

## Court of the EAEU: has an important step been made on the path of abolishing the limit on foreign players?

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### What is the competence of the EAEU Court?

The Treaty on the Eurasian Economic Union of May 29, 2014 established the EAEU Court in the system of the Union bodies. The purpose of this institution is to ensure a uniform application by the EAEU member states and bodies of international agreements within the Union, international agreements of the Union with third parties and decisions of the Union bodies in accordance with the provisions of the Eurasian Economic Union Court Statute (Appendix N 2 to the Treaty on the EAEU).

The competence of the Union Court is determined as follows. The court hears disputes arising from the implementation of the Treaty of May 29, 2014, international treaties within the framework of the EAEU and (or) decisions of the bodies of the Union following the petition of a member state or an economic entity (legal entities and entrepreneurs). It should be noted that member states, as compared to business entities, have the right to appeal to the Court of the EAEU on a wider range of issues. At the same time, the right to appeal to the Court of the Union is held by legal entities and entrepreneurs not only from the EAEU countries but also from third countries.

A member state of the EAEU may apply to the Court of the Union for the compliance of an in-

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ternational treaty within the framework of the EAEU or its individual provisions with the Treaty of May 29, 2014. A member state is also entitled to apply to the Court for the compliance of international treaties within the Union and (or) the decisions of the Supreme Eurasian Economic Council, Supreme Intergovernmental Eurasian Economic Council, Eurasian Economic Commission (EEC) or individual provisions of these treaties and decisions by other member states with the EAEU Treaty. The EAEU member states may raise the issue of the compliance of a EEC decision or its individual provisions with the Treaty of May 29, 2014, international treaties within the Union and (or) decisions of the Union's higher authorities.

The economic entity has the right to apply to the Court of the EAEU for the compliance of the EEC decision or its individual provisions with the Treaty of May 29, 2014, international treaties within the Union, or to challenge the Commission's action or inaction. Disputed decisions, actions and inaction of the EEC must directly affect the rights and legitimate interests of an economic entity in the field of business and other economic activities and violate the rights and legitimate interests of such an economic entity provided by the Treaty on the EAEU and (or) international treaties within the Union.

The decisions of the EAEU Court which are made on the basis of hearing cases initiated by statements of the Union member states or economic entities are obligatory for execution by the member states and the EEC. The Treaty on the EAEU unambiguously establishes that the decisions of the Court do not change or cancel the existing rules of the Union law, the laws of the member states and do not create new ones. It is not within the competence of the Court to vest the bodies of the Union with additional powers other than those explicitly provided by the Treaty of May 29, 2014 and international treaties within the Union.

Another judicial procedure established by the Treaty on the EAEU is the Court's advisory opinion. It is an explanation of the provisions of the Treaty of May 29, 2014, international treaties within the Union and the decisions of its bodies following the petition of a member state or one of the EAEU bodies. The advisory opinion, in contrast with other decisions of the Court, is only a recommendation. However, according to the judge of the EAEU Court, Doctor of Law and Honored Lawyer of Russia Tatyana N. Neshataeva, the interpretation given in the advisory opinion is mandatory for the Court itself which will have to "reiterate the valid formula in a legally binding decision in order to create a uniform law enforcement"<sup>1</sup>. In other words, the advisory opinion of the EAEU Court is a kind of "preparation" that will allow resolving the relevant legal conflict in the future while at present it can deter the parties from making a potential legal conflict a real one.

Despite the restraining provisions of the EAEU Treaty in relation to the acts of the Union Court, its activities are very important. The acts of the Court of the EAEU contain many interesting le-

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<sup>1</sup> Neshataeva T.N. Court of the EAEU: from the legal position to the existing law // Court of the Eurasian Economic Union. URL: <http://courteurasian.org/page-22731>

gal positions that clarify certain provisions of the law of the Union developing and supplementing it, including in the matters of the common labor market.

### **Who and when raised the issue of the restrictions for athletes-legionnaires in the EAEU?**

On June 21, 2016, the Eurasian Economic Commission received an appeal from the Deputy Prime Minister, the Minister of International Economic Integration and Reforms of the Republic of Armenia about violating the rights of Armenian citizens - professional athletes in their work activities in sports clubs of the Russian Federation. The Commission during the monitoring of the obligations fulfillment by the member states within the framework of the Union internal market concerning the employment of professional athletes who are citizens of the EAEU countries found that paragraph 2 of Article 97 of the Treaty on the EAEU was not complied with. This norm obliges member states to refrain from imposing and applying restrictions in their legislation in order to protect the national labor market. The exceptions are the restrictions established by the Treaty on the EAEU and the legislation of the member states in order to ensure national security (including in strategic sectors of the economy) and the public order with respect to work performed by employees of the member states, their occupation and territory of stay.

The Commission's position was that the work activity of athletes-legionnaires from the Union countries did not fall within the scope of these exceptions and that they were entitled to have the complete freedom of movement of labor in the EAEU territory. The Board of the EEC informed about this in its Decision № 47 of May 11, 2017 and recalled the need to fulfill the Treaty on the Union regarding the elimination of the quantitative restrictions established for legionnaires from the participating countries.

In August 2018, the EEC reported that it had sought an advisory opinion from the Court of the EAEU on the compliance of the quantitative restrictions established on the participation of athletes in national sports events depending on their citizenship with the Union law.

### **What is the position of the EAEU Court?**

On December 7, 2018, the Grand Chamber of the EAEU Court provided an advisory opinion on the issue of athletes-legionnaire from the Union countries<sup>1</sup>. According to the opinion, paragraph 2 of Article 97 of the Treaty on the EAEU is the norm of direct action and, accordingly, is

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<sup>1</sup> The advisory opinion of the Grand Chamber of the Court of 12/07/2018 upon the application of the Eurasian Economic Commission to clarify the provisions of the Treaty on the Eurasian Economic Union // Eurasian Economic Union. Official site. URL: [https://docs.eaeunion.org/docs/ru-ru/01420336/ac\\_21122018](https://docs.eaeunion.org/docs/ru-ru/01420336/ac_21122018)

subject to direct execution. Also, the Court of the EAEU came to the unequivocal conclusion that neither the establishment of quantitative restrictions in the legislation of member states and local acts of organizations of physical culture and sports nor the application of effective quantitative restrictions to professional athletes holding the citizenship of the Union member states with regard to their professional work, occupation and territory of stay are allowed.

The arguments of the EAEU Court were as follows. The norms of paragraph 1 of Article 97 of the EAEU Treaty provide the right of employers and customers to attract workers from the member states without regard to restrictions on the protection of national labor markets and EAEU member states without the requirement to obtain a work permit in the state of employment. The EAEU Court interpreted the interdependent provisions of paragraphs 1 and 2 of Article 97 of the Treaty in such a way that they are addressed to the member states of the Union, employers, customers as well as to employees of the member states and give rights to these entities and individuals. The EAEU Court characterized these provisions as clear and transparent as well as not requiring implementation into national legislation that allows stating that they have properties of direct action and direct application. The Grand Chamber of the EAEU Court explained that the restrictions mentioned in paragraph 2 of Article 97 of the Treaty on the Union which were established to protect the national market were limits and quotas and that they were not applied to labor migrants from the EAEU countries.

The Grand Chamber of the EAEU Court concluded that the professional activities of athletes are regulated by the norms of labor and civil law as well as by acts of international and national organizations of physical culture and sports. In different EAEU member countries, professional activities of athletes can be carried out both on the basis of an employment contract (Armenia, Kyrgyzstan, Russia) and on the basis of a civil law contract (Belarus and Kazakhstan). However, in any case, regardless of the type of contract on the basis of which a professional athlete carries out his work activity, his / her job function is to be prepared to and to participate in competitions in a particular kind of sports. In this regard, in the opinion of the Grand Chamber of the EAEU Court, the professional activity of an athlete in terms of his / her job function may be considered a labor activity and is covered by the provisions of Articles 96 and 97 of the Treaty of May 29, 2014. The athletes from the EAEU countries must meet the labour requirements of the Union member states:

- 1) holding the citizenship of one of the member states;
- 2) legal presence in the state of employment;
- 3) working or providing services legally on the basis of a concluded labor or civil law contract in the territory of a member state;
- 4) not holding citizenship of the state of employment;
- 5) remuneration for the implementation of his / her activities.

The EAEU court gave a detailed consideration to the restrictions that, in principle, cannot be imposed or applied in the Union's common labor market as well as to those that are not per-

missible for professional athletes. Job restrictions which concern the conditions for the implementation of the labor function are prohibited, for example, the restriction in relation to the conditions of work, salary, the ability to compete. The Grand Chamber of the EAEU Court noted that the restrictions concern not the hiring of players but the capability of the club to suggest them as participants in official matches. Due to the fact that participation in such matches is the main purpose of the activity of a professional player, the rule that limits such participation also, in its turn, reduces the ability of an athlete to get a job. The argument of Grand Chamber of the EAEU Court in this part was that the existence of limits and quotas for foreign players has implications for foreign athletes' access to the labor market because it makes entering into employment contracts with such athletes from other member states of the Union less attractive for sports clubs.

The EAEU court noted that paragraph 2 of Article 97 of the Treaty of May 29, 2014 extends to the professional activities of athletes in terms of the implementation of their labor function. In other words, the inadmissibility of the restrictions on the legal possibility of athletes to take part in competitions is implied. This means that the actual opportunity, for example, of a legionary football player from an EAEU country to enter the field in the first team or as a substitute depends on his or her health, fitness and strategic considerations of a football club coach, for example, a game plan.

In addition, the Court of the EAEU, in fact, rejected the legality of extending the limits on athletes-legionnaires from the countries of the Union in order to ensure national security and public order. The wording of the Grand Chamber of the Court of the Union casts doubts on the possibility of attributing sports to the branches of economy that are of strategic importance.

Among the approaches practiced by the member states the position of the Russian Federation which does not consider the additional requirements stipulated in the laws and regulations of the Ministry of Sports to be restrictions imposed and applied in order to protect the national labor market in accordance with paragraph 2 of Article 97 of the Treaty on the EAEU stands out.

### **What are the possible consequences of the EAEU Court decision?**

In the nearest future we may witness one of the EAEU member countries filing an application to the Union Court for the compliance of the Russian Federation with the Treaty of May 29, 2014. In our country there is a limit on legionnaires who can take part in a football match in one team. Moreover, the internal rules in the Russian Football Premier League make no distinction between foreign nationals in general and foreign citizens from the EAEU countries. The limits on legionaries-footballers in our country will not be canceled soon because of the aforementioned Court decision. However, the first step has already been taken at the Union level. The process is most likely not going to be fast. The precise legal position of the EAEU Court with regard to the common labor market is now known. The advisory opinion contains an interpreta-

tion that is relevant not only to sportsmen-legionaries, but also to labor migrants from the EAEU member states in general. The legal position of the Court of the Union can be overcome only if the member states exercise the right to joint interpretation of the Treaty on the EAEU which, by the way, entitles them with such a right. However, this is not possible now, since Russia is alone in its dissenting opinion and it will not be able to reach a consensus with other member states. Therefore, for the development of a common labor market, the explanation provided in the advisory opinion of December 7, 2018 will determine the integration vector in this area. In particular, the EAEU Court made it clear that it would consider a violation of paragraph 2 of Article 97 of the Treaty on the Union:

- 1) restrictions on working conditions;
- 2) salary restrictions;
- 3) reservation of certain types of activities for citizens of the relevant state;
- 4) the establishment of quotas, proportional ratios of citizens and non-citizens;
- 5) the presentation to non-citizens of additional requirements for access to certain types of labor activity;
- 6) barriers to access to work due to mandatory residence in a particular area.

It is important that the Grand Chamber of the Court of the EAEU expressed its opinion on the possibility of member states' imposing restrictions to protect national security and public order, including those in the sectors of strategic economic importance. The Court of the Union recognized the exclusive discretion (competence) of the member states to determine the measures of national security and public order as well as the sectors of strategic economic importance. At the same time, the Court clarified that government measures should be proportionate and consistent with the achievement of the objectives set to ensure national security and public order, including those in the sectors of strategic economic importance, and should provide only what is necessary for their achievement. Thus, the Court of the EAEU suggests that member states should be guided by the principle of proportionality as a tool and criterion of their behavior in regulating the common labor market of the Union. Thus, the Court follows the practice of the Court of the EU established in the cases of the Belgian footballer Jean-Marc Bosman<sup>1</sup>.

The foregoing relates in general to the state and development of the common EAEU labor market, and, as the Court of the Union noted, it is a matter of not only legally established but also de facto existing restrictions in the member states regarding foreigners from the EAEU countries.

The position expressed by the Court of the EAEU in the advisory opinion of December 7, 2018 provides a set of legal arguments for the subsequent abolition of quotas on legionaries from the Union countries in Russian football. However, the abolition of quotas might require a decision of the EAEU Court whereby it will be recognized that the Russian Federation does not

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<sup>1</sup> Bosman, Lehtonen and Castors Braine (Case C-176/96) и Olympique Lyonnais (Case C-325/08).

comply with the provisions of the Treaty of May 29, 2014 in the common labor market. Unfortunately, at the current stage, Russian football clubs as business entities are entitled to appeal to the Court of the EEU only to challenge decisions or actions (inaction) of the Eurasian Economic Commission. The Commission itself can only act as a defendant in the proceedings of the Court of the EAEU, with the exception of the procedure for providing an advisory opinion. This is currently possible only if any of the other member states of the Union the labor rights of whose citizens-athletes may be violated by the established limits appeals to the Union Court.

In developing their external relations with third countries and international organizations the member states of the EAEU and the Union as a whole should take into account the following component of the Advisory Opinion of December 7, 2018. The Court of the EAEU has taken the approaches of the EU Court of Justice, directly referring to the preceding cases of Russian football player Igor Simutenkov<sup>1</sup>. In particular, in 2001 the EU Court of Justice made a decision with reference to the Agreement of 24.06.1994 on Partnership and Cooperation between Russia and the EU<sup>2</sup>. Part 1 of Article 23 of the Agreement states: "Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regard working conditions, remuneration or dismissal, as compared to its own nationals".

If formulations like the ones from the Russia-EU Agreement of 1994 appear in the EAEU agreements with third countries, our Union will be obliged to extend the provisions of the common labor market to the citizens of these countries. Therefore, all EAEU member states need to be attentive, and the Eurasian Economic Commission needs to clarify the position of the Union members on this account.

And the last aspect worth noting is the position of the Grand Chamber of the EAEU Court regarding the allied discipline in the integration community. The Court of the EAEU emphasized that the decisions of the Eurasian Commission are of a regulatory nature and, therefore, obligatory for the member states. In case of disagreement with the decisions of the Commission, the member states shall have the right to appeal these acts to the Court of the Union following the procedures provided by the provisions of its Statute. The EAEU court, in fact, called abnormal the state of affairs when there is a failure to comply with the decisions of the Commission which entered into legal force and were not contested in accordance with the established procedure, since this is not consistent with the Treaty of May 29, 2014. The Grand Chamber of the

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<sup>1</sup> Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol (Case C-265/03); Union royale belge des sociétés de football association and Others v Bosman and Others (Case C-415/93).

<sup>2</sup> The Partnership and Cooperation Agreement, which establishes a partnership between the Russian Federation, on the one hand, and the European communities and their member states, on the other, is concluded on Corfu 06/24/1994 // Collection of the legislation of the Russian Federation. 1998. N 16. Art. 1802.

Union Court recalled that according to the Treaty on the EAEU the member states are obliged to create favorable conditions for the Union to perform its functions. Member States also have an obligation to refrain from measures that could jeopardize the achievement of the Union goals which according to Article 4 of the Treaty of May 29, 2014 include the establishment of a common labor market within the Union.