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# Sports Law and the European Union

Marios Papaloukas

*Department of Sport Management, University of Peloponnese*

## Abstract

For the last thirty years the athletic community as well as academics are dealing with an effort by the European Court of Justice to influence sport law and the rule-making power of member states in the area of sports. In the present paper the reader will find a summary of all the major cases brought before the Court as well as an analysis of their effect. Apart from that, the reader will be able to understand the fact that the Court does not accept the rule of precedent in its decisions as well as the fact that it is rather policy than Treaty provisions that controls it. It remains to see how sports authorities can use these facts to their benefit, if they want to hope for a change of the Courts' case law in the future.

**Key Words:** *european union, sports law.*

## 1. The Development of Case Law of the European Court of Justice

The athletic authorities view, up until the 90s was that sport clubs could not be regarded as undertakings. In the beginning of the 90s under the pressure of the European Community authorities, they expressed the opinion that only the major European Sport clubs may be regarded as undertakings (see also M. Papaloukas, p. 679-685, 1998), whereas small clubs carry on an economic activity only to a negligible extent (see also European Commission, D-G X, Commission Staff Working Paper. Brussels, 29/9/1998). They also held that transfer rules did not concern the employment relationships between players and clubs but the business relationships between clubs and the consequences of freedom to affiliate to a sporting federation. They thought that as the Community authorities have always respected the autonomy of sport, it would be extremely difficult to distinguish between the economic and the sporting aspects of athletic activity and that a decision of the European Court of Justice concerning the situation of professional players might call in question the organization of football as a whole. For that reason, even if Treaty provisions on the free movement of workers and services were to apply to professional players, a degree of flexibility was to be expected because of the particular nature of the sport (see Case of the ECJ C-415/1993 *Bosman*, paragraph 72; M. Papaloukas, p. 683-687, 1997).

The member states (see also M. Papaloukas, p. 69-83, 1996) up until the 90s considered, first, that in most cases a sport is not an economic activity (M. Papaloukas, 10-12 July 1997) since sport in general has points of similarity with culture and that under the EC Treaty, the Community should respect the national and regional diversity of the cultures of the Member States. However this argument based on points of alleged similarity between sport and culture was not accepted by the European Court on the grounds that freedom of movement of workers is a fundamental freedom in the Community system (see, Case C-19/92, *Kraus v Land Baden-Wuerttemberg*, paragraph 16).

The member states were also of the opinion that the freedom of association and autonomy enjoyed by sporting federations under national law, by virtue of the principle of subsidiarity, taken as a general principle, intervention by public and particularly Community authorities in this area should be confined to what is strictly necessary. This principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as was reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order. However, the European Court held that the rules laid down by sporting associations cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players,

nor can they be seen as an inevitable result thereof (see Case of the ECJ C-415/1993, *Bosman*, paragraph 79-80). At the same time the principle of subsidiarity (see N. Emiliou, p. 383. 1992), interpreted to the effect that intervention by public authorities, and particularly Community authorities, in the area of sports must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty (see case of the ECJ C-415/1993, *Bosman*, paragraph 81).

## 2. Sport as an Economic Activity

With regard to the objectives of the Community, Sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Treaty provisions (see Case 36/74 *Walrave and Koch*, paragraph 4; Case 13/76 *Donà*, paragraph 12; Case C-415/93 *Bosman*, paragraph 73; Joined Cases C-51/96 and C-191/97 *Deliège*, paragraph 41; and Case C-176/96 *Lehtonen and Castors Braine*, paragraph 32). Thus, where a sporting activity takes the form of gainful employment (P.J. Sloane, p. 16, 1980) or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen (see, to this effect, *Walrave and Koch*, paragraph 5, *Donà*, paragraph 12, and *Bosman*, paragraph 73), it falls, more specifically, within the scope of European Law (M. Papaloukas, p. 8-15. 1996-1997).

It is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is the existence of, or the intention to create, an employment relationship. Application of these provisions is not precluded by the fact that sporting rules govern the business relationships between clubs rather than the employment relationships between clubs and players. For example if the employing clubs must pay fees on recruiting a player from another club this would affect the players' opportunities for finding employment and the terms under which such employment is offered.

As regards the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held since the 70s (in *Donà*, cited above, paragraphs 14 and 15) that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature of the athletic activity. It has stressed, however, that such a restriction on the scope of these provisions must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty (see also M. Papaloukas, p. 39-45. 2005).

The obligation by Member States to abolish obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law (see *Walrave*, cited above, paragraph 18). Working conditions in athletic activity in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. In the Courts view, the Treaty provisions on freedom of movement could not be confined to acts of a public authority since there would be a risk of creating inequality in its application (see *Walrave*, cited above, paragraph 19). Consequently, these Treaty provisions not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment in a collective manner.

Finally the Court also considered the problem of the possible consequences that its rulings could have in sports authorities and the sporting activity as a whole and held that, although the practical consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision. At the very most, such repercussions might be taken into consideration when determining whether exceptionally to limit the temporal effect of a judgment (see Case C-163/90 *Administration des Douanes v Legros and Others*, paragraph 30).

### 3. Professional Athletes and Fundamental freedoms

With respect to the concepts of «economic activity» and «worker» within the meaning of the Treaty, it must be observed that these concepts define the scope of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively (see, to that effect, Case 53/81 *Levin v Staatssecretaris van Justitie*, paragraph 13).

In that concept, (see Case *Donà*, paragraph 12, and Case 196/87 *Steymann v Staatssecretaris van Justitie*, paragraph 10) work as a paid employee or the provision of services for remuneration must be regarded as an economic activity within the meaning of the Treaty. However, those activities must be effective and genuine activities and not such as to be regarded as purely marginal and ancillary. As to the concept of worker, it may not be interpreted differently according to each national law but has a Community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under

the direction of another person, in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum v Land Baden-Württemberg*, paragraphs 16 and 17) (see C-176/96 Lehtonen, paragraphs 42-46).

One might think that only professional athletes and professional sporting activities could be falling inside the scope of the European Law and therefore enjoy the protection of the fundamental freedoms such as rule for freedom of movement of workers.

The mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities within the meaning of the Treaty provisions. Services are considered to be services where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons (see also F. Burrows, 1987).

In that connection, it must be stated that sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of the Treaty even if some of those services are not paid for by those for whom they are performed (see Case 352/85 *Bond van Adverteerders and Others v Netherlands State*, paragraph 16) (see Case C-51/96 Christelle Deliege, paragraphs 46, 55-56).

Furthermore a rule requiring professional or semi-professional athletes or persons aspiring to take part in a professional or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, (which does not involve national teams competing against each other), does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services (see Case C-51/96 Christelle Deliege).

## 4. The Nationality of Athletes

According to European Law there it is a general principle that there shall be no discrimination on grounds of nationality, which applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination (see, *inter alia*, Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli*, paragraph 11, and Case C-379/92 *Peralta*, paragraph 18). However as regards workers, that principle has been implemented and specifically applied Treaty provisions. It remains to see how this principle was applied to sporting activity.

In 1998 a Court of Belgium submitted to the European Court a request for a preliminary ruling giving the Court an excellent opportunity to decide whether

nationality should play any role in the drafting of national teams. In particular the Court in order to answer the Belgian Courts request, it would have to answer if it should be prohibited for a national of a Member State of the European Union from taking part in a sporting competition, whether as a professional, semi-professional or amateur, on the ground that the person in question does not possess the nationality of the Member State on whose territory the competition is organised, where it is known that that person is the child of workers who are established in that Member State and has himself acquired the status of worker on the territory of that Member State. Further, may the person in question claim the right to be treated in the same way as nationals of that State with respect to the teams selected by the national sports federation of the Member State concerned for participation in major international tournaments and competitions such as the European or World Championships or the Olympic Games, or may the national federations reserve such selection for their nationals exclusively? (see Case C-9/98 *Ermano Agostini*).

The Court however rejected the request on procedural grounds and the sport community had to wait another two years to find the answer to the above question (see Case C-51/96 *Christelle Deliege*). The Courts answer confirmed its views expressed in the 70s. In those views Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. That restriction must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity (see Case 13/76 *Donà v Mantero*, paragraphs 14 and 15, and *Bosman*, paragraphs 76 and 127).

### 5. State Restrictions on Betting on Sporting Events

The Treaty prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State. The importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a service (see Case C-275/92 *Schindler*, paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised in another Member State, even if they concern sporting events taking place in the first Member State, relates to a service. A service is also when the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 *Alpine Investments*, paragraph 22). It follows that a service could be

offered by a provider offers via the internet - and so without moving – to recipients in another Member State. Any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services. Services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone*, paragraph 16, and Case C-294/97 *Eurowings Luftverkehr*, paragraphs 33 and 34), (see Case C-243/01 Gambelli, paragraph 51-55)

In the light of the above considerations it is obvious that National legislation which prohibits the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned, constitutes a restriction on the freedom of establishment and the freedom to provide services. Restrictions on gaming activities (see also M. Papaloukas, p. 6-12, 2000-01) could be allowed only if they are justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming. Restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner (see Case C-275/92 *Schindler*, Case C-124/97 *Läärä and Others*, Case C-67/98 Zenatti, Case C-243/01 Gambelli, paragraphs 67, 76, Case C-338/04 Placanica, paragraph 72).

## 6. The Exceptions According to Case Law

### *6.1. Exception in Cases of Purely Sport Activities*

The Community provisions on freedom of movement for persons and freedom to provide services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner (*Deliège*, paragraph 47, and *Lehtonen and Castors Braine*, paragraph 35). The prohibitions enacted by those provisions of the Treaty do not affect rules concerning questions which are of purely sporting interest and, as such, have nothing to do with economic activity (see, to this effect, Walrave and Koch, paragraph 8). Severing however the economic aspects from the sporting aspects of a sport, is not an easy task. It is accepted (in *Donà*, paragraphs 14 and 15) that provisions justified on non-economic grounds which relate to the particular nature and context of certain sporting events could enjoy an exemption from Community law concerning freedom of movement for persons and freedom to pro-

vide services, only if the scope of the provisions in question remain limited to its proper objective (*Bosman*, paragraph 76, and *Deliège*, paragraph 43).

In light of all of these considerations, it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition (see also K. Van Miert, Forum Europeen du Sport. Luxembourg, 27/11/1997). Thus, where engagement in the sporting activity must be assessed in the light of the Treaty provisions relating to freedom of movement for workers or freedom to provide services, it will be necessary to determine whether the rules which govern that activity do not constitute restrictions prohibited by those articles (*Deliège*, paragraph 60). Likewise, where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States. Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activity *(Walrave and Koch and Donà)*, that fact means neither that the sporting activity in question necessarily falls outside the scope of European Law nor that the rules do not satisfy the specific requirements of those articles (see Case C519/04 P Meca-Medina, paragraphs 22-31).

### *6.2. Exception in Cases of Promoting Economic Progress*

Any measure imposing restrictions which constitute a barrier to access to an economic activity affecting competition might however be eligible for an exemption (see Case C519/04 P Meca-Medina, paragraph 101). For it to enjoy an exemption it should be established that:

- It contributes to promoting economic progress,
- allows consumers a fair share of the resulting benefit,
- does not impose restrictions which are not indispensable to the attainment of these objectives
- and does not eliminate competition.

### *6.3. Exception in Cases of Promoting Economic Progress*

Sports authorities sometimes regulate outside the scope of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C 309/99 *Wouters and Others* [2002] ECR I 1577, paragraphs 68 and 69) and those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations (see Bosman, paragraph 81, and *Deliège*, paragraph 47). Since these regulations are binding on its member, they resolve to coordinate the conduct of its members. They therefore constitute a decision by an association of undertakings (Case 45/85 *Verband der Sachversicherer v Commission*, paragraphs 29 to 32, and *Wouters and Others*, paragraph 71), which must comply with the Community rules on competition, where such a decision has effects in the Community.

However when these regulations appear to result in applying qualitative criteria such as the attainment of the objective of raising professional standards rather than quantitative criteria such as the objective of imposing restrictions on access to a certain occupation.

With regard to sports authorities' legitimacy to enact such rules, which do not have a sport-related object, but regulate an economic activity that is peripheral to the sporting activity in question and touch on fundamental freedoms, the rule-making power claimed by a private organisation, whose main statutory purpose is to promote a sport, is indeed open to question. (see Case T-193/02 Placanica, paragraph 100-103).

## 7. The doctrine of «Stare Decisis» and Policy Factors Affecting the Future of Sports in Europe

There is no legal doctrine of «stare Decisis» in European Law. The European Court of Justice however does follow its previous decisions in the majority of cases. The judgments of the European Court do however convey a misleading impression. Although lawyers and advocate generals constantly site precedents, the Court itself refers to its previous decisions only rarely. Sometimes it even reproduces whole sentences or paragraphs from previous judgments without quotation marks or any acknowledgment of the source. One gets the impression that the Court almost wants to play down the extent to which it follows its previous decisions trying to avoid revealing its «ratio decidendi».

There are a number of important instances where the Court has not followed precedent. These are the result of changing circumstances or a change of opinion among the judges possibly following criticism by academic writers. Where this happens the Court does not formally overrule the previous case or

even attempt to distinguish like it is done in case law countries, it simply ignores it. More common are cases in which the Court refines or expands doctrines previously enunciated in general terms (T.C Hartley, pages 75-76, 1988).

Although previous cases may not be binding to the European Court of Justice, policy seems to affect its decisions to a great extent. By policy is meant the values and attitudes of the judges, the objectives they wish or feel compelled to promote. The basic policies of the European Court are the following:

- Strengthening the European Union and especially the supranational elements of it,
- increasing the scope and effectiveness of European Law and
- enlarging the powers of European Institutions.

All these policies can be summed up in one phrase: the promotion of European integration. All courts are known to be influenced by policy, but in the European Court policy plays a particularly important role (see to that effect Case 294/83 *Les Verts v. European Paliamen* as well as Case 43/75 *Defrenne v. Saben*).

As a Judge Kutscher, a former president of the European Court has put it extra-judicially *«Interpretations based on the original situation would in no way be in keeping with a Community Law orientated towards the future»* (T.C Hartley, page 77, 1988).

By studying the European Courts' Case Law regarding sports for the last thirty years it is obvious that its is very unlikely that the autonomy enjoyed by sports in many, if not all, member states will be granted also in a European level in the near future (see also Conclusions of Advocate General Lenz in the Case C-415/93 point 227; D. Panagiotopoulos, p. 143-148, 2006; D. Panagiotopoulos, p. 136-162, 2007; M. Papaloukas, p. 145-148, 2005). We can hope however that given the facts that, there is no doctrine of precedent to bind the European Court as well as that policy plays a very strong part in the decision making of the Court, sports authorities, assisted by academics will be able to promote their sport policies to the extent needed to affect the decision making of the Court and forcing it thus to change its case law to its favour. In this case the Court would have to resort to the so called «teleological interpretation» of the relevant provisions. This procedure although it is considered as an interpretation procedure in reality it is nothing more than a decision based on policy (see also A. Arnull, p. 683, 1990).

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*Address for correspondence:*

Marios Papaloukas (LLM, Ph.D)
University of Peloponnese
Department of Organisation and
Management of Sports
e-mail: mpapalouka@ote.gr