

RESEARCH ARTICLE

The Implications of the Recent Jurisprudence of the Court of Justice of the European Union for the Protection of the Fundamental Rights of Athletes and the Regulatory Autonomy of Sporting Federations

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Fundamental rights of the EU are in principle applicable in relations of vertical nature, in which individuals are confronted with the state. However, in relations of horizontal nature, in which both parties are individuals and on equal terms, applicability of the Charter of Fundamental Rights of the EU has been long disputed among scholars. Only recently, in rulings *Egenberger* and *Bauer*, the Court of Justice of the European Union has directly addressed this issue. This paper elaborates on the consequences of the Court's decision for the European sports model, presents reasons for justification of horizontal applicability of fundamental rights of the EU towards sports and proposes a method of applying the framework developed by the Court to conducting sports activity in the EU. Main argument of the Author is that the rules regulating sporting activity, if this activity falls within the scope of the law of the EU, may be subject to assessment of conformity with fundamental rights of the EU thanks to direct horizontal applicability of the Charter, which explicitly results from the recent Court's rulings.

Keywords: Human rights; fundamental rights; horizontal applicability; autonomy of sports; sports law

1 Introduction

Sport, along with education, vocational training, and youth, is one of the areas listed in Article 6(e) of the Treaty on the Functioning of the European Union (TFEU)¹ in which the European Union (EU) has competence to carry out 'actions to support, coordinate or supplement the actions of the Member States'. According to Article 165(1) TFEU, the Union shall contribute to promoting European sporting issues, while taking account of the specific nature of sports, its structures based on voluntary activity, and its social and educational function. Furthermore, Union actions 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, as well as by protecting the physical and moral integrity of athletes—especially the youngest—pursuant to Article 165(2) TFEU.

Nevertheless, the influence of actions undertaken by the Union in the sporting sector and on the legal position of individuals practicing sports—both for leisure and for money—is not merely supportive, coordinative, and supplementary. The Court of Justice of the European Union (hereinafter 'the Court') has ambitiously increased the level of protection of the rights of athletes in its judicial activity. This increase, spanning decades from *Walrave and Koch*² to *TopFit and Biffi*,³ has occurred in parallel to the progress made in the

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¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

² Case C-36/74 *Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405.

³ Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* ECLI:EU:C:2019:497.

protection of individual rights. Recent adjudications in the cases *Egenberger*⁴ and *Bauer*⁵ are in this respect particularly significant, as they may result in groundbreaking changes to the regime of protection of fundamental rights in the EU.

2 The Tangled Matter of Horizontal Applicability of Fundamental Rights in the Union Legal Order

Fundamental rights originated as *Abwehrrechte*—legal instruments that enable the protection of the rights and freedoms of individuals from authoritative actions of the state. Because of the aim of protecting individual rights and freedoms in the sphere of public law, their applicability to disputes between private parties has never been obvious. Due to their constitutional origins, the discussion on applicability of fundamental rights to disputes between private parties (*horizontal* applicability) was held among constitutional law scholars at national levels⁶ long before fundamental rights emerged in EU legal order after *Stauder* ruling.⁷ However, the debate around the horizontal effect and applicability of fundamental rights at the Union level was long impeded due to the lack of a defined catalog of binding fundamental rights. This changed with the adoption of the Charter of Fundamental Rights of the European Union (hereinafter ‘the Charter’) in 2000, which became binding in 2009.⁸

2.1 The Indirect Horizontal Applicability of the Fundamental Rights in the EU

Even after 2009, it remained dubious whether the Charter could be applied to disputes between private parties for two reasons. Firstly, this was because of the dual nature of the Charter’s provisions, divided by Article 52(5)⁹ into binding ‘rights and freedoms’ on the one hand and merely interpretive ‘principles’ on the other.¹⁰ Secondly, the unambiguous wording of Article 51(1) explicitly states that ‘the provisions of [the] Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. Until now, this provision has been interpreted in a straightforward manner, indicating that the EU institutions and Member States, in limited situations of implementing EU law, remain the sole addressees of the Charter. The most interesting problems for scholars seemed to be related to the scope and meaning of ‘implementing the EU law’ and the Court’s decision in the case *Akerberg Fransson*.¹¹ The Court explained then that the Member States may be accountable for respecting the Charter provisions in all situations remaining in scope of the law of the EU and covered by the Union legislation. The emphasis of the Court was rather put on *vertical* applicability of the Charter provisions—in which cases individuals may revoke the Charter to protect their fundamental rights covered in its provisions against actions of the state.

Nevertheless, two main theoretical concepts of horizontal applicability of fundamental rights were developed by scholars based on the jurisprudence of the Court: the theories of direct and indirect horizontal applicability of the Charter provisions. Direct horizontal applicability relates to situations in which a judge directly imposes provisions incorporating fundamental rights in a dispute between private parties to settle a case, the provisions of the Charter thus becoming the expressly invoked ground of the judgment. Indirect

⁴ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257.

⁵ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* ECLI:EU:C:2018:871.

⁶ Foremost in Germany, where the theory of applicability of the fundamental rights enshrined in the German Basic Law to the relations between private parties (*Drittwirkung*) was first developed by the *Bundesarbeitsgericht* (Federal Labor Court) and subsequently was adopted and adapted by *Bundesverfassungsgericht* (Federal Constitutional Court) in *Lüth* Case (BVerfGE 7, 198 (15 January 1958) 1 BvR 400/51 *Lüth*; See also: Sonya Walkila, ‘Horizontal Effect of Fundamental Rights, Contributing to the Primacy, Unity and Effectiveness of European Union Law’ (Dissertation, University of Helsinki 2015) 196–200.)

⁷ Case 29–69 *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419, para 7.

⁸ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁹ The precise wording of the provision is as follows: ‘[t]he provisions of this Charter which contain principles may be implemented by legislative European and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’.

¹⁰ Matteo Fornasier, ‘The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect’ (2015) 23 *European Review of Private Law* 29, 36–37; Dorota Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 *European Law Review* 479; David Ramos Munoz, ‘Do Fundamental Rights Conflict with Private Law?’ (2017) 25 *European Review of Private Law* 1031; Joanna Krzeminska-Vamvaka, ‘Horizontal Effect of Fundamental Rights and Freedoms – Much Ado About Nothing? German, Polish and EU Theories Compared after Viking Line’ Jean Monnet Working Paper No 11/2009 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582314> accessed 21 March 2020.

¹¹ Judgement of the Court of 26 February 2013, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

horizontal applicability, in contrast, means that a judge interprets the adjudication-relevant private law provisions in the context of fundamental rights to ensure the latter's fullest possible implementation. The private law provisions remain the sole grounds of the judgment.¹²

Additionally, some authors claimed that two further possibilities to grant horizontal applicability of fundamental rights existed on the grounds of Article 51(1) of the Charter. One group assumed the positive obligation resting on the Member States to protect the rights and freedoms of individuals from the actions of other individuals. The state should provide optimal conditions for fulfillment of rights and freedoms derived from the Charter for all individuals through legislative, executive, and adjudicative actions.¹³ In other words, to act in conformity with the Charter, the state should guarantee, by all available means, to all individuals that other individuals will not violate their fundamental rights or prevent them from making use of the fundamental freedoms.

The other group of scholars indicated the Court as one of the institutions of the EU expressly bound to observe the Charter in the Article 51(1) and, as a consequence, to ensure its horizontal applicability by responding to the preliminary questions of national courts and formulating guidelines on the interpretation of fundamental rights for them.¹⁴ If such questions and responses were issued in private law disputes, the Court would indirectly grant horizontal applicability of the Charter provisions. All four concepts were mainly developed on the grounds of rulings of the Court in *Mangold*,¹⁵ *Kücükdeveci*,¹⁶ and *AMS*.¹⁷

The rulings in *Mangold* and *Kücükdeveci* were related to the principle of non-discrimination on the grounds of age, which the Court declared in its *Mangold* ruling as inherent to the EU's legal order as a general principle. Even regarding disputes between private parties, the Court stated the following:

it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that these rules are fully effective, setting aside any provision of national law which may conflict with that law.¹⁸

This remark was then repeated in *Kücükdeveci*,¹⁹ in which the Court endorsed the central role of national courts in ensuring proper level of protection for individuals.²⁰ Both cases were framed as reviewing the actions of the Member State by examining national legislation and its compatibility with EU law. Some authors, however, argued that in these verdicts, the Court implied indirect horizontal applicability of fundamental rights, albeit not included in provisions of the Charter, but as a general principle of EU law and in strict connection to the Directive in which they are expressed—in both cases Directive 2000/78.²¹

In contrast, in the *AMS* ruling, the provisions of the Charter were explicitly invoked. The Court examined the horizontal applicability of Article 27 of the Charter or, more specifically, whether it would be sufficient to determine its nonconformity with a national provision in order to set the latter aside in a dispute between private parties. The result of this examination was negative because Article 27 'by itself does not suffice to confer on individuals a right which they may invoke as such'.²² The Court explained that Article 27 of the Charter covers a principle (in the meaning of Article 52(5) of the Charter) of the 'worker's right to information and consultation within the undertaking', not a right that could be effectively invoked to settle the case among private parties.²³ Therefore, the findings from *Mangold* and *Kücükdeveci*, respectively, could not be applied to the case's dispute between an employer and employees. In order not to leave the

¹² Fornasier (n 11).

¹³ Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 *European Law Journal* 657, 663.

¹⁴ Walkila (n 8) 157–168.

¹⁵ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

¹⁶ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-365.

¹⁷ Case C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT and Others* [2014] OJ C85/03.

¹⁸ *Mangold* (n 15) para 77.

¹⁹ *Kücükdeveci* (n 16) para 51.

²⁰ The CJEU indicated that the national court is fully independent and needs not to ask preliminary questions to the CJEU in order to set aside the national provisions.

²¹ Frantziou (n 13) 667–668; Fornasier (n 11) 40–46; Walkila (n 8) 236–240.

²² *AMS* (n 17) para 49; See also: Nicole Lazzarini, '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS' (2014) 51 *CML Rev* 907.

²³ 'It is [...] clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law'. See: *AMS* (n 17) para 45.

individuals without any protection of their rights, the Court indicated the solution presented in the case *Dominguez*²⁴ that would allow individuals to obtain, if appropriate, compensation from Member States for the sustained loss resulting from the national law not being in conformity with the law of the EU.²⁵

2.2 Arguments for Direct Horizontal Applicability of the Charter

Everything changed with the Court issuing rulings in *Egenberger* and *Bauer*. In both cases, the Court had to examine horizontal applicability of the Charter provisions (the general prohibition of any form of discrimination enshrined in Article 21(1) and the right to paid annual leave in Article 31(2), respectively) in response to the preliminary question asked by the German *Bundesarbeitsgericht*—the very same judicial authority that developed the theory of *Drittwirkung*. In *Egenberger*, the Court referred to ‘prohibition of all discrimination on grounds of religion or belief [that] is mandatory as a general principle of EU law’ as a consequence of Directive 2000/78’s provisions not being horizontally applicable.²⁶ Then, the Court stated that this principle is enshrined in Article 21(1) of the Charter and as such ‘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’.²⁷

The Court subsequently noted that this provision is of mandatory nature, analogously to the respective prohibitions of discrimination expressed in the provisions of the Treaties, ‘even where the discrimination derives from contracts between individuals’.²⁸ The same mandatory character may be conferred on Article 47 of the Charter regarding the right to a fair trial, leading the Court to conclude that national courts had to award ‘the judicial protection for individuals flowing from Articles 21 and 47 of the Charter’ by guaranteeing its full effectiveness and dismissing contrary provisions of national law if necessary.²⁹ However, national courts have an obligation to balance competing fundamental rights of both parties to a dispute, so the fundamental rights of one individual are limited by the fundamental rights that may be derived from the Charter by another.³⁰ These remarks were extensively repeated and further developed in the subsequent ruling in *Bauer*. The Court examined the horizontal applicability of the right to allowance in lieu of the annual leave provided for by Directive 93/104 and Directive 2003/88 and allegedly enshrined in Article 31(2) of the Charter.³¹

The Court declared that the right to paid annual leave constituted an essential principle of EU social law, which is reflected in Article 31(2) of the Charter. This provision is of mandatory and unconditional nature and constitutes a binding right (not an interpretative principle) in the meaning of Article 52(5) of the Charter, thus being sufficient as such to confer rights on workers ‘that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter’.³² In such situations, national courts should not apply national legislation contrary to a fundamental right, and employers cannot rely on that national legislation.³³ The Court then considered whether such horizontal applicability may be in conformity with the interpretation of Article 51(1) of the Charter. It declared that the fact that this provision was in principle addressed to the Member States and the institutions of the EU did not systematically preclude the application of the provisions of the Charter to relations between individuals. Such conclusion came upon argumentation of the Court that Article 51(1) is not expressively excluding individuals. Thus, they might be directly required to comply with certain provisions of the Charter.³⁴

These conclusions were further reaffirmed through the rulings in *Max Planck*,³⁵ *Sindicatul*,³⁶ and *Cresco*,³⁷ supporting the argument that the Court allowed fundamental rights to be directly horizontally applicable

²⁴ Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [2012] OJ C73/03; On the issue of horizontal applicability of fundamental rights in this judgment, see also: Dorota Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 *European Law Review* 479, 480–483.

²⁵ *AMS* (n 17) para 50.

²⁶ *Egenberger* (n 5) para 76; See also: Luísa Lourenço, ‘Religion, discrimination and the EU general principles’ gospel: *Egenberger*’ (2019) 56 *CML Rev* 193.

²⁷ *Egenberger* (n 5) para 76.

²⁸ *ibid* para 77.

²⁹ *ibid* paras 78–79.

³⁰ *ibid* paras 80–81.

³¹ *Bauer* (n 6) paras 80–85.

³² *ibid*.

³³ *ibid* para 86.

³⁴ *ibid* paras 87–89.

³⁵ Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* ECLI:EU:C:2018:874.

³⁶ Case C-147/17 *Sindicatul Familia Constanța and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța* ECLI:EU:C:2018:926.

³⁷ Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* ECLI:EU:C:2019:43.

to disputes between private parties in fields covered by EU law.³⁸ Although these judgments were not issued in sporting disputes, such as the landmark rulings in *Walrave and Koch*, *Bosman*,³⁹ or *Meca-Medina and Majcen*,⁴⁰ the concept of direct horizontal applicability of fundamental rights may prove to be relevant to sporting activity in the EU for various reasons.

3 Application of the EU law to Sport as a Matter of Horizontality

Sporting activity in the EU is commonly conducted under private law terms. National associations, clubs, and athletes are bound by the rules issued by international sporting federations based on their will and consent—sometimes expressed in an implied way, but always voluntary. These sporting federations, although often powerful and rich, do not have the legal status of states. Therefore, the relations between athletes and federations are horizontal, although the balance of power is strongly in favor of the governing bodies in each discipline due to their organizational, commercial, and institutional hegemonies. This imbalance was subject to certain adjustments by the Court, which developed the principles concerning the horizontal application of different kinds of rules of EU law in its jurisprudence.

The Court's sporting jurisprudence, especially related to the exercising of Single Market freedoms against federations,⁴¹ demonstrates the continuous development of the doctrine of horizontal applicability of primary EU law. The question of whether the various norms of the *acquis communautaire* may be applied to the relations between private parties, such as sporting federations and athletes, was present across all the sporting rulings of the Court. Therefore, it is worth broadly presenting how the horizontal applicability of the provisions of EU law has been reviewed by the Court in different phases of the development of its sporting jurisprudence.

3.1 Sporting Jurisprudence of the CJEU as a Playground for the Horizontal Applicability of Single Market Freedoms

In *Walrave and Koch*, the Court used the horizontal applicability of the provisions prohibiting discrimination on the grounds of nationality to justify its jurisdiction over a dispute between athletes and the *Union Cycliste Internationale* (UCI)—the global governing body for sports cycling. The Court stated that Treaty provisions should enjoy horizontal effect in situations when the rules issued by a private law organizations—such as the UCI—are aimed at collectively regulating the functioning of individuals providing that sport activity may be regarded as an economic activity and thus falls within the scope of the law of the EU. Furthermore, the conformity of actions undertaken by the private parties might be directly assessed in the context of the Treaty provisions without needing to invoke national rules and laws.⁴² The Court formulated these remarks in a general way, opening the possibility of extending the relevance of this case beyond sports. Thus, this ruling significantly contributed to the development of the horizontal applicability of the Treaty provisions prohibiting discrimination on the grounds of nationality.

In *Bosman*, the Court further developed and extended the concept of horizontal applicability of the Treaty provisions, this time in the context of Single Market freedoms. The horizontal applicability of the Single

³⁸ However, see: Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, ECLI:EU:C:2019:402. Here, the Court reverted to indicating Member States' obligation to ensure the full effectiveness of the Charter in disputes among private parties.

For more on the *Egenberger* and *Bauer* rulings, see: Eleni Frantziou, 'Mangold Recast? The ECJ's Flirtation with Drittwirkung in *Egenberger*' (*European Law Blog*, 24 April 2018) <<https://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/>> accessed 21 December 2019; Aurelia Colombi Ciacchi, 'The Direct Horizontal Effect of Fundamental Rights: ECJ 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* and ECJ 11 September 2018, Case C-68/17, *IR v JQ'* (2019) 15 *European Constitutional Law Review* 294; Sim Haket, 'Egenberger and Bauer: The EU Charter as a source of rights and obligations for individuals' (*Blog of the Montaigne Centre for Rule of Law and Administration of Justice*, 8 April 2019) <<http://blog.montaignecentre.com/index.php/1383/egenberger-and-bauer-the-eu-charter-as-a-source-of-rights-and-obligations-for-individuals-2/>> accessed 21 December 2019; Aurelia Colombi Ciacchi, 'Egenberger and Comparative Law: A Victory of the Direct Horizontal Effect of Fundamental Rights' (2018) 5 *European Journal of Comparative Law and Governance* 207.

³⁹ Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal, club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-4921.

⁴⁰ Case C-519/04 P. *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECR I-6991.

⁴¹ Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 1333; Joined Cases C-51/96 and C-191/97 *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-2549; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* [2000] ECR I-2681; Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177.

⁴² *Walrave and Koch* (n 3) paras 17–18.

Market freedoms resulted from the recognition that barriers to the functioning of the Single Market may be imposed not only by the Member States but also by private parties. Therefore, the latter remain addressees of the prohibitions enshrined in the Treaty. As a result, their actions must comply with the general principles developed in this area of EU primary law.⁴³ For instance, the justification of restrictions due to pressing reasons of public interest may find relevance in situations other than those where the actions conducted by the Member States are reviewed.⁴⁴ This applies not only to discriminatory measures restricting access to national markets on the grounds of nationality, as was the case in *Walrave and Koch* and *Deliege*, but also to those of nondiscriminatory nature, such as football transfer rules.⁴⁵ Hence, the ruling in *Bosman* is not only crucial for the question of limiting the autonomy of sporting federations, but also for the functioning of the EU and the cornerstones of its Single Market.⁴⁶ In this way, sport rulings of the Court contributed to the development of the horizontal application of EU law in other areas as well.⁴⁷

3.2 The Fundamental (Rights) Revolution?

Whereas the horizontal application of the provisions of the Treaty—the prohibition of discrimination on the grounds of nationality and Single Market freedoms—to sports in the EU was subject to well-established jurisprudence of the Court, the direct horizontal applicability of fundamental rights to the relations between athletes, clubs, national associations, and sporting federations has not yet been expressly confirmed. This ambiguity and lack of prescribed conduct raise the level of uncertainty for athletes, as well as for federations. Therefore, the following section is aimed at filling this void and serves to present the justifications for such horizontal applicability, practical problems related thereto, and the provisional catalog of sport-relevant rights that may be deemed to become horizontally applicable under the principles developed by the Court in its recent jurisprudence.

3.2.1 The Grounds for Horizontal Applicability of Fundamental Rights to Conducting Sport Activity

Accountability of the sport federations in the ‘European model of sport organization’⁴⁸ to the fundamental rights of the EU may be deemed as justified, as it could contribute to pursuing legitimate objectives. Furthermore, horizontal applicability of fundamental rights proves necessary to reach these objectives, and it may be regarded as proportionate, as the Court explained in *Egenberger* and *Bauer* how to balance the interests of all stakeholders while applying fundamental rights to the disputes of private parties—in the context of sport this would include individuals and associations involved in conducting, participating, commercializing, and following the sport competitions. These three elements—pursuing legitimate objective, necessity and proportionality—are part of the Court’s test to determine whether limitations to the Single Market freedoms may be justified, but prove equally useful to illustrate the reasons speaking for transposition of Court’s argumentation in *Bauer* and *Egenberger* to the so-called ‘specificity of sports’ in the EU. Transposition of the argumentation of the Court in the *Egenberger* and *Bauer* judgements to the specifics of sport organization in Europe additionally requires considering the particularly strong position of the sport federations vs. athletes, as well as the relation between aims of principles of Olympism—*sui generis* ‘constitution rules’ of the sport system—and aims of fundamental rights.

The need to guarantee legal protection to all individuals in scope of the EU law is the first legitimate objective. Monopolistic position of sport federations in the European pyramid of sport organization in Europe causes substantial bias of power between them and athletes.⁴⁹ Their relation, although of horizontal nature,

⁴³ *Bosman* (n 39) para 86.

⁴⁴ *ibid* para 104.

⁴⁵ *ibid* para 114; see also: *Bernard* (n 41).

⁴⁶ There exists no need to analyze the horizontal applicability of the competition rules, since these are directly addressed to undertakings. However, the Court expressly allowed the application of the competition rules to sporting activity under specific requirements in its revoked *Meca-Medina and Majcen* ruling.

⁴⁷ See more: Mattias Derlén and Johan Lindholm, ‘Bosman: A Legacy Beyond Sports’ in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman* (T.M.C. Asser Press 2016).

⁴⁸ As defined in the White Paper on Sport (COM/2007/0391).

⁴⁹ See S. Weatherill, *Is the Pyramid Compatible with EC Law?*, “The International Sports Law Journal”, Nr 3–4, 2005, see also: S. Nagel, T. Schlesinger, E. Bayle, i D. Giauque, *Professionalisation of sport federations – a multi-level framework for analyzing forms, causes and consequences*, “European Sport Management Quarterly”, Vol. 15, No. 4, 2015; O. Budzinski, S. Szymanski, *Are restrictions of competition by sport associations horizontal or vertical in nature?*, “Journal of Competition Law & Economics”, Nr. 11 (2), 2015; S. Miettinen, *Policing the Boundaries between Regulation and Commercial Exploitation: Lessons from the MOTOE Case* (in:) S. Gardiner, R. Parrish, R. Siekmann (red.), *EU, Sport, Law and Policy: Regulation, Re-Regulation and Representation*, The Hague 2009.

is in many aspects similar to the uneven vertical relation of a citizen vs. state. Existing of such relations which are of horizontal nature but vertical unevenness, is also a more general trend visible in data protection law, as private law companies recently tend to gather more data and information on behavior of individuals than the states. In some situations, it is more important to be protected by the 'right to be forgotten' against the private Internet browser than against the criminal registry maintained by the statutory court.⁵⁰ The same applies to the employment relationships in which, even collectively, individuals are often in a weaker negotiating position compared to behemoth-like international companies. These effects are even more harmful in situations in which one party is in a position to unilaterally regulate the sphere of rights and freedoms of collectives (general terms and conditions, collective work agreements or sporting codes).⁵¹

A situation such as practicing sport activity within a federation's purview, is particularly prone to potential abuse where (1) one party is vastly more powerful due to the long-established regulatory and commercial monopoly (reaching back to the 14th century in some disciplines) and (2) this party has at its disposal a wide range of tools to substantially influence the sphere of rights and freedoms of the other. Such potential abuse could take various shapes—limiting non-national's right to access the foreign markets of sporting events,⁵² acting to the detriment of the economic interest of athletes through imposing a ban on participation in unauthorized events⁵³—but are also possible in the sphere of fundamental rights of athletes. Arguably, such infringements—for example deprivation of right to independent court or right of defense by establishing obligatory arbitration clauses in statutes, misconduct of anti-doping tests causing violation of rights to integrity and intimacy or inequality in prizes between men and women in the same discipline—are most painful for individuals. To protect individuals, the fundamental rights are usually codified on a constitutional level. In the EU, fundamental rights are protected in the Charter, and in Article 6(1) of the Treaty on European Union (TEU).⁵⁴ However, even though these provisions are usually explicitly addressed to public authorities, the sole circumstance of horizontal nature of relations between the athletes and federations is not enough to refuse the EU or constitutional protection.⁵⁵

Pursuing legitimate objective through horizontal applicability of fundamental rights in the context of sports is further reaffirmed by the nature of the fundamental rights as legal instruments. They are aimed at protecting the basic rights and freedoms of individuals that are inseparably attached to human beings and rooted in human dignity. The catalogue of these rights is largely similar and overlapping across different international legal acts and national constitutions. There exist various standards and levels of protection, but the necessity to establish such a system protecting fundamental rights is widely accepted and omnipresent among different legal orders. The effectiveness of this protection is particularly important in a community such as the EU which, pursuant to Article 2 TEU, was founded on the common values such as respect for human dignity, freedom, equality, and respect for human rights. Therefore, as stated by *Walkila* and *Frantziou* the reason for the uniform protection of fundamental rights, irrespective of the nature of relation between the parties, is the best solution to protect the 'integrity, priority and effectiveness' of the EU law and contributes to fulfillment of the objective of the EU, i.e. building the ever closer Union.⁵⁶

It is worth stressing that pursuing such legitimate objectives of the EU law is not contrary to the objectives and principles of sport federations, expressed in the *sui generis* 'constitution' of sporting rules found in the Olympic Charter. As indicated in its preamble, the goal of Olympism was to place sport at the service of harmonious development of humankind, with a view to promoting peaceful society concerned with the preservation of human dignity.⁵⁷ Furthermore, the practice of sport is declared as a human right, which every individual must be able to practice without discrimination of any kind (race, color, sex, sexual orientation,

⁵⁰ Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.

⁵¹ See S. Walkila (n 7) 231–234; E. Frantziou, *The Horizontal Effect...* (op. cit.), p. 668–677.

⁵² As in the cited case of *TopFit and Biffi* (n 4).

⁵³ See more: Commission Decision of 8.12.2017 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the EEA Agreement in Case AT.40208 – *International Skating Union's Eligibility rules*. More on the decision: R. Agafonova, *International Skating Union versus European Commission: Is the European sports model under threat?*, "The International Sports Law Journal", September 2019, Volume 19, Issue 1–2, pp. 87–101 (DOI: <https://doi.org/10.1007/s40318-019-00155-6>).

⁵⁴ Treaty on European Union, Official Journal C 326, 26.10.2012, p. 13–39.

⁵⁵ See ruling *Egenberger* (n 5) para. 49.

⁵⁶ See S. Walkila (n 8) 261–272; E. Frantziou (n 13) 665–666.

⁵⁷ Olympic Charter in force as from 9 October 2018, Preamble, para 2 (digital access: https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.19577151.669996558.1555340281-1735520707.1555340281 last accessed 15.4.2019).

language, religion, political or other opinion, national or social origin, property, birth or other status) and in the Olympic spirit of friendship, solidarity, and fair play, as well as in respect for fundamental ethical principles.⁵⁸ Various sport organizations and disciplines expressed similar commitment to protect human rights in their statutes—among others FIFA,⁵⁹ FIA,⁶⁰ as well as Formula 1.⁶¹ These principles are compatible and reconcilable with the catalogue of values of the EU, as determined in Article 2 TEU, as well as with the catalogue of the fundamental rights expressed in the Charter. Therefore, horizontal applicability of the fundamental rights to the practice of sport activity can only support reinforcing and strengthening the values represented by the movement of Olympism, which contributes to pursuing the promotion of the social function of sport and protecting the physical and moral integrity of athletes expressed in Article 165 TFEU.

The argument above is of a functional nature—the horizontal applicability of fundamental rights towards the actions of sport federations is necessary to maintain the uniformity of the level of protection derived by individuals from ‘integral, prioritized and effective’ law of the EU. Otherwise the whole system of protection of fundamental rights in the EU would sustain significant damage and a protection-loop-hole could be created. The level of protection of individuals would be dependent on the nature of relation and would vary between horizontal and vertical relations, which would lead to fragmentation of the level of protection of fundamental rights in the EU. The emergence of such a loop-hole can be precluded by extending the obligation to respect the fundamental rights and freedoms of individuals to private parties who maintain a significant power advantage over subordinate individuals.

The demand for uniform protection of the fundamental rights in the EU is a result of the changes to the character of European integration, as well as social and economic realities, throughout the last 60 years. The European Community, which, around the time of the *Walrave and Koch* judgements, was hardly integrated in the economic dimension, became the constitutionalized Union of common values, Single Market freedoms and binding fundamental rights granted to its citizens.⁶² It is necessary for the approach of the EU to reflect this evolution in the sphere of protection of the basic rights of individuals, hence protection of the fundamental rights in the EU should permeate all spheres of the Union law.

In the context of sport, what once was ‘subject to community law only to the extent of constituting economic activity’,⁶³ has been updated by the Court to ‘being subject to all the obligations which result from the various provisions of the Treaty’,⁶⁴ when the activity falls within the scope of the EU law. In *Bauer* ruling, the Court added that ‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law’.⁶⁵ Thus, conducting sporting activity, under indispensable condition of being the subject to the law of the EU, can be regarded as the realization of the fundamental rights and freedoms enshrined in the Charter by individuals; for example, as pursuing commercial activity, the right to integrity and health, the freedom of association or realization of the freedom of choosing the occupation, all four protected by the EU. Therefore, the observance of these rights and freedoms by other individuals should be of the Union’s interest, if the EU is to effectively protect the values it declares to acknowledge.

Such a direct obligation protecting the fundamental rights imposed on sport federations is also indispensable in the broader context of their regulatory autonomy as well as legal and business power resulting from this autonomy. As rules on conducting sporting activity in the EU are neither a matter of Member States’ nor the EU’s legislation but of codes and statutes of the private associations such as FIFA, less burdensome indirect horizontal effect of fundamental rights in the form of positive obligation resting on public authorities to grant protection to the athletes would not prove sufficient. Firstly, because public courts do not usually have competence to resolve disputes in sporting matters because of mandatory arbitration clauses that provide exclusive jurisdiction to the Court of Arbitration of Sport (which judicial independence and

⁵⁸ Ibid, Preamble para 1, 4 and 6.

⁵⁹ FIFA Statutes June 2019 edition, Article 3 (digital access: <https://resources.fifa.com/image/upload/fifa-statutes-5-august-2019-en.pdf?cloudid=ggymhxxv8jrdfbekrrm>).

⁶⁰ FIA Statutes, Application from 1st January 2019, Article 1.2 and 1.3 (digital access: file:///C:/Users/w.lewandowski/Downloads/2019_fia_statutes_fr-en_clean.pdf)

⁶¹ Statement of Commitment to Respect for Human Rights, (digital access: <https://www.formula1.com/en/toolbar/statement-of-commitment-to-respect-for-human-rights.html>).

⁶² E. Spaventa, *Should we “harmonize” fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system*, “Common Market Law Review” 55, 2018, p. 997–1024; on constitutionalization of the EU see more A. Rosas, L. Armati, *EU Constitutional Law, An Introduction*, Hart Publishing, 2018; L. Pech, *The Rule of Law as Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09.

⁶³ Judgement *Walrave and Koch* (n 3) para 4.

⁶⁴ Judgement *Meca-Medina and Majcen* (n 40) para 28.

⁶⁵ Judgement *Bauer* (n 6) para 52

conformity with the right to a fair trial is disputable and has been recently under not-univocal review by the judiciary).⁶⁶ Secondly, there are examples in which public authorities were revoking their own actions to combat various misuses and violations of public law in national associations under pressure from international federations—such reluctance of states is not posing them to be credible guarantors of the rights of the athletes.⁶⁷ Thirdly, the excess to which public authorities may review statutes of private associations varies among Member States (and Switzerland where the majority of the sport federations are based), so the level of protection for athletes would also vary depending on the state in which the federation or national association is located. As presented above, such situation could lead to the deprivation of the fundamental rights of the EU of their ‘integrity, priority and effectiveness’⁶⁸ and thus to the fragmentation of the level of protection of fundamental rights of the EU not only in respect of ‘horizontal or vertical nature of relation’, but also among different Member States. Therefore, it is necessary to grant athletes direct and uniform protection of their fundamental rights in relations of horizontal nature at the Union, and not only national, level.

Last, but not least, the mechanism provided by the Court in *Egenberger* establishes a method by which the interests of different parties may be respected and balanced; balancing the proportionality of the interference against the autonomy of the sport federations. In the final part of *Egenberger*, the Court indicated on an obligation to evaluate the EU fundamental rights of both parties and to duly examine which of them has priority in a particular situation in accordance with the proportionality principle.⁶⁹ Derived from the freedom of association which may be balanced against the fundamental rights derived from the Charter by the athletes, proportionality is particularly important in regard to the regulatory autonomy of sport federations. Therefore, the horizontal applicability of the fundamental rights involves the element of ensuring protection of interests of all stakeholders and participants of sport practice (e.g. the fundamental rights and freedoms of viewers, commercial rights holders, intellectual property rights holders etc. which have to be taken into consideration as well if at issue).

Thanks to these three features of horizontal applicability of the fundamental rights of the EU as developed by the Court in the rulings *Egenberger* and *Bauer*—pursuing the legitimate objective, necessity and proportionality—such horizontal applicability to the actions of sport federations should be regarded as justified.

3.2.2 The Horizontal Applicability of the Fundamental Rights as the New Legal Weapon of Sportsmen

The Court in *Egenberger* and *Bauer* determined abstract and general conditions that ought to be fulfilled by the provisions of the Charter so they could become horizontally applicable. This *Egenberger/Bauer* test consists of two prongs.

The first prong requires the dispute to be ‘in a field covered by EU law and therefore falling within the scope of the Charter’.⁷⁰ Conclusions from the verdict in *Akerberg Fransson* relating to the scope of EU law remain applicable to determine the fulfillment of this condition.⁷¹ Therefore, the horizontal applicability of the Charter would be possible only in the situations governed by EU law—the Charter will not be effective by itself.

The second prong determines whether the provision is of mandatory and unconditional character and does not need to be given literal expression by the provisions of the law of the EU or national law.⁷² This provision should furthermore be ‘sufficient in itself to confer on [individuals] a right that they may actually

⁶⁶ The Judgment of the European Court of Human Rights of 2 October 2018, Cases No. 40575/10 et 67474/10 *Mutu and Pechstein versus Switzerland*, ECLI:CE:ECHR:2018:1002JUD004057510; see more: A. Duval, *The “Victory” of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS*, “Asser International Sports Law Blog”, 10.10.2018 (digital access: <https://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas> last access 21.03.2020); see also ECHR’s case *Platini v. Switzerland* (application no. 526/18) (not published yet – press information available under [https://hudoc.echr.coe.int/eng-press#\(%22itemid%22:%5B%22003-6657864-8849494%22%5D\)](https://hudoc.echr.coe.int/eng-press#(%22itemid%22:%5B%22003-6657864-8849494%22%5D))) (last access 21.03.2020).

⁶⁷ In 2008 FIFA warned Polish authorities of threat of imposing ban on national team to participate in World Cup Qualifying amid introducing curator in the Polish Football Association. The curator had initially been introduced to combat the allegations on corruption among officials of the association—<https://uk.reuters.com/article/uk-soccer-fifa-poland/fifa-warns-poland-on-world-cup-suspension-idUKTRE4906EA20081001> (last access: 21.12.2019).

⁶⁸ Walkila (n 8); Frantziou (n 13).

⁶⁹ Judgement *Egenberger* (n 5) para 80–81.

⁷⁰ Judgement *Bauer* (n 6) para 85 and judgement *Egenberger* (n 5) para 76.

⁷¹ *Akerberg Fransson* (n 12).

⁷² *Ergo* it does not contain non-binding principle in the meaning of Article 52(5) of the Charter.

rely on in disputes between them and [other individuals]'.⁷³ It should be noted that the fulfillment of this prong can be determined based on the wording of the provision, i.e. whether it is unambiguously and clearly formulated analogous to the conditions of direct effect of Union law.

After fulfilling the two prongs presented above, the evaluated provision may be horizontally applicable. This is not, however, equivalent to absolute preference for protection of fundamental rights of weaker individuals enshrined in horizontally applicable provisions in every circumstance. Firstly, for full effectiveness of Article 52(5), the fundamental right enshrined within it must be balanced with the rights of other individuals, in particular with those of a fundamental nature. Secondly, it should be determined whether potential limitations on exercising the rights and freedoms may be justified upon the grounds derived from Article 52(1) of the Charter.⁷⁴ These grounds include the examination whether the limitations respect the essence of these rights and freedoms in conformity with the principle of proportionality, are 'necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others' and are provided for by law. Arguably, such justification would be possible and effective solely upon balancing the fundamental rights and freedoms of both parties in conformity with the proportionality principle. The potential violation of the essence of these rights and freedoms is scrutinized by assessing conformity with the principle of proportionality when each party's fundamental rights are taken into account. Further conditions of Article 52(1)—'necessity and meeting the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others'—are fulfilled by the virtue of the fact that the *limiting* provision are of the same hierarchical level as the *limited* provision—both enshrine fundamental rights of the EU (or are recognized by the EU in Article 2 TEU).

In horizontal relations, the limitations of the fundamental rights and freedoms of one individual are thus always determined by exercising the fundamental rights and freedoms by other individuals. Hence, the freedom of action within borders of fundamental rights expressed in binding provisions of law is enshrined in their nature and consequently should be regarded as implicatively *provided for by law*. Therefore, there is no need to specifically examine whether the limitation *is* provided for by law, as all actions presenting execution of fundamental rights are *provided for* by the provisions enshrining these rights.

Conclusively, the method to assess the limitations to the fundamental rights of individuals in horizontal relations should be examined by applying the proportionality test. In a prevailing amount of sporting cases, the results of an examination would depend on the substantiality and essentiality of alleged limitations of fundamental rights and freedoms of the weaker parties—athletes, clubs, or national associations—in horizontal relations with federations. However, granting the absolute priority for the fundamental rights and freedoms of athletes would not be fully compliant with the proper conduct of the assessment procedure presented above.

Sport federations, as institutions of private law, mostly in the form of associations, act on the grounds of the freedom of association from Article 12(1) of the Charter. The essence of this right, which has to be respected just as much as the essence of the rights of weaker parties, includes the freedom to self-govern and regulate the activities of the members of the sport federations—i.e. national associations, clubs and sportsmen. This is the core of the regulatory autonomy of federations that must be preserved. However, any actions undertaken by federations which potentially limit the fundamental rights and freedoms of the individuals obliged to act in conformity with the regulations issued by the sport governing bodies, have to be balanceable and pass the proportionality test to be permissible. That means that the regulatory autonomy of federations may find its boundaries and limits in the form of the fundamental rights of athletes.

3.2.3 In the Court's Footsteps: an Attempt to Determine the Catalogue of Horizontally Applicable Rights and Freedoms Expressed in the Charter

As presented above, the conditions to determine horizontal applicability of the fundamental rights and freedoms require the provisions to have mandatory and unconditional application and be sufficient in itself to confer the right an individual may rely on. These abstract and general test requirements make it possible to speculate which provisions in the Charter may be horizontally applicable under prescribed conditions and remain particularly relevant for conducting sport activity in the EU.⁷⁵

⁷³ Judgement *Bauer* (n 6) para 85 and judgement *Egenberger* (n 5) para 76.

⁷⁴ See judgement *Bauer* (n 6) para 59.

⁷⁵ The analysis of the provisions of the Charter suggests the following catalogue: Article 1 (Human dignity), Article 2 (The right to live), Article 3 (The right to the integrity of the person), Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment), Article 5 (Prohibition of slavery and forced labor), Article 6 (The right to liberty and security), Article 7 (Respect for private and family life), Article 8 (Protection of personal data), Article 10 (The freedom of thought, conscience and religion),

Some of the provisions listed in the footnotes are more significant in the everyday landscape of conducting sporting activity while others have limited relevance. Arguably, horizontal applicability of Article 47 (right to a fair trial) may carry the largest practical consequences. In the light of the recent verdict of the European Court for Human Rights in *Mutu and Pechstein v Switzerland*⁷⁶ the Court could potentially impose further obligations on the central judiciary body in the European sports—Court of Arbitration for Sport—and put the whole system of arbitration as the mandatory method of settling disputes among athletes and federations provided by majority of sporting statutes under review. Moreover, compatibility of the conduct of the anti-doping tests and the rules of WADA (World Anti-Doping Agency) with Article 7 (the right of respect for private and family life) or in the case of particularly grave misconduct Article 4 (prohibition of torture and inhuman or degrading treatment or punishment) may receive scrutiny if tested athletes felt that the intervention in the sphere of their rights went beyond what is necessary to ensure fair conditions of competition and violated their fundamental rights. Horizontal applicability of Article 21 (prohibition of discrimination) and Article 23 (equality between men and women in particular in respect of the salaries) may support the leveling of the positions between men and women in disciplines like football and tennis, as well as result in full openness of local competitions to foreigners.⁷⁷

More hypothetically, life-time bans and other forms of disciplinary sanctions imposed by federations on athletes, which prevent them from participation in sporting competitions can potentially be reviewed for their proportionality under fundamental right for choosing an occupation and right to conduct business protected by Article 15 and Article 16 respectively—for example sanctions for participating in unauthorized events may be seen as not only contrary to competition rules,⁷⁸ but also not being in conformity with the Charter. IP and commercial rights to the trademarks and image may be protected under Article 17 as athletes and federations could invoke directly the right to protect the individual property. Some athletes could also argue that imposing a match ban for expressing political views after scoring a goal during football game is not a proportional punishment because Article 11 of the Charter is providing freedom of expression for individuals.⁷⁹

Above examples will remain speculations until any of presented examples is judicially reviewed by the Court and horizontal applicability of cited provisions of the Charter is expressly confirmed. However, one thing is certain—*Egenberger* and *Bauer* are changing the rules of the game in European sports by allowing direct horizontal applicability of the fundamental rights of the EU despite being related to worker's rights and not expressly related to sports. At this moment *Egenberger* and *Bauer* reinforce the level of protection of the rights of athletes while not invalidating nor annihilating the scope of autonomy of sport federations.

4 Conclusion: Horizontal Applicability as a Threat to the Regulatory Autonomy of Sport-Governing Bodies?

The horizontal applicability of the fundamental rights of the EU to sporting activity is not only justified but also indispensable and deserving acclamation. In the most recent Court's sports case, *TopFit and Biffi* case, AG Tanchev issued an opinion in which he refers to *Egenberger* and *Bauer* to support his argument on admissibility of Article 49 TFEU (freedom of establishment of business activity) and its horizontal application.⁸⁰ The Court, however, in its recent judgment did not follow his suggestions. Instead, the case was resolved solely upon the provisions of the TFEU that prohibit any form of discrimination (Article 18) and limit the freedom of movement of EU citizens (Article 21).⁸¹

Article 11 (The freedom of expression and information), Article 12 (The freedom of assembly and of association), Article 15 (The freedom to choose an occupation and the right to engage in work), Article 16 (The freedom to conduct business), Article 17 (The right to property), Article 20 (Equality before the law), Article 21 (Non-discrimination), Article 23 (Equality between women and men), Article 31 (Fair and just working conditions), Article 47 (The right to an effective remedy and to a fair trial), Article 48 (Presumption of innocence and the right of defense), Article 50 (The right not to be trailed or punished twice in criminal proceedings for the same criminal offence).

⁷⁶ *Mutu* (n 64).

⁷⁷ *TopFit and Biffi* (n 4).

⁷⁸ As was the case in the decision of the Commission on eligibility rules of ISU (n 56).

⁷⁹ FIFA effectively forbids expressing political views that could provoke the crowd during official matches and potential sanctions include bans—two Swiss players Xhordan Shaqiri and Granit Xhaka were under threat of match-ban and fined by the federation with financial fines during the last World Cup for their 'double eagle' celebrations of goals scored against Serbia: <https://www.theguardian.com/football/2018/jun/25/swiss-xhaka-shaqiri-escape-ban-celebration-serbia> (last access: 21.12.2019).

⁸⁰ Opinion of the Advocate General Tanchev in Case C-22/18, *TopFit and Biffi* (n 4) para 63–66.

⁸¹ See Judgment *TopFit and Biffi* (n 4) para 34–52.

Horizontal applicability of EU fundamental rights represents the last chapter in the saga of limiting sport federations' autonomy after previous breakthroughs in the judgements of the Court in *Walrave and Koch* (prohibition of discrimination on the grounds of nationality), *Bosman* (non-discriminatory Single Market freedoms) and *Meca-Medina and Majcen* (competition rules). The question arises: whether the concept of federation autonomy is still relevant? Clearly, it is worth considering: what is the extent of this autonomy and what should it consist of? Taking into consideration that exercising autonomy at the Union level may be limited by the need to respect Single Market freedoms, rules on competition law and (still potentially) the fundamental rights and freedoms of the athletes/other weaker stakeholders, scope of this autonomy is much more limited than federations would probably want to admit. However, the perspective of the conflict between principles of autonomy of sport federations, values of Olympism and fundamental rights of the EU proves misleading.

It seems that the approach to this question should put emphasis more on the aspect of the functioning of sport federations in accordance with the Union's legal order and the synergies between them, not on the narrative of limitations and intervention in the autonomy of sports. The sporting rules and provisions of EU law, as presented above, are aimed at protecting basic rights and freedoms of individuals and are based on common values of respecting human dignity, freedoms, equality and observance of human rights. When there is no contradiction in the pursued values and aims, any possible corrections of the provisions issued by the sporting federations by requiring their conformity with the fundamental rights of the EU contribute to realization of legitimate objectives inherent for the idea of Olympism. Thus, horizontal applicability of the fundamental rights of the EU is not a threat to the position of sport federations, but rather a win-win-win situation. The athletes benefit from a higher level of protection, sport-governing bodies' autonomy is respected and the objectives pursued by them are easier to achieve, thus representing a desirable direction for further developments.

Competing Interests

The author has no competing interests to declare.

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