

SPORTS LAW, SPORTS POLICY AND THE AMATEUR ATHLETE.

REFLECTIONS ON *TOPFIT AND BIFFI v. DEUTSCHER*

LEICHTATHLETIKVERBAND

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Abstract

There have been a number of significant papers on the European Court of Justice's 2019 decision in *TopFit v DLV*, a preliminary reference which concerns direct nationality discrimination against an amateur athlete. This paper contributes to that knowledge-base by drawing on those contributions but also by setting the case in its historical context to show how it aligns with forty years' worth of developments in both sports law and sports policy.

Furthermore, *TopFit* illustrates that the potential ramifications of the EU's sports competence as laid down in Article 165 TFEU might be greater than they first appear. Contrary to the Advocate General's Opinion, the Court held that direct nationality discrimination laws were applicable to amateur sporting activities – there was no need to establish the existence of economic activity which, fortuitously, Biffi possessed. It thus needs to be considered alongside the wider caselaw on EU citizenship, and the case is not a matter of 'purely sporting interest.'

But nationality restrictions can still be legitimate if they are deemed to be a proportionate response to a legitimate sporting concern. In any other cultural sphere, the idea that one's desire to take part in an amateur event might be lawfully ended by 'proportionate' discrimination would seem ludicrous. The paper argues that sport's privileged position within the European Union is a reflection of its ability to leverage its financial muscle and ubiquity, and its concomitant ability to influence policymakers; it does not possess any 'inherent' qualities that make it 'special' in comparison to other cultural fields.

Keywords: Sports law, sports policy, participation, amateur sport, economic activity.

1. INTRODUCTION

This paper explores the link between EU sports policy and the Court's ruling in *TopFit and Biffi v Deutscher Leichtathletikverband*¹ (hereafter *TopFit*). Here, the Court had a first opportunity to consider the implications of Article 165 TFEU for an amateur athlete who argued that restrictions on his ability to compete amounted to discrimination on grounds of nationality. The paper makes the link between the policy, the Treaty provision and the case, showing how the problematic (bordering on fallacious) assertions about sport's social utility in the 1985 Adonnino Report informed the EU's nascent sports policy and contributed to its later development. The policy processes that culminated in Article 165 TFEU, and how that

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¹ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497.

provision informed the Court's reasoning in the case, are also discussed. The contrasts between the ruling and the Advocate General's Opinion, particularly with regard to Biffi's economic activities, are highlighted and explained.

2. THE DEVELOPMENT OF AN EU SPORTS POLICY

The Adonnino Report represented the EEC's first formal engagement with sporting activity, and it was its first attempt to overtly leverage sport to serve policy aims.² At the 1984 European Council meeting, the member states had resolved to strengthen the identity and image of the Community both for its citizens and to the wider world. A committee chaired by Italian MEP Pietro Adonnino was asked to submit proposals for discussion at the 1985 Heads of State meeting. With that in mind, the committee sought to "encourage (...) sporting activities within the Community and the use of Community emblems in such events"³ in the context of promoting mobility, especially among young people. The Report proposed the creation of Community teams, suggesting the European Council organise events in collaboration with sports associations, "invit(e) sports teams to wear the Community emblem in addition to their national colours" and promote the exchange of players and coaches.⁴

These suggestions were made at a time when the idea of the free movement of sport-sector workers was almost as novel as the idea of a 'team Europe' emerging in sports other than men's golf⁵ or the wearing of a Community emblem. But all of this is troubling. Adonnino had confidently asserted that "since ancient times sport has been an important forum for communication among peoples" and noted that it was still an important part of many people's lives. However, it also noted that "it is all the more regrettable that the enjoyment of international competitive sport has been drastically marred recently by hooliganism" and alluded to the "recent tragic events (which) demonstrated that a much closer co-operation between the authorities and the sports organisations is indispensable in order to prevent and stamp out hooliganism."⁶

The Report was released at the end of June 1985. The 'recent tragic event' to which it alluded had occurred just six weeks earlier. Fifty-six people had died at a fire in an antiquated football ground in Bradford, England where 30 years' worth of flammable rubbish had built up under a wooden stand in which people were allowed to smoke and where the exit gates were jammed shut so that people could not get in without paying. Four weeks before publication, 39 Italian football fans were killed at the Heysel stadium in Belgium after a toxic juxtaposition of fan violence and crumbling infrastructure resulted in a wall collapsing. Four years later, an almost unbelievable combination of inept policing, stadium mismanagement, a collective failure to learn anything from Bradford and Heysel and unparalleled stupidity and complacency on the part of the police, football's authorities and the UK government caused further tragedy - the Hillsborough disaster which claimed 97 lives. After publication, police-on-fan and fan-on-fan football violence continued to be routine in many member states, and not just at international games as Adonnino had indicated. Then as now, men's sports were routinely played against a

² European Parliament (1985) *The (Adonnino) Report from the Ad Hoc Committee on a People's Europe*, <https://ec.europa.eu/dorie/fileDownload.do;jsessionid=jg62PJXBhnmZGRLcpQX3zDz1vHwp9n0zyR63mC2qCyvK1BG51C!-572674064?docId=186651&cardId=186651>.

³ Adonnino, para 2.

⁴ Adonnino, para 5.9.1.

⁵ Team Europe first participated in the Ryder Cup in 1985, but its creation was a desperate bid to breathe commercial life into a dying competition; the United States had won every match against Great Britain and Ireland over the previous 28 years.

⁶ Adonnino, para 5.9.

backdrop of sportwashing, violence, racism, homophobia, xenophobia and casual misogyny. Under the ‘European Model,’ women’s sports were usually a niche pursuit that merited neither funding nor attention unless it served the state’s political or social aims.⁷ The idea that either contemporary or ancient sport had ever contributed to feelings of jolly togetherness among the peoples of Europe has never withstood serious scrutiny.

Adonnino’s sports-related suggestions were entirely at odds with the realities of professional sport, but they gained little immediate traction. This was partly because the European Parliament had minimal influence on developing community policies, but after its powers were extended by the 1992 Maastricht Treaty, Parliament published two reports that advocated a more coherent approach to sport and echoed Adonnino. The Larive Report⁸ “clearly link(ed) the active or passive participation in sport with the social and cultural identity of people,” while also noting the significant levels of economic activity associated with it. It recommended that sport should receive greater political attention, in relation to both European integration and the single market.⁹ Shortly after, the Pack Report¹⁰ was concerned that “the EU currently has no overall concept of the action that needs to be taken in the field of sport” even though the sector was potentially relevant to the work of at least 18 Directorates General. The work of a sports unit within DG X (Information, Communication, Culture, Audiovisual Media) in administering a modest annual sports budget and convening an annual forum was recognised, but Pack stressed that either having a Treaty base for sport “as called for by the sports movement” or annexing a new protocol to the Treaty was imperative.¹¹ Sport clearly had allies within the Parliament and, crucially, DG X – but the two Reports also acknowledged a distinction between sport as an economic actor and sports as a cultural phenomenon. Sandwiched between them, the *Bosman*¹² ruling, according to proponents of the European Model, had “undermined the twin pillars supporting the European model, namely sporting autonomy and the specificity of sport. Without the ability, free from judicial oversight, to adopt rules to preserve the European model, international sports federations could not protect the special character of European sport.”¹³ They needed to win friends and influence people.

The 1997 Amsterdam Treaty had included a non-binding declaration which fell short of the Pack Report’s recommendations, but it further emphasised the social significance of sport and “called on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue.”¹⁴ Thereafter, DG X noted the relationship between sport and EU law but also duly acknowledged its unique educational, social, cultural and public

⁷ Gigliola Gori and Guttman Allen, *Italian Fascism and the Female Body: Sport, Submissive Women and Strong Mothers* (London: Routledge, 2004).

⁸ European Parliament (1994), *Report on the European Community and Sport*, Rapporteur: Mrs J. Larive. A4-0197/97.

⁹ Richard Parrish, *Sports Law and Policy in the European Union*, (Manchester: Manchester University Press 2003), 165.

¹⁰ European Parliament (1997) *Report on the Role of the EU in the Field of Sport*, Rapporteur: Mrs Doris Pack. A4-0197/1997.

¹¹ European Parliament (1997), 11.

¹² Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1994:463.

¹³ Andrea Cattaneo and Richard Parrish, *Sports Law in the European Union*, (Alphen aan den Rijn: Kluwer Law International 2020), 17.

¹⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Declaration 29 (OJ C 340, 10.11.1997, p. 136).

health functions.¹⁵ The Helsinki Report on Sport¹⁶ similarly mentioned sport's educational and social functions, noting that over half of European Union citizens "regularly do sport" and that "almost two million teachers, instructors and volunteers spend their working or leisure time organising sporting activities."¹⁷ But some of sport's key contemporary features – the development of its economic dimension, the internationalisation of sport and its growing audiences – were again identified as sources of tension. Those tensions have never been resolved.

One of the first signs of these developments is the overloading of sporting calendars, which, linked to the need to produce results under the pressures of sponsors, may be considered one of the causes of the expansion of doping.

A second consequence is the increase in the number of lucrative sporting events, which may end up promoting the commercial approach to the detriment of sporting principles and the social function of sport.

A third symptom is the temptation for certain sporting operators and certain large clubs to leave the federation in order to derive the maximum benefit from the economic potential of sport for themselves alone. This tendency may jeopardise the principle of financial solidarity between professional and amateur sport and the system of promotion and relegation common to most federations.

Another consequence that has been observed is the hazardous future facing young people who are being led into top-level competitive sport at an increasingly early age, often with no other vocational training, with the resulting risks for their physical and mental health and their subsequent switch to other employment.¹⁸

The Helsinki Report was the first attempt to meaningfully articulate the social, cultural and educational values of sport, and to link them to its economic aspects. It concluded with a plea for a partnership approach in order to reconcile the need to apply EU law to the sports sector with the equally pressing need to respect its unique characteristics.

Insufficient coordination between the protagonists of sport (federations, member states and the European Community), all of them working in isolation, would risk thwarting efforts to achieve these shared principles. However, their convergent efforts... could make an effective contribution to the promotion in Europe of sport that is true to its social role while ensuring that its organisational aspects assimilate the new economic order.¹⁹

Notwithstanding Amsterdam failure to provide a Treaty competence for sport, Parliament and the Commission had at least given guidance on how they expected EU institutions, member states and sporting stakeholders to approach their relationship. That guidance was significantly different from "the single-market regulatory ethos that characterised the *Bosman*

¹⁵ European Commission, Commission Staff Working Paper (1998) *The Development and Prospects for Community Action in the Field of Sport* (Brussels: DG X 1998); *Opinion of the Committee of the Regions on The European Model of Sport* (1999/C 374/14).

¹⁶ Commission of the European Communities, *Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework, The Helsinki Report on Sport*, COM (1999) 644 Final.

¹⁷ Commission of the European Communities (1999), para 1.

¹⁸ Commission of the European Communities (1999), para 2.

¹⁹ Commission of the European Communities (1999), para 5.

environment,”²⁰ and it was further articulated in the European Council’s 2000 Declaration on Sport which noted the Community “must...take account of the social, educational and cultural functions inherent in sport and making it special.”²¹

This was the first time that the concept of ‘inherency’ had been used in the context of sport at the Community level, while the greater social-cultural sensitivity had been apparent both in the Court’s post-*Bosman* judgments and in several Competition Commission decisions. For example, the UEFA rules on multiple ownership of clubs were deemed to be “inherent to the very existence of club competitions”²² and in an unpublished decision on the location of clubs’ grounds it said that the ‘home and away rule’ was indispensable for the organisation of competitions.²³ In both cases, the Commission also decided the restrictive rule in question was proportionate. Through these and other decisions, there developed a competition policy which became “one of the most centralised and powerful EU competences, which is only subject to review by the EU courts.”²⁴ Competition law’s impact on sport has been profound and that impact will continue, not least with the ongoing dispute over a European Super League in football and the challenge in reconciling the European model with the fact that rules or actions which prevent participation in ‘breakaway’ events *prima facie* breach competition law.²⁵ Reconciling sport’s unique features with the principles of economic integration have similarly “had the effect of shifting EU involvement in sport from classic Single Market regulation to a form of regulation that recognises the socio-cultural and integrationist qualities of European sport.”²⁶

But how does all this impact on amateur participation, which was the key issue in *TopFit* and is thus the subject-matter of this paper?

Several introductory points will help set the context. First, Weatherill²⁷ and others have discussed how, in the aftermath of *Bosman*, the Commission and the Court had acknowledged the specific, legitimate factors that render sports which constituted economic activity ‘different,’ but the relevance of those factors to wholly amateur sport was unclear until now. Second, the views of sporting authorities themselves were not uniform, so there was no single policy position that sports actors collectively sought support for. Led by UEFA and FIFA, ‘big’ sport’s immediate response to *Bosman* had been to seek to a blanket exemption from EU law, lobbying for a protocol that would prevent the EU from any involvement, but there was never a ‘sporting exception’ of the kind they lobbied for, and it was never a viable proposition. In contrast, a ‘socio-cultural coalition’ of sporting federations, international confederations, National Olympic Committees, grassroots and amateur sport stakeholders wanted to limit EU regulatory involvement in order to safeguard those socio-cultural elements. Third, public service broadcasters had sought to protect their market share in the face of competition from satellite and pay-per-view channels who could use sport as a battering-ram into people’s homes and receive both advertising and subscription revenue in return, but by definition that had been of little direct relevance to amateur sports. Fourth, after *TopFit* amateur sport has now been

²⁰ Richard Parrish, “Sports Regulation in the European Union: A New Approach?”, *Managing Leisure* 6 (2001): 194.

²¹ European Council (2000) *Conclusions of the Presidency*: Annex IV, https://www.europarl.europa.eu/summits/nice2_en.htm#an4.

²² European Commission Decision of 27 June 2002, Comp/IV/37.806 (*ENIC/UEFA*).

²³ European Commission Decision of 3 December 1999, Comp/E3/36.85 (*Lille/UEFA*).

²⁴ Borja Garcia and Meier, Henk-Erik, “Limits of Interest Empowerment in the European Union: The Case of Football”, *European Integration* 34, no. 4(2012): 362.

²⁵ Case C-333/21 *European Superleague Company* application for a preliminary ruling 3 September 2021.

²⁶ Parrish, “Sports Regulation in the European Union: A New Approach?”, 188.

²⁷ Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford: Oxford University Press, 2001).

addressed from “the perspective of the emergence of a pluralist, cohesive and multicultural European society which represents the ideal context and the national evolution of Union citizenship.”²⁸ Finally, the case is an example of the Court’s developing “an EU administrative law shield against arbitrary national decision-making...prior authorisation schemes – when they can potentially restrict EU free movement – must be based on accessible, objective and non-discriminatory criteria which are known in advance and decisions to refuse authorisation must be reasoned, taken in a timely manner, and subject to effective judicial review.”²⁹ While the educational, cultural and social significance of sport have been widely, if problematically, acknowledged, and while sport has played a superb hand in cajoling the EU towards its way of thinking,³⁰ the first three points illustrate why *TopFit* is significant for sports, while the last two are crucial to a proper understanding of its wider implications.

3. ARTICLE 165 TFEU

As noted, the Court and the EU institutions had acknowledged that their approach to sport had to be sensitive to its particular features, but federations and other stakeholders remained critical of what they perceived as a continuing restrictive approach towards the specificity of sport. Crucially, however, those stakeholders had also realised that engaging with the EU was a far better strategy than outright hostility. This had especially been the case after *Meca-Medina*,³¹ where the Court’s support for anti-doping rules had helped persuade the sports world that its practices and interests were not inevitably incompatible with the Treaties, that the Court was not ‘anti-sport’ and that “cooperation was the most promising way to promote awareness of sporting exceptionalism.”³² These strategies of negotiation and lobbying finally culminated in the adoption of a new, albeit limited, sporting competence in Article 165 TFEU.

In 2010, Weatherill³³ had suggested that the impact of Art 165 would be both profound and trivial. The triviality arose from the cautious approach of the member states, whose reluctance to confer new powers on the EU meant that Article 165 TFEU did not take EU law beyond the degree of regulation and control over sport which the institutions were already exercising in practice. Its profundity, he suggested, lay in the simple fact that it provided the Treaty base that key actors in the EU and beyond had long sought. And as Celik wrote a decade later, “the official involvement of the EU institutions provided the possibility (of) finding an appropriate balance between the wishes of the sporting world and the requirements of EU law; the institutions could support, co-ordinate or compliment sports’ actions” while acknowledging the primary role of the sporting organisations.³⁴

Understanding the implications of Article 165 TFEU, especially for amateur athletes like Biffi, requires an understanding of the three types of competence the EU has. First, Art 2 TFEU states that the EU enjoys either exclusive competence, shared competence or supporting competence.

²⁸ Antonio Di Marco, “Amateur Sport and Union Citizenship in the *Biffi* Case: Towards a European Sporting Citizenship”, *Maastricht Journal of European and Comparative Law* 27, no. 5(2020): 600.

²⁹ Angelica Ericsson, “EU Law and the Discretion of Private National Decision-Makers in Light of the Court’s Judgment in Case C-22/18 *TopFit and Biffi*”, *Nordic Journal of European Law* 3, no. 2 (2020): 83.

³⁰ Borja Garcia and Stephen Weatherill, “Engaging with the EU in Order to Minimise Its Impact: Sport and the Negotiation of the Treaty of Lisbon”, *Journal of European Public Policy* 19, no. 2 (2012): 238-256.

³¹ Judgment of 30 September 2004, *Meca-Medina*, T-312/02, EU:T:2004:282.

³² Berna Celik, “*The Impact of the EU on the European Model of Sport*” (PhD diss., Edge Hill University, 2021), 92.

³³ Stephen Weatherill, “Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?”, *International Sports Law Journal* no. 3-4 (2010): 11.

³⁴ Celik “*The Impact of the EU on the European Model of Sport*”, 107.

Under Article 3 TFEU, only the EU can legislate and adopt legally binding measures in relation to monetary policy, competition rules, the customs union, the protection of marine resources and commercial policies. The member states may do so only if empowered by the EU. Shared competence under Art 4 TFEU enables the member states to exercise their competence where the Union has not done so, or decides not to do so, in respect of the areas covered under that Article. It applies to at least a dozen important areas including agriculture, energy, the environment and consumer protection. Finally, under Article 6, the EU can only intervene to support, coordinate or complement the actions of member states. It does not supersede their competence in the stated areas. Those stated areas include culture, tourism and education as well as sport. This supporting competence means the EU cannot pass legally binding measures which entail the harmonisation of member states' laws or regulations; it is the 'softest' of the three competencies available, and it is immediately apparent that Art 165 TFEU does not provide a 'sporting exception' to European law. It recognises that there are specific aspects of sport which need to be recognised and taken into account in reaching decisions which impact upon it, but 'taking into account' does not mean that sports' interest take precedence if there is a conflict with legal norms. In fact, every relevant Court and Commission decision since *Walrave*³⁵ has taken sport's particular features 'into account.'

Writing shortly after the TFEU came into force, Downward et al pointed out that "tak(ing) account of the specific nature of sport ... did not unequivocally establish this provision as a horizontal obligation which applies to the exercise of other EU powers such as free movement and competition law."³⁶ 'Taking account' contrasts with, for example, "in all its activities the EU shall aim to eliminate inequalities" as used in TFEU Art 8 (on equality between men and women), and "must be integrated into...the Union's policies and activities" as per TFEU Article 11 (on environmental protection). Those provisions "mandate the EU institutions to respect these obligations in the exercise of other Treaty competences" and they have a horizontal obligation that Article 165 TFEU lacks. Those phrases "mandate the EU institutions to respect these obligations in the exercise of other Treaty competences. By contrast, reference to the need to protect 'the specific nature of sport' appears to only bind those actions which are connected to 'the promotion of European sporting issues.'"³⁷

That absence of horizontal obligation, together with the EU having a supporting competence rather than a shared or exclusive one seemingly acts as a very strong limit on the potential of Article 165 TFEU. It does not have an internal market aim or objective, there is no economic or social right (although the 'social function' of sport is expressly acknowledged) and Art 165(4) expressly excludes any potential for the EU to adopt harmonising legislation. As Di Marco notes, "the inclusion of a specific sporting competence in the Lisbon Treaty, with its weak legislative remit and reference to 'the specificity of sport' should not be a genuine extension of EU competence."³⁸ So far as the Court has been concerned, in *Olympique Lyonnais*³⁹ it merely said Article 165 TFEU corroborated its views on justifications for restrictive practices while in *Murphy*⁴⁰ its existence was simply 'noted.' But in *TopFit* the Court's approach was far more robust, representing "an evolving importance attached to sport,

³⁵ Judgment of 12 December 1974, *Walrave*, C-36/74, EU:C:1874:140.

³⁶ Paul Downward, Richard Parrish, Geoff Pearson and Anna Semens, "An Assessment of the Compatibility of UEFA's Homegrown Player Rule with Article 45 TFEU", *European Law Review* 35, no. 4 (2014): 500.

³⁷ Richard Parrish, "Lex Sportiva and EU Sports Law", *European Law Review* 37, no. 6 (2012): 727.

³⁸ Di Marco, "Amateur Sport", 607.

³⁹ Judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143.

⁴⁰ Judgment of 4 October 2011, *FA Premier League Ltd*, C-403/08 and C-429/08, EU:C:2011:631.

and in particular on the basis of ‘the constitutional objective of integration’ of EU citizens in the host Member State.”⁴¹

4. *TOPFIT* and ARTICLE 165 TFEU

TopFit illustrates, and helps resolve, the tension between EU citizens’ free movement rights and the European Model of Sport. At issue was the free movement rights of wholly amateur athletes, and the judgment considered whether EU citizenship rights have horizontal direct effect so that they be relied upon in respect of private actors such as sports governing bodies. If they could, the question which then arose was “to what extent can direct discrimination on the grounds of nationality be justified considering conditions particular to the area of sport?”⁴²

In *TopFit*, a German amateur sports club and an Italian national residing in Germany challenged a recently-changed rule of the federal umbrella organisation for amateur sports. The rule stopped non-German nationals participating in German athletics championships on equal terms. Biffi, a sprinter, could seek permission to participate before the registration deadline expired, but even if permission were granted he would only be able to participate in the heats and not progress to the final. The Deutscher Leichtathletik-Verband (DLV) justified the rule change on the ground that only athletes of German nationality should be crowned the German champion, the rationale being that “the German champion should be somebody who is also entitled to start for ‘GER’ (Germany)”⁴³ in international events. The athlete and his club challenged the legality of the rule before the German court. Although an amateur athlete, Biffi used his success in competitions to promote his business as an athletics coach and personal trainer, so to that extent there was ‘economic activity’ in what he did.

The German court sought a preliminary ruling on whether the nationality requirement constituted unlawful discrimination. The DLV said that as an amateur athlete he was not engaging in an economic activity, so EU law did not apply, while the referring court was unsure whether the application of EU law to sport required there to be economic activity at all. But the referring court noted that Art 165 TFEU meant that EU law did now explicitly refer to sport, and that the right to reside in other member states without discrimination under Articles 18, 20 and 21 TFEU was not dependent on there being economic activity in other contexts. It therefore felt that Biffi should be eligible, and while exceptions could apply in the case of national titles and championships those exceptions should be proportionate and “not go beyond what is absolutely necessary to guarantee sporting competition.”⁴⁴ The referring court asked if Articles 18, 21 and 165 TFEU meant that a provision which made participation by an amateur athlete dependent on German nationality, or which stopped a non-national from taking part in the final or excluded him from the award of national titles was impermissible discrimination

Significantly, the Advocate General advised against “expanding the material scope of EU law,”⁴⁵ which would arise if Article 21 TFEU were given horizontal direct effect. Instead, the solution was to be found in the link between Biffi’s participation and his work as an athletics trainer. This amounted to economic activity and, discussing *Deliege*⁴⁶ at length, the Advocate

⁴¹ Di Marco, “Amateur Sport”, 609.

⁴² Richard Parrish and Johan Lindholm, “Horizontal Direct Effect of Union Citizenship and the Evolving Sporting Exception: *TopFit*”, *Common Market Law Review* 57, no. 4 (2020): 1284.

⁴³ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 18

⁴⁴ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 20.

⁴⁵ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 51.

⁴⁶ Judgment of 11 April 2000, *Deliege*, C-51/96 and C-191/9, EU:C:2000:199.

General said this meant Biffi was not an amateur sportsman.⁴⁷ His economic activity was not marginal and ancillary⁴⁸ and the DLV rules made the provision of his services less attractive in comparison with a German national who was running a similar business.⁴⁹ The Advocate General suggested that “although the referring court has apprehended the dispute here as one primarily concerned with...Article 21 TFEU...what is in issue is (a) restriction, founded on the basis of nationality, of...freedom of establishment under Article 49 TFEU.”⁵⁰

While recognising that rules restricting the title of national champion and the awarding of podium places “are best qualified as a rule of purely sporting interest, falling outside of the EU Treaty” the sporting exception to the rules on nationality discrimination in team composition “is subject to compliance with the principle of proportionality.” On that issue, the Advocate General felt that “perceived public confidence” being maintained by “ensuring that the national champion has a sufficiently strong link with Germany, and the need not to disturb or distort the process of selecting athletes to represent Germany at the international level” were legitimate public policy objectives, but the strategies for achieving them which were disproportionate.⁵¹ The DLV had made no transitional provision for citizens like Biffi and its directly discriminatory rules had not existed when he exercised his free movement rights and become established in a different member state. Consequently, he had lost rights that he had previously enjoyed. “It would be contrary to the underlying logic of gradual integration that ‘informs’ Article 21(1) TFEU for EU citizens to lose rights they have acquired as a result of having exercised their freedom of movement.”⁵² Germany’s selection processes for over-35 athletes like Biffi had functioned for over 30 years without such rules existing,⁵³ and the arguments as to why different rules could not exist for different categories were “unpersuasive.”⁵⁴ However, while all these matters would have to be carefully assessed by the referring court he did agree with the DLV that “the aims pursued by (it) equate to an overriding ground of public interest.”⁵⁵

The Advocate General’s approach “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.”⁵⁶ If the Court rejected that approach, he said, then there would be no applicable provision of EU law: expanding the case law so that Article 21 TFEU applied also to the horizontal relationship between two private parties would be “a significant constitutional step,” but in any event the open-ended nature of Article 21 rights “rendered them ill-adapted to direct horizontal application to disputes between private parties.”⁵⁷ He also said that the principle of non-discrimination on the basis of nationality under Article 18 TFEU “is given specific expression with effect to freedom of establishment by Article 49 TFEU,”⁵⁸ and that Article 49 TFEU does not only apply to the actions of public authorities “but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.”⁵⁹ The only alternative to providing a remedy under Article 49 TFEU would be to implement specific measures under Article 165 TFEU, but

⁴⁷ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 51.

⁴⁸ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 52.

⁴⁹ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 62.

⁵⁰ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 48.

⁵¹ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 76-78.

⁵² Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 86.

⁵³ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 88.

⁵⁴ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 94.

⁵⁵ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 98.

⁵⁶ Parrish and Lindholm, “Horizontal Direct Effect”, 4.

⁵⁷ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 105.

⁵⁸ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 56.

⁵⁹ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 59.

“none of the precursors to the elaboration of Article 165 TFEU point towards the development of EU law to the point that anti-discrimination protection under Articles 18 and 21 can be extended to leisure sports.”⁶⁰

The Court took a very different approach.

Biffi had resided in Germany for fifteen years and had exercised his free movement rights within the meaning of Article 21 TFEU. Further, it was settled law that “union citizenship is destined to be the fundamental status of nationals of the member states,” so that they enjoy the same treatment in law as the nationals of the member state in question, subject to express exceptions,⁶¹ while Article 18 TFEU established the principle of non-discrimination on grounds of nationality in respect of those who, like Biffi, move between member states.⁶² The Court had previously held that access to leisure activities is “a corollary to freedom of movement”⁶³ because the opportunity to engage in such activities promoted the EU citizen’s gradual integration in the host state. The role of Article 165 TFEU is that it “reflects the considerable social importance of sport...in particular amateur sport”⁶⁴ as highlighted in the Treaty of Amsterdam and explored in *Bosman*⁶⁵ and *Lehtonen*.⁶⁶ Biffi could thus rely on Articles 18 and 21 to pursue his involvement in competitive amateur sport, but nevertheless “the question (then) arises whether the rules of national sports associations are subject to the rules of the Treaty in the same way as they are subject to the rules of the state of origin.”⁶⁷

In that respect, the General Court pointed out that in *Walrave*,⁶⁸ *Bosman*⁶⁹ and *Olympique Lyonnais*⁷⁰ sporting rules which discriminated on the basis of nationality were also prohibited under the Treaties because although they “were not public in nature (they) are aimed at regulating gainful employment and the provision of services in a collective manner.”⁷¹ The abolition between member states on obstacles to the free movement of persons and the free movement of services applies equally in cases where a group or organisation imposes “conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty,” the rules of sports organisations were thus subject to Articles 18 and 21 TFEU “and it is appropriate to examine whether (the DLVs) rules comply with those Articles”.⁷²

Biffi and TopFit argued that amateur athletes who were nationals of other member states might be less well supported by their clubs if there was no prospect of them competing in national championships. This made it more challenging for them to integrate themselves into the club and, consequently, the wider society. The Court agreed with this argument, advising that amateur sport would be less attractive for EU citizens and the rules thus constituted a restriction on the freedom of movement under Article 21 TFEU. They could only be justified if they were

⁶⁰ Opinion of 7 March 2019, *TopFit*, C-22/18, EU:C:2019:181, para 108.

⁶¹ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 28. See also Judgment 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458.

⁶² Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 29. See also Judgment 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898.

⁶³ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 31. See also Judgment 7 March 1996, *Commission v France*, C-334/94, EU:C:1996:90.

⁶⁴ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 33.

⁶⁵ Judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463.

⁶⁶ Judgment of 13 April 2000, *Lehtonen*, C-176/96, EU:C:2000:201.

⁶⁷ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 36.

⁶⁸ Judgment of 12 December 1974, *Walrave*, C-36/74, EU:C:1874:140.

⁶⁹ Judgment 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463.

⁷⁰ Judgment of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143.

⁷¹ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 36.

⁷² Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, paras 39-41.

based on objective considerations and were proportionate to a legitimate objective.⁷³ It “appeared to be legitimate to limit the award of the title of national champion to a national of the relevant member state and consider that nationality requirement to be a characteristic of the title of national champion itself,”⁷⁴ and the DLV argued that it was proportionate because success in the elite national amateur championship was used to select German competitors in international events such as the European championships. It was “not possible to distinguish between the age categories and to make rules for senior sport” that diverged from those for youth and elite participants,” it said. It also argued that “the public expects” the national champion to be a national of that state and, contrary to what had been established in *Bosman*, it said that as a sports association it was free to make its own rules.⁷⁵ The General Court said that what ‘the public expects’ does not justify a restriction.

In any event, it became evident during the hearing that any senior-category competitor who reached the qualifying standard could register and participate in international senior championships on their own initiative. They could pay the entrance fee, turn up and run, and did not have to be selected by a national federation in order to do so.⁷⁶ The DLV’s power of selection only applied in the ‘elite’ category, so its argument that it could not have different rules for different groups was unsustainable because those different rules already existed. Further, while the presence of non-nationals in the final might hinder the designation of ‘best national,’ in deciding whether the ban on their participation was a proportionate way of establishing who was, it would be necessary for the referring court to take into account that the ban was a very recent introduction.⁷⁷ Taking all those factors into account, Articles 18, 21 and 165 TFEU had to be interpreted as precluding the rules in question unless those rules could be justified by objective considerations which were proportionate to the legitimate objective pursued. That was ultimately a matter for the referring court,⁷⁸ but Articles 18 (prohibition of discrimination on grounds of nationality and Article 21 (free movement of EU citizens) did not rely on the presence of economic activity.

5. CONCLUSION

Bearing the Advocate General’s approach in mind, it is notable the Court explored Article 165 TFEU by “deviat(ing) from the orthodoxy of only permitting direct nationality discrimination to be justified with reference to the express Treaty derogations.”⁷⁹

Article 165 TFEU reflects the considerable social importance of sport in the European Union, in particular amateur sport...and the role of sport as a factor for integration in the society of the host Member State.

It is therefore clear from Article 21(1) TFEU, read in conjunction with article 165 TFEU, that practising an amateur sport, in particular as part of a sports club, allows an EU citizen residing in a Member State other than the Member State of which he

⁷³ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 48. See judgment 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, para 31.

⁷⁴ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 50.

⁷⁵ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 51. Sports’ supposed freedom to make their own rules in violation of the Treaties had been laid to rest in judgment 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, para 81.

⁷⁶ The Rules for the European Senior Masters Championships confirm this: <https://european-masters-athletics.org/lawsarules.html>, last accessed 22 March 2022.

⁷⁷ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 62

⁷⁸ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, para 67.

⁷⁹ Parrish and Lindholm, “Horizontal Direct Effect”, 16.

is a national to create bonds with the society of the State to which he has moved and in which he is residing or to consolidate them. That is also the case with regard to participation in sporting competitions at all levels.

It follows that an EU citizen, such as Mr Biffi, can legitimately rely on Articles 18 and 21 TFEU in connection with his practice of a competitive amateur sport in the society of the host Member State.

Nevertheless, the question arises whether the rules of national sports associations are subject to the rules of the Treaty in the same way as they are subject to the rules of the State of origin.⁸⁰

Lindholm and Parrish argue that *TopFit* “opens a new dimension in EU sports law by connecting amateur sporting practices to the Treaty.”⁸¹ Di Marco similarly asserts that “the non-discriminatory access to sporting activities, and in particular to amateur activities, could be interpreted as a ‘corollary’ to freedom of movement of EU citizens and to the fundamental objective of their integration, as leisure activities are a corollary to freedom of movement of the ‘market citizen.’”⁸² Ericsson persuasively argues that the case “combines the case-law concerning the right of EU citizens not just to move freely but to integrate -effectively and without disproportionate sanctions – in the member state they happen to settle down in, with a case-law on horizontal direct effect of the free movement provisions connected to economic activity, and hitherto only applied to private employers or organisations that would regulate access to the economic activity.”⁸³

But its significance should not be over-stated. Restricting the participation of non-nationals, if proportionate, can still justify directly discriminatory nationality restrictions in sports and “all is not lost for those sports bodies wanting to preserve sport’s national character.”⁸⁴ Furthermore

Sports bodies can also rely on the inherent rules approach. In *Deliege* the ECJ took a different path from (*TopFit*) by finding that selection rules do not constitute a restriction on the freedom to provide services on the ground that they were inherent in the conduct of an international high-level sports event. The inherent rules logic, which was subsequently repeated in *Meca-Medina*, can reasonably be used in a non-economic context and while neither case concerned nationality discrimination, it must remain a possibility that in future, sporting rules and practices based on direct nationality discrimination could find shelter under this doctrine.⁸⁵

But if Biffi had played in a pipe band, or sung in a church choir, the idea that his aspirations to compete in international events might be thwarted by direct nationality discrimination which is deemed ‘proportionate’ because it served some higher agenda would appear ludicrous. That such an outcome was even possible was a consequence of *Bosman*, but sport’s social, cultural and educational functions are no more worthwhile, and in some ways are far more problematic, than other cultural forms. The idea that sport is ‘special’ has characterised the EU’s engagement with it since *Dona*, *Walrave* and the Adonnino Report. Its social, cultural and educational functions and potential are no more significant than music, theatre, or dance, but it has carved out a unique position as an economic, social and cultural field.

⁸⁰ Judgment of 13 June 2019, *TopFit*, C-22/18, EU:C:2019:497, paras 33-36.

⁸¹ Parrish and Lindholm, “Horizontal Direct Effect”, 17.

⁸² Di Marco, “Amateur Sport”, 611.

⁸³ Ericsson, “EU Law”, 94.

⁸⁴ Parrish and Lindholm, “Horizontal Direct Effect”, 18.

⁸⁵ Parrish and Lindholm, “Horizontal Direct Effect”, 19.

In 1958, Raymond Williams famously asserted that ‘culture is ordinary.’⁸⁶ That was true at the time, but for all its ordinariness, contemporary sport is distinct from those other cultural forms partly by the negative qualities alluded to above but also by the adoration it attracts from policy makers and politicians, its popular and populist appeal, and the revenue it generates. That is what makes it extraordinary. Perhaps most importantly of all, the cultural field of sports has been able to coalesce around policy positions and to successfully influence law and policy makers without ever reconciling those tensions between economic activity and recreational (broadly defined) participation. Sport’s anomalous position has less to do with any inherent qualities than with that ability to leverage both its financial might its undoubted socio-cultural significance. This gave it considerable influence over, first, the development of an EU sports policy and, second, over policy implementation.

Neither the policy nor the judgment in *TopFit* are a cause for regret. Biffi’s ability to participate fully should not have depended on the fortuitous fact of his work as a personal trainer as opposed to a piano teacher or a yoga instructor (although the latter might have given rise to some interesting conversations about whether yoga is a sport) and the Court’s departing from the Advocate General in that regard is to be welcomed. The full ramifications of Article 165 TFEU are not fully understood yet, but the judgment indicates that it does not merely give legislative effect to the longstanding approaches of the Court and the Commission, and perhaps those who argue that it represents “another seismic ECJ ruling on sport”⁸⁷ will be proved right in time. That aside, the case impliedly articulates the processes through which sport and the law have influenced one another. The extraordinary ability of powerful interest groups to rewrite history, and to exploit sports for economic and political ends, is what makes it ‘special.’ For this author at least, *TopFit* epitomises the combination of factors which makes the discipline problematic, exasperating and rewarding.

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⁸⁶ Raymond Williams, “Culture is Ordinary.” In Norman Mackenzie, Ed, *Conviction* (London: MacGibbon and Kee, 1958): 74-92.

⁸⁷ Di Marco, “Amateur Sport”, 613.

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