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The EU and Gender Discrimination in Sports: the Italian case Amsterdam Centre for European Law and Governance (ACELG)

di Beatrice Russo¹

Abstract

In this paper it is described how the European Union embodies the principle of nondiscrimination on the grounds of gender in the sport field. It will be described the principle of nondiscrimination according to the European Union law primary and secondary legislation, mentioning the Equality Directive (2006/54) in particular, which clarifies the definitions of direct and indirect discrimination. It will be analyzed the nondiscrimination principle applied to the sport field, from a regulation perspective (the nondiscrimination on the base of gender thought the Olympia Project and the motion of the European Parliament resolution on women and sport in particular) and from the point of view of the ECJ jurisprudence. Further more it will be exposed, under the light of a feminist theoretical approach, the "*Italian case*", which is peculiar because – accordingly to the Italian "composition of norms" – women cannot become professional athletes, unlike their male colleagues. The analysis of "*The EU and Gender Discrimination in Sports: the Italian case*" is mainly based on secondary data: few quantitative data and -mostly- qualitative data that are collected from literature review of the main Scholars interested in the subject of nondiscrimination principle in EU, International Sport Law and Feminist Theory.

Suggested Quotation: B.Russo; The EU and Gender Discrimination in Sports: the Italian case; discussion paper Amsterdam Centre for European Law and Governance (ACELG); June 2017

Key words: Gender Discrimination; Sport; EU; legge 91/1981; Women.

Research Question: How does the European Union enforce the principle of non-discrimination on the grounds of gender? Is this principle applicable to the sport field? Could the Italian case fall under the indirect discrimination matter?

Research Hypothesis: In this analysis I will argue that the non discrimination principle is protected by the European Union norms, also for what concerns the Sport field, and I will claim that the Italian State, as a Member State of the European Union, should comply with the European Union laws and principles on the matter of gender discrimination and sports.

Thesis Statement: The European Union considers the principle of nondiscrimination *latosensu* -and therefore on the grounds of gender-as one of the core values of the Union. The nondiscrimination principle is enforced in the Treaties and in many directives, such as the 2006/54, which prohibits (and

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defines) the indirect discrimination in particular. The Italian norms (law 1981/91) establish that the definition of "professional athletes" is matter for the Federations regulation, which created a regulation system apparently neutral, that in concrete doesn't allow women to become professional athletes.

Introduction

Gender Discrimination consists in applying to similar cases different treatments exclusively on the basis of the gender of the individuals, causing so an unequal treatment among genders. This "negative paradigm" can be found also in sports, which is realized mainly accordingly to three subjects in particular: access to sport activities for women, unequal treatment between male professional athletes and female professional athletes, inclusion in the sport categories of transgender individuals. Gender discrimination among male athletes and female athletes consists, not only in the diverse economic treatment (hard, simple fact: men gain more money than women), but also in a different media impact, in the differentiation of prizes and in the sponsors' interest in the athlete. For the purposes of this work, we are going to reflect mainly on which the impacts of the gender discrimination are, as unequal treatment, among women and men in the European Union law framework.

The European Union considers the principle of nondiscrimination as one of the core values of the Union. If gender equality is one of the fundamental objectives of the European Union, equality in all its aspects and equality among genders in particular, are the key values of the European Union. Indeed, these are already contained in the first part of the Treaty on European Union, which is an expression of those common and essential principles on which the Community (the European Union) has been (and is) founded. In this paper it will be described how the European Union norms protect the nondiscrimination principle on the base of gender *tout court*, and in the sport field in particular. It will be examined the ECJ jurisprudence about the duo sport and the nondiscrimination principle in the EU and, in the end, it will be described the Italian legal system and its norms which regulate the definition of "professional athlete" that - in

practice- don't allow women to become professional athletes.

Methodology

The analysis of the "*The EU and Gender Discrimination in Sports: the Italian case*" is mainly based on secondary data: quantitative data and - especially- qualitative data that are collected from literature review of the main Scholars interested in the subject of nondiscrimination principle in the EU, International Sport Law and Feminist Theory. The conclusions and the Italian case paragraph are based on primary data. The cited Jurisprudence is entirely based on the ECJ decisions. The paragraphs "*EU and Gender Discrimination*" and "*EU, Gender Discrimination and Sport*" mainly describe the normative aspects of the nondiscrimination principle, while the paragraph "*EU Jurisprudence on Discrimination and Sport*" is an analysis of the leading cases.

This paper is based on a Chapter of the thesis Gender Discrimination in the Sport field that will be defended at the Università della Campania Luigi Vanvitelli- SUN in 2018, and it has been written during a stay -as guest researcher- at the Amsterdam Centre for European Law and Governance (ACELG).

It is important to underline that, in the writing of the paper, it has been preferred to use the term "*gender*" and not the word "*sex*" in the description of the phenomenon of discrimination, since "*sex*" represents all the elements that biologically determine the male / female dichotomy. Instead, the word "*gender*" represents the set of behavioral, cultural, social, and relational factors that build the identity of an individual (G. Priula, *There is Difference* 1989). Therefore, through the use of the term "*gender*" it is possible to better understand the various "social classifications" of man, woman, LGBTQIA (Lesbian, Gay, Bisexual, Transsexual, Queer, Intersex, Asexual) of identity of individuals (Judith Butler; Queer theory).

EU and Gender Discrimination

During the years, the legislative production, the court jurisprudence and the changes implemented in the Treaties, have contributed to strengthen the principle of gender equality, extending its application within the European Union². Indeed the European Parliament has always been a strong defender of the principle of equality between women and men.³

The European Union encompasses the nondiscrimination principle, first of all, in its Treaties. In the first paragraph of article 2 TEU⁴, it is illustrated the value of equality, which, together with the principles of human dignity, freedom, democracy, rule of law and respect for human rights, constitutes the common grounds for all the Member States. In the second period of article 2, it is defined the Community (*rectius* European Union) society, as based on: pluralism, tolerance, justice, solidarity and equality between men and women. These values characterize (or should do so) the net of relationships of the human community.

Another reference to the prohibition of discrimination and to the enforcement of the equality between men and women can be found in Articles 21 and 23 of the Charter of Fundamental Rights of Man (Charter of Nice).⁵ Accordingly to the

conjunction of articles 21 and 23, the nondiscrimination principle is -first of all- reaffirmed, moreover it is constituted the legal ground on which it is possible to rely the implementation of measures in favor of the under-represented gender. More specifically, accordingly to article 21, gender equality is required in all areas and in all fields, in which the personality of a human being develops. The consequence, in the light of this paper subject, is that the nondiscrimination/gender equality principle must be applied also in the field of sport and in the field of professional sport. In the second paragraph of article 2, it is placed the legal basis for the measures in favor of the "under-represented" gender. Through this norm, it is possible to intervene to bring balance - with appropriate instruments - in "pathological" situations, where there is a gap between the genders.

It is necessary to underline that the possibility of applying measures in favor of the "under-represented" gender is also protected under Article 157 paragraph 4 of the TFEU⁶, which autho-

²Ugo Villani, *Istituzioni di Diritto dell'Unione Europea*, 4a edizione riveduta e aggiornata, 2016, Bari, Cacucci.

³http://ec.europa.eu/justice/discrimination/awareness/index_en.htm

⁴article 2: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

⁵Article 21: Non-discrimination

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited".

Article 23 Equality between men and women

"Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."

⁶Article 157 TFEU "Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

rizes positive action within the scope of women's empowerment, by envisaging the application by Member States of measures: "*from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers*".

Accordingly to Article 19, paragraph 1 of the TFEU, "*without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*". In other words the norms included in article 19 TFEU confer to the institutions of the European Union the necessary powers to intervene in order to counteract any form of discrimination. Lastly, there are specific rules in the Lisbon Treaty, which explicitly encompass the principles of equality and non discrimination, establishing these as the shared values of the Member States. Indeed the Treaty makes the principle of substantial equality and the fight against any sort of discrimination the basis of European actions and policies.

In particular in article 19 of the Treaty of Lisbon it is re-established the principle of intervention,

3. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*

4. *With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers*".

which was already mentioned in the Amsterdam Treaty, providing for appropriate measures in order to fight gender-based discrimination and discriminations on the ground of ethnicity, religion, personal convictions, disability, age and sexual orientation.

Although the nondiscrimination principle has received numerous contributions at European level, the most fruitful field is the European labor law, where most of the Union interventions - hard law and soft law; primary and secondary legislation - have been enforced. So in addition to the definition of the principle of non-discrimination on the basis of the gender in the Treaties, there are various directives in support of the fight against gender inequalities. Speaking of directives, one of the most important outcomes for the enforcement of the gender equality principle must be found in the 2006/54 Directive (Equality Directive), which contains the definition of indirect discrimination. The 2006/54 Directive is a synthesis of the provisions contained in precedent directives concerning gender equality and of the leading cases of the EU Court of Justice on this matter. The main goal of this so-called "*redefinition*" of the discrimination subject was to clarify and consolidate -in one single text- the main provisions regarding access to employment, working conditions, social security and welfare.

As we mentioned before, the 2006/54 directive contains the definition of direct discrimination and the definition of indirect discrimination. According to the letter of the law, at article 2: "(a) '*direct discrimination*': where one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation; (b) '*indirect discrimination*': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legiti-

mate aim, and the means of achieving that aim are appropriate and necessary;"

In other words the provisions of the Equality Directives explains that direct discrimination occurs where one person is treated less favorably on grounds of prohibited criterion. Thus, it relates to the disadvantageous treatment based on the possession of specific characteristics, which distinguish an individual from other people. It is therefore necessary to determine a comparator (male worker or a compared situation), which can be either past, present, or even hypothetical⁷. In contrast, indirect discrimination is based on neutral criteria, which formally are not prohibited. So the discrimination occurs when "an apparently neutral provision, criterion or practice" creates a disadvantage for an individual-protected by the general prohibition of discrimination (on the base of his/her gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation)-compared with other persons. The effect of such a measure is similar to direct discrimination, where an individual who belongs to the protected group is disadvantaged⁸.

It is, also, fundamental to stress on the distinction between direct and indirect discrimination, because it has different effects not only theoretically but also from a practical point of view. From the perspective of the victim of the alleged discrimination, a finding of its direct form will always be preferable because of the usually more limited justification possibilities and because of the difficulties involved in proving disparate impact, which is required in the case of indirect discrimination⁹. Furthermore both forms of discrimina-

tion are complementary in the sense that if one cannot prove direct discrimination -in some cases- it is possible to allege an indirect form of disadvantageous treatment.

Ultimately it is important, in the framework of policies to prevent gender discrimination, to analyze the operational strategies launched by the European Union in relation to the so-called "principle of mainstreaming".

The principle of gender mainstreaming has been welcomed at an international level and constitutes a strategy for achieving gender equality. It consists in the "process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality"¹⁰.

In other words, the gender mainstreaming consists, first of all, on studying the effects (the negative ones in particular) that a certain economic, political, legislative decision may have on a gender. Secondly, the principle of gender mainstreaming allows for compensatory actions in favor of the underrepresented gender, if the policies adopted by the Union can lead to a gender gap.

The main consequence of the gender mainstreaming is(or should be) the European Institutions constant attention to the impacts and effects that the Union's policies may have on one gender; this strategy is supposed to make easier achieving gender equality, through the fight against any form of discrimination.

⁷ A. Masselot *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood*; 2004

⁸Boruta, Irena, "The Prohibition of Discrimination in Employment: A New Regulation." *Praca i Zabezpieczenie Społeczne* 2004, 2.

⁹ Ch. Tobler "CEDAW and the EU's Policy in the Field of Combating Gender Discrimination" (2005).

¹⁰ The strategy of mainstreaming is defined in the ECOSOC agreed conclusions, 1997/2.

EU, Gender Discrimination and Sport

In order to describe the relation among the principle of nondiscrimination and the European Union we should focus, first of all, on the "European Sport Charter" of 1992, which in article 4 guarantees that "no discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, shall be permitted in the access to sports facilities or to sports activities". The letter of the law also encompasses the need to realize some actions to promote integration¹¹. In other words accordingly to the abovementioned article not only it has been established the principle of equality, but it is also necessary to remove the obstacles that make difficult or impossible the access to sports facilities or to sports activities¹².

In the same period it has been adopted the "European Code of Sport Ethics", which its basic principal is that *"the ethical considerations leading to fair play are integral, and not optional elements, of all sports activity, sports policy and management, and apply to all levels of ability and com-*

mitment, including recreational as well as competitive sport. The Code provides a sound ethical framework to combat the pressures in modern day society which appear to be undermining the traditional foundations of sport - foundations built on fair play and sportsmanship, and on the voluntary movement". The most important outcome of the Code is the introduction of the concept of the "fair play, that is "defined as much more than playing with the rules. It incorporates the concepts of friendship, respect for others and always playing within the right spirit. Fair play is defined as a way of thinking, not just a way of behaving. It incorporates issues concerned with the elimination of cheating, gamesmanship, doping, violence (both physical and verbal), the sexual harassment and abuse of children, young people and women, exploitation, unequal opportunities, excessive commercialisation and corruption." So it is clear how the "European Code of Sport Ethics", while describing the concept of the fair play, explicitly recognizes the value of the nondiscrimination principle, intended also as the elimination of any unequal opportunity¹³.

Another fundamental step toward the affirmation of the principle of the equality among genders should be found in the "Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies", accordingly to which "the European Council stresses its support for the independence of sports organizations and their right to organize themselves through appropriate associative structures. It recognizes that, with due regard for national and Community legislation and on the basis of a democratic and transparent method of operation, it is the task of sporting organizations to organize and promote their particular sports, particularly as regards the specifically sporting rules applicable and the make-up of national teams, in the

¹¹Measures shall be taken to ensure that all citizens have opportunities to take part in sport and, where necessary, additional measures shall be taken aimed at enabling both young gifted people, as well as disadvantaged or disabled individuals or groups to be able to exercise such opportunities effectively.

3. Since the scale of participation in sport is dependent in part on the extent, the variety and the accessibility of facilities, their overall planning shall be accepted as a matter for public authorities. The range of facilities to be provided shall take account of public, private, commercial and other facilities which are available. Those responsible shall take account of national, regional and local requirements, and incorporate measures designed to ensure good management and their safe and full use.

4. Appropriate steps should be taken by the owners of sports facilities to enable disadvantaged persons including those with physical or mental disabilities to have access to such facilities.

¹² E. GREPPI - M. VELLANO, *Diritto internazionale dello sport*, Giappichelli, 2010.

¹³ Ibidem.

way which they think best reflects their objectives. It notes that sports federations have a central role in ensuring the essential solidarity between the various levels of sporting practice, from recreational to top-level sport, which co-exist there; they provide the possibility of access to sports for the public at large, human and financial support for amateur sports, promotion of equal access to every level of sporting activity for men and women alike, youth training, health protection and measures to combat doping, acts of violence and racist or xenophobic occurrences"¹⁴.

It is possible to affirm that through the "White paper on Sport" and with the approval of the Lisbon Treaty that the European Union has assigned major power in the matter of the discrimination in the sport field. Indeed in the "White paper on Sport" the principle of equal opportunities and the principle of non-discrimination are emphasized: *"Sport involves all citizens regardless of gender, race, age, disability, religion and belief, sexual orientation and social or economic background. The Commission has repeatedly condemned all manifestations of racism and xenophobia, which are incompatible with the values of the EU [...] the Commission will suggest to Member States that the progress programme and the Lifelong Learning, Youth in Action and Europe for Citizens programmes support actions promoting social inclusion through sport and combating discrimination in sport. In the context of cohesion policy, Member States should consider the role of sports in the field of social inclusion, integration and equal opportunities as part of their programming of the European Social Fund and they are encouraged to promote action under the European Integration Fund"*.

It is fundamental to analyze the two main European documents that specifically are devoted to the gender discrimination in sport. The first document is the motion for a European parliament resolution on women and sport (2002/2280(INI)) and the other one is the European Charter of Women's Right in Sports (also known as Olympia project).

In the explanatory statement of the motion for a European Parliament resolution on women and sport (2002/2280(INI)) it is possible to find the reasons why it is fundamental to enforce gender equality, which is a task yet to be accomplished, especially in sports.

From a political point of view, it has only been in the last 20 years that the question of women and sport has been discussed by institutions and associations. It is fundamental to recall that *"the goal of equal opportunities for school, amateur and professional sport is seen above all as a way of improving women's integration at all levels; for its part, however, sport must recognise the importance of the role of women. It is not enough simply to deplore the poorer involvement or motivation of women. We need to stress that sport develops in harness with democracy, compulsory education and citizenship."* Furthermore, *"physical differences between the sexes highlight the disparity and duality between boys and girls. Coeducation is one solution"* [...] but, with regard to physical exercise, the best criterion is *"to create equality on the basis of physical differences"*. Last, but not the least, it should be stressed on the importance of women taking responsibility for management and decision-making in sports organizations and movements. This is the way that could *"fully involved women in the future of top-level sport"*.

Accordingly to its preamble, the European Charter of Women's Rights (Olympia Project) in Sports is addressed to sports organizations and federations, sports participants, supporter groups, public authorities, EU institutions and all

¹⁴ G. NICOLELLA, *Diritto dello sport: ordinamento, giustizia e previdenza*, 2014.

organizations that may have a direct or indirect impact on the promotion of "sport for all" and particularly for campaigning in favour of equal opportunities between women and men in sport. This Charter about gender equality in sport is addressed to all people without any distinction of culture, religion, age, mental and physical capacities, sexual orientation or social standing. It is important to emphasize that the Charter embodies universal values of equity and it provides specific measures to reinforce gender equality policies for targeted groups."

The Charter includes the following areas, underlining how in this context all the actors above mentioned necessarily have to reinforce the principle of nondiscrimination and the principle of equality opportunities for genders:

- Practice sport tout court: *"Everyone has the right to participate in sport in a safe environment that preserves human dignity. Women and men of all ages coming from a different social and ethnic background must have the same opportunities to practise sport. Sports organisations and institutions must be responsible for implementing gender equality and find means of governance to promote women's participation in sport at all levels"*
- Leadership: *"Women and men must have the same opportunities to participate in decision-making at all levels as well as in all areas of sport. They must be equally represented on boards, committees and in managerial positions. The EC and Member States must take concrete measures to ensure equal representation of women and men in decision-making positions in sports organisations and institutions, as well as in administrations and agencies dealing with sport. A quota system and additional pro-active action are needed to attain this goal"*
- Education and Sports / Physical Education: *"Girls and women, as well as boys and men, must have the same right to learn various sports and skills and to develop physical literacy and fitness. Both genders should be given the chance to develop a life-*

long commitment to sport and to the physical activities of their choice. Physical education teachers, coaches, health professionals and other groups working in educational environments should be made aware of gender discrimination in sport and should adopt and implement the principles of gender equality"

- Research and scientific communities: *"Women and men should have the same opportunities to become members of sports scientific communities and to influence theories, methods and research topics. Equal participation and equal treatment of women and men at all levels and in all fields of sports sciences should be promoted."*
- Women, sports and the media: *"Mass media has an enormous impact on the development of culture in the EU and must be the first to embrace the principles and values of gender mainstreaming, not least the priorities and recommendations established by this Charter. Female athletes must have the same opportunities as men to be represented in mass media. Media coverage should respect the dignity of the individual. Women should be equally represented in media-related positions, such as journalists, photographers or editors."*
- Audiences and fans: *"Women should have the same opportunity as men to express their love of sport by being fans and through their participation as members of fan communities. Female fans should be respected as experts, given access to the core activities of supporters groups and not be considered as merely uninformed spectators or consumers who don't share the group's core ideals."*

It is clear that the asset of norms and practices that nowadays are ruling the topic of sport is generated by a "male monopoly" of construction.¹⁵ It is evident how the structure is a typical example of the patriarchal¹⁶, male control in the public

¹⁵ N. NAFFINE, *Law and the Sexes*, London 1990.

¹⁶ N. NAFFINE, *Law and the Sexes*, London 1990.

sphere. The abovementioned documents, in spite, could be defined as an appetent towards the deconstructive feminist approach. The deconstructive feminist approach aim is to dismantle the categories that influence life and therefore the laws, in a way that the new structures can encompass the natural differences that belong to genders. Society and laws are made by men and for men; this is why equality among genders is a task and not a criterion as it should be. Women, especially in sport, shouldn't see applied to them male "physical and not" categories, instead sport regulations should embody diversity among genders, preserving it as a value and not as a disadvantage. Equality doesn't mean treating all cases as the same, but consists in identifying the actual differences and then creating solutions able to accommodate them. This is the best solution to respect the nondiscrimination principle and to accomplish equality among genders¹⁷.

EU Jurisprudence on Discrimination and Sport

As it has been described in the previous paragraph, the European Union encompasses the field of Sport in the communitarian sphere of intervention. The Court of Justice first cases about the duo sport-European union can be dated during seventies (*Walrave* and *Donà* cases), but the most resounded case about the subjection of the sport field under the principles included in the EU Treaties (EC Treaty then, TFEU now) should be considered the *Bosman*¹⁸ case (1995). Indeed

thanks to the *Bosman* case the European Union Law enters definitely in the regulation of the sport activities.¹⁹

In *Walrave* case (1974), the European Court of Justice ruled two key-principles:

1) The Community law should govern sporting activities exclusively when they can be configurable as economic activities, within the meaning of Article 2 of the EC Treaty. Furthermore, it is a European Union matter, when this activity has the character of gainful employment or remunerated service covers all work service, without regard to the exact nature of the legal relationship under which such activities are performed.

2) The private nature of Sport Federations cannot constitute a valid reason to subtract the Federations' Regulations from European Union law. This is so because an obstacle (or a norm that creates any sort of discrimination) put by a Federation would affect the freedom of circulation of workers and the freedom of movement of services. Not just Member State norms are subject to European Union laws and principles, but also the norms issued by non-public associations and organizations that are anyway involved in public affairs²⁰.

In the *Donà* case (1976) it was explicitly recognized that rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the state in question, are incompatible with article 7 and, as the case may be, with articles 48 to 51 or 59 to 66 of the Treaty, unless such rules or practice exclude foreign players

¹⁷G. Spivak, *Deconstruction and Feminist Literary Theory*. "Displacement and the Discourse of Woman," 1995

¹⁸*Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93 (known as the *Bosman* ruling) is a 1995 European Court of Justice decision concerning freedom of movement for workers, freedom of association, and direct effect of article 39[2] (now article 45 of the Treaty on the Functioning of the European Union) of the TEC. The case was an important decision on the free movement of labour and had a profound effect on the transfers of footballers within the European Union (EU). The rul-

ing prevented the various continental leagues from setting a ceiling on the number of foreigners, if this would be discriminatory towards athletes in the Union.

¹⁹ E. GREPPI - M. VELLANO, *Diritto internazionale dello sport*, Giappichelli, 2010.

²⁰ G. NICOLELLA, *Diritto dello sport: ordinamento, giustizia e previdenza*, 2014.

from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only. Furthermore article 48 on the one hand and the first paragraph of article 59 and the third paragraph of article 60 of the Treaty on the other - the last two provisions at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or the fact that he resides in a member state other than that in which the service is to be provided - have a direct effect in the legal orders of the member states and confer on individuals rights which national courts must protect²¹.

Another fundamental ruling has been the *Deliège* case, which gave a criterion to define when an athlete is considered professional. Accordingly to the *Deliège* judgment an athlete has benefits from the liberalization of the communitarian market (so he/she can benefit of the freedom of movement of workers) regardless of his/her national definition of professional athlete, as long as his/her job performance is not autonomous and under the payment of a salary²².

Analyzing the ECJ jurisprudence it is possible to affirm that Sport and Discrimination are two fields of interest for the European Union. In particular it is possible to argue that accordingly to the European Union that: i) discriminations are not permitted within the EU borders; ii) sport activities-as economic activities- must comply with EU norms, otherwise it the freedom of circulation of workers and the freedom of movement of services would be affected; iii)also the Federations norms must adhere to European Union norms and principles; iv) Member States National Courts must protect individuals against any dis-

criminations that can occur in EU (art. 45 TFEU), therefore also in sport; v) European Union has its own definition of professional athletes, which disregard the Federations ones.

Italian Case

Core of this paper is to describe how the Italian norms, which define the difference between a professional athlete and an amateur, are apparently neutral, indeed they had created a gap between women and men regarding the access to the professional carrier as athlete.

The normative text concerned is the *Legge* 91/1981, also called "*Norme in materia di rapporti-trasocietà e sportiviprofessionisti*" (law 91 of the 1981- Regulation of the relation among sport societies and professional athletes), at article 2 in particular²³. This law was made to regulate the working relations among athletes and sport societies, in particular regarding access to work, sport contracts, employment, health protection, treatment of pensions. In other words these norms are meant to define and protect professional athletes in their role of working people²⁴.

Accordingly to the norms of article 2: "For the purposes of the application of this law, are considered professional athletes: athletes, coaches, technical-sport directors and athletic trainers, who exercise sport activitiesfor consideration and continuous, in the sport disciplines regu-

²³Art.2 legge91/1981: "*Ai fini dell'applicazione della presente legge, sono sportivi professionisti gli atleti, gli allenatori, i direttori tecnico-sportivi ed i preparatori atletici, che esercitano l'attività sportiva a titolo oneroso con carattere di continuità nell'ambito delle discipline regolamentate dal CONI e che conseguono la qualificazione dalle federazioni sportive nazionali, secondo le norme emanate dalle federazioni stesse, con l'osservanza delle direttive stabilite dal CONI per la distinzione dell'attività dilettantistica da quella professionistica*".

²⁴ E. GREPPI - M. VELLANO, *Diritto internazionale dello sport*, Giappichelli, 2010.

²¹ E. GREPPI - M. VELLANO, *Diritto internazionale dello sport*, Giappichelli, 2010.

²² G. NICOLELLA, *Diritto dello sport: ordinamento, giustizia e previdenza*, 2014.

lated by the CONI²⁵ and the sport disciplines must have received the qualification from the national sport Federations, accordingly to the rules issued by the Federations themselves, in compliance with the CONI guidelines regarding the distinction between amateur and professional activities²⁶.

In other words, to be considered as a professional athlete (and having access to all the protections that he could be entitled of, as worker), an individual:

- 1) must practice sport activity not occasionally but without interruption;
- 2) must practice sport activity in order to be paid;
- 3) the sport must be regulated by the CONI;
- 4) the sport discipline must be qualified as professional sport by the Federations.

In Italy the Federations recognized as professional sport exclusively the following sports:

- Italian Football Federation (F.I.G.C.)
- Italian Pugilistic Federation (F.P.I.)
- Italian Cycling Federation (F.C.I.)
- Italian Motorcycle Federation (IMF)
- Italian Golf Federation (F.I.G.)
- Italian Basketball Federation (F.I.P.)

Therefore only and exclusively those athletes, who are registered for sports clubs affiliated with Federations that had recognized the sport as a profession, can be legally considered as professional athletes. How and why does a Federation recognize "as professional" a sport? How does a Federation choose? Hard and simple: Federations recognized sporting disciplines as professional ones on the base of the economic relevance of the sporting discipline (Decreto Legislativo 8

Gennaio 2004, n. 15.)²⁷.

The consequence is that an individual can become a professional athlete in Italy (and he is entitled of all the consequently protections) exclusively if it belongs to the described sports. In other words if a person i) practice a sport "as professional athlete recognized at international level" because he/she participate to international athletic competitions with other professional athletes, ii) earn his/her remuneration mainly from sport, iii) practice competitive sport without interruption, he/she is not qualified as a professional athlete, whether the Federations don't define the sporting discipline as professional. For instance a tennis player such as Adriano Panatta, for the Italian law, is not a professional athlete, and the same is for professional athletes like Federica Pellegrini (swimmer), nor Valentina Vezzali (fencing), Tania Cagnotto (diver) or Valentino Rossi (motorcycling). Valentino Rossi, accordingly to the Italian law, was a professional athlete in 2011/2012, while he was a member of Team Ducati affiliated to the Italian Motorcycle Federation, but today since he is a member of the Yamaha team (Japanese club), he is not a professional athlete for the Italian norms.

The criteria that distinguish amateurs from professional athletes can be in appearance natural, because they seem to affect all individuals who doesn't belong to a Federation affiliated sport/club, regardless of their gender. But if we analyze the abovementioned categories deeper, we will discover that exclusively men practice the professional sports in list. The practical consequence is that in Italy no woman can become a professional athlete today.

Under the light of the European Union norms and principles the Italian normative system that regulates professional athletes is not complying

²⁵ CONI: The Italian National Olympic Committee (Italian: Comitato Olimpico Nazionale Italiano, CONI), founded in 1914 and a member of the International Olympic Committee (IOC), is responsible for the development and management of sports activity in Italy.

²⁶ E. GREPPI - M. VELLANO, *Diritto internazionale dello sport*, Giappichelli, 2010.

²⁷ G. NICOLELLA, *Diritto dello sport: ordinamento, giustizia e previdenza*, 2014.

with the principle of nondiscrimination among genders. First of all, because it is an example of indirect discrimination, because the criteria chosen by the legislator (and by the Federations) are apparently neutral, but in the Italian work market, in the Italian cultural and society context, they create a gap between men and women.

Secondly, because accordingly to a well-established jurisprudence of the ECJ sport activities -as economic activities- must comply with EU norms, otherwise it would affect the freedom of circulation of workers and the freedom of movement of services (so gender discrimination in the Italian system can affect the freedom of movement of workers). In other words, if a female professional athlete would transfer in Italy and keeping her professional status, she wouldn't be allowed to do so. This could effect the free movement of workers.

Thirdly because also the Federations norms must adhere to European Union norms and principles (so they have to eliminate any sort of possible theoretical and practical discrimination) and the Member States National Courts must protect individuals against any discrimination that can occur in EU.

Conclusion

Aim of this work was to show how the nondiscrimination principle on the grounds of gender is encompassed and described in the European Union norms, in connection with the regulation about sport in particular. The nondiscrimination principle fails in the Italian norms, creating a gap between female athletes and male athletes, through a standard that is apparently neutral. As the famous post-structuralism feminist philosopher Judith Butler said in a Q&A at a Conference held at the Vrije Universiteit Amsterdam, the Italian norms, which regulate the definition of professional athlete "*represent a typical case of inequality [between men and women]*".

To overcome this inequality relation it is possible to suggest two solutions. Accordingly to the first one, to distinguish professional athletes from amateurs, we should rely on the concept of "*professional athlete de facto*", established by the ECJ and Italian Jurisprudence.

The second solution should consist in changing the Italian normative text in a way that the Federation should comply with the principle of nondiscrimination stated by the Italian Constitution and by the European norms and Jurisprudence, while choosing the professional sport disciplines (such as creating different professional categories for women).

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