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Athletes in the European Union – Towards Improved Protection of Image Rights

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Contents

Summary

The topic of this thesis is the sports law attached to the image rights and intellectual property rights (IPR). The focus is more on the individual athletes when it comes to the commercial use of their image. In this work I study how the individual athletes' right to their image might possibly be limited. My question layout includes the reflection on how the athletes' opportunities to use or to commercialise their own image are limited by the agreement between the athletes and the national federations. Correspondingly, I elaborate whether the limitative clauses established by the sports federations are justifiable.

While studying the athlete contracts and the use of image, the focus shifted towards another essential legal problem which the individual athletes are faced during their sport careers: an unauthorized use of the athletes' image in the marketing field. The regulatory notion of the image right is strongly national, however, this thesis widen the legislative scope to the transnational level. This is done by examination of the possibilities for the improved protection of athletes' image under the European Union (EU) law, and further at the international level. One way to strengthen the protection is to apply the EU's harmonised IPR *acquis* more extensively. On the other hand, the establishment of an international agreement would bring somewhat improved protection.

Ultimately, I note that the need for the common rules at the transnational level in this subject area is essential. In the EU, the development in sports law in its entirety is enabled by the Lisbon Treaty, which entered into force in 2009, together with the other principles of EU law. The optimal way to employ the development in sports law and the image rights is to establish the harmonised rules. The possibilities to implement such harmonised rules at the EU and international level are examined by this thesis.

Sammanfattning

Denna avhandlingen fokuserar på idrottsjurikens kopplat till bildrätt och immaterialrätt. Fokus är istället mera på individuella idrottare för affärsmässig användning av deras image. I detta arbete undersöker jag hur den individuella idrottarens rättighet till sin image skulle kunna begränsas. Upplägget för mina frågor möjliggör även för kritik om idrottarnas möjligheter att använda eller kommersialisera sin egen image är begränsad av avtalet mellan idrottarna och de nationella föreningarna. På motsvarande sätt utvecklar jag om de begränsande klausulerna från föreningarna är berättigade eller inte.

Även om jag avhandlar idrottarnas kontrakt och användning av deras image, fokuserar jag mycket på ett annat grundläggande juridiskt problem som idrottarna möter under sina idrottskarriärer nämligen en obehörig användning av idrottarnas image inom marknadsföring. Det rättsliga begreppet av idrottarens image har en stark nationell ställning, men denna avhandling avser den rättsliga omfattningen på en transnationell nivå. Detta genom att undersöka olika möjligheter att bättre skydda idrottarnas image inom den Europeiska Unionens (EU) rätten och den internationella rätten. Ett sätt att förstärka skyddet är att tillämpa EU:s vidsträckta harmoniserade immaterialrätt regelverk. Eller på andra sidan att skapa ett internationellt avtal vilket skulle bidra till att skyddet förbättras någorlunda.

Slutligen noterar jag att behovet för gemensamma regler på en transnationell nivå inom detta ämne är nödvändigt. I EU är idrottsjuridikens utveckling enbart möjlig med hjälp av Lissabon fördraget, som trädde i kraft 2009, tillsammans med andra principerna inom EU-rätten. Det optimala sättet att utveckla idrottsjuridiken och imagerätten är att etablera de harmoniserade reglerna. Möjligheterna att verkställa sådana harmoniserade regler på EU och internationell nivå blir undersökta i denna avhandling.

Preface

I want to take this opportunity to thank everyone that has supported me throughout this path of writing the master thesis. Especially, I want to thank my beloved boyfriend Jens of being my truly inspiration from the beginning of this process. I am grateful for my friends, near and far, as well as my family for all the understanding you gave to me during this time.

Moreover, I want to express my greatest acknowledgement to my colleague, Niko, who has enthused me even more towards the fascinating legal issues within the most interesting branch of law: sports law. I really hope our discussions will continue.

Helsinki, 24 May 2018
Lotta Toivonen

Abbreviations

CAS	Court of Arbitration for Sport
CJEU	Court of Justice of the European Union
EU	European Union
FUBPA	Finnish Unfair business practices Act
HelHO	Helsinki Court of Appeal
ICC	International Chamber of Commerce
IOC	International Olympic Committee
IPR	Intellectual Property Rights
KKO	The Supreme Court of Finland
MAO	The Market Court of Finland
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code

1 Introduction

1.1 Background and purpose

Sports have many functions. Sports play cultural and educational role, it brings entertainment and excitement, and it may form one's profession. The involvement of sports is everyday life in today's society. Sports have had a recognisable role in bringing people together. And it still has.

The nature of sports has been important in the development of peace and the understanding of different cultures amongst the world. For instance, the fundamental idea behind the Olympic movement was to create harmony within Europe and to raise children in the spirit of sports. Later the Olympic movement has had an essential role in developing the profession in sports.[1]

The profession in sports covers the athletes. The professional athletes are not a brand new phenomenon. Therefore they should not be legally less trivial than any other professions. Instead, the legal protection of the athletes should be comparable to the same of all the other professions. The protection of the athletes in the contemporary world is largely based on the private law principles rather than the profession specific regulations. These principles, together with the rules established by the international non-governmental organisations, form a regulatory framework to protect the professional sports.

But why do we even care that there exist any regulatory framework around the professional sports? Besides bringing the social cohesion among people, the sports have an impact on world's economy. Also, even if the law does not fit perfectly to the sports, the legal questions that come along sports challenge us to apply the law innovatively. Indeed sports encompass a wide

[1] Petri Heikkinen, 'EU:n urheilupolitiikan ajankohtaiset asiat' in Markus Manninen (ed), *Urheilu ja oikeus 2011* (Bookwell Oy 2011) at 62

policy, and the lack of specific regulations pushes the limits of the other applicable branches of laws.[2]

The Court of Justice of the European Union (CJEU, or the Court) has held that the sports constitute an economic activity[3]. Likewise, the exponential commodification of the sports and, in particular, of the athletes' images contributes to the big business worldwide.[4] For instance, the large-scale sports events bring visibility and thus substantial positive externalities for an undertaking being a sponsor to those events.[5] Hence, one can argue that the sports form an economic sector of its own.

The economic benefits of professional sports for the undertakings come hand in hand with the legal interests of the athletes. This thesis examines the economical questions around the sports that have their significance in particular on the athletes. The first directing question is whether the national federations limit the opportunities of the athletes to commercialise their image. This connects to the second question, which examines whether the shift from the nationally protected athletes' image rights to the new transnational image right is desirable and especially why. Thirdly, there is a common concern whether the implementation of the harmonised image right at the EU level is a viable option, or if the broader harmonisation seems more appropriate.

The way of using the term sports law is generous. The sports law is not its own branch of law in the traditional sense. Instead, it is classified as a pragmatic research that serves the practical needs within the life of sports.[6] Therefore, it is vital to remember that the sports law is examined through

[2] Sherman J. Clark, 'Why Sports Law' (2017) Stanford Law & Policy Review Vol. 28:151
[3] Case C-13/76 *Dona v Mantero* [1976] ECLI:EU:C:1976:115
[4] Ian S. Blackshaw, 'Sports Marketing Agreements: Legal, Fiscal and Practical Aspects' (T.M.C. Asser Press 2012) at 254
[5] Christopher J. Auld, Kathleen M. Lloyd and Jennifer Rieck, 'Perceptions of the Impacts of Major Commercial Sport Events' in Harald Dolles and Sten Söderman (eds.), *Sport as a Business: International, Professional and Commercial Aspects* (Palgrave Macmillan 2011) at 75
[6] Heikki Halila, *'Idrottsrätten som specifikt rättsområde'* (2002) JFT 6/2002, at 726

the problems that have arisen in sporting practice. Sports law is a combination of the traditional branches of law that are applied to the issues related to the sports. This, however, does not exclude the idea of having a branch of law called as sports law where the amount of these questions rises exponentially. As it will be argued, the branch of law called as sports law exists in the EU as well as nationally.

1.2 Delimitation

The focus of this thesis is on the concerns related to sports and, more specifically, private law related problems raised around the professional athletes. My own interest and a background as an athlete have relevance in choosing this topic. The dissatisfaction in the current arrangement of the image protection on behalf of the athletes made the initiative to this research. Moreover, there is a global importance as the business around the sports and the use of the image reach wide.

I have limited the scope of the thesis in the following ways. First, I only discuss the EU law and Finnish law related to sports law when the legal framework is given in Chapter II. As there is a global interest towards the matter of image protection, the international framework on sports, such as anti-doping rules, will be elaborated to the limited extent in the last part of this thesis. Secondly, when the EU and national laws are examined, the laws related to IPR are discussed only within the scope of the sports law. In other words, the thesis provides an insight to the IPR issues that may arise in the context of protection of athletes' image rights.

The most important limitation is made, however, to the athlete as a subject. Where I discuss about athletes, the reference is made only to the individual professional athletes. This means that no teams of professional athletes are examined in this thesis. The difference between these professionals is that under the laws subject to interpretation the team athletes are considered as

being subject to employment laws[7] whereas the individual athletes are deemed as business practitioners. Therefore, the relevant scope of laws in the context of this thesis differs between these athletes.[8] Moreover, the scholar has argued that an individual athlete hardly ever enters into the employer-employee relationship with the national federation.[9]

1.3 Method and material

This thesis employs two research methodologies. One of them is a legal dogmatic, combined with the teleological interpretation. The interpretation of the legal instruments is the essential element in legal dogmatic besides balancing and finding solutions through the norms. The aim is to produce the semantic content through the interpretation of legal norms. With the teleological interpretation the goals that the legal norms, the EU or national, aim to achieve will be searched, after which the alternative interpretation and the actual consequences of the legislation will be assessed. Using the division of the subjective and objective teleological interpretation, different legal intentions will be compared impartially and comprehensively. It is relevant to look at the problems raised in sports and the intersection between different norms accordingly. The interpretation of the sporting rules and practices under the EU regulatory framework pushes the sports more and more towards the juridification.[10]

The other methodology used in this thesis is an empirical research. By using the method of empirical research, the athletes' contracts have been collected and reviewed. By collecting the athlete contracts and reviewing them, I have established a starting point for the further analysis on the protection of the athletes' rights. By choosing this methodology the aim is to provide more thorough understanding to the issues around the image rights of the athletes.

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[7] Essi Kinnunen, 'Mitä etuliite urheilu merkitsee oikeudessa' Heikki Halila (ed), *Urheilu ja oikeus: Urheiluoikeuden yhdistys 10 vuotta* (Gummerrus Kirjapaino Oy 2004) at 54
[8] Olli Rauste, *Urheiluoikeus* (Lakimiesliiton kustannus 1997) at 105, 164
[9] Carolina Pina, 'The Role of IP for Athletes and Image Rights'. Available at <http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_ip_sport_sin_14/wipo_reg_ip_sport_sin_14_t_11.pdf> (accessed 15 April 2018)
[10] Heikki Halila, *Oikeudellistuva urheilu* (Talentum Media Oy 2006) at 3-7

To be noted is that the review is based on two athlete contracts of two individual athletes. Moreover, the empirical research methodology is a supplement to the teleological interpretation. Certainly, legal dogmatic with teleological interpretation is a major methodology used in this thesis and the most common in researching the EU law.[11]

The interpretation can not be considered as a legal interpretation if the sources of law are not used or if the principles steering the interpretation are dismissed.[12] Accordingly, the EU and national law related to sports law and image rights are reviewed. In addition, the relevant legal texts and literature in the scope of the commercial use of the image are studied.

1.4 Outline

After the introductory Chapter I, the Chapter II of this thesis will provide an overview for the grounds of the sports law falling under the scope of the EU law. Included in this Chapter are the widespread case law established by the CJEU on the issues related to sports, and the review of the background of the Article 165 of the Treaty on the Functioning of the European Union[13] (TFEU). The TFEU is the instrument that brings the sports law into the EU's competence. The reference to the internal market for sports law will be made. Also included to the Chapter II, the Finnish legal regime on sports law and the position of an individual athlete within this regulatory framework will be analysed. The last part of the Chapter assesses the relevant national laws touching upon the image rights.

The Chapter III combines two kinds of agreements: sponsorship agreements and athlete contracts. The reasons why it is indispensably for the athletes to form the sponsor relationships will be elaborated. Further the Chapter III assesses the role of the national federations, and conducts a case study on

[11] Ari Hirvonen, 'Mitkä metodit? Opas oikeustieteen metodologiaan (2017) Yleisen oikeustieteen julkaisuja 17, at 36-40
[12] Aulis Aarnio, *Laintulkinnan teoria* (WSOY 1989) at 195
[13] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012

actual athlete contracts pointing out the flaws within the contracts. The equality between the parties and the athletes' contract consisting out of sports federation and athlete will be considered. The lack of equality will be elaborated and noted in the sense that the young and the ignorant athletes do not always know what they are signing. The role of the federations and the inequality between the parties to the athlete contract will have relevance in the reasoning for the shift towards transnational protection of the image rights.

Chapter IV, before the Conclusion, will establish the means of abusing the image of the athletes. After these are explained, the Chapter will apply the relevant IPR laws to fulfil the loopholes in the subject matter. In particular, the regulations on trademarks and to some extent copyrights will be discussed. As it will conclude that the protection given by the trademarks does not suffice, a proposal for an international agreement on the image rights will be given. Further, the viability of this alternative will be discussed. The functionality of the international agreement is assimilated to the existing, succeeding regulatory framework on the anti-doping practice.

2 Athletes within the EU

Sleeping, eating, training, repeating – a life of an athlete in a nutshell? These activities are a general part of a regular day of an athlete, professional or amateur, which have dedicated full time in sports and live off allowances from the sports federations, prize money and sponsorships. There is not a much of time to build a professional career other than that of being an athlete. In other words, all the financial benefits that the sports bring for an athlete count as an income.

But is the income of the athletes the result of services of an economic activity? In *Christelle Deliege*[14] the national court argued that the sports celebrities are able to receive rather high levels of income, due to their celebrity status, leading to provision of services of an economic nature[15]. Based on the presented argument by the national court the most successful individual athletes are engaged in the economic activities due to their income. To this effect the CJEU has clarified that the interpretation of economic activity can not be restrictive[16].

The Court stated that the 'services are considered to be services within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.'[17] As a result the Court established that the athletes providing the services of an economic nature fall within the scope of Article 59 of the TFEU, and the fundamental rights of the EU apply to them.[18] Hence, there is a strong link between sport, policy and laws.

[14] Joined cases C-51/96 and C-191/97 *Christelle Deliege v Ligue francophone de judo et disciplines associées ASBL, et al.* [2000] ECLI:EU:C:2000:199
[15] ibid para 13
[16] ibid para 52; Case C-53/81 *Levin v Staatssecretaris van Justitie* [1982] ECLI:EU:C:1982:105, para 13
[17] *Christelle Deliege* (n 14) para 55
[18] ibid para 56

Whilst assessing the sports law in general the various branches of law are covered. For instance, the issue of individual athletes' rights and requirements in commercial use of their image is most commonly a matter of contract interpretation. However, as argued by the scholar, the legal doctrines and principles regarding sports marketing in general form a judicial mixture that protects athletes' legal interests.[19] Such a mixture consists of intellectual property laws and doctrines, that are, copyrights and trademarks, as well as the image rights, right of publicity, marketing and protection under competition rules.

This Chapter aims to provide an overview of the legislative framework in both the EU and national level to give an understandable legal context for sports in the Europe. The Chapter elaborates the EU law rules that support harmonisation of sports law at the EU level. Furthermore, the relevant national laws of the selected Member State will be reviewed. The explanation that there is a minimal interaction between these two legal set-ups in the area of sports law will be given. However, the free movement of persons being one of the fundamentals of internal market of the EU[20] enables the common rules on such economic practice. I argue that sports being more economic practise is a result of an expansion of the commodification by means of marketing and endorsement. One of the subjects being endorsed is the image of an athlete.

2.1 EU law and sports

The question whether there is such a thing as EU sports law is likely to be answered affirmative. [21] December 2009 is a breakthrough for the EU sports law – by the virtue of the Lisbon Treaty. However, the roots were established in the earlier days. Already before the Lisbon Treaty, since the

[19] Lars Halgreen, *European Sports Law – A Comparative Analysis of the European and American Models of Sport* (2nd edn, Karnov Group Denmark A/S 2013), at 334
[20] Catherine Barnard, *The substantive law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013) at 229
[21] Stephen Weatherill, 'Is There Such a Thing as EU Sports Law?' in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. ASSER PRESS 2012)

70's, the CJEU has paid attention whether various sporting rules and practices were in line with the EU's mission.[22] In addition, the Amsterdam Treaty in 1997 referred to the sports by the publication annexed to the Treaty[23]. The publication did not have any legally binding effect though. Even if the EU sports law is found to be less exhaustive, the law will have a well-recognised interest and legal status under the EU's legal order.

Article 165 of the TFEU stipulates the legal concept of specific nature of sport. The concept encompasses all characteristics that make sports so special, such as the multifunctional character, interdependence between competing adversaries and the pyramid structure of the open competitions.[24] The specific nature of sports is to be taken into account when assessing whether a number of sporting rules comply with the fundamental rights, free movement laws, prohibition of discrimination, and competition rules of the EU.

The Union takes a stance in the field of sports and development. Pursuant to paragraph two of the Article 165 of the TFEU, the actions taken by the Union shall aim at 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen'. Paragraph three of the Article 165 encourages Member States of the Union to foster cooperation with third countries and the competent international organisations. The cooperation is vital and refers back to the special nature of sports – the interdependence between the competing adversaries manifestly reaches outside the Europe.

Moreover, Article 6(e) of the TFEU prescribes that the Union has only an ancillary competence in the field of sport. Paragraph four of the Article 165

[22] See Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140
[23] Official Journal of the European Communities, C 340, 10 November 1997, at 136
[24] Simon Gardiner, Richard Parrish and Robert CR Siekmann, *EU, Sport, Law and Policy: Regulation, Re-regulation and representation* (TMC Asser Press 2009) at 7

of the TFEU reveals the feeble powers of the Union by restraining the way in which it may contribute to the achievement and objectives referred to in that article. In particular, the European Parliament and the Council shall adopt incentive measures only – excluding harmonisation of the laws and regulations of the Member States. Accordingly, the Council, acting on the proposal from the Commission, shall adopt merely recommendations in the field of sport.

2.1.1 Fitting sports into the internal market project

The EU sports law materialises specifically in the application of the Treaty rules on free movement of persons[25] and competition[26]. The rights of the free movement of persons and the competition rules shape a firmly founded pattern of the legal doctrines. The compliance of national practices in the field of sports is checked according to these legal doctrines at the EU level.[27] Because of the obligation to comply with the Treaty rules and doctrines one can not simply say that sports are not a EU's business.

In *Walrave & Koch*[28] the CJEU delivered its first ruling in the context of sports and the Union law. Despite the statement that the EU law does not apply to pure sporting interest the decision given by the Court clarified the role of the EU law in the field of sports. In particular, the ruling was important for the future sports cases since it has been the very first time the Court elaborated the practice of sports as subject to Union law under certain conditions. In particular, the Court held that sports are subject to the law of the Union in so far as the sporting activities constitute an economic activity

[25] ibid Article 45
[26] ibid Articles 101 and 102
[27] Ivo Belet, Roger Blanpain, Michele Colucci, et al., *The Future of Sports Law in the European Union: beyond the EU Reform Treaty and the White Paper* (Kluwer Law International 2008) at 2
[28] *Walrave and Koch* (n 22)

under Article 2 of the EC Treaty.[29] Later on the ruling has been confirmed by the Court's decisions in a number of other cases[30].

Furthermore, there is an important notice given by the Court in the cases concerning sports and the internal market. The Court has held that the justification for the exceptions to the principle of non-discrimination is not based on the basic grounds of public policy, public security or public health in Article 45(3) of the TFEU. Instead, the justification is based on the fact that certain sporting motives are not considered to be economic.[31] Perhaps such justification ground for the modern case law is not usable because of the fact that the sports in today's context are more often found to be an economical activity. Arguably, it is the economic nature that makes the sports cases to fall under the scope of the internal market law in the first place. Perhaps one could say that the pure sporting activities, such as 100 meters running or 50 meters swimming performance, are not economic in a way that they are all about the pursuance of optimal performances. However, these performances could always be looked at the economic viewpoint in the sense that the optimal one leads to success, and the success leads to the celebrity. Celebrity, in turn, leads to the attractiveness of the athletes' image in the commercial sector. The statement that the sporting motives are non-economic must therefore be challenged. There is a strong and non-escapable economic nature of today's sporting motives. The justification grounds for discrimination should be duly re-considered.

The free movement of persons, and further the anti-competitive issues form an amount of the more apparent cases in which the EU law has been applied

[29] ibid para 4
[30] Dona (n 3) para 12; Case C-415/93 *Union royale belgie sed sociétés de football association ASBC and others v Jean-Marc Bosman and others* [1996] ECLI:EU:C:1995:463 para 73; Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECLI:EU:C:2006:492 para 22; Case C-49/07 *MOTOE* [2008] ECLI:EU:C:2008:376 para 22; Case C-325/08 *Olympique Lyonnais* [2010] ECLI:EU:C:2010:143 para 27; *Christelle Deliege* (n 14) para 41; and Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basketball ASBL* [2000] ECLI:EU:C:2000:201 para 32
[31] See *Walrave and Koch* (n 22)

to sporting rules.[32] For instance, in *Lehtonen*[33] a Finnish basketball player challenged the restrictive transfer rules established by the Belgian Basketball federation. The CJEU took a stance in the case by clearly showing how certain rules on sports breach the free movement of persons right under the TFEU. The Court clarified that the so-called transfer windows rule restricting the transfer of professional basketball players from one club to another during a competitive season was not in compliance with the internal market.[34] Whilst the case did not involve an issue of discrimination based on nationality[35], the assessment was to be conducted under the Article 48 of the TFEU on the principle of free movement of persons. Where the restriction to the freedom of movement right was found, the Court went on to assess the possible grounds for justification. In particular, the Court evaluated the applicability of the justification based on legitimate sporting objective, that is, a regulatory and proper functioning of competition in the field of basketball. Even if it was left to the national court to ascertain, the CJEU have been strikingly validated the restrictions aimed at legitimate sporting objectives.[36]

2.1.2 EU Competition law and sports

The anti-competitive issues being considered, it must be showed that the federation or other organisation conducting sports practice fulfils the criteria set out to the application of Articles 101 or 102 of the TFEU. First, a federation concerned is to be considered as 'an undertaking' or an 'association of undertakings' when its members such as the athletes are engaged in economic activity[37]. Secondly, the sporting rule is to restrict competition within the meaning of Article 101(1) of the TFEU. Thirdly, the trade between Member States must be affected. To save such a sporting rule

[32] Mikko Kohtala, 'Katsaus urheilusääntöjen ja kilpailuoikeuden väliseen suhteeseen' in Markus Manninen (ed), *Urheilu ja Oikeus 2011* (Bookwell Oy 2011) at 90
[33] *Jyri Lehtonen* (n 30)
[34] ibid para 60
[35] Simon Gardiner, John O'Leary, Roger Welch, Simon Boyes, et al., *Sports Law* (4th edn, Routledge 2012) Chapter 4
[36] *Jyri Lehtonen* (n 30) paras 51-56
[37] Case T-193/02 *Piau v. Commission* [2005] ECLI:EU:T:2005:22 paras 69-72; and Commission Case 37806 *ENIC/UEFA* [2002] para 25

the conditions for exception under Article 101(3) of the TFEU need to be fulfilled. To this effect, the national sports federations carry out activities of an economic nature, notably as regards for instance the conclusion of sponsorship contracts. Moreover, in order to fall under Article 102 of the TFEU the dominance of an undertaking in a relevant market must be proved.[38] National federations frequently have monopolies in certain sports and in organising certain sports events. Hence, they are able to fall under Article 102 of the TFEU and are prohibited for abusing of the dominant position therein.[39]

In what specific ways may the national federations then be claimed for abusing their dominant position? A Finnish case on *Finnish Biathlon federation*[40] concerns a contract between an athlete and the federation, which restricts the athletes' ability to promote their own sponsors, that are rivals to the ones of the federation's, when the athletes represent the nation by taking part in the international competitions. Moreover, signing the contract by the athletes is a prerequisite for being appointed to the national team and so for being able to participate in the internationally significant competitions such as world cups and championships. In the case it was claimed that principally the international competitions had the relevance in seeking new sponsors by an individual athlete. Thus, by establishing such prerequisites the federation was claimed for being in a position of abusing the dominant position. In this particular case, taking into account the *ex ante* published selection criteria and the conformity of the rules established by the national federation with the international one, the federation's procedure was not questionable. The Finnish competition authority and the Market Court dismissed the case based on the fact that it is not for them to assess the compatibility of the rules established by the national federation with those established by the international umbrella organisation. Furthermore, the sound and effective competition was not affected by the challenged

[38] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) at 189
[39] Arnout Geeraert, *Limits to the autonomy of sport: EU law'* (KU Leuven 2013) at 17
[40] See MAO 244/13

rules. The case shows the fine line where the sports case actually falls under the scope of competition law. The threshold of the economic relevance is set up surprisingly high when the competition law concerns are invoked in the sports-related cases.

2.1.3 Contracts

The contracts have a high importance within the scope of sports law. Under the EU law the contracts form a somewhat obscure component. The principle of conferral under Article 5 of the Treaty on the European Union[41] (TEU) determines the limits of the EU's legislative powers and the competence of the Union in the harmonisation of the national laws. To the far extent the contracts are the matter of the Member States to legislate. However, the internal market project largely drives the legal concept of contract law in the EU. In particular, the internal market law of the EU assesses the compatibility of national law. This applies to the review of contracts and national law on contracts as it does for any other national rules. Correspondingly, the scholar has argued that the involvement of the Union in the contract law diminishes the proper understanding of the legal dogma of the contracts as whole.[42] The idea of the EU contract law can not be ruled out though.

The relevance of the harmonisation of contract law in the EU is that it establishes a legal, protective aquarium for the parties concluding the inter-state sponsorships and contracts. The common rules also would bring a ground for the standard clauses related to the commercial use of the athletes' image. It would then bring legal certainty to the matter. Further it would approximate the rather diverse national laws.

[41] Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012
[42] Stephen Weatherill, *Contract Law of the Internal Market* (Intersentia Ltd 2016) at V, 18

2.2 What does the national law say: discovering Finnish law

Sports law is a great example how a branch of law does not always fit into the clear division of public or private law. Instead, the sports law is largely based on the combination of the sovereignty of governmental organisations and the self-regulation by the non-governmental organisations. This legal set-up is based on the unique umbrella structure of sports and the position of an athlete therein (see Illustration 1). An important component to the sports law *acquis* is the national law. The national law constitutes the basic protection, such as the personal rights, for an individual athlete.[43]

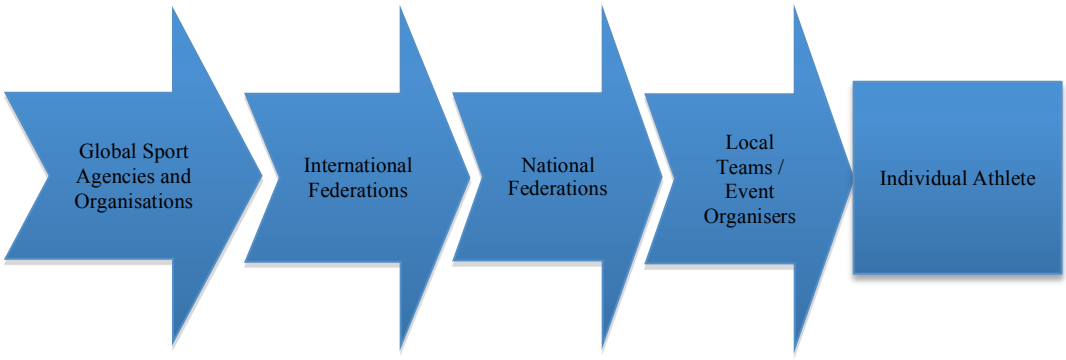

Illustration 1: The athlete's position in the (regulatory) umbrella structure of sports – there is an individualised and localised focus of sports within the global ambition.

Similar to the EU law, there is no number of specific regulations or doctrines on sports in Finland.[44] Even if sports are moulded into its own branch of law it rather will consist of various elements covered under the other law doctrines. The multiform nature of the legal framework of sports might make one questioning whether there is a branch of law called as sports law in the first place. Indeed the question of the existence of sports law, even at the national level, is not simple. But I argue that the answer is affirmative here too. Even if sports law in Finland does not fulfil the

[43] Heikki Halila and Olli Norros, *Urheiluoikeus* (Alma Talent Oy 2017) at 1-2; and András Nemes, *European Sports Law,* presentation available at <http://tf.hu/wp-content/uploads/2010/04/European-Sports-Law-András-Nemes.pdf> (accessed 2 April 2018)

[44] Heikki Halila, 'Perusoikeuksista urheilussa', in Markus Manninen, *Urheilu ja oikeus 2011* (Bookwell Oy 2011) at 51

conceptual requirements[45] to be defined as a specific branch of law, it is somewhat classified as a law of a lifestyle. In other words, sports law is where the justice and the specific area of life meet.[46] And this is what makes it so fascinating – it combines knowledge, interests and numerous legal questions that might not always even relate to the fundamentals of sports, that are, sporting activities themselves.

Sports law covers many branches of law in one legal system. When researching sports law, the approach must rather be taken by establishing specific legal questions. Where these questions are identified the relevant law will be determined accordingly. Referring to the research questions of this thesis, the national juridical principles on basic rights such as personal rights, as well as image rights, contracts, unfair business practices and the intellectual property law form the relevant laws to be examined.

2.2.1 Freedom of contract

Under the freedom of contract, the individuals and the entities may regulate their mutual legal relationships by separate agreements.[47] This freedom is a corner stone to the contract law, however, various provisions protect both parties to the agreement. The national sports federations, local teams, and individual athletes may freely conclude a variety of agreements. Two types of contracts being examined in this thesis are first, a contract between a national federation and an athlete, and secondly, sponsorship contracts between the athletes and the undertakings. Reflecting to the both types of contracts, a relevant law to this effect is the Finnish Unfair business practices Act[48] (FUBPA).

[45] There must be an amount of specific norms or legal doctrines that form a branch of law under the Finnish legal system. See Heikki Halila and Olli Norros (n 43)
[46] Heikki Halila (n 10) at 2, 10
[47] Toivo Mikael Kivimäki and Matti Ylöstalo, *Suomen siviilioikeuden oppikirja* (Juva 1981) at 57
[48] Laki sopimattomasta menettelystä elinkeinotoiminnassa (Finnish Unfair Business Practices Act) 1978/1061. Available in English <https://www.finlex.fi/en/laki/kaannokset/1978/en19781061_20020461.pdf> (accessed 2 April 2018)

According to Section 1 of the FUBPA, a good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business. Established that the athletes are business practitioners, the provision is to be respected whenever athletes conclude agreements between their future-to-be sponsors. Moreover, Section 2 provides that any false or misleading expression concerning one's own business or the business of another may not be used in business if the said expression is likely to affect the demand for or supply of a product or harm the business of another. That provision is of the great importance in case of the commercial use of athlete's image. Accordingly, to associate an athlete with the advertised product without an authorisation given by the athlete counts as a giving of a misleading expression. The association may create invalid impression to the target audience of the ad as well as the loss of reputation of an athlete. And that is what the Section 2 of the FUBPA protects against for: harming the business of another. Scarcely wish the athletes to be associated with the products they do not preferably consume. Under the sports law context the provisions under the FUBPA have an effect of protecting the parties to the sponsorship agreements together with the international rules established by the International Chamber of Commerce (ICC)[49].

Even if the FUBPA protects all the parties to the contract the position of the individual athletes is not equally good. Whereas any other laws such as consumer protection laws and employment laws do not apply, the athletes are provided with a rather weak legal protection. Individual athletes are considered as business practitioners and should be comparable to all kind of undertakings, big and small. The freedom of contract provides the opportunity to a number of commitments by the parties. The inequality between the parties leads to the unfair athletes' obligations from which the athlete, blindly agreed, can not diverge. Therefore, I argue that there is a lack equal mutual relationship between the parties to the athlete or sponsorship contracts – even if the FUBPA existed.

[49] See Chapter 3

2.2.2 Image rights: main principles and *ratio legis*

Generally, image rights are considered to include the rights connected to one's own picture, name, reputation, signature and other personal identity subjects such as charisma.[50] In Finland, they have the similar effect to the personal rights, which are considered as classical civil rights rooted in the Roman law. Furthermore, the right to personality is also referred to as a personal right[51], which literally protect one's personality and optionally give legitimate ground to restrict that protection.[52] Where these rights are not used as synonyms, they form a wide scope of protection against an unauthorised use and exploitation of an individual's characteristics.

The name of an athlete is protected against unauthorised commercial use. This protection is automatic, in other words, there is no need to register or to do any other protective measures regarding the name. Such a protection is based on the intellectual property rights, namely trademark law.[53] Eventually, there are some restrictions applied to this right. It protects only to the extent as it restricts others in taking or exploiting the surname of an athlete as their own.[54]

In practice, the athletes transpose the right to use and to exploit their names and images to the national federation or enterprises. Contracts between athletes and the undertakings form a sponsorship that fundamentally aims to

[50] See Richard Haynes, 'The Fame Game: The Peculiarities of Sports Image Rights in the United Kingdom' (2004) Trends in Communication Vol 12 Issue 2-3
[51] Heikki Halila, *Henkilöoikeuden perusteet* (2008) at 1-2. Available at <https://courses.helsinki.fi/sites/default/files/course-material/4506172/Henkilöoikeuden%20perusteet%202008%252c%20Halila.pdf> (accessed 18 March 2018)
[52] Ahti Saarenpää, 'Henkilö- ja persoonallisuusoikeus' in *Oikeusjärjestys 2000, part III* (2003) at 304
[53] European Intellectual Property office (EUIPO), Guidelines for Examination in the Office, Part C, Opposition, FINAL 23 March 2016, Section 7.2. Available at < https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/trade_marks_practice_manual/WP_2_2016/Part-C/02-part_c_opposition_section_2/part_c_opposition_section_2_chapter_7_global_assessment/part_c_opposition_section_2_chapter_7_global_assessment_en.pdf> (accessed 9 May 2018)
[54] Martin J Greenberg, *Sports law practice* (Michie Co 1993) at 589-596

finance or in other way to support the athletes' career. Reciprocally, they also aim to maximise the utilisation of athletes' names or images in the field of undertakings' business. Many times these contracts aim at a long-time sponsorship where the athletes benefit from the cooperation even during the time after the end of their career. Accordingly, athletes have handed over certain rights related to their persona, such as name, pictures and reputation, for the use of the undertakings in question.

The issues rise when the image rights have been handed over to the two separate undertakings within the same business area. It is probably the worst scenario where these undertakings are rivals. In such a case athletes might commit a breach of a contract with the former undertaking to whom they have dedicated the exclusive rights to their image. These kinds of double-transpositions of athletes' image rights take place where an individual athlete is selected for the national team. It actually might often be so that the athlete's own sponsor is a rival to the one of the national federation.

2.2.3 Criteria to prevent the exploitation of the image

Besides the issue of double-transposition of the image rights, the exploitation of these rights is a massive problem. Therefore, there are the three criterions according to which the commercial use of athletes' images is considered as legal.[55] The first criterion is the authorisation to be obtained from the athletes or the other owners of their image rights before the commercial use takes place. The accuracy of the authorisation is to be evaluated on case-by-case basis. Yet the *ex ante* authorisation and the principle of voluntariness have to be observed.[56]

The second criterion encompasses the condition that the person is not recognisable in the picture or the name shown. Where no one can be recognised in the picture, or the name is too general, there is no right to rely

[55] Salla Autio, 'Urheilijan nimen ja kuvan luvaton käyttö markkinoinnissa' in Tapio Rantala (edn), *Urheilu ja oikeus 2017* (Bookwell Oy 2017) at 65-78
[56] See cases KKO 1982-II-36 and HelHO 2007:20

on the commercial use of the image ban. The recognisability in the picture might be easily fulfilled. For the name it may be a bit more challenging, even if the name was to be understood as including the first, last and artist name as well as the signature.[57] With both the picture and name, the recognisability is to be objectively assessed. This means that, for instance, even if one recognises oneself in the picture the criterion might not be fulfilled. The person needs to be recognised by the group of people[58] – not just by the family or relatives[59]. In case of celebrities or well-known athletes the recognisability is fulfilled rather easily.

The third criterion concerns the purpose of the use. Namely, where the image of an athlete is associated with any kind of commercial use it is likely to be considered as illegal where no authorisation is obtained. An example of non-commercial public use would be journalism, such as the use of a picture in the newspaper to communicate the end result of a competition to the public[60].

The above-explained criteria are not cumulative. This means that the fulfilment of at least one of them grants the legality of the use of an image. But, as the evaluation is based on case-by-case analysis, the other relevant legal provisions on image rights can not be forgotten. Moreover, despite the established commercial use ban on one's image, the sanctions to the abuser do not compensate the negative publicity to the offender. Therefore, there is a need for the improved protection of the image rights.[61] There are some specific laws on commercial use of the image at the national level[62]. However, one would argue that the diverged protection even within the EU still leaves some loopholes into the protection of image.

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[57] Krister Malmsten, *Idrottsutövares namn oc bild i reklam* (2001) at 156-166
[58] Katja Vaahtera, 'Oikeus omaan kuvaan ja look alike –kuvaan markkinoinnissa' (2014) Acta Legis Turkuensia 2014, at 41-67
[59] See KKO 1989:62
[60] Paula Paloranta, *Markkinoinnin etiikka käytännössä* (Helsinki 2014) at 136
[61] Trademark law already protects the interests of an athlete to the certain extent. See more discussion on this matter in Chapter 4.
[62] See i.e. Lagen om namn och bild i reklam (Swedish Act on names and pictures in advertising) 1978:800

3 Individual athletes and contracts

Due to strengthen contractual freedom the individual athletes are free to enter into sponsorships with the businesses emphasising their image.[63] This takes often place where athletes realise the financial benefits of the collaboration as sufficient either to cover the costs caused by the sports or to earn their livelihood. Nevertheless, the athletes are subjects to the regulatory framework set by the global sports agencies[64], as well as sports discipline specific international and national institutions, that are, the sports federations (see Illustration 1). Such an institutional structure of sports might limit the abilities of the athletes' contractual freedom, justified by the specificity of sports law itself[65].

In this Chapter the definition of image of an athlete will be given. Furthermore, the reasons for the contracts with both sponsors and national federations will be elucidated. The point is made on the matter that the problems may arise where the commercial use of athlete's image by businesses other than that sponsoring the sports federation takes place. In other words, there may arise a problem when an individual athlete concludes a sponsorship with business that is not a sponsor of the federation with whom the athlete has an athlete contract. Many contracts between athletes and federations try to solve this by imposing to some extent restrictive provisions on commercial use of athlete's image. As a consequence the contracting athletes may face a barrier to conduct economic activities, for instance, when attempting to get funding for their sports career.[66] This

[63] Barbara Bogusz, Adam Jan Cygan and Erika M. Szyszczak, *The Regulation of Sport in the European Union* (Edward Elgar Publicshing Limited 2007) at 178
[64] See for instance World Anti-Doping Agency (WADA). Available at <https://www.wada-ama.org/en/who-we-are> (accessed 15 April 2018)
[65] See Tomas Gabris, 'The Specificity of Sports in the International and EU Law' (2010) Annals of the Constantin Brancusi University of Targu Jiu Juridical Sciences Series Vol. 2010 Issue 2 at 171-173
[66] David Thorpe, 'The Use of Multiple Restraints of Trade in Sport and the Question of Reasonableness' (2012) Australian and New Zealand Sports Law Journal Issue 7 No. 1 at 66

Chapter will conclude with the discussion whether contract clauses on the image are restrictive, protective, or well justified.

3.1 Athletes' image and the purpose of sponsorship

The purpose of the sponsoring in sports in general is to achieve the objectives of the both parties to the contract. These objectives are referred as the benefits that result from the synergy, or in other words collaboration, between an athlete and an undertaking. As simply put, athletes need money for their career progress and an undertaking needs promoter for its goods or services.

The very essence of a professional athlete is to perform sports to the very best extent possible. Many times the condition peak is desired to exist in the internationally most significant and appreciated competitions such as world championships or the Olympics. The way to get there requires the number of hours of contribution, not only in the place of sports performance (training), but also in the negotiations with possible sponsors and other parties to the collaboration. The work to attain both physical and financial resources are vital in all kind of sport.

The reason why different businesses want to engage in sports and with certain athletes is their known positive image. To name few features, athlete's image contains athletic performance, reputation, charisma, and personal identity. These elements of the athletes, besides their acquired goodwill, generate increased revenue for an undertaking.[67] The definition of an athlete's goodwill, in turn, is somewhat multifunctional. Fundamentally, the goodwill is based on the performance of an athlete and the resulting reputation. Further, the goodwill means the appearance composed of the

[67] Rainer Oesch, 'Urheilijan oikeudesta omaan kuvaan muuttuvassa sopimus- ja markkinointiympäristössä' (2011) Defensor Legis Issue No 6 at 743

performance, reputation and overall vision created by the athlete.[68] The goodwill is managed and transferred from the athletes to their sponsors by contracts. The goodwill often brings economic benefit for the both parties to the contract. The goodwill might as well be tainted by an athlete. Therefore a contract plays a role as insurance for the undertakings that would be able to terminate the contract in such situations.[69]

3.2 International rules that govern sponsorhip contracts

To ensure that the interests of both parties to the contract are protected, certain internationally accepted rules established to govern sponsorships in general. The ICC has issued a code on sponsorship that lays down important rules on sales promotion, sponsorships, direct marketing, digital interactive media and environmental claims.[70] The ICC is an international organisation having a mission to promote the international economy and business as well as to promote entrepreneurship.[71] The involvement of ICC code in the world of sports is important because the sports increasingly attract business, *inter alia*, through the increased involvement of media.[72]

In the context of this thesis, the most relevant rule imposed by the ICC is the rule B2. Accordingly, the sponsorship should respect the autonomy and self-determination of the sponsored party in the management of its own activities and properties, provided the sponsored party fulfils the obligations set out in the sponsorship agreement. To the far extent this clause is to be found in the

[68] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) at 829
[69] Rainer Oesch (n 67) at 743
[70] Consolidated ICC Code of Advertising and Marketing Communication Practice Document No. 240-46/660 (2011). Available at <http://www.codescentre.com/media/2083/660%20consolidated%20icc%20code_2011_final%20with%20covers.pdf> (accessed 8 May 2018)
[71] See ICC – International Chamber of Commerce, *'About us'*. Available at <https://iccwbo.org/about-us/> (accessed 11 April 2018)
[72] Ragnar Lund and Stephen A. Greyser, *More Effective Sports Sponsorship – Combining and Integrating Key Resources and Capabilities of International Sports Events and Their Major Sponsors* (Harvard Business School Working Paper 2016), at 12. Available at <http://www.hbs.edu/faculty/Publication%20Files/16-139_ef87ec49-a8c0-46d3-8761-99f70e68543b.pdf> (accessed 11 April 2018)

sponsorship contracts. However, the rules of the code apply only where the contracts between an athlete and sponsor are concerned. Other types of contracts, namely the contracts between an athlete and national sports federation won't be directly affected by the ICC code. Instead, they are affected by the rules established by the international umbrella federation founded for that specific field of sport.

3.3 The role of the sports federations

The local sporting rules are for the sports federations, both international and national, to establish. This is based on the autonomy given to the federations in order to, *inter alia*, develop sporting activities. The established rules are, however, required to regard the respective national and EU laws. Where the rules are doubted to restrict some of the fundamental rights, such as economic rights, they do lead to the legal considerations. In particular, it is about the balancing between the regulatory autonomy of the federations and the protection of the economic rights of the bodies involved in sports.[73]

This takes us to the specific role of sports and sports federations under the EU law. The Commission has acknowledged that 'sporting organisations and Member States have a primary responsibility in the conduct of sporting affairs, with a central role for sports federations.'[74] But what role do the sports federations play? They have an economic as well as non-economic role for the pursuit of sporting motives.

As a non-economic actor the federations promote the sporting motives by supportive functions. Moreover, the federation grants certain benefits for the athletes to encourage their sporting careers. The supportive functions are largely found in the athlete contracts as the rights of an athlete[75]. On the other hand, the sports association is an economic actor[76]. The activities that

[73] See Stephen Weatherill, 'The Influence of EU Law on Sports Governance' in Stephen Weatherill (ed) *European Sports Law* (T.M.C. ASSER PRESS 2014)
[74] White Paper on Sport COM/2007/391 final at 2
[75] See Section 3.4 of this thesis
[76] Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECLI:EU:C:1991:161 para 21

include fundraising for the sporting activities are considered as economic activities. The economic activities in this context mean, *inter alia*, the sale of commercial rights to the media.[77] Where the practices are considered as economic activities the federation may be considered as a subject to the Union law.

The role of the national federation is a so-called bottleneck for athletes' official representation in the elite sporting competitions. In other words, the federations have a freedom to select individual athletes to participate on national teams for international competitions.[78] In *Christelle Deliége* the Court held that this is in no way a restriction to freedom to provide services.[79] However, the ruling applies only in so far as the representation of national team is concerned. To this effect, the Court has held that Article 45 of the TFEU precludes any restrictive rules laid down by sporting associations that have effect in hindering the athletes, that are nationals of the other Member States, in participating to the matches or competitions organised by those sporting associations.[80] Hence, athletes preserve their free movement rights. The presented case law shows that the Union law intervenes with the sporting game played by the federations.

By the communication[81] the Commission has stated that it respects the autonomy of sports governing structures. Despite this, the Commission aims to provide a European platform for the sports stakeholders and furthermore to spread and to promote good practices as well as a development of the sports field in the EU.[82] Namely, the Commission has stated that:

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[77] Mikko Kohtala (n 32) at 93
[78] Robert C. R. Siekmann and Janwillem Soek, 'Towards a typology of (International) Comparative Sports Law (Research) in Robert C. R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (T.M.C. ASSER PRESS 2012) at 337
[79] *Christelle Deliége* (n 14)
[80] See *Union royale belgie sed sociétés de football association ASBC and others v Jean-Marc Bosman and others* (n 30)
[81] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Developing the European Dimension in Sport COM/2011/12 final
[82] ibid at 3

> Good governance in sport is a condition for the autonomy and self-regulation of sport organisations. While it is not possible to define a single model of governance in European sport across different disciplines and in view of various national differences, the Commission considers that there are inter-linked principles that underpin sport governance at European level, such as autonomy within the limits of the law, democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders. Good governance in sport is a condition for addressing challenges regarding sport and the EU legal framework.[83]

The attention towards the elite sports increase as the athletes become more and more interesting. Therefore, the stakeholders in sports are expected to preserve the principle of good governance. In particular, the good governance in sports presumes the bodies to behave pragmatically, flexibly and proportionally. The principle aims to facilitate the development and implementation of the more effective sports regulation internationally.[84]

The sports are a global phenomenon. Therefore, the principle of good governance shall apply throughout the whole spectrum of sports organisations – from the grass root sports organisations, and national umbrella sports organisations to the European and international federations. Whilst the principle of good governance involves many national and international sports disciplines and bodies, it is not only linked to the EU.[85]

[83] ibid at 10
[84] Expert Group "Good Governance", ' *XG GG – Deliverable 2: principles of good governance in sport*' (2013) EU Work Plan for Sport 2011-2014. Available at < http://ec.europa.eu/assets/eac/sport/library/policy_documents/xg-gg-201307-dlvrbl2-sept2013.pdf> (accessed 8 May 2018)
[85] ibid at 4-5

3.4 Study on athlete contract clauses and issues raised therein

When the individual athletes reach the high level in sport, or fulfils the other criteria published by the federation, they will be selected into the national team. The selection into the national team is partly for the purposes of an athlete being able to represent the nation in the world championships and Olympic games. The team does have other purposes too. The important instrument engaging an athlete and the federation in the cooperation is an athlete contract. The athlete contract is a device facilitating to achieve the purposes, such as long-time progress of an athlete, in sports. The following will go through the clauses in two athlete contracts and the deficiencies experienced by the contracting athletes.

'An athlete is on the central focus of an attention'[86]. Those words are the beginning of an athlete contract between a federation and an individual athlete. It is vital to the contracts that their fundamental aim is to promote the career of an athlete to the top international level through a successful training system. Without the distribution of responsibilities generated by the agreed collaboration between the parties there would not be a reciprocally beneficial contract. The activities under the contract between these two parties differ, but the vital common goal is the same: success in sport.

The athlete contract covers a wide range of topics including sporting activities. After the signature an athlete engage in to observe the rules established by the international umbrella federations with regard to the sports specific rules, such as anti-doping activity[87]. Engagement in the international rules is in fact a prerequisite of performing any professional sports at the international level. In addition to the international framework rules and principles there are many contract specific rules established by the

[86] Athlete contract II, The background and purpose
[87] See WADA, World Anti-doping Code 2015. Available at <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf> (accessed 8 February 2018)

national federation. Therefore, the individual athletes are subject to the regulatory umbrella structure of sports: the rules established by the international organisations, as well as international and national federations apply to them (see Illustration 1).[88] These rules lay down the rights and obligations that are shared between parties to the athlete contract.

Most of the obligations imposed on the federations relate to the creation of the sporting facilities for the athletes. The sports federation is responsible for organising the quantitatively adequate and sufficiently high-level training facilities and other ancillary activities. Those are done to the extent of the federation's functional and financial capacities. The federation's obligation is the provision of sufficient number of trainers during the training sessions. Further the federation needs to ensure that the medical services are available at command. Taking into account the financial budget of a federation an athlete is entitled to have trainers and other staff providing ancillary activities at hand when the athlete has been selected to represent the nation in the international competitions.[89]

There are number of duties to which an athlete is obliged to when signing the contract. For instance, athletes are required to engage in the lifestyle of professional athlete for 24 hours within the contract period of 12 months. This system commits the athletes to duly taking care of their training and maintenance, rest, diet, mental training, and management of other areas of life. Instead of direct financial compensation the athletes are entitled to receive other benefits such as training facilities, a fully prepared program for the training camps and competitions, allowance for the equipment, and the clothing. The additional amount of deductible is to be paid by an athlete at certain dates of payment.[90] The deductible is to be paid by the athletes themselves, for which they actually do need the income.

[88] Olli Rauste (n 8) at 29
[89] Athlete contract I, clause no. 3
[90] ibid, clause no. 4

For the most part, the different kind of costs on athletes' shoulders result in the conflicts. An athlete argues that the compensation given to the athlete is very low compared to the requirements imposed by the sports federation within the athlete contract[91]. An athlete is, for instance, obliged to participate in the national championships but the traveling cost within the home country is to be covered by an athlete. Moreover, the athlete is required to participate to the specific amount of events other than that related to the competitions and training, such as to the events organised by federation's sponsors. Furthermore, the requirements imposed by the federation would, for example, mean restrictions to the athletes' rights to their own image.

The individual athletes do not get reimbursed by the means of salaries paid by the federation. Rather they get the support solely in sports. In return, athletes are to hand over their image rights including their names, pictures, voices and other production produced by the athletes. Federation and its sponsors will exploit these as agreed with the athletes. Many times athletes are prohibited to collaborate with the undertakings that conduct business in the same sector as the federation's sponsors. Moreover, the athletes engage to use the federation's clothing and commodities when participating in the training camps, competitions and other official and public events organised by, or representing the federation. In breach of this provision an athlete is responsible for the requirements set by the federation's sponsor.[92] To this effect, the clauses related to the athletes' image seem restrictive in their nature.

The federation encourage the goodwill of the athletes through the athlete contract. In particular, to maximise the visibility of the athletes the contract emphasises the importance of them being active in the social media. Whilst being active in the public and further conducting other activities such as concluding agreements with the individual sponsors, an athlete must support

[91] Interview with the athlete being party to the athlete contract II
[92] Athlete contract II, clause no. 4.3

and promote the positive vision of the concerned sports.[93] This is important since by promoting the goodwill of the sports as a whole the undertakings are kept closely interested in the sporting activities.

The goodwill of sports attracts the business. The great part of the financing for training and competition activities comes from the sponsors – these being the federations or the athletes' own. Athletes are entitled to individually conclude contracts with the sponsors to the certain limited extent. The federation often sets the contract specific rules, but overall an athlete is allowed to represent the undertakings that do not conflict with federation's sponsors. Therefore, prior to the conclusion of the contract the consent by the federation is required.[94] Such a requirement of confirmation refers to the tripartite agreements that the athletes conclude with their individual sponsors and the federation. By being party to the contract the federation is able to control the individual sponsors of the athletes. Moreover, the federation is able to prevent the athletes in contracting with the rivals to the official sponsors of the federation itself.

Any economic use of the image of an athlete is significant. This leads to the provision, one more requirement within the contract, that the federation has a right to monitor the use of athletes' image as well as to prepare claims of unauthorised use.[95] This is somewhat a shielding clause for both of the parties, which strengthen the protection against an unauthorised use of an athlete's image.

3.4.1 Clauses on athletes' image: limitative, protective, justifiable?

The reimbursement that the athletes obtain from the collaboration with their sponsors has mainly two usages: to finance sporting itself and being the athletes' source of livelihood. The athletes' livelihood may be depended

[93] ibid, clause no. 5
[94] ibid, clause 5.3
[95] ibid, clause no. 5.3

almost entirely on their own sponsors.[96] Therefore, the rules controlling the ability to conclude sponsorships may have significant consequences on an athlete. The effect of this dependence can be seen on one's ability to trade and to earn income. But could these restrictions be objectively justified by the federation? Or do these restrictions lead to imbalance between athlete and federation as the parties to the contract? The objectives pursued by the rules are to be considered. This would include the assessment of whether the effects of the restrictive rules are intrinsic in pursuing the objectives and whether they are proportionate.

The two Finnish cases test the stringency of the clauses controlling the athletes' abilities to conclude sponsorships. First case concerns a Finnish athlete who formed a collaboration agreement with an international undertaking without the notification to the federation on the matter. The case became apparent when the athlete began to bring the drinking bottles and beverages covered by the brand of his sponsor to the training camps organised by the federation. The official sponsor of the federation was an undertaking within the same area of industry as was the athlete's own sponsor. The national federation considered the action by the athlete as a disruption of the clause on tripartite agreements but did not take any further actions in the context of such a borderline case.[97] The case thus reflects the flexibility of the limitative clauses on the athlete contracts.

The second Finnish case on the clauses regarding the limitation of an athlete to conclude sponsorship agreements independently concerns the sponsor of the Finnish Ski federation that holds a dominant position in Finland. In particular, the athlete concluded a sponsorship agreement with an undertaking within the business of money lotteries activities. As the operation of money lotteries as well as pools and betting in Finland is

[96] Tuulia Kössö, 'Suomalaiset huippu-urheilijat elävät köyhyysrajalla – laskut maksamatta, rahaa ruokaan toimeentulotuesta tai isän kukkarosta' Yle uutiset (2016). Available at <https://yle.fi/uutiset/3-9217654> (accessed 8 May 2018)
[97] See YLE Urheilu, 'Iivo Niskanen säästyi rangaistukselta' (2015). Available at <https://yle.fi/urheilu/3-8432375> (accessed 13 April 2018)

exclusively granted to the Veikkaus Oy[98], the representation of another foreign undertaking providing these services was considered as breach of the athlete contract. Therefore, the Finnish Ski federation terminated the athlete contract.[99] Furthermore, the athlete contracts between the Finnish Ski Association and the athletes now includes a clause emphasising that an athlete can not agree to the collaboration with an undertaking conducting business in the field of money lotteries[100]. Although the clause is limitative, it has a foundation in the Finnish Lotteries Act[101].

One of the objectives recognised by the EU is a financial status of the sports clubs or teams[102]. Showed that the high majority of the total participants in sports comprises of youth athletes[103], the federation wishes to have the resources to finance the development of the sports activities. The wider grant of use given by the federation, the better is the agreed deal on sponsorship for the potential undertaking. The justification ground for the rules limiting the athletes' use of their image to this effect appears evident.

Furthermore, it is not just the national federations that restrict the athletes' image rights. For instance, the International Olympic Committee has established codes, such as the Rule 40[104], for the duration of the Olympic games. In particular, the Rule 40 states that '[e]xcept as permitted by the [International Olympic Committee] IOC Executive Board, no competitor, coach, trainer or official who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising

[98] Police of Finland, 'Finnish gambling system' (2018). Available at <https://www.poliisi.fi/services/gambling/finnish_gambling_system> (accessed 14 April 2018)
[99] See Finnish Ski Association, 'Hiihtoliitto purkaa Harri Ollin urheilijasopimuksen' (2016). Available at <http://www.hiihtoliitto.fi/en/uutiset/hiihtoliitto-purkaa-harri-ollin-urheilijasopimuksen/> (accessed 14 April 2018)
[100] Athlete contract II, Rights and obligations of the parties
[101] Arpajaislaki (Lotteries Act) 1047/2001, Chapter 2. Available in English at <https://www.finlex.fi/en/laki/kaannokset/2001/en20011047.pdf> (accessed 14 April 2018)
[102] White paper on sport (n 74) para 4.2.(2)
[103] Lars Halgreen (n 19) at 67
[104] See International Olympic Committee, 'Rule 40 Guidelines, XXIII Olympic Winter Games PyeongChang 2018'. Available at <https://www.olympic.si/datoteke/PyeongChang%202018%20-%20Rule%2040%20Guidelines%20-%20ENG.pdf> (accessed 13 April 2018)

purposes during the Olympic Games'[105]. Accordingly, it may be interpreted in a way of restricting the athletes to represent the sponsors other than the Official sponsors of the Olympic team.[106] The economic reasoning behind the rule is protective. Namely, the rule aims to prevent any kind of ambush marketing taking place during probably the World's most followed sports event[107]. This means that the produced protection is not intended only to the official sponsors of the event. Rather, it also has a significant effect on the protection of the athletes' image during the Olympic games.

[105] Olympic Charter in force as from 2 August 2015, Rule 40, Bye-law paragraph 3
[106] See International Ski Federation, 'Guidelines for NOCs regarding Rule 40 of the Olympic Charter'. Available at <http://www.fis-ski.com/mm/Document/document/General/04/59/98/GuidelinesforOlympicRule40_Neutral.pdf> (accessed 13 April 2018)
[107] See International Ski Federation, ' Rule 40 of the Olympic Charter – What you need to know as an athlete'. Available at <http://www.fis-ski.com/mm/Document/document/General/04/60/00/Rule40AthleteQA_Neutral.pdf> (accessed 13 April 2018)

4 Road to improved protection of athletes' image

The image rights of the athletes may be considered as being comparable to the IPR. However, whereas the IPR grant the exclusive rights to their holder[108] the image rights do not do so. This is, because the scope of image rights as personal rights vary nationally and thus are subject to ambiguous interpretation.[109] Perhaps, the more extensive application of the IPR to the commercial use of athletes' image would bring the common clarity to the matter. Further, the protection granted by the IPR would result in the improved prevention of the abuse of the athletes' image.

But, as will be discussed in section 4.2, is the protection granted by the IPR strong enough for the issues related to the commercial use of the athletes' image? The brand of the athletes, including their name, may be protected, *inter alia*, by the trademark registration.[110] Still, the issues rise in the context of one's image. As the EU will not impose general rules applicable to all European sports[111], the rules regulating the use of the athletes' image should be established rather at the global level.

First, this Chapter will establish the different ways of abusing the image in merchandising. The conflict between the right to one's image and the freedom of expression is taken into account and briefly examined through a case study. Secondly, the strength of the protection created by the IPR to the athletes' intangible property is examined. Because it will be argued that the IPR do not create the robust protection, a proposal for the establishment of an international agreement on the protection of athletes' image is given.

[108] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16 June 2017, Art 9(1)
[109] Rainer Oesch (n 67) at 756
[110] See Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford University Press 2016) at 367-374
[111] Lars Halgreen (n 19) at 69

4.1 Abuses of image in merchandising

Business around sports frequently involves a transposition of the athletes' protected IPR. This means that the athletes are willing to dispose their rights, for instance, to their image to the enterprises against reimbursement. It is obvious that the enterprise seeks to maximise the economic gain under the agreement with an athlete. Therefore, it is rather a rule than an exception that the athletes agree to refrain from requiring additional compensation from the further commercial use of the athletes' image. This is a standard sponsorship model that the athletes or sports federations, under their competence[112], form with various enterprises.[113] Where these agreements are formed it is aimed that the abuse of image would be avoided. However, the avoidance is not always attained.

There are in general four ways of abusing the image rights of an athlete. First of them is a manipulation of the picture of an athlete for the use in the advertisement.[114] Second manner is by way of an ambush marketing[115] that is used in connection to activities taken by the rivals to the official event organisers. Ambush marketing has generally been well explained as a planned attempt by a third party to associate itself directly or indirectly to gain the recognition and benefits associated with being a sponsor.[116]

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[112] A federation must have acquired the right to the athlete's image by an agreement before accepting further commercial use e.g. by any enterprises. This applies also to the athletes that must have acquired the right to use the mark of the federation in their further commercial use. To this effect, see *National Football League Properties Inc. v Playoff Corp*. [1992] 808 F.Supp. 1288

[113] Olli Rauste (n 8) at 494-495

[114] See *Irvine v Talksport Ltd* (2003) EWCA Civ 423, [2003] 1 WLR 1576

[115] See Mikael Segercrantz and Johanna Flythsröm, 'Ambush marketing – what is it and what can be done to prevent it?' in Tapio Rantala (ed), *Urheilu ja oikeus 2016* (Bookwell Oy 2016)

[116] Jason K. Schmitz, 'Ambush Marketing: The Off-Field Competition at the Olympic Games' (2005) Northwestern Journal of Technology and Intellectual Property Vol 3 No 2 at 1. Available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwjylaqE6PjaAhWLhSwKHdE7ATYQFggqMAE&url=http%3A%2F%2Fscholarlycommons.law.northwestern.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1035%26context%3Dnjtip&usg=AOvVaw0SJRbR3nZ-hfKCyu_jhf47&httpsredir=1&article=1035&context=njtip> (accessed 9 May 2018)

Thirdly, the imitation of a product or a brand name that is based on an athlete's name or image without an authorisation is considered as an abusive use. Fourthly, the non-authorised use of look-a-like pictures of an athlete, together with the above-mentioned imitation, are both different ways of abusing the athletes' goodwill. Common to all image abuses is that the usages have been made without athletes' explicit authorisation.[117]

Who can then invoke the image rights and why does it matter? The protection granted under the scope of FUBPA covers the athletes and their sponsors as well as the sports teams and federations they belong to. This is, because Section 1 of the FUBPA is comparable to the principle of loyalty in the contracts. Moreover, Section 1 is generally applied in parallel with the principle of loyalty where the party to the contract has found in breach of a contract by conducting unfair business practices towards the third party.[118] Further, there is a wide scope for invoking the right, because the athletes rather often transpose their image rights to these federations and undertakings. Therefore, the federations and undertakings are able to file an action against other undertakings abusing athletes' image rights.[119] The ability to invoke the rights by multiple actors strengthens the protection of interests but at the same time the transposing of the image rights may raise further issues.

4.1.1 Fictional Olympics case and Rosberg case

The two issues regarding the athletes' image have been identified. The first one was about the freedom to conclude sponsorships by an athlete, examined by the case studies on individual athletes[120]. Accordingly, by having transposed the image rights to the national federation, and thus agreed to represent federation's sponsors, an athlete may be driven to the conflict of interests where athlete's personal sponsor is a rival to the one

[117] Salla Autio (n 55)
[118] See Master's thesis by Venni Valkama, *Urheilijan sponsorisopimukset ja lojaliteetti* (University of Helsinki 2014) at 47
[119] MAO 503/2008
[120] See Chapter 3.3.1

sponsoring the federation. The second issue is closely connected to the ambush marketing of an athlete's image – a so-called free riding. Namely, the unauthorised undertakings attempt to exploit the enormous goodwill and popularity of sports and professional athletes. The goodwill and celebrity of the athletes likely have a great impact in improving the sales of the products.

A thought-provoking scenario of the second issue, namely ambush marketing, mentioned above is a fictional borderline case on the non-authorised use of an athlete's image. The case concerns a national Olympic team and its official sponsor. The sponsorship covers a contracting period of six years including the Olympic games in Pyeongchang, Tokyo and Peking. The legal issue established is that the undertaking used the picture of an individual athlete in the newspaper ad after the Olympic games had already gone to an end. Therefore, questionable is what are the rights and responsibilities of an undertaking that is an official sponsor to the Olympic team, outside the period of two weeks that the Olympic games last?

Certainly the parties are free to establish the contractual terms and conditions. However, would it be so that during the period of six years the rights to athletes' image would be transposed to the official sponsor only for the duration of the Olympic games? If so, would it be a breach of a contract where the official sponsor uses the picture of an athlete in the newspaper advert once the Olympic games are over in order to thank for the cooperation? The advert in a newspaper is public, commercial in nature and accessible for everyone.

To solve the borderline case, it is essential to know the contractual details. Nevertheless, I take a stance that the overall impression given by the case is legally obscure. Instead, it raises further thoughts whether the use of the image of only one athlete actually complies with the purpose of a sponsorship, that is, to support and commercially use the Olympic team as a whole. It could be also that the sponsoring undertaking likes to use only the

image of the most succeeding athlete of the Olympic team in its media and marketing. Where the undertaking is an official sponsor to the Olympic team as a whole, I argue that the non-consented commercial use of an individual athlete's image is doubtful. In Finland, it would be against section 1 of the FUBPA.[121]

In the context of the second issue on ambush marketing established above it is also remarkable to assess the Finnish case concerning a Finnish formula 1 driver *Rosberg*[122]. The facts are slightly different compared to the fictional Olympics case elaborated above, and the judgment was rather based on the freedom of expression. In the case the Finnish Supreme Court gave a ruling concerning the commercial use of the athlete's image in the journal's advertisement without an authorisation. The Court held that the athlete did not have a right to claim additional reimbursement for the use of his pictures. The ruling was based on the fact that there were many other articles and pictures of the athlete in the same journal. The fact that there was a cooperation agreement between the athlete and the journal, which had just ended before the use of the athlete's image, did not have significance in delivering the judgment in this case. Instead, the Court relied on the principle of freedom of expression and the right of the journalists to advertise their articles by using the images. Moreover, the ruling showed that the consent requirement is not unconditional. In other words, the exception to the consent requirement seems to be allowed – even where sacrificing the fundamental right of the athletes to their images.

The application of the exception to the authorisation requirement is still somewhat unclear. Therefore, the question remains: how an individual athlete if at all could avoid situations just like the two established above?

[121] See Jari Kantomaa, 'Urheilun mainonta' (2003) *Opetusministeriön julkaisuja 2003:19* at 40
[122] KKO 1986-II-131

4.2 The appropriate intellectual property rights in the EU

The rapid advances in technology together with the more globalised economy have made the intellectual matters gradually important. The protection of the IPR by the law creates an alleged warranty for the rights and interest of the holder. The protection also plays an essential role in promoting innovation, creativity and the smooth functioning of the competitive markets. Thus, the recognition of the IPR has a central to the economy within the EU.[123] The different legal instruments form a wide scope of protection of the IPR. This section examines the harmonising EU instruments on the IPR that have their utmost contribution in protecting the image of the individual athletes in the context of this thesis: the legislation on trademarks.

Generally, the intellectual property covers the private rights from the classical authorial rights to the appearance of the product and their reputation.[124] The protection is perceived as an exclusive right to one's intellectual property[125], however, the third party uses are permitted whereas the trademarks are concerned. For instance, whilst the published and furthermore registered sign is protected by the trademark rules, the use of own name by the third party is exempted from this protection.[126] It appears contradictory to the statement that the name of an athlete shall be protected under the IPR[127]. Nowadays the professional athletes are considered as the figures of sports that encompass more than just a name or a nickname. The protection of the name by trademarks comprehends the charisma, goodwill and reputation – all that the athletes have created by their own success and behaviour.[128] In this regard the freedom of expression[129] is the sole ground

[123] Justine Pila and Paul Torremans (n 110) at 3-4
[124] Catherine Seville, 'Intellectual Property' (2011) International and Comparative Law Quartely Vol 60 Issue 4
[125] See i.e. EUTM Regulation 2015/2424, art. 9(1), TMD 2015/2436, art 10
[126] Justine Pila and Paul Torremans (n 110) at 6
[127] See Section 2.2.1
[128] Brett Harris Pavony and Jaia Thomas, 'For the Love of the Name: Professional Athletes Seek Trademark Protection' (2012) 2 Pace Intell. Prop. Sports & Ent. L.F. 153 at 156-157

for the exemption for the third party uses – the purpose of the use yet being non-economical[130].

Through a proprietorship of a trademark, the owners may distinguish their products and services from the similar of the others. Besides fostering the proprietor's abilities in the competitive market, the trademarks indicate the origin and certain quality of the goods and services in question.[131] In the EU, trademark laws of the Member States are harmonised by the Directive[132] and further by the establishment of the communal European Union trademark[133] (EUTM). The prerequisites and the scope of protection of the trademarks under the harmonised legislative framework are discussed in the following.

The important function of the trademarks for their proprietors is to prevent third parties from using the registered sign. To invoke one's exclusive rights the proprietor must show that the new sign, where accused to be infringing the registered mark, is identical or confusingly similar to the one holding the prior rights.[134] Such a function further warranties the explicit use of the registered mark to the proprietor and therefore the full economic benefit as a result of the registration.[135] In other words, the registration of a trademark would be costly and meaningless if it did not grant exclusive rights to its proprietor.

But what can be registered as an EUTM? As a result of the amending Regulation (EU) 2015/2424[136], the requirement of a graphical presentation

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[129] Charter of fundamental rights of the European Union 2000/C 364/01, Article 11
[130] See discussion on 'A Sign Used in the Course of Trade' in Justine Pila and Paul Torremans (n 110) at 402
[131] Case C-206/01 *Arsenal Football Club* [2001] ECLI:EU:C:2002:373 para 48
[132] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (TMD), OJ L 336, 23 December 2015
[133] See EUTMR
[134] TMD, Article 10(2)(a) and EUTMR, Article 9(2)
[135] Annette Kur and Thomas Dreier, *European Intellectual Property Law: text, cases and materials* (Edward Elgar 2013) at 157-158
[136] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade

of the mark was removed. Therefore, the scope of the registrable trademarks has widened exponentially. In particular, '[a]n EU trade mark can consist of any signs, in particular words (including personal names), or designs, letters, numerals, colours, the shape of goods, or of the packaging of goods or sounds.'[137] Non-revocable criteria for the registration of a mark consist of the distinctiveness as well as the non-descriptive nature of the mark.[138] Accordingly, many of the features of an individual athlete can be protected under the registered EUTM[139]. For instance, by registering the name[140] of an athlete as an EUTM would give a wider protection for the name than when the registration was applied through the national office. However, one must consider the value of the registration and the scope of protection for the purposes of protecting their image as a whole.

4.2.1 Application of trademarks for protection of athletes' image

One may be confused when image rights are considered as separate from the trademarks. The various legal systems view image rights differently. In particular, there are many different ways to approach image right issues even within Europe.[141] Just to briefly mention, the passing off right in the United Kingdom (UK) is somewhat an IPR established for the purpose of protecting the concept of goodwill. Notably, the owner of the passing of

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mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341, 24 December 2015

[137] See European Union Intellectual Property Office (EUIPO), 'What can be an EU trade mark?'. Available at <https://euipo.europa.eu/ohimportal/en/what-can-be-an-eu-trade-mark> (accessed 21 April 2018)

[138] ibid

[139] See various features subject to a trademark registration in Mikko Husa, 'Onko urheilusuorituksen matkiminen rikos?' *Aamulehti* (2017). Available at <https://www.aamulehti.fi/urheilu/onko-tassa-taiteilija-granlund-tyossaan-urheilun-tekijanoikeuksista-on-puhuttu-vahan-koska-suorituksia-on-vaikea-verrata-kirjan-kaltaisiin-teoksiin-olisiko-jo-aika-200415347/> (accessed 21 April 2018)

[140] Niklas Bruun, *'Intellectual Property Law in Finland'* (Kluwer Law International 2001), at 102. For the registration of name, see also Case C-404/02 *Nichols* [2004] ECLI:EU:C:2004:538 para 30

[141] Corinna Coors, 'Harmonisation and Diversity - Trends and Challenges in European Sports Image Rights Law' in Jack Anderson, Richard Parrish, Dr Borja Garcia (eds), *Forthcoming: Handbook on EU Sports Law* (Edward Elgar's Research Handbooks in European Law 2016). Available at SSRN <https://ssrn.com/abstract=2858335> (accessed 22 April 2018)

right is the person generating the goodwill. The passing off right was created against the abuse of celebrity's image, likeness or voice, as there was no general right of personality recognised under the British law.[142] Already in the early 20th century the UK rejected the idea that any property rights in the form of name or sign, such as trademark, even where registered by the proprietor, would have conveyed an efficient protection against abuse.[143]

Further the right of publicity, or the right to protection against false endorsement, establish the scope of protection against the non-authorised use of one's name, likeness and other personal features for the use in trade. The right of publicity is recognised by the many individual states and is held being comparable to the trademark laws. Nevertheless, as the practical consequences diverge between these states recognising the right of publicity, it is rather on its way of development.[144]

After the Section 4.2 above established that the features of an athlete might be protected by the trademark registration, the question remains whether the registration meets the decisive needs for the protection of their image. The IPR protection given by the trademark registration impedes the constant non-authorised endorsement of the celebrities' name, signature or their brand, however, the registration does not fully protect against the commercial use of one's image. For instance, the first scenario on the freedom to conclude sponsorships by the athletes established in section 4.1.1 would not fall within the protective scope of the trademark registration.[145] Therefore, I argue, that the trademarks are simply not enough to protect the fundamental, and economically very valuable interest of the athletes, that is, their image.

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[142] See Lionel Bently and Brad Sherman (n 68) at 827-834
[143] See *Spalding (A.G.) & Bros. v Gamage (A.W) Ltd* (1915) 32 RPC 273
[144] See International Trademark Association (INTA), 'What is right of publicity?'. Available at <https://www.inta.org/Advocacy/Pages/RightofPublicity.aspx> (accessed 22 April 2018)
[145] See Jari Kantomaa (n 121) at 40

Being a contribution to the internal market, I argue that the EU should recognise a harmonised right to image. For instance, one way would be a formulation of a comparable right to the EUTM. Today, it can be said that the image rights in the EU are fragmented rather than approximated. Nevertheless, the specificity of sports establishes that sports are an international phenomenon. Therefore, the wider measures to this effect ought to be established.

4.3 A proposal: international agreement on athletes' image rights

Arguably, anyone having been involved in professional sports has somehow tangled with agreements. Indeed agreements form a big part of the sports – was it about sporting activities or the business around it. The scope and purpose of the agreements differ: athlete contracts, sponsoring agreements, sports broadcasting contracts, world anti-doping code (WADC) and many more. This section establishes one more type of an agreement having its aim at protecting the interest of the athlete.

The former subsection discussed about the value of IPR in the protection of the athletes' image rights. Moreover, it concluded that the protection established by the registered trademark does not provide the robust protection for an individual athlete. This loophole in the IPR protection vis-à-vis the image rights has been also recognised by the scholars of the Institution specialised in the public international law, private international law, and European law[146]. Namely, the publication by the Institute very well particularises the need for recognition of the image rights:

> In light of this absence of intellectual property protection for the specific contribution of athletes, it has been argued that the legal framework should be amended. The direction of the amendment, athletes contend, should be *towards a specific recognition of their*

[146] See T.M.C Asser Institute, 'About the Institute'. Available at <http://www.asser.nl/about-the-institute/> (accessed 22 April 2018)

> *image rights* [emphasis added] and of their "intellectual creation" (the act of playing) in a way that will effectively benefit them not only against unauthorized uses by the media, but also against employers.[147]

From the top of the umbrella structure of sports (Illustration 1), the international organisations and the sports specific federations have the best influence all the way down to the national federations, local teams and the individual athlete. Therefore, the international arrangement in the fight against abuse of the image seems appropriate. Shortly I will discuss how and why it would be a viable alternative to the non-harmonised national practice. But first, in order to deliver a comparative, robust reasoning for the need of harmonisation, the international fight against the doping is reviewed.

4.3.1 International agreement in fight against doping

The doping scandals have shaken sports men, women and fans over the decades. To name few recent ones, Lance Armstrong's seven magnificent victories in Tour de France were earned with doping, and the Sochi Olympic games were tainted with the extensive involvement of doping. To overcome the stains to the reputation of sports as a result of the doping, the anti-doping activities were necessarily recognised and implemented.[148] In 1999, the first World Conference on doping in Sport was held in Lausanne, Switzerland. Pursuant to the Lausanne Declaration on Doping in Sport[149], the WADA was established to function with 'the support and participation of intergovernmental organizations, governments, public authorities, and other

[147] Ben van Rompuy et al., 'Study on Sports Organisers' Rights in the European Union' (2014) EAC 18/2012 43 at 19. Available at <http://www.ivir.nl/publicaties/download/1353> (accessed 5 May 2018)
[148] See Jaime Morente-Sánchez and Mikel Zabala, 'Doping in Sport: A Review of Elite Athletes' Attitudes, Beliefs, and Knowledge' (2013) Sports Medicine Vol 43 Issue 6
[149] Lausanne Declaration on Doping in Sport, adopted by the World Conference on Doping in Sport 4 February 1999, Lausanne, Switzerland. Available at <https://www.wada-ama.org/sites/default/files/resources/files/lausanne_declaration_on_doping_in_sport.pdf> (accessed 26 April 2018)

public and private bodies fighting doping in sport'.[150] Arguably, the way in which the fight was initiated is comprehensive and well promising. The clean sports are respected.

The first anti-doping code[151] was established by the WADA in 2003 and it entered into force on 1 January 2004. Ever since it has been revised to ensure the stronger protection of the clean sports worldwide.[152] The main function of the code is to harmonise the anti-doping policies in all sports in all countries. The vision is to ensure that everyone may compete and do sporting activities in the doping-free environment. The code is monitored by the WADA and the principles established by the code are reinforced by the Court of Arbitration for Sport (CAS).

It is remarkable how the harmonisation of the anti-doping activities has managed to tackle the problem worldwide. Without the international involvement, the forceful monitoring framework would never have been created.[153] The commitment in the fight against doping achieved by the agreement shows the value of use of the international agreement as a tool in protecting the worldwide interests in sports[154]. Perhaps, alike might be established for the purposes of protecting the image of the athletes.

[150] See WADA, 'Who We Are' (2018). Available at <https://www.wada-ama.org/en/who-we-are> (accessed 26 April 2018)
[151] World Anti-doping Code 2003. Available at <https://www.wada-ama.org/sites/default/files/resources/files/wada_code_2003_en.pdf> (accessed 26 April 2018)
[152] See Anti-doping codes from 2003 to 2015 with amendments. Available at <https://www.wada-ama.org/en/resources/the-code/world-anti-doping-code> (accessed 26 April 2018)
[153] To this effect, see Juha Viertola, 'Valtioiden välisestä yhteistyöstä urheilun antidopingtyössä', in Heikki Halila (ed), *Urheilu ja oikeus: Urheiluoikeuden yhdistys 10 vuotta* (Gummerrus Kirjapaino Oy 2004); and Lauri Tarasti, 'Maailman antidoping-säännöstö WADC ja sen soveltaminen', in Heikki Halila (ed), *Urheilu ja oikeus: Urheiluoikeuden yhdistys 10 vuotta* (Gummerrus Kirjapaino Oy 2004)
[154] See code signatories. Available at <https://www.wada-ama.org/en/code-signatories> (accessed 28 April 2018)

4.3.2 Viability of the international rules on anti-abuse of image

The common rules on anti-doping aim at promoting clean and fair play. It is important for all sports men and women to follow the rules as the consequences can soil the good character of sporting. Anti-doping activities are essential for sports and belong to the competence of the international sports organisations to arrange. If they were organised at the national level the practices would differ broadly between the countries – as it is now with the image rights. Therefore the exemplary of the anti-doping rules could be taken into the harmonised image rights. The establishment of a World anti-abuse code would require an ambitious plan and a systematic progression. It would further need a commitment by the intergovernmental organizations, governments, public authorities, and other public and private bodies to fight abuse.

The question how would the international anti-abuse of image rules be implemented is another matter. Because of the multi-dimensional structure of the sports, the rules necessarily should awake a broad interest. The implementation by the number of international and national sports organisations and federations is necessary to make the rules effective. The image right is not solely the interest of the athletes – instead, the right would, as harmonised, create a more clear playground extensively for the commercial activities that go around the sports.

Reverting to the bye-law of the Rule 40 in the Olympic Charter, its purpose in principle is to shelter the official sponsors of the Olympic games and the national teams, as well as to protect the individual athletes from the unauthorised commercial endorsement. Alternatively, one would argue that the Rule 40 simply enhances the sponsors to achieve more market power. By this I mean that the bigger the turnover of an undertaking is, the better is the chance of being nominated as the official sponsor to the Olympic

games[155]. Therefore Rule 40 rather limits the abilities of the smaller companies to exploit the goodwill of sports and Olympic games. To overcome such thoughts and focus on the individual athletes and their image, the eventual idea of protection behind the Rule 40 would be expanded by creating the whole new governing framework for the use of the image.

I argue that the establishment of the international agreement is a viable alternative within the EU context as well as globally. The international agreement would cover the whole chain of the agreements involved in sports: between athletes, federations, sponsors, subscribers, journalists, and many more. Further, it would support the already harmonised copyright and neighbouring rights *acquis*[156] and be comparable to that legal framework. Even if the fundamentals of the copyright, such as the standard of originality, have always been a matter of national law, the approximation of these rights has succeeded.[157] Thus the harmonised image rights, established by the international agreement, monitored by the international institutions such as Olympic and Paralympic Committee, executed by the CAS, and, finally, implemented by the EU[158] or national federations, would demonstrate an impressive step towards the improved protection of the athletes' image.

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[155] See Lars Becker, 'Sponsors of the Olympic Games: These are the Olympic funders' (2018) ISPO Sports Business Network. Available at <https://www.ispo.com/en/markets/sponsors-olympic-games-these-are-olympic-funders> (19 May 2018)

[156] See comprehensively at the European Commission, *'The EU copyright legislation'*. Available at <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (accessed 28 April 2018)

[157] See Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in M. Perry (ed), *Global Governance of Intellectual Property in the 21st Century* (Springer 2016)

[158] The implementation of the international agreement on image rights is subject for another discussion and not falling within the scope of this thesis. More on the conclusion of International agreements by the EU, see e.g. Paul Craig and Gráinne de Búrca, *EU Law: text, cases and materials* (6th edn, Oxford University Press 2015) at 316-379; Geert De Baere, 'EU external action' in Catherine Barnard and Steve Peers (eds), *European Union law* (Oxford University Press 2014) at 704-750; and Alan Dashwood, Michael Dougan, Barry Rodger, et. al., *Wyatt and Dashwood's European Union Law* (6th edn, Hart Publishing 2011) at 897-968

5 Conclusion

Athletes are admired and they act as a role model for many, regardless of being involved in sports or not. Furthermore, they can be equated to the celebrities. By getting the attention amongst the big audience the athletes are driven into the different kinds of legal concerns. These concerns, in turn, have to deal with private laws, IPR, contractual principles and many more. Thus, what can be seen is that the career in sports, especially where succeeded, can bring joy, wealth and legal errands.

The sports have a role in promoting the social cohesion within Europe. Because of the social importance of sports, the EU has taken it as its business. In particular, Article 165 of the TFEU recognises sports. It does articulate the specific nature of sports too. The specific nature of sports refers namely to the multifunctional character, interdependence between competing adversaries and the pyramid structure of the open competitions. As these features are still mainly under the governance of the umbrella structure for the sports, the EU has feeble powers to legislate the sporting activities.

In particular, the main legal issues on sports in the EU consist of the consideration whether the sporting rules are in compliance with the internal market, namely, free movement of persons as well as competition law rules. Despite the lack in the abilities to establish a detailed legislative framework by the EU, the sports still exist in the EU's agenda. The sports cases have been challenged in the Court and the different sporting rules and practices, *inter alia* the measures taken by the sports federations to restrict the athletes' rights have been examined from the internal market point of view.

This thesis has specifically examined the image rights of the individual athletes. The thesis established that the protection of athletes' image rights lacks legal certainty and the global legal framework. Rather, the protection

is ensured at the national level, which results in the various different legal practices. This legislative diverge occurs not only globally but also within the EU. Thus, even if the image rights are regulated by the national private law, the approximation is well welcomed. As sports are an international phenomenon and have a specific nature, not only the EU should act towards the improved protection of the athletes' image. The wider actions in a long-run would be needed.

Mainly, the national private law constitutes the basic protection for the athletes' image. There is a major importance of freedom of contract because the athlete as well as sponsorship contracts, governing the image rights, fall under the principles of contract law. In Finland, the Sections 1 and 2 of the FUBPA provides the principles for the use of athletes' image in the commercial purposes. As the aim of the FUBPA is to prevent the harming of the business of the others, the law indeed delivers just the marginal shield. The interpretation of the law to this effect has a great importance in cases concerning the abuse of the image in Finland.

Another factors protecting the athletes' image are the national principles on personal rights. These personal rights establish a criteria according to which the use of the image is considered as acceptable: the athlete has given an explicit authorisation to the use; where no authorisation is given, the athlete shall not be recognised from the picture; and the unauthorised use may only be acceptable for the purpose of non-economic use. However, the possible dent caused to the athletes' image from the unauthorised use simply lacks compensation.

After the analysis on the EU and national level laws on the image protection the thesis conducted a case study on two athlete contracts to illustrate the possible concerns on behalf of the athletes. The better understanding was given to the some extent for the limitative clauses within the athlete contracts established by the national federations. Even if the purpose was to protect the financial interests in general, the proper balance should be sought

between the parties to the both athlete and sponsorship contracts. Appropriately, the due care must be taken when negotiating the athlete and sponsorship agreements. Especially the novice athletes might not pay attention enough to the vital clauses on the image use, which later may lead to legal concerns.

Where the pictures and names are concerned, one could argue the IPR protect the athletes. Namely, under the Finish trademark law the use of the name is seen as acceptable even if one could bring it under the scope of protection by registering it as an EUTM. Moreover, the privacy and the personal rights of the celebrities are much more narrow compared to the ordinary people. The name protection is based solely on the protection of the surname. Further, the more general is the name the less protection it gets. It seems that the IPR does not generally provide adequate protection for the athletes' image.

As the IPR leave the discussed loopholes, the standard clauses, recognised at the top of the umbrella structure in sports, would bring a much desired legal certainty. The thesis established that the international agreement would create the standard clauses for the protection of the both parties to the contracts in question. Moreover, the suitability of an international agreement is prodigious for the purpose of taking care of those involved in the numerous of contracts in sports.

Based on the analysis on the current practices under the EU law, national law and organisational rules I argue that there is a need for a shift from the nationally protected athletes' image rights to the new transnational image rights. The current, vague protection does not establish a legal certainty for the athletes to claim their image rights properly. If the athletes can not be well aware of their image rights in the international field, there is neither prospect for well established international sports nor the proper business around it. Indeed, the broader is the harmonisation of image rights the better is the shield for the athletes. Because of the Article 165 of the TFEU the EU

has an opportunity to be a forerunner in the matter. But, the interest should be merely on the individual athlete. The broad, internationally established standards for image protection have a direct link to the athletes' own economy. No one should be able to prevent or in other way interfere the athletes to maximise their economy – not even the national sports federations. There is no better way to ensure this than at the international level.

Where the international agreement is successfully established and ratified globally, the efficient enforcement system is required. These would be, for instance, civil remedies such as damages in addition to the CAS's order to stop the unauthorised interference by the user. In order to prevent the future interferences the effective deterrence shall be established. I argue that the criminal remedies would be, however, a little too unconscionable.[159] The question of remedies would thus be a fascinating subject for a further research on the matter – this time not comparable to the practices established by the WADA. This is, because the athletes are not the subjects for the image right abuses. They are the objects.

[159] See more Ian Blackshaw, 'Sports Merchandising: Fighting the Fakes' (2004) The International Sports Law Journal 2004/3-4, at 76

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