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ARTICLE

The legal status of disciplinary regulations in sport

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Abstract International and national sports organisations have created extensive regulatory frameworks to govern their activities. Associated athletes and clubs are required to comply with the rules set by these organisations. If they do not abide by the rules, a disciplinary sanction can be imposed. Regulating sports is, however, not an easy exercise. Due to the many different actors involved legal issues are numerous and complex. By its nature, sport is not a national affair. As the best athletes and clubs compete on an international level, when a disciplinary sanction is imposed, this can have effects on international competition. Therefore, this article will provide a comparative and transnational overview of the main legal framework in which national and international sports organisations operate according to Dutch, English, French, German and Swiss law. The article will provide an answer to the question whether a 'level playing field' exists in European organised sports with regard to the legal status of disciplinary regulations.

Keywords Sport · Disciplinary regulations · Sanction · Comparative law · Football

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1 Introduction

International sports organisations, such as the International Olympic Committee, UEFA and FIFA, have created extensive regulatory frameworks to govern their activities. In these frameworks, a prominent place is reserved for disciplinary regulations and rules regarding the behaviour of the different actors involved. Disciplinary regulations in sports started with regulating the game[1]. Over time, however, more and more aspects have become the subject of regulation, including doping, player transfers, stadium safety and, connected with the latter, the liability of clubs for their supporters' conduct. If athletes or clubs do not comply with the rules, a disciplinary sanction can be imposed.

However, regulating sports is not an easy exercise. Due to the many different actors involved, legal issues are numerous and complex. This point is illustrated by the following situation. A football player is a member of his local club. Both the player and the club are members of the national football federation, which in its turn is a member of both UEFA and FIFA. In what way are the player and the club bound by the regulations of the different organisations? Both have a legal relationship with the national federation, but not with UEFA or FIFA. Are the player and the club nevertheless directly bound by UEFA's and FIFA's rules, even if there is no direct relationship? Furthermore, the national federation's regulations contain a provision which obligates its adhered members to comply with the regulations of UEFA and FIFA. What happens when these rules change? Are the player and club bound to these changed rules? If they do not comply with the rules and the national federation wishes to impose a disciplinary sanction, what requirements must then be met?

[1] See on the development of rules in sports: Vamplew (2007).

In this article these questions will be answered according to Dutch, English, French, German and Swiss law. In doing so, this article will provide a comparative and transnational overview of the main legal framework in which national and international sports organisations operate. By its nature, sport is not a national affair. The best athletes and clubs compete on an international level or aspire to do so. When a disciplinary sanction is imposed, this can have effects on international competition. Therefore, this contribution is intended to determine whether a 'level playing field' exists in European organised sports with regard to the legal status of disciplinary regulations. In other words, which similarities and differences exist between the chosen jurisdictions and can common denominators be identified?

The selection of the jurisdictions is determined by the following substantive grounds[2]. First, in the Netherlands, research on sports disciplinary regulations is scarce and mainly nationally orientated. By contrast, the reason for including both Germany and France is the strongly developed legal discourse on the main subject. Switzerland has been chosen because of its practical importance. Most international sports federations, including the International Olympic Committee, UEFA and FIFA, are seated there, which results in the applicability of Swiss law on virtually all decisions made by international federations. Finally, England, as a common law jurisdiction, is chosen as a contrast to the civil law jurisdictions. The fact that England has played a profound role in the development of organised sports in general and football in particular was an additional reason for inclusion.

The structure of this article is as follows. First an outline of the legal framework in which sports organisations create and apply their rules will be provided (2), including the limitations of the regulatory power of these organisations (3). Then the focus turns to the main issue of how the different actors involved are bound by the disciplinary rules of sports organisations; the binding character of the rules upon members (4) will be followed by discussing the possibility to bind so-called indirect members (5) as well as the question of what happens when the rules change. Following on from there, the enforcement of disciplinary regulations in the form of a sanction (7) and the requirements for application (8) will be discussed in brief. Finally, some evaluative and concluding remarks will be made (9).

2 The regulatory framework of sports organisations

2.1 The pyramid

Professional and amateur sports are organised in a pyramid structure. The local sports clubs are at the base of the pyramid. Here, people come together to practise their sport, recreationally and competitively. The clubs are usually associated with a national federation[3] that is responsible for the organisation of a certain sport at the national level. In their turn, the national federations are a part of the international federation that manages the sport at the international level. In certain sports, a continental federation is positioned between the national and international federations, with the UEFA, Union des *Associations Européennes de Football*, probably being the most renowned.

An important feature of the pyramidal structure is the so-called *Ein-PlatzPrinzip*. This principle entails that only one federation on the national and international level can represent a certain sport[4]. It ensures the uniform development of the sport, that the game is played by the same rules and that only the strongest athletes or teams take on each other in national and international championships. The pyramidal structure thus creates a monopoly position of the international federation, allowing it to organise the sport in conformity with its own discretion. The monopoly position of national and international federations has multiple legal implications and will prove to be a recurring issue throughout this article.

2.2 The association: the cornerstone of organised sports

In all five jurisdictions, the primary legal form of sports clubs and national federations is the (incorporated) association. The choice of the association as organisational form is prompted by the relatively little stringent laws regulating this legal entity. As a result, ample room is left for associations to create and enforce the rules that are deemed needed for an adequate functioning of the sport.

In the Netherlands, most sports clubs and almost all national federations, including the Royal Dutch Football Association (KNVB), take on the form of an association (*vereniging*)[5]. Association law is governed by art. 1–52 of Book 2 of the Dutch *Burgerlijk Wetboek* (*BW*)[6]. An association is defined as a legal person with members aimed at pursuing a specific purpose[7]. It is formed by a

[2] Naturally, the selection was also partly influenced by the linguistic abilities of the author.

[3] A federation is generally defined as an association of associations. See Philipp (2004), p. 8; Oswald (2010), p. 209.

[4] See for application of this principle in German case law: BGH 23 November 1998—II ZR 54/98—BGHZ 140,74. BGH, 02.12.1974—II ZR 78/72, BGHZ 63, 282.

[5] Art. 11 of the *Statuten* of the NOC*NSF (the Dutch umbrella organisation for all sports) only allows associations as ordinary members.

[6] The Dutch *BW* is comprised of multiple Books. Book 2 governs legal entity law and precedes the general part of the law of obligations which is governed by Book 3.

[7] Art. 2:26 *BW*.

multilateral legal act and possesses legal personality[8].The increasingly commercialised nature of sports activities has led to certain organisations opting for the incorporation of a company. For example, in Dutch football many clubs are driven in a company, e.g. a private company with limited liability (*BV*) or a company limited by shares (*NV*). However, the shares are usually owned by a foundation with no or little financial interest[9].

Dutch association law only provides a minimal legal framework. For example, only a few provisions are mandatory to incorporate in the articles of association (*statuten*)[10]. Bearing the few rules of imperative law, an association is free to organise itself as it wishes[11]. It follows that whoever is given authorisation to certain acts based on the association's structure is autonomous in the exercise of that power[12]. This autonomy is an elaboration of the freedom of association, i.e. the civil right to create and adhere to an association[13]. According to art. 2:27 (4) *BW* and 2:34a *BW*, obligations of members must have a basis in the association's articles[14]. Among these obligations fall the adherence to comply with the behavioural rules set forth by the association—for instance to treat others with respect and refrain from verbal and physical violence[15]—and the submission to its disciplinary jurisdiction. It is generally accepted that disciplinary rules may be laid down in secondary regulations as long as these have a basis in the articles of association[16].

In England, the unincorporated association has traditionally been the most common structure used by the majority of sports clubs and governing bodies[17]. An unincorporated association is comprised a group of individuals who are contractually bound together by the constitution or rules of the club. As these entities are not recognised as having legal personality, the members may be personally liable for the debts of the club if these debts cannot be met from the assets of the club or under an insurance policy. For this reason, many sports organisations prefer the structure of an incorporated association in the form of a company[18]. There are multiple types of companies. The governing body for football in England, the Football Association (FA), the Premier League and most professional football clubs are structured as companies limited either by shares or by guarantee. When a company is limited by shares, members invest their capital by purchasing shares. By contrast, members of a company limited by guarantee cannot buy shares, instead given a guarantee. This means that their liability is limited to the amount the members undertake to contribute to the assets of the company in the event of its being wound up (usually of £1)[19].

The regulations for the company are laid down in the articles of association[20]. The tradition of English company law has been to give members a considerable freedom regarding the internal organisation of the company. The articles of association regulate all those matters that are not subject to rules laid down in legislation or common law[21]. The Companies Act provides model articles that apply by default unless the company decides otherwise[22]. The articles of association take effect as a 'vertical' contract between the members and the company[23]. All members are bound by virtue of this contract to observe the company's rules[24].

In Germany, the standard organisational structure is the registered association (*eingetragene Verein*) which is regulated in § 21–79 of the German *Bürgerliches Gesetzbuch* (*BGB*). An association whose objective is not commercial business operations, such as sport clubs and their national federations, acquires legal personality by entry in the register of associations of the competent local court (*Amtsgericht*)[25]. The freedom for an association to organise itself as it wishes (*Vereinsautonomie*) derives from the constitutional right to form associations[26]. The *Vereinsautonomie* is implicitly addressed by § 25 *BGB*, which states that an association's constitution is determined by the articles of association. As the German *BGB* only provides a minimal legal framework, the articles of association

[8] Art. 2:26 *BW* and art. 2:3 *BW*.

[9] Verdoes et al. (2010), p. 248.

[10] According to art. 2:27 (4) *BW,* these include the name and seat of the association, its purpose, the obligations put on the members or the manner in which those obligations may be imposed, the manner of convening general meetings, the appointment and removal of the officers and the allocation of the surplus upon winding up.

[11] van der Grinten and Scholten (1956), pp. 25–26; Löwensteyn (1959), pp. 22–23; Van der Velden, (1969), p. 56; Asser/Maeijer (2007) (2-II), p. 10.

[12] Compare: Van der Velden (1969), p. 51.

[13] This fundamental right is laid down in Art. 8 of the Dutch Constitution.

[14] For the subtle difference of the notion of obligation in the two articles see: Asser/Rensen (2012) (2-III*), nr. 51.

[15] Rule 1 of the Gedragscode (model code of conduct) of the Dutch Football Association (KNVB).

[16] See Kollen (2007), p. 210 and implicitly also Rensen (2005), pp. 84–85.

[17] Beloff (1989), p. 96 and Gardiner et al. (2012), p. 105.

[18] According to Davies a company is "an organisational form, provided by the law, through which the suppliers of the various inputs necessary to achieve a certain objective can come together and coordinate their activities". Davies (2010), p. 2.

[19] Section 3 Companies Act 2006. See also Ashton and Reid (2011), pp. 19–20.

[20] Section 18 of the Companies Act 2006.

[21] Davies (2010), p. 14.

[22] Section 20 of the Companies Act 2006 and explanatory note 70.

[23] Beloff et al. (1999), p. 25, nr. 2.26.

[24] Section 33 Companies Act 2006 and explanatory note 108.

[25] § 21 *BGB*.

[26] Art. 9, section 1 German Basic Law.

can deviate from most statutory provisions given that only few are of imperative law[27]. The minimal legal requirements of the articles of association include the purpose, the name and the seat of the association and the indication that the association is to be registered[28]. Furthermore, the law stipulates that the articles contain provisions regarding membership, the composition of the board and the general meeting. The relationship between the association and its members is thus governed by the applicable provisions of the *BGB* and the articles of association[29]. Membership obligations are varied—they include for instance administrating duties and (monetary) contributions—and generally must have a basis in the association's articles[30]. Hereto, a general provision suffices; disciplinary rules may be specified in secondary regulations[31]. Besides the primary membership obligations expressed in the articles, there is the so-called duty of loyalty (*Treuepflicht*)[32]. This duty goes beyond the general principle of good faith in accordance with § 242 BGB.[33]. Its content and scope depend inter alia on the nature of the association's purpose, the internal unity of the association, the degree of personal commitment and the person-centredness of the membership relationship[34].

In Switzerland too, the chosen legal form of most sports organisations is the association[35]. An association is a group of natural or legal persons organised as a corporate body and is governed by art. 52–79 of the Swiss Civil Code. According to art. 60 CC, associations formed for political, religious, scientific, artistic, charitable, social or other non-economic purposes acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association[36]. The association is the most liberal of legal entities in Switzerland. It is subject to fewer legal requirements than the other corporations in terms of both the constitution as in the internal and external organisation. An explanation can be sought in the fact that since the possibility to exercise economic activities as a principal and important purpose is excluded, the legislature deemed it unnecessary to provide a more stringent structure or control mechanism to safeguard the interests of the members and third parties[37]. With regard to professional sports, the company is gaining ground as organisational structure for clubs. Nowadays, many professional teams in both ice hockey and football are organised as a company limited by shares pursuant to art. 620–763 of the Swiss Code of Obligations[38]. However, all national and international federations seated in Switzerland are organised as associations[39].

One of the fundamental principles of Swiss private law is the freedom of the parties in the design of their legal relationships[40]. In association law this principle is embodied by the notion of freedom of association, or in German: *Vereinsautonomie*.[41] According to Heini, "*Kerngedachte der Vereinsautonomie ist, dass die Verbandsperson in den Schranken des Gesetzes und der guten Sitten ihre Belange ohne Einmischung des Staates oder Dritten selber regeln darf*".[42] This view is reflected in the provisions of Swiss association law on organisation and membership, which are predominantly dispositive and only apply when no specific rules are established in the articles of association.[43] Consequently, the right to freely organise one's association does not only entail the composition of the articles, but rather the design of the entire regulatory system.[44] Furthermore, according to doctrinal views the term *Autonomie* entails not only the creation of rules, but also its application and enforcement.[45] The Swiss Federal

[27] § 40 *BGB*.

[28] § 57 *BGB*.

[29] Otto and Stöber (2012), Rn. 201.

[30] Sauter et al. (2010), Rn. 347.Regarding forced exclusion and other disciplinary sanctions consistent case law requires that these are regulated in the articles of association: BGHZ 13, 5; BGHZ 21, 370; BGHZ 28, 131; BGHZ 29, 352; BGHZ 36, 105; BGHZ 47, 172; BGHZ 105, 306.

[31] Reuter (2012) § 25, Rn. 10; Weick (2005), §25, Rn. 3 and 23; Otto and Stöber (2012), Rn. 984.

[32] Reuter (2012), § 38, Rn. 44; Weick (2005), §35, Rn. 7.

[33] BGH 12.03.1990—II ZR 179/89—NJW 1990, 2877.

[34] Sauter et al. 2010, Rn. 348. See also BGHZ 129, 136.

[35] In German: 'Verein', in French: 'association'.

[36] Deviation from art. 52 CC, which states that other corporate and independent bodies acquire legal personality upon being entered in the commercial register.

[37] Riemer (1990), p. 121 ff; Baddeley (1994), p. 25.

[38] In French: société anonyme (S.A.): in German: Aktiengesellschaft (AG).

[39] Valloni and Pachmann (2010), p. 40.

[40] Article 19 (1) of the Swiss Code of Obligations (CO) provides that the terms of a contract can be freely determined as long as it resides within the limits of the law. This provision is by analogy applicable upon association law according to art. 7 of the Swiss Civil Code, which provides: "The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil law matters".

[41] The term *Vereinsautonomie* is dominantly used in both case law and doctrine. See: BGE/ATF 70 II 63; BGE/ATF 73 II 2; BGE/ATF 97 II 108; Egger (1930), p. 410; Fenners (2006), p. 20; Philipp (2004), p. 21 ff. Riemer, however, speaks of '*privatrechtliche Vereinsfreiheit*': Riemer (1990), p. 102 ff.

[42] Heini (1982), p. 229.

[43] Art. 63 (I) Swiss Civil Code.

[44] Compare Fenners (2006), p. 21.

[45] Egger (1930), p. 410; Riemer (1990), p. 405; Bodmer (1989), p. 39 and 43; Fuchs (1999), p. 38; Fenners (2006), p. 22 ff. Fenners speaks of sanctions instead of the more common doctrinal term of enforcement (Durchsetzung). In contrast, apart from the creation, application and enforcement of rules Philipp distincts also: the freedom to found, the freedom of design and content, the freedom of choice in choosing partners, the freedom to exclude members (art. 72 CC), the freedom of organisation and the freedom of dissolution: Philipp (2004), p. 22 ff.

Supreme Court also seems to support this outlook.[46] Another general observation is the particular form in which the principle manifests itself. Freedom of association appears through decisions, realised by a majority of votes.[47] Or in the words of Egger: "*Für das korporative Leben bedeutet die Vereinsautonomie privatrechtliche Majoritätsherrschaft, die Gestaltung der Vereinsordnung und des Vereinslebens nach dem Willen der Mehrheit*".[48] Under Swiss law the freedom of association thus comprises the creation, application and enforcement of rules. This broad conception of *Vereinsautonomie* and its liberal application in Swiss association law is generally considered the main reason why most international sports federations have chosen this country as their seat.[49] As a result, the practical importance of Swiss law on organised sports cannot be underestimated.

In France, the promotion and development of sport is recognised as a matter of public interest, which results in the French state taking up a much more prominent role in the organisation of sports compared to the other countries[50]. This is exemplified by article L.100-2 of the French *Code du sport,*[51] which sets out that the state, local authorities and their groups, associations, sports federations, businesses and social institutions contribute to the promotion and development of sport and physical activity. As in the other countries, the general organisational form of clubs and governing bodies is the association, governed by the French law of 1 July 1901 relating to the contract of association. However, when sports associations reach 1.2 million in annual revenues from the organisation of paying sports events or a total of 800.000 in annual remunerations, they have the legal obligation to manage these activities in a corporation subject to the *Code de commerce*[52]. In France too, the articles of association are subject to both the freedom of contract and association and can be freely determined[53]. According to the *Cour de Cassation*, "*les statuts font la loi des parties*"[54]. While the French law of 1 July 1901 relating to the contract of association contains no provisions relating to the internal organisation of associations, views in literature strongly suggest the incorporation of additional provisions regarding, e.g. access to the association, its organs and their powers and member obligations[55].

In the organisational structure of sports, in France a pivotal role is played by the sports federations. As in most other jurisdictions, the federations are associations and serve to organise the practice of one or several sports disciplines[56]. The French state recognises different levels of national federations: certified federations and delegated federations[57]. Certified federations participate in the execution of a public service and therefore are eligible for state support in the form of funding or personnel. To be certified by the minister for sport, a federation must adopt certain mandatory provisions in its articles of association as well as standard disciplinary rules[58]. Delegated federations are certified federations that enjoy a monopoly position in their respective discipline to organise competitions resulting in international, national, regional or departmental titles. Additionally, these federations carry out the selection procedures for national teams and are responsible for enacting technical rules and other regulations relating to competitions[59]. With regard to the creation and enforcement of disciplinary rules, the distinction between 'normal' associations, such as clubs, on the one hand, and certified and delegated federations, on the other, is essential. According to French case law and doctrinal views, every association or federation by its nature enjoys disciplinary power over its members; this is inherent in the organisation of any association[60]. Moreover, certified and delegated sports federations exercise disciplinary power over their members also by virtue of the *Code du sport*, according to which they must adopt the standard disciplinary regulations[61].

[46] BGE/ATF 97 II 108, cons. 3: *"Die Autonomie bedingt daher auch, dass die freie Willensbildung grundsätzlich gewährleistet sein muss. Es hätte keinen Sinn, dem Verein die Freiheit der innern Gestaltung zuzugestehen, gleichzeitig aber grundlegende Beschränkungen der freien Willensbildung zuzulassen"*.

[47] Art. 67 (2) Swiss Civil Code.

[48] Egger (1930), p. 410.

[49] Oswald (2010), p. 33; Riemer (2004), p. 106.

[50] Other countries where the state plays a major role in organised sports are Italy and Spain, among others.

[51] The *Code du Sport* entered into force in 2006 and replaced several other law acts, resulting in the consolidation of all laws and ordinances applicable to sport in a single document.

[52] Art. L.122-2 of the *Code du sport* in conjunction with art. R122-2 of the decree. The company created must take one of the legal forms listed in the *Code du sport*.

[53] Art. 5 French law of 1 July 1901 relating to the contract of association. Minimum legal requirements to include are the title and purpose of the association, the seat of its institutions and information on those who are responsible for its administration.

[54] Cass. civ. 1re, 25.10.2002, *Recueil Dalloz* 2002, 2359, note Y. Chartier.

[55] Buy et al (2009), nr. 389; Teyssié (2010), nr. 839 and 854.

[56] Art. L.131-1 and L.131-2 of the *Code du sport*.

[57] In French: *fédérations agréés* and *fédérations délégataires*.

[58] Art. L.131-8 ff. of the *Code du sport*. See also the landmark case CE 22.11.1974, no 89828, *RecueilDalloz*, 1975, p. 739, note J.-F. Lachaume.

[59] Art. L.131-15 and L.131-6 of the *Code du sport*.

[60] CE 19.12.1988, no 79962, *Recueil Dalloz*, 1990, p. 280, obs. C. Dudognon. See also Karaquillo (1980), pp. 115–124, p. 115; Buy et al (2009), nr. 226; Simon (1990), p. 256.

[61] Art. L.131–8 of the *Code du sport* in conjunction with the annex to the decree no 2004–22.

In summary, it shows that great similarities exist in the way sport is organised and regulated in all five countries. The large majority of clubs and national governing bodies are legally organised as an association. Except in France, where national sport federations have to adhere to additional rules, this legal entity provides the room to regulate internal matters with great autonomy.

3 Limits

Despite the high degree of discretion regarding the self-organisation of associations, there are certain limits. Associations cannot escape complying with national law as well as with their self-created internal regulations.

3.1 National law

In all civil law jurisdictions, it is provided by law that the articles of association are not to violate the law, public policy and morality[62]. It must be noted that, in the jurisdictions that are member states of the European Union, 'the law' nowadays also entails provisions and regulations of European law[63]. Consistent case law of the European Court of Justice holds that sport is subject to European Union law insofar as it constitutes an economic activity[64].

Some jurisdictions present certain additional statutory limits worth noting. For example, in Dutch law a further limitation is the statutory duty of article 2:8 *BW*. According to this provision the relationships between the legal entity and those involved in its organisation, and between the latter, are partly determined by standards of reasonableness and fairness[65].Moreover, in Swiss law, the freedom to create and enforce rules is also limited by two provisions in the Civil Code that constitute the application of human rights between private persons. These provisions maintain the prohibition not to violate the rights of personality[66].

In England, as a common law country befits, the regulatory power of sports organisations is limited by a number of core principles that have been developed in case law[67]. First, it has been held that sports federations act unlawfully if they take into account irrelevant factors, or fail to consider relevant factors, when making decisions such as determining a sanction[68]. Second, the conduct of sports federations is subjected to the general principle of proportionality[69]. Third, in *Enderby Town Football Club Ltd v The Football Association Ltd* it was held that the decisions of sports federations are subject to the requirements of natural justice[70]. There are two main rules of natural justice: the rule against bias and the right to a fair hearing[71].Despite being a public law feature in origin, the principles of natural justice have infiltrated the contractual relationships of private entities, such as sports federations[72]. In the context of a sports disciplinary sanction, the right to a fair hearing includes inter alia prior notice of a decision, an oral hearing, legal representation and a requirement to give reasons for the decision[73]. Moreover, participants in sport can also rely upon the restraint of trade doctrine. This doctrine purports that a contract in unreasonable restraint of trade is void. In the sporting context the doctrine has been applied in roughly three areas: transfer systems, participation in competition and challenges to the reasonableness of disciplinary measures[74]. The doctrine is primarily concerned with the effect of the challenged provision upon the ability to trade and less preoccupied with the 'special position' of sports regulating bodies. The content of rules can be called into question and tested for reasonableness. However, as long as their aims and objects are legitimate and reasonable, sports federations are free to act[75].

In France, the normative power of certified and delegated federations is supervised by the minister of sports. Any modification of the articles of association, procedural rules, the disciplinary regulations or financial regulations has to be notified. If the modifications are inconsistent with the certification granted to the federation, the minister will

[62] The Netherlands: Art. 3:40 *BW*. France: Art. 6 *Code Civil*; Germany: §134 *BGB* and §138 *BGB*; Switzerland: art. 19 and 20 Swiss Code of Obligations in conjunction with art. 7 Swiss Civil Code.

[63] Staudinger/Weick (2005), § 25, Rn. 19, referring to the Bosman case.

[64] Case 36–74, *Walrave/Koch*, 1974ECR 01405; Case C-415/93, *UEFA/Bosman*, 1995 ECR I-04921; Case C-325/08, *Olympique Lyonnais/Bernard*, 2010 ECR I-02177.

[65] Art. 2:8 *BW*.

[66] Art. 27 and 28 Swiss Civil Code.

[67] Gardiner et al. (2012), p. 117.

[68] See *Bradley* in first instance and *Fallon v Horseracing Regulatory Authority* 2006 [EWHC] 2030.

[69] *Bradley v Jockey Club* (2004) EWHC Civ 2164 (QB), para 43.

[70] *Enderby Town Football Club Ltd v The Football Association Ltd* (1971) 1 Ch. 591, following *Russel v Duke of Norfolk* (1949) 1 All ER 109.

[71] See for applications of these rules regarding sports organisations: *McInnes v Onslow-Fane* (1978) 1 WLR 1520; *Modahl v British Athletic Federation Ltd* (2002) 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* (2005) EWCA 1117. See for extensive overview of the rules of natural justice Wade and Forsyth (2009), pp. 371–470.

[72] According to Morris and Little this is in order to achieve procedural fairness similar to that in public law. Morris and Little (1998), pp. 131–132.

[73] See also in more detail: Gardiner (2008), p. 128.

[74] Gardiner (2008), p. 49. See also: Gardiner et al. (2012), pp. 120–126.

[75] Gardiner et al. (2012), p. 126.

demand the necessary corrections[76]. Regulations and the decision taken by delegated federations are, as administrative acts, subject to the principle of administrative legality which requires compliance with all hierarchically superior rules[77]. First, these include the *Code du sport* and its regulations, including the standard disciplinary regulations. The requirement of legality was first laid down by the *Conseil d'Etat* and meanwhile has been adopted by the *Code du sport*[78]. For instance, art. L.131–33 of the *Code du sport* expressly prohibits federations to impose rules regarding the '*équipement sportif*' that are dictated by business imperatives[79]. Besides, the law requires the set rules to be necessary for the execution of the delegation or for the application of regulations of the international federation as long as these are compatible with French law. Furthermore, the rules must be proportionate to the demands of the sport, include reasonable time frames for compliance and have to be published in the federation's bulletin[80]. Aside from the general principles of law, French sports federations must comply with the principles of equal access to sport and equal treatment[81].

Moreover in all five jurisdictions, the freedom to create and enforce rules is also limited by general principles of law, which include inter alia: the principle of equal treatment, rights arising from the right to be heard if a member is concerned by a decision of the association, the principle of legality and the principle of proportionality[82].

3.2 Internal regulations

In addition to the various limits deriving from rules of national law, an association is bound by the specific purpose for which it was created and by its own articles of association and secondary regulations.

Under Dutch law a provision in a regulation that is contrary to the law or the articles of association is not binding[83]. In addition, a decision (*besluit*) can be challenged if it is contrary to the law, the articles of association, an internal regulation or if it conflicts with the standards of reasonableness and fairness[84]. The association's organs thus have to adhere to the boundaries set by law and the articles of association[85]. Furthermore, legal acts transgressing the specific purpose for which the association was created can be voided[86]. It must be noted that only the legal entity is entitled to claim voidance on this ground. Voidance of legal acts that conflict with the purpose of the corporation is a rarity in practice[87].

In England, it was first held that sports governing bodies are limited by their own regulatory framework as well as by the general purpose of the organisation in 1954[88]. This view was affirmed in *Davis v. Carew Pole* only 2 years later. The court held that "if the powers of the quasi-judicial body are set out in a code of rules to which the party aggrieved is in the circumstances subject, the quasi-judicial body is also bound by its own rules and can only mete out punishment in strict accordance with such rules"[89].

Also in French case law, it has been acknowledged that associations and federations must comply with their own regulations[90]. However, there is quite an interesting exception to this general rule. Rules set by the international federation do not have a direct effect. Decisions breaching these rules do not entail a breach of '*excès de pouvoir*'[91]. Furthermore as in the other jurisdictions, French associations and federations are also bound by their objective[92]. The prohibition of a legal person to exceed the limits of its purpose defined in the articles of association is also known as the principle of speciality[93].

In Germany, it is postulated that the autonomy of the association inherently entails that it finds its limit in the articles of association. In the words of Sauter et al.,

[76] Art. R.131–8 of the Code du sport.

[77] Buy et al. (2009), nr. 296, citing G. Simon, Valeur juridique des normes sportives, Lamy Droit du Sport, mai 2003, no 112–10.

[78] CE 20.11.2003, no 369474, *Les Cahiers de Droit du Sport* (2) 2005, p. 49, note J.-M. Duval. See also Buy et al. (2009), nr. 296.

[79] Such as setting the number of places and spaces used for public reception or determination devices and facilities for the sole purpose of enabling the audio-visual broadcast competitions. Also, it is prohibited to impose the choice of a trademark for a material or a given material.

[80] Art. R.131–34 of the Code du sport.

[81] CE 16.03.1984, no 50878 (Broadie), *Recueil Dalloz* 1984, p. 317, note M. Genevois.

[82] Germany: Staudinger/Weick (2005), § 25, Rn. 19; France: Buy et al. (2009), nr. 296; Switzerland: Baddeley (1994), p. 108 ff; Riemer (1990), p. 402 ff and 666 ff.

[83] Compare: Asser/Maeijer (1997) (2-II), nr. 35 and Asser/Rensen (2012) (2-III*), nr. 41; Kollen (2007), p. 123.

[84] Art. 2:14 and 2:15 *BW*.

[85] For the general assembly, this was established in case law: HR 21 January 1945, *NJ* 1959, 43 (Forumbank).

[86] Art. 2:7 *BW*. In answering the question whether a particular act exceeds the objective of the corporation all circumstances must be taken into account. The goal defined in the articles of association need not be solely decisive. HR 16 October 1992, NJ 1993, 98 (Westland/Utrecht Hypotheekbank) with note Ma.

[87] Asser/Maeijer (1997) (2-II), nr. 76.

[88] *Baker v. Jones* (1954) 2 All ER 553.

[89] *Davis v Carew-Pole* (1956) WLR, p. 838.

[90] CE 12.05.1989, no 97144, Recueil Dalloz, 1990, p. 276, note J.-F. Lachaume.

[91] CE 02.02.2006, no 289701 available at:http://www.conseil-etat.fr; CE 08.11.2006, *Recueil Dalloz*, 2007, p. 924, note Sophie Dion. This position is contested by Latty, who supportsthe direct applicability of the rules of international federations. Latty (2007), pp. 128–130.

[92] Karaquillo (1980), pp. 115–124, p. 119; Rabu (2010), p. 71.

[93] Teyssié (2010), nr. 855. Légal and Brethe de la Gressaye (1938), p. 135, 347.

"*Allerdings kann die Vereinsautonomie gerade auch in der Weise ausgeübt werden, daß das Selbstverwaltungsrecht des Vereins satzungsmäßig beschränkt wird; auch eine solche Beschränkung stellt die Ausübung von Autonomie dar*"[94]. This dogmatic thesis has been affirmed in case law, according to which an association is not allowed to violate its articles or the purpose for which the association was founded[95].

As in Dutch law, in Switzerland the law explicitly provides that a decision infringing the articles of association or regulations can be challenged[96]. Furthermore, with regard to an association's purpose or objective, several authors noted that the pursuance of this objective is the sole reason of existence of the association[97]. As a result, all acts and rules by the association must be covered by its objective[98].

As is the case for the regulatory framework of sports organisations in general, the rules of both national law and internal regulations that limit the power of associations are largely similar across the five countries. Except in France, where more detailed regulations exist, associations are virtually only bound by very fundamental rules of private law, including the law, their articles of association and secondary regulations, and general principles of law.

4 The binding character of disciplinary rules

Rules exist for a reason. It is obvious that governing a certain sport, whether at the club, national or international level, would not be possible without rules and the possibility to enforce them by means of disciplinary sanctions. In all the researched jurisdictions the qualification of the relationship between a member and the association he adhered to has been the subject of legal literature and sometimes of case law. The debate in Germany and Switzerland best illustrates the qualification issue. Therefore, these countries will be addressed first.

4.1 Germany and Switzerland

The binding character of disciplinary regulations has been the subject of a long-standing debate in both German and Swiss legal literature. As the regulations have their basis in the articles of association, the debate is closely connected to the nature or qualification of the articles of association *an sich*[99].

The *Vertragstheorie* (contractual theory) is primarily based on the contractual nature of the relationship between a member and the association, not only at the initial stage but also throughout the duration of the membership. Authors supporting this theory consider the articles of association a: "*von den Gründern des Vereins geschlossener Vertrag, das heißt ein mehrseitiges Rechtsgeschäft, das durch den wechselseitigen Zugang der übereinstimmenden Willenserklärungen zustande kommt*"[100]. Proponents of this theory base their argument on the particular contractual relationship between the association and its members at the time of the founding act. With regard to new acceding members, it is argued that the members voluntarily join the association[101].

According to the *Normentheorie*, the articles of association are an 'objective law' based on the freedom of association which the members are subjected to as of their accession[102]. The influential *Münchener Kommentar* champions this theory, arguing that the articles of association are not—unlike a contract—the result of negotiations between individuals who coordinate their interests and compromise with one another. Rather, they attempt to establish an order of social life that ensures the achievement of a super-individual purpose[103]. In connection with association law, this purpose is generally the association's reason for existence, for example to play sports together with others or to advocate for certain issues.

The prevailing view in Germany, which is adopted in case law, keeps a middle between the two. According to the so-called *modifizierte Normentheorie*, the articles of association are of a contractual nature while the association is still being formed. As soon as the association is established, the articles lose their contractual nature and apply to the members by virtue of 'corporate law' as the members have subjected themselves to it[104]. With regard to the nature of the disciplinary sanction, the *Bundesgerichtshof* (*BGH*) took a stand in 1956. In its landmark case regarding the nature and review of a disciplinary sanction the *BGH*

[94] Sauter et al. (2010), nr. 39a.

[95] BGHZ 87, 337, p. 343.

[96] Art. 75 Swiss Civil Code.

[97] According to some authors, the association's objective is to some extent, the '*causa*' of the membership. Heini (1988), p. 28; Fenners (2006), p. 43.

[98] Baddeley (1994), p. 110.

[99] Krieger (2003), p. 50.

[100] MünchKomm/Reuter (2012), § 25, Rn. 17; Fuchs (1999), p. 20; Hadding (1979), pp. 165–196, 188 ff.

[101] MünchKomm/Reuter (2012), § 25, Rn. 17; Steiner (2010), p. 102, 106 ff.; Hadding and van Look (1988), pp. 270–280, 275.

[102] MünchKomm/Reuter (2012), § 25, Rn. 17.

[103] MünchKomm/Reuter (2012), §25, Rn. 18.

[104] BGH 04.10.1956—II ZR 121/55—BGHZ 21, 370, p. 373: "*Denn sobald der nichtrechtsfähiges Verein ins Leben getreten ist, gilt seine Satzung nicht mehr als Vertrag, sondern als seine Verfassung, der sich die Mitglieder unterworfen haben und die für sie kraft Korporationsrechts gilt*". See also: BGH 06.03.1967—II ZR 231/64—BGHZ 47, 172, p. 179.

considered that, [s]anctions provided by association law that ensure compliance with membership obligations, are not contractual sanctions, because, unlike contractual sanctions, they are not based on contract, but on the submission of the members to the articles of association[105]. Despite criticism in literature,[106] the *BGH* affirmed its position in later cases and even extended its application to cooperatives[107].

As in Germany, the majority of the Swiss doctrinal views rejects the contractual theory and qualifies the disciplinary sanction as a legal institution *sui generis* of association law[108]. The main argument cited in favour of this theory is the existence of a relationship of subordination between an association and its members, which is deemed closer to a normative relationship than to a contract. As Corbat states, 'the source of disciplinary power of the association is the free and voluntary subordination of the individual of autonomy of the association to adopt a regulatory system, which includes the power of the association to provide for sanctions'[109]. Nevertheless, support for the contractual theory remains existent[110].

4.2 The binding character according to the Swiss Federal Supreme Court

In its early case law regarding the qualification of disciplinary sanctions, the Swiss Federal Supreme Court implicitly defined the relationship between a federation and an athlete (the same holds for clubs) as a contract, the sanction being defined as a contractual sanction[111]. Later, a distinction was made between pecuniary sanctions, described as contractual and consequently subject to the Code of Obligations, and other social sanctions[112].

However, in the *Gundel* case in 1993 the Court took a different approach. It had to decide on the appeal against a sentence of the Court of Arbitration for Sport (CAS) concerning disciplinary sanctions imposed on an athlete who was a member of a German horse riding club, but not a member of either the German or international federation (*Fédération Equestre International*). The Court stated that the withdrawal of cash prizes related to the disqualification, as well as the suspension from international competitions imposed by the international federation, goes well beyond mere sanctions to ensure the correct execution of a game and constitutes '*véritables peines statutaires*'[113]. Regrettably, the Court omitted further explanation of this legal qualification. However, in a non-published paragraph (5a) in the Gundel judgement the Court states: "*il est généralement admis que la peine statutaire représente l'une des formes de la peine conventionnelle*"[114]. This statement has resulted in different interpretations of the Gundel case[115].

The Court seems to have definitely abandoned the notion of the contractual sanction in the *Grossen* case in 1995, in which it decided that a member of a regional wrestling club—the club being a member of the national federation—was not in a contractual relationship with the national federation[116]. In two more cases, the court reaffirmed its view without further explanation using only a sole reference to the Gundel case[117]. It was not until 2007 that the Court mentioned the nature of the disciplinary sanction again in the *Rayo* case.

Rayo Vallencano Madrid SAD (FC Rayo), a second division football club and a member of the Spanish Football Federation, which itself is a member of FIFA, appealed a disciplinary sanction imposed by the Disciplinary Committee of FIFA. As a result of not paying a transfer sum to a Brazilian club, FC Rayo was sentenced to a fine of CHF 25,000 and a conditional sanction of the withdrawal of points or relegation. The payment was not made within time causing FC Rayo to lose points in the championship of the second division in Spain. After an unsuccessful appeal to the CAS, FC Rayo appealed to the Swiss Federal Supreme Court arguing that the sanctions imposed had occurred in the context of a purely contractual dispute and that the disciplinary regulations of FIFA, providing fines and other coercive measures such as the withdrawal of points, contained rules of private enforcement[118]. According to the club, FIFA's actions thus contain a prerogative that is reserved to the state, making its decision contrary to public policy[119]. The Court rejected the appeal and held

[105] BGHZ 21/370, p. 373: "*Vereinsrechtlich vorgesehene Strafen, die die Einhaltung mitgliedschaftlicher Pflichten sichern, sind keine Vertragsstrafen, da sie anders als die Vertragsstrafen nicht auf Vertrag, sondern auf der Unterwerfung der Mitglieder unter die Satzung beruhen*".

[106] Critisism: See Hadding (1979), pp. 165–196.

[107] BGHZ 47, 172; BGHZ 47, 381; BGH 2 December 2002—II ZR 1/02—published in the online database of the BGH. For a critical review of this last case see: van Look et al. (2004), pp. 539–560.

[108] Bodmer (1989), p. 78; Baddeley (1994), p. 224; Jaquier (2004), p. 48; Fenners (2006), pp. 23–24.

[109] Corbat (1974), p. 60, 70ss.

[110] Fuchs (1999), p. 45; Steiner (2010), p. 106 ff.

[111] BGE/ATF 57 I 204.

[112] BGE/ATF 80 II 123, cons. 3b.

[113] BGE/ATF 119 II 271.

[114] Baddeley (1994), p. 222.

[115] Jaquier (2004), p. 50; Steiner (2010), pp. 98–99.

[116] BGE/ATF 121 III 350.

[117] BGE/ATF 120 II 369 and Swiss Federal Supreme Court 31 March 1999 *Lu Na Wang et al v. FINA* (5P.83/1999).

[118] The Swiss public debt enforcement monopoly includes the prohibition of private debt enforcement.

[119] The sole substantive ground to quash an arbitral award, art. 190 Swiss Private International Law Act.

that the question whether a breach of the public debt enforcement monopoly was indeed enough to constitute a breach of Swiss public policy could remain unanswered, since the award that was challenged did not concern debt enforcement as such but rather sanction enforcement. The connected question that thus needed answering was if a sports federation as powerful as FIFA was allowed to impose sanctions on its members. According to the Court, the sanctions against the appellant are not enforcement measures, *but sanctions based on association law*. When enacting regulations to achieve its objectives and to which its members are subject, an association may validly provide for a system of sanctions intended to compel recalcitrant behaviour. This subjection to the regulatory system is considered voluntary, even if the association concerned has a dominant position. Finally, the fact that this possibility of sanctioning has similar effects to enforcement measures does not entail that these are in conflict with the public debt enforcement monopoly. This is illustrated by the fact that the actual enforcement of monetary sanctions can only be enforced with the assistance of state authorities, so that the measures provided by FIFA are contrary to the prohibition of private debt enforcement[120]. Although the Court expressly noted that sanctions are based on association law, the complex facts of the case ask for restraint when drawing conclusions from this statement. Nevertheless, even without a more explicit confirmation of the standpoint that the Court took in the *Grossen* case, there is a general consensus in Switzerland that the source of disciplinary power of associations over its members is rooted in association law.

4.3 The Netherlands

In the old Dutch *BW* the association was part of contract law. The historical conception of the contractual nature of legal entity law (*rechtspersonenrecht*) was gradually replaced by the institutional doctrine by the 1950s[121]. In 1940, Scholten already advocated the idea that an association's articles are of an abstract nature comparable to the relationship between a state and its citizens and contrary to a contract, which only creates specific legal relationships[122]. The membership relationship between an association and its members is now generally qualified as an 'institutional relationship'—or relationship *sui generis*—as opposed to a contractual one[123]. This relationship is not governed by what parties agree, but instead by association law—comprising both internal (articles of association, regulations and decisions) and external (the law and unwritten law) norms[124]. Association law is laid down in Book 2 *BW* and precedes the provisions on the law of obligations, thus emphasising its institutional nature.

The legal acts of constitution of an association and accession to one are subject to the general law of obligations[125]. Accordingly, these acts can be voidable when entered into on the basis of threat, fraud or abuse of circumstances and error[126]. However, in contrast with a contract, which is constantly dependent on the will of the parties, the obligation to comply with the association's rules is independent of the member's will[127]. With the adhesion to an association, a member becomes obliged to comply with the rules and regulations. If an association's resolution restricts rights or increases obligations, the member is free to terminate his membership[128].

4.4 England

The general view in English law regarding the binding character of the rules of a club or sports federation is that it is based on contract. This does not alter the fact that submission to the rules of sports associations is mandatory. This 'adhesionary nature'—as Gardiner et al. call it—of the rules and regulations of sports federations has been recognised in court[129]. However, the existence of a contract was by no means uncontroversial; it has even been labelled a legal fiction:

"The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction—a fiction created by the lawyers so as to give the courts jurisdiction. (..) Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code—a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the courts"[130].

Similarly, certain authors have expressed concern stating that the relationship between a powerful global

[120] Swiss Federal Supreme Court 5 January 2007, 4P.240/2006 (nr. 4.2).

[121] de Jongh (2011), par. 2.2.1.; Van der Velden (1969), p. 37.

[122] Asser/Scholten (1940) (1–II), p. 135.

[123] Asser/Maeijer (1997) (2-II), nr. 269; Rensen (2005), p. 268; Dijk and van der Ploeg (2007), p. 131.

[124] Asser/Rensen (2012) (2-III*), nr. 14 and 58.

[125] den Tonkelaar (1979), pp. 206–207; Rensen (2005), pp. 268–269; Overes (2009), art. 26*BW*, aant. 3 and art. 33 *BW*, aant 2. The same holds for private companies with limited liability (*BV*) and companies limited by shares (*NV*), see Asser/Maeijer/van Solinge and Nieuwe Weme (2009) (2-II*), nr. 42.

[126] Art 3:44 *BW* and art. 6:228 *BW* in conjunction with 6:216 *BW*.

[127] Compare: Van der Velden (1969), p. 63.

[128] Art. 2:36 (3) *BW*.

[129] Gardiner et al. (2012), p. 97.

[130] *Enderby Town Football Club Ltd v The Football Association Ltd* (1971) Ch 591, p. 606, per Denning LJ. See also Foster (2003), p. 15.

international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced that the legal form of the relationship should not be contractual[131]. After all, if athletes wish to continue their careers, they have no choice. As Pannick notes, in any effective system of self-regulation, the power of the regulator leaves the subject no practical choice but to comply[132]. This issue was addressed in *R v Football Association Ltd ex p Football League*. Rose J held that, despite the virtually monopolistic powers of the Football Association and the importance of its decisions to many members of the public, it is a domestic body whose powers were solely derived from private law and therefore not susceptible to judicial review[133]. Nevertheless Rose J followed Lord Denning's view in *Enderby* stating that, "the FA rules, though in contractual form, are effectively a legislative code"[134]. Regardless of how powerful their licensing and disciplinary powers may be, it appears that in English law the use of contract, legal fiction or not, is regarded the most appropriate way to regulate the relationship between sports associations and their members[135].

4.5 France

Whereas in the Netherlands and England, the nature of the binding character of the rules is barely disputed, in France it has been debated by various scholars supporting either the institutional theory or the contractual theory.

The institutional theory was developed by the famous French constitutional lawyer Maurice Hauriou in the early twentieth century[136]. According to Hauriou,"*une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social. Pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes. D'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures*"[137]. In short, an institution is a group of people who have joined together to achieve a certain objective. To fulfil this objective and to resolve difficulties within the group laws are enacted and power is established. An institution by definition possesses the right to '*se faire justice à soi-même*'[138]. It is thus the institution which is "the source of disciplinary law"[139].

The main argument posed by authors in favour of the contractual theory is that an association is founded on a contract[140]. After all, art. 1 of the French law of 1 July 1901 relating to the *contract* of association explicitly sets out that, 'the association is an agreement by which two or more people share, permanently, their knowledge or activity for a purpose other than sharing profits and that it is governed as to its validity by the general principles of law applicable to contracts and obligations'. A member is a party to the contract of association and thus contractually bound to the regulatory framework of the association.

However, in the assessment of the contractual theory as the basis for disciplinary power, French scholars have identified the same flaws that have been put forward in the other researched jurisdictions. In short, the fact that an athlete or club has no choice but to accept to subordinate himself to the regulations of the sports association if he wishes to participate in competition contravenes the requirement of consent[141]. According to Simon, the contractual analysis leads to denying the institutional reality that characterises the relationships in sports[142]. Although it is recognised that an extensive notion of contract can include the '*contrat d'adhésion*', among specialist authors, the institutional theory seems to be prevailing as better equipped to explain the complex relationship between an association and its members[143].

As mentioned earlier, one of the main characteristics of the organisation of sport in France is the interference of the state. This public aspect also affects the legal nature of disciplinary power of delegated federations[144]. Although delegated federations are associations, their disciplinary power is not solely rooted in private law. In contrast, it is the exercise of a public service. As a result, a disciplinary sanction imposed by a delegated federation is qualified as an administrative act[145]. Despite this legal reality, many

[131] Foster (2003), p. 16. See also: Beloff and Kerr (1996), pp. 31–32 and Pannick (1997), p. 152.

[132] Pannick (1997), p. 152.

[133] *R v Football Association Ltd ex p Football League* (1993) 2 All ER 833, p. 848.

[134] *R v Football Association Ltd ex p Football League* (1993) 2 All ER 833, p. 841.

[135] Wade and Forsyth (2009), p. 573; Gardiner (2008), p. 48 (nr. 42).

[136] His theory was developed in different works, none of which exhaustive or definitive. See Millard (1995), pp. 381–412. See for a summary of the theory in English: Broderick (1968).

[137] Hauriou (1925)/(1933), p. 96.

[138] Légal and Brethe de la Gressaye (1938), p. 448.

[139] Hauriou (1906), p. 136.

[140] Rabu (2010), p. 37 (quoting Duval (2002), p. 69).

[141] Légal and Brethe de la Gressaye (1938), pp. 42–43; Maisonneuve (2011), pp. 154–160.

[142] Simon (1990), p. 8.

[143] " Membres n'adhèrent pas à un quelconque contrat social mais à l'idée de l'institution" Maisonneuve, p. 185; Latty (2007), p. 116.

[144] This does not hold for certified federations as the certification confers no monopoly position and thus constitutes no '*puissance publique*'. CE 10.12.1988, no 79962, *Recueil Dalloz* 1990, p. 280, obs. C. Dudognon.

[145] Landmark case : CE 22.11.1974, no 89828, *Recueil Dalloz* 1975, p. 739, note J.-F. Lachaume; affirmed by CE 12.05.1989, *Recueil Dalloz* 1990, p. 276, note J.-F. Lachaume.

authors have disagreed with this contention. In their view, the disciplinary power of a federation should not be qualified as the delegation of a public service[146]. The monopoly of national sports organisations to organise competitions and regulate their discipline on the national territory already existed before the French state intervened. The state in fact delegated a competence that it did not develop or ever exercised[147]. However, in doctrine it has been argued that the state's interference is justified by the monopoly position of the federations. In the words of Simon, "although the administrative nature of disciplinary power of federation is based on the fiction that this power is held by the state, it is merited by the 'exorbitant' character of this power"[148]. Considering the similarity of this statement to that of LLJ Denning, it can be suggested that there exists an almost uniform 'European' understanding of the relationship between a sports organisation and its members.

5 Indirect membership

A distinctive feature of the organisational structure of sport is the 'membership chain'. An athlete or club is only a member of an umbrella federation when its articles of association allow for this. However, in most cases an athlete is only a member of his club, and in some cases also of his national federation, but not a member of the international federation. The same holds for clubs. In the abovementioned FC Rayo case, the club is a member of the Royal Spanish Football Federation, which in turn is a member of both UEFA and FIFA. FC Rayo is thus not a direct member of the international federation, but rather a so-called indirect member. In connection with the imposition of sanctions, the question arises how athletes or clubs are bound to the regulations of a federation of which they are not a member. After all, without membership no enforcement power exists[149].

Generally, there are two grounds on which an indirect member can be bound: first, by means of a licence. A licence, generally granting access to competitions, is issued by the sports federation after the athlete or club agrees to the terms. Secondly, it might be possible for indirect members to be bound based on the indirect legal relationship.

In the Netherlands, the subordination of indirect members of sports federations has not received much, if any, attention. Dutch authors Dijk and Van der Ploeg only noted that a federation cannot directly enforce compliance upon the members of their members. According to them, only the member association has this power[150]. However, in other sectors it is not uncommon that rules that have been created between two parties become binding upon individuals who are members of those parties. For instance, in the Netherlands collective labour agreements are negotiated between representatives of employers' associations and trade unions, respectively. The collective agreement becomes directly binding on all members of the contracting organisations[151].

In England, the membership relationship is governed by contract. Indirect members might be bound by an express contract in the form of a licence[152]. Additionally, if no express contract can be identified, the indirect member might be bound by an implied contract. This last issue, whether the nature of the relationship between an athlete and her national sports federation was contractual, has been addressed in the *Modahl* case. The claim that a contract existed was based on the argument that there are three bases on which a contract can be construed or a combination of the three: 'the club basis', 'the participation basis' and 'the submission basis'. The first was based on the athlete's membership of her athletics club, whose rules specifically required her to adhere to the rules of the governing federation. Secondly, the participation basis means that by participating in competitions overseas, the athlete submitted herself to the jurisdiction of the federation, whose disciplinary function could only sensibly be exercised within the structure of a contract. Thirdly, the submission basis holds that a contract is to be implied when the athlete submitted herself to the federation's disciplinary process. There was a disagreement amongst the Court of Appeal on how to handle this key issue. While both Latham and Mance LLJ found that overall it was appropriate to find the existence of a contract—although arriving there in a different way—Parker LJ was not. Finally it was held that, although there was no express contract, one could be implied from the athlete's submission to the federation's rules.

"The necessary implication from the claimant's conduct in joining a club, in competing at national and international level on the basis stated in the rules and in submitting

[146] Instead, they defend the view that the disciplinary power derives from the right to self-regulation inherent to all institutions. Karaquillo (1980), p. 120 ff and Karaquillo (2011), p. 127; Maisonneuve (2011), pp. 161–168. See also Rabu, who defends the application of the contractual theory. Rabu (2010), pp. 80–81.

[147] Maisonneuve (2011), pp. 161–168. See also Karaquillo (2011), pp. 33–34.

[148] Simon (1990), p. 152, 181 and 244.

[149] Compare BGHZ 128/93, p. 99.

[150] Dijk and van der Ploeg (2007), p. 299.

[151] Art. 12 and 13 Collective Labour Agreements Act (Wet CAO).Provisions of these agreements can be further extended upon non-members by being declared generally binding by decree of the Minister of Social Affairs. Art. 2 Act on the Extension of Collective Agreements (Wet AVV).

[152] Lewis and Taylor (2008), p. 228.

herself to doping tests both in and out of competition was that she became party to a contract with the defendant subject to the relevant terms of the rules."[153].

A cautious conclusion from *Modahl* is that where such an indirect legal relation exists—in the form of participation in competition or submission to the rules—an implied contract is easily deemed to exist.

In France, individual athletes are tied to their national (delegated) federations by virtue of the licensing system. A sports licence is issued by a delegated sports federation and entitles an athlete to participate in sports activities[154]. The relationship between a licensed athlete and the federation is quite complex. On the one hand, the licence is an administrative act granting the right to participate in competitions[155]. On the other, the licence is only granted if certain conditions are met, the most important condition being subordination to the federation's disciplinary power[156]. For this reason, some equate the licence to a contract, arguing that the athlete consents to this subordination[157]. Others attribute the licence with a double nature[158]. In this view the licence is both an administrative act and a '*convention d'adhésion associative*'. Regardless of the academic debate regarding the nature of the licence, the acquisition of a licence can be characterised equivalent to subordination to the disciplinary regulations. The possibility of subordination of athletes or clubs to the regulatory framework of an international federation other than through a licence so far has received no attention in case law or doctrine[159].

In German law, it is recognised that an indirect member can be bound through contractual acceptance (subordination) of the regulations which can take on the form of an individual agreement, a licence or a competition agreement, thereby extending the disciplinary power of a sports association to non-members[160]. In 1994, the famous *Reitsport* case overturned earlier case law in which the *BGH* considered the enforcement of disciplinary measures upon non-members inadmissible[161]. IFor a non-member to be bound, it is now required that he has subjected himself to the rules and regulations of the respective umbrella association. This submission can only derive from a '*rechtsgeschäftlichen Einzelakt*'. Aside from an individual agreement, this can be attained by participating in a competition organised by the sports association or by acquiring a general competition licence, for which one must accept and recognise the relevant rules and regulations of the association. In both situations, the non-member must have a reasonable possibility of taking cognizance of the content of these rules, i.e. must be published[162]. According to the *BGH* this relationship is *Mitgliedschaftsähnlich*. Despite the contractual nature of the relationship between federations and non-members, the regulations of sports federations cannot be qualified as standard contract terms, resulting in the inapplicability of the provisions regarding standard contract terms (§ 305-310 BGB)[163]. The Court reasoned that the judicial review (*Inhaltskontrolle)* of sanctions imposed upon non-members should be the same as when the sanction is imposed on a member, via § 242 BGB[164]. It is reasoned that the safeguards for indirect members should not lag behind those of members[165].

In Switzerland it is agreed in both legal literature and case law that the disciplinary force of federations upon indirect members can be constructed through contractual subordination[166]. The Swiss Federal Supreme Court has ruled that an athlete or club can be subordinated to an association's regulatory framework through a 'certificate of obligation'[167] or through participating in competition[168]. In line with the German view, Fenners qualifies the relationship as *Mitgliedschaftsähnlich*[169]. However, unlike in German law, most Swiss doctrinal views argue that these contracts must be reviewed in connection with the rulings based on the principles of the standard contract terms[170]. This approach is for the most part due to the monopoly position of the governing bodies. Primarily reviewed is

[153] *Modahl v British Athletic Federation Ltd* (2002) 1 WLR 1192, p. 1193.

[154] Art. L.131–3 jo. L.131–6 of the Code du sport.

[155] CE 31.05.1989, no 99901, *Recueil Dalloz* 1990, p. 394, obs. J.-F. Lachaume. According to Simon, this ruling confirms the difference in nature between the license on the one hand and adhering to an association on the other. Simon (1990), p. 111.

[156] Simon (1990), pp. 110–112.

[157] Rabu (2010), p. 96.

[158] Buy et al. (2009), nr. 820.

[159] Referring to Swiss doctrine, only Latty has argued in favour of direct application of the rules of international federations via the membership chain. Latty (2007), p. 128.

[160] BGH 28.11.1994—II ZR 11/94—NJW 1995, 583 = BGHZ 128, 93; BGH 13.07.1972—II ZR 138/69—WM 1972, 1249; Affirmed by OLG München 28.03.1996—NJW 1996, 2382. See Otto and Stöber (2012), Rn: 975–976; Heermann (1999), pp. 325–333; Orth (2009), pp. 182–183.

[161] BGZH 29, 352, p. 359.

[162] BGHZ 128, 93, p. 105. See also: Heermann (1999), p. 329 and Heermann (2010), p. 282.

[163] BGHZ 128/93, pp. 101–103. See affirmative: Otto and Stöber (2012), Rn. 977; Orth (2009), pp. 185–186. See critically: Heermann (2010), p. 283 ff.

[164] BGH 13.07.1972—II ZR 138/69—WM 1972, 1249; BGHZ 128, 93.

[165] Heermann (2010), p. 282.

[166] Baddeley (2008), pp. 357–391; Steiner (2010), p. 146.

[167] BGE/ATF 80 I 336, cons. 5.

[168] BGE/ATF 134 III 193, cons. 4.2.

[169] Fenners (2006), pp. 52–53.

[170] Baddeley (2008), p. 367; Jaquier (2004), p. 101; Philipp (2004), p. 116.

whether the athlete or club has had the possibility to take note of the terms. Additionally, the '*Ungewöhnlichkeitsregel*' entails that provisions which the consenting party did not expect and objectively did not have to expect are not binding[171].

Furthermore, some also acknowledge a direct enforcement power of the national federation upon indirect members[172].According to Steiner, the acceptance of such a power is consistent with the approach taken by the Federal Supreme Court. He argues that, even though the Court has not taken the opportunity to define or develop the notion of indirect membership, its case law simply affirms that indirect members are subordinate to the disciplinary power of their federations. This approach has been firmly criticised by Aguet in his reaction on the *Rayo* case[173]. He argues that applying the regulations of the federation on this relationship (i.e. FIFA with non-members) diverts art. 60 ff. of the Swiss Civil Code of its purpose and constitutes "*fraude à la loi*"[174]. According to Aguet, the foundation of the disciplinary sanction can only be the *contrat d'adhésion* between the member and the federation in question[175]. Nevertheless, according to the Court, it is indisputable that clubs and players are subject to all rules and decisions of FIFA, even if they are not a member of the latter[176].

To sum up, in all countries individual athletes and clubs that are not a member of a federation can be bound to its regulations, either through an indirect relationship based on the 'membership chain' or through a licensing contract.

6 Changing rules and dynamic reference

To be able to implement a national or international uniform sports discipline, the respective federation relies on rules that ought to be directly enforceable at all levels. The rules must be the same everywhere. This is complicated by the fact that international federations generally have only national federations as their members. Therefore, FIFA, UEFA and many other international federations require their members to follow the rules set by them, and also to implement them into their own articles of association so that they are also binding on the members of the national federations[177]. This implementation can be attained in two manners. First, a club or national federation can change its own regulations every time the federation changes its regulations. This is called static reference. Another option is dynamic reference. Dynamic reference means that a provision cited is always taken to be the provision with any amendments. In other words: it is not a certain edition of the articles of association and regulations that is in force on a specific date, but always the current version that is applicable. Changes in the federation's rules must be enforced immediately.

The practical importance of the choice between static and dynamic reference becomes eminent in the following example. In the fight against doping it is crucial to ensure that all athletes are treated equally and comply with the same rules. If every time the prohibited list is modified and associations have to change their articles of association to comply with it, enforcement of the rules will be impossible. It is undesirable that in the same competition two athletes of different nationalities both test positive on the same banned substance, but only one of them suffers consequences because their national federation changed their regulations and the other did not. The same holds when rules of the game are changed. If every change of competition, selection or other rules needs to be implemented first, uniform application will be jeopardised.

The question whether or not dynamic reference is acceptable has been extensively discussed in Germany and Switzerland. By contrast, this concept has not received much attention in the other researched jurisdictions[178]. In the Netherlands, only Rensen has noted the possibility of referring to rules of a federation higher up in the pyramid. In his view, a simple reference is insufficient; an association can only oblige its members to comply with the regulations of an umbrella organisation if the provisions in question are cognisable from the association's articles[179].

[171] BGE/ATF 77 II 154, p. 156; BGE/ATF 109 II 213, cons. 2a; BGE/ATF 119 II 443, cons. 1b. With regard to doping provisions, it is noted that these are no longer to be regarded as unexpected. See Philipp (2004), p. 116, fn. 502 and Steiner (2010), p. 153).

[172] Steiner (2010), p. 142. See also Fenners (2006), p. 18; Riemer (1990), p. 221, nr. 511.

[173] Aguet argues that the assertion that the relationship between a club or a player and FIFA has its source in association law is fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed. Aguet (2007), nr. 47.

[174] Aguet (2007), nr. 50.

[175] Aguet (2007), nr. 54.

[176] BGE/ATF 5 January 2007, 4P.240/2006 (FC Rayo), Sachsverhalt A; BGE/ATF 9 January 2009, 4A_460/2008 (Dodo), cons. 6.2.

[177] Art. 13 FIFA Statutes and Art. 7bis UEFA Statutes. See for an example art. 4 I of the Swiss Football Association's articles of association: "*Die Statuten, Reglemente und Beschlüsse der FIFA und der UEFA, des Verbandes, seiner zuständigen Organe und ständigen Kommissionen sind für alle Klubs und deren Mitglieder, Spieler und Funktionäre, für alle Abteilungen, ihre Organe und anerkannte Unterorganisationen verbindlich*".

[178] Especially in England, dynamic reference seems not to be an issue.

[179] Rensen (2005), pp. 182–183.

Nonetheless, in other legal relations it is not uncommon to incorporate a reference to rules that are drafted by third parties. For instance, commercial contracts often refer to general contract terms drafted by trade organisations[180]. Such references can either refer to a specific edition or to the current edition of certain general contract terms (dynamic reference). In the Netherlands, references are assessed on the basis of the general rules of contract law. The civil courts mainly check whether the reference is sound and take into consideration the social circles to which the parties belong, the professionalism of the parties and the prevalence of the use of referrals in the industry[181]. Depending on a party's social circle, his profession and/or his level of knowledge about a certain subject, he will be held at a lower or higher standard by the courts. A reference to the rules of the international federation can thus be deemed invalid when an amateur athlete is concerned, but valid in the case of a professional athlete as he is held at a higher standard and expected to be familiar with the rules that govern his profession.

In France the *Conseil d'Etat* held, with regard to implementation of the rules of an international federation, that a national federation is free to replicate rules set by international federations in their own regulation as long as these stay within the boundaries set by national law[182]. However, the dogmatic construction of dynamic reference as such seems not to be an issue in France. This might be explained by the fact that in France individual athletes are directly subordinated to the regulations of the national federations by virtue of the licensing system and perhaps also by the strong national focus of most research.[183]

In Germany, a significant part of the authors is of the opinion that dynamic reference is not allowed.[184] One cited argument is that dynamic reference is contrary to § 71 *BGB*, which requires that amendments of the articles of association are to be entered in the register of associations to become effective.[185] So far, the debate has found little judicial resonance. In 1988 the BGH expressly accepted static reference, but did not rule on the issue of dynamic reference.[186] In the *Reitsport* case, which concerned the subordination of indirect members to disciplinary regulations of the national federation, the *BGH* acknowledged the practical difficulty/importance for sports federations to enforce the rules at all levels. Although the court expressly referred to the majority opinion which dismisses dynamic reference, it did not take a clear position in the debate.[187] More recently, the debate has shifted towards a more nuanced approach. It has been argued that dynamic reference cannot be accepted or rejected on principle; rather, the admissibility depends on certain conditions. When these conditions are met, dynamic reference is in principle acceptable.[188] The reference must be clear, unambiguous and transparent. In addition, the referenced regulations must be published.[189]

Unlike in Germany, in Swiss legal doctrine dynamic reference is explicitly accepted by the majority of authors.[190] Riemer, for example, notes that changes in an umbrella federation's articles do not only apply to its own member associations, but also to their members; explicit subordination to the federation's rules in the member association's articles is not a prerequisite.[191] Additionally, it has been suggested that as long as the rules are available for consultation, there is nothing against dynamic reference to a federation's articles or regulations[192]. An explanation for the relative absence of a debate can be sought in the fact that Swiss association law contains little legal constraints. As mentioned above, the relative liberal nature of Swiss association law is deemed the primary reason why most international sports federations are seated in Switzerland[193]. Unlike in German law, Swiss association law does not require amendments to an association's articles to be publicly registered[194]. Unsurprisingly, the majority of Swiss authors deem the legal form of the association perfectly suitable to enforce rules on all levels[195].

[180] In the Netherlands, especially in logistics and construction.

[181] Van Gulijk and Van der Velden (2012), pp. 985–991.

[182] CE 20.11.2003, no 369474, *Les Cahiers de droit du sport* no 2, 2005, p. 49, note J.-M. Duval.

[183] Art. L.131–3 of the Code du sport. See section 5.

[184] MünchKomm/Reuter (2012), §21, Rn. 121; Staudinger/Weick (2005), § 25 Rn. 7; Haas and Prokop (1998), p. 17; Hilpert (2009), p. 7 and 54; Otto and Stöber (2012), Rn. 51. See also Orth (2009), p. 160 ff, for a detailed examination of the different views.

[185] See for example: Staudinger/Weick (2005), § 25 Rn. 7 and Kotzenberg (2007), p. 41.

[186] BGH 10.10.1988—II ZR 51/81—available at: http://www.jurion.de.

[187] BGH 28 November 1994—II ZR 11/94—NJW 1995, 583 = BGHZ 128, 93 (cons. I.2c). This case will be further discussed below regarding indirect membership.

[188] Heermann (2010), p. 260 and 264; Orth and Pommerening (2010), pp. 222–224.

[189] Orth and Pommerening (2010), p. 224.

[190] Jaquier (2004), p. 98; Philipp (2004), p. 113; Riemer (1990), nr. 508; Steiner (2010), pp. 140–141. More critical: Fenners (2006), p. 47.

[191] Riemer (1990), nr. 508; referring to BGE/ATF 70 II 63; see below.

[192] Philipp (2004), p. 113.

[193] Oswald (2010), p. 33; Riemer (2004), p. 106.

[194] See § 71 (1) German BGB. See also Heermann (2010), p. 275.

[195] Baddeley (1994), p. 112; Dias (2010), p. 96; Pachmann (2007), p. 120; Zen-Ruffinen (2002), p. 46.

The Swiss Federal Supreme Court is not opposed to dynamic reference either. Although a principal ruling on the issue has not yet materialised, the Court accepted a dynamic reference in a cantonal statute to technical regulations in 1997[196]. Much earlier, in a case where a woman was a member of both an association and its umbrella federation, the dynamic reference in question was deemed acceptable on the ground that nothing prevents an association to constitute itself as a branch of another association and recognise its articles. According to the Court, a subsequent amendment of these articles has to be binding for the umbrella federation's members—i.e. the branch associations—as well as for the members of these branch associations[197]. More recently, the Court had the chance to express its view towards references in regulations of sports federations. Brazilian football player Dodo appealed an award by the CAS inter alia disputing its competence on the grounds that the Brazilian federation's articles did not provide an arbitration clause. An arbitration clause was, however, laid down in the FIFA statutes. The Brazilian federation's articles contained a provision which obligated its adhered athletes to comply with the FIFA regulations. The Swiss Federal Supreme Court held that in line with previous case law, this global reference sufficed to establish the competence of the CAS[198]. However, no principal ruling materialised as the Court was very brief in its considerations. In addition, the global reference was not to any behavioural or disciplinary rule, but to an arbitration clause, which results in the application of many other rules. Therefore, as in the *Rayo* case, it is difficult to draw general conclusions from this case other than that the Court still seems to accept dynamic reference, albeit implicitly.

7 Enforcing the rules: definition, purpose, and justification of the disciplinary sanction

The disciplinary sanction is the instrument which sports organisations can employ to enforce their rules. As a legal notion the disciplinary sanction is not easy to define. Despite the fact that most disciplinary sanctions will be recognised as such, no single legal definition exists to describe this phenomenon[199]. Still, the classification, justification and goal(s)of the sanction are discussed in similar fashion in the different jurisdictions[200].

In the Netherlands, different definitions of disciplinary law and the disciplinary sanction have emerged in literature[201]. However, not much has been written on disciplinary law in associations in general or in sports in particular[202]. According to several authors, disciplinary law bears close resemblances to both penal law and civil law[203]. Nonetheless, it has been classified as a *sui generis* field of law[204]. In contrast, disciplinary law of associations is considered private law (*privaatrechtelijk tuchtrecht*)[205] Regarding the goals of the disciplinary sanction, De Doelder alleges that '*normhandhaving*'—the enforcement of norms—is the primary goal of every legal system, disciplinary law including.

In France, definitions of the disciplinary sanction vary[206]. On the one hand, it has been argued that it is primarily '*une mesure répressive*'[207]. On the other hand, according to the more traditional approach it is primarily a sanction whose effect is purely moral and preventive[208]. It is a power founded upon the idea the common objective is served by the sanctioning of members who endanger the

[196] BGE/ATF 123 I 112, p. 127 ff.

[197] BGE/ATF 70 II 63. ("*Allein nichts hindert einen Verein, sich als Zweigverband eines anderen zu konstituieren und dessen Satzungen anzuerkennen. (..) Auch eine spätere Änderung dieser Statuten muss für die Zweigverbände nicht minder als für die diesen und dem Gesamtverbande zugleich angehörenden Mitglieder verbindlich sein.*").

[198] BGE/ATF 9 January 2009, 4A_460/2008 (Dodo), consider. 6.2. With references to earlier case law.

[199] Not even in Switzerland where one of the first authors to treat and define the subject was Corbat in 1974. "*Les peines statutaires sont des désavantages que le membre d'un groupement s'engage à subir s'il n'exécute pas ou exécute imparfaitement ses devoirs envers le groupement ou les autre membres et visent toujours à maintenir l'ordre juridique interne*". Corbat (1974), p. 70. Steiner's definition specifically envisages the disciplinary sanction imposed by sports associations. "*La sanction sportive est une mesure répressive de droit privé prise par une fédération sportive nationale contre un athlète individuel qui vise à maintenir l'ordre social interne de la fédération auquel l'athlète est soumis en vertu d'un ou plusieurs liens statutaires et/ou contractuels*". Steiner (2010), p. 64. Although Steiner limits his definition to individual athletes, teams, clubs and all subordinate federations can also be subject to a disciplinary sanction. The application of disciplinary measures on the latter is governed by the same principles as the sanctioning of an individual athlete.

[200] Except for in England, where these questions do not seem to be a subject of concern.

[201] See for an extensive overview Leijten (1999), pp. 5–44.

[202] In contrast, research has been mainly focused on statutory disciplinary law, which include *inter alia* the military, medical professions and legal professions. Disciplinary law of associations is qualified as non-statutory disciplinary law.

[203] De Doelder (1981), p. 33 and the authors cited there; Santing-Wubs (2003), p. 553.

[204] See Laclé and Huls (2004), 6, p. 232 and Roes (2008), p. 919 both citing De Doelder (1981), pp. 33–34.

[205] Leijten (1999), p. 33.

[206] See on this subject Ancel and Moret-Bailly (2007).

[207] Laurie (2005), pp. 3–7.

[208] Légal and Brethe de la Gressaye (1938), p. 7.

pursuit of this objective[209]. In this view, inspired by Hauriou's institutional theory, punishment is only secondary[210]. In literature it is recognised that although the disciplinary sanctions approaches the penal law regime to some extent—Simon notes for instance the strict application of the principle of *légalité des sanctions*[211]—it must be distinguished[212]. Nevertheless, as a result of the state interference, the disciplinary sanction is qualified as an administrative act.

In Germany, too, the justification of the disciplinary sanction is linked to the rationale of the association. The possibility to create and enforce disciplinary sanctions derives from the freedom of association and is only permitted because of the voluntary subordination of the members to the associations' regulations[213]. With regard to the goal of the sanction, the *BGH* has stated that the sanction serves to penalise infringements of the membership duties[214].

As in Germany, in Switzerland it is argued that the primary function of the disciplinary sanction is to punish. However, the sanction must also prevent and dissuade, both by the standards themselves as by its enforcement. It deems to encourage the sanctioned member to refrain from reoffending and to prevent similar behaviour of other members[215]. In 1926 the Federal Supreme Court expressed its view on the nature of a disciplinary sanction. According to the Court,

> "[u]ne décision de cette nature ne peut être assimilée ni à un jugement pénal (…) ni même à une sentence arbitral, puisque celle-ci a pour objet de statuer sur le mérite d'une prétention litigieuse et qu'en matière d'amende, l'association ne devient créancière du sociétaire fautif qu'en vertu de la décision même qui la prononce. Le pouvoir d'infliger des amendes découle uniquement des statuts, autrement dit d'une convention d'ordre privé, et il suit de là nécessairement qu'en cas de contestation sur le bien-fondé de la prétention de l'association le conflit ne peut pas être tranche que par les tribunaux"[216].

Resemblances between penal law and disciplinary law have been acknowledged in literature. However, the purely private law nature of the disciplinary sanctions is undisputed[217].

With regard to the fixation of sanctions, it must be noted that there are many different types and forms of disciplinary sanctions. For example, FIFA has laid down 21 different sanctions in its articles of association[218]. The different sanctions can roughly be regrouped into three categories: moral sanctions, pecuniary sanctions and sanctions that deprive certain benefits[219].

First, moral sanctions are disadvantages of dishonourable character when a member fails to perform his duties that he owes to the association, to another member or to third parties linked to the association[220]. Examples are: a warning, a reprimand and the publication of the sentence. Secondly, pecuniary sanctions can be defined as the payment of an amount of money when a member fails to perform his duties. Fines are an extremely frequent sanction. Often, pecuniary sanctions and other types of sanctions are cumulated. The actual amount of the fine is to be determined by the applicable regulations of the federation: it can be set within a framework or set at a maximum. Thirdly, sanctions may consist of partial or total deprivation of the benefits deriving from the membership. This deprivation can be divided into the deprivation of financial benefits and deprivation of non-financial benefits. For example, a club or an athlete can be sentenced to give back earned rewards or be excluded from participation in certain competitions or tournaments. Depending on the sport, exclusion from participation in a tournament can have financial consequences, i.e. missing out on participation fee or sponsorship bonuses. However, these must be distinguished from the direct deprivation of financial benefits.

8 Requirements for application of a disciplinary sanction

As examined in Sect. 3, all created rules and their application are subject to overall limits set forth by the legal system. In short, these are the interdiction to breach the law, public policy, morality, the general principles of law, the articles of association and the specific purpose for which the association was created. In addition to these general conditions, disciplinary sanctions have to meet a few other requirements to be legally applied.

[209] *Un pouvoir juridique ayant pour objet d'imposer aux membres du groupe, par des sanctions déterminées, une règle de conduite en vue de les contraindre à agir conformément au but d'intérêt collectif qui est la raison d'être de ce groupe*. Légal and Brethe de la Gressaye (1938), p. 152.

[210] Millard (2007), p. 34.

[211] Simon (1990), p. 154; Buy (2007), p. 159.

[212] Laurie (2005), pp. 3–7.

[213] BGHZ 29, 352, p. 355. BGHZ 13, 5, p. 11; BGHZ 21, 371, p. 375.

[214] BGHZ 21, 370, p. 376:"*Eine Vereinsstrafe dient der Ahndung von Verletzungen der Vereinspflichten und hat mit Schadenersatz nichts zu tun*".

[215] Baddeley (1994), p. 219; Bodmer (1989), p. 58.

[216] BGE/ATF 52 I 75.

[217] Baddeley (1994), p. 220; Jaquier (2004), p. 46; Heini (1982), pp. 225–226; Steiner (2010), p. 64.

[218] See Art. 65 FIFA Statutes (July 2012).

[219] Compare Corbat (1974), p. 94; Steiner (2010), p. 67.

[220] Corbat (1974), p. 94.

8.1 Express mention

In three of the five jurisdictions, it has been developed in case law that any decision by an association concerning a sanction is required to be based on an express provision in an association's regulatory framework[221]. This implies that if there is no such provision, a disciplinary sanction cannot be applied. The provision must be in force at the time of the offence[222]. To put it briefly, the imposition of a disciplinary sanction is subject to the principle of legality.

Although so far no Dutch court has decided on this matter, in literature it is assumed that a sanction can be imposed without an express provision[223]. In England, the approach is slightly different as disciplinary rules are terms of the contract between member and association. As mentioned above, in *Davis v Carew-Pole* it was held that "the quasi-judicial body is bound by its own rules and can only mete out punishment in strict accordance with such rules"[224]. It would thus seem that express terms are required. Moreover, in German and Swiss literature it is accepted that a general provision confirming the disciplinary power suffices, and the specific disciplinary rules may be specified in secondary regulations[225]. This includes references to rules of other organisations to the extent that members can peruse these regulations[226].

The link between a certain offence and its sanction is generally only clearly established with regard to game violations. For instance, article 49 of the FIFA Disciplinary Code provides that misconduct against match officials, when received a direct red card, can be sanctioned with an overall suspension for: a) at least four matches for unsporting conduct towards a match official; b) at least 6 months for assaulting (elbowing, punching, kicking, etc.) a match official; c) at least 12 months for spitting at a match official. Furthermore it is possible that a fine is imposed[227]. However, in cases of application that deal with other violations than violations of the game, the choice of the kind of sanctions to be adopted and its measurement is at the discretion of the internal judicial bodies.

8.2 Other substantive law requirement

Besides the requirement of legality, the application of a disciplinary measure must also comply with the principles of equal treatment and proportionality [228]. The principle of equal treatment entails that similar situations should be treated in the same manner. The principle of proportionality is a general principle of law. It implies that all specific circumstances of a situation will be taken into consideration in its assessment.

8.3 Fault and strict liability

In considering the requirements to validly impose a sanction, the question arises whether fault is such a requirement. None of the jurisdictions provide a clear definitive answer to this question. In the Netherlands, this subject has not yet been a topic of discussion in case law. So far, the *Hoge Raad* has only enunciated that different standards apply in disciplinary proceedings compared to ordinary private law proceedings[229]. In Dutch literature both sides have been argued[230]. In France, case law remains faint[231]. This is exemplified by the fact that although in 2007 the *Conseil d'Etat* upheld a sanction imposed on football club Lille Metropole that was based on strict liability for the behaviour of their supporters, it did not elaborate on the requirement of fault in general[232].

As French law, German law is characterised by contrasting views on this point. According to older case law of the *BGH*, the imposition of a disciplinary sanction does not necessarily require fault[233]. However, over time doctrinal views have developed into the direction that fault (*Verschulden*) is required[234]. Additionally, more recent case law

[221] France: CE 15.05.1991, no 124067 and CE 12.07.1991 (Girondins de Bordeaux), *Revue français de Droit administratif* 1992, p. 203, note G. Simon. Germany: BGHZ 47, 172, p. 178; Staudinger/Weick (2005), § 35, Rn. 36–38. Switzerland: BGE/ATF 52 II 75; See also: Steiner (2010), pp. 120–121 and the authors cites there.

[222] BGHZ 55, 381, p. 385; Staudinger/Weick (2005), § 35, Rn. 38.

[223] Santing-Wubs (2003), p. 554; De Doelder (1981), pp. 77–79. Soek, however, argues that with regard to doping offences, the principle of legality applies. Soek (2006), p. 314 ff.

[224] *Davis v Carew-Pole* (1956) WLR, p. 838.

[225] Germany: MünchKomm/Reuter (2012), § 25, Rn. 10; Staudinger/Weick (2005), §25, Rn. 3 and23; Otto and Stöber (2012), Rn. 984. Switzerland: Baddeley (1994), p. 228; Bodmer (1989), p. 102; Riemer (1990), p. 847.

[226] See on references section 6.

[227] Art. 49 FIFA Disciplinary Code.

[228] In the Netherlands case law or literature is lacking on this point. England: *Bradley v Jockey Club* (2004) EWHC Civ 2164 (QB), para 43. France: See CE 22.10.1993, D. 1995, p. 58 obs. J.-P. Karaquillo; CE 20.10.2008, no 320111 (Paris St. Germain/FFF) and Frédéric Buy, Pas de responsabilité disciplinaire du fait d'autrui!, note sur T. adm. Paris 16.03.2007 (Paris Saint Germain), *Les Cahiers de Droit du Sport* no 8, 2007, p. 159. Germany: Staudinger/Weick (2005), § 35, Rn. 41. Switzerland: Baddeley (1994); Fuchs (1999), pp. 111–114; Steiner (2010), pp. 120–121.

[229] HR 13.10.2006, NJ 2008, 528 and 529 (Vied'Or.), note, C.C. van Dam.

[230] De Doelder (1981), p. 106 ff; van der Ploeg (1989), pp. 226–227; Soek (2006), pp. 191–192.

[231] Maisonneuve (2008), pp. 1–3.

[232] CE 29.10.2007, no 307736, *Recueil Dalloz* 2008, p. 1381, note Maisonneuve.

[233] BGHZ 29, 352.

[234] Hilpert (2009), p. 54, 58; Orth (2009), pp. 101–103; Otto and Stöber (2012), Rn. 986.

seemingly affirms this development, especially in cases where the sanction entails serious consequences or a condemnation[235].

In Switzerland, too, it is suggested that fault is required[236]. However, this requirement is not absolute[237]. In 2007, the Swiss Federal Supreme Court considered that although a strict liability infringes the personality rights of an athlete,[238] such a regulation can be justified by an overriding public interest; which in this case was the fight against doping[239].

With regard to whether fault is required (and strict liability allowed) for the valid application of a disciplinary sanction, both case law and literature leave us with a contrasting impression. Nevertheless, it must be remarked that with regard to doping, where an athlete is strictly liable for any breach of the regulations, disciplinary sanctions have been imposed and upheld in most jurisdictions[240].

8.4 Procedural safeguards

The sanctioning process must provide for procedural safeguards to ensure a proper procedure. In most jurisdictions, these safeguards have been developed in case law and literature. Naturally, slight differences in the specific interpretation of the various elements exist, but on the whole the following apply in all jurisdictions[241]. First, a member threatened with a penalty must be able to know his offence. Second, he must be able to defend himself, either verbally or in writing, before the penalty is imposed. In other words, the right to be heard must be respected[242]. Third, decisions must be notified and motivated[243]. Only with respect for these safeguards will the sanction be valid. Violations of procedural rights by the associations' bodies may lead to annulations of the sanction by the civil court, even if the measure would have proved well founded had it been imposed in a properly conducted procedure.

In comparison, in France procedural safeguards are laid down in the *Code du sport*, which imposes to follow the standard procedures provided in the annexes[244]. These procedural rules, also affirmed by case law,[245] include: the right to an independent and impartial tribunal, a public procedure, reasonable duration and the right to defend oneself, including a fair hearing and notification and motivation of the decision.

9 Concluding and evaluative remarks

No unbridled imagination is needed to recognise that without rules, sport could not function. After all, how would we know how to play or who the winner is? Rules of the game were only the beginning of regulation in sports. Meanwhile, however, extensive regulatory frameworks have been created to govern sports at different levels. The goal of this article was to provide an overview of the main legal framework in which national and international sports organisations operate with special regard to rules of a disciplinary nature. The comparison that has been made across five European countries showed that, in general, the legal status of disciplinary regulations in sports is strikingly similar and that many issues are approached and reviewed in the same way.

By and large, the five jurisdictions display similar modalities regarding the design of the regulatory framework in which sports organisations operate (2). The significant position of the association, as the preferred organisational form, and thus association law are evident in most countries. The exception is England where associations are generally incorporated and thus subject to company law. Nevertheless, in all jurisdictions the applicable legal framework was little stringent, being limited to dispositions treating only the internal organisation of and membership to the association. Associations are allowed to adjust the internal organisation to their own needs. In four of the five jurisdictions, this autonomy is said to be founded on the civil right of freedom of association. This right does not just include the right of people to freely create and adhere to associations, but also to autonomously decide

[235] OLG Frankfurt am Main, 18.05.2000, 13W 29/00, E. 63, available at: http://www.openjur.de > ; OLG Hamm, 01.04.2008, 27 U 133/07, E. 33, available at: < http://www.justiz.nrw.de > .

[236] Scherrer (2009), p. 81.

[237] Baddeley (1994), p. 243.

[238] Art. 28 Swiss Civil Code.

[239] BGE/ATF 134 III 193, cons. 4.6.3.2.2.

[240] See for instance in England: *Modahl v British Athletic Federation Ltd* (2002) 1 WLR 1192, in France for a recent example: CE 25.05.2010, no 332045 and in Switzerland: Swiss Federal Supreme Court 04.08.2006, 4P.105/2006 and Swiss Federal Supreme Court 10.01.2007, 4P.148/2006.

[241] England: See for instance *McInnes v Onslow-Fane* (1978) 1 WLR 1520*; Modahl v British Athletic Federation Ltd* (2002) 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* (2005) EWCA 1117. See more in detail: Beloff et al. (1999), p. 195 ff. Germany: BGHZ 102, 265, p. 269; Staudinger/Weick (2005), § 35, Rn. 46–51. Switzerland: BGE/ATF 52 I 75; BGE/ATF 90 II 347; Fuchs (1999), pp. 107–110.

[242] An oral hearing is not always obligated. See *Currie v. Barton*, 1988 WL 622889 and BGHZ 29, 352, p. 355.

[243] Under English law no general duty to give reasons for decisions exists. However, it has been suggested that this maybe should be part of the rules of natural justice. See Wade and Forsyth (2009), p. 436.

[244] Article R.131–3 and R.232–86 of the *Code du sport*. See for the details Annexe I–6 art R131–2 and R131–7.

[245] See for example CE 10.04.1991, no 115482, *Recueil Dalloz* 1993, p. 345, obs. J. Morange and more recently CE 10.06.2011, no 327158; CE 26.12.2012, no 350833.

how to organise it internally. Still, the regulatory power of associations is limited by both national law and their self-created internal regulations (3). It may be inferred from the above that limits of both national law and internal regulations in the respective countries are similar to a large extent. Most notably, in all jurisdictions an association is bound by the specific purpose for which it was created and by its articles of association and secondary regulations. In France, however, due to the interference of the state, certified and delegated federations are subject to more detailed regulations.

With regard to the binding character of disciplinary rules, it can be concluded that although certain differences remain, the jurisdictions covered reveal the development of a shared understanding (4). The binding character of the rules set by national and international sports federations differs depending on the relationship of an individual actor with a certain federation. In the civil law countries, the nature of the relationship between an association and its members is generally characterised as institutional. The decisive factor in favour of this standpoint is the subordinate relationship between the federation and the members. Although it has been argued that the assertion that the relationship between a club or a player and FIFA has its source in association law is fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed,[246] with regard to the contract theory, this is no less problematic. If relations between FIFA and clubs or athletes are subject to contract law, there is no form of equality between the parties either. On the one hand FIFA, as an international governing body of football, adopts and amends the rules that are imposed to all participants in the sport. On the other hand, clubs and athletes are forced to submit to these rules if they want to play the game. Consequently, it is difficult to maintain that the relationship between FIFA and a club or an athlete derives from free will. The strong subordinate relationship between the federation and its members and the members of these members (clubs and athletes) is better explained in light of association law. By contrast, the common law approach is very different from the outset. In England, members of an incorporated association are bound by contract. However, it has been suggested that this contract is a fictional one as there is no choice but to enter into it. Nonetheless, in all countries, it is recognised that as a result of the monopoly position of national and international federations, the relationship between the parties is essentially totally subordinate.

Furthermore, in all countries it is accepted that individual athletes and clubs that are not a member of a federation can nevertheless be bound to its regulations (5). This subordination materialises either through an indirect relationship based on the 'membership chain' or through a licensing contract. Additionally, to bind all actors to the same rules it is common practice to refer to regulations of organisations that are positioned higher in the pyramid (6). By means of dynamic reference, it is attempted to bind all athletes and clubs to changing rules at once. Actually, in the sporting context this phenomenon has only received attention in Germany and Switzerland where, in general, dynamic reference can be accepted as long as the reference is clear and cognisable. In times of the Internet, the latter requirement should not be too difficult to meet.

When rules are not followed, a disciplinary sanction can be imposed. The disciplinary sanction is a peculiar legal notion (7). In all countries its definition and functions are debated in a similar fashion. It has features that bear resemblances to both penal law and private law. However, the dominant view is that the disciplinary sanction is of a private law nature. In France too, disciplinary sanctions imposed by club associations are rooted in private law. Only because the French state interfered with sports at the national level, sanctions were imposed by delegated federations of an administrative nature. A variety of sanctions exist, which can more or less be regrouped into three categories: moral sanctions, pecuniary sanctions and sanctions that deprive certain benefits. However, all sanctions are aimed at ensuring the membership obligations under the association's purpose.

Although an association's autonomy is large, it cannot enforce sanctions as it wishes (8). Across the jurisdictions the requirements to apply a sanction bear close similarities. It is recognised that sanctions must be expressly mentioned in the regulatory framework and comply with the principles of equal treatment and proportionality. Furthermore, procedural safeguards must be met. Only with regard to the question whether fault is required, the situation remains obscure. Nonetheless, the position that fault is an absolute requirement is difficult to reconcile with the fact that sanctions that were imposed without fault have been upheld in different national courts.

[246] Aguet (2007), nr. 47.

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