

THE SPORTS LAW
REVIEW

EIGHTH EDITION

Editor
Claude Ramoni

THE LAWREVIEWS

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PREFACE

The Sports Law Review is intended to be a legal guide for all stakeholders in the field of sport, including legal practitioners, academics, sports business entities, sports federations, clubs and athletes. It aims to provide an overview of the relevant legal framework in a wide range of selected jurisdictions, with an emphasis on the most significant developments and decisions of the past year. It shows that sports law – despite having an international dimension that culminates in the adoption of the regulations of international sports federations under the ultimate imprimatur of the Court of Arbitration for Sport – remains both interdisciplinary and subject to state authority. Local laws are particularly relevant in all areas that are not covered by sports regulations or that are subject to sovereign powers and mandatory provisions of state law.

The Sports Law Review is of particular interest to sports lawyers who intend to act internationally on behalf of sports federations, clubs and athletes, and must, therefore, be familiar with not only international private norms and the *lex sportiva* but also domestic laws, in a globalised world. The *Review* also allows comparative law and sports law lecturers to obtain a general understanding of the situation in the field of sport worldwide without having to undertake time-consuming research. It can be consulted as a hard copy or on The Law Reviews website, thus providing a unique and specialised resource, and one which is widely disseminated.

The *Review* chapters are traditionally structured in 10 sections, thereby treating all the countries examined similarly, to facilitate comparisons. It opens with the legal structure and organisation of sports clubs and governing bodies, and the dispute resolution system applicable to sports matters. It then presents issues related to the organisation of sports events, such as liability for injuries and riot prevention, and provides a description of the legislative framework governing the commercialisation of sports events, labour, antitrust and taxation. It also addresses topics specific to sports, including doping, betting, match-fixing and grey market sales, and it concludes with a review of the year, outlining recent decisions of courts or arbitral tribunals of interest to an international audience, as well as a summary and outlook for the coming period.

This eighth edition covers the period from July 2021 to July 2022. It gathers 18 chapters written by renowned sports law practitioners and experts based in key countries across all five continents. The year under review was far from being usual in the world of sport. Although the covid-19 outbreak was still present, sporting competitions could be resumed, under specific conditions. Two editions of the Olympic Games, the Summer Olympic Games in Tokyo (23 July–8 August 2021) and the Winter Olympic Games in Beijing (4–20 February 2022) took place within a time span of six months. Each of these Games gave rise to disputes,

notably in relation to athletes' qualification to compete, following numerous disruptions and last-minute adaptations caused by the covid-19 pandemic and the cancellation of the vast majority of the qualification events that were planned initially.

Immediately after the end of the Beijing Winter Olympic Games, Russia invaded Ukraine – during the period of the Olympic Truce. This triggered numerous reactions from national governments and sporting bodies, with significant effects on sport, particularly as Russia was a key actor in terms of the organisation of sporting events, the number of participating athletes and teams, and monetary investments in sport. The reaction of the sporting world to the invasion of Ukraine – with coordinated bans on Russian athletes and teams, and the cancellation not only of all events scheduled in Russia but also of most sponsorship deals with Russian companies – has resulted in numerous actual or potential legal disputes, the vast majority of which remain unresolved as this book goes to publication. Measures adopted at national level in reaction to the Russian invasion have sometimes contradicted the position adopted by international sports governing bodies, with unfortunate negative effects on athletes. Particularly noteworthy was the decision by the United Kingdom not to accept Russian and Belarusian players at the Wimbledon tournament, and the subsequent decision by the Association of Tennis Professionals and the Women's Tennis Association to strip the English Grand Slam tournament of its world ranking points.

International sport has entered a period of uncertainty. Since the end of the Cold War, sport had become a global market, with competitions taking place on all five continents, drawing athletes and investments from around the entire world. The situation has now changed. The Russian invasion of Ukraine, and the resulting decisions by governments and sports governing bodies, effectively mean that Russia (and Belarus) are now completely excluded from the worldwide sports system. In addition, the covid-19 crisis is not over and numerous countries still have restrictions in place, with consequences for the organisation of international competitions all over the globe. It could be said that the combined effect of the war in Ukraine and the covid-19 pandemic means the world of sports now has much less 'global' reach than in the recent past, because participation in international competitions now depends not only on sporting merit but also on the nationality or origin of the athletes, their vaccination status or the travel restrictions in place in their country of residence.

Even when dealt with at an international level, to a certain extent, these issues and their legal consequences will undoubtedly have jurisdiction-specific answers in each case, and this only confirms the interest of the *Review*.

As the editor of this publication, I would like to thank all the authors for their contributions. I also extend my gratitude to all the people involved at all stages of this process, from proofreading to production and distribution. I trust that readers will find this global survey informative.

Claude Ramoni

Libra Law

Lausanne

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AUSTRIA

Arthur Stadler and Christopher Falke¹

I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES

The regulation of sports raises several interdisciplinary issues with regard to different fields of law. In Austria, in several areas of law, the regulation of sports is still in the process of development to provide more legal certainty for athletes, sports clubs and federations.

In Austria, sports clubs are almost exclusively organised in the form of associations on the basis of the constitutionally protected freedom of association² in accordance with the Austrian Association Act (VereinsG).³ This applies not only to simple sports clubs but also to federations at state level and at federal level. To give an example, professional football in Austria is played almost exclusively in leagues organised by the Austrian Football Association (ÖFB), which is considered to be the umbrella organisation. Each participating association is a member of a regional association (or federal league), which in turn belongs to the ÖFB. Therefore, all associations and their players are indirectly subject to the regulations of the ÖFB, which are issued within the framework of the autonomy of the association's by-laws. Moreover, the ÖFB is a member of the International Federation of Association Football (FIFA) and the Union of European Football Associations (UEFA).

In particular, the organisation of professional football clubs is interesting, especially when located in Germany or Austria. The idea that football is purely about sporting interests is one that dates back to the era of 'football romanticism'. Professional football is a billion-dollar business. Sporting success also means higher revenues.⁴ In addition, a lot of money also flows in from outside (e.g., through sponsorship). Moreover, investors also play an important role.⁵ To ensure the independence of clubs, there is a special feature in Austria in the '50+1' rule. A similar rule is also found in German football.⁶

1 Arthur Stadler is a founding partner and Christopher Falke is a research assistant at Stadler Völkel Attorneys at Law.

2 According to Article 12 of the Austrian State Basic Act, Article 11 of the European Convention on Human Rights (ECHR) and Article 12 of the Charter of Fundamental Rights.

3 In force as of 1 July 2002.

4 For example, in the form of entry bonuses for international competitions and higher television revenues due to having a better position in the final league table.

5 Notable in this context at European level are Paris Saint-Germain, Manchester City and Inter Milan.

6 According to Section 16c No. 3 of the Statutes of the German Football Association (DFB) and Section 8 No. 2 of the Statutes of the German Football League (DFL), a prerequisite for acquiring a licence, and thus membership in the DFL, is the legal independence of the club (i.e., no legal entity has a legally dominant influence over the club).

The licensing system is structured roughly as follows. Possession of a licence for the current season issued by the ÖFB is a prerequisite for participation in the Austrian Football Bundesliga (ÖFBL), the highest division in Austrian football.⁷ A licence may only be granted to a non-profit association.⁸ However, a prerequisite for the processing of the application for a licence is that the club has outsourced the operation of the professional team to a corporation.⁹ This is where the 50+1 rule comes into play: according to Article 4.4.2.5 of the ÖFBL's licensing provisions, the applicant must have a controlling influence¹⁰ on the company and directly hold the majority of the voting rights in the company. In short, the football club must hold at least 50 per cent of the voting rights plus one additional vote (i.e., the majority of votes) in the (outsourced) company. In theory, therefore, because of this rule, it is currently not possible for an investor to exert a controlling, significant influence on a football club in Austria, whether the investor is a natural person or a legal entity.

II THE DISPUTE RESOLUTION SYSTEM

i Access to courts

According to Austrian law (see Section I), the founders of an association are obliged to prepare the association by-laws, which must meet certain minimum requirements.¹¹ The association by-laws contain not only the organisation of the association but also regulate the rights and obligations of the association members. In other words, both professional athletes and non-professional association athletes (i.e., athletes who participate in a sports association as a hobby) abide by association by-laws.¹² Pursuant to Section 8 of the VereinsG, the means of settling disputes arising from association membership must also be stated in an association's by-laws (e.g., by the incorporation of a conciliation clause). In the case of association disputes, an athlete must first refer the dispute to a conciliation body and seek an amicable solution to the dispute. Then, six months after the dispute has been referred to the conciliation body, the dispute may be brought before an Austrian court (the procedural bar of (temporary) inadmissibility to take legal action). The nature of the conciliation body and the scope of dispute resolution conducted by the conciliation body are subject to debate in Austrian legal literature, as neither is further determined in law, nor is the legal nature of any association sanctions arising therefrom.¹³

The right to bring an action before the Austrian courts can only be waived by concluding an arbitration agreement and, thus, referring the dispute to an arbitral tribunal in accordance with Section 577 et seq. of the Austrian Code of Civil Procedure (ZPO). As regards the characteristics of sports arbitration, see Section I.ii.

7 See No. 4.3.1.1 of the licence provisions of the ÖFBL (status: 10 December 2021).

8 See No. 4.3.2.1 of the licence provisions of the ÖFBL (status: 10 December 2021).

9 See No. 4.3.2.2 of the licence provisions of the ÖFBL (status: 10 December 2021) and Decree of the Federal Minister of Finance of 27 February 2015, BMF-010219/0074-VI/4/2015, BMF-AV No. 40/2015. By outsourcing, the non-profit status of the association and the associated tax benefits can be maintained.

10 A controlling influence exists, for example, through shareholdings or through the possibility of appointing a majority of the members of the governing bodies.

11 Section 3 VereinsG.

12 Holzer/Reissner, *Einführung in das österreichische Sportrecht* (2013) p. 43.

13 See the discussion in Druml, *Sportgerichtsbarkeit* (2017) p. 55 et seq.

ii Sports arbitration

As sport connects many people of different origins, especially through internationally organised sport events, complicated legal questions in a cross-border context may arise. In particular, the question arises as to who or which decision-making bodies should decide on the legal issues associated with international sports events. If these were to be regulated by national courts and national laws, there would be a risk of legal fragmentation, resulting in legal uncertainty. Therefore, it seems reasonable that sport disputes should not be decided by the courts but by (private) arbitral tribunals.¹⁴

Probably the most famous and important sports arbitral tribunal is the International Court of Arbitration for Sport (CAS).¹⁵ The CAS is an institutionally established arbitral tribunal located in Lausanne, Switzerland, which was founded through the initiative of the International Olympic Committee (IOC) in 1983. As the first and foremost example of the successful use of arbitration to resolve sports-related disputes, the CAS deals with all types of sports disputes.¹⁶ The CAS has different functions: on the one hand, it can be made competent as an arbitral tribunal of first instance for disputes arising from a contractual arbitration clause agreed between two or more parties in favour of the CAS (the ordinary arbitration procedure).¹⁷ On the other hand, the CAS can serve as a second instance or appeal instance for the challenge of internal association decisions (the appeals procedure), for example, in disciplinary disputes.¹⁸ Most statutes of sports associations contain an arbitration clause establishing the jurisdiction of the CAS.¹⁹ The worldwide recognition and use of the CAS for all types of sports disputes brings the further advantage that such disputes are resolved in an internationally uniform manner. Indeed, a typical feature of sports arbitration is the precedent value of arbitral awards. The practice of sports arbitration shows

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- 14 In the past, sports associations have had rather unpleasant experiences with the courts. For example, following the sentencing of Juventus FC to mandatory relegation within the Italian football association and the club's subsequent intention to appeal this decision to a national court, FIFA threatened the association with exclusion from FIFA, with all the resulting consequences that exclusion would have for international sports. FIFA used a similar strategy against the French football association in the case of the forced relegation of Olympique de Marseille. In both cases, the matter was not brought before the courts.
- 15 On the website of the CAS, one has access to the ICAS Statutes, with the provisions S12 to S22 containing regulations of a mainly organisational nature (e.g., tasks of the CAS panels, and structure and organisation of the CAS). The Procedural Rules, which regulate arbitral proceedings before the CAS, are also available.
- 16 There are other numerous examples of specialised sports arbitration at the international level. To give an example, the International Basketball Federation has established the Basketball Arbitral Tribunal.
- 17 If the CAS bases its jurisdiction on a contract with an arbitration clause, the dispute will be decided in accordance with Article R38 et seq. of the CAS Code 2020 (Special Provisions Applicable to the Ordinary Arbitration Procedure).
- 18 Should the CAS function as an appeal instance, the conduct of the arbitration is determined in accordance with Article R47 et seq. of the CAS Code 2020 (Special Provisions Applicable to the Appeal Arbitration Procedure).
- 19 In international literature, it is discussed whether the simple act of joining a sports association, by an athlete, without any reference to submitting to arbitration being associated with such joining, is sufficient for the 'consent' of the athlete to the jurisdiction of the CAS. See, e.g., Holzer/Reissner, *Sportrecht* p. 24; Swiss Supreme Court 6 November 2009, 4A 358/2009; Bärtsch, 'Consent' in Sports Arbitration: Which Lessons for Arbitrations Based on Clauses in By-laws of Corporations, Associations, etc.? in Geisinger/Trabaldo-de Mestral (eds.), *Sports Arbitration: A Coach for Other Players* (2015) p. 95 et seq.

that both the arbitral tribunals in their awards and the parties in their submissions regularly refer to the precedent value of previous awards or, conversely, distinguish their cases from previous awards.²⁰

One of the most important features of arbitration and, thus, also of sports arbitration, is that parties to arbitration proceedings voluntarily waive state jurisdiction and submit to arbitration by mutual agreement. Therefore, a contractual basis (in the form of an arbitration agreement or arbitration clause) is necessary for every arbitration proceeding, as well as for an arbitration proceeding before an arbitral tribunal with its seat in Austria.²¹ However, owing to the imbalance of power existing in the sports world between sports associations and athletes, it is questionable whether this voluntariness on the part of the athletes can in fact be considered to exist or whether such voluntariness can simply be assumed by reference to an arbitration clause contained in a player's contract.²²

Another difference compared with courts is that arbitral tribunals are often composed of experts who have extensive experience in sports law (i.e., arbitrators are frequently engaged in consistently greater proximity to sports matters). This is mainly because the sports sector has many specific features that can be better met and decided by specialised decision-making bodies.

In addition, arbitration proceedings in Austria usually have a shorter duration than court proceedings, which is extremely important in organised sports, since there is a particularly great need for timely decisions (e.g., before a sports competition, a qualification or a championship).²³

iii Enforceability

One of the greatest advantages of arbitration is that arbitral awards are enforceable in a large number of states on the basis of the New York Convention,²⁴ of which Austria is a Member State, whereas the enforcement of court judgments generally requires multilateral or bilateral agreements. The declaration of enforceability and enforcement proceedings can be rather lengthy and complicated. In the field of organised sports, however, owing to their monopolistic position in relation to athletes, sports associations often do not need any enforcement if they win an arbitration case. For example, if the association issues a sanction, the athlete concerned can usually no longer participate in the sports competition, which is why there is no need to enforce this sanction.

20 Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?* *Arbitration International* 2007, Vol. 23, No. 3, pp. 357 to 378.

21 Section 583 ZPO; Rechberger/Hofstätter in Rechberger/Klicka (eds.), *ZPO* (2019), 5th edition, Section 581 ZPO; Zeiler, *Schiedsverfahren* (2014), 2nd edition, Section 581 ZPO.

22 See the discussion in Switzerland: Bärtsch in Geisinger/Trabaldo-de Mestral p. 95 et seq.

23 For example, the CAS Code 2020 provides for an expedited procedure (Article R44.4) before the CAS; see further the discussion in Coccia, *Sports Arbitration: Which Features Can Be 'Exported' to Other Fields of Arbitration?* in Geisinger/Trabaldo-de Mestral (eds.), *Sports Arbitration: A Coach for Other Players* (2015) p. 5 et seq.; see also the following quote of the arbitrator Michel Beloff QC as part of a CAS panel in the Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 4.7: 'Finality is all important in this area: rough justice may be all that sport can tolerate.'

24 The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

In contrast, the decision of a conciliation body does not have an enforcement effect comparable to an arbitral award or a court judgment.²⁵ Consequently, if one party does not comply with the decision of the conciliation body, the other party must take legal action and try to obtain a court judgment.

III ORGANISATION OF SPORTS EVENTS

The covid-19 pandemic has been and remains very challenging for the sports world in several respects. As dynamic as the factual situation has proved to be, the legal situation has been just as changeable and complex. Because of the number of legal issues that have arisen, and their complexity, a comprehensive presentation here is impossible and pointless. For this reason, only a brief, selected overview is presented in this section. The most important legal sources have been the regulations of the Federal Ministry for Social Affairs, Health, Care and Consumer Protection, which contained provisions for the practice of sports and for (sports) events.²⁶ All these regulations can be found on the website of the Austrian government²⁷ and they generally distinguished between amateur and professional sport. If events were not completely prohibited because of the epidemiological situation, there was usually a graduated system of regulation based on the number of visitors. In simple terms: the more visitors, the more duties had to be fulfilled. The matches of the ÖFB provide a good example of the changing situation and the corresponding legal position. The situation varied from complete prohibition to admissibility subject to exclusion of visitors, to gradual admission of visitors and full stadiums under (strict) conditions. These included, for example, proof of vaccination, testing or recovery, as well as the preparation of a prevention concept and the appointment of a covid-19 officer.

It should also be noted that different regulations have applied partially, depending on the province. In accordance with Article 2 of the Federal Constitutional Law (B-VG), Austria is a federal state composed of nine federal provinces. The pendulum swings in favour of the federal state, as it has responsibility for the most, and the most important, areas of competence.²⁸ With regard to health law, legislation and enforcement also fall within the competence of the federal state,²⁹ although enforcement is carried out indirectly by provincial authorities.³⁰ According to Section 7(2) of the Covid-19 Measures Act, the provincial governor is entitled to set stricter measures by decree. Vienna in particular, or rather its provincial governor, has often made use of this right.

On 5 May 2020, the Arts, Culture and Sports Protection Act (KuKuSpöSiG) entered into force and aims at supporting event organisers and, above all, tackling their liquidity problems. It is applicable in cases where a sports, arts or cultural event is cancelled after 13 March 2020 because of the covid-19 pandemic and the organiser of the event would

25 According to Section 607 ZPO, an arbitral award is considered to have the same effect as a court judgment.

26 The power to issue a decree is found in Section 7(1) of the Covid-19 Measures Act BGBl I 12/2020.

27 See www.oesterreich.gv.at/themen/coronavirus_in_oesterreich/Rechtliche-Grundlagen.html. (last accessed 27 June 2022).

28 See Article 10 B-VG.

29 See Article 10(1) Z 12 B-VG.

30 See Article 102 B-VG.

thus be obliged to refund the ticket price to the customer.³¹ According to Section 1(1) of the KuKuSpoSiG, instead of refunding the amount, the organiser now has the option, at least partially, to issue the amount in the form of a voucher.³² The voucher can also be passed on to other persons and, if the owner of the voucher has not redeemed it by 31 December 2022, the organiser shall pay out the value of the voucher upon request. The KuKuSpoSiG was amended in the course of 2021. Particularly notable in this regard was the extension of its scope.³³ If an event was postponed from 2020 or the first half of 2021, or if it was intended to replace an event that was cancelled in 2020 or in the first half of 2021, the owner of the voucher can (as before) demand payment of the monetary value after 31 December 2022.³⁴ Because of this extension of the scope, events that were cancelled in the first half of 2022 on account of the covid-19 pandemic are now also covered.³⁵ If the owner of the voucher has not redeemed it by the end of 31 December 2023, the organiser or operator must pay him or her the value of the voucher immediately upon request.³⁶

IV PROFESSIONAL SPORTS AND LABOUR LAW

Athletes can perform as employees, freelancers or independent contractors.³⁷ Only employees can fully benefit from the Austrian labour law, whereas freelancers may only assert claims regarding specific labour law provisions that protect against abuse, and independent contractors are qualified as independent entrepreneurs. Employees are personally dependent upon their employer, as they are integrated into its organisation and work on behalf of the company on the basis of its instructions; for example, professional football players³⁸ and professional ice hockey players³⁹ are considered employees under Austrian law. They follow instructions from their trainers and organisation, and are integrated into the club.⁴⁰

31 However, the Arts, Culture and Sports Protection Act (KuKuSpoSiG) does not apply primarily if the customer purchased tickets for a sports event in a foreign state and was then unable to attend. In cases of this kind, it has to be determined which law and provisions apply to the ticket refund. Within the European Union, this is to be answered by Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

32 The amount for which a voucher has to be issued or a payment made depends on the ticket price (for example, if the ticket price is less than €70, the full amount may be issued as a voucher (see Section 1(4) and (5) KuKuSpoSiG BGBl I 40/2020 as amended by BGBl I 223/2021).

33 Section 1(1) KukuSpoSiG BGBl I 40/2020 as amended by BGBl I 223/2021.

34 Section 2(3) KukuSpoSiG BGBl I 40/2020 as amended by BGBl I 223/2021.

35 Section 1(1) KukuSpoSiG BGBl I 40/2020 as amended by BGBl I 223/2021.

36 Section 2(4) KukuSpoSiG BGBl I 40/2020 as amended by BGBl I 223/2021. However, if the event is one that was postponed from 2020 or the first half of 2021, or one that was agreed as a substitute for an event omitted in 2020 or the first half of 2021, the voucher holder may continue to request payment in cash after 31 December 2022.

37 Marhold/Ludwig, *Der Berufssportler im Arbeitsrecht*, in Marhold/Schneider (eds.), *Österreichisches Sportrecht* (2016) p. 90.

38 Austrian Supreme Court (OGH) 30 September 1992, 9 Ob A 186/92.

39 OGH 18 October 1977, 4 Ob 95/77.

40 Marhold/Ludwig in Marhold/Schneider p 91.

V SPORTS AND ANTITRUST LAW

From an Austrian perspective, antitrust law is not of great importance in sports matters. Nonetheless, Austrian and European antitrust regulations must be taken into account in sport just as they are in other areas. The area of sport in which antitrust law is at least discussed prominently is that of football because of the 50+1 rule (see Section I). The 50+1 rule constitutes a restriction of competition by imposing on clubs conditions that they have to fulfil to participate in professional football. In Germany, for example, where a very similar rule applies, the federal competition authority, the Bundeskartellamt, concluded in a preliminary assessment that the objectives pursued by the basic rule of 50+1 (disregarding the details of the rule) justify the restriction.⁴¹ In Austria, the question of the compatibility of the 50+1 rule with antitrust law has not yet been referred to the Austrian Federal Competition Authority.

VI SPORTS AND TAXATION

In Austria, the employment status of an athlete depends on the individual sport he or she is competing in. While tennis players mostly operate independent businesses, football players are integrated into a team and are thus considered employees of their club. The Austrian tax regime accommodates the variable revenues generated by athletes to the extent that employees simply have to pay tax on their wages according to their tax bracket, in a range from 20 per cent to 55 per cent; the actual amount is calculated and passed on directly to the tax authorities by their employer. Independent or self-employed athletes such as tennis players have to submit a yearly income tax statement, on the basis of which their income is taxed accordingly, as with any other conventional business. However, there is a notable exception to this rule: athletes who are subject to unlimited tax liability in Austria, mostly perform internationally and operate independently may opt in to a flat-rate determination of their taxable income. If the financial authority deems the applicant acceptable, an athlete only has to pay taxes on 33 per cent of his or her income (in Austria and abroad), including any revenue from advertising or prize money.⁴² This arrangement is of great benefit to athletes, although it has one downside: as soon as an athlete has opted in to the flat-rate option, taxes that have already, and directly, been paid in foreign countries cannot be credited.⁴³

VII SPECIFIC SPORTS ISSUES

In this section, newly adopted laws and sports-related topics that have been the subject of discussion over the past year will be addressed.

i Anti-doping

In Austria, the Federal Anti-Doping Act 2021 (ADBG) entered into force on 1 January 2021. This new law serves to implement the World Anti-Doping Code 2021 and provides a new basis for anti-doping law. In a nutshell, the following amendments were made. There are new

41 See www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/31_05_2021_50plus1.html (last accessed 27 June 2022).

42 Austrian Federal Law Gazette (BGBl) II No. 418/2000.

43 *ibid.*

anti-doping provisions regarding the protection of whistle-blowers⁴⁴ and the protection of persons in particular need of protection.⁴⁵ In another major amendment, amateur athletes are now defined in law. They are subject to anti-doping violations in the same way as professional athletes, but there are lighter sanctions.⁴⁶ In addition, there are new provisions concerning sanctions for substance abuse outside a sports competition,⁴⁷ doping prevention,⁴⁸ the establishment of an athletes' commission,⁴⁹ the inclusion of teams in the national testing pool⁵⁰ and physicians' duty to provide information.⁵¹ There is also a new provision offering the option to settle amicably disputes involving the Austrian anti-doping legal commission, the athlete or another (legal) person, such as the World Anti-Doping Agency.⁵²

Doping is also subject to criminal prosecution. Pursuant to Section 147(1a) of the Austrian Criminal Code (StGB) and, in relation to doping in sports, the Annex to the Anti-Doping Convention of Federal Law Gazette No. 451/1991, whoever commits fraud causing more than minor damage⁵³ by deceiving about the use of a prohibited substance or a prohibited method⁵⁴ shall be punished. In addition, there is the possibility of suspension from participation in professional sports for life.⁵⁵

ii Esports

In recent years, esports have become part of the Austrian sports and media landscape: 5.3 million Austrians play video games and 1.3 million of these compete in esports and follow sporting structures in the process.⁵⁶ From a legal point of view, esports is 'cross-sectional' in nature and involves issues in very diverse legal areas. This includes, for example, areas of law regarding associations, tax, events, the protection of minors, copyright, competition, gambling and betting, and much more.

Despite their growing importance, there is not yet clarity as to whether esports also qualify as conventional 'sports' from a legal perspective, especially since the term 'sports' is not defined by law in Austria. The lack of a legal framework currently leads to legal uncertainty, which should be eliminated in the future. Nonetheless, it cannot be denied that

44 Section 1(1) No. 11 ADBG.

45 Section 1 No. 4 ADBG.

46 Section 2 No. 14 ADBG.

47 Section 2 No. 28 ADBG.

48 Sections 3 and 24(2) No. 13 ADGB.

49 Section 5(2) No. 5 ADGB.

50 Section 9 No. 5 ADGB.

51 Section 27 ADGB.

52 Section 19 ADBG.

53 'More than minor' damage must be caused by just one offence. It must not result from the aggregation of the damage amounts of several offences. See OGH 27 April 2021, 14 Os 119/20m; 14 September 2021, 14 Os 63/21b.

54 Deception about the use of a prohibited substance or a prohibited method are equivalent variants of the offence, which is why it is an alternative mixed offence. If the accused conduct (in any case) corresponds to one variant of the offence, it is of no consequence if the other is incorrectly affirmed. See OGH 11 Os 49/20w EvBl 2021/84.

55 Tipold, *Strafrechtliche Aspekte des Dopings*, in Berger/Hattenberger (eds.), *RECHT SPORTLich 2* (2013) p. 92.

56 See the Federal Minister of Arts, Culture, Public Service and Sport Report on the review of the legal framework for e-sports (III-651 BlgNR XXVII. GP) p. 1. The report can be accessed via www.parlament.gv.at/PAKT/VHG/XXVII/III/III_00651/index.shtml (last accessed 27 June 2022).

there have been efforts to provide more clarity. In December 2020, the Federal Minister for Arts, Culture, Public Service and Sport established the ‘E-Sport’ working group to clarify the legal framework. Recently, the 32-page report of the working group was submitted to the Sports Committee of the National Council.⁵⁷ For the most part, the parliamentary parties see the embedding of esports in a legal framework as sensible. However, the recognition of esports as sports is still the subject of very varied discussions, especially since this would have far-reaching consequences in a number of areas, including in legal matters.⁵⁸

The growing significance and acceptance of esports has also led to its professionalisation. Furthermore, some (quite successful) Austrian esports teams participate in worldwide tournaments. An interesting question that was raised in legal doctrine in 2021 in this context is whether professional training centres or houses for esports athletes are subject to trade law.⁵⁹ The Austrian Trade Act 1994 generally applies to all commercial activities (i.e., those carried out independently, regularly and with the intention of obtaining a profit or other economic advantage, regardless of the activity’s intended purpose).⁶⁰ In the absence of a legal exception, it is to be assumed that the operation of such a training centre can constitute a commercial activity and must be registered.⁶¹ Furthermore, a training facility of this kind could constitute an operating facility requiring a licence.⁶² Such a facility is deemed to exist in the case of a locally bound facility that is intended to serve the development of a commercial activity on a more than temporary basis.⁶³ Ultimately, the questions raised depend on the specific individual case; however, these illustrate the fact that esports are becoming more widespread not only in factual terms but also in legal terms.

VIII THE YEAR IN REVIEW

The following section presents selected sports law topics that were noteworthy in 2021.

i Focus: football

The year 2021 was dominated by football, not least because of the pan-European UEFA European Championship. The Austrian Supreme Administrative Court (VwGH) had to clarify the extent to which a club must accept responsibility for any illegal or culpable conduct of its fans. The issue was triggered by the surveillance of fans of the visiting club ordered by official decision of the competent authority on the basis of Section 48a of the Security Police Act (SPG). The subject of the appeal to the VwGH was the question of whether culpability should be taken into account in the context of ordering special surveillance or in determining the costs of special surveillance, and the relationship between these provisions. The VwGH confirmed its established case law,⁶⁴ according to which the decision on special

57 *ibid.*

58 See Parliamentary Correspondence No. 641 of 9 June 2022, accessible via www.parlament.gv.at/PAKT/PR/JAHR_2022/PK0641/#XXVII_III_00651 (last accessed 27 June 2022).

59 Grünstaudl/Holzer, Betten, Beamer und Konsolen. Sind e-Sport Trainingsstätten ein Fall für die Gewerbeordnung? *ÖZW 2021*, p. 25 et seq.

60 Section 1(1) icw. (2) Austrian Trade Act 1994 (GewO 1994).

61 Grünstaudl/Holzer, *ÖZW 2021*, p. 26 et seq.

62 Grünstaudl/Holzer, *ÖZW 2021*, p. 28 et seq.

63 Section 74(1) GewO 1994.

64 VwGH 22 May 2014, Ro 2014/01/0024; 17 October 2017, Ra 2017/01/0301.

surveillance pursuant to Section 48a of the SPG is a prognosis decision, to be made on the basis of previous experience. Culpability is not to be taken into account in this *ex ante* examination and, therefore, the need for special surveillance can be concluded from past (dangerous) behaviour of the ‘fans’ of a visiting club. According to Section 5a of the SPG, fees are to be charged for special surveillance services. These surveillance fees are to be borne by the person who carries out the operation for which monitoring has been ordered, unless the monitoring was caused by the fault of another person, in which case the fees are to be borne by that person. The VwGH states that the order for surveillance and the imposition of surveillance fees are separate from one another, and culpability is only to be examined in the context of proceedings to determine the monitoring fees. The validity of a legally binding order for surveillance pursuant to Section 48a of the SPG cannot be taken up in proceedings concerning the determination of costs.⁶⁵

In November 2021, the Austrian football world was shaken by a betting scandal in the Regional League East, the third-highest division. Several people are suspected of having manipulated matches.⁶⁶ Match-fixing in Austria constitutes a criminal offence. Depending on the particular form taken by the offence, it is considered fraud or fraudulent data management abuse within the meaning of the StGB. As such, the player who actually fixes the match is committing a criminal offence, as is every person knowingly placing a bet.⁶⁷ The public prosecutor’s office in Graz has now filed charges against 15 people, including active and former players. At least 19 matches are alleged to have been manipulated between 2019 and 2021. Not only matches of the Regional League East are said to have been fixed but also matches of other competitions. The defendants are accused of serious commercial fraud.⁶⁸ Anyone who commits fraud on a commercial basis⁶⁹ is liable to a custodial sentence of up to three years, while anyone who commits serious fraud on a commercial basis is liable to a custodial sentence of six months to five years.⁷⁰

The 50+1 rule was also a topic again in 2021. The trigger was the association and company structure of the football club Linzer Athletik-Sport-Klub, known commonly as Linzer ASK, which was suspected of circumventing the aforementioned rule.⁷¹

ii Lifetime bans

Another upset or ‘scandal’ was the suspension of the entire Austrian national boxing A-team and the imposition of bans before the Olympic Games in Tokyo. The six squad members first raised serious internal accusations against the national coach of the Austrian

65 VwGH 15 March 2021, Ra 2021/01/0049.

66 www.kurier.at/sport/fussball/wettskandal-erschuetterte-die-regionalliga-ost-vier-verdaechte-in-u-haft-ermittlungen-laufen/401814916 (last accessed 27 June 2022).

67 Harta, Wettbetrug durch Spielmanipulation Fragen der Täuschung und des Schadens, in Lewisch (Hrsg), *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* (2018) p. 22 et seq.

68 www.skysportaustria.at/anlage-im-ostregion-wettskandal-eingebracht/#:~:text=Im%20mutma%C3%9Flichen%20Fu%C3%9Fball%2DWettskandal%20in,Sprecher%20der%20Staatsanwaltschaft%20der%20APA (last accessed 27 June 2022).

69 A person is deemed to be engaged in a commercial activity if he or she intends to obtain a continuous and not merely insignificant income by committing an act on a recurring basis over a long period and if one of the requirements of Section 70(1) No. 1 to 3 of the StGB is met.

70 Section 148 icw. Section 147(1) to (2) StGB. A serious fraud is committed, inter alia, by anyone who commits a fraud with damage exceeding €5,000.

71 See in detail www.sportsbusiness.at/der-lask-als-501-umgeher/ (last accessed 27 June 2022).

Boxing Federation (ÖBV) (including bullying, blackmail, discrimination and sexism) and subsequently published a letter making the accusations public. As a result of the dispute, three of the boxers were banned for life on the basis of an ÖBV board decision. The admissibility of this suspension was questioned, both formally and materially.⁷² A lifetime ban represents a serious encroachment on the legal sphere of an athlete. The ban affects both the contractual relationship under private law between the club and the member, and the personal advancement of the latter. Lifetime bans for professional athletes are tantamount to a ban on practising a profession, especially where the association occupies a dominant position. Participation in a major tournament is often only possible as a member of the national federation. In cases of this kind, a contracting obligation must generally be assumed.⁷³ The admissibility of lifetime bans, at least with regard to professional athletes, is evaluated critically and requires objective justification by way of a proportionality test.⁷⁴ In Austria, for example, a professional football player was banned for life from all related functions (as player, match official, official, and player agent) by the ÖFB for match-fixing.⁷⁵ The ban was considered legally immoral by the courts and declared null and void on the grounds that the associated deprivation of the means of livelihood acquisition had to be *ultima ratio*.⁷⁶ In the boxing case, the lifetime bans were lifted by the ÖBV itself, which meant that the admissibility of the bans did not have to be clarified in court. However, this is a good example of the power of national federations and the attendant risks for the individual athlete.

iii ‘Compulsory’ vaccination for basketball athletes

The Basketball Superleague (BSL) introduced a new measure in autumn 2021. As the premier league in Europe, it was decided that only vaccinated players, coaches and referees would be allowed to participate in matches from 1 November 2021. This ‘vaccination obligation’ is very exciting from a legal point of view, although it is not about the permissibility of a state-ordered vaccination obligation, as dealt with by the European Court of Human Rights,⁷⁷ but about a relationship under private law. At issue is the extent to which clubs (as employers) or associations are allowed to enact and implement a regulation that has the same or similar effect as a compulsory vaccination. For top athletes who do not have themselves vaccinated, the vaccination requirement has immense consequences for their practice of sport and correlates with personal rights⁷⁸ and positions protected by fundamental rights.⁷⁹

72 www.derstandard.at/story/2000123854647/sportanwalt-lebenslange-boxer-sperre-haelt-unter-keinen-umstaenden (last accessed 27 June 2022).

73 Höhne/Jöchli/Lummerstorfer, *Das Recht der Vereine* (2019), 6th edition, p. 399; OGH 24 September 1998, 2 Ob 232/98a.

74 Höhne/Jöchli/Lummerstorfer, *Vereine*, 6th edition, p. 400.

75 www.derstandard.at/story/1392685675003/liga-mit-lebenslanger-sperre-gegen-taboga (last accessed 27 June 2022).

76 See Niedermaier, Der Fall Claudia Pechstein – eine Analyse mit Blick auf die Causa Dominique Taboga, in Grundeis/Karollus (eds.), *Berufssportrecht VIII* (2017) p. 50 et seq.

77 European Court of Human Rights (ECtHR) 24 September 2012, 24429/03, *Solomakhin/Ukraine*, 8 April 2021, 47621/13, *Vavrickal/Czech Republic*.

78 See Schedle, Gesetzliche Impfpflicht und arbeitsrechtliche Aspekte, *ARD 6785/4/2022*, p. 4.

79 For example, the right to respect for private and family life (Article 8 ECHR) and the right to life (Article 2 ECHR) are to be considered here. According to prevailing doctrine, the fundamental rights apply indirectly in private law relationships; see Grabenwarter/Holoubek, *Verfassungsrecht. Allgemeines Verwaltungsrecht* (2019), 4th edition, marginal number 421.

The duty of care⁸⁰ of the employer (in the case of the basketball players, their club) requires respect for the (fundamental) rights of each employee.⁸¹ According to prevailing doctrine, it is not permissible to unilaterally order a vaccination during an existing employment relationship in the absence of a legal ordinance.⁸² Various aspects of unilateral implementation of a behavioural regulation for existing employment relationships that goes beyond the rules laid down by epidemic law (requiring employees to be tested, recovered or vaccinated) have been discussed in Austria.⁸³ The admissibility of the rule that only players, coaches and referees who have been vaccinated may participate in matches remains contentious.

iv Austrian Constitutional Court

The Austrian Constitutional Court (VfGH) has decided *ex post*, upon request, that Sections 1 and 2 of the Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection on provisional measures to prevent the spread of covid-19, concerning the prohibition against entering sports facilities (and also recreational facilities) were unlawful.⁸⁴ According to Article 18 of the B-VG, every regulation must have a legal basis in, and comply with, the law. However, the files submitted by the Federal Ministry of Social Affairs, Health, Care and Consumer Protection did not specify the circumstances in which specific possible developments of covid-19 were decisive in establishing the prohibition on entering sports and recreational facilities. Moreover, documentation of this kind would be a prerequisite for the VfGH to be able to assess whether the Regulation of the Federal Minister complied with the Covid-19 Measures Act.

IX OUTLOOK AND CONCLUSIONS

The most dynamic area in sport, and the one that will see a lot of developments in the near future, is that of esports, in particular, the question whether the competitive playing of computer games and video games will be recognised as a sport, with all the legal implications and associated benefits of such a development. It will be interesting to see which recommendations of the E-Sport working group (see Section VII.ii) will be implemented. In any case, it cannot be denied that a legal structure would be welcome to guarantee legal certainty in this growing sector. Apart from this, the year 2021 was also marked by the covid-19 pandemic. The legal situation was changeable and sometimes ambiguous. Some of the issues that preoccupied practitioners practically and legally as a result of the coronavirus in 2021, such as the permissibility of sporting events or the topic of vaccination in sport, will, hopefully, no longer be an issue in the future, even if they are exciting from a legal standpoint.

80 Section 18 of the Federal Act concerning employment contracts and Section 1157 of the Austrian Civil Code respectively.

81 Pallwein-Prettner, Indirekte Impfpflicht am Arbeitsplatz? *ARD* 6738/5/2021, p. 4.

82 Hainz, Impfstatus im Arbeitsverhältnis, *ecolex* 2021, p. 245; Pallwein-Prettner, *ARD* 6738/5/2021, p. 4; Silbernagl/Silbernagl, Indirekte Impfpflicht durch Arbeitsverhältnis oder gesetzliche Impfpflicht durch staatliche Gesundheitsversorgung, *ZfG* 4/2021, p. 49; Obrecht, Was in Corona-Zeiten im Arbeitsverhältnis angeordnet werden darf, *RdW* 2021, p. 713; Schedle, Corona-Regeln im Betrieb, *ARD* 6761/4/2021, p. 3 et seq.

83 Mazal, Impfpflicht – Individualarbeitsrechtliche Aspekte, *ecolex* 2022, p. 222; Obrecht, *RdW* 2021, p. 712 et seq; Schedle, *ARD* 6785/4/2022, p. 4.

84 VfGH 9 March 2021, V 530/2020.

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