

# **POLICY, EUROPEAN SPORTS LAW AND LEX SPORTIVA**

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## **ABSTRACT**

As a result of the commercialisation of sports, the number of sports cases that were brought before the courts for a ruling, increased. At first it appeared that commercialisation was the only reason that the European Court of Justice (henceforth ECJ) issued a number of decisions that treated sports as an economic activity, the truth however is that inside the European Union (henceforth EU) there are different coalitions that support different policies. The ECJ's decisions and the legally binding documents issued by the EUs' institutions concerning sports, which can be called European Sports Law, represent merely the outcome of the debate between these different policy coalitions inside the EU. However, even if according to the Lisbon Treaty, the european institutions will have to recognize the «specificity of sport», this does not mean that European Sports Law can be included in the autonomous, independent, supranational legal order that is called Lex Sportiva.

## 1. The Economic Science in Sport

The sports area has not always been an area in which a serious economic activity was developing. However with the help of economic science experts devised new ways for economic evolution and thus a new market, the sports market. That was the beginning of the commercialization of sport.

The hitherto commercially untouched sports activity was recognized as the new commercial «Eldorado», a growing and promising market. The fans were the new consumers in this market.<sup>1</sup> The stadiums were converted into shopping malls, signs and colours of the teams into «gadgets», athletes into marketable products whose value raised or dropped, groups were converted into listed companies with stock shares and all with the help of TV media and the Internet.<sup>2</sup>

## 2. The Association of Sport with the Law and Sports Law

Economic science however was not the only science to “invade” sports. A key role in the development of sports and sports law was also played by the legal science. In the 1970s the sports commercialization<sup>3</sup> acquired a more professional nature that has led to a significant increase in the financial figures.<sup>4</sup> The broadcasting by the media, the sponsorship of professional football, basketball and other sports in Europe, caused the emergence of sporting disputes which had to be tried before the courts, sports or not. As the disputes were increasing the lawyers in general as well as the courts have started to use certain legal concepts, legal principles, and legal arguments. These conditions in the legal practice which were combined with the sports legal theory evolving in the universities, created the conditions for the international recognition of sports law as a new legal order.

Thus, in sports law we can find principles of international law, administrative law,<sup>5 6</sup> commercial law, civil and criminal law. These principles are not integrated directly into the sports law legal order but as they enter the sports area they are reshaped as either new rules or exceptions to the existing rules.<sup>7</sup> Taking the example of doping in sport,<sup>8 9</sup> we see the rule of a common criminal prohibition (use of cocaine)<sup>10</sup> transformed to a sports rule infringement with new legal consequences and so we have a new sporting rule. On the other hand we see the case of an antipyretic drug, that every ordinary person can use freely, being prohibited for athletes, which means that the new sports rule is an exception to a pre-existing general rule.

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<sup>1</sup> Papaloukas, M., «The Sports Legal Order and the Sports Market», 2007, Dikaio Epiheiriseon kai Etairion. Volume 137, p. 569-574.

<sup>2</sup> Papaloukas, M. «Sports Law and Sports Market». Χρηγία. Sport Management International Journal. Vol. 1(1): 39-45, 2005. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310446)

<sup>3</sup> Sloane, P.J. (1980). «Sport In the Market?». The Institute of Economic Affairs. Page 16.

<sup>4</sup> Papaloukas, M., «Sports and Law». 2007. Newspaper TA NEA - Monday 2<sup>nd</sup> July 2007.

<sup>5</sup> Papaloukas, M., «Management and Sports Law», Papaloukas Editions, Thessaloniki 1996. <http://docs.google.com/fileview?id=F.b351d7b2-d947-4cc1-a94b-ea6e59b2b7b5&hl=en>

<sup>6</sup> Allen, D. «Sport and the European Union: Foreword», Journal of Contemporary European Research, Vol. 3, No. 3, pp.180-181. 2007.

<sup>7</sup> Papaloukas, M., «Sports Code», Papaloukas Editions, Athens 2008.

<sup>8</sup> Papaloukas, M., «Doping», Papaloukas Editions, Thessaloniki 1995.

<http://docs.google.com/fileview?id=F.c58de3a8-d6b7-4add-8686-32e2cf53cefd&hl=en>

<sup>9</sup> Papaloukas, M., «The Role of the State and of Sports Entities in the Implementation of a Law concerning Doping». 1<sup>st</sup> Congress of Sports Law. Athens 1992, p. 313-322.

<sup>10</sup> Papaloukas, M., «Legal Handling of the Drugs Problem». Round Table Discussion organised on the 19.06.1995, by the Directorate of the Centre of information and Prevention of Drug Addiction and AIDS of the Greek Red Cross and the Society for the Handling of the Drug Abuse, apropos the 26<sup>th</sup> of June, Universal day for the Drug Abuse Prevention.

Both sciences, the legal science and economics have changed the face of the sport to what we know today. After such an introduction to the regulation and commercialization of sport one expects a reference to the “invasion” in the sports area by the European competition rules through the decisions of the European Court of Justice (ECJ).<sup>11</sup> We are used to consider the ECJ’s sports case law<sup>12</sup> as a direct result of the commercialisation of sports and the emergence of a new sports market.<sup>13</sup> Could this however be just the tip of the iceberg? Could it be that behind the ECJ’s case law<sup>14</sup> before which sports authorities stand in awe, there is a huge mechanism of conflicting views and debating coalitions, trying to influence the institutions of the European Union in one or the other direction? We must not forget that the Court is not the EU itself, but simply one of its institutions, and its decisions may conflict with decisions of other institutions of the EU. One must therefore ask himself what is behind and above the European Union and directs the actions of its institutions, which in turn issue declarations and take decisions affecting the lives of us all.

### **3. Sport and Politics in the European Union**

The actions of any natural or legal person are directed by the target that it is set to fulfil, the mission it has undertaken. When we talk about a human being the target is affected by the limits of natural life and of the person, what we usually call the objective conditions, ideology, life dreams, etc. When talking about a legal person and especially the European Union, the objectives which are being undertaken are called «policy». So in the decade of 50s the European Union’s policy was to create a common market to sell products, to enhance the production and in the 80s could be the promotion of a single monetary policy for trade facilitation.

Each European Union policy cannot remain powerful for ever.<sup>15</sup> Usually it gradually loses power and new policies take their place in the same manner as the objectives and dreams of a natural person succeed one another. So the monocacy and the omnipotence of the policy aimed at creating a common market in Europe, as it reached its completion, it was challenged by new policies less practical and more ideological. These new policies of the European Union are located in the socio-cultural sector. The sports activity until recently was treated as just an economic activity. Perhaps the time had come to consider sports as a socio-cultural activity and to include it in the new European Union policies.

The result was that today there is a dispute within the European Union on how to cope with the sports activity. It is about whether it should be treated as an economic or social activity. The EU, in the same way as at the national law of each Member State, has attempted to define the boundaries of sport as a social activity or an economic activity. This definition requires the adoption by the ECJ of particular legal

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<sup>11</sup> Papaloukas, M., «The Future of Sports in the European Competition Law », 2001, «ATHLOS». Volume 1-2. Issue [36-37], p. 6-12.

<sup>12</sup> Papaloukas, M., «Sports: Case Law of the Court of Justice of the E.C.», Papaloukas Editions, Athens 2008.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1311952](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311952) & [http://works.bepress.com/sports\\_law/1/](http://works.bepress.com/sports_law/1/)  
<sup>13</sup> Papaloukas, M., «The Consequences of European Competition Law on Sports». 5th International Association of Sports Law Congress, Nafplion, Greece, 10-12 July 1997.

<sup>14</sup> Papaloukas, M. «Sport Law and the European Union» Χρηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007.

<sup>15</sup> Papaloukas, M., «The Influence of the European Union Law and of the Case Law of the European Court of Justice on the Management and the Organisation of Sports», 1997, «ATHLOS». Volume E/96-97. Issue 1(21), p. 8-15.

principles and rules for the sport. The Court however has de facto awarded to sport a set of specific rules and a set of exceptions from general rules.

The policy behind the actions of an institution such as the European Union is an abstract notion. This policy however becomes concrete in the texts issued by the institutions of the EU. That is where a scholar should look for to discover who promotes which policy. Which entity considers sports activity as a commercial or economic activity and which entity as a socio-cultural activity and why. It is obvious that one should consider starting his study from the legally binding documents, such as the Treaty of the EU, the decisions and directives of the ECJ. The influence of these is obvious and are mainly used as weapons of the coalition that supports the treatment of sport as an economic activity under the Common Market Policy. Instead not so obvious is the influence on the Community institutions of the non-binding documents, such as declarations, the White Paper, etc.,<sup>16</sup> used as weapons of the coalition that supports the treatment of sport under the Socio-Cultural Policy.

#### **4. The Role of the Institutions and especially the ECJ's**

From a regulatory perspective, however, the sport received initially a favourable treatment with respect to the obligations stemming from the need to create a common market in Europe. This claim that the sport was above the law was originally based on a self-proclaimed autonomy towards European law. This view is certainly reflected in the views of Member States, that opposed a «European» intervention in their social and cultural structures and was based on the fact that sport had traditionally conquered a self-regulatory power, in all national laws of Member States.

Given the lack of a clear legal competence of the EU in sport, the European Parliament, the Council and even the Commission initially adopted a moderate stance on intervention in sports matters. Especially the Council considered the sport mainly as a means to promote European identity and consciousness of citizens as part of its strategy called «A Peoples Europe» as defined in the Adonnino Committee's Recommendations issued in Milan in 1985 and approved by the Council. The Court, however, showed from the start, that it would not be as tolerant as the other institutions. It rejected the principle of the self-proclaimed independence of sports authorities. During the 1990s the issue was more explosive than ever, as the football authorities clearly violated articles of the Treaty and in particular the articles on the free movement of professional athletes.<sup>17 18</sup>

#### **5. The Influence of the Common Market Policy in Sports**

The development of the Common Market in Europe, based on the economic freedoms of the Treaty of Rome, has helped the formation of the international profile of sports law.<sup>19</sup> The ECJ rulings on sports since the 1970's were sending a clear message that the policy of achieving common market in Europe is all-powerful and it

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<sup>16</sup> White Paper on Sport. Commission of The European Communities. Brussels, 11.7.2007.

<sup>17</sup> Barani, L., «The Role of the European Court of Justice as a political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling», Journal of Contemporary European Research. Published by UACES Student Forum & UACES. Vol.3, Issue 3, December 2007, pp. 42-58. <http://www.jcer.net/ojs/index.php/jcer/article/view/6/5>

<sup>18</sup> Weatherill, S., «European Sports law Collected Papers», TMC Asser Press 2007, page. 73 and page 87.

<sup>19</sup> Foster, K., «Lex Sportiva and Lex Ludica: The Court of Arbitration for Sports Jurisprudence». Entertainment and Sports Law Journal, January 2006, pp. 1-14. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/foster/foster.pdf>

also includes the sports sector.<sup>20</sup> It is easy to note the escalation of the ECJ's arguments from the case Walrave and Koch in 1974 and Dona case until the 1976 Bosman case in the 1990s.<sup>21 22</sup> By the mid-1990s sport seemed to be merely an economic activity according<sup>23</sup> to the ECJ. The omnipotence of the Common Market Policy seemed undeniable.<sup>24 25</sup>

The Common Market Policy consists of an ideological attachment to the legal foundation of a Single European Common Market.<sup>26</sup> In this view there cannot be any area to be exempted from the provisions of the EU in its pursue of the Common Market idea. With regard to sport, the supporters of this policy, believe that all national sports law provisions should be treated the same way<sup>27</sup> as all other provisions of the national legislation and any sporting activity as any commercial activity.<sup>28</sup>

A key supporter of this policy was the powerful Directorate General for Competition.<sup>29</sup> Another supporter is also private parties with legal claims supporting this policy by filing appeals and complaints on infringement of free competition, based on the rule of direct application of EU Law. These complaints may result in an investigation by the Commission or the imposition of fines or end up before the ECJ issuing decisions that set legal precedents through the formation of a standard (albeit non-binding) case law.<sup>30 31</sup> It is no coincidence that the Bosman ruling was followed by the Commission investigation of many sports cases in which there were complaints for competition violations.

Following the first shock caused by the Bosman ruling there were three similar cases. The cases Deliege, Lehtonen and Balog. The most ambitious of these was the first case which applied the Bosman doctrine to amateur athletes, while the second applied the Bosman doctrine in Basketball. The Balog case sought to apply the Bosman doctrine not only to EU players but also to players from countries that had signed a cooperation agreement with the EU.

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<sup>20</sup> Panagiotopoulos, D., «Implementation and Consequences of the European Community Law on the Sports Activity », 5th International Association of Sports Law Congress, Nafplion, Greece, 10-12 July 1997.

<sup>21</sup> Papaloukas, M., «Comments on the Bosman Case», 1997, Nomiko Vima. Volume 45. Issue 4, p. 683-687.

<sup>22</sup> Brand, A. and Niemann, A. «Europeanisation in the Societal/Transnational Realm: What European Integration Studies can get out of Analysing Football», Journal of Contemporary European Research, Vol. 3, No. 3, pp.182-201. 2007.

<sup>23</sup> Papaloukas, M. «Sport Law and the European Union» Χορηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310401)

<sup>24</sup> Papaloukas, M., «Sports Businesses and European Competition Law», 1998, Dikaio Epiheiriseon kai Etairion. Volume 7. Issue 41, p. 679-685.

<sup>25</sup> Papaloukas, M., «The Future of Sports in the European Competition Law », 2001, «ATHLOS». Volume 1-2. Issue [36-37], p. 6-12.

<sup>26</sup> Manders Toine (MEP), September 2005, «Professional Sport in the Internal Market», Project Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament on the initiative of Mr. Manders Toine.

<sup>27</sup> Papaloukas, M., «The Sports Legal Order and the Sports Market», 2007, Dikaio Epiheiriseon kai Etairion. Volume 137, p. 569-574.

<sup>28</sup> Parrish Richard: «The Birth of European Union Sports Law». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 2, Summer 2003, pp. 20-39. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

<sup>29</sup> Arnall A. (1990). "Does the Court of Justice have Inherent Jurisdiction?". CMLRev, 27:683.

<sup>30</sup> On the "Stare Decisis" doctrine see Papaloukas, M. "Sport Law and the European Union Χορηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007.

<sup>31</sup> Hartley, T.C. (1988). The Foundations of European Community Law. Pages 75-76.

Supporters of this policy however do not operate autonomously but within the framework and under the guidance of a broader policy. Also the great number of complaints brought before the Commission has shown that there are some limits to the amount of cases that can be investigated the Commission.

With the fear of a repetition of the Bosman doctrine, whenever a case arose before the Court national governments «interfered» arguing in favour of applicants and sporting bodies. The tug-of-war between political and legal arguments to regulate the sport activity continued during the procedures that led to the Declaration of Nice in 2000. It should be noted that this was the time when the Court issued almost simultaneously the Deliège and Lehtonen decisions, in which the second appears to complement the first. Perhaps the ECJ was influenced by the political pressure from the Member States in favour of the sport activity since without overruling the Bosman doctrine, it first assumes competence in the economic aspect of sports, and then it outlines the authority of sports entities for ruling as long as there is no violation of the «Acquis Communautaire».<sup>32</sup>

However the pressure from the Directorate General for Competition<sup>33</sup> in the UEFA and FIFA<sup>34</sup> has continued after the European championship in 2000 and sports authorities were threatened with fines if they did not change their transfer policy. The negotiations lasted from September 2000 until March 2001 and affected the text of the Declaration of Nice in 2000. The sports authorities however had to negotiate under enormous pressure as the issuance of the Opinion on the case Balog was imminent, which was feared that it would extend the Bosman doctrine to all professional players working in countries that were associated with the EU (such as Morocco, Turkey etc.)

The Declaration of Nice was a relief for sports entities in their efforts to deal with the pressures of the Directorate General for Competition and the ECJ. Sports authorities were eagerly seeking to include the sport in the Treaty of EU.

Despite the enormous power held by supporters of this policy, decisions in the ECJ are influenced by broader political and administrative constraints. The Commission and particularly the Directorate General for Competition was now flooded with complaints to investigate cases and political pressures of governments for a more friendly handling of sporting authorities could help alleviate a heavy workload. Meanwhile, the General Directorate of Culture had proposed to declare 2004 as Year of Sport thus upgrading its role and claiming the sports activity. The negotiation procedure and the compromise that followed led to the interruption of the procedure in the Balog case, while the Commission reached an agreement with the sports authorities for the athletes transfer policy. These events since 2000 show therefore that there was room for negotiation with the supporters of the Socio-cultural policy in order to find a common ground between the two policies.<sup>35 36</sup>

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<sup>32</sup> Papaloukas, M., «Sports: Case Law of the Court of Justice of the E.C.», Papaloukas Editions, Athens 2008. [http://works.bepress.com/sports\\_law/1/](http://works.bepress.com/sports_law/1/)

<sup>33</sup> Van Miert, K. (1997). «Sport et Concurrence: Developments Recents et action de la Commission.» Forum European du Sport. Luxembourg, 27.11.1997.

<sup>34</sup> Garcia, B. «UEFA and the European Union: From Confrontation to Co-operation?», Journal of Contemporary European Research, Vol. 3, No. 3, pp.180-181. 2007. <http://aei.pitt.edu/7878/01/garcia-b-10i.pdf>

<sup>35</sup> Barani L. «The Role of the European Court of Justice as a political Actor in the Integration Process: The Case of Sport Regulation after the Bosman Ruling», Journal of Contemporary European Research. Published by UACES Student Forum & UACES. Vol.3, Issue 3, December 2007, pp. 42-58. <http://www.jcer.net/ojs/index.php/jcer/article/view/6/5>

## 6. The Influence of the Socio-Cultural Policy in Sport

The basic position of the supporters of the socio-cultural policy is that there is a need for the EU to integrate into its legal framework the uniqueness and specificity of sport.<sup>37 38 39</sup> In the supporters of this policy we can include many powerful institutions, with enormous economic power as well as policy shaping abilities, such as the European Parliament, several Member States, non-governmental sports organizations, the European Olympic Committee, national federations, etc.

One could think that this dispute should easily end in favour of this policy because of the enormous potential of its supporters to influence the EU policy, bearing in mind that its supporters include Member States which only they have the power to amend the EU Treaty. This huge power is however limited by the rule of unanimity required for such an amendment. Member states could nevertheless easily adopt non-binding documents which would support this policy. A typical example is the initiative by the Member States following the Bosman ruling to attach to the Treaty of Amsterdam, a non-binding Declaration on Sport, which forced the institutions of the EU to recognize the social significance of sport. These actions resulted in including to the Declaration of Nice in 2000 an obligation for the EU acting under the provisions of the Treaty to always take into account the social, educational and cultural function performed by sport which renders it of special importance.

Another factor limiting the enormous power of this coalition is the fact that supporters of this view are not united. There are many sub-coalitions within it supporting different degrees of independence of sport. The European Parliament, the European Olympic Committee and national federations support the establishment of an article in the EU Treaty referring directly to sport. Several major sporting entities support the UEFA simply establishing a protocol attached to the treaty that provides for the need for EU to recognize the specificity of sport. Finally, some Member States such as Great Britain, Sweden and Denmark consider that these actions are not necessary and that the institutional framework of the EU has enough flexibility to recognize the specificity of sport without any further legal action needed.<sup>40</sup>

## 7. The Reconciliation of the two Policy Coalitions

Given the great political power and importance of both coalitions, it is obvious that none of them was able to prevail. Therefore mediation, negotiation and compromise became necessary in order to combine both views, a practice that is customary in EU. The result of this compromise was officially recognized by the Commission in a report of 1999<sup>41</sup> the text of which was made known to the ECJ.

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<sup>36</sup> Parrish Richard: «The Birth of European Union Sports Law». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 2, Summer 2003, pp. 20-39. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

<sup>37</sup> See Conclusions by the working party concerning the specific nature of sport from the 9<sup>th</sup> European Sports Forum. Lille 26-27/10/2000.

<sup>38</sup> Panagiotopoulos, D., «Sports Law», Nomiki Vivliothiki 2005.

<sup>39</sup> Malatos, A., «Sports Law Lectures», A.N. Sakkoulas editions, Athens-Komotini 2005.

<sup>40</sup> Parrish Richard: «The Birth of European Union Sports Law». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 2, Summer 2003, pp. 20-39. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

<sup>41</sup> DN: IP/99/565/24-2-1999, «Commission Debates Application of its Competition Rules to Sport».

According to this political compromise sports differences can be divided into three categories.<sup>42</sup>

**The first category** relates to sporting rules outside the scope of European law and related to purely sporting matters.<sup>43</sup> An example of these rules are the rules of the game, rules on the selection of the members of national teams,<sup>44</sup> some transfer cases,<sup>45</sup> etc.

**The second category** of sports rules are rules that prima facie fall under the jurisdiction of the European institutions and are tested for their compatibility with the EU Law, however, may be exempted from the jurisdiction of EU institutions under certain conditions. Provisions that may be subject to exclusion include the state aids to sports entities, collective sale of television rights, etc.

**The third category** includes sports provisions prohibited by European law. While the provisions of the above mentioned categories are of an athletic nature, the provisions of this category are primarily commercial in nature. These provisions include restrictions to the free movement of workers,<sup>46</sup> transfer rights after the contract expires,<sup>47</sup> sporting rules allowing sports entities to regulate trade issues in the sports area,<sup>48</sup> etc.

This compromise to handle every sports provision by placing it among one of these three categories is based on a simple legal concept. Each sport provision can be of either sport or commercial nature. The provisions of a sporting nature do not interest the EU institutions, on the other hand the provisions of a commercial nature will be examined by the EU institutions. While for some provisions there can be no doubt that they fit in one or the other category, there are provisions lying in a grey area between the two poles of pure sports and purely commercial arrangements.<sup>49</sup>

## 8. The prevalence of the Socio-Cultural Policy in the Treaty of Lisbon

It is certain that the option to include an article on sport in the Treaty of the EU would be a huge success for the sports authorities, which could provide a momentum for development. First, it could end the conflict between the two coalitions. Besides that, all the EU institutions will be obliged when forming any policy to take into account the interests of sports entities.

This option would solve the huge problem of funding sports activities in the European Union. According to the ECJ decision C-106/96 (Great Britain v. Commission) each funding should be based on a Treaty provision.<sup>50</sup> The EU has no

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<sup>42</sup> Papaloukas, M. «Sport Law and the European Union» Χρηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310401)

<sup>43</sup> Foster, K. «Lex Sportiva and Lex Ludica: The Court of Arbitration for Sports Jurisprudence». Entertainment and Sports Law Journal, January 2006, pp. 1-14. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/foster/foster.pdf>

<sup>44</sup> ECJ Case: C-51/96, Christelle Deliège & Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo.

<sup>45</sup> ECJ Case: C-176/96, Jyri Lehtonen, Castors Canada Dry Namur-Braine ASBL, Fédération royale belge des sociétés de basket-ball ASBL (FRBSB), Ligue belge - Belgische Liga ASBL.

<sup>46</sup> ECJ Case: C-415/93, Jean-Marc Bosman.

<sup>47</sup> ECJ Case: C-415/93, Jean-Marc Bosman.

<sup>48</sup> In 2001 the investigation of the Commission on F1 ended.

<sup>49</sup> Parrish Richard: «The Birth of European Union Sports Law». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 2, Summer 2003, pp. 20-39. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

<sup>50</sup> See paragraph 19 of ECJ Case C-106/96 “Any Community expenditure, if it is submitted, requires a dual legal basis: entry in the budget and, as a general rule, prior adoption of an act of secondary legislation authorising the expenditure in question. The only exception to the latter requirement



competence based on an article of the Treaty to fund sports actions and therefore any action in this area is taken cautiously. The above decision of the Court led the Commission to abandon all activities funded on the sport. Of course to get round this difficulty sporting activities are funded by the Directorate General for Education and Culture. Nevertheless the financing of any sporting action is very fragile and must be done carefully because of the lack of justification in the Treaty. Finally, the adoption of an article including sport in the Treaty could help a policy that aims to establish EU citizenship awareness.

The Treaty of Lisbon, known as the European Constitution, was signed in Lisbon on 13 December 2007. It is now in the process of ratification by the Member States in accordance with their respective constitutional requirements. The Treaty, as provided for in Article 6, will take effect from the 1<sup>st</sup> of January 2009, if all the ratification documents have been deposited before that date or, failing that, from the first day of the month following the deposit of the last document of ratification.

Under Article 6 of the Treaty, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. One of the areas defined is the sport in its European dimension.

In Article 165 paragraph 1 of the Treaty it is stated that the Union contributes 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.

In Article 165 paragraph 2 of the Treaty it is stated that the EU will take action to develop 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.

In Article 165 paragraph 3 of the Treaty it is stated that the Union and its Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe, and in Article 165 paragraph 4 of the Treaty it is stated that in order to contribute to the achievement of these objectives, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States and finally, the Council, on a proposal from the Commission, shall adopt recommendations.

It follows from the above, that if the Treaty of Lisbon is ratified by member states, then the sport will be explicitly stated for the first time in the EU Treaty. Only then the sports specific nature, at least in its European dimension, will be respected by the EU institutions. This leaves room for optimism towards the recognition of the autonomy of sport. This does not mean however that the sports actions will not be controlled. It does not provide a general exception to the sport but rather recognizes the rule of the three areas analyzed above. The delegation in paragraph 2 of Article 165 to the EU institutions of the power to promote the openness and fairness of the contests seem to leave room for private claims by athletes or teams against sports authorities.

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*concerns the funding of non-significant actions, namely pilot projects or preparatory actions designed to assess the policy pros and cons of a proposal for a basic measure. In that event, the legal basis lies in the Commission's power of initiative derived directly from the Treaty."*

In any case, the change that is to be brought about by this article is the biggest opportunity of the EU institutions to take action in the sports area and to finance more sports research projects that will lead to a closer relationship between sports entities and universities in Europe resulting to a scientific upgrading of sport in Europe.

### **9. Lex Sportiva - Globalization and Internationalization of Sports Law.**

All the above mentioned developments and sports regulations from the EU, contemplated by the decisions of the ECJ, have now created a so called European Sports Law.<sup>51</sup> In that sense, apart from the national sports law and international sports law there is now also a European sports law. None of them has yet to obtain the desired full independence from the countries with which it is associated. The question remains however which are the rules of Lex Sportiva that constitute a supranational autonomous and independent legal order?

The answer can be given considering the internationalization and globalization of sports law. The distinction between the two terms is very important as an international sports law may be applied by national courts but the adoption and implementation of a global sports law requires the exclusion of national laws.<sup>52</sup> The international law is governing relations between States, therefore the international sports law should include the principles of international law applicable on sports. In that sense, international sports law should include the Jus Commune, the general principles of international law, and it should therefore be a part of international law rather than a separate legal order called supranational sports law or Lex Sportiva.<sup>53</sup> An international sports law should be characterized by a system in which national jurisdictions are sovereign and the highest authority of sport is established in the form of a multinational organization by these national laws.

On the other hand, a global sports law is not governed by national law and constitutes an independent supranational legal order<sup>54</sup> created by the worlds governing sport authorities. It is a global law without national ties, a set of supranational legal principles sui generis, derived from the rules laid down by international sports federations, as interpreted by the competent sports courts. This is a separate legal order that is globally autonomous.<sup>55 56</sup> It implies that international sports federations can not be regulated by national courts or by national laws. They can only be regulated by their own internal organs or external bodies established or authorized by the same international sports federations.<sup>57</sup>

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<sup>51</sup> Papaloukas, M. «Sport Law and the European Union» Χορηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310401)

<sup>52</sup> Foster, K. «Is There a Global Sports Law?». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 1, Spring 2003, pp. 1-18. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/articles/foster/>

<sup>53</sup> This view has been proposed by Prof. Nafzinger. See Nafzinger J: “Globalizing Sports law”. Marquette Sports Law Journal. 9 (1999), pp.225-237.

<sup>54</sup> Papaloukas, M. “Sports Law and Sports Market”. Χορηγία. Sport Management International Journal. Vol. 1(1): 39-45, 2005. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310446)

<sup>55</sup> Papaloukas, M., «The Sports Legal Order and the Sports Market», 2007, Dikaio Epiheiriseon kai Etaireion. Volume 137, p. 569-574.

<sup>56</sup> Papaloukas, M., «Sports: Case Law of the Court of Justice of the E. C.», Papaloukas Editions, Athens 2008. [http://works.bepress.com/sports\\_law/1/](http://works.bepress.com/sports_law/1/)

<sup>57</sup> Foster, K. «Is There a Global Sports Law?». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 1, Spring 2003, pp. 1-18. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number1/articles/foster/>

Thus, it has been argued<sup>58</sup> that in the international sports scene rules of international sports law can coexist with global sports law rules. International sports law includes rules that regulate a part of sport which although appears to have international aspects, it is however firmly based on the national sports system, governed by national law and usually subsidized by the national budget. An example of this case is football. To the contrary, global sports law contains the rules regulating the sports in which groups with no national ties or with little national ties, take part. In this case each group is not subsidized by any state and sponsors play a key role. A typical example is F1. In this system a global sports law includes rules by which sport regulates itself, while an international sports law in the EU or on the level of member states, it will produce a patchwork of regulations deriving from different regulatory systems.

Against this background we can distinguish different rules of sports law. First there are the rules of the game (concerning the way the game is played) as well as the rules that include the sports ethics, as are the principles of sportsmanship and fair play and fall into what is often called **Lex Ludica**. Then there are the general principles of international law applicable in sports which automatically include a basic protection from abuses such as the right to be heard and are included in the so-called **International Sports Law**. Finally, there are the principles arising from the interpretation and application of the rules of international sports federations. These are of a conventional nature, special and unique and they are included in the so-called **Global Sports Law**.

When one mentions the term *Lex Sportiva* meaning a separate, autonomous and independent legal order, one cannot refer to an international sports law, which by definition should be governing relations between states. Therefore the term *Lex Sportiva* should refer to a global sports system and not an international sports system. Some scholars often support the view that *Lex Sportiva* includes the international sports law, but when they try to describe the rules that are included in *Lex Sportiva*, they don't refer to international sports law rules but to global sports law rules.<sup>59</sup>

## 10. Conclusion

We should not forget that the EU is not the only factor in the ever-evolving world of sports governance. European law takes precedence over national law. Therefore, the EU Law may directly affect the sports provisions of national laws and national non-governmental organizations. The EU can not apply the same logic to sports areas that are covered by international agreements, especially when the EU is a party in these agreements. As the restructuring of agricultural policy in the EU was promoted by the liberalization of trade policy of the World Trade Organization, so Europe also can be forced by external factors in reshaping its sports policy.<sup>60</sup> No country, let alone the EU can formulate policies<sup>61</sup> in an area like sports without taking into account the existing international situation. It is obvious that, apart from the

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<sup>58</sup> Hoolihan, B. «Governance, Globalisation and Sport». This paper was presented in November of 1991 during the Anglia polytechnic University LLM Sports law Seminar.

<sup>59</sup> Beloff, M., Kerr T., Demetriou M. «Sports Law». Oxford. Hart. 1999.

<sup>60</sup> Parrish Richard: «The Birth of European Union Sports Law». Entertainment Law. Published by Frank Cass. London. Vol.2, No. 2, Summer 2003, pp. 20-39. <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

<sup>61</sup> Papaloukas, M. «Sport Law and the European Union» Χρηγία. Sport Management International Journal. Vol. 3(2): 39-49, 2007. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1310401](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310401)

globalization of economy and the related globalization of policy concerning sports, there is also a globalization of sports law.

So at the end of the day, if one accepts that there is an international as well as a global sports law, the autonomous, private and self-regulated one, can only be the global sports law. The Treaty of Lisbon and the inclusion of a provision on sport that recognizes the specificity of sport,<sup>62</sup> when ratified by member states would be a very important step towards the recognition of Lex Sportiva. This does not mean that the European sports law is the new Lex Sportiva since European law is by its nature international law governing relations between member states. European sports law recognizes the specificity of sport, but it does not recognize that European sports law is an independent, special legal order. This may mean however that for the first time a union of states (the EU) and its judicial body (the ECJ) make a bold step that may someday lead to the recognition by the EU of this global, supranational, self-regulated sports law, called Lex Sportiva.

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<sup>62</sup> Papaloukas, M. "Sports Law and Sports Market". Χρηγία. Sport Management International Journal. Vol. 1(1): 39-45, 2005. [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1310446](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1310446)

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