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# Sport Governance in Portugal

by Alexandre Miguel Mestre\*

## 1. Legal Framework

### 1.1. Sport at the Portuguese Republic Constitution

Since the first Portuguese Republic Constitution (“Constituição da República Portuguesa”) - PRC - dated from 1976, sport is recognized as a fundamental right. The “right to physical culture” and sport” is enshrined in Article 79, under the umbrella of the Section dedicated to “Rights, Freedoms and their Guarantees” in Title III which covers “Economic, social and cultural rights and duties”.

Article 79 (1) stipulates a general right to physical culture and sport as follows: “Everyone shall possess the right to physical education and sport”. This means that all citizens are entitled to sport in its various dimensions and scenarios: school; recreation; high performance; amateurism; professionalism, informal activities, *inter alia*.

In its turn, no. 2, added at the time of the 1989 constitutional revision, states as follows: “Acting in cooperation with schools and sporting associations and groups, the state shall be charged with promoting, stimulating, guiding and supporting the practice and dissemination of physical culture and sport, and preventing violence in sport.” One can infer from this provision that instead of a State’s monopoly, there is a collaborationist and decentralized model. The PCR demands State to have a central role in sport policies but simultaneously refuses a sole intervention of the State. In other words, the State’s intervention shall be developed necessarily in close collaboration with public and private stakeholders, mainly schools, the “sports movement” (private and autonomous sport governing bodies such as clubs, associations and federations) and local authorities<sup>2</sup>.

Apart from and in conjunction with Article 79, sport is covered by some other constitutional provisions, both explicitly and implicitly:

- (i) Further to Article 59 (1) (d), “workers have the right to rest and leisure time, a maximum limit on the working day, a weekly rest period and periodic paid holidays”;
- (ii) According to Article 71 (1), “[c]itizens with physical or mental disabilities shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution and save the exercise or fulfilment of those for which their condition renders them unfit.” If one read this provision in conjunction with Article 79, one must conclude that handicapped citizens have a fundamental entitlement to sport;
- (iii) Pursuant to Article 64 (1) “[e]veryone shall possess the right to health protection and the duty to defend and promote health”. Further to no. 2 of the same provision, this right to health protection shall be fulfilled, among other means, by “(...) promoting physical fitness and sport at school”;
- (iv) The constitutional provision related to youth is also very relevant for sport. In fact, as stated in Article 70 (1) (d), “[i]n order to ensure the effective enjoyment of their economic, social and cultural rights, young people shall receive special protection, particularly (...) [i]n physical education and sport”;
- (v) Article 65 enshrines the “right to housing and urban planning” In order to ensure the enjoyment of the right to housing the State shall be charged with “[p]lanning and implementing a housing policy that is embodied in general town and country

planning documents and supported by urban planning documents that guarantee the existence of an adequate network of transport and social facilities”. There is no doubt that sport facilities integrate the concept of “social facilities”;

- (vi) Article 66 (1) states that “[e]veryone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it”;
- (vii) Article 69 enshrines the right of children to the protection of society and the State, “with a view to their integral development”, i.e., children shall possess the right to take part in recreational and sporting activities suitable for their age;
- (viii) According to Article 73 (1) and (2) “[e]veryone shall possess the right to education and culture” and it is for the State to “promote the democratization of education and the other conditions needed for education” and to contribute to equal opportunities, the overcoming of economic, social and cultural inequalities”. Physical culture and sport are very useful tools for such State’s duty since they contribute for some of the objectives provided in the said constitutional provision, namely “(...) the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in public life.”

### 1.2. The evolution of “Sports Law” in Portugal

The first Portuguese legislation relevant to sport which structured the sports system dates from 1932<sup>3</sup>. With subsequent legislation enacted in 1943<sup>4</sup>, which introduced the regulations governing the General Directorate of Physical Education, Sport and School Health<sup>5</sup>, the approach of the law to sport became less harsh and began to see sport as a pleasure, to be afforded to the citizenship. Despite accepting payment in order to enjoy sport as a pleasure, that new legislation made no mention of professional sport).

The first time that professionalism is referred to in a law occurred only in 1960<sup>6</sup>. The legislator admitted the existence of professional sportsmen and sportswomen even so with great reservations in the so-called “sports of the masses”, i.e., those sports in which practice was starting to demonstrate the inevitability of the professionalization.)

Only after the revolution of the 25th of April of 1974 start to be talk of real professional sport, but always in connection with topics such as the ethics of sport, namely violence and doping. The inclusion of physical education and sport in the PCR was the starting line of a process of a qualitative and quantitative legal interventionism of the State in the field of sport. Important rules were already enacted in the eighties’ decade. However it was still a period of disperse and non integrated sports law policy.)

In 1990 everything changed. Since then the legislation related to sport has been based on “Basic Laws” (“Leis de Base”). This type of laws “develop the general basis of legal frameworks”<sup>7</sup>, i.e., they contains general principles and programmatic rules, which are then developed not also by laws (adopted by the Parliament) but also and mostly by decree-Laws (adopted by the Government). Therefore, all the ordinary legislation directly and indirectly related to sport is a devel-

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<sup>1</sup> The concept of “physical culture” is no longer used both at the legislation and by the Portuguese sports scientists. Some

have replaced it by the term “physical activity” and others prefer to use just the notion of “sport”, in accordance with the broad definition of sport provided by the Council of Europe’s European Sport Charter.

<sup>2</sup> Article 2 (1) of the “Basic Physical Activity and Sport Law” (“Lei de Bases da Actividade Física e do Desporto”) - Law no. 5/2007 of January 16 - has a text that merges and reflects the whole con-

tent of Article 79 of the PRC: “The sportive system, within the scope of the constitutional principles, encourages the sportive practice for everyone, either for recreation or for competition, in primary conjunction with schools, given its high educational content, and equally in alliance with associations, sportive collective groups and local authorities”.

<sup>3</sup> Decree no. 21.110 of September 4. It approved the regulations governing phys-

ical education in grammar schools. The law’s preamble referred to the “evil spirit” of competitive sport, as a cause of “physical and moral malformation”. Competitive sport was therefore not encouraged in schools.

<sup>4</sup> Decree no. 32.946 of August 3.

<sup>5</sup> This administrative organ was created by the Decree-Law no. 32.241 of September 5.

<sup>6</sup> Law no. 2104 of May 30.

<sup>7</sup> See Article 112 (2) of the PCR.

opment of a legal framework structured by the “Magna Carta” of physical education and sport.

Currently it is in force the “Basic Sports Law of Physical Activity and Sport” (“Lei de Bases da Actividade Física e do Desporto”), adopted in 2007<sup>8</sup>, which was preceded by the “Basic Law of the Sports System”<sup>9</sup> (“Lei de Bases do Sistema Desportivo”), approved in 1990, and by the “Basic Law of Sport” (“Lei de Bases do Desporto”), enacted in 2004.<sup>10</sup>

### 1.3. The current legal regime in the field of sport and its influence on the Portuguese “sports governance”

The scope of the “Basic Sports Law of Physical Activity and Sport”<sup>11</sup> is to establish the general framework of the sport system and its aim is to promote and offer guidance to the generalization of the sportive activity as “(...) an indispensable cultural factor to the complete education of the human being and to the development of the society.”

The “Basic Sports Law of Physical Activity and Sport” comprises several different topics that cover the different subsystems of the Portuguese Sports System, namely sport at school (curricular and extracurricular activities) and at the University; sport in the armed forces; sport at the workplace; sport in prisons; sport in the armed forces and in the security forces.

Legislation covers not only sport for all but also high professional and high performance (or high level) sport. The legislator has also a horizontal and holistic approach since it adopts several laws that discipline the interplay between sport and other sectors of the society such as culture, youth, tourism, and environment. Sports medicine, sports insurance, taxation in sport, sports infra-structures or sports ethics (doping, violence associated to sport, racism, xenophobia, intolerance, and corruption); image rights; merchandising; and sponsoring are other paradigmatic examples of the public intervention of the State in sport by means of the adoption of legislation.

## 2. Institutional Framework

### 2.1. Administrative organization in the sports field

#### 2.1.1. The Government Structure for sport

The Government intervenes in sport through the work of the Presidency of the Council of Ministers, namely by the Minister of the Presidency which is supported by the Secretary of State for Youth and Sport<sup>12</sup>. The role of government in sport is to establish the basis upon which all sports activities can be developed and fostered to create the technical and material conditions for sport development.

#### 2.1.2. The administrative organs with competence in the field of sport

##### 2.1.2.1. The Portuguese Sport Institute

The Portuguese Sport Institute<sup>13</sup> (“Instituto do Desporto de Portugal”) performs the duties and exercises the powers of the Presidency of the Council of Ministers and is an organ of the Indirect State Administration, with administrative, financial autonomy and its own assets<sup>14</sup>. It is governed by its own bylaws<sup>15</sup> and its role is to support the definition, implementation and evaluation of sports public policy as well as to promote the generalization of physical exercise. It is also responsible for supporting normal and high performance sport via the provision of technical, financial and human resources.

So far as security is concerned, the Portuguese Sport Institute is the

body responsible for (i) proposing measures with a view to the prevention and combating of racism and xenophobia in sport; (ii) proposing and implementing an integrated program for the construction and recuperation of sports facilities and infrastructures, in collaboration with local authorities, as well as giving an opinion regarding sports security and safety rules to be complied with in the construction and licensing thereof; (iii) promoting the generalization of medical checks on access to and during sports activities; (iv) carrying out such supervisory and inspection activities and issuing such authorizations and licenses as it is charged with by law and to issue the certifications and credentials envisaged in the law<sup>16</sup>.

##### 2.1.2.2. The National Sport Council

The National Sport Council (“Conselho Nacional do Desporto”), which has replaced the former Higher Council for Sport (“Conselho Superior de Desporto”)<sup>17</sup>, is made up of representatives of the Public Administration and of the “sports movement”<sup>18</sup> and operates under the immediate auspices of the Government member responsible for sport.

The power and responsibilities of the National Sports Council include the following tasks:

- (i) To monitor the development of policies to promote physical activity and sport;
- (ii) To give an opinion regarding draft legislation related to sport, when requested so to do by the Government member responsible for sport;
- (iii) To promote and co-ordinate the adoption of measures with a view to ensuring compliance with the principles of sports ethics, i.e. with regard to the fight against doping, violence associated with sport, racism, xenophobia corruption and different forms of discrimination;
- (iv) To state its opinion regarding the development factors of high performance sport, the measures to be taken within the ambit of the non-academic training of sports staffs and the links between the various sports subsystems<sup>19</sup>;
- (v) To recognize the professional nature of the competitions in each sport.

In addition to the powers and duties referred to above, the National Sport Council is the body responsible for the regulation, on a provisional basis, of disputes that arise between the professional leagues and the corresponding sports federations, namely conflicts regarding the number of clubs that take part in the professional sports competition, the conditions governing access to professional and non-professional sports competitions and the organization of the activities of national teams.<sup>20</sup>

The National Sport Council is divided into two internal sections, the Council for Ethics, Safety and Security in Sport (“Conselho para a Ética e Segurança no Desporto”) and the Council for the Sports System (“Conselho para o Sistema Desportivo”). The Council for Ethics, Safety and Security in Sport’s role is to promote and co-ordinate the taking of measures to safeguard sport ethics and to evaluate the implementation thereof. In its turn, the Council for the Sports System’s role is to give an opinion regarding the legality of the bylaws and regulations of sports federations, the organization of national sports competitions, the appli-

8 Law no. 5/2007 of January 16.

9 Law no. 1/90 of January 13.

10 Law no. 30/2004 of July 21.

11 See Article 1.

12 See Articles 3 (4) (b), 11(2) (b) and 11 (3) (c) of the Decree-Law no. 321/2009 of December 11 which approved the organic of the XVIII Government.

13 The Portuguese Sport Institute was created by the Law no. 96/2003, of May 7. This law was repealed by Decree-Law no. 169/2007, of May 3, which came into force on June 1 2007 and introduced a new organisational framework.

14 The organization of Public Sports’

Administration in the Autonomous Regions is subject to specific provisions approved by the local government bodies. Azores and Madeira have their own official sports bodies, the Azores Regional Directorate for Physical Education and Sport (“Direcção Regional de Educação Física e Desporto”) and the Sports Institute of the Madeira Autonomous Region (“IDRAM”).

15 The bylaws were approved by Statutory Instrument no. 662-L/2007 of May 31, as amended by the Statutory Instrument no. 573/2008 of July 4.

16 The Portuguese Sport Institute has vari-

ous departments, which are first level organizational units, which are hierarchically and functionally subject to the chairman of the Institute. It also has local offices. The Portuguese Sport Institute has the following departments: (i) The Information, Communications and International Relations Department; (ii) The Human, Financial and Material Resources Department; (iv) The Sports Medicine Department; (v) The Sports Development Department; (vi) The Jamor National Sports Centre Management Department.

17 The Decree-Law no. 202/2006 of

October 27 abolished the Higher Council for Sport and provided for the creation of the National Sports Council.

18 The Decree-Law no 1/2009 of January 5 enlarged the number of members from 33 to 38.

19 These non-binding opinions are submitted to the Government member responsible for sport.

20 This power derives from Article 23 (4) of the “Basic Law of Physical Activity and Sport”. It is provisional since the intervention of the National Sport Council occurs only until such time as a consensus is achieved between the parties.

cations for the grant or renewal sports public utility status, and the social and economic impact of sport. It also belongs to the Council for the Sports System the above mentioned dispute resolution competence.

### 2.1.2.3. The Portuguese Anti-doping Authority ("Autoridade Antidopagem de Portugal - ADOP")

The Portuguese Anti-doping Authority is attached to the Portuguese Sport Institute, being the national body with functions of control and fight against doping in sport, namely as an entity responsible for the adoption of the rules aimed at unchain, implement or apply any phase of the doping control procedure<sup>21</sup>.

The Portuguese Anti-doping Authority<sup>22</sup> is specifically responsible for:

- (i) Recording the federation regulations governing anti-doping controls and verifying their compliance with the provisions of this statute;
- (ii) Issuing scientific and technical advices, recommendations and notices namely about the procedures of prevention and control of doping;
- (iii) Providing sports federations with technical assistance as they may request, both in the drawing up and in the application of their respective anti-doping regulations;
- (iv) Pronouncing about the drafting of legislation regarding the fight against doping, having heard the National Council for Anti-Doping ("Conselho Nacional Antidopagem" - CNAD)<sup>23</sup>;
- (v) Issuing binding advices concerning the regulations of fight against doping in sport adopted by the sport federations holding the statute of public sport utility, having heard the National Council for Anti-Doping;
- (vi) Receiving the requirements for the Therapeutic Use Exemption of substances and prohibited methods, proceeding with the respective guiding the Therapeutic Use Exemption's Commission, and to establish the procedures inherent to the system of authorization of therapeutical use at national level;
- (vii) Studying in collaboration with the entities which are responsible for the educational system and for sport pedagogical plans, and particularly information and education campaigns, as are aimed to increase the awareness of a practitioner, their entourage and young people in general of the dangers and unfairness of doping;
- (viii) Studying and proposing adequate and suitable legislative and administrative measures designed to ensure the fight against doping in general and the control of production, commercialisation and illicit trafficking in substances or prohibited methods;
- (ix) Studying and suggesting measures aimed at coordinating the national programs to fight doping with the guidelines issued by the World Antidoping Agency, and complying with the obligations derived from conventions entered into by Portugal within the same ambit;
- (x) Proposing the financial support of research programs in the domain of the fight against doping, namely sociological, behav-

oural, legal and ethical as well as researching in the medical, analytical and physiological fields;

- (xi) Issuing general or special recommendations which concern doping prevention and control procedures and are aimed not only to the entities which form part of the sport associations ("sports movement") but also to sport practitioners and their entourage;
- (xii) Deciding to hold and initiating extraordinary inquiries and the anti-doping controls which are inherent therein whenever it receives or gathers strong indications of the existence of habitual or continuous doping on the part of a given athlete or in a given sector of sporting activity;
- (xiii) Revising, substituting and repealing the filed, absolved or punishment decisions adopted by the jurisdictional organs of the sport federations, after the verification of a non conformity with the provided in the present law;
- (xiv) Providing the services requested by other national or foreigner entities, in the framework of the fight against doping in sport;
- (xv) Following the national technical participation in the different international instances responsible for the fight against doping in sport;
- (xvi) Evaluating the risks of new substances and methods, having heard the National Council for Anti-Doping.

## 3. The Non Governmental Sport Organizations ("The Portuguese Sports Movement")

### 3.1. Sports clubs

Sport clubs ("clubes desportivos") are private corporations whose aim is the organization, promotion and supervision of the practice of sports activities through membership. Sports clubs which do not take part in professional sports competitions shall form associations for non profit-making purposes.

### 3.2. Sports companies

Sport companies ("sociedades desportivas") are deemed to be private corporations incorporated as private limited companies whose object is to participate in one sports discipline, in competitions of a professional character, to promote and organize sport spectacles and to promote or develop activities connected with the professional practice of such discipline.<sup>24</sup>

According to the law<sup>25</sup>, sport companies may be come about as the result of:

- (i) The transformation of a club which participates, or intends to participate, into professional competitions;
- (ii) The "legal personalization" of the teams which participate, or intend to participate, into professional competitions; or
- (iii) The original formation, which does not result from the transformation of a club or of the "legal personalization of the teams".

### 3.3. Sports federations

A sport federation ("federação desportiva") is a private corporate body which, integrating athletes, clubs and groups of clubs - generally called "associations" ("associações"), becomes incorporated under the legal system of a non profit-making association, and pursues, at national level, exclusively or cumulatively, the following requirements and/or aims:

- (i) To record the federation regulations governing anti-doping controls and to verify their compliance with the provisions of the "Legal Regimen of Sports Federations";
- (ii) To seek to pursue the objectives set out below under the terms of their articles of association;
- (iii) To promote, regulate and direct, at national level, the practice of a sport discipline or of a group of similar sport disciplines at national level;
- (iv) To represent the interests of their members in their relationship with the Public Administration;
- (v) To represent their sport disciplines a group of similar sport disciplines with the international sport organizations as well as to ensure the competitive participations of the national teams.<sup>26</sup>

<sup>21</sup> See Article 16 of the Law no. 27/2009 of June 19.

<sup>22</sup> See Article 18 (1) of the Law no. 27/2009 of June 19.

<sup>23</sup> This Council is the consultative body of Portuguese Anti-doping Authority. Its competences are the following: (i): To provide previous and binding advices concerning the application by the sport federations of the sanctions derived from the use, by sportsmen, of specific substances, as defined in the list of substances and prohibited methods; (ii) To issue previous and binding advices concerning the attenuation of the sanctions based on the exceptional circumstances defined by the World Anti-doping Code; (iii) To issue previous and binding

advices concerning the aggravation of the sanctions based on the exceptional circumstances defined by the World Anti-doping Code; (iii) To ensure the remaining functions provided at the law. See Article 26 of the Law no. 27/2009 of June 19.

<sup>24</sup> See Article 2 of Decree-Law no. 67/97 of April 3.

<sup>25</sup> See Article 3 of Decree-Law no. 67/97 of April 3.

<sup>26</sup> See and Article 2 of the Decree-Law no. 248-B/2008 of December 31 - the "Legal Regimen of Sports Federations" ("Regime Jurídico das Federações Desportivas").

A distinction is drawn between “single-sport federations” (“federações unidesportivas”) and sports federations with multi-sport nature (“federações multidesportivas”)<sup>27</sup>: single-sport federations are those including people or bodies who play the same sport including its various disciplines or a series of similar disciplines and multi-sport federations represent a range of sports for specific areas of social organization, namely sports for the disabled and sports played within the framework of the education system.

The large majority of the Portuguese sport federations hold the “statute of public sport interest”<sup>28</sup> (“estatuto de utilidade pública desportiva”) which is the instrument by means of which the State<sup>29</sup> endows a federation with the competence to exercise, within the respective scope, regulating-making powers, disciplinary powers and other powers of public nature.<sup>30</sup>

### 3.4. Professional leagues

The single-sport federations engaged in sport competitions of a professional nature integrate one professional league (“liga profissional”), under the status of a non-profit association, endowed with legal personality and administrative, technical and financial autonomy<sup>31</sup>. A professional league, which is compulsorily composed by the sport clubs and the sports companies that compete in the professional competitions<sup>32</sup>, develop, by means of a delegation from the respective federation, the competences related to the competitions of professional nature. Its main tasks are the following:

- (i) To organize and regulate the competitions of professional nature, respecting the technical rules defined by the relevant national or international federate organs;
- (ii) To perform, as to what concerns its associates, the supervision, control and monitoring duties as have been established by law or by its respective bylaws and regulations;
- (iii) To define the sports, financial and organizational requirements of access to professional competitions, as well as to supervise its execution by the participant entities of those competitions.

The referred competences are delegated by the sports federations and the relations between the sports federations and the leagues are regulated by a contract.<sup>33</sup>

### 3.5. Sport-promoting associations

Sport-promoting associations (“associações promotoras de desporto”) are non profit entities whose aims are the promotion and organization of physical and sports activities for recreational, educational or social purposes which do not fall under the jurisdiction of sport federations.<sup>34</sup>

### 3.6. The Portuguese Sport Confederation

The Portuguese Sport Confederation (“Confederação do Desporto de Portugal”) is a private association created in 1993 that brings together the national sport federations. This “umbrella organization” seeks to support and to foster the affiliated Federations. As stated in its bylaws, it is an instrument of cooperation, consultation and representation of its members towards the State, namely the Parliament, the Government, the Autonomous Regions, the local authorities, the European Union, the International Confederations, and other national and international institutions<sup>35</sup>. Its objectives are the following:

- (i) “To defend the right to sport as an essential factor of the complete development of the human being, as an obligation arising from the Portuguese Republic Constitution and the Basic Sports Law of the Sports System;
- (ii) To promote the sports association’s movement and the relationships with homologous organizations from other countries;
- (iii) To intervene in the national sports policy and to participate in the general strategies for sport, as a social partner of the State;
- (iv) To represent the whole of the sport federations with the State, the European Union and the organisms congeners from other countries;
- (v) To support its affiliated sport federations, in the framework of their respective activities;
- (vi) To promote the conciliation of interests within the sport federations;
- (vii) To promote and support cultural, educational and training initiatives related to sport in all its features;
- (viii) To contribute through sport to the reduction of the regional asymmetries as well of the social inequalities in the access to sports practice;
- (ix) To defend and promote participation in sport, with equal opportunities, non discrimination on grounds of sex, age, ethnic origin, sexual orientation or deficiency;
- (x) To promote the values of ethics and sport spirit, supporting all ways of fighting against doping as well as combating all sources of corruption and violation associated to sport.”<sup>36</sup>

### 3.7. The Sport Foundation

In 1995 a private Foundation with public-interest status was formed<sup>37</sup>, the Sport Foundation (“Fundação do Desporto”), with the State as one of the founders, among others such as the Portuguese Olympic Committee, the Portuguese Sports Confederation and the RTP - the Public Portuguese TV broadcaster. The purpose of this Foundation is “to support the promotion and the development of sport, mainly in the domain of high-performance”<sup>38</sup>. In special conditions, the Sports Foundation can grant patronage or subsidies to a specific sport modality or sport competition.

### 3.8 The INATEL Foundation

The INATEL Foundation (“Fundação INATEL”) is a legal person of private law and public interest, with legal personality, which main purpose is “(...) to promote better conditions for the occupation of leisure time and leisure for workers, retirees and active in developing and enhancing social tourism, the creation and enjoyment of cultural, physical activity and sport, the social inclusion and solidarity”<sup>39</sup>. (Emphasis added)

### 3.9. The Olympic Organization

#### 3.9.1. The Portuguese Olympic Committee

The Portuguese Olympic Committee (“Comité Olímpico de Portugal”) is a non-profit association, endowed with legal personality, which is governed by its statutes and regulations, by respect for the law and the Olympic Charter.

It has exclusive competence to set up, organize and manage the Portuguese delegations participating in the Olympic Games and other sporting competitions under the auspices of the International Olympic

<sup>27</sup> See Article 15 of the “Basic Law of Physical Activity and Sport”. See also Article 10 of the “Legal Regimen of Sports Federations”.

<sup>28</sup> At present, there are 79 sports federations. According to the information provided by the Portuguese Sports Institute, 64 hold the “statute of public interest”.

<sup>29</sup> Further to the Statutory Instrument no. 595/93 of June 19, the application for the granting of the statute is submitted to the Prime Minister and delivered to the Portuguese Sport Institute.

<sup>30</sup> The granting of the aforementioned

statute is subject to specific statutory provisions and must be based upon the consideration and accomplishment of objective requirements, namely: (i) Compliance of the respective bylaws with the law; (ii) Democratic structure and the representation of the respective bodies; (iii) Independence and technical powers of the appropriate jurisdictional bodies; (iv) Degree of social and sports implantation, nation-wide, namely in terms of the number of sports players, associative organizations and other elements enabling the verification of sportive

development; (v) Framing in an international sport federation possessing a recognized representation.

<sup>31</sup> Until now Portugal had only three Professional Sports Leagues: Football, Basketball and Handball.

<sup>32</sup> Professional leagues may also integrate other sports agents, in accordance to the law and their respective bylaws. See Article 22 (4) of the “Basic Law of Physical Activity and Sport”.

<sup>33</sup> See Article 23 of the “Basic Law of Physical Activity and Sport”.

<sup>34</sup> See Article 33 of the “Basic Sports Law of

Physical Activity and Sport”. The legal regimen of the Sport Promoting Associations was first established by the Statutory Instrument no. 279/97 of October 1.

<sup>35</sup> See Article 4.

<sup>36</sup> See Article 6.

<sup>37</sup> See Article 1 of its bylaws.

<sup>38</sup> See Article 7 of its bylaws.

<sup>39</sup> See Articles 4(1) and 5 of the Decree-Law no. 106/2008 of June 25.

Committee, by collaborating in the preparation thereof and encouraging participation in the activities that form part of them. Among other functions and powers provided in the law, the Portuguese Olympic Committee shall keep the register of participants in Olympic sports up to date and has the right to the exclusive use of the Olympic symbols in the national territory, in accordance with the law.<sup>40</sup>

Further to its bylaws<sup>41</sup>, the competences of the Portuguese Olympic Committee are the following:

- (i) To spread, develop and defend the Olympic Movement and sport in general, in conformity with the Olympic Charter;
- (ii) To promote the pleasure for the sport practice as a mean of character formation, health protection, environment, social cohesion and social integration;
- (iii) To fight against the use of substances and prohibited methods, in observance of the norms of the International Olympic Committee (IOC) Medical Code, collaborating with the national authorities in the control of those practices;
- (iv) To promote the compliance of the sports ethics in the competitions and in the relations between the sports agents;
- (v) To adopt measures against any form of discrimination, on grounds of gender, deficiency, race or religion, in the sports practice and within its directing organs;
- (vi) To participate compulsorily in the Olympic Games and to organize and direct on an exclusive basis the respective national delegation, being responsible for the behavior of its members;
- (vii) To designate, on an exclusive basis, the bid city to the organization of the Olympic Games and to ensure its realization when those Games take place in national territory;
- (viii) To represent, in the framework of its attributions, the national sport federations with the Government and official organisms;
- (ix) To promote the diffusion of the values of Olympism in the curricula of physical education and sport in the school and University institutions;
- (x) To stimulate and support the training of sports agents;
- (xi) To support the activities of the Olympic Academy, the Olympic Museum and any other institutions dedicated to Olympic education or that promote cultural programmes related to the Olympic Movement;
- (xii) To cooperate with governmental and non governmental organizations in any sports activities which are not in contradiction with the Olympic Charter;
- (xiii) To coordinate with the federations the programs of Olympic preparation;
- (xiv) To participate, jointly with public and private institutions, in the collection and management of funds dedicated to the support of programs of development of high performance and programs of Olympic preparation, either directly or through the entities to which the funds are destined;
- (xv) To support the institutionalization of the Court of Arbitration for Sport.

### 3.9.2. The Portuguese Paralympic Committee

The Portuguese Paralympic Committee (“Comité Paralímpico de Portugal”) is also mentioned in the Basic Law of Physical Activity and Sport”, namely in Article 13 according to which “the regimen provided in the previous article [the one related to the Portuguese Olympic Committee] “(...) shall apply to the Portuguese Paralympic Committee, adapted as appropriate, in relation to participants in sport who have a disability and in relation to the relevant international sports competitions.”

The adaptations are diminutives, as one can easily remark by reading the aims of the Portuguese Paralympic Committee provided in its

bylaws. The few differences arise from the different competitions and institutions at stake: the Portuguese Paralympic Committee role is related to the Paralympic and Deaflympic Games and it must comply with the International Paralympic Committee (IPC) Handbook and the International Committee for Sport and Deaf (ISCD), the role of the Portuguese Paralympic Committee.

## 4. Sports Financing

### 4.1. The “Financial Support’s structural framework: the “Programme contracts for sports development”.

Under the “Basic Law of Sports and Physical Activity” 42, sports associations sports events with public interest recognized as such by the member of the Government responsible for sport are eligible to benefit from aids or financial contributions from the State, the Autonomous Regions and local authorities. That financing must be granted through the so-called “Programme contracts for sports development”, in accordance with the law (“Contratos-programa de desenvolvimento desportivo”).

This sort of contracts shall be subject to the presentation of sport’s development programmes and its detailed characterisation, specifying the forms, means and deadlines for compliance therewith. It is also obligatory the presentation of costs as well as checking the degree of financial, technical, material and human autonomy envisaged in the programmes. In other words, the legislator wants to be sure that public subsidies are properly targeted.

There must be also emphasised two other important features of the Portuguese financial support’s framework: (i) Financial contributions may only be granted exclusively for the purposes envisaged and are insusceptible of judicial apprehension or any onus; (ii) Sports clubs which compete in competitions of professional nature can not receive from the State any kind of financial contributions except in the case of the organisation of sport competitions with public interest or in the case of construction and improvement of sport infra-structures or sport equipments.

The “Basic Law of Sports and Physical Activity” and the new “Legal Regimen of Sports Federations” (“Regime Jurídico das Federações Desportivas”) lead to the repeal of the decree-law that framed the programme contracts of sports development that was already in place since 1991. The main novelties introduced in 2009<sup>43</sup> can be systematized as follows:

- (i) The need for prior binding opinion of the member of the Government responsible for sport for the provision of State funding for the construction of sports facilities (public and private);
- (ii) The need of an assumption by the beneficiaries of public interest compensations in the case of financial contributions for public construction or improvement of sports facilities owned by private entities when the nature of the investment is justified and in the case of acts of free allocation of the use or management of State Property to the same entities;
- (iii) The previous recognition of the sporting events’ public interest as a condition for public funding thereof, through an order of the member of the Government responsible for sport;
- (iv) The principle that sports clubs participating in competitions of a professional nature can not benefit in this context of support or financial contributions by the State, Autonomous Regions and local authorities, in any form, except as regards the construction or improvement of facilities or sports facilities for the achievement of sporting events of public interest, acknowledged as such by the member of the Government responsible for sport;
- (v) A compulsory certification of the accounts of the entities beneficiaries of public funds when the amounts paid exceed a limit set in the contract programmes of sport development;
- (vi) The ban of new public financing imposed to entities that are in breach of their tax and social security obligations and simultaneous suspension of any financial benefits from any contract programmes in progress as the situation continues;
- (vii) The immunity from judicial arrest or encumbrance of funds derived from public financing, duly granted by contract pro-

<sup>40</sup> See Article 12 of the “Basic Sports Law of Physical Activity and Sport” as well as Article 1 of Decree Law no. 1/82 of January 4.

<sup>41</sup> See Article 6.

<sup>42</sup> See Article 46.

<sup>43</sup> Decree Law no. 273/2009 of October 1.

<sup>44</sup> See Article 1(i) of Decree-Law no. 84/85 of March 28.

- grammes, since the sums are considered exclusively granted for the purposes for which they were awarded;
- (viii) The funds granted by sports federations as well as by the Portuguese Olympic and Paralympic Committees to entities under their jurisdiction should also occur through contract programmes which clarify the objectives of the support, since those conceding entities have previously received public funding for such purpose (it is still here concerned public money);
  - (ix) In order to avoid gaps resulting from transition economic years it is established a scheme that consists of the funding maintenance until the signature of a new contract programme.

#### 4.2. "Social games" as sources of sport financing in Portugal

"Social games" ("jogos sociais") such as lotto games, lotteries and football betting are an important financing stream for the Portuguese sports system due to the fact that the State's financial contribution to the sports sector also includes a levy on "social games" (games of chance and lotteries).

Under the law<sup>44</sup>, the right to promote "social games" is reserved by the State which grants the Santa Casa da Misericórdia de Lisboa, a centuries-old private non-profit-making organization with public administrative interest, the exclusive right to organize and operate them throughout Portugal.

It is also the law<sup>45</sup> that sets out the distribution of revenue from the "social games". Santa Casa retains only 28% of the earnings from the various games and the balance is shared among other public-interest institutions<sup>46</sup>. Part of the earnings serve to finance sports activities: (i) 0.7% of the money allocated to the Ministry of Internal Affairs are assigned to the policing of sporting events, (ii) the funds allocated for the Presidency of the Council of Ministers, 7.8% is for the promotion of activities and infrastructure sports (are transferred to the Sports Institute of Portugal), 1.5% for the promotion of activities and facilities juveniles (transferred to the Portuguese Youth Institute) and 0.6% have as objective the promotion and development of football (are transferred to the Sports Institute of Portugal); (iv) 1.2% of the money allocated to the Ministry of Labour and Social Security are conducted for the organization of leisure, culture and sport popular across the INATEL Foundation and; (v) 1% of funds allocated to Ministry of Education are used in support of school sport and investment in sports facilities at school.

#### 4.3. Tax Benefits related to "Sports Patronage"

Under the law, donations<sup>47</sup> given to certain sport entities are considered cost or losses, to the limit of 6/1000 of their turnover or services rendered. Those entities are the following:

- (i) The Portuguese Olympic Committee;
- (ii) The Portuguese Sports Confederation;
- (iii) Sports federations holding public interest status;
- (iv) Promotion Sport Associations;
- (v) Associations endowed with the statute of public interest whose main goal is the promotion and practice of sports activities, except those sections which participate in professional sports' competitions;
- (iv) Culture and sports' centres organised under the terms of the INATEL Foundation.

The sports patronage ("Mecenato Desportivo") is a relevant tax incentive which aims to increase financial support to the sports sector by private entities, alleviating the sports movement from an excessive reliance on public money and helping to offset the shrinking budgets of the majority of the Portuguese non-governmental sport actors.

#### 4.4. Bans or restrictions on tobacco and alcohol beverages' advertising as legislative measures with a (negative) impact on sports funding

By banning or restricting tobacco and alcohol beverages' advertising, sports stakeholders lose or have less possibilities of obtaining funds. The main features of the legislation in force are described below.

##### 4.4.1. Tobacco

According to Article 16 (1) of the Law no. 37/2007 of August 14, all and any forms of advertising and promotion of tobacco and tobacco products, including occult, dissimulate and subliminal advertising, are prohibited.<sup>48</sup>

##### 4.4.2. Alcohol beverages' advertising

Article 17 of the Advertising<sup>49</sup> Code ("Código da Publicidade")<sup>50</sup> establishes the general principles regarding alcoholic beverage advertising. Some of those principles have an impact on the sports field:

- (i) The advertising of alcoholic beverage, regardless of the advertising vehicle used for such purpose, is only permitted providing it does not link the consumption of alcohol to enhanced physical performance<sup>51</sup>;
- (ii) It is forbidden any association between alcoholic beverage advertising and any national symbols as identified in the PCR<sup>52</sup>;
- (iii) Advertising of any events where minors participate, namely sports events, cultural activities or other, shall not make any, direct or indirect, reference to alcoholic beverage brands. This restriction is also applicable to the locals where such events take place<sup>53</sup>.

## 5. Conclusion

The PCR provides a collaborationist model between public and private actors in the promotion of the "right to physical culture and sport". However, other multiple constitutional rules which directly and indirectly apply to sport constitute an "open door" to an interventionist and bureaucratic model.

In fact, the State - the Government, the Parliament, the Autonomous Regions and the local authorities - tends to regulate extensively the different features of physical education and sport which inevitably jeopardizes the implementation of a subsidiary cohabitation and collaboration between all the stakeholders.

State Interventionism in sport is also evident in what regards financing. In fact, the Portuguese sports financing is structured in a model that relies primarily on public sources. Unfortunately, the existent legal and institutional mechanisms created to stimulate other sources of revenue are still not sufficient to mitigate the high dependency of the sports movement on public funds. There is no doubt: public funds assume a crucial role, being almost a non substitutable resource, in particular in the case of sports federations.

Paradoxically (or not), there are a lot of nongovernmental sport organizations - ranging from sports collectivities to fitness centers and health clubs - that have an increasing role in the generalization of

<sup>45</sup> See Decree-Law no. 56/2006 of March 15.

<sup>46</sup> Those institutions comprise associations of voluntary firemen, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, the cultural development fund or social projects.

<sup>47</sup> For tax purposes, donations are money or goods granted without any counterpart which may create commercial or money obligations for the mentioned public or private entities and whose activity mainly consists of promoting activities within

those social, cultural, environmental, scientific, technological, sports and educational fields - See Article 61 of the Statute of Tax Benefits.

<sup>48</sup> An exception to this general principle was set forth in Decree Law 52/87 of 30 January 30 according to which advertising to tobacco was generally accepted in automobile sports events with international prestige, including, inter alia, sports events such as World and European cups and championships, formula 1, rallying, motorcycling and sport-

cars. Advertising to tobacco was therefore permitted through the placement of any name, brand or logo in the equipment or clothing of the intervenient in such events and in placards where such events take place. That exceptional regime ended in December 31 2005 by means of the Decree-Law no. 178/2001 of June 9.

<sup>49</sup> Further to Article 3 (1) of the Advertising Code, "advertising" is defined as "any form of communication made by a public or a private undertaking in connection with trade, industrial activity, business,

craft or profession in order to promote, directly or indirectly the commercialization of any goods or services, any ideas or principles, initiatives or institutions".

<sup>50</sup> This Code was approved by the Decree-Law no. 330/90 of October 23. Its last amendments were introduced by Decree-Law no. 62/2009 of October 3.

<sup>51</sup> Article 17 (1).

<sup>52</sup> Article 17 (4).

<sup>53</sup> Article 17 (5) and (6)

sports practices and in the promotion of healthy life habits in the Portuguese population. However, even the most important and prestigious Portuguese nongovernmental organizations - the Portuguese Olympic Committee and the Portuguese Sport Confederation - have more prestigious than decision-making powers. Maybe it is also their own fault, taking into consideration that despite having a lot of members and competences in common, those entities do not consider the possibility of merging into one single social partner. Apart from obvious economies of scale, we are convinced that efficiencies could certainly arise from the existence of a single voice representing and defending the interests of the whole sports movement in the context of the dialogue with the public authorities.

In this context, we advocate the adoption of a new model of sports governance based on clear and different missions allocated to public and private entities with equity mechanisms and stronger commitments of all the different stakeholders.

In accordance to the PCR State must assume a decisive role.

However, unless its intervention is an added value for the sports system, room should be given to voluntary, commercial and other private activities. More collaboration and shared accountability are urgently needed.

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# Image Rights: the Albanian Perspective

by Denis Selimi\*

Differently from other jurisdictions where established statues and case law entitle individuals to control how their image or likeness is used for commercial purposes in public the realities of Albania have not yet caused that the legislator addresses and protects image rights. This is mainly due to somewhat historical but nowadays also commercial reasons. Sportsman who would like to be recognized not only for their physical abilities but also as icons to the public would certainly like to have defended their rights to the exploit of their image as they see fit.

Nowadays, Albanian sportsmen are building up their image by mainly playing for foreign teams. Some of them have started cashing in on their image based on agreements with their sponsors. However, there is little awareness that the Albanian law does not afford them protection of their image rights. Furthermore to date there has been almost no court cases elaborating on the legal means in defending rights of sportsman in availing of their image.

In Albania, civil relationships are mainly regulated by the Civil Code (that is Law no. 7850 entered into effect as of year 1994). The Civil Code constitutes a series of provisions designed to comprehensively deal with the core rights of a private person. The Albanian Civil Code being mainly inspired by the Italian Civil Code has a remarkably resemblance and takes many of its provisions from the Italian Civil Code.

However, as at the time the Albanian Civil Code entered into effect the realities in Albania were not the same as those in western countries the drafters of the Albanian Civil Code did feel that many of the regulations provided for in the Italian Civil Code were too advanced to be included in the Albanian statute.

This becomes evident also due to the fact that while the Italian Civil Code provides on and the defends the so called personality rights including the right to name and the right to image, the Albanian Civil Code limits its protection only in regard to the name.

Furthermore, image rights are not comprehensively protected also by the relevant copyright protection legislation. Whilst the rights of a person appearing in a drawn picture are distinctly defended there is no mention regarding rights of persons appearing in other representations.

On the other hand considering the non-existing case law there is no guidance and certainty on the applicable principles and valid arguments to be put forward to a court.

As earlier mentioned in regard to protection personal rights (i.e. the rights that a person has over their own body), the Albanian Civil Code only entitles a person to defend the rights to its name. The

defense entitles any person to oppose the use of its name against any other person that unjustly uses its name.

However, as personal rights should be associated with the aspects of the personality of a person as qualities that make a person distinct from another, a person's image or likeness should have been distinctly been protected in the Albanian Civil Code. That becomes important as in general Albanian courts are reluctant to recognize rights that are not specifically provided for in the Albanian statutes. Furthermore, the doctrine has not elaborated on the intrinsic aspects of personal rights. Therefore, the subject remains uncharted by the scholars and untested by the courts.

In regard to one specific case the Albanian legislation explicitly provides a portrayed person with rights as to the use of its image. Under the Albanian copyright law (*Law no. 9380 of 2005*) the authorization of a person portrayed in a picture must be first be obtained. However as the provision is limited only in regard to pictures it is arguable whether courts would interpret this provision by way of analogy and extend its application also in regard to other portraying formats.

As remedy, considering that the Albanian legislation fails to convincingly protect image rights one should consider registering its own image as a trademark. Under the Albanian Intellectual Property Law (*Law no. 9947 of 2008*) this remedy is possible if a person is registered as an entrepreneur and the trademark relates to goods or the provisions of services. The registration is generally a straightforward process and entitles the trademark owner to oppose the use of the trademark owned against all other persons as of the day of the application for the registration of the trademark.

#### Conclusion

The Albanian legislation fails to explicitly protect image rights and the courts have not yet established precedent upon which to rely on the standards and tests in considering infringements to such rights. Nevertheless, in absence of legal clarity and to ensure protection of proper image sportsman are strongly advised to consider registration of the proper image as a trademark in Albania.

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