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TO BE OR NOT TO BE SPECIFIC? UNDERSTANDING EU INSTITUTIONS' DEFINITION OF THE SPECIFIC NATURE OF SPORT


JACK MEREDITH*
BORJA GARCÍA**

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Abstract

This article analyses how EU institutions have defined the so-called specificity of sport and the extent to which its recognition might have affected the application of internal market and competition law to sport after the adoption of Article 165 TFEU. The article relies on qualitative and inductive thematic analysis of 83 sport-related documents adopted by EU institutions. Four main themes have been identified: Definition of sports specificity, categorisation of sporting exceptions, contribution of sporting exceptions to the specificity of sport, and the impact of Article 165 TFEU in the application of EU sports law. Our findings suggest that the EU has defined the specificity of sport around a set of unique characteristics that differentiates sport from other industries. While the formal recognition of the specific structures of sport in the Treaties had little effect on the application of free movement and anti-trust provisions to sport, it seems to have had some impact in the recent application of state aid provisions to sport. Our findings are of relevance for existing debates on the regulation and governance of sport in Europe and the development of the so-called European Model of Sport.

Keywords: Specificity of sport, Sporting exception, Article 165 TFEU, EU Sports law, Thematic analysis.

* School of Sport, Exercise and Health Sciences, Loughborough University, UK. ✉ jack.meredith15@gmail.com
** Ph.D. School of Sport, Exercise and Health Sciences, Loughborough University, UK.  <https://orcid.org/0000-0002-7841-7805>. ✉ b.garcia-garcia@lboro.ac.uk.

1. INTRODUCTION

The specificity of sport has been a key discussion within European sports law since the first sport-related rulings of the Court of Justice of the European Union (CJEU) in the *Walrave* and *Donà-Mantero* cases. In *Walrave* the Court established that sport fell within its jurisdiction as an economic activity¹, and importantly referred to the specific nature of sport, creating what has been referred to as the sporting exception.² Since *Walrave*, EU institutions have crossed paths with sport through several cases, including the landmark rulings of *Bosman* and *Meca-Medina*. But also in policy documents, informal political declarations and soft-law instruments, until the Treaty on the Functioning of the European Union (TFEU) entered into force in 2009 with the inclusion of sport in Article 165 as a supporting competence for the EU.

Even after the adoption of Article 165 TFEU, the concept of the specificity of sport continues to be of major interest as it remains a grey area without a definitive meaning,³ given the Treaty refers to it, but it does not provide a firm definition. The reticence of EU institutions to compile a conclusive list of sporting exceptions (i.e. situations under which the specificity of sport will require special application of EU law), but rather to decide on a case by case basis,^{4 5} has added to this uncertainty, leaving it open to interpretation.⁶

Thus, the primary aim of this article is to critically evaluate how EU institutions have defined the specificity of sport in their case law and policy-making. This is done through an inductive thematic analysis of EU official documents to elicit whether common meaningful themes can be identified in their understanding of the specific nature of sport despite the case by case approach normally adopted as a result of CJEU case law. Building on this, our second research aim is to identify and categorise which sport rules have been considered as sporting exceptions in EU case law. Indeed, over the years several rules and policies of sport bodies have been challenged by stakeholders and analysed by the EU to ascertain the extent to which they could be considered as part of the specific nature of sport or not. EU institutions, however, have generally refused to produce a systematic catalogue of such rules,⁷ except for the discussion in the accompanying documents to the European Commission 2007 White Paper on Sport.

This article, therefore, aims to contribute to ongoing debates on EU sports law and policy by interrogating EU official documents to find common approaches (if there are any) in the case-by-case approach to sport regulations adopted by the Commission and the CJEU.

1 Borja García, and Stephen Weatherill, "Engaging with the EU in Order to Minimize its Impact: Sport and the Negotiation of the Treaty of Lisbon", *Journal of European Public Policy* 19, no.2 (2012): 238–256, <https://doi.org/10.1080/13501763.2011.609710>.

2 Erika Szyszczak, "Competition and Sport: No Longer so Special?", *Journal of European Competition Law & Practice* 9, no. 2 (February 2018): 188-196, <https://doi.org/10.1093/jecclap/lpy012>.

3 Stephen Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", in *European Sports Law: Collected Papers*, ed. Stephen Weatherill (The Hague: TMC Asser Press, 2014), 507-525.

4 Robert Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", *Introduction to International and European Sports Law* (2012): 697-725, https://doi.org/10.1007/978-90-6704-852-1_3.

5 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

6 Oliver Budzinski, "The Institutional Framework for doing Sports Business: Principles of EU Competition Policy in Sports Markets", *International Journal of Sport Management and Marketing* 11 no.1-2 (2012): 44-72, <https://doi.org/10.1504/IJSMM.2012.045485>.

7 Budzinski "The Institutional Framework", 44-72.

Methodologically, the article adopts a qualitative research design based on thematic analysis of EU documents. The article proceeds now in four steps. First, we review the existing academic literature on the specificity of sport to define our analytical framework. Second, we discuss our research design. Third, we present our results. Finally, we discuss the relevance of our findings.

2. LITERATURE REVIEW

In this section we review the academic literature around three main bodies of work to provide a suitable conceptual framework for our analysis. First, we discuss the academic contributions to the definition of sports specificity. Second, we examine academic literature that has explored the characteristics that might differentiate sport from other industries. Finally, this section analyses a body of work that has discussed how far sport's special nature has been recognised by the Commission and CJEU.

2.1. DEFINING THE SPECIFICITY OF SPORT

Sports bodies have long argued sport is *unique*, hence it could not be regulated like other industries in the EU; this resulted in initial requests to exclude sport from the application of EU law.⁸ However, such an overarching and wide-ranging request has been met with a critical eye from academic analysis, leading to a far more nuanced line of argumentation from the sport governing bodies later down the line. Academic literature on the specificity of sport can be grouped around two questions. Firstly, does sport merit special treatment?⁹ If so, what does the phrase 'sports specificity' mean?¹⁰

The literature generally agrees that sports specificity deserves acknowledgement within European law, as sport possess some unique characteristics that call for a flexible approach.¹¹ ^{12 13 14 15} There are, however, also authors that have put forward a less common, yet noticeable, counter-argument; these authors argue that professional sports produce substantial revenues rivalling other industries, and therefore cannot be specific, but rather be seen as a commercially focused businesses.¹⁶

8 Jean-Loup Chappelet, "The Autonomy of Sport and the EU", in *Research Handbook on EU Sports Law and Policy*, eds. Jack Anderson, Richard Parrish, and Borja García (Cheltenham: Edward Elgar, 2018), 157-172.

9 Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", 697-725.

10 García, and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

11 Richard Parrish, "The Birth of European Union Sports Law", *Entertainment Law Journal* 2, no. 2 (Summer 2003): 20-39, <https://doi.org/10.16997/eslj.137>.

12 Stefaan V. D. Bogaert, and An Vermeersch, "Sport and the EC Treaty: A Tale of Uneasy Bedfellows?", *European Law Review* 31, no. 6 (January 2006): 821-840.

13 Erika Szyszczak, "Is Sport Special?," in *The Regulation of Sport in the European Union*, eds. Barbara Bogusz, Adam Cygan, and Erika Szyszczak (Cheltenham: Edward Elgar, 2007), 3-32.

14 Jonathan Hill, "The European Commission's White Paper on Sport: A Step Backwards for Specificity?," *International Journal of Sport Policy and Politics* 1, no. 3 (November 2009): 253-266, <https://doi.org/10.1080/19406940903265533>.

15 Tom Serby, "The State of EU Sports Law: Lessons Learned from UEFA's "Financial Fair Play" Regulations", *International Sports Law Journal* 16 (April 2016): 37-51, <https://doi.org/10.1007/s40318-016-0091-2>.

16 Adam Cygan, "Competition and Free movement Issues in the Regulation of Formula One Motor Racing", in *The Regulation of Sport in the European Union*, eds. Barbara Bogusz, Adam Cygan, and Erika Szyszczak (Cheltenham: Edward Elgar, 2007), 74-94.

The most common view, though, is that although commercialisation has increased in sport, the notion of sport priorities playing second fiddle to commercial exploits in sports institutions is a stretch.¹⁷ Indeed, this is summarised by Hill,¹⁸ who points out that regardless of commercialisation 'the internal mechanisms of sport remain the same'. This implies that regardless of commercialisation sport remains at the heart of these institutions and therefore, some specific characteristics are acknowledged because sport should be considered special. Yet, despite the emerging consensus, the literature is also quick to point out that the increasing commercialisation of sport has raised questions about the exact definition, the reach and the contours of the specificity of sport.^{19 20}

The specificity of sport has no widely accepted single definition in the literature, perhaps because it has been approached from a variety of disciplinary angles from law to economics. This, naturally, makes our analysis more difficult. Generally, specificity tends to be defined in generic terms as sports' unique features that isolate and differentiate it from other industries.²¹ In European law terms, García and Weatherill define it as a call to 'have the law moulded in application'²² of sports unique characteristics. Flanagan's²³ definition is slightly stronger, stating it is the belief that sports bodies should have complete autonomy over sports from the EU. This is where the definitions differ, as García and Weatherill²⁴ suggest specificity is a step below autonomy, while Flanagan²⁵ implies autonomy is part of the specificity of sport. Such a definition comes with important consequences for the governance of sport. García and Weatherill's definition is perhaps closer to the current institutional and regulatory *status quo*, as Flanagan's perhaps more aspirational definition implies a level of self-regulation which sports organisations do not currently hold. Indeed, the literature tends to agree that while the EU has recognised sports specificity, they have not granted complete autonomy.²⁶

Away from academic definitions, the Union of European Football Associations (UEFA) define sports specificity as acknowledging 'the particular and essential aspects of sport that distinguish it from any other economic sector'.²⁷ This suggests UEFA have a similar definition to García and Weatherill²⁸ and Szyszczak.²⁹ However, UEFA³⁰ also highlight the need for assurance on autonomy, suggesting they would like to see autonomy recognised in the same way as specificity, similar to Flanagan's³¹ definition.

17 Serby, "The State of EU Sports Law", 37-51.

18 Hill, "The European Commission's White Paper on Sport", 261.

19 Parrish, "The Birth of European Union Sports Law", 20-39.

20 Philip Kienapfel and Andreas Stein, "The Application of Articles 81 and 82 ECC in the Sport Sector", *Competition Policy Newsletter*, no. 3 (2007): 6-7.

21 Szyszczak, "Competition and Sport: No Longer so Special?", 188-196.

22 García, and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 248.

23 Christopher A. Flanagan, "A Tricky European Fixture: An Assessment of UEFA's Financial Fair Play Regulations and their Compatibility with EU Law", *International Sports Law Journal*, 13 (April 2013): 148-167, <https://doi.org/10.1007/s40318-013-0006-4>.

24 García, and Weatherill, "Engaging with the EU in Order to Minimize its Impact," 248.

25 Flanagan, "A Tricky European Fixture," 148-167.

26 Bogaert and Vermeersch, "Sport and the EC Treaty," 821-840.

27 Union of European Football Associations, "UEFA's position on Article 165 of the Lisbon Treaty." *UEFA*, November 14, 2020, 3.

28 García and Weatherill, "Engaging with the EU in Order to Minimize its Impact," 238-256.

29 Szyszczak, "Competition and Sport: No Longer so Special?", 188-196.

30 UEFA, "UEFA's position on Article 165", 1-12.

31 Flanagan, "A Tricky European Fixture", 148-167.

Amongst these attempts to provide firmer definitions of sport specificity, Hill³² suggests a different approach: Sports bodies should work with the Commission to ensure rules are compatible with internal market and competition law, rather than asking the Commission to recognise sports specificity if they are challenged. The home-grown players' rule can be seen as an example of this.^{33 34} This view is a more pragmatic approach to the attempts to define the specificity of sport, and perhaps one worth exploring given its complexity. On the other hand, this provides conceptual uncertainty and heterogeneity, which might make analysis more difficult. This approach is similar to the European Commission's refusal to provide a single comprehensive definition, which builds inevitably on the CJEU case-by-case approach,³⁵ that has now to be accepted in the absence of any political effort to move the debate forward. Hill's view is a good summary of the existing gap and the contribution this article seeks to make. As we have seen in this review, there is a good group of academic work acknowledging the specificity of sport and providing more or less detailed definitions. Yet, there is not a clear consensus and, moreover, EU institutions have decided to proceed on a case-by-case basis, hence not providing a definition either. Therefore, identifying the common trends of that case-by-case approach over time, as this article does, could enhance this area of research.

2.2. SPORT SPECIFIC CHARACTERISTICS

The specificity of sport has been recognised through a series of unique and inherent characteristics that differentiate sport from other economic and social activities.^{36 37} There is a wide consensus in the academic literature that the Commission and CJEU have taken sports unique characteristics into account when applying EU law.^{38 39 40} In that respect, García and Weatherill⁴¹ point out that sports bodies have lobbied for a stronger recognition of the specificity of sport, but it would be unfair to say EU institutions have not recognised sport's special features. Across the literature, we can find four main characteristics of sport that are consistently highlighted as being specific. These are: Sport depends on rivalry, unpredictability, pyramid structure and sports societal benefits.^{42 43 44 45} We now discuss these in turn.

32 Hill, "The European Commission's White Paper on Sport", 253-566.

33 Borja García, "UEFA and the European Union: From Confrontation to co-operation?", *Journal of Contemporary European Research* 3, no. 3 (2007): 202-223, <https://doi.org/10.30950/jcer.v3i3.52>.

34 Hill, "The European Commission's White Paper on Sport", 253-566.

35 Parrish, "The Birth of European Union Sports Law", 20-39.

36 Bob Stewart and Aaron Smith, "The Special Features of Sport", *Annals of Leisure Research* 2, no. 1 (1999): 87-99, <https://doi.org/10.1080/11745398.1999.10600874>.

37 Kienapfel and Stein, "The Application of Articles 81 and 82 ECC", 6-7.

38 Parrish, "The Birth of European Union Sports Law", 20-39.

39 Lenita Lindström-Rossi, Sandra De Waele, and Dovile Vaigauskaite, "Application of EC Antitrust Rules in the Sport Sector – An Update", *Competition Policy Newsletter*, no. 3 (Autumn 2005): 72-77.

40 Hill, "The European Commission's White Paper on Sport", 253-566.

41 García and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

42 Kienapfel and Stein, "The Application of Articles 81 and 82 ECC", 6-7.

43 Hill, "The European Commission's White Paper on Sport", 253-566.

44 Budzinski "The Institutional Framework", 44-72.

45 Geoff Pearson, "Sporting Justification under EU Free Movement and Competition Law: The Case of the Football 'Transfer System'", *European Law Journal* 21, no. 2 (March 2015): 220-238, <https://doi.org/10.1111/eulj.12110>.

2.2.1. Sport Depends on Rivalry

While teams are competitive on the pitch, Parrish and Miettinen⁴⁶ emphasise that off the pitch clubs in some respect are uncompetitive. This is because for sports teams to exist, a level of sustained rivalry is needed. Rivalry in other industries signifies beating competitors in the hope of removing them from the sector.⁴⁷ This philosophy is not shared in sports where multiple teams (or athletes in individual sports) are required to compete.⁴⁸ This highlights a divide between sport and other industries contributing to the argument for a special recognition under European law.

2.2.2. Unpredictability

Another body of work focuses on the need to maintain uncertainty of results as a key component of the specificity of sport.⁴⁹ ⁵⁰ Budzinski⁵¹ believes this characteristic can be split into two prisms. Firstly, it relates to maintaining morality in terms of regulating breaches like 'match-fixing, doping etc.' which distorts true results. Secondly, it is the ability to maintain unpredictability, with numerous teams or athletes contesting to avoid a monopolistic competition. This is often referred to as the need to maintain competitive balance.

2.2.3. Pyramidal Structure of Governance

The third specific characteristic of sport that can be commonly found in the literature is a reference to the so-called 'pyramid structure' of how sports are organised; this refers to sport systemic governance with one international federation sitting on top,⁵² and only one federation per sport. This is a clear separation between sport and other businesses.⁵³ However, Weatherill⁵⁴ argues the pyramid structure itself is not the key element, but the freedom of sport regulatory bodies internal organisation is. He suggests that sports bodies enjoy relative freedom in organising their structures, making it near impossible to enter from the outside.

46 Richard Parrish and Samuli Miettinen, *The Sporting Exception in European Union Law* (The Hague: T.M.C Asser Press, 2008).

47 Ruben Conzelmann, "Models for the Promotion of Home Grown Players for the Protection of National Representative Teams", in *EU, Sport, law and Policy: Regulation, Re-regulation and Representation*, eds. Simon Gardiner, Richard Parrish and Robert Siekmann (The Hague: T.M.C Asser Press, 2009), 215-225.

48 Budzinski "The Institutional Framework", 44-72.

49 Hill, "The European Commission's White Paper on Sport", 253-566.

50 Parrish and Miettinen, *The Sporting Exception in European Union Law*.

51 Budzinski "The Institutional Framework", 56.

52 Kienapfel and Stein, "The Application of Articles 81 and 82 ECC", 7.

53 Roberto B. Martins, "Agenda for a social dialogue in the European professional football sector," in *EU, Sport, law and Policy: Regulation, Re-regulation and Representation*, eds. Simon Gardiner, Richard Parrish and Robert Siekmann (The Hague: T.M.C Asser Press, 2009), 345-400.

54 Stephen Weatherill "The White Paper on Sport as an Exercise in 'Better Regulation'" in *EU, Sport, Law and Policy: Regulation, Re-regulation and Representation*, eds. Simon Gardiner, Richard Parrish and Robert Siekmann (The Hague: T.M.C Asser Press, 2009), 101-114.

2.2.4. The Social Dimension of Sport

Finally, there is also another group of authors that cite commonly the societal benefits of sport,⁵⁵ highlighting its 'educational, public health, social, cultural and recreational elements.'⁵⁷ This denotes the virtue of professional sports redistributing its wealth down the structure to the grassroots level.⁵⁸ This implies the importance of sport in society. However, Weed *et al.*⁵⁹ and Weed⁶⁰ challenge this, emphasising that politicians often overinflate the societal benefits of sport to justify investments. Citing an absence of evidence for sports positive impact, namely participation rates.

2.2.5. Other Characteristics

Whereas the four features reviewed above are the most found in the literature, given the nature of this body of academic work many others have also been mentioned, but not to the same extent or consensus. Stewart and Smith⁶¹ suggest the trade-off between profit and on-field success, that arguably sports businesses rank winning higher. This might not be true globally as American leagues are organised like cartels,⁶² whereby it is an exclusive club with no promotion or relegation.⁶³ This means clubs are protected so can prioritise profit over winning unlike in Europe. Downward, Dawson and Dejonghe⁶⁴ highlight the employment market in sport as unique, with higher employee turnover due to short careers common in sport. Finally, UEFA⁶⁵ highlight promotion and relegation, which is unique. However, the limitation is that not all leagues possess this, so this is specific to individual sports rather than the blanket of European sport. On the other side, Weatherill⁶⁶ discusses characteristics that are shared between sports and other industries. This implies that a blanket approach to European sport cannot be applied as not all sports aspects are special, some are heavily commercial.

55 Kienapfel and Stein, "The Application of Articles 81 and 82 ECC", 6-7.

56 Budzinski "The Institutional Framework", 44-72.

57 Henk E. Meier, "Emergence, Dynamics and Impact of European Sport Policy – Perspectives from Political Science", in *EU, Sport, law and Policy: Regulation, Re-regulation and Representation*, eds. Simon Gardiner, Richard Parrish and Robert Siekmann (The Hague: T.M.C Asser Press, 2009), 8.

58 Budzinski "The Institutional Framework", 44-72.

59 Mike Weed et al., "The Olympic Games and Raising Sport Participation: A Systematic Review of Evidence and an Interrogation of Policy for a Demonstration Effect", *European Sport Management Quarterly* 15, no. 2 (January 2015): 195-226, <https://doi.org/10.1080/16184742.2014.998695>.

60 Mike Weed, "Should we Privilege Sport for Health? The Comparative Effectiveness of UK Government Investment in Sport as a Public Health Intervention", *International Journal of Sport Policy* 8, no. 4 (October 2016): 559-576, <https://doi.org/10.1080/19406940.2016.1235600>.

61 Stewart and Smith, "The Special Features of Sport", 87-99.

62 John Vrooman, "The Economic Structure of the NFL" in *The Economic of the National Football League: The State of the art*, ed. Kevin Quinn (New York: Springer, 2012), 7-31.

63 Stewart and Smith, "The Special Features of Sport", 87-99.

64 Paul Downward, Alister Dawson, and Trudo Dejonghe, *Sports Economics: Theory, Evidence and Policy* (Oxford: Butterworth-Heinemann, 2009).

65 UEFA, "UEFA's position on Article 165", 1-12.

66 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

2.3. HOW FAR HAS SPORTS SPECIAL NATURE BEEN RECOGNISED?

Having analysed the literature on the specificity of sport, there is one final area of work that needs to be discussed. Indeed, much academic debate has been focused, especially in legal academia, on the extent to which the specificity of sport has been recognised by EU institutions or not. Foster⁶⁷ highlights in that respect that for the most part sports bodies have enjoyed recognition of their special nature. Bogaert and Vermeersch⁶⁸ built on this, implying sports bodies have enjoyed a great deal of success in cases with the Commission and CJEU. An increase in EU sports cases unfolded as clubs and players believed they could challenge rules set by sporting bodies under free movement and competition law.⁶⁹ While an increase in cases might have been assumed as negative for sports bodies, Weatherill⁷⁰ and Bogaert and Vermeersch⁷¹ argue the EU institutions were often too lenient, granting sports regulators a wide degree of flexibility.

A different view was taken by Hill,⁷² who argued that the European Commission White Paper on Sport was an assault on sporting rules. Hill's view, however, is not supported by the most recent body of work in this area, which raises similar conclusions to those of García, Weatherill or Vermeersch cited above. Pearson,⁷³ for example, suggests that the EU has had a hands-off approach, citing the UEFA home-grown players' rule as an example. Weatherill, unsurprisingly, shares this point of view and raises concerns over the true compatibility of UEFA's home-grown players' requirement with EU law.⁷⁴ Weatherill's argument might not be far off the mark, since the home-grown players rules have been referred for a CJEU preliminary ruling at the time of writing this article. Serby⁷⁵ highlights another example of this leniency, suggesting the Financial Fair Play (FFP) rules would be hard to defend based on proportionality. In relation to this debate, earlier work by García and Weatherill⁷⁶ emphasised the EU might be showing greater leniency to sports bodies because of the adoption of Article 165 TFEU, an argument that is also put forward by Pearson. However, some of these authors in their later work have nuanced their argument^{77 78}, suggesting that, actually, Article 165 has likely just legitimised and codified the EU's pre-TFEU approach to the special nature of sport.

There is, finally, an interesting body of work in relation to the recognition of the specificity of sport that deserves mentioning. There are several authors which have evaluated the consequences that such a recognition has had on the governance of sport. Thus, authors argue

67 Ken Foster, "Can Sport be Regulated by Europe? An Analysis of Alternative Models" in *Professional Sport in the European Union*, eds, Andrew Caiger and Simon Gardiner (The Hague: TMC Asser Press, 2000), 43-64.

68 Bogaert and Vermeersch, "Sport and the EC Treaty", 821-840.

69 García and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

70 Stephen Weatherill, "Fair Play Please: Recent Developments in the Application of EC Law to Sport", *Common Market Law Review*, 40 (2003): 51-93, https://doi.org/10.1007/978-90-6704-939-9_9.

71 Bogaert and Vermeersch, "Sport and the EC Treaty", 821-840.

72 Hill, "The European Commission's White Paper on Sport", 253-566.

73 Pearson, "Sporting Justification under EU Free Movement and Competition Law", 220-238.

74 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

75 Serby, "The State of EU Sports Law", 37-51.

76 García and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

77 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

78 Borja García, An Vermeersch, and Stephen Weatherill, "A new Horizon in European Sports Law: The Application of the EU State Aid Rules meets the Specific Nature of Sport", *European Competition Journal* 13, no. 1 (2017): 28-61, <https://doi.org/10.1080/17441056.2017.1311146>.

that not all stakeholders have benefitted equally from the EU's recognition of some sport specific rules. Weatherill,⁷⁹ for example, emphasises the adverse effects the home-grown players' requirement has on less financially rich clubs. Vöpel⁸⁰ suggests the FFP requirements could similarly harm smaller clubs, therefore, distorting fair competition. Pearson,⁸¹ on the other hand, emphasises the consequences for players' free movement generated by (so far) accepted practices in team sport transfer regulations, such as transfer windows. The overall idea behind the work of these authors is that the analysis of the recognition of the specificity of sport by the EU needs to go beyond the mere assessment of the extent to which it has happened. It is also necessary to ascertain its consequences and which stakeholders might have benefited (if at all) over others in the complex governance structures of European sport. This is relevant because further recognition sports specificity or a wider definition of the term by EU institutions will come with some (positive or detrimental) consequences for stakeholders.

2.4. LITERATURE GAPS AND CONTRIBUTION TO KNOWLEDGE

This section has highlighted that there is a wide range of literature on sports specificity but limited identifiable EU definitions of this concept. Although the literature does extensively discuss and assess the characteristics which might make sport unique, this has not been done in a consistent way. This paper contributes to fill to this gap. Secondly, Kienapfel and Stein⁸² and Siekmann⁸³ argue that there is merit in creating a list of sporting exceptions based on previous case law in the absence of a conclusive list from the EU.⁸⁴ This, however, has not been done systematically; and existing efforts in this respect are now relatively dated, most of them pre-dating the entering into force of Article 165 TFEU. But more importantly from a conceptual level, there has been very limited analysis on how specific rules that are considered as sporting exceptions link with the concept of the specificity of sport. This is, again, a limitation in the existing research that we seek to address with this paper.

3. METHODOLOGY AND DATA ANALYSIS

This article relies on qualitative and inductive thematic analysis of EU institutions' documents. Documents facilitate understanding and interpretation of the sports law area, contributing to the research aims of this study.⁸⁵ This enables the researcher to uncover definitions and themes.⁸⁶ Moreover, Bryman⁸⁷ emphasises that documents from government institutions such as EU organisations supply rich extensive data. This rich data generates new themes and builds upon ones identified in the literature review to address the research aims.

79 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

80 Henning Vöpel, "Do we really need Financial Fair Play in European Club Football? An Economic Analysis," *CESifo DICE Report* 9, no. 3 (2011): 54-59.

81 Pearson, "Sporting Justification under EU Free Movement and Competition Law", 220-238.

82 Kienapfel and Stein, "The Application of Articles 81 and 82 ECC", 6-7.

83 Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", 697-725.

84 Alfonso Rincón, "EC Competition and Internal Market Law: On the Existence of a Sporting Exception and its Withdrawal," *Journal of Contemporary European Research* 3, no. 3 (2007): 224-237, <https://doi.org/10.30950/jcer.v3i3.51>.

85 Sharan, Merriam, *Case Study Research in Education: A Qualitative Approach* (San Francisco: Jossey-Bass, 1988).

86 DavidAltheide, "QualitativeMediaAnalysis", *Poetics* 27(2000):287-299, <https://doi.org/10.4135/9781412985536>.

87 Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2016).

For the selection of the documents, we used a 'purposive sampling' strategy based on 'criterion sampling'.⁸⁸ This is when documents are selected which meet pre-set criteria. The criteria established to select documents into the sample for analysis were as follows:

- Documents concerning internal market or competition law produced by the European Commission, General Court, or CJEU pertaining to sport.
- Produced between 1974 and 2020.
- Accessible in the public domain.

This produced a sample of a total of 83 documents. See table 1 (below) for details on the final composition of the sample.

Table 1. Composition of the sample of documents selected for analysis

Document Type	Number of documents
European Commission Decision	14
European Commission formal letter in competition cases	16
European Commission soft-policy (non- legally binding) documents and reports	4
European Commission press release	23
CJEU or General Court judgments	15
Advocate-General opinion	8
European Council conclusions or declarations	3
TOTAL	83

It is necessary to acknowledge the limitations that come with this sampling strategy. First and foremost, the focus on the European Commission and the CJEU comes at the expense of not covering the European Parliament and the Council of the EU. There are three European Council documents included in the sample given their relevance in the build-up to the introduction of Article 165 TFEU, though. We acknowledge, along with the literature⁸⁹ the relevance of these institutions in the development of EU sports law and policy; however, we argue that an initial focus on the Commission and CJEU as enforcers and interpreters of the Treaty is still of value, especially when focusing on the consequences for sport regulation. Moreover, the literature argues that the interventions of the Parliament and the Council have been incorporated in the evolution of the Commission and CJEU's legal thinking, hence their analysis reflects, to a certain extent and perhaps indirectly, also the interventions of the Parliament and the Council. Nevertheless, this is a limitation that needs to be openly recognised. Overall, we argue that there is still merit in this research, though, as it opens the way for a line of enquiry. Hence the

⁸⁸ Bryman, *Social Research Methods*, 408.

⁸⁹ García and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

paper might need to be seen as exploratory, inviting other colleagues to continue this line of investigation with a focus on other institutions.

A second limitation comes from the time frame we selected (1974 to 2020). This is perhaps less impactful, as one needs to draw a line somewhere when doing research. The dates were chosen because Walrave in 1974 was the first sport-related case decided by the CJEU, and because 2020 features the General Court's decision on ISU, which is the latest case with a formal and final decision, although we acknowledge it is pending appeal at the time of writing, and other sport-related cases are also before the CJEU at the time of writing.

Once sampled, documents were analysed using Braun and Clarke's⁹⁰ framework for thematic analysis, which provides flexibility that allows for both inductive and deductive approaches to the generation of codes. Braun and Clarke recommend a six-phase approach. The first step is for the researcher to immerse themselves in the data, highlighting preliminary points from reading the EU documents. This is also used to generate conceptually-informed codes that will be used in the next stage. Secondly, the coding of the documents is done by the research team. Coding in our case was done by one single member of the team to avoid inter coder discrepancies. The coding process included an extra measure to ensure intra coder reliability.⁹¹ The coder went back and repeated the coding of each tenth document to ensure there were no significant differences between the coding of that document at the first and second time. The third and fourth step are the generation of overarching themes from the coded data and then reviewing the themes against the coded EU documents to check they match. This step can be seen as 'quality control', making changes when needed.⁹² These two steps involved the research team as a whole and were done through a series of conceptually-informed iterative discussions. The fifth step involves defining the key themes that accurately reflect the concepts identified in the data, while also naming each theme. The final step, naturally, is the creation of the report. In this case, the writing up of the paper. This encompasses tying the analysis of the documents back to the research questions and outlining how the themes generated provide an answer to these.

3. FINDINGS

The thematic analysis of the EU documents produced four main themes: Development of sports specificity, categorisation of sporting exceptions, contribution of sporting exceptions to the specificity of sport, and Article 165 TFEU's impact on EU sports law. In this section we present and discuss these four themes, along with the subthemes that have also been identified.

90 Virginia Braun and Victoria Clarke, "Using Thematic Analysis in Psychology", *Qualitative Research in Psychology* 3, no. 2 (2006): 77-101, <https://doi.org/10.1191/1478088706qp063oa>.

91 Will Hoonard, "Inter- and Intracoder Reliability," in *The SAGE Encyclopedia of Qualitative Research methods*, ed. Lisa Given (London: Sage, 2008), 445-446.

92 Gareth Terry et al., "Thematic Analysis", *The SAGE handbook of qualitative Research in Psychology*, eds. Carla Willig, and Wendy Stainton-Rogers (London: Sage, 2017), 29.

3.1. DEVELOPMENT OF SPORTS SPECIFICITY

The EU's acceptance that sport is specific developed from the CJEU's *Walrave* ruling⁹³ when it declared national team composition 'a question of purely sporting interest and as such has nothing to do with economic activity' (para 8). While sports specificity was not mentioned in those terms, the acknowledgement that a rule is 'incompatible with Article 48 of the EEC Treaty'⁹⁴ but can be exempt based on sporting interest⁹⁵ should be seen as an acceptance that sport is somehow, and to some extent, specific, i.e. different from other industries, even if neither the Court nor other institutions did provide a definition of this notion at the time. While *Walrave* is where the EU first recognised sport possessed specific qualities, it is in more political and soft-law documents where the EU developed an understanding of the specificity of sport. The Amsterdam Declaration on Sport referred to the 'particular characteristics of amateur sport'.⁹⁶ The Helsinki Report on Sport⁹⁷ and the Nice Declaration on Sport⁹⁸ built on this by highlighting a handful of sport-specific characteristics like the unpredictability of results and pyramid structure of sports. However, these documents consisted of soft law meaning the recognition was not legally binding. Though soft law, evidence exists that the Commission acknowledged sports specificity in formal decisions following those political declarations. In the UEFA joint selling of Champions League TV rights case, the European Commission declared the 'the Commission fully endorsed the specificity of sport'.⁹⁹

Following the landmark ruling of *Meca-Medina*¹⁰⁰ where the CJEU rejected that sporting rules were not necessarily outside of the application of EU law by virtue of its sporting nature, the Commission published the White Paper on Sport¹⁰¹. This developed sports specificity further by identifying 'sport has certain characteristics, which are often referred to as the "specificity of sport"'.¹⁰² In the accompanying Staff Working Document the European Commission added that sports specificity was 'the distinctive features setting sport apart from other economic activities'.¹⁰³ Although not legally binding, this presented a more robust acknowledgement of

93 Judgment of 12 December 1974, *Walrave and Koch v. Association Union Cycliste Internationale*, C-36/74, EU:C:1974:140.

94 Opinion of 24 October 1974, *Walrave and Koch v. Association Union Cycliste Internationale* C-36/74, EU:C:1974:111.

95 Judgment of 12 December 1974, *Walrave*, C-36/74.

96 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Declaration 29 (OJ C 340, 10.11.1997, p. 136), <https://eur-lex.europa.eu/eli/treaty/ams/sign>.

97 Commission of the European Communities, *Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework, The Helsinki Report on Sport*, COM (1999) 644 Final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF>.

98 European Council (2000) Conclusions of the Presidency: Annex IV, https://www.europarl.europa.eu/summits/nice2_en.htm#an4.

99 European Commission Decision of 23 July 2003, Comp/2-37.398, *Joint Selling of the Commercial Rights of the UEFA Champions League* [2003] EC 778, Para 131, <http://data.europa.eu/eli/dec/2003/778/oj>.

100 Judgment of 18 July 2006, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, Case C-519/04, EU:C:2006:492.

101 European Commission, *White Paper on Sport*, COM (2007) 391 Final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0391>.

102 White Paper on Sport, 13.

103 European Commission, *Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport*, COM (2007) 391 final, 69, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007SC0935>.

sports specificity, confirming the Commission and CJEU had applied this prior to the White Paper on Sport. This is supported by decisions such as UEFA's multiple club ownership rules,¹⁰⁴ regarding the protection of uncertainty of outcomes. Also, the *Lehtonen* judgment¹⁰⁵ supports this, where a single transfer deadline for all federations inside and outside of the European zone was deemed compatible with EU law based on contributing to sport's proper functioning. The recognition of these features of the specificity of sport implies a level of 'conditional autonomy' of sport, but not complete autonomy.¹⁰⁶

Sports specificity gained formal recognition with the entering into force of the Lisbon Treaty and its Article 165 which refers to 'taking account of the specific nature of sport'. Though legally binding at this point, the evidence above suggests sports specificity was recognised before its formal codification in the Treaty. However, the impact on EU law has been slow, and perhaps even limited, as our analysis also reveal that, actually, many Commission decisions that cited the specificity of sport were finally taken on economic or market grounds, not on the basis of the specificity of sport.^{107 108 109}

4.1.1. Characteristics of Sports Specificity

The White Paper on Sport¹¹⁰ provides the clearest breakdown of characteristics that the EU views as sport specific. These are shown in Table 2 (below). The White Paper splits these characteristics into 'sporting activities' and 'sporting structures'. While the majority of these were highlighted in the literature review, some were not. For instance, separate competition for men and women or limitations on participants in competitions. Although, with transgender participation increasingly being recognised in sport¹¹¹ along with gender-fluid athletes, it could prove increasingly difficult for sport to argue separate competitions for genders is a specific characteristic. Limitations on participants are needed for the proper functioning of competition. If not, any individual in theory could argue for inclusion. This characteristic received acknowledgement in the *Deliège* case¹¹² where the CJEU declared that selection rules limiting participants did not present 'a restriction on the freedom to provide services' as it was inherent to sports functionality.

104 European Commission Decision of 27 June 2002, Comp/IV/37.806 (ENIC/UEFA), https://ec.europa.eu/competition/antitrust/cases/dec_docs/37806/37806_7_3.pdf.

105 Judgment of 13 April 2000, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, Case C-176/96, EU:C:2000:201.

106 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 524.

107 European Commission Decision of 19 April 2001, Case 37.576, (*UEFA's Broadcasting Regulations*), <http://data.europa.eu/eli/dec/2001/478/oj>.

108 European Commission Decision of 23 July 2003, Comp/2-37.398, (Joint selling of the commercial rights of the UEFA Champions League), <http://data.europa.eu/eli/dec/2003/778/oj>.

109 European Commission Decision of 22 March 2003, Comp/C-2/38.173, (Joint selling of the media rights to the FA Premier League), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC0112%2803%29>.

110 White Paper on Sport, 13.

111 Owen Hargie, David Mitchell, and Ian Somerville, "People have a knack of making you feel excluded if they catch on to your difference: Transgender experiences of exclusion in sport", *International Review for the Sociology of Sport* 52, no. 2, (2017): 223–239, <https://doi.org/10.1177/1012690215583283>.

112 Judgment of 11 April 2000, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée*, Case C-51/96 and C-191/97, EU:C:2000:199, para 64.

Table 2. *The specificity of sport according to the 2007 White Paper on Sport*

Sporting Activities	Sporting Structures
Reliance on rivalry between teams	Pyramid framework of sport governance
Uncertainty of results	Autonomy of sport organisations
Separate competition for men and women	Open competition structure and solidarity between grassroots and elite level
Limitation on participants in competitions	

There are limitations to the application of sports specificity and its characteristics, as defined in the White Paper. The most relevant limitation lies in the heterogeneity of sport, and the fact that not all those characteristics can be found in every sport. This demonstrates the problem of a single definition, which in turn could create regulatory instability. The European Commission indeed highlights this problem, accepting that ‘features often presented as characteristics such as system of open competitions based on promotion and relegation, are actually limited to a certain category of sport’.¹¹³ An example is the 6 Nations tournament in rugby union, where the tournament is ring-fenced to include the same teams. Similarly, sports like tennis and golf differ from the typical pyramid structure of competition. This implies the sport-specific characteristics cannot be cumulatively generalised to all European sports. The implication is that EU institutions might be limited in developing blanket sport policies or law, like a general sporting exception if European sports cannot be uniformed under the same specific characteristics.

A takeaway from the recognition of only a few characteristics as sport-specific is ‘it cannot be constructed so as to justify a general exemption from the application of EU law’.¹¹⁴ This is because not all sports elements are specific, some are common in other industries as highlighted by Weatherill.¹¹⁵ Thus a blanket sports exception is extremely difficult to build, and it could even be argued that it is neither feasible, nor desirable. This would be a justification to support the EU’s case-by-case approach to the specificity of sport, confirmed for example in *Meca-Medina*. The consequence of not having a blanket exception, though, is that it might create a certain level of insecurity for sports bodies.^{116 117} On the other hand, it can be argued that it can be beneficial for wider sport governance, because it places a limit on the governing bodies’ autonomy and regulatory power. A secondary consequence of not having a blanket exception that defines the specificity of sport is that it obliges sport governing bodies to focus on good governance in their decision making, because it empowers stakeholders to challenge the traditional vertical governance structure of European sports under EU Law.¹¹⁸

113 Commission Staff Working Document – Accompanying document to the White Paper on Sport, 40.

114 White Paper on Sport, 13.

115 Weatherill, “EU Sports Law: The Effect of the Lisbon Treaty”, 507-525.

116 Weatherill, “EU Sports Law: The Effect of the Lisbon Treaty”, 507-525.

117 Stephen Weatherill, “Is there such a thing as EU Sports Law?” in *European Sports Law: Collected Papers*, ed. Stephen Weatherill (The Hague: TMC Asser Press, 2014), 543-553.

118 Borja García, “Sport governance after the White Paper: The demise of the European model?”, *International Journal of Sport Policy and Politics* 1, no. 3 (2009): 267–284, <https://doi.org/10.1080/19406940903265541>.

4.1.2. Cooperation as a Method towards Specificity?

Evidence exists of cooperation between the EU and sports regulators seen in examples like the home-grown players' rule.¹¹⁹ Hill¹²⁰ advocated for this approach to specificity recognition. UEFA alluded to cooperation in the Bosman case,¹²¹ as they claimed the '3+2 rule was drawn up in collaboration with the Commission'. Although this claim yielded no success, more recently the EU has embraced cooperation with UEFA, with the Commission signing a cooperation agreement with the football governing body since 2014.^{122 123} It could be argued that this cooperation is a result of recognising the specificity of sport. Noticeably, this cooperation seems to be led by UEFA, with little evidence of other bodies partaking. García and Weatherill¹²⁴ highlight that UEFA took this approach to perhaps confine interference from the EU.¹²⁵ However, the cooperation between EU institutions and sport bodies in the regulation of sport still has its limits, as seen in the ISU case, where first the Commission and then the General Court ruled against the International Skating Union's eligibility rules.¹²⁶ This, in turn, reinforces the argument that even through cooperation, it is unlikely that sport will obtain a general definition of its specificity from EU institutions and any type of blanket exemption from EU law.

4.2. CATEGORISATION OF SPORTING EXCEPTIONS

We move now to the second theme identified in our analysis. This refers to the efforts to categorise specific sporting rules adopted by sports organisations as being sporting exceptions recognised under EU law. Our analysis of EU documents adds to previous academic work^{127 128} that took stock of sporting exceptions recognised by the EU. The list of sporting rules that have been categorised as exceptions by EU institutions can be seen in Table 3 (below).

A sporting exception is defined as the acceptance of sports rules that would normally be contrary, *prima facie* to EU law. These rules are deemed compatible with the Treaty, and hence accepted, based on being inherent to the functioning of sports activities.^{129 130 131} Inherency was established in *Walrave* where the CJEU declared discrimination on the basis of nationality

119 European Commission Press Release, *UEFA rule on 'home-grown players': compatibility with the principle of free movement of persons*. IP/08/807, 2008, https://ec.europa.eu/commission/presscorner/detail/en/IP_08_807.

120 Hill, "The European Commission's White Paper on Sport", 253-566.

121 Judgment of 15 December 1995, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, Case C-415/93, EU:C:1995:463, para 126.

122 European Commission Press Release, *European Commission and UEFA consolidate cooperation*. IP/18/901, 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_901.

123 Henk Meier et al. "The short life of the European Super League: a case study on institutional tensions in sport industries", *Managing Sport and Leisure* (2022): 1-22, <https://doi.org/10.1080/23750472.2022.2058071>.

124 García, and Weatherill, "Engaging with the EU in Order to Minimize its Impact", 238-256.

125 See also Meier et al. "The Short Life of the European Super league", 1-22.

126 European Commission Decision of 8 December 2017, Case AT.40208 (International Skating Union's eligibility rules), https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1579_5.pdf.

127 Kienapfel, and Stein, "The Application of Articles 81 and 82 ECC", 6-7.

128 Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", 697-725.

129 Judgment of 15 December 1995, *Bosman*, Case C-415/93.

130 Judgment of 11 April 2000, *Deliège*, Case C-51/96 and C-191/97.

131 Judgment of 18 July 2006, *Meca-Medina*, Case C-519/04.

for international competitions were 'inherent in the concept of a national team'.¹³²

Robert Siekmann, in his work, included the joint selling of media rights as a sporting exception¹³³. This is debatable, however, as the conclusion of the European Commission¹³⁴ in the UCL case was that the joint selling arrangements were granted an 'exemption pursuant to Article 81(3)'. This implies sports specificity was not the reason for the exemption. It was based on an exemption clause non-sport-related industries can attain. Thus, not a sporting exception. The same is true for an agency licensing system as outlined in the Piau case. The CJEU confirmed that sports specificity was not relevant as it stated 'the "specific nature" of sport may not be relied on... The contested decision is not based on such an exception'.¹³⁵ This supports the view that sporting rules that are exempt under Article 81(3) are not necessarily, at least formally, sporting exceptions and therefore we have decided not to include those in Table 3. This is of course a conceptual debate, but with policy implications, which can require further research and discussion, and we invite colleagues to build on our contribution for that. Be that as it may, the implications of our findings are that, as pointed out above, very few sporting rules are actually considered inherent to sport. The explanation is perhaps relatively simple, as most cases that reach EU institutions deal with the economic dimension of sport, and therefore EU institutions are minded to rule on those economic grounds.

Table 3. Sporting rules and activities recognised as exceptions

Sporting rule/activity	Case in which it was identified
National team composition	Walrave (1974)
Team selection/participant limitation	Deliège (2000)
Transfer system/deadline	Bosman (1995) and Lehtonen (2000)
Compensation for training young players	Bernard (2010)
Anti-doping regulations	Meca-Medina (2006)
Multiple ownership in the same competition	ENIC/UEFA (2002)
Gatekeeping/license system	FIA (2001) and ISU (2017)
Home and away rule	Mouscron (1999)

Source: *Authors' elaboration with analysis of EU documents*

4.2.1. Importance of Proportionality

A subtheme that appears clearly in the recognition and classification of sporting exceptions is the issue of proportionality, for it is one of the main criteria to adjudicate by the Commission

¹³² Judgment of 12 December 1974, *Walrave*, C-36/74, 1410.

¹³³ Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", 697-725.

¹³⁴ European Commission Decision of 23 July 2003, Comp/2-37.398, (Joint selling of the commercial rights of the UEFA Champions League), para 201.

¹³⁵ Judgment of 15 December 1995, *Bosman*, Case C-415/93, para 105.

and the CJEU. Sports regulators have had to adhere to a two-step process when defending their rules. Firstly, to objectively justify the sport rule. Secondly, to ensure proportionality. This process is what Parrish and Miettinen¹³⁶ identified, whereby they attempted to outline the process that has led to the recognition of some sporting exemptions.

Proportionality, thus, is key. If this is not met, then the compatibility with EU law or exception status of the sporting rule under analysis is lost. This was most evident in *Bosman* where the CJUE accepted the defendant's justifications could be deemed legitimate. However, they were not proportional as 'the same aims can be achieved at least efficiently by other means which do not impede freedom of movement for workers'.¹³⁷ And has been repeated more recently on the ISU case, where the eligibility rules were deemed to go beyond what was necessary. Thus, as Kienapfel and Stein¹³⁸ emphasise, proportionality presents a significant challenge to a conclusive categorisation of rules which can be relied upon to predict future compatibility. However, while challenging, it is not impossible to predict future compatibility using a deductive analysis of existing case law, as we do in our article. As time goes on with this case-by-case approach, more sporting exceptions could be added to the list, and therefore prediction of future compatibility will become easier, with incremental clarity likely being provided with each future decision.

4.3. THE LINK BETWEEN SPORTING EXCEPTIONS AND THE SPECIFICITY OF SPORT

The first two themes of our findings analyse the way in which EU institutions have defined the specificity of sport and identify the sporting rules that have been accepted as sporting exceptions. This leads almost naturally to one question: Is it possible to relate, analytically, those sporting rules to the specificity of sport? In other words, which sporting exceptions contribute to the specificity of sport? This can be discussed by juxtaposing our first two themes to create a combined narrative whose relevance deserves to be presented as a theme on its own.

Indeed, it can be seen that the sporting exceptions recognised by the EU, and summarised in our second theme and Table 3 (above), are justified because they contribute to specific and legitimate sporting objectives; that is to say, those rules are identified because they maintain some of the characteristics of the specificity of sport identified by the EU, and summarised in our first theme and Table 2 (above). Therefore, this implies that it is possible, for analytical matters, to link sporting exceptions to the definition of the specificity of sport. For example, UEFA's ban on multiple club ownership analysed by the Commission in the ENIC case in the same competitions was justified to 'ensure the uncertainty of the outcome',¹³⁹ which is one of the characteristics identified in the definition of the specificity of sport. Another example is sports federations being allowed to operate a licensing system for the organisation of competitions as part of the pyramidal structure of sport governance (another of the characteristics of the specificity of sport), as confirmed in the ISU decision.¹⁴⁰ The Commission accepted a licensing

136 Parrish and Miettinen, "The Sporting Exception in European Union Law".

137 Judgment of 15 December 1995, *Bosman*, Case C-415/93, para 110.

138 Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law", 697-725.

139 European Commission Decision of 27 June 2002, Comp/IV/37.806 (ENIC/UEFA), para 28.

140 European Commission Decision of 8 December 2017, Case AT.40208 (International Skating Union's eligibility rules).

system could be compatible, but only if the ISU made changes to its eligibility rules. In both examples, of course, the relevance of proportionality is paramount, as we have also discussed above. Whereas those rules might be accepted and, therefore, linked to the specificity of sport, their legality under EU law will not be judged purely on the objective that is pursued, but also on the proportionality of its application.

However, this does not detract the relevance of our analysis here. Characteristics of the specificity of sport have been cited by the EU institutions when elucidating the nature of those sporting rules. It is therefore possible to elaborate a categorisation of the sporting rules that have been categorised as sporting exceptions, and link those to the features of sport specificity that such rules are protecting. This is summarised in Table 4 (below).

Table 4. Categorisation of sporting rules according to their contribution to the specificity of sport

Characteristics of the specificity of sport	Sporting rules recognised as exceptions that protect sports specificity
Reliance on rivalry between teams	<ul style="list-style-type: none"> • Compensation for training young players • Transfer system/deadline
Uncertainty of results	<ul style="list-style-type: none"> • Multiple ownership in same competition • Anti-doping regulations • Transfer system/deadline
Separate competition for men and women	<ul style="list-style-type: none"> • Team selection/participant limitation
Limitation on participants in competition	<ul style="list-style-type: none"> • National team composition • Team selection/participant limitation • Multiple ownership in same competition
Pyramid framework of sport	<ul style="list-style-type: none"> • Gatekeeping/license system • Team selection/participant limitation
Autonomy of sport organisations	<ul style="list-style-type: none"> • Anti-doping regulations • Team selection/participant limitation • Home and away rule • National team composition • Transfer system/deadline
Competition structure and solidarity between grassroots level and elite level	<ul style="list-style-type: none"> • Compensation for training young players • Team selection/participant limitation

Source: *Authors' elaboration with analysis of EU documents*

4.4. THE IMPACT OF ARTICLE 165 TFEU

The final theme that we identified in our analysis refers to a discussion of the extent to which Article 165 TFEU might have had an impact in the definition of the specificity of sport and the identification of sporting exceptions by EU institutions. We have identified two different practices, which we present as sub themes in this section.

4.4.1. Impact on the Application of Articles 101 and 102 TFEU: Confirmation of Existing Practice

When the EU have applied Articles 101 and 102 TFEU it has mostly accounted for the specificity of sport as outlined above. In the first post-Lisbon case (*Bernard*), Article 165 was referenced. However, the reference was merely a confirmation of what was already established. That 'recruitment and training of young players must be accepted as legitimate'.¹⁴¹ This argument is reinforced as the CJEU reminded in *Bernard*¹⁴² that the training of young players was recognised as a legitimate objective already in *Bosman*.¹⁴³ As García, Vermeersch and Weatherill¹⁴⁴ have pointed out, the formal recognition of sports specificity in Article 165 TFEU has likely just formalised the EU's existing approach to sport.

Similarly, resemblances can be drawn between the European Commission decision on FIA regulations¹⁴⁵ and its more recent ISU decision,¹⁴⁶ which has been appealed to the General Court and the CJEU. In both decisions, the Commission raised objections, citing a conflict of interest as both FIA and ISU were abusing regulatory power to protect commercial activities. However, in both cases the Commission acknowledged that a pre-authorisation system of alternate competitions to their own could be legitimately justified if they were proportional. These similarities reinforce the suggestion that the EU's approach to sport has not changed based on the formal introduction of specificity in Article 165.

4.4.2. Impact on State Aid: Development of an Emerging Sports Law Area

Since 2011 state aid decisions concerning sport have surged. This started with the European Commission's¹⁴⁷ verdict on the Hungarian tax scheme. In this case, the Commission used the recognition of sports specificity in Article 165 to show a common interest objective. This being one of the criteria for an exception under Article 107(3)(c), that it needs to be 'aimed at a well-defined objective of common interest, i.e. does the proposed aid address a market failure or other objective?'.¹⁴⁸

Our findings confirm García, Vermeersch and Weatherill's¹⁴⁹ analysis that recent state aid cases can be split into two groups. Those concerning building or renovation of sports infrastructure

141 Judgement of 16 March 2010, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, Case C-325/08, EU:C:2010:143, para 139.

142 Judgement of 16 March 2010, *Olympique Lyonnais*, Case C-325/08.

143 Judgment of 15 December 1995, *Bosman*, Case C-415/93, para 110.

144 García et al, "A new Horizon in European Sports Law", 28-61.

145 European Commission, *Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163, Notification of FIA Regulations, COMP/36.638, Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776, GTR/FIA & others*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001XC0613%2801%29>.

146 European Commission Decision of 8 December 2017, Case AT.40208 (International Skating Union's eligibility rules), https://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1579_5.pdf.

147 European Commission Decision of 9 November 2011, Case SA.31722 (Supporting the Hungarian sport sector via tax benefit scheme), https://ec.europa.eu/competition/state_aid/cases/240466/240466_1271180_52_3.pdf.

148 European Commission Decision of 20 November 2013, Case SA.37109 (Belgium football stadiums in Flanders), para 29, https://ec.europa.eu/competition/state_aid/cases/249493/249493_1510284_167_2.pdf.

149 García et al, "A new Horizon in European Sports Law", 28-61.

and those regarding professional sports teams. The trend is the Commission were more favourable on the former group. Regarding infrastructure, Article 165 TFEU is referenced in almost all cases to show a common interest.^{150 151 152 153 154 155 156 157 158 159 160} This demonstrates Article 165 is having a reasonable impact on state aid decisions. In the European Commission decision of renovation to a Flanders stadium, they acknowledged 'sport has an educational role, as well as a social, cultural and health dimension'.¹⁶¹ This suggests the Commission took account of sports societal benefits, implying Article 165 is having an impact. Interestingly, nine of the decisions above that reference Article 165^{162 163 164 165 166 167 168 169 170} also reference the Amsterdam Treaty and its declaration on sport, which suggests that Article 165 TFEU cannot be considered as the only reason to recognise the specificity of sport. In turn, that moderates, or at least qualifies, the impact of Article 165 on its own in the legal reasoning of the Commission.

Regarding state aid to sport clubs, the Commission has taken a less lenient approach, and it has made far less reference to Article 165 TFEU. This suggests that, irrespective of other legal reasoning, decisions that accept a level of state aid to sport-related activities do indeed tend to mention Article 165 TFEU. Even if it is perhaps not the main contributor to the final decision, it is another tool the European Commission can use to elaborate on and support the specificity of sport.

150 European Commission, *Supporting the Hungarian sport sector via tax benefit scheme*.

151 European Commission Decision of 5 December 2012, Case SA.33952 SA.33952 (Germany climbing centres of Deutscher Alpenverein), https://ec.europa.eu/competition/state_aid/cases/246072/246072_1392662_211_2.pdf

152 European Commission, *Belgium football stadiums in Flanders*.

153 European Commission Decision of 20 March 2013, Case SA.35135 (Germany Multifunktionsarena der Stadt Erfurt), https://ec.europa.eu/competition/state_aid/cases/245994/245994_1426005_90_2.pdf.

154 European Commission Decision of 20 March 2013, Case SA.35440, (Germany Multifunktionsarena der Stadt Jena), https://ec.europa.eu/competition/state_aid/cases/245993/245993_1426022_126_2.pdf.

155 European Commission Decision of 2 October 2010, Case SA.36105, (Germany Fußballstadion Chemnitz), https://ec.europa.eu/competition/state_aid/cases/247460/247460_1472227_93_2.pdf.

156 European Commission Decision of 2 May 2013, SA.33618 (Sweden is planning to implement for Uppsala arena), https://ec.europa.eu/competition/state_aid/cases/244148/244148_1453714_110_2.pdf.

157 European Commission Decision of 13 December 2013, Case SA.37373, (The Netherlands contribution to the renovation of ice arena Thialf in Heerenveen), https://ec.europa.eu/competition/state_aid/cases/250448/250448_1502751_94_2.pdf.

158 European Commission Decision of 18 December 2013, Case SA.35501, (France Financement de la construction et de la rénovation des stades pour l'EURO 2016), https://ec.europa.eu/competition/state_aid/cases/248555/248555_1532962_165_2.pdf.

159 European Commission Decision of 9 April 2014, Case SA.37342, (United Kingdom regional stadia development in Northern Ireland), https://ec.europa.eu/competition/state_aid/cases/252038/252038_1585421_47_2.pdf.

160 European Commission Decision of 24 May 2017, Case SA.46530, (Slovakia National football stadium), https://ec.europa.eu/competition/state_aid/cases/266249/266249_1924988_109_2.pdf.

161 European Commission, *Belgium football stadiums in Flanders*, para 31.

162 European Commission, *Belgium football stadiums in Flanders*.

163 European Commission, *Germany Multifunktionsarena der Stadt Erfurt*.

164 European Commission, *Germany Multifunktionsarena der Stadt Jena*.

165 European Commission, *Germany, Fußballstadion Chemnitz*.

166 European Commission, *Sweden is planning to implement for Uppsala arena*.

167 European Commission, *The Netherlands contribution to the renovation of ice arena Thialf in Heerenveen*.

168 European Commission, *France Financement de la construction et de la rénovation des stades pour l'EURO 2016*.

169 European Commission, *United Kingdom regional stadia development in Northern Ireland*.

170 European Commission, *Slovakia National football stadium*.

Back to issues of state aid to sport clubs, though, Article 165 TFEU was just barely mentioned in the decisions regarding illegal state aid to three Valencian clubs, where the European Commission¹⁷¹ acknowledges Article 165 but does not refer to it thereafter. In the case of tax incentives given through the Spanish national sports act to four clubs, the European Commission¹⁷² referenced Article 165 again. However, the Commission declared that 'in the sense described by Article 165 of the Treaty. It is obvious that the general support of sport is not an objective of the measure at state'.¹⁷³ The Commission uses Article 165 against the defendants, implying the fortunate circumstances were contrary to Article 165 as it promoted 'selective support to certain strong actors',¹⁷⁴ rather than promoting fairness and openness, as Article 165 requires. Importantly, this European Commission¹⁷⁵ decision shows that Article 165 can also have a *negative* impact, working against sports clubs claiming the specificity of sport; something which has not been seen before. The implication is that Article 165 reinforces the socio-cultural elements of sport. Hence, it might act as a magnifying glass on the economic side of sport as the Commission can possibly separate the socio-cultural and economic elements in an easier way. Therefore, the Commission might use Article 165 to determine if professional football clubs (in these cases, but can apply to other commercialised sports) are acting in the interest of sports specificity or acting as commercial operators in the interest of economic gain. Article 165 TFEU, therefore, whilst supporting the specific nature of sport, could also be used to be more strict, coherent and robust in identifying what *is not* part of the specificity of sport. This, in the long term, might present difficulties for those sports organisation that perform both sporting and economic or commercial functions. It is, we would argue, one of the unintended consequences of the adoption of Article 165 TFEU and the current policy frame that drives EU sport policy.

5. DISCUSSION AND CONCLUSION

In this article we have identified that the EU consider sports specificity to mean the distinct characteristics of sport that separate it from other economic activities.^{176 177 178} There are several sporting rules that have been categorised as sporting exceptions, as they protect some of these sports-specific characteristics. However, the EU recognition of sport specific rules cannot be widely generalised to all sports because of the heterogeneity of sport structures. This can complicate EU sport regulation. Finally, a limited list of specific characteristics implies that the EU does not consider all aspects of sport to be unique, because some are heavily commercial.¹⁷⁹ Therefore, in the eyes of the EU, the specificity of sport allows for the recognition of sport's special features, but it does not warrant a general exception for sport from EU law.

171 European Commission Decision of 4 July 2016, Case SA.36387, (Implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva), <http://data.europa.eu/eli/dec/2017/365/oj>.

172 European Commission Decision of 4 July 2016, Case SA.29769, (Implemented by Spain for certain football clubs), <http://data.europa.eu/eli/dec/2016/2391/oj>.

173 European Commission, *Implemented by Spain for certain football club*, para 88.

174 European Commission, *Implemented by Spain for certain football club*, para 89.

175 European Commission *Implemented by Spain for certain football club*.

176 White Paper on Sport.

177 Commission Staff Working Document - Accompanying document to the White Paper on Sport.

178 European Commission, *Developing the European dimension of sport*, COM (2011) 12 final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>.

179 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

The inclusion of Article 165 TFEU has had some impact on the application of EU law to sport and on the recognition of the specificity of sport, but this has been mostly limited to the application of state aid provisions. However, if focusing on free movement and other competition policy provisions, then Article 165 has affected it to a very minimal extent. It has just provided confirmation to pre-Lisbon practice.^{180 181 182} Similarities between cases pre and post-Lisbon suggest that the same verdicts may have been reached even in the absence of Article 165 TFEU.

This study also focused on the understanding of sports specificity from the perspective of the EU. The findings show that there is only a handful of rules considered as inherent to sport. Therefore, the implication that can be drawn for sports bodies is they cannot rely on sporting exceptions being granted without due analysis. However, sports bodies that can demonstrate their rules protect sports specificity have a stronger defence. This is because the research implies sporting exceptions have been granted when they protect the special characteristics of sport.

In the analysis it was highlighted that the Commission seems willing to take a cooperative approach to sports specificity as shown with UEFA, resulting in the favourable backing of UEFA rules more recently. The implication of this finding is that should other sports bodies follow suit, they could see similar benefits. As Hill¹⁸³ suggests and this paper discusses, working alongside the Commission could see sports specificity applied more generously in sports regulators favour as seen with UEFA.

One important implication of the findings is that the existing case-by-case approach is unlikely to change. So, there will be continued uncertainty for sports organisations regarding compatibility with EU law. Our analysis, however, suggests that it is possible to elaborate a categorisation of sporting rules and their correspondence to the specificity of sport. This can help sporting organisations in their policy-making, and certainly future decisions will only add to that categorisation. One of the contributions of our article, therefore, is not only the inductive identification of definitions of sport specificity, but the way in which these can be linked to sporting rules that operationalise such specific characteristics. One of the main implications of that analysis is that public authorities or sports organisations need to demonstrate that their decisions have positive socio-cultural benefits through sport to have a higher possibility of being recognised as part of the specificity of sport.

Our research has presented in-depth analysis of the legal approach of the EU to sport. Although some policy or soft-law documents were analysed, our conceptual framework was socio-legal, and the sample of documents analysed focused on legal decisions. Therefore, we need to acknowledge that our study comes with some limitations, especially in relation to not exploring the policy side of EU sport regulation. Therefore, further research may benefit from taking a wider scope to incorporate the policy approach to offer a more holistic view. This can be achieved through analysing more documentation from the Council of the EU and the

180 Weatherill, "EU Sports Law: The Effect of the Lisbon Treaty", 507-525.

181 Weatherill, "Is there such a thing as EU Sports Law?", 543-553.

182 García et al, "A new Horizon in European Sports Law", 28-61.

183 Hill, "The European Commission's White Paper on Sport", 253-266.

European Parliament alongside the Commission and CJEU.

Finally, further research will need to be done to build on the empirical effort presented in this paper. There is a number of cases pending the CJEU with relevance to the definition of the specificity of sport, and especially to the nature of open competitions and the pyramidal governance of sport. Inevitably any research comes with time limits, as it is necessary to draw a line at some point. However, this paper hopefully provides a framework to build on and develop future and continuous critical analysis of the concept of the specificity of sport in the development of EU sports law and policy.

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