

## **Horizontal direct effect of Union citizenship and the evolving sporting exception: *TopFit***

Case C-22/18, *TopFit e.V. and Daniele Biffi v. Deutscher Leichtathletikverband e.V.*, Judgment of the Court of Justice (Third Chamber) of 13 June 2019, EU:C:2019:497

### **1. Introduction**

Many European sports are organized according to the principles of the so-called “European model of sport”. One such principle is that sport is organized on a national basis with one – and only one – governing body per nation and sport, which is exclusively responsible for the organization of its respective sport within that national territory.<sup>1</sup> This organizational principle reveals and strengthens the national character of sport – a character that is reflected in the importance attached to national competitions, national championships, and competitions between national teams. To preserve this national character, it is common for sports governing bodies to restrict access of non-nationals to national sporting events.<sup>2</sup>

These characteristics of sport are fundamentally at odds with the principles of the European Union. The EU is organized around the achievement of free movement between Member States and this includes, in particular, the abolition of discrimination on grounds of nationality.<sup>3</sup> Hence, there is tension between sport’s demands to organize its affairs along national lines and the requirements of EU law: to what extent should EU law recognize the specificity and autonomy of sport, and what are the boundaries of sporting self-regulation?

These questions have generated much academic literature<sup>4</sup> and an ever-expanding body of EU jurisprudence and Commission decisional

1. Commission Communication, “White Paper on Sport”, COM(2007)391 final, p. 13.

2. The extent of this practice in European sport was revealed in a study funded by the European Commission in 2010: “Study on the equal treatment of non-nationals in individual sports competitions”, (T.M.C. Asser Instituut, Edge Hill University and Leiden University, 2010).

3. Art. 18 TFEU.

4. See e.g. Parrish, *Sports Law and Policy in the European Union* (Manchester University Press, 2003); Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, 2005); Parrish and Miittinen, *The Sporting Exception in European Union Law* (T.M.C. Asser Press, 2008); Pijetlovic, *EU Sports Law and Breakaway*

practice that centres around the role of sport in the achievement of the internal market – “an area without internal frontiers” for the economically active.<sup>5</sup> The picture in modern professional sport appeared to be relatively clear: “sport is subject to Community law only in so far as it constitutes an economic activity”<sup>6</sup> and EU law does not touch on nationality-based rules for selection to national teams<sup>7</sup>. Nationality discrimination in professional club sport is incompatible with the Treaty unless justified<sup>8</sup> and, following *Meca-Medina*, some nationality-based rules could, in principle, escape classification as a restriction as they are inherent in the pursuit of a legitimate sporting objective.<sup>9</sup> This has given rise to a well-founded impression that invoking EU law in a sporting context requires some modicum of economic nexus and that EU law cannot be invoked in “pure” amateur sport.

In retrospect, this appears to be less obvious. In 1993 the Maastricht Treaty established Union citizenship for every Member State national.<sup>10</sup> The significance of this became clear, if it had not been before, when the ECJ declared in *Grzelczyk* that “Union citizenship is destined to be the fundamental status of nationals of the Member States”.<sup>11</sup> As a result, it is well-established that every Union citizen enjoys and can directly rely on the Treaty-based right to reside in any Member State regardless of whether he or she is economically active.<sup>12</sup>

How should these doctrines of Union law be reconciled? Can Union citizens rely upon their citizenship rights against private actors such as sports governing bodies, i.e. does Union citizenship enjoy horizontal direct effect? And if so, to what extent can direct discrimination on the grounds of nationality be justified considering conditions particular to the area of sport? These were the questions facing the ECJ in *TopFit*.

*Leagues in Football* (Springer, 2015); Duval and Van Rompuy (Eds.), *The Legacy of Bosman* (Springer, 2016); and Weatherill, *Principles and Practice in EU Sports Law* (OUP, 2017).

5. Art. 26(2) TFEU.

6. Case C-36/74, *Walrave and Koch*, EU:C:1974:140, para 4, and Case C-415/93, *Union Royale Belge Sociétés de Football Association and others v. Bosman and others*, EU:C:1995:463, para 73.

7. Case C-36/74, *Walrave and Koch*.

8. Case C-415/93, *Bosman*, EU:C:1995:463.

9. Case C-519/04 P, *Meca-Medina and Macjen v. Commission*, EU:C:2006:492.

10. Art. 20(1) TFEU.

11. Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, para 31.

12. Case C-413/99, *Baumbast and R. v. Secretary of State for the Home Department*, EU:C:2002:493, paras. 82–84.

## 2. Factual and legal background

Daniele Biffi is an Italian national and Union citizen who has lived in Germany for a number of years. As a member of German athletics club TopFit, he competed for the title of “national champion” in the amateur senior German championships, organized by the German Athletics Association. His placings were recorded and he used his results to advertise his business as an athletics coach and personal trainer.

A rule change promulgated by the German Athletics Association in 2016 meant that non-nationals, such as Mr Biffi, were as a general rule excluded from participating in the national championship. Non-nationals could apply for an exception, but only to participate without classification, meaning that participation was restricted to the first round of a running competition or in the first three attempts of a technical competition. Indeed, in the German national championships in Zittau, Mr Biffi placed third in the 100m heats, but was prevented from running in the final even though he should have qualified based on his performance.

Mr Biffi objected on the grounds that as a non-national, he could not compete in the German national championships on the same basis as those athletes with German nationality. This could result in him receiving less support from his athletics club given that he would be fully or partially excluded from involvement in the national championships, thus making investing in him less attractive. Consequently, Mr Biffi would be less able to integrate at the sports club to which he is affiliated and, therefore, in the society of the Member State where he is resident. Such treatment could also have a damaging effect on his business as he cited his athletics prowess to advertise his services.

In the German court, Mr Biffi cited an alleged infringement of EU law, a claim rebuffed by the German Athletics Association on the grounds that as he was an amateur athlete, no economic activity was being carried out and, as per paragraph 4 of *Walrave and Koch*, EU law does not apply. The referring court was not clear on whether the application of EU law to sport is always subject to the exercise of economic activity, particularly since the advent of EU citizenship rights and the entry into force of Article 165 TFEU in 2009, both provisions which are not dependent on the existence of economic activity. Consequently, the court made a reference to the ECJ regarding the interpretation of Articles 18, 21 and 165 TFEU.

### 3. The Opinion of the Advocate General

Advocate General Tanchev was opposed to “[e]xpanding the material scope of EU law” by giving Article 21 TFEU horizontal direct effect. To that end, and contrary to the national court’s question and assessment of the facts, the Advocate General approached the situation as a restriction of the economic freedom of establishment under Article 49 TFEU. That move reflected the orthodoxy of how EU sports law has, to date, largely developed, which is on the basis of individuals connecting defence of their EU rights to the pursuit of economic activity. This has presented itself either in the context of disputes involving workers with employment contracts or those athletes providing sporting services.<sup>13</sup>

Since Mr Biffi used his performance in amateur competitions to advance his business interests as a coach and personal trainer, the Advocate General claimed that “Mr Biffi cannot be regarded as an ‘amateur’ sportsman”.<sup>14</sup> Consequently, the discrimination he suffered in breach of Article 18 TFEU falls within the scope of the Treaty by virtue of Article 49 TFEU.<sup>15</sup> In short, Mr Biffi’s economic activity was the gateway to the Treaty prohibitions on nationality discrimination. Thus, the Advocate General proposed that the ECJ should rule that the measure in question constituted a violation of the prohibition against discrimination under the freedom of establishment.

However, if the Court chose not to answer the question using Article 49 TFEU, the Advocate General believed that Union law was not applicable in the case. Whilst the Advocate General could not deny that the Court had already severed the link between migration and economic activity,<sup>16</sup> he declined to take the “significant constitutional step” of expanding the Court’s case law on Article 21 to extend its effect to the horizontal relationship between private parties<sup>17</sup> – the open-ended nature of which makes it a poor candidate for horizontal direct effect.<sup>18</sup> The Advocate General therefore argued that sports can only be affected by EU law either through the exercise

13. For workers see Case C-415/93, *Bosman*; for the self-employed see Joined Cases C-51/96 & 191/97, *Deliège v. Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* (C-51/96) and *Pacquée* (C-191/97), EU:C:2000:199.

14. Opinion of A.G. Tanchev in Case C-22/18, *TopFit*, EU:C:2019:181, para 51.

15. *Ibid.*, para 56.

16. In Case C-413/99, *Baumbast*, the ECJ stated that “the Treaty on European Union does not require that citizens of the Union pursue a professional or trade activity, whether as an employed or self-employed person, in order to enjoy the rights provided in Part Two [TFEU], on citizenship of the Union”.

17. Opinion, para 56.

18. *Ibid.*, para 105.

of freedom of movement or through specific measures, such as those adopted under Article 165 TFEU.<sup>19</sup>

#### 4. Judgment of the Court of Justice

The ECJ noted that Mr Biffi had already exercised his right to free movement under Article 21 TFEU, as he had resided in Germany for 15 years.<sup>20</sup> It also repeated the above-cited mantra in *Grzelczyk*.<sup>21</sup> Having exercised his right to free movement, Mr Biffi is also protected by Article 18 TFEU governing non-discrimination on the grounds of nationality. It follows from the Court's case law that economically active individuals who exercise freedom of movement have a corollary right to access leisure activities available in the Member State of residence.<sup>22</sup> Union citizenship, under Article 21 TFEU and secondary acts, subsequently provided access to such "social advantages"<sup>23</sup> independent of economic activity – advantages that are important to facilitate a non-national's integration into the society of the host State.<sup>24</sup>

The ECJ went on to say that Article 165 TFEU strengthens this position by reflecting the considerable social importance of sport – a characteristic already acknowledged by the Member States in the 1997 Amsterdam Declaration on Sport<sup>25</sup> and by the Court itself in its sports-related case law. Therefore, taken together, Articles 21 and 165 TFEU allow an EU citizen who is residing in another Member State to "create bonds with the society of the State to which he has moved and in which he is residing or to consolidate them".<sup>26</sup> In the context of those non-nationals wishing to practise amateur sport, the Court therefore effectively established the principle that such sporting competitions should be open access.

But who should ensure this open access and can sports bodies derogate from this principle? On the first question, the ECJ diverged from the Advocate General's Opinion. It noted settled case law, particularly in the area of sport, to the effect that observance of the fundamental freedoms and the prohibition of nationality discrimination apply not only to rules which are of a public nature,

19. *Ibid.*, para 110.

20. Judgment, para 27.

21. *Ibid.*, para 28, citing Case C-184/99, *Grzelczyk*.

22. Case C-334/94, *Commission v. France*, EU:C:1996:90, paras. 21–23.

23. Art. 7(2) of Regulation 492/2011 on freedom of movement for workers within the Union refers to "Social and Tax Advantages".

24. See Case C-165/16, *Lounes v. Secretary of State for the Home Department*, EU:C:2017:862.

25. Declaration No. 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam.

26. Judgment, para 34.

but also to rules of a private nature that are aimed at regulating gainful employment and the provision of services in a collective manner as not doing so would compromise the ability to exercise those rights. After restating its case law on the scope of rights based on economic activity, the Court concluded that the rights of non-economically active individuals under Articles 18 and 21 TFEU may similarly be relied on against all private entities that exercise “certain power over individuals” and are able “to impose on them conditions”.<sup>27</sup> The Court went on to examine the compatibility of the rule with these provisions. It found that the difference in treatment between Mr Biffi and a German national meant that Mr Biffi would be less able to integrate at his sports club and, consequently, in his host State. As such, the Court concluded, these rules constitute a restriction on the freedom of movement of EU citizens within the meaning of Article 21 TFEU.<sup>28</sup> The question then turned to the issue of justifications and proportionality.

Whilst the Court reaffirmed that free movement restrictions related to national competitions between national teams can be justified under EU law due to their “particular nature and context”, this does not justify excluding non-nationals from the “whole of a sporting activity”.<sup>29</sup> In the current case, the German Athletics Association argued that the public expects the national champion of a given State to be a national of that State.<sup>30</sup> This is based not only on the issue of the national champion and highest placed athletes being selected to represent Germany in international competitions, but also on the basis that it is not possible to distinguish between the age categories and to make rules for senior sport different to those applicable within other categories, including within the elite category.

Considering the facts presented, the ECJ rejected both arguments. On the question of selecting the national team, the Court found that the contested rules meant that in the senior category, non-Germans could in fact represent Germany. It transpired that it was only in the elite category that the German Athletics Association selects the best national athletes in order to participate in international championships.<sup>31</sup> Had the rules been applied consistently between the two categories, one would have to conclude that the national team justification would have been accepted. Naturally, this was also the downfall for the second justification relied upon, namely the need to adopt the same rules for all age categories. As with the first justification, it was clear that there

27. *Ibid.*, paras. 37–40.

28. *Ibid.*, para 47.

29. *Ibid.*, para 49, citing Case C-415/93, *Bosman*, paras. 76 and 127. However, as the Court points out, even for national competitions such restrictions must remain limited to their proper objectives.

30. *Judgement*, para 51.

31. *Ibid.*, para 56.

was no such consistency in the rule's application.<sup>32</sup> Thus, the Court found that the measure in question could not be justified.

The Court acknowledged that in sports with eliminatory heats, such as athletics, the presence of non-nationals is capable of preventing a national from winning the championship and of hindering the designation of the best nationals.<sup>33</sup> In such circumstances, it might be legitimate to limit the participation of non-nationals, assuming there is no mechanism for the participation of the non-national, such as participation in the early heats and/or participating without classification. Should such a mechanism be available, the total exclusion of that non-national would, according to the Court, fail the proportionality test.<sup>34</sup>

Setting aside the specific circumstances presented in the case, the judgment is clear authority for the proposition that Articles 18, 21 and 165 TFEU preclude rules of a national sports association that restrict participation of non-nationals in national sports championships unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued.

## 5. Comments

In *TopFit* the Court continues the expansion of the scope of EU law. Union citizenship, the principle of non-discrimination and even the concept of access to integration, as opposed to market access, are familiar elements of this development. However, the particular circumstances in sports – a key integration factor almost entirely governed by private actors – warranted consideration and ultimately the expansion of the application of EU law to a sphere that is both private and non-economic. While the special role of sports in society allowed it to serve, yet again, as the arena for a general expansion of the scope of EU law, the decision is also very particular to sports, which occupies a special role in EU law and policy.

### 5.1. *The scope of Union citizenship*

*TopFit* is unusual, although not entirely unique, due to the classification of the complainant as an amateur. Following *Walrave and Koch*, it has been widely understood that amateur sport falls outside the scope of EU law due to the absence of economic activity – the key trigger for the defence of free

32. *Ibid.*, para 57.

33. *Ibid.*, para 61.

34. *Ibid.*, para 66.

movement rights.<sup>35</sup> In *Deliège*, an amateur judoka challenged selection rules in her sport on the basis that they frustrated her provision of services.<sup>36</sup> Ms Deliège asserted, and the Court accepted, that economic activity was present due to various grants and sponsorship agreements she had concluded.<sup>37</sup> Therefore, in *Deliège*, 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.<sup>38</sup>

Like previous sports-related cases brought before the ECJ, the unique conditions in sport caused the Court in *TopFit* to reconsider fundamental questions regarding the scope and application of Union law. A first, and in some regards most fundamental question addressed in *TopFit*, is whether the rights of Union citizens give rise to legal obligations for private actors such as the German Athletics Association.<sup>39</sup> The brevity of the Court's reasoning suggests that a positive reply to that question is obvious,<sup>40</sup> despite the Advocate General's advice to the contrary.<sup>41</sup> It is established case law that Treaty articles are capable of directly giving rise to legal obligations for private actors that exercise State-like quasi-legislative powers, such as sports governing bodies<sup>42</sup> and trade unions.<sup>43</sup> In retrospect, it turns out that we – albeit understandably – took the ECJ's repeated claim that “sport is subject to Community law only in so far as it constitutes an economic activity”<sup>44</sup> too seriously and too literally.<sup>45</sup>

However, *TopFit* does not address the seemingly important difference between Articles 18 and 21 TFEU and Treaty Articles previously recognized as having horizontal direct effect: the latter pertain to “economic activity” and, more specifically, guarantee the fundamental freedoms that serve as the basis of the internal market.<sup>46</sup> This begs the question to what extent arguments

35. Case C-36/74, *Walrave and Koch*, para 4.

36. It should be pointed out that Ms Deliège contested her amateur classification. See Joined Cases C-51/96 & 191/97, *Deliège*, para 6.

37. *Ibid.*, para 51.

38. This helps explain why the A.G.'s assessment included Art. 49 TFEU.

39. A distinction can and should be made between two types of horizontal direct effect: the ability to invoke provisions of Union law against private entities that exercise quasi-legislative powers (“quasi-horizontal” direct effect) and against all private entities (“full” horizontal direct effect). The judgment in *TopFit* concerns and supports only the former.

40. Only two rather short paragraphs of the judgment, paras. 38 and 39, serve as a bridge between existing case law on the horizontal direct effect of economic fundamental freedoms.

41. Opinion, paras. 99–101.

42. Case C-36/74, *Walrave and Koch*, paras. 17–21.

43. Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772, paras. 34–37.

44. Case C-415/93, *Bosman*, para 73.

45. See e.g. Opinion, para 106, and Weatherill, op. cit. *supra* note 4, pp. 74–75.

46. Arts. 45, 49 and 56 TFEU.

previously used to support horizontal direct effect for internal market rights are applicable in a non-economic context.

The Court's findings of horizontal direct effect have been based on the idea of actor equivalence: private measures that serve the same function or have the same effects as State measures ought to be subject to the Treaties to the same extent.<sup>47</sup> While this appears sensible, it requires further "unpacking" and a closer examination reveals two, at least partially distinct arguments, for horizontal direct effect.<sup>48</sup> The first argument focuses on the uniform application of Union law between Member States: if some Member States regulate a particular matter and others leave it to private actors to provide the regulation, the uniformity of Union law would be severely weakened if the Treaties applied only to the former and not to the latter.<sup>49</sup> While the uniformity argument as such makes intuitive sense, the ECJ sensibly did not raise it in support of its conclusion in *TopFit*; unlike in the case with for example minimum wages<sup>50</sup> there is no clear risk of inequitable application of Union law between Member States with regard to appointing amateur champions.

In *TopFit*, the Court instead relied on the effectiveness argument: the Union's objectives and correlating individual rights would be adversely affected if powerful private "collective regulators" are not bound by the Treaties.<sup>51</sup> The effectiveness argument makes good sense. It would be untenable if Member States were able to circumvent their obligations under Union law by actively or passively delegating regulatory functions to private entities. However, effectiveness is not an end in and of itself,<sup>52</sup> and it is not always easy to distinguish between "collective regulation" and "true" agreements between private actors.<sup>53</sup> Simply put, how do we know if a private measure has such qualities that it is comparable to a State measure?

The Court's focus on collective regulation<sup>54</sup> has held off the adoption of "full" horizontal direct effect.<sup>55</sup> However, with *TopFit* the Court ventures into

47. Barnard, *The Substantive Law of the EU*, 5th ed. (OUP, 2016), p. 233.

48. Van den Bogaert, "Horizontality: The Court attacks?" in Barnard and Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing, 2002), pp. 123–152, at p. 125.

49. See e.g. Case C-36/74 *Walrave and Koch*, para 19, and Case C-438/05, *Viking Line*, para 34.

50. Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

51. Judgment, paras. 38–40.

52. Van den Bogaert, op. cit. *supra* note 48, 136.

53. See e.g. Case C-159/00, *Sapod Audic v. Eco-Emballages SA*, EU:C:2002:343, para 74.

54. As seen in the case law referenced in judgment, paras. 38–40.

55. The only major exceptions being Case C-43/75, *Defrenne v. Sabena*, EU:C:2008:425, and Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, EU:C:2000:296.

unfamiliar territory. The market access model assists the determination in hard cases regarding free movement connected to the internal market: the private actor's capacity of hindering access to the relevant market helps determine whether the Treaties apply to the actor.<sup>56</sup> However, this approach offers little or no support in situations like *TopFit* concerning access to integration rather than access to a market,<sup>57</sup> and the decision offers little guidance on this matter. For example, do political parties, the Scouting Movement and religious organizations play such a role in societal integration that they belong to the class of actors that have obligations under the Treaties? Although *TopFit* focuses specifically on sport and its specific role under EU law, the ECJ's reasoning on horizontal direct effect does not indicate that other types of groups and organizations are necessarily exempt. We foresee the need for the Court to clarify this matter.

### 5.2. *The expanding scope of application of the Treaties*

The decision to give Article 21 TFEU horizontal direct effect calls for a re-examination of previous ECJ case law. Although the Treaties have always contained a prohibition against discrimination on grounds of nationality, it only applies in situations that fall within the "scope of application of the Treaties",<sup>58</sup> and the ECJ has recognized and developed alternative tests to determine whether a situation falls within the Treaties' scope.<sup>59</sup> Previous sports-related free movement cases before the ECJ have rested on the presence of an economic activity that places the situation within the scope of the internal market, and, as such, protection against discrimination as part of the right to free movement. Such cases have therefore involved a determination of whether the athletes in question were professional or semi-professional.<sup>60</sup> By allowing athletes to invoke the fundamental right against discrimination on grounds of nationality through Article 21 this question is largely irrelevant after *TopFit*. For example, even if they were not "economically active", Bruno Walrave and Longinus Koch could today invoke Article 21 to challenge the pacemaker nationality rules, as could Jean-Marc Bosman with regard to the so-called "3+2 Rule".

56. See e.g. Case C-171/11, *Fra.bo SpA v. Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, EU:C:2012:453.

57. Judgment, para 33.

58. Art. 18 TFEU. See also Case C-186/87, *Cowan v. Trésor public*, EU:C:1989:47, para 17.

59. Derlén and Lindholm, "Three ideas: The scope of EU law protecting against discrimination" in Derlén and Lindholm (Eds.), *Volume in Honor of Pär Hallström* (Iustus, 2012), pp. 77–100.

60. Case C-13/76, *Donà v. Mantero*, EU:C:1976:115, para 12; Case C-415/93, *Bosman*, paras. 73–75 and Joined Cases C-51/96 & 191/97, *Deliège*, paras. 43–59.

Although in this regard *TopFit* constitutes a clear and important development compared to previous case law, it has been clear for some time that the protection against non-discrimination on grounds of nationality enjoys a particularly strong position under EU law, involving an extraordinarily far-reaching ability to invoke such protection against private entities. Almost two decades ago, the ECJ recognized in *Angonese* that the right to not be (directly) discriminated against on grounds of nationality can be invoked by “economically active” citizens against other private entities, including those not exercising State-like regulatory powers.<sup>61</sup> The protection against discrimination under EU law has been significantly strengthened through the adoption of legislative acts<sup>62</sup> and the EU Charter.<sup>63</sup> These measures paved way for the ECJ to recognize the prohibition of discrimination on other grounds as a general principle that employees may invoke directly against employers.<sup>64</sup> With this development in mind, the fundamental right to non-discrimination was, in retrospect, a likely subject for an expansion of the horizontal direct effect of EU law.<sup>65</sup>

However, there is nothing in *TopFit* that suggests that the negative obligations of sports governing bodies and other similarly powerful private actors are limited to direct discrimination on national grounds. On the contrary, the Court’s finding that these actors are subject to Article 21 TFEU contains no reservations.<sup>66</sup> It is clear from ECJ case law that Article 21 has a broad scope and captures any unequal treatment “that is liable to affect the freedom of nationals of other Member States to move within the European

61. Case C-281/98, *Angonese*, para 36, confirmed in Case C-94/07, *Raccanelli v. Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*, EU:C:2008:425, para 45.

62. E.g. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16–22, granting stronger protection of economically active non-movers.

63. In particular, Art. 21 contains a general protection against discrimination on various grounds.

64. See e.g. Case C-144/04, *Mangold v. Helm*, EU:C:2005:709; Case C-555/07, *Kucucdevici v. Swedex GmbH & Co. KG.*, EU:C:2010:21; Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Rasmussen*, EU:C:2016:278; Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257; Joined Cases C-569 & 570/16, *Stadt Wuppertal v. Bauer and Willmeroth v. Broßonn*, EU:C:2018:871; and Case C-68/17, *IR v. JQ*, EU:C:2018:696.

65. In this context it can be noted that ECJ case law on the horizontal application of the fundamental right against non-discrimination after *TopFit* leaves out one group of EU citizens, i.e. non-economically active citizens seeking to invoke the fundamental right against a private entity that lacks State-like regulatory powers. It remains to be seen if the Court will subsequently extend its protection to this group.

66. Judgment, para 40.

Union”.<sup>67</sup> Moreover, in *TopFit* the ECJ explicitly declared that horizontal direct effect extends to all measures that “adversely affect the exercise of the fundamental freedoms”,<sup>68</sup> a phrase that in the Court’s language includes all types of obstacles, including those that are non-discriminatory. Finally, the Court examined the measure in question using a broad market-access-like standard rather than a strict direct discrimination standard.<sup>69</sup> In *TopFit*, the ECJ generously connects the exercise of free movement, interest in amateur sports, integration at a particular club, and integration in society more generally, thereby indicating that Union citizens can invoke Article 21 TFEU to challenge any private measure that makes it less attractive for them to exercise their free movement rights, and this includes non-discriminatory obstacles. Thus, private actors who may be subject to Article 21 TFEU should not feel secure that they are in compliance with the requirements of EU law just because they do not engage in direct discrimination on the grounds of nationality.

### 5.3. *The relationship between EU law and sports*

#### 5.3.1. *The demise of the sporting exception*

In *Walrave and Koch*, a case concerning alleged nationality discrimination in motor-paced cycling, the Court declared that sport was subject to EU law “only in so far as it constitutes an economic activity”, and that the prohibition on nationality discrimination “does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity”.<sup>70</sup> Taken together, paragraphs 4 and 8 have been interpreted as giving rise to the so-called “sporting exception” in European law.<sup>71</sup> In *Bosman*, the scope of the sporting exception was narrowed by the ECJ, as it rejected pleas based on the sporting exception to exclude from the reach of the Treaty the system of demanding payment for a player who had reached the end of his contract and the use of nationality quotas in European club football.<sup>72</sup> In *Bosman*, the Court did, however, recognize as legitimate the pursuit of certain sporting objectives that could be used to justify restrictions on freedom of movement for workers. These included “the aims of maintaining a balance between clubs by

67. See e.g. Case C-182/15, *Petruhhin*, EU:C:2016:630, paras. 32–33; Case C-247/17, *Raugevicius*, EU:C:2018:898, paras. 28–30; Case C-191/16, *Pisciotti v. Germany*, EU:C:2018:222, para 45.

68. Judgment, para 39.

69. *Ibid.*, paras. 44–47.

70. Case C-36/74, *Walrave and Koch*, paras. 4 and 8.

71. For comprehensive treatment see Parrish and Miettinen, *op. cit. supra* note 4.

72. Case C-415/93, *Bosman*.

preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players”.<sup>73</sup>

In *Meca-Medina*, the Court severely curtailed the reach of the sporting exception by finding that “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down”.<sup>74</sup> The Court did, nevertheless, recognize that some rules are “inherent in the organization and proper conduct of competitive sport”.<sup>75</sup> Although the Court, in this case, was referring to how doping rules are inherent in the pursuit of clean sport, it has not been foreclosed that certain nationality restrictions in sport could fall within this category. Since *Meca-Medina*, European sport has had to adjust to a new legal reality in which purely sporting rules are no longer removed from the scope of the Treaty. *Meca-Medina* therefore fatally damaged paragraph 8 of *Walrave and Koch* and in doing so castrated half of the so-called sporting exception in EU law. The other half, the paragraph 4 reference to economic activity, has survived – until now. In his Opinion, Advocate General Tanchev referred to paragraph 4 of *Walrave and Koch* as containing the “cardinal rule” that sport is only subject to EU law whenever practised as an economic activity, and that the sports sector “organized their affairs” on this basis and took comfort from that cardinal rule being repeated in all sports-related cases since.<sup>76</sup> The development of citizenship rights, which are not dependent on the exercise of economic activity, has placed a strain on the cardinal rule.

### 5.3.2. *EU sports policy comes of age*

The EU’s sports policy is, to a large extent, a creature of arguably the most prominent EU sports law case – *Bosman*. Since then, through a series of Commission and Parliament reports and studies, the EU has sought, amongst other things, to promote a wider understanding of the specificity of sport and outline the social significance of sport.<sup>77</sup> However, without a constitutional footing in the Treaty, such activity was limited and EU action in sport continued to be guided by the ECJ case law and the decisional practice of the Commission.

The adoption of Article 165 TFEU was a potential turning point, as the Treaty now made explicit reference to the “specific nature of sport” and “its

73. *Ibid.*, para 106.

74. Case C-519/04 P, *Meca-Medina*, para 27.

75. *Ibid.*, para 45.

76. Opinion, para 106.

77. For a discussion on the development of EU sports policy see Parrish, “Sources and origins of EU sports policy” in Anderson et al., *Research Handbook on EU Sports Law and Policy* (Edward Elgar, 2018).

social and educational function”. However, for these statements to have practical meaning within the world of sport required both a maturation of EU sports policy and its judicial recognition. With *TopFit*, EU sports policy has finally come of age. *TopFit* represents its judicial recognition (a form of positive integration) and a juridification of the social dimension of sport in which essentially private areas of activity, such as the organization of amateur sport, have become subject to public or judicial scrutiny (a form of negative integration).<sup>78</sup> These points are amplified by a brief assessment of EU engagement in this area. The EU has long stressed the social, as well as the economic, importance of sport. In *Bosman*, the Court stressed “the considerable social importance of sporting activities” in the EU.<sup>79</sup> Shortly afterwards, the 1997 Amsterdam Declaration on Sport emphasized “the social significance of sport, in particular its role in forging identity and bringing people together ... In this connection, special consideration should be given to the particular characteristics of amateur sport”.<sup>80</sup> Advocate General Tanchev dismissed this statement as “merely” recognizing the social importance of sport and lacking “binding legal force”.<sup>81</sup>

The 2000 Nice Declaration stressed the “specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies” and the importance of sport for integration and involvement in social life.<sup>82</sup> In both the 2007 White Paper on Sport and the 2011 Communication on Sport, the Commission dedicated chapters to the “Societal role of sport” in which it once again stressed the value of sport for “social inclusion, integration and equal opportunities”.<sup>83</sup> The White Paper stated that “[s]port makes an important contribution to economic and social cohesion and more integrated societies” and that “[a]ll residents should have access to sport”,<sup>84</sup> and went on to state that “membership of sports clubs and participation in competitions are relevant factors to promote the integration of residents into the society of the host country” and that Member States *and*

78. For a discussion of juridification in the context of sport see Foster, “Developments in sporting law” in Allison (Ed.), *The Changing Politics of Sport* (Manchester University Press, 1993) and Gardiner et al. (Eds.), *Sports Law* (Routledge, 2012), pp. 73–77.

79. Case C-415/93, *Bosman*, para 106.

80. Declaration 29 to the Treaty of Amsterdam.

81. Opinion, para 108.

82. Nice European Council: Conclusion of the Presidency, “Declaration on the specific characteristics of sport and its social function, of which account should be taken in implementing common policies”, 7–10 Dec. 2000.

83. Commission Communication cited *supra* note 1, Ch. 2, and Commission Communication, “Developing the European dimension in sport”, COM(2011)12 final, Ch. 2.

84. Commission Communication, cited *supra* note 1, section 2.5. In the view of A.G. Tanchev, the White Paper was “light on detail and deferential to the role of governing bodies in sport”, Opinion para 108.

sports organizations should “address discrimination based on nationality in all sports”.<sup>85</sup> In the accompanying background paper, the Commission forthrightly stated that “[a]mateur sport must not remain outside the scope of the fundamental principles of free movement”.<sup>86</sup>

The Member States confirmed the importance of sport in society when in 2010 the Council published conclusions on the role of sport as a source of and driver for active social inclusion.<sup>87</sup> In the Conclusions, the Council highlighted that “sport holds an important place in the lives of many EU citizens and plays a strong societal role with a powerful potential for social inclusion in and through sport, meaning that participation in sport or in physical activity in many different ways contributes to inclusion into society”.

The Commission has sought to give practical effect to these sentiments. In a complaint regarding nationality restrictions in amateur football in Spain, it expressed concern that a worker’s right to be joined by their family in the host country, and the integration of that family into their new surroundings, may be undermined by rules such as those adopted by the Spanish Football Federation prohibiting the issuing of amateur licences to non-Spanish nationals.<sup>88</sup> Furthermore, in a response to a question asked by a private party, the Commission argued that:

“following a combined reading of Articles 18, 21 and 165 of the Treaty on the Functioning of the European Union, the general EU principle of prohibition of any discrimination on grounds of nationality applies for all EU citizens who have used their right to free movement. This principle concerns amateur sport as well as professional sport ... the Commission considers that the practice of amateur sport constitutes a social advantage ...”.<sup>89</sup>

Thus, more than a decade before *TopFit*, the Commission was moving in the same direction.

Article 165 TFEU recognizes sport’s “social and educational function” whilst stating that EU action is to be directed at “developing the European dimension in sport, by promoting fairness and openness in sporting

85. *Ibid.*, section 4.2.

86. European Commission, “Commission staff working document – The EU and sport: Background and context – Accompanying document to the white paper on sport, COM(2007)391 final”, 11 July 2007, section 4.2.1.

87. Council of the European Union, Council conclusions of 18 Nov. 2010 on the role of sport as a source of and a driver for social inclusion, O.J. 2010, C 326/04.

88. Commission Press Release, IP/04/1222.

89. Details of the letter have been published in Engelbrecht, “Discrimination against EU nationals in amateur sports”, (2010) *International Sports Law Journal*, 105–106.

competitions”. Reference to the “social” function of sport and “openness in sporting competitions” reflects the trajectory of thinking concerning the role of sport in society expressed by the EU institutions described above. It also aligns with some academic thinking that has argued that sport’s relationship with the Treaty should extend beyond the confines of the economic aspects of sport.<sup>90</sup> Article 165 has also acted as the legal basis for the adoption of a number of EU Work Plans on Sport that have continued the theme of connecting sport with EU social goals.<sup>91</sup> The 2017–2020 Work Plan gives priority to “[s]port in society, particularly social inclusion”.<sup>92</sup> *TopFit* absorbs these concerns and in doing so marks the most significant judicial validation of EU sports policy to date.

*TopFit* also adds some clarity on the question of whether Article 165 has horizontal reach into other Treaty provisions. Prior to *TopFit*, this debate had focused on the significance of its reference to the “specific nature of sport”. In other words, does Article 165 require or merely invite the Court and Commission to take account of sport’s specific nature in the exercise of other Treaty functions. The ECJ’s case law did not, until *TopFit*, greatly advance this debate. In its assessment of training compensation schemes in football, the Court, in *Bernard*, found that the existence of Article 165 “corroborated” its finding that the restrictive effects of such schemes can be justified with reference to the proportionate pursuit of legitimate sporting objectives.<sup>93</sup> In *QC Leisure* the Court merely “noted” the existence of Article 165.<sup>94</sup> *TopFit* reveals a more explicit willingness on the part of the Court to read Article 165 horizontally into other Treaty provisions – in this instance Articles 18 and 21,<sup>95</sup> and its existence seems central to why the Court decided to deviate from the orthodoxy of only permitting direct nationality discrimination to be justified with reference to the express Treaty derogations.

90. See e.g. Van den Bogaert, op. cit. *supra* note 4; Study cited *supra* note 2; Parrish, annotation of Case 36/74 *Walrave and Koch*, in Anderson (Ed.), *Landmark Cases and Decisions in Sports Law* (T.M.C. Asser Press, 2012).

91. Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, on a European Union work plan for sport for 2011–2014, O.J. 2011, C 162/01; 2014–2017, O.J. 2014, C 183/03, and 2017–2020, doc. 9639/17.

92. Resolution on a European Union work plan for sport for 2017–2020, cited *supra* note 91, at p. 6.

93. Case C-325/08, *Olympique Lyonnais v. Olivier Bernard, Newcastle United*, EU:C:2010:143, para 40.

94. Joined Cases C-403 & 429/08, *Football Association Premier League Ltd and Others v. QC Leisure* (Case C-403/08) and *Murphy v. Media Protection Services Ltd* (Case C-429/08), EU:C:2011:631, para 101.

95. Judgment, para 34: “It is therefore clear from Article 21(1) TFEU, read in conjunction with Article 165 TFEU”.

#### 5.4. *Crafting a new sporting exception: Justifying nationality discrimination*

Through its interpretation of the words “social function” of sport and “openness” in sporting competitions contained in Article 165, *TopFit* opens a new dimension in EU sports law by connecting amateur sporting practices to the Treaty. The juridification of these practices, whilst very significant and no doubt quite baffling to sports bodies should not, however, be considered a “transformative” development, as it merely represents the next logical stage in the teleology of EU sports law and policy described above.<sup>96</sup> In light of the above legal and policy developments, it should have come as no surprise that this was the direction of travel.

Nevertheless, the reference to the word “openness” in *TopFit* does merit attention. Article 165’s reference to “openness” always posed a potential threat to sports bodies, particularly if, as in *TopFit*, it was interpreted by the Court to require, in principle at least, open access to sports competitions.<sup>97</sup> Genuine open access to sporting competitions would drive a wedge into the European model of sport and its implications are, potentially, far-reaching. For example, within professional sport, one could conceive that “openness” could be cited by professional clubs wanting to relocate across borders without impediment. This could transform the sporting landscape in Europe in a way that the liberalization of the player market did following *Bosman*.<sup>98</sup>

Open access is feared by many, but not all, sports bodies across Europe. The 2010 Commission study on discrimination against non-nationals in individual sports competitions collected evidence from sports bodies as to why restricting the participation of non-nationals is important.<sup>99</sup> These included: the desire of national sports bodies and sponsors to fund national athletes; the need to prepare for national representative events and to identify the best national athletes; the need to nurture and give opportunities to young national athletes; the need to ensure integrity, fairness and competitive balance in sport; the need to preserve the national character of national championships; the desire of the public to identify with national athletes and stay engaged in the sport; the need to avoid a situation in which one nationality dominates

96. Commenting on Art. 165 TFEU prior to *TopFit*, Weatherill argued that the effect of Art. 165 TFEU “should not be regarded as transformative”. See Weatherill, *op. cit. supra* note 4, p. 161.

97. For a discussion see Weatherill, “Fairness, openness and the specific nature of sport: Does the Lisbon Treaty change EU sports law?”, (2010) *International Sports Law Journal*, 11–17.

98. See e.g. Duval and Van Rompuy, *op. cit. supra* note 4.

99. Commission Communication cited *supra* note 2, Ch. 5.

many national championships; and the need to retain media interest in the sport. It should be noted that not all of the above have been accepted, or rejected, by the Court of Justice as amounting to legitimate sporting objectives.

In light of the above, it is to be expected that *TopFit* will raise fears of an organizational revolution in sport; brought about by opening access to sporting competitions and diluting the purity of national competition. However *TopFit* actually dampens such talk, as the Court has acknowledged that notwithstanding the directly discriminatory nature of the rule at issue, sporting justifications, proportionately pursued, can be cited to restrict the participation of non-nationals. Despite damage done to the sporting exception by both *Meca-Medina* (demise of purely sporting rules) and *TopFit* (severing the economic activity nexus), all is not lost for those sports bodies wanting to adopt rules designed to preserve sport's national character.

In *TopFit*, the ECJ, using a similar construction each time, repeated a line of reasoning expressed in its sporting case law to the effect that the provisions of EU law concerning the free movement of persons and services, do not preclude rules or practices justified on (non-economic) grounds which relate to the particular nature and context of certain sports matches, such as matches between national teams from different countries, as long as such a restriction on the scope of the provisions in question remains limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.<sup>100</sup> It is worth observing that in *TopFit* the above bracketed reference to non-economic grounds was removed, reflecting the difficulty in severing economic aspects from sporting considerations in modern commercialized sport. It should also be noted that the reference to "matches between national teams from different countries" is cited as an example, implying that justifications can also relate to other sporting contexts, such as eligibility for national championships.

Sports bodies can also rely on the inherent rules approach. In *Deliège*, the ECJ took a different path from that outlined above, by finding that selection rules do not constitute a restriction on the freedom to provide services on the grounds that they were inherent in the conduct of an international high-level sports event.<sup>101</sup> The inherent rules logic, which was subsequently repeated in *Meca-Medina*, can reasonably be used in a non-economic context and whilst neither case concerned nationality discrimination, it must remain a possibility that in future, sporting rules and practices based on direct nationality

100. See Case C-415/93, *Bosman*, paras. 76 and 127; Joined Cases C-51/96 & 191/97, *Deliège*, para 43; Case C-519/04, *Meca-Medina*, para 26 and judgment, para 49.

101. Joined Cases C-51/96 & 191/97, *Deliège*, para 64.

discrimination could find shelter under this doctrine, as recommended by the 2010 Commission funded study.<sup>102</sup>

Elsewhere, the Court has adopted a more standard restriction/objective justification test when reviewing international transfer regulations governing the payment of transfer fees, the use of transfer windows, and the operation of training compensation schemes in sport; all of which, once again, did not involve allegations of direct nationality discrimination.<sup>103</sup>

An orthodox approach suggests that the type of direct nationality discrimination experienced by Mr Biffi can only be justified with reference to the express Treaty derogations of public policy, public security and public health.<sup>104</sup> But *TopFit* confirmed that sport has carved out of this orthodoxy a more generous justificatory regime in which sporting justifications for directly discriminatory measures, unrelated to the express Treaty derogations, can be relied on. Apart from *Walrave and Koch*, the only other example of the Court considering direct nationality discrimination in the sporting context came with its examination of the “3+2 rule” in *Bosman*. But here, the Court declined to classify the rule as directly discriminatory and rather referred to the system as giving rise to an obstacle to free movement which could, in theory, be justified. The grounds for such justification were then dismissed, but were at least aired.<sup>105</sup>

In Mr Biffi’s case, the Court identified differential treatment “on account of his nationality”<sup>106</sup> implying an analysis based on direct nationality discrimination. But the Court went on to examine traditional sporting justifications and not those expressly cited in the Treaty. In doing so, the Court stated that “as has been held with regard to the composition of national teams, 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

102. Commission Communication cited *supra* note 2, Ch. 6.

103. Case C-415/93, *Bosman*; Case C-176/96, *Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball (FRBSB)*, EU:C:2000:201, and Case C-325/08, *Olympique Lyonnais*. For general authority on this standard test, see Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

104. Art. 45(3) TFEU. Barnard refers to this “orthodoxy” although she does acknowledge that “there have been signs that the Court is contemplating a move towards allowing distinctly applicable measures to be justified not only by the express derogations but also by the judicially developed ‘public-interest requirements’”. See Barnard, *op. cit. supra* note 47, p. 218.

105. Although it is conceivable that the Court did not concern itself with the legal concept of nationality, but with that of sporting nationality. If true, sporting nationality clauses could indeed be considered indirectly discriminatory and subject to the orthodox justificatory regime. See Weatherill, *op. cit. supra* note 4, p. 193 and Van den Bogaert, *op. cit. supra* note 4, p. 155.

106. Judgment, para 43.

national champion itself”.<sup>107</sup> It went on to offer some justificatory guidance to sports bodies by acknowledging that in sports with eliminatory heats, such as athletics, the presence of non-nationals is capable of preventing a national from winning the championship and of hindering the designation of the best nationals.<sup>108</sup>

*TopFit* therefore represents an opportunity for sports bodies to craft a new sporting exception based on the overriding requirement in the general interest to preserve the national character, identity, purity, public confidence in and cultural significance of national sporting competitions. These, and related justifications, fall outside the express Treaty derogations and thus offer sports bodies greater opportunities to justify rules and practices that discriminate directly on the grounds of nationality, subject of course to proportionality review. In that regard, the existence of legitimate sporting objectives will not necessarily be sufficient to justify a complete ban on the participation of non-nationals. In crafting this new sporting exception, sports bodies are advised to apply them consistently, proportionately and to connect these objective justifications to Article 165 TFEU which can act as the source of a Treaty-based derogation from the orthodox approach.<sup>109</sup>

This analysis might embolden some sports administrators to devise new rules, or rethink old ones, motivated by a desire to exclude foreigners from some sporting competitions. For example, in 2008 FIFA recommended, but then withdrew, a proposal to introduce a “6+5 rule” in football in which six players in a team had to be eligible to represent the national team of the association in which the club was located. The challenge of connecting justifications to the orthodox express Treaty derogations no doubt influenced FIFA’s decision to withdraw it. UEFA, by contrast, crafted an alternative measure – the Locally Trained Players rule – that scrupulously avoided reference to direct nationality discrimination within the eligibility criteria, thereby opening up potential justifications outside the confines of the Treaty derogations, should a challenge be brought on the basis of indirect nationality discrimination.<sup>110</sup>

107. *Ibid.*, para 50.

108. *Ibid.*, para 61.

109. An important question is to what extent private actors, such as sports governing bodies, can invoke general interest objectives, such as protecting consumer interests, the environment or preventing social dumping, to justify their measures. See e.g. Case C-438/05, *Viking Line* and Case C-171/11, *Fra.bo SpA*. This is a difficult question not clearly answered in ECJ case law. On the one hand, private actions should be motivated by private interests – it is not the role of private actors to set public interest. On the other hand, limiting the aims that private actors can invoke to justify their measures would mean that their obligations under Union law are effectively greater than the Member States’ – even though the former are its creators and main subjects.

110. Downward et al., “An assessment of the compatibility of UEFA’s home-grown player rule with Article 45 TFEU”, (2014) *EL Rev.*, 493–510.

## 6. Conclusion

In *TopFit*, the ECJ took the “significant constitutional step” of making private actors subject to the obligations that come with Union citizenship,<sup>111</sup> uncoupling horizontal direct effect of the Treaty from the economic activity paradigm of the internal market that has governed it since the start.<sup>112</sup> Once again, sport has served as a vehicle for the development of the scope of Union law. At the same time, *TopFit* can comfortably sit alongside *Walrave and Koch*, *Bosman* and *Meca-Medina* as a key case in EU sports law. It further challenges the “cardinal rule” enshrined in *Walrave and Koch* and subsequent sports-related case law, it gives judicial validation to the trajectory of EU sports policy, it advances our understanding of the horizontal reach of Article 165 into other Treaty competences, and it opens up new judicial opportunities for sports bodies to seek to justify directly discriminatory rules and practices.

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111. Opinion, para 56.

112. Case C-36/74, *Walrave and Koch*, para 8.

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