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# The relationship btw EU law and CAS

## From the Bosman Ruling to the ISU case(s)

By Alessandro Oliverio

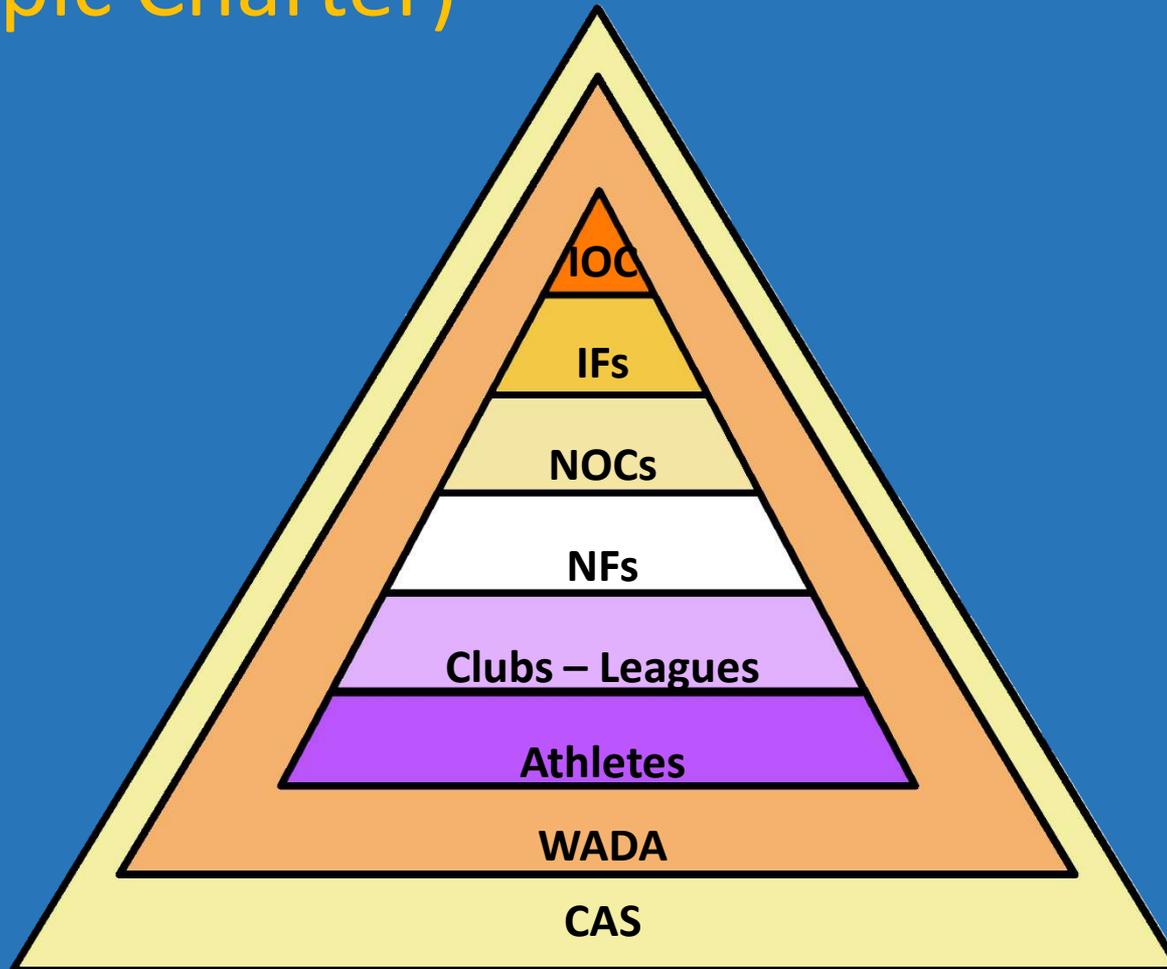


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# The sources of sports law (Olympic Charter)



## History

established in 1984

Before 1995: few cases x year

1993: SFT *Gundel* ruling: recognition as independent and impartial tribunal / legitimacy of awards

1994: CAS reform: creation of ICAS (International Council of Arbitration for Sport)

1995: ECJ *Bosman* ruling / binding arbitration clauses in the SGBs' statutes

2000: ad-hoc division at the Olympics

2003: 100 cases x year (adoption of WADA code)

2016: 500 cases x year

## Procedure

Arbitration clause

Ordinary Division (disputes of commercial/contractual nature)

Appeal Division (decisions of SGBs)  Supreme Court of World Sport

Closed list of arbitrators (369). Japan: 2 Switzerland: 29

Panel of 3 arbitrators

Time limits: R49 21 days – R59 3 months

Binding award. Challenge (annulment) before SFT for incompatibility with public policy

The **EU Parliament**: Directly-elected EU body with legislative, supervisory, and budgetary responsibilities

White Paper on sport (2007): Its overall objective is to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making and to raise public awareness of the needs and specificities of sector. The initiative aims to illustrate important issues such as the application of EU law to sport.

It contains a number of proposed actions to be implemented or supported by the Commission: (i) the societal role (i.e. public health, physical activity, doping, education, volunteering, social inclusion), (ii) the economic dimension, (iii) the organization (i.e. the free movement, protection of minors, social dialogue)

The Lisbon Treaty (2009), Art. 165: The EU shall contribute to the promotion of European sporting issues {...} while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. The EU action shall be aimed to : {...} developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen. The EU and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport.

# The EU institutions in brief (2)

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The EU **Commission**: Promotes the general interest of the EU by proposing and enforcing legislation as well as by implementing policies and the EU budget

European Week of Sport (#beactive) - Erasmus+ Program (#ProtectIntegrity)

The decision against the ISU eligibility rules (December 8, 2017)

The EU **Court of Justice**: Ensuring EU law is interpreted and applied the same in every EU country; ensuring countries and EU institutions abide by EU law

Bosman ruling (1995): free transfer of players

Meca-Medina ruling (2009): supremacy of EU Law over SGBs rules

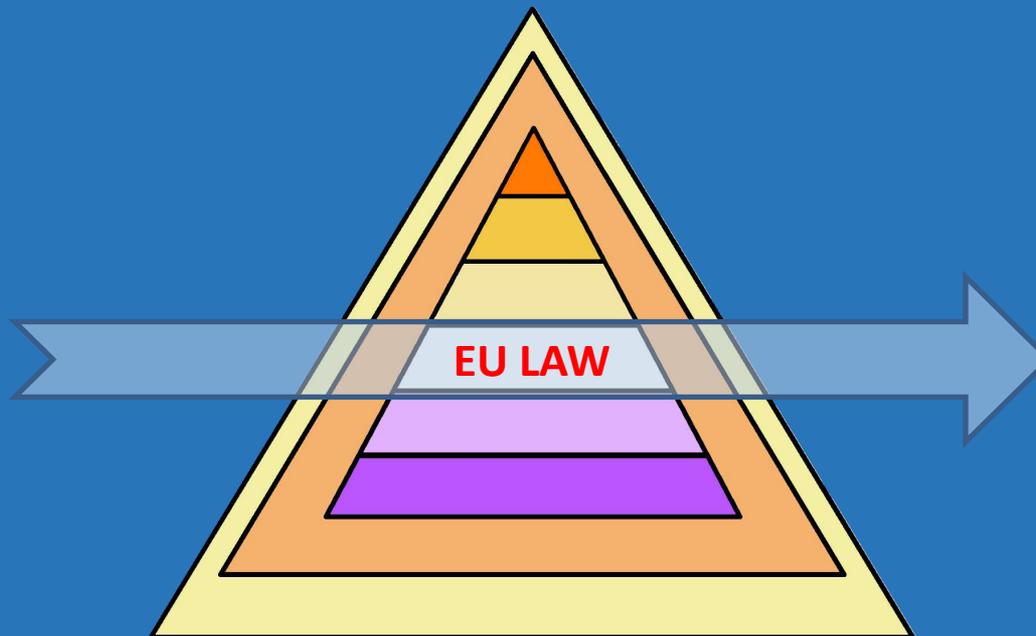
# The model of sport: IOC (CAS) vs EU

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The IOC model of sport: pyramidal, vertical top to bottom approach

The CAS model of arbitration: closed, not fully accessible, not fully transparent (ICAS)

The EU model of sport: horizontal, subject to EU law



# How the EU affected the CAS system

1. The Bosman ruling (1995)
2. The Pechstein case (2009)
3. The ISU eligibility rules case (2017)



**Background:** Jean-Marc Bosman was a player for RFC Liège in the Belgian First Division whose contract had expired in 1990. He wanted to change teams and move to Dunkerque, a French team. However, Dunkerque refused to meet his Belgian club's transfer fee demand, so Liège refused to let him go. In the meantime, Bosman's wages were reduced as he was no longer a first-team player. He took his case to the European Court of Justice and challenged the FIFA transfer system

**The decision:** On 15 December 1995 the court ruled that the system, as it was constituted, placed a restriction on the free movement of workers and was prohibited by Article 39(1) of the EC Treaty (now Article 45 (1)). Bosman and all other EU football players were given the right to a free transfer at the end of their contracts, with the provision that they were transferring from a club within one EU Association to a club within another EU Association. In 1996, Edgar Davids became Europe's first high-profile player to benefit from the ruling, when he moved from Ajax to A.C.Milan

**Implications:** the current FIFA status and transfer of players regulations reflects the *ratio* of the Bosman ruling

**Procedural note:** at the time of the ruling there was no mandatory arbitration clause in favour of CAS. Only in 2002 FIFA recognised the CAS jurisdiction

**Background:** Claudia Pechstein (GER), speed skater won 3G 2S 2B at the Olympics. In 2009 she was banned by ISU for two years after failing a doping control.

**The legal battle:** Pechstein began a legal battle (with the support of FIFPro and World Player Association) challenging (i) the doping allegation and (ii) the CAS system, and in particular, the forced arbitration agreement and the independence of CAS. As a result:

1. CAS and the SFT confirmed the 2 years ban
2. The Court of Appeal of Germany (OLG), argued that the mandatory CAS arbitration clause is imposed to speed skaters as a condition for participation in international competitions, and this is an abuse of dominant position by ISU, contrary to Art. 102 EU Treaty. The OLG also noted that SGBs were (with the 2004 CAS Code) in a favourable position to influence the composition of the 3 member arbitral panel. SGBs enjoyed a favourable position *vis-a-vis* athletes which could threaten the neutrality of the arbitral tribunal
3. The Federal Court of Justice of Germany (BGH), confirmed the dominant market position of SGBs, but not their abuse. As a rationale for the list of arbitrators imbalance issue, the BGH did not see a structural imbalance as the CAS is not integrated in another organization like disciplinary bodies within SGBs. CAS rules allow athletes to achieve the balance because the list of arbitrators has been composed in a sufficient independent way.

**The legacy:** ICAS amended the CAS code (2014)

The CAS Arbitration system is lawful, allegedly independent, but NOT consensual in nature

# The ISU eligibility rules

**Rule 102(2) ISU General Regulations:** A person becomes ineligible to participate in ISU activities and competitions by skating or officiating in an International Competition not sanctioned by the ISU in any of the ISU sport disciplines, if ineligibility is imposed by the ISU Council

**The background:** On October 7, 2015, Mark Tuitert and Niels Kerstholt, speed skaters from the Netherlands, lodged a complaint to the EU Commission. Under the ISU eligibility rules, skaters participating in non-ISU competition could be banned by ISU, including from the Olympics. Such rules enables ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events.

**The EU Commission decision:** On December 8, 2017 the EU has decided that ISU rules imposing severe penalties on athletes participating in non-ISU competitions are in breach of EU antitrust law.

As a consequence: ISU has 90 days to stop its illegal conduct. ISU can abolish or modify the eligibility rules so that they are based only on legitimate objectives (explicitly excluding the ISU's own economic interests)  
If ISU fails to comply with the decision it will be fined

## The closed list of arbitrators

**2004 CAS Statute:** 3/5 chosen by SGBs + 2/5 chosen by ICAS

**2014 CAS Statute:** S.14 appointment by ICAS upon proposals of SGBs and Athletes Commission

**Information upon arbitrators:** there is no information available regarding the arbitrator's nomination (he/she be listed by a SGB, athlete or ICAS). The CVs are limited

R.34: The challenge of an arbitrator is decided by ICAS itself

## ICAS

**Composition S4:** only 4 out of 20 members shall be independent from SGBs. The President John Coates is currently the President of the Australian NOC and IOC Member

The role of the **President of the Appeal Division. R54:** the President appoints the President of the Panel. The President Corinne Schmidhauser is currently the President of the Swiss Antidoping. The former President of the Appeal Division, until 2013, was Thomas Bach

**ICAS board meetings:** no accessible minutes, financial disclosures

**R44.2 – Hearing.** Unless the parties agree otherwise, the hearings are not public

**R59.2 – the CAS Secretary General.** Before the award is signed by the President of the Panel, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle

**R59.5 – Time Limit.** The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel

**R59 – Publication of awards.** The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential



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