Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 7 March 2019[1]

Case C-22/18

TopFit e.V.
Daniele Biffi
v
Deutscher Leichtathletikverband e.V.

(Request for a preliminary ruling from the Amtsgericht Darmstadt (Local Court, Darmstadt, Germany))

(Freedom of establishment — Citizenship — Articles 18, 21, 49 and 165 TFEU — Discrimination on the basis of nationality — Rule withdrawing from an EU citizen established in a host Member State the right to compete in national amateur athletics championships in the age group of over 35 years on an equal footing with nationals of that Member State — Facility for participation 'without classification' precluding placement ranking of non-nationals and across all age categories — Absence of a transitional period for EU citizens established in that Member State at the time of rule change — Horizontal effect of freedom of establishment — Restriction — Justification — Proportionality)

1. Mr Daniele Biffi, an Italian national and the second applicant in the main proceedings, has been resident in Germany since 2003. There he runs a business in which he provides services as an athletics coach and personal trainer, and it was mentioned at the hearing that he has his own website advertising these services.[2] Mr Biffi is heavily involved in competitive athletics as an amateur in the age group of over 35 years. He is settled in Germany with his family.

2. In 2012 Mr Biffi renounced his right to compete within the auspices of the Italian federation of amateur athletics. From at least then until 2016, as an Italian national resident in Germany and affiliated for more than a year with an athletics club in Berlin, namely TopFit e.V. (the first applicant in the main proceedings, 'TopFit'), Mr Biffi was able to compete for the title of 'national champion' within his age category, and had his placings otherwise recorded. His various successes, in terms of securing titles and placements, appear on his website.[3]

3. However, in 2016, the Deutscher Leichtathletikverband e.V. (the German Athletics Association, 'the DLV'), the defendant in the main proceedings and an association established under private law, altered its rules. Thereby it limited the right to compete for the title of 'national champion' across all age categories to German nationals. Under the new rule, athletes in the position of Mr Biffi can participate in the national champions, but only 'without classification'. This precludes the awarding either of a place in individual races to such participants (for example first, second, or third) or the title of 'national champion'. It does not preclude, however, participation in other competitions run by the DLV, such as those that take place at regional level.

1 Original language: English.

2 http://www.corso-mental-coaching.it/team_item/daniele-biffi/.

3 Ibid.

4. TopFit and Mr Biffi challenged this new rule before the Amtsgericht Darmstadt (Local Court, Darmstadt) ('the referring court'), which has sent three questions to the Court by way of reference for a preliminary ruling. These concern the prohibition on discrimination on the basis of nationality (Article 18 TFEU), the right of EU citizens to 'move and reside freely within the territory of the Member States' (Article 21(1) TFEU), and the obligation on the EU to 'contribute to the promotion of European sporting issues' (Article 165(1), second paragraph, TFEU), and to take action aimed at developing the European dimension of sport (Article 165(2) TFEU).

5. I have come to the conclusion that, principally due to the absence of a transitional rule to account for the established rights of EU citizens like Mr Biffi, who have already acquired the right to compete on an equal footing with nationals of their host Member State, after having exercised their rights to move 'move and reside freely'[4] there, the DLV has acted inconsistently with Mr Biffi's rights to freedom of movement under EU law, and more specifically his freedom of establishment under Article 49 TFEU. The restriction imposed by the DLV is, in these circumstances, disproportionate.

I. Legal framework

A. EU law

6. The first paragraph of Article 18 TFEU states:

'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

7. Article 21(1) TFEU states:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'

8. The first sentence of Article 49 TFEU states:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.'

9. The second subparagraph of Article 165(1) TFEU states:

'The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.'

10. Article 165(2) TFEU states:

'Union action shall be aimed at:

…

4 Article 21 TFEU.

– developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.'

11. Article 165(3) TFEU states:

'The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.'

B. Member State law

12. Paragraph 5.2.1 of the German Athletics Rules states:

'As a general rule, all championships shall be open to all athletes who have German nationality and a valid starting right for a German association/athletics community.'

13. Paragraph 5.2.2 was deleted by the defendant on 17 June 2016. It stated that:

'Union citizens are entitled to participate in German championships if they have a starting right for a German association/athletics community and that right has existed for a year.'

14. After 17 June 2016, the following rule applied ('the impugned rule').[5]

'In conformity with Paragraph 5.2.4 of the German Athletics Rules, foreigners who possess a starting right with a national federation may be assigned a right to participate without classification when so authorised by the president of the federal committee or the organiser prior to the event. The details of participation without classification are set out in the national provision on rule 142.1 of the International Competition rules.'[6]

II. The facts in the main proceedings and the questions referred for a preliminary ruling

15. Mr Biffi was born in 1972. As mentioned above, he is an Italian national, has lived in Germany since 2003, and has been participating in German championships since at least 2012, having relinquished his starting right in respect of the Italian athletics association in 2012. He runs a business as a sports coach and personal trainer. He specialises principally in races covering a distance of 60, 100, 200 and 400 metres, and between 2012 and 2016 successfully and regularly competed on an equal footing with German nationals.

16. Mr Biffi has a starting right with TopFit pursuant to the German Athletics Rules. It in turn is a member of the Berliner Leichtathletik-Verband (Berlin Athletics Association), which is a regional athletics association and itself a member of the DLV. The DLV is the federal umbrella association for the German athletics associations and holds national athletics championships both for young athletes active in top-level sport and for 'seniors', that is to say 'over-35' age groups participating in grass roots sport.

5 According to the written observations of the defendant, this is in conformity with point 3, first additional clause, of the general conditions for participation in the German national athletics championships.

6 These observations also state that the impugned rule was modified as follows from 2018: 'Foreigners who possess a starting right with an association/athletics' community of athletes on the territory of the German Athletics Federation or with another national federation can, by way of reasoned application, be assigned a right to participate without classification, when the president of the federal committee for the organisation of competitions authorised such participation before the date of closing of registrations for the sporting event in question. The details of participation without classification are set out by the national provision on rule 142.1 of the International competition rules.'

17. The first sentence of Paragraph 1 of the German Athletics Rules states that the members of all clubs of the *Land* associations are entitled to participate in athletics events pursuant to the provisions of the rules.

18. On 17 June 2016, the council of the DLV amended the German Athletics Rules, so that EU nationals having a starting right with a German association/athletics community that has existed for a year, were no longer able to participate in the national championships on the same basis as had occurred in the past (see points 3 and 14 above). The order for reference further states that the reason the defendant gave for its decision was that the German champion should be someone who is also entitled to start for 'GER' (Germany). Thus, according to the defendant's nomination guidelines of 2017, the German champions were given priority in the nominations. The DLV stated that it was also not possible to make rules for senior sport that diverged from those for youth or competitive sport.

19. For the German Senior Indoor Championships on 4 and 5 March 2017 in Erfurt, TopFit put Mr Biffi forward for the 60 m, 200 m and 400 m disciplines. This nomination was rejected by the DLV. TopFit and Mr Biffi initiated proceedings against the rejection to the Verbandsrechtsausschuss (Association Legal Committee), which is the legal commission of the federation. It declined jurisdiction *ratione materiae* and consented to the case being referred to an ordinary court. TopFit and Mr Biffi did not challenge the exclusion from the German Senior Indoor Championships of 4 and 5 March 2017.

20. From 30 June to 2 July 2017, the DLV held the German Senior Championships in Zittau. Mr Biffi fulfilled in the prescribed period the minimum performance requirements for the 100 m, 200 m and 400 m disciplines. TopFit and Mr Biffi commenced an action before the referring court to guarantee participation in this event. The application was rejected owing to a lack of grounds for an interim order.

21. Mr Biffi participated 'outside classification' in the Zittau event. In the 100 m, he achieved the third fastest time in the heats, but was not allowed to run in the final. In the 200 m discipline, only time trials took place. No qualification rounds were held, and instead the times from the two races held were taken into account as final race times. Mr Biffi ran the third fastest time. He was unable to compete in the 400 m due to injury.

22. TopFit and Mr Biffi brought proceedings before the referring court to be allowed to participate and be classified in future national championships. They take the view that making grant of the right to participate in the national championships in senior sport dependent on nationality is inconsistent with EU law, and contend that Mr Biffi is protected by prior rights. The DLV takes the contrary position. The referring court considers that it must also decide whether Mr Biffi's performance at a national championship that took place in Zittau is to be recorded for the purposes of classification.

23. It referred the following questions by way of preliminary ruling under Article 267 TFEU:

'(1) Are Articles 18, 21 and 165 TFEU to be interpreted as meaning that a provision in the Athletics Rules of an association of a Member State which makes participation in national championships dependent on having the nationality of the Member State amounts to impermissible discrimination?

(2) Are Articles 18, 21 and 165 TFEU to be interpreted as meaning that an association of a Member State impermissibly discriminates against amateur athletes who do not have the nationality of the Member State by allowing them to participate in national championships but only letting them start "outside classification" or "without classification" and not letting them participate in the finals of races and contests?

(3) Are Articles 18, 21 and 165 TFEU to be interpreted as meaning that an association of a Member State impermissibly discriminates against amateur athletes who do not have the nationality of the Member State by excluding them from the award of national titles or from the standings?'

24. Written observations were filed at the Court by TopFit, the DLV, the Governments of Spain and Poland, and the European Commission. All attended the hearing that took place on 13 December 2018, save for Poland.

III. Summary of written observations

25. TopFit contends that under the *Bosman* ruling, Article 21(1) TFEU applies to rules of private law passed under the rules of a private association like the DLV.[7] The rules elaborated in *Bosman*, are not confined to free movement of workers, and they apply to Article 21(1) TFEU.

26. Participation in competitions falls within the normative domain of the TFEU, as do amateur sports, so that Article 18 TFEU applies to the main proceedings, there being no such thing as pure amateur sport.

27. A restriction on participation in amateur sport makes transition to practising the relevant sport professionally more difficult, thereby causing an indirect effect on economic life. An EU citizen who is treated less favourably than a national in the context of private life, and or in access to social and cultural advantages is treated in breach of Article 45 TFEU. Access to sporting activities is a social advantage that contributes to integration, and exclusion of athletes like Mr Biffi from championships is contrary to the European project, and is inconsistent with the goals in Article 165(2) TFEU final indent. Clubs will become less likely to invest in non-Member State EU nationals.

28. Objective justification is determined by whether the rule in question pursues a legitimate objective, is appropriately adapted to achieving this objective, and does not exceed what is required to achieve a legitimate goal. A proportionate restriction would be one in which athletes are required to be a member of a club for a specified minimum period. Thus, while opening up national championships to all EU citizens cannot be insisted upon, it can be insisted upon that participation is opened up for EU citizens when it is linked to the exercise of certain fundamental liberties, like free movement rights. TopFit also refers to Article 21of the Charter of Fundamental Rights of the European Union ('the Charter').

29. The DLV argues that TopFit has no standing to sue, because this was so decided by the referring court in a judgment of 14 June 2017, although the DLV acknowledges that these arguments are absent from the order for reference in these proceedings. Articles 18 and 21 TFEU only protect citizens of the Union and not legal persons like TopFit. Article 165 TFEU affords no rights to clubs like TopFit.[8]

30. The DLV argues that the first question is theoretical because TopFit was not refused the right to participate in the German championships for seniors. Rather, the dispute concerns whether Mr Biffi should be allowed to compete on a classified basis, so that he could become champion of Germany.[9]

7 TopFit refers to judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraphs 8 to 12).

8 In this context the DLV refers to judgment of 16 March 2010, *Olympique Lyonnais*, (C-325/08, EU:C:2010:143, paragraph 40).

9 In this context the DLV refers to Article 94(c) of the Rules of Procedure of the Court, the judgments of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraphs 28 and 29); of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraph 43); and of 8 March 2018, *Saey Home & Garden* (C-64/17, EU:C:2018:173, paragraphs 18 and 19).

31. The main proceedings also concern a situation purely internal to Germany[10] because the frontiers of Germany are not crossed.

32. The DLV relies on the fact that the Court has held that the prohibition on discrimination does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest.[11] The DLV supports restricting the award of medals and the recognition of national records to national athletes as a matter of purely sporting interest.[12]

33. Spain argues that selecting a national team for a sporting discipline is a legitimate objective and the restrictions introduced for national athletics championships are proportionate[13] and do not damage the professional development of foreign sports people resident in a host country. National championships for individuals are traditionally used for selecting national teams for important international competitions. The participation of foreigners could upset this process.

34. Poland points out that the competence of the Union under Article 165 TFEU in matters of sport is very limited. Under Article 6(e) TFEU, Union powers are restricted to actions to support, coordinate or supplement the actions of the Member States in the field of sport. Further, matches between national teams from different countries are an example of matters of a purely sporting interest, but Poland acknowledges that the scope of the provisions in question must remain limited to their proper objective.[14]

35. That said, Poland takes the view that the main proceedings concern whether amateur sport falls within the scope of application of the Treaties, and that is an activity that cannot be considered economic. However, like the Commission Poland notes that the Court has held that access to leisure activities available in a Member State to which an EU citizen has moved is a corollary to that freedom of movement.[15]

36. Poland agrees with Commission that the organisation of sport and national competitions is embedded in the historical and cultural context of European sport.[16] Modifying it could diminish the attractiveness of sport to spectators. Poland is also concerned by the role of sport in selecting national sporting teams.

37. The Commission takes the view that amateur sport falls within the material scope of application of EU law for four reasons.

10 The DLV refers to the judgments of 20 March 2014, *Caixa d'Estalvis i Pensions de Barcelona* (C-139/12, EU:C:2014:174, paragraph 42 and the case-law cited); of 30 June 2016, *Admiral Casinos & Entertainment* (C-464/15, EU:C:2016:500, paragraph 21 and the case-law cited); of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraph 47); and of 8 December 2016, *Eurosaneamientos and Others* (C-532/15 and C-538/15, EU:C:2016:932, paragraph 57).

11 The DLV refers to the judgments of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140, paragraph 8), and of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 15).

12 Report of the Asser Institute of 20 December 2010, 'Study on the equal treatment of non-nationals in individual sports competitions' (http://ec.europa.eu/assets/eac/sport/library/studies/study_equal_treatment_non_nationals_final_rpt_dec_2010_en.pdf: 'the Asser Institute Report'), chapter VI points 3.2.1 and 3.4.1.

13 Spain refers to 'Sport and Free Movement', SEC(2011) 66 final, and the judgments of 13 April 2010, *Bressol and Others* (C-73/08, EU:C:2010:181), and of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675).

14 Poland refers to the judgments of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140, paragraphs 8 and 9); of 14 July 1976, *Donà* (13/76, EU:C:1976:115, paragraphs 13-15); of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 73); of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 43); and of 18 July 2006, *Meca-Medina and Majcen* v *Commission* (C-519/04 P, EU:C:2006:492, paragraph 26).

15 Poland refers to the judgments of 7 March 1996, *Commission* v *France* (C-334/94, EU:C:1996:90, paragraph 21); of 12 June 1997, *Commission* v *Ireland* (C-151/96, EU:C:1997:294, paragraph 13); and of 27 November 1997, *Commission* v *Greece* (C-62/96, EU:C:1997:565, paragraph 19).

16 Poland refers to the White Paper on Sport, COM(2007) 391 final, p. 15.

38. First, the right to equal treatment of workers includes social advantages, due to Article 7(2) of Regulation (EU) No 492/2011.[17] Second, under established case-law, the right to free movement includes access to leisure activities in the host Member State,[18] and this access is covered by equal treatment by virtue of Article 18 TFEU. Thirdly, the Commission emphasises the importance of sport for social inclusion, integration, the development of social networks and employability,[19] so it must be taken into account in interpreting legal provisions concerning citizenship. Fourthly, under the Lisbon Treaty, the scope of EU law was considerably extended with respect to sport (see Articles 6(e) and 165 TFEU) conferring powers in that field.

39. Articles 18 and 21 TFEU apply to a national federation like the DLV governed by private law, so that the actions of a private, and in this case monopolistic entity, do not undermine abolition by the State of barriers to free movement.[20]

40. However, the impediment to Mr Biffi's right to free movement is proportionate.[21] Participation in regional and local competitions remains open to non-nationals. National champions must be attached to the Member State that is organising the championship. If not, problems in terms of public identification arise.

A. Introductory observations

1. Preliminary objections

41. The argument of the DLV to the effect that there is an insufficient cross border element to the dispute to bring it within the jurisdiction of the court is to be rejected. Once an EU national has 'made use of his right to move freely' his situation falls within the scope of application of Article 18 TFEU.[22] Further, Mr Biffi contends that his business in a host Member State, namely Germany, is adversely affected by discrimination on the basis of nationality.[23] The situation is connected with trade between the Member States.[24] Just as the Court held in *Bosman* that accepting offers of employment across Member State borders to play professional football does not entail a purely internal situation,[25] nor does movement across borders entailing commercialisation of athletics and establishment of a business.

42. With regard to TopFit's standing to challenge the compliance of DLV with EU law in its dealings with Mr Biffi, rules of standing fall within the procedural autonomy of the Member States, subject to limitations set by EU law which are not in contention in the main proceedings.[26]

17 Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1). The Commission refers to the judgment of 12 May 1998, *Martinez Sala* (C-85/96 EU:C:1998:217, paragraphs 55 to 64).

18 The Commission refers to the judgment of 7 March 1996, *Commission* v *France* (C-334/94, EU:C:1996:90, paragraphs 21 and 23).

19 The Commission refers to the Council conclusions of 18 November 2010 on the role of sport as a source of and a driver for active social inclusion, 2010/C 326/05, point 4.

20 Judgments of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140); of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56); of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463); and of 3 October 2000, *Ferlini* (C-411/98 EU:C:EU:C:2000:530, paragraph 50).

21 Judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 127); and of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraphs 61 to 64).

22 Judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 27 and the case-law cited).

23 This formed part of the arguments made at the hearing.

24 Judgment of 30 June 2016, *Admiral Casinos & Entertainment* (C-464/15, EU:C:2016:500, paragraph 22).

25 Judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraphs 90 and 91).

26 Namely, the principle of sincere cooperation laid down in Article 4(3) TEU and Article 19(1) TEU, additionally requiring Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law. See recently the judgment of 20 December 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, (C–664/15, EU:C:2017:987). On Member State rules on standing, the principles of effectiveness and equivalence, and Article 47 of the Charter, see, e.g. judgment of 19 March 2015, *E.ON Földgáz Trade* (C-510/13, EU:C:2015:189, paragraphs 49 to 51).

43. Finally, contrary to submissions made by the DLV, question 1 is admissible. The purpose of the main proceedings is to determine the basis on which Mr Biffi can participate in future athletics championships. Pursuant to the German Athletics Rules, participation without classification is subject to the approval of the president of the federal committee or the organiser of the event (see point 14 above). Given that complete exclusion of participation by athletes like Mr Biffi is foreseen under the rules, the first question is not hypothetical.[27]

2. Member State practice on the participation of non-nationals in national athletics championships

44. There is no uniform rule or practice shared by the Member States on this topic, and nor do the rules of the International Association of Athletics Federations (IAAF)[28] dictate one.[29] Indeed, the law and practice across the Member States is highly varied.[30]

45. For example, Spain at present seems to have a relatively open policy with respect to access, subject to a requirement of affiliation to a club (but with a facility to provide for a special authorisation) a quota, and residence in Spain;[31] while this latter requirement does not apply in, for example, Belgium.[32] Only Spanish nationals can, however, become national champions.

46. At the other extreme, Denmark allows access to foreigners only by decision of the special organising federation, it being understood that only a Dane can be the champion of Denmark, and nor can the medal of the Danish sporting Union be offered to foreigners. Access in any event is only open to foreigners who have been resident in Denmark for at least six months.[33] In both France[34] and Belgium[35] only the nationals of these Member States can be made their, respective, national champions, while there is no positive rule preventing a foreigner from becoming national champion in Sweden,[36] and it is actively possible in Cyprus.[37]

27 Indeed, according to the order for reference, complete exclusion has already occurred. See point 19 above.

28 https://www.iaaf.org/.

29 Rule 4(3), however, of the Competition Rules of the IAAF 2018-2019 place limits on the affiliation of an athlete over 18 years old with more than one national federation.

30 See the Asser Institute Report, footnote 12 above.

31 See Real Federación Española de Atletismo, http://www.rfea.es/ and http://www.rfea.es/datosrfea/reglamentos.htm. See also, http://www.rfea.es/normas/pdf/Reglamento_Juridico_Disciplinario.pdf.

32 Ligue Belge francophone d'athlétisme (LBFA) (FR), https://www.lbfa.be/web/l-asbl, Vlaamse Atletiekliga (NL), https://www.atletiek.be/. See also https://www.lbfa.be/web/regles-et-directives.

33 Danish Federation of Athletics, http://dansk-atletik.dk. See also http://dansk-atletik.dk/media/2139299/2O18-2019-daf-reglement-1-.pdf and http://dansk-atletik.dk/regler-og-love/dafs-love.aspx.

34 See Fédération française d'athlétisme, http://www.athle.fr/ and Code du sport, https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071318, and http://www.athle.fr/Reglement/Reglements_Generaux_%282009-07-25%29.pdf .

35 Footnote 32 above.

36 Swedish Federation of Athletics (Friidrott.se) http://www.friidrott.se/Regler/index.aspx. See also http://www.friidrott.se/docs/regelboken2018.pdf. Concerning senior age categories see http://www.friidrott.se/Veteran/Regler/Intro.aspx.

37 See statute of the Federation of Non-professional Athletics http://www.koeas.org.cy/wpcontent/uploads/2018/10/%CE%9A%CE%91%CE%A4%CE%91%CE%A3%CE%A4%CE%91%CE%A4%CE%99%CE%9A%CE%9F-%CE%9A%CE%9F%CE%95%CE%91%CE%A3-18.11.2017-.pdf, and the Code of Good Governance of Cypriot Sporting Federations (2018) https://cyprussports.org/phocadownload/kodikaschristisdiakivernisis/KodikasChristisDiakivernisis.pdf.

47. With regard to attribution of a national record to foreigners, this is precluded in, for example, Austria,[38] Belgium,[39] Cyprus,[40] Denmark (except for seniors),[41] France,[42] Slovenia[43] and Sweden.[44] The rules of Denmark,[45] Spain,[46] France[47] and Slovenia,[48] explicitly state that it is impossible for foreign athletes to be awarded medals. The Belgian rules state that they cannot mount the podium.[49]

3. Why do the main proceedings fall within the scope of application of EU law?

48. Although the referring court has apprehended the dispute here in issue as one primarily concerned with EU citizenship under Article 21 TFEU, and its relationship with both the prohibition on discrimination on the basis of nationality under Article 18 TFEU and the promotion of European sporting issues under Article 165 TFEU, what is in issue in the main proceedings is restriction, founded on discrimination based on nationality, of Mr Biffi's freedom of establishment under Article 49 TFEU.

49. The parties to the main proceedings have focussed to a large degree on arguing whether rules on the free movement of people developed in the primary rules of the Treaty which date back to the Treaty of Rome, as they have been applied by the Court to the context of participation in sporting activities, are transposable to Article 21 TFEU, a measure introduced by the Lisbon Treaty. This was, however, on the facts arising in the main proceedings, misplaced.

50. It emerged at the hearing that Mr Biffi is a psychological coach and a personal trainer, so he earns his living via sports training. He works with various sporting associations but also provides personal training to individual athletes. He runs an independent organised business. He is not an employee, thereby excluding status as a 'worker' under Article 45 TFEU. The representative of TopFit and Mr Biffi argued at the hearing that status as the national champion for Germany would be a valuable and important addition to Mr Biffi's business card. This was not contested by the DLV. As noted above (point 2), Mr Biffi's performance in past German national championships already appears on his website.

51. In the light of this, Mr Biffi cannot be regarded as an 'amateur' sportsman. The Court ruled in *Deliège*[50] that 'the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities',[51] with the pursuit of economic activities being the trigger required for both the application of EU rules on freedom of movement,[52] and for the inclusion of sporting activities within the scope of EU law.[53]

38 Österreichischer Leichtathletik-Verband ÖLV https://www.oelv.at/de, and www.oelv.at/de/service/downloads#satzungen-und-ordnungen.

39 Footnote 32 above.

40 Footnote 37 above.

41 Footnote 33 above.

42 Footnote 34 above.

43 On sport law in Slovenia see Zakon o športu (ZŠpo-1), http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6853; Pogoji, pravila in kriteriji za registriranj, http://www.olympic.si/datoteke/Pogoji%2C%20pravila%20in%20kriteriji%20za%20registriranje%20in%20kategoriziranje%20%C5%A1portnikov_potrjeno_SSRS%C5%A0_2018%282%29.pdf. Rules of athletics competitions see Pravila-za-atletska-tekmovanja_2018_2019_web.pdf.

44 Footnote 36 above.

45 Footnote 33 above.

46 Footnote 31 above.

47 Footnote 34 above.

48 Footnote 43 above.

49 Footnote 32 above.

50 Judgment of 11 April 2000 (C-51/96 and C-191/97, EU:C:2000:199).

51 Ibid., paragraph 46.

52 Judgment of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 20).

53 Judgment of 18 July 2006, *Meca-Medina and Majcen* (C-519/04 P, EU:C:2006:492, paragraph 22 and the case-law cited).

52. Thus, while I acknowledge the established case-law of the Court to the effect that, having regard to the objectives of the European Union, sport is subject to EU law in so far as it constitutes an economic activity,[54] this is the case in the main proceedings, given that the work performed by Mr Biffi is genuine and effective and not such as to be regarded as being purely marginal or ancillary.[55] Because the concept of 'economic activity' defines the scope of one of the fundamental freedoms of the Treaty, it is not to be interpreted restrictively.[56]

53. Moreover, the Court made it clear in *Deliège*,[57] a case concerning participation in individual sport, and an alleged restriction on free movement, that grants of (financial) awards on the basis of sporting results, and from government, along with private sponsorship, were all relevant in determining whether an amateur athlete was engaged in economic activities.[58] The Court added in *Meca-Medina* that 'where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 39 EC et seq. or Article 49 EC et seq.'[59]

54. Establishment under Article 49 TFEU entails 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period',[60] with this time reference furnishing the dividing line between freedom to provide services under Article 56 TFEU and freedom of establishment under Article 49 TFEU.[61]

55. Mr Biffi has been resident in Germany for 15 years, and there is nothing in the case file to suggest that his provision of services in Germany as an athletics coach is being done on a temporary basis, or that it has a cross border element by, for example, provision of the service from Italy. He is involved 'on a stable and continuous basis' in economic life in Germany.[62]

56. Thus, any discrimination he may have suffered in breach of Article 18 TFEU falls within the scope of application of the Treaties by virtue of Article 49 TFEU. The principle of non-discrimination on the basis of nationality in Article 18 TFEU is given specific expression with respect to freedom of establishment by Article 49 TFEU. The Court need only therefore, rule with respect to Article 49,[63] read together with Article 165 TFEU, given that Article 18 TFEU applies independently only to situations governed by EU law in respect of which the TFEU lays down no specific prohibitions on discrimination.[64] For reasons that I will further explain at points 97 to 110 below, the main

54 Ibid.

55 Judgment of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 54 and the case-law cited).

56 Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 42 and the case-law cited).

57 Judgment of 11 April 2000 (C-51/96 and C-191/97, EU:C:2000:199, paragraph 51).

58 Ibid.

59 Judgment of 18 July 2006, *Meca-Medina and Majcen* (C-519/04 P, EU:C:2006:492, paragraph 23 and the case-law cited). It has been suggested that only a narrow range of sporting activities will fall outside the scope of EU law for absence of an economic link, such as the rules of the game, given that sports bodies and their federations are most competent for establishing technical rules. See Exner, J., 'European Union Law and Sporting Nationality: Promising Alliance or Dangerous Liaison?', https://www.olympic.cz/upload/files/European-Union-Law-and-Sporting-Nationality-Promising-Alliance-or-Dangerous-Liaison.pdf, pp. 13 to 14.

60 See classically the judgment of 25 July 1991, *Factortame and Others* (C-221/89, EU:C:1991:320, paragraph 20).

61 Judgment of 30 November 1995, *Gebhard* (C-55/94 EU:C:1995:411, paragraph 26).

62 Judgment of 17 June 1997, *Sodemare and Others* (C-70/95, EU:C:1997:301, paragraph 24).

63 Judgment of 4 September 2014, *Schiebel Aircraft* (C-474/12, EU:C:2014:2139, paragraphs 19 to 22 and the case-law cited).

64 E.g. judgment of 26 October 2017, *I* (C-195/16, EU:C:2017:815, paragraph 70 and the case-law cited).

proceedings do not present an occasion on which to consider taking the significant constitutional step of expanding its case-law on Article 21 TFEU and the component elements of European citizenship to the horizontal context of a dispute between private parties,[65] which would thereby oblige non-State actors to comply with them.

57. Under the established case-law of the Court, 'the fact that a national court has, formally speaking, worded its request for a preliminary ruling by referring to certain provisions of EU law does not preclude the Court of Justice from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, having regard to the subject matter of the dispute'.[66]

58. In consequence, the three questions referred should be reformulated into one that reads as follows:

'Are Articles 18, 21, 49 and 165 TFEU to be interpreted as meaning that an association of a Member State impermissibly discriminates against amateur athletes who do not have the nationality of the Member State in which they are resident, by precluding their participation in the national championships, or allowing them to participate in national championships but only letting them start "outside classification" or "without classification" and not letting them participate in the finals of races and contests, and excluding them from the award of national titles or from the standings?'

IV. Answer to the question

A. Is the DLV bound by Article 49 TFEU?

59. Under the established case-law of the Court, Articles 45, 49 and 56 do not apply only 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.[67] The Court has sought to avoid inequality in the application of prohibitions contained in these articles, since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons.[68] The abolition as between Member States of obstacles to freedom of movement of persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law.[69]

65 As observed by Advocate General Kokott in *Commission* v *Austria* (C-75/11, EU:C:2012:536, point 31), the Court usually finds it does not need to decide on the interpretation of Article 21 TFEU when fundamental freedoms are in issue. The Advocate General refers to judgments of 6 February 2003, *Stylianakis* (C-92/01, EU:C:2003:72, paragraph 18 et seq.); of 11 September 2007, *Commission* v *Germany* (C-318/05, EU:C:2007:495, paragraph 35 et seq.); of 20 May 2010, Zanotti (C-56/09, EU:C:2010:288, paragraph 24 et seq.); and of 16 December 2010, Josemans (C-137/09, EU:C:2010:774, paragraph 53). See also e.g. the judgments of 11 January 2007, *ITC Innovative Technology Centre* (C-208/05, EU:C:2007:16, paragraph 65), and of 11 September 2007, *Hendrix* (C-287/05, EU:C:2007:494).

66 Judgment of 27 June 2018, *Turbogás* (C-90/17, EU:C:2018:498, paragraph 25 and the case-law cited).

67 Judgment of 11 December 2007, *The International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 33 and the case-law cited). See also judgment of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809).

68 Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 34).

69 Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 35).

60. The Court had held on several occasions that the Treaty provisions on free movement apply to rules laid down by sports associations,[70] with one Advocate General expressing the view that 'the rules of sports federations fall in principle within the scope of Community law where they concern economic relationships'.[71]

61. I acknowledge that, in all of the cases preceding the main proceedings, the rules of a sporting association were held to fall within the scope of application of EU law in a context in which the rules in issue restricted the activities of people engaged in sporting activities who were professional in the sense that they were directly remunerated by a contract of employment in performance of the relevant sport, and that remuneration was directly imperilled by the rules of the sports associations that were the subject of challenge.[72]

62. However, it can make no difference that the new rules of the DLV have what might be described as an indirect impact on Mr Biffi's economic activities through making the provision of his services less attractive, in comparison with a German athlete running a similar business, but who is eligible to fully compete in the national championships, secure that title and place this fact and mount their placings in each event on their website (see further point 70 below). Indeed, the Court held in *Deliège* that services remain services even when they are not paid for by those for whom they are performed.[73] This implies scope for indirect impact on economic activities.

63. The rule impugned therefore concerns 'economic relationships'. The Court held in *International Transport Workers' Federation and Finnish Seamen's Union* that Article 49 TFEU applied to collective action of trade unions aimed at requiring an undertaking to enter into a collective bargaining agreement with a trade union,[74] because the collective action was 'inextricably linked' to the collective agreement which was sought, such that the action fell within the scope of Article 49 TFEU.[75]

64. The link between the new rule of the DLV precluding participation of Mr Biffi in the national championships on an equal footing with German nationals is sufficiently proximate to the harm to Mr Biffi's business to bring the rule within the scope of Article 49 TFEU. Just as the Court has held that the prohibition on discrimination on the basis of nationality must be enforceable against private sector employers with respect to both employed workers and workers with a self-employed status under Article 49 TFEU,[76] so too must organisations such as the DLV be responsible under Article 49 TFEU for actions that may impact adversely on the freedom of establishment and discrimination on the basis of nationality which it precludes.[77] If not, harm to the internal market results.

70 E.g. judgments of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140); of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463); of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 36; and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143).

71 Opinion of Advocate General Alber in *Lehtonen and Castors Braine* (C-176/96, EU:C:1999:321, point 33).

72 Employed football players were in issue in the judgments of 12 April 2005, *Simutenkov* (C-265/03, EU:C:2005:213), of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463), and of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143), and the order of 25 July 2008, *Real Sociedad de Fútbol and Kahveci* (C-152/08, EU:C:2008:450), employed basketballers in judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201), employed pacemakers in judgment of 12 December 1974, *Walrave and Koch* (36/74, EU:C:1974:140), and employeded handball players in the judgment of 8 May 2003, *Deutscher Handballbund* (C-438/00, EU:C:2003:255).

73 Judgment of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 56).

74 Judgment of 11 December 2007 (C-438/05, EU:C:2007:772, paragraph 33 to 35 and the case-law cited).

75 Ibid., paragraphs 36 and 37. See also judgment of 18 December 2007, *Laval un Parneri* (C-341/05, EU:C:2007:809).

76 Judgment of 4 September 2014, *Schiebel Aircraft* (C-474/12, EU:C:2014:2139, paragraph 26 and the case-law cited).

77 Ibid., paragraph 23.

65. Finally, the Court held recently in *Egenberger*[78] that the prohibition of all discrimination on grounds of religion or belief, laid down in Article 21(1) of the Charter, is mandatory as a general principle of EU law which is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law, including when the discrimination derives from contracts between individuals.[79]

66. Article 21(2) of the Charter prohibits discrimination on the basis of nationality within the 'scope of application of the Treaties', which means the field covered by EU law. In the light of the ruling in *Egenberger*, and the view I have already expressed at point 56 above to the effect that the dispute to hand falls within the scope of the prohibition on discrimination on the basis of nationality in the context of freedom of establishment under Articles 18 and 49 TFEU, TopFit and Mr Biffi are fully entitled under EU law to enforce the prohibition contained in Article 21(2) of the Charter against an entity such as the DLV, given that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.[80]

B. Has there been a restriction?

67. The case-law of the Court is generally strict when it comes to direct discrimination on the basis of nationality. It has been held that legislation making authorisation for businesses to trade in military weapons and munitions, or to broker the sale and purchase of such goods, subject to the condition that the members of their statutory representation bodies, or their managing partner, must hold Austrian nationality amounted to a prohibited difference of treatment.[81] An Italian nationality requirement for access to social housing and reduced rate mortgage loans, even with respect to EU nationals resident in Italy, meant that that Member State had failed to fulfil its obligations under Articles 49 and 56 TFEU,[82] given that the right of establishment and freedom to provide services is concerned 'not solely with the specific rules on the pursuit of occupational activities but also with the rules relating to the various general facilities which are of assistance in the pursuit of those activities'.[83] And nationality requirements under Hungarian and Latvian law to pursue the profession of a notary have recently been held to be inconsistent with Article 49 TFEU.[84]

68. Under the Court's established case-law, 'all the provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Union nationals of occupational activities of all kinds throughout the EU, and preclude measures which might place Union nationals at a disadvantage when they wish to pursue an activity in the territory of a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there'.[85]

69. As a result, Article 49 TFEU precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by that article.[86]

78 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257).

79 Ibid., paragraphs 76 and 77.

80 Judgment of 6 November 2018, *Bauer and Willmeroth* (C-569/16, EU:C:2018:871, paragraph 52).

81 Judgment of 4 September 2014, *Schiebel Aircraft*, (C-474/12, EU:C:2014:2139, paragraph 29).

82 Judgment of 14 January 1988, *Commission* v *Italy* (63/86, EU:C:1988:9).

83 Ibid., paragraph 14.

84 Judgments of 10 September 2015, *Commission* v *Latvia* (C-151/14, EU:C:2015:577), and of 1 February 2017, *Commission* v *Hungary* (C-392/15, EU:C:2017:73).

85 Judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited).

86 Ibid.

70. Mr Biffi is at a disadvantage when compared with German nationals engaged in the provision of athletics training services in that Member State because he is no longer able to make reference to his achievements in national sporting championships in order to attract business. A consumer is more likely to be drawn to an athletics coach advertising on-going excellence via his or her performance in the national athletics championships.

71. In addition, if EU law allowed Member States' sporting federations to alter rules permitting participation of non-national residents in national championships *after* a businessman like Mr Biffi has become established there, this would deter EU nationals from leaving their home Member State (which can entail, as occurred in Mr Biffi's case, the loss of the right to participate in the national championship in that State) and from setting up a business entailing the commercialisation of participation in the relevant sport. As already stated, EU law precludes any national measure which is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms. [87]

72. I accept that EU nationals moving from one Member State to another to set up commercial enterprises cannot, like workers, turn to EU law in order to secure the conditions under which a business was run in their home Member State in a host Member State. [88] However, this can never justify a directly discriminatory measure that falls within the scope of application of EU law by virtue of its impact on economic activity, particularly when disadvantage results in comparison with a national of the host State (see point 70 above).

73. Therefore, I take the view that Mr Biffi's situation is not unlike that of the applicant in the seminal ruling of the Court in *Konstantinidis*. [89] Mr Biffi is disadvantaged in comparison to the way a German national would be treated in the same circumstances because, as was the case with respect to the (mandatory) spelling, or misspelling of Mr Konstantinidis' name under German law, the loss of the right to refer to his achievements in national championships in future events is of a degree of inconvenience to interfere with Mr Biffi's freedom of establishment under that article. [90] Indeed the Court held in *Konstantinidis* that the impact on the measure impugned for attracting clients was relevant to this assessment. [91]

C. Can the restriction be justified?

1. General principles

74. What is common to cases entailing direct discrimination on the basis of EU nationality is that they can generally only be justified by reference to other provisions on the Treaties. Thus, the Court has held, for example, that legislation making authorisation for businesses to trade in military weapons and munitions, or to broker the sale and purchase of such goods, subject to the condition that the members of their statutory representation bodies, or their managing partner, must hold Austrian nationality cannot be justified by Article 346(1)(b) TFEU on the protection of essential interests of

87 Ibid.

88 Ibid.

89 Judgment of 30 March 1993 (C-168/91, EU:C:1993:115).

90 Ibid., paragraphs 13 and 15.

91 Ibid., paragraph 16.

Member State security that are concerned with the production of or trade in arms, munitions and war material.[92] The nationality requirements attached to the pursuit of the profession of notary could not be justified on the basis that they are connected with the exercise of official authority within the meaning of the first paragraph of Article 51 TFEU.[93]

75. However, the principle difficulty with the main proceedings lies in the fact that this does not necessarily apply to the sporting sector. The Court has consistently held that it recognised that 'the Treaty provisions on the free movement of persons do not preclude rules or practices excluding foreign players from certain matches for reasons which are not economic in nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as matches between national teams from different countries'.[94] These include rules that concern the 'proper functioning' of a championship as a whole.[95]

76. In the context of a sport entailing individual rather than team competition, the Court has held that the mere circumstance, in the absence of discrimination on the basis of nationality, of selection rules that have the effect of limiting the number of participants in a tournament is inherent in the conduct of international high level sports events, and cannot in themselves be regarded as a restriction on the freedom to provide services.[96] However, there is no direct guidance in the case-law to date on the circumstances in which Member State rules which limit participation of non-nationals in competitions concerning individual sports, like athletics, on the basis of nationality, is done for reasons which are not economic in nature, and which relate to the particular nature and context of such championships and are thus of sporting interest only.

2. Application to the rules in issue: maintenance of the status quo

77. In the light of the scale of disparity in the law and practice of Member States on the participation of non-nationals in national athletics championships (see points 44 to 47 above), I accept that, in principle, a Member State rule restricting the award of title of national champion, and the awarding of medals for first, second and third place, are best qualified under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and can therefore be maintained by the Member States who have such a system in place.[97] The narrow parameters of EU competence over sport (see the written observations of Poland, above point 34) set by Articles 6(e) and 165 TFEU, equally point toward upholding Member State discretion.[98]

78. However, the Court has underscored that while the prohibition on discrimination on the basis of nationality does not apply to the composition of sporting teams, and in particular national sporting teams, this is subject to compliance with the principle of proportionality. The 'restriction on the scope of the provisions in question must remain limited to its proper objective'.[99]

92 Judgment of 4 September 2014, *Schiebel Aircraft* (C-474/12, EU:C:2014:2139, paragraphs 34 to 38).

93 Judgments of 10 September 2015, *Commission* v *Latvia* (C-151/14, EU:C:2015:577), and of 1 February 2017, *Commission* v *Hungary* (C-392/15, EU:C:2017:73).

94 Judgment of 8 May 2003, *Deutscher Handballbund* (C-438/00, EU:C:2003:255, paragraph 53). See also the judgments of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 43); and of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 34).

95 Judgment of 13 April 2000, *Lehtonen and Castors Braine* (C-176/96, EU:C:2000:201, paragraph 54).

96 Judgment of 11 April 2000, *Deliège* (C-51/96 and C-191/97, EU:C:2000:119, paragraph 64).

97 See the Asser Institute Report, footnote 12 above, chapter VI point 3.4.1

98 For a discussion of the processes that led to the addition of Article 165 to the TFEU in the Lisbon revision see Weatherill, S., *Principles and Practice in EU Sports Law*, Oxford University Press, 2017, Chapter 6, pp. 125 to 156. At page 158 of the same book the author notes the absence of any specific organic link between Article 165 TFEU and the internal market.

99 E.g. judgment of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 127 and the case-law cited).

79. The objectives pursued by the DLV by the proposed change to its rules on access to and participation in the national championships are maintenance in public confidence in the championships, 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. These are legitimate public policy objectives.

80. However, precluding Mr Biffi from the title of national champion, and relegating him to participation without classification with the consequences that entails for recording his placement in events, is disproportionate to the pursuit of these goals, given that he had a pre-existing right to participate in the national championships on an equal footing with German nationals that has been taken away by the rule change impugned in the main proceedings.

81. It is established in the case-law that EU legislation is to be interpreted in conformity with the general principle of respect for acquired rights,[100] and the 'corresponding legal certainty that forms an essential part of the general rule'.[101] The Court observed in its ruling in *Bozkurt*[102] that the general principle of respect for acquired rights was a principle according to which a Turkish national may legitimately rely on rights acquired pursuant to a provision of Decision No 1/80 of the Association Council of 19 September 1980, those rights no longer being dependent on the continuing existence of the circumstances which gave rise to them, as no condition of that nature was laid down by the relevant EU decision. Acquired rights have also been relevant in the context of interpretation of EU legislation designed to facilitate free movement of EU citizens across the Union, and limitations on the discretion of Member States to restrict it.[103]

82. While there is no question of factual circumstances having fallen away that have deprived Mr Biffi of his right to compete in the German national championships on an equal footing with German nationals, the acquired rights case-law was developed in the context of rights to free movement and residence, partially in view of the imperative of gradual consolidation of position and integration in a Member State.[104] Further, Mr Biffi is a permanent resident in Germany under Article 16(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States;[105] a measure which is a key element in promoting social cohesion and which was included in Directive 2004/38 in order to strengthen the feeling of Union citizenship.[106]

83. Further, a duty to take transitional measures to protect the legitimate expectations of those who have acted in reliance on an established legal regime which has been altered without notice is not unknown to EU law.[107] In the context of obligations imposed on the Commission by a particular set of EU legislation, the Court held that 'given the need for legal certainty, the Commission is under a duty in such a situation to warn traders clearly and precisely of its intention to depart from its previous practice in that respect if necessary, if it is not to breach the principle of protection of legitimate expectation.'[108]

100 Judgment of 29 September 2011, *Unal* (C-187/10, EU:C:2011:623, paragraph 50).

101 Opinion of Advocate General Sharpston in *Unal* (C-187/10, EU:C:2011:510, point 52).

102 Judgment of 22 December 2010 (C-303/08, EU:C:2010:800, paragraph 41).

103 See, e.g., judgment of 16 October 1997, *Garofalo and Others* (C-69/96 to C-79/96, EU:C:1997:492, paragraph 17), on the interpretation of Council Directive 86/457/EEC of 15 September 1986 on specific training in general practice (OJ 1986 L 267, p. 26).

104 Judgment of 22 December 2010, *Bokzurt* (C-303/08, EU:C:2010:800, paragraph 40).

105 And amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34, OJ 2005, L 30, p. 27, and OJ 2007 L 204, p. 28).

106 Judgment of the Court of 7 October 2010, *Lassal* (C-162/09, EU:C:2010:592, paragraph 32, referring to recital 17 of Directive 2004/38).

107 See classically order of the President of the Court of 10 June 1988, *Sofrimport* (152/88 R, EU:C:1988:296).

108 Ibid., paragraph 22. See also judgment of 26 June 1990, *Sofrimport* (C-152/88, EU:C:1990:259).

84. Yet the DLV has promulgated no transitional provision to cater for EU citizens like Mr Biffi who have exercised their right to free movement and become established in a Member State other than their own under Article 49 TFEU, and in Mr Biffi's case lost their right to participate in the national championships in their home Member State.

85. This is incompatible with a cornerstone of the Court's case-law on citizenship. That is, 'the status of citizen of the Union is intended to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy, within the scope *ratione materiae* of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard'.[109] The rules of the DLV, which are directly discriminatory on the basis of nationality, were not 'expressly provided for' at the time Mr Biffi exercised his right to move and reside freely in Germany under Article 21 TFEU, Article 45 of the Charter, and, as explained above, Article 49 TFEU.

86. As the Court has recently held, 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 'because they have sought … to become more deeply integrated in the society of that state'.[110] The same logic necessarily informs disputes falling within the parameters of Article 49 TFEU.[111]

87. Given that Mr Biffi has an established and strong link with Germany, and appears, from the case file, to be embedded in the athletics community there, no immediately apparent threat to the legitimacy of the title of 'national champion' would seem to arise by conferring that title on an athlete like Mr Biffi. The same applies to awarding medals, recording placements in events and participation in heats.

88. Nor would a requirement under EU law for established non-national athletes to continue to be allowed to participate on the basis on which they already have prior to the introduction of a rule purporting to limit participation, impede, to an unmanageable degree, the selection of German nationals to compete in the over 35 age category internationally. This is so because it was stated at the hearing that participation on an equal footing between nationals and non-nationals affiliated with a club has been the practice in Germany for some 30 years.

89. Further, the impugned measure would seem to have a particularly harsh impact on multi-cultural clubs, and the sense of community for all clubs, given that it will create two tier levels of membership. TopFit and Mr Biffi argued at the hearing that the rule it is challenging renders the clubs less likely to invest in EU national athletes; people who are already among their ranks.

90. It is for these reasons that I have come to the conclusion that the absence of provision by the DLV to ameliorate the impact of the impugned rule, and preserve the status quo for EU citizens like Mr Biffi who are established in Germany and have acquired a right to compete in the national athletics championships on an equal footing with German nationals, renders the impugned rule disproportionate to the legitimate aims they pursue.

109 See judgment of 25 July 2018, *A* (*Assistance for a disabled person*) (C-679/16, EU:C:2018:601, paragraph 56 and the case-law cited).

110 Judgment of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 58).

111 See the discussion of judgment of 14 January 1988, *Commission* v *Italy* (63/86, EU:C:1988:9), point 67 above, in which deeper integration was protected by Article 49 TFEU (and freedom to provide services) in securing equal treatment in access to bank loans and public housing.

3. Application to the rule in issue more broadly

91. If the Court were to disagree with the this analysis, as stated above (point 77), the award of title of national champion, and the awarding of medals for first, second and third place, are, in principle, best qualified under EU law as a rule of purely sporting interest, falling outside the scope of the EU Treaty, and thus can generally be maintained by the Member States who have such a system in place. Rejection of the analysis concerning maintenance of the status quo for established athletes like Mr Biffi might appear at first blush to result in a negative answer to the question as reformulated at point 58 above.

92. However, the questions referred also ask about wholesale exclusion of non-national athletes from the national championships; this being what occurs to Mr Biffi if he is not granted a right to participate outside classification by either the organisers of the event or the President of the federation. Whether this is proportionate requires assessment by the referring court, taking into account all relevant circumstances, including the importance of the role of sport in facilitating social inclusion, as reflected in the text of Article 165 TFEU.

93. That said, wholesale exclusion would seem on its face to be justifiable in unusual circumstances only. Limitation, for example, of the number of people able to participate without classification might be all that is necessary, in most circumstances, to avoid disturbance of the process of selecting German nationals to compete for that Member State in international athletics championships.[112] It is also essential for the national judge to establish that there is in fact a link between selection of national champions and selection of teams to participate in international sporting events. Equally, I see no reason for precluding a record being taken of how a non-national has fared in heats that is essential to the pursuit of the DLV's legitimate aims.

94. Finally, the DLV's submissions as to why it has been unable to draw up a different set of rules to deal with different age categories of athletes are unpersuasive. They do not address the fact that the pressures and social expectations associated with national championships that precede participation in major international sporting events such as the Olympics are quantifiably different from age categories having no direct link with such participation.

95. Here I have in mind both very young and very old athletes. Does not the imperative of securing the social integration of a child in a family that has recently moved to Germany from another Member State outweigh the remote prospect of that child taking away the place in the national championships from a German child that may one day run for Germany in an event like the Olympics or the European championships, particularly given the enhanced time frame enjoyed by young people in deciding whether to take out a second citizenship? It is therefore important for the national referring court to carefully assess whether the blanket nature of the impugned rule, covering as it does all age categories, is appropriately adapted to securing the legitimate aims pursued by the DLV and does not go beyond what is necessary to secure them.

96. Thus, in the event of the Court disagreeing with my primary position on maintenance of the status quo for established athletes like Mr Biffi, all these matters would have to be carefully assessed by the referring Court.

112 Siekemann, R., 'The Specificity of Sport: Sorting Exceptions in EU Law', https://www.pravst.unist.hr/dokumenti/zbornik/2012106/zb201204_697.pdf, p. 721.

V. Citizenship, Article 21 TFEU, and leisure activities

97. If the Court were to reject the above analysis concerning the applicability of Article 49 TFEU to the main proceedings, and find that the dispute is to be resolved by reference to Mr Biffi's right to leisure activities under Article 21 TFEU, I would advise the Court to reach the same outcome here suggested. Restrictions on freedom of movement falling within the rubric of Article 21 TFEU are subject to justification by reference to over-riding grounds of public interest,[113] and compliance with the principle of proportionality.[114]

98. While I agree that the aims pursued by the DLV equate to an overriding ground of public interest (see point 79 above) that could prevail over any right to equal access and participation in leisure activities under Article 21 TFEU, I do not agree that, in the circumstances of the main proceedings, it is inevitable that the impugned rule is either appropriately adapted to the pursuit of these aims, or falls short of exceeding what is necessary to achieve them (points 77 to 96 above).

99. However, I am unable to recommend, as has been argued most strenuously by the Commission (see points 38 and 39 above), that the scope *ratione materie* of Article 21 TFEU extends to access to and participation in leisure activities, at least when this is sought against a private sector actor like the DLV. I do so for the following reasons.

100. If the Court were to take this step, it would be the first time this century that a provision of the Treaty has been selected to join the small number of provisions having the quality of horizontal direct effect in disputes between private sector actors.[115] The situation in the main proceedings differs from that considered by the Court in *Egenberger*, in which the Court ruled on the horizontal impact of the Charter to circumstances that already fell within the scope of application of EU law by reference to the pertinence of a directive to the resolution of the dispute.[116]

101. Expanding the material scope of EU law by imbuing a Treaty provision with horizontal direct effect is a quantifiably different matter. Article 21 TFEU disputes classically concern relations between the citizen and the State,[117] and as far as I am aware the main proceedings represent the first occasion on which the Court has been called on to impose the obligations inherent in Article 21 TFEU on a private sector actor.

102. Further, many disputes that have been resolved by reference primarily to Article 21 TFEU have involved intense disagreement between the parties over compliance with fundamental rights, aside from Article 45 of the Charter, and discussion of relevant case-law of the European Court of Human Rights.[118] This arises due to the obligation in Article 52(3) of the Charter for Charter rights which

113 E.g. judgment of 25 July 2018, *A* (*Assistance for a disabled person*) (C-679/16, EU:C:2018:601, paragraph 68).

114 E.g. judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 31 and the case-law cited).

115 The Commission has placed reliance in this regard, on the judgment of 3 October 2000, *Ferlini* (C-411/98, EU:C:2000:530). However, this case concerns interpretation of an EU regulation in conformity with the prohibition on discrimination on the basis of nationality, rather than Article 21 TFEU.

116 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257).

117 I note that Article 45 of the Charter, on the right of free movement and residence, appears in Title V, entitled 'Citizens' Rights'. However, all of the other articles in that title concern the relationship of the citizen with the State. See Article 39 (the right to vote and to stand as a candidate at elections at the European Parliament); Article 40 (the right to vote and stand as a candidate at municipal elections); Article 41 (the right to good administration); Article 42 (the right of access to documents); Article 43 (on the European Ombudsman) and Article 44 on the right to petition the European Parliament.

118 See recently, e.g. judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385).

'correspond to rights guaranteed by the Convention for the Protection of Fundamental Rights and Freedoms' to have 'the same' meaning. Yet, in the main proceedings, the Court has not been referred to any case-law of the European Court of Human Rights in which restriction of the participation of non-nationals in national sporting championships has been in issue. [119]

103. In addition to this, Article 21 TFEU does not lend itself to horizontal application for reasons of legal certainty. Article 21 TFEU classically comes into play in the broad and unpredictable range of circumstances in which the protection of EU law is sought by applicants unable to show a link between what is in issue and economic activities, [120] or who would otherwise fall outside EU legislation concerning freedom of movement. [121]

104. More specifically, as one Advocate General has recently observed, Article 21 TFEU has been given 'an extremely dynamic interpretation by the Court in situations in which, by reason of the return of Union citizens to their Member State of origin, Directive 2004/38 is no longer applicable to them'. [122] To this must be added financial assistance in the pursuit of education. [123]

105. Therefore, the open ended nature of the rights protected beneath the rubric of Article 21 TFEU render them ill-adapted to direct horizontal application to disputes between private parties. [124] This does not preclude, however, recourse to general principles of law concerning citizenship in the development of the case-law concerning Articles 45, 49 and 56 TFEU for disputes falling within the scope of these provisions when the occasion to do so arises, as is the case in the main proceedings. [125]

106. Further, a finding that purely amateur sports falls within the scope of application of Article 21 TFEU would be in direct conflict with the cardinal rule that sport only falls within the scope of application of EU law to the extent that it constitutes an 'economic activity'; a rule on which private sector actors in the sporting sector across Europe will have organised their affairs, and which was reiterated in the case-law of the Court *after* the entry into force of the Lisbon Treaty and the acquisition by the EU of limited competence with respect to sport as a leisure activity under Article 165 TFEU. [126]

107. That said, any requirement for sport to amount to an 'economic activity' before it can fall within the material scope of EU law is subject to the absence of primary or secondary EU measures that are relevant to the resolution of a given dispute. As explained in my Opinion in *Egenberger*, I have reservations as to whether the absence of an 'economic activity' can diminish the temporal, personal, or material scope of measures of EU law that fall within EU competence as set out in the Treaties. [127]

119 On the compatibility of anti-doping rules with Article 8 of the Convention and Article 2 of Protocol No 4 see ECtHR, 18 January 2018, *FNASS and Others v. France*, CE:ECHR:2018:0118JUD004815111. On sport and the Convention generally see Miège, C., *Sport et droit européen*, L'Harmattan, 2017, p. 279.

120 Dashwood, A. (et.al.), *Wyatt and Dashwood's European Union Law*, Hart Publishing, 2011, pp. 461 to 462. At page 462 the authors correctly state that 'economically active migrants … have always enjoyed the right to equal treatment in respect of most benefits'.

121 E.g. judgments of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385), c.f. judgment of 26 October 2017, *I* (C-195/16, EU:C:2017:815).

122 Opinion of Advocate General Bot in *Lounes* (C-165/16, EU:C:2017:407, point 69); *Coman and others*, ibid.

123 For a recent example of the Court's substantial case law on financial support for students and EU citizenship see judgment of 25 July 2018, *A* (*Assistance for a disabled person*) (C-679/16, EU:C:2018:601).

124 For recent views on the horizontal application of the Charter see e.g. my Opinion in *Egenberger* (C-414/16, EU:C:2017:851), the Opinion of Advocate General Bobek in *Cresco Investigation* (C-193/17, EU:C:2018:614) and the Opinion of Advocate General Bot in *Bauer* (C-569/16, EU:C:2018:337).

125 See for example points 85 and 86 above.

126 Judgments of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143); and of 18 July 2006, *Meca-Medina and Majcen* (C-519/04 P, EU:C:2006:492).

127 *Egenberger*, (C-414/16, EU:C:2017:851, points 46 to 51). The Court has held 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'. See judgment of 18 July 2006, *Meca-Medina and Majcen* (C-519/04 P, EU:C:2006:492, paragraph 27 and the case-law cited).

108. But that is not the case with respect to Article 165 TFEU. Indeed, none of the precursors to the elaboration of Article 165 TFEU point toward the development of EU law to the point that anti-discrimination protection under Articles 18 and 21 TFEU can be extended to leisure sports. The Declaration on Sport which was annexed to the Amsterdam Treaty, which in turn entered into force in 1999, merely recognised the social importance of sport, and called on the EU to listen to sports associations, with special consideration to be given to the particular characteristics of amateur sports. The Conclusions of the European Council of December 2000, held in Nice, entitled 'Amateur sport and sport for all'[128] like the Amsterdam Declaration lacked binding legal force.[129] And the Commission White Paper preceding the adoption of Article 165[130] TFEU is light on detail and deferential to the role of governing bodies in sport, advocating for the EU a subsidiary role.[131] At point 39 of the White Paper the Commission merely 'calls on Member States and sports associations to address discrimination based on nationality in all sports. It will combat discrimination in sport through political dialogue with the Member States, recommendations, structured dialogue with sport stakeholders, and infringement procedures where appropriate'.[132]

109. In the main proceedings the Commission has placed particular emphasis on the fact that the Court has held that access 'to leisure activities' available in a Member State 'is a corollary to … freedom of movement'.[133] It suffices to note that the Court has only ever made this finding in the context of Treaty provisions governing free movement of workers, freedom of establishment, and freedom to provide services.[134] This case-law therefore supports the primary position I have elaborated above with respect to Article 49 TFEU, rather than providing a basis for its transfer to Article 21 TFEU.

110. As one commentator has observed, it 'is the broad reach of the internal market that provides the constitutional basis for the EU's claim to assert competence in matters of sport'[135] Sports, for pure leisure, can only be affected by EU law by virtue of measures passed under Article 165(4) TFEU or the fostering of cooperation under Article 165(3) TFEU, or when sporting activities are affected by others measures of EU law that are within the Union's competence, such as Article 49 TFEU.

VI. Answer to the questions referred

111. I therefore propose responding to the Amtsgericht Darmstadt (Local Court, Darmstadt, Germany) as follows:

In the circumstances of the main proceedings, Articles 18, 21, 49 and 165 TFEU are to be interpreted as meaning that an association of a Member State impermissibly discriminates against amateur athletes who do not have the nationality of the Member State in which they are resident, by precluding their participation in the national championships, or allowing them to participate in national championships but only letting them start 'outside classification' or 'without classification' and not letting them participate in the finals of races and contests, and excluding them from the award of national titles or from the standings.

128 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l35007.

129 Weatherill, op. cit., footnote 98, p. 129.

130 White Paper on Sport, COM(2007) 391 final, 11 July 2007.

131 For a detailed analysis see Weatherill, op. cit., footnote 98, pp. 135 to 141. The White Paper is less ambitious than the preceding 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), Brussels, 10.12.1999, COM(1999) 644 final. See also 'Sport and Free Movement', SEC(2011) 66 final, and 'Developing the European Dimension of Sport', Brussels, 18.1.201, COM(2011) 12 final.

132 White Paper on Sport, COM(2007) 391 final, 11 July 2007.

133 Judgment of 7 March 1996, *Commission* v *France* (C-334/94, EU:C:1996:90, paragraph 21).

134 Ibid. See also Judgments of 12 June 1997, *Commission* v *Ireland* (C-151/96, EU:C:1997:294, paragraph 13); of 27 November 1997, *Commission* v *Greece* (C-62/96, EU:C:1997:565, paragraph 19); and of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212).

135 Weatherill, op.cit., footnote 98, p. 112.