

THE IMPACT OF EUROPEAN CITIZENSHIP IN AMATEUR SPORTS

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Abstract: Sport is one of the areas to which the European Union (EU) currently attaches great importance. This aspect is reflected in the permanent concerns of strengthening the EU policy in the field of sports. In this regard, it can be observed that in The European Union's Work Plan on Sport 2021-2024, a new European Model of Sport is taking shape, which is based on the current European values. Specialists in EU law mention that the first landmarks of the model appeared with the specific jurisprudence that somewhat forced the EU's involvement in sports and the application of its legislation in this area of interest. The decisions of The Court of Justice of the European Union (CJEU) in C-36/74 Walrave and Koch, C-13/76 Donà, C-415/93 Bosman, C-176/96 Lehtonen, C-51/96 and C-191/97 Deliège, C-519/04 Meca-Medina, C-325/08 Bernard or C-22/18 Biffi are expressions of European law applied to the specificity of sport that bring significant changes. Although the CJEU rules only on the cases it receives and which meet the conditions for the application of European law, the competence of the EU in the field of sports has continuously developed. Thus, with the modification of EU policies, the existence of the economic activity requirement was eliminated, and non-economic sports activities entered the scope of application of EU law. Besides the competition rules, CJEU has dealt with cases related to EU citizenship and discrimination on grounds of nationality, free movement of persons (related to professional and amateur sportspeople) and free movement of services.

Keywords: *sports law; amateur sports; European citizenship*

Introduction

From a legislative point of view, the social significance of sports is recognized by the European Union (EU) through the Treaty of Amsterdam (1997). The placement of sport in the sphere of influence of EU law is observed with the entry into force of the Treaty of Lisbon (2009), when EU recognizes the specific nature of sport, its social and educational functions and provides the (legislative) framework for its involvement in the promotion of the European sports objectives. The previously conferred mandate to act in the field of sports is also found in the consolidated version of the Treaty on the Functioning of the European Union (TFEU, 2012). Thus, the European Union, through Article 6 TFEU, "shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States", including areas such as culture, education and sport.

Also, Article 165 (1) TFEU states that "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function". Moreover,

as mentioned in the second paragraph of the same article, the European Union aims to develop "the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen [...]". Weatherill (2018) says that Article 165 TFEU "has provided a constitutional foundation for EU sports law, both by providing the vocabulary of the 'specific nature' of sport as a means to package the existing case law concerning the rules of the internal market and to provide a basis for future contribution by the EU to improving sports governance".

At the same time, The Court of Justice of the European Union (CJEU) acting in its judicial role, conferred by Article 267 TFEU, has created a solid body of case law regarding the application of EU law on the regulatory aspects of this field. This consistent body of cases, labelled as 'EU sports law', constitutes a different legal path for the application of EU law in sport (Geeraert, 2013).

For the purpose of ensuring the free movement of persons, discrimination on the basis of nationality is banned. So, in more

general terms, Article 18 TFEU states that “within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”. According to the CJEU case law, Article 18 TFEU can be applied independently and only in situations which are governed by Community law, for which the Treaty does not stipulate any specific rules which prohibit discrimination. More precisely, the principle is implemented in the TFEU with reference to workers, self-employed persons and services.

According to Van den Bogaert et al. (2011) and as mentioned by the Court, EU citizens who lawfully reside in the territory of a host Member State and who find themselves in the same situation as the citizens of that state can rely on Article 18 TFEU in order to receive the same treatment in law regardless of nationality in situations that fall within the scope of the EU law. The situations include the exercise of the fundamental freedoms and the right to move and reside within the territory of the Member States, as granted by Article 21 TFEU which states that “every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”.

Sports Law Cases Outline

As reported by Parrish (2022), “it has long been understood that sport is subject to EU law whenever it is practiced as an economic activity and that EU law does not touch nationality-based rules for selection to national sports teams”. In its first ruling in the field of sport - Case 36-74 Walrave - the CJEU had to establish whether and to what extent sporting activities are subject to the provisions in the Treaties laying down prohibitions. In this case, the Court ruled that the practice of sport is subject to EU law only in so far as it constitutes an economic activity (Article 3, Treaty on European Union). Thus, according to CJEU, activities which are of sporting interest, but do not have an economic

nature, are not subject to the application of EU law.

However, the situation is different in the case of a professional sports club where discrimination on the basis of nationality is prohibited (unless it can be justified). The Bosman case (C-415/93) “resulted in a landmark ruling of the CJEU which applied the right of free movement to professional footballers (and by implication other sportsmen) by allowing them to transfer players without impediments to another club at the end of their existing contract” (European Union, 2022).

As stated by Geeraert (2013), “the Court, recognizing that sporting activities are of considerable social importance in the EU, held that the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate”. Thus, according to the European Union (2022), this case “brought important changes to the legal and commercial landscape of the international sport movement and caused difficulties for many public sport authorities”.

In the Lehtonen case (C-176/96), as presented by Van den Bogaert et al. (2011), the CJEU “held that rules of a basketball federation which provide that players can only be transferred to other clubs during limited ‘transfer windows’, constituted a barrier to the free movement of workers, but subsequently acknowledged that such a measure could be justified by the legitimate objective of ensuring the regularity of sporting competitions”, through this displaying openness to the specificity of sport (Van den Bogaert, 2013). Thus, the European Commission pointed that non-EU nationals who are covered under a sports agreement shall enjoy the same protections against discrimination in the same way as EU citizens (Geeraert, 2013).

In Deliège (Cases C-51/96 & C-191/97), the CJEU explored the extent to which amateur athletes may enjoy market freedoms and ruled that they may come within the scope of EU law when the exercise of their sporting

activity is sufficiently connected to an economic sphere (Duval, 2019). According to Geeraert (2013), this case “demonstrated that an athlete can be a provider of service and thus an entity engaged in an economic activity” and that sport can be subject to the freedom of services, in cases “where economic activity has the character of a remunerated service and does not fall under one of the other fundamental freedoms”. Also, Lindholm and Parrish (2020) concluded that “the direct connection between the defence of EU rights and the requirement to be carrying out direct economic activity was somewhat eroded but essentially the link remains, albeit more indirectly”.

In the Meca-Medina ruling (Case C-519/04), the CJEU showed that “even if a rule is purely of a sporting nature, and has nothing to do with an economic activity, this does not mean that the activity governed by that rule or the body which issues such rules are not governed by the Treaty” (Mrkonjic & Geeraert, 2013).

In the Bernard case (C-325/08), the CJEU ruled on obstacles to the free movement of workers. The Court referred to Article 165 TFEU and stated that the specific nature of sport must be considered regarding the legality of a sporting measure intended to foster training (European Union, 2022). According to Mrkonjic and Geeraert (2013), the Court “explicitly and for the first time refers to the new legal basis of the Treaty on Sport, emphasizing the account must be taken of the specific characteristics of sport in general and of its social and educational function when making this consideration”.

Amateur Sport and European Citizenship Rights – Case C-22/18 TopFit and Biffi

Case C-22/18 consists of the decision of The Court of Justice of the European Union on a preliminary ruling based on Article 267 TFEU concerning the interpretation of the European Treaties. The case revolves around the right to free movement (Article 21 TFEU), the citizenship of the European Union, discrimination on grounds of nationality (Article 18 TFEU) and the rules of a sports association.

The legal status of sport in the European project, and thus the relation between amateur sport and EU citizenship, was considered to be unclear until Case C-22/18. That is because, according to the established case law of the Court, sport is covered by the Treaty in so far as it constitutes an economic activity (Di Marco, 2020).

However, the case offered the opportunity to clarify the legal relation between the EU citizenship and amateur sporting activities. In this case law, the CJEU shows the explicit recognition of the social importance of sport and the application of EU sports policy by prohibiting nationality discrimination not only in the field of sport in general, but also in amateur sport. Also, the judgment places a duty on sports organizations “who regulate amateur sport to review their nationality-based rules and accept the principle of ‘open-access’ to sport unless there are legitimate sporting reasons why non-nationals should be excluded” (Parrish, 2022). This position has been strengthened by the entry into force of Article 165 TFEU which confers on EU a supporting competence in the field of sport (Parrish, 2013).

The case represents a request by TopFit e.V, an athletics club located in Berlin, and Mr Daniele Biffi, an Italian national, against Deutscher Leichtathletikverband eV (German Athletics Association; ‘the DLV’), “concerning the conditions governing participation in the national amateur sports championships, in the senior category, of nationals of other Member States” (Case C-22/18, paragraph 2).

Mr Biffi is an Italian national who has been living in Germany since 2003. He is an amateur athlete who competes in running races (senior category) and is a member of TopFit - a sports association established in Berlin and a member of the Berlin Athletics Association, which is affiliated to the DLV. Mr Biffi has also participated in the German national championships. However, in 2016, the DVL, the German Athletics Federation, decided to delete a paragraph from the German Athletics Rules which allowed the participation of EU citizens of other Member States in national championships on equal

terms as German citizens. Consequently, “participation in the national championship was subject to prior authorization of the organizers of the event, and even if participation was granted, the athlete may only compete outside of classification and may not participate in the final heat of the competition”. “After having been required to compete out of classification for one national championship and even dismissed from participating in another, Mr. Biffi and TopFit, his athletics club based in Berlin, brought proceedings to a German national court” (Duval, 2019).

As mentioned in paragraph 17 of the case, “the referring court is uncertain whether such a nationality requirement constitutes unlawful discrimination that is contrary to the rules of the FEU Treaty”. Mostly, the request refers to discrimination on the basis of nationality in the case of European citizens exercising their right to free movement. Also, there is a need to answer the question whether the provisions can be relied on against a private body (the DLV) by an amateur athlete.

The referring court also states that while “Mr Biffi is a senior sportsman who, despite impressive sporting achievements, remains an amateur sportsman who is not exercising an economic activity when he participates in championships”, it “is unsure whether the application of EU law in the area of sport is always subject to the exercise of such an activity”. That is because the EU law is not explicitly stating in Article 165 TFEU that it refers to sport and “that the right of EU citizens to reside in another Member State without discrimination under Articles 18, 20 and 21 TFEU is not dependent on the exercise of an economic activity” (Case C-22/18, paragraph 19).

In this regard, the German court decided to refer three questions to CJEU and asked “in essence, whether Articles 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for many years in the territory of the Member State where that association, in which he runs in the

senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can as, even if he fulfils all the necessary conditions bar the nationality requirement, he can participate in those championships only ‘outside classification’ or ‘without classification’, without being able to progress to the final and without being eligible to be awarded the title of national champion, and may not even be permitted to participate in those championships” (Case C-22/18, paragraph 26).

In the decision, the CJEU states that Mr Biffi exercised his right to free movement in accordance with Article 21 TFEU and this situation comes within the scope of Article 18 TFEU (the principle of non-discrimination on grounds of nationality). Moreover, the Court has already stated that the EU law guarantees to every national of a Member State the freedom to enter another Member State in order to pursue an economic activity and to reside in that country after doing so, and to access leisure activities in that state which are directly connected with the right to freedom of movement.

According to settled case law, the Court has also stated that Article 21 (1) TFEU promotes the gradual integration of EU citizens in the host Member States. At the same time, “Article 165 TFEU reflects the considerable social importance of sport in the European Union, in particular amateur sport, as highlighted in Declaration No 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam (see *Bosman*, C-415/93; *Lehtonen and Castors Braine*, C-176/96) and the role of sport as a factor for integration in the society of the host Member State” (Case C-22/18, paragraph 33). It follows, therefore, from the analysis and application of the two articles, that an EU citizen residing in a host Member State is allowed to create bonds with the society of the country in which he is residing, including the participation in sporting events. In that regard, it is possible for amateur sportsmen, such as Mr Biffi, to rely on Article 18 and 21 TFEU. Therefore,

“the Court has confirmed that EU law, through rights derived from European citizenship, may apply to restrictions of free movement that arise from ‘all levels’ of amateur sport, basically extending the reach of EU law applicability to all types of sports activity on the territory of the EU, provided by public authorities or by private ones” (Duval, 2019).

With regard to the rules of national sports associations being subject to the rules of the Treaty in the same way as they are subject to the rules of the State of origin, the CJEU states that the “observance of the fundamental freedoms and the prohibition of discrimination on the basis of nationality provided for by the Treaty also apply to rules which are not public in nature but which are aimed at regulating gainful employment and the provision of services in a collective manner (see *Walrave and Koch*, 36/74; *Bosman*, C-415/93; *Olympique Lyonnais*, C-325/08)” (Case C-22/18, paragraphs 36-37). Thus, the rules of a national sports association, which limit the access of EU citizens to sports competitions, are subject to Articles 18 and 21 TFEU. In that regard, these rules impose a restriction on the freedom of movement of EU citizens (Article 21). As stated by the Court, even if sports associations are free to adopt their own rules, these cannot limit the exercise of rights of individuals which are guaranteed by the Treaty.

With regard to the principle of proportionality, the Court, in paragraph 50 of the case, mentions that “it appears to be legitimate to limit the award of the title of national champion in a particular sporting discipline to a national of the relevant Member State and consider that nationality requirement to be a characteristic of the title of national champion itself”, but the restrictions resulting from the pursuit of that objective should observe this principle.

Furthermore, “the Court finds that, since there is a mechanism for the participation of a non-national athlete in the national championships, at the very least in the heats and/or without classification, the total non-admission of such an athlete to those championships on account of his nationality

seems, in any event, to be disproportionate” (Case C-22/18, paragraph 66).

Consequently, the CJEU states that Articles 18, 21 and 165 TFEU “must be interpreted as precluding rules of a national sports association, under which an EU citizen, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only ‘outside classification’ or ‘without classification’, without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify” (Case C-22/18, paragraph 67). In these circumstances, amateur sportsmen are able to rely on Articles 18 and 21 TFEU. Therefore, as mentioned by Duval (2019), “the Court has confirmed that EU law, through rights derived from European citizenship, may apply to restrictions of free movement that arise from ‘all levels’ of amateur sport, basically extending the reach of EU law applicability to all types of sports activity on the territory of the EU, provided by public authorities or by private ones”.

In essence, Case-22/18 *TopFit* and *Biffi* rewrites the limits of the application of EU law in sports.

Conclusions

The application of modern EU citizenship policies has had a major impact in the field of sport. Although sport is an increasingly important economic phenomenon, and interests in this area are growing, European bodies are trying to maintain a balance between the recent economic and societal trends and any possible threats. This fact is starting to be distinguished more often in the work of the CJEU.

The EU sports policy grants great importance to the social function of sport, as shown in

Article 165 TFEU, and the evolution of the CJEU jurisprudence demonstrates this matter. Thus, the application of EU law in sports activity without an economic nature, respectively in amateur sports, eliminates the limitation regarding cases that addressed only professional sports. Also, it offers the opportunity to integrate the amateur sportsman in a Member State on the basis of the European citizenship. Thus, the amateur sportsman benefits from the protection offered by Article 21 TFEU – the right to free movement and Article 18 TFEU – prohibition of discrimination on grounds of nationality before sports bodies that regulate amateur sports. These bodies preserve their regulatory autonomy provided that they respect the rights of European citizens.

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