTRODUCTION

'*Good luck, you know who you are, on making it you know where.*'[1]

While competing in the Olympic Games often is an athlete's biggest achievement in his sporting career, Rule 40, bye-law no. 3 (henceforth: "Rule 40"), of the Olympic Charter – arguably unfairly – precludes him from benefiting from the commercial opportunities of that Olympic dream, whereas a simple supporting message by his non-Olympic sponsor on social media is already subject to restrictions.[2] Since its inception in 1991, Rule 40 aims to prevent ambush marketing by non-Olympic sponsors during the defined Games period in an effort to secure the exclusivity of Olympic sponsorship programmes and to protect the integrity of athletes' Olympic performances.[3] It was, however, not until the Atlanta Olympic Games in 1996 that the IOC became committed to lay down rigorous marketing restrictions that athletes are still confronted with today. During the Games in Atlanta, official Olympic sponsor Reebok accused sports brand Nike of ambush marketing after it designed the iconic golden spikes for US athlete Michael Johnson.[4] Sports fans around the world saw records being broken on these shoes during the 200m and 400m sprint finales.[5] A few days later Johnson gracefully posed on the cover of TIME magazine with the golden shoes dangling from his neck alongside his golden Olympic medals.[6]

From that time onwards, athletes and non-official Olympic sponsors have been significantly restricted in their commercial opportunities. To illustrate, the Ricoh Arena

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[1] Twitter post by @Rule40 on 26 May 2016 <https://twitter.com/rule40> accessed 29 June 2020.
[2] Rule 40, bye-law no. 3, of the Olympic Charter in force as from 26 June 2019 reads: "*Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board*". <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> accessed 29 June 2020.
[3] Megan Ormond, '#WeDemandChange: Amending International Olympic Committee Rule 40 for the Modern Olympic Games' (2014) 5 Case W Res JL Tech & Internet 179, 181-182.
[4] Joshua Parsi, 'Ambush marketing in the Olympics and Rule 40 – does it really deter big brand owners?' (*Reddie & Grose, IP News,* 6 September 2016) <https://www.reddie.co.uk/2016/09/06/ambush-marketing-olympics-rule-40-really-deter-big-brand-owners/> accessed 29 June 2020.
[5] <https://www.youtube.com/watch?v=JQ9cBQANjiw&t=100s> accessed 29 June 2020.
[6] <http://content.time.com/time/covers/0,16641,19960812,00.html> accessed 29 June 2020.

in Coventry (UK), sponsored by the Japanese company of the same name, had to cover up all signs hinting to the naming sponsorship as it would be hosting Olympic football games during London 2012.[7] The stadium even had to be renamed for the duration of the Olympics into City of Coventry stadium.[8] Although Nike always seems to find a loophole, nearly all athletes and non-Olympic sponsors have tacitly complied with the imposed restrictions for years.[9] For one, because athletes will sign almost anything in order to be able to compete in this highly, if not most, prestigious sporting event, but also for fear of the consequences of a violation. Athletes could forfeit medals and face additional financial penalties, with all that this entails for their sporting careers.[10]

Controversy surrounding Rule 40 first sparked during the London 2012 "Twitter Games".[11] The rise of social media and the commercialisation of sporting events have re-defined the scope of Rule 40, which caused affected parties and critics to strongly question its legitimacy.[12] The commotion and subsequent relaxations of the approach to Rule 40 enacted by the IOC and NOCs since, did not provoke the envisaged fundamental change.[13] Athletes and other stakeholders continue to advocate for greater freedom to exploit the commercial opportunities the Olympic spotlights provide[14], some under threat of legal action.[15]

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[7] 'London 2012: Ricoh Arena to cover up signs for Olympics' *BBC News* (25 January 2012) <https://www.bbc.com/news/uk-england-coventry-warwickshire-16703448> accessed 29 June 2020.

[8] Jonathan Guthrie, 'Coventry to rename stadium for Olympics' *Financial Times* (4 January 2011) <https://www.ft.com/content/e74ab006-1827-11e0-88c9-00144feab49a> accessed 29 June 2020.

[9] Hannah Spruce, '3 times Nike ambushed the Olympics' (29 March 2016) <https://www.highspeedtraining.co.uk/hub/ambush-marketing-sport/> accessed 29 June 2020.

[10] Rule 59 OC.

[11] See e.g. David Rowe and Brett Hutchins, 'Globalization and online audiences' in Andrew C. Billings and Marie Hardin (eds), *Routledge Handbook of Sport and New Media* (Routledge 2014), 12; 'London 2012: Olympics will be 'Twitter Games' says BOA chief' *BBC Sport* (6 January 2012) <https://www.bbc.com/sport/olympics/16442778> accessed 29 June 2020.

[12] Erika Szyszczak, 'Competition and Sport: No Longer *So* Special?' (2018) 9(3) JECL&Pract 188, 192; See e.g. John Grady, 'Analyzing Rule 40's Restrictions on Using Athletes in Olympic Sponsorship at Rio 2016' (2017) 15(1) ESJL 1.

[13] See e.g. relaxation by the Dutch NOC*NSF: Geert Slot, 'Meer commerciële mogelijkheden voor sporters tijdens Olympische en Paralympische Spelen' *NOC*NSF* (13 December 2019) <https://pers.nocnsf.nl/meer-commerciele-mogelijkheden-voor-sporters-tijdens-olympische-en-paralympische-spelen/> accessed 29 June 2020.

[14] See e.g. Ben Cronin, 'Athlete Body calls on IOC to make Rule 40 relaxation mandatory' *SportBusiness* (10 October 2019) <https://www.sportbusiness.com/news/athlete-body-calls-on-ioc-to-make-rule-40-relaxation-mandatory/> accessed 29 June 2020.

[15] See e.g. United Kingdom: Peter Crowther, Lisa Hatfield and Jake White, 'Are the British Olympic Association's new Rule 40 Guidelines still too restrictive?' (*LawInSport*, 18 December 2019)

In Germany, athletes, together with the German athlete body and the Federal Association of the German Sports Industry, effectively brought Rule 40 under legal scrutiny before the Bundeskartellamt, the German competition authority.[16] Even though the case was eventually resolved through commitments, the preliminary assessment set out in the Bundeskartellamt decision of 25 February 2019 (henceforth: "German decision") proves that regulations restrictive on commercial behaviour of athletes and non-Olympic sponsors could be subjected to EU competition law challenges.[17] The decision could serve as an informal precedent for challenges by other NCAs, or even the European Commission.[18] Supposedly, the Commission has already invited the IOC to apply the revised German approach to all EU athletes in November 2019.[19] However, IOC president Thomas Bach openly resists all demands for further relaxation.[20] According to him, the present IOC approach to Rule 40 ahead of Tokyo 2021 represents a justified balance between the interests of individual athletes and the collective interest of the Olympics' organisation.[21]

In light of the foregoing, it does not seem feasible that the IOC and the European Commission will resolve the controversy over Rule 40 diplomatically. This thesis intends

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<https://www.lawinsport.com/topics/item/are-the-british-olympic-association-s-new-rule-40-guidelines-still-too-restrictive> accessed 29 June 2020.

[16] Press release of the Press Office of the Bundeskartellamt (Bonn, 27 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/27_02_2019_DOSB_IOC.pdf?__blob=publicationFile&v=3> accessed 29 June 2020.

[17] Bundeskartellamt, Decision pursuant to Section 32b GWB Public version, B-226/17 (25 February 2019).

[18] Parliamentary question for written answer E-002118/2019 to the Commission <https://www.europarl.europa.eu/doceo/document/E-8-2019-002118_EN.html> accessed 29 June 2020; See e.g. John Grady and Anita Moorman, 'Rule 40 versus European Competition Law: A New Challenge to an Ongoing Sponsorship Concern' <https://www.easm.net/download/2018/Rule-40-versus-European-Competition-Law-A-New-Challenge-to-an-Ongoing-Sponsorship-Concern.pdf> accessed 29 June 2020; Antoine Duval and Thomas Terraz, 'Balancing Athletes' Interests and The Olympic Partner Programme: the Bundeskartellamt's Rule 40 Decision' (*Asser International Sports Law Blog*, 22 January 2020) <https://www.asser.nl/SportsLaw/Blog/post/balancing-athletes-interests-and-the-olympic-partner-programme-the-bundeskartellamt-s-rule-40-decision-by-thomas-terraz> accessed 29 June 2020.

[19] Will Sparks and Gabriel Pennington, 'Questions raised over Marketing Restrictions on Olympic Athletes' (*Squire Patton Boggs*, 9 December 2019) <https://www.sports.legal/2019/12/questions-raised-over-marketing-restrictions-on-olympic-athletes/> accessed 29 June 2020; Craig Lord, 'IOC to consult members as EC says Olympic Charter must change to grant European athletes their rights' *Swimming World Magazine* (3 December 2019) <https://www.swimmingworldmagazine.com/news/ioc-to-consult-members-as-ec-says-olympic-charter-must-change-to-grant-european-athletes-their-rights/> accessed 29 June 2019.

[20] Ben Cronin, 'IOC resists further calls to change Rule 40, tells athletes to begin NOC negotiations' *SportBusiness* (15 April 2019) <https://www.sportbusiness.com/news/ioc-resists-further-calls-to-change-rule-40-tells-athletes-to-begin-noc-negotiations/> accessed 29 January 2020.

[21] Craig Lord (n 19).

to examine the legal merits of a challenge on the basis of EU competition law to the IOC's approach to Rule 40 ahead of Tokyo 2021. It first discusses the relevant aspects of the Rule's framework in Part I. Part II subsequently elaborates on the legal framework in place under EU law to challenge regulatory powers of sports bodies. In this regard, it also highlights on the special governance structures in place in international sports. Part III then contains a detailed legal assessment of the compatibility of IOC's approach to Rule 40 with EU competition law. Some final remarks on possible remedies are made in Part IV. Finally, the findings of all different parts are brought together to conclude the inquiry.

I. THE RULE 40 FRAMEWORK

I.1 Introduction

With Tokyo 2021 around the corner, the traditionally limited exceptions to the general ban of Rule 40 on the use of an Olympic participant's image for commercial purposes turned into commercial opportunities.[22] However, despite the loosened approach, the stringent conditions to those opportunities may still give rise to competition law concerns. To be able to assess the viability of a competition law challenge, it is essential to understand the Rule 40 framework in place ahead of Tokyo 2021. This part elaborates on the Rule's background, scope, principles, implementation and enforcement.

I.2 Ensuring the regular celebration of the Olympic Games

The IOC is the guardian of the Olympic Games.[23] It is the final authority on what is collectively referred to as the Olympic Movement, which further includes NOCs, ISFs and the relevant OCOG.[24] In order to ensure the continued organisation of the Games, the

[22] James Schwabe, 'The pledge to Brand Loyalty: A Gold Medal Approach to Rule 40' (2018) 9 Harv J Sports & Ent L 55, 56.
[23] Rule 2, paragraph 3, OC.
[24] 'Olympics and International Sports Law Research Guide: Organization & Legal Structure of the Olympic Games' (*Georgetown Law Library*, last updated 22 October 2018) <https://guides.ll.georgetown.edu/c.php?g=364665&p=2463479> accessed 29 June 2020; IOC, 'Leading the Olympic Movement' <https://www.olympic.org/the-ioc/leading-the-olympic-movement> accessed 29 June 2020.

members of the Olympic Movement generate revenue from the exploitation of their rights.

I.2.1. Sustaining the Olympic funding and solidarity mechanism

Aside from the sale of broadcasting rights, the Olympic Movement's biggest source of income stems from the sale of marketing rights.[25] In this regard, the IOC runs The Olympic Partner ("TOP") programme and coordinates all other Olympic marketing programmes run by members of the Olympic Movement.[26] The Olympic partners acquire the exclusive rights of association with the Olympics, including the use of Olympic properties and images.[27]

For the purpose of maintaining the distinctiveness of Olympic marketing programmes and to 'so sustain the funding' of the Olympic Games and Olympic Movement, the IOC introduced Rule 40 to the Olympic Charter.[28] In essence, Rule 40 prevents participants from crediting non-Olympic partners and it precludes non-Olympic partners from associating with the Olympics during the specified Games period. [29] In turn, income stemming from the Olympic programmes is allocated to ISFs and NOCs, who subsequently employ that money to enable athletes to train, prepare and compete in the Games, regardless of their level of funding through private or public means. This is what is called the Olympic solidarity mechanism.[30] Rule 40 thus serves to preserve the financial stability and sustainability of the Olympic Games and the Olympic funding

[25] IOC, 'Funding' <https://www.olympic.org/funding> accessed 29 June 2020; International Olympic Committee, 'Olympic Marketing Fact File 2020 Edition', 8 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File.pdf> accessed 29 June 2020.

[26] Rule 7, paragraph 2, OC and Rule 24, paragraph 1, OC; Olympic Marketing Fact File 2020 Edition (n 25), 8.

[27] IOC, 'Commercial opportunities for Participants during the Tokyo 2020 Olympic Games' <https://www.olympia.at/download/files/%7B9D130C87-FAEA-41B7-88A3-935D76187A5D%7D/Commercial_opportunities_for_Participants_during_the_Tokyo_2020_Olympic_Games.pdf> accessed 29 June 2020, 2.

[28] Tokyo 2021 Principles (n 27), 2.

[29] Athletes, team officials and other team personnel participating in the Olympic Games are collectively referred to as participants in the Olympic Games. But since the focus of this thesis is on athletes, the terms 'participant' and 'athlete' are used interchangeably throughout this thesis.

[30] Olympic Marketing Fact File 2020 Edition (n 25), 10-11; IOC, 'Olympic Solidarity Commission' <https://www.olympic.org/olympic-solidarity-commission/> accessed 29 June 2020.

model. Additionally, the IOC asserts that Rule 40 also aims to prevent excessive commercialisation so that the focus of the Games is on athletes' sporting performances.[31]

I.2.2. IOC versus participants

The impact of Rule 40 has significantly increased, particularly as a result of the commercialisation of professional sport, alongside with the emergence of social media as an advertising tool.[32] On the one hand, this has caused Olympic partners to require sufficient safeguards for their acquired marketing rights now more than ever, while on the other hand this has led to increased demands by athletes to be able to capitalise off the commercial opportunities.

I.2.2.1. Elicited changes to Rule 40

In an effort to establish a balance between the collective interest of the Olympic Movement and athletes' individual interests, the IOC has adopted several relaxations of its approach to Rule 40 for Rio 2016, PyeongChang 2018 and Tokyo 2021 respectively.[33] Previous to Tokyo, the Rule read: "Except as permitted by the IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games".[34] Although the language of the Rule was long left

[31] Tokyo 2021 Principles (n 27), 2.

[32] See e.g. Barry Smart, 'Consuming Olympism: Consumer culture, sport star sponsorship and the commercialisation of the Olympics' (2018) 18(2) J Consum Cult 241, 245; Ben van Rompuy, 'The role of EU competition law in tackling abuse of regulatory power by sports associations' (2015) 22(2) MJ 174, 174.

[33] Rosie Duckworth, 'Rio 2016: IOC's "relaxation" of Rule 40' (2016) 23(2) Sports Law Administration & Practice 10; 'IOC relaxes Rule 40 ahead of Tokyo 2020' *SportBusiness* (27 June 2019) <https://www.sportbusiness.com/news/ioc-relaxes-rule-40-ahead-of-tokyo-2020/> accessed 29 June 2020.

[34] See guidelines for **London 2012**: IOC, 'IOC Social Media, Blogging and Internet Guidelines for participants and other accredited persons at the London 2012 Olympic Games' <https://stillmed.olympic.org/Documents/Games_London_2012/IOC_Social_Media_Blogging_and_Internet_Guidelines-London.pdf> accessed 29 June 2020; **Sochi 2014**: IOC, 'Guidelines for NOCs regarding Rule 40 of the Olympic Charter' <https://assets.fis-ski.com/image/upload/v1537188536/fis-prod/assets/Guidelines_for_Olympic_Rule_40.pdf> accessed 29 June 2020 and IOC, 'IOC Social Media, Blogging and Internet Guidelines for participants and other accredited persons at the Sochi 2014 Olympic Winter Games' <https://stillmed.olympic.org/media/Document%20Library/2015/08/12/19/06/00/IOC-Social-Media-Blogging-and-Internet-Guidelines-for-participants-and-other-accredited-persons-at-the-Sochi-2014-Olympic-Winter-Games.pdf#_ga=2.95668062.336588394.1593612393-538637167.1578477259> accessed 29 June 2020; **Rio de Janeiro 2016**: IOC, 'Rio 2016 Olympic Games –

untouched by the IOC, the issued guidelines did gradually generate more possibilities for athletes. For instance, the Rio 2016 guidelines on Rule 40 allowed athletes to apply to their NOC for a waiver of the restrictions. Notwithstanding this advanced opportunity, authorisation would already be denied for individual use of social and digital media by athletes in case it implied any association between a non-Olympic partner and the Olympics. An escape was thus still only exceptionally available.

I.2.2.2. An insufficiently loosened approach to Tokyo 2021?

After the IOC's latest amendment of the Olympic Charter in June 2019, Rule 40 reads: "Competitors, team officials and other team personnel who participate in the Olympic Games may allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board."[35] It follows from the established principles for Tokyo 2021, that the IOC is more receptive to generic advertising opportunities. The adjusted approach also grants athletes more flexibility to benefit from the use of social media platforms without prior authorisation.

In spite of the steps taken by the IOC to ease the restrictions on athletes' commercial opportunities in relation to the Olympic Games, athletes and other stakeholders still argue

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Rule 40 Guidelines' <https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiWgIiDsqzqAhWC-qQKHaY7CsEQFjABegQIChAD&url=https%3A%2F%2Fwww.teamusa.org%2F~%2Fmedia%2FTeamUSA%2FDocuments%2FRule-40-Guidelines-ENG.pdf%3Fla%3Den&usg=AOvVaw2t-RzTOQYOXOk3XZo2SYWa> accessed 29 June 2020 and IOC, 'IOC Social and Digital Media Guidelines for persons accredited to the Games of the XXXI Olympiad Rio 2016' <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Summer-Games/Games-Rio-2016-Olympic-Games/Social-Media-Blogging-Internet-Guidelines-and-News-Access-Rules/IOC-Social-and-Digital-Media-Guidelines-Rio-2016.pdf#_ga=2.29025150.336588394.1593612393-538637167.1578477259> accessed 29 June 2020; **PyeongChang 2018**: IOC, 'Rule 40 Guidelines, XXIII Olympic Winter Games PyeongChang 2018' <https://www.olympic.si/datoteke/PyeongChang%202018%20-%20Rule%2040%20Guidelines%20-%20ENG.pdf> accessed 29 June 2020 and IOC, 'IOC Social and Digital Media Guidelines for persons accredited to the XXIII Olympic Winter Games PyeongChang 2018' <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-PyeongChang-2018-Winter-Olympic-Games/IOC-Social-and-Digital-Media-Guidelines/PyeongChang-2018-Social-Media-Guidelines-eng.pdf> accessed 29 June 2020.

[35] Rule 40, bye-law no. 3, OC.

the present approach to unjustly preclude them from exploiting those opportunities.[36] The strict principles and procedural aspects accompanying the opportunities, as laid down in the IOC's issued guidelines 'Commercial opportunities for Participants during the Tokyo 2020 Olympic Games', allegedly render the relaxations ineffective, especially when considering their broad scope.

I.3 Tokyo 2021 Principles

I.3.1. Scope

The principles apply to all forms of advertising using a participant's image, for a period starting ten days prior to the Opening Ceremony until the Closing Ceremony, i.e. the Games/blackout period.[37] This includes paid-for forms of advertising, such as traditional advertising, direct advertising, lending or gifting products and in-store promotions, as well as all activity on social networks, regardless of whether or not it was paid for.[38] The use of a participant's image in these forms of advertising means any reference to a participant, whether by name, (recent) sports performances, appearance, image or any representation thereof.[39]

I.3.2. Principles applicable to Participants

Participants are restricted in what they can post on social and digital platforms.[40] They can only provide one unique and simple message of thanks to their sponsors during the blackout period, which may not include a personal endorsement of a product or service, nor any implication it enhanced their performance. Moreover, no message may imply a commercial connection between the Olympic Movement and a non-Olympic sponsor.

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[36] See e.g. EUAthletes' statement <https://euathletes.org/statement-on-bye-law-3-to-rule-40-of-the-olympic-charter/> accessed 29 June 2020; Cronin (n 14); Sparks and Pennington (n 19).
[37] Tokyo 2021 Principles (n 27), 3; Christopher Chase, 'Olympic Athlete Marketing: Easing Up On Rule 40, But With Strings Attached' (*Lexology*, 8 October 2019) <https://www.lexology.com/library/detail.aspx?g=37c952f8-0350-4b91-8d1f-630e1600029c> accessed 29 June 2020.
[38] Tokyo 2021 Principles (n 27), 4.
[39] Ibid., 4.
[40] Ibid., Key Principle 5.

I.3.3. Principles applicable to non-Olympic sponsors

Besides that, non-Olympic partners may only use participants' images as long as the advertising does not contain any Olympic Properties, which essentially include all Olympic-related phrases, symbols and anthems.[41] The list of Olympic-related terms depicts the IOC's loosened approach to some extent. Previously, this list also included words such as 'medal', 'effort' and 'summer'. Those commonly used words, are no longer specified as Olympic-related terms. Furthermore, for an advertising campaign to be permitted, it must be run consistently already three months prior to the defined Games period and may not materially escalate during the Games. Furthermore, the only link with the Games may be the use of the participant's image.[42]

If a non-Olympic sponsors wishes to benefit from this narrowly defined opportunity to use a participant's image for commercial purposes, it must notify the IOC, Tokyo 2020 OCOG and/or the affected or targeted NOC of their plans in order to obtain permission.[43] However, the notification requirement for non-Olympic partners no longer applies to every individual post on social networks.[44] Any advertising plan through social media should, nonetheless, be notified. In any case, non-Olympic sponsors are not permitted to post any supporting, nor congratulatory messages on social networks during the Olympic Games.[45] This right is reserved for Olympic partners, 'because of the intrinsic connection with the Olympic Games'.[46] Prior to and after the Games, they may, provided that the message contains no Olympic Properties.

I.4 Implementation, enforcement and the role of NOCs

Evidently, the applicable principles further to Rule 40 significantly restrict the extent to which athletes can engage with non-Olympic partners and benefit from commercial activities connected with the Olympic Games. To further complicate the matter, athletes from different countries are affected differently by the principles due to the implementation thereof by NOCs.

[41] Tokyo 2021 Principles (n 27), Key Principle 2, under g.
[42] This is defined as "generic advertising". Ibid., Key Principle 3.
[43] Ibid. Key Principle 2, under c.
[44] Ibid., Key Principle 2, under e.
[45] Ibid., Key Principle 4.
[46] Ibid., Key Principle 4.

I.4.1. "No one size fits all solution"[47]

According to the IOC, a strictly global approach to Rule 40 would disregard the different legal frameworks, funding models and sponsorship contracts existent in different countries.[48] NOCs are therefore responsible for the implementation of the IOC's Key Principles within their respective territories.[49] The NOCs lay down the particular commercial arrangements in an agreement on cooperation in the preparations and participation in the Olympic Games with their national participants and their representative NSF. As a result, negotiations and litigation relating to Rule 40 often take place at a national level between a participant and NOC. This can be seen in the antitrust proceedings before the Bundeskartellamt.

I.4.2. The German challenge

The Bundeskartellamt found the German Rule 40 guidelines applicable to athletes competing in the Olympic Games in Rio 2016 to amount to anti-competitive and abusive conduct. The IOC and DOSB[50] responded to those competition law concerns by committing to the Bundeskartellamt to ease the commercial restrictions pursuant to Rule 40 applicable to marketing activities by German athletes on the German market. The revised German approach does no longer require commercial activities to be notified to the DOSB in advance. Besides that, also new marketing campaigns run just closely before the Games period, as well as supporting and congratulatory messages, could be admissible under the new guidelines, as long as they do not contain any Olympic terminology. The list of what comprises Olympic terminology and is therefore not allowed, now mainly relates to the Olympic Movement's intellectual property rights, as it

[47] Answer by IOC president Thomas Bach when asked about changing Rule 40. 'IOC resists change to Olympic Rule limiting athlete sponsors' *USA Today* (14 April 2019) <https://eu.usatoday.com/story/sports/olympics/2019/04/14/ioc-resists-change-to-olympic-rule-limiting-athlete-sponsors/39344465/> accessed 29 June 2020.

[48] See IOC letter to NOCs, published 3 December 2019, available on <https://www.swimmingworldmagazine.com/news/ioc-to-consult-members-as-ec-says-olympic-charter-must-change-to-grant-european-athletes-their-rights/> accessed 29 June 2020; See also Charles Russel, 'The BOA holds firm on Rule 40 guidance' (*Lexology*, 11 December 2019) <https://www.lexology.com/library/detail.aspx?g=c2ce89cc-777a-4bb4-b76d-e0dab39676c8> accessed 29 June 2020.

[49] Tokyo 2021 Principles (n 27), 1.

[50] The DOSB is the German NOC.

does no longer include terms like "summer games" or "gold".[51] The revised approach certainly represents a far better balance between the interest of the Olympic Movement and the individual interests of athletes in comparison to the debated IOC's Principles.

However, the IOC refuses to extend the application of the relaxations to all EU athletes and international marketing activities. It uses the implementational framework as an argument against extension of the German approach for it would be based on the very specific contracts in Germany and therefore only suitable to apply to German athletes.[52] In addition, the IOC argues that extension would impair the Olympic solidarity funding mechanism.[53]

Despite that and the fact that the German decision concerns a challenge to the implemented German approach to the Olympics in Rio 2016, it signifies that Rule 40 is susceptible to judicial review under EU competition law.[54] Moreover, the preliminary assessment offers an important point of reference for any future challenge to the approach applicable to Tokyo 2021.

I.4.3. Sanctions for non-compliance

Besides implementation, NOCs are principally responsible to oversee compliance with Rule 40 when it concerns advertising activities targeted at its territory, albeit that international marketing activities directly fall within the remit of the IOC.[55] In case of non-compliance with the principles or national implementation thereof, the IOC, Tokyo 2021 OCOG or the relevant NOC may require advertising to be withdrawn or amended. They may even revoke the permission granted to non-Olympic sponsors.[56] The committees additionally have discretion to impose sanctions on participants. Sanctions might entail temporary or permanent ineligibility, withdrawal of accreditation,

[51] Bundeskartellamt Decision (n 17), paras 136-148.
[52] Mike Rowbottom, 'IOC maintains German athletes' court decision over Rule 40 is "not generally applicable"' *Inside the Games* (Vienna, 18 May 2019) <https://www.insidethegames.biz/articles/1079388/ioc-maintains-german-athletes-court-decision-over-rule-40-is-not-generally-applicable> accessed 29 June 2020.
[53] The IOC has outlined its position during the 40th EOC Seminar in Vienna.
[54] Bundeskartellamt Decision (n 17).
[55] Tokyo 2021 Principles (n 27), 2.
[56] Ibid., 4.

disqualification or exclusion from the Olympic Games.[57] On top of that, the IOC may impose financial sanctions, including fines or suspension of any form of financial support emanating from the IOC.[58] In light of these possibly severe sanctions in combination with the considerable discretion granted to the aforementioned committees, it is remarkable that the IOC's present approach, nor its former approaches, require the sanctions to correspond to the gravity of the infringement or provide for any guidance on appropriate sanctioning.

I.5 Decisive role of the IOC

Notwithstanding the role of NOCs, the IOC has the final say within the Rule 40 framework. Admittedly, the Committee has legitimate reasons for Rule 40 as it enables the funding of the Olympic Games and all actors within its organisation, including athletes. However, as attested by the German decision, introduced relaxations to the approach to Rule 40 in the run-up to Rio 2016 were not apt to establish a legitimate balance between the individual commercial interests of athletes and the proclaimed collective interest of the Olympic Movement. The German decision has intensified discussions on the need for further legal steps by means of EU competition law, especially since the IOC openly resists further calls to amend its approach. Before entering into a substantive competition law assessment of the Rule 40 framework applicable to Tokyo 2021, the next part discusses the means available under EU law to challenge the regulatory powers of SGBs.

II. CHALLENGING THE REGULATORY POWER OF SPORTS GOVERNING BODIES BY MEANS OF EU LAW

II.1 Introduction

Sport is a unique phenomenon in our society. It is often difficult to explain why you are loyal to a particular team or athlete, especially not when they perform badly. Many would

[57] Rule 59, paragraph 2, OC.
[58] Rule 59, paragraph 2, under 5, OC.

even voluntarily disrupt their sleep to possibly end up watching their favourites on television loose at the Olympics taking place in a different time zone. On a more positive note, sport brings people all around the world together. Since it transcends national borders, special governance structures have evolved in order to make sure sporting rules are the same worldwide, thereby also facilitating international sports competitions.

While the special character of sports and its governance has also been recognised by the institutions of the European Union, sports bodies cannot be considered exempt from the application of EU law. Rules adopted by sports bodies are no longer solely confined to rules of the game. All the more so in today's society, a lot of the adopted rules incorporate an economic or commercial dimension as well, see Rule 40. This part first elaborates on the governance structures of sports, after which it goes on to discuss the special status the sporting bodies have under EU law. It finally outlines the potential of EU competition law in challenges to the regulatory powers of sports bodies.

II.2 Organisation of international sports

Governance structures in international sports are characteristically formed on the basis of a hierarchic pyramid model through a comprehensive network of agreements between SGBs, clubs and athletes.[59] SGBs are mainly international non-governmental not-for-profit organisations who assert state-like powers, such as legislative and executive, for the purpose of ensuring the proper regulation of their sports. All other sports bodies and actors down the chain of command are subjected to the rules and institutional practices produced by SGBs.

[59] Katarina Pijetlovic, 'European model of sport: alternative structures' in Jack Anderson, Richard Parrish and Borja García (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018) 326; Jens Alm, 'Action for Good Governance in International Sports Organisations. Final report' (2013) published by Play the Game/Danish Institute for Sports Studies, Copenhagen, Denmark, 9-10; Borja García, 'Sport Governance After the White Paper: The Demise of the European Model?' (2009) 3(1) IJSPP 267.

II.2.1. *Lex sportiva*

The entirety of rules and practices produced by international sporting bodies through their own institutional processes may be loosely referred to as *lex sportiva*.[60] All institutional players involved with the practice of a particular sports to some extent play a role in the establishment, implementation and/or enforcement of the *lex sportiva*, depending upon their place in the hierarchal governance structure.[61] Most regulatory power lies with SGBs, who set out the main rules and framework within which all other players down the chain of command may operate. This secures the rules' globally harmonised application, which is understood to be necessary, as well as characteristic, for the practice of international sports and competition.[62] At the same time, this induces the monopolistic position of SGBs.[63]

Lex sportiva could be divided into four main categories of rules. The obvious category, being the rules of the game, constitute the very need for international governance structures in sport.[64] They ensure offside in a game of soccer is the same anywhere, regardless of whether you compete in a national amateur league or in the Olympic Games. Besides that, sports competitions require rules governing their organisation, like the rules on athletes' eligibility to compete in the Olympic Games. Furthermore, the growing commercial dimension in professional sports has prompted sports bodies to adopt rules of an economic nature.[65] For instance Rule 40 does not directly relate to the practice or organisation of sports at the Olympic Games. It is, nonetheless, indispensable for the Olympic funding.[66] Lastly, sports governance structures encompass rules of adjudication. Those rules dictate that infringements of the *lex sportiva* are to be challenged before separate (non-)legal bodies designated by sporting bodies themselves, instead of before national courts or authorities. In first instance, most international sporting organisations have appointed an internal

[60] Antoine Duval, 'Lex Sportiva: A Playground for Transnational Law' (2013) 19(6) ELJ 822, 827.
[61] See e.g. all different actors involved with Rule 40, as described in part I.
[62] Borja García and Mads de Wolff, 'European law and the governance of sport' in Jack Anderson, Richard Parrish and Borja García (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018) 292.
[63] Duval (n 60), 828.
[64] Ibid., 828-830.
[65] Ibid., 825.
[66] See paragraph I.2.1. Sustaining Olympic funding and solidarity mechanism, pp 9-10.

adjudicative body to decide on these infringements. If the case cannot be resolved internally, sporting bodies will generally submit the case to the jurisdiction of the CAS by virtue of a mandatory clause in their respective statutes. To exemplify, the Olympic Charter stipulates that any disputes relating to decisions by the IOC may be resolved solely by the IOC Executive Board and, exceptionally, by arbitration before the CAS.[67]

II.2.2. Governance of the Olympic Movement

Although the Olympic Movement does not govern one sport in particular, but rather governs all Olympic sports together with ISFs, its governance structure resembles that of most international sports organisations, with the IOC at the top of the chain of command.[68] The IOC has established a harmonised framework of rules that define the organisation of the Olympic Games. Within its harmonised network, the Committee has supreme authority over all Olympic activity, participants and entities. It also has the exclusive rights to the Olympic Games and properties, from which it generates revenue.[69]

The role and responsibilities of the other main constituents of the Olympic Movement, i.e. the NOCs, the OCOG and ISFs, are defined by the Olympic Charter.[70] The role of NOCs, as exemplified under I.4., is to implement and ensure compliance with rules and guidelines adopted by the IOC further to the Olympic Charter within their respective territories.[71] The NOC of the host city is additionally entrusted to set up an OCOG for the duration of the organisation of the Olympic Games in their state. Lastly, ISFs are responsible for establishing and enforcing the rules involved with the practice of their respective sports.[72] In any case, all committees, federations and other actors operating within the Olympic Movement, have to act in line with the rules and principles determined by the IOC and Olympic Charter.

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[67] Rule 61 OC.
[68] Antoine Duval, 'The Olympic Charter: A Transnational Constitution Without a State?' (2018) 45(1) JL&Soc 245, 246.
[69] Rule 7 OC.
[70] Rule 1 OC.
[71] Rule 27 OC.
[72] Rule 26 OC.

One might argue international sporting organisations like the Olympic Movement, by way of all-encompassing self-regulation, have constituted their own legal order, which operates in apparent isolation of national legal systems.[73] This self-regulation is, to some extent, imperative to the international organisation of sports. Sports bodies have the required sporting expertise and they are, unlike most courts, capable to keep up with the fast-paced identity of sports. Consequently, SGBs enjoy a lot of regulatory autonomy *vis-à-vis* the legal order of states and the EU.

II.3 Special status of *lex sportiva* under EU law

While the autonomy of the *lex sportiva* should not be undervalued, it is certainly not absolute or unconditional. The EU institutions acknowledge that sport's special character requires them not to systematically interfere with the regulatory powers of private sports bodies.[74] The CJEU and the European Commission have on multiple occasions reflected on the considerable latitude granted to sporting bodies under EU law. However, no argument can be made that SGBs, like the IOC, are to be considered immune from the application of EU law.

II.3.1. Early co-existence of EU internal market law and *lex sportiva*

The claim to exercise authority over the *lex sportiva* is often founded in its economic implications and the consequences thereof for the internal market.[75] The co-existence of EU internal market law and *lex sportiva* was already recognised by the Court in 1974. In *Walrave and Koch*, the Court ruled that sports practices were subject to EU law 'in so far as it constitutes an economic activity'.[76]

[73] Duval (n 60), 827-828; Duval (n 68), 248-250; Tom Serby, 'The state of EU sports law: lessons from UEFA's 'Financial Fair Play' regulations' (2016) 16 Int Sports LJ 37, 38-39.
[74] See e.g. Richard Parrish and Samuli Miettinen, *The Sporting Exception in European Union Law* (TMC Asser Press 2007).
[75] Katarina Pijetlovic, 'EU sports law: a uniform algorithm for regulatory rules' (2017) 17(1) Int Sports LJ 86, 89.
[76] Case C-36/74 *Walrave and Koch v Union Cycliste International* [1974] ECR 1405, para 4.

It is, however, the infamous ruling of the CJEU in *Bosman* that marks the 'birth' EU sports law.[77] The judgment is of indisputable significance in defining the legitimate scope of the asserted autonomy by SGBs under EU law. In *Bosman*, the Court ruled UEFA's transfer rules to be incompatible with the internal market through the application of the Treaty provisions on the free movement of workers.[78] The Court's analysis confirmed its earlier judgment in *Walrave and Koch* by repeating that sport may be subject to scrutiny under EU law insofar as it constitutes an economic activity.[79] At the same time, the Court recognised that sport is special and that rules and regulations adopted by sporting bodies should be treated accordingly under EU law. It elucidated that the adoption of *lex sportiva* that is 'not of an economic nature', but rather 'of sporting interest only' are not precluded by the Treaties.[80]

II.3.2. Shaping the Court's analytical approach

Since all claims to absolute or unconditional autonomy were rejected in *Bosman*, it became apparent that athletes and other stakeholders had rights under EU law. It instigated a wave of legal attempts by state authorities and empowered stakeholders to scale down the regulatory powers of SGBs by means of EU law.[81] This was further enhanced by the commercialisation of professional sport.[82] By virtue of the growing number of cases, the Court also had to further reflect upon the relationship between EU law and *lex sportiva*.

The Court's formula in *Bosman* disregarded the fact that even though the reason of adoption of certain categories of *lex sportiva* may not be of an 'economic nature', they could still exert economic effects and could therefore not be considered 'of sporting

[77] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921; Stefaan van den Bogaert, 'From Bosman to Bernard C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177' in Jack Anderson (ed), *Leading Cases in Sports Law* (TMC Asser Press 2013) 97.
[78] *Bosman* (n 77), para 114.
[79] Ibid., para 73; *Walrave and Koch* (n 76), para 4.
[80] The Court thereby confirmed what it had ruled earlier in Case 13/76 *Donà v Mantero* [1976] ECR 1333, paras 14 and 15; *Bosman* (n 77), para 127.
[81] Van Rompuy (n 32), 174; Arnout Geeraert and Edith Drieskens, 'Normative Market Europe: the EU as a force for good in international sports governance?' (2017) 39(1) J Eur Integr 79, 85; Stefaan van den Bogaert, '*Bosman*: One for all' (2015) 22(2) MJ 174, 175-176; Marios Papaloukas, 'The Sporting Exemption Principle in the European Court of Justice's Case Law' (2019) 3(4) Int Sports LJ 7, 8.
[82] Szyszczak (n 12), 192.

interest only'. In *Deliège* the Court supplemented the analytical approach taken in *Bosman*.[83] In its analysis on whether the applicable rules governing the selection of individual judokas for international competition impeded on the freedom to provide services, the Court first reiterated what it had decided in *Walrave and Koch* and *Bosman*: sport falls within the scope of EU law to the extent that it constitutes an economic activity.[84] The ruling made it abundantly clear that rules that are not of an economic nature, that nonetheless have economic implications are also subject to scrutiny under EU law. It did, however, not conclude the rules to form an unjustifiable restriction on the freedom to provide services by athletes.[85] The Court accepted that limiting the number of participants 'is inherent in the conduct of an international high-level sports event', and that this necessitates the adoption of selection rules or criteria.[86] It follows that sporting autonomy under EU law is thus conditional upon the fact whether the contested rules and practices are 'inherent' in the organisation of sport.

II.3.3. Conditional autonomy of *lex sportiva*

The Court's ruling in *Bosman* – as supplemented by *Deliège* – is considered to have initiated an analytical practice, that has been built on by the Court ever since. Due to the economic nature or effects produced by (most) *lex sportiva*, an obstacle to the internal market is readily found. However, the Court does allow sporting bodies to reign autonomously within the scope of EU law as long as the adopted rules and practices pursue a legitimate aim compatible with the Treaty and can be justified by overriding reasons of public interests, i.e. is inherent in the organisation of sport. In subsequent sports-related cases, the Court has recognised several objectives pursued by sporting to be legitimate in light of the Treaties. Important examples of legitimate objectives accepted by the Court relate to promoting the recruitment and training of young players[87],

[83] Joined Cases C-51/96 and C-191/97 *Deliège v Ligue de Judo* [2000] ECR I-2549; Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 1st edn., 2017) 101.
[84] *Deliège* (n 83), para 41.
[85] Ibid., para 64.
[86] Ibid., para 64.
[87] Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard* [2010] ECR I-2177, para 39; *Bosman* (n 77), para 106; European Commission 'White Paper on Sport' COM (2007) 391 final, 6; European Commission 'Communication on Sport' COM (2011) 12 final, 24.

ensuring the regularity of sporting competitions[88] and preserving fairness of sporting competitions.[89] The rules should, nonetheless, be limited so as to ensure achievement of the legitimate aim and must not go beyond what is necessary for that purpose.[90] This analytical framework construed under EU free movement law to challenge regulatory powers of SGBs, originating in *Bosman,* is what Weatherill refers to as the conditional autonomy model.[91]

The Court has also come to employ this analytical model in sports-related cases dealing with competition law. It has even extended the application of this approach to cases relating to European citizenship rights of amateur sportsmen.[92] Moreover, the conditional autonomy approach is also reflected in EU policy and decisional practices by the other EU institutions.[93] The Commission, for instance, stipulated that the 'specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law'.[94]

II.4 EU Competition law in sports-related cases

Although the competition rules remained unaddressed in both *Bosman* and *Deliège*, an increasing number of sports-related cases have dealt with the application of competition law since.[95] Competition law ensures that private market operators do not disturb the functioning of the internal market through anti-competitive behaviour, thereby establishing a level-playing field for businesses. The rules on competition are laid down in article 101 and 102 TFEU, which deal respectively with collusive behaviour and with the abuse of a dominant position by a single market operator. Given that governance structures in sport rely on a network of agreements, which typically place one SGB with most regulatory power at the top of its hierarchal structure, the sporting world is particularly vulnerable to challenges by way of EU competition law.

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[88] Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL (FRBSB)* [2000] ECR I-02681 ,para 53; Commission Communication (n 87), 24.
[89] Commission Communication (n 87), 14.
[90] Richard Parrish 'Lex sportiva and EU sports law' (2012) 37(6) EL Rev 716.
[91] Weatherill (n 83), 91-93.
[92] Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019], para 50.
[93] See e.g. the introduction of Article 165 TFEU with entry into force of the Lisbon Treaty in 2009.
[94] Commission White Paper (n 87), 13.
[95] Weatherill (n 83) 104.

II.4.1. The Court's authoritative voice

The Court's ruling in *Meca-Medina* is of central significance alongside *Bosman* for the opportunity for athletes and other stakeholders to challenge the regulatory powers of SGBs.[96] The case concerned a challenge by professional swimmers David Meca-Medina and Igor Majcen against the imposed period of ineligibility to compete in swimming competitions for violations of the IOC's anti-doping rules, as implemented by swimming's SGB, the FINA. The swimmers filed a complaint with the European Commission, claiming that the period of ineligibility constituted a violation under EU competition law, but unsuccessfully so. The swimmers' application to the General Court for annulment of the Commission's decision was then also rejected. On appeal, the CJEU set aside the judgment of the General Court, ruling that it had erred in law by finding the contested rules to fall outside the scope of the Treaty on the grounds that they were purely sporting in nature.[97] Nonetheless, the Court still concluded the swimmers' application for annulment of the Commission decision had to fail.

While the outcome in *Meca-Medina* was certainly not satisfactory for the swimmers, the Court's judgment provided certainty as to the status of sporting bodies and *lex sportiva* within the scope of EU competition law cases, to the satisfaction of the Commission and possibly many other athletes. The Commission had already dealt with a number of sports-related cases before, but *Meca-Medina* solidified the special status of sporting bodies under EU competition law.[98] The analytical approach adopted by the Court's judgment shows close association with Weatherill's conditional autonomy model.[99] The Court held that the mere fact that parts of the *lex sportiva* may be qualified as being purely sporting in nature does not necessarily remove it from the scope of EU competition law.[100] However, within that scope, the Court reasoned that a rule or practice generating anti-competitive effects is not necessarily prohibited by article 101(1) TFEU, when the rules and practices could be justified by a legitimate objective.[101] In the

[96] Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991.
[97] Case T-313/02 *David Meca-Medina and Igor Majcen v.Commission* [2004] ECR II-3291, paras 40-41.
[98] See e.g. *ENIC/UEFA* (Case COMP 37.806) Commission Rejection Decision IP/02/942 [2002].
[99] Weatherill (n 83), 112-116.
[100] *Meca-Medina* (n 96), para 27.
[101] *Meca-Medina* (n 96), para 42; See also the Court's judgment in *Wouters,* which was unrelated to sports. Case C-309/99 *JCJ Wouters, JW Savelbergh, Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, para 42.

substantive analysis of the contested anti-doping rules, the Court held that the restrictive effects on competition of the rules could be justified by its legitimate objective, since such 'a limitation is inherent in the organisation and proper conduct of competitive sport'.[102] Hence, the Court recognised that *lex sportiva* may entail restrictions or have restrictive effects on competition, but could nonetheless be justified in light of the objectives pursued, as long as it remains limited to what is necessary to ensure the proper conduct of competitive sport.

This conditional autonomy approach was later also adopted by the Court in *MOTOE*, which involved an analysis on an alleged abuse of a dominant position by the Greek Motorcycling Federation.[103] Typically, due to the hierarchal governance structures of sporting organisations and their claim to adopt globally applicable rules and practices, it could be readily established that a SGB could behave independently to an appreciable extent from all other market-operators, and therefore holds a dominant position on the relevant sporting market.[104] *MOTOE* and *Meca-Medina* thus confirmed that SGBs must accord to the individual requirements of the Treaty provisions on competition.

II.4.2. European Commission as regulator

The European Commission and NCAs were faced with a high number of complaints by athletes and other stakeholders attempting to enhance their economic freedom.[105] Interestingly, the Commission has long denied the *Community* interest in sporting cases. When it did interfere, the Commission often resolved cases by virtue of (informal) settlements. While admittedly this may have led to improved governance structures in sport, it does lack transparency and legal certainty.[106]

In recent years, the European Commission more actively came to employ the analytical conditional autonomy approach in sports-related cases. In 2017 it issued a decision in relation to the complaint brought by two ice-skaters against a loyalty clause of

[102] *Meca-Medina* (n 96), para 45.
[103] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] ECR I-4863, para 22; Van Rompuy (n 32).
[104] See e.g. Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207; Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.
[105] See e.g. Szyszczak (n 12), 190.
[106] Ibid., 191.

ice skating's SGB, the ISU.[107] The contested clause precluded athletes from competing in events of alternative organisers. Though the Commission did not find an abuse of the ISU's dominant position, it did rule the clause to be incompatible with article 101 TFEU.[108] The ISU was ordered to revise the contested clause within 90 days, subject to a penalty payment of a daily periodic penalty payment of 5% of the ISU's average daily turnover in the preceding business year in case the ISU fails to comply.[109]

The *ISU* decision displays the core conflict of interest sporting bodies deal with, that is their role as a regulator of their sport and their (increasing) commercial interest in the organisation of sporting events.[110] It is often hard to distinguish the two different hats worn by sporting bodies and how to subsequently deal with *lex sportiva* that incorporates both a sporting and commercial interest, under EU law. Regardless, the *ISU* decision demonstrates the Commission's willingness to take on SGBs' regulatory powers by means of EU competition law, in case those are closely related to their commercial interests. The decision may therefore be important for future regulatory involvement of the European Commission in sports-related cases.[111]

II.5 Case-by-case analysis

In sum, sport is special. However, it is not as special under EU law as SGBs would like to see. While the specificity of sports to some extent justifies the need for special governance structures and autonomous rule-making powers, the Court did not exempt SGBs and their *lex sportiva* from the application of EU law. At the same time, EU law does prove sensitive to its special character, which can be found in the global reach of *lex sportiva* and the knowledge and experience residing with SGBs. Rules and practices produced by sporting bodies will not be condemned by EU law insofar as they pursue a legitimate objective and they are necessary and proportionate in light of that objective.

[107] *International Skating Union's Eligibility rules* (Case AT.40208) Decision C (2017) 8240 final.
[108] Ibid., para 349.
[109] Ibid., paras 345-346.
[110] Jacob Kornbeck, 'Specificity, Monopoly and Solidarity in the European Commission's ISU (International Skating Union) Decision: Anything New Under the Sun?' (2019) 10(2) JECL&Pract 71, 77-78.
[111] Szyszczak (n 12), 191.

This analytical approach taken by the Court, also enforced by the Commission, is what is referred to as the conditional autonomy of sporting bodies under EU law.

Following *Bosman, Deliège,* and later *Meca-Medina*, athletes and other stakeholders were provided a stronger voice in sports' hierarchal governance structures. They started to increasingly enforce their rights under EU law before ordinary courts and through complaints at NCAs and the Commission. Particularly competition law has emerged as a powerful tool to challenge regulatory powers of SGBs and to, consequently, exert influence over the governance structures and institutional features of sports associations. Besides that, due to the commercialisation of sport, nearly all rules and practices of sporting bodies – the rules of the game aside – are either of an economic nature or are liable to produce economic effects, making it harder for sporting bodies to argue their inherence in the organisation of sport. The commercial dimension of sports has furthermore induced the involvement of a much broader range of people with *lex sportiva,* generating an even bigger incentive to create a level-playing field by means of EU competition law.

Due to the evolved analytical conditional autonomy approach to regulatory powers of SGBs under EU law, the assessment whether *lex sportiva* is compatible with the Treaty provisions on competition law can ultimately only be made on a case-by-case basis.[112] In light of this, Part III provides a competition law assessment of the case of Rule 40, which forms an integral part of the *lex sportiva* of the Olympic Movement.

III. THE COMPETITION LAW CASE AGAINST RULE 40

III.1 Introduction

There is no virtue in denying the economic repercussions of Rule 40 for athletes and other stakeholders. Consequently, it is indisputable that the rule is open to legal scrutiny under EU law. In considering the potential for competition law to address the regulatory powers of SGBs, this part assesses the compatibility of Rule 40, as drafted and

[112] Stefaan van den Bogaert, 'Sport, free movement and nationality' in Jack Anderson, Richard Parrish and Borja García (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018) 381; Weatherill (n 83), 122; See also Commission White Paper (n 87), 14; Commission Communication (n 87), 22.

implemented ahead of Tokyo 2021, with EU competition law. In this regard, this part takes note of the Court of Justice's case law and the European Commission's decisional practice in sports-related cases, as well as the German decision.

III.2 Market analysis

Competition law promotes the proper functioning of the EU internal market by regulating anti-competitive conduct to ensure consumer welfare.[113] In order to assess the anti-competitive effects of *lex sportiva* it is necessary to define the relevant market and identify any sporting bodies' competitors capable of exerting influence over the alleged anti-competitive conduct.[114] Accordingly, it is important to define both the relevant product and geographic market.[115]

III.2.1. Relevant product market

The relevant product market 'comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer'.[116] The test is essentially a matter of interchangeability, where demand- and supply-side substitutability of other products and services indicate the most immediate and effective anti-competitive influences on businesses.[117]

III.2.1.1. Organisation and marketing of the Olympic Games

In applying these principles to the sports sector, SGBs are generally involved in both the organisation and commercial exploitation of sporting events. The Court in *MOTOE* found these activities to be functionally complementary.[118] Similarly, the organisational and commercial activities of the IOC and other principal members of the Olympic Movement

[113] European Commission, 'Competition: preserving and promoting fair competition practice' <https://europa.eu/european-union/topics/competition_en> accessed 1 July 2020; Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 1.
[114] Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 2.
[115] *United Brands* (n 104), para 10.
[116] Notice on the definition of the relevant market (n 114), para 7; *United Brands* (n 104), para 32.
[117] Notice on the definition of the relevant market (n 114), para 13.
[118] *MOTOE* (n 103), para 33.

are inextricably linked, and accordingly cannot be considered as separate from one another.[119] Organisational activities primarily consist of the establishment and implementation of the rules of the game and the rules governing the organisation, spanning the Olympic Candidature Process to appointing referees. Commercial activities comprise *i.a.* the sale of advertising and broadcasting rights.[120] Without revenue from broadcast partnerships and sponsorship agreements, the viability of the Olympic Games as a global event would be inconceivable. The organisation largely depends on the exploitation of commercial rights for its cost recovery.[121] Rule 40 represents this functional complementariness. By virtue of Rule 40, the IOC protects the exclusivity of advertising rights awarded to sponsors and broadcast partners of the Olympic Movement with the underlying aim of ensuring the regular organisation of the Olympic Games. In line with the German decision, supported by the market definition in the *MOTOE* judgment and the *ISU* decision, the relevant product market should therefore be defined as the market for the organisation and marketing of the Olympic Games.[122]

III.2.1.2. No substitutability with international sporting events…

Contrary to what has been argued by the IOC, the relevant market should not be defined as to include other international sporting events. In the market for the organisation and commercial exploitation of the Olympic Games, there are three primary parties on the demand- and supply-side of the Olympic Movement: (i) spectators, (ii) broadcasters and (potential) sponsors, and (iii) participants (i.e. athletes). These stakeholders are unlikely to consider other international sporting events as credible substitutes for the Olympic Games for the following reasons.

III.2.1.3. …for spectators

Spectators, either attending the Olympic Games in person or watching via broadcast platforms, constitute a primary party on the demand side of the relevant market.

[119] Bundeskartellamt Decision (n 17), para 43.
[120] See also *MOTOE* (n 103), para 33; *ISU* decision (n 107), para 85.
[121] Olympic Marketing Fact File 2020 Edition (n 25).
[122] Bundeskartellamt Decision (n 17), para 43; *ISU* decision (n 107), para 86; *MOTOE* (n 103), para 33.

Spectators would not be inclined to substitute another international sporting event for the Olympic Games. Sports fans are generally loyal to their favourite sports discipline. It is hard to argue a handball fan would easily substitute the IHF World Handball Championship for the World Figure Skating Championships. Besides that, sporting events enjoy different levels of media attention based on sports discipline and geography. However, those contentions do not hold as regards the Olympic Games. Firstly, the Olympic Games are multi-disciplinary. Spectators will have the ability to consume no less than 33 different sports during Tokyo 2021.[123] Because of its multi-disciplinary nature, the Olympics cover the field and accordingly appeal to a uniquely broad range of sports consumers globally. There is currently no other global multi-disciplinary sporting event that offers a comparable services. The Olympic Games bring consumer attention to relatively unpopular sports by virtue of its global coverage. There are few credible alternatives for spectators, since nearly all other major sporting events and leagues are deliberately suspended during or have concluded in time for the Olympic Games. Moreover, unlike many other major sporting events, the Olympic Games are often perceived by spectators as more than just a sporting event.[124] They symbolise peace and friendship and often contribute to solutions for major societal problems, making the Olympic Games a socio-cultural phenomenon as well.[125] For these reasons, it is not feasible that a hypothetical small but significant and non-transitory increase in the price of tickets for or 'online' access to Olympic competitions will make spectators change sporting event. Hence, there is are no substitutable alternatives to the Olympic Games for spectators.

[123] 'Olympische Spelen 2020/2021' <https://tokyo.nl/olympische-spelen/#genomineerde-sporten> accessed 1 July 2020.
[124] See e.g. Jelle Zondag, 'Olympische idealen: méér dan sport alleen' (*Radbound Universiteit, Faculteit der Letteren*) <https://www.ru.nl/letteren/faculteit/over-de-faculteit/departementen/geschiedenis/vm/cultuurgeschiedenis/collectief-project-sportcultuur/nieuwsbrief4/olympische-idealen/> accessed 1 July 2020.
[125] See e.g. 'Promote Olympism in Society' < https://www.olympic.org/the-ioc/promote-olympism> accessed 1 July 2020; Cristiana Pop, 'The Modern Olympic Games – A Globalised Cultural and Sporting Event' (2013) 92 Procedia – Social and Behavioral Sciences 728.

III.2.1.4. ...for broadcasters and (potential) sponsors

Demand for the Olympic Games from broadcasters and (potential) sponsors is interlinked with its appeal to spectators, brand exposure opportunities and image.[126] Based on those criteria, the Olympic Games score significantly higher relative to other international sporting events. The Olympic Games in Rio 2016 reached a global audience of 3.2 billion people through television, 1.3 billion users on digital platforms and had 4.4 billion video views on those platforms.[127] Due to the extensive global reach of the Olympic Games in conjunction with the event's historically prestigious image, Olympic marketing and broadcasting has proven to be very effective.[128] Additionally, the distinctiveness of the Olympic marketing programme is largely secured by Rule 40, the scarcity of Olympic partnerships, and restrictions on brand placement opportunities at Olympic venues. From an economic perspective, there are few sporting events that could ever match the Olympic Games with respect to its appeal to broadcasters and (potential) sponsors. The Bundeskartellamt rightly observed that today, the FIFA World Cup might be the only substitutable sporting event in this regard.[129] However, due to the distinguishing factors set out above such as the Olympic Games' multidisciplinary nature, reach and reputation, the relevant market is still rightly confined to the Olympic Games alone.

III.2.1.5. ...for athletes

Regarding the substitutability of the Olympic Games for athletes, it is important to note that participation in the Olympic Games is often perceived as the pinnacle of an athlete's career.[130] To quote Olympic gold medal winning Australian swimmer Dawn Fraser: 'The Olympics remain the most compelling search for excellence that exists in sport, and maybe in life itself.'[131] Additionally, its unique character is intrinsically linked to its

[126] See Bundeskartellamt decision (n 17), paras 50-52; *ISU* decision (n 107), para 90.
[127] Olympic Marketing Fact File 2020 Edition (n 25), 25.
[128] Report by Ipsos Connect China, 'Reflection on Rio Olympics Marketing: Ad Performance Evaluation From Ipsos Connect China' <https://www.ipsos.com/sites/default/files/2017-01/Reflection_on_Rio_Olympics_Marketing.pdf> accessed 1 July 2020; Chuck Tomovick and Rama Yelkur, 'Olympic Advertisers Win Gold, Experience Stock Price Gains During and After the Games' (2010) 20(1) J Glob Mark 80, 84.
[129] Bundeskartellamt Decision (n 17), para 52.
[130] Except for perhaps ultra-popular sports like for example football;
[131] David Arscott, *The Olympics, A very Peculiar History* (The Salariya Book Company 2011).

quadrennial occurrence and resultant scarcity. Considering that an athlete's career is typically short-lived, competing at the Olympic Games for many athletes is a once-in-a-lifetime opportunity, or at most twice or thrice.[132] Furthermore, it provides athletes with an unique and honourable opportunity to represent their country on a global stage.

Its unique character is not only embedded in the event's prestige and importance for an athlete's sporting career. Hardly any other sporting event offers athletes the opportunity to compete with the international sporting elite in their discipline at an event that enjoys as much media coverage and with the same marketing potential as the Olympic Games. Besides that, in order to obtain an Olympic bid most athletes have to compete and succeed in other sporting events, which are not apt to offer the same sporting and commercial benefits to athletes as the Olympic Games.

Due to the lucrative nature of the Olympic Games, its substitutability with other, even well-known, international sporting events is limited and, if at all, only exists for athletes practicing ultra-popular sports such as football. And even then, those events often do not enjoy the same global reach, with their popularity varying based on geography.[133]

III.2.2. Geographic market

The relevant geographic market comprises the area 'in which the conditions of competition are sufficiently homogeneous'.[134] Taking into account the Olympic Games' global audience and the globally applicable *lex sportiva*, it is beyond question that its geographic market is worldwide.[135] For the purpose of a competition law challenge to Rule 40, the relevant market should accordingly be defined as the worldwide market for the organisation and commercial exploitation of the Olympic Games (henceforth, "the relevant market").

In light of this market definition and the identified stakeholders in that market, the following paragraphs analyse whether Rule 40 could be considered a prohibited anti-

[132] In the ISU proceedings, EU Athletes submitted that an athlete's career lasts eight years on average. See *ISU* decision (n 107), para 263.
[133] An exception would be the FIFA World Cup. See e.g. Bundeskartellamt Decision (n 17), para 54.
[134] Notice on the definition of the relevant market (n 114), para 8.
[135] *ISU* decision (n 107), para 114; Bundeskartellamt Decision (n 17), para 56.

competitive restriction by assessing its features against the individual elements of a prohibition under EU competition law.

III.3 Olympic Movement: association of undertakings or a collective entity

For competition law to apply, both article 101 and 102 TFEU require that the anti-competitive conduct is performed by an undertaking or association of undertakings. 'Any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed' constitutes an undertaking.[136] The fact that the economic activity has a connection with sport does not except an entity from characterisation as an undertaking under EU law.[137] On the contrary, the Court's case law and decision-making practices of the Commission and NCAs in sports-related cases demonstrate that SGBs are often found to constitute undertakings.

III.3.1. Association of undertakings within the meaning of Article 101 TFEU

The IOC plays a central in the worldwide market for the organisation and commercial exploitation of the Olympic Games. The IOC's operations are ultimately dependent upon the performance of economic activities, which mainly relate to the selling of broadcasting rights and the entering into marketing agreements. Those economic activities, even if ancillary to its regulatory purpose, allow for the IOC to be characterised as an undertaking under EU competition law. This characterisation is not compromised by the fact that the IOC is a non-profit association[138] that is established outside the EU.[139]

Similar economic activity is also undertaken at the Olympic Movement's lower levels of governance by NOCs at the national level, the relevant OCOG in relation to the Olympic Games for which it was set up, and ISFs in relation to their respective sports discipline. Those constituent members of the Olympic Movement can accordingly also be

[136] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, para 46.
[137] *MOTOE* (n 103), para 22; *Walrave and Koch* (n 76), para 4; *Bosman* (n 77), para 73; *Meca-Medina* (n 96), paras 22 and 28.
[138] Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paras 122-123; *MOTOE* (n 103), paras 27-28.
[139] The IOC is based in Lausanne, Switzerland, but it does operate on the internal market. Joined Cases 89/85 etc. *A Ahlström Oy v Commission* [1988] ECR 5193, paras 12-14; Whish and Bailey (n 113), 526.

considered undertakings for the purpose of a competition law challenge. Under the binding terms of the Olympic Charter, those members of the Olympic Movement conduct their regulatory and economic activities in a highly coordinated fashion, which serves the common interest of the Olympic Games.[140] All these features of the operation of the Olympic organisation strongly suggests that an association of undertakings exists between the IOC, NOCs, OCOG Tokyo 2021 and ISFs within the meaning of Article 101 TFEU, acting within the relevant market of the organisation and marketing of the Olympic Games.[141]

III.3.2. Collective entity for a challenge under Article 102 TFEU

On the basis of the interconnectedness of the members of the Olympic Movement pursuant to the Olympic Charter and its governance structure, it could also be argued that those members constitute a collective entity for the purposes of a challenge under Article 102 TFEU.[142] All primary *lex sportiva* is adopted by the IOC, and subsequently implemented, supplemented and enforced in a coherent manner by all other actors under the supreme authority of the IOC. Sporting regulations, like Rule 40, therefore result in the Olympic Movement's undertakings being so interlinked that in the relevant market they amount to a collective entity *vis-à-vis* all other market operators, such as athletes and (potential) marketing partners. What is more, those members are not just linked by virtue of the organisational structure. The distribution of funds through the Olympic solidarity mechanism also renders them financially co-dependent. This consolidates the sustainability of their coordination over time.

In consideration of the foregoing, there is a strong argument that there are grounds for a challenge to the Olympic Movement under both Article 101 TFEU and 102 TFEU. Notwithstanding the twofold possibility for a challenge to Rule 40 under EU competition

[140] See *Wouters* (n 101), para 16.
[141] See Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-00209, para 72; See also Commission Decisions in *ENIC/UEFA* (n 99) and *ISU* (n 103).
[142] See Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge* [2000] ECR I-1365, para 42; Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, para 62; For sports-related cases in which a (collective) dominant position of SGBs was established, see also *Piau* (n 141), paras 114-115 ; *MOTOE* (n 103), para 29; Bundeskartellamt decision (n 17), paras 57-63.

law and the fact that the Bundeskartellamt based its challenge on Article 102 TFEU, this thesis will be confined to a detailed analysis of the individual elements of the prohibition of collusive behaviour within the meaning of Article 101 TFEU.[143] An analysis on the basis of Article 101 TFEU is by analogy with the Commission's *ISU* decision, in which the Commission did find the ISU's Eligibility Rules to comprise collusive behaviour as prohibited by Article 101 TFEU, but did not find an abuse of a dominant position within the meaning of Article 102 TFEU.

III.4 Rule 40: A prohibited restriction on competition under Article 101 TFEU?

Judicial review under EU competition law should build on the conditional autonomy methodology as applied by the Court in cases involving challenges to the compatibility of *lex sportiva* with the internal market. More specifically, in assessing whether Rule 40 is a decision of an association of undertakings which has anti-competitive effects and is capable of appreciably affecting trade between Member States[144], it must be considered whether the rule is inherent in the Olympic organisation.

III.4.1. Decision by an association of undertakings

All decisions coordinating the conduct of the members of an association of undertakings fall within the scope of Article 101(1) TFEU. In the context of sports, this means that the regulations governing sports organisations could be considered to constitute decisions of an association of undertakings.[145] In this respect, it should be noted that the Olympic Movement's constituting document, the Olympic Charter, is binding on all its members.[146] The Charter reflects the IOC's intent to coordinate the conduct of other

[143] A possible violation of article 101 TFEU is without prejudice to any inquiry into a potential infringement under Article 102 TFEU. Nonetheless, it is argued that EU sports law should be interpreted as to establish convergence of outcome in sports-related procedures dealing with the Treaty provisions on competition law and free movement law. A proceeding under article 101 TFEU could thus be exported as to inform a possible proceeding under article 102 TFEU as well, and *vice versa*. See e.g. Weatherill (n 83), 162-165.

[144] Article 101(1) TFEU reads: "*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*".

[145] See e.g. *Piau* (n 141), para 75.

[146] Rule 19, paragraph 3, under 10, OC.

members. Furthermore, *lex sportiva* adopted at lower levels of governance subsequent to the Olympic Charter require approval by the IOC. Consequently, Rule 40, including the supplementary IOC documents and rules and practices of NOCs, ISFs and OCOG adopted pursuant thereto, are to be considered decisions of association of undertakings

III.4.2. Capable to affect inter-State trade

Under Article 101 TFEU, it is necessary to establish that the anti-competitive agreements, decisions or practices are liable to affect trade between Member States to an appreciable extent. According to case law developed by the Court, 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States'.[147] In applying these criteria to sports-related cases, it can be concluded that *lex sportiva* is generally likely to, or at least capable of, affecting inter-State trade. So too is Rule 40, especially when considering its global character and its fragmentised implementation by NOCs.

In terms of appreciable effect, it should be noted that Rule 40 intends to protect the revenue generated by the Olympic Movement through the sale of its marketing rights. The IOC's TOP programme alone generates around 250 million EUR per annum.[148] In light of the substantial amounts involved in the sale of marketing rights and Rule 40's role in securing those revenues, it can be concluded the rule is capable of appreciably affecting trade between Member States.

III.4.3. Restrictive on competition, though inherent in the Olympic organisation?

Thus far, a competition law challenge to Rule 40 did not pose any significant difficulties, nor surprises. More interesting and contentious is the analysis of whether Rule 40 is prohibited by Article 101(1) TFEU, because it has as its object or effect the prevention, restriction or distortion of competition within the internal market. This is where the

[147] Commission Notice Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 107/07, para 23; See e.g. *MOTOE* (n 103), para 63; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, para 48.
[148] Olympic Marketing Fact File 2020 Edition (n 25), 8.

special status of sport under EU (competition) law, as extensively discussed in Part II, comes into play. In applying the conditional autonomy approach adopted by the Court in sports-related cases, the following paragraphs explore whether or not the applicable approach to Rule 40 for Tokyo 2021 is caught by the prohibition of Article 101(1) TFEU. When considering its overall context, effects and objectives, it should be assessed whether Rule 40 (i) serves a legitimate objective and whether its restrictions on competition (ii) are inherent in the organisation of sport and (iii) proportionate to the legitimate objective pursued.[149]

III.4.3.1. Anti-competitive implications of Rule 40

Indisputably, the approach to Rule 40 for Tokyo 2021 results in restrictions on competition. To summarise, the rule is intended to regulate the commercial behaviour of athletes and non-Olympic partners in the worldwide market for the organisation and marketing of the Olympic Games, so as to help 'maintain the distinctiveness of official Olympic marketing programmes.'[150] Implementation of Rule 40 harms the earning potential of athletes and their non-Olympic sponsors as it largely complicates the use of athlete images for any advertising purposes on penalty of severe sanctions for non-compliance.[151] As a result, any meaningful presence of non-Olympic partners in the relevant market is significantly compromised.

Moreover, Rule 40 not only affects existing partnerships between non-Olympic partners and athletes, but also has the real effect of deterring potential sponsors from entering the relevant market. For them, entering into partnerships with athletes depends upon perceived potential for economic and/or commercial gain. However, since nearly all commercial opportunities are rendered ineffective by Rule 40, potential sponsors are much less inclined to enter into partnership agreements with athletes. The lack of prospective profitability thus raises further barriers to market entry.

Furthermore, these restrictions on competition detrimentally affect the potential for participants to capitalise off the commercial opportunities the Olympic spotlights

[149] *Meca-Medina* (n 96), paras 42-43.
[150] Tokyo 2021 Principles (n 27), 2.
[151] Van den Bogaert (n 112), 377.

provide. In particular, for athletes practicing sports disciplines that do not enjoy equivalent (year round) marketing opportunities, such as football for example, the Olympic Games are of exceptional commercial significance. Yet, athletes are prevented from commercially exploiting their participation therein. Worse still, taking into account the governance structure of the Olympic Movement, athletes, who are at the base of sports governance hierarchies, are to a significant extent unable to influence the Key Principles to their benefit. This leaves athletes and other participants no choice but to accept the restrictions imposed on their commercial opportunities. In the hypothetical absence of Rule 40's restrictions on the use of athletes' images for advertising purposes, athletes' commercial freedom and earning potential would be far greater and potential competitors would be able to enter the market for the organisation and marketing of the Olympic Games.

III.4.3.2. Conditional autonomy: (i) Legitimate aim

In light of the foregoing, the anti-competitive implications of Rule 40 are beyond question. Although the Rule aims to prevent athletes from unauthorised crediting of and engaging with non-Olympic sponsors during the Games period, it may be considered to serve a legitimate objective from an EU perspective. As contended by the IOC, Rule 40 and the applicable Key Principles aim to preserve the financial stability and sustainability of the Olympic Movement and the Olympic Games. In this respect, Rule 40 is said to be essential to preserving the distinctiveness of marketing programmes, for no business would otherwise enter into an expensive Olympic partnership agreement, and consequentially to the funding of the Olympic Movement which is in part facilitated by these programmes. On top of that, revenue coming from marketing programmes run by the primary members of the Olympic Movement ensure that all teams and athletes, regardless of their individual profile, are funded through the Olympic solidarity mechanism in order to be able to prepare for and compete at the Olympic Games. Furthermore, the rule intends to prevent over-commercialisation of the Olympic Games to ensure the focus remains on the athletes' sporting performances.[152] The IOC asserts

[152] Tokyo 2021 Principles (n 27).

that pursuit of these objectives are legitimate aims that justify the non-application of competition law.

A legitimate objective of *lex sportiva* under EU law generally relates to the 'organisation and proper conduct of competitive sport'.[153] With a view to protecting the exclusive rights acquired by Olympic sponsors, to secure the funding of the Olympic Games facilitated by the Olympic marketing programmes, this aim could be said to represent a legitimate aim for the organisation of sport. Especially since the Olympic Movement largely depends on exploitation of its commercial rights for cost recovery. Marketing programmes are imperative to the economic wellbeing of the organisation of the Olympic Games.

Regarding the objective of safeguarding the Olympic solidarity mechanism, it is arguable that this may be interpreted as a legitimate objective in the general interest which justifies restrictions on the relevant market.[154] Be that as it may, a justification on this ground is only appropriate if the financial support granted on the basis of the solidarity mechanism is sufficiently transparent for participants in the relevant sporting events.[155] The IOC boasts about their Olympic solidarity concept. However, besides making general statements on the solidarity mechanism and the marketing revenues generated by Olympic marketing campaigns, no insight is provided into individual systemic allocation of funds to athletes and national teams. Furthermore, there is little to no transparency where solidarity funds are indirectly provided to the athletes.[156] The revenues are partly channelled to the NOCs or the IOC, which then decide on the scope and measure of support. It should be acknowledged that financial assistance offered through the Olympic solidarity mechanism may nonetheless be an important source of income for athletes, enabling them to train, prepare and compete in the Games.

Lastly, the IOC's aim to prevent over-commercialisation of the Olympic Games in the interest of athletes cannot be said to represent a legitimate objective in relation to the organisation of the Olympic Games. The credibility of such an objective is diminished by the emphasis the Olympic Movement places on the commercial aspects of the Olympic

[153] *Meca-Medina* (n 96), para 45.
[154] Case E-8/17, *Henrik Kristoffersen v the Norwegian Ski Federation* [2018], para 116; *ISU* decision (n 107), para 222; Bundeskartellamt Decision (n 17), para 93.
[155] *Kristoffersen* (n 155), paras 118 and 124; Bundeskartellamt Decision (n 17), para 103.
[156] Bundeskartellamt Decision (n 17), para 103.

Games.[157] The prevalence of revenue-generating commercial activities conducted by Olympic Movement, such as the TOP programme, contradicts this objective. Rule 40 cannot operate to ensure that the focus really remains on the athletes' performance, since excessive commercialisation is typical of the modern conduct and governance structure of the Olympic Games. The IOC's contention that this is not a purely economic objective would be unlikely to succeed.

III.4.3.3. Conditional autonomy: (ii) Restrictions inherent in the pursuit of Rule 40 objective

Article 101 TFEU also requires consideration of whether the anti-competitive consequences of subjecting commercial relationships between athletes and their non-Olympic partners to a comprehensive set of principles are inherent to the protection of the funding and regular celebration of the Olympic Games. A strong argument can be made that the restrictions pursuant to Rule 40 are indeed essential to securing funding. It should be noted that (potential) Olympic partners willingness to enter into costly sponsorship deals with the members of the Olympic Movement is, among other factors, dependent upon the exclusivity and unique character of the acquired rights. Marketing campaigns which connect companies and their products to the Olympic Games without paying the same expenses Olympic partners do, i.e. ambush marketing, are a legitimate concern to potential Olympic partners.[158] Any unauthorised association with the Olympic Games harms and devalues the exclusivity of the rights granted to Olympic partners. Potential partners therefore require safeguards that ensure that spectators identify only the partner's product and brand with the Olympic Games.[159] Consequently, (contractual) arrangements restricting the commercial behaviour of athletes in order to prevent unauthorised association with the Olympics by third parties could be considered to preserve the value of Olympic marketing programmes that are indispensable to the Olympic business model

[157] See to that extent IOC document 'The Olympic Games Framework' produced for the 2024 Olympic Games in which the IOC places great emphasis on the commercial aspects <https://stillmed.olympic.org/Documents/Host_city_elections/IOC_Olympic_Games_Framework_English_Interactive.pdf> accessed 2 July 2020.
[158] Alex Locke, 'Fair Use & Fair Play: Olympic Marketing in the Information Age' (2018) 1(2) Int'l Comp, Policy & Ethics L Rev 339, 346.
[159] Chris Davies, 'Ambush Marketing and the Australian Olympic Committee' (2018) 24 JCULR 197.

and could therefore justify the non-application of competition law. In any case, the restrictions on athletes and non-Olympic partners should be confined to what is necessary and proportionate.

III.4.3.4. Conditional autonomy: (iii) Proportionality

The conflict of interest, as discussed in paragraph II.4.2., remains when SGBs through their regulatory function have the power to restrict the commercial opportunities of other (potential) market operators in order to maintain the distinctiveness of the Olympic marketing programmes, which is at the same time essential for the funding of the organisation of the Olympic Games. Rule 40 represents both a commercial and non-commercial interest to the primary members of the Olympic Movement. There is validity to the claim often made by SGBs that consideration should be given to the fact that sporting bodies, besides their regulatory functions, are to some extent entitled to conduct commercial activities. The exercise of that regulatory power should then be limited to what is proportionate to their sporting objectives. The subsequent paragraphs will discuss the proportionality of the following restrictive aspects of Rule 40 in light of the aim to ensure the regular celebration of the Olympic Games by preventing athletes and non-Olympic partners from unauthorised association with the Olympic Games: the notification and authorisation scheme, the substantive restrictions on athlete's commercial behaviour, and the sanctions for non-compliance. In doing so, it will balance the competing interest between the IOC and athletes and their non-Olympic partners, including an assessment of whether the restrictions go beyond what is necessary and proportionate.[160]

III.4.3.4.1. Proportionality: Authorisation scheme

Athletes are required to notify intended advertising campaigns to the IOC or relevant NOC. The notification requirement allows the IOC and NOCs to effectively block any association with the Olympic Games. On the other hand, the notification and

[160] Geoff Pearson, 'Sporting Justifications under EU Free Movement and Competition Law: The Case off the Football Transfer System' (2015) 21 ELJ 220, 233.

authorisation scheme is apt to provide certainty for athletes and non-Olympic sponsors as to whether their intended marketing plans accord with the Key Principles. It therefore significantly decreases the possibility of legal disputes during the Olympic Games or afterwards.

However, the German decision did raise concerns about the way the IOC and DOSB affected the notification and authorisation scheme. In its preliminary assessment, the Bundeskartellamt found the scheme applicable to Rio 2016 to be disproportionate as the obligation to notify four months prior to the commencement of the Olympic Games in order to obtain authorisation was likely to have prohibitive effects on athletes.[161] It concluded that the scheme did not sufficiently take the into account that athletes and their non-Olympic sponsors often have not settled their Olympic advertising campaigns well in advance. For instance, for athletes who only qualify a few weeks prior to commencement of the Olympic Games, it was not possible to plan and obtain permission for activities before the notification deadline.

Regarding Tokyo 2021, the IOC has responded to those concerns by reducing the deadline for notification to three months prior to the start of the Olympic Games.[162] Additionally, the IOC will allow athletes who qualify for the Olympic Games after the deadline to notify the IOC of their advertising plans so long as notice is given at least fifteen days in advance of any advertising activity. However, this scheme does not acknowledge the fact that many athletes practicing what is referred to as minority sports only gain attention, and attract sponsors, shortly before or during the Olympic Games.[163] These athletes will be deprived of any – narrowly defined – commercial opportunities they may still have under Rule 40. The notification and authorisation scheme has thus been significantly improved as regards proportionality, but it nevertheless still disproportionately affects some athletes.

[161] Bundeskartellamt Decision (n 17), para 108.
[162] It should be noted that the initial deadline was 15 May 2020 i.e. three months prior to the originally planned start of the Olympic Games on 15 July 2020. This deadline is still to be changed, since the Olympic Games are postponed until 2021 due to COVID-19. Tokyo 2021 Principles (n 27), Key Principle 2, under e.
[163] Duckworth (n 33), 11.

III.4.3.4.2. Proportionality: Substantive restrictions

Besides the changes to the notification and authorisation scheme, the IOC has relaxed its approach in terms of substance as well. Rule 40 no longer bans the use of Olympic participants' images during the blackout period, with limited exceptions. Instead, the IOC purports to maintain athletes' commercial opportunities, though still subject to the Key Principles. Nonetheless, those principles *de facto* impose extensive restrictions on the commercial opportunities of athletes which are disproportionate relative to the legitimate aim of ensuring the regular celebration of the Olympic Games by preventing athletes and non-Olympic partners from unauthorised association with the Olympic Games.

Regarding these extensive restrictions, it should first be emphasised that the Key Principles' scope of application is broad, so as to include all commercial promotions irrespective of their form or whether they were paid for or not. This is based on a presumption that all athletes and non-Olympic partners constantly intend to cash in on the brand reputation of the Olympic Games. While this is a valid presumption for traditional advertising platforms such as television, which usually involves financial payments, social networks are not an exclusively commercial platform used by athletes and non-Olympic partners. Social media also constitutes a genuine communication platform, where congratulatory and supporting posts may be of a sincere nature. What is more, not all posts made by athletes and their non-Olympic partners which suggest a connection with the Olympics will negatively impact the Olympic audience's perception of official sponsors. It would be hard to justify a blind application of the restrictive principles in light of objective to prevent unfair abuse of the high regard of the Olympic Games in order to ultimately sustain the funding of all Olympic activities.

To some extent, this is also acknowledged by the IOC in its document 'Commercial opportunities for Participants during the Tokyo 2020 Olympic Games'. For instance, athletes are permitted to post one identical thank you message per non-Olympic partner on their social media accounts. Non-Olympic partners on the other hand hardly have any latitude in what they are allowed to post. Whilst not all individual posts on social networks by non-Olympic partners involving a reference to a participant are subjected to the notice and authorisation scheme, congratulatory and supporting messages are prohibited without exception. Other marketing activities by non-Olympic partners that

are 'allowed' in theory are in reality made practically impossible. Requiring that the only link between the Olympic Games and advertising may be the use of participant's image and that any advertising campaign must be run consistently three months prior to the blackout period weighs heavily on athletes, particularly those practicing minority sports. Athletes will struggle to find sponsors that are prepared to invest in advertising campaigns that they are obligated to run long before sports fans become aware of the athlete's participation in the Olympic Games and associated popularity. Moreover, even if athletes are able to find businesses that are willing to sponsor and engage in marketing activities, the principles also restrict advertising activities involving any reference to the athlete's performances in other sporting events, whereas application of the principles is already triggered by the mere mention of recent historical sports performances. No distinction is made between Olympic qualification tournaments or national sporting events unrelated to the Olympic Games, leading to serious proportionality concerns. Furthermore, the blackout period commences ten days prior to the Opening Ceremony and overlaps with other major international sporting events. In 2021 for example, the Tour de France will not end until the 25th of July, while the blackout period will begin on the 23rd of July. Cyclists, for example, are generally under contracts of employment with cycling teams and accordingly have conflicting contractual obligations, as the right to commercially exploit their image is often reserved for the employer.[164] Part of the peak marketing period for elite cyclists therefore falls within the blackout period. Rule 40 falls short of recognising and accommodating legitimate commercial interests unrelated to the Olympic Games and goes beyond what is necessary in its aim. It accordingly disproportionately impedes upon athletes' contractual freedoms in order to safeguard the Olympic funding model.

Additionally, permitted forms of individual advertising using participant's images are prohibited from including Olympic Properties. The non-exhaustive list of Olympic Properties identified by the IOC extends beyond those covered by intellectual property rights. For instance, use of Olympic team names or monikers, such as "Team GB" or "Team Great Britain", is prohibited. In line with the view of the Bundeskartellamt, a

[164] Interview with Michiel van Dijk, partner at CMS Derks Star Busmann in the Netherlands, specialised in sports and employment law (16 June 2020). Van Dijk represents the Dutch cycling team Jumbo-Visma, a non-Olympic partner, that is confronted with the complications of Rule 40.

prohibition on Olympic-related phrases and images is reasonable to some extent. The IOC has adjusted this prohibition in an increasingly proportionate manner, by repealing the ban on words and phrases used in everyday language, whereas during Rio 2016 words such as "medal" and "gold" were off-limits. It nonetheless remains a grey area as regards proportionality when it concerns Olympic-related phrases and references not covered by intellectual property rights. But since these are, in terms of mutual cooperation, contractually agreed upon, they may be understood to be proportionate.

The present restrictions solely serve the commercial interests of the Olympic Movement. Individual athletes that are reliant on commercial partnerships to earn a living cannot contract freely by any means. Rule 40 goes beyond what is necessary to secure Olympic funding, because it essentially subjects all forms of activity to far-reaching restrictions, and is manifestly insensitive to the commercial opportunities other sporting events provide to athletes. It not only prevents unfair abuse of the high regard, but also plainly impedes any opportunity to benefit from the high regard of the Olympic Games at all. Considering Rule 40's legitimate and inherent purpose of securing funding for the Olympic Games, it is important to establish a more proportionate approach that balances the interests of athletes and the SGBs of the Olympic Movement.

III.4.3.4.3. Proportionality: Sanctions

Even if Rule 40 and its anti-competitive effects were to be considered proportionate and inherent to the pursuit of any legitimate objectives, the sanctions athletes could face for non-compliance are grossly disproportionate. In this respect, it is irrelevant whether any disproportionate sanctions were actually imposed on athletes. To require advertising to be withdrawn or amended, or the revocation of granted permission, are reasonable sanctions to ensure compliance. However, sanctions such as ineligibility to compete, disqualification, withdrawal of accreditation and/or fines go beyond what is necessary or proportionate to ensure compliance. The imposition of such sanctions has serious implications for athletes' sporting careers and ultimately, their financial situation. Sponsors have little to gain from sponsoring disqualified athletes. In this sense, such far-reaching sanctions create a downward spiral for athletes. In particular, athletes practicing

minority sports, who are to a great extent reliant upon the commercial benefits they gain from the Olympics, lose commercial appeal and could end up unable to fund their training. By extension, the substantial threat to a professional athlete's career posed by the mere possibility of sanctions might deter athletes from engaging in commercial activities at all, which are already significantly restricted by Rule 40.

Furthermore, there are no pre-established, clear or transparent criteria to ensure proportionality between the offence and the sanction imposed. This gives sporting bodies a great deal of discretion with no legal accountability due to the adjudicative system of the Olympic Movement. Disputes are decided by internal adjudicative bodies, appointed by the same sporting bodies accused of imposing disproportionate sanctions. Even in the event of appeal to the CAS, it is debatable whether an arbitrator specialising in sports-related disputes is competent to rule on sanctions relating to commercial interests.

Moreover, it could be argued that some sanctions do not even contribute to the organisation or proper conduct of competitive sport. For example, the imposition of a period of ineligibility in case of a doping violation is inherent in the pursuit of the objective to establish fair sporting competition.[165] Doping violations justify the imposition of a period of ineligibility for prohibited substances directly influence the competitive balance. In contrast, athletes do not gain any sporting advantages through non-compliance with the Key Principles. The only advantages gained are purely economic. Imposition of such sanctions does not uphold the integrity of the actual sporting competition, only the commercial framework that surrounds such competition. Withdrawal of the unauthorised advertising activity and/or a fine should be sufficient to ensure compliance with Rule 40.

Against this background, it may be concluded that the anti-competitive effects of Rule 40 as applicable during Tokyo 2021 are in part not inherent in the pursuit of legitimate objectives and, in any event, not proportionate to them. Accordingly, Rule 40 constitutes a prohibited restriction on competition under Article 101(1) TFEU.

[165] See *Meca-Medina* (n 96).

III.4.4. Article 101(3) TFEU: an alternative escape?

Although Rule 40 is caught by the prohibition of Article 101(1) TFEU, the Olympic Movement could still invoke Article 101(3) TFEU as a defence. For a successful appeal to a justification ground under this article, the Olympic committees bear the burden of proving that the following four cumulative conditions are satisfied: (i) Rule 40 must deliver efficiency gains, (ii) consumers must receive a fair share of the resulting benefits, (iii) the consequential restrictions must be indispensable to the attainment of these objectives and (iv) the Rule must not allow the committees the possibility of eliminating competition in respect of a substantial part of the products in question.[166]

Regardless of whether any relevant objective efficiency gains due to Rule 40 could be identified, Rule 40 cannot be deemed indispensable to the attainment of those efficiencies, as is required by the third condition. The extensive proportionality analysis under paragraph III.4.3. demonstrates that the restrictions further to Rule 40 cannot be considered proportionate in light of any possible efficiencies achieved by it, as there would be less restrictive means available. On top of that, as regards the fourth condition, it should be noted that Rule 40 allows the Olympic committees to eliminate competition in the relevant market, since it raises barriers to market entry to (potential) sponsors and athletes by rendering marketing partnerships between a participant and a non-Olympic partner ineffective.

Consequently, it would be hard to argue that the four cumulative conditions are met. In consideration of this and the fact that this justification ground is perceived to provide SGBs with a much less flexible defence than the conditional autonomy approach under Article 101(1) TFEU, Rule 40 cannot be exempted under Article 101(3) TFEU either.[167]

III.5 Legitimate concerns about the compatibility of Rule 40 with competition law

In light of the foregoing assessment, it should be concluded that the regulatory autonomy granted to SGBs under EU law does not go as far as justifying the non-applicability of the Treaty provisions on competition to Rule 40. Accordingly, there is a strong competition

[166] Commission Notice Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, paras 34 and 41.
[167] See Parrish (n 90), 722; Van Rompuy (n 32), 189.

law case to be made against Rule 40, which could be structured along the individual requirements of Article 101 TFEU.

IV. REMEDIES TO TACKLE RULE 40

IV.1 Introduction

Unequivocally, EU athletes competing in the Olympic Games faced with the disproportionately restrictive consequences of Rule 40 ahead of Tokyo 2021 have recourse to a remedy under EU law, specifically competition law. It subsequently raises the question what remedies could encourage the IOC to establish an approach that would justifiably balance the Olympic Movement's interests with the interests of athletes. Growing pressure from global athlete bodies and other stakeholders such as the sports marketing industry, and subsequent diplomatic efforts by the European Commission, were unable to compel the IOC to extend the revised German approach resulting from the challenge by the authoritative German competition authority to all EU athletes and international advertising activities.

IV.2 Private enforcement

Instead, the IOC encourages athletes to negotiate with their NOCs if they wish to expand their commercial freedom. The framework for implementation of Rule 40 allows for disparities in NOCs' national guidelines. Moreover, since these NOC guidelines must be contractually agreed upon by national participants and their respective NSF, discrepancies also exist between national athletes. In case the national guidelines on Rule 40 by NOCs are too restrictive in detail and therefore incompatible with the internal market, athletes and their non-Olympic sponsors do have private enforcement options at their disposal under EU competition law to challenge those rules before national

courts.[168] The potential for legal remedies was further strengthened by the Bundeskartellamt decision.

Notwithstanding this possible course of action, it is questionable whether this would effectively generate equivalent commercial opportunities for all EU athletes. In this regard, it must be noted that an athlete's negotiating position is dependent on a variety of circumstances. In some states, the formal relationship between participants and the respective NOC means that there is limited ability to negotiate an improved commercial position.[169] In any case, in particular athletes practicing minority sports may lack the financial resources, endurance and networks necessary to successfully renegotiate the protectionist position taken by senior Olympic committees. The implementational framework creates legal inequality between athletes from different (member) states and athletes in different sports disciplines. In any case, it would be a lengthy and costly process with a lot of practical issues, if athletes were prepared to take on such a challenging endeavour.[170] Accordingly, it is inconceivable that those legal inequalities will be eliminated, or even minimised, through private enforcement under EU competition law.

IV.3 Public enforcement by NCAs and/or the European Commission

Alternatively, a more adequate legal remedy under EU law to address the legitimate competition law concerns, would be through public enforcement by NCAs or the European Commission. The potential of such a remedy can be seen in the German decision. The proceedings by the Bundeskartellamt were already coordinated with the Commission. However, subsequent diplomatic efforts by the Commission to bring about more fundamental change for all EU athletes failed, as a result of which recourse to public enforcement becomes plausible. The Commission has the authority to initiate

[168] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union [2014] OJ L349/1; Grady and Moorman (n 18).
[169] Interview Van Dijk (n 165).
[170] See e.g. Till Schreiber, Carsten Krüger and Pádraic Burke, 'Practical challenges for cross-border follow-on actions' in Pier L Parcu, Giorgio Monti and Marco Botta (eds), *Private Enforcement of EU Competition Law* (Edward Elgar Publishing 2018).

administrative proceedings on the basis of Article 7 and Article 23(2) of Council Regulation on the implementation of the EU competition rules.[171]

Notably, the European Commission would constitute a credible opponent to most senior SGBs, like the IOC. The effectiveness of intervention by the Commission was evidenced by the Commission's antitrust investigation into the compatibility of the FIFA transfer regulations. The investigation led to FIFA fundamentally revising its transfer framework in 2001 on the grounds of an informal settlement with the Commission.[172] Yet, athletes relying on the Commission to enforce their rights would not be without obstacles, the first being whether the Commission would see sufficient cause to take on the role as watchdog of the Treaty in respect of Rule 40. If the Commission decides not to intervene or does not make it a priority to intervene, there will be no significant pressure on the IOC to establish a more balanced approach to Rule 40, compatible with EU competition law. Nonetheless, it should be noted that the Commission's reluctance to subject *lex sportiva* to legal scrutiny under competition rules has recently been encroached on by the Commission's decision against the ISU. This decision is therefore important for future regulatory involvement of the European Commission in sports-related cases.[173] Furthermore, it remains to be seen whether legal action by the Commission would lead to the desired outcome for athletes. It should be pointed out that aside from the *ISU* decision, the limited amount of investigations into the compatibility of *lex sportiva* of major SGBs, like FIFA[174] and FIA[175], mostly resulted in informal settlements.[176] Admittedly, those settlements may contribute to increased compatibility of *lex sportiva* with the competition rules. However, they do lack transparency.[177] Moreover, in spite of competitive improvements by virtue of informal settlements, legal

[171] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.
[172] European Commission, 'Commission closes investigations into FIFA regulations on international football transfers', Press release IP/02/824 (5 June 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_02_824> accessed 7 July 2020.
[173] Szyszczak (n 12), 191.
[174] Ibid.
[175] European Commission, 'Commission closes its investigation into Formula One and other four-wheel motor sports' (30 October 2001) Press release IP/01/1523 <https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1523> accessed 13 July 2020.
[176] Van Rompuy (n 32), 175.
[177] Ibid.

scholars still question whether, for instance, the revised FIFA transfer system would uphold when it would be fully adjudicated on in a court of law.[178]

Regardless, it should be emphasised that in case no intervention takes place, the legal injustice and disparity between EU athletes caused by Rule 40 will prevail. The European Commission has the legal resources and precedents to take on the regulatory power of the most senior SGBs. Hence, there are great incentives for the European Commission to initiate such a procedure.

Irrespective to the IOC's reluctance to fundamentally revise its restrictive approach to Rule 40, athletes may pursue a two-pronged approach under EU competition law to enforce their rights so as to 'leverage opportunities to generate income in relation to their sporting career, name and likeness, while recognising the intellectual property or other rights, rules of the event and of sports organisations as well as the Olympic Charter', as underlined by Right 5 of the Athlete's Declaration.[179]

CONCLUSION

The aim of this thesis has been to examine the legal merits of a challenge on the basis of EU competition law to Rule 40, as drafted and implemented ahead of Tokyo 2021. Part I elaborated on the Rule's framework and the Key Principles athletes competing in Tokyo must accord to. The Principles entail restrictions on the commercial activities of athletes and non-Olympic partners during the so-called blackout period, which subsequently have to be implemented by NOCs in their respective territory. Rule 40 is said to be essential to preserving the distinctiveness of marketing programmes run by the constituent members of the Olympic Movement and consequentially to the funding of the Olympic Movement, which is in part facilitated by these programmes. In consideration of the effectively significant economic consequences associated with Rule 40, it was no surprise that its restrictiveness became cause for discussion.

[178] See e.g. Pearson (n 160), 236-237.
[179] Athlete365, 'Athletes' Rights and Responsibilities Declaration' presented to and adopted by the 133rd IOC Session (9 October 2018) <https://www.olympic.org/athlete365/athletesdeclaration/> accessed 7 July 2020.

Yet, despite demands from global athlete bodies and other stakeholders to fundamentally revise its framework, the IOC did not concede. The German decision by the authoritive Bundeskartellamt has intensified discussions on the need for legal action by means of EU competition law. Part II witnessed the potential of EU law, in particular competition law, to challenge the regulatory powers of SGBs. Impactful cases before the Court of Justice involving challenges to rules and practices produced by SGBs, i.e. *lex sportiva*, such as *Bosman, Deliège* and *Meca-Medina*, elucidated that while due consideration should be had to sports special character, it is not immune from scrutiny under EU law. A conditional autonomy approach is taken towards the regulatory powers of SGBs, which means that *lex sportiva* will not be condemned by EU law insofar as it pursues a legitimate objective that is inherent in the organisation of sport and that is necessary and proportionate in light of that objective.

In Part III this analytical conditional autonomy approach was applied to the case of Rule 40. An assessment of the Rule's compatibility with EU competition law demonstrated that there is a strong competition law case to be made against Rule 40, which, parallel to the Commission's recent *ISU* decision, could be based on Article 101 TFEU. It concluded that while admittedly the IOC has a legitimate interest to prevent any unfair abuse of the high regard of the Olympic Games for the purpose of securing the Olympic funding model, Rule 40's anti-competitive effects are, in any event, not proportionate in light of this objective. The regulatory autonomy granted to SGBs under EU law therefore does not go as far as justifying the non-applicability of the Treaty provisions on competition to Rule 40.

Bearing in mind the failed diplomatic attempts by the European Commission to bring the IOC to establish an approach that represents a justified balance between the interests of individual athletes and the collective interest of the Olympic Movement, Part IV discussed the private and public legal remedies available under EU law to athletes and other stakeholders. It also made clear that if no action is taken to challenge the powers located at the Olympic top level of governance, the manifested legal disparities between athletes as a result of the fragmentised implementation of Rule 40 will be sustained. Hence, there are great incentives to employ EU competition law to create a level-playing field between EU athletes, and possibly, all athletes competing in the Olympic Games.

The underlying issue relates to SGBs having regulatory functions, while at the same time those SGBs are entitled to commercially exploit its rights for the purpose of ensuring the organisation of sporting events. In case SGBs employ their regulatory powers for commercial purposes, a conflict of interest may arise. The conflict of interest, that is to some extent inherent in SGBs regulatory and organisational conduct, is and will only be further enhanced by the commercialisation of sport. Therefore, there should be convincing limits to the exercise of regulatory powers, where the activities conducted by SGBs are involved with the commercial exploitation of its rights. This is where EU competition law could play an important role. It provides a powerful instruments for athletes and other stakeholders to push for good governance in sports. On a last note, one might question whether a SGB deserves the special status granted to it under EU law, in the event adopted *lex sportiva* predominantly has commercial or economic motivations, or whether it should then be considered as any other market operator.

In any case, there are legitimate concerns about the compatibility of Rule 40 of the Olympic Charter with EU competition law. It remains to be seen whether the IOC will eventually overhaul its approach and establish an approach that represents a justified balance with equivalent commercial opportunities to capitalise off the prestige of the Olympic Games for all athletes. Notwithstanding, this thesis concludes that legal action by means of EU competition law would add the necessary fuel to the Olympic flame.

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