

THE RIGHT TO FREEDOM OF EXPRESSION OF ATHLETES: BETWEEN LAW AND SPORTING REGULATIONS

KRISTJAN ZAHRASTNIK

University of Maribor, Faculty of Law, Maribor, Slovenia
kristjan.zahrastnik@um.si

In this article, the author examines the legal justification for excluding political, religious, and racial expression by athletes. The analysis is grounded in the standards developed by the European Court of Human Rights regarding permissible restrictions on the right to freedom of expression, as well as in the application of a structured test to assess whether interferences with that right are legally justified. The article further provides a case-based analysis of examples that have shaped the scope of athletes' freedom of expression, offering insight into the sanctions imposed on athletes for expressive conduct. Particular attention is devoted to the distinction between prohibited and permissible forms of expression, both at sports venues and within the athlete's private or personal sphere. The article concludes by critically questioning the legal sustainability of a blanket prohibition on ideological expression by athletes at sporting events.

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1 Introduction

The right to freedom of expression is guaranteed both by the European Convention on Human Rights (ECHR)¹ and by the Charter of Fundamental Rights of the European Union.² Within the European continental legal system, this right is typically enshrined at the constitutional level in national legal orders, as it constitutes a fundamental human right and one of the cornerstones of a democratic society.

Freedom of expression is enshrined in Article 10 of the ECHR. This provision states that everyone has the right to freedom of expression and guarantees the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and irrespective of frontiers, while allowing States to impose licensing requirements on broadcasting, television, or cinema enterprises. The ECHR further recognises that the exercise of freedom of expression entails duties and responsibilities and may therefore be subject to restrictions prescribed by law and necessary in a democratic society. Such restrictions may be justified, *inter alia*, by the interests of national security, territorial integrity, or public safety; to prevent disorder or crime; to protect health or morals; to protect the reputation or rights of others; to prevent the disclosure of confidential information; and to maintain the judiciary's authority and impartiality.

At the level of EU law, freedom of expression and information is guaranteed by Article 11 of the Charter of Fundamental Rights of the EU. This provision similarly affirms that everyone has the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. In addition, the Charter explicitly requires respect for the media's freedom and pluralism. Closely related to this guarantee, the Charter also expressly protects, in Article 10, the freedom to manifest religion or belief, thereby extending the scope of expressive freedom to religious and belief-based expression.

¹ European Convention on Human Rights, 1950.

² Charter of Fundamental Rights of the European Union, 2012.

Furthermore, in the Slovenian legal system, freedom of expression is constitutionally guaranteed under Article 39 of the Constitution of the Republic of Slovenia. This provision ensures freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression. It further guarantees the right of everyone freely to collect, receive, and disseminate information and opinions.

Within the scope of freedom of expression, individuals are entitled to express messages, information, ideas, opinions, viewpoints, or beliefs. This right also affords legal protection to symbolic expression, including implicit and conclusive forms of conduct. Conversely, restrictions on freedom of expression are permissible only insofar as they are necessary to protect others' rights and legitimate public interests. Accordingly, public authorities may prohibit certain forms of expression where such expression is inherently anti-democratic, expresses support for terrorist activities, or constitutes hate speech, offensive speech, or otherwise incites or instigates violence.³

The most explicit limitations on freedom of expression are set out in the Criminal Code, which criminalises conduct amounting to public incitement to hatred, violence, or intolerance. In this regard, Article 63 of the Constitution of the Republic of Slovenia explicitly prohibits any incitement to national, racial, religious, or other discrimination, as well as the inflaming of national, racial, religious, or other hatred and intolerance. It further provides that any incitement to violence and war is unconstitutional.

These constitutional prohibitions are implemented in criminal legislation through Article 297 of the Slovenian Criminal Code, which defines the offence of public incitement to hatred, violence, or intolerance. Under this provision, anyone who publicly incites or stirs up hatred, violence, or intolerance on grounds such as nationality, race, religion, ethnicity, gender, skin colour, origin, financial situation, education, social position, political or other beliefs, disability, sexual orientation, or any other personal circumstance, and who does so in a manner capable of jeopardising or disturbing public law and order, or by means of threats, verbal abuse, or insults, may be punished by imprisonment of up to two years. The same penalty

³ Teršek, 2019, pp. 375, 378.

applies to those who publicly disseminate ideas on the supremacy of one race over another, provide assistance to racist activities, or deny, trivialise, approve, justify, ridicule, or advocate genocide, the Holocaust, crimes against humanity, war crimes, aggression, or other criminal offences against humanity as defined in the legal order of the Republic of Slovenia.

The Criminal Code further provides for enhanced liability where such acts are committed through mass media or online platforms, by means of coercion or other aggravating conduct, or through the abuse of official authority. It also mandates confiscating materials and objects bearing prohibited messages, as well as of devices intended to produce, reproduce, or disseminate them.

When imposing sanctions for public statements, punitive measures must be directed at the existence of a convincing and pressing necessity to protect another right or freedom, a legitimate interest, or an overriding public interest. According to the established case law of the European Court of Human Rights (ECtHR), restrictions on freedom of expression of a political nature are, as a rule, considered permissible primarily in cases involving the following categories of expression:

1. Expressions of racial intolerance and racial hatred, including deliberate racist statements and hate speech;
2. Endorsing or promoting Nazi ideology;
3. Revisionist views aimed at denying historical facts relating to serious violations of human rights or at negating the historically established facts of the Holocaust;
4. Blasphemous expression;
5. Obscene expression, particularly where restrictions are justified in order to protect public morality and minors' morality;
6. Abusive or offensive speech, as well as incitement and instigation to violence.⁴

In its judgment, the ECtHR established a structured test to assess when the State is justified in enacting measures that interfere with freedom of expression. According to this test, an interference by a public authority must be prescribed by law, pursue one or more of the legitimate aims listed in Article 10(2) of the ECHR, and be necessary in a democratic society.⁵

⁴ Teršek, 2019, pp. 380, 383.

⁵ ECtHR, *Markt Intern Verlag v. Germany*, 1989.

The ECtHR has consistently held that political expression, including expression on matters of public interest and public concern, enjoys a particularly high level of protection under Article 10 of the ECHR.⁶ Although freedom of political debate is not absolute, the limits of acceptable criticism are significantly wider where the criticism is directed at the government or those exercising public authority.⁷

Nevertheless, in the field of sport, specific regulatory regimes apply that may entirely exclude political expression and propaganda. By way of example, Rule 50(2) of the Olympic Charter⁸ provides that “no kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.” Through this provision, the Olympic Charter restricts the exercise of freedom of expression, a right that is otherwise expressly guaranteed by international legal instruments such as the ECHR and the Charter of Fundamental Rights of the EU.

The primary justification for limiting freedom of expression at sporting venues lies in the need to ensure peace, safety, and the orderly conduct of competitions, while adhering to the principle of political neutrality. Where an athlete’s statements contain political, religious, racial or ideological content that is inconsistent with the regulations of a sporting organisation, disciplinary measures may follow and can be particularly severe. Notably, the Olympic Charter provides for the possibility of disqualification of an individual athlete for a breach of Rule 50(2).⁹ In practice, however, athletes’ freedom of expression is often restricted not only within competition venues but also in their private sphere, particularly when they express opinions through social media, interviews, or public appearances outside sporting venues.

This regulatory framework and its practical application, therefore, raise the fundamental question of the extent to which the rules of sports governing bodies (SGBs) may, if at all, legitimately restrict athletes’ right to freedom of expression.

⁶ ECtHR, *Steel and Morris v. the United Kingdom*, 2005.

⁷ Teršek, 2019, p. 380.

⁸ In force as from 30 January 2025.

⁹ Compare Bye-law to Rule 50.

2 Function of Sports Governing Bodies

SGBs establish rules that apply to athletes who wish to compete under the auspices of such organisations. SGBs operate at different levels, with international organisations constituting the highest level, followed by continental organisations, which are further divided into national bodies. At each level, SGBs may adopt their own competition-related rules. By adopting competition rules and determining disciplinary frameworks, SGBs function as regulators of a particular sport. Although SGBs perform a regulatory function, their acts are subject to compliance with national, transnational, and international legal norms. Consequently, they are required to ensure the protection afforded by hierarchically superior legal rules. Within the scope of their regulatory role, however, they may impose stricter regulation in certain legal areas governing the organisation and conduct of competitions (such as Rule 50(2) of the Olympic Charter).

The monopolistic position of SGB significantly limits athletes' ability to refuse the rules imposed by such organisations, as non-compliance would effectively exclude them from international competition.¹⁰ This structural imbalance has also been emphasised by the ECtHR (case of *Mutu v. Switzerland*). In this respect, the Court observed that an athlete's only realistic choice may be between accepting the regulatory framework imposed by a sports federation and thereby being able to pursue sport professionally, or refusing it and consequently being entirely prevented from competing and earning a living at that level. In light of the severe consequences that non-acceptance would entail for an athlete's professional life, the Court held that such acceptance cannot be regarded as free and unequivocal.¹¹ Consequently, athletes consent to rules that restrict their right to freedom of expression.

3 Cases of Restrictions on an Athlete's Right to Freedom of Expression

3.1 Introductory

The following section presents and analyses selected cases that illustrate athletes' conduct through the prism of the right to freedom of expression as more strictly defined by the rules of individual SGBs. For analytical clarity, these cases may be

¹⁰ Holzer, 2024, p. 61.

¹¹ *Mutu v. Switzerland*, 2018, para. 113-114.

divided into three categories: i) expression without political, religious, or racial propaganda; ii) political, religious, or racial propaganda at competition venues; and iii) political, religious, or racial propaganda outside competition venues. In certain instances, SGBs restrict or prohibit athletes' freedom of expression for commercial or sponsorship-related reasons, in the interest of political neutrality, or on the grounds that the conduct is deemed generally detrimental to the league or competition.

3.2 Expression Without Political, Religious, or Racial Propaganda

3.2.1 Promotional Programmes

UEFA acted as the organiser of the UEFA Euro 2020. During the tournament, Cristiano Ronaldo, at a pre-match press conference, removed two Coca-Cola bottles placed in front of him and subsequently lifted a bottle of water, stating 'aqua'. Similar conduct followed when Paul Pogba (practising Muslim) removed a non-alcoholic Heineken bottle during a post-match press conference, and Manuel Locatelli likewise replaced a Coca-Cola bottle with water.

UEFA's Regulations of the UEFA European Football Championship¹², governing the tournament, provide the legal basis for addressing such conduct. Rule 65.09 of the Regulations of the UEFA European Football Championship stipulates that: "each participating association must support and ensure that its players, coaches, officials and other employees support the commercial programme established by UEFA to exploit the marketing rights to the final tournament, including the promotional programmes run by UEFA and its commercial affiliates."¹³ Disciplinary responsibility is further governed by Rule 53.01, which provides that the provisions of the UEFA Disciplinary Regulations apply to all disciplinary offences. In this context, Rule 6.01 establishes that national associations are responsible for the conduct of their players, officials, members, supporters, and any person performing a function at a match on their behalf. UEFA does not impose fines directly on individual players for such breaches. Instead, it may sanction the

¹² The version of the Rules is edition between 2022 and 2024, as the version applicable during the EURO 2020 tournament is not available; nevertheless, the provisions are substantively identical (compare Moore, 2021).

¹³ The Rule continues beyond this point; however, the remaining part is not relevant for assessing the justification of the conduct.

relevant national football association, which retains discretion as to whether and how to discipline a player who has infringed the tournament's sponsorship-related rules.¹⁴

UEFA's tournament director, Martin Kallen, stated that the primary concern was the athlete's conduct in relation to contractual obligations, while also acknowledging that certain actions may have been motivated by religious beliefs. In such cases, he indicated that players would not be required to have sponsor-branded products placed in front of them. Nevertheless, UEFA did not exclude the possibility of sanctions in the event of repeated or similar incidents, noting that the participating federations had formally accepted the relevant regulations and that financial penalties remained a potential enforcement mechanism.¹⁵

The incident attracted significant public and economic attention, as reports indicated a temporary decline in the sponsoring company's market value (a 1.6% drop in share price, corresponding to an estimated USD 4 billion loss) following Ronaldo's actions. However, it is not possible to state with certainty that a causal relationship existed between the decline in market value and the removal of the sponsor's products. Coca-Cola responded by downplaying the significance of the event, issuing a statement emphasising individual freedom of choice and acknowledging that consumers have differing preferences, tastes, and needs.¹⁶

Although the cases in question did not result in the actual sanctioning of the athlete or in judicial proceedings, they nonetheless clearly demonstrate that even seemingly simple conduct, such as the removal of sponsored products, may constitute a breach of SGB regulations and interfere with the athlete's right to freedom of expression. Particularly noteworthy is the fact that the tournament president emphasised that such conduct was acceptable when motivated by religious ideology. This position effectively introduces political, religious, and ideological considerations into commercial or sponsorship obligations – domains in which such expressions are otherwise strictly restricted within sporting venues.

¹⁴ Moore, 2021.

¹⁵ Evans, 2021.

¹⁶ BBC, 2021 and Garcia, 2021.

3.2.2 Prohibition of Wearing Slogans Under Jerseys

In football, the International Football Association Board (IFAB) acts as the relevant SGB responsible for adopting the Laws of the Game.¹⁷ Law 4.5 comprehensively prohibits the use of political, religious, or personal slogans, statements, or images on players' equipment, including undergarments. This prohibition is subject only to narrowly defined exceptions, such as initiative slogans or emblems promoting the game of football, respect and integrity, as well as advertising expressly permitted by competition rules or by the regulations of national football associations, confederations, or FIFA. Breaches of these rules may result in sanctions imposed by the competition organiser, the relevant national football association, or FIFA.

The regulatory framework applies broadly to all players and team officials. It is interpreted in conjunction with Law 12.4, which requires referees to take disciplinary action in cases of offensive, insulting, abusive, provocative, derisory, or inflammatory conduct. The interpretative guidance to Law 4 further clarifies that, while 'religious' and 'personal' expressions are relatively easy to define, the concept of 'political' expression is less precise. Nevertheless, slogans, statements, or images relating to specific categories are explicitly prohibited, including references to identifiable persons (living or deceased, unless forming part of the official competition name), political parties, organisations or groups at any level, governmental bodies or functions, discriminatory organisations, organisations whose aims or actions are likely to offend a significant number of people, as well as specific political acts or events.

The rules additionally empower competition organisers to impose further restrictions, particularly regarding the size, number, and placement of permitted slogans, statements, or images, and stress the importance of resolving any potential disputes concerning such expressions before a match or competition begins.

This IFAB regulatory framework entered into force on 1 June 2014, and categorically prohibits players from displaying political, religious, or personal messages during matches. Before this date, players were not subject to such comprehensive restrictions. The rationale for the amendment was the pursuit of consistency. As

¹⁷ Laws of the Game apply for the season 2025/2026.

articulated by Jonathan Ford, chief executive of the Football Association of Wales, while there was broad consensus on excluding political and religious statements, the decision to extend the prohibition to personal statements was driven by the view that it was easier to maintain that such expressions have no place in the game.¹⁸

3.2.3 Possession of Weapons

The National Basketball Association's (NBA) disciplinary practice in cases involving firearms illustrates the extent to which athletes' expressive conduct may be restricted under private regulatory regimes, even where such conduct does not constitute a criminal offence. In the case of Ja Morant, NBA Commissioner Adam Silver explicitly framed the player's conduct as an issue of safety and league values rather than legality, emphasising that the applicable standard was a private organisational one grounded in behaviour deemed detrimental to the league's reputation.¹⁹ Morant was first suspended for eight games after live-streaming a video in which he displayed a firearm while intoxicated at a nightclub, and subsequently received a substantially harsher 25-game suspension after again posing with a firearm during a live-streamed video, despite prior commitments to the NBA and public assurances that the conduct would not be repeated.²⁰

This approach is consistent with earlier precedents, including the 2010 suspensions of Gilbert Arenas and Javaris Crittenton following an incident involving firearms in a locker room, where the mere presence of guns in a professional basketball context was deemed incompatible with league values (the suspensions were imposed for 50 and 38 games, respectively). Notably, Morant's 25-game suspension aligns in length with sanctions imposed for performance-enhancing drug violations,²¹ while being slightly more lenient than penalties imposed for other forms of serious misconduct, such as domestic violence, as exemplified by the 30-game suspension of Miles Bridges.²² The financial consequences of Morant's suspension were substantial. Whereas his prior suspension cost approximately USD 669,000 in lost salary, the later sanction resulted in losses exceeding USD 7.6 million, in addition to the indirect

¹⁸ The Guardian, 2014.

¹⁹ ESPN, 2023.

²⁰ Reynolds, 2025.

²¹ ESPN, 2023.

²² NBA, 2023.

consequence of forfeiting eligibility for All-NBA selection and a resulting USD 39 million contractual bonus.²³

Sanctions arise from conduct deemed detrimental to the NBA. The legal basis for such measures is provided by Article 35(d) of the National Basketball Association Constitution and By-Laws,²⁴ which grants the Commissioner broad discretionary authority to impose disciplinary sanctions on players whose conduct or public statements are deemed detrimental to the league's interests. The Commissioner may impose a fixed or indefinite suspension and/or a financial penalty of up to USD 100,000 where, in his assessment, a player has made statements intended or likely to harm the reputation or best interests of basketball, the Association, or its members, or has engaged in conduct that fails to meet standards of morality or fair play, violates applicable laws, or is otherwise prejudicial or detrimental to the Association.

Taken together, these cases illustrate the breadth of authority exercised by SGBs in restricting athletes' expressive conduct – particularly where firearms are involved – on the basis of safety, reputational, and commercial considerations. Crucially, such sanctions have been imposed notwithstanding that the conduct occurred outside competitive venues and team premises, within contexts in which athletes would ordinarily benefit from the protection of freedom of expression. By characterising off-field expressive behaviour as 'conduct detrimental to the league', private regulatory regimes effectively extend their disciplinary reach into athletes' private and social spheres. This approach raises serious concerns regarding the legitimacy and proportionality of such restrictions, particularly where expressive conduct is equated with violations such as the use of prohibited substances or sanctioned at levels comparable to penalties imposed for serious criminal misconduct, including domestic violence.

²³ ESPN, 2023.

²⁴ From 2024.

3.3 Political, Religious, or Racial Propaganda at Competition Venues

3.3.1 Tommy Smith and John Carlos

One of the earliest and most emblematic instances of the sanctioning of political expression in sport dates back to the 1968 Olympic Games in Mexico City. During the medal ceremony for the 200-metre race, two United States of America (USA) athletes, Tommie Smith and John Carlos, stood on the podium and raised black-gloved fists while the national anthem was played. This gesture, later known as the Black Power salute, constituted a silent yet powerful protest against systemic racial oppression in the USA and has since come to represent a defining moment in the history of civil rights activism.²⁵

The International Olympic Committee (IOC) responded swiftly, convening its executive bodies and exerting pressure on the USA Olympic Committee to discipline the athletes, reportedly threatening to bar the entire USA team from further participation should no action be taken. Although members of the USA committee were divided on the appropriate response, the decision to dismiss Smith and Carlos from the Olympic Games was ultimately taken in accordance with the IOC's directive. In its official statement, the USA Olympic Committee expressed 'profound regret' for the athletes' conduct, characterising it as a violation of Olympic principles, good manners, and sportsmanship.²⁶ Both athletes were subsequently banned from national and international competitions,²⁷ thereby illustrating an early and stringent application of the principle of political neutrality in sport and the readiness of SBG to impose severe sanctions on athletes for politically expressive conduct, even in instances where the intensity and duration of such measures, as well as their overall proportionality, may reasonably be questioned.

3.3.2 Fethi Nourine and Amar Benikhlef

During the Tokyo 2020 Olympic Games, Algerian judoka Fethi Nourine and his coach, Amar Benikhlef, publicly announced through the media that, should the competition draw result in Nourine facing an Israeli athlete, they would withdraw

²⁵ Burke, 2023.

²⁶ Sheehan, 1968.

²⁷ Burke, 2023.

from the Olympic Games. Accordingly, Nourine refused to compete against an Israeli opponent on the scheduled competition date of 26 July 2021. Afterwards, the Executive Committee of the International Judo Federation (IJF) initiated disciplinary proceedings against both Nourine and Benikhlef, taking the view that their conduct constituted a breach of Article 50 of the Olympic Charter, which prohibits any kind of political, religious, or racial demonstration or propaganda at Olympic sites, venues, or related areas. The matter was subsequently referred to the IJF Disciplinary Commission at first instance.²⁸

In its decision, the IJF Disciplinary Commission found that the athlete and his coach had deliberately used the Olympic Games as a platform for political and religious protest, thereby committing a serious violation of the IJF Statutes, the IJF Code of Ethics, and the Olympic Charter. On this basis, the Commission concluded that imposing a severe sanction was warranted. Consequently, it imposed a ten-year suspension on each individual, barring them from all events and activities organised or authorised by the International Judo Federation and its affiliated unions for the period from 23 July 2021 to 23 July 2031.²⁹

This case exemplifies the strict enforcement of political neutrality within the Olympic framework and highlights the far-reaching disciplinary consequences that may arise when athletes' expressive conduct is classified as political or ideological propaganda under SGB rules.

3.3.3 Josip Šimunić v. Croatia

An illustrative case concerning the limits of freedom of expression in sport arose following a football match between the Croatian and Icelandic national teams at Maksimir Stadium. After the match was officially concluded, Croatian international footballer Josip Šimunić took a microphone, walked to the centre of the pitch, and repeatedly addressed the spectators by shouting the phrase 'For Home', to which the crowd responded 'Ready!' This exchange was repeated several times, accompanied by a raised-hand gesture. Given the historical and symbolic context, the chant 'For Home – Ready!' constitutes the official salute of the totalitarian

²⁸ Case No. 2021-8 & 2021-9, 2021.

²⁹ Ibid.

‘Ustaša’ regime of the Independent State of Croatia during the Second World War and is widely recognised as a symbol associated with racist ideology, intolerance based on religion and ethnic origin, and the trivialisation of crimes against humanity.³⁰

On 8 December 2015, the Zagreb Minor Offences Court found the player guilty of a minor offence for addressing messages to spectators that incited hatred on the grounds of race, nationality, and religion, imposing a fine of 5,000 Croatian kunas. In subsequent proceedings before the ECtHR, the Court emphasised that, as a well-known professional footballer and a role model for many football fans, the applicant should have been aware of the likely negative and provocative impact of his conduct on spectators and should have refrained from such behaviour. The Court held that the interference with the applicant’s freedom of expression was supported by relevant and sufficient reasons and that, given the modest nature of the sanction and the broader context of the conduct, the domestic authorities had struck a fair balance between the applicant’s right to free expression and the societal interest in promoting tolerance, mutual respect, and the prevention of discrimination at sporting events, acting within their margin of appreciation.³¹

In parallel disciplinary proceedings at the international level, FIFA imposed a ten-match suspension on the player, thereby excluding him from participating in the World Cup. FIFA held that the salute was discriminatory and offended the dignity of a group of persons on grounds including race, religion, and origin, constituting a clear breach of Article 58(1)(a) of the FIFA Disciplinary Code.³² Under this provision, any conduct that offends human dignity, contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin entails a minimum suspension of five matches, in addition to fines and potential stadium bans.

This case demonstrates the convergence of national, international sporting, and human rights standards in sanctioning expressive conduct deemed incompatible with the fundamental values of equality, non-discrimination, and respect in sport. At

³⁰ *Šimunić v. Croatia*, 2019, para. 3.

³¹ *Ibid.*, para. 3, 45, 48.

³² FIFA Disciplinary Code from 2011. *The Guardian*, 2013.

the same time, it sends a clear message that expression amounting to a criminal offence is unequivocally prohibited in sporting venues.

3.3.4 Colin Kaepernick Kneeling

Colin Kaepernick, at the time quarterback of the San Francisco 49ers, deliberately refused to stand during the playing of the national anthem as a form of protest against systemic racism and alleged wrongdoing by state authorities against African Americans and other minorities in the USA.³³ At the time, Kaepernick was not formally sanctioned by the National Football League (NFL), as his conduct did not violate any existing league rules and no disciplinary measure was imposed in direct response to the protest itself.³⁴ Nevertheless, in October 2017, Kaepernick filed a grievance under the NFL's collective bargaining agreement, alleging collusion by the league and its club owners to prevent him from obtaining employment in retaliation for his protest and public advocacy for equality and social justice. In the grievance, Kaepernick asserted that the NFL had unlawfully deprived him of employment opportunities due to his leadership in raising awareness of persistent racial inequalities in the USA. The dispute proceeded to arbitration and was ultimately resolved through a confidential settlement between Kaepernick and the NFL.³⁵

This case illustrates how expressive conduct by athletes, even when not explicitly prohibited by formal sporting regulations, may nonetheless give rise to indirect professional consequences, thereby highlighting the complex interaction between freedom of expression, SGB regulatory frameworks, and labour relations in professional sport. In this context, it is notable that following the settlement of his collusion grievance with the NFL, Colin Kaepernick did not play another game in the league.

3.3.5 Symbolic Gestures in Sports

Kneeling as a form of expressing support for raising awareness of persistent racial inequalities has appeared across a wide range of sporting competitions, including the NFL, the NBA, the Tokyo 2020 Olympic Games, UEFA Euro 2020, the FIFA World Cup 2022, and the Premier League, among others.

³³ Wyche, 2016.

³⁴ Compare Bieler, 2017.

³⁵ ESPN, 2019.

Before the start of the Tokyo 2020 Olympic Games, athletes were not permitted to take a knee or otherwise protest against human rights abuses. On the first day of the Games, however, several athletes – including players from the United States, Sweden, and New Zealand – took a knee in protest against racism.³⁶ In response to these actions, the IOC adopted the Rule 50(2) Guidelines - Olympic Games Tokyo 2020,³⁷ which addressed peaceful protest during the Olympic Games Tokyo 2020.³⁸

These guidelines clarified that, during the Olympic Games, athletes are afforded limited opportunities to express their views in specific contexts, including mixed zones, media centres, press conferences, interviews, team meetings, and through traditional or digital media, including social media platforms. Expression was also permitted on the field of play before competition began, such as after leaving the call room or during athlete introductions, provided that such expression complied with the Fundamental Principles of Olympism, did not directly or indirectly target individuals, states, organisations, or their dignity, and was neither disruptive nor otherwise prohibited by the rules of the relevant National Olympic Committee or International Federation. In particular, the guidelines emphasised that expression must not interfere with competition protocols, other athletes' concentration, or public order. Notwithstanding these allowances, the guidelines strictly prohibited expressive conduct during official ceremonies, during competition itself, and within the Olympic Village, thereby reaffirming the Olympic Movement's restrictive approach to political, religious, and ideological expression in core Olympic spaces.³⁹

The use of the OneLove captain's armband has emerged as a visible symbol opposing discrimination and promoting inclusion in professional football. Launched in 2020 by the Royal Dutch Football Association (KNVB) as part of an inclusiveness campaign, the armband targets prejudice based on race, skin colour, sexual orientation, culture, faith, nationality, gender, age, and other forms of discrimination. Its design features a rainbow flag shaped as a heart with the number one in the centre, flanked by the text 'One Love'.⁴⁰

³⁶ The Guardian, 2021a.

³⁷ From 2021.

³⁸ An almost identical document was also published for the Beijing 2022 Olympic Games (see Rule 50(2) Guidelines - Olympic winter Games Beijing 2022).

³⁹ Rule 50.2 Guidelines - Olympic Games Tokyo 2020 (2021).

⁴⁰ Reuters, 2022.

In the context of the FIFA World Cup 2022 in Qatar, the captains of the national teams of England, Wales, Belgium, Denmark, Germany, and the Netherlands announced their intention to wear the 'OneLove' armband as a public expression in support of inclusion and diversity in professional football. The respective national football associations initially indicated their willingness to accept financial penalties in order to allow their captains to display the armband. However, shortly before the tournament started, FIFA announced that it would impose sporting sanctions on any captain wearing the OneLove armband on the field of play.⁴¹ FIFA relied on Article 13.8.1 of the FIFA Equipment Regulations,⁴² which provides that, in FIFA final competitions, the captain of each team must wear the captain's armband supplied exclusively by FIFA.

The controversy surrounding the OneLove armband was closely linked to the broader legal and social context of the host State, particularly the criminalisation of same-sex relations under Qatari law. In response to FIFA's position, the German national team adopted an alternative form of protest by covering their mouths during the official pre-match team photograph, symbolically expressing perceived restrictions on freedom of expression.⁴³ Notably, FIFA did not prohibit players from kneeling before matches as a gesture against discrimination, injustice, and inequality,⁴⁴ thereby revealing a degree of inconsistency in regulating expressive conduct. This episode illustrates the tension between athletes' freedom of expression, the regulatory autonomy of SBG, and potential conflicts with the national law of the state hosting the competition.

In Italy, male football players have also used symbolic gestures to raise awareness of social issues, such as placing red marks on their faces as part of a campaign to combat violence against women.⁴⁵

3.3.6 Non-Participation in Symbolic Gestures in Sport

In recent years, certain symbolic gestures, such as taking a knee and wearing the OneLove captain's armband, have been permitted in sporting venues. In this

⁴¹ Hamilton, 2022.

⁴² From 2025.

⁴³ ESPN, 2022.

⁴⁴ Reuters Fact Check, 2022.

⁴⁵ AP, 2023.

context, a dilemma also arises regarding an individual's freedom to decline to participate in such ideological gestures within the scope of their right to freedom of expression.

In the NBA, Jonathan Isaac was the first player in the NBA bubble to neither kneel for the national anthem nor wear a Black Lives Matter T-shirt over his jersey before a game.⁴⁶ In the Premier League, Wilfried Zaha became the first footballer to refrain from taking a knee, citing his belief that the protest was no longer effective.⁴⁷ Neither player faced any disciplinary action.

Further examples from English football (Premier League) illustrate the possibility the an individual may refuse to participate in symbolic gestures. The captain of Ipswich Town, Sam Morsy, declined to wear a rainbow armband intended to express support for LGBTQ+ inclusion, citing his religious beliefs. The club publicly stated that it respected the player's personal decision while reaffirming its commitment to inclusivity.⁴⁸

Crystal Palace defender Marc Guéhi avoided disciplinary proceedings by the Football Association after wearing a rainbow captain's armband inscribed with the message 'I love Jesus'. The FA's regulatory framework incorporates the IFAB Laws of the Game, which, in Law 4, prohibit the display of political, religious, or personal slogans, statements, or images. In this instance, however, the FA elected to merely remind both the club and the player of the applicable rules rather than initiate formal disciplinary action.⁴⁹

Just as an individual has the right to participate, they should also have the right to refuse to take part in such collective symbolic gestures, since freedom of expression includes not only the right to express oneself, but also the right to abstain from expression.

⁴⁶ Friedell, 2020.

⁴⁷ The Guardian, 2021b.

⁴⁸ The Guardian, 2024.

⁴⁹ Ostlere, 2024.

3.4 Political, Religious, or Racial Propaganda Outside Competition Venues

3.4.1 Muhammad Ali

The controversy arose when Muhammad Ali declared that his Muslim religious convictions prevented him from serving in the Vietnam War. Following his conscription, Ali repeatedly refused to report for military service and was subsequently convicted of draft evasion, sentenced to five years' imprisonment, and fined USD 10,000.⁵⁰ In response, the World Boxing Association suspended him and stripped him of his world championship title, reasoning that his refusal to serve was detrimental to the best interests of boxing. Similarly, the New York State Athletic Commission revoked Ali's licence to compete, a position that was soon adopted by nearly all other boxing commissions across the USA. At the age of twenty-five, Ali was effectively barred from professional boxing.⁵¹

Ali challenged these measures before the federal courts, arguing that revoking his licence was arbitrary and discriminatory, particularly in light of the fact that other boxers who had committed more serious offences were nevertheless permitted to continue competing. The United States District Court of New York held that, while Ali's constitutional rights had not been directly infringed, his claim was well-founded under principles governing private associations, as the New York State Athletic Commission operated as a private regulatory body. Consequently, the court ordered his boxing licence reinstated, thereby restoring his professional status.⁵² Although the dispute was framed primarily in terms of freedom of religion, it also engaged Ali's right to publicly oppose the Vietnam War – an issue of global political significance that was unrelated to the sporting activity he was being sanctioned for.⁵³

He ultimately did not serve a prison sentence; nevertheless, he was still severely sanctioned, as he was barred from competing for three years and stripped of his world championship title. For a professional athlete, such a period represents a substantial portion of a career, with long-term consequences not only for sporting achievements, but also from a financial perspective.

⁵⁰ Klein, 2009.

⁵¹ Yale Bordman, 2007, p. 39; Barber, 2021.

⁵² See in more detail *Muhammad Ali v. Division of State Athletic Com'n*, 1970.

⁵³ Yale Bordman, 2007, p. 39.

3.4.2 Naki v. Turkey

The Turkish Football Federation (Türkiye Futbol Federasyonu, TFF) has imposed disciplinary sanctions in several cases for statements made by football actors outside the field of play, raising significant questions regarding the compatibility of such measures with the right to freedom of expression. In *Naki v. Turkey*, the applicant, a professional footballer, was sanctioned for a message published on social media in which he expressed hope and solidarity and dedicated his team's victory to those who had lost their lives or been injured during ongoing violence in Turkey. The TFF's disciplinary and arbitration boards classified the impugned statements as ideological propaganda unrelated to sport, capable of encouraging violence and misbehaviour in sport and of eliciting protests by supporters. They further considered the statements to constitute conduct tarnishing the image and peaceful nature of sport;⁵⁴ consequently, the TFF Professional Football Disciplinary Committee found that Naki's remarks violated the ban on ideological propaganda and unsportsmanlike statements and imposed a twelve-match ban and a fine of 19,500 Turkish liras.⁵⁵

The ECtHR held that the national authorities had failed to perform an adequate balancing exercise between the applicant's right to freedom of expression and the competing interests relied upon, such as preventing disorder and hostility in the football community. The domestic decisions relied largely on general references to regulatory provisions prohibiting 'anti-sport' statements and ideological propaganda, without concretely assessing the content, context, or actual impact of the applicant's remarks. In particular, the authorities failed to demonstrate that the statements had incited, or were capable of inciting, violence, hatred, or intolerance among supporters.⁵⁶

The Court therefore concluded that the reasons advanced by the domestic authorities were neither relevant nor sufficient and that the sanctions imposed were not necessary in a democratic society nor proportionate to the legitimate aims pursued.⁵⁷ The same reasoning was applied in the related cases of *İbrahim Tokmak v.*

⁵⁴ *Naki v. Turkey*, 2021.

⁵⁵ Gemalmaz, 2024, p. 239.

⁵⁶ *Naki v. Turkey*, 2021.

⁵⁷ *Naki v. Turkey*, 2021.

*Turkey*⁵⁸ and *Sedat Doğan v. Turkey*,⁵⁹ in which sanctions imposed by the TFF on a football referee and a club official, respectively, for comments made on social media and in television appearances were likewise found to be incompatible with Article 10 of the ECHR.

In these cases, the Courts missed an important opportunity to provide a more detailed substantive assessment that would either justify the legitimacy of the interference with the right to freedom of expression or clearly demonstrate its unjustified nature. An even more significant shortcoming lies in the Courts' failure to address the fact that the impugned statements were made outside sporting venues. By overlooking this aspect, the Courts failed to take a clear stance on whether athletes – and other sporting actors – retain an unimpaired right to freedom of expression in their private sphere, notwithstanding their professional status.

3.4.3 Youcef Atal and Anwar El Ghazi

Recent disciplinary actions against professional footballers further illustrate the legal tensions surrounding athletes' freedom of expression in relation to political speech on social media. In France, OGC Nice suspended Algerian international Youcef Atal following a social media post relating to the Israel–Gaza conflict that was characterised by the club and domestic authorities as antisemitic. Although Atal deleted the post and issued a public apology, criminal proceedings were initiated against him. He was subsequently convicted by a court in Nice for provoking hatred on religious grounds and sentenced to an eight-month suspended prison sentence and a €45,000 fine. In parallel, the Ligue de Football Professionnel imposed a seven-match sporting suspension.⁶⁰

By contrast, the case of Dutch footballer Anwar El Ghazi in Germany demonstrates a markedly different legal outcome. El Ghazi was first suspended and later dismissed by Bundesliga club 1. FSV Mainz 05 after publishing social media posts critical of Israel following the Hamas attacks of 7 October 2023. While the club justified the termination on the basis of its internal values, German labour courts held that the dismissal constituted wrongful termination, concluding that the player's statements

⁵⁸ *İbrahim Tokmak v. Turkey*, 2021.

⁵⁹ *Sedat Doğan v. Turkey*, 2021.

⁶⁰ BBC, 2023; Hand, 2023; Woodyatt, Szaniecki & Schlachter, 2024.

fell within the scope of constitutionally protected freedom of expression. In conducting the required balancing exercise, the courts found that El Ghazi's expressive rights outweighed the employer's interests, and that summary dismissal was therefore disproportionate.⁶¹

These cases confirm that in the cases of both legal and sporting sanctions any restrictions on freedom of expression must be carefully scrutinized. It is important to highlight the distinction between the two cases. In the first case (Youcef Atal), the athlete was sanctioned by a SGB. In contrast, in the second case (Anwar El Ghazi) the issue arose in the context of an employment relationship, with sanctions imposed within that framework. Expression that is criminalized is prohibited in both private and sporting contexts. The situation differs, however, when sporting sanctions target an individual whose actions fall within the legitimate scope of freedom of expression. In such instances, SGB and sporting clubs must exercise great caution to avoid unlawfully interfering with this fundamental right.

4 Justification of Restrictions on an Athlete's Right to Freedom of Expression

The analysis of the selected cases demonstrates that, despite the diversity of regulatory frameworks adopted by individual SGBs, several common structural constraints on athletes' freedom of expression can be identified. First, athletes are subject to contractual limitations, most notably obligations arising from commercial and promotional programmes established by SGBs. As illustrated by incidents involving football players' interactions with sponsors' products, such as Coca-Cola or Heineken, a breach of these obligations does not automatically lead to disciplinary sanctions. Rather, whether penalties are imposed depends on the seriousness of the conduct and the motives underlying the breach. This regulatory sphere lies at the intersection of commercial interests and freedom of expression. Notably, the acceptance of exemptions from promotional duties on the basis of religious convictions indicates that, within this framework, elements of freedom of expression and of religion are at least partially recognised and accommodated.

⁶¹ Lobley, 2025; 1. FSV Mainz 05, 2025.

Second, athletes' expressive freedom is constrained by equipment and dress regulations, which generally prohibit political, religious, racial, and, in many instances, personal messages (for example, the blanket prohibition on slogans displayed beneath football jerseys). These restrictions typically derive from SGB rules designed to exclude political, religious, and racial propaganda, as well as demonstrations of a non-sporting nature. However, since these rules do not abolish freedom of expression as such, but merely restrict it by excluding specific categories of expression, extending such prohibitions to personal messages raises questions regarding their legal justification, particularly where such expressions are neither inherently disruptive nor explicitly prohibited by the relevant SGB regulations.

Third, athletes are subject to a general ban against promoting political, religious, and racial propaganda – or non-sporting demonstrations – at competition venues. This is most clearly exemplified by Rule 50(2) of the Olympic Charter and is similarly reflected in the regulatory frameworks of other major international SGBs, including the FIA (Rule 12.2.1(o) of the International Sporting Code),⁶² FIBA (Article 110(b) of the FIBA Internal Regulations – Book 1: General Provisions),⁶³ FIFA (Article 13(2)(c) of the FIFA Disciplinary Code),⁶⁴ FIG (Section I, point 7 of the FIG Code of Conduct),⁶⁵ FINA (Rule C.4 of the FINA Constitution),⁶⁶ FIVB (Rules 8.3 and 8.4 of the Disciplinary Regulations),⁶⁷ the ITF (Article IV(C)(3)(d) of the Code of Conduct for the Men's and Women's ITF World Tennis Tour),⁶⁸ UEFA (Article 11(2)(c) of the UEFA Disciplinary Regulations),⁶⁹ and World Athletics (Rule 3.3.14 of the Integrity Code of Conduct).⁷⁰ Although these rules formally exclude – rather than merely limit – such forms of expression, recent practice reveals an increasing tolerance of certain ideological gestures at sporting events. Examples include individual or collective kneeling, the wearing of rainbow or OneLove armbands, and the use of symbolic markings on athletes' faces. Importantly, athletes have also been permitted, on the basis of their freedom of expression and conscience, to refrain

⁶² From 2026.

⁶³ From 2025.

⁶⁴ From 2025.

⁶⁵ From 2022.

⁶⁶ From 2021.

⁶⁷ From 2023.

⁶⁸ From 2023.

⁶⁹ From 2024.

⁷⁰ From 2023.

from participating in such expressive acts, as illustrated by the conduct of athletes such as Jonathan Isaac, Wilfried Zaha, and Sam Morsy.

The SGB's have not always tolerated these forms of expression. This is clearly illustrated by the case of Tommie Smith and John Carlos, who were suspended from future competitions after performing an ideological gesture during the medal ceremony at the 1968 Olympic Games. Notably, even presently athletes are prohibited from engaging in any type of ideological expression during medal ceremonies. Similarly, contemporary sports regulations continue to aggressively proscribe overt political propaganda. This is exemplified by the previously discussed case of judoka Fethi Nourine, who deliberately used the Olympic Games as a platform for political and religious protest and, as a result, committed a serious violation of the applicable SGB rules, leading to his suspension from current and future professional judo competitions.

By contrast, interferences with freedom of expression are least controversial where an athlete's conduct not only violates SGB regulations but also clearly infringes legally protected interests under international and national law, particularly when such conduct occurs at competition venues (e.g., *Šimunić v. Croatia*). In such circumstances, the restriction of expression cannot reasonably be regarded as a violation of freedom of expression. More complex issues arise where athletes make potentially incriminating statements in their private sphere, most notably via social media. As demonstrated by the case of Youcef Atal, expressions made outside competition venues may nonetheless constitute breaches of SGB rules where they encroach upon legally protected interests or are deemed detrimental to the league or sport's reputation. In these cases, disciplinary measures are typically justified not by reference to the location of the expression, but by its content and its perceived impact on the integrity and public image of the sport. A related, albeit distinct, example is the case of Muhammad Ali, which concerned both the right to freedom of religion and the criminal prohibition of draft evasion. Nevertheless, the sporting sanctions imposed upon him further illustrate the willingness of sports authorities to severely discipline athletes for conduct unrelated to sporting performance.

The divergent outcomes in cases involving athletes' expression in their private sphere – particularly on social media – suggest a degree of arbitrariness and inconsistency in the manner in which prohibitions relating to ideological expression

are interpreted and applied. In this regard, the resolution of the Anwar El Ghazi case is noteworthy, albeit achieved only through judicial intervention. The national court explicitly emphasised the need to balance the individual's right to freedom of expression against conflicting rights and interests. The importance of such balancing is likewise underscored by the judgment in *Naki v. Turkey*, as well as in the related cases of *İbrahim Tokmak v. Turkey* and *İbrahim Tokmak v. Turkey*, in which the ECtHR held that the national authorities had failed to conduct an adequate balancing exercise between the applicants' right to freedom of expression and the competing interests invoked, such as the prevention of disorder and hostility within the football community. However, the Court again missed an opportunity to address explicitly whether athletes retain an unimpaired right to freedom of expression in their private sphere.⁷¹ The mere fact that an individual is a professional athlete cannot, in itself, justify restricting a legally guaranteed fundamental right. From this perspective, the sanctioning of Ja Morant may be viewed as an example of an excessively expansive, potentially arbitrary interpretation of rules prohibiting conduct deemed detrimental to the league's image.

Importantly, SGB rules consistently exclude political, religious, and racial propaganda at competition venues. This is exemplified by Rule 50(2) of the Olympic Charter, for example, which as previously mentioned applies to expressions occurring "in any Olympic sites, venues or other areas". Similarly, Article 13(2)(c) of the FIFA Disciplinary Code prohibits "using a sports event for demonstrations of a non-sporting nature". A similar formulation is found in Article 11(2)(c) of the UEFA Disciplinary Regulations, which sanctions anyone "who uses sporting events for manifestations of a non-sporting nature". Moreover, the guidelines issued under Rule 50(2) of the Olympic Charter for the Tokyo 2020 and Beijing 2022 Olympic Games expressly underlined that athletes are afforded only limited opportunities to express their views, and only in clearly defined contexts, including, *inter alia*, social media platforms.

Against this background, certain SGBs may be criticised for exercising excessively strict control over, and repression of, expression that should otherwise fall within the sphere of individual freedom, including for athletes. Even where no formal breach of SGB rules or legal norms can be established, athletes may still be subject

⁷¹ Compare Lindholm, 2017.

to implicit or indirect sanctions. This is particularly evident in the case of Colin Kaepernick, who, despite engaging in ideological expression not prohibited by league rules, was effectively excluded from the NFL. This case highlights the pressing need to enhance oversight of SGB conduct and to develop coherent and consistent criteria distinguishing protected freedom of expression from permissible restrictions, especially given that athletes must, as a condition of pursuing a professional sporting career, consent to the regulatory frameworks imposed by SGBs.

In assessing whether restrictions on freedom of expression are legally justified, it is appropriate to rely on the standards developed by the ECtHR in its interpretation of the ECHR, which is binding on its Contracting States. Assessing whether a restriction is legally justified requires a two-step approach. The first requires an examination of those categories of expression that the ECtHR has expressly recognised as amenable to restriction, such as racial hatred or intolerance, promoting Nazi ideology, Holocaust denial or other forms of historical revisionism relating to grave human rights violations, blasphemy, obscenity – particularly where protecting public morality or minors is at stake – and speech that is abusive, offensive, or incites violence.⁷²

Because athletes often serve as role models, particularly for younger audiences, it is sometimes argued that placing heightened restrictions on their forms of expression is justified – reflecting heightened 'duties and responsibilities' under Article 10 ECHR – as compared to ordinary citizens.⁷³ Regardless of whether one accepts this position, the decisive question remains whether any restriction of freedom of expression is grounded in legally legitimate reasons recognised under international and national human rights frameworks. In this respect, the analysis ultimately concerns a stricter application of the second para. of Article 10 of the ECHR.

The second step in the analysis requires consideration of the well-established three-part test under Article 10(2) of the ECHR, according to which any interference with freedom of expression must be prescribed by law, pursue one or more legitimate aims listed in that provision, and be necessary in a democratic society. It is precisely

⁷² Teršek, 2019, p. 380, 383.

⁷³ Rietiker, 2024, p. 275.

at this stage that the legitimacy of rules imposing blanket exclusions of political, religious, and racial expression – such as Rule 50 of the Olympic Charter – becomes problematic. Scholarly commentary,⁷⁴ has increasingly argued that Rule 50 fails to comply with these criteria, as the categorical restrictions imposed on athletes' freedom of expression neither clearly pursue a recognised legitimate aim⁷⁵ nor satisfy the requirements of necessity and proportionality. In addition, such restrictions suffer from a lack of clarity and transparency. While it may be possible to justify restrictions in cases of extreme, targeted, or disruptive demonstrations, it is difficult to sustain the argument that all forms of political, religious, or racial expression are incompatible with the requirement of being 'necessary in a democratic society'. Consequently, Rule 50 appears to require repeal or, at a minimum, substantial revision in order to narrow its scope and ensure that freedom of expression is adequately protected based on clear and legally sound justifications.⁷⁶ Although general prohibitions aimed at safeguarding political neutrality may fall short of the standards developed by the ECtHR, a balancing exercise remains unavoidable – between the limited restriction of freedom of expression on the one hand and the safeguards necessary to ensure the safe, orderly, and non-confrontational conduct of sporting competitions on the other. In conducting this balancing exercise, courts must determine the level of restriction, as opposed to outright exclusion, of freedom of expression that is compatible with the legitimate objectives of safety and non-conflictual sporting events.

5 Conclusion

The bipolar nature of sanctioning athletes for expressive conduct – where similar forms of expression are permitted in some cases yet punished in others – while imposing sanctions for statements made outside the competitive environment, even when such statements fall within legally protected boundaries, reveal a pronounced degree of arbitrariness in assessing political, religious, and racial expression, as well as conduct allegedly detrimental to the reputation of sporting competitions. This inconsistency underscores the need to harmonise the standards governing prohibited propaganda.

⁷⁴ James & Osborn, 2024, p. 207; Gemalmaz, 2024, p. 246.

⁷⁵ Gemalmaz, 2024, p. 246.

⁷⁶ James & Osborn, 2024, pp. 207–208.

Particularly, the ECtHR's criteria used to assess the legal justification of restrictions on freedom of expression may serve as an appropriate benchmark. These criteria consist of two complementary components. The first encompasses categories of expression that the ECtHR has expressly recognised as legitimately subject to restriction. The second comprises the well-established three-part test, according to which any interference with freedom of expression must be prescribed by law, pursue one or more legitimate aims listed in Article 10(2) of the ECHR, and be necessary in a democratic society.

Given that blanket prohibitions on ideological expression are fundamentally incompatible with these standards, future regulatory approaches must be grounded in a contextual balancing exercise. Such an exercise should weigh the limited restriction of athletes' freedom of expression, on the one hand, against the safeguards required to ensure the safe, orderly, and non-conflictual conduct of sporting competitions, on the other. Only through such a principled and proportionate approach can legal certainty be enhanced and the risk of arbitrary interference with fundamental rights be meaningfully reduced.

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