

THE SPORTS LAW
REVIEW

SIXTH EDITION

Editor
András Gurovits

THE LAWREVIEWS

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PREFACE

The Sports Law Review, in its sixth edition, is intended as a practical, business-focused legal guide for all relevant stakeholder groups in the area of sports, including sports business entities, sports federations, sports clubs and athletes. Its goal is to provide an analysis of recent developments and their effects on the sports law sector in 20 jurisdictions, and serve as a guidebook for practitioners as to how a selected range of legal topics is dealt with under various national laws. The guidance given herein will, of course, not substitute for any particular local law advice that a party may have to seek in connection with sports-related operations and activities. Specific emphasis is put on the most significant developments and decisions of the past year in the relevant jurisdictions that may be of interest for an international audience.

The Sports Law Review recognises that sports law is not a single legal topic, but rather a field of law that is related to a wide variety of legal areas, such as contract, corporate, intellectual property, civil procedure, arbitration and criminal law. In addition, it covers the local legal frameworks that allows sports federations and sports governing bodies to set up their own internal statutes and regulations, as well as to enforce these regulations in relation to their members and other affiliated persons. While the statutory laws of a particular jurisdiction apply, as a rule, only within the borders of that jurisdiction, these statutes and regulations, if enacted by international sports governing bodies, such as FIFA, UEFA, FIS, IIHF, IAAF and WADA have a worldwide reach. Sports lawyers who intend to act internationally or globally must, therefore, be familiar with these international private norms if and to the extent that they intend to advise federations, clubs and athletes that are affiliated with such sports governing bodies. In addition, they should also be familiar with the relevant practice of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, as far as it acts as the supreme legal body in sport-related disputes. Likewise, these practitioners should have at least a basic understanding of the Swiss rules on domestic and international arbitration as Swiss law is the *lex arbitri* in CAS arbitration.

While sports law has an important international dimension, local laws remain relevant in respect of all matters not covered by the statutes and regulations of the sports governing bodies. This growing international dimension means that athletes, sports clubs and sports federations are increasingly operating in an international environment and dealing with a variety of jurisdictions. As a result, the need for an international regulation of international sport is growing, and more and more specific legal assessments of individual aspects of local law are required, in particular in respect of local mandatory provisions that may prevail over or invalidate certain provisions of regulations enacted by sports governing bodies. The primacy of local laws is of particular importance in international employment relationships; for example, between clubs and foreign players, where the local laws of the clubs usually provide for a set

of mandatory provisions that may impede performance by the athletes of their contractually agreed rights as regards the employers, should they not fulfil the employment agreement.

Each chapter of this sixth edition begins by discussing the legal framework of the relevant jurisdiction permitting sports organisations, such as sports clubs and sports governing bodies (e.g., national and international sports federations), to establish themselves and determine their organisational structure, as well as their disciplinary and other internal proceedings. The section detailing the competence and organisation of sports governing bodies will explain the degree of autonomy that sports governing bodies enjoy in the jurisdiction, particularly in terms of organisational freedoms and the right to establish an internal judiciary system to regulate a particular sport in the relevant country. The purpose of the dispute resolution system section is to outline the judiciary system for sports matters in general, including those that have been dealt with at first instance by sports governing bodies. An overview of the most relevant issues in the context of the organisation of a sports event is provided in the next section and, subsequent to that, a discussion on the commercialisation of such events and sports rights will cover the kinds of event- or sports-related rights that can be exploited, including rights relating to sponsorship, broadcasting and merchandising. This section will further analyse ownership of the relevant rights and how these rights can be transferred.

Our authors then provide sections detailing the relationships between professional sports and labour law, antitrust law and taxation in their own countries. The section devoted to specific sports issues will discuss certain acts that may qualify not only as breaches of the rules and regulations of the sports governing bodies, but also as criminal offences under local law, such as doping, betting and match-fixing.

In the final sections of each chapter, the authors provide a review of the year, outlining recent decisions of courts or arbitral tribunals in their respective jurisdictions that are of interest and relevance to practitioners and sports organisations in an international context, before they summarise their conclusions and the outlook for the coming period.

Each chapter of this sixth edition of *The Sports Law Review* has been provided by renowned sports law practitioners in the relevant jurisdiction. As the editor of this publication, I would like to take the opportunity to thank all of the authors for their skilful and insightful contributions to this publication. I trust that you will find this global survey informative and will avail yourselves at every opportunity of the valuable insights contained herein.

András Gurovits

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Zurich

August 2020

AUSTRIA

*Arthur Stadler and Urim Bajrami*¹

I ORGANISATION OF SPORTS CLUBS AND SPORTS GOVERNING BODIES IN AUSTRIA

The regulation of sports in Austria is a very lively topic as it raises several interdisciplinary issues with regard to different fields of law (e.g., events law, association law or taxation, to name a few). The ongoing commercialisation of leagues in football drives the revenue generated from broadcasts to a new level, while the rise of sports in new media poses different questions about rights exploitation. Concerning new media, e-sports has garnered phenomenal attention, revenue and prize money in recent years; however, e-sports is a relatively unexplored legal matter and, having not (yet) been recognised as a sport by the competent Austrian authority, the level of legal certainty in this field is low, which unfortunately complicates the development of and investment into e-sports.

In Austria, most sports clubs are organised in the legal form of an association. Associations under the Austrian Association Law (*Vereinsgesetz 2002 (VereinsG)*) are forbidden from primarily performing profit-oriented activities.² Yet they may take advantage of tax benefits if they fulfil certain requirements. To be eligible for tax benefits, the club must be – not solely stipulated by its statutes but reflected in its actual management – a non-profit organisation that solely and directly pursues non-profitable, charitable or ecclesiastical purposes. Solely codifying those purposes in the statutes of an association is not sufficient. The activity of the legal entity has to be useful for the public in an intellectual, cultural, moral or materialistic way and has to be motivated by the selfless and altruistic ethos of the person standing behind the legal entity.³ The promotion of ‘physical sport’ is a cause implying such benefits (or attitude) in any case (non-profit). While for most non-professional sports clubs, these prerequisites do not pose any significant hurdles, since authorities recognise activities like darts or shooting as sport and therefore grant them tax exemptions, they are a concern for highly commercialised sports associations.⁴ A professional club in Austria is considered professional if more than half of the players in the club get paid a minimum of €21,000 per year.⁵ While, for a long time, authorities did not seem to mind Austrian first division football club players earning more than that while still playing under the legal form of an association, this has changed with the introduction of several EU directives. Today, the top clubs are mostly construed as limited

1 Arthur Stadler is a founding partner and Urim Bajrami is an attorney at Stadler Völkel Attorneys at Law. The authors would like to thank David Tisler and Tamino Chochola for their valuable contributions.

2 *Weilinger/Miernicki* in *Schopper/Weilinger*, *VereinsG* §1, item 38 (status as at 1 October 2018, rdb.at).

3 *Unger* in *Schopper/Weilinger*, *VereinsG* §22, item 8 (status as at 1 October 2018, rdb.at).

4 *Bajrami*, *Zur Gemeinnützigkeit von Vereinen im E-Sport*, *ecolex* 2019, 710.

5 Decree of Austrian Federal Ministry of Finance (BMF) BMF-010216/0002-IV/6/2017.

liability companies under Austrian law (see Austrian Law on Limited Liability Companies (GmbH-Gesetz (GmbH-G)), having established different branch associations, which are still eligible for the tax benefits outlined above.

While for traditional sports clubs the hurdles in relation to tax exemptions come about through commercialisation, e-sports clubs have to put up a fight to be recognised as beneficiaries in this context. Being considered a sport and legally classified as such is not only relevant with regard to tax exemptions and grants, but also necessary to be permitted to bet on the respective events in some provinces of Austria. The Court of Justice of the European Union (CJEU) has already dealt with a relevant matter in this regard in *The English Bridge Union Limited v. Commissioners for Her Majesty's Revenue & Customs*.⁶ The English Bridge Union regulates the card game 'duplicate bridge' and operates and hosts tournaments in that respect; thus, it had demanded a refund of the VAT on participation fees for the tournaments, since the VAT directive granted tax exemptions for services that stand in close connection to sports.⁷ This tax exemption for organisers of sports events would not just apply towards the charging of participation and entrance fees but also towards sponsoring in kind in Austria.⁸

The CJEU stated that, owing to the lack of a definition of the term 'sports' in the VAT directive, it has to resort to typical usage in everyday language to evaluate the above issue. 'Sports' as typically used in the general linguistic usage is defined by the CJEU as an activity characterised by a significant physical element. The competitive character of the activity alone is not sufficient to classify the activity as sport. Duplicate bridge requires high-level mental skills (e.g., logic, lateral thinking or memory), while the physical element involved is insignificant in this game, thus duplicate bridge is not to be considered a sport in the sense of said directive. While this decision provides some guidance for local authorities, it does not apply to a large amount of e-sports since – in contrast to the widespread assumption – e-sports mostly require a significant physical effort. Players generally perform more than 200 to 600 hand and finger movements per minute and demonstrate heart frequency rates similar to those of race drivers.⁹ In e-sports, hand-eye coordination, reaction time and strategic thinking are required at all times during the multiple hours often consumed by tournaments in this regard. During this time, the players cannot lack concentration, because every single mouse click may determine victory or defeat. With this, it is indispensable to sustain bodily fitness to be able to concentrate over these long periods. This physical requirement connected with most e-sports entails considerable hurdles for players wishing to participate in professional tournaments, similar to the requirements demanded from professional athletes, which is why they should be sufficiently considered at all times.¹⁰

The Austrian Federal Ministry of Finance explicitly defines the term 'physical sport' in an extensive manner, to provide fiscal benefits to associations promoting any sorts of physical sport, including the controlling of a technical gadget. This definition would already comprise e-sports. Thus, it will be interesting to observe how regulators will treat different associations in this context, which should all be considered charitable organisations in the sense of the law.

6 CJEU C-90/16, *The English Bridge Union Limited*, ECLI:C2017:814

7 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 2006/347, 1.

8 Decree of Austrian Federal Ministry of Finance (BMF), BMF-010219/0221-IV/4/2018.

9 <https://www.engadget.com/2014-10-24-starcraft-2-and-the-quest-for-the-highest-apm.html> (25.7.2020).

10 *Toth/ Bajrami*, E-Sport juristisch betrachtet, Magazin der Bundessportorganisation (12 March 2019).

While traditional sports are organised using a monopolistic approach, putting an umbrella federation in charge to regulate the whole sport, executing the enforcement of rules and regulations via arbitration bodies, e-sports has yet to create such a structure. An e-sports federation already exists in Austria, but since video games are copyright-protected works, the conditions for organising e-sports are completely different compared to traditional sports. The governance of those federations as well as the individual integrated associations is based on the principle of due diligence. Executives and other association bodies are not personally liable for their failings if they performed their duties in a diligent manner at all times and have not acted negligently. If the respective official is performing its activities without payment, there is a higher threshold for actions to be classified negligent, effectively minimising risks of becoming personally liable.¹¹ This shall prevent making honorary posts increasingly undesirable. In addition to the personal liability, the Austrian Supreme Court (Oberster Gerichtshof (OGH)) has stated that the activities of representatives are to be accredited to the organisation, making it liable if the damage was caused during the exertion of activities for the benefit of the organisation and, in particular, in accordance with its statutes.¹²

While executives of associations are only liable if their actions were not performed with the required diligence, organisers of sports events may specifically be held accountable if they fail to provide the necessary safe environment to be expected with respect to an individual event. To this effect, the respective regulations issued by sports federations as well as potential official orders issued by competent authorities shall act as the standard of care.¹³ In any case, the environment has to be considered safe for both athletes and spectators of sports events in order to prevent organisers from being exposed to liability. Since, in most cases, both athletes and spectators have concluded a specific contract with such organiser, the burden of proof referring to the lawful execution of an event lies with the organiser and not with the individual athlete or spectator possibly seeking indemnification for damages suffered owing to an alleged security deficiency.

Athletes are generally not liable for their actions during a competition unless they committed acts out of malevolence with the intention of hurting someone else or with extreme negligence. As this might be hard to prove, there are very few cases where an action in a competition was actually considered a criminal assault and even fewer where the dispute was not resolved by settlement. In some sports, such as boxing, the competing athletes consent to possible respectively necessary bodily harm and waive their right to pursue claims to this effect. From a legal perspective, there is very little leeway with regard to lawfully consenting to the suffering of bodily harm. In contrast, any damage inflicted after the competition has ended or during a break is obviously not covered by such consent. The same applies to damage inflicted by an athlete taking advantage of illegal doping substances. As all athletes agree to a fair fight without the (prohibited) use of doping substances in accordance with the terms issued by their respective federation, any violations in that respect are not covered by the consensual agreement and therefore illegal. As such, the 'harmed' athlete may not only assert tortious claims owing to the criminal assault suffered but also owing to the contract with the federation both athletes are subjugated to.

11 Jöchel in *Marbold/Schneider*, Österreichisches Sportrecht (2016) 61.

12 OGH 15.10.1985, 4 Ob 520/85.

13 OGH 02.04.1997, 7 Ob 2415/96i.

II THE DISPUTE RESOLUTION SYSTEM

Since, according to Austrian law, every association has to create and implement an internal conciliation board for their clubs, most disputes in Austrian sports are resolved through arbitration.¹⁴ In terms of dispute resolution, a distinction is being made between *lex sportiva* and *lex extra sportiva*. *Lex sportiva* are any regulations being established by an individual association or the respective umbrella federation. *Lex extra sportiva* are – by contrast – the different state laws applying in a multitude of individual situations. The difference lies not only in the individual topics of regulation but also in the allocation of competences to either an arbitration court, arbitration body or the state courts. If the dispute is solely of an internal nature in respect of the rules and requirements of an individual association, the path to the state court is not open. An example of this would be a dispute between association members regarding utilisation agreements of their club's training facility.¹⁵

The arbitration body of an association merely constitutes a conciliation board if it does not fulfil the required qualities of an arbitration court as stipulated by law. For the resolution of any disputes that entail legal consequences or relate to topics of fair play or league integrity, a legal arbitration court has to be called upon. This may either be an internal associational arbitration court which fulfils the prerequisites set forth in Section 577 of the Austrian Civil Procedure Act (*Zivilprozessordnung* (ZPO)), such as the minimal number of judges and the possibility of appealing, or a permanent arbitration court (e.g., the independent Court of Arbitration for Sport in Lausanne (CAS)). Most federations, including the Austrian football federation, retain a permanent neutral arbitration court which is organised to deal with various matters in different senates. If a case is brought to an arbitration court, the state courts must not be invoked until the arbitration procedure is finished or at least six months – being calculated from the date of the initial complaint brought before the respective arbitration court – have passed.¹⁶ In other cases, filing a complaint with the state courts is only possible if a legal remedy before the arbitration body is unacceptable due to a violation of the right of a fair trial pursuant to Article 6 of the European Convention on Human Rights (e.g., co-determination is not based on parity, or the judgment violates *ordre public*).¹⁷ If a legal dispute arises outside of the scope of *lex sportiva*, traditional courts are competent from the beginning; to this end, any claim relating to tortious acts is subject to the jurisdiction of the state courts.

To make arbitration bodies competent to resolve matters of *lex sportiva*, it is necessary to conclude an arbitration agreement. Not only players but also associations and national federations have to conclude such agreements for arbitration to be executed in a legally compliant manner. If an association employs an athlete, he or she is granted the same protection as a consumer in arbitration matters. As a result, arbitration agreements may only be concluded with regard to disputes that have already emerged to be valid¹⁸ – special arbitration clauses providing for any dispute arising out of a contract to be resolved by means of arbitration are invalid under Austrian labour law.¹⁹

14 *Schopper in Schopper/Weilinger, VereinsG* §3, item 63 (status as at 1 October 2018, rdb.at)

15 *Mayr in Czernich/Deixler-Hübner/Schauer, Schiedsrecht* item 31.8 (status as at 1 May 2018, rdb.at).

16 *Mayr in Czernich/Deixler-Hübner/Schauer, Schiedsrecht* item 31.9.

17 *Mayr in Czernich/Deixler-Hübner/Schauer, Schiedsrecht* item 31.22.

18 *Grundeis in Marhold/Schneider, Sportrecht* 251.

19 *Grundeis in Marhold/Schneider, Sportrecht*, 251.

The conclusion of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), has facilitated the enforcement of verdicts rendered by arbitration courts, since most countries ratified the treaty accordingly. In addition, the EU has made the enforcement of verdicts passed by courts of EU member states even more simple by reducing the number of necessary documents for the execution to an official notarised copy of the verdict as well as an extraction of the judgment and a list of arrears. The competent authority may only demand a fully translated verdict if the enforcement is contested,²⁰ as any party may postulate a recourse challenging the execution.

III ORGANISATION OF SPORTS EVENTS

The law on the organisation of sports events falls within the competence of the governments of the nine provinces of Austria. Most events require a concession issued by the competent authority and based on the relevant provincial Act, which sets out the safety rules and conditions in respect to the venue in question. While the detailed requirements may vary due to the different provincial Acts, the organiser has to implement certain precautionary measures in any case (e.g., a certain number of medical equipment and doctors in relation to the amount of viewers in a stadium). The competent authority as well as the police are entitled to control observance of the provisions as well as the general safety of an event and are obliged to remove any potential danger and cancel the event if there is no other possibility to keep the audience safe. If an organiser fails to comply with the rules, he or she commits an administrative offence which is punished by a fine of €7,000 or – if the fine is uncollectible – by imprisonment for six weeks. If the organiser is part of a sports federation, he or she has to fulfil additional provisions set forth by the individual association he or she is part of. At all times, organisers have to ensure that no riots arise at the relevant event. Depending on the individual case, Austria has seen penalties of up to €100,000 being imposed on clubs for failing to set up the necessary precautions. The standard of care to be pursued by means of those necessary precautions is outlined by the statutes of the respective federation.

In addition, there are certain provisions the organiser must fulfil because of the viewing contract the spectators conclude when buying a ticket to the event. With the conclusion of the contract, the spectator also submits to an arena rulebook defining the individual duties and prohibitions. A very common rule found in almost all rulebooks of sports arenas is the prohibition of fireworks or any other kind of explosives used to create light in the stands or thrown towards the field. If these contractual provisions are violated, the spectator is liable for the damages caused through his or her illicit actions. In spite of arena rules stating that interfering with the game or causing a riot is a violation of the contract, associations having been subject to disciplinary penalties owed to misbehaviour of the fans in the arena are not able to claim indemnification from the person being alleged to have committed the infringing act.²¹ The Vienna regional court argues that the possibility of such indemnification would oppose the duty set forth in the federal statutes to provide necessary precautions for such an event and would illegitimately shift the burden away from the club. While an individual is

20 *Fucik in Fasching/Konecny*, Zivilprozessgesetze Art 20 EuUVO (status as at 30 November 2010, rdb.at).

21 Vienna Higher Civil Court (LGZ Wien) 25.11.2011, 34 R 163/10p.

not subject to the actual penalty, the liability for any other damage arising out of the breach of the viewership contract stays intact.²² Furthermore, the person who causes a riot or storms the field faces additional criminal charges if he or she causes bodily harm or resists arrest.

When competing in a sports event, every athlete must sign an athlete agreement with the individual sports federation hosting the tournament in which he or she agrees to the individual set of rules of the respective discipline. With these statements, athletes declare submission to the general rules of the event as well as the doping rules, acceptance of the duty to conclude an insurance policy and provide a waiver of liability. These agreements have to be concluded not only by competing athletes but also by any person performing individually at the site – for example, a test ski jumper jumping before the start of the competition to check if everything is in accordance with the respective requirements and the tournament may thus take place. In some cases, it is very hard to determine if the provision of such athlete statement and the subsequent and continuous participation in events of the federation constitutes an employment relationship, and so there may be claims to sickness benefits in the case of an accident.

IV COMMERCIALISATION OF SPORTS EVENTS

i Types of and ownership in rights

Sports events do not constitute any ‘work’ as defined by Austrian copyright law.²³ Unlike in other countries such as France or Brazil, there exists no ancillary copyright in Austria that protects the event in an arena. Because of this, event organisers have no absolute right derived from the copyright to restrict the actual depiction of the event by any photographer. Event organisers or right holders may forbid depiction or reproduction of the event only based on domiciliary right, which is of a possessional nature, and therefore cannot only be exercised by the owner, but also by any lessee.²⁴ As such, organisers or right holders either have to block persons from entering the event location or must consent to any recording for it to be legally reproduced. If any recording is being distributed or replicated without consent, the organiser or right holder does not only have the right to block the reproduction but can also assert contractual damages as well as indemnification regarding any unjustified gains made from the recording. Besides that, a sports association hosting a game in an official sports league and holding the exclusive broadcasting rights is seen as a monopolist. If the event is of significant cultural or athletic relevance for the public, the association has to grant the right of short coverage of the event to any television broadcaster in the form of a summarising clip no longer than 90 seconds under the appropriate conditions. Hence, if other appropriate measures apply, the association is not allowed to prevent a camera crew from entering and filming the event for such purpose.²⁵

While several national antitrust laws exclude the establishment and activity of sports federations and the related statutes of sports associations, the EU Commission has stated that the EU antitrust law is indeed applicable also to the law of associations, sports federations and sports event organisers. Consequently, any rule may potentially also violate antitrust law if it harms competition or is capable of abusing a dominant market position (with relation

22 Vienna Higher Civil Court (LGZ Wien) 25.11.2011, 34 R 163/10p.

23 OGH 23.03.1976, 4 Ob313/76.

24 *Palka in Marbold/Schneider*, Sportrecht 90.

25 OGH 14.06.2005, 4 Ob 66/05t.

to events, broadcasting rights, copyrights, players and player rights). In accordance with this, the European Commission found that the International Skating Union (ISU) – the only umbrella federation in the sport of speed skating recognised by the International Olympic Committee (IOC) – was violating antitrust laws as it stipulated extremely harsh sanctions for competing in an event not hosted by the organisation itself.²⁶ This rule was considered to distort competition as it enabled the ISU to pursue their commercial interest on the back of athletes they were supposed to support.

One of the most important topics in the field of antitrust laws in sports is the bundled sale of broadcasting rights exclusively to a single buyer. That sale has to be measured on the basis of the cartel ban and must not distort the market. Long running contracts or those that include an automatic extension clause might be violating the ban. While the CJEU does not rule out territorial exclusivity of licensing rights, it stated in the preliminary ruling procedure to ‘Football Association Premier League’²⁷ that clauses in a contract violate the cartel ban if the broadcaster does not provide decoding devices to parts of the world not regulated by the licensing agreement in order to enable the viewing.²⁸

ii Professional sports and labour law

Labour laws in Austria are relevant for athletes that are considered professionals or perform for compensation. Depending on the individual relation of the athlete to a sports association, a tournament organiser or the federal association for the individual sport, the legal relation within this context can be manifold.²⁹ Athletes can perform as employees, freelancers or independent contractors.³⁰ Only employees can fully profit from the Austrian labour law, while freelancers may only assert claims in regards to specific provisions of labour law that protect against abuse and independent contractors are qualified as independent entrepreneurs. Employees are personally dependent upon the employer, being integrated in its organisation and working on behalf of the company on the basis of its instructions. Professional football players are considered employees under Austrian law. They are part of a team, follow instructions by their trainer(s) and organisation and are integrated into the club.³¹ Their contracts are based on collective agreements made by their union and offer salary protection as well as holiday entitlement of 30 days. They are also entitled to at least six weeks of paid sick leave per year. While professional athletes are – just as any traditional employee – subject to labour law in its entirety and therefore able to take advantage of its protective mechanisms, some provisions are hard to enforce in the sports industry. There are no explicit constraints on clauses of employee contracts or on the possibility of postulating clauses in the associational statutes, but they are constricted by *bonos mores* and compelling provisions of labour laws. If any provision of a contract is contradicting labour laws or is violating *bonos mores*, those provisions are void.

Within the EU, professional athletes are able to compete without any restrictions due to the fundamental freedoms of EU’s internal market, *inter alia*, the free movement of

26 https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5184 (30.7.2020).

27 CJEU C-403/08, *Football Association Premier League*, ECLI:EU:C:2011:631.

28 *Thyri in Kucsko/Handig*, *urheber.recht* 2nd edition, introduction to §§27 and 28 UrhG (status as at 1 April 2017).

29 *Marhold/Ludwig in Marhold/Schneider*, *Sportrecht* 88.

30 *Marhold/Ludwig in Marhold/Schneider*, *Sportrecht* 90.

31 *Marhold/Ludwig in Marhold/Schneider*, *Sportrecht* 91.

workers. Amateur athletes may travel to any event in the EU on the basis of the freedom of movement. The situation is different for people outside the EU. They have to apply for a visa allowing them to perform. While there is a special type of visa for athletes making it easier for them to be accredited, the requirements of the procedure must not be underestimated.

V SPORTS AND TAXATION

As mentioned before, the employment status of an athlete depends on the individual sport he or she is competing in. While tennis players mostly operate independent businesses, football players are integrated in a team and are therefore considered employees of their club. The Austrian tax regime is coordinated towards the variable revenues generated by athletes. As such, employees just have to pay wage tax according to their tax bracket ranging from 25 per cent to 55 per cent – the actual amount is calculated and directly passed on to the tax authorities by their employer. Independent or self-employed athletes like tennis players have to submit an income tax statement on a yearly basis as to where their income is taxed accordingly, just as it is the case in any other conventional business. However, there is a relevant exception to this rule: athletes who mostly perform internationally and are not integrated into a sports club but operate independently may opt in for a flat-rate determination of their taxable income. If the financial authority deems the applicant acceptable, a sportsperson only has to pay taxes on 33 per cent of his or her income (in Austria and abroad) including any revenue from advertisement or prize money.³² This benefits sportspersons in Austria a lot: under the assumption of having to pay the maximum tax rate of 55 per cent for parts of their income, he or she can choose to opt in for the flat tax option and is required to pay around 18 per cent of tax on all income during the tax year.

There is only one downside to this: as soon as the athlete has opted in for the flat tax option, he or she is not able to deduct taxes from the Austrian tax calculation basis for those taxes that were already (and directly) paid (e.g., prize money won) in foreign countries.³³

VI SPECIFIC SPORTS ISSUES

i Anti-doping

Austrian anti-doping law is based on the World Anti-Doping Code. The ban on doping is twofold: first, it constitutes serious fraud to enhance performance with illegal substances according to Section 147 of the Austrian Criminal Code (Strafgesetzbuch (StGB)), which is punishable by a prison sentence of up to three years in addition to the possible suspension of participation in professional sports for life;³⁴ second, the granting of benefits by the state is tied to the acceptance and enforcement of the anti-doping provisions set out by the policies of the umbrella federation of the individual sport. Besides the Austrian Criminal Code, the Austrian Anti-Doping Federal Act (Anti-Doping-Bundesgesetz 2007 – (ADBG)) is applicable – a law designed to regulate not only the arbitration procedure in the case of an irregular doping test but also establishes punishable offences for any figure in the background enabling the doping (e.g., a trainer or a federation official). Depending on the individual acts

32 Austrian Federal Law Gazette (BGBl.) II Nr. 418/2000.

33 Austrian Federal Law Gazette (BGBl.) II Nr. 418/2000.

34 *Tipold*, *Strafrechtliche Aspekte des Dopings*, RECHT SPORTlich 2, 92.

committed, the offence is punishable with a prison sentence of up to five years according to Section 22 Austrian Anti-Doping Federal Act and a possible suspension of any participation in sporting events as trainer or official.

ii Betting

Betting on sports events is legal in Austria; however, it requires betting licences for bookmakers or intermediaries who offer (sports) betting to business-to-consumer (B2C) betting clients. The triggering element is the offering of sports betting to B2C betting clients from within Austria; the fact that the sports event takes place from within Austria is not dispositive. The matter of sports betting falls within the competence of the governments of the nine federal states of Austria. Hence, there are nine different betting regulations for the nine provinces, so there is a relatively high level of legal fragmentation, in particular with regard to licensing proceedings and different approaches for offline betting premises and offering of online betting. While all provinces have Betting Acts in place, the scope of most Betting Acts is regulating betting in offline betting premises. Out of nine provinces, there are merely a few provinces, such as Vorarlberg, Salzburg and Tyrol, which regulate online betting in their Betting Acts. One major shortcoming in all online betting regulations in Austria, so far, is the *de facto* seat requirement in an Austrian province to be able to be granted such provincial licence. The provincial Betting Acts (e.g., of Vorarlberg and Salzburg) require betting operators to have their server located (e.g., in Vorarlberg or Salzburg) to be granted a licence. In our opinion, this is a hidden seat requirement and violates primary EU laws, in particular violating the freedom to provide services and the freedom of establishment, as less restrictive means would be possible in order to achieve public goals such as the aim to fight crime, to fight money laundering or to fight against betting addiction. The consequence of provincial Betting Acts that do violate primary EU laws is that – following the principle of primacy of EU laws – such national or provincial provisions are considered as not applicable, while higher ranking EU laws prevail. Two conclusions can, therefore, be drawn:

- a* operators who do not have a seat in Austria are not required to apply for a licence to offer to B2C betting clients from within Austria; and
- b* operators who offer sports betting on the basis of a valid licence issued by a competent authority of another Member State of the EU may legitimately offer such online sports betting products to B2C betting clients from within Austria, without an Austrian provincial licence, given the violation of provincial Betting Acts against EU laws (principle of primacy of EU law).

E-sports

Owing to the lack of recognition of e-sports as a sport, betting on e-sports tournaments or events does not fall under the term ‘sports betting’. As mentioned above, the triggering element in order to be subject to Austrian betting provisions is the offering of sports betting to B2C betting clients from within Austria, but not the fact that the sports event or the e-sports event takes place from within Austria. Six of nine provinces allow ‘social bets’, namely betting on any other bet that is not a sports event – in particular, any bet that can be placed on any social or cultural event. Regulating e-sports and allowing their recognition as sports would have further consequences at the level of licensing and taxation: the tax duty for betting on any event, including sports events, is set at 2 per cent of the stake. Online (as well as offline) betting is subject to a federal duty stipulated in the Austrian Duties Act (*Gebührengesetz*

(GebG)): Section 33 tariff 17 GebG subjects all forms of (online and offline) betting within Austria – that are not subject to gambling under the Gambling Act – to a taxation of 2 per cent on stakes.

Sanctions for violation of tax provisions

According to Section 33, Paragraph 1 of the Austrian Act on Financial Crime (Finanzstrafgesetz (FinStrG)), an intentional action or omission leading to tax evasion in violation of a legal obligation to file a statement of taxes or duties payable, is considered tax fraud. According to Section 33, Paragraph 3(b) FinStrG, not paying taxes or duties that are subject to self-calculation (Selbstberechnung) constitutes tax evasion in the meaning of Section 33, Paragraph 1 FinStrG. The mentioned duties pursuant to Section 33 tariff 17 GebG are duties subject to self-calculation (according to Section 33, tariff 17, Paragraph 3 GebG, the duties must be paid until the 20th day of the calendar month following the calendar month in which the duties became due; to declare these duties, a standard form available from the Tax Office for Duties, Transaction Taxes and Games of Chance shall be used). Tax fraud is sanctioned by a fine in the amount of up to the double amount of the evaded tax (i.e., double the amount of duties that should have been paid) or imprisonment of up to two years under specific circumstances listed in Section 15 FinStrG.³⁵

iii Manipulation

Another problem Austrian authorities have to deal with in connection to any sports (including e-sports) is match fixing. Match fixing in Austria constitutes a criminal offence. Depending on the individual form, it is considered fraud or fraudulent data management abuse in the sense of the Austrian Criminal Code. As such, the player who actually fixes the match as well as every person knowingly placing a bet are committing a criminal offence.³⁶ Since the placement of a bet is regarded as a contract that depends on the outcome of an unforeseeable event, the placing of a bet on a game being not unforeseeable because of the manipulation constitutes a grave violation of the contractual duties. Because of this, the betting operator does not have to pay potential winnings (considering Austria's civil law regime). If the company pays out winnings being the result of a fixed match and the player was aware of the fixing taking place, he or she is liable for the damage incurred by said operator.³⁷ For fraud and fraudulent data management abuse, Austria's Criminal Code provides prison sentences of up to half a year or up to 10 years if the fraudulent data management abuse was conducted through a business.

Grey market sales

In the last few years, the organisers of sports events or other festivities in general face the problem of commercial third-party resellers buying tickets in stock and selling them at increased prices. In some cases, this has led to tickets being sold out the minute they are offered, only to be resold at a preposterous price. While in France the sale by third parties is illegal, the buying of tickets not through the channels established by the event organiser but

35 Note that we are not tax advisers and have merely summarised the tax provisions above. In case a reader needs support on this topic or fully fledged tax advice, we recommend contacting an Austrian tax adviser.

36 *Harta* in *Lewisch* (ed), *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* (2018) 20.

37 *Harta* in *Lewisch* (ed), *Jahrbuch Wirtschaftsstrafrecht und Organverantwortlichkeit* (2018) *Wirtschaftsstrafrecht* 23.

on a second market is permitted in Austria.³⁸ However, since the ticket sale is a civil contract, companies may prohibit the commercial resale of tickets via their general terms of conditions. There is a difference if the ticket is anonymous: if anonymous, the ticket is considered a freely tradable value paper. The buyer inherits the rights of the original owner and thus cannot be barred from attending the event. If the ticket was sold to a certain person mentioned by name, then it does not constitute a value paper but rather a legitimation paper. This kind of paper is not freely tradable and permits only the named person to enter the event.³⁹ While event organisers try their best to eliminate anonymous tickets for safety reasons, it proves to be very difficult in practice since it is permitted to buy up to four tickets per person.

VII THE YEAR IN REVIEW

The covid-19 pandemic has presented a multitude of problems for the traditional sports industry. Since the covid-19 pandemic has not only forced people to socially distance but also to shut down most of the professional sports leagues, e-sports have been quick to fill (some of) the gaps left behind. The possibility of holding tournaments solely online, without having to compete face-to-face, made it possible to keep up any ongoing league. Viewership has risen to record levels and betting on such events followed suit. Steam – a game distribution platform – proclaimed a new all-time record of simultaneous gamers,⁴⁰ just as betting operators have observed a rise in new registrations of up to 50 per cent on their e-sports departments, following, for example, the English Football Premier League shutting down.⁴¹ With an uncertain future dependent upon the development with regard to covid-19 lying ahead, the development of e-sports is not the only thing in Austria creating unpredictability.

38 *Stopper/Karlin*, Bekämpfung des nicht autorisierten Ticketzweitmarkts in Frankreich, England und Deutschland, *Causa Sport* 2014, 320.

39 *Gaulhofer*, Wenn Tickets für die Fans zu teuer werden, *Die Presse – Recht* 2018/404.

40 <https://www.forbes.com/sites/paultassi/2020/03/15/as-coronavirus-keeps-everyone-home-steam-is-breaking-concurrent-player-records/#1480fc5962b8> (30 July 2020).

41 <https://www.casino.org/de/nachrichten/e-sport-wetten-die-hoffnung-fuer-die-sportwetten-industrie/> (30 July 2020).

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