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The *TopFit* judgment on amateur sport and its potential aftermath on the relationship between EU law and dual careers of athletes

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1. What does the *TopFit* judgment[1] on amateur sport have to do with dual-career programmes for student-athletes? Apparently, nothing. However, if the strict perspective of the subject matter at issue in the judgment is broadened, it is possible to discover new and interesting aspects directly affecting the legal basis of the relationship between EU law and non-economic sporting activities.

2. Considering the *TopFit* judgment first, the Court of Justice ruled that the practice of amateur sport is governed by Articles 18 and 21 TFEU. Contrary to its previous settled case law, the Court of Justice has moved away from the traditional *refrain*, according to which, having regard to the objectives of EU law, sport is subject to EU law in so far as it constitutes an economic activity. After ratification of the Lisbon Treaty, the Court of Justice, for the first time, applied EU law to a sporting activity regardless of its non-economic nature. This aspect should not be underestimated, given that in the *Olympique Lyonnais* case[2], also following the Lisbon Treaty, the Court of Justice had still repeated the mantra that the subjection of sport to EU law was only to the extent that it constituted an economic activity[3]. In contrast, in the *TopFit* judgment, the Court of Justice argued that: (*i*) Union citizenship is destined to be the

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[1] Court of Justice, 13 June 2019, case C-22/18, *TopFit and Biffi*, ECLI:EU:C:2019:497.
[2] Court of Justice, 16 March 2010, case C-325/08, *Olympique Lyonnais*, ECLI:EU:C:2010:143.
[3] J. LINDHOLM, *Case C-325/08, Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United UFC, Judgment of the Court of Justice (Grand Chamber) of 16 March 2010*, in *Common Market Law Review*, 2010, p. 1187 ff.

fundamental *status* of nationals of Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality; (*ii*) the situation of an EU citizen who has made use of the right to move freely comes within the scope of Article 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality. On the basis of such a fundamental statement, the Court of Justice faces no problem in ruling that Article 18 TFEU is applicable to an EU citizen who resides in a Member State, other than the Member State of which he/she is a national, and in which he/she intends to participate in sporting activities in an amateur capacity. The reasoning of the Court of Justice is further strengthened by the following findings: (*a*) access to leisure activities available in the host Member State is a corollary to the freedom of movement; (*b*) the rights conferred on an EU citizen by Article 21(1) TFEU are intended, among other things, to promote the gradual integration of the EU citizen concerned into the society of the host Member State; (*c*) Art. 165 TFEU reflects the considerable social importance of sport, in particular amateur sport, in the European Union, as highlighted in Declaration No. 29 on sport annexed to the Treaty of Amsterdam, and the role of sport as a factor for integration in the society of the host Member State. In so doing, the Court of Justice has clearly shown that it shares the Commission's point of view illustrated in the 2011 *Communication on sport*[4] where it stated that "the free movement rules apply also to amateur sport as the Commission considers that following a combined reading of Articles 18, 21 and 165 TFEU, the general EU principle of prohibition of any discrimination on grounds of nationality applies to sport for all EU citizens who have used their right to free movement, including those exercising an amateur sport activity".

3. The next step is to analyse the aftermath of the *TopFit* judgment on the interpretation of Article 165 TFEU in conjunction with Article 6 TFEU in relation to non-economic sporting activities. Article 6 TFEU states that in the field of sport (as well as in the field of protection and improvement of human health, industry, culture, tourism, education, vocational training, youth, civil protection and administrative cooperation), the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States. However, Article 2(5) TFEU clarifies that in these sectors the action of the Union cannot replace that of the Member States, and that legally binding acts of the Union adopted on the basis of the provisions in the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. Accordingly, Article 165 TFEU states that the Union shall contribute to the promotion of European sporting activities, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. In so doing, the 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. However, in order to respect the nature of the supporting competence of the Union in the field of sport, it is expressly stated that the European Parliament and the Council, acting in accordance with ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, may

[4] European Commission, *Communication on sport (2011). Developing the European Dimension in Sport*, 2011, available at: https://op.europa.eu/en/publication-detail/-/publication/db29f162-d754-49bc-b07c-786ded813f71.

adopt incentive measures only, excluding any harmonisation of the laws and regulations of the Member States; similarly, the Council, on a proposal from the Commission, may adopt recommendations only[5].

Immediately after the entry into force of the Lisbon Treaty, the common opinion was that the Treaty had not introduced any significant change in the relationship between EU law and sporting activities: sport, despite having become a competence of the Union, remained relegated to the field of so-called complementary (or supporting) competences for which any harmonisation of Member States' laws and regulations was expressly forbidden. In other words, this meant that EU law continued to apply to sport in so far as it constituted an economic activity; on the other hand, where the economic dimension of sport was absent, there was no room for a binding legislative intervention by the Union. More simply: *nihil novi sub sole.*

In this context, the *TopFit* judgment is rather revolutionary. It is worth underlining that Advocate General Tanchev[6] argued that the scope *ratione materiae* of Article 21 TFEU should not have been extended to access to/and participation in leisure activities and that a finding that purely amateur sport 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 that was reiterated in the case law of the Court after the entry into force of the Lisbon Treaty (*id est*, the *Olympique Lyonnais* case) and the EU's acquisition of limited competence with respect to sport as a leisure activity under Article 165 TFEU. On the contrary, as already illustrated, the Court of Justice has expressly recognised the right to leisure activities under Article 21 TFEU and that an EU citizen who has made use of his/her right to move freely can legitimately rely on Articles 18 and 21 TFEU in connection with his/her practice of an amateur sport in the society of the host Member State.

4. Let us apply such principles of law to athlete engagement in dual careers. Dual-career programmes can be regarded as one of the different aspects of the so-called social and cultural dimension of sport under EU policy[7]. After a rather quiet start, in the last five years, the topic of dual career has become a priority in the political agenda of the Union. In this regard, it is important to remember the following key points:

(*a*) In 2012, the Commission published its Guidelines on dual careers of athletes[8] aimed at sensitising governments, sport governing bodies, educational institutions and employers in order to create the right environment for dual careers of athletes, including an appropriate legal and financial framework and a tailor-made approach respecting differences between sports. However, in accordance with the specific nature of the EU competence on sport recognised by

[5] R. SCHÜTZE, *Classifying EU competences: German constitutional lessons?*, in S. GARBEN, I. GOVAERE (eds.), *The division of competences beteween the EU and the Member States*, London, 2017, p. 50 ff.

[6] Opinion of Advocate General Tanchev delivered on 7 March 2019, case C-22/98, *TopFit and Biffi*, ECLI:EU:C:2019:181.

[7] F. GUIDOTTI, C. CORTIS, L. CAPRANICA, *Dual career of European Student-athletes: A systematic literature review*, in *Kinesiologia Slovenica*, 2015, p. 5 ff.; N.B. STAMBULOVA, T.V. RYBA, *A critical review of career research and assistance through the cultural lens: towards cultural praxis of athletes' careers*, in *International Review of Sport and Exercise Psychology*, 2014, p. 1 ff.

[8] European Commission, *EU Guidelines on Dual Careers of Athletes. Recommended Policy Actions in Support of Dual Careers in High-Performance Sport*, Approved by the EU Expert Group "Education & Training in Sport" at its meeting in Poznań on 28 September 2012, available at: https://ec.europa.eu/assets/eac/sport/library/documents/dual-career-guidelines-final_en.pdf.

Article 6 TFEU and Article 165 TFEU, it is expressly stated that the Guidelines are not intended to become a binding instrument and that they respect the diversity of competences and traditions in Member States in the various policy fields;

(*b*) In 2014, the Council and the Representatives of the Governments of the Member States[9] invited the EU Member States, sports organisations and stakeholders to develop a policy framework and/or national guidelines for dual careers: to promote cooperation and agreement in the development and implementation of dual careers between all relevant stakeholders; to encourage cross-sectoral cooperation and support innovative measures and research aimed at identifying and solving the problems facing athletes in both education and in the workplace; to promote the exchange of good practice and experience on dual careers among Member States at local, regional and national level; to ensure that measures in support of dual careers, where they exist, are applied equally for male and female athletes, and taking into account the special needs of athletes with a disability; to encourage sports organisations and educational institutions to ensure that only suitably qualified or trained staff work or volunteer in support of athletes undertaking a dual career; and to promote the use of quality standards in sports academies and high performance training centres, for example with regard to dual-career staff, safety and security arrangements and transparency about the rights of athletes.

(*c*) Lastly, in 2015, the Commission published a study on the minimum quality requirements for dual-career services[10] aimed at developing a set of requirements to function as a reference point for national dual-career services and facilities across the EU.

Generally speaking, student-athletes are not supposed to be professional sportsmen and sportswomen. Although it is not possible to deny that some top-level student-athletes could be regarded as European workers or service providers, the vast majority of young and very young student-athletes do not provide an economic activity, and, therefore, fall outside the scope of EU provisions on the free movement of workers and/or of services. However, by virtue of the principle of law laid down in the *TopFit* judgment, this does not mean that their sporting activity is outside the scope of EU law. In particular, it must be stressed that a student-athlete who has made use of his/her right to move freely within the Union, is entitled to legitimately rely on Article 18 and Article 21 TFEU in connection with the practice of his/her (non-economic) sporting activity. This means that the Court of Justice is fully entitled to rule on matters concerning dual-career programmes in so far as they may be in contrast to EU principles of European citizenship and free movement of European citizens. This point is fundamental considering that in the 2012 Guidelines on dual careers of athletes, the Commission underlined that "athletes represent one of the most internationally mobile parts of the European population. They frequently travel abroad for sports training and stages, competitions (including long tournaments), and/or studies. International activities are increasing in all sports and starting at a younger age, as illustrated for example by the Youth Olympic Games (15–18 years) and international youth championships in several sports"[11]. Although student-athletes generally consider this mobility as temporary, intending to return to their countries of origin, many

[9] Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on dual careers for athletes, in *OJEU*, C 168 of 14 June 2013, p. 10.
[10] European Commission, *Study on the minimum quality requirements for dual career services*, 2016, available at: https://op.europa.eu/en/publication-detail/-/publication/e06e5845-0527-11e6-b713-01aa75ed71a1.
[11] European Commission, *EU Guidelines on Dual Careers of Athletes*, cit., p. 33.

aspects of dual careers have a clear EU dimension. In this context, it is not possible to exclude the risk of violation of student-athletes' right to access to sporting activities on a non-discriminatory basis because of the lack of harmonisation of national laws and regulations; in such a case, however, it seems possible to argue that neither the non-economic nature of the sporting activity practised by student-athletes nor the complementary (or supporting) nature of the Union's competence in the field of sport (and of education) could prevent the Court of Justice from ruling on a case where it is alleged a violation has occurred of the student-athlete's right to access to sporting activities in the host Member State.

To sum up, the debate to date on the extension of the boundaries of the supporting competences has been mainly centred on the following issues:

(*a*) Can the Union adopt a supporting measure in the form of an ordinary binding act such as a directive, regulation or decision?

(*b*) If yes, can a supporting measure adopted by the Union in the form of a directive, regulation or decision have the indirect effect of harmonising Member States' laws and regulations?

After the *TopFit* judgment, these issues have not changed; but they are enriched by the principle of law according to which the right to leisure and amateur sporting activities is fully covered by Article 18 and Article 21 TFEU. If one considers that the vast majority of student-athletes do not practise an economic activity and that they are characterised by relevant mobility across Europe (and internationally), their protection under EU law could be even more extensive than one might imagine. This is because when the Court of Justice states that EU law must be interpreted as precluding a given national provision, the *erga omnes* binding effect of the preliminary ruling is likely to create a *de facto* harmonisation of Member States' laws and regulations.