

MoveS Webinar

Labour mobility and social security in sports

19 April 2024

Online

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MoveS

project presentation

PRESENTED BY:

HARALD HAUBEN

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MoveS

EU-wide network of independent legal experts in the
fields of
free movement of workers (FMW)
social security coordination (SSC)
Posting

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Bimonthly Monitoring Reports
Ad hoc requests
Comparative assessments

2) To disseminate expertise and increase experts' and practitioners' knowledge by means of

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<https://ec.europa.eu/social/main.jsp?catId=1098&langId=en>

MoveS LinkedIn group:

MoveS – free movement and social security coordination

<https://www.linkedin.com/groups/4291726>

Labour mobility and social security in sports

Today's agenda

Content	Timeslot	Presenter
Introduction	10:00 – 10:10	Harald Hauben Project Director, MoveS
Freedom of movement and labour mobility in sport	10:15 – 10:45	Prof. dr. Stefaan Van den Bogaert Leiden University (Netherlands)
Professional sports and coordination of national social security schemes	10:45 – 11:15	Prof. dr. Jean-Philippe Lhernould Poitiers University (France)
Wrap up of Session 1 Questions and Answers	11:15 – 11:30	Harald Hauben MoveS
<i>Break</i>	11:30 – 11:40	
Latest developments in the light of the December 2023 European Court of Justice rulings	11:40 – 12:00	Prof. dr. Stefaan Van den Bogaert Leiden University (Netherlands)
Questions and Answers	12.00 – 12:15	ALL

Freedom of movement and labour mobility in sport

PRESENTED BY:

PROF. DR. STEFAAN VAN DEN BOGAERT
LEIDEN UNIVERSITY

Structure

1. Status quo
2. Latest developments – the possible impact of the 21 December '23 judgements of the CJEU in *ESL, ISU & Royal Antwerp*
3. Future developments

'Executive summary'

- The internal market is one of the crownjewels of the EU's architecture
- The right to move is a fundamental cornerstone of the internal market
- It is not absolute, but interpreted widely by the CJEU, correspondingly, restrictions are viewed narrowly
- Professional sportsmen & women are workers or service providers and enjoy FM rights in the sense of the Treaty
- The relevant Treaty provisions have direct effect and can be invoked against sports associations
- Sport is a paradigm of free movement

'Executive summary'

- There is no specific EU sports law
- Development has been piecemeal & fragmented, mainly judicial, on a case-by-case basis
- Not all problems have been solved
- Two main incursions into self-proclaimed autonomy of sporting associations:
 - *Bosman* ('95): nationality discrimination & transfers (Big Bang, FM)
 - *ESL & ISU + Antwerp* ('23): breakaway leagues & competitions (COMP; good governance & dispute resolution)

1. Legislative framework

- No reference to sport in EEC Treaty
- 2 Political declarations at IGC Amsterdam & Nice
- Article 165 TFEU: limited EU competence
- +
- General Treaty provisions on free movement and competition law

2. Judicial developments (1) - CJEU

- *Walrave* ('74)

- Sports is part of EU law insofar as it constitutes an economic activity
- Restriction on the scope for measures of purely sporting interest (national teams)

- *Dona* ('76)

- Confirmation *Walrave*
- Footballer is a worker
- Measure is DD and violates Article 45 TFEU -> non-nationals cannot be prevented from playing in national leagues

Judicial developments (2) - *Bosman*

- *Big Bang* ('95)
 - Transfer rules and nationality clauses violate Article 45 TFEU (no comp)
 - Discriminations and restrictions
 - Need to ensure training young players and to maintain balance between teams are legitimate aims; not proportionate though
 - No more quotas on EU nationals: Ajax can field 11 Italians
 - No more transfer fees after expiry contract

Judicial developments (3): *Post-Bosman*

- In practice, attempts to limit impact: long-term contracts, more foreign players (sport becomes paradigm of FM)
- *Open the Gates of Litigation* (national courts, CJEU, EU Commission, CAS)
- Often based on FM, gradually also on competition law (*Meca-Medina*, *MOTOE*)
- Wide variety of issues: nationality discrimination (*Kolpak*, *Simutenkov*), transfer issues (*Lehtonen*, *Olympique Lyonnais*), selection rules (*Deliege*)

Judicial developments (4): key features

- Wide interpretation FM (Deliege is a service provider)
- Openness to the sporting specificity
- Athletes have rights under EU law and can enforce them; often difficult though
- Generally, situation athletes has improved vis-à-vis federations (e.g. FIFA Transfer Regulations)
- Problems subsist
- Gradual development only

3. Remaining problems

- Nationality discrimination remains a sensitive issue
 - FIFA '6+5' plan, UEFA homegrown rules, nationality clauses relating to TCN (passaportopoli; Bellingham/Real)
 - See study on the treatment of non-nationals in individual sport competitions: https://ec.europa.eu/assets/eac/sport/library/studies/study_equal_treatment_non_nationals_final_rpt_dec_2010_en.pdf
 - Random examples: situation in ice hockey in Germany; or the Dutch plans relating to ice skating hall in Heerenveen
- The transfer saga also continues: e.g. concerning unilateral breach of contract (Art. 17 FIFA Regulations, *Diarra* case, pending)

4. Recent major developments

- Amateur sportsmen & women can invoke the citizenship provisions of the Treaty (*TopFit*): 'helps integration in the host MS' -> extension scope EU law to sport
- Brexit!
 - No more free movement
 - Big impact? E.g. on Premier League?
 - EU players must now apply for GBE
 - No more transfers of minors!

...To be continued...

Professional sports and coordination of national social security schemes

PRESENTED BY:

PROF. DR. JEAN-PHILIPPE LHERNOULD
UNIVERSITY OF POITIERS

Two real cases



1) X..., a professional footballer with a four-year contract with Olympique Lyonnais (FR), was loaned to Manchester City (UK) from 1 July 2002 to 30 June 2003

- X... died suddenly on 26 June 2003 during a match
- During loan period, was he insured in the UK or in FR?

2) B. and L. are third-country nationals residing in Ukraine and employed by a company established in NL, which organises ice-skating shows in some EU Member States (FR and DE) between October and May each year

- Are they insured in the NL?
- Or in each MS where they perform an exhibition?

The answer depends on the EU social security rules of conflict of law



Deloitte.



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So many concrete situations... (1)



- A Belgian cyclist resides in Spain, is employed by an Italian team, trains in Spain in the Winter and competes mostly in Europe
 - Where are social security contributions paid?
 - Which country will pay unemployment benefits if he/she is dismissed?
- A German football player has been playing for a total of 8 teams in Europe throughout his career, sometimes for a few months
 - Does he/she have to change affiliation every transfer?
 - What about old age pension(s)?
- A Lithuanian basketball team is involved in the EuroLeague competition and plays several matches per year in Europe
 - What if hospital care is needed during a match?

So many concrete situations...(2)



- An American golf player comes to Sweden for a single tournament in Europe. He wins the tournament and earns €500,000
 - Are social security contributions levied on the prize money?
- A (free lance) Danish tennis player plays tournaments in Europe. His spouse and two children stay in Denmark
 - Are contributions levied on fees in each country? Solely in Denmark?
 - Which country is in charge of family benefits?
- A full-time professional hockey player employed in France has also a two-day part-time employed sports coach job across the border in Germany
 - In which MS is he/she insured?

EU rules of conflict of law



- Regulation 883/2004 of 29 April 2004 on the coordination of social security systems
 - Regulation 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems
 - Regulation 1231/2010 of 24 November 2010 extending Regulation 883/2004 and Regulation 987/2009 to nationals of third countries (“TCN”)
- + European Commission, practical guide, 2013 (“The legislation that applies to workers in the EU, EEA and Switzerland,”)

Key principles of rules of conflict



- Social security rules of conflict are **disconnected from labour (Rome I Reg.) & tax law rules of conflict**
- Persons to whom Reg. 883/2004 applies are subject to the legislation of a **single Member State only**
 - Even if activities are carried out in two MS
- The law applicable **cannot be chosen by the parties** (or by the employer)
- Conflict rules are applicable **irrespective of nationality**
 - Reg. 1231/10 extending Reg. 883/2004 to nationals of third countries (TCN)
 - However: Reg. 883/2004 does not apply to TCN in a situation which is confined in all respects within a single Member State. This concerns, inter alia, the situation of a TCN who has links only with a third country and a single Member State.

Lex loci laboris (1)



Insurance in the country of actual work

Applicable for professional athletes with either employee or self-employed person status (art.11§3, a)

- T. is an Irish rugby player who has always played in Ireland so far and is recruited by a French club for one season = He will be insured in France (only) for the season.
- If T. goes back to Ireland during the season to receive medical treatment after an injury, France remains the MS of insurance
 - Match abroad is a 'marginal activity' ("*marginal activities are activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal activities. Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities*", see Practical guide)
- If T. is hired by an Italian club for the next season, he will become insured in Italy
 - If he is made redundant in Italy, he will receive unemployment benefits in Italy if he meets the minimum period of insurance requirement by virtue of aggregation rules

Lex loci laboris (2)



No rule prevents from **unlimited changes in lex loci laboris**

- A German football player has been playing in a total of 6 MS throughout her career, sometimes for 6 months only
 - She has been insured successively in each of the 6 MS
- Social security benefits will reflect the European fragmented career
 - Affiliation and deaffiliation procedure to complete 6 times...
 - 6 old age pensions (at different pensionable age and different rates)!
 - Benefits granted by the competent MS at the time they are claimed
 - with support (if necessary) of principle of aggregation
 - Change of legislation may lead to less interesting benefits
 - Specific rules if residence is located in a MS other than that of insurance
 - Private supplementary insurance to increase protection?

Lex loci laboris and posting (1)



- A person who pursues an activity as an employed person in a MS on behalf of an employer which normally carries out its activities there and **who is posted by that employer to another MS to perform work on that employer's behalf** shall continue to be subject to the legislation of the first MS provided that the anticipated duration of such work does not exceed 24 months (Reg. 883/2004, Art. 13(1))
- Racing car driver employed by a team which seat is in Luxembourg, performing races in Europe
 - Contributions in LU
 - PDA1 certificate to be requested before trip abroad
 - **[business trip:** “a temporary working activity of short duration organised at short notice, or another temporary activity related to the business interests of the employer and not including the provision of services or the delivery of goods, such as attending internal and external business meetings, attending conferences and seminars, negotiating business deals, exploring business opportunities, or attending and receiving training”, Art. 1(2)(eb) of the proposed amendment of Reg. 987/2009]

Lex loci laboris and posting (2)



- “Self-posting” exists... (Reg. 883/2004, Art. 13(2))
 - Person who normally pursues an activity as a self-employed person in a MS who goes to pursue a similar activity in another MS shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months
 - A self-employed tennis player carries out her activity from Czech republic, where she resides and trains between tournaments. When she plays tournaments in Europe, she is self-posted from CZ
 - A PDA1 certificate is issued by the CZ authorities
 - Contributions based on prize money paid only in CZ

Multistate (employed) activity (1)



- Special rule of conflict for **employees** “normally working in two or more MS” (Reg. 883/2004, Art. 13)
 - Insurance in MS of residence if worker pursues a substantial part of activity in the MS of residence
 - “Substantial part of employed activity’ = **quantitatively substantial part of all the activities**, without this necessarily being the major part of those activities. Less than 25 % working time and/or the remuneration is an indicator that a substantial part of the activities is not being pursued in the relevant MS (Reg. 987/2009, Art.14(8))
 - Activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his overall remuneration should be regarded as **marginal activity** (Reg. 987/2009, Art.14(5))
 - If no substantial activity in country of residence
 - Insurance in the country of business (businesses)
 - Or in the country of residence

Multistate (employed) activity (2)



- **Simultaneous exercise of one or more separate activities** in two or more other MS, irrespective of the duration or nature of that separate activity [one or two employers]
 - A full-time professional hockey player employed in France has also a two-day part-time employed sports coach job across the border in Germany
 - If he resides in France, social security in France
 - If he resides in Germany, social security in Germany
 - A volleyball coach is employed full time by an Italian team and is also the coach of the Dutch national team...
- **Continuous performance of alternating activities**, in two or more MS, irrespective of the frequency or regularity of the alternation [one employer]
 - A rugby player employed by a Swiss professional team practices in CH and plays matches in the FR rugby championship
 - If he resides in CH, social security in CH? (substantial activity there? Or posting rules?)

Multistate (freelance) activity



- A person who normally pursues an activity as a self-employed person in two or more MS shall be subject to:
 - the legislation of the MS of residence if he/she pursues a substantial part of his/her activity in that MS
 - To determine whether a substantial part of the activities is pursued in a MS, the following indicative criteria shall be taken into account: in the case of a self-employed activity, the turnover, working time, number of services rendered and/or income
 - or the legislation of the MS in which the centre of interest of his/her activities is situated
 - the 'centre of interest' of the activities of a self-employed person is determined by taking account of all the aspects of that person's occupational activities, notably the place where the person's fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances
 - See example slide 10!

Multistate mixed activity

- What if an **employed activity is performed in one Member State and a self-employed in another MS?**
 - G. is a professional handball player employed in Denmark and a freelance fitness coach in Sweden
 - A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person (art. Reg. 883/2004, Art. 13(3))
 - She is insured in Denmark

Quiz...where is he/she (social security) insured?



- An American golf player comes to Sweden for a single tournament in Europe?
- A Belgian cyclist who resides in Spain, is employed by an Italian team, trains in the Winter in Spain and competes mostly in Europe?
- A (free lance) Danish tennis player plays tournaments in Europe?

Back to the two real cases

- X..., professional footballer, employed by Olympique Lyonnais (FR) for four seasons, from 1 July 2000 to 30 June 2004, was loaned to Manchester City (UK) from 1 July 2002 to 30 June 2003
 - X... died suddenly on 26 June 2003 during a match organised in France
 - He is **insured in the UK since posting conditions are not met**: “on the day of the accident in which he was involved, X... was not a member of the staff of Olympique Lyonnais, did not work on its behalf and had no connection with it.
- Mr B. and Mr L. are TCN employed by a NL company, which organises ice-skating shows in various countries between October and May each year, notably in EU Member States (FR and DE)
 - **Based on multistate activity rule, they should be insured in the NL** (issuance of PDA1 certificates)

Wrap up and Q&A TIME!



COFFEE BREAK

11.45-11.55

Latest developments in the light of the December 2023 European Court of Justice rulings

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5. Latest issues: 21 December rulings

- *ESL* attracted most (almost all?) of the attention
- *ESL* & *ISU* are essentially about good governance in sport, not about free movement of labour
- Indirectly the rulings do have an impact on individual rights

ESL

- The maintenance of undistorted competition needs *equality of opportunity* to be guaranteed (ESL, 133)
- A power of prior authorization and participation must be subject to restrictions, obligations and review
- This requires a framework of *substantive criteria* and *procedural rules* for ensuring that they are transparent, objective, precise and non-discriminatory
- Failing this, the system is in violation of competition law

ESL & ISU: impact on individual rights

- A system of **good governance** will benefit everyone in sport
 - No more unmotivated prohibitions to take part in alternative competitions
 - No more excessive sanctions on athletes
- **Social dialogue** or collective bargaining might be instrumental in achieving this
- **Better enforcement:** ‘the current system of CAS fails to live up to the requirements of effective judicial protection’ – reform needed

Royal Antwerp

- Somewhat surprisingly, this case was decided together with the other two and really forms part of 'one unit'
- Motivation behind it? AG opinion, application of the new rules on object restrictions?
- Focus Court is primarily on competition, while this case is essentially about free movement, and nationality discrimination
- *In casu*: lawfulness of the UEFA and Belgian homegrown rules

Royal Antwerp

- AG Szpunar: focus only on Article 45 TFEU, HGR problematic
- CJEU confirms this:
 - HGR is probably ID, in any event restrictive
 - Training of young players is legitimate aim
 - Are the rules proportionate?
- CJEU ultimately leaves it up to national court to adjudicate, but indicates it has doubts about suitability and necessity (especially association based aspect may be problematic)

Wrap up and Q&A TIME!



Thank you for your attention!

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