

ASSOCIATIONS AND SPORTS CLUBS IN THE LIGHT OF COMMUNITY AND INTERNATIONAL LEGISLATION: BRIEF NOTES ON THE VERIFICATION OF THE COMPATIBILITY OF THE SYSTEM WITH THE SPORTS ANTITRUST RULES AND THE PROTECTION OF COMPETITION

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Abstracts: *The article discusses the problem of the monolithic governance structures of sport. The purpose of the author is to suggest an alternative approach based on a “free market” of sport. The European sports system and the antitrust laws and the judicial system in the United States and the protection of competition are discussed.*

Key words: Sports, Antitrust Law, European Law, U.S. Law.

1. General assessment

In recent years, the organization and ruling system of associations and sport clubs has undergone a process of profound renewal because of influences of culture, economics and communication changes. Sport associations have acquired a great social significance because the sport has gained a leading role in our society.

In fact, the association is the indispensable substrate of sport, since even the most basic manifestation of a sporting nature, requires the participation of multiple subjects that adopt common rules of the game¹. The doctrine makes it clear that: “*sporting associations is characterized, in fact, as a phenomenon essential to the life and vitality of the sport, (...) can only be at the heart of sport, as a genuine expression of the community of members who over time has spontaneously materialized, clearly aspiring to the realization pragmatic and, at the same time, genuine of ethical values highly significant*”². The sport, as a manifestation of values shared by the community, cannot be ignored by the legal systems that must recognize its own social value³. The European Union itself, in focusing on the specific characteristics of sport, outlines at least five functions of the sport that gravitate around the sphere

¹L. DI NELLA, *Il fenomeno sportivo nell'ordinamento giuridico*, Napoli, 1999, p. 180.

²R. PRELATI, *Fondamenti etici del diritto sportivo*, in A. PALAZZO, *Quaderni di diritto e processo*, Perugia, 2008, p. 62.

³W. CESARINI SFORZA, *La teoria degli ordinamenti sportivi e il diritto sportivo*, in *Foro italiano*, 1933, p. 1390.

of social life: the educational function, the function of public health, the social function of promoting solidarity among members of a community, the function of cultural integration in the territory and the playful function⁴.

In addition, sports associations having as objective the promotion and organization of sports activities, contribute to the development of sport as a vehicle of mental well-being of individuals. Consequently, organizations that have such meritorious aim must be safeguarded and promoted by the legal system, constituting the basis for putting in place a set of institutions, not only private but also publicist, to guarantee the individual and collective health. In addition, sport associations respond perfectly to the evolution in the concept of health, which should not be considered only in its physical condition, but, involving the physical, the psychological and the social aspects, should not be directed exclusively to the care of the disease, but mainly to its prevention, in a context in which the community is not only the beneficiary of health but collectively responsible for this⁵.

2. The European sports system and the antitrust laws

However, recognizing the importance of this phenomenon not leads *naturaliter* to the institutionalization of the sector, with damage for those sports that do not recognize themselves in the official sports system. In fact, the associations cannot be limited, in our view, by the National Olympic Committees and Federations that arise in the hierarchically higher position, exercising the powers and functions of regulation and selection in relation to collective subjects characterized by a strong social dynamism. Attributing to the National Olympic Committees and the Federations a selective function of sports associations, it would result the denial of the autonomy of such organizations. Indeed, the indeterminacy is a concept that causes concern and mystery. For this we took up organizations (National Olympic Committees and Federations) that catalyze and synthesize the contents of sport. Nevertheless, the creative force that reality of sport has, phoenix that rises from its own ashes continuously, determines the impossibility of a unitary representation. In a strict determinist equation, the artefact dominates. The unit is a stretch, a counterfeit simplification, while the reality has more faces and more subscribers. Therefore, just as it would be pointless to argue that people are not only citizens, equally we cannot define as a sport only what is part

⁴European Commission, Directorate General for audiovisual media, information, communication, culture and sport (currently education, culture and sports), Working Paper of the Commission services, September 29, 1998, Evolution and prospects of Community action in the field of sport, available in M. PIERINI, *Autonomia, concorrenza e autogoverno dello sport in Europa*, in J. TONGNON, *Diritto Comunitario dello sport*, Torino, 2009, p. 130.

⁵On the evolution of the concept of the right to health, see C. PETRINI, *Bioetica, ambiente, rischio: evidenze, problematicità, documenti istituzionali nel mondo*, Soveria Mannelli (CZ), 2003, p. 85.

of the official system⁶.

This monopoly is stigmatized by the doctrine that says that in the sport “*this freedom is substantially restricted by de facto the monopoly of the sports federations and their rules*”⁷. In fact, “*as a rule European sport organizations are monopolies within their particular sport as a result of the European Model of Sport, which only allows a single federation for sport in each country (...) if regulation and organization vested in one and the same body leads to significant commercial conflict of interest*”⁸. The European Commission also clarifies that sport has its own specificity, being arranged in a pyramid system⁹. This characteristic is grounded in the legal international sports rules, think about article 28 of the International Olympic Charter provides that the National Olympic Committee will not recognize more than one national federation for each sport governed by an International Federation¹⁰.

However, in our view, the top-down structure of sport should be counteracted by legislation. In fact, the general principles of law preclude pyramidal positions in the market that cascade have negative effects for both workers and consumers, who would not have the choice of the best system among the possible ones. The doctrine states that “*for national management of a certain sport, the more you can realistically get is a competition for the market, certainly not in the market*”, since only an organization can be a Sports Federation¹¹. The doctrine makes it clear that “*the (European) Commission’s competition sports policy has not convincingly be addressed the tremendous polarization which has been going on*

⁶Compare with regard to the issue N. PORRO, *Le organizzazioni dello sport come soggetti dell’economia civile*, in C. BUSCARINI – F. MANNI – M. MARANO, *La responsabilità sociale e il bilancio sociale delle organizzazioni dello sport*, Milano, 2006, p. 19, which states that in countries such as Italy, “*dove comitati olimpici e federazioni godono, per delega dello Stato, di un sostanziale monopolio nella gestione dell’offerta sportiva, sono questi soggetti a ispirare, a loro beneficio, le politiche di settore, e a negoziare le opportunità offerte dal mercato*”, expressing-rooted cultural persistence, not without emotional implications and prosaic conveniences.

⁷M. COLUCCI, *Sport Law, Supplement 1, Italy*, in F. HENDRICKX, *International Encyclopaedia of Laws*, Ah Alphen aan den Rijn, 2004, p. 63.

⁸L. HALGREEN, *European Sports Law: a comparative analysis of the European and American models of sport*, Copenhagen, 2004, p. 155.

⁹European Commission White Paper on Sport, Brussels, 2007, which states in section 4.1: “*the specificity of the sport structure, including the autonomy and diversity of sport organizations, a pyramid structure of competitions (...) the organization of sport on a national basis and the principle of a single federation for sport*”.

¹⁰The article 28 of the International Olympic Charter states: “*An N.O.C. shall not recognise more than one national federation for each sport governed by an I.F.*”.

¹¹F. GOISIS, *La giustizia sportiva tra funzione amministrativa ed arbitrato*, Milano, 2007, p.118.

*in the European world of sport*¹². In fact, as anticipated, the Federations and the National Olympic Committees are the only entity able to guarantee access to certain economic activities, such as, for example, that of the soccer player¹³. In particular, the dubious abstract possibility of setting up of amateur leagues alternative to the official monopoly position does not affect the substance of the Federations and National Olympic Committees. In fact, only the Federations and the National Olympic Committees allow access to controlled sport and, with it, to the official and internationally accepted sports titles that are really appealing because economically and socially expendable¹⁴.

The protection against the monopoly power must be real and not formal, placing itself in the perspective of the actual choice of the average user. Furthermore, the Commission stated, to adapt to the international sports rules, “*in the current state of community legislation, member states may, for reasons of non-economic public interest, subtract certain services to competition by conferring exclusive rights to one or more companies*”¹⁵. However, there is no denying that a monopoly, although theoretically compatible with community law, is designed to violate the rules that regard the freedom to provide services, freedom of establishment and the free movement of goods within the common market¹⁶.

In light of the foregoing, the National Olympic Committees and Federations are power centers that significantly influence the market of sports product, limiting competition and the freedom to practice a sport, which are elements conatural to identify a particular practice which sports. A system based on a single federation for sport should be discouraged and not favored as at present. Indeed we should avoid interference direct to discriminate entities outside the “federal monopolies”, as this will in fact limit the ideological pluralism and freedom of association aimed to realize the person. In addition, in our opinion, the protection of equality in sports competitions is the “*esprit des lois du sport*”¹⁷ and a sport unwritten principles of law that is the basis of sporting rules, and that is manifested in a duty not to distort competition.

The general principles of equal treatment and proportionality (also applied by the CAS) are then placed in relation to the principle of equity and in accordance

¹²L. HALGREEN, *European Sports Law: a comparative analysis of the European and American models of sport*, Copenhagen, 2004, p. 163.

¹³L. CASSINI, *Il diritto globale dello sport*, Milano, 2010, p. 69.

¹⁴F. GOISIS, *La giustizia sportiva tra funzione amministrativa ed arbitrato*, Milano, 2007, p. 151.

¹⁵Written question n. 3097/98 to the European Commission. Monopoly ITALIAN of CONI, football clubs and free competition, in the Official Gazette n. C. 142, May 21, 1999, p. 83.

¹⁶Answer given by Mr. Van Miert on behalf of the European Commission, November 19, 1998, cited by F. GOISIS, *La giustizia sportiva tra funzione amministrativa ed arbitrato*, Milano, 2007, p. 185.

¹⁷G. SIMON, *Puissance sportive et ordre juridique*, Paris, 1990, p. 83.

with a sport writer “*cette confrontation est une constante de la lex dont sport the latest finalité et superieure east of ‘the assurer sincérité des competitions (...). Le respect de cette toutes les autresfinalité first considerations*”¹⁸.

The principle of free access to competitions based on sporting merit is confirmed by the pronouncements of the CAS for which the rules appropriate to the resolution of the case do not reside in the state law but are “*constituees pour l’essentiel des principes generaux du droit applicables au sport, telles qu’elles ont ete degagees dans des decisions anterieures du Tas notamment, ces principes incluent par exemple ceux d’equite, equal qui impliquent inter alla l’obligation de respecter des procedures equitables*”¹⁹.

After all, the sport is an expression of life is not separated from the other sectors. The sport competition in our view is not very different from the competition entrepreneurial, professional and intellectual. In all these areas there is a clear competition between the various peoples which should be based on the freedom to participate in the competition. Following these precepts, it can lead to an effective improvement of the individual and a collective growth.

It is clear that we are facing one of the many examples where the law favors the power of the lobbies, where the abstract affirmation of the values of pluralism turns into its opposite, materialized in the despotism of the fittest. Therefore, it would be desirable by the sports associations that are not part of the official sports system, a refusal to resign themselves to a state of inferiority inescapable, as is admirably expressed by the fifth of Beethoven, whose deep meaning corresponds to man’s struggle against adversity of life. It is desirable that Community law guarantees the freedom to associate in sports associations outside the official system, without incurring discrimination, protecting, thus, competitive equality between sports corporations that are not part of the official system and institutionalized sports bodies.

3. The sports judicial system in the United States and the protection of competition

Moreover, if we look at it clearly, a monolithic governance system is also present in the US sports. In fact, the American sports system is characterized by an anomaly. In fact, the Major league represent monopolistic structures that do not allow access to sports clubs unconnected with it, except on the basis of economic and political decisions that do not meet the true foundation of sports system that should be based on merit. As a competition between athletes or teams are the best to compete in the Olympics or the World Cup, so the companies that manage to get the best sports results should be able to play each other.

¹⁸E. LOQUIN, *Observations a Arbitral award Cas JO-SYD 00/004*, in *Journal du droit international*, 2001, p. 259.

¹⁹Arbitral award CAS 2004/A/776 of July 15 2005, available at www.tas-cas.org.

In this way it allows both to small communities virtuous to large does not really taken into account to be able to emerge. Meritocracy is restricted by monopoly of the major leagues and their rules. As a rule American Major leagues are monopolies within their particular sport as a result of the American Model of Sport, which only allows the same team to play each year.

In addition, denying participation in sports bodies based on economic and political considerations, would produce a violation of the principle of substantive equality. In fact, in practice the same subject would be treated differently. a spontaneous question arises: why New York has 10 sports franchises and Austin and Las Vegas no one. The variations are permitted in a jurisdiction only if they are reasonable. In the present case, in our view, entirely missing the logical consistency.

Even the Olympic Charter, as one of its fundamental principles according to which: “*the practice of sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind*”. This principle can be extended to sports clubs representing unions of individuals.

The real perspective is that of a subordination and subservience of the minor leagues to the major ones, with a mechanism that would only replicate grotesquely, in today’s democratic society, a situation of unequal subjection of companies involved in the Major league and other comparable to that which in ancient Greece was between Spartans and Helots.

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