

Impact of eu trade secret directive on sport



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Professional Sports Organizations, Teams and Personnel often possess various forms of propriety information that provide them with potential competitive advantages over competitors. Critically discuss the application of the UK's doctrine of confidential information and the potential impact of the EU trade secrets directive on sport.

(Support your analysis with the relevant legal authority (Primary and Secondary). Apply relevant EU/UK case law if and where appropriate.)

1. INTRODUCTION

With the immense growth of popularity in sports in the last few decades, It is important to understand the ' Behind the Scenes' in sport when it comes to the planning and operations. Intellectual Property in Sport, More specifically Confidential Information is one of the key aspects that sporting bodies, teams and personnel ensure that are protected in the highest manner. Confidential Information and trade secrets can be from the slightest breach of contract confidentiality to the more tortious acts of email hacking to unethically obtaining information in the intent to gain an unfair advantage. As can be seen in *United States of America v. Christopher Correa* .

[1]Christopher Correa, the former Director of Baseball Development for the St Louis Cardinals Major League Baseball Team was found guilty of theft of intellectual property of a competitor team the Houston Astros by hacking the opponents emails and personal computers to obtain financial and scouting information[2]It can be argued that an opposing team obtaining Confidential Information or Data of the competing team can cause major financial and reputation damages to the victim team.[3]Thus in the field of competition the importance of confidential information is continuously being monitored <https://assignbuster.com/impact-of-eu-trade-secret-directive-on-sport/>

and precautions are put in place to ensure protection. Although it is not possible to protect confidential information through the process of Intellectual Property Protection in the United Kingdom[4] Following the requirements, confidential information can be protected by the doctrine of breach of confidence[5]. In this essay I will discuss The Doctrine of Confidential Information in the field of sports in the United Kingdom and The Impacts of the European Trade Secrets in Sport. Concluding this essay with my analysis of both sectors.

2. APPLICATION OF UK DOCTRINE OF CONFIDENTIAL INFORMATION IN SPORTS

Confidential Information is often misunderstood as a registered form of Intellectual Property, as it can be perceived in a manner that confidential information and Trade Secrets are still created and thought of by the person who is impairing the secret, the matter of fact is that Confidential Information and Trade Secrets are 'secrets' in the terms that it is an idea which is not available to the public.[6] Therefore they do not follow the requirements to receive protection for either Copyright, Trademark or Patent Protection[7]. Arnold J held that " Confidential Information is not a form of property, ... However Judges often use the language of Property when discussing Confidential Information." [8] in the case of *Force India Formula One Team v. 1 Malaysia Racing Team* .[9] although it can also be argued that confidential information is a form of Intellectual Property.[10] Despite the difficulty to determine the exact terminology for the Confidential Information. A concise definition of the law of confidence is that the law is a broad doctrine to the effect that if someone receives information in confidence,

that person is not in liberty to use the information to make any profit, or disclose the information without the consent of the person impairing the information.[11] Thus In the United Kingdom, Confidential Information is protected under the Doctrine of Confidential Information[12] which are legal principles that allow the courts to distinguish the types of information that should be protected. The breach of confidence may be actionable at law if the information was received under a duty of confidence, It can be argued that “ The Origins of the breach of confidence lie in equity.”[13] Further Lord Denning stated in the case of *Frazer v. Evans*[14] The basis of Confidential Information is based on the moral principles of loyalty and fair dealing. [15] With that said it is important to note that English Law provides a remedy of the Breach of Confidence if the breach can be defined in the following way.[16]

- a) The information imparted must be of a confidential nature; and
- b) The plaintiff in the action must be the owner of the confidential informational; and
- c) That information must have been communicated to the recipient in circumstances which import an obligation of confidence on the recipient; and
- d) There has been unauthorised use or disclosure of that information by the recipient, or someone who has received that information from the recipient, to the detriment of the owner

It is further evident in the words of Justice Megarry held in the case of *Megarry J in Coco v A. N. Clark (Engineers) Ltd* .[17]“ That of the three elements essential to a cause of action for breach of confidence, namely[18]

- a) That the information was of a confidential nature,
- b) That it was communicated in circumstances importing an obligation of confidence and
- c) That there was an unauthorised use of the information”.

With The advances in technology and funding contributions towards the rise of sports, the research and developments have only advanced to provide the best results in competition. Thus shows the importance of keeping research and developments private from the public. It is important to understand how the Breach of Confidence can be seen relating to common issues in sports as such. 1) Confidential Disclosures in Contract Agreements. 2) Image and Privacy Rights and finally 3) Trade Secrets

1. Confidential Disclosures in Contract Agreements

In order to keep Confidential Information safe from exposure, measures to protect information in sports has been put into place with the rigorous contract agreements for not only the coaches but for the athletes who wish to represent the team or country in the sport, as seen in the International Coaches Federation Code of Ethics[19]it is clear to say that coaches oversee all the operations in the sport and therefore possess a vigorous amount of private information about the players and the team that is not released to the public, therefore the contracts are guarded heavily with non-disclosure

agreements[20]which prevent the employee from releasing any information to the public. Although Non-Disclosure Agreements are commonly used in the business work space for big corporations.[21]Non- Disclosure Agreements are made to serve two main purpose[22]

- 1) To inform the employee that the information being disclosed is confidential
- 2) Possession of Legal Written Evidence that confidential information was disclosed in the terms that the Employee will not share or disclose the information.

Sporting Teams and Governing Bodies have adopted the use of Non-Disclosure Agreements in Contracts as Confidential Information is developing progressively due to the increase in sports analytics and athlete databases. Therefore It can be said that athletes have the same right of responsibilities when it comes to disclosing the confidential information of the team they represent and the affiliated players. An example of the breach of confidence can be seen in the involvement of Tom Arscott and the Sale Sharks Rugby Team[23]Steve Diamond, the Sale Director of Rugby stated “ I think when you sign a professional contract, team information is sacrosanct to the team’s performance and that can’t be discussed, certainly with opposition teams. I think that is the top and bottom of it. I think it’s worded [in contracts], words to that effect, that the passing of information is forbidden.”[24]Stated by Diamond after Tom Arscott was proven guilty to leaking confidential information to the opposing team, Although it was unclear if the confidential information Arscott had leaked was based on the

team or players which may have given an unfair advantage to the opposing team to win the match. Regardless of the intentions of Arscott, Diamond also stated that “ I think if you do your own analysis, you probably don’t need the information, because teams do the same most weeks. But in the same breath, I think there is an element of trust you need, and loyalty.”[25]Despite the fact that this was a decision governed by the sporting body of Rugby, by law this case would steer toward the breach in contract law[26]As Arscott was in breach of the contract terms that “ passing of information is forbidden”[27]Although it was not proven that the confidential information leaked was in effect to the team, The main terms of action for cause of breach of confidence would have to abide to the terms that Justice Meggery Stated[28]But with the words stated by Diamond “ I think if you do your own analysis, you probably don’t need the information”[29]doesn’t show a lot of evidence that the confidential information of the team was at risk, More so stating that the information can be obtained by simply “ doing your own analysis”[30]therefore the decision of the governing body of rugby was a simple breach of contract and the moral elements of trust and loyalty.

2. Image and Privacy Rights

The English Law with the combination of the European Convention of Human Rights have had an immense impact on the law of confidentiality, providing the protection of privacy, the right to freedom and expression and the defence of the public interest.[31]The two articles with direct relevance to the law of confidence, Article 8 concerns the right to privacy[32]and Article 10 which gives the right to freedom of speech.[33]As seen In the case of

Campbell v Mirror Group Newspapers [34] a celebrity fashion model Naomi Campbell was photographed at her Narcotics Anonymous Meeting by photographers who then published the photos online. The English Courts made use of the ECHR 1998 Article 8[35] Although the House of Lords held a majority that Mirror Group was liable for Campbells damages. Lord Hoffman and Lord Nicholls stated that the Mirror Group was allowed to publish the fact that Campbell was receiving treatment for her drug addiction.[36] As it was already known to the public that she suffered a drug addiction. Further, In the case of *Douglas v Hello! (2001)*[37] Shows the English Courts and the use of the ECHR 1988 Article 8 and 10[38]. The marriage of two film actors Douglas and Catherine Zeta Jones. Sold the exclusive rights to their wedding photos to OK! Magazine for 1 Million Pounds with the terms that they would have the choice and final decisions to which pictures are released to the public. The issue that occurred was the presence of a freelance photographer who had gained access to the wedding and took unauthorised unflattering photos which Hello! purchased for the publications in UK and European Countries. The photos where a breach of the confidence.[39] It can be said that the popularity of sports has struck the increase of celebrity influencers in sport.[40] With the fans demanding to see more of the public lives of their favourite sports stars, the intrusion of privacy can become an issue for the athletes and sports officials. A case involving a sports official can be seen in *Mosley v. News Group Newspapers Ltd*[41] The former president of Fédération Internationale de l'Automobile the international sports governing body for the Formula One filed a law suit against the News Group for promoting a scandalous video of sexual acts characterizing Mosley as a 'Nazi'[42] It was held that " The law [of confidence] now affords

protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence.”[43]In the instances of privacy, the breach of confidence applies within the spectrums of Human rights. In despite of the Courts siding with Mosely it was also mentioned that the News Group still had the right to post the video as it was not new information to the public eye, But it was the fault of portraying Mosley as a ‘ Nazi’ in the video published.

Trade Secrets

To determine the full analytic views of the breach of confidence it is important to note that the United Kingdom Government added an extra reinforcement on the statutory protection for the Trade Secrets[44]that are “ implement provisions of Directive (EU) 2016/943 of the European Parliament and of the Council on 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition.”[45]Although the Trade Secrets Act works in parallel with the Breach of Confidence, It can be said that Trade secrets are confidential business secrets that involve productions secrets, formulas, company financials, consumers data and overall company marketing strategies. [46]Which are “ protected by laws against misuse of confidential information through unfair means, including industrial espionage, including employees to reveal secrets that has been disclosed within the company.”[47]In the United Kingdom the laws of the Trade Secrets Act is a set of legal principals as such[48]

- a) Secret in the sense that it is not known to the public domain
- b) The value of the secret is to a commercial value
- c) There are measure taken to keep the secret confidential.

Despite the principals, The UK courts have not yet established a general definition of Trade Secrets, Although Meggary J offered a definition of trade secrets in the case of Thomas *Marshall v Guinle* [49]

- a) The owner must believe that the release of the information injures him or helps his rivals
- b) He must believe the information is not in the public domain
- c) Finally the information must also be judged in the light of the particular trade practices to which it pertains

However the elements of Meggary J's definition does not meet the objective definitions of the predominate in case law therefore it is in no way authoritative.[50]With the continuous growth of the Global Sports Equipment Market. The market has become valuable to the commercial side of sports, as it is expected to reach a value of \$89. 22 Billion Dollars in 2025 with the advancement in lightweight materials and advanced technology.[51]With the progression of the global sports equipment market pushing to becoming a multi-billion dollar industry, sporting brands are more motivated to fund research programs to formulate equipment for the best results in competition. Therefore to prevent the tortious acts of competing brands, The Trade Secrets within the companies are well maintained until the release of

production. With Sports relying on equipment to compete at an elite level. A major case to note is the Formula One Espionage[52] In the sport of Formula One it can be said that the privacy of trade secrets is one of the most important factors for the sport due to the technical analysis of the equipment and expensive research and developments.[53] In the case of Ferrari Spa v Coughlan and Anr[54] The Chief Designer for the Automobile brand and Formula One Team McLaren Mike Coughlan was accused of illegally obtaining Team Ferraris Information. During the investigation he was found to have Information of Team Ferrari Information in possession.[55] Although an action was due to take place in the High Courts of London, a settlement was reached between McLaren and Ferrari[56] with a recording breaking settlement payment in the sport. If a settlement was not reached and the case had continued to the High Courts of London, Team Ferrari would have to provide evidence that the secrets illegally obtained were not available in the public domain, the value of the information was in risk of commercial damage and what measures Team Ferrari have taken to keep the confidential secrets protected.[57] Although the case was settled by both parties. There are cases of serious claims towards illegally obtaining confidential trade secrets which have a harsh consequence if proven guilty in the UK. An example of this is the case of Corbiere Ltd v. Ken Xu[58]. A quantitative analyst was found guilty of misappropriating his employer's confidential information with the intention to use the information in China. With the failure to disclose the confidential information files and reveal the location of the files.[59] Xu was found guilty and sentenced to 13 months' imprisonment.[60]

3. IMPACTS OF EU TRADE SECRETS DIRECTIVES IN SPORT

In the European Union the Trade Secrets are protected under the Trade Secrets Directive[61] which is identical to article 39, 'Undisclosed Information' of the Trade Related Aspects of Intellectual Property (TRIPS). [62] The definition has 3 elements[63]

- a) Secret in the sense that it is not known to the public domain
- b) The value of the secret is to a commercial value
- c) There are measures taken to keep the secret confidential.

In the context of sport, it can be argued that Europe is the main hub for sporting teams, sporting organisations and governing bodies for sport. [64] Thus the EU Trade Secrets Directive is more effective towards sports in Europe.

International Sports Governing Bodies

The most commonly known events in sport are the Olympic Games and the Football World Cup[65]. Although the events are held in different jurisdictions the majority of the operations and planning is conducted by the Head Governing Body of sports, the International Olympic Committee (IOC). [66] Which is located in Lausanne, Switzerland operating under the Swiss Laws[67] The IOC working in a pyramid like structure[68]. Information is passed down from the IOC to the International Federations then finally the National Federations. With the increase in confidential information of athletes and teams being passed from one governing body to another, it is the duty of the governing bodies to fit the right protection when it comes to

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disclosure of information, whether it be to the employees or other sources. Further, During the term of applications to host the Olympic games. Countries are sharing confidential information with the IOC which involves financials of the bidding city, building plans, community databases and future plans and revenues being guarded heavily from the public.[69] This information being confidential to an international level, the protection of these secrets must be under a tight protection. A recent incident involving the International Football Federation (FIFA)[70] And the International Clubs of Indonesia.[71] Shows the security of the Governing Bodies when it come to the breach of confidential information. although this was a penalty governed by the international federation. FIFA had monitored social media to find that three Indonesian football clubs had leaked confidential information on social media outlets. Due to the breach of confidence and the organisation contracts. An official letter was sent to all three clubs along with a reprimand and fined for the wrongdoing actions.[72] Regardless of the harm the information may have. In the cases of breaches in confidence and Trade Secrets all sports related claims would be directed to the Court of Arbitration for Sport (CAS)[73] the main arbiter to resolve any cases in relation to sport. In which the use of Swiss Law is the default method.[74]

World Anti-Doping Agency (WADA)

An important organization to note in the world of sport is the World Anti-Drug Doping Agency (WADA).[75] WADA being a sanctioned agency by the IOC, oversees all the rules and regulations of substance usage for athletes during competitions and everyday life until retirement from the sport.[76] It can be

said that WADA is in possession of sensitive confidential information of athletes.

PRIMARY LEGISLATIONS

Case Resources

1. *United States v. Christopher Correa* [2016] (4: 15-cr-00679)
2. *Force India Formula One Team v. 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616
3. *Boardman v Phipps* [1976] 2 AC 46
4. *SBJ Stephenson v Mandy* [2000] FSR 286
5. *Frazer v. Evans* CA [1969] 1 QB 349
6. *Fraser v. Thames Television Ltd* [1984] QB 44, [1983] 2 ALL ER 101

7. Coco v AN Clark (Engineers) Ltd [1968] FSR 415, [1969] RPC 41

8. *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22
9. *Douglas v Hello No 1* [2001] 2 WLR 992
10. *Mosley v News Group Newspapers* [2008] EWHC 1777
11. *Marshall (Thomas) (Exporters) Ltd v Guinle* [1978] IRLR 174, HC
12. *Corbiere Ltd v. Ken Xu* [2018] EWHC 112 CH

Statutory Legislations

1. European Convention of Human Rights Article 8

2. European Convention of Human Rights Article 10
3. Trade Secrets Act 2018
4. Trade Secrets Directive (EU) 2016/943
5. Trade Related Aspects of intellectual Property (TRIPS)

SECONDARY LEGISLATIONS

Book Publication Resources

1. RobertCR Siekmann and Janwillem Soek, *Arbitral and Disciplinary Rules of International Sports Organisations* (edn, TMC ASSER PRESS 2001)
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3. Paul David, *A Guide to the World Anti-Doping Code (The Fight for the Spirit of Sport)* (3rd edn, Cambridge University Press 2017)
4. Jennifer Davis, *Intellectual Property Law* (4th edn, Oxford University Press 2012)
5. David Griffith-jones , *Law and the Business of Sport* (1st edn, Butterworths 1997)
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Website Resources

1. Scott Dippel , 'These are the details the city wants kept secret about the possible Olympic pricetag' (CBC News , 3 October 2018) accessed 2 January 2019
2. “ Intellectual property is something unique that you physically create or the expression of the Idea. An idea alone is not intellectual property”
See <https://www.gov.uk/intellectual-property-an-overview>
3. International Coaches Federation(ICF) , 'Code of Ethics ' (*International Coaches Federation* ,

June 2015) accessed 17 December 2018

4. Intellectual property office , 'Non-Disclosure Agreements ' (*GOV UK Intellectual Property Office* , 12 March 2015)
5. Mark Dobson, 'Tom Arscott sacked by Sale over alleged leak of information to Bristol' (*The Guardian Sport* , 19 Jan 2017)
6. the sports team , 'Sale Sharks sack winger Tom Arscott for alleged leak of team information' (*The Independent* , 19 Jan 2017)

7. Sam Gyimah, 'The Trade Secrets (Enforcement, etc) Regulations 2018' (*Legislationcogov* , 15 May 2018) accessed 18 December 2018
See, Explanatory Note
8. LauraWood Research and markets , 'Global Sports Equipment Market 2016-2018 & 2025 - Market is Expected to Reach \$8922 Billion with Opportunities in Lightweight Materials and Advanced Technologies' (*Cision PR Newswire* , 7 Nov 2018)
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10. ' The Formula 1 Innovation Battle - On and Off the Circuit' (*Clearview IP* , 25 August 2015)
11. Jonathan Noble , 'Coughlan named in Ferrari court action' (*Autosport* , 9 July 2007)
12. sky sports , 'McLaren and Ferrari settle' (Sky Sports , 11 July 2008)
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14. 'The Organisation ' (International Olympic Committee ,)<https://www.olympic.org/about-ioc-institution>
15. ' Olympic Charter ' (International Olympic Committee , 2 August 2015)
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17. ' Indonesian clubs sanctioned for publishing TMS data on social media' (FIFA , 9 December 2014)
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[1] *United States v. Christopher Correa* [2016] (4: 15-cr-00679)

[2]Ibid

[3]Cost of Labour and efforts to retrieve and store information and Damage of reputation from media and team secrets

[4]" Intellectual property is something unique that you physically create or the expression of the Idea. An idea alone is not intellectual property" See <https://www.gov.uk/intellectual-property-an-overview>

[5]Common Law Doctrine of Confidential Information

[6]Jennifer Davis, *Intellectual Property Law* (4th edn, Oxford University Press 2012) p 103, Section 3. 16

[7]CDPA 1988, See Requirements for the following Copyright, Trademark and Patents

[8] *Force India Formula One Team v. 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616

[9]Ibid para 377-8

[10] *Boardman v Phipps* [1976] 2 AC 46, *SBJ Stephenson v Mandy* [2000] FSR 286, Headnote 2, 298

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[11]David Griffith-jones , *Law and the Business of Sport* (1st edn, Butterworths 1997) 225

[12]Common Law Doctrine of Confidential Information

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[20]Intellectual property office , 'Non-Disclosure Agreements ' (*GOV UK Intellectual Property Office* , 12 March 2015) accessed 29 December 2018

[21]MindyChen Wishart , *Contract Law* (2nd edn, Oxford University Press 2008) p 205 (NDA's are common in Contract Law for Companies to add into Employee Contracts.

[22]Ibid, p 206

[23]Mark Dobson, 'Tom Arscott sacked by Sale over alleged leak of information to Bristol' (*The Guardian Sport* , 19 Jan 2017) accessed 17 December 2018

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See End of Article with points made by Sale Director of Rugby, Steve Diamond

[25]the sports team , 'Sale Sharks sack winger Tom Arscott for alleged leak of team information' (*The Independent* , 19 Jan 2017) accessed 17 December 2018

[26]Breach of the Laws of Contract

[27]Mark Dobson, 'Tom Arscott sacked by Sale over alleged leak of information to Bristol' (*The Guardian Sport* , 19 Jan 2017) accessed 17 December 2018

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[28]Coco v AN Clark (Engineers) Ltd [1968] FSR 415, [1969] RPC 41 Section 20

[29]the sports team , 'Sale Sharks sack winger Tom Arscott for alleged leak of team information' (*The Independent* , 19 Jan 2017) accessed 17 December 2018

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[30]Ibid, See statements of Steve Diamond

[31]Jennifer Davis, *Intellectual Property Law* (4th edn, Oxford University Press 2012) p 129, sec 3. 60

[32]ECHR 1998 art 8 “

[33]Ibid art 10 “

[34] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22

[35]ECHR 1998 Article 8

[36] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 See the Judgement of Lord Hoffman and Lord Nicolls

[37] *Douglas v Hello No 1* [2001] 2 WLR 992

[38]ECHR 1988 Article 8 and 10

[39] *Douglas v Hello No 1* [2001] 2 WLR 992, See Judgments

[40]Felix Mutter and Tim Pawlowski , *Role models in sports – Can success in professional sports increase the demand for amateur sport participation?* (Elsevier 2014) 327 See, Section 3. 2 Motivational Effects of Sports

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[42]Ibid

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[45]Sam Gyimah, 'The Trade Secrets (Enforcement, etc) Regulations 2018' (*Legislationcogov* , 15 May 2018) accessed 18 December 2018 See, Explanatory Note

[46]Keith E Maskus , *Private Rights and Public Problems* (edn, Peterson Institute for International Economics 2012) p 237

[47]Ibid p237

[48]Trade Secrets Regulation Act 2018

[49]Marshall (Thomas) (Exporters) Ltd v Guinle [1978] IRLR 174, HC

[50]Jennifer Davis, *Intellectual Property Law* (4th edn, Oxford University Press 2012) p 104

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[58] *Corbiere Ltd v. Ken Xu* [2018] EWHC 112 CH

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[60]Ibid

[61]Trade Secrets Directive (EU) 2016/943

[62]Trade Related Aspects of intellectual Property (TRIPS)

[63]Trade Secrets Directive (EU) 2016/943,

[64]Governing Bodies of Sport and the Court of Arbitration of Sport is located
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[65]Matt slater, 'Olympics and World Cup are the biggest, but what comes
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[68]RobertCR Siekmann and Janwillem Soek, *Arbitral and Disciplinary Rules of International Sports Organisations* (edn, TMC ASSER PRESS 2001)

[69]Scott Dippel , 'These are the details the city wants kept secret about the possible Olympic pricetag' (CBC News , 3 October 2018) accessed 2 January 2019

[70]FIFA Fédération Internationale de Football Association is the main governing body for the sport of football Governed by the International Olympic Committee under the Olympic Movement

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[73]IanS Blackshaw and others, *The Court of Arbitration For Sport* (edn, TMC ASSER PRESS 2006) p 21

[74]Ibid see, p 31 and 50

[75]Paul David, *A Guide to the World Anti-Doping Code (The Fight for the Spirit of Sport)* (3rd edn, Cambridge University Press 2017) p 62

[76]Ibid see, p292 ' Responsibility for testing and investigations'