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Provisional text

JUDGMENT OF THE COURT (Third Chamber)

13 June 2019 (\*)

(Reference for a preliminary ruling — Citizenship of the Union — Articles 18, 21 and 165 TFEU — Rules of a sports association — Participation in the national championship of a Member State by an amateur athlete holding the nationality of another Member State — Different treatment on the basis of nationality — Restriction on free movement)

In Case C-22/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Darmstadt (Local Court, Darmstadt, Germany), made by decision of 2 November 2017, received at the Court on 11 January 2018, in the proceedings

**TopFit eV,**

**Daniele Biffi**

v

**Deutscher Leichtathletikverband eV,**

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, J. Malenovský, C.G. Fernlund (Rapporteur) and L.S. Rossi, Judges,

Advocate General: E. Tanchev,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 13 December 2018,

after considering the observations submitted on behalf of

- TopFit eV and Mr Biffi, by G. Kornisch, Rechtsanwalt,
- Deutscher Leichtathletikverband eV, by G. Engelbrecht, Rechtsanwalt,
- the Spanish Government, by S. Jiménez García, acting as Agent,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by M. Kellerbauer and I. Rubene, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2019,

gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 21 and 165 TFEU.

2 The request has been made in proceedings between TopFit eV and Mr Daniele Biffi, on the one hand, and Deutscher Leichtathletikverband eV (German Athletics Association; ‘the DLV’), on the other, concerning the conditions governing participation in the national amateur sports championships, in the senior category, of nationals of other Member States.

### **Legal context**

#### **EU law**

3 Article 165 TFEU, which features under Title XII of the FEU Treaty, headed ‘Education, Vocational Training, Youth and Sport’, states in paragraphs 1 and 2:

‘1. ...

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.

2. Union action shall be aimed at:

...

– 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.’

### **Rules of the DLV**

4 Paragraph 5.2.1 of the Deutsche Leichtathletikordnung (German Athletics Rules) ('the Athletics Rules'), which relates to the right to participate in German championships, states, in the version of 17 June 2016:

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

5 Those rules previously contained a Paragraph 5.2.2, pursuant to which EU citizens were entitled to participate in German championships if they had an entitlement to participate for a German athletics association/athletics community and had had that entitlement for at least one year. That paragraph was deleted on 17 June 2016 and has not been replaced.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

6 Mr Biffi is an Italian national who was born in 1972 and has lived in Germany since 2003. He competes in amateur running races over 60 m, 100 m, 200 m and 400 m distances in the senior category (over 35 years of age). Mr Biffi is a member of TopFit, a sports association established in Berlin (Germany) and a member of the Berliner Leichtathletik-Verband (Berlin Athletics Association), which is itself affiliated to the DLV.

7 The DLV is the umbrella association for all athletics associations at federal-state (*Land*) level. It organises national athletics championships for three categories of athlete: youth athletes under 20 years of age, youth athletes in the 'elite' category, and seniors.

8 Since 2012, Mr Biffi, who is no longer affiliated to the Italian National Athletics Federation, has participated in national senior championships in Germany.

9 Until 17 June 2016, Paragraph 5.2.2 of the Athletics Rules provided that participation in the German championships was open to EU citizens who did not have German nationality if they had an entitlement to participate through a German athletics association or athletics community and had had that entitlement for at least one year.

10 On that date, the DLV amended those Athletics Rules by removing that provision. Paragraph 5.2 of that provision now refers only to nationals, and, according to the DLV's guidelines, it is therefore those with German nationality who have priority when athletes are selected to participate in national championships.

11 The referring court states that the DLV justified that amendment by claiming that only an athlete of German nationality who can participate in championships under the abbreviation 'GER', which refers to the word 'Germany', should be the German champion. The DLV claimed that it is impossible to make rules for senior sport that diverge from those applicable to other sporting categories, namely youth athletes under 20 years of age and the 'elite' category.

12 In its written observations, the DLV provides further details on the Athletics Rules and explains that foreign nationals with an entitlement to participate through an athletics club or athletics community within the territory of the DLV or through another national association can, by way of reasoned application, be granted an entitlement to participate without classification where they receive an authorisation to that effect before the closing date for registration for the sporting event in question. In such circumstances, they can participate only in the first round of a running competition or in the first three attempts of a technical competition.

13 TopFit registered Mr Biffi for the German senior indoor championship, which took place on 4 and 5 March 2017 in Erfurt, for the 60 m, 200 m and 400 m disciplines. However, that registration was rejected by the DLV, with the result that Mr Biffi was completely excluded from that championship, despite fulfilling all of the participation conditions bar the nationality requirement. TopFit and Mr Biffi unsuccessfully appealed against the decision rejecting his registration before the DLV's judicial commission.

14 Another German senior championship was held by the DLV from 30 June to 2 July 2017 in Zittau, for which Mr Biffi fulfilled the minimum performance requirements to run in the 100 m, 200 m and 400 m disciplines. However, as Mr Biffi had the right to participate in those championships only 'outside classification' or 'without classification', he and TopFit brought an application for interim measures before the referring court to allow him to participate fully in that championship. That application was rejected.

15 Mr Biffi was authorised to participate in those races, but only in part, that is to say, without being classified either in time trials or in disciplines involving a final, such as the 100 m, in which he was permitted to participate only in the heats without being able to progress to the final.

16 As a result, Mr Biffi and TopFit lodged an application before the referring court seeking his admission to participate in future German senior athletics championships and requesting that he be able to be classified at those championships. They submit that he fulfils all the conditions required by the DLV, inter alia those relating to performance, bar the requirement to have German nationality.

17 The referring court is uncertain whether such a nationality requirement constitutes unlawful discrimination that is contrary to the rules of the FEU Treaty.

18 It states that, according to the DLV, the Athletics Rules are not contrary to the provisions of the Treaty, as the sporting practice in question is not an economic activity and, therefore, does not come within the scope of EU law.

19 While noting that Mr Biffi is a senior sportsman who, despite impressive sporting achievements, remains an amateur sportsman who is not exercising an economic activity when he participates in championships, the referring court is unsure whether the application of EU law in the area of sport is always subject to the exercise of such an activity. In that regard, it observes that EU law does now explicitly refer to sport in Article 165 TFEU and that the right of EU citizens to reside in another Member State without discrimination under Articles 18, 20 and 21 TFEU is not dependent on the exercise of an economic activity.

20 While having doubts in this regard, that court concludes that participation of nationals of certain Member States in the sporting championships of another Member State should, in principle, be permitted. Exceptions may apply, in particular in the case of national titles and championships, but the restrictions should be proportionate and should not go beyond what is absolutely necessary to guarantee sporting competition.

21 In those circumstances, the Amtsgericht Darmstadt (Local Court, Darmstadt, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(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 [a sporting] association of a Member State impermissibly discriminates against amateur athletes who do not have the nationality of that Member State by allowing them to participate in national championships but only letting them participate “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 [a sporting] 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 classification?’

### **The request for the oral procedure to be reopened**

22 Following the delivery of the Advocate General’s Opinion, the DLV requested, by letter of 20 March 2019, that the oral part of the proceedings be reopened on the ground that the Opinion is principally based on Article 49 TFEU, whereas the questions referred relate solely to Articles 18, 21 and 165 TFEU and the parties have not had the opportunity to take a position on the effect that Article 49 TFEU may have on the outcome of the dispute in the main proceedings.

23 In that regard, Article 83 of the Rules of Procedure of the Court permits the Court, after hearing the Advocate General, to order at any time the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of a legal argument which has not been debated between the parties.

24 In the present proceedings, the Court finds that it has all the information necessary to respond to the questions that have been referred to it and that the case does not have to be decided on the basis of an argument founded on Article 49 TFEU that has not been debated between the parties.

25 Accordingly, there is no need to order that the oral part of the procedure be reopened.

### **Consideration of the questions referred**

26 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for many years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can as, even if he fulfils all the necessary conditions bar the nationality requirement, he can participate in those championships only ‘outside classification’ or ‘without classification’, without being able to progress to the final and without being eligible to be awarded the title of national champion, and may not even be permitted to participate in those championships.

27 In that regard, it should be noted that an EU citizen, such as Mr Biffi, an Italian national who moved to Germany, where he has resided for 15 years, has exercised his right to free movement within the meaning of Article 21 TFEU.

28 According to settled case-law, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for (judgment of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31).

29 As the Court has held previously, the situation of an EU citizen who has made use of his right to move freely comes within the scope of Article 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality (judgment of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 27).

30 That article is applicable to an EU citizen who, like Mr Biffi, resides in a Member State other than the Member State of which he is a national and in which he intends to participate in sporting competitions in an amateur capacity.

31 Further, the Court has previously held that, under EU law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity and that access to leisure activities available in that Member State is a corollary to that freedom of movement (judgment of 7 March 1996, *Commission v France*, C-334/94, EU:C:1996:90, paragraph 21).

32 The Court has also found that the rights conferred on an EU citizen by Article 21(1) TFEU are intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State (see, to that effect, judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 56).

33 Moreover, Article 165 TFEU reflects the considerable social importance of sport in the European Union, in particular amateur sport, as highlighted in Declaration No 29 on sport annexed to the Final Act of the conference which adopted the text of the Treaty of Amsterdam (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 106, and of 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201, paragraph 33) and the role of sport as a factor for integration in the society of the host Member State.

34 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 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.

35 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.

36 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.

37 In that regard, it should be noted that, in accordance with settled case-law, observance of the fundamental freedoms and the prohibition of discrimination on the basis of nationality provided for by the Treaty also apply to rules which are not public in nature but which are aimed at regulating gainful employment and the provision of services in a collective manner (see, inter alia, judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 17; of 15 December

1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 82; of 18 December 2007, *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 98; and of 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 30).

38 The Court has thus held that the abolition as between Member States of obstacles to the freedom of movement for persons and to the freedom to provide services, which is a fundamental objective of the European Community contained in Article 3(c) of the EEC Treaty (repealed by the Treaty of Lisbon), replaced in essence by Articles 3 to 6 TFEU, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law (see, to that effect, judgment of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140, paragraph 18).

39 The principle established by this case-law of the Court also applies in cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty (see, to that effect, judgment of 3 October 2000, *Ferlini*, C-411/98, EU:C:2000:530, paragraph 50).

40 It follows from the above that the rules of a national sports association, such as those at issue in the main proceedings, which govern the access of EU citizens to sports competitions, are subject to the rules of the Treaty, in particular Articles 18 and 21 TFEU.

41 Therefore, it is appropriate to examine whether such rules comply with those articles.

42 The referring court observes, in this regard, that EU citizens such as Mr Biffi have been treated differently from nationals since the change to the Athletics Rules was introduced by the DLV on 17 June 2016.

43 According to that court, even if such a citizen fulfils the conditions relating to the obligatory sporting performances and has had an entitlement to participate for the sports event through a club affiliated with the national athletics association for at least one year, he may not, on account of his nationality, be permitted to participate in a national amateur running championship over short distances in the senior category or may be permitted to participate only in part.

44 It should be recalled that such a difference in treatment is liable to restrict the freedom of movement of that EU citizen (see, to that effect, judgment of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 28).

45 In the present case, it is apparent from the order for reference that an amateur sportsman such as Mr Biffi does not have access to the senior category of the national championships organised by the DLV under the same conditions as German nationals, despite those championships being among some of the most important competitions at a national level. While he is authorised to participate in those championships, he is, however, restricted to taking part either in the heats without classification, and therefore without being able to progress to the final, or in the time trials, but without classification.

46 As TopFit and Mr Biffi argue in their written observations, rules such as those at issue in the main proceedings can also lead to athletes who are nationals of a Member State other than the Federal Republic of Germany being less well supported by the sports clubs to which they are affiliated as compared with national athletes, since those clubs will have less interest in investing in

an athlete who has no prospect of participating in the national championships. In such circumstances, athletes who are nationals of other Member States, such as Mr Biffi, would be less able to integrate themselves into the sports club to which they are affiliated and, consequently, into the society of the Member State in which they are resident.

47 The Court finds that such effects are likely to make amateur sport less attractive for EU citizens and, consequently, constitute a restriction on the freedom of movement of EU citizens within the meaning of Article 21 TFEU.

48 Such a restriction on the freedom of movement of EU citizens can be justified only where it is based on objective considerations and is proportionate to the legitimate objective pursued by the rules at issue (see, to that effect, judgment of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 31).

49 In that regard, it should be recalled that, in the field of sport, the Court has consistently held that the provisions of EU law concerning the free movement of persons and services do not preclude rules or practices justified on grounds that relate to the particular nature and context of certain sports matches, such as matches between national teams from different countries. However, such a restriction on the scope of the provisions in question must remain limited to its proper objective and cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty (see, to that effect, judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 76 and 127).

50 Since, *prima facie*, the award of the title of national champion in a particular sporting discipline does not cover all competitions occurring at a national level in that discipline, the award of that title has a limited effect on the practice of the sporting discipline in question. Further, as has been held with regard to the composition of national teams, it appears to be legitimate to limit the award of the title of national champion in a particular sporting discipline to a national of the relevant Member State and consider that nationality requirement to be a characteristic of the title of national champion itself. However, it is vital that the restrictions resulting from the pursuit of that objective should observe the principle of proportionality.

51 In the present case, the DLV maintains, generally, that, as a sports association, it is free to establish its own rules and that the public expects that the national champion of a given State will be a national of that State. Further, that association relies on two specific explanations aimed at justifying its rules. First, designation as the national champion and as the second and third best national athletes is used to select the athletes who will represent their country in international championships, such as the European championships, in the present case under the abbreviation 'GER', referring to the word 'Germany'. Second, the DLV submits that it is not possible to distinguish between the age categories and to make rules for senior sport that diverge from those applicable to youth athletes under 20 years old and to those in the 'elite' category.

52 Turning, firstly, to the assertion that sports associations are free to establish their rules, it should be borne in mind, as has already been noted in paragraph 40 above, that the freedom of private associations to adopt sporting rules cannot authorise them to limit the exercise of rights conferred on individuals by the Treaty (see, to that effect, judgment of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 81).

53 It should be pointed out that the fact that a rule applies solely to sport does not mean that it is automatically excluded from the scope of the Treaty (see, to that effect, judgment of 18 July 2006, *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, paragraph 33).



54 Consequently, the argument that the public expects that the national champion of a country will have the nationality of that country does not systematically justify any restriction on the participation of non-nationals in the national championships.

55 Therefore, it is further necessary to examine the specific justifications relied on by the DLV.

56 With regard to the first of those justifications, namely designation of the national champion who will represent his country in international championships, it became apparent at the hearing before the Court that the DLV does not itself choose the participants in international championships in the senior category, but that athletes belonging to a club affiliated to the DLV who fulfil the conditions governing performance can, regardless of their nationality, participate in those championships and register for them themselves. Thus, a national of a Member State other than the Federal Republic of Germany can become a European running champion in the senior category by competing for Germany. According to the DLV's own contentions, it selects the best national athletes in order to participate in international championships only in the 'elite' category.

57 With regard to the second justification relied on by the DLV, namely the need to adopt the same rules for all age categories, it follows from the previous paragraph that that justification is not substantiated by the DLV's statement on the mechanism for the selection of athletes at an international level, from which it is apparent that that mechanism applies only to the 'elite' category.

58 Therefore, neither of the two justifications put forward by the DLV appears to be founded on objective considerations.

59 It is for the referring court to verify whether there are other justifications for the rules establishing the partial non-admission of non-nationals to the national championships.

60 In that regard, it should also be borne in mind that, while it falls to the bodies concerned, such as the organisers of championships or sports associations, to lay down appropriate rules in order to ensure the proper functioning of competitions (judgment of 11 April 2000, *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraph 67), those rules may not go beyond what is necessary for achieving the aim pursued (judgment of 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, EU:C:2000:201, paragraph 56).

61 Concerning the argument that the present case involves an individual sport with eliminatory heats, in this instance short-distance running over eight lanes, it must be noted that the presence of one or several non-nationals in the final is capable of preventing a national from winning the championship and of hindering the designation of the best nationals.

62 However, even in the context of such sports, the non-admission of non-nationals to the final must not go beyond what is necessary for achieving the aim pursued. In that regard, it is necessary to take into account the fact that, in the Member State at issue in the present case, it is not the case that that exclusion has existed for years in the senior category.

63 It is for the national court called upon to examine whether there are other potential justifications to carry out that examination by taking into account the objective, arising from a combined reading of the provisions of Article 21(1) TFEU and Article 165 TFEU, of increased openness in competitions and the importance of integrating residents, in particular long-term residents, such as Mr Biffi in the present case, in the host Member State.

64 Secondly, with regard to the total non-admission to the national championships, the DLV considers that this does not apply in the present case, as Mr Biffi should be able to continue to participate in those championships. However, it is apparent from the order for reference that Mr Biffi was excluded from participating in a national championship in 2017. Further, according to the details on the rules provided by the DLV in its written observations, as the participation of non-nationals who are members of a club affiliated with the DLV is subject to an authorisation, such exclusion remains possible.

65 It should be borne in mind in this regard that, in order for a prior authorisation scheme to be justified in the light of Articles 18 and 21 TFEU, it must, in any event, be based on objective and non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the DLV's discretion so that it is not used arbitrarily (see, to that effect, judgment of 20 February 2001, *Analir and Others*, C-205/99, EU:C:2001:107, paragraph 38).

66 In addition, the Court finds that, since there is a mechanism for the participation of a non-national athlete in the national championships, at the very least in the heats and/or without classification, the total non-admission of such an athlete to those championships on account of his nationality seems, in any event, to be disproportionate.

67 Consequently, the answer to the questions referred is that Articles 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only 'outside classification' or 'without classification', without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify.

### **Costs**

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Articles 18, 21 and 165 TFEU must be interpreted as precluding rules of a national sports association, such as those at issue in the main proceedings, under which an EU citizen, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only 'outside classification' or 'without classification', without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify.**

[Signatures]

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\* Language of the case: German.

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