

SPORTS GOVERNING BODIES LIMITING THE ECONOMIC FREEDOM OF ATHLETES: EXCESSIVE OR NOT?

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Keywords

SPORTS GOVERNING BODIES; ECONOMIC FREEDOM OF ATHLETES ; CONTRACTUAL OBLIGATIONS ; CONTRACTUAL LIMITATIONS ; MANDATORY LAW

Aim of paper and research question

The paper aims to assess the respective application of EU and national law to a Sports Governing Body (SGB)'s

1. right of autonomy pursuant to Article 12 EU Charter to set the rules (disciplinary -, doping - and arbitration rules and 'rules of the game')
2. freedom of contract under Article 16 EU Charter (Case 151/78, para 19; C-240/97, para 99) to contractually bind an athlete
3. right to enforce those rules after he has been bound by a common or membership contract

The (professional) sport sector continues to claim a wider role in the name of regulation of their sport than is justified and they go beyond setting the rules, and, accordingly, occupy a monopoly position in determining matters of significant commercial impact.

Therefore, the fundamental question to be analysed on a case-by-case basis is whether the respective contractual limitation of economic freedom of an athlete by a SGB is excessive or not under mandatory law.

Theoretical background or literature review

A private law entity established under national law that operates in an EU Member State, is required to exercise its freedom of association (i.e. right of autonomy) with due regard to national and EU law.

The right of autonomy safeguards a private law entity such as SGB to be set up, to be organized according to its own opinions and needs (freedom of organization), to be maintained and/or to be terminated. It has therefore the right to set its own rules. A SGB is however only authorized to decide an agreement (i.e. freedom of contract) under national law and EU Law if it has a full legal competence pursuant to its byelaws. Moreover, enforcing those rules to an athlete is only possible after he has been contractually bound.

According to the EU Court '[a] practice may be of a sporting nature - and perhaps even purely sporting' in *intent* – but it falls to be tested against the demands of EU law where it exerts economic *effects*. In practice, it means that the main focus is on a possible breach of the *competition rules* by an undertaking, e.g., club, player (Case C-41/90), or on the measures taken by a regulator (e.g., SGB) that may illegally set restrictions to the *fundamental freedoms*.

A national court will, however, use a *test of reasonableness* in order to assess the fairness of a SGB's limitation of the economic freedom of an athlete.

Therefore, there is no consistency between the respective assessment at EU and national level, which may further give a SGB a(n) (theoretical) opportunity to excessively limit an athlete's economic freedom.

Moreover, a thorough review of the relevant literature conducted in the context of my PhD research, already revealed that a legal analysis has only been done at EU level (e.g., Van den Bogaert 2011) *or* national level (Olfers 2006). In my view, the possible excessiveness of the contractual limitation of economic freedom of an athlete by a SGB under mandatory law should therefore be assessed at EU *and* national level.

Methodology

In order to tackle the fundamental question in more comprehensive ways, the study of the relevant literature will be complemented with an in-depth legal analysis of relevant legislation and jurisprudence.

The paper will be structured as follows:

1. A contextual overview of the main topic;
2. If EU Law is applicable, its impact will be assessed;
3. If not, the application of national law will be assessed;
4. Overall conclusions.

Discussion, conclusion and implication

There is a difference of interpretation between EU and national courts with regard to measures taken by a SGB, which may contractually limit an athlete's economic freedom.

This paper will argue that the possible excessiveness of the contractual limitation of economic freedom of an athlete by a SGB under mandatory law should therefore be assessed at EU *and* national level.

References

- Van den Bogaert, in: De regels en het spel, 2011, p. 49.
- Olfers, Sport en mededingingrecht 2006, p. 187.
- Case 151/78, Sukkerfabriken Nykøbing, ECR [1979] 1, para 19
- Case C-240/97, Spain v Commission, ECR 1999, I-6571 , para 99
- Case C-41/90, Höfner and Elsnner, ECR 1991 I-1979.