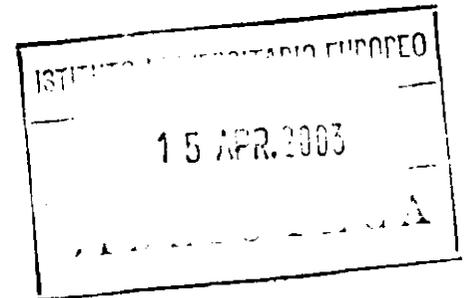




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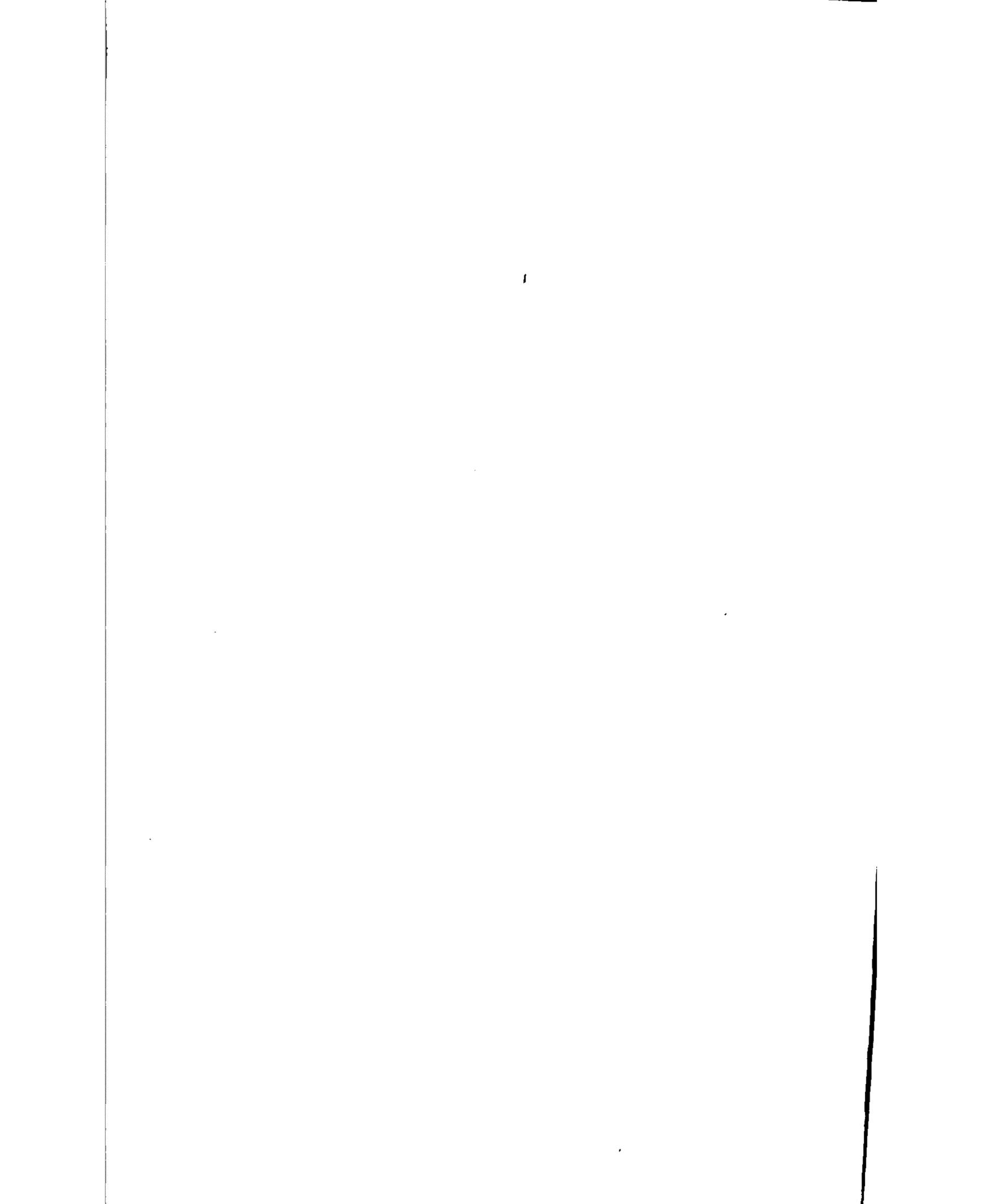
**From Wembley to San Siro:**  
**Regulation of the mobility of sportsmen in the EU**  
***post Bosman***

**Stefaan Van den Bogaert**

Thesis submitted with a view to obtaining the title of  
Doctor of Laws of the European University Institute

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**Stefaan Van den Bogaert**

LAW  
ECnfd9  
VAN



Thesis submitted with a view to obtaining the title of

Doctor of Laws of the European University Institute

Florence, June 2003

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## **“WITH A LITTLE HELP OF MY FRIENDS...”**

Brussels, Heysel stadium, 15 December 1982. After a truly heroic game, the Belgian Red Devils defeat Scotland 3-2 and make an important step towards the qualification for the European Championships in 1984. Amongst the crowd, there was a 9-year old boy, fascinated about his first presence at a real match... Twenty years have passed since, and the game has never completely let go of the boy anymore. Admittedly, things have not gone exactly the way I thought they might in my boyhood's dream, but today, I can only look back upon my time in Florence with a smile. The commonplace “if only I had known what it actually takes to write a thesis, I would not have embarked on the adventure” therefore does not really hold true for me. I would only say that one thesis is enough though! Also, I know perfectly well that I would have never been able to write this thesis without the help of a number of people, whom I would like to thank sincerely at this occasion.

“If you are in the penalty area and you don't know what to do with the ball, just put it in the net and we'll discuss the options later.” How appealing this no nonsense approach may sound and how effective it may turn out to be on a sports field, whether it is useful to write a thesis is more questionable. Fortunately, I could always count on Professor Gráinne de Búrca, a truly wonderful person and a fantastic supervisor, to show me the right way forward. I really could not have wished for a better 'coach'! I am indebted to Professors Christian Joerges and Pierre Lanfranchi for having raised and incited my interest and enthusiasm for this particular topic. Furthermore, I would like to thank the people of the Sport Unit of DG Education and Culture of the European Commission for having given me the opportunity to work on sports issues in practice. I am grateful to Professors De Witte, Lenaerts and Weatherill for having agreed to sit in the jury of my defence. Thanks also to the entire technical and administrative staff of the European University Institute, for creating an agreeable working environment.

Vado via adesso, parto per orizzonti piu nordiche, e lascio il mio paese preferito. Ma il mio non è un 'addio', è soltanto un 'arrivederci'. Spero proprio di potere portare con me un po' dello tipico spirito italiano, che caratterizza tutte le persone con cui ho condiviso tanti bellissimi

momenti in questi anni. 'Carpe diem'! Inanzitutto c'è Mimmo, mio grande amico e punto di riferimento della prima ora; la signora Eugenia di Via Marconi 108 e Domenico, l'autore della piu bella rete nella storia dell' Istituto; Franca, la mia prima insegnante di italiano, e Guido, il cronista piu famoso di gare ciclistiche; Antonio, o'mister, Pippo, o'manager, e Giuliano della 'squadra fantastica'; Mauro, il miglior batterista al mondo, e Federico, metà belga ormai... Grazie a tutti, e a risentirci!

Writing a thesis may very well be the solitary activity par excellence, but I never walked alone. These years at the Institute have offered me several – multicultural - friendships that I hope to treasure for a very long time to come. Koen, Sandrine, Frédéric, Sigrid, Dan, Hidia, Monica, Eulalia and Annelies, it's simply great to have you as a friend! Thanks for sharing many unforgettable moments with me also to the guys of the 'Eroi Internazionali', the moot court teams of Copenhagen and Budapest, Oscar, Mike, Sam, Vanessa, Inaki, Catherine, Makis, Galina, Paul, Olivier, Aline D., Alex, Sarah, Thierry and Laurence, Olivia and all the others I may not have mentioned, but whom I have definitely not forgotten!

En ce moment, une pensée particulière va à une personne qui a joué un rôle déterminant dans cette thèse. Aline, ton soutien a simplement été essentiel pour moi...

Tenslotte nog enkele dankwoordjes in het Nederlands. Luc, Lieven en Geert, ik heb altijd reikhalzend uitgekeken naar de bijeenkomsten van de vrienden van de universiteit als ik eventjes in België was. Ik kom echt terug nu! Ik maakte telkens ook graag een ommetje langs Brugge, bij de familie Blomme. Maar België betekent in de allereerste plaats natuurlijk thuis, in Meerbeke, bij mijn broers, mijn zus en mijn ouders. Ik ben er niet vaak geweest de laatste 4-5 jaar, maar jullie waren tegelijk nooit ver weg. En dat is altijd een ongelofelijke geruststelling geweest. Ik draag dit proefschrift dan ook graag aan jullie op.

Stefaan Van den Bogaert, Firenze, 9 April 2003

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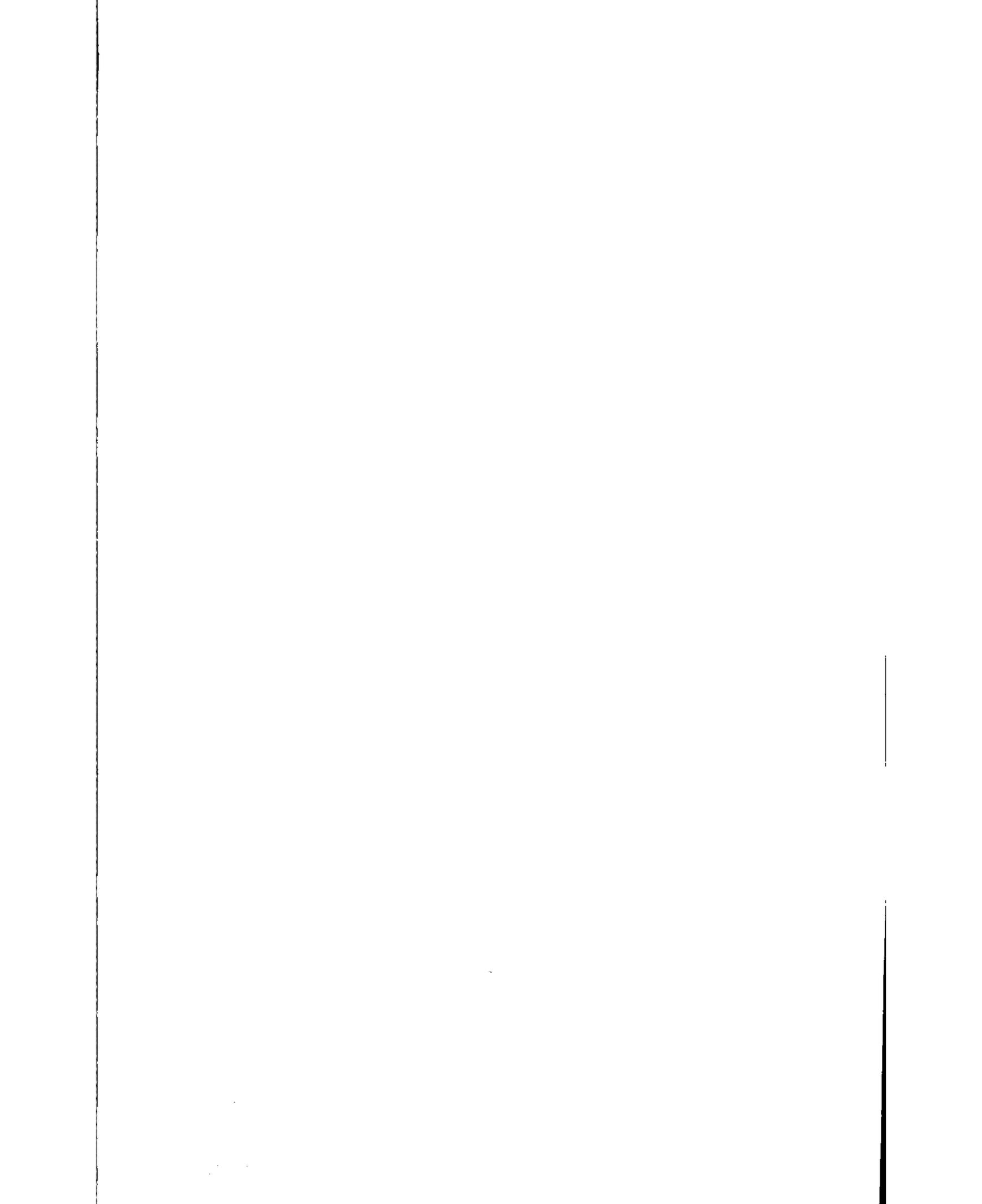
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# Introduction

**“In the beginning, there was nothing ...  
then there was *Bosman*.”**

Such an overture has in common with most, if not all, myths, legends, fairytales and other stories of this kind that it is inevitably somewhat inaccurate and does not always entirely - if at all - capture the reality of things. Be that as it may, it nonetheless unmistakably carries an element of truth. Furthermore, the inherent weakness of such a statement is at the same time counterbalanced by its strengths, in that it immediately announces the crucial event and moreover, despite or thanks to its conciseness, easily catches the eye and thus endeavours to stimulate the readers' interest in the further course of the story. Arguably, therefore, bearing in mind these reservations, this catch-phrase could stand as a prelude for a hopefully intriguing account. Certainly, that is not to say that this thesis aspires to acquire epic dimensions. Nor does it purport to deal with the impact of European law on sporting issues in an exhaustive way. Its objectives are significantly more modest. For a proper understanding of what this study aims to achieve, it is necessary to firstly draw a rough sketch of the general framework within which it is situated. This will permit the research questions, which shall be subsequently outlined, to be evaluated in the relevant context. Certainly the *Bosman* decision of the European Court of Justice,<sup>1</sup> which to date still constitutes the most spectacular legal intervention within the sporting environment, will occupy a central place within the structure of this thesis. Therefore, it is appropriate – also as a kind of recognition - to initiate this research project with a reflection on an athlete who has already secured himself a place in history books, even if it were not really for his sporting performances... “Once upon a time, everything was peace and quiet in the world of sport ... until *Bosman* came.”

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<sup>1</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

## 1. The many different faces of sport

In the European Sports Charter, the Council of Europe has undertaken a reasonable attempt to categorise sport under the definition of “all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels”.<sup>2</sup> It must indeed be recognised that sport is a social phenomenon which plays various roles in contemporary societies. In a working paper exploring the prospects for Community action in the field of sport, the European Commission has identified no less than five different functions which demonstrate the uniqueness of sport.<sup>3</sup>

Five examples, randomly taken from different places during five separate sporting events, serve to illustrate this point: Cambridge, 13 June 1998. On the last day of the traditional May Bumps and under the equally traditional British pouring rain, Wolfson College’s First Rowing Eight manage to overtake Clare College and crown themselves as champions of the third rowing division to the delight of hundreds of fellow students supporting them from the banks of the river Cam.

Paris, 12 July 1998. In a truly remarkable game in the Stade de France, the French national football side defeats title holders Brazil in the final of the 1998 FIFA World Cup. The relatively unexpected victory of ‘les bleus’ unchains incredible festivities and scenes of joy in the whole of France and its overseas territories. The team was composed of players with widely varying origins such as Blanc, Zidane, Djorkaeff, Desailly, Karembeu and the likes of Lizarazu, but nevertheless managed to win the unequivocal support of the whole of France, which identifies itself with its heroes.<sup>4</sup>

Paris, 22 May 1982. In an act of true sportsmanship during the fifth set of the semi-final of the French Open at Roland Garros, 17 year old tennis player Mats Wilander overrules a line call in his favour on his first match point, which would have secured him a ticket to his first

---

<sup>2</sup> Article 2 Council of Europe, European Sports Charter. (consult <http://www.coe.int>)

<sup>3</sup> European Commission staff working paper, *The development and prospects for Community action in the field of sport*, consult <http://europe.eu.int/comm/sport>

<sup>4</sup> X, “Et Dieu créa Zizou”, *La Provence*, 13 July 1998.

Grand Slam final. Rather than gratuitously accepting the erroneous decision of the umpire, the Swedish talent decided to play fair and awarded the point to his opponent. Eventually, he still won the match and two days later even the tournament.

Austin, Texas, 9 October 1996. American cyclist Lance Armstrong, former world champion and one of the most charismatic riders of the pack, is diagnosed with cancer. Doctors give him only a small chance of survival and virtually none to return to competitive sports at professional level. However, the body of an athlete is a chamber of secrets. The Texan fails to surrender, conquers the illness and realises one of the most stunning come-backs ever within sporting history when he wins the Tour de France for the first time in 1999.<sup>5</sup>

Amsterdam, April 2001. The football team of the European University Institute in Florence takes part in the European Championship for Universities. In-between the different games of the group stage, the student-players have some time off to visit the city and admire the works of ancient masters such as Rembrandt and Van Gogh...

It appears clearly from these examples that sport performs in the first place a *recreational* function, both for active participants in any given sporting discipline as well as for the more passive bystanders. Sport guarantees people personal and collective entertainment during their leisure time. According to relatively recent statistics, more than half of the citizens of the European Union regularly engage in sporting activities, be it within or outside the framework of one of the approx. 700.000 sports clubs within the Union.<sup>6</sup> Furthermore, millions of people directly or indirectly follow sporting events as spectators, through their physical presence at the stadium or by means of television coverage. Secondly, sport evidently also plays an important *social* role, in that it can be used as an effective instrument to combat racism, intolerance, violence, alcohol and drug abuse. It may be helpful in bringing together people, irrespective of their social origin, and even assist in integrating people excluded from the labour markets. Thirdly, and closely linked to the former, sport also has a clear *educational* function: it emphasises the importance of moral values such as fair play and solidarity and encourages team spirit. It is conceived as an excellent way of ensuring balanced personal development for all

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<sup>5</sup> Consult <http://www.lancearmstrong.com>

<sup>6</sup> Communication from the Commission (COM (1999) 644 and /2), Report from the European Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework ('The Helsinki report on Sport'). Consult <http://europe.eu.int/comm/sport/>

categories of age. Sport is extraordinary because it is a combination of fair competition and competitiveness, and that is why the influence of sport in the education of adolescents is particularly important. Fourthly, sport also contributes to *public health*, as appropriate physical activities constitute essential health determinants and may generally serve to prevent or cure illnesses and diseases and improve an individual's well-being. Fifthly, sport is intricately related to *culture*, offering people ample opportunities to explore their roots as well as new areas, and to develop respect for, amongst other things, the environment.

In addition to these societal functions, sport is also often used by governments and regimes as an instrument to realise various *political* objectives. In 1971, the USA sent its national table-tennis team to China for a historic encounter in a symbolic act to relax international diplomatic relations between the two world powers. This event would later be referred to as the 'ping-pong diplomacy'. During the period of the Cold War, many countries behind the Iron Curtain – especially former Eastern Germany - invested heavily in sporting programmes. Sporting success was thought to reflect the success of the communist system. For many years, athletes and teams from Southern Africa were prevented from taking part in international sporting competitions by several associations. This almost universal boycott was a loud condemnation of the apartheid system in the country. Furthermore, sport is also increasingly acquiring an *economic* dimension in contemporary societies. In the summer of 1998, Lazio Roma, one of Italy's leading football teams, bought Christian Vieri, one of the world's most prolific strikers, from Atletico Madrid for 45 million Euro to increase its chances of winning the Italian championship. In order to finance the whole operation, Lazio's chairman and owner Cragnotti raised the prize of the famous tomato sauces (!) of Cirio, the company of which he is the owner. Nine months later, Lazio drew in Florence after their penultimate game of the championship and saw their title contenders of AC Milan definitively overtake them. After the game, the shares of Lazio took a dive of 11% at the Roman stock exchange, amounting to a loss of 20 billion Euro.<sup>7</sup> These examples illustrate that sport is a rapid growth area in economic terms: nowadays a lot of money is invested in sport, and -sporting competitions often generate enormous amounts of revenue. As a result, an ever-increasing number of people engage professionally in the sporting

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<sup>7</sup> *La Repubblica*, 17 May 1999: During the match in Florence, the referee had wiped away vigorous protests from the Lazio players for a supposed foul in the penalty area of Fiorentina. Cragnotti harshly criticised the referee for not having thought twice before taking such an important decision.

business. As will become clear below, existing sporting rules and structures, which are often still based on traditional or even archaic principles, are not always adequately adapted to these particular economic developments. In this thesis, the core focus shall be on certain economic dimensions of sporting activities.

## 2. The evolving relationship between sport and the European Union

The original Treaty of Rome establishing the European Economic Community was primarily an economically inspired and economically oriented treaty. This appeared clearly from the aims of economic integration set out in its preamble and in Article 2 EEC.<sup>8</sup> At the time of drafting this Treaty, at the end of the fifties, the economic dimension of sport was still virtually negligible; professional sport was still very much in its infancy. Sport was almost exclusively exercised on a purely amateur basis. Unsurprisingly therefore, no explicit reference to sport was included in the EEC Treaty. Several decades later, sport still does not expressly appear within the Community Treaty, although nowadays that omission is not so readily explicable. Since the adoption of the EEC Treaty in 1957, there have been significant developments, both within the domain of sport as with regard to Community law. First of all, economics and professionalism have made a remarkable and irresistible entry within the field of sport.<sup>9</sup> Even though sport remains foremost a leisure activity for the great majority of people, an ever-increasing number of sportsmen and their entourage currently make a living of some kind from the performances of the athletes within the sporting arena. Hence sporting events often also generate enormous amounts of revenue for organisers, sponsors, advertisers, television broadcasters, etc.

This important evolution induced the European Court of Justice to recognise for the first time in 1974 in the case of *Walrave and Koch* that in so far as it constitutes an economic activity, sport falls under the scope of application of Community law.<sup>10</sup> Two years later, the Court of Justice unequivocally confirmed this principle in *Donà v Mantero*.<sup>11</sup> Contrary to common expectations, these judgements - which shall be analysed in depth at a later stage - did not lead to

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<sup>8</sup> Craig & de Búrca, *EU Law. Text, Cases and Materials* (OUP, 2003), at 10-12.

<sup>9</sup> See, *inter alia*, European Commission staff working paper, *The development and prospects for Community action in the field of sport*; European Commission, Consultation document of DG X, *The European model of sport*. (consult: <http://europe.eu.int/comm/sport>)

<sup>10</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405, par. 4.

a stream of challenges against the compatibility with Community law of certain sports rules and practices before national courts and tribunals. The ranks were closed in sporting circles. The sporting federations involved in the different disputes tried to minimise the impact of the decisions as much as possible. Walrave and Koch were strongly dissuaded from pressing for a judgement before the national court after the Court of Justice had rendered its preliminary ruling, as the International Cycling Union threatened to remove the discipline in which they were active from the programme of the next World Championships.<sup>12</sup> Moreover, the Italian football federation even tried to ignore the consequences of the *Donà* decision, although ultimately it was forced to comply with its terms when a similar request for a preliminary ruling was referred to the Court of Justice.<sup>13</sup> From a practical point of view, both decisions appeared thus to have caused nothing but a storm in a glass of water. Afterwards, it was business as usual. Most sporting associations continued elaborating their own regulations, settling their affairs autonomously and operating on the assumption that they were practically immune from legal intervention from outside.<sup>14</sup> Finally, it would effectively take almost 20 years before another dispute concerning sports regulations would reach the stadium of the Court in Luxembourg.

The tone was set, however. Once the Court's rulings had made it absolutely clear that sporting activities were at least partly subject to Community law, the European institutions, especially the European Parliament and the European Commission, gradually started to demonstrate a greater interest in the subject.<sup>15</sup> In the first place, they voiced serious concerns

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<sup>11</sup> Case 13/76 *Donà v Mantero* [1976] ECR 1333, par. 12.

<sup>12</sup> Van Staveren, 18th Colloquy on European Law, *Sport and the Law* (Proceedings published by the Council of Europe, Strasbourg, 1989) 67.

<sup>13</sup> Request for a preliminary ruling, presented by an ordonnance of the 'Procura della Repubblica italiana de Salerno', Case 46/79 *Criminal proceedings v Gennaro Brunetti*, 28 April 1979, OJ C 107/14.

<sup>14</sup> Joerges, Furrer and Gerstenberg, "Challenges of European Integration to Private Law", *Collected Courses of the Academy of European Law, Volume VII, Book I* (Kluwer, 1999) 281.

<sup>15</sup> Consult, *inter alia*, European Parliament, Resolution on Sport and the Community, 13 April 1984, (1984) OJ C 127/142; European Parliament, Resolution on violence and the Heysel tragedy, 13 June 1985, (1985) OJ C 175/211; European Parliament, Resolution on the necessary measures to combat vandalism and violence in sport, 11 July 1985, (1985) OJ C 229/99; Resolution on women in sport, 30 June 1987, (1987) OJ C 305/62; European Parliament, Resolution on Sport in the European Community and a People's Europe, 17 February 1989, (1989) OJ C 69/234; European Parliament, Report Janssen van Raay on the freedom of movement of professional footballers in the Community, PE DOC A2-415/88, 1 March 1989; European Parliament, Resolution on the freedom of movement of professional footballers in the Community, 11 April 1989, (1989) OJ C 120/33; European Parliament, Resolution on the freedom of movement of professional footballers, 21 November 1991, (1989) OJ C 326/208. European Parliament, Larive Report on the European Union and Sport, 27 April 1994, PE DOC A3-0326/94. European Parliament, Resolution on the European Community and Sport, 6 May 1994, (1994) OJ C 205/486; European

about the lawfulness under Community law of sporting rules such as the nationality restrictions and the transfer systems which were applicable in different sporting disciplines. However, their interventions in relation to sport did not remain strictly limited to issues which could be situated in an economic context. This had everything to do with the second relevant development since the entry into force of the EEC Treaty. With the adoption of the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, the original European Economic Community has been transformed in the European Community and subsequently the European Union, and has been attributed powers which far exceed the economic sphere.<sup>16</sup> Almost inevitably therefore, in view of the multifunctional role played by sport in contemporary societies, Community interest in the field of sport has moved onto a broader social, educational and cultural plane. These Community 'actions' relating to sport remained essentially limited to the level of communications, resolutions, reports or declarations of intent. This was mainly due to the fact that the sporting associations vigorously safeguarded their self-proclaimed regulatory autonomy and were extremely reluctant to accept any interference in what they considered to be their prerogatives. Furthermore, as the Treaty contained no clear legal basis for action in the domain of sport, the Community institutions had to be careful not to transgress the limits of their competencies.

In this context, the decision of the Court of Justice in the *Bosman* case, in which it invalidated the traditional nationality clauses and some aspects of the transfer system in professional football for infringement of the Community rules on freedom of movement for workers, evidently fell like a bolt from the blue. The ruling exerted an immediate and drastic impact on the relationship between the world of sport and 'Europe'. For one, the sporting associations were suddenly and definitively stripped of their aura of untouchability. Even if they remain the primary regulatory authority within the sporting disciplines for which they are responsible and undoubtedly still have a large margin of discretion to organise their affairs, they can no longer simply ignore the reality of Community law. The *Bosman* decision raised the – often painful – awareness in sporting circles that sporting rules are in principle subject to a test of compliance with Community law. Contemporaneously, the decision also caused a change in the

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Commission, Adonnino Report (1985), at 28 et seq; Communication on Sport of 1991 (consult: <http://europe.eu.int/comm/sport>)

<sup>16</sup> Craig & de Búrca, *o.c.*, at 13-52.

mindset of the Community institutions about sport. It led to both an intensification and a deepening of Community intervention in sports matters.<sup>17</sup> Sport even started figuring regularly on the agenda of the European Council during the various intergovernmental conferences.<sup>18</sup> On two recent occasions, this resulted in an official declaration on sport being attached to the Treaties of Amsterdam and Nice. The first Declaration on Sport, annexed to the Treaty of Amsterdam, emphasises the social significance of sport and calls on the bodies of the European Union to give special consideration to the particular characteristics of amateur sport.<sup>19</sup> The second – and more elaborate – Declaration relates to the specific characteristics of sport and its social, educational and cultural functions in Europe, of which account should be taken in implementing common policies.<sup>20</sup> With these documents, sport has thus managed to acquire in some way a formal, albeit modest place within the Community framework.

### 3. Delimitation of the scope of this thesis

As the European Commission specified in its working paper relating to sport, there are three major areas of Community activity which have a direct influence on sporting affairs: firstly, the free movement rules; secondly, the competition rules; and thirdly, the different provisions concerning Community policies such as health, education, culture, etc. The Commission also

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<sup>17</sup> Since the *Bosman* ruling, several disputes involving sports matters have reached the stadium of the Court of Justice: see Joined Cases C-51/96 and C-191/97 *Christelle Delière v Ligue Francophone de Judo et Disciplines ASBL and Others* [2000] ECR I-2549; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball* [2000] ECR I-2681; Case C-264/98 *Tibor Balog v Royal Charleroi Sporting Club ASBL*, removed from the register; Case C-438/00 *Deutscher Handballbund v Maros Kolpak*, still pending. European Parliament, Resolution on the broadcasting of sporting events, 22 May 1996. (1996) OJ C 166/109; Report Pack on the role of the EU in the domain of sport of 22 May 1997, PE Doc. A4-0197/97; Resolution on the role of the EU in sport, 13 June 1997, (1997) OJ C 200/252; Resolution on the urgent measures to take to fight doping in sport, 17 December 1998, (1999) OJ C 98/291; Report Mennea on the Commission's Helsinki report on sport of 18 July 2000, PE Doc A5-0208/2000.

<sup>18</sup> Consult, *inter alia*, the conclusions of the Presidency of the European Council of Cardiff, 15-16 June 1998, European Bulletin 6/98, IV, pt. 31: 'Bringing the Union closer to the citizen'; the conclusions of the Presidency of the European Council of Vienna, 11-12 December 1998, European Bulletin 12/98, XII, pts 95 et seq: 'Sport'; the conclusions of the Presidency of the European Council of Santa Maria da Feira, 19-20 June 2000, European Bulletin 6/00, IV, pt. 50: 'Europe and the citizens'.

<sup>19</sup> European Council, Declaration on Sport, attached to Treaty of Amsterdam (consult <http://europe.eu.int/comm/sport/>)

<sup>20</sup> European Council, Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Community place, attached to the Treaty of Nice, consult <http://europe.eu.int/comm/sport>. The Declaration stipulates, *inter alia*, that "the Community must, in its action under the various Treaty provisions, take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."

readily identified the ineffectiveness of anti-doping measures, the lack of protection for young people taking part in top-level competitions, and the risk of excessive commercialisation or economic interpenetration of sport as the principal challenges to contemporary sport. These first two problems, which are tackled under the different Community policies, will not be dealt with in this thesis. Only in the second chapter of the second part, which is dedicated to the new international transfer system in professional football, shall the issue of the protection of minors be briefly dealt with. This thesis is largely focused on one specific aspect of the third – economic – challenge to sport, namely **the regulation of the mobility of sportsmen in the European Union in the post-Bosman era**. This central theme shall be examined primarily on the basis of two practical case studies, which constitute the doctrinal core of the thesis. The question asked in each of the two studies, respectively, is whether rules on transfers of athletes between sport clubs and rules limiting or excluding the participation of athletes with a foreign nationality from certain sporting competitions, both sets of rules normally being elaborated by sporting associations, can withstand the test of compatibility with the Treaty free movement provisions. The study is almost exclusively devoted to the free movement rights of the sportsmen themselves, and therefore the specific problems related to the mobility of their coaches or instructors, notably with regard to the recognition of their diplomas and qualifications, or of sport clubs, will not be scrutinised in further detail. As a logical negative consequence of this choice, the principles on the free movement of goods will only be taken into consideration insofar as this may prove necessary or useful to interpret or explain particular developments within the domains of the freedom of movement of persons and the freedom to provide services. By the same token, the possible impact of the Community competition rules, which is the second fundamental pillar of the Internal Market programme, on sporting rules and practices shall not be systematically examined. Reference to the competition rules shall only be made in so far as this may be necessary to fill certain loopholes in the protection of some categories of sportsmen under Community law, caused by a restrictive application of the Treaty free movement provisions.

This thesis aims to provide an answer to some practically relevant issues and simultaneously attempts to contribute to some more abstract questions. The main research questions are:

- firstly, whether – and if so, to what extent - valuable arguments exist for keeping certain sporting rules and practices entirely outside the scope of the Community Treaty, or alternatively, for sheltering them from the straightforward application of the Treaty rules. In this respect, close attention shall be paid to the particular dynamics of the uneasy relationship between the sporting federations and the Community institutions.
- Secondly, whether the private nature of regulatory or contractual entities such as sporting associations and clubs constitutes a stumbling block for the application of the relevant free movement rules.

As already indicated, an important part of this study shall be dedicated to an in-depth analysis of the viability under Community law of traditional sports regulations such as transfer rules and nationality clauses. A subsidiary question which will be addressed is whether certain specific categories of athletes, such as amateurs and sportsmen with the nationality of a third country can derive some rights of mobility from certain legal instruments within the European Union. The peculiar situation of national representative sides and of naturalised athletes or athletes with a dual nationality shall also be dealt with in further detail.

On the basis of the findings on these questions, the thesis shall ultimately consider whether the current position of sport within the formal Community legal framework is appropriate or needs to be revisited.

#### **4. The precise structure of the thesis**

This thesis is composed of an introduction, two main parts and a conclusion. The first part is dedicated to a largely abstract study of the general framework of the relevant fundamental freedoms, *in casu* the freedom of movement for persons and the freedom to provide services. It is divided into three chapters. The first two chapters concern the question whether, and to what extent, Community law in general and Articles 39 and 49 EC in particular can überhaupt be applied to sporting rules and practices which might run counter to the principle of freedom of movement. Firstly, critical attention shall be paid to the most important arguments of the sporting associations against the applicability of Community law to sport. Secondly, the chapter will

enquire whether the necessary preconditions for the application of the free movement rules – the requirement of an economic activity, a cross-border element and possession of EU nationality – are fulfilled in the case of sportsmen claiming that they are hindered in the exercise of their free movement rights by the application of certain rules or regulations, normally elaborated by the associations of the discipline in which they are active. Practical questions concerning the legal situation of amateur athletes and sportsmen with the nationality of a non-EU Member State will also be considered in this context.

Once the existence of the indispensable criteria for the application of the Community free movement provisions has been established, the next issue addressed in the third chapter is whether sporting measures actually do infringe the relevant Treaty Articles. In first instance, the principle of non-discrimination on grounds of nationality, which has traditionally been the guiding principle in the Court's case law concerning free movement, will be considered. An analysis of the significant evolution in the Court's approach from a discrimination-based examination to a more general analysis centred around the more elusive notion of restriction will follow. The final section will consider different aspects of the issue of justification, to which the Court turns once it has concluded that the contested rule is liable to prevent or render less attractive the right to freedom of movement.

In the second part of this thesis, which also consists of three chapters, the abstract principles elaborated in the first part are applied to two sets of concrete sporting rules and practices, which have been subject to legal scrutiny by the European institutions. The theme of the first two chapters is the so-called transfer system, which makes the 'transfer' of an individual sportsman from one sports team to another conditional upon the fulfilment of a certain number of formal, material and temporal criteria. The first chapter consists almost entirely of an in-depth examination of the famous *Bosman* ruling of the European Court of Justice. The analysis focuses first on whether the Court applied the law correctly and secondly, whether sufficient account was taken of the particular features of sport. The second chapter begins with a brief description of the practical consequences caused by the judgement in *Bosman* for the world of sport, and the way in which athletes, clubs and federations tried to adjust to this new reality. The remainder of the chapter examines the new international transfer system in football. Legally speaking, the *Bosman*

ruling remained limited to the specific circumstances of the case and thus left several issues unresolved. As the responsible associations showed no inclination to carry through a radical reform of the traditional system, the European Commission began an official infringement procedure in order to bring to an end the remaining unlawful practices. The recently implemented new FIFA regulations represent the result of intense negotiations between the Commission and the football authorities. The new rules are analysed in detail to assess whether the revised system withstands the test of conformity with Community law and at the same time whether the specific characteristics of sport were duly taken into consideration. Where appropriate, alternative solutions are proposed.

The third chapter concentrates on issues relating to nationality. In practice, the regulations of several national and international sports associations contain rules on nationality which, in different ways, limit an athlete's opportunities to compete in the sporting events of his choice. Firstly, an overview of the different sorts of nationality clauses which are frequently found in the regulations of various sporting associations is provided. Within this context, the situation of naturalised sportsmen and of athletes with a dual nationality is scrutinised further. On the basis of some concrete examples, the crucial concept of national teams is also examined in more detail. Secondly, the reaction of the Court of Justice towards these nationality requirements in its case law is analysed in depth. In particular, the Court's ruling in the *Bosman* case again constitutes the core of the examination.

Finally, on the basis of the various conclusions drawn from the different chapters of the thesis, the conclusion aims to evaluate whether the existing Treaty framework is appropriate and sufficiently flexible to guarantee satisfactory treatment of sporting matters under Community law, or whether a number of changes are required.

# **Part 1**

## **Theoretical Framework**



# 1

## Applicability of Community law to sport 'For the Good of the Game'?

### *Introduction*

Formally, the EC Treaty contains no single explicit reference to sport. According to the principle of attributed competencies, the Community can act only within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein.<sup>21</sup> The remaining competencies are reserved to the Member States. Logically, the Member States and the sporting associations thus have the primary responsibility in the conduct of sporting affairs.<sup>22</sup> The Community does not have any direct powers in this area.<sup>23</sup> Unsurprisingly therefore, the application of Community law in general, and of the free movement provisions in particular, to sporting rules and practices has at times been vigorously contested in proceedings before the European Court of Justice. Several arguments have been invoked to keep sport outside the scope of application of the Treaty, or alternatively, to minimise at least the impact of Community law to sport. In this largely introductory chapter, the most important of these submissions will be subjected to somewhat closer scrutiny.

### *§1: The non-economic and/or special character of sport*

In all cases relating to sports matters which have been brought before it up until today, the Court of Justice has conspicuously ruled that having regard to the objectives of the Community, sport falls within the ambit of Community law insofar as it constitutes an economic activity

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<sup>21</sup> Article 5 EC.

<sup>22</sup> Vieweg, "The Legal Autonomy of Sport Organisations and the Restrictions of European Law", in Caiger & Gardiner (eds.), *Professional Sports in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000), 83.

<sup>23</sup> European Council, Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, adopted at the IGC in Nice. (Consult: <http://europe.eu.int/comm/sport>)

within the meaning of Article 2 EC.<sup>24</sup> Almost inevitably therefore, the first arguments traditionally forwarded by the sporting federations or the Member States to attempt to avoid or to restrict the application of the Treaty rules to a particular sporting dispute consist of pointing at the non-economic character of the sporting activity in question, or at least of emphasising its sports-specific characteristics so as to downplay the importance of its economic features. By way of example, during the proceedings in *Bosman*, the German government intervened stressing that in most circumstances, a sporting discipline such as football is not an economic activity.<sup>25</sup> The Belgian football federation defended a similar point of view, arguing that only the major European clubs are to be regarded as undertakings, whereas the majority of clubs carry on an economic activity only to a negligible extent.<sup>26</sup> UEFA approached the matter in a subtle way: it indicated that it would be an extremely arduous task distinguishing between the economic and purely sporting aspects of football and that a Court's decision concerning the situation of professional players might "call in question the organisation of football as a whole", clearly implying that it would be better for the Court not to apply Community rules to the circumstances of the case. It continued carefully suggesting that for that particular reason, even if the Court were to apply Article 39 EC to professional players, "a degree of flexibility would be essential because of the particular nature of sport."<sup>27</sup> A similar mode of reasoning can be found in the case of *Deliège*, in which the defendants essentially affirmed that in Belgium judo constitutes a leisure activity, and thus has a recreational rather than an economic character.<sup>28</sup> It results clearly from these examples that, in order to avoid the intervention of Community law into their affairs, the sporting federations and the Member States try to minimise as much as possible the economic character of sports and simultaneously to stress the special features of sport. They are not completely blind to the reality and do acknowledge that many sports nowadays undeniably have economic aspects, with high wages for sportsmen and their personnel and huge revenue for athletes and clubs derived from various sources such as sponsoring, ticketing or television broadcasting of sporting events, but these economic aspects are considered indispensable for the well-functioning of the entire system – for example, the purpose of the transfer rules under

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<sup>24</sup> This principle was enunciated for the first time in Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405, par. 4. It was consistently reiterated in subsequent case law relating to sport.

<sup>25</sup> *Bosman*, par. 72.

<sup>26</sup> *Bosman*, par. 70.

<sup>27</sup> *Bosman*, par. 71.

<sup>28</sup> See e.g. *Cosmas AG in Deliège*, par. 23.

scrutiny in *Bosman* is *inter alia* to subsidise the smaller clubs.<sup>29</sup> They advocate that the role of economics in sports, apart from being marginal, is thus merely functional and in any event subordinate to the social role sport plays in modern society.<sup>30</sup>

Even though the Court consistently held on firmly to the principle it had enounced for the first time in *Walrave*, these submissions nonetheless did not completely fall on deaf ears. The Court has effectively taken into account the specificity of sport and has granted the sporting authorities that with regard to the difficulties encountered when trying to distinguish the economic aspects from the other, purely sporting aspects, the Community free movement provisions do not preclude “rules or practices on non-economic grounds which relate to the particular nature and context of certain matches.” It added the important proviso though that this restriction on the scope of Community law must remain limited to its objective and could thus not be relied upon to exclude an entire sporting activity from the ambit of the Treaty.<sup>31</sup> In legal doctrine, there exists some controversy as to the specific legal basis of this ‘restriction on the scope of Community law’: it is not entirely clear whether these rules must be considered as an exception to the sphere of the Treaty, or rather as a justification under the mandatory requirements doctrine. This specific matter will be tackled in the chapter on nationality.<sup>32</sup> Moreover, the Court has acknowledged that restrictions on the right to freedom of movement caused by the application of particular sporting rules and practices may at times be justified by overriding requirements in the general interest relating to the specificity of sport. In the second part of this research, this issue will be dealt with in further detail. Furthermore, to the contention in *Bosman* that such a ruling would have serious repercussions for the organisation of football, the Court clearly stated that “although the consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application. At the very most, such repercussions might be taken into account when determining whether exceptionally to limit the temporal effect of a judgement.”<sup>33</sup>

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<sup>29</sup> See Lenz AG in *Bosman*, par. 128. For an elaborate analysis, see in particular chapters 4 and 5.

<sup>30</sup> See also Dubey, *La libre circulation des sportifs en Europe* (Bruylant, 2000), at 189-190; Schroeder, *Sport und Europäische Integration – Die Diskriminierung von Sportlern in der Europäische Gemeinschaft* (thesis Munchen, 1989), at 35.

<sup>31</sup> See, e.g., *Dona*, paras. 14-15; *Bosman*, par. 76.

<sup>32</sup> See *infra*, chapter 6, §2, II, 1.

<sup>33</sup> *Bosman*, par. 77. In this context, the Court referred to Case C-163/90 *Administration des Douanes v Legros and Others* [1992] ECR I-4625, par. 30.

Consequently, both arguments undoubtedly have some effect. Firstly, by means of an *a contrario* reasoning applied to the Court's principled statements in *Walrave* and subsequent cases, it appears that non-economic sporting activities may fall outside the scope of application of Community law. In this respect, it must of course be stressed that the principled position of the Court *an sich*, based on a strict dichotomy between economic activities falling under the scope of Community law and non-economic activities being excluded from it, is to be situated in the early conception of the European construct as a predominantly economically inspired legal order.<sup>34</sup> Since then, sport has somehow gained a modest place within the Community framework, *inter alia* by means of two official declarations attached to the respective Treaties of Amsterdam and Nice. This means that nowadays it does not suffice any longer to simply emphasise the non-economic character of a certain sporting activity to avoid the application of Community law. Some elaboration on the legal situation of amateur sportsmen in the following chapter will clarify this issue. Secondly, the Court has also been willing to accept that sport is special and that in view of these specific features, the straightforward application of the Community free movement provisions may be tempered by making use of the doctrine of objective justification.

## §2: *The similarity between sport and culture*

During the proceedings in *Bosman*, the German government further submitted that sport in general has points of similarity with culture and pointed out that, under Article 151(1) EC, the Community only has limited powers and must respect the national and regional diversity of the cultures of the Member States.<sup>35</sup> The link between culture and sport was not new: already in the seventies, the Commission had advocated in a communication that a modern conception of culture also comprised sport.<sup>36</sup> The analogy between these sector-specific policies was made because of the fact that they arguably pursue parallel objectives: limiting Community action within the respective domains, ensuring that the specific features of these fields are taken into

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<sup>34</sup> See Dubey, at 190-191. As he correctly pointed out, once the objectives of the Treaty exceeded the economic domain, this argument was no longer really sustainable.

<sup>35</sup> *Bosman*, par. 72.

<sup>36</sup> Commission Communication of 22 November 1977 concerning Community action in the cultural sector, OJ Supplement 6/77, 26, points 55-57.

consideration in Community action and guaranteeing extensive consultation of the representative actors within the field before undertaking action.

However intrinsically valuable this comparison may be, for example in the broader context of evaluating whether a specific title concerning sport should be inserted in the Community Treaty,<sup>37</sup> arguably its practical usefulness in this particular context is doubtful. Cultural activities which are carried out, performed or delivered in return for remuneration are just the same deemed to be economic activities for the purposes of the application of Community law and thus do not escape the scope of the Treaty.<sup>38</sup> The Court has previously established this on several occasions in its case law, for example with regard to the activities of tourist guides<sup>39</sup> or museums. Consequently, the mere analogy between sport and culture cannot constitute reason for rejecting the application of Community law to sport. Clearly, the Court of Justice shared the same opinion.<sup>40</sup> Nonetheless, it did not enter into the substance of this argument based on an alleged similarity between sport and culture, and contented itself by rejecting it on the ground that “the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 151(1) EC, may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 39, which is a fundamental freedom in the Community system.”<sup>41</sup>

### §3: *The freedom of association*

A third argument regularly invoked to protect sport from falling within the ambit of the Treaty concerns the freedom of association and the autonomy enjoyed by sporting federations under national law.<sup>42</sup> In his opinion in *Bosman*, Advocate General Lenz pointed out that it is

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<sup>37</sup> See *infra*, the conclusion to this thesis.

<sup>38</sup> Séché, “Quand les juges tirent au but: L’arrêt *Bosman* du 15 –12-1995”, *CDE* (1996) at 360.

<sup>39</sup> Case C-154/89 *Commission v France* [1991] ECR I-659, Case C-180/89 *Commission v Italy* [1991] ECR I-709; Case C-198/89 *Commission v Greece* [1991] ECR I-727.

<sup>40</sup> As has been demonstrated above, the Court views sport as being covered under the heading of Community law insofar as it is an economic activity. At a later stage, it will be advocated that also sporting activities of amateur athletes may be part of the scope of application of Community law, making use of the concepts of ‘social advantages’ in secondary legislation and/or ‘corollary rights’ of free movement.

<sup>41</sup> *Bosman*, par. 78. The Court also referred to, *inter alia*, Case C-19/72 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, par. 16.

<sup>42</sup> *Bosman*, par. 72.

“certainly undeniable that the sports associations have the right and the duty to draw up rules for the practice and organisation of the sport, and that that activity falls within the association’s autonomy which is protected as a fundamental right.”<sup>43</sup> The Court explicitly recognised that the principle of freedom of association, enshrined in Article 11 ECHR and resulting from the constitutional traditions common to the Member States, “is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on the European Union, are protected in the Community legal order.”<sup>44</sup> Subsequently, however, the Court stopped short from conferring complete and unconditional protection on the freedom of association, thereby effectively quashing the argument. It somewhat vaguely ruled that the contested rules elaborated by sporting federations could not be considered as necessary to ensure enjoyment of the freedom of association by those associations, nor could they be regarded as an inevitable result thereof.<sup>45</sup> In his opinion in the case of *Deliège*, Advocate General Cosmas stated more explicitly that even though the principle of freedom of association is protected under Community law, this does not go so far as to exclude a certain activity from the scope of the Treaty, insofar as this issue did not directly affect the exercise of this freedom.<sup>46</sup>

Evidently, these statements do not render this particular submission completely devoid of purpose. The sporting associations may rely on the right to freedom of association, but if this right clashes with the individual sportsman’s right to freedom of movement, these rights must clearly be brought into harmony.<sup>47</sup> To resolve such a conflict, a delicate exercise of ‘balancing of rights’ will have to be effectuated.<sup>48</sup> More attention will be paid to this issue at later stages of this research. In any event, it is clear that even if the principle of freedom of association were not useful to exclude sporting activities completely from the scope of the Treaty, it may nonetheless serve at the justification stage, once a restriction to the freedom of movement has been

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<sup>43</sup> Lenz AG in *Bosman*, par. 216.

<sup>44</sup> *Bosman*, par. 79.

<sup>45</sup> *Bosman*, par. 80.

<sup>46</sup> Cosmas AG in *Deliège*, par. 27.

<sup>47</sup> Schroeder, *o.c.*, at 191.

<sup>48</sup> Schroeder, *o.c.*, at 199; also Lenz AG in *Bosman*, at 216. Preedy, *Private Regulations and the Fundamental Freedoms of the EC Treaty* (EUI LL.M. thesis, 1999).

established, when verifying whether there exist imperative reasons in the general interest to uphold the contested measures.<sup>49</sup>

#### ***§4: The principle of subsidiarity***

Finally, and closely linked to the previous argument, also the principle of subsidiarity has been advanced to safeguard sport from Community law scrutiny.<sup>50</sup> The German government in *Bosman* advocated that “by virtue of the principle of subsidiarity, taken as a general principle, intervention by public, and particularly Community, authorities in this area must be confined to what is strictly necessary.”<sup>51</sup> The second limb of Article 5 EC indeed provides that “in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot sufficiently be achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, better be achieved by the Community.”

Clearly, the principle of subsidiarity, which concerns the division of competencies between the Community and the Member States, is of crucial importance within the Treaty framework. In all circumstances, this principle must be carefully respected. Complaints about violations of the principle must be cautiously examined. In this particular context, the issue of subsidiarity was however of no avail to the sporting federations. In *Bosman*, the Court of Justice limited itself to stipulating that the principle of subsidiarity, as interpreted by the German government, “cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.”<sup>52</sup> Advocate General Lenz was more straightforward in his opinion. He firmly stated that the wording of the principle of subsidiarity clearly indicates that it does not apply in the field of the Community’s exclusive competence, such as the fundamental freedoms. Furthermore, he continued that it could not be deduced from the principle either that Community law could not be applied to the field of

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<sup>49</sup> See also Dubey, *o.c.*, at 193-194.

<sup>50</sup> *Bosman*, par. 71.

<sup>51</sup> *Bosman*, par. 72.

<sup>52</sup> *Bosman*, par. 81.

professional sport.<sup>53</sup> Evidently, the Advocate General shared the view of the Commission, which had identified a series of exclusive powers which are joined around the concept of the internal market and do include the fundamental freedoms.<sup>54</sup> The idea that the fundamental freedoms are within the Community's exclusive competence and therefore escape the application of the principle of subsidiarity also finds widespread support in legal doctrine.<sup>55</sup> In this respect, it must nevertheless be observed that the Member States do have a certain margin of discretionary competence in relation with freedom of movement. They are legitimately entitled to invoke grounds of public policy, public security or public health, exceptions of public service and overriding reasons in the general interest to uphold measures which have *prima facie* been held to be restrictive of freedom of movement. These justifications will be examined at a later stage. Furthermore, it must be indicated that the Court of Justice has recently, in a number of cases, applied the principle of subsidiarity to issues relating to the internal market,<sup>56</sup> albeit with a 'relatively light touch'.<sup>57</sup> It seems therefore appropriate to take this principle carefully in consideration when dealing with sports matters.

## **Conclusion**

It emerges clearly from the foregoing that the different arguments submitted by the sporting associations and some Member States were not such as to convince the Court of Justice to keep Community law entirely at bay in the field of sport. But after all, this was an unrealistic prospect anyway. Be that as it may however, what matters far more is that the Court has effectively accepted that the practice of sport presents some characteristics which are somehow special and which therefore deserve protection under Community law. The following chapters will elaborate on how the Court conceives this special treatment and how far the Community

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<sup>53</sup> Lenz AG in *Bosman*, par. 130.

<sup>54</sup> See *1st Report of the Commission on Subsidiarity*, COM (94) 533.

<sup>55</sup> See, *inter alia*, Lenaerts & van Ypersele, 16; Séché, *Cahiers de Droit Européen* (1996) 360; Toth, "A Legal Analysis of Subsidiarity", in O'Keefe & Twomey (eds.), *Legal Issues of the Maastricht Treaty* (London, 1994) 39-40.

<sup>56</sup> Case C-377/98 *Netherlands v Council (Biotechnology Directive)* [2001] ECR I-7149, paras. 30-34; Case C-491/01 *The Queen and Secretary of State for Health ex parte BAT Ltd. And Imperial Tobacco Ltd.* [2002] ECR I-, paras. 177-183.

<sup>57</sup> Craig & de Burca, *o.c.*, at 136-137.

institutions are actually prepared to go in their recognition of this specificity of sport. Furthermore, it has also been demonstrated that the Community actors must approach carefully in this respect, in order not to encroach upon the powers of the Member States and the sporting federations in this domain. This is the inevitable result of the lack of a clear position of sport within the Treaty framework. It remains thus to be seen whether this current situation is practically still tenable.



## Applicability of free movement rules 'Citius, Altius, Fortius'

### *Introduction*

In order to trigger the application of the Treaty provisions on free movement of persons and freedom to provide services, three basic requirements must in principle be satisfied: the person who wishes to exercise his or her rights to freedom of movement must be engaged in some kind of economic activity, he or she must be a national of a Member State of the European Union, and finally, there must be a cross-border element detectable in the particular situation. These three prerequisites shall be dealt with respectively in sections two, three and four of this chapter. The analysis shall rigorously be centred around the person of the sportsman who wants to make use of his freedom of movement. However, before addressing these criteria separately, the first section shall be dedicated to the preliminary question of whether the Community free movement provisions can actually be relied upon in disputes between private entities.

### *§1: The Issue of Horizontal Direct Effect*

One of the principal objections forwarded against the application of the Community provisions on free movement of persons and services to rules and practices enacted and imposed by sporting associations and/or clubs concerns the issue of the so-called horizontal direct effect.<sup>58</sup> According to conventional doctrine, Articles 39 and 49 EC are only applicable to acts of public

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<sup>58</sup> For a more elaborate discussion of the issue of horizontal direct effect of the free movement provisions, see, *inter alia*, Baquero Cruz, *The Economic Constitutional Law of the European Community: between Competition and Free Movement* (EUI Ph.d thesis, 1999); Jaensch, *Die unmittelbare Drittwirkung der Grundfreiheiten, Untersuchung der Verpflichtung von Privatpersonen durch Art. 30, 48, 52, 59, 73b EGV* (Nomos, 1997); Schaefer, *Die unmittelbare Wirkung des Verbots der nichttarifären Handelshemmnisse (Art. 30 EWGV) in den Rechtsbeziehungen zwischen Privaten* (Lang, 1987); Van den Bogaert, "Horizontality: The Court Attacks?", in Barnard & Scott (eds.), *The Law of the Single European Market: Unpacking the Premises* (Hart, 2002) 123.

authorities and are therefore not horizontally directly effective in disputes between private parties. Thereupon, it has been advocated that possible restrictions resulting from sporting regulations nevertheless do not fall under free movement scrutiny as the sporting federations and/or clubs which have drafted these rules are private entities. From the outset, it must be acknowledged that, in spite of several judgements on the matter, it is still not completely clear precisely to what extent Articles 39 and 49 EC are applicable to acts of private parties.

## I. RELEVANT CASE LAW OF THE COURT

### 1. *Walrave*: collective measures

The issue of the potential horizontal direct effect of the Community provisions on the free movement of persons came to the fore for the first time precisely in *Walrave*.<sup>59</sup> The Court had to decide whether Articles 12, 39 and 49 EC had to be interpreted in such a way that the provision in the rules of the UCI relating to medium-distance world cycling championships behind motorcycles, according to which the pacemaker had to be of the same nationality as the stayer, was incompatible with them. *Walrave* and Koch, who used to participate in these races as pacemakers for stayers of other nationalities,<sup>60</sup> regarded this provision of the rules of the UCI as discriminatory. It was undisputed in the proceedings that the UCI, being an association of national bodies concerned with cycling as a sport, is a private association. The defendants advocated that the prohibitions of any discrimination on grounds of nationality, laid down in Articles 12, 39 and 49 EC, “refer only to restrictions which have their origins in acts of an authority and not to those resulting from legal acts of persons or associations who do not come under public law.”<sup>61</sup> The Court, however, refuted this allegation and held that the prohibition of discrimination “does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.”<sup>62</sup>

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<sup>59</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405.

<sup>60</sup> Warner AG in Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1423.

<sup>61</sup> *Walrave*, par. 15.

<sup>62</sup> *Walrave*, par. 17.

The Court based this decision upon three grounds: firstly, it stipulated that the “abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, 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.”<sup>63</sup> This can be described as the *effet utile* argument. Secondly, it proceeded stating that since “working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.”<sup>64</sup> This could be referred to as the *uniform application* argument. Thirdly, it emphasised the general nature of the terms of the relevant Treaty provisions, not distinguishing between the source of the restrictions to be abolished and extending to rules and agreements which do not emanate from public authorities.<sup>65</sup> This is the *general wording* argument.

Consequently, to the extent that measures regulate the subject matter concerned in a *collective manner*, public and private regulation are unequivocally put on a par by the Court of Justice.<sup>66</sup> Interpreted in this way, the *Walrave* decision undoubtedly constituted a significant development in the jurisprudence of the Court. Evidently, its importance should be estimated at its true value: the private party involved in the proceedings, the International Cycling Union is an association with a quasi-government status, as it acts as the ultimate regulatory body within its field of competence and performs State-like functions.<sup>67</sup> Arguably, at this stage of the Court’s case law on the matter, only this kind of private party thus seemed to be subject to free movement scrutiny. Besides, it also needs to be emphasised that the case concerned a measure which clearly discriminated between Community nationals on grounds of nationality. Practically, for the purposes of this research, this ruling does unmistakably mean that regulations elaborated by sporting federations are caught by the free movement provisions insofar as they contain discriminatory provisions.

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<sup>63</sup> *Walrave*, par. 18.

<sup>64</sup> *Walrave*, par. 19.

<sup>65</sup> *Walrave*, par. 20-21.

<sup>66</sup> This decision has been confirmed in Case 13/76 *Donà v Mantero* [1976] ECR 1333, par. 17.

## 2. *Bosman*: beyond discrimination

The Court of Justice developed the issue further in subsequent case law. In *Haug-Adrion*<sup>68</sup>, the Court hinted for the first time that it might be prepared to extend the applicability of the Community provisions on freedom of movement of workers and services to private parties beyond the point at which it had arrived in *Walrave*: it omitted every reference to collective measures, and held instead that the Treaty provisions in question “are intended to eliminate *all measures* (emphasis added) which, in the fields of free movement of workers and freedom to provide services, treat a national of another Member State more severely or place him in a situation less advantageous, from a legal or factual point of view, than that of one of the Member State’s own nationals in the same circumstances.”<sup>69</sup> This general statement had the potential of opening up the whole array of private measures to investigation. However, somewhat surprisingly maybe, at the time the whole issue was not really taken up any further in the legal doctrine, presumably because the standardised contract terms at stake in the particular case could be considered as comparable to collective agreements,<sup>70</sup> or possibly because the Court reached the conclusion that the measure concerned was not discriminatory and thus not contrary to the Treaty provisions invoked.<sup>71</sup> In *Bosman*,<sup>72</sup> the Court of Justice, in true ‘procession of Echternach’ style, first appeared to retreat one step from its previous findings before finally moving some steps forward again. At stake was the compatibility with Articles 39, 81 and 82 EC of a number of rules emanating from the representative football federations FIFA and UEFA, two private associations governed by Swiss law. First of all, the Court reiterated the approach it had already adopted in *Walrave*.<sup>73</sup> Then, the Court made a giant leap forward: whereas in its previous case law it had only submitted discriminatory rules of private associations to the test of compliance with the free movement provisions, it now brought genuinely non-discriminatory private measures under direct free movement scrutiny. Indeed, the Court ruled that even though the

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<sup>67</sup> The same could be said about the Italian Football Federation in *Donà*.

<sup>68</sup> Case 251/83 *Haug-Adrion v Frankfurter Versicherungs-AG* [1984] ECR I-4277.

<sup>69</sup> *Haug-Adrion*, par. 14.

<sup>70</sup> Roth, “Drittwirkung der Grundfreiheiten”, in Due/Lutter/Schwarze (eds.), *Festschrift für Ulrich Everling*, Vol. 2, (Nomos, 1995) 1239.

<sup>71</sup> *Haug-Adrion*, par. 18.

<sup>72</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

transfer rules in question did not discriminate on grounds of nationality, they still directly affected players' access to the employment market and were thus capable of impeding the freedom of movement of workers.<sup>74</sup> And the Court did not leave it at that. When the UEFA objected that the Court's interpretation made Article 39 EC "more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health"<sup>75</sup>, the Court rejected this argument for being based on a false premise, and ruled in an unequivocal way that "there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question."<sup>76</sup> This statement was wider than it strictly had to be, for at the time, only measures regulating employment or the provision of services in *a collective manner* were caught by the free movement provisions.<sup>77</sup> After *Bosman*, it could thus be taken for granted that also non-discriminatory private collective measures come under free movement scrutiny. However, it still remained to be seen whether the same held true also for purely individual measures.

### 3. *Angonese*: horizontal direct effect of Article 39 EC

Ultimately, it would take the Court five more years to provide explicit confirmation about the full horizontal direct effect of Article 39 EC. It formulated its views against the background of the case of *Angonese*.<sup>78</sup> *Angonese*, an Italian national whose mother tongue is German and who is resident in the province of Bolzano, applied to take part in a competition for a post with a private

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<sup>73</sup> *Bosman*, paras. 82-84.

<sup>74</sup> *Bosman*, par. 103.

<sup>75</sup> *Bosman*, par. 85.

<sup>76</sup> *Bosman*, par. 86; see also Case 350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521, par. 24.

<sup>77</sup> In two other sports cases, the Court neatly proceeded along the path it had previously chosen in *Bosman*, albeit with a different outcome: see Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball* [2000] ECR I-2681, par. 49 on workers; Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue Francophone de Judo et Disciplines ASBL and Others* [2000] ECR I-2549, par. 64 on services. For further information, see e.g. Van den Bogaert, "The Court of Justice on the Tatami: Ippon, Wazari or Koka", 25 *ELRev.* (2000) 554.

<sup>78</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139. See Lane & Shuibhne, "Annotaton on Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano*", 37 *CMLRev.* (2000) 1237; Streinz & Leible, "Die unmittelbare Drittwirkung der Grundfreiheiten – Überlegungen aus Anlass von EuGh, EuZW 2000, 468 *Angonese*", 15 *EuZW* (2000) 459.

banking undertaking in Bolzano. One of the conditions for entry to the competition was possession of a certificate of bilingualism, which used to be required in Bolzano for access to the former managerial career in the public service. The specific certificate is issued by the local public authorities after an examination which is held only in that province. Angonese is perfectly bilingual, but he was not in possession of that specific certificate. On that basis he was denied admission to the competition. Although acknowledging the right of the bank to select its future staff from persons who are perfectly bilingual, he considered the requirement to have and to produce the certificate unlawful and contrary to the principle of freedom of movement for workers, and thereupon commenced legal proceedings. When seized of the dispute, the Court of Justice initially trod on well-known territory, reaffirming the principles enounced in *Walrave*. It also embraced exactly the same line of reasoning, based on the arguments of the general wording of Article 39, the requirement of effectiveness and the necessity of uniform application of the principle of non-discrimination.<sup>79</sup> Subsequently, however, the Court introduced a new element into the debate, originating from its decision in the second *Defrenne* case<sup>80</sup>. In that case, the Court had ruled that "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down."<sup>81</sup> And accordingly it had held, in relation to a provision of the Treaty which was mandatory in nature, that "the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals."<sup>82</sup> On the basis of these statements, the Court construed a bridge with Article 39 EC in the present case, emphasising that "such considerations must, *a fortiori*, be applicable to Article 39 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 12 of the EC Treaty. In that respect, like Article 143 of the EC Treaty, it is designed to ensure that there is no discrimination on the labour market."<sup>83</sup> At this point, everything was put in readiness for *le moment suprême*, which was not long in coming:

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<sup>79</sup> *Angonese*, paras. 30-33.

<sup>80</sup> Case 43/75 *Gabrielle Defrenne v Sabena* [1976] ECR 455.

<sup>81</sup> *Defrenne*, par. 31.

<sup>82</sup> *Defrenne*, par. 39; *Angonese*, par. 34.

<sup>83</sup> *Angonese*, par. 35.

“Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 39 of the Treaty must be regarded as applying to private persons as well.”<sup>84</sup>

## II. PRACTICAL IMPLICATIONS

Since *Angonese*, it is undisputed that Article 39 EC is horizontally directly effective. Some questions are however still unanswered and must therefore be addressed in future case law. Firstly, in the case at hand, the contested measure was indirectly discriminatory. It is still unclear whether Article 39 EC can also be applied in a dispute between purely private parties concerning a genuinely non-discriminatory measure.<sup>85</sup> Furthermore, it is not entirely certain either whether these findings will be entirely transposed to the domains of the freedom of establishment and the freedom to provide services.<sup>86</sup> Within this context, the Court recently ruled in *Wouters* that compliance with Articles 43 and 49 EC is also required in the case of rules which are not public in nature but which are designed to regulate collectively, self-employment and the provision of services.<sup>87</sup> It did not appear to matter to the Court whether the contested regulation was discriminatory or not.<sup>88</sup> It can therefore relatively safely be assumed that non-discriminatory rules from collective private actors are also covered under Articles 43 and 49 EC. Consequently, on the basis of these findings, it is advocated that the regulations from all sporting associations which are self-regulatory and possess powers akin to public law must comply with the provisions on free movement of persons and services, regardless of whether they are discriminatory or not and whether the athletes submitted to these regulations are workers or self-employed. Moreover,

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<sup>84</sup> *Angonese*, par. 36.

<sup>85</sup> Baquero observed that the Court's judgement is limited to discriminatory rules (Baquero, *o.c.*, at 234). Körber limited himself to stating that the Bosman decision of prohibiting also genuinely non-discriminatory rules was not reiterated (Körber, “Innerstaatliche Anwendung und Drittwerking der Grundfreiheiten?”, 6 *EuropaRecht* (2000) at 949-950)

<sup>86</sup> Baquero, *o.c.*, at 250, is of the opinion that the *Angonese* decision will not be transposed to other freedoms. He advocates that the Court prefers to ensure an enhanced protection for workers as a matter of constitutional law. According to Körber, the decision in *Angonese* will be implemented also with regard to services, but maybe not with regard to establishment (see Körber, *o.c.*, at 950). On the broader issue of convergence between the fundamental freedoms. see, e.g., Behrens, “Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht”, *EuropaRecht* (1992) 145; Daniele, “Non-Discriminatory Restrictions to the Free Movement of Persons”, 22 *ELRev.* (1997) 191; Friedbacher, “Motive Unmasked: The European Court of Justice, the Free Movement of Goods and the Search for Legitimacy”, 2 *ELJ* (1996) 226; Mortelmans, “Excepties bij non-tarifaire intracommunautaire belemmeringen: assimilatie in het nieuwe EG-Verdrag?”, 5 *SEW* (1997) 182; Mortelmans, “Towards convergence in the application of the rules on free movement and on competition?”, 38 *CMLRev.* (2001) 613.

<sup>87</sup> Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, par. 120.

<sup>88</sup> *Wouters*, par. 122.

discriminatory measures imposed on employed sportsmen by private entities such as clubs, for example in contracts, arguably also come under the scope of application of Article 39 EC. Whether Community law will eventually reach even further within the realm of private relations must still be awaited...

## ***§2: The Requirement of an 'Economic Activity'***

Sport falls within the ambit of the Community's law to the extent that it constitutes an economic activity.<sup>89</sup> The specific wording of this principled statement of the Court of Justice is straightforward and does not leave much room for interpretation. Consequently, at first scrutiny, it seems to be that the only question which needs to be tackled for the purposes of this research is the following: can a certain form of sport be considered as being of an economic nature; and if so, to what extent? However appealing this may look for reasons of clarity or simplicity, this way of putting the question is just not accurate enough. It must be emphasised from the outset that what matters really is not so much that a particular sports discipline in general is regarded as an economic activity, but rather that the concrete activities of sportsmen involved in one or the other sport are of an economic nature. This subtle change of perspective may seem immaterial, but it does have its importance. Indeed, as Advocate General Cosmas indicated in his opinion in *Deliège*,<sup>90</sup> it is perfectly feasible that notwithstanding the fact that a sport is deemed to be of an amateur character in general, some sportsmen nevertheless perform it in an economic way. Therefore, instead, the predominant question which has to be addressed becomes then whether a given sportsman's activities when practising his sport are to be considered of an economic nature. If the answer to this question is affirmative, the athlete concerned will be able to rely directly on the free movement provisions of the EC Treaty of his own right - provided he satisfies the other requirements for their application, of course. Conversely, if the answer to the question formulated is negative, the sportsman will be considered as an amateur and he will have to invoke other Community provisions or instruments in order to be able to move within the European Union, thereby necessarily having to comply with their inherent restrictions.

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<sup>89</sup> *Walrave*, par. 4.

<sup>90</sup> *Cosmas AG in Deliège*, par. 26.

Once the Court has decided that a certain sporting activity is economic in nature, the next issue to be dealt with - for the purpose of the application of the Community law provisions on free movement of persons - is whether the athlete in question is to be qualified as a 'worker' within the meaning of Article 39 EC, or alternatively, rather as a sportsman competing in an independent, self-employed capacity according to the terms of Articles 43 and 49 EC. In view of the common foundations of the free movement provisions and the apparent tendency towards convergence, which will be discussed further below, this second evaluation may turn out to be of less crucial importance than the former one. Admittedly, in many, if not most circumstances, the concrete application of the respective free movement provisions will lead to the same outcome, regardless of whether the sportsman in question is considered as an employee ('workers') or as a self-employed ('establishment' or 'services'). Moreover, as will be demonstrated later, it won't always be easy or even possible to assess with absolute certainty how a particular sportsman is to be qualified exactly under the chapter of the fundamental freedoms. However, one shouldn't forget that the principles of the freedom of movement of workers and these of the freedom to provide services do not always run completely in parallel, and therefore, it arguably remains important to always try at least to distinguish correctly between these different categories of rights holders.

One more additional remark before tackling the identified issues concretely: it speaks for itself that this two-tier approach remains to some extent artificial and theoretical, in the sense that in practice, these two questions are often almost inextricably linked and scrutinised contemporaneously. In order to keep the different concepts separated, the two issues will be dealt with successively in this research, respectively in the second and the third section of the chapter. The first section will be dedicated to a concise explanation of the content of the central notions 'economic activity', 'worker', 'establishment' and 'services'. In the last section, the legal position of amateur sportsmen under Community law shall be scrutinised more in detail.

## I. GENERAL CONCEPTS & PRINCIPLES

In this first section, it will be examined which specific conditions someone needs to fulfil from an economic point of view in order to activate the Community provisions on the fundamental freedoms. In order to concentrate fully on the different aspects of the requirement of an economic activity, the other two constituent criteria which must equally be satisfied before someone can benefit from the rights conferred in these Treaty Articles, namely the fact that the person in question must in principle be a national of a Member State of the European Union and the presence of an inter-state element, will provisionally be left out of consideration here.

### 1. The concept of 'worker' within the meaning of Article 39 EC

It follows logically from the terms of Article 39(1) EC that in order to be able to trigger the application of this provision, one must have the status of a 'worker'. It has been left up to the Court of Justice to establish the impact of this term.<sup>91</sup> Initially, the Court confined itself to laying down the general contours of its approach, stopping short of providing an actual definition of the concept. It has consistently held that the term 'worker' must be given a Community scope, so as to avoid that Article 39 would be deprived of all effect and the Treaty objectives would be frustrated if its meaning were unilaterally fixed and modified by national law.<sup>92</sup> Furthermore, the Court stipulated that it is appropriate, to determine the meaning of the terms 'worker' and 'activity as an employed person', "to have recourse to the generally recognised principles of interpretation",<sup>93</sup> and that these concepts may not be interpreted restrictively.<sup>94</sup> After having

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<sup>91</sup> For a more elaborate discussion on the evolution of this concept, see e.g. Castro Oliveira, "Workers and Other Persons: Step-By-Step from Movement to Citizenship", 39 *CMLRev.* (2002) 77; Craig & de Búrca, *EU Law. Text, Cases and Materials* (OUP, 2003), at 701-762; Handoll, *Free Movement of Persons in the European Union* (Chancery, 1995); O'Leary, "The Free Movement of persons and Services", in Craig & de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999) 377.

<sup>92</sup> Case 75/63 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177. Mancini described this situation as a 'hermeneutic monopoly' conferred by the Court upon itself to counteract possible unilateral restrictions of the application of the rules on freedom of movement by the different Member States. See Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice", in Curtin & O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law* (Butterworths, 1992), 67.

<sup>93</sup> Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, par. 9.

<sup>94</sup> *Levin*, par. 13.

sufficiently outlined the premises, the Court specified that the essential feature of an employment relationship is that “for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”<sup>95</sup> Three constituent criteria can be detected in this judge-made definition: before someone can be regarded as a worker, there must be (1) an economic activity of some kind; (2) remuneration; and (3) subordination. Each of these elements has been subject to further scrutiny in the Court’s case law. With regard to the first criterion, the prerequisite of an economic activity of some kind, the Court introduced a kind of quantitative element, explaining that Article 39 EC is said to cover only “the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary”.<sup>96</sup> The second criterion, involving the element of remuneration, constitutes the financial counterpart of the activities carried out and ensures or confirms in a certain way their truly economic character. It gives a kind of qualitative touch to the definition of a worker. In this context, the Court included part-time workers earning an income lower than what is considered to be the minimum required for subsistence within the Community scope of ‘worker’, recognising that part-time work constitutes for a large number of persons an effective means of improving their living conditions.<sup>97</sup> As such, it didn’t even oppose to the fact that part-time workers appeal to assistance from the public funds to supplement their income.<sup>98</sup> The Court pushed the issue of remuneration to its outer limits, accepting that in so far as work carried out by members of a religious community, which aims to ensure a measure of self-sufficiency for the Community, constitutes an essential part of participation in that Community, “the services which the latter provides to its members may be regarded as an indirect quid pro

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<sup>95</sup> Case 66/85 *Lawrie Blum v Land Baden-Württemberg* [1986] ECR 2135, par. 17.

<sup>96</sup> *Levin*, par. 17. In further cases, the Court has offered more guidance in this respect: See Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, par. 14: the “national court may [...] take account of the irregular nature and limited duration of the services actually performed under a contract for occasional employment. The national court may also take account, if appropriate, of the fact that the person must remain available to work if called upon to do so by the employer.” Also, Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071, par. 16: the Court concluded that an Italian national who was employed for ten weeks as a paid trainee as part of her occupational training was not precluded, in principle, from being considered as a worker either by the fact that her productivity was low or that she worked only a small number of hours a week and received limited wages. Nonetheless, the national court was entitled “to examine whether in all the circumstances the person concerned has completed a sufficient number of hours to familiarise himself with the work.”

<sup>97</sup> *Levin*, par. 15.

<sup>98</sup> Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, par. 14. Slyn AG in *Kempf*, at 1744, opined that “if a person deliberately and for no good reason took a part-time job when he could do a full-time job, that might under national law affect his rights to public funds. It does not prevent him from being a worker.”

quo for their work.<sup>99</sup> The third constitutive criterion of the definition laid down in *Lawrie-Blum* can be described as the element of subordination. In its case law the Court has identified several relevant factors which can be taken into consideration when evaluating concretely whether or not a given person is to be regarded as being in a position of subordination towards a person that ordered him to carry out a certain economic activity. In *Lawrie-Blum*, the Court concluded that during the entire period of preparatory service, the trainee teacher in question was indeed under the direction and supervision of the school to which he was assigned, holding "it is the school that determines the services to be performed by him and his working hours and it is the school's instructions that he must carry out and its rules that he must observe."<sup>100</sup> In the case of *Agegate*<sup>101</sup>, the Court furnished some additional distinguishing elements, "such as, for example, the sharing of the commercial risks of the business, the freedom for a person to choose his own working hours and to engage his own assistants. In any event, the fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker."<sup>102</sup>

Additionally, the Court gradually adduced some further specifications to this general framework in order to complete the whole picture concerning the concept of 'worker'. First of all, the Court clarified that the underlying motives for undertaking work are immaterial and can therefore, in principle, not prevent a person from being qualified as a worker within the meaning of Article 39 EC.<sup>103</sup> Secondly, not only persons carrying out an economic activity on the basis of a contract governed by private law, but also persons performing work in the public sphere, whose terms of work are regulated by public law, can properly be considered as workers within the meaning of Article 39 EC.<sup>104</sup> Thirdly, the Court also extended the protection of Article 39 EC to persons who are actively looking for a job, but who cannot, formally speaking, be considered as workers just yet.<sup>105</sup> In this respect, it must be observed, however, that the Court hasn't conferred

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<sup>99</sup> Case 196/87 *Steymann v Staatssecretaris van Justitie* [1988] ECR 6159, par. 12.

<sup>100</sup> *Lawrie-Blum*, par. 18.

<sup>101</sup> Case 3/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd.* [1989] ECR 4459.

<sup>102</sup> *Ex parte Agegate*, par. 36.

<sup>103</sup> In *Levin*, for example, it was suggested that Mrs. Levin may have sought work only in order to obtain a residence permit to remain in the country. See, however, Case 344/87 *Betray v Staatssecretaris van Justitie* [1989] ECR 1621, paras. 17-19.

<sup>104</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, paras. 5-6.

<sup>105</sup> Case C-292/89 *R v Immigration Appeal Tribunal, ex parte Antonissen* [1991] ECR I-745, paras. 12-13. See also *Levin*, par. 16; and Case 48/75 *Royer* [1976] ECR 497: the right "to look for or pursue an occupation".

the same status to job seekers as to actual workers,<sup>106</sup> and that the right to enter and to stay in another Member State to look for employment is limited in time.<sup>107</sup>

## 2. The concepts of 'establishment' and 'services' within the meaning of Articles 43 & 49 EC

The fundamental freedom of movement of persons, enumerated in Article 3(c) EC, is not limited to workers who perform labour for and under the direction of someone else; it also extends to persons who carry out work in a self-employed capacity, on an independent basis. Their free movement rights are regulated in respectively, Articles 43 EC *et seq.*, on the freedom of establishment, and Articles 49 EC *et seq.*, on the freedom to provide services.<sup>108</sup> Again, it has been mainly the responsibility of the European Court of Justice to establish the precise scope of application of these freedoms. Basically, the Court imposed the same two principal requirements as with regard to Article 39 EC: there needs to be some kind of economic activity in return for which remuneration is due to trigger the application of these two sets of provisions. Furthermore, the Court has also interpreted the text of the Treaty Articles or even adduced some further elements to distinguish more clearly between self-employed falling under the heading of establishment and self-employed covered by the rules on services.

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<sup>106</sup> See Case 316/85 *Centre public d'aide sociale de Courcelles v Lebon* [1987] ECR 2811, in which the Court ruled that several of the social and tax advantages granted to workers under Community law could not be claimed by those who were moving in search of work.

<sup>107</sup> In *Antonissen*, par. 16, the Court pointed out that "the effectiveness of Article 39 is secured in so far as Community legislation or, in its absence, the legislation of a Member State gives persons concerned a reasonable time in which to apprise themselves, in the territory of the Member State concerned, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged." Subsequently, in par. 21, the Court further specified that "in the absence of a Community provision prescribing the period during which Community nationals seeking employment in a Member State may stay there, a period of six months, such as that laid down in the national legislation at issue in the main proceedings, does not appear in principle to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of free movement. However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State."

<sup>108</sup> For a more elaborate discussion on these concepts, see e.g. Craig & de Búrca, *EU Law. Text, Cases and Materials* (OUP, 2003) at 765-824; Hatzopoulos, "Recent Developments in the Case Law of the ECJ in the Field of Services", 37 *CMLRev.* (2000) 43; O'Leary, "The Free Movement of persons and Services", in Craig & de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999) 377; Snell, *Goods and Services in EC Law* (OUP, 2002).

## 2.1 Freedom of establishment

The Court went through relatively little trouble in defining the concept of 'establishment'. In *Factortame*, the Court observed in general terms that the concept of establishment within the meaning of Article 43 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.<sup>109</sup> Evidently, the notion of 'establishment' thus involves both a geographical and a temporal requirement.<sup>110</sup> To complete the picture, regard should also be had to the following observations. Firstly, the Court stipulated that freedom of establishment is not confined to the right to create a single establishment within the Community. In its opinion, a person may be established, within the meaning of the Treaty, in more than one Member State – in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries, and, in the case of members of the professions, by establishing a second professional base, subject to observance of the professional rules of conduct.<sup>111</sup> Secondly, the Court also unequivocally held that "a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 49 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services."<sup>112</sup> In the light of the foregoing, the Court legitimately concluded that "the concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and contingent basis, in the

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<sup>109</sup> Case C-221/89 *The Queen v The Secretary of State for Transport, ex parte Factortame LTD and Others* [1991] ECR I-3905, par. 20. See also Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, par. 23: the Court described the right of establishment, subject to the exceptions and conditions laid down, as allowing "all types of self-employed activity to be taken up and pursued on the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up."

<sup>110</sup> Chalmers & Szyszczak, *European Union Law – Volume II - Towards a European Polity?* (Ashgate Publishing, 1998), 363-366.

<sup>111</sup> See Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971, par. 19.

<sup>112</sup> Case 205/84 *Commission v Germany* [1986] ECR 3755, par. 22; Case 33/74 *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299. The concrete application of this principle in Case C-212/97 *Centros Ltd. v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 caused considerable commotion in legal doctrine: the Court ruled that the deliberate choice of a Member State national to set up a company in a Member State with lenient legislative requirements concerning incorporation and to set up branches in other Member States with stricter requirements

economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.”<sup>113</sup>

## 2.2 Freedom to provide services

Article 50 EC stipulates that “services shall in particular include: activities of an industrial character; activities of a commercial character; activities of craftsmen; activities of the professions.” The domain of ‘services’ constitutes the residual category of the free movement provisions, which can only come into play whenever a particular situation cannot be caught under the other fundamental freedoms.<sup>114</sup> In clear contrast with the Treaty provisions on the freedom of establishment, requiring a permanent basis in the host Member State, the provisions of the chapter on services, in particular the third paragraph of Article 50 EC, envisage that where the provider of services moves to another Member State, he is to pursue his activity there on a *temporary* basis. The Court clarified that “the temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity.”<sup>115</sup> Article 50 EC expressly mentions only the right of the person providing a service to temporarily pursue his activity in the Member State where the person for whom the service is provided is established.<sup>116</sup> However, in its case law, the Court has given an extensive interpretation to this fundamental freedom, seemingly extending its scope of application to interstate services in general.<sup>117</sup> Firstly, it has ruled that the freedom to provide services also includes the freedom, for the recipients of services, to go to another Member State

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cannot simply in itself constitute an abuse of the right of establishment. Such a decision is inherent in the exercise, in a single market, of the freedom of establishment. (paras. 24-27).

<sup>113</sup> See to this effect also Case 2/74 *Reyners v Belgium* [1974] ECR 631, par. 21.

<sup>114</sup> Article 50 EC. The Court unequivocally confirmed this in Case C-159/90 *Society for the Protection of the Unborn Child (SPUC) v Grogan* [1991] ECR I-4685, par. 17; see also *Gebhard*, par. 25.

<sup>115</sup> *Gebhard*, par. 27. In addition, it held that the fact “that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.”

<sup>116</sup> See, for example, cases such as Case 16/78 *State v Choquet* [1978] ECR 2293, or Case 279/80 *Criminal Proceedings against Webb* [1981] ECR 3305.

<sup>117</sup> *Eeckhout, The European Internal Market and International Trade: A Legal Analysis* (Clarendon Press, 1994), at 9-10.

in order to receive a service there, without being obstructed by restrictions.<sup>118</sup> It considered this scenario as the necessary corollary of the freedom to provide services, fulfilling the objective of liberalising all gainful activity not covered by the free movement of goods, persons and capital.<sup>119</sup> Secondly, also a third situation in which both the provider and the recipient of the service move from one Member State to another is considered to be caught under the heading of services,<sup>120</sup> as well as thirdly, a final fourth situation in which nor the provider nor the recipient move, and only the service itself 'travels'.<sup>121</sup>

The broad approach generally adopted by the Court with regard to the fundamental freedoms is also reflected in the concept of remuneration. In *Steymann*, it had already accepted that also an indirect *quid pro quo* could nevertheless be considered as a economic counterpart for the services rendered.<sup>122</sup> Furthermore, in *Bond van Adverteerders*, the Court acknowledged that "Article 50 does not require the service to be paid for by those for whom it is performed", so long as there is remuneration from some party.<sup>123</sup> The issue becomes complicated however when the remuneration is provided for by the state. In *Humbel*<sup>124</sup>, the Court held that the essential characteristic of remuneration – "that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service"<sup>125</sup> - is absent in the case of courses provided under the national education system<sup>126</sup>, as the State, in establishing and maintaining such a system, fulfils its duties towards its own population in the social, cultural and

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<sup>118</sup> Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, par. 16.

<sup>119</sup> *Luisi and Carbone*, par. 10.

<sup>120</sup> See for example the so-called 'tourist guide' cases: Case C-154/89 *Commission v France* [1991] ECR I-659; Case C-180/89 *Commission v Italy* [1991] ECR I-709; Case C-198/89 *Commission v Greece* [1991] ECR I-727.

<sup>121</sup> For example financial operations, telecommunication, etc: see Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069; Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141.

<sup>122</sup> *Steymann*, par. 12.

<sup>123</sup> Case 352/85 *Bond van Adverteerders v the Netherlands* [1988] ECR 2085, par. 16. This issue was further elaborated upon in *Deliège*, at paras. 56-57. In the previous Case 62/79 *Compagnie Générale pour la Diffusion de la Télévision, Coditel, and Others v Ciné Vog Films and Others* [1980] ECR 881, at 890, the applicants argued that the provision of services does not necessarily imply the existence of a legal relationship between the provider and the recipient of a service; Such a requirement was considered being scarcely compatible with economic reality in industries such as the newspaper, radio and television industries in which revenue is often largely generated by advertising.

<sup>124</sup> Case 263/86 *Belgian State v Humbel* [1988] ECR 5365.

<sup>125</sup> *Humbel*, paras. 16-17.

<sup>126</sup> In *Humbel*, par. 20, it concluded that "courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services for the purposes of Article 49 of the EEC Treaty, properly construed."

educational fields and funds it, as a general rule, from the public purse.<sup>127</sup> However, it ensues from a series of recent cases concerning cross-border health care that this distinction between publicly and privately remunerated services appears difficult to handle.<sup>128</sup> In *Geraets-Smits and Peerbooms*, the Court unequivocally stated that it is settled case-law that medical activities fall within the scope of Article 50 EC, and that the fact that "hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services."<sup>129</sup> As *Craig & de Búrca* indicate, Articles 49-50 EC apply in principle to any service which is provided for remuneration, and it remains to be seen to what extent systems of mixed public and private financing of welfare and social services will fall within the scope of the Treaty rules.<sup>130</sup>

Furthermore, it must be observed that, in principle, a certain economic activity must be legal, although it is not required that all Member States regard it as such in order for it to be qualified as a service in the terms of Article 49 EC.<sup>131</sup> The Court came to this conclusion in cases such as *Grogan*<sup>132</sup> on the prohibition of abortion in Ireland or *Schindler*<sup>133</sup> on the sale of lottery tickets in the United Kingdom. On both occasions, the Court stipulated that it was not its task "to substitute its assessment for that of the legislature in those Member States where the activities are practised legally."<sup>134</sup> However, it also ruled that the fact that these activities are to be regarded as services does not preclude Member States in which the activity in question is considered illegal

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<sup>127</sup> *Humbel*, par. 18. In par. 19, the Court added that the "nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system." In the similar case of *Wirth*, the Court stipulated that those considerations "are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds. Subsequently, however, it observed that "whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit." Therefore, it ruled that when "courses are given in such establishments, they become services within the meaning of Article 50 of the Treaty. Their aim is to offer a service for remuneration." (Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447, paras. 16-17)

<sup>128</sup> See Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-368/98 *Vanbraekel v ANMC* [2001] ECR I-5363.

<sup>129</sup> Case C-157/99 *Geraets-Smits v Stichting Ziekenfonds, Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473, paras. 47-59.

<sup>130</sup> *Craig & de Búrca, o.c.*, at 806-810.

<sup>131</sup> See, inter alia, Case C-268/99 *Jany v Staatssecretarissen voor Justitie* [2001] ECR I-8615: the Court ruled that "the activity of prostitution pursued in a self-employed capacity can be regarded as a service provided for remuneration." To arguments based on the immoral nature of the services the Court responded declaring that "far from being prohibited in all Member States, prostitution is tolerated, even regulated by most of those States." (par. 57)

<sup>132</sup> Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

<sup>133</sup> Case C-275/92 *Customs and Excise v Schindler* [1994] ECR I-1039.

<sup>134</sup> *Grogan*, par. 20; *Schindler*, par. 32.

from regulating or restricting the provision of these services on its territory by providers established in another Member State,<sup>135</sup> as long as they respect the principle of proportionality and do not discriminate arbitrarily on grounds of nationality or place of establishment.<sup>136</sup>

## II. DO SPORTSMEN CARRY OUT AN ECONOMIC ACTIVITY?

This second section shall be dedicated to the question whether sportsmen can be considered to be carrying out an economic activity within the meaning of the Community Treaty when competing in a particular form of sport. In a first instance, a brief *ex cursus* will be effectuated, to figure out how English national courts have dealt with the same issue under national law, before subsequently coming to the truth of the matter and explore how this question has been and/or should have been answered under Community law. Admittedly, at first sight it may appear somewhat odd in the context of this chapter to have a look at how national courts have addressed the problem at stake from the angle of national legislation, but arguably, this approach is legitimate and can be justified. Hence, both *Walker v Crystal Palace* as *Donà v Mantero* and *Bosman*, two of the first three sports case before the European Court of Justice, turned around football. The question whether football players are to be considered as carrying out an economic activity arose in every one of these three cases. Unsurprisingly, counsel for the parties involved in the different proceedings advanced more or less the same arguments in favour of or against this contention. From the point of view of the principles involved, therefore, it is interesting to see which conclusion was reached at by the English Court of Appeal, even though it must be readily acknowledged that its practical usefulness is limited, given the different legal context in which the cases are situated. In addition, there is also the emotive reason that this is an English football case, decided by English judges, and England will always be regarded as the country in which football as it is played nowadays found its origins.<sup>137</sup>

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<sup>135</sup> See e.g. *Case Société Générale Alsacienne de Banque SA v Koestler* [1978] ECR 1971.

<sup>136</sup> See *Van Gerven AG in Grogan*; similarly also *Craig & de Búrca, op.cit.*, at 770-772.

<sup>137</sup> In 1996, when UEFA's European Championship was held in England, British newspapers headlined "Football's coming home".

## 1. English Court of Appeal: *Walker v Crystal Palace* <sup>138</sup>

*Walker v Crystal Palace*, concerning a sportsman's request for compensation due to incapacity for work, is to be situated already in the beginning of the twentieth century. In this particular case, the English Court of Appeal had to rule upon the issue whether a professional football player was to be considered as a 'workman' under the Workmen's Compensation Act.<sup>139</sup> The clubs counsel advocated that a football player could not be qualified as a 'workman' within the terms of the Act for two main reasons: firstly, the club arguably only exerts limited control over the player, as the way in which he performs on the pitch during the games depends on his own initiatives, skills and instincts. And secondly, "the game of football which the applicant was hired to exhibit is a sport or pastime, not work." These arguments were readily quashed by the Court. Cozens-Hardy Master of the Rolls, who delivered the first opinion, concluded in the following way: "I feel myself quite unable to entertain any doubt that this man has entered into a contract of service with the club. I think it was a contract by way of manual labour, but whether it was so or not, I think it is a contract which plainly comes within those words 'or otherwise'."<sup>140</sup> Equally, Fletcher Moulton Lord Justice couldn't find any reasonable room for doubt that a professional football player came within the scope of the Act: "Here is a company that carries on the game of football as a trade, getting up and taking part in football matches. In order to share in the proceeds of those matches they must, of course, have a team, which they can send to represent them in the games. This they obtain by entering into contracts of service with definite persons who are called professional football players, and who, in the language of the Master of the Rolls, give up their time for the purpose. Now I ask myself why is such a contract, which is in its form a contract of service, not to be regarded by us as such? I can see no reason."<sup>141</sup> Finally, Farwell Lord Justice rejected the arguments of the club in the following terms: "They first of all say there is no contract of service with an employer because the football player is at liberty to

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<sup>138</sup> *Walker v The Crystal Palace Football Club Limited* [1910] 1 K.B. 87.

<sup>139</sup> Section 13 of the Workmen's Compensation Act 1906 provides: "The definition of a workman does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into, or works under, a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

<sup>140</sup> *Walker*, at 92.

<sup>141</sup> *Walker*, at 92-93.

exercise his own initiative in playing the game. That appears to me to be no answer. There is many employment in which the workman exercises initiative, but he may or may not be bound to obey the directions of his employer when given to him. If he has no duty to obey them, it may very well be that there is no service, but here not only is the agreement by the player that he will serve, but he also agrees to obey the training and general instructions of the club. I cannot doubt that he is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game – that is to say, any direction that is within the terms of his employment as a football player.”<sup>142</sup> Moreover, he stated that “it is impossible for the Court to consider the practical utility of the service or work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is, therefore, necessarily excluded from the definition of workman within the meaning of the Act.”<sup>143</sup>

Consequently, the judges unanimously decided that the footballer in question came under the terms of the Act. In the opinion of the Court of Appeal, it seemed therefore self-evident that the sporting activity of an athlete can be considered as an economic activity. Furthermore, the judges also seemed to agree that a football player performed his game under the direction and the supervision of his employer. Several decades later, the European Court of Justice would reach the same conclusions within the context of the Community Treaty, as will be demonstrated next.

## **2. Economic versus non-economic activities in the Community Treaty**

As it results clearly from the analysis of the Court’s case law effectuated above, any given sporting activity must comply with two essential preconditions for it to be considered as an economic activity within the meaning of Article 2 EC: firstly, it must be a genuine and effective, and not a merely marginal or ancillary activity, and secondly, it must be of a truly economic character, implying that it is carried out in return for remuneration. The other main elements outlined in the previous section, namely the test of subordination and the temporary character of

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<sup>142</sup> *Walker*, at 93.

<sup>143</sup> *Walker*, at 93-94.

the activities, will colour the debate in the next section as to whether these perceived economic activities are performed by workers or rather by self-employed covered under the provisions of establishment or services.

First of all, it must be assessed whether sport can be considered as a genuine and effective activity. In the light of the generous reading of the Court of Justice of this concept, interpreting, for example, teaching as a trainee for approximately 11 hours per week during two years<sup>144</sup> or giving 12 hours of music lessons per week during a period of eight months<sup>145</sup> as genuine and effective work, it seems that it can hardly be disputed that sport, certainly when performed at a certain level, constitutes a genuine and effective activity. The great majority of people active in one or the other sports discipline, regardless of whether they play in the favelas of Rio de Janeiro, on the streets of Berlin, in Yankee Stadium or on the holy grass of Wimbledon, view sport as fun, a leisure activity, a pastime. Some however, invest time, effort and money in sport with the objective of somehow making a living out of it. Most sports do require special technical skills and particular physical and mental capacities to obtain performances of a certain level. It almost inevitably and invariably takes years and years of practice, training and effective competition to master completely the whole gamut of basic techniques of a certain sports discipline and to gain the necessary insight and experience in the game to be able to play successfully. Furthermore, it speaks for itself that once athletes have reached a certain level of competitiveness, they have to keep on working, often even harder, to continue improving, to keep up with the rest. As one often says "it's hard to get there, it's even harder to stay there". A recent survey carried out in Finland demonstrated, for example, that athletes competing at the highest national level in the five most popular sports dedicated between 24 and 32 hours per week to their sports, without even taking into account time for the indispensable periods of rest after training or mental preparation for the games.<sup>146</sup> It seems thus obvious that sport can be a genuine and effective, very time-consuming activity, both physically as psychologically.

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<sup>144</sup> See *Lawrie-Blum*.

<sup>145</sup> See *Kempf*.

<sup>146</sup> See Huttunen, *A comparative analysis of the legal position of professional sportsmen under Finnish, English and European Community Law. The borderlines of employment* (Ph.D. thesis EUI, 1999) at 169-177: for the 1992/93 season football players devoted on average 24 per week to warming up, training, matches and travelling to the

Secondly, and principally, the exercise of sport must also be of an economic nature, that is to say it must be pursued for remuneration for it to come under the scope of application of the Community Treaty. It is all very well that sport is practised by the athlete as a genuine and effective activity in terms of time and effort, but if there is no financial counterpart whatsoever for the performances of the player, then his sporting activity does not have a real economic character. In the early days, this particular requirement seemed to function as a real stumbling block to the inclusion of sport under Community law, as amateurism was considered to be of paramount importance in sport. Under the motto of the Olympic movement "participating is more important than winning", professionalism was taboo. Until recently, the greatest sporting event in the world, the Olympic Games, were only open to amateur athletes.<sup>147</sup> The same exclusionary phenomenon could also be detected in other sports.<sup>148</sup> However, it is clear that in practice, it was often merely lip service which was paid to amateurism. Already in ancient Greece, Olympic medal winner received financial rewards securing them a comfortable life in society. And nobody can be expected to believe that athletes like sprinter Carl Lewis or pole-vaulter Sergey Bubka who earned eternal sporting glory in the Olympic arena were real amateurs. It didn't therefore come as a surprise that the sporting associations finally yielded to the pressure exerted by the industrial sector and officially opened the doors to their competitions for professional sportsmen. In a way, in doing so, the associations were simply keeping up with time and adjusting to the changed reality. It was the arrival of – in a second phase especially private - television that heralded the entry of big business and forced the definitive break-through of professionalism within the world of sport.<sup>149</sup> Sponsors had found an ideal forum to advertise their products and invested loads of money in sport.<sup>150</sup> Athletes suddenly got the opportunity to turn their hobby or

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matches; basketball players 25 hours per week; Finnish baseball players 28 hours, volleyball players 31 hours and ice hockey players 32 hours.

<sup>147</sup> In this way, Germany's ice skating queen Katarina Witt was prevented from aiming for another gold medal after taking part in Disney's professional World on Ice tour. Conversely, several talented Cuban boxers, headed by Felix Savon, renounced the almost certain championship belts and the big money to be earned in professional fights in the United States and remained loyal to Castro, in order to gain some precious sporting success for the communist regime as amateurs at the Olympic Games.

<sup>148</sup> In tennis, for example, Australian tennis legend Rod Laver was excluded from participating in the Grand Slam events between 1962 and 1969 for also participating in the professional tennis circuit.

<sup>149</sup> European Commission Working Paper on sport, consult <http://europe.eu.int/comm/sport>

<sup>150</sup> To illustrate with an example, in 2001, the French Open at Roland Garros in Paris, one of the four Grand Slams events in tennis, was financed by the following sponsors: BNP Paribas (presenting sponsor), IBM (official partners), Adecco (suppliers), JCDecaux (suppliers), Adidas, Lacoste, Balles Roland Garros, Champagne Lanson, AVIS, Café de Colombia, Comfort Bultex, Nestlé, Groupe ONET, Perrier, Descamps, PMU, Canon, Ericsson, elis, Stella Artois, Peugeot, Fujifilm, Häagen-Dazs, Tecnifibre, Philips, Rado Switzerland, France Télévision, RTL, Intersport, Orange.

their passion into their profession and make their living out of it. They received a salary from the club they play for, or obtained participation fees or prize money from tournament organisers,<sup>151</sup> or concluded sponsorship contracts. A recent analysis has highlighted that a football player in the Belgian first division, one of the smaller European leagues, nowadays earns on average 3.750 Euro per month, and in addition gets to use an apartment and a car from his club.<sup>152</sup> Furthermore, these figures are very small compared to the astronomic amounts of money that players in the Italian, Spanish, English, French or German leagues often make. Consequently, viewed at against the background of the wide approach adopted by the Court to the concept of remuneration, recognising not only the economic value of work carried out for less than the minimum guaranteed income, but being also permissive towards payments of income by persons other than the beneficiaries of the work or even towards economic counterparts which constitute only an indirect quid pro quo for the services delivered and can therefore not be considered as remuneration in the traditional sense of the term, it is clear that certain sport performances are of an economic nature within the meaning of Article 2 EC.

Effectively, the Court of Justice had little trouble in holding in *Donà* that the activities of professional or semi-professional football players are “in the nature of gainful employment or remunerated service” within the meaning of the Community provisions.<sup>153</sup> This conclusion appears logical and straightforward, almost trivial nowadays. Far more intriguing is the question where the borderlines of this approach within the field of sport can be detected. It may very well be obvious that a high-level football player performs an economic activity within the meaning of Article 2 EC, but it is an entirely different matter whether the same can be said about a footballer playing for a club in a lower division. Equally worthy of further investigation is the situation of athletes active in other disciplines, less mediatised than football and often generating much smaller amounts of money. The main issue becomes then: when does sport in general cease or start being an economic activity for the purposes of the Treaty? Is it possible to distil some

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Sanex, Top Tennis, Groupe Algeco, GlobeCast. In 2000, the event was broadcast in 166 countries. (source of information: <http://www.rolandgarros.com> )

<sup>151</sup> In 2001, at Roland Garros, the total amount of prize money to be divided by the participating players amounted to 73,317,150 FF.

<sup>152</sup> Demets & Killemaes, “Luis Figo naar Westerlo?”, *Trends*, 10 August 2000. All included, this is more or less 4-5 times as much as the minimum level of subsistence in Belgium.

<sup>153</sup> *Donà*, par. 12.

general guidelines or principles from the scarce pronouncements from the Court of Justice on the matter?

In theory, a kind of presumption could be established in favour of high-level football players, implying that they are to be regarded as performing an economic activity until proof of the contrary and therefore entailing a shift in the burden of proof in proceedings before the courts. Furthermore, one could envisage transposing this approach to the situation of athletes competing in other high profile sports. However, it is submitted that it is appropriate to adopt a cautious approach in this respect and avoid jumping to conclusions too hastily. First of all, one should evaluate properly the practical relevance of such a decision. Establishing a presumption necessarily implies that sometime somewhere a dividing line will have to be drawn. And this may prove to be more difficult than maybe expected at first sight, for in Italy or Spain, generally considered to have the strongest European leagues, a footballer playing in the third division may still be considered as carrying out an economic activity, whereas in Luxembourg, even a second division player may not satisfy the conditions to be regarded as such any longer. In this not improbable scenario, any workable presumption will inevitably be reduced to a sort of lowest common denominator, devoid of much practical substance. Secondly, one should also be aware of the impact of regional differences and preferences within the European Union on the potential correctness of such a presumption. Football is a special case. When it is sometimes referred to as 'King Football', there is a reason for it. Football enjoys universal popularity. And moreover, in most countries it is the top sport, in which so much money circulates that everywhere within the European Union the game played at high level can be considered without too much difficulty or hesitation as an economic activity.<sup>154</sup> This makes it a difficult case for comparison however. Any other sport which is considered to be a high profile sport in one Member State, does not necessarily enjoy the same fame or status in another Member State. Some examples serve to illustrate this point: rugby may be immensely popular within the United Kingdom, Ireland, France and to a certain extent also in Italy,<sup>155</sup> and many players can undoubtedly be considered as professional athletes carrying out an economic activity for the purposes of the application of the

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<sup>154</sup> In 2000, the world's three richest football clubs, Manchester United, Real Madrid and Bayern München had an annual turnover of respectively 184,8 million Euro, 163,8 million Euro and 144,7 million Euro. The top-10 is further completed by AC Milan, Juventus, Lazio Roma, Chelsea, FC Barcelona, Internazionale and AS Roma. (Source: Deloitte and Touche Sport at <http://www.sportbusiness.com>.)

Community provisions, but elsewhere in the European Union, rugby is only a sport of secondary importance, exercised almost exclusively on an amateur basis. The same holds true for ice hockey in Scandinavia, or cyclo-cross in the low countries. One should therefore be careful not to generalise too readily.

In principle therefore, in view of the fact that it is difficult to elaborate any workable presumption, it seems reasonable to presuppose that the particular situation of each sportsman will have to be evaluated on a case by case basis, on the basis of the objective circumstances of each particular situation.<sup>156</sup> In this respect, it is important to bear in mind that the starting point of the analysis is always the same: the essential difference between amateur sport, which remains outside the Treaty scope, and professional sport or sport as an economic activity within the meaning of the Community Treaty lies in the fact that, contrary to amateur sportsmen, who play the sporting game predominantly as a pure hobby, professional athletes practice sport in order to earn their living, or at least part of it, by doing so. This is not to say that amateurs receive no financial compensation whatsoever for taking part in one or the other sporting activity. On the contrary, often they receive a kind of remuneration which in fact more or less takes the form of a reimbursement for the expenses incurred. In addition, they may also be rewarded by financial bonuses in case of sportive success. Substantially, in the light of the case law of the Court of Justice on the matter, that does not change as such their status of amateurs for the purposes of the application of Community law. However, what really seems to distinguish professional sportsmen from amateurs and permits them to be considered as workers or self-employed competing on an independent basis within the meaning of the Treaty provisions on free movement is the fact that in return for exercising their specific skills and capacities within a given sports discipline, they earn a regular income, exceeding the expenses made. The precise amount of this income does not really appear to be a matter of primary importance, in the light of the broad interpretation given by the Court to the concept of remuneration. In any event, in case of doubt or discussion, the issue will have to be decided by the national courts. For athletes which are to be regarded as workers, on the one hand, this remuneration will probably take the form of a traditional salary, to be paid in accordance with the terms of the contract of employment by the

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<sup>155</sup> England, Scotland, Wales, Ireland. France and Italy compete yearly in the famous "Six Nations Tournament".

<sup>156</sup> See also Huttunen, *o.c.*, at 259-264.

club or organisation with which they are affiliated. The specific details of the individual contract seem to be of no particular importance: whether a sportsman receives a fixed salary regardless of sporting results, or rather a basic salary to be supplemented by bonuses or premiums in the event of sporting success makes no real difference. Professional athletes practising sport on an independent, self-employed basis, on the other hand, are more likely to be qualified as service providers within the meaning of the free movement provisions. In general, they derive their remuneration from various sources. First of all, there is the prize money they gain in sporting competitions, the amount of which is normally dependent on the stage of the competition they reach before getting eliminated or on the place they obtain in the final rankings.<sup>157</sup> In this respect, it could be argued that since there sometimes is an inherent chance of not winning any prize money, this eventuality might imperil the qualification of a sportsman as a service provider. However, it is submitted that this supposition can be countered on the basis of the following argument: in principle, athletes taking part in this kind of competitions have the intrinsic qualities and the intention to perform on a certain level which guarantees them to win prize money more or less on a regular basis. As long as this is the case, there is no reason to question the economic character of their sporting activities. Ultimately, this always remains a factual evaluation of course. Secondly, they often also receive money for simply taking part in a particular contest or competition, as the prestige, attractiveness for the audience and success of a sporting event is often measured on the basis of the presence of sport stars. Organisers are therefore mostly more than prepared to pay to engage players like Stephen Hendry or Jimmy White to participate in their snooker tournaments. Furthermore, many sportsmen also obtain an income consisting of sponsorship revenue or grants or subsidies awarded by their representative federations. Arguably, these financial means can also be taken into consideration when assessing the economic nature of the sporting activities of the athlete in question.

*Test-case: the situation of judoka Christelle Delière*

An excellent illustration of the casuistic approach of the Community institutions with regard to this matter is the opinion of Advocate General Cosmas in the case of *Delière*. He

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<sup>157</sup> The winner of the Australian Open 2002 in Melbourne, another of the four Grand Slam events in tennis, receives 1,000 000 Australian dollars. The losers of the first-round matches still get 14,980 Australian dollars. (source: <http://www.australianopen.org>)

entered into an in-depth examination of the issue whether the activities of the judoka in question could be regarded as being of an economic nature.

Firstly, the Advocate General analysed whether the support offered by the judo federations to Deliège constituted in fact the financial counterpart of the services she claimed to provide, regardless of the specific denomination of these sums of money or the absence of a contractual relationship between the athlete and the federation.<sup>158</sup> He submitted that a sportsman is to be viewed as a service provider within the meaning of Article 49 EC if he carries out his sporting activities in a professional way. This is to be assessed in the first place on the basis of objective criteria imposed by the responsible institutions, often in a general and abstract way, which must be fulfilled by the athlete in question for financial help to be granted: as there are, for example, daily training sessions, other obligations requiring the athlete to dedicate him/herself exclusively to sport, significant investments of time and efforts, concrete high-level performances, titles, etc. In addition, it is also required that this activity has a certain continuity or duration, and that the actual amount of support can somehow be considered as a form of salary and thus exceeds the level of help for purely sporting reasons. Furthermore, in the opinion of the Advocate General, attention should equally be paid to more subjective criteria, such as for example the underlying motivation of the federation when subsidising certain athletes. Allegedly, the sole objective of this mechanism of attributing grants to athletes would be to make it possible for them to improve their sportive performances. The federations maintain that, in view of this purely social and cultural aim, Article 50 EC should be declared non-applicable in this respect.<sup>159</sup> The Advocate General raises some doubts about the validity of this statement. He argues that aids granted on a regular basis by the federations to their champions often exceed the level of ameliorating or perfecting the performances. He opines that a high-level athlete renders an important service to his representative sports organisations, since his sports successes make him a hero or an idol for the youngsters one wants to convert to the sport in question,<sup>160</sup> and an attraction pole for sponsors. Sporting success is also a convincing argument to claim a bigger

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<sup>158</sup> Cosmas AG in *Deliège*, paras. 36-47.

<sup>159</sup> This proposition is based on an analogous interpretation of the Court's decisions in a number of cases concerning public education; see Case 263/86 *Belgium v Humbel* [1988] ECR 5365 and Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

share of the total amount of subsidies for sport from the State budget. Certain sports performances have a clear financial value nowadays. Therefore, in the light of these objective and subjective elements, the Advocate General concluded that under certain circumstances, sporting activities can be considered as services normally provided in return for which the sportsman regularly receives financial and/or material support from his federation

Secondly, Advocate General Cosmas embarked on a more general study of the relationship between sport and economic life.<sup>161</sup> Firstly, he affirmed the fundamental rule that the closer the link is between sport and economic activity, the more sporting activities are subject to the Treaty provisions on freedom of movement. Within this framework, he firstly examined the potential importance for the application of Community free movement law of the existence of individual sponsoring contracts concluded between sportsmen and private financiers.<sup>162</sup> In his opinion, it would be mistaken to completely disconnect the advertising services the athlete renders to his sponsors from his sporting performances. Most of the time, both activities are closely linked and are simply two expressions of the same activity. Admittedly, it must be observed that sports results are not the only relevant element which is taken into consideration when undertakings decide to sponsor sportsmen. Other factors also have a role to play, such as the physical appearances, certain qualities or capacities or particular characteristics of the athlete. It can therefore not be excluded that for commercial purposes, sponsors prefer another athlete rather than the champion of a certain sports discipline to promote or identify with a certain product.<sup>163</sup> However, it is undeniably true that this kind of publicity through sponsoring does require athletes of a high level, known by the audience at large precisely because of their participation in important sporting events.<sup>164</sup> Advertising assignments go hand in hand with sporting success. Consequently, the Advocate General concluded that the existence of personal sponsors are an important indicator of the fact that a given sports activity might represent an

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<sup>160</sup> Since the two Belgian teenagers Kim Clijsters and Justine Henin stormed into the top-10 of women's tennis in the summer of 2000, after respectively reaching the finals at Roland Garros and Wimbledon, the number of young tennis players in Belgium has increased spectacularly.

<sup>161</sup> Cosmas AG in *Deliège*, paras. 48-60.

<sup>162</sup> Cosmas AG in *Deliège*, paras. 51-53.

<sup>163</sup> A good example can be found in the women's tennis circuit: Russia's Anna 'Lolita' Kournikova is the undisputed queen of commercials, even though she isn't ranked in the top ten and hasn't even won one single WTA (Women's Tennis Association) singles tournament in her career yet. But she has the looks...

<sup>164</sup> Danone have chosen Bob Peeters to figure in their new commercials for yoghurts in Belgium. He is definitely not the best or most famous Belgian football player, but still, he is often selected for the 'Red Devils', the national side.

economic character. He didn't go so far as stipulating that sponsoring constitutes always or necessarily a sufficient condition for a certain sports activity to be considered as economic however, explaining that the financial expectations of the athletes and the commercial interests of the sponsors do not, as such, touch upon the substance of the sport in question. He opined that if all other relevant factors which make up a sporting event (such as, in particular, the sporting rules or the rules concerning the organisation of the competitions) remain outside the economic sphere, sponsors cannot intervene in these non-economic aspects of sport and change the face of the sport according to their wishes. As an abstract rule, this is no doubt correct. However, during the last years, one can unmistakably observe an increasing tendency to modify the specific rules in different sports in order to make them more attractive for television broadcasting.<sup>165</sup> The grip of sponsors on sport is still continuously tightening ... Subsequently, the Advocate General tackled the question whether a sporting event in itself, in view of its specific features, can be considered to be of an economic nature, an issue which he regards as being of capital importance for the precise determination of the economic nature of a sporting activity.<sup>166</sup> After all, only sports contests allow for the evaluation of athletes: individual performances lose much, if not all, of their significance and value if they are not accompanied by success in real events, where athletes compete with and measure themselves against their rivals. If a sporting competition is more than simply a quest to be the best and represents also a proper economic dimension, it may constitute as such an economic activity within the meaning of Article 2 EC. According to Cosmas, this economic dimension may consist of different elements: firstly, the sporting competition may be an event accessible to the public in return for payment ('gate-money'); secondly, it may become a television product generating revenue for the holders of the rights of transmission, and thirdly, it can provide an ideal location or moment for promotion services or advertisement campaigns. In this respect, the Advocate General also rightly observed that common experience has revealed that the natural course of things leads to a progressive reinforcement of the economic character of sporting events. As the importance of a certain sporting competition grows for the world of sport, also the economic interests at stake increase. Paradigm examples are the Tour of France for

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<sup>165</sup> In basketball, the time for a team to make an attempt at the basket has been reduced from 30 to 24 seconds, increasing the number of replays and thus also of potential commercial messages. In volleyball, one has abolished the old rule according to which one could only score a point on one's own serve, to increase the risk factor in the game, to render it more attractive and to reduce the duration of matches. This move was indicated for television annex sponsorship purposes.

<sup>166</sup> Cosmas in *Delière*, paras. 54-56.

cycling, the World Cup for football and above all, the Olympic Games for sport in general. All these events generate enormous amounts of money from spectators, television deals and sponsorship contracts. Equally, their economic dimension can be derived from the impact of the economy on the purely sporting aspects of the competition. For example, as far as the Olympic Games are concerned, in order to attract the largest possible audiences and to increase sponsoring deals, professional athletes have recently been allowed to participate, and new sporting disciplines are regularly being introduced on the Olympic agenda.

On the basis of his findings, Advocate General Cosmas opined that the participation of a high-level athlete such as Christelle Deliège, who has the benefit of some sponsorship contracts, to international tournaments with an economic dimension, can be considered as an economic activity and constitutes a service within the meaning of Article 49 of the Treaty.<sup>167</sup> The Court, on the other hand, only dealt in an extremely concise way with this matter. It noted first that the referring judge referred “among other things to grants awarded on the basis of earlier sporting results and to sponsorship contracts directly linked to the results achieved by the athlete”, before simply specifying that Deliège had produced supporting documents that she had indeed received, “by reason of her sporting achievements, grants from the Belgian French-speaking Community and from the Belgian Inter-Federal and Olympic Committee and that she has been sponsored by a banking institution and a motor-car manufacturer.”<sup>168</sup> This seemed to suffice for the Court to conclude somewhat further in its judgement that “sporting activities and, in particular a high-ranking athlete’s participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 49 of the Treaty, even if some of those services are not paid for by those for whom they are performed.”<sup>169</sup> There is nothing inherently wrong or objectionable about the Court’s principled decision in this respect, of course, but it speaks for itself that the profoundly documented examination of the Advocate General is much richer and has provided more insight and analysis relevant for the purposes of this thesis.<sup>170</sup>

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<sup>167</sup> Cosmas AG in *Deliège*, par. 60.

<sup>168</sup> *Deliège*, par. 51.

<sup>169</sup> *Deliège*, par. 56.

<sup>170</sup> Also, as is often the case, the Court may well have been influenced by the AG’s analysis even while basing its judgement on a much narrower ground. A similar relationship between a ‘rich’ AG’s opinion and a rather

### III. ARE SPORTSMEN WORKERS OR SELF-EMPLOYED?

Having established that the practice of sport can under certain circumstances be considered as an economic activity within the meaning of Article 2 EC, one would logically expect the next step in the general Community approach to be a critical evaluation of the question whether this kind of activity falls under the Treaty provisions on the freedom of movement of workers or rather under the rules concerning the freedom to provide services.<sup>171</sup> However, the Court does not seem to attach too much weight to the precise assessment of the applicable Treaty provisions with regard to this particular issue, or at least did not do so initially.

On the first occasion when the Court was confronted with this matter, in *Walrave*, Advocate General Warner had already expressed his view that "Articles 39 and 49 are, in every material respect, parallel and that, Article 49 being residuary, if the plaintiff's contracts are not of a kind to which Article 39 relates, they must be of a kind to which Article 49 relates. That being so, the question whether they are contracts of service or contracts for services loses, to my mind, much of its importance. At all events, the Arrondissementsrechtbank, quite properly, does not ask this Court to decide it."<sup>172</sup> In essence, the Court followed the opinion of its Advocate General on this point. It stipulated clearly that when the practice of sport has the character of gainful employment or remunerated service, "it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty."<sup>173</sup> It proceeded holding that in this respect, "the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services."<sup>174</sup> Further on in its decision, the Court specified that the "activities referred to in Article 49 are not to be distinguished by their nature from those in Article 39, but only by the fact

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deliberately 'narrow' judgement of the European Court of Justice on the same issue of remuneration and economic activity (in broadcasting) can be seen in the much earlier *Bond van Adverteerders* case.

<sup>171</sup> The rules on freedom of establishment, though theoretically potentially relevant of course, will be left out of consideration for the remainder of this chapter, as in all sports cases which have been decided up until now, the issue has been whether the athletes in question were to be qualified as workers or alternatively, as service providers.

<sup>172</sup> Warner AG in *Walrave*, at 1425.

<sup>173</sup> *Walrave*, par. 5.

<sup>174</sup> *Walrave*, par. 7.

that they are performed outside the ties of a contract of employment.”<sup>175</sup> According to the Court, “this single distinction cannot justify a more restrictive interpretation of the scope of the freedom to be ensured.”<sup>176</sup> The Court thus didn’t deem it necessary to judge which provisions finally prevailed in the light of the factual circumstances of the case. When referring the matter back to the national court to be decided, it contented itself with the statement that “the provisions of Articles 12, 39 and 49 of the Treaty may be taken into account by the national court in judging the validity or the effects of a provision inserted in the rules of a sporting organisation.”<sup>177</sup>

Two years later, in the case of *Donà*, the matter came up for consideration again. Advocate General Trabucchi made a rather interesting contribution to the debate. In his opinion, he drew some comparisons with the previous case, stating that in *Walrave*, “in the relationship between athlete and club, the prevalence of the element of gainful employment over the sporting element was very clear since it involved a type of cycle race in which some of the participants [...] played a secondary and subordinate role. In the case of a football team, the element of athletic subordination, if I may call it that, is not present; the fact remains, however, that the players have a professional or semi-professional status which, in fact, puts them in the position of employees as against the club which runs the team.”<sup>178</sup> Be that as it may, the Court once more refrained from offering any useful guidance to the discussion, and simply ruled that the activities of professional or semi-professional football players are in the nature of gainful employment or remunerated service.<sup>179</sup> Furthermore, it also added that where “such players are nationals of a Member State they benefit in all the other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services.”<sup>180</sup> Consequently, the Court left it open whether the provisions of Article 39 on workers or rather the provisions of Article 49 on services apply to the activities of professional footballers.

In the light of these previous two judgements, it seemed almost self-evident that the Court of Justice would be inclined to proceed along the path chosen and would not distinguish between

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<sup>175</sup> *Walrave*, par. 23.

<sup>176</sup> *Walrave*, par. 24.

<sup>177</sup> *Walrave*, par. 25.

<sup>178</sup> Trabucchi AG in *Donà*, at 1343.

<sup>179</sup> *Donà*, par. 12.

<sup>180</sup> *Donà*, par. 13.

the fundamental freedoms of persons and services if there was no real necessity to do so. From this point of view, it did thus somehow come as a surprise that when the Belgian Court of Appeal decided to stay the proceedings in the *Bosman* case and refer the matter to the European Court of Justice, its request for a preliminary ruling concerning the transfer rules and nationality clauses in professional football involved only their compatibility with Article 39 EC, to the exclusion of Article 49 EC.<sup>181</sup> In any event, the Court did not appear to be troubled by this omission, for it simply concluded that “Article 39 therefore applies to rules laid down by sporting associations such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in gainful employment.”<sup>182</sup> Advocate General Lenz dedicated some interesting paragraphs in his opinion to the matter. Firstly, he observed that “it appears indeed correct that the professional footballers active in a football club are to be regarded as workers within the meaning of that provision”, but immediately added that “the result would be no different if the examination had to be done with reference to Article 49 et seq.”<sup>183</sup> Subsequently, he suggested that “in examining the compatibility of national provisions with the provisions of Community law on the fundamental freedoms, it is not so important which specific fundamental freedom a particular factual situation is to be measured against. What should be decisive is rather whether the provisions in question hinder trans-frontier economic activity and –if that is the case- whether those restrictions are justified.” He acknowledged that “that does not exclude the possibility that distinctions are to be made with respect to justification according to whether the hindrance is of a discriminatory or non-discriminatory nature. The circumstance of a permanent or only a temporary activity in another Member State being concerned may also justify distinctions in that respect, as is already accepted in the case law.”<sup>184</sup> He insisted that “that is by no means a purely academic point. The Court’s case law shows that there is often considerable difficulty in distinguishing between factual situations which come under one and those which come under another of the fundamental freedoms. The present case is a good example. As a rule it is no doubt correct [...] to classify football players as workers within the meaning of Article 39. Under the third paragraph of Article 50, the essential criterion for distinguishing between Article 39 and Article 49 is that the latter only covers activities which are ‘temporarily’ pursued in another

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<sup>181</sup> The national court also asked the Court to express its opinion on the lawfulness of the transfer rules and the nationality clauses with regard to the Community competition rules, of course.

<sup>182</sup> *Bosman*, par. 87.

<sup>183</sup> Lenz AG in *Bosman*, at I-4976, par. 134.

Member State. What does that mean, for example, with respect to a contract by which a club engages a player for a few matches? It is debatable whether in such a case it would not be better to speak of a provision of services. The transfer rules currently in force admittedly ensure for the most part by means of specified time-limits that contracts with players have a term of at least a whole season, or at any rate half a season. However, that is not necessary, as the example of other sports shows. The Court has therefore quite rightly left it open in a number of cases whether Article 39 or 49, for example, was applicable in the present case. It did that in the *Walrave* and *Donà* cases, which are of special interest in the present case. The Court thereby clearly indicated that those two provisions employ comparable criteria and that their application led to the same result in the specific case. That confirms my opinion set out above.”<sup>185</sup>

Clearly, all this perfectly illustrates the almost overwhelming consensus at the time between the Court of Justice and its Advocates-General on the qualification of the sporting activities of an athlete for the purposes of the application of the Community law provisions on the right of freedom of movement: the precise nature of the legal relationship under which the sport in question is exercised simply does not seem to matter really. Once a certain activity is considered being of an economic nature, that suffices to trigger the application of the free movement provisions, be it the rules on the free movement of workers or rather the ones on the freedom to provide services. This particular approach of the Court, however practically useful it may be, cannot be unequivocally supported, for it oversimplifies things and, more importantly, disregards the intrinsic differences which can be distinguished between these two sets of provisions. Even if it must be acknowledged that it is sometimes indeed extremely hard to state with absolute certainty under which fundamental freedom a given factual situation is to be caught, and moreover, that the final outcome of the decision of the Court is often the same, irrespective of whether the Court’s analysis has been based on Article 39 or Article 49 EC, the fact remains that these Articles to a certain extent cover separate realities, as Advocate General Jacobs readily admitted. In the words of the Court itself, “the situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the Treaty on the free movement of workers, or the chapter

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<sup>184</sup> Lenz AG in *Bosman*, at I-5006, par. 200.

<sup>185</sup> Lenz AG in *Bosman*, at I-5006-5007, par. 201.

on the right of establishment or the chapter on services, these being *mutually exclusive*.<sup>186</sup> To emphasise these differences once again, firstly, the provision of services, contrary to the performance of mere working activities, is performed outside the ties of a contract of employment, so that the element of subordination, inherent in a working relationship, is less clear-cut or even completely absent in this respect. And secondly, the Treaty provisions on services envisage that these activities are pursued only on a temporary basis. It is therefore submitted that, inasmuch as possible, regard should be had to these characteristic features to determine which fundamental freedom is better suited to deal with the factual situation at hand. And if this were to turn out practically impossible on the basis of the information available, it should not be forgotten that services constitute a residual category, subordinate to the other fundamental freedoms, in that the first paragraph of Article 50 EC specifies that the provisions relating to services apply only if those relating to the other freedoms do not apply.<sup>187</sup>

Besides, it is submitted that also from a legal point of view, it may be relevant to distinguish carefully between workers and service providers. Arguably, the category of workers have been attributed more substantive rights and entitlements in Community secondary legislation than the category of service providers. To give but an example, Article 7(2) of Regulation 1612/68 which guarantees Community workers the same social and tax advantages in their host Member State as that State's nationals, is not applicable to service providers.<sup>188</sup> Moreover, it is not unthinkable that, in the light of the intrinsic differences between these two fundamental freedoms, certain justifications invoked to safeguard any given restrictive national measure may be accepted by the Court of Justice as overriding requirements in the general interest under one fundamental freedom whereas they may be rejected as unsatisfactory or unnecessary under the other freedom. Furthermore, it is entirely conceivable that the Court will refrain from transposing its findings in *Angonese* to the field of services so that Article 49 EC, contrary to Article 39 EC, will not be considered as fully horizontally effective. In the light of the

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<sup>186</sup> See Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, par. 20.

<sup>187</sup> See e.g. *Gebhard*, par. 22 et seq.; or Case 155/73 *Giuseppe Sacchi* [1973] ECR 409, paras. 6-7, in which the Court decided that the transmission of television signals, including those in the nature of advertisements, comes within the rules of the Treaty relating on services, but conversely, subjected trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals to the rules relating to the freedom of movement for goods.

foregoing, the specific qualification of sportsmen as workers or service providers may therefore turn out to be of crucial importance for their legal situation under Community law. Conversely, if in the future the trend towards convergence were to be radically carried through, a hypothesis which cannot be completely discarded, so that one would not be able to detect practical differences between the freedom of movement of workers and the freedom to provide services any more, under these circumstances it would no longer make sense to try to distinguish between these two sets of provisions. For the time being, however, it arguably still makes sense to differentiate clearly between Articles 39 and 49 EC.<sup>189</sup>

That it is indeed perfectly feasible in many circumstances to distinguish between workers and service providers is further evidenced by the fact that the Court, contrary to its findings in the early sports cases *Walrave* and *Donà*, in which it held both Articles 39 and 49 EC to be indistinctly applicable, based its judgements in the more recent cases of *Bosman*, *Deliège* and *Lehtonen* on the basis of one single Treaty provision relating to one fundamental freedom only, this respectively being Article 39, 49 and again 39 EC. Whether this change does effectively reflect an evolved approach on behalf of the Court or, rather, is to be explained on the simple ground that the national courts or tribunals, when they decided to stay the national proceedings and sent the matter to the Court of Justice for a preliminary ruling, referred only to one fundamental freedom with regard to the case to be decided, so that the Court was more or less forced to limit its pronouncement to that particular Treaty Article, is not completely crystal clear. It may very well be that the last three preliminary references originate all from Belgian courts, whereas the former two have their source in respectively a Dutch and an Italian court, but this fact can probably more easily be attributed to a fortunate concurrence of circumstances rather than constitute a scientific explanation for the occurrence of the change in question. A far more plausible elucidation lies in the observation that the societal and legal landscape has considerably evolved in the years which passed between the Court's decision in *Donà* in the mid seventies and the initial skirmish in *Bosman* in the beginning of the nineties. As a matter of fact, in the seventies, the Court's case law on the fundamental freedoms in general, and on the concepts of 'workers' and 'services' in particular, was relatively speaking, still in its infancy. And within the

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<sup>188</sup> See also Preedy, *Private Regulations and the Fundamental Freedoms of the EC Treaty* (EUI LLM.thesis, 1999) at 18.

<sup>189</sup> See also Huttunen, *o.c.*, at 264-269.

world of sport, professionalism was still very busy settling down. One simply seemed to be too busy coming to grips with this new reality and with all its inevitable repercussions to be really genuinely concerned about the – from this perspective at least - minor question whether sportsmen, if they already had to be considered as carrying out an economic activity within the meaning of the Community Treaty at all, were to be regarded as workers or service providers in the context of the free movement provisions. However, since then, a lot of water has been running to the sea. By the time *Bosman* cleared his throat to utter his legendary complaint against the traditional transfer system in football, the Court of Justice had fleshed out the scope of application of the provisions relating to free movement. Moreover, in several Member States important progress had been made with regard to the assessment of the legal status of sportsmen. On the basis of these almost contemporaneous developments, the task of distinguishing between sports activities carried out under the terms of a contract of employment as a worker within the meaning of Article 39 EC and sports performances delivered as a service provider falling under the scope of Article 49 EC became much more feasible.

In the remainder of this paragraph, I will scrutinise somewhat more in detail the specific activities of certain athletes, in order to assess whether they are to be qualified as workers or rather as services providers for the purposes of Community law. From these particular findings, I will then try to derive some more general observations about other sportsmen active in different sports disciplines.

The most hotly debated case undoubtedly is that of professional or semi-professional football players. Whereas the Court of Justice in *Donà* still declined to pronounce itself on the question whether footballers were to be regarded as workers or alternatively as service providers, almost twenty years later in *Bosman* it did not show any hesitation whatsoever in stipulating that football players are workers within the meaning of Article 39 EC. Essentially, the Court simply affirmed this, without providing any further guidance. It limited itself to holding that all that is required for the application of the Community provisions on freedom of movement for workers “is the existence of, or the intention to create, an employment relationship”<sup>190</sup> and furthermore that Article 39 applies to “rules laid down by sporting associations such as URBSFA, FIFA or

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<sup>190</sup> *Bosman*, par. 74.

UEFA, which determine the terms on which professional sportsmen can engage in gainful employment.”<sup>191</sup> In this respect, it is interesting to observe that the defendants in the proceedings objected to virtually everything they were charged with, but they did not adduce any specific information or evidence to rebut the qualification by the Belgian court of football players as workers. Inevitably, this silence on behalf of the football authorities contributes to the impression that this particular qualification is to be taken for granted, as a matter of fact.

Time has therefore come now to try to falsify the hypothesis and put the Court’s statement to the test: do football players effectively comply with the necessary preconditions to be considered as a worker in the meaning of Article 39? Firstly, it goes without saying that professional or semi-professional football is a genuine and effective economic activity and that these players are – or at least are supposed to be – familiar with all the different aspects of the game, both technically and tactically. Secondly, it is also beyond doubt that professional football players are – often even richly – financially rewarded for representing their club of affiliation. Admittedly, all this still seems like forcing an open door. Thirdly, however, finally arriving at the decisive criterion to discern workers from service providers, it still remains to be seen whether footballers pass the test of subordination as laid down in *Lawrie-Blum* and supplemented in *Aegate*. Strictly speaking, footballers clearly do not choose the services they perform: the club pays them principally to play football, not to act in a movie for example. Admittedly, there may be some free choice with regard to concomitant activities such as interviews and other representative tasks, but in general, this freedom is only limited and furthermore concerns only activities of secondary importance. Basically, everything turns around the ball. Moreover, football players normally do not have the freedom to choose their working hours either. Evidently, they have to be present at the regular fixtures of their club, regardless of whether these matches are played during the day or in the evening, at weekdays or during the weekend, in the own stadium or ‘away’, in the home country or abroad. Before important games, teams sometimes go in ‘retirement’, in order to prepare the players in optimal conditions for the game; therefore, they have to accompany the team in these retirements. Players also have to be regularly at the training centre of the club to participate in the group training sessions as scheduled by the coaching staff. Besides, many clubs simply impose the requirement that their players also be

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<sup>191</sup> *Bosman*, par. 87.

present at the club during certain hours, in order to promote the team spirit and to keep an eye on discipline (with regard to food, alcohol, lifestyle in general, etc.). Only in the event of individual training sessions, for example during the phase of rehabilitation after injury, players may have some freedom to choose their working hours, but even then, they are normally supposed to follow precisely the instructions of the special programme elaborated by the coaches in co-operation with the medical staff of the club. Furthermore, the players have the obligation to obey the orders and carry out the tasks assigned to them on the pitch by the coaches, both during training sessions and matches. Also more in general, footballers must observe the rules established by the club they play for. These may concern a variety of issues, ranging from internal regulations or dress codes over obligations not to ventilate critical remarks on the colleagues, coach and management of the club to rules imposing bedtime hours or limiting alcohol consumption within a certain period of time before a match.

All criteria laid down by the Court of Justice in *Lawrie-Blum* in order to determine the existence of a relationship of subordination are clearly fulfilled in the case of football players and the club they represent. In sum, nothing seems to contradict the supposition that footballers are to be considered as workers within the meaning of Article 39 EC. Additionally, this conclusion is further reinforced by the fact that the situation of footballers also seems to satisfactorily comply with the supplementary factors furnished by the Court in *Agegate* to complete the test of subordination. Firstly, usually football players do not share the commercial risks of the business. They normally do not own shares of the club if it is quoted on the stock exchange. Creditors of the club can not recover their losses from the players if the club fails to live up to its financial obligations.<sup>192</sup> Secondly, players do not have the freedom to engage their own assistants. It is self-evident that football players are in no position to engage personal assistants who would carry out their sporting activities for them. The practice of sport requires the individual effort and performance of the athlete in question. Germany's Oliver Kahn is paid by Bayern Munich to be their goalkeeper; he cannot rely on someone else, his brother for example, to do so, he has to stand between the posts himself. In principle, there does not seem to be any reason to prevent

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<sup>192</sup> <http://www.kwsport.kataweb.it> of 14 November 2001: The situation of Italian team Fiorentina, which went bankrupt due to accumulated debts serves to illustrate this point. In no way whatsoever were the players involved in the investigation procedure of the Florence justice department. To the contrary, they even acted as creditors, claiming arrears of income.

players from calling for the services of personal doctors or physiotherapists or other assistants, apart from the personnel they can already consult at the club, as long as they get the club's consent to do so. But in any event, what matters really is the sports performance in se, and this unmistakably has to be delivered by the athlete himself. Thirdly, also the final criterion recognised by the Court to determine someone's status for the purposes of the application of free movement law, namely the particular way in which remuneration for services rendered is calculated, does not stand in the way of a qualification of footballers as workers within the meaning of Article 39 EC. Hence, in the case of *Agegate*, the Court already minimised somewhat the importance to be attached to this criterion, expressing the opinion that "the sole fact that a person is paid a 'share' and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status of worker."<sup>193</sup> And besides, in general it seems that football players do not receive pay calculated on a collective basis. In principle, the specific salary structure, the way it is calculated and its final height may vary considerably from player to player and is negotiated in the terms of the individual contract between the player and the club. It must be acknowledged that bonuses received in the event of successful performances could be construed as pay calculated on a collective basis, but even if this were true, it only constitutes part of the salary of the players, the rest of which remains, under normal circumstances, on an individual basis.

Consequently, at this point, it can safely be affirmed that the Court of Justice reached the correct conclusion in *Bosman* and that professional or semi-professional football players indeed fit squarely within the scope of application of the Treaty provisions on free movement of workers as laid down in Article 39 EC et seq. Even the observation of AG Jacobs that it is debatable whether it would not be better to speak of provision of services with respect to a contract by which a club engages a player only for a few matches, how pertinent it may be or seem, does not detract from this conclusion. Hence, even if the engagement by the club of these football players is only very temporary, that does not change anything about the fact that during that limited period of time, they are supposed to carry out their sporting activities under the direction and the supervision of the club that has hired them.<sup>194</sup> Under these circumstances, they clearly fulfil the

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<sup>193</sup> *Agegate*, par. 36.

<sup>194</sup> See in this context Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1070.

necessary conditions to be considered as workers within the meaning of Article 39 and there is no reason to qualify them as service providers simply because of the limited duration of their contract. This also serves to illustrate the hierarchically superior position of the category of workers with regard to the category of services within the framework of the EC Treaty: as soon as the requirements for the application of Article 39 are satisfied, Article 49 as the residual provision no longer has to be taken into consideration.

Arguably, the same conclusion can also be reached with regard to athletes active in many other sports such as volleyball, basketball, handball, rugby, ice-hockey, etc. What has been said previously about football players also holds true, *mutatis mutandis*, for sportsmen performing these kinds of sports. When signing a contract of affiliation with a certain team, these players agree to render services to the club for a certain period of time, in return for which they receive remuneration. It belongs to the essence of team sports that the team delivers a collective performance, composed of the combined individual efforts of all of its players. It goes without saying that a team can only function properly and that the team's performances can only be improved or optimised when the constituent members know exactly what is expected of each of them individually and do indeed carry out the coaching staff's instructions on the pitch. It can therefore hardly be disputed that these sportsmen carry out their sporting activities under the direction and the supervision of the club's management. Consequently, it is advocated that the conclusion reached by the Court of Justice in *Bosman* to the extent that the activities of professional or semi-professional football players are covered under Article 39 EC, can be transposed without too much difficulty to athletes active in other team sports, who are thus equally to be considered as workers within the meaning of Article 39 EC. In this respect, it must be emphasised that the Court of Justice seems to share the same opinion. In the case of *Lehtonen*, involving a Finnish professional basketball player, the Court readily came to the conclusion that he had to be considered as a worker. After briefly outlining its established case law on the concept of 'workers' within the meaning of the Community Treaty,<sup>195</sup> it simply held that "it appears from the findings of fact made by the national court and from the documents produced to the Court that Lehtonen had entered into a contract of employment with a club in another Member State with a view to exercising gainful employment in that State. As he has rightly

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<sup>195</sup> *Lehtonen*, paras. 39-45.

submitted, he thereby accepted an offer of employment actually made, within the meaning of Article 39(3)(a) of the Treaty.”<sup>196</sup> Previously, in his opinion in the case, Advocate General Alber even more readily reached the same conclusion.<sup>197</sup>

In the light of the foregoing, the qualification of athletes competing in team sports for the purposes of the application of the Community provisions on freedom of movement seems to be sufficiently crystallised now, at least for the time being. That, however, is not the end of the story yet. Many sports disciplines are exercised predominantly or exclusively on an individual basis. Suffice to think of tennis, skiing, most of the track and field athletics disciplines, swimming, etc, to name but some of the more obvious. In general, competitions in these sports take the form of direct encounters between two sportsmen, whereby the winner advances to the next stage of the event,<sup>198</sup> or of confrontations between several athletes contemporaneously.<sup>199</sup> Contrary to what is the case in team sports, in which the score or result obtained by the team is the result of the combined efforts of the team members, in individual sports the result is entirely dependent upon the single performance of the sportsmen in comparison to that of the other athletes competing in the same event. The question arises now whether these sportsmen performing an individual sport have to be qualified differently from the angle of the Community free movement rules than athletes active in team sports or whether they can equally be considered as workers within the meaning of Article 39 EC? Once more, one proceeds from the assumption that the basic constituent preconditions for the application of the fundamental freedoms are fulfilled, that is to say that the specific sporting activities of these athletes are of an economic nature and that they

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<sup>196</sup> *Lehtonen*, par. 46.

<sup>197</sup> Alber AG in Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball* [2000] ECR I-2681, paras. 41-43: Firstly, he opined in more general terms that what was the case for professional football players, also had to be true for professional basketball players, as they find themselves in the same situation. Subsequently, he proceeded holding that as “it is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is the existence of, or the intention to create, an employment relationship”, Article 39 EC is applicable to the circumstances of this case. Finally, he did acknowledge that – as the Italian government had observed in its intervention – the request for a preliminary ruling contained almost no concrete factual information which might be helpful in deciding whether Lehtonen was to be qualified as a worker. However, he didn’t consider this to be problematic, as he argued that it emerged incontestably both from the reference from the national tribunal as from the subsequent developments in the procedure between the parties that Lehtonen must be regarded as a worker.

<sup>198</sup> Tennis is a good example of this sort of competition. In order to win one of the four Grand Slam events, a tennis player needs to win seven consecutive matches.

<sup>199</sup> For example, in general, eight sprinters participate in the final of the 100 meter athletics at international tournaments.

are remunerated. The decisive criterion distinguishing between sportsmen competing on an employment basis and athletes performing their sporting discipline as self-employed, as outlined above, is the element of subordination. In general, this seems to be absent in this particular kind of factual situation. Sportsmen competing in individual sports normally do not sign contracts of employment with one or the other employer. In principle, they deliver their performances on their own account, not under the direction and the supervision of an employer. They can therefore not be considered as workers within the meaning of the Community Treaty. They do of course conclude contracts with sponsors or organisers of tournaments which entail that certain obligations are temporarily imposed upon them, for example during the progress of a certain competition,<sup>200</sup> but it seems that the activities they carry out in compliance with these contracts can be more appropriately classified in the category of provision of services as regulated in Article 49 EC. The Court of Justice highlighted this very well in its judgement in the case of *Deliège*, involving a Belgian judoka who performed this martial art at high level. Firstly, the Court confirmed that "sporting activities and, in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related, services which may fall within the scope of Article 49 of the Treaty even if some of those services are not paid for by those for whom they are performed."<sup>201</sup> Subsequently, it offered somewhat more guidance on the issue, holding that "for example, an organiser of such a competition may offer athletes an opportunity of engaging in their sporting activity in competition with others and at the same time, the athletes, by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may retransmit and which may be of interest to advertisers and sponsors. Moreover, the athletes provide their sponsors with publicity the basis for which is the sporting activity itself."<sup>202</sup>

Summarising, it seems relatively safe to conclude that sportsmen carrying out a sporting activity - which has an economic character and for which they receive remuneration in return - on a collective basis, that is to say that they are member of a team, generally do so according to

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<sup>200</sup> A good example of such an obligation is the availability for interviews with the press immediately after a game or match.

<sup>201</sup> *Deliège*, par. 56.

<sup>202</sup> *Deliège*, par. 57.

the terms and conditions of the contract of employment they sign with their club of affiliation, and are therefore to be regarded as 'workers' within the meaning of Article 39 EC. Conversely, athletes competing in an individual sports discipline generally do not perform under the direction and the supervision of an employer, but rather act as self-employed sportsmen rendering certain services to tournament organisers, sponsors or advertisers, and are consequently more appropriately to be considered as 'service providers' within the meaning of Article 49 EC.

However practically workable this generalisation may be in most circumstances, nevertheless it has to be taken into consideration that its usefulness is not absolute. This has a lot, if not everything, to do with the fact that it will not always be possible to discern with perfect precision whether a certain sports discipline is to be considered as a team sport or rather as an individual sport.<sup>203</sup> Admittedly, this may seem surprising at first sight, especially for outsiders, but it cannot be denied that certain sports show features which are characteristic of both team sports and individual sports. Cycling seems to be the paradigm example of this. Initially, one might be inclined to say that cycling is an individual sport *par excellence*, as only one cyclist can cross the finish line as the winner of the race per definition, but after closer scrutiny, it becomes clear that this appearance is deceptively simple and that the situation in reality is less straightforward. Of course, it is undeniably the case that each edition of traditional races such as Liège-Bastogne-Liège or the Giro d'Italia can only be won by one rider at the time, as much as it is true that the International Cycling Union makes an official individual ranking of all professional cyclists based on the results they obtained in the races that form part of the official UCI calendar. However, by the same token, it is equally true that in order to obtain a licence to start in cycling races, cyclist have to be member of a team. Apart from an individual ranking, there also exists a UCI world ranking for teams. And it is unequivocally clear that in many circumstances, and in races consisting of a number of different stages during several successive days<sup>204</sup> almost inevitably, the victory of one particular cyclist is facilitated or at least made possible thanks to the physical and mental or tactical help and support from his team members

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<sup>203</sup> See also Parisi and Fernández Salas, "Le sportif individuel au regard de l'arrêt 'Bosman': les ordonnances 'Deliège'", 1 *RMUE* (1996) 139.

<sup>204</sup> Varying from two days up to three entire weeks, as there are for example the Internationaal Wegcriterium (two days), the Three Days of Le Panne, the Four Days of Dunkerque, Paris-Nice (one week), the Tour of Switzerland, and the Vuelta d'España (three weeks).

during the race.<sup>205</sup> Furthermore, it is an unwritten ethical rule that during a race, one does not chase after another cyclist if he belongs to the same team,<sup>206</sup> or at least that one does not bring opponents along if one nevertheless decides to do so. It could therefore easily be envisaged that a victory in a cycling race should be considered as the fruit of the combined efforts of the different team members. Consequently, contrary to first impressions, cycling turns out to be not such a clear-cut case of an individual sport at all, as some plausible arguments can be adduced in favour of regarding it rather as a team sport in fact. The relative uncertainty surrounding the qualification of cycling as an individual sport or as a team sport is further increased by the specific structure or course of some cycling events. The Tour de France for example, the most important race of the year, consists of 21 or 22 stages, most of which are normal races, but some of which are *individual* time trials and/or time trials *per team*. This is further evidence of the fact that it is not really possible to straightforwardly categorise cycling as an individual sport or as a team sport. In these circumstances in which the division between team sports and individual sports is less than clear, it is submitted that the proposed generalisation, which ultimately is no more than a simple rule of thumb, must be left aside and one should proceed with a case-by-case analysis based on concrete facts and objective features to ascertain whether an athlete competing in a certain sport is to be regarded as a worker or rather as a self-employed for the purposes of the application of the Community free movement provisions. If we take up the example of cycling again, after closer examination of the working conditions, I am inclined to say that, contrary to first impressions, professional cyclists are to be considered as 'workers' within the meaning of Article 39 EC. In order to be able to participate in cycling races, sportsmen must belong to a team. When both parties – rider and team - reach an agreement of collaboration and conclude a contract, this implies that the athlete will compete for the team in certain races and will receive remuneration from the team. It appears to be that cyclists indeed carry out their sporting activity

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<sup>205</sup> This help may take the form of purchasing rivals that escaped from the main group, supplying provisioning during the race, leading the pack to control its speed and indicate the rhythm, giving assistance in the event of technical breakdown, etc.

<sup>206</sup> In this respect, it might be interesting to have a closer – or more critical – look at what happened in the last miles of the World Championship in 2001, in Lisbon, a race to which traditionally national teams participate. Italy's Gilberto Simoni had escaped from the peloton and seemed to profit from a moment of hesitation in the pack behind him to reach for the title and the rainbow jersey, were it not for the fact that another Italian, Paolo Lanfranchi, suddenly, and to the complete astonishment of the entire sporting world, started pursuing him and brought the whole group back to his teammate-for-the-day. A few minutes later, Spanish Freire won the final sprint in front of Italian Bettini. An unfortunate misunderstanding between occasional team mates, one might say. But the story definitely gets more spicy if one takes into consideration that Lanfranchi, Freire and Bettini all belong to the Mapei team, whereas Simoni defends the colours of the rivals of Lampre...

under the direction and the supervision of the team management. It must be acknowledged that they may have some freedom in the choice of their training programme, or even of the races in which they will participate, often taking the necessary decisions in co-operation with the sporting directors, but in general they must follow strictly and rigidly the guidelines or the recommendations of the team management. Even the great Miguel Indurain, 'El Rey', winner of the Tour de France for 5 consecutive years, was forced to participate in the Vuelta d'España in his last year of racing, to satisfy the demands of Banesto, a Spanish commercial bank and main sponsor of the team of which he was a member. Moreover, the sportsmen are clearly obliged to follow the orders and carry out the tasks they receive before, during and after the race by their coaches. Belgium's Johan Museeuw's victory in Parix-Roubaix, the legendary race over the cobblestones of the 'Hell of the North', in 1996 serves perfectly to illustrate this point. That year, the three leaders in the race all belonged to the Italian team Mapei. Rather than really competing for the victory amongst themselves, they contented themselves with staying simply ahead of the chasing group, and ended the race without even sprinting. Mapei boss Squinzi had telephonically instructed team coach Lefevere to follow this scenario, with Museeuw as the designated winner. And so the photo of three Mapei racers celebrating victory together on the legendary velodrome of Roubaix, with Museeuw slightly preceding his team mates Bortolami and Tafi, crossed the world ... Furthermore, cyclists must also comply with the code of conduct and, more generally, with all the internal rules established by the team they represent. In this respect, for example, one can situate the unilateral decision of the management of French team Cofidis to preventively suspend their star rider Belgian Frank Vandenbroucke from further cycling activities in the spring of 2001 after his name had appeared in an ongoing investigation concerning certain doping practices, even though he had not been found guilty and the UCI had not imposed a temporary ban yet.<sup>207</sup> Apparently, in view of all this, the element of subordination is present in the relationship between cyclists and the team they race for. Arguably, therefore, they can be qualified as 'workers' under Community law.

Another similar illustration, but this time the other way around, of the fact that the generalisation proposed is only tenable to a limited extent is to be found in the tennis circuit. The men's ATP singles tournaments and the women's WTA singles counterparts are undeniably competitions between individual athletes. By the same token, it seems logical and self-evident to

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<sup>207</sup> Later on, Vandenbroucke was completely acquitted from all accusations and the team suspension was lifted.

consider doubles events as an example of team sports. However this may be, it becomes apparent that a tennis match between two doubles teams is conceptually not entirely similar to a football or basketball game between two teams. In the former situation teams are normally the simple result of a decision or the will of two individuals to play together without too much structure and without too many strings attached. Generally, there are no contractual agreements made. The continued existence of the teams depends almost entirely upon the players which compose the team. It is really the players that enter into the spotlight. Hence, in this respect it is unsurprising that the world ranking for doubles is made up on a purely individual basis, rather than per team. Conversely, in the latter case teams are proper institutions of their own, to a large degree independent of its players. The emphasis is thus much more on the team itself, rather than on its constituent members. One day Raul, Figo and Zidane will change club or retire from professional football, but Real Madrid will continue to exist. Consequently, it may seem necessary in this respect to introduce a fine distinction between team sports *sensu strictu*, concerning competitions between different clubs of which the players are contractually registered members, and team sports *sensu lato*, involving sporting events between more or less loose associations of several individuals.<sup>208</sup> The generalisation that athletes active in team sports are considered to be 'workers' and are thus covered under the personal scope of application of Article 39 EC, would only hold true for team sports *sensu strictu*. I suggest that for the others every situation will again have to be decided on a case-by-case basis. In the situation of double tennis, I would say that the team consists of two independent service-providers according to the terms of Article 49 EC.

Finally, one also has to take into account that in certain situations, sports with an intrinsically individual character acquire certain collective features.<sup>209</sup> Athletes competing in martial arts such as judo, for example, often do not participate only in individual tournaments, but compete also in national and/or international club championships. During these events, these sportsmen still compete individually, but the result obtained is added to the result of all the other team members and contributes in this way to the final score of the club. In this respect, it must be wondered whether under these specific circumstances the qualification of the sporting activity of the sportsmen in question for the purposes of the application of the Community free movement

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<sup>208</sup> See in this respect also Parisis and Fernández Salas, *o.c.*, at 139.

<sup>209</sup> Parisis and Fernández Salas, *o.c.*, 138-140.

provisions is to be altered. It is submitted that, once more, this particular situation will have to be analysed and evaluated on the basis of the concrete circumstances of each individual case, for it seems appropriate that it cannot be excluded *a priori* that athletes who generally fall under the heading of 'service providers' of Article 49 EC must be qualified as 'workers' within the scope of Article 39 EC for certain specific activities. This is probably all the more so when these club competitions have a certain regularity or frequency and are of a certain importance. Is Belgium's Jean-Michel Saive, one of the world's leading table tennis players, to be seen as an employee or rather as a self-employed service provider when he defends the colours of his club Villette Charleroi, with which he has already won the European Champions League? Decisive in this respect will be again the special features of the relationship between the player and the club for which he competes: does the club have a certain say over the athlete, or rather, is their relationship merely one of simple affiliation, allowing the player to render the club some services occasionally?

#### IV. THE LEGAL SITUATION OF AMATEUR SPORTSMEN

It results clearly from the analysis in the previous sections that sportsmen whose sporting activities can be classified as an economic activity fall under the personal scope of application of the Community free movement provisions and may therefore benefit from the rights laid down in these Treaty Articles. Conversely, athletes who deliver their sporting performances on a merely amateur basis, without an economic dimension, cannot enjoy from this protection granted by the relevant free movement chapters. All this fits squarely within the general pronouncement of the Court of Justice, reiterated on several occasions, that sport is part of Community law only in so far as it constitutes an economic activity within the meaning of Article 2 EC.<sup>210</sup> By means of an *contrario* reasoning, purely amateur sport thus appears to remain outside the ambit of Community law.

These concise statements could have very well constituted the end point of the examination; instead, however, they are nothing but the starting point of further analysis which will add nuances to this rather rigid dichotomy between professional and amateur sportsmen in

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<sup>210</sup> *Walrave*, par. 4; *Donà*, par. 12; *Bosman*, par. 73; *Deliège*, par. 41; *Lehtonen*, par. 32.

various respects, both from a legal and even from a purely sporting point of view. Firstly, it must be observed that from a sporting perspective, professional and amateur sportsmen do not always belong to two completely separate worlds. Traditionally, the federations of many sports disciplines maintained a strict dividing line in their regulations between professional and amateur athletes, organising separate and mutually exclusive events and competitions for these two categories of athletes. However that may be or may have been, this often cautiously safeguarded distinction seems to have become blurred to a certain extent. As it appeared clearly from the factual circumstances in the case of *Deliège*, it is not always straightforward to establish whether the sporting performances of a given athlete have an economic character or not.<sup>211</sup> Furthermore, nowadays professional and amateur sportsmen compete sometimes with each other in the same sporting event. In this context, it is particularly revealing that in the last few years, the Olympic Games, which have always been the absolute bastion of amateur sports, have been officially opened to professional sportsmen. In this way, professional sportsmen could also enter the Olympic arena and compete for glory in disciplines which were traditionally exclusively reserved to amateurs.<sup>212</sup> Furthermore, the International Olympic Committee also conferred Olympic status on some sports disciplines which have an undoubtedly professional character – in the sense that a number of athletes active in these sports perform their activities in an economic way.<sup>213</sup> The point which is being made here is simply that in contemporary sport, even though distinctions between professional and amateur athletes continue to exist in many, if not all sporting disciplines, and are nowadays often even more outspoken than ever as a result of the recent massive influx of money in professional sport, these differences cannot be generalised under all circumstances.

Secondly, also from a legal point of view, some additional comments need to be made in this respect. The statement of the Court of Justice that sport belongs to the ambit of Community law only to the extent that it constitutes an economic activity within the meaning of the Treaty was made in the judgement in *Walrave* in 1974 and must be situated in this specific context of time, when the European Union was still the European *Economic* Community, with a strong emphasis on economic matters. Since then, through the Single European Act and the Treaties of

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<sup>211</sup> For more detail, see analysis of *Cosmas AG in Deliège*, supra, in §2.II.2.

<sup>212</sup> This was the case of cycling for example during the Games of 1996 in Atlanta, where Switzerland's professional Pascal Richard took the gold medal.

Maastricht and Amsterdam, the EEC has become the EU, with largely expanded powers and competencies which clearly exceed the economic sphere.<sup>214</sup> The Court's principled statement from *Walrave* has therefore arguably become somewhat inaccurate: certainly, sport forms part of Community law when it can be characterised as an economic activity; but that is not the whole story. As the Court has explicitly recognised in its case law, sporting activities are also of considerable social importance in the Community.<sup>215</sup> Besides, the Declaration on Sport, annexed to the Treaty of Amsterdam, emphasises the social significance of sport and calls on the bodies of the European Union to give special consideration to the particular characteristics of amateur sport.<sup>216</sup> Currently, 20 out of 24 Directorates-General of the Commission are dealing in some way or the other with sports issues, linking sport with matters such as culture, environment, education, social affairs, etc. Evidently, nowadays sport is no longer subject to Community law only insofar as it has an economic character.<sup>217</sup> As a result, it is advocated that this modified situation exercises an influence upon the legal situation of amateur sportsmen under Community law.

The legal position of amateur sportsman vis-à-vis Community law shall be clarified somewhat more in detail on the basis of the rights they can invoke to oppose the application of the transfer rules and the nationality clauses which were at stake in *Bosman*. As a logical consequence of a strict application of the free movement principles, the direct practical implications of the *Bosman* decision in which the Court of Justice outlawed some aspects of the traditional transfer system and the nationality clauses in football for unjustified violation of Article 39 EC remained limited to the sphere of professional sportsmen. Strictly legally speaking, this judgement did not affect the situation of amateur sportsmen. Hence, from the point of view of the Treaty free movement provisions, there seemed to be nothing to preclude the maintenance at amateur level of rules instituting nationality restrictions and of rules imposing the payment of

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<sup>213</sup> Also during the 1996 Atlanta Olympics, tennis was for the first time scheduled on the programme: local hero and highly paid professional Andre Agassi turned out to be the strongest of the field.

<sup>214</sup> For a more detailed overview of this development, see Craig & de Búrca, *o.c.*, at 3-52.

<sup>215</sup> *Bosman*, par. 106, *Deliège*, par. 41.

<sup>216</sup> See also *Deliège*, par. 42.

<sup>217</sup> For an broad overview of the Community's involvement in sport, see, *inter alia*, the Commission's 'Helsinki report on Sport', or the Commission's Consultation Document "The European Model of Sport", or the European Council's Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Community place, attached to the Treaty of Nice: consult <http://europe.eu.int/comm/sport>

fees in the event of transfers of out-of-contract players. This principled position however must be revisited in several respects.

### **1. Broad interpretation of concept of 'economic activity'**

First of all, and importantly, the evolution from an economically inspired Community towards a broader oriented Union has prompted the Court of Justice to give a generous reading to Community concepts such as 'economic activity', 'worker' or 'service provider'. In the light of its expansive case law on the matter, it can forcefully be submitted that many sportsmen nowadays exceed the basic threshold to trigger the application of the Community provisions on freedom of movement. Arguably, a lot of athletes effectively carry out their sporting activities in such a way that these can be considered as 'genuine and effective work' and also obtain a certain financial return from the performances they deliver.

### **2. Secondary Community legislation**

Secondly, the fact that pure amateur sportsmen still cannot successfully be qualified as 'workers' for the purposes of Community law and are therefore not entitled to rely directly on Article 39 EC nonetheless does not automatically entail that they cannot claim any rights related to freedom of movement. Article 7(2) of Regulation 1612/68, intended to flesh out the principles laid down in Article 39(2) EC, guarantees Community workers "the same social and tax advantages" in the territory of another Member State as the national workers. The Court of Justice has given an extensive interpretation to this notion, so as to include all those advantages "which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community."<sup>218</sup> As a result, it can presumably not be excluded *a priori* that a Community national who has exercised his free movement rights to carry out an economic activity in another Member State and wishes to practice a certain sporting discipline on an amateur basis in the host

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<sup>218</sup> Case 207/78 *Ministère Public v Even and ONPTS* [1979] ECR 2019, par. 22.

Member State can successfully rely upon Article 7(2) to be enabled to deliver his sporting performances on the same par as nationals of that State.<sup>219</sup> Moreover, Article 7(2) has even been held to cover advantages which are only of indirect benefit to the worker himself.<sup>220</sup> This way, even family members who, by virtue of Article 10 of Regulation 1612/68, have installed themselves with the Community worker in question, might be entitled to avail themselves of these advantages.<sup>221</sup> It is submitted that this possibility for Community workers and/or certain members of their family to participate in sporting events and competitions in their host Member State in their spare time for non-economic purposes under the same conditions and circumstances as the nationals of that State may facilitate the integration of the worker and his family into the new Member State and contribute in this way to the realisation of the objective of freedom of movement for workers,<sup>222</sup> and might thus be considered as a social advantage within the meaning of Article 7(2).

Concretely, were the Court to accept this proposition, amateur sportsmen who have moved abroad for professional purposes themselves and/or who are a member of family of a Community worker within the meaning of Article 10 of Regulation 1612/68 would be entitled to object on this legal basis against the application to them of the nationality clauses limiting the participation of foreign players in sporting events and of the transfer rules, to the extent that these rules infringe the principle of equal treatment with the nationals of the host Member State. This is definitely the case with the nationality clauses, which clearly discriminate on grounds of nationality. However, the same cannot readily be said about the transfer rules. Importantly, the principle of equal treatment marks the outer limits of this particular approach: for example, foreign amateurs cannot challenge the practice of transfer payments within a certain Member State insofar as the nationals of that State are also subject to these rules.

Regulation 1612/68 is applicable within the context of the free movement of workers. It is not entirely clear whether persons who are self-employed and/or certain of their family members

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<sup>219</sup> For a concurrent opinion, see Thill, "L'arrêt 'Bosman' et ses implications pour la libre circulation des sportifs à l'intérieur de l'Union européenne dans des contextes factuels différents de ceux de l'affaire 'Bosman'", 1 *RMUE* (1996) at 104-105; Dubey, *La libre circulation des sportifs en Europe* (Bruylant, 2000), at 157-163.

<sup>220</sup> Case 94/84 *Office Nationale de l'Emploi v Deak* [1985] ECR 1873.

<sup>221</sup> Case 316/85 *Centre public d'aide sociale de Courcelles v Lebon* [1987] ECR 2811, par. 12.

<sup>222</sup> See, *inter alia*, Case C-137/84 *Mutsch* [1985] ECR 2681, par. 16; Case C-59/85 *Reed* [1986] ECR 1283, par. 28.

can rely upon the concept of 'social advantages' to ensure equal treatment with other Community nationals when they engage in sporting activities on an amateur basis in a host Member State. However, this relative uncertainty is soon to be remedied. There is to be a new general directive on free movement for citizens of the European Union and their family members,<sup>223</sup> which will replace much of the existing secondary legislation. Under the terms of this directive, the concept of social advantages will arguably also be of benefit to self-employed citizens.

### 3. 'Corollary rights' to freedom of movement

Furthermore, if, conversely, the Court were not to be inclined to categorise the possibility for amateur sportsmen to take part in sporting competitions in a given Member State under the same conditions as the nationals of that country as a social advantage within the meaning of Regulation 1612/68, legal solace may nevertheless be brought about by another judicially created technique. In its case law, the Court of Justice explicitly established on several occasions that certain rights may constitute the "necessary corollary" of the rights to freedom of movement and are therefore included within these freedoms.<sup>224</sup> In the case of *Cowan*, for example, involving a British tourist assaulted in France who was subsequently denied State compensation for victims of violent crimes, which was available to nationals and residents of France, the Court stipulated that "when Community law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement."<sup>225</sup> Consequently, it held the principle of non-discrimination to be applicable to this situation.<sup>226</sup> Interestingly, in a more recent case, the Court recognised that access to leisure activities in the host Member State constitutes the corollary of the free movement of workers.<sup>227</sup> On the basis of this decision, it appears plausible and perhaps even likely to assert that the participation to sporting competitions on an amateur basis of Community workers or self-employed in their host

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<sup>223</sup> Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States, COM (2001) 257 final.

<sup>224</sup> See, *inter alia*, Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377, paras. 10-16; Case C-294/97 *Eurowings Luftverkehrs AG v Finanzamt Dortmund-Unna* [1999] ECR I-7447; Case C-17/00 *De Coster v Collège des Bourgmestres et échevins de Watermael-Boitsfort* [2001] ECR I-9445.

<sup>225</sup> Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195, par. 17.

<sup>226</sup> *Cowan*, par. 17.

<sup>227</sup> Case C-334/94 *Commission v France* [1996] ECR I-1307, paras. 21-23.

Member State under the same circumstances as the home nationals may constitute the corollary of the freedom of movement guaranteed in the relevant provisions of the Community Treaty.<sup>228</sup>

#### 4. Concept of citizenship

Finally, and importantly, there is another set of provisions on which amateur sportsmen presumably can base certain claims related to freedom of movement under Community law. Article 17 EC provides that "every person holding the nationality of a Member State shall be a citizen of the Union." According to the terms of Article 18 EC, possession of the status of citizen of the Union automatically engenders the principal right to move and reside freely within the territory of the Member States. As a result of the introduction of the concept of citizenship of the European Union, the right to freedom of movement is no longer strictly limited to workers and their family, but is extended in principle to the non-economically active nationals of the EU. Be that as it may, Article 18.1 EC also contains the important proviso that this citizens' right is "subject to such limits and conditions as are laid down in the Treaty and by the measures adopted to give it effect." In the first place, there are of course the express Treaty exceptions on grounds of public policy, public security and public health and the public service or official authority exception. In addition, the Council adopted three directives granting rights of residence to categories of persons other than workers, subject to the conditions that they have sufficient financial resources so as not to become a burden on the social assistance schemes of the Member States and are also covered by sickness insurance.<sup>229</sup> Consequently, the rights contained in Article 18.1 EC are only conferred upon EU citizens with adequate financial means.

Substantially, there is considerable uncertainty and controversy in legal doctrine concerning the precise meaning or practical effect of Articles 17 and 18 EC.<sup>230</sup> It is not unequivocally clear to what extent EU citizens can actually derive rights from these provisions.

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<sup>228</sup> For a concurring opinion, see Dubey, *o. c.*, at 164-165; Thill, *o. c.*, at 105.

<sup>229</sup> Council Directive 90/366 (later replaced by Directive 93/96) concerning students exercising the right to vocational training, (1993) OJ L 317/59; Council Directive 90/365 relating to employed and self-employed people who have ceased to work, but without necessarily having moved to another Member State, (1990) OJ L 180/28; Council Directive 90/364 governing all persons who do not already enjoy a right of residence under Community law, (1990) OJ L 180/26.

In a number of more recent judgements, the Court of Justice has shed some more light on this issue. It solemnly declared that "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."<sup>231</sup> In the case of *Martinez Sala*, the Court stated that a citizen of the European Union who is lawfully resident in the territory of a host Member State, can rely on the principle of non-discrimination in Article 12 EC "in all situations which fall within the scope *ratione materiae* of Community law".<sup>232</sup> Subsequently, in its ruling in *Grzelczyk*, the Court stipulated that those situations "include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 18.1 EC."<sup>233</sup> It appears thus clearly from this statement that in the Court's opinion, the concept of citizenship has an autonomous content, as the scope *ratione materiae* of Community law is partly defined by the right to move and reside freely in another Member State in Article 18.1 EC.<sup>234</sup> Moreover, this conclusion that the Court conceives Article 18 EC as a free-standing provision results with even more force from its decision in *Baumbast*.<sup>235</sup> The Court did not eschew using the language of direct effect in this context. It expressly held that "as regards, in particular, the right to reside within the territory of the other Member States under Article 18(1) EC, that right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty. Purely as a national of a Member State, and consequently as a citizen of the Union, Mr. Baumbast therefore has the right to rely on Article 18(1) EC."<sup>236</sup> The Court proceeded admitting that this right is subject to conditions and limitations, but it insisted that "any limitations and conditions imposed on that right do not

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<sup>230</sup> See, for example, O'Keeffe, "Union Citizenship", in O'Keeffe & Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Wiley, 1994) 87; O'Leary, "Putting Flesh on the Bones of European Union Citizenship", 24 *ELRev.* (1999) 68; Shaw, "The Many Pasts and Futures of Citizenship in the European Union", 60 *MLR* (1997) 554.

<sup>231</sup> Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aide Sociale d'Otignies-Louvain-la-Neuve* [2001] ECR I-6193, par. 31.

<sup>232</sup> Case C-85/96 *Maria Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, par. 62-63: this scope includes "the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State."

<sup>233</sup> *Grzelczyk*, par. 33. See also Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paras. 15-16.

<sup>234</sup> See also *Craig & de Búrca, o.c.*, at 758-759.

<sup>235</sup> Case C-413/99 *Baumbast, R v Secretary of State for the Home Department* [2002] ECR I- 7136.

<sup>236</sup> *Baumbast*, par. 84.

prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect.”<sup>237</sup>

Now, as will be demonstrated later with more detail, it emerges clearly from the Court’s decisions in the cases of *Walrave*, *Donà* and *Bosman* that the transfer rules and the rules on foreign players, which constitute the core of the analysis, belong to the material scope of application of the Community Treaty. Taking into account the preceding considerations of the Court on the status of citizenship of the Union, it can relatively safely be assumed that EU amateur sportsmen who lawfully reside in a host Member State and who satisfy the formal conditions of sufficient financial resources and coverage under sickness insurance derive a right from Article 18 EC to successfully challenge transfer rules and nationality clauses to the extent that these measures put them at a disadvantage vis-à-vis that Member State’s own nationals. The Court did unequivocally state that Article 18(1) EC attaches to the status of citizenship of the Union “the rights and duties laid down by the Treaty, including the right [...] not to suffer discrimination on grounds of nationality within the scope *ratione materiae* of the Treaty.”<sup>238</sup>

## V. CONCLUSION

The Court of Justice has consistently, the usual exception that confirms the rule notwithstanding, given a generous reading to the concept of an ‘economic activity’ in its case law. In practice, this broad interpretation has allowed many athletes to pass the hurdle of ‘a genuine and effective, and not a merely marginal or ancillary activity’ which is carried out in return for remuneration, so as to qualify as a worker or as a service provider for the purposes of the application of Articles 39 and 49 EC. Moreover, it has been argued that it is still important to differentiate between these two sets of fundamental freedoms, as they do not always under all circumstances yield exactly the same legal effects. Merely as a rule of thumb, it has been proposed that athletes active in team sports can normally be considered as workers, whereas sportsmen competing in individual disciplines are generally to be regarded as self-employed service providers, but in view of the complexity of some factual situations, it is nonetheless

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<sup>237</sup> *Baumbast*, par. 85-86. To that effect, the Court referred also to Case 41/74 *Van Duyn* [1974] ECR 1337, par. 7.

<sup>238</sup> *Martinez Sala*, par. 62.

recommended to always have regard to the particular circumstances of each specific case before proceeding to a final qualification anyway. Furthermore, it has been demonstrated that amateur athletes, who do not pass the threshold of performing sport in an economic way, nevertheless do not completely fall outside the scope of application of the Community treaty and may actually rely upon a number of Community concepts and legal instruments to claim a certain degree of free movement protection under Community law. In this particular context, *inter alia*, some provisions of Regulation 1612/68, the concept of 'corollary free movement rights', and, especially, the concept of citizenship of the European Union have been identified as potentially relevant.

### §3: *The Condition of Nationality*

#### I. EU NATIONALS V THIRD-COUNTRY NATIONALS: GENERAL OBSERVATIONS

In principle, the right to freedom of movement of persons is only open to nationals of the Member States of the European Union. As a rule, third-country nationals have been excluded from this right under Community law.<sup>239</sup> Articles 43 and 49 EC explicitly refer to 'nationals of a Member State'. Only from the wording 'workers of the Member States' in Article 39 EC it was not immediately apparent whether this notion was intended to cover only nationals of the Member States, or whether it also included third-country nationals resident and employed within the Community.<sup>240</sup> The secondary legislation subsequently passed to implement Article 39 EC, especially Regulation 1612/68, explicitly restricted its personal scope of application to workers who are nationals of the Member States.<sup>241</sup> In the case of *Meade*,<sup>242</sup> the Court of Justice has confirmed this interpretation. This general body of EC freedoms is therefore in principle not applicable to non-EU nationals. This dichotomy between Us and Them has been further

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<sup>239</sup> Lenaerts & Van Nuffel, *Europees Recht. In Hoofdpijnen* (Maklu, 1999) at 198-199.

<sup>240</sup> Burrows, *Free Movement in European Community Law* (Clarendon Press, 1987), at 124. Plender insisted that the contrast with the terms of Article 69 of the ECSC Treaty, which mentioned 'workers who are nationals of the Member States', urged the reflection that "the draftsmen of the EEC Treaty intended to establish a common policy for all workers in the Community, irrespective of their nationality": Plender, "Competence, European Community Law and Nationals of Non-Member States", 39 *ICLQ* (1990) 599.

<sup>241</sup> Craig & de Búrca, *EU Law. Text, Cases & Materials* (OUP, 2003) at 705.

<sup>242</sup> Case 238/83 *Caisse d'allocations familiales v Ehtelieden Meade* [1984] ECR 2631, par. 7.

exemplified by the introduction of a status of citizenship of the Union, which is conditional on the possession of Member State nationality.<sup>243</sup> Third-country nationals can only fully benefit from the rights and advantages conferred upon the citizens of the Union if they acquire the nationality of one of the Member States.<sup>244</sup> That is not to say that non-EU nationals enjoy no rights of movement and residence within the Community.<sup>245</sup> The treatment accorded to third-country nationals has both an external and an internal dimension.<sup>246</sup> Only the latter one is of interest for the purposes of this research. The limited rights non-EU nationals enjoy within the Community are based on a number of diverse legal provisions and arrangements: they may derive rights from their capacity as family members of certain EU workers, or from their status as employees of EU service providers,<sup>247</sup> or also from their being subjects of one of the third countries with which the Community and its Member States have concluded an international agreement.

In this section, it will be examined whether, and if so, to what extent and under which precise conditions, certain categories of third-country nationals can rely on these legal instruments to avoid the application of certain sports rules and practices to their concrete personal situation, in particular the nationality clauses and the transfer rules which were invalidated by the Court of Justice in the *Bosman* ruling.<sup>248</sup> From a legal point of view, this judgement entailed direct consequences only for EU nationals. Strictly technically speaking, third-country nationals were not concerned by this decision. Many sporting federations effectively decided to comply with the terms and conditions imposed by the Court only to the minimum extent necessary. This

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<sup>243</sup> D'Oliveira, "Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Areas of Free Movement, Immigration and Asylum", in O'Keefe & Twomey (eds.) *Legal Issues of the Maastricht Treaty* (Chancery, 1994), 261.

<sup>244</sup> Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer 1999) at 83.

<sup>245</sup> See for example, Carlier, "Le droit d'entrée et de séjour des ressortissants des Etats membres", *AD* (1994) 143; Peers, "Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union", 33 *CMLRev.* (1996) 7; Cremona, "Citizens of Third Countries: Movement and the Employment of Migrant Workers Within the European Union", *LIEI* 2 (1995) 87; Hedemann-Robinson, "An Overview of Recent Legal Developments at Community Level in relation to Third Country Nationals Resident within the European Union, with Particular Reference to the Case Law of the Court of Justice", 38 *CMLRev.* (2001) 525.

<sup>246</sup> The terminology is borrowed from Craig & de Búrca, *o.c.*, at 753-755: The *external* dimension is concerned with 'getting into the EU', and deals with issues such as border controls, visa requirements, etc. The *internal* dimension deals with the rights granted to third-country nationals resident within the EU.

<sup>247</sup> See Case C-113/89 *Rush Portuguesa v Office National d'Immigration* [1990] ECR I-1417; Case C-43/93 *Vanderelst v Office des Migrations Internationales* [1994] ECR I-3803; Case C-165/98 *Mazzoleni, Guillaume and others* [2001] ECR I-2189.

means that non-EU nationals are nowadays sometimes still confronted with rules limiting their participation to official matches on grounds of their nationality. In Italy, for example, until the rules of the FIGC were changed in April 2001, football clubs playing in the Serie A could engage a maximum of five players with a non-EU nationality, out of which only three could participate during one and the same championship's match.<sup>249</sup> With regard to the transfer system, the situation of third-country nationals has only recently been regularised in football. In Circular n° 611 of 27 March 1997, FIFA notified the national associations that players who were not subjects of an EU or EEA country would henceforth be classified as European citizens and that no compensation would be due any longer for the transfer of these players between two countries on EU or EEA territory as from 1 April 1997.<sup>250</sup> FIFA had taken this course of action shortly after Rumanian footballer Hagi and the Croatian player Vlaovic had deposited an official complaint against this transfer regulation with the European Commission.<sup>251</sup> The Executive Committee of FIFA proceeded to ratify this decision on 31 May 1997. However, at the express request of several national associations and on the recommendation of the Player's Status Committee, it decided to postpone enforcement of the new rule until 1 April 1999.<sup>252</sup> Clubs and players affected by this rule were thus granted a transitional period of two years to implement it into practice. In the meantime, Article 14 of the FIFA Regulations governing the Status and Transfer of Players of 1994 were to remain in force. Accordingly, in the event of an international transfer of a third-country national between two clubs in different countries of the EU/EEA, the acquiring club still had to pay a transfer sum to the selling club to ensure itself of the services of the player in question. Consequently, as from 1 April 1999, third-country national football players are treated in the same way as Community nationals with regard to transfers within the Community. Even though the following analysis will therefore have a largely theoretical relevance only for football,

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<sup>248</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

<sup>249</sup> In April 2001, during the course of the Serie A season, the FIGC suddenly abolished the second indent of this rule, while holding on to the first indent, so that clubs were allowed to field all five third-country nationals during one and the same game. This change had an immediate impact three days later, for it put AS Roma in a position to bring Japanese midfielder Nakata on the pitch as a substitute alongside Argentina's Batistuta and Brazil's Asuncao and Lima in the title deciding game against Juventus in Turin. Nakata scored the goal which helped the Romans to clinch the championship a couple of weeks later.

<sup>250</sup> Consult <http://www.fifa.com>

<sup>251</sup> See Blanpain, *De Belgische Voetbalbond, Het Vlaams Decreet Martens en het Arbitragehof: Vrijheid en gebondenheid in de sport. De CAO van 12 juni 1998. De Balog case*, (Peeters, 1998), at 206.

<sup>252</sup> See Circular n° 616 of 4 June 1997, <http://www.fifa.com>

it nonetheless remains useful to scrutinise the specific status of non-EU nationals in relation to transfer payments, to assess whether there are legal grounds which can be relied upon by third-country national sportsmen active in other sports disciplines in which transfer payments might still be a current practice to evade the application of these rules.

Before actually addressing the issue practically, some preliminary observations must nevertheless still be made. Firstly, it must be taken into consideration that many countries which are currently still third countries, will very soon acquire the status of Member States. The positive outcome of the second Irish referendum on the ratification of the Treaty of Nice in October 2002 has effectively given the green light to the finalisation of the ongoing enlargement process which will ultimately result in the accession of twelve new member countries to the European Union, arguably some time in 2004. Invariably, the nationals of these countries will acquire the privileged status of EU citizens with all the rights and repercussions this entails. Secondly, even though it is undeniably true that there is still no coherent body of EU law regulating the position of third-country nationals,<sup>253</sup> it must be pointed out that it seems that slowly but surely some progress is being made in this context. Recently, a Community Regulation has been implemented, which deals with certain issues relating to residence of third-country nationals.<sup>254</sup> Moreover, several other important pieces of legislation are currently being prepared, concerning the status of third-country nationals who are long-term residents in a Member State,<sup>255</sup> or relating to the posting of workers who are third-country nationals for the provision of cross-border services,<sup>256</sup> the provision of cross-border services by third-country nationals established in the Community, or the conditions of entry and residence for third-country nationals who seek employment, or self-employment, within the EU. When effectively implemented, these acts of secondary Community legislation will considerably improve the situation of third-country nationals within the European Union.

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<sup>253</sup> The Tampere European Council of 15-16 October 1999 called for a set of uniform rights for third-country nationals, which are to be as near as possible to those enjoyed by EU citizens.

<sup>254</sup> Regulation 1091/2001 (2001) OJ L 150/4, dealing with freedom of movement for those with a national long-stay visa.

<sup>255</sup> COM (2001) 127.

<sup>256</sup> COM (2000) 271; COM (1999) 3.

## II. ENTITLEMENTS FOR THIRD-COUNTRY NATIONALS

The analysis shall be conducted in the following way: firstly, it will be examined which rights can be invoked by which non-EU nationals on the basis of secondary Community legislation, and specifically Regulation 1612/68. Secondly, it will be verified what may be the impact of the relevant provisions of the international agreements concluded by the Community and its Member States with certain third countries on the position of the nationals of these countries within the Community. Thirdly, and admittedly somewhat out of context, it will be scrutinised whether third-country nationals may rely on the Community competition rules to challenge the persisting existence of transfer rules and nationality clauses concerning them.

### 1. Article 11 of Regulation 1612/68

It may very well be that the Community Treaty provisions on the free movement of persons confer rights exclusively on nationals of the Member States of the European Union, this does not preclude that third-country nationals may nevertheless derive some rights from certain instruments of secondary Community legislation. In particular Regulation 1612/68,<sup>257</sup> the purpose of which is to further implement the principles laid down in Article 39 EC, contains a number of provisions from which also a particular category of third-country nationals can benefit. Most importantly, Article 11 of Regulation 1612/68 provides that “where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.” The inclusion of a similar provision in Regulation 1612/68 is not surprising. After all, the right to freedom of movement also unequivocally entails that obstacles to the mobility of workers, relating specifically to the worker’s right to be joined by his family and the conditions for the integration of that family into the host country, shall be eliminated.<sup>258</sup> In the case of *Gül*,<sup>259</sup> the

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<sup>257</sup> Council Regulation EEC N° 1612/68 on freedom of movement for workers within the Community, OJ Special Edition 1968 (II) at 475.

<sup>258</sup> See Preamble Regulation 1612/68.

<sup>259</sup> Case 131/85 *Gül* [1986] ECR 1583.

Court of Justice undertook to interpret the terms of this provision, and affirmed that a spouse of a Member State national should benefit, on the basis of Article 11, from the same working conditions as the nationals of the host Member State.

When focusing somewhat more in detail on this provision, its inherent strengths and weaknesses become readily apparent.<sup>260</sup> In the first place, a considerable advantage of Article 11 of Regulation 1612/68 – especially in comparison with the disparate situation created by the international agreements concluded with third countries – is that it can be relied upon by any third-country national, regardless of his nationality, who is a spouse or a dependent child of a Community national. Furthermore, as it forms a constituent part of a Council Regulation, Article 11 has the additional bonus of being directly applicable throughout the whole territory of the Community,<sup>261</sup> so that the direct effect of the provision is not contested. The third-country nationals who fall under the scope of this provision may thus directly rely on it before the national courts of their host Member State. Be that as it may, it should not be lost out of sight that there clearly are also some significant downsides to this provision. Firstly, the preconditions which must be fulfilled in order to trigger the application of Article 11 are rather restrictive. Hence, it is indispensable that the third-country national in question is married to or is the dependent child of a Member State national, but this alone is not sufficient, for the Member State national must also have effectively made use of his right of free movement before the third-country national can invoke the provisions of Article 11. The right to take up any activity as an employed person is only a derived right, dependent on the exercise of the free movement rights of the Community worker, and is thus of no avail to a third-country national if the EU national does not leave his Member State of origin. A second negative side of the medal is that the scope of application of Article 11 is strictly restricted to territory of the Member State in which the European Union national is employed, and does not extend to the territory of other Member States. Basically, this means that a third-country national who is working in a certain Member State X, where his spouse or parent, who possesses the nationality of Member State Y, is employed, is only entitled to take-up an economic activity in Member State Z on the basis of Article 11 of Regulation 1612/68 on the condition that his spouse or parent has moved to work in

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<sup>260</sup> See also Nyssen & Denoël, "La situation des ressortissants de pays tiers à la suite de l'arrêt 'Bosman'", 1 *RMUE* (1996) at 127-128.

<sup>261</sup> Craig & de Búrca, *o.c.*, at 189-193.

Member State Z as well. Obviously, this is a serious disadvantage in a sector such as sport, which is often characterised by great mobility of athletes. However, it is abundantly clear that the strict application of this provision can be rather easily circumvented in practice. Hypothetically speaking, if a Spanish football club were interested in the services of any given third-country national, it would simply suffice to engage his Italian spouse or parent or to find them an employment elsewhere in Spain in order to enable the football player with the non-EU nationality to benefit from the same working conditions as the Spanish footballers.

It is important to evaluate the precise impact of this right for third-country nationals on its intrinsic value. Concretely, the issues which are at the centre of the attention in this research are the obstacles to mobility created by the existence of the nationality clauses and the transfer rules. On the one hand, with regard to the rules limiting the formal engagement or alternatively, the actual use of foreign players during official matches, the situation created by Article 11 of Regulation 1612/68, as interpreted by the Court of Justice, seems to be clear: third-country nationals should benefit from exactly the same working conditions as the nationals of the Member State in question and thus cannot be hindered in the exercise of their sporting activities by the existence of nationality clauses. That the nationality clauses effectively fall under the concept of 'working conditions' seems to yield from the *Bosman* ruling, in which the Court expressly held, in reference to these rules on foreign players, that Article 39 EC "applies to rules laid down by sporting associations which determine the conditions under which professional sports players may engage in gainful employment."<sup>262</sup> On the other hand, the situation with regard to the transfer rules appears to be less straightforward, or at least partially. Firstly, in all likelihood Article 11 has no impact on the domestic transfer systems. When a third-country national moves from one club to another within one Member State, he is therefore subject to the same rules on internal transfers as the national athletes of that Member State. Secondly, however, it is no so evident whether a third-country national can rely on Article 11 when he is transferred internationally, between clubs in different Member States. Article 11 confers on him the right to take up employment in the Member State in which his spouse or parent is employed. According to the Court of Justice, this implies that he should benefit from the same *working conditions* as national workers. The Court hasn't gone as far as granting third-country nationals *access* to the

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<sup>262</sup> *Bosman*, par. 116.

labour market of a Member State on the same par as that Member State's nationals. Presumably, therefore, Article 11 could not be invoked to escape the payment of transfer fees under these circumstances.<sup>263</sup> All elements taken into consideration, the derived right of Article 11 of Regulation 1612/68 granted to certain third-country nationals family members of an EU worker who has exercised his free movement right is therefore only of partial use for the sporting purposes of the non-EU nationals concerned.

## 2. International Agreements with third countries

In general, agreements concluded between on the one hand, the European Community - and sometimes also its Member States - and on the other hand, third countries constitute the most important legal instrument which confers rights on third-country nationals who are legally resident in a Member State of the European Union. Article 310 EC is the legal basis of these agreements. The relationship that is established between the Contracting Parties is governed by public international law. Moreover, the fact that these international agreements are acts of public international law does not preclude that they entail legal effects within the Community legal order. They are also a source of Community law.<sup>264</sup> The Court of Justice has consistently ruled that these agreements are an integral part of Community law.<sup>265</sup> Consequently, individuals can invoke the provisions of these agreements provided that these provisions satisfy the conditions for direct effect as established by the Court of Justice.<sup>266</sup> The most important of these international agreements are the Agreement establishing the European Economic Area, the Association Agreement concluded with Turkey, the Co-operation Agreements concluded with the Maghreb countries, the Europe Agreements concluded with the Central and Eastern European countries and the Baltic States, the Partnership Agreements concluded with former Soviet

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<sup>263</sup> For a contrary opinion in this respect, see Nyssen & Denoël, *o.c.*, at 127-129.

<sup>264</sup> Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer, 1999) at 95-96.

<sup>265</sup> See inter alia, Case 181/73 *Haegeman* [1974] ECR 449, par. 5; Case 12/86 *Demirel* [1987] ECR 3719, par. 7; Case 30/88 *Greece v Commission* [1989] ECR 3711, par. 12.

<sup>266</sup> See inter alia, Craig, "Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law", 12 *OJLS* (1992) 453; De Witte, "Direct Effect, Supremacy and the Nature of the Legal Order", in Craig & de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999) 177; Eleftheriadis, "The Direct Effect of Community Law: Conceptual Issues", 16 *YBEL* (1996) 205; Lenz, Tynes & Young, "Horizontal What? Back to Basics", 25 *ELRev.* (2000) 509; Pescatore, "The Doctrine of 'Direct Effect': An Infant Disease in Community Law", 8 *ELRev.* (1983) 155; Prechal, "Does Direct Effect Still Matter?", 37 *CMLRev.* (2000) 1047; Winter, "Direct Applicability and Direct Effects", 9 *CMLRev.* (1972) 425.

Republics and the Lomé Agreements. These different categories of international agreements are characterised by a great diversity of substantive rights in their contents. This variety of rights significantly complicates the effort of conducting a somewhat coherent analysis of the legal status of third country nationals residing in the European Union.<sup>267</sup> In the following analysis, regard will only be had to the relevant provisions of the more important agreements, and moreover, only with these provisions which deal with the situation of third-country national workers.<sup>268</sup>

### *1.1. European Economic Area Agreement<sup>269</sup> : freedom of movement*

In the first place, Article 28 of the European Economic Area Agreement literally reproduces the wording of Article 39 EC. The terms of this provision seem to be sufficiently clear, precise and unconditional for it to be granted direct effect.<sup>270</sup> In this respect, it should nevertheless be remarked that the Court has stipulated that notions or principles, used in provisions contained in international agreements or decisions adopted by an Association Council, which are textually similar or even identical to the corresponding provisions of Community law, are in principle not necessarily interpreted in exactly the same way.<sup>271</sup> This ultimately depends on the objectives pursued with the Agreement in question. Specifically, in the context of the EEA Agreement, the EFTA Court and the European Surveillance Authority are obliged to take into consideration the relevant judgements of the Court of Justice relating to the interpretation of provisions of Community law which are substantially identical to those contained in the EEA Agreement.<sup>272</sup> Hence, it has immediately been taken for granted in legal doctrine that players from Norway, Iceland and Liechtenstein were able to rely on Article 28 of the EEA Agreement to successfully combat the obstacles to freedom of movement erected by the rules on foreign

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<sup>267</sup> For a more elaborate analysis, see Staples, o.c., 239-270; Jorens, *De rechtspositie van niet-EU-onderdanen in het Europese Socialezekerheidsrecht* (die Keure, 1997).

<sup>268</sup> In most of these international agreements, the provision of services has received much less attention. The provisions relating to services are often only framework provisions which are much less far-reaching than those relating to workers. Generally, they also lack direct effect. For these reasons, the attention in this context is focused on the provisions on workers.

<sup>269</sup> Agreement creating a European Economic Area, signed at Porto, May 2 1992, (1994) OJ L 1/3.

<sup>270</sup> Maresceau, "Nationals of third countries in agreements concluded by the European Community", in Actes du Colloque organisé l'Institut d'études juridiques européennes de l'Université de Liège "1993, le marché unique et l'Europe des personnes", 2 AD (1994), at 249-263.

<sup>271</sup> See Case 270/80 *Polydor* [1982] ECR 329, par. 8; Case 104/81 *Kupferberg* [1982] ECR 3641, par. 29-31.

<sup>272</sup> Pollet, "The Bosman Case and the Abolition of Nationality Clauses and the Position of Third Country Nationals", *European Business Law Review* (June 1996), at 143.

players and the transfer rules.<sup>273</sup> Besides, on one of the first official meetings of its Executive Committee in the wake of the *Bosman* decision in February 1996, UEFA had already explicitly confirmed that the ruling of the Court of Justice was also relevant to EEA football players and on EEA territory.<sup>274</sup>

Clearly, the nationals of EEA countries find themselves in a privileged position. They are the only third country nationals who benefit undisputedly from the right to freedom of movement within the territory of the Member States of the European Union and the European Economic Area. The rights granted to nationals of other third countries with which the Community and/or its Member States concluded an international agreement are all invariably substantially more limited.

### *1.2. Association Agreement with Turkey<sup>275</sup> : Access to the labour market in host State*

Subsequently, also the situation of Turkish nationals merits further attention. Article 12 of the Association Agreement of 1963 declares that the freedom of movement for workers shall be gradually established and indicates that the Contracting Parties shall be guided by the relevant Community Treaty provisions of Articles 39, 40 and 41 EC in this regard.<sup>276</sup> Despite the clear intention to secure progressively the freedom of movement for workers, currently this objective has not been fully realised in practice yet. Article 37 of the Additional Protocol<sup>277</sup> concluded in 1970 merely provides that workers of Turkish nationality employed in the Community shall not be discriminated against on grounds of nationality as regards working conditions and remuneration. Furthermore, Decision 1/80 of the EC/Turkey Association Council<sup>278</sup> deals with

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<sup>273</sup> Norberg, Hökborg, Johansson, Eliasson and Dedicken, *The European Economic Area. EEA Law. A Commentary on the EEA Agreement* (CE Fritzes AB, 1993) at 192.

<sup>274</sup> Blanpain, *Het statuut van de sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht* (Larcier, 2002), at 13.

<sup>275</sup> Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara, September 12 1963, (1973) OJ C 113/2.

<sup>276</sup> According to Article 36 of the Additional Protocol concluded in 1970, the freedom of movement for workers should have been gradually established in the period between 12 and 22 years after the entry into force of the Association Agreement.

<sup>277</sup> Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, signed at Brussels, November 23 1970, (1973) OJ C 113/18.

<sup>278</sup> Decision n° 1/80 of the Association Council of September 19 1980, on The Development of the Association, not published in the Official Journal.

the situation of Turkish workers who are already integrated into the labour market of their host Member State. Importantly, as the Court has unequivocally held on several occasions, it therefore does not encroach upon the competence of the Member States to regulate both the entry to their territory by Turkish nationals and the conditions under which they can take up their first employment.<sup>279</sup> Article 6(1) of this Decision 1/80 entitles a Turkish worker (1) after one year of being legal employed in the Member State of residence, to renewal of his work permit for employment by the same employer; (2) after three years of legal employment and subject to priority for Community workers, to respond to any offer of employment for the same occupation with an employer of his choice, made under normal conditions and registered with the employment services of that Member State; and (3) after four years of legal employment in his Member State of residence, to enjoy free access to any paid employment. A similar right has been granted to family members under Article 7 of Decision 1/80.

This concisely described legal framework allows for the following conclusions to be made: firstly, the abolition of nationality clauses should presumably also apply to the benefit of professional athletes of Turkish nationality legally employed in their host Member State, on the basis of Article 37 of the Additional Protocol. This provision appears to fulfil the conditions to be declared directly effective. Secondly, with regard to the transfer rules, the situation is arguably somewhat more intricate. The transfer rules have been brandished by the Court of Justice as directly affecting access to the relevant employment markets.<sup>280</sup> Undeniably, Article 6(1) of Decision 1/80 grants Turkish nationals the right to accede to any paid employment on the condition that they satisfy a precise set of legally established criteria.<sup>281</sup> On several occasions, the Court has affirmed that this provision is directly effective.<sup>282</sup> This right to accede to the labour market conferred upon Turkish workers presumably constitutes the most substantial right granted to third-country nationals in general in international agreements. Be that as it may, in order to be entitled to invoke this Article 6(1) to safeguard the right contained in it, Turkish workers must be

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<sup>279</sup> Case C-355/93 *Eroglu* [1994] ECR I-5113, par. 10; Case C-171/95 *Tetik* [1997] ECR I-329, par. 21; Case C-351/95 *Kadiman* [1997] ECR I-2133, par. 31

<sup>280</sup> *Bosman*, par. 103.

<sup>281</sup> For more details, consult Staples, *o.c.*, at 244-255.

<sup>282</sup> Case C-192/89 *Sevinçe* [1990] ECR I-3461, par. 26; Case C-237/91 *Kus* [1992] ECR I-6807; Case C-98/96 *Ertamir* [1997] ECR I-5179, par. 24.

“duly registered as belonging to the labour force of a Member State”<sup>283</sup> and furthermore “legally employed”<sup>284</sup> in their Member State of residence for a period of four years. Only if these conditions have been rigorously complied with, workers of Turkish nationality can claim access to any paid employment of their choice, a right which is further confined to the territory of their host Member State. Consequently, four years of legal employment in the host Member State does not give them the right to accept any offer of employment in another Member State. In theory therefore, there is no legal basis in the Association Agreement or the subsequent Decisions of the Association Council to evade the application of the transfer rules in the event of an international transfer between clubs in different Member States of a Turkish athlete, even if he has been legally employed for four years in the host Member State. Conversely, it seems that Article 6(1) of Decision 1/80 does oppose against the imposition of a transfer fee when sportsmen of Turkish nationality who have played for four years in the host Member State, move between domestic clubs.<sup>285</sup> Arguably, in practice, the application of this provision leads to the somewhat paradoxical situation that in these particular circumstances, Turkish athletes are in a more advantageous position in relation to the home-grown players, as the *Bosman* ruling of the Court of Justice condemned the transfer rules only in their international context and didn’t extend to the purely internal situation of domestic transfers.<sup>286</sup> Strictly from the point of view of European law, a professional German football team could thus freely engage an out-of-contract Turkish footballer from another German team, provided the Turkish national has been legally playing in Germany for four years, whereas it would have to pay a transfer sum to ensure itself of the services of an equally out-of-contract German player from the same team.

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<sup>283</sup> See Case C-434/93 *Bozkurt* [1995] ECR I-1475, para. 22-23; *Ertamir*, paras. 39 and 43; Case C-36/96 *Günaydin* [1997] ECR I-5143, paras. 29 and 31: according to the Court, two elements are relevant in determining whether a Turkish national must be categorised as “duly registered as a member of the labour force of the host Member State”: firstly, it must be possible to identify the employment relationship within the territory of a Member State; and secondly, the person in question must be engaged in a genuine and effective economic activity, carried out for and under the direction of another person in return for which he receives remuneration.

<sup>284</sup> *Sevince*, par. 32; *Kus*, par. 18; Case C-285/95 *Kol* [1997] ECR I-3069, paras. 27-28: it derives from the Court’s case law that “legal employment” presupposes a stable and secure situation as a member of the labour force in the Member State of residence.

<sup>285</sup> For a concurrent opinion, see Pollet, *o.c.*, at 144.

<sup>286</sup> See also Nyssen & Denoël, *o.c.*, at 122.

### 1.3. Remainder of the Association Agreements: 'Working Conditions & Remuneration'

Running the risk of generalising maybe too broadly, the remainder of the international agreements concluded by the European Community and/or its Member States can grossly be classified in a third category, which only provide for equal treatment of third country nationals legally employed in a Member State - on a basis of reciprocity - as regards working conditions, remuneration - and sometimes also dismissal - in relation to its own nationals. This is the case for the Co-operation Agreements concluded with the Maghreb countries, the Europe Agreements concluded with the Central and Eastern European countries and the Baltic States and the Partnership Agreements concluded with former Soviet Republics. Nationals of these third countries can invoke these rights provided that, firstly, they are legally employed in their host Member State, and secondly, the relevant provisions on the international agreements are considered to be directly effective. This can be further exemplified on the basis of the recent disputes involving a Polish basketball player and a Slovak handball player. In both cases, the players claimed that the sporting federations responsible for the discipline in which they are active had issued rules on foreign players which unjustifiably discriminated against them.

#### 1.3.1. The *Malaja* case

Miss Lilia Malaja is a professional basketball player of Polish nationality. She used to play for Rennes in the French first division. In the summer of 1998, she was recruited by Racing Club Strasbourg for the 1998-99 sports season. The relevant provisions of the Regulation for the women's league of the French Basketball Federation stipulated that maximum ten players could participate to an official match of the championship, out of whom maximum two players could possess the nationality of a non-EU/EEA country.<sup>287</sup> Prior to the engagement of Malaja, RC Strasbourg already employed a Croatian and a Bulgarian player. However, its Bulgarian player was about to acquire the nationality of an EU country through her scheduled marriage with a Greek national. When the marriage was unexpectedly called off, RC Strasbourg effectively faced the problematic situation that during official matches, always at least one of its three non-EU players had to remain sidelined. The club requested the official authorisation from the federation

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<sup>287</sup> More specifically, Article 8 of the rules of the French Basketball Federation.

to grant Malaja the same status as EU/EEA nationals for the purpose of the application of Article 8 of the relevant regulation. For this purpose, it referred to the judgement of the Court of Justice in the case of Bosman and to the Europe Agreement establishing an Association between the European Communities and its Member States and the Republic of Poland.<sup>288</sup> The federation rejected the request in August 1998, and subsequently maintained its position in October 1998, in spite of a procedure of reconciliation<sup>289</sup> which had resulted in a favourable outcome for Malaja and RC Strasbourg. Hereupon, the player and the club instituted legal proceedings before the administrative tribunal of Strasbourg for annulment of the decision of the federation, but their complaint was rejected. The tribunal reached the conclusion that Malaja could not be regarded as being legally employed in France because the national basketball federation had refused to officially recognise her contract with RC Strasbourg. The athlete didn't leave it at that and lodged an appeal against this decision.

In its judgement of 3 February 2000, the Administrative Court of Appeal of Nancy decided to annul the ruling of the administrative tribunal of Strasbourg.<sup>290</sup> Firstly, it had regard to the relevant provisions of the Europe Agreement concluded with Poland.<sup>291</sup> Article 37(1) of the Europe Agreement provides that "subject to the conditions and modalities applicable in each Member State, the treatment accorded to workers of Polish nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals". According to the Court of Appeal, this provision fulfilled the conditions for it to be directly effective.<sup>292</sup> Moreover, it considered that the possibility for an professional athlete to play for a certain team forms part of the working conditions with regard to which Polish workers who are legally

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<sup>288</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, (1993) OJ L 348/2.

<sup>289</sup> Under these circumstances, such a procedure was mandatory according to the terms of Article 19 of the Loi n° 92-652 du 13 juillet 1992 modifiant la loi n° 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives et portant diverses dispositions relatives à ces activités, JO 16 juillet 1992, at 9515 et seq.

<sup>290</sup> Cour administrative d'appel de Nancy, 1re chambre, arrêt du 3 février 2000, *Lilia Malaja c/ Fédération française de basketball* (affaire VC n° 99 NC OO 282): consult <http://jurisweb.citeweb.net>

<sup>291</sup> Cour administrative d'appel de Nancy, 1re chambre, arrêt du 3 février 2000, *Lilia Malaja c/ Fédération française de basketball* (affaire VC n° 99 NC OO 282), 36(2) *RTDeur.* (avril-juin 2000), at 387.

<sup>292</sup> In a later case, the European Court of Justice unequivocally confirmed the direct effect of Article 37(1) of the Europe Agreement concluded with Poland: see Case C-162/00 *Land Nordrhein-Westfalen v Pokrzepowicz-Meyer* [2002] ECR I-1071, paras. 17-30.

employed in France cannot face any form of discrimination. Subsequently, it turned to the contested issue of whether Malaja must be considered as being legally employed in France.<sup>293</sup> Article 337 of the general regulations of the French Basketball Federation stipulates that contracts of employment must be compulsory homologated by the Federation to be regularly recognised and to be able to produce legal effects. However that may be, the Court of Appeal observed that such a requirement cannot have as its object or effect to evade the application of the labour law rules relating to the conclusion and effects of labour contracts, and results in the situation that the beneficiary of the contract, namely the athlete in question, cannot be deemed to be legally employed within the meaning of Article 37(1) of the Europe Agreement in the absence of homologation. Concretely, it ruled that Malaja was in possession of a contract of employment the regularity of which was not disputed under the terms of the labour law legislation. Moreover, the Court of Appeal proceeded holding that she had a valid residence permit and therefore must be regarded as being legally employed in France at the time of the judgement of the administrative tribunal. As a result, it concluded that the French Basketball Federation could not refuse to authorise Malaja to participate to official matches of the Women's championship on the grounds of Article 8 of its Regulations without infringing the principle of non-discrimination, as laid down in Article 37(1) of the Europe Agreement with Poland.<sup>294</sup> Ultimately, this decision was recently entirely upheld on the same grounds by the French Conseil d'Etat.

### 1.3.2. The *Kolpak* case<sup>295</sup>

The dispute involving Mr. Maros Kolpak, a Slovak national, represents a lot of similarities with the *Malaja* case. Since March 1997, Kolpak plays handball as goalkeeper for the German second division team TSV Östringen. Initially, he signed a contract which was due to expire on 30 June 2000. In February 2000, both parties concluded a new contract for the period until 30 June 2003. In return for the services he provides to the club, he receives a monthly salary of DM 2500 net. He resides in Germany and possesses a valid residence authorisation. Rule 15 of

<sup>293</sup> Cour administrative d'appel de Nancy, 1re chambre, arrêt du 3 février 2000, *Lilia Malaja c/ Fédération française de basketball* (affaire VC n° 99 NC OO 282), *o.c.*, at 387-388.

<sup>294</sup> For a more elaborate discussion of the peculiarities of the case, consult Auneau, "Les conditions de résolution d'un contentieux sportif national à la lumière de la jurisprudence communautaire: l'affaire *Malaja*", 36(2) *RTD eur.* (avril-juin 2000), 389-399.

the playing regulations (the 'Spielordnung', hereinafter referred to as 'SpO') of the German Handball Federation (the 'Deutscher Handballbund', further referred to as 'DHB') reads as follows:

1. "The letter A is to be inserted after the licence number of the licences of players
  - a.) who do not possess the nationality of a State of the European Union,
  - b.) who do not possess the nationality of a third country associated with the EU whose nationals have equal rights as regards freedom of movement under Article 39(1) of the EC Treaty,
  - c.) ...
2. In teams in the federal and regional leagues, no more than two players whose licences are marked with the letter A may play in a championship or cup match.
3. ...
4. ...
5. The marking of a licence with the letter A is to be cancelled from 1 July of the year if the player's country of origin becomes associated within the meaning of paragraph 1(b) by that date. The German Handball Federation (DHB) publishes and continually updates the list of the States correspondingly associated."

In correspondence to its own rules, the DHB has issued Kolpak a player's licence marked with the letter A because of his foreign nationality. Kolpak regards this as unfavourable treatment and seeks from the DHB a player's licence without a suffix indicating his foreign nationality. He claims that Slovakia is one of the third countries whose nationals are entitled, under the rules of the SpO and on the basis of the relevant provisions of the Europe Agreement establishing an association between the European Communities and its Member States and the Republic of Slovakia,<sup>296</sup> to an unrestricted authorisation to play, as Germans and nationals of other Member States of the EU/EEA are entitled to. In first instance, the Regional Court of Dortmund ordered the DHB to issue the player's licence sought. The federation appealed against this decision with

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<sup>295</sup> For more details about the facts of the case, consult Stix-Hackl AG in Case C-438/00 *Deutscher Handballbund v Maros Kolpak*, not yet reported, at paras. 6-19.

<sup>296</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, (1994) OJ L 359/2.

the Higher Regional Court of Hamm, which decided to stay the proceedings and referred the matter to the Court of Justice for a preliminary ruling under the third paragraph of Article 234.

Currently, the action is still pending before the Court of Justice. Advocate-General Stix-Hackl presented her opinion on 11 July 2002.<sup>297</sup> The Advocate General conducted her analysis in different steps. Firstly, she examined whether Article 38(1) of the Europe Agreement concluded with Slovakia is directly effective.<sup>298</sup> This provision provides that “subject to the conditions and modalities applicable in each Member State, treatment accorded to workers of Slovak Republic nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals”. In this context, the Advocate General referred to the recent judgement of the Court of Justice in the case of *Pokrzeptowicz-Meyer*,<sup>299</sup> in which the Court had explicitly pronounced that the first indent of Article 37(1) of the Europe Agreement with Poland must be held to have direct effect, so that Polish nationals who assert it may invoke it before the national courts of the host Member State.<sup>300</sup>

For the purposes of this research, it seems interesting to have a closer look at the precise considerations which led the Court to this outcome. Primarily, it must be stated that it is settled case law that a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>301</sup> Firstly, considering the wording of Article 37(1), the Court held that this rule of equal treatment lays down a precise obligation to produce a specific result and, by its nature, can be relied on by an individual to apply to a national court to set aside the discriminatory provisions of a Member State’s legislation, without any further implementing

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<sup>297</sup> Stix-Hackl AG in Case C-438/00 *Deutscher Handballbund v Maros Kolpak*, not yet reported.

<sup>298</sup> Stix-Hackl AG in *Kolpak*, paras. 39-44.

<sup>299</sup> Case C-162/00 *Land Nordrhein-Westfalen v Beata Pokrzeptowicz-Meyer* [2002] ECR I-1071.

<sup>300</sup> *Pokrzeptowicz*, par. 30.

<sup>301</sup> *Pokrzeptowicz*, par. 19; see also Case C-262/96 *Sürül* [1999] ECR I-2685, par. 60; Case C-63/99 *Gloszczuk* [2001] ECR I-0000, par. 30.

measures being required for that purpose.<sup>302</sup> According to the Court, the proviso “subject to the conditions and modalities applicable in each Member State” may not be interpreted in such a way as to allow the Member States to subject the principle of non-discrimination set forth in the first indent of Article 37(1) to conditions or discretionary limitations, as it would render that provision meaningless and deprive it of any practical effect.<sup>303</sup> Secondly, the Court ruled that the provisional conclusion that the principle of non-discrimination is capable of directly governing the situation of individuals is not invalidated either by an analysis of the purpose and nature of the Europe Agreement.<sup>304</sup> According to the 15th recital in the preamble of the Europe Agreement and its Article 1(2), its purpose is to establish an association designed to promote the expansion of trade and harmonious economic relations between the Contracting Parties, in order to foster dynamic economic development and prosperity in Poland, with a view to facilitating its accession to the Community.<sup>305</sup> Moreover, the Court emphasised that the fact that the Europe Agreement is intended essentially to promote the economic development of Poland and therefore involves an imbalance in the obligations assumed by the Community towards the non-member country concerned is not such as to prevent recognition by the Community of the direct effect of certain provisions of that Agreement.<sup>306</sup> Thirdly, the Court considered that the direct effect of Article 37(1) is not affected by the impact of Article 58(1) of the Europe Agreement.<sup>307</sup> The Court stresses that all that follows from Article 58(1) is that the authorities of the Member States remain competent to apply, *inter alia*, their own national laws and regulations regarding entry, stay, employment and working conditions of Polish nationals, while respecting the limits laid down by the Europe Agreement. As a result, it judged that Article 58(1) does not concern the Member States’ implementation of the provisions of the Europe Agreement relating to the free movement of workers and is not aimed at making implementation or the effects of the rule of equal treatment of Article 37(1) subject to the adoption of further national measures.<sup>308</sup> Finally, the

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<sup>302</sup> Pokrzeptowicz, par. 22.

<sup>303</sup> Pokrzeptowicz, par. 24.

<sup>304</sup> Pokrzeptowicz, par. 25.

<sup>305</sup> Pokrzeptowicz, par. 26.

<sup>306</sup> Pokrzeptowicz, par. 27; also Gloszczuk, par. 36.

<sup>307</sup> This Article 58(1) of the Europe Agreement provides: “For the purposes of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement.”

<sup>308</sup> Pokrzeptowicz, par. 28.

Court stipulated that implementation of the first indent of Article 37(1) is not subject to the adoption of additional measures by the Association Council to define the modalities for its application.<sup>309</sup>

In the opinion of Advocate-General Stix-Hackl, a comparison of the Europe Agreements concluded with respectively Poland and Slovakia and, more precisely, the relevant Articles 37(1) and 58 for the former and Articles 38(1) and 59 for the latter, reveals that they have decisive points in common. Firstly, on the basis of their purpose and their nature, one cannot distinguish in principle between the two Agreements. Secondly, also the terms of Articles 37(1) and 38(1) are essentially identical.<sup>310</sup> On these grounds, the Advocate-General submitted that the statements of the Court relating to the Europe Agreement with Poland can be transposed to the Europe Agreement with Slovakia. Concretely, this entails that Article 38(1) of the Europe Agreement with Slovakia is directly effective and that Article 59 of this Agreement does not detract anything from this conclusion.<sup>311</sup>

Once this matter had been settled, the remainder of the case was predictable. Evidently, the Advocate General didn't have any problems in holding that Kolpak belongs to the circle of beneficiaries of Article 38(1), since he has a valid residence permit and it is undisputed that he is linked to handball club TSV Östringen with a contract of employment.<sup>312</sup> Furthermore, she argued that the contested Rule 15 of the SpO relates to the working conditions of handball players to the extent that it effectively restricts the possibilities of nationals of third countries to participate in official matches of the national and regional leagues.<sup>313</sup> In her opinion, Rule 15 of the playing regulations of the DHB unjustifiably discriminates against Slovak handball players on grounds of their nationality.<sup>314</sup> As a result, Advocate-General Stix-Hackl submitted that Article 38(1) of the Europe Agreement concluded with the Slovak Republic precludes that a rule of a

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<sup>309</sup> *Pokrzeptowicz*, par. 29.

<sup>310</sup> Stix-Hackl AG in *Kolpak*, par. 42.

<sup>311</sup> Stix-Hackl AG in *Kolpak*, paras. 43-44.

<sup>312</sup> Stix-Hackl AG in *Kolpak*, paras. 55-58.

<sup>313</sup> Stix-Hackl AG in *Kolpak*, par. 60.

<sup>314</sup> Stix-Hackl AG in *Kolpak*, paras. 62-70.

sporting federation which allows clubs only to field a limited number of third-country nationals in official matches is effectively applied to Slovak nationals.<sup>315</sup>

### 1.3.3. Observations

Arguably, it is conceivable to derive some more generalised conclusions from the above examples on the status in the EU/EEA of workers who are nationals of a third country with which the Community and its Member States have concluded an international agreement. In the first place, all Agreements under consideration invariably presuppose that a third-country national worker is legally employed in the host Member State before he can actually assert the right to equal treatment as regards working conditions and remuneration (and sometimes also dismissal) in relation to that Member State's own nationals. In this respect, regard must always be had to the relevant labour law legislation of the host Member State. Evidently, this is predominantly a factual question which must be evaluated on the basis of the concrete circumstances of each particular case. As has been analysed above, there was some dispute on the issue of whether Malaja could be considered as being legally employed in France in the absence of registration of her contract with RC Strasbourg by the responsible federation, whereas it is not really contested that Kolpak is legally employed in Germany. Legal employment in the host Member State may be a necessary condition, but it is not a sufficient condition to invoke the right to equal treatment conferred to third-country nationals in the international agreement which is of concrete interest to them.

Secondly, nationals of third countries who have passed the first hurdle and are legally employed in their host Member State, are only able to rely on the principle of non-discrimination as regards working conditions, remuneration and dismissal before the national courts of this host State if the relevant provisions of the international agreement concluded between their country of nationality and the Community and the Member States are directly effective. In what is about to follow, it will be endeavoured to give a short examination of some of these provisions laid down in the more important international agreements. This overview is by no means intended to be exhaustive. In the case of *Pokrzepowicz-Meyer*, the Court of Justice unequivocally regarded

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<sup>315</sup> Stix-Hackl AG in *Kolpak*, par. 71.

Article 37(1) of the Europe Agreement concluded with Poland as being directly effective.<sup>316</sup> In her opinion in the case of *Kolpak*, Advocate-General Stix-Hackl reached the same conclusion with regard to Article 38(1) of the Europe Agreement with Slovakia.<sup>317</sup> An examination of the corresponding provisions in the other Europe Agreements concluded between the Community and the Member States and the Central and Eastern European countries and the Baltic States demonstrates that they are all essentially identically worded in clear, precise and unconditional terms. Furthermore, all these Europe Agreements appear to pursue the same or at least similar purpose of establishing an association designed to promote the expansion of trade and harmonious economic relations between the Contracting Parties, in order to foster dynamic economic development and prosperity in these third countries, with a view to facilitating their accession to the Community, and they also seem to have the same nature. Consequently, it is submitted that Article 37(1) of the Europe Agreement with Hungary,<sup>318</sup> Article 38(1) of the Agreement with Romania,<sup>319</sup> Article 38(1) of the Agreement with the Czech Republic,<sup>320</sup> Article 38(1) of the Agreement with Bulgaria,<sup>321</sup> Article 38(1) of the Agreement with Slovenia,<sup>322</sup> Article 37(1) of the Agreement with the Latvia,<sup>323</sup> Article 37(1) of the Agreement with Lithuania,<sup>324</sup> and Article 36(1) of the Agreement with Estonia,<sup>325</sup> etc, which all provide that subject to the conditions and modalities applicable in each Member State, the treatment accorded to workers of the nationality of these countries, legally employed in the territory of a Member State, shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals, are all to be considered as being directly effective.

<sup>316</sup> *Pokrzeptowicz*, paras. 19-30.

<sup>317</sup> *Stix-Hackl AG in Kolpak*, paras. 39-44.

<sup>318</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, (1993) OJ L 347/2.

<sup>319</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Romania, of the other part, (1994) OJ L 357/2.

<sup>320</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, (1994) OJ L 360/2.

<sup>321</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, (1993) OJ L 358/3.

<sup>322</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Slovenia, of the other part, (1999) OJ L 51/3.

<sup>323</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, (1998) OJ L 26/3.

<sup>324</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part, (1998) OJ L 51/3.

By the same token, also Article 23(1) of the Agreement of Partnership and Co-operation concluded by the Community and its Member States with Russia,<sup>326</sup> which provides that “subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State, shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals” could possibly be considered as having direct effect.<sup>327</sup> Conversely, the equivalent provisions in the Agreements of Partnership and Co-operation which the Community and its Member States concluded with other republics of the former Soviet Union, such as, *inter alia*, Ukraine,<sup>328</sup> Moldova,<sup>329</sup> Kazakhstan,<sup>330</sup> the Republic of Kyrgyz,<sup>331</sup> Georgia,<sup>332</sup> Uzbekistan<sup>333</sup>, Armenia<sup>334</sup> or Azerbaijan,<sup>335</sup> in all likelihood lack direct effect, as the Contracting Parties only committed themselves to “endeavour to ensure” that the treatment accorded to the nationals of these countries shall be free from discrimination. Not only the specific wording of these provisions stands in the way of granting them direct effect. It must also be considered that these Agreements of Partnership and Co-operation do not pursue the same goals as the Europe Agreements. In their preambles, no reference is made to “the process of European integration” or the “objective of EU membership”. Instead, these Agreements principally aim towards a gradual rapprochement between ex-Soviet States and a wider area of co-operation in Europe and neighbouring

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<sup>325</sup> Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, (1998) OJ L 68/3.

<sup>326</sup> Agreement on Partnership and Co-operation establishing a partnership between the European Communities and their Member States, of one part, and the Russian federation, of the other part, (1997) OJ L 327/3.

<sup>327</sup> For a concurrent opinion, see Nyssen & Denoël, *o.c.*, at 125.

<sup>328</sup> Article 24(1) Partnership and Co-operation Agreement between the European Communities and their Member States, and Ukraine, (1998) OJ L 49/3.

<sup>329</sup> Article 23(1) Partnership and Co-operation Agreement between the European Communities and their Member States, and the Republic of Moldova, (1998) OJ L 181/3.

<sup>330</sup> Article 19(1), Partnership and Co-operation Agreement between the European Communities and their Member States and the republic of Kazakhstan (1999) OJ L 196/3.

<sup>331</sup> Article 19(1) Partnership and Co-operation Agreement between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part, (1999) OJ L 196/48.

<sup>332</sup> Article 20(1) Partnership and Co-operation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, (1999) OJ L 205/3.

<sup>333</sup> Article 19(1) Partnership and Co-operation Agreement between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, (1999) OJ L 229/3.

<sup>334</sup> Article 19(1) Partnership and Co-operation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, (1999) OJ L 239/3.

<sup>335</sup> Article 20(1) Partnership and Co-operation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, (1999) OJ L 246/3.

regions.”<sup>336</sup> That these Partnership and Co-operation Agreements have a less far reaching impact than the Europe Agreements is further evidenced by the fact that they do not contain specific provisions relating to family members of the nationals of these third countries and that, if they already lay down provisions on social security co-ordination, these entitlements are still purely provisional, so that separate agreements will have to be negotiated at a later stage to guarantee these rights.

Furthermore, the Community has also concluded a series of Co-operation Agreements with some Maghreb countries. The objective of these Agreements is to promote overall co-operation between the Contracting Parties with a view to contributing to the economic and social development of the third country and helping to strengthen relations between the Parties.<sup>337</sup> Although the ambitions of these Agreements are thus obviously less high than these of the Community Treaty, this particular observation didn't prevent the Court of Justice from declaring, in the case of *Kziber*,<sup>338</sup> that it follows from the terms of Article 41(1) of the Co-operation Agreement with Morocco,<sup>339</sup> as well as from the purpose and nature of the Agreement of which that provision forms part, that this Article is directly effective, thereby effectively enabling a Moroccan national resident in Belgium to secure the right of non-discriminatory treatment on grounds of nationality in relation to nationals of the Member State in which he was employed in the field of social security. In view of this unequivocal statement, it is submitted that Article 40 of the same Co-operation Agreement, which stipulates that “the treatment accorded by each Member State to workers of Moroccan nationality employed in its territory shall be free from any discrimination based on nationality, as regards working conditions or remuneration, in relation to its own nationals”, must equally be accorded direct effect so that Moroccan nationals can rely on this provision before Member States' courts. Besides, also Article 39 of the Co-operation

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<sup>336</sup> Peers, “From cold war to lukewarm embrace: the European Union's agreements with the CIS states”, 44 *ICLQ* (1995) 829, at 831.

<sup>337</sup> See for example Article 1 Co-operation Agreement between the European Economic Community and the Kingdom of Morocco, (1978) OJ L 264/2.

<sup>338</sup> Case C-18/90 *Office nationale de l'Emploi v Kziber* [1991] ECR I-199, paras. 15-23.

<sup>339</sup> Article 41(1) provides that “subject to the provisions of the following paragraphs, workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from discrimination based on nationality in relation to nationals of the Member State in which they are employed.”

Agreement concluded with Tunisia<sup>340</sup> and Article 38 of the Co-operation Agreement concluded with Algeria<sup>341</sup> should arguably be regarded accordingly, given that these provisions are identically worded and these Agreements pursue the same objectives and are of the same nature as the Agreement with Morocco.

Consequently, sportsmen who are legally employed in a Member State and who are nationals of a third country with which the European Community and/or its Member States have concluded an international agreement which contains provisions conferring them the right of equal treatment as regards working conditions, remuneration and dismissal within the host Member State in relation to that Member State's own nationals, may thus rely on these provisions before their host State's courts and tribunals, on the condition that these specific provisions are directly effective. Concretely, this entails in the first place that they can oppose against the application of rules on foreign players which have the effect of quantitatively limiting their possibilities to participate in sporting events or even to be officially employed by a sports club. As has already been stated earlier in this section, in *Bosman*, the Court of Justice ruled that Article 39 EC was applicable to "rules laid down by sporting associations which determine the conditions under which professional sports players may engage in gainful employment."<sup>342</sup> It emerges clearly from this statement that these nationality clauses fall within the scope of the notion 'working conditions'. Moreover, these nationality clauses are obviously discriminatory on grounds of nationality and should therefore be abolished in relation to these third-country nationals, because they inevitably result in an infringement of the right of equal treatment granted to them in these international agreements. In this respect, it might be interesting to point out that the Court also explicitly considered that the fact that these nationality clauses sometimes concern not the employment of players, but only the extent to which their clubs may actually field them in official matches is irrelevant, insofar as participation in such matches is the essential purpose of a professional player's activity.<sup>343</sup> Relying on the relevant provisions of the Association Agreements with respectively Russia and Rumania, Valery Karpin and Carmen Contra obtained

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<sup>340</sup> Co-operation Agreement between the European Economic Community and the Republic of Tunisia, (1978) OJ L 265/2.

<sup>341</sup> Co-operation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, (1978) OJ L 263/2.

<sup>342</sup> *Bosman*, par. 116.

<sup>343</sup> *Bosman*, par. 120.

from the Spanish judge the authorisation to consider the nationality restrictions which the Spanish Football Federation still maintained with regard to non-EEA players inapplicable to them,<sup>344</sup> so that they could play undisturbed for their respective employers in the Spanish Primera Division.<sup>345</sup> Admittedly, this is an all in all relatively straightforward conclusion. Secondly, however, it is an entirely different issue whether these privileged third-country nationals can also serve themselves of this right to non-discriminatory treatment laid down in directly effective provisions of the Association Agreements to challenge the application of the transfer rules. In this respect, it has been argued on the one hand that the transfer rules concern the issue of access to employment, rather than that they relate to matters such as working conditions, remuneration and dismissal. As a result, since the right to equal treatment conferred to third-country nationals in these international agreements does not extend to access to the labour market of Member States, the relevant provisions of these Agreements arguably cannot be relied upon to contest the application of the transfer rules. Besides, this conclusion is further reinforced by the observation that the transfer rules do not amount to a discrimination on grounds of nationality, but constitute a genuinely non-discriminatory restriction of the freedom of movement.<sup>346</sup> On the other hand, it has also been advocated that the maintenance of a system of transfer payments in the event of a transfer of a third-country national, in combination with the abolishment of these transfer sums in the similar situation of a transfer of an EU/EEA sportsman, results in discriminatory treatment of the third-country national athletes as regards remuneration.<sup>347</sup> This submission is based on the presumption that when clubs don't have to pay a transfer sum to ensure themselves of the services of a Community national, they are in a position to offer them a salary which is significantly higher than the financial offer they can make to a third-country national for whom they had to pay a transfer sum to engage him. Supposedly, such a situation would amount to a breach of the right to treatment free from discrimination on grounds of nationality as regards remuneration, which is guaranteed to some third-country national athletes in the Association Agreements. Precisely this latter argument has also been raised at the proceedings in the case of

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<sup>344</sup> According to the rules of the Spanish Football Federation, Spanish clubs may only engage five non-EU nationals.

<sup>345</sup> Fylan, "Contra to follow Karpin in bid for EU status", consult [www.fifa.com/reuters](http://www.fifa.com/reuters) of 29 November 2000. In this respect, it is interesting to observe that the Italian Football Federation approved the request of AC Milan to grant EU status to Ukrainian striker Shevchenko, even though the relevant provisions of the Association Agreement with Ukraine are arguably not directly effective. Consult X, "Milan's Shevchenko gets EU status", [www.fifa.com/reuters](http://www.fifa.com/reuters) of 1/12/2000.

<sup>346</sup> For a concurrent opinion, see Pollet, *o.c.*, at 144-145.

<sup>347</sup> See Nyssen & Denoël, *o.c.*, at 123-124.

*Balog*, which will be further discussed below.<sup>348</sup> Interestingly however, the national court which stayed the proceedings and referred the matter for a preliminary ruling to the Court of Justice, asked the Court only for an interpretation of the Community competition rules, and did not explicitly refer to the relevant provisions of the European Agreement concluded with Hungary. Presumably, it might appear somewhat light-hearted to deduce from this simple omission that the national court considered that the contested transfer rules did not constitute an infraction of the right to equal treatment accorded to workers of Hungarian nationality as regards remuneration. However, it is undeniably so that one would inevitably be confronted with a practical problem of proof in this specific context: even if one were to manage to deliver some evidence of disparate treatment as regards remuneration to the detriment of third-country nationals in relation to Community athletes, it would still remain to be conclusively demonstrated that this difference is precisely due to the existence of the system of transfer payments in case of a transfer of a third-country national.<sup>349</sup> This appears to be an arduous task in the light of the availability of alternative plausible explanations: for one, it may simply be that the reason why some third-country nationals are less well paid is because they are less good players. Moreover, the issue of remuneration is a contractual question, which has to be negotiated and agreed upon by both parties: it might thus also be that third-country nationals have lower financial demands than Community athletes. Consequently, it is far from clear and probably even doubtful whether directly effective provisions of Association Agreements may be useful to invalidate the transfer rules in relation to certain privileged third-country nationals. In this respect, it must of course be remembered that the right of treatment free from discrimination is limited to the territory of the host Member State: if the responsible sports federation has maintained the system of internal transfers also for national athletes, as they strictly legally speaking could do, third-country national athletes are not even treated differently.

By way of summary, again, just as was the case for the rights conferred to third-country nationals in Community secondary legislation, this second set of legal instruments granting rights to non-EU nationals combines some strengths with a number of inherent weaknesses. The great advantage in comparison with the derived rights from Article 12 of Regulation 1612/68 is of

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<sup>348</sup> See Report for the hearing in Case C-264/98 *Tibor Balog v Royal Charleroi Sporting Club ASBL*, par. 29, removed from the register.

<sup>349</sup> Nyssen & Denoël, *o.c.*, at 126.

course that third-country nationals are now guaranteed the right to freedom of movement or equal treatment in relation to the host Member State's nationals as regards access to employment, working conditions, remuneration or dismissal – as the case may be – of their own right. Exception made for the free movement right accorded to EEA nationals, this treatment free from discrimination on grounds of nationality remains however limited to the territory of the home Member States. In addition, the third-country nationals are only entitled to invoke the rights conferred on them in the international agreements provided that they are legally employed in their host Member State and that the relevant provisions of the Agreement in question fulfil the conditions to be considered directly effective. The Achilles heel of this particular legal technique of conferring rights upon third-country nationals remains obvious: only the nationals of the non-EU countries with which the European Community and/or its Member States have concluded an Association Agreement can invoke some rights. American and African athletes, to name but the most eye-catching examples, are excluded from this preferential treatment. In the end, it ultimately requires thus a case-by-case analysis to ascertain exactly which nationals of third countries can claim which particular rights.

### 3. Community Competition rules

At this stage, it is interesting to remark that, apart from some Articles of secondary Community legislation and a set of directly effective provisions in Association Agreements concluded between the Community and its Member States, there potentially exists a third legal technique within the Community law framework for third-country nationals to challenge the continued existence of nationality clauses and transfer rules after the *Bosman* decision, albeit outside the formal context of freedom of movement. What is more, the Community competition rules may actually turn out to be the most effective instrument to invalidate the contested rules and practices of the sporting associations.<sup>350</sup> For one, the Articles 81 and 82 EC are unmistakably directly applicable. Moreover, the nationality of the parties which have been adversely affected by the anti-competitive behaviour of undertakings seems to be of little or no relevance. What matters to trigger the application of the competition rules is that the restrictive behaviour takes

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<sup>350</sup> See in respect of the applicability of the competition rules, *inter alia*, Campogrande, "Les règles de concurrence et les entreprises sportives professionnelles après l'arrêt 'Bosman'", 1 *RMUE* (1996) 45; Pappalardo & Parisi, "Le

place within the Community territory. In theory, therefore, Articles 81 and/or 82 EC appear to provide the ideal setting to tackle the issue of nationality clauses and transfer payments in relation to third-country nationals, were it not for the fact that the Court of Justice up until today consistently and rigorously dribbled around the hot potato and refused to pronounce a judgement on the applicability of the Treaty competition rules to regulations of sporting associations, deciding the cases in which the question on the compatibility of certain sporting rules with the competition rules was raised invariably on the basis of the free movement provisions.<sup>351</sup> In the end therefore, from the point of view of the Court in Luxembourg, the relationship between Community competition law and sport is still very much unexplored territory.<sup>352</sup>

Be that as it may, in the case of *Balog*, the Tribunal of First Instance of Charleroi in Belgium requested the Court of Justice to gather up the threads of *Bosman* and to rule unequivocally on the validity of the transfer rules in relation to third-country nationals under the competition rules.<sup>353</sup> The particular circumstances of the case were the following: Mr. Balog was a professional football player of Hungarian nationality. Between 1993 and 1997, he used to play for R.S.C. Charleroi, a Belgian first division team, until the expiry of his contract on 30 June 1997. In April 1997, in conformity with the applicable transfer rules, Charleroi offered him a new contract of a one-year duration, which Balog refused to sign, after the management of the club had revealed in local newspapers that the player didn't fit any more within the future plans of Charleroi and that there was not really a place for him any more in the team. As a result, he was put on the transfer list. Several other clubs showed an interest to engage Balog,<sup>354</sup> amongst them even Kaiserslautern, a leading team in the German Bundesliga, but none of them was prepared to pay the transfer sum, initially set at 125.000 Euro, later decreased to 75.000 Euro by Charleroi in accordance with Article IV/85 of the Regulations of the KBVB. His transfer to the Norwegian

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droit de la concurrence et le sport professionnel par équipe: quelques appréciations critiques sur la notion de marché en cause, en marge de l'affaire 'Bosman', 1 *RMUE* (1996), 57.

<sup>351</sup> See for example *Bosman*, par. 138: "Since both types of rule to which the national court's question refer are contrary to Article 39, it is not necessary to rule on the interpretation of Article 81 and 82 of the Treaty."

<sup>352</sup> For the time being, Advocate-General Lenz' submission in *Bosman* that the transfer rules at stake in the proceedings constituted a violation of Article 81 EC is arguably still the highest authoritative opinion in this particular context.

<sup>353</sup> For more information, consult Blanpain, *De Belgische Voetbalbond, Het Vlaams Decreet Martens en het Arbitragehof: Vrijheid en gebondenheid in de sport. De CAO van 12 juni 1998. De Balog case*, (Peeters, 1998).

<sup>354</sup> In particular Laval and Nancy, two teams playing in the French second division, and Austria Salzburg and Hartberg, two teams evolving in the Austrian second division: see Report of the Hearing in Case C-264/98 *Tibor Balog v Royal Charleroi Sporting Club ASBL*, par. 12, removed from the register.

team of Skeid only fell through because the KBVB refused to deliver the international transfer certificate requested by the Norwegian football federation. For half a year, the situation remained in an impasse. From December 1997 onwards, Balog started playing for Ironi Ashdod in the Israeli first division. The Israeli team only temporarily engaged Balog on a free loan, which entailed that the player remained 'property' of Charleroi, and thus had to return to Charleroi at the end of the season 1997-98. In order to avoid the same 'vaudeville' from happening all over again, Balog decided to take the matter to the national courts in April 1998. Being of Hungarian nationality and therefore a third-country national, he could not directly rely on the *Bosman* judgement of the Court of Justice to vindicate his claimed right to freely move to another club after the expiry of his contract without the imposition of a transfer sum. Consequently, he challenged the remains of the existing transfer system under the Community competition rules. The Tribunal of First Instance of Charleroi stayed the proceedings and referred the matter to the Court of Justice under the Article 234 EC procedure, requesting the Court to rule on the following question: "Is it compatible with Article 81 EC and/or Article 53 EEA that a football team established on the territory of a Member State of the European Union claims to obtain a transfer sum for the engagement of one of his former players, a professional football player with the nationality of a third country whose contract of affiliation with that club has expired, by a new employer established in the same Member State, in another Member State of the European Union or the European Economic Area, or in a third country?"<sup>355</sup>

This time, there really seemed to be no route of escape available to the Court. In its request for a preliminary ruling, the national court had only referred to the conformity of the transfer system in professional football with the Community competition rules, so the Court was forced to couch its judgement in these terms. And yet, the event again didn't materialise, as the dispute was settled out of court. Precisely on the morning of 29 March 2001, when Advocate-General Stix-Hackl was expected to deliver her opinion to the case, the parties reached an agreement not to pursue the proceedings any further. Clearly, the timing of the amicable resolution of the dispute was peculiar and raised some questions. Insiders believed the content of the opinion of the Advocate-General was somehow leaked to the football authorities on the eve of its publication. Supposedly, it contained a condemnation of the transfer rules for breach of the

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<sup>355</sup> Report of the Hearing in *Balog*, par. 12, removed from the register.

competition rules. Presumably, this circumstance would have persuaded FIFA to convince Balog to clinch a deal. Rumours go that the player was offered the sum of two million dollar to drop the case. The impression that this whole scenario of events sounds rather plausible is further reinforced by the fact that the deal included that the actual content of the opinion of Advocate General Stix-Hackl would not be revealed.<sup>356</sup> Besides, in this context it should not be lost out of sight that barely three weeks before, on 5 March 2001, FIFA had managed to come to a consensus with the European Commission on a revised international transfer system, which brought the infringement procedure for breach of the competition rules which the Commission had instigated against the football authorities to a halt.<sup>357</sup> This agreement was generally hailed as a moral victory for the football authorities. Quite understandably, they didn't want to throw to grabs immediately the newly acquired image that they are perfectly well capable of managing their own affairs without legal intervention from outside. From this point of view, an outright condemnation in Luxembourg, even of a rule of the transfer system that was no longer in force at the time of the proceedings, would have a pernicious impact on this perception. And that is not even to speak of the potential effects for future litigation which a principled decision on the applicability of the competition rules on sporting regulations may entail. Consequently, all pieces of the jigsaw fit together. FIFA's sudden and unexpected readiness to reach a friendly settlement in *Balog* is after all rather comprehensible.

From a practical point of view, the concrete outcome of the dispute can hardly be deplored. As a general rule of law, dispute settlement out of court is to be preferred over court litigation. Besides, whatever the decision of the Court of Justice would have been, as such its impact would remain limited to the particular circumstances of the *Balog* case, since the system of transfer payments in the event of international transfers within the territory of the EU/EAA of third-country national football players whose contract of employment with their club has expired had been officially abolished as from 1 April 1999.<sup>358</sup> Be that as it may, however, from a more theoretical point of view, another seemingly excellent opportunity has been lost to finally obtain a principled judgement on the applicability of the Community competition rules to certain

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<sup>356</sup> Surprisingly, some time later, AG Stix-Hackl published an article on the uncomfortable relationship between sport and competition law... Egger & Stix-Hackl, "Sports and Competition Law: a Never-Ending Story?", *ECLR* (2002) 81.

<sup>357</sup> See *infra*, chapter 5.

regulations and practices of sporting federations. Once again, one is left to guess how the Court would have trenched the case. May it suffice to simply state in this context that arguably, the Court would have ruled that the contested transfer rules amount to an unjustified restriction of competition and therefore violate Article 81 EC. It is submitted that the transfer system could be categorised as a decision of associations of undertakings which shares markets or sources of supply, which may affect trade between Member States and has as its effect a restriction of competition within the common market.<sup>359</sup> Furthermore, presumably, also the practice of nationality clauses could be tackled under this particular heading.

### III. CONCLUSIONS

According to the principles of the EC Treaty, as interpreted by the European Court of Justice, the free movement rights belong thus to the exclusive preserve of the nationals of the Member States of the European Union. However, in international agreements concluded by the Community and its Member States and in some acts of secondary Community legislation, some of these movement rights have been conferred to some categories of third country nationals under certain circumstances. For the time being, the whole framework of rights concerning non-EU nationals is extremely complex and rather patchy. Community legislation intended to grant more substantial rights and to introduce more coherence into the system is currently being prepared. This tendency can only be applauded.

The analysis in this section has been predominantly focused on the issue of whether third country nationals could rely on certain provisions of Community law or international agreements to challenge the application of transfer rules and nationality clauses against them. Firstly, with regard to the transfer rules, this was largely a theoretical question for the world of football, as FIFA proceeded to abolish the system of transfer payments in the event of international transfers within the EU/EEA of out-of contract professional players also for third-country nationals as from 1 April 1999. It resulted from the examination that the Community competition rules constitute arguably the most reliable instrument to invalidate these contested transfer rules. Only

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<sup>358</sup> See FIFA Circular n° 616 of 4 June 1997, <http://www.fifa.com>

<sup>359</sup> Article 81.1(c) EC.

the nationals of Norway, Iceland and Liechtenstein can undoubtedly rely on the provisions of the international agreement concluded with the Community – the EEA Agreement – to contest the legality of the transfer system in relation to them. To a more limited extent, this also holds true for Turkish workers on the basis of Decision 1/80 of the EC/Turkey Association Council. The relevant rights conferred to the other third-country nationals in international agreements are mostly limited to treatment free from discrimination within the host Member State with that State's nationals, and furthermore, it is doubtful whether these transfer rules can be convincingly construed as amounting to a violation of this principle as regards remuneration. Besides, for basically the same reasons, Article 11 of Regulation 1612/68 does not appear to be particularly useful in this context either. Secondly, and conversely, these legal instruments seem to be more appropriate to mount a challenge against the nationality clauses which restrict the possibilities for third-country nationals to be engaged by a club or to participate in official matches or competitions. Non-EU nationals who are the spouse or dependent children of a Community worker who has exercised his free movement rights may rely on Article 11 of Regulation 1612/68 before the national courts of the host Member State in this context. Furthermore, the same can be done by nationals of the third countries with which an Association Agreement has been concluded which contains directly effective provisions securing equal treatment within the host Member State as regards working conditions. Presumably, the nationality clauses also amount to an infringement of the Community competition rules. From the point of view of Community law alone already, it therefore seems recommendable and probably even compulsory to eradicate the practice of nationality clauses.<sup>360</sup> Be that as it may, not all national sports associations have effectively carried through this reform. In various sports disciplines in different countries, there are still rules on foreign players in force.

At times, this has given rise to unexpected and utterly unwarranted situations. Under such a regime of nationality clauses, it is clear that an EU passport is a useful asset, as it significantly

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<sup>360</sup> Arguably, on the basis of some provisions of international law or national state law one would reach the same conclusion. However, it would exceed beyond the scope of this research project to consider this issue any further. May it suffice in this respect to refer to one particular example: in the case of Econg, a Nigerian football player, the Italian 'pretore di lavoro' has decided that the rule of the Italian Football Federation according to which team playing in the third division cannot make use of third-country national players is incompatible with the national decree Turco-Napolitano which stipulates that there shall be no discrimination between Italian workers and foreign workers who are residing in Italy, and therefore must be abolished. See [www.kwsport.kataweb.it](http://www.kwsport.kataweb.it) of 3 November 2000, "Extracomunitario, giocherà in C1 per decisione del tribunale. E il calcio italiano trema"

increases an athlete's opportunities to find employment and/or to effectively take part in official matches or competitions. The mere possession of the nationality of an EU country may actually make the difference for a sportsman between a place in the starting line-up of the team in official matches or a seat on the bench, or even between a contract of employment with a club or no contract whatsoever. From this particular perspective it somehow does not come as a surprise that many third-country national sportsmen, in their quest to compete in their sporting discipline under the most favourable personal circumstances possible, have endeavoured to establish a link with a Member State of the European Union, so as to acquire the nationality of this State and the corresponding privileged Community status for sporting purposes. Unsurprisingly, many of these non-EU sportsmen effectively turned out to have one or the other relative or ancestor with the nationality of an EU Member State – often a Southern European country – which enabled them, in accordance with the relevant nationality legislation of the Member State in question, to obtain the EU passport desperately looked after. However, on some occasions, these documents appeared to be of doubtful legal validity.<sup>361</sup> An after all rather innocent identity check in Poland in September 2000 unleashed a real passport scandal when the Polish customs found out that the Portuguese passports of two Brazilian players of Italian football club Udinese, who travelled with their club to Poland for the away game of an UEFA Cup tie, appeared to be false. This scandal concerning false passports for athletes would ultimately assume serious proportions all over Europe. In Italy, where the whole affair was commonly referred to as 'passaportopoli', the Justice Department opened an official enquiry against no less than 7 football clubs and 24 players from the Serie A.<sup>362</sup> And these number could even have been considerably higher if the clubs had not, on their own initiative, refused to take into consideration the EU passport of some of the third-country nationals they employed.<sup>363</sup> Former Lazio Roma midfielder Veron from Argentina and Internazionale striker Recoba from Uruguay were the most famous names implicated in the whole affair. Their Italian passports effectively turned out to be false. In the end, only relative light punishments were inflicted on the clubs and the players who were finally convicted in Italy: they consisted of fines to be paid by the clubs involved and of temporary bans to play for the

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<sup>361</sup> See Leijendekker, "Landstitel van Lazio Roma staat ter discussie door schandaal valse paspoorten", *De Standaard*, 8 February 2001.

<sup>362</sup> Some of the players and teams involved are Cafu and Aldair from AS Roma, Chamot of AC Milan, Mihaljovic of Lazio Roma and Sosa of Udinese.

footballers, which could then easily be circumvented by moving abroad to another Member State. Arguably, French football club St-Etienne paid the highest sporting price for the fraud committed: after the passports of two of its players had turned out to be false, 'les stéphanois' received a severe point penalty from the FFF which ultimately led to the relegation of the club to second division. This whole affair of false passports clearly shows that interests in contemporary professional sports have assumed such dimensions that some athletes and clubs do not eschew from using illegal methods to attain their objectives any longer. Evidently, such sporting fraud should never be tolerated. However, the fact that this practice has actually occurred could also be an additional argument in favour of abolishing these nationality clauses which are in all likelihood untenable under Community

#### ***§4: The Requirement of a Trans-National Underpinning***

In order to trigger the application of the Community free movement provisions, the situation of a Member State national who carries out a genuine and effective economic activity must also contain a certain cross-border element.<sup>364</sup> Without migration from the territory of one Member State to that of another, no free movement protection can be invoked. According to settled case law of the Court of Justice, "the provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law."<sup>365</sup> As Advocate General Fennelly stated, this formula has acquired the status of terms of art used to express the test of applicability of Community law.<sup>366</sup> In this respect, the Court has stressed on repeated occasions that a purely hypothetical prospect of exercising free

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<sup>363</sup> For example, AS Roma didn't trust the Portuguese papers of its Brazilian Asuncao, AC Milan refused to consider the Portuguese papers of Brazilian goalkeeper Dida and Juventus doubted about the validity of the Greek passport of Uruguyan O'Neill.

<sup>364</sup> *Lenaerts & Van Nuffel, o.c.*, at 201-203.

<sup>365</sup> Case 175/178 *R v Saunders* [1979] ECR 1129, par. 11; Case 298/84 *Iorio v Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, par. 14; Case C-332/90 *Steen v Deutsche Bundespost* [1992] ECR I-341, par. 9.

<sup>366</sup> Fennelly AG in Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139, par. 14.

movement rights does not establish a sufficient connection with Community law to justify the application of Community provisions.<sup>367</sup>

As a result of this principle, situations may arise in which static nationals of a given Member State are effectively treated less favourably within their own Member State than nationals of other Member States who have actually moved and may therefore invoke Community law, even though they find themselves in similar factual circumstances. This particular situation is usually referred to as 'reverse discrimination'.<sup>368</sup> In general, it is viewed as a regrettable, but inevitable consequence of the division of the spheres of competence between the Community and its Member States.<sup>369</sup> In principle, Member State nationals who claim to be discriminated against in their own Member State and who seek redress before the national courts against this State must rely on the internal legislation and cannot invoke EC law. Be that as it may, the Court has somehow fine-tuned this position in its case law.<sup>370</sup> At this point, only the most important of these decisions will be highlighted. The Court did for example expressly acknowledge that the fundamental freedoms of persons, establishment and services "could not be fully realised if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and who have acquired, by virtue of such facilities, the trade qualifications referred to by the Directive in a Member State other than that

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<sup>367</sup> See *inter alia*, Case 180/83 *Moser v Land Baden-Württemberg* [1984] ECR 2539, par. 18: the case concerned a German national who had always lived and maintained his residence in Germany, but who, in order to establish a connection with the Community provisions he invoked, claimed that the German legislation denying him access to the teaching profession in that country because of uncertainty as to his loyalty to the Basic law (he was said to be a member of the Communist Party) also precluded him from applying for posts in schools in the other Member States. Similarly, see also Case C-299/95 *Kremzow v Austrian State* [1997] ECR I-2629, par. 16: the Court declined to tackle the question whether the deprivation of an Austrian national's liberty by virtue of a prison sentence imposed by the Austrian courts for murder and possession of firearms constituted an unlawful restriction on the prisoner's freedom of movement, stipulating that "whilst any deprivation of liberty may impede the person concerned from exercising his right of free movement, ... a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions."

<sup>368</sup> For more general information, consult *inter alia*, Canizzaro, "Producing 'Reverse Discrimination' Through the Exercise of EC Competences", *YBEL* (1997) 29; Pickup, "Reverse Discrimination and freedom of movement for workers", 23 *CMLRev.* (1986) 135; Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination", in Kilpatrick, Novitz and Skidmore (eds.), *The Future of European Remedies* (Hart, 2000) 117.

<sup>369</sup> Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?", 39 *CMLRev.* (2002) 731.

<sup>370</sup> See Hedemann-Robinson, "An Overview of Recent Legal Developments at Community Level in relation to Third Country Nationals Resident in the European Union, with Particular Reference to the Case Law of the European Court of Justice", 38 *CMLRev.* (2001) 345.

whose nationality they possess.”<sup>371</sup> Every Community national who has carried out an economic activity in another Member State than that of his nationality is considered by the Court to be covered under the personal scope of application of the free movement of workers and establishment, regardless of his residence or nationality.<sup>372</sup> Furthermore, in the landmark decision of *Surinder Singh*,<sup>373</sup> the Court has postulated that “a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.”<sup>374</sup> It proceeded holding that “he would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.”

Even in spite of these refinements, the ‘wholly internal situation’ approach of the Court of Justice has led to some truly unsatisfactory and unwarranted results, both for Community nationals and their families.<sup>375</sup> A clear illustration of the invidious consequences of the acceptance of reverse discrimination at Community level can also be found in the domain of sport. In the proceedings in the *Bosman* case, UEFA considered that the dispute concerned a Belgian player whose transfer fell through because of the conduct of a Belgian club and a Belgian

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<sup>371</sup> Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, par. 20. See also par. 24: “Although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 43 to ‘nationals of a Member State’ who wish to establish themselves ‘in the territory of another Member State’ cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State’s own nationals when the latter, owing to the fact they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognised by the provisions of Community law, are, with regard to their States of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.”

<sup>372</sup> See *inter alia*, Case C-419/92 *Scholz v Opera Università di Cagliari* [1994] ECR I-505, par. 9; Case C-443/93 *Vougioukas* [1995] ECR I-4033, par. 38; Case C-107/94 *Asscher v Staatssecretaris van Financiën* [1996] ECR I-3089, paras. 31-34.

<sup>373</sup> Case C-370/90 R v *Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265.

<sup>374</sup> *Singh*, par. 19.

<sup>375</sup> See in particular Cases 35-36/82 *Morson and Jhanjan v the Netherlands* [1982] ECR 3723; or Joined Cases C-64&65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171.

association and therefore had to be regarded as a purely internal Belgian situation which consequently fell outside the ambit of Article 39 EC.<sup>376</sup> The Court of Justice swiftly dismissed this argument, pointing out that it was clear from the findings of fact made by the national court that Bosman had entered into a contract of employment with a club in another Member State with a view to exercising employment in that State.<sup>377</sup> It stated that by doing so, the player had accepted an offer of employment actually made, and thus squarely came within the scope of Article 39(3)(a) EC.<sup>378</sup> Subsequently, the Court pursued its analysis along these lines, which ultimately culminated in a condemnation of the international transfer rules which prevent a professional football player who is no longer linked to a contract with his former club from freely negotiating a new contract with a club in another Member State of the European Union for violation of Article 39 EC.<sup>379</sup> Accordingly, the express terms of the ruling do not extend to purely domestic transfers. As a result, on the basis of the Community free movement provisions there seemed to be no immediate need for the national football associations to abolish their domestic transfer regimes. Some federations have actually made use of this opportunity offered by the Court to assert the continued existence of domestic transfer rules. The application of these national transfer systems can under certain circumstances effectively work to the detriment of national players and thus amount to reverse discrimination: if out-of-contract football players who are nationals of a given Member State want to change clubs in their Member State, a transfer sum is still due by the acquiring club, whereas this club can acquire nationals of other Member States who are in the same position for free.

Nevertheless, some observations deserve to be made in this respect. Firstly, it must be noticed that it is in conformity with the Court's established case law on reverse discrimination to consider purely domestic transfers as lying beyond the scope of application of Community free movement law. However, in this context it is submitted that the concept of a 'wholly internal situation' must be interpreted strictly. Arguably, one can only speak of a purely domestic transfer when a player of Member State A is transferred between two clubs of Member State A. The transfer in the summer of 2002 of German midfielder Michael Ballack from Bayer Leverkusen to

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<sup>376</sup> *Bosman*, par. 88.

<sup>377</sup> *Bosman*, par. 90.

<sup>378</sup> *Bosman*, par. 90.

<sup>379</sup> *Bosman*, paras. 92-114.

Bayern Munich provides a good illustration of an entirely internal situation. The same can be said about the deal between Manchester United and Leeds United concerning England's defender Rio Ferdinand. Presumably however, the move of Holland's midfielder Clarence Seedorf from Internazionale to AC Milan cannot be categorized as a wholly internal transfer.<sup>380</sup> Certainly, this transfer is governed by the rules of the Italian football federation, as it is a transaction involving two Italian teams. However, arguably this transfer is also subject to Community law, as it concerns a Community national who has exercised his free movement rights. Under these circumstances, the principles enunciated by the Court's ruling in *Bosman* apply also to an otherwise internal situation. To a certain extent at least, the *Bosman* decision thus also entails direct consequences for domestic transfer systems. Furthermore, also the situation of a Member State national who moved abroad to play for a club in another Member State and is subsequently transferred back to a club of his home Member State escapes in all likelihood the qualification of 'wholly internal'. This submission seems rather straightforward in the light of the previous case law of the Court on this particular issue.<sup>381</sup> However, as Weatherill correctly observed, in this context, the possibility exists that clubs in different Member States conclude co-operation agreements with the sole or primary purpose of deviating the rules.<sup>382</sup> Hypothetically speaking, if Ajax Amsterdam were interested in a player from Feyenoord Rotterdam and wanted to avoid having to pay a transfer sum to ensure itself of his services, it could call upon its Belgian partner to acquire the player for free. Subsequently, after having concluded the transaction, the Belgian team could then simply hand over the player their Dutch partners of Ajax. This kind of artificial constructions runs the risk of being labeled as sham frontier-crossing by the Court, which would imply that the player concerned is incapable of benefiting from the protection granted by Community law.<sup>383</sup> The player may therefore be required to effectively play for a while for the

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<sup>380</sup> For a concurrent opinion, see Mortelmans and Temmink, "UEFA vs J-M Bosman: Het vrije verkeer van beroepssporters in de Europese Unie", 45 *Ars Aequi* (1996) 166; similarly, Thill, "L'arrêt 'Bosman' et ses implications pour la libre circulation des sportifs à l'intérieur de l'Union européenne dans des contextes factuels différents de ceux de l'affaire 'Bosman'", 1 *RMUE* (1996) 100.

<sup>381</sup> Cfr. cases such as *Surinder Singh and Kraus*.

<sup>382</sup> Consult Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", 33 *CMLRev.* (1996) 1020.

<sup>383</sup> See also Case 39/86 *Lair v University of Hannover* [1988] ECR 3161; Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795. On the other hand, Weatherill observed that "the Court's refusal to sanction challenges to domestic rules by 'sham' migrants might not extend to a situation where the domestic rules in question, the transfer system, are not a comprehensive regulatory regime, but merely the tattered and anomalous remnants of a discredited system.": see Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *o.c.*, at 1020.

Belgian team before he can be considered as a 'genuine and effective' economic migrant worthy of the status of Community worker with all the advantages it entails.<sup>384</sup>

Secondly, almost inevitably, the maintenance of domestic transfer regimes had a significant impact on transfer patterns on the players' market.<sup>385</sup> For the clubs, it became financially more attractive to engage players whose contract had expired from teams from other Member States rather than players from clubs from the same League, simply because they did not have to pay transfer fees for the former players. At times, these economic considerations even prevailed over arguments about quality, in the sense that clubs sometimes preferred to acquire a player who was less good than another one, but cheaper. By the same token, also for the players the idea of trying their luck in other Member States had a certain – often predominantly financial – appeal: as clubs in foreign Member States did not have to effectuate a transfer payment in the event of a cross-border transfer, they were often able to offer these players considerably higher salaries than the clubs competing in the same Member State as the player's previous club, which still had to pay a transfer fee for the services of the player. Consequently, as it was interesting both for the clubs as for the players to conclude international transfers, the number of cross-border moves within the European Union increased considerably in the aftermath of the *Bosman* judgement. Moreover, in this context, it must be pointed out that national federations cannot attempt to curb this trend and force clubs to buy national players by setting limits on the number of foreign EU players who can be engaged and/or fielded during official matches, as the Court has equally invalidated similar national clauses in the *Bosman* ruling. Consequently, it appears from the foregoing that the unrestricted possibility of acquiring out-of-contract players from other Member States renders it practically anomalous to maintain the national transfer systems, even though this is strictly legally speaking unobjectionable on the basis of the Community free movement provisions as they are currently interpreted by the Court of Justice in its case law.

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<sup>384</sup> In the light of the recently revised FIFA Regulations on transfers, establishing two periods in a season during which a football player can be transferred internationally, it could forcefully be submitted that a player has to play at least for one period in between two such transfer windows for a foreign club before he can effectively be considered as having moved to another Member State. For a more elaborate analysis, see Chapter 5.

<sup>385</sup> For more detailed information, consult Weatherill, "European Football Law", *Collected Courses of the Academy of European Law, Volume VII, Book I* (Kluwer, 1999), at 376.

Be that as it may, however, thirdly, there remains another legal issue to be resolved: hence, it appears unlikely that the domestic transfer regimes withstand the test of compatibility with the Community competition rules.<sup>386</sup> Immediately after the Court's decision in *Bosman*, in which the Court, conspicuously refrained from addressing the issue from the competition law angle, former European Commissioner in charge of competition affairs Karel Van Miert insisted on a number of different occasions that the maintenance of the national transfer systems, even if their effects are normally limited to one Member State, violates Article 81 EC.<sup>387</sup> Furthermore, he hinted clearly at the fact that the Commission would not hesitate to take the necessary steps in accordance with its prerogatives under Regulation 17/62 to proceed to an official decision for infringement of the competition rules if the responsible football associations did not bring these anti-competitive practices to an end.<sup>388</sup> More concretely, as has been demonstrated above, the existence of transfer systems within one single Member State yields the effect that domestic clubs prefer to engage players from clubs from other Member States and contemporaneously induces players to move to clubs in another Member State. These domestic regimes thus clearly affect trade patterns between Member States within the meaning of Article 81(1) EC. It may very well be that that these practices actually lead to an increase in cross-border trade, but it cannot be denied that they hinder the realisation of "a single market achieving conditions similar to those of a domestic market",<sup>389</sup> which is one of the principal objectives of the Community competition rules.<sup>390</sup> Under these circumstances, domestic transfer systems remain caught under Article 81(1) EC.<sup>391</sup> It is submitted that the precise distortion of competition caused by the maintenance of national transfer systems consists in the fact that competition between clubs with regard to the recruitment of players is artificially directed at footballers playing for foreign clubs, because transfer fees must be paid for out-of-contract domestic players, and also in the fact that the salaries of domestic players are kept lower than they probably would have been in the absence of

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<sup>386</sup> See *inter alia*, *Lenz AG in Bosman*, paras. 254-278; Fleischer, "Absprachen im Profisport und Art. 85 EGV- eine kartellrechtliche Nachlese zum Bosman-Urteil des Europäischen Gerichtshofs", *Wirtschaft und Wettbewerb* 46 (1996) 473; Morris, Morrow and Spink, "EC Law and Professional Football: Bosman and its Implications", 59 *MLR* (1996) 893.

<sup>387</sup> Van Miert, "Sports and Competition: Recent Developments and the Commission's Action", *European Sports Forum*, Luxembourg, 28 November 1997.

<sup>388</sup> Van Miert, "L'arrêt 'Bosman': la suppression des frontières sportives dans le Marché unique européen", 1 *RMUE* (1996) 3.

<sup>389</sup> Case 26/76 *Metro-SB-Grossmärkte GmbH & Co. KG v Commission* [1977] ECR 1875; Case 22/78 *Hugin v Commission* [1979] ECR 1869.

<sup>390</sup> See for example, *Craig & de Búrca, o.c.*, at 936-937.

<sup>391</sup> See Joined Cases 56&58/64 *Consten and Grundig v Commission* [1966] ECR 299.

these transfer systems.<sup>392</sup> Furthermore, there seems to be no recourse available for an exemption of the domestic transfer systems under Article 81(3). In *Bosman*, the Court had ruled that the objectives pursued by the contested transfer rules could be attained with alternative means which were less restrictive of free movement. Consequently, the transfer rules were regarded as being not indispensable and thus failed to pass the test of proportionality. In his opinion to the case, Advocate General Lenz argued that rules which are disproportionately restrictive for the purposes of Article 39 EC should not be able to benefit from an exemption under Article 81(3) EC.<sup>393</sup> Consequently, the existing domestic transfer regimes seem to be open to challenge under the competition rules.

Summarising, it appears the Community competition rules could efficiently be invoked to cancel the unwarranted situations of reverse discrimination caused by the maintenance of transfer systems within one single Member State, which are left unscathed as a result of the Court's unwillingness to intervene in wholly internal situations in the context of Article 39 EC. Effectively, when the Commission in December 1998 sent a statement of objections to FIFA declaring that it intended to start an official procedure for infringement of the competition rules against – amongst others- some remnants of the traditional transfer system, it clearly indicated that also the practice of domestic transfer regimes was under scrutiny. This initiative of the Commission resulted finally in an elaborate revision of some of the salient points of the international transfer system. Rather surprisingly, however, during this whole process no particular attention was paid to the problematic issue of the domestic transfer systems. What is more, in the preamble of the amended FIFA Regulations on transfers, national associations were encouraged to maintain national transfer systems. Apparently, both the Community institutions as the football authorities led thus once again escape an excellent opportunity to finally and definitely abandon these national regimes.

By way of conclusion, it may be worth adding one more observation. The previous example of the continued existence of transfer systems at the level of one Member State and the consequences it entails convincingly demonstrates that the Court's traditional refusal to tackle

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<sup>392</sup> In this respect, I concur completely with the in-depth analysis of Weatherill. Consult Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *o.c.*, 1021-1026.

<sup>393</sup> See Lenz AG in *Bosman*, paras. 277-278.

situations which are internal to one Member State under Article 39 EC is subject to criticism and may ultimately need to be revisited.<sup>394</sup> It does indeed appear somewhat anomalous that a whole framework of rights and entitlements is set up to ensure that Community nationals are ensured of being able to move freely to other Member States, whereas they might encounter difficulties and even outright instances of reverse discrimination when they want to move simply within their own Member State. This seems to go squarely against the whole idea of the internal market.<sup>395</sup> Evidently, this is an extremely complex issue for which no all-encompassing solution might be readily available, as it touches upon the delicate issue of the division of competencies between the Community and its Member States. It would exceed the purposes of this research to dig substantively deeper into this issue. May it simply suffice in this context to state that recently, some interesting actions of the Community institutions can be noticed in this domain, which tentatively appear to go into the direction of some more Community involvement in what may be termed national spheres of competence. Some recent remarkable judgements of the Court of Justice in cases such as *Angonese*<sup>396</sup> and *Carpenter*<sup>397</sup> may be revealing in this respect. It remains of course to be seen whether this trend will be confirmed in subsequent case law and/or secondary legislation...

## **Conclusion**

The picture that emerges clearly from this chapter is that the Community has gradually but certainly, and at times almost unnoticeably, deepened and extended its grip on the world of sport. It must be emphasised though that this is a general development, which has occurred in virtually all sectors of societal life, and which is therefore not specifically related to sport. Undeniably, this evolution is to a large degree the result of the work of the Court of Justice. In the first place, the Court rejected allegations that the relevant free movement provisions could only

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<sup>394</sup> See, for example, *Shuibhne, o.c.*, at 731.

<sup>395</sup> Mortelmans, "Zaak C-415/95 KBVB, Royal Club Liégeois, UEFA tegen J-M. Bosman", 4 *SEW* (1996) 141.

<sup>396</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

<sup>397</sup> Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6305. The case concerned a Philippine national who is married to a national of the United Kingdom and applies for the right of residence in her spouse's State of origin. Carpenter resides in the UK and provides services abroad. In this case, the Court essentially extended the rights granted to workers and their family members in *Singh* to the field of the provision of services.

be applied to public actors - and thus not to private bodies such sporting associations - and adopted a forthright stance on the issue of horizontal direct effect. In *Angonese*, it attributed full horizontal direct effect to Article 39 EC, leaving undecided only the question of whether this principle is limited to discriminatory measures or can also be extended to genuinely non-discriminatory measures. At the moment, there are no concrete indications that the Court would not be found willing to go equally far with regard to Articles 43 and 49 EC, even though it has not yet done so. The principle of free movement of workers - and in the future maybe also the right to freedom to provide services - may thus nowadays arguably be relied upon in a dispute between two private parties, for example a player and his club of affiliation. Secondly, as a result of the Court of Justice's wide approach towards the concept of 'economic activity' within the meaning of Article 2 EC, many sportsmen are nowadays legitimately entitled to move around within the European Union while enjoying the full protection of the relevant Articles 39, 43 and 49 EC. Besides, in this respect it is worth pointing out that even athletes who are active in sport on a mere amateur or recreational basis are presumably no longer *a priori* completely excluded from the ambit of this branch of Community law, through the use of the concepts of Union citizenship or corollary free movement rights or through some provisions of Regulation 1612/68. Thirdly, it has been tentatively indicated that the requirement of a cross-frontier element to is under serious doctrinal strain and that the Court recently might be showing signs of a possible more flexible or lenient approach to the matter, resulting in the application of Community law to situations which previously would have been earmarked as belonging to the exclusive preserve of member States' competence. Finally, also the requirement that one must possess the nationality of a Member State of the Union to be able to invoke free movement rights has been moderated. By means of an extensive series of international agreements with non Member State countries, these rights to freedom of movement have also been conferred, generally on the basis of reciprocity, and albeit mostly only to a greater or lesser extent and provided certain circumstances are complied with, to sportsmen who have the nationality of these third-countries. Furthermore, some categories of third-country nationals - spouses or dependent family members of Community workers - may also derive some rights from Regulation 1612/68. And it is even entirely conceivable that third-country nationals could successfully invoke the Community

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Potentially, this decision has far-reaching consequences, in view of the wide interpretation of the concept of 'services' and also because this freedom also contains the freedom to receive services...

competition rules to object against the application of rules which somehow function as a barrier when they wish to migrate, such as, for example, the contested transfer rules and/or nationality clauses. Consequently, in the light of these developments, it can relatively safely be stated – with a sense of exaggeration - that a basic set of – more or less extended - Community free movement rights nowadays seems to belong to the survival kit of almost every athlete delivering sporting performances in the European Union and wishing to migrate!

## Compatibility with free movement rules In 'Restrictions' We Trust?

### *Introduction*

Once it has satisfactorily been established that the necessary preconditions for the application of the Community free movement provisions are fulfilled, the chronologically next issue to be addressed is whether any given national measure which is under challenge in a particular dispute does actually infringe the relevant Treaty Articles. The specific purpose of this –to a large extent– purely theoretical chapter is to set out concisely the basic concepts and the core principles which are handled by the European Court of Justice to deal with this matter. After these foundations have been laid, the following chapters shall be dedicated to a practical evaluation, precisely on the basis of the instruments developed in this chapter, of whether certain contested sporting rules or practices do survive the test of compatibility with Community law or alternatively, are to be invalidated for violating the free movement provisions.

The structure of this chapter will be as follows: in the first section, the principle of non-discrimination on grounds of nationality, which has traditionally been the guiding principle in the Court's case law with regard to freedom of movement, shall be briefly dealt with. The second section shall be devoted to a short description of the significant evolution in the Court's approach of the free movement provisions from a discrimination-based examination to a more general and wider analysis centred around the notion of restriction. Subsequently, in the third section, it will be endeavoured to clarify this relatively vague concept of restriction, thereby paying particular attention to the idea of market access. Finally, in the fourth section, the different aspects of the issue of justification, to which the Court reverts having reached the conclusion that a contested rule is liable to prevent or render less attractive the right to freedom of movement, will be further elaborated upon.

## *§1. The principle of non-discrimination on grounds of nationality*

In the case of *Ruckdeschel*<sup>398</sup>, the Court of Justice explicitly stated that the general principle of equality is “one of the fundamental principles of Community Law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.”<sup>399</sup> Lenaerts maintains that with this statement, the Court has instituted a superior rule of law with general application.<sup>400</sup> Be that as it may,<sup>401</sup> this principle of equality or non-discrimination also expressly appears in a number of different contexts of the Treaty.<sup>402</sup> One of these areas is of particular interest for the purposes of this research and concerns specifically the prohibition of discrimination on grounds of nationality, as laid down in Article 12 EC and further enunciated in the free movement field in the Articles 39, 43 and 49-50 EC.<sup>403</sup>

### I. ARTICLE 12 EC: GENERAL PROHIBITION

Article 12, situated in Part One on the Principles of the EC Treaty, generally provides that “within the scope of application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited...” Conceptually, the principle of non-discrimination is generally perceived in terms of arbitrarily or unjustifiable unequal treatment between nationals of the host Member State and nationals of the other Member States within an area of Community competence. Moreover, prohibited discrimination on grounds of nationality will also occur where a Member State treats nationals of a given Member State more favourably than the nationals of another Member State of the

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<sup>398</sup> Joined cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, par. 7.

<sup>399</sup> *Ruckdeschel*, par. 7.

<sup>400</sup> Lenaerts, “Gelijke behandeling in het Gemeenschapsrecht”, in Alen & Lemmens (eds.), *Gelijkheid en Non-Discriminatie. Verslagen voortgebracht op een colloquium te Leuven op 10 oktober 1990* (Kluwer, 1991), 50.

<sup>401</sup> For a general application of the principle of non-discrimination, outside the sphere of a specific Treaty policy in which the Treaty referred to it, see for example Cases 75, 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, paras. 16-17; or Case 20/71 *Sabbatini* [1972] ECR 345.

<sup>402</sup> Craig & de Búrca, *EC Law. Text, Cases and Materials* (OUP, 2003), 387-390.

<sup>403</sup> In the first place, there is the more general Article 13 EC. Furthermore, the principle of non-discrimination can also be found, for example, in the context of equal treatment of men and women as laid down in the amended Articles 2 and 3, and in Articles 137 and 141; in the field of agriculture, as between producers and consumers, in accordance with Article 34(2); or in Article 90 EC, prohibiting the imposition of taxes discriminating between domestic products and products imported from other Member States.

European Union.<sup>404</sup> In the first case in which it pronounced itself on the scope of Article 12 EC, the Court ruled that a differential treatment of situations which are not comparable is not discriminatory as such; measures which formally appear to be discriminatory are therefore not necessarily materially discriminatory. Material discrimination involves the different treatment of like situations or the similar treatment of unlike situations.<sup>405</sup> On several occasions, the Court has held that this general principle of non-discrimination on the basis of nationality contained Article 12 EC can only be invoked independently of the other Treaty provisions in situations within an area of Community competence with regard to which there exists no specific Treaty prohibition of discrimination.<sup>406</sup> It has consistently stressed that these more specific Treaty prohibitions of nationality discrimination are to be interpreted in the light of the general prohibition of Article 12 EC.<sup>407</sup> Furthermore, it also decided that national measures incompatible with the provisions laid down in the Article 39, 43 and 49 EC also automatically and inevitably constitute a violation of Article 12 EC.<sup>408</sup>

## II. SPECIFIC EXPRESSIONS OF GENERAL PROHIBITION

### 1. Free movement for workers

Article 39(2) EC stipulates that the freedom of movement of workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Evidently, Article 39 EC represents an application, within the specific context of workers, of the general prohibition of discrimination on grounds of nationality as set out in Article 12 EC. It is unequivocally clear from the wording of this provision that the principle of non-discrimination forms the conceptual basis for the application of the free movement of workers. The only real difficulty which has arisen in the case law of the Court of Justice in this framework concerns the

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<sup>404</sup> Schermers and Waelbroeck, *Judicial Protection in the European Communities* (Kluwer, 1992), 121; Handoll, *Free Movement of Persons in the European Union* (Wiley and Sons, 1995) at 133.

<sup>405</sup> Case 13/63 *Italy v Commission* [1963] ECR 165; Case C-370/88 *Marshall* [1990] ECR I-4071, par. 21.

<sup>406</sup> See, inter alia, Case C-10/90 *Masgio v Bundesknappschaft* [1991] ECR I-1119, par. 12; Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, par. 6; Case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

<sup>407</sup> Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.

<sup>408</sup> Case 305/87 *Commission v Greece* [1989] ECR 1461, par. 12.

interpretation and the mutual relationship of the provisions of the second and third paragraph of Article 39 EC. It has been argued that since the second paragraph expressly restricts the prohibition of discrimination to employment, remuneration and other conditions of work and employment, the prohibition did not extend to the situations contained in the third paragraph.<sup>409</sup> However, in *Saunders*,<sup>410</sup> the Court held that in application of the general principle of Article 12 EC, "Article 39 aims to abolish the legislation of the Member States provisions as regards employment, remuneration and other conditions of work and employment, including the rights and freedom which that freedom of movement involved pursuant to Article 39(3), according to which a worker who is a national of another Member State is subject to more severe treatment or is placed in an unfavourable situation in law or in fact as compared with the situation of a national in the same circumstances". Admittedly, this statement has not been repeated anymore in further judgements, but one can nevertheless assume, since the Court did not expressly override it, that it is still valid, that is to say, that the principle of non-discrimination laid down in Article 39(2) also covers the rights and freedoms guaranteed by Article 39(3).

## 2. Freedom to provide services

Article 49 EC provides that "Within the framework of the provisions set out below, *restrictions* on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Subsequently, Article 50 EC stipulates then that "Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*" (emphasis added). Initially, the wording of the respective Articles 49 and 50 EC may thus have given rise to some doubts or ambivalence as to the specific role or importance attributed to the principle of non-discrimination within the specific context of the freedom to provide services. However, the text of Article 54

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<sup>409</sup> Martin, "'Discriminations', 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *CDE* (1998) at 589-590.

<sup>410</sup> Case 175/78 *R v Saunders* [1979] ECR 1129.

EC<sup>411</sup> and the definition of restrictions in the General Programme for the abolition of restrictions of freedom to provide services<sup>412</sup> leave no doubt that the prohibition of discrimination on grounds of nationality in effect lies at the basis of the provisions concerning this fundamental freedom. This conclusion is further strengthened by the early judgements of the Court of Justice on the matter.<sup>413</sup>

### 3. Freedom of establishment

Article 43 EC provides: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. [...] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter on capital." As was the case with Articles 49-50 EC in the field of services, it cannot clearly be deduced from the wording of Article 43 EC which is the specific function of the principle of non-discrimination within the domain of establishment. In the first paragraph of Article 43 EC, mention is made of the broader term "restrictions", whereas in the

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<sup>411</sup> Article 54 EC provides that "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions *without distinction on grounds of nationality or residence* to all persons providing services within the meaning of the first paragraph of Article 49". In this respect, it must be acknowledged though that the Court of Justice seems to have never invoked this provision to interpret Article 49 EC: see Martin, "Discriminations", 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *o.c.*, at 562. See also Warner AG in Case 52/79 *Procureur du Roi v Debauve* [1980] ECR 833, and the Court's subsequent rejection of his opinion in par. 16 of its judgement.

<sup>412</sup> General Programme for the abolition of restrictions of freedom to provide services of 18 December 1961, *Official Journal of 15 January 1962, Special Editions, Second Series, IX*, p. 32: Restrictions are defined as "any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person *by treating him differently from nationals of the State concerned*." Furthermore, are also to be regarded as restrictions, "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, where, although *applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals*" (Title III) (emphasis added).

<sup>413</sup> Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, par. 25. It must be observed, however, that in paragraph 10 of the same decision, the Court already laid the foundations for a potentially broader approach in the future. Be that as it may, this observation does not detract anything from the fact that the Court views the freedom to provide services as a specific expression of the general principle of equal treatment or non-discrimination. See also Case 39/75 *Coenen v Sociaal-Economische Raad* [1975] ECR 1547.

second part of the Article the Treaty simply refers to “the conditions laid down for its own nationals”. Be that as it may, it is submitted that, in view of the parallel structure of the Articles and the identical concepts used in the two sets of provisions, the observations that were being made in the field of services also hold true for Article 43 EC. This implies that an analogous outcome applies and that the prohibition of discrimination on grounds of nationality also forms the conceptual basis of the fundamental freedom of establishment. This conclusion is further corroborated by the provisions of the General Programme for the abolition of restrictions on freedom of establishment<sup>414</sup> and has been confirmed in the case law of the Court of Justice.<sup>415</sup>

## ***§2: From discriminations to restrictions***

It results clearly from the analysis in the preceding section that the principle of non-discrimination on grounds of nationality lies at the heart of the application of the Community provisions on the free movement of workers, the freedom of establishment and the freedom to provide services. Originally, in the early case law of the Court, it even constituted the undisputed decisive criterion in the assessment of the Court of whether a contested national measure breached the relevant Treaty provisions. However, by the same token, it cannot be denied that Article 3(1.c) EC has stipulated from the outset that the activities of the Community shall comprise “an internal market characterised by the abolition, as between Member States, of *obstacles* to the free movement of goods, persons, services and capital.” As a result, it didn’t entirely come as a surprise that the Court gradually started to strengthen its grip on the free movement provisions, extending its supervision over the lawfulness of national rules from a pure discrimination-based control to a wider investigation into the existence of restrictions to the right to freedom of movement. This development occurred first in the sphere of the free movement of goods. Subsequently, the domains of the other fundamental freedoms were characterised by an identical evolution.

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<sup>414</sup> General Programme for the abolition of restrictions on freedom of establishment, *OJ Special Edition*, Second Series, IX, 7.

<sup>415</sup> Case 2/74 *Reyners v Belgian State* [1974] ECR 631.

## I. FREE MOVEMENT OF GOODS

In a nutshell, the case law of the Court of Justice in the context of Article 28 EC with regard to the importance of the prohibition of discrimination on grounds of nationality can be summarised as follows. As a starting point, the principle non-discrimination does not figure within the main provision on the free movement of goods.<sup>416</sup> It seems thus obvious that it does not constitute the conceptual basis of Article 28 EC. However that may be, as from the early beginning, Directive 70/50<sup>417</sup> defined measures having an effect equivalent to quantitative restrictions on the basis of a reference to the principle of non-discrimination,<sup>418</sup> even though it also foresaw already the possibility of bringing indistinctly applicable rules under the scope of Article 28 EC.<sup>419</sup> The famous *Dassonville* formula,<sup>420</sup> subsequently confirmed in *Cassis de Dijon*,<sup>421</sup> established that as soon as a trading rule was found to be capable of restricting inter-state trade, regardless of whether the measure was discriminatory or indistinctly applicable, Article 28 EC came into play. The decisive element to come to a measure having an effect equivalent to quantitative restrictions is thus the effect of a rule: it must be capable of restricting inter-state trade.<sup>422</sup> A discriminatory intent is not required. In essence, therefore, the principle of non-discrimination originally only played a role of secondary importance, subordinate to the concept of 'obstacle' to the freedom of movement, mainly exercising some influence on the issue of justification, as will be demonstrated below. After *Cassis de Dijon*, it was clear that Article 28 EC covers discriminatory as well as indistinctly applicable national measures. How relatively straightforward this situation may have appeared from the outside, reality turned out to be all but

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<sup>416</sup> Article 28 EC simply provides that "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States". This Article makes no reference as such to the principle of non-discrimination.

<sup>417</sup> Directive 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L 13/29.

<sup>418</sup> Article 2(1) Directive 70/50: measures having equivalent effect are "measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place including measures which make importation more difficult or costly than the disposal of domestic production.

<sup>419</sup> Article 3 Directive 70/50.

<sup>420</sup> Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, par. 5.

<sup>421</sup> Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, par. 8.

<sup>422</sup> In a more recent case, Advocate General Darmon argued that a non-discriminatory national measure could only infringe Article 28 EC if the rule had caused a specific restriction to inter-state trade. The Court however, rejected his opinion and followed the line of reasoning it had adopted in *Dassonville* : see Case 207/83 *Commission v United Kingdom* [1985] ECR 1201.

a bed of roses. The problem was that basically, all rules which concern trade, whether they are discriminatory or not, regardless of any protectionist intent, could in some way or the other be construed as constituting an obstacle to the freedom of movement of goods. Under the broad definition of measures having equivalent effect to quantitative restrictions adopted by the Court of Justice in *Dassonville*, potentially all these measures were susceptible of violating Article 28 EC. And this theoretical scenario did effectively materialise, as the Court found itself confronted with a huge workload of cases involving the application of Article 28 EC. The Court had to deal with a wide range of different and often very difficult or locally sensible factual situations, and was almost bound to render some judgements which are not always entirely convincing, logically consistent or reconcilable with each other.<sup>423</sup> Hence, unsurprisingly, it came under increasing doctrinal strain to find a solution for this untenable situation.<sup>424</sup> After a period of relative uncertainty, the Court considered it "necessary to re-examine and clarify its case law on this matter" in *Keck and Mithouard*.<sup>425</sup> Essentially, what the Court did in *Keck* was to institute a formal distinction between measures relating to product characteristics and measures concerning selling arrangements and to bring the principle of non-discrimination all of a sudden to the fore front: on the one hand, as far as the former measures are concerned, everything remains as it was after *Cassis de Dijon*,<sup>426</sup> but on the other hand, as for the latter measures, the picture has changed drastically: whereas genuinely non-discriminatory selling arrangements walk free and escape scrutiny under Article 28 EC,<sup>427</sup> discriminatory selling arrangements fall nonetheless under

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<sup>423</sup> See, for example, on the one hand Case 75/81 *Blesgen* [1982] ECR 1211; and to the same effect Case 148/85 *Forest* [1986] 3448; Case C-69/88 *Krantz* [1990] ECR I-583 and Case C-23/89 *Quietlynn v Southend Borough Council* [1990] ECR I-3059; and on the other hand, Case 286/81 *Oosthoek Uitgeversmaatschappij BV* [1982] ECR 4575; Case 382/87 *Buet v Ministère Public* [1989] ECR 1235; Case C-145/88 *Torfaen Borough Council v B&Q* [1989] ECR 3851 and Case C-312/89 *Union départementale des syndicats CGT de l'Aisne v SIFEDEF Conforama* [1991] ECR I-997.

<sup>424</sup> Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?", 28 *CMLRev.* (1991) 115; Steiner, "Drawing the Line: Uses and Abuses of Article 30 EEC", 29 *CMLRev.* (1992) 749; White, "In Search of the Limits to Article 30 of the EEC Treaty", 26 *CMLRev.* (1989) 235.

<sup>425</sup> Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097, par. 14.

<sup>426</sup> *Keck and Mithouard*, par. 15.

<sup>427</sup> *Keck and Mithouard*, paras. 16-17: "contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgement [...] provided that those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States." Subsequently, the Court concluded that "where those conditions are fulfilled, the application of such rules to the sale of products from another Member State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 28 of the Treaty."

Article 28 EC and can only be upheld when adequately justified. Even though this decision hasn't met with unanimous approval,<sup>428</sup> the Court has continuously applied it rather rigorously in all subsequent cases concerning the free movement of goods which have come under its scrutiny.<sup>429</sup> Therefore, if the principle of non-discrimination has not overtaken the concept of obstacle or restriction as the conceptual basis on which Article 28 EC is construed, it is nonetheless at least prominently present now within the framework of free movement of goods.

## II. EVOLUTION WITHIN THE OTHER RELEVANT FREEDOMS

Under influence of the Court's jurisprudence on the free movement of goods in *Dassonville* and *Cassis de Dijon*, the emphasis in the Court's reasoning with regard to the other fundamental freedoms has equally shifted from a discrimination-dominated analysis to a kind of two-steps legality procedure in which the Court firstly simply examines whether the national measure at stake constitutes a barrier to the right of freedom of movement and subsequently verifies whether this restriction can be properly justified. This development occurred chronologically first in the domain of services, before materialising as well within the sphere of workers and establishment. Interestingly however, instead of transposing to the other fundamental freedoms the whole mechanism elaborated in its case law concerning goods to trigger the application of the relevant Treaty provisions, the Court actually stopped one step short of doing so, conscientiously refusing for the moment to extend its threshold-test laid down in *Keck* to the other freedoms. This particular feature of the Court's case law will be further dealt with in detail in the next part of this chapter.

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<sup>428</sup> Chalmers, "Repackaging the Internal Market – The Ramifications of the *Keck* Judgement", 19 *ELRev.* (1994) 385; Maduro, *We the Court, the European Court of Justice and the European economic Constitution* (Hart, 1998) 83-87; Reich, "The 'November Revolution' of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited", 31 *CMLRev.* (1994) 459.

<sup>429</sup> See for example, Case C-292/92 *Hunermund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787; Cases C-401&402/92, *Criminal Proceedings against Tankstation 't Heukske vof and Boermans* [1994] ECR I-2199; Cases C-69&258/93 *Punto Casa SpA v Sindaco del Comune di Capena* [1994] ECR I-2355; Cases C-418-421, 460-462 and 464/93, 9-11, 14-15, 23-24 and 332/94 *Semeraro Casa Uno Srl v Sindaco del Comune di Erbusco* [1996] ECR I-2975; Cases C-34-36/95 *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB & TV-Shop i Sverige AB* [1997] ECR I-3843.

## 1. Freedom to provide services

Advocate-General Jacobs had pleaded in favour of this transposition in his opinion in the case of *Säger*, in which he argued that “it may be thought that services should rather be treated by analogy with goods, and that non-discriminatory restrictions on the free movement of services should be approached in the same way as non-discriminatory restrictions on the free movement of goods under the ‘*Cassis de Dijon*’ line of case law...I do not think that it can be right to state as a general rule that a measure lies wholly outside the scope of Article 49 simply because it does not in any way discriminate between domestic undertakings and those established in other Member States. Nor is such a view supported by the terms of Article 49: its expressed scope is much broader.”<sup>430</sup> The Court followed the opinion of its Advocate-General, ruling that “Article 49 requires not only the elimination of discrimination against a provider of services on the ground of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.”<sup>431</sup> On precisely the same day as the decision in *Säger*, the Court built its judgement in the case of *Collectieve Antennevoorziening Gouda*<sup>432</sup> on exactly the same grounds.<sup>433</sup> The wording of these decisions is clearly influenced and even modelled on the Court’s case law concerning the free movement of goods.<sup>434</sup> It may be true, as Martin observes, that the theoretical definition given by the Court of the scope of application of Article 49 EC in these judgements in reality is purely reminiscent of what the General Programme of 1961 qualified as instances of indirect discrimination,<sup>435</sup> but the fact remains that the Court unequivocally couched its rulings in terms of restrictions, in spite of the apparent discriminatory nature of the national provisions in question. These judgements therefore clearly

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<sup>430</sup> Jacobs AG in Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, at 4234-4235.

<sup>431</sup> Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221, par. 12.

<sup>432</sup> Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda & Others v Commissariaat voor de Media* [1991] ECR I-4035; see also Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069.

<sup>433</sup> *Gouda*, par. 14.

<sup>434</sup> Marengo, “The Notion of Restriction on the Freedom of Establishment and Provision of Services in the Case-law of the Court”, 11 *YBEL* (1991) 111, at 142.

<sup>435</sup> Martin, “‘Discriminations’, ‘entraves’ et ‘raisons impérieuses’ dans le Traité CE: trois concepts en quête d’identité”, *o.c.*, at 570-572.

signal the Court's determination to abandon its traditional discrimination-based analysis in favour of the broader approach to restrictions also within the field of the free movement of services.<sup>436</sup>

## 2. Freedom of establishment and free movement of workers

A similar approach to that adopted in the aforementioned cases on services has been pursued by the Court of Justice with regard to the freedom of establishment and the free movement of workers. In *Stanton v INASTI*,<sup>437</sup> for example, a case concerning social security exemptions for self-employed persons, the Court preliminarily held that the national legislation at issue was applicable without distinction to all self-employed persons working in Belgium and did not discriminate according to the nationality of those persons. In addition, it specifically stated that the national legislation in question could not be considered to result in indirect discrimination on grounds of nationality.<sup>438</sup> Despite this conclusion, the Court proceeded stipulating that the provisions in the Treaty relating to the free movement of persons are "intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State."<sup>439</sup> More recently, in *Kraus*,<sup>440</sup> the Court had to ascertain whether a Member State was legitimately entitled to prohibit one of its own nationals who holds a postgraduate academic title awarded in another Member state from using that title on its territory unless he has obtained administrative authorisation to do so. The Court stipulated that "Articles 39 and 43 preclude any national measure governing the conditions under which an academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member States which enacted the measure, of fundamental

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<sup>436</sup> O'Leary, "The Free Movement of Persons and Services", in Craig & de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999) at 402.

<sup>437</sup> Case 143/87 *Stanton v INASTI* [1988] ECR 3877.

<sup>438</sup> *Stanton*, par. 9.

<sup>439</sup> *Stanton*, par. 13.

<sup>440</sup> Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

freedoms guaranteed by the Treaty.”<sup>441</sup> The situation would be different only if such a measure were adequately justified.<sup>442</sup>

The Court’s judgement in *Kraus* is often marked as the starting point in the field of workers and establishment of the ‘restriction-legality approach’. Again, Martin has questioned the appropriateness of the Court’s reasoning in this respect: he argues that the decision does not take into account that Articles 39 and 43 EC do not only restrict direct discrimination on grounds of nationality, and that the terminology of the Court does no more than repeat the wording of the General Programme of 1961 on indirect discrimination.<sup>443</sup> Intrinsically, these criticisms are no doubt correct indeed. However to may be, I tend to agree with Craig and de Búrca who observe that even though this seems in fact an exemplary case of an indirectly discriminatory measure, the judgement of the Court nevertheless seems to imply that “even if just as many or more German nationals than non-nationals established in Germany were obtaining LL.M. degrees in other Member States, the restriction would still fall within the scope of Article 43 despite its non-discriminatory nature, and the fact that the complainant was a German national adds force to this suggestion.”<sup>444</sup> In his opinion in the case of *Bosman*, also Advocate General Lenz forcefully argued that it need not be decided whether judgements in cases such as *Ramrath* and *Kraus* could also have been reached on the basis of a - broadly interpreted - prohibition of discrimination.<sup>445</sup> According to him, “what is decisive is that the Court precisely did not choose that path.”<sup>446</sup> The Court’s unambiguous statements in aforementioned cases have removed all his doubts as to whether the requirements of Article 39 go beyond the principle of treatment like a national of the host State. “If Article 39 was indeed limited to imposing an obligation on the Member States to treat its own nationals and nationals of other Member States in the same way, it would be neither necessary nor admissible to examine whether the relevant national provisions are lawful.

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<sup>441</sup> *Kraus*, par. 32.

<sup>442</sup> To the same effect, see Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351.

<sup>443</sup> See Martin, “‘Discriminations’, ‘entraves’ et ‘raisons impérieuses’ dans le Traité CE: trois concepts en quête d’identité”, *o.c.*, at 587-588.

<sup>444</sup> Craig & de Burca, *EC Law. Text, Cases & Materials* (OUP, 2003), at 786.

<sup>445</sup> Lenz AG in *Bosman*, par. 187. In this context, he also referred to Van Gerven AG in *Kraus*, at 1677, who opined that the national measure in question was discriminatory contrary to Article 39(2) EC. Conversely, AG Lenz considered it “irrelevant whether the provisions examined by the Court were perhaps cases of indirect discrimination.” See also Nachbaur, “Art.52 EWGV – Mehr als nur ein Diskriminierungsverbot?”, *Europäische Zeitschrift für Wirtschaftsrecht* (1991) at 471.

<sup>446</sup> Lenz AG in *Bosman*, par. 187.

Precisely that question, however, is what the Court is examining here. That shows that in the Court's opinion Article 39 may also apply to provisions of a Member State which apply without distinction for its own nationals and for nationals of other Member States."<sup>447</sup> Advocate-General Lenz viewed the conventional interpretation of Article 39 EC as only prohibiting discriminatory measures as the most evident and most serious restriction on freedom of movement.

In *Bosman*, the Court first reiterated its statement of the *Stanton* decision to the effect that the Treaty provisions relating to the free movement of workers are aimed at facilitating "the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State."<sup>448</sup> Subsequently, it specified that in that context, "nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity."<sup>449</sup> In the light of this, it ruled that "provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned."<sup>450</sup> In the light of the already rather unambiguous statements of the Court in *Kraus* and *Ramrath*, it is probably more accurate to say that the Court in *Bosman* unequivocally confirmed that genuinely non-discriminatory measures are covered under the scope of the free movement provisions. The specific importance of *Bosman* lies in the fact that it constitutes the first case in which a genuinely non-discriminatory measure were involved. Indeed, contrary to the rules at issue in the previous cases of *Kraus* and *Ramrath*, which arguably could still be considered as indirectly discriminatory, the transfer rules at stake in *Bosman* applied both legally and factually in an equal manner to professional football players.

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<sup>447</sup> Lenz AG in *Bosman*, par. 190.

<sup>448</sup> *Bosman*, par. 94. See *Stanton*, par. 13; also case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, par. 16.

<sup>449</sup> *Bosman*, par. 95. See also, *inter alia*, Case C-363/89 *Roux v Belgium* [1991] ECR I-273.

<sup>450</sup> *Bosman*, par. 96. In this respect, the Court also referred to Case C-10/90 *Masgio v Bundesknappschaft* [1991] ECR I-1119, paras. 18-19.

### §3: The concept of 'restrictions'

On several occasions by now, the Court has reiterated that provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement must be regarded as a restriction to that freedom.<sup>451</sup> This basic conception of restriction is an extremely wide one, and is in many aspects reminiscent of the famous *Dassonville*-formula the Court applied for many years in the field of the free movement of goods. Viewed in this way, the notion of restriction basically encompasses potentially almost every regulatory rule, even when it has, strictly speaking, nothing to do with the exercise of the right to freedom of movement.<sup>452</sup> Hence, this situation might lead to a floodgate of challenges to existing national rules and regulations which may be perfectly legitimate at first sight, but which will now be captured by the free movement provisions under the –according to some, possibly unduly wide<sup>453</sup> – heading of restrictions. These contested measures will only be safeguarded if their existence can be backed up by an acceptable means of justification. The Court faces the uphill task to deal with these cases one by one. Clearly, this is an unappealing perspective. In order to prevent this scenario from occurring, several suggestions have therefore been made to erect a kind of dam against the risk of too many challenges, similar to what happened in the field of goods in the post-*Dassonville* period.

## I. SOME DOCTRINAL ATTEMPTS TO DELIMITATE THE CONCEPT

### 1. Transposition of Keck?

Firstly, it has been suggested to transpose the essence of the Court's decision in *Keck* from the field of goods to the domain of persons and services. The issue was raised explicitly in the cases of *Alpine Investments*<sup>454</sup> and *Bosman*. In *Alpine Investments*, the Court ruled that the legislation at issue was not analogous to the legislation concerning selling arrangements held in

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<sup>451</sup> *Bosman*, par. 96.

<sup>452</sup> See also Hoskins, "The impact of the free movement rules of the EC Treaty on sports", "Sports: Competition Law and EC Law" Conference, London, 10 February 1999

<sup>453</sup> See for example O'Keeffe & Osborne, "L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen", 1 *RMUE* (1996) 17

<sup>454</sup> Case C-384/89 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141.

*Keck* to fall outside the scope of Article 28 EC. It held that a “prohibition such as that at issue is imposed by the Member States in which the provider of services is established and affects not only offers made by him to addressees who are established in that State or move there in order to receive services, but also offers made to potential recipients in another Member State. It therefore directly affects access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services.”<sup>455</sup> In principle, the Court thus didn’t outright exclude the possibility of implementing its *Keck* judgement in the spheres of the other freedoms, it solely distinguished from *Keck* on the basis of the different factual circumstances: whereas the case of *Keck* turned around rules of the importing State relating to selling arrangements within the territory of that State, *Alpine Investments* concerned rules of the exporting State imposing respect for its own rules in the territory of other Member States.<sup>456</sup> Similarly, in *Bosman*, as will be demonstrated in a later chapter, the Court rejected the analogy with *Keck* following the same logic.<sup>457</sup> For the time being, the Court has thus resisted the temptation to simply transpose its *Keck* ruling to the other freedoms, without excluding the possibility that one day, it will do so. Furthermore, it is rather improbable that it will actually happen,<sup>458</sup> as the Court conspicuously refrained from using *Keck* in the *de Agostini* case in the context of Article 49 EC,<sup>459</sup> whereas it contemporaneously applied the *Keck* principles in the context of Article 28 EC.<sup>460</sup>

## 2. ‘Access’ versus ‘exercise’?

Alternatively, it has also been suggested in the legal doctrine to introduce a similar ‘filter test’ as the one introduced in *Keck* to the domain of the free movement of persons and the freedom to provide services, specifically adapted to the particularities of these freedoms. In this respect, Advocate General Lenz in *Bosman* was of the opinion that if one wished to apply the case law on Article 28 EC by analogy, one might consider drawing a distinction between measures which

<sup>455</sup> *Alpine Investments*, par. 38.

<sup>456</sup> See also O’Keeffe & Osborne, “The European Court Scores A Goal”, *The International Journal of Comparative Labour Law and Industrial Relations* (Summer 1996) at 118.

<sup>457</sup> *Bosman*, paras. 102-103.

<sup>458</sup> Stuyck, “Annotation of Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentenombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV-Shop i Sverige AB*”, 34 *CMLRev.* (1997) 1445.

<sup>459</sup> Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentenombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV-Shop i Sverige AB* [1997] ECR I-3843, paras. 48-54.

<sup>460</sup> *De Agostini*, paras. 39-47.

regulate access to occupational activity and measures which are directed more to the exercise of that activity.<sup>461</sup> He argued that Article 39 EC must apply to non-discriminatory restrictions on freedom of movement, at least when the restriction relates to access to the employment market in other Member States.<sup>462</sup> In other words, he assimilated rules on access to rules relating to product characteristics and rules on exercise to rules regarding selling arrangements, in the sense that the latter, contrary to the former, may remain outside the scope of the free movement provisions. Interestingly in this respect, Advocate General Alber expressed a different opinion in *Lehtonen*. In principle, he did not exclude that the Court could envisage the possibility of drawing a distinction between rules on access and rules on exercise.<sup>463</sup> Nevertheless, he argued, by reference to *Keck*, that rules on the exercise of a profession/occupation are much closer to product-related rules than to rules on selling arrangements. According to him, "rules on exercise must, like product-related rules, be complied with directly by a citizen of the Union who wishes to assert the fundamental freedom under Article 39 of the Treaty. He must take account of new rules of exercise and acquire corresponding qualifications, possibly after every cross-frontier change of employment."<sup>464</sup> In his opinion in *Graf*, Advocate General Fennelly tried to explain this "apparent disagreement" as arising "in part from a different understanding of what is meant by rules governing the exercise of an economic activity." He submitted that "national provisions which require certain skills of economic actors and thus tend to subject migrant workers to a dual regulatory regime are more readily classifiable as formally affecting access, or at the very least, as in *Kraus* and *Choquet*, as being sufficiently closely bound up with market access as to be subjected to a similar regime."<sup>465</sup> Be that as it may, in spite of this laudable attempt to reconcile both views, this rather essential difference of opinion arguably clearly demonstrates that it is probably not feasible and possibly not even desirable to introduce or to maintain a rigid distinction between measures relating to access and those directed at the exercise of an employment activity. Two simple examples may serve to illustrate this point: Admittedly, a measure reducing the number of sport clubs participating in a certain league or competition does affect the exercise of that sport, but it does not have an impact on the access to the market of that

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<sup>461</sup> Lenz AG in *Bosman*, at 5009, par. 205.

<sup>462</sup> Lenz AG in *Bosman*, at 5008, par. 203.

<sup>463</sup> Alber AG in Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball ('FRBSB')* [2000] ECR I-2681, at 2695, par. 46.

<sup>464</sup> Alber AG in *Lehtonen*, at 2696, par. 48.

<sup>465</sup> Fennelly AG in Case C-190/98 *Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493, at 510, par. 33.

sport, at least not directly. Conversely, however, transfer periods, limiting the possibility for athletes of moving from one sports team to another to certain prescribed periods during the sports season, clearly affect the exercise of any given sports discipline that makes use of them. At the same time, arguably, they also affect the access to the employment market of sportsmen who want to be transferred to a team belonging to another national federation and thus wish to exercise their right to freedom of movement.<sup>466</sup> Consequently, it is submitted that measures on access to a sports discipline and measures relating its exercise are partly overlapping categories,<sup>467</sup> which renders them unsuitable as a filter test for the application of the free movement of persons and the freedom to provide services.

### 3. 'Substantial restriction of access to the market'?

Another proposition ensued from the fact that the Court's judgement in *Keck and Mithouard* could not count on unequivocal support and was widely criticised in the legal doctrine.<sup>468</sup> In his opinion in the case of *Leclerc-Siplec*, Advocate General Jacobs commented on the issue.<sup>469</sup> Basically, he agreed with the outcome in *Keck*, but nevertheless, he found the decision unsatisfactory for two reasons. Firstly, he rejected the distinction between rules concerning selling arrangements and those relating to product characteristics as too rigid.<sup>470</sup> Secondly, he remarked that the exclusionary rule amounted to re-introducing a test of discrimination in relation to restrictions on selling arrangements which he considered inappropriate.<sup>471</sup> Instead, he favoured

<sup>466</sup> See also Alber AG in Lehtonen, at 2695, par. 47.

<sup>467</sup> See also Barnard, "Fitting the remaining pieces into the goods and persons jigsaw", 26 *ELRev.* (2001) 58.

<sup>468</sup> See, *inter alia*, Weatherill, "After Keck: Some Thoughts on how to Clarify the Clarification", 33 *CMRev.* (1996) 885; Barnard, "Fitting the remaining pieces into the goods and persons jigsaw", *o.c.*, at 51-52. Amongst others, it is submitted that the *Keck* decision is too rigid and that paragraph 17 is not always entirely accurate under all circumstances. It may actually turn out that contested measures which are factually and legally equal in application are not such as to deter or prevent access to the market – such as was the case in *Keck* itself, or in *Leclerc-Siplec* – but arguably, one could equally envisage situations in which this presumption no longer holds true, and in which the measures at issue do effectively hamper access to the market, in spite of being genuinely non-discriminatory. This is demonstrated clearly in cases like *Alpine Investments*, *Bosman*, or Advocate General Jacobs' hypothetical example of the direct television marketer in *Leclerc-Siplec*. This is why it is perceived that the Court's judgement in *Keck*, even though it may be correctly decided on its facts, is inappropriate to function as a general principle in the context of the scope of application of Community internal market law.

<sup>469</sup> Jacobs AG in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA* [1995] ECR I-179.

<sup>470</sup> Jacobs AG in *Leclerc-Siplec*, at 194, par. 38.

<sup>471</sup> Jacobs AG in *Leclerc-Siplec*, at 194-195, paras. 39-40: "The central concern of the Treaty provisions on the free movement of goods is to prevent unjustified obstacles to trade between Member States. If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade [...] Equally, from

an approach which in essence amounted to a subtle refinement of the *Keck*-formula, as he based it on the concept of market access, which was already present in *Keck*.<sup>472</sup> According to the Advocate-General, all undertakings which engage in legitimate economic activities should have unfettered access to the whole of the Community market, unless there is a reason for denying them full access to a part of that market. Only substantial restrictions on that access should be caught by the Treaty provisions. Measures affecting the goods themselves, as in *Cassis*-type cases, would be presumed to have this substantial impact. However sophisticated and appealing the Advocate General's approach may have been, the Court was not receptive to it and declined to take up his suggestion, deciding the case simply on the basis of its traditional *Keck*-formula.<sup>473</sup> Conversely, in the legal doctrine Advocate General Jacobs' alternative analysis was enthusiastically embraced. His proposition was welcomed by Weatherill for squarely addressing the core of the "*Keck*-problem", namely the need to place beyond the reach of Community law national rules that pose no real threat to the realisation of the internal market, while contemporaneously having the additional advantage of being sufficiently flexible, avoiding the rigid formalism of *Keck* itself.<sup>474</sup>

## II. 'STATE OF THE ART' ON RESTRICTIONS

Currently, in the field of goods, the Court in principle still adheres to its dichotomy between rules regarding selling arrangements and rules relating to product characteristics in order to define the scope of application of this fundamental freedom. In this respect, it must be acknowledged though that in more recent cases, the Court is somehow applying the formal criteria in *Keck* in a more flexible way, "with a relatively light touch"<sup>475</sup>, when it considers the access to the market to be materially threatened. In the case of *Dior*<sup>476</sup>, for example, the Court ruled that national legislation permitting the owner of a trade mark or holder of copyright to

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the point of view of the Treaty's concern to establish a single market, discrimination is not a helpful criterion: from that point of view, the fact that a Member State imposes similar restrictions on the marketing of domestic goods is simply irrelevant. The adverse effect on the Community market is in no way alleviated; nor is the adverse effect on the markets of the other Member States, and so on the Community economy. Indeed the application of the discrimination test would lead to the fragmentation of the Community market, since traders would have to accept whatever restrictions on selling arrangements happened to exist in each Member State, and would have to adapt their own arrangements accordingly in each State."

<sup>472</sup> Jacobs AG in *Leclerc-Siplec*, at 195-198, paras. 41-49.

<sup>473</sup> Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA* [1995] ECR I-179, paras. 18-24.

<sup>474</sup> Weatherill, "After *Keck*: Some Thoughts on how to Clarify the Clarification", *o.c.*, at 897.

<sup>475</sup> Fennelly AG in *Graf*, at 502, par. 20.

prevent parallel importers from advertising the further commercialisation of those goods fell within the scope of Article 28 EC as such a prohibition of advertising would render access to the market for those goods “appreciably more difficult”.<sup>477</sup>

As far as the fundamental freedoms of persons and services are concerned, the Court has clearly endeavoured to avoid adopting too wide an interpretation of the concept of restriction. In *Alpine Investments* and *Bosman*, the Court already hinted at its willingness to limit the scope of these fundamental freedoms, narrowing it to catch as restrictions only rules which affect access to the labour markets of the other Member States. This supposition was recently officially confirmed in the case of *Graf*.<sup>478</sup> The dispute in *Graf* turned around the question whether a worker’s loss, upon voluntary resignation in order to take up employment in another Member State, of a contingent statutory right to compensation by his employer payable upon forced resignation, dismissal or retirement is capable of constituting such a restriction to the freedom of movement of workers, where the amount of any such compensation is related to the length of the worker’s period of continuous service with his former employer. In its decision, the Court firstly simply reiterated its principled statement that “provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom.” Additionally, it linked for the first time explicitly the concept of restriction with that of market access, stipulating that in order to be capable of constituting an obstacle to the freedom of movement, provisions must affect access of workers to the labour market.<sup>479</sup> And the Court didn’t leave it at that. Subsequently, it ruled that legislation of the kind at issue in the main proceedings “is not such as to preclude or deter a worker from ending his contract of employment in order to take a job with another employer, because the entitlement to compensation on termination of employment is not dependent on the worker’s choosing whether or not to stay with his current employer but on a future and hypothetical event, namely the subsequent termination of his contract without such termination being at his own initiative or attributable to him.”<sup>480</sup> It considered such an event “*too uncertain and indirect* a possibility for legislation to be capable of

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<sup>476</sup> Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* [1997] ECR I-6013.

<sup>477</sup> *Dior*, paras. 50-52.

<sup>478</sup> Case C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-493.

<sup>479</sup> *Graf*, par 23.

being regarded as liable to hinder freedom of movement for workers where it does not attach to termination of a contract of employment by the worker himself the same consequence as it attaches to termination which was not at his initiative or is not attributable to him.”<sup>481</sup>

If it can already be taken for granted now that the Court has formally linked the concept of market access to the concept of restrictions, at least with regard to the fundamental freedoms of persons and services, that still doesn't mean one has reached the end of the tunnel. Currently, several basic questions surrounding both concepts remain – completely or partially – unresolved.<sup>482</sup> In this respect, the Court, at most, has lifted the veil of its intentions. For the sake of clarity and consistency, it is imperative that the Court formulates an unequivocal and straightforward answer to these issues. At present, the *locus standi* on barriers and market access can therefore only tentatively be summarised. The outcome of such a descriptive exercise would probably be something like this: firstly, in order to trigger the application of the relevant Treaty provisions on freedom of movement, the burdensome effects of a contested national measure must affect access to the labour market within a Member State. Presumably, they may also stem from regulation of the exercise of an economic activity, provided this contemporaneously influences access to the market. Secondly, for them to be taken into consideration by the Court, the restrictive effects of the barrier in question must not necessarily be such as to actually preclude persons from exercising their free movement rights, for it suffices that they simply deter or hamper them in so doing.<sup>483</sup> Thirdly, however, these preventive or dissuasive effects must probably somehow be substantial, that is to say, they must be of a certain level of gravity or intensity. This would essentially boil down to introducing a kind of *de minimis* test in the field of free movement,<sup>484</sup> whereas the Court had previously preserved such a quantifiable threshold exclusively to the domain of competition.<sup>485</sup> Advocate General Jacobs admitted that this test of substantial restriction on market access is hard to handle, not only for the European Court of

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<sup>480</sup> *Graf*, par. 24.

<sup>481</sup> *Graf*, par. 25. To that effect, with regard to the free movement of goods, the Court referred in particular to Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583, par. 11; and Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269, paras. 16 and 21.

<sup>482</sup> Fennelly AG in *Graf*, at 495, par. 1.

<sup>483</sup> See for example Case C-18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345.

<sup>484</sup> Jacobs AG in *Leclerc-Siplec*, at 195, par. 42.

<sup>485</sup> See Fennelly AG in Case C-67/97 *Bluhme* [1998] ECR I-8033: “the slight effect of the Decision, in volume terms, cannot in itself prevent the application of Article 28.”

Justice, but also, and especially, for the national courts. If it is applied too enthusiastically, the result would be that the free movement provisions are pushed back too far. Moreover, the test may entail some difficulty in securing the uniform application of the law. However, it cannot be denied that other areas of Community law create comparable awkwardness. As Weatherill remarked, "these issues are unavoidable in the sustenance of a law appropriate to the dynamic process of internal market creation."<sup>486</sup> Be that as it may, the fact is that it remains as yet thoroughly uncertain what precisely must be understood as substantial hindrance to market access. Fourthly and fifthly, the Court hasn't satisfactorily solved either the dilemmas as to whether the restrictive effects of a perceived obstacle must be direct or may be indirect and whether they must be certain or may be merely hypothetical or contingent. The relatively frequently recurring use of the formula "too uncertain and indirect a possibility to be capable of being regarded as liable to hinder freedom of movement"<sup>487</sup> seems to indicate that the Court might be willing to accept some leeway in this respect. However, it speaks for itself that this prediction remains utterly tentative and will therefore necessarily have to receive confirmation in future case law of the Court. In any event, the Court will also have to elaborate further on what precisely is covered under this vague terminology of "too uncertain and indirect", be it with a principled decision or rather on a case-by-case basis, through gradual factual application in particular cases. Sixthly, surprisingly, and to a certain extent maybe also unacceptably, it remains also still doubtful whether the restrictive effects of a disputed national rule must in some way be conditional on the actual exercise of the rights of freedom of movement. At first sight, this issue appears to be trivial, an affirmative answer seemingly being the self-evident solution. However, the following situation will demonstrate that this matter is not as straightforward as initially expected. In the *Bosman* case, which will be discussed at length at a later stage, Jean-Marc Bosman argued that the transfer rules applicable to professional football players who wish to play for another club prevented him from moving to the club of his choice, thereby effectively hindering his mobility of labour. In the concrete circumstances of the case, there was effectively an inter-State element present, as Bosman wanted to be transferred from a Belgian to a French team, but it is submitted that this cross-border aspect was purely incidental and deprived of any material significance. Basically, the core of the problem was that the transfer rules existed in the

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<sup>486</sup> Weatherill, "After Keck: Some Thoughts on how to Clarify the Clarification", *o.c.*, at 901.

<sup>487</sup> See also, *inter alia*, Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583, par. 11; Case C-44/98 *BASF v Präsident des Deutschen Patentamts* [1999] ECR I-6269, paras. 16 and 21.

first place, not so much the fact that they existed in a particular Member State. Consequently, it has been argued that it might have been preferable to resolve the case on the basis of the competition rules.<sup>488</sup> However that may be, the Court invalidated the transfer system for violating the free movement provisions. Finally, the Court still has to decisively cut the knot as to whether it will adopt a substantive or, rather, a merely formal approach to the notion of market access. As Barnard and Deakin argue, a mere formal test would imply that the Court contents itself with verifying whether the formal obstacles of entry and exit to the market have been removed.<sup>489</sup> Inhibited permission to accede to the market suffices to pass the formal test, regardless of the practical difficulties that may still be encountered subsequently, once the market has been formally penetrated. By contrast, a more substantive approach towards market access would additionally entail that also these practical barriers experienced after access to the market has been gained be abolished. According to these authors, the Court's case law with regard to this aspect of free movement law is currently extremely inconsistent and appears almost to vary at the whim of the moment. In its rulings in *Keck and Mithouard* and *Graf*, the Court has presumably adhered to a strict formal notion of market access. Conversely, the cases of *Alpine Investments*, *Bosman* and *Centros*<sup>490</sup> have been cited as examples of judgements in which the Court favours a substantive version of market access, which would in principle eliminate every national regulation unjustifiably precluding or hindering market access as contrary to the Treaty. Besides, arguably one can detect in the jurisprudence of the Court a spectrum of further attitudes on behalf of the Court which basically amount to more or less diluted versions of the two extreme tests of formal or substantive market access.<sup>491</sup> This continued lack of uniformity is evidently to be deplored, not only for obvious reasons of certainty or predictability, but also, and especially, because the Court's interpretation of the market access concept does not stand by itself, in a legal vacuum, but must be considered having regard to the larger picture of the internal market project and taking into account the requirements of the principle of subsidiarity, or in other words the division of competencies between the Community and its institutions and the Member States. In my opinion, a strong substantive test has the considerable advantage of securing maximum

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<sup>488</sup> See, for example, Weatherill, "European Football Law", in *Collected Courses of the Academy of European Law*, Volume VII, Book I (Kluwer, 1999) at 364.

<sup>489</sup> Barnard and Deakin, "Market Access and Regulatory Competition", in Barnard and Scott (eds.) *The Legal Foundations of the Single market: Unpacking the Premises* (Hart, 2002) 197.

<sup>490</sup> Case C-212/97 *Centros v Erhvers-og Selskabsstyrelsen* [1999] ECR I-1459.

<sup>491</sup> Barnard and Deakin, "Market Access and Regulatory Competition", *o.c.*, at 204-213.

guarantees of entry or exit to the labour market of the other Member States. Nevertheless, almost inevitably, there are also downsides to such an intrusive approach. It has far-reaching implications upon national regulatory processes, as it invalidates in principle all national measures which restrict market access. Potentially, it has an adverse effect on national diversity as well, inducing uniformity and possibly leading to a race-to-the-bottom and/or to a deregulation of standards, to maintain national competitive positions vis-à-vis the other Member States. However, these often negatively perceived consequences can to a large extent be countered by an appropriate use of the test of justification, which – in combination with the requirements of the principle of proportionality - allows to a certain extent for national diversity to be safeguarded and for a degree of national autonomy in law-making to be preserved. Furthermore, it should not be forgotten that, as Advocate General Tesauro forcefully argued in his opinion in the case of *Hünermund* in the context of the free movement of goods, the free movement provisions are intended to liberalise intra-Community trade, instead of or rather than to encourage the unhindered pursuit of commerce in individual Member States.<sup>492</sup> He considered that the purpose of the free movement provisions is to establish a single integrated market, eliminating therefore those national measures which in any way create an obstacle to or even mere difficulties for the freedom of movement; their purpose is not to strike down the most widely differing measures in order, essentially, to ensure the greatest possible expansion of trade.<sup>493</sup> In this perspective and on these conditions, I believe a test based on material access to the market could legitimately be adopted.

#### ***§4: The issue of justification***

As has been demonstrated in the previous parts of this chapter, the current state of the approach of the Court of Justice with regard to the fundamental freedoms is thus predominantly centred around the concept of 'restriction' or 'obstacle', which has to a large extent replaced the traditional non-discrimination analysis. In this framework, the legality of a national measure under scrutiny hinges to a great deal on the specific reasons invoked to justify the continued

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<sup>492</sup> See Tesauro AG in Case C-292/92 *Hünermund v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6800.

existence of the measure. This increased importance attached to the issue of justification, in comparison with the former discrimination-based examination, can be explained by the relative uncertainty actually still surrounding the concept of restriction. Up until now, the Court hasn't completely and satisfactorily outlined the content and the limits of this concept, for example with regard to the principle of 'market access'. As a result, this particular part of Community Internal Market law finds itself in a transitional period, similar to the situation in the field of free movement of goods between the *Dassonville* and *Keck* judgements. Hence, the Court is faced with a difficult situation, which it created itself, as it potentially will have to deal with an avalanche of cases in which it will have to confront the justification issue, in view of the fact that the threshold it appears to apply for the moment to conclude to the existence of a restriction to the freedom of movement in need of justification is much lower than the discrimination hurdle which had to be taken before coming to the matter of justification previously. Apart from being difficult or delicate, as it obviously creates the risk of docket congestion, this situation is also not entirely satisfactory, for it obliges the Court time and again to undertake a case-by-case evaluation on the basis of the concrete factual circumstances, a task for which it is not necessarily always well equipped, and which, more importantly, might be better carried out by the national courts.

In the light of all this, it is thus considered to be of the utmost importance to set out clearly from the outset, firstly, exactly which kinds of justifications exist, and secondly, and more importantly, which type of restrictions can be upheld by which justifications. However straightforward, self-evident and even indispensable this latter starting point may seem to be, as Advocate General Tesauro pointed out in his joined opinion in the cases of *Decker* and *Kohll*<sup>494</sup> and repeated in his opinion in the case of *Safir*<sup>495</sup>, the Court has up until now failed to provide a precise and unequivocal solution to this matter. Moreover, it ignored in its rulings in these cases the Advocate General's request to create clarity. Be that as it may, in the following paragraphs it shall nevertheless be attempted to set out a workable and straightforward

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<sup>493</sup> Tesauro AG in *Hünernmund*, at 6814, par. 28.

<sup>494</sup> Tesauro AG in Case C-120/95 *Decker v Caisse de maladie des employés privés* [1998] ECR 1831 and Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1935, at 1858 et seq.

<sup>495</sup> Tesauro AG in Case C-118/96 *Safir v Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län* [1998] ECR I-1899.

framework for the issue of justification, on the basis of the case law of the Court of Justice on the issue.

## I. DIFFERENT GROUNDS OF JUSTIFICATION

In this first section, it will be examined which kinds of grounds can be invoked to justify measures which are *prima facie* held to constitute barriers to the rights of free movement of persons and services. More specifically, it is possible to distinguish between two different types of justification: firstly, there are the derogations which are expressly provided within the EC Treaty, namely the public policy, public security and public health derogations, and the public service and the official authority exceptions; and secondly, there are the objective justifications which have been recognised by the European Court of Justice in its case law, under the so-called 'rule of reason' doctrine.

### 1. Specific Community Treaty derogations

#### 1.1. *Public policy, public security and public health*

Article 39(3) EC, establishing the rights attached to the freedom of movement of workers, stipulates that these rights are "subject to limitations justified on grounds of public policy, public security or public health." Equally, Articles 46(1) and 55 EC permit Member States only to derogate from the Treaty provisions on the freedom of establishment and the freedom to provide services on grounds of public policy, public security and public health.<sup>496</sup> The precise scope of these three exceptions has been further outlined in secondary legislation<sup>497</sup> and in the case law of

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<sup>496</sup> Within the domain of goods, more grounds of justification are available. Article 30 EC provides that "the provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of individual property." See, *inter alia*, Case 34/79 *R v Henn and Darby* [1979] ECR 3795; Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305; Case 72/83 *Campus Oil Ltd. v Ministry for Industry and Energy* [1984] ECR 272; Case 251/78 *Denkavit Futtermittel v Minister für Ernährung, Landwirtschaft und Forsten des Landes* [1979] ECR 3369; Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487.

<sup>497</sup> Council Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, (1963-64) OJ Spec. Ed. 117.

the Court of Justice.<sup>498</sup> Generally, the Court emphasised from the outset that these concepts must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without being subject to control by institutions of the Community.<sup>499</sup> Nevertheless, it readily acknowledged that the competent national authorities do retain an area of discretion within the limits imposed by the Treaty in this matter.<sup>500</sup> More substantively,<sup>501</sup> Directive 64/221 stipulates that these grounds of justification “shall not be invoked to service economic ends”<sup>502</sup> and that “measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.”<sup>503</sup> The Court added as a rule that “recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.”<sup>504</sup> With regard specifically to the public health derogation, the Directive stipulated that refusal of entry into a territory or refusal to issue a first residence permit

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<sup>498</sup> See, for more details, Hall, “The ECHR and Public Policy Exceptions to the Free Movement of Workers in the EEC Treaty”, 16 *EL Rev.* (1991) 466.

<sup>499</sup> See Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, par. 18.

<sup>500</sup> *Van Duyn*, par. 18. In subsequent case law, it subtly qualified this statement, ruling that Member States “must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.” See e.g. Cases 115 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] ECR 1665, par. 7.

<sup>501</sup> Apart from material limitations on the content of the concepts of public policy, public security or public health, the Directive also contains a set of procedural guarantees to protect a person against whom one of the grounds is being invoked (Articles 5-9 Directive 64/221). For more information, see for example, Case 48/75 *Royer* [1976] ECR 497; Case C-175/94 *R v Secretary of State for the Home Department, ex parte Gallagher* [1995] ECR I-4253; Cases C-65/95 & C-111/95 *R v Secretary of State for the Home Department, ex parte Shingara and ex parte Radiom* [1997] ECR I-3341. Also O’Keeffe, “Practical Difficulties in the Application of Article 48 of the EEC Treaty”, 19 *CML Rev.* (1982) 35. However, for the specific purposes of this research, it is not considered necessary to go deeper into detail into these procedural protections.

<sup>502</sup> Article 2(2) Directive 64/221.

<sup>503</sup> Article 3(1) Directive 64/221. Article 3(2) offered further concrete guidance, holding that “previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.” The Court clarified that the existence of a previous criminal conviction can only be taken into account “in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.” However, it did not exclude that it is possible that past conduct alone may constitute such a threat to the requirements of public policy. See Case 30/77 *R v Bouchereau* [1977] ECR 1999, paras. 28-29.

<sup>504</sup> *Bouchereau*, par. 35. In addition, in Case 131/79 *R v Secretary of State for Home Affairs, ex parte Mario Santillo* [1980] ECR 1585, par. 18, the Court considered it essential that “the social danger resulting from a foreigner’s presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.” See also Case C-348/96 *Criminal proceedings against Calfa* [1999] ECR I-11.

were only justified in the event of diseases or disabilities explicitly listed in Annex to the Directive.<sup>505</sup>

## 1.2. *Employment in the public service*

According to Article 39(4) EC, the provisions on freedom of movement of workers “shall not apply to employment in the public service.” Perfectly in line with its approach of the derogations contained in Article 39(3) EC, the Court of Justice has stressed that also this exception “cannot have a scope going beyond the aim in view of which this derogation was included.”<sup>506</sup> Concretely, the Court has ruled that the “interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting *admission* of foreign nationals to certain activities in the public service. On the other hand this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers once they have been admitted to the public service.”<sup>507</sup> In the *Commission v Belgium* case<sup>508</sup>, the Court stipulated that Article 39(4) EC “removes from the ambit of Article 39(1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities”, explaining that “such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.”<sup>509</sup> These two requirements seem to be cumulative rather than alternative.<sup>510</sup> In 1988, the Commission endeavoured to provide some practical guidance on the sorts of State functions which it considered would or would not benefit

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<sup>505</sup> Article 4(1) Directive 64/221. Moreover, Article 4(2) Directive 64/221 emphasised that diseases or disabilities occurring after a first residence permit has been issued shall not justify refusal to renew the residence permit or expulsion from the territory.

<sup>506</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, par. 4.

<sup>507</sup> *Scholz*, par. 4.

<sup>508</sup> Case 149/79 *Commission v Belgium* [1980] ECR 3881.

<sup>509</sup> *Commission v Belgium*, par. 10. In the words of Mancini AG in Case 307/84 *Commission v France* [1986] ECR 1725, at 1727-1733: “In short, in order to be made inaccessible to nationals of another State, it is not sufficient for the duties inherent in the post at issue to be directed specifically towards public objectives which influence the conduct and action of private individuals. Those who occupy the post must don full battle dress: in non-metaphorical terms, the duties must involve acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply.”

<sup>510</sup> See for example, O’Keeffe, “Judicial Interpretation of the Public Service Exception to the Free Movement of Workers”, in Curtin and O’Keeffe (eds.), *Constitutional Adjudication in the European Community and National Law* (Butterworths, 1992) 89, at 96; or Léger AG in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, par. 18.

from the exception of Article 39(4):<sup>511</sup> the armed forces, police, judiciary, tax authorities, and certain public bodies engaged in preparing or monitoring legal acts were mentioned as examples of the former, whereas those which probably would not included nursing, teaching and non-military research in public establishments. In many situations however, it remains unclear what does and what does not constitute a post reserved for Member State nationals.<sup>512</sup>

### *1.3 Exercise of 'official authority'*

According to Article 45 EC, the provisions of the chapter on freedom of establishment shall not apply "so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority." This 'official authority' exception,<sup>513</sup> extended to cover also the field of services by the terms of Article 55 EC, can be legitimately considered as the functional equivalent of the 'public service' exception in the domain of the free movement of workers. As is the case with the other derogations, the official authority exception allowed by the Community Treaty cannot be given a scope which would exceed the objective for which this exemption clause was inserted.<sup>514</sup> The Court has limited the right of Member States to exclude non-nationals from taking up functions involving the exercise of official authority to "those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority."<sup>515</sup> It further specified that an extension of this exception to a whole profession would be possible "only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing

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<sup>511</sup> (1988) OJ C 72/2.

<sup>512</sup> It is argued that Member States could 'abuse' unequivocal, straightforward legislation with the purpose of deviating from or undermining the Court's case law. Furthermore, it is observed that "such legislation could ossify the process of creating a 'citizen's Europe". See Mancini, "The Free Movement of Workers in the Case-Law of the European Court of Justice" in Curtin & O'Keeffe (eds.), *o.c.*, 67; Craig & de Burca, *EU Law. Text, Cases & Materials*, at 724-727.

<sup>513</sup> In his opinion in the case of *Reyners*, Advocate General Mayras defined official authority as "that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens." See Mayras AG in Case 2/74 *Reyners v Belgium* [1974] ECR 631, at 664.

<sup>514</sup> Case 2/74 *Reyners v Belgium* [1974] ECR 631, par. 43. For other examples, see Case C-306/89 *Commission v Greece* [1991] ECR I-5863 on the activities of traffic-accident experts; Case C-272/91 *Commission v Italy* [1994] ECR I-1409 on operating a computerisation system for a national lottery; Case C-42/92 *Thijssen v Controledienst voor de Verzekeringen* [1993] ECR I-4047 on commissioners of insurance companies.

<sup>515</sup> *Reyners*, par. 45.

on the Member State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority.”<sup>516</sup>

## 2. ‘Objective justification’ - doctrine

It may have seemed that national measures which were perceived to infringe the Treaty provisions on the fundamental freedoms and which could not be categorised under one of the express Treaty exceptions had to be invalidated by the Court of Justice. However, gradually the Court came to realise that in spite of the fact that there may not have been grounds of justification readily available for certain contested measures within the formal Community framework, so that they in theory had to be considered unlawful, some of these measures nevertheless served objectively legitimate purposes and effectively deserved to be safeguarded. Consequently, the Court decided to elaborate a new ‘objective justification’-doctrine, in addition to the types of justification already explicitly provided in the Treaty. Essentially, this development boiled down to a recognition, on behalf of the Court of Justice, of an open category of supplementary grounds of justification. In the legal literature, this idea is also often referred to as the ‘rule of reason’.<sup>517</sup>

### 2.1 *Mandatory or imperative requirements in the general interest*

The Court officially introduced this doctrine in the field of the free movement of goods, and more concretely in the case of *Cassis de Dijon*, in which it solemnly declared that “obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”<sup>518</sup> The list of mandatory requirements enumerated

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<sup>516</sup> *Reyners*, par. 46. Conversely, it declared that the extension is not possible “when, within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.” (par. 47)

<sup>517</sup> For more elaboration on this issue of objective justification, consult Scott, “Mandatory or Imperative Requirements in the EU and the WTO, in Barnard and Scott (eds.), *The Legal Foundations of the Single market: Unpacking the Premises* (Hart, 2002) 269.

<sup>518</sup> *Cassis de Dijon*, par. 8. For an example of fairness of commercial transactions: Case 286/81 *Oosthoek’s Uitgeversmaatschappij BV* [1982] ECR 4575; public health & consumer protection: see Case 178/84 *Commission v Germany (German Beer)* [1987] ECR 1227.

by the Court in its judgement is not exhaustive, as is clearly evidenced by the use of the term 'in particular'.<sup>519</sup>

In the context of services, the Court developed a similar test of justification alongside the express Treaty exceptions. In general, the Court formulates this as follows: "restrictions come within the scope of Article 49 EC if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest".<sup>520</sup> Also in this context, the Court has already recognised a considerable number of justifications as overriding reasons in its case law.<sup>521</sup> The Court didn't hesitate either to transpose this objective justification test to the sphere of workers and establishment. In *Kraus*, it pointed out that the Articles 39 and 43 EC prevent the legislation of a Member State from jeopardising or hindering the rights of freedom of movement, "unless such legislation pursues a legitimate aim, compatible with the Treaty, and is justified on imperative grounds of general interest."<sup>522</sup>

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<sup>519</sup> For an early overview of the mandatory requirements accepted by the Court of Justice, see Defalque, "Les restrictions quantitatives et les mesures d'effet équivalent", in *Commentaire Mégret - Le droit de la CEE. I. Préambule. Principes. Libre circulation des marchandises*, (Editions de l'Université de Bruxelles, 1992), at 235-237. In further cases, the Court has accepted, *inter alia*, the protection of the working environment (Case 155/80 *Oebel* [1981] ECR 3409), the protection of the environment (Case 302/86 *Commission v Denmark* [1988] ECR 4607), cinema as form of cultural expression (Case 60-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] 2605), the protection of national or regional socio-cultural characteristics (Case 145/88 *Torfaen Borough Council v B&Q* [1989] ECR 3851), the maintenance the plurality of the press (Case C-368/95 *Vereinigte Familienpress Zeitungsverlags - und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689), or the need to preserve the financial balance of the social security schemes (Case C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831.) as mandatory requirements.

<sup>520</sup> See, for example, *Gouda*, par. 13.

<sup>521</sup> See also *Gouda*, par. 14: in particular, professional rules intended to protect recipients of services (Joined cases 110&111/78 *Van Wesemael* [1979] ECR 35, par. 28); protection of intellectual property (Case 62/79 *Coditel* [1980] ECR 881); protection of workers (Case 279/80 *Webb* [1981] ECR 3305; Joined Cases 62&63/81 *Seco v EVI* [1982] ECR 223; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417); consumer protection (See the *Insurance cases*: Case 220/83 *Commission v France* [1986] ECR 3663, Case 252/83 *Commission v Denmark* [1986] ECR 3713, Case 205/84 *Commission v Germany* [1986] ECR 3755, Case 206/84 *Commission v Ireland* [1986] ECR 3817; and the *Tourist Guide cases*: Case C-154/89 *Commission v France* [1991] ECR I-659, Case C-180/89 *Commission v Italy* [1991] ECR I-709, Case C-198/89 *Commission v Greece* [1991] ECR I-727); conservation of the national historic and artistic heritage (Case C-180/89 *Commission v Italy* [1991] ECR I-709); turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country (Case C-154/89 *Commission v France* [1991] ECR I-659; Case C-198/89 *Commission v Greece* [1991] ECR I-727); the need to safeguard the reputation of financial markets and to protect the investing public (Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141); the need to prevent gambling and to avoid the lottery from becoming a source of private profit (Case C-275/92 *HM Customs and Excise v Schindler* [1994] ECR I-1039); or the protection of creditors of a company against the risk of insolvency (Case C-212/97 *Centros v Erhvers- og Selskabsstyrelsen* [1999] ECR I-1459).

<sup>522</sup> *Kraus*, par. 32.

It must be acknowledged that the Court's terminology when dealing with this particular aspect of the justification issue in the field of the fundamental freedoms is far from uniform. Be that as it may, it is submitted that, despite this apparent linguistic difference, the concepts of 'mandatory requirements', 'overriding reasons relating to the public interest' or 'imperative or pressing requirements of general interest' are essentially identical. In fact, they all deal with the matter of safeguarding national measures which *in se* pursue objectively legitimate purposes and are therefore considered to be worthy of protection, even though these measures strictly legally speaking constitute a barrier to the right of freedom of movement and cannot plausibly be justified under the express Treaty derogations. Hilson describes these notions as being functionally equivalent.<sup>523</sup> Scott subtly observed that if these doctrines were to represent really different tests of justification, it is strange that there are few, if any, good cases in which they have been advanced separately.<sup>524</sup>

## 2.2. *The principle of proportionality*

In this context, it is also important to take into account that the Court has imposed the additional requirement of respect for the principle of proportionality.<sup>525</sup> On several occasions, the Court has explicitly insisted that for the purpose of objective justification, apart from pursuing an overriding reason in the general interest, the national measures under investigation must also be "suitable for securing the attainment of the objectives which they pursue and they must not go beyond what is necessary in order to attain it."<sup>526</sup> Concretely, this implies that the Court will firstly verify the appropriateness of the means chosen to achieve the end in view, and will secondly review whether it is not possible to conceive a measure which is less restrictive of the freedom of movement under the given circumstances and nevertheless capable of producing the same result.<sup>527</sup> It has been suggested that the test of proportionality contains a third element, i.e. even if there are no less restrictive alternatives, it must still be established that the contested

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<sup>523</sup> Hilson, "Discrimination in Community free movement law", 24 *ELRev.* (1999) at 449-450.

<sup>524</sup> Scott, *EC Environmental Law* (Longman, 1998), at 75.

<sup>525</sup> In general, see Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart 1999)

<sup>526</sup> See *inter alia*, Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351, paras. 29-30; *Gebhard*, par. 37.

<sup>527</sup> Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Ellis, *o.c.*, 65, at 68. See for a practical example Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219.

measure does not have an excessive or disproportionate effect,<sup>528</sup> but it is submitted that the Court in practice does not really seem to maintain a strict dividing line between the second and the third element.<sup>529</sup>

Essentially, the test of proportionality thus consists of a balancing exercise between the aims pursued by the national measure and its restrictive effects on the exercise of the right to freedom of movement. Consequently, a legal procedure in which the Court firstly concludes that a measure under challenge is liable to hinder the right to freedom of movement, but secondly acknowledges that it pursues a legitimate aim and therefore in principle deserves to be justified, only to conclude finally that it must nevertheless be invalidated for not complying with the requirements of the principle of proportionality, is a perfectly feasible scenario.<sup>530</sup> The transfer rules at issue in *Bosman* fell precisely on this hurdle, as will be explained at a later stage, and thus perfectly illustrate this point. In some instances, the Court itself applies the principle of proportionality to the factual circumstances of the particular case. In other situations, the Court wisely leaves the issue to be decided by the national courts. In this respect, Advocate General Jacobs stipulated that “it may be difficult always to draw the dividing line in the right place”, expressing nevertheless the opinion that it may be preferable for the Court to make the final assessment itself when it has the necessary technical expertise and has sufficient knowledge of the facts.<sup>531</sup>

## II. HOW TO JUSTIFY DISCRIMINATIONS AND RESTRICTIONS?

Having established which instruments *-in casu* the express Treaty exceptions or alternatively, the judicially created objective justifications under the rule of reason- are in principle available to justify national measures which are *prima facie* considered to constitute a restriction to the freedom of movement and therefore to violate the relevant Treaty provisions, the logically next question to be tackled is how exactly these justifications do fit in within the

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<sup>528</sup> de Búrca, “The Principle of Proportionality and its Application in EC Law”, 13 *YBEL* (1993) 105.

<sup>529</sup> Van Gerven, “The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe”, in Ellis, *o.c.*, 37.

<sup>530</sup> Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

framework construed by the Court around the concept of restriction. It needs to be examined whether, in the analysis of the Court, the relation between obstacles and justifications is to be considered as straightforward and all-encompassing, in the sense that all types of justification can be invoked at any time to uphold regardless whatever kind of restrictions at stake in the proceedings before the Court; or rather whether the choice of potential justifications is limited in certain circumstances and is precisely dependent on the type of obstacle concerned?

It results from the foregoing that the Court basically distinguishes between three types of restrictions: there are firstly, the directly discriminatory measures, which are discriminatory in law and in fact; secondly, the indirectly discriminatory rules, which are indistinctly applicable in law but discriminatory in fact; and thirdly, the genuinely non-discriminatory provisions, which are legally and factually indistinctly applicable.

### 1. Traditional approach to justification

Traditionally, it was generally accepted that directly discriminatory provisions can only be upheld under the expressly provided Treaty exceptions, whereas for the justification of the non-discriminatory provisions, in addition to these express derogations, also the judicially created imperative requirements in the general interest can be adduced. So far, everything was peachy keen. However, problems arose with regard to the final category of the indirectly discriminatory rules, which is situated somewhat uncomfortably between the genuinely non-discriminatory measures on the one hand, and the directly discriminatory provisions on the other hand: the indirectly discriminatory rules are indistinctly applicable in law<sup>532</sup>, just as the genuinely non-discriminatory rules, but they are also undeniably discriminatory in fact, like the directly discriminatory measures. This 'bipolar' feature of the concept of indirect discrimination did not only result in conceptual obscurity, as both the terms discriminatory and indistinctly applicable measures were commonly used to refer to indirectly discriminatory measures; it also entailed

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<sup>531</sup> Jacobs, "Recent Developments in the Principle of Proportionality in European Community Law", in Ellis, *o.c.*, 1, at 19-20.

<sup>532</sup> Martin makes the distinction between indirectly discriminatory measures, which are according to him "mesures faussement indistinctement applicables" and genuinely non-discriminatory measures, to which he refers as "mesures réellement indistinctement applicables": see Martin, "Reflexions sur le champ d'application matériel de l'article 48 du traité CE", *CDE* (1993) at 574; read also Mattera, *Le Marché unique européen, ses règles, son fonctionnement* (Jupiter, 1988) at 242, note 64.

substantive uncertainty as to the possibilities of justification for these indirectly discriminatory measures. In essence, the crux of the matter of the justification of indirectly discriminatory measures seems to be the following: either one emphasises the discriminatory effect in practice of the indirectly discriminatory rules, in spite of their formally legally indistinctly applicable character, which would result in the fact that these measures can only be upheld by one of the express derogations provided for in the EC Treaty, just as is the case with the directly discriminatory provisions; or one tilts the balance in favour of the fact that the indirectly discriminatory provisions are formally indistinctly applicable, just as the genuinely non-discriminatory provisions, in which case one can also refer to an overriding reason in the general interest in order to justify them. In the opinion of Advocate General Tesouro, this issue is not as banal as it may seem at first sight, given that such a classification is not always easy to make in relation to the fundamental freedoms or rather that it is difficult to arrive at a clear and unequivocal definition of discriminatory measures from the relevant case law.

These two mutually exclusive lines of thought can be found both in the legal doctrine<sup>533</sup> as in the case law of the European Court of Justice.<sup>534</sup> In the beginning of 1996, it was thus still not

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<sup>533</sup> In favour of the former opinion, see for example Kapteyn and VerLoren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen – Na Maastricht* (Kluwer, 1995) at 395-397: they maintain that in assessing whether a particular national measure is indistinctly applicable, the Court goes further than a mere test of formal discrimination, and also checks in relevant cases whether there is no factual discrimination. In other words, they argue that strictly legally speaking indirectly discriminatory measures are still discriminatory and can therefore only rely on express Treaty derogations for their justification. See also Mattera, “De l’arrêt ‘Dassonville’ à l’arrêt ‘Keck’: l’obscure clarté d’une jurisprudence riche en principes novateurs et en contradictions” *Revue du Marché Unique Européen* 1 (1994) at 129-131; or Wyatt and Dashwood, *European Community Law* (Sweet & Maxwell, 1987) at 138-143. Conversely, see Lenaerts and Van Nuffel, *Europees Recht in hoofdlijnen*, (Maklu, 1995) at 139-142: they hold the view that national measures, which are formally indistinctly applicable but nevertheless materially discriminate, can invoke the mandatory requirements doctrine. Their opinion is supported by, for example, Brinch Jørgensen, *Union Citizens- Free movement and non-discrimination* (Jurist- og Økonomforbundets Forlag, 1996) 208-214; Garrone, “La discrimination indirecte en droit communautaire: vers une théorie générale”, 30 *RTD eur.* (1994) at 432-436; or Bernard, “Discrimination and Free Movement in EC Law”, 45 *ICLQ* (1996) at 90-95. Bernard looked at the particular circumstances which led to the ruling in *Cassis* and decided that this was an inherent case of indirect discrimination. The problem the Court dealt with in *Cassis* was that of disparities between two different national laws. According to him, the mandatory requirements doctrine is conceived especially for these measures. Goods which are to be marketed in a certain state have to comply with the national regulations of that state. These trading rules therefore have a disparate impact on the imported and the national goods which results in additional costs for the imported goods. This disparate impact of the trading rules therefore means that the mere imposition of national requirements automatically leads to indirect discrimination.

<sup>534</sup> In Case C-204/90 *Bachmann v Belgium* [1992] ECR I-249, an indirectly discriminatory measure was upheld by the Court on grounds of the need to preserve the cohesion of the applicable tax system, an imperative requirement in the general interest. Conversely, in Case C-484/93 *Svensson & Gustavsson v Ministre du logement et de l’urbanisme* [1995] ECR I-3955, the Court held that a discriminatory measure could only be justified by the express Treaty exceptions.

unequivocally clear whether the objective justification doctrine could be invoked for the justification of indirectly discriminatory measures or whether one had to put reliance on the exhaustively enumerated Treaty exceptions in case of indirect discrimination. But then the Court was faced with the case of *O'Flynn*<sup>535</sup>, in which the Social Security Commissioner referred to the Court for a preliminary ruling some highly pertinent questions as to the concept of indirect discrimination. The Court firstly defined the concept of indirect discrimination, holding that “conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers<sup>536</sup>, or the great majority of those affected are migrant workers<sup>537</sup>, where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers<sup>538</sup>, or where there is a risk that they may operate to the particular detriment of migrant workers<sup>539</sup>.” Subsequently the Court stated that “it is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law”<sup>540</sup>. The Court thus concluded that “unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage”.<sup>541</sup> This last statement of the Court was confirmed and reiterated in several subsequent cases.<sup>542</sup> It appeared thus very much as if the Court’s judgement in *O'Flynn* had finally cut the Gordian knot as to the existence and the possible justification of indirectly discriminatory measures.

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<sup>535</sup> Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2631.

<sup>536</sup> See inter alia Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, par. 24; Case 33/88 *Allué and Another v Università degli Studi di Venezia* [1989] ECR 1591, par. 12; *Le Manoir*, par. 11.

<sup>537</sup> See Case C-279/89 *Commission v United Kingdom* [1992] ECR I-5785, par. 42; Case C-272/92 *Spotti v Freistaat Bayern* [1993] ECR I-5185, par. 18.

<sup>538</sup> See Case *Commission v Luxembourg*, par. 10; Case C-349/87 *Paraschi v Landesversicherungsanstalt Württemberg* [1991] ECR I-4501, par. 23.

<sup>539</sup> See Case C-175/88 *Biehl v Administration des Contributions* [1990] ECR I-1779, par. 14; Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249, par. 9.

<sup>540</sup> See to that effect for example *Bachmann*, par. 27; *Commission v Luxembourg*, par. 12; Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others v Università degli Studi di Venezia* [1993] ECR I-4309, par. 15.

<sup>541</sup> *O'Flynn*, par. 21.

<sup>542</sup> See for example Case C-29/95 *Pastors and Trans-Cap v Belgian State* [1997] ECR 287; Case C-57/96 *Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-6708; Case C-187/96 *Commission v Greece* [1998] ECR I-1110.

## 2. Uniform restriction-justification approach?

By way of summary, it seems to correspond to the currently prevailing view to stipulate that contested national measures can only be safeguarded by the express Treaty derogations when they are directly discriminatory, whereas they can also be upheld by imperative requirements in the general interest when they are conceived to be only indirectly discriminatory or genuinely non-discriminatory. In such a 'restriction-justification' construct, the principle of non-discrimination still clearly plays an important role in the debate on the lawfulness of any given national rule suspected of infringing the Community free movement provisions. Be that as it may, it must be observed that a careful reading of some recent decisions of the Court appears to reveal a possible new trend in the case law of the Court on the fundamental freedoms which would consist in a uniform obstacle-justification approach. Essentially, this would imply that all kinds of restrictions could be saved by all types of justification, thus necessarily entailing that also directly discriminatory measures could be justified under the imperative requirements doctrine and obliterating in a certain way the almost sacrosanct distinction between this judge-made doctrine and the express Treaty exceptions.

A first, albeit mainly implicit and admittedly still timid expression of this potentially new approach can be found in the so-called *Walloon Waste* case.<sup>543</sup> In this case, the Commission challenged the compatibility with Community law of a ban in Wallonia on the disposal of waste originating in other Member States or in other regions of Belgium. To justify the restrictions placed on the movement of waste, Belgium argued that the contested legislation meets "imperative requirements relating to environmental protection and the objective of protection of health, which takes precedence over the objective of freedom of movement for goods, and constitutes an exceptional and temporary protective measure to counter the inflow into Wallonia of waste from neighbouring countries."<sup>544</sup> As such, this line of argumentation could have made sense, had it not been for the fact that environmental protection does not figure among the express Treaty derogations of Article 30 EC. Strictly legally speaking, Belgium was simply not entitled to rely on the mandatory requirements doctrine, as the contested legislation was aimed specifically at non-Walloon waste and therefore directly discriminatory. As a result, Advocate

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<sup>543</sup> Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

General Jacobs rigorously concluded that the national legislation was incompatible with Community law.<sup>545</sup> However, the Court reached a different conclusion. It stated that in assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste.” It proceeded holding that “the principle that environmental damage should as a matter of priority be remedied at source, laid down by Article 130r (2) of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste.”<sup>546</sup> Ultimately, it concluded that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures could not be regarded as discriminatory.<sup>547</sup> Admittedly, in view of the Court’s reasoning, this case cannot stand as authority for the use of justifications which aren’t expressly mentioned in the Treaty to uphold directly discriminatory measures.<sup>548</sup> But it can hardly be denied that essentially, this is precisely what the Court has done, even though it has not followed the conventional way.<sup>549</sup>

Possibly more straightforward in this respect was the Court’s treatment of the nationality requirements in *Bosman*. As is commonly known, nationality clauses are the standard example of discriminatory, and even more, directly discriminatory treatment. Therefore, it was somehow in the line of expectations that the Court were to decide that the so-called ‘3+2’ rule<sup>550</sup> was *per se* prohibited, unless it could be justified on grounds of public policy, public security or public health, as laid down in Article 39(3) EC. Quite surprisingly however, the Court firstly concluded

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<sup>544</sup> *Walloon Waste*, par. 29.

<sup>545</sup> Jacobs AG in *Walloon Waste*. Subsequently, in Case C-379/98 *PreussenElektra AG v Schlesweg AG* [2001] I-2099, AG Jacobs argued that the Court’s approach in *Walloon Waste* was flawed: according to the AG, the question whether a measure was discriminatory was logically distinct from whether it could be justified. However, he pleaded for a relaxation in the distinction between the express Treaty justifications under Article 30 EC and the objective justification doctrine. The Court in *PreussenElektra* did uphold the national measure on environmental grounds.

<sup>546</sup> *Walloon Waste*, par. 34.

<sup>547</sup> *Walloon Waste*, par. 35.

<sup>548</sup> *Craig & de Búrca, o.c.*, at 634-635.

<sup>549</sup> Bernard, “Discrimination and Free Movement in EC Law”, *o.c.*, at 93-94: “Denying the existence of discrimination is patent is, however, no solution either. The case was clearly wrongly decided.”

<sup>550</sup> According to this rule, during official matches only three foreign players could be fielded, plus two assimilated players. For more information, see chapter 6.

that the nationality clauses amounted to a barrier to the free movement of workers and therefore constituted an infringement of Article 39 EC,<sup>551</sup> rather than qualifying them as directly discriminatory, and subsequently proceeded to an investigation of possible justifications for these nationality clauses under the rule of reason.<sup>552</sup> There are a number of plausible explanations for this at first glance incomprehensible approach. Firstly, the Court may very well have taken here a giant leap towards a single uniform procedural framework for the fundamental freedoms of movement, treating also the clearly directly discriminatory nationality clauses merely as restrictions and especially, introducing implicitly, but nevertheless undoubtedly, the possibility of justification of a directly discriminatory national provision under the rule of reason, in addition to the express Treaty derogations, which traditionally could already be invoked to justify such measures. This rather bold assertion with regard to the justification of directly discriminatory measures can be underpinned with a textual argument: in *Gebhard*, the Court had determined exactly which conditions needed to be complied with in order to justify a contested national measure under the rule of reason doctrine. It had to be "(i) applied in a non-discriminatory manner; (ii) justified by imperative requirements in the general interest; (iii) suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is necessary to attain it."<sup>553</sup> This so-called '*Gebhard*-formula' is reiterated in *Bosman*, with one slight difference however: the requirement that the disputed measure must be non-discriminatory in order to be eligible for objective justification has remarkably – and perhaps strategically - disappeared and has been replaced by the condition that the rule pursues a legitimate aim compatible with the Treaty.<sup>554</sup> In the light of this rephrased formula, there would thus seem to be nothing to preclude directly discriminatory measures from being justified by imperative requirements in the general interest. Alternatively, it may equally have been that the Court did not really wish to go that far, but manifestly sensitive to the particularities and the importance of sport, it nevertheless tried by all means to come to a justification for the national clauses, probably also in view of the delicate situation of the national teams,<sup>555</sup> and therefore dealt with the national requirements under the heading of restriction rather than on the traditional basis of discrimination. This second

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<sup>551</sup> *Bosman*, paras. 116-120.

<sup>552</sup> *Bosman*, paras. 121-137.

<sup>553</sup> *Gebhard*, par. 37, citing *Kraus*, par. 32.

<sup>554</sup> *Bosman*, par. 104.

<sup>555</sup> The specific situation of representative national teams within the Community framework will be dealt with in chapter 6, §2, II.

explanation for the Court's *démarche*, implying the existence of a kind of *sui generis* exception for purely sporting interests, somehow appears to be plausible and based on common sense, given that this particular situation, although potentially deserving protection,<sup>556</sup> does not fit under the heading of the expressly provided exceptions of public policy, public security and public health.<sup>556</sup> Notwithstanding that, it cannot seriously be denied that the nationality clauses squarely infringe the Treaty provisions prohibiting discriminatory treatment on grounds of nationality. How well this approach may fit within the Court's modern two-steps 'restriction-justification' procedure, it does not conceal the fact that the nationality requirements are unequivocally discriminatory. Finally, there is a third, eventually conceivable explanation for the Court's dealing with the nationality clauses, namely that the Court of Justice has carried out its analysis on the basis of the concept of 'sporting nationality', rather than on that of legal nationality.<sup>557</sup> This notion implies that an athlete has the sporting nationality of the country for which he is entitled to represent the national team. Viewed in this way, the nationality clauses would be solely indirectly discriminatory, and could therefore be objectively justified. After all, this third explanation is maybe the most plausible one.<sup>558</sup>

Be that as it may, it is clear that the specific issues dealt with in respectively *Walloon Waste* and *Bosman* highlight perfectly the limitations inherent to the rigid Treaty structure of prohibitions of discrimination and express derogations.<sup>559</sup> Arguably, these kinds of difficult sensitive matters can be better dealt with under the broader and more flexible 'restriction plus rule of reason' analysis. The fact that the Court's ruling in *Bosman* could be construed as having implicitly introduced the possibility for directly discriminatory measures to be justified under the imperative requirements in the general interest undoubtedly constitutes to a certain extent a remarkable and highly contestable innovation within the case law of the European Court of Justice. Admittedly, the traditional position of the Court with regard to direct discrimination has always been that no defence is available, unless the Treaty provides for an express derogation.<sup>560</sup> However, in this respect it should not be forgotten that it was within the framework of equal

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<sup>556</sup> O'Keeffe & Osborne, "L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen", 1 *RMUE* (1996) at 40.

<sup>557</sup> Weatherill, "European Football Law", *o.c.*, at 354.

<sup>558</sup> For a more detailed critical analysis, see chapter 6, §2, III.

<sup>559</sup> See also Mortelmans, "Zaak C-415/95 KBVB, Royal Club Liégeois, UEFA tegen J.-M. Bosman", 4 *SEW* (1996) 141.

treatment between men and women that both the Commission and Advocate General Van Gerven urged the Court for the first time to accept the argument that direct discrimination could be justified. In *Birds Eye Walls v Roberts*<sup>561</sup>, the Commission suggested that direct discrimination could be objectively justified "since the very concept of discrimination, whether direct or indirect, involves a difference in treatment which is unjustified". The Advocate General pointed out that the Court has never ruled that direct discrimination could not be justified by objective factors and held that it is often very difficult to distinguish between direct and indirect discrimination, which renders it arbitrary to grant the possibility of justification only in the case that the discriminatory treatment is indirect. At that moment however, the Court did not take up this suggestion and dribbled away from the hot issue by deciding the case on a different point.<sup>562</sup> Be that as it may, in the meantime, and also within the field of equal treatment, secondary legislation has been adopted in which it has been officially recognised that both direct and indirect discrimination can be objectively justified.<sup>563</sup> This particular development could be interpreted as paving the way for a similar evolution within the field of the fundamental freedoms. Moreover, it would of course not be the first time in the history of the case law of the Court that it implicitly launches a new development in a particular case in order to vigorously confirm or ascertain the new principle in a subsequent case. However, up until now, the Court in my opinion hasn't yet rendered such a judgement in which it expressly confirms this potential new trend. At this stage, one thus has to settle for a couple of decisions of the Court containing important indications to this effect.<sup>564</sup> In any event, it can no longer be denied that the Court in

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<sup>560</sup> Barnard, *EC Employment Law*, (Wiley, 1995) at 182-184.

<sup>561</sup> Case C-132/92 *Birds Eye Walls v Roberts*, 3 CMLR (1993) 822; see also Case C-152/91 *Neath v Hugh Steeper Ltd*, 1 All England Law Reports (1994) 929.

<sup>562</sup> For further analysis, see Ellis, "The Definition of Discrimination in European Community Sex Equality Law", 19 *ELRev.* (1994) 563.

<sup>563</sup> Article 4 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 014, 6-8

<sup>564</sup> In this respect, reference is sometimes made to the Court's decision in Case C-250/95 *Futura Participations SA v Administration des Contributions* [1997] ECR I-2471. Martin argued that the contested Luxembourg legislation establishing differential treatment for resident and non-resident taxpayers was directly discriminatory. (Martin, "Discriminations", 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *o.c.*, at 611) To reach this conclusion, he based himself on paragraph 25 of the Court's judgement, in which it held that the legislation imposed a condition affecting "specifically" undertakings having their seat in another Member State. Although the Luxembourg measure under scrutiny in this case had clearly a discriminatory effect, the Court nevertheless proceeded by holding that the measure would only infringe the Treaty provisions on the freedom of establishment if it did not pursue a legitimate objective and could not be justified by a mandatory reason. Consequently, he considered this case as a confirmation of the supposition that even directly discriminatory measures can be justified under the objective justification doctrine. In my view, the measure at stake was not directly, but indirectly discriminatory. Be that as it may, the Court did reiterate the *Gebhard*-formula, laying down

its language in practice reverts more and more often to a simplified approach in the context of the fundamental freedoms in which it seeks to ascertain whether the contested national measures amounts to an obstacle to the fundamental freedom before moving on immediately to the issue of justification. The Court effectively seems to abandon its traditional two-tier approach, consisting, firstly, of a classification of the measures under scrutiny as discriminatory or as indistinctly applicable, followed by an evaluation of the grounds invoked to justify the measure, the availability of which is decisively determined by the outcome of the preceding classification.<sup>565</sup> Consequently, the principle of non-discrimination seems to have surrendered its primary role within the framework of these fundamental freedoms. Presumably, however, in the analysis of the Court, it will still be harder for discriminatory measures to pass the tests of objective justification and of the principle of proportionality than for indistinctly applicable measures. In this sense, the principle of non-discrimination will probably still have a word to say in the debates. And it might always bounce back if the Court were to decide to transpose its *Keck* ruling to the spheres of free movement of persons and freedom to provide services anyway, or decided to take it into consideration as a delimiting factor when ultimately defining the precise scope of the concept of restriction.

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the requirements to be fulfilled to objectively justify national measures, precisely as it was subtly modified in *Bosman*. The original first condition that the measure must be indistinctly applicable seems thus somehow to have fallen into oblivion. This of course adds further credence to the theory that even directly discriminatory measures may be objectively justified. Apart from that, my divergence of opinion with Martin as to the discriminatory nature of the Luxembourg rule underlines once again that Advocate General Van Gerven was probably right in holding that even the difference between direct and indirect discrimination is not always crystal clear. Also for that reason, a more uniform approach to the justification issue might be welcomed.

<sup>565</sup> See C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, concerning a request by a doctor established in Luxembourg for authorisation for his daughter to receive treatment from an orthodontist established in Germany. Instead of categorising the contested rules as indirectly discriminatory, as it probably would have done previously in the traditional framework, the Court solely decided that "such rules deter insured persons from approaching providers of medical services established in another Member State and constitute, for them and their patients, a barrier to the freedom to provide services." (par. 35) Subsequently, the Court went on to assess the different reasons advanced to justify the restriction, without paying any particular attention as to whether these justifications could actually be invoked in the light of the particular – *in casu* indirectly discriminatory – nature of the contested rules.(paras. 37-53) It simply rejected both the argument concerning the risk of seriously undermining the financial balance of the social security system, which could be construed as an overriding reason in the general interest, as the arguments concerning the necessity to guarantee the quality of medical services and the aim to provide a balanced medical and hospital service open to all insured persons, which could be captured under the express public health derogation.

## *Conclusion*

Evidently, Community law with regard to the application of the fundamental freedoms is currently standing at a crossroads, as the case law of the Court of Justice is fraught with substantial uncertainty concerning the new core concept of restrictions. The Court now faces the important task of satisfactorily completing the reform it started when it decided to extend its examination of the compatibility of national measures with the Treaty free movement provisions beyond the scope of the principle of non-discrimination on grounds of nationality. So far, the Court's approach of the issue hasn't always excelled in consistency and coherence, rendering it somehow difficult to extrapolate with precision useful indications or principles for future cases. For the time being the Court seems to be hesitating whether it would be preferable to keep a 'standard-like' test to define the concept of restriction, to borrow from the terminology introduced by Wils,<sup>566</sup> or rather build a 'rule-like' test into the notion. A standard-like test has the advantage of reducing error costs, as it puts the emphasis of the Court's analysis on ex post adjudication, but it inevitably entails considerable administrative costs to resolve all the cases which come before the Court. Conversely, a more rule-like test, involving a predominantly ex ante evaluation of which measures infringe the free movement provisions, allows to diminish administrative costs, increasing however the risk of erroneous judgements. In the field of free movement of goods, the Court has adhered to a more rule-based regime since its decision in *Keck*, distinguishing between measures on selling arrangements and measures relating to product characteristics. In the domains of persons and services, the Court still adopts the standard of prevention or hindrance of a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement to define the concept of restriction. However, there are strong indications that it is contemplating a move towards the other direction, with the introduction of a rule-like test centred around the notion of market access. In this respect, it is essential that the Court strives to find a delicate balance between a high level of legal certainty, great precision in the application of the applicable norms and low administrative costs, regardless of whatever form the final test will turn out to take. Furthermore, in addition to shining light on the precise scope and interpretation of the concepts of restriction and market access, the Court is invited to reappraise the role of the prohibition of discrimination on grounds of nationality, which

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<sup>566</sup> Wils, "The Search for the Rule in Article 30 EEC", 18 *ELRev.* (1993) 475, at 480-482.

sometimes appears to be downgraded to a principle of secondary importance in the more recent case law of the Court on the free movement of persons and services. It is respectfully submitted that this principle still has an important role to play on this matter. If it is not to exert any direct influence, for example on the issue of justification, by means of rendering the availability of certain grounds of justification dependent on whether the contested measure is discriminatory or not, even in a possibly new scheme of justification,<sup>567</sup> it could definitely do so indirectly, if the Court were to apply more tightly the requirements imposed by the principle of proportionality in the event of discriminatory measures under challenge. Admittedly, the Court has never explicitly downplayed the role of the principle of non-discrimination, but nevertheless, in the face of the latest developments, a formal recognition of its function would be welcome.

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<sup>567</sup> See in this respect the interesting proposals of Mortelmans, "Excepties bij non-tarifaire intracommunautaire belemmeringen: assimilatie in het nieuwe EG-Verdrag?", 5 *SEW* (1997) 182.



## Part 2

### Practical Implications

6

6

## The Transfer Issue: Chronicle of a Death Foretold?

- Gabriel Garcia Marquez -

### *Introduction*

The Community does not have any direct powers in the domain of sport. This has not prevented the Court of Justice from reiterating regularly that to the extent that it constitutes an economic activity according to the terms of Article 2 EC, sport nonetheless falls within the scope of Community law. The analysis effectuated in the preceding chapters has revealed that there is in principle nothing to preclude sportsmen from being qualified as workers or service providers within the meaning of the relevant free movement provisions. A first set of rules elaborated by the sports associations which have come in the line of fire from the point of view of compliance with the Community provisions on freedom of movement concern the so-called transfer system. Essentially, these transfer rules require the fulfilment of a certain number of formal, material and temporal conditions for a 'transfer' of an individual sportsman from one club to another to be rendered effective. Clearly, in some way or the other, these provisions thus substantially limit the athlete's freedom to change clubs when he deems it fit. It has been alleged on different occasions that several of these prerequisites also constitute restrictions to the right to freedom of movement as guaranteed in the European Community Treaty. This particular issue which will be examined in detail in the next two chapters. In this first chapter on transfers, it shall be evaluated in particular whether the Court of Justice in the *Bosman* case has managed to find an appropriate balance between on the one hand, the exigencies of the Community to ensure compliance with Community law, and on the other hand, the claims of the sporting associations to respect their freedom of association and to take duly into account the special character of sport.

The purpose of this short introductory section is to convey a better understanding of the precise content of the notion of 'transfer'. Also, it will be explored already somewhat more in

detail which particular shape these suspect transfer conditions take. However, initially, it is considered necessary to sketch briefly the framework of the mutual legal relationships in the triangular situation of a sportsman, his club and the federation within which transfers of individual sportsmen are effectuated.

## **I. DIFFERENT LINKS ATHLETE – CLUB - FEDERATION**

In general, one can discern different types of relationship in the particular situation of a sportsman playing for a club in a given sports discipline.<sup>568</sup> First of all, a player must be affiliated to a certain sports club. This bond of allegiance between the player and the club can be limited to a simple membership of association, as is often the case with regard to amateur sportsmen, and/or find expression in a contract of employment concluded between both interested parties, which is in principle the rule when sport is exercised on a more professional basis. Furthermore, an athlete must also be affiliated to the national federation responsible for the sport in which he wishes to perform his activities. And in order to be able to participate for his club in the official competitions organised by this federation, the athlete must receive specific authorisation to play for this club. This entitlement usually takes the form of a 'qualification' or 'licence' issued by the federation. Broadly speaking, the federations pursue a double objective with the imposition of this requirement: firstly, it is a means to enforce compliance with the internal laws and regulations of the federation, as the deliverance of the licence is conditional on the formal acceptance of these rules by the player, and secondly, it allows to exert control on the regularity of the competitions by preventing unauthorised athletes from participating.

## **II. THE NOTION OF 'TRANSFER'**

Conceptually, a transfer can be defined as the transaction by which a player moves from one club to another and thus obtains a change of club of affiliation and possibly, as the case may be, a change of registration at a national federation.<sup>569</sup> In the event of a transfer, the membership of the player in question to the club or their contractual relationship thus comes to an end, after

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<sup>568</sup> For more detail, see Blanpain & Boyaert, *De transfer van sportbeoefenaars* (Peeters, 1995); Dubey, *La libre circulation des sportifs en Europe* (Bruylant, 2000), at 274-277.

which the released player is free to conclude an agreement with the new club. The clubs have the obligation to inform the national federation(s) of the transfer, enabling the federation(s) to annul or withdraw the licence of the player to play for the selling club, and to deliver a new licence qualifying him to play for the buying club.<sup>570</sup> It is important to bear in mind from the outset that a player will only be entitled to put his capacities and skills effectively at the service of his new club once all specific formalities with regard to the transfer have been respected.<sup>571</sup> Remarkably, even though strict compliance with the conditions imposed by the transfer rules hinges in the first place on the clubs involved in the particular transaction, eventual sanctions resulting from violation or non-respect of the transfer rules in practice predominantly hit the player in question, as he will not receive the necessary licence to play from the competent federation, which will exclude him from taking part in the official competitions and thus bar him from exercising his profession.<sup>572</sup>

In this context, it is basically conceivable to distinguish between two different situations.<sup>573</sup> on the one hand, there is the unequivocal, straightforward situation of an athlete who definitively and in principle permanently leaves one club to go and play for another one, in which one is confronted with a real or proper transfer. On the other hand, an athlete sometimes leaves his club only on a temporary basis, and defends the colours of another team solely for a determined period, after the expiry of which he returns normally to his previous club. Under these circumstances, the player continues to be affiliated to his club but is registered at the national federation as entitled to play for another club. This particular situation is generally referred to as a 'loan'. These loan agreements between clubs often contain a specific clause providing the new club with the option of acquiring the player on a definitive basis at the end of the loan period. If this hypothesis materialises and the club indeed decides to make use of this option, the transaction turns into a real transfer.<sup>574</sup>

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<sup>569</sup> Baddeley, *L'association sportive face au droit – Les limites de son autonomie* (thesis Genève, Basel and Frankfurt, 1994) at 182.

<sup>570</sup> Baddeley, *o.c.*, at 183.

<sup>571</sup> See also Füllgraf, *Der Lizenzfußball – Eine vertragliche Dreierbeziehung im Arbeitsrecht* (thesis Berlin, 1981), at 76.

<sup>572</sup> Dubey, *o.c.*, at 277.

<sup>573</sup> See also Sutter, *Rechtsfragen des organisierten Sports – unter besonderer Berücksichtigung des Einzelarbeitsvertrages* (thesis, Basel, Bern, Frankfurt, New York, 1984), at 271-275: he talks about 'echte' and 'unechte Transfer'.

<sup>574</sup> In the remainder of this part of the thesis, only real transfers will be dealt with in principle.

### III. DIFFERENT CONDITIONS TO BE FULFILLED IN CASE OF A TRANSFER

A state of complete freedom on the players' market, enabling sportsmen to leave their club of affiliation for another one at any moment in time without the official recognition of their move being subjected in whatever kind of way to the realisation of different sorts of conditions, would potentially entail serious repercussions, not only for the clubs concerned, which risk to be substantially weakened respectively strengthened by the departure or arrival of influential players, but also for the competitions to which these clubs participate, as their outcome could be influenced to a greater or lesser degree by the turnover of players, which would cast doubts on the regularity of these sporting events.<sup>575</sup> In order to prevent these scenarios from occurring, the competent federations have elaborated a set of transfer rules, submitting the achievement of a transfer of a player to compliance with different requirements, thereby effectively restricting the possibility for players to freely walk out of their club of affiliation to join a new team.<sup>576</sup> From the different transfer systems established by the diverse international and national federations, it is conceivable to derive three major types of conditions. Firstly, one can distinguish temporal limitations. The rules introducing this factor of time generally stipulate that transfers can in principle only be effectuated within a certain period of time before, during or after the sporting season, or alternatively, until a certain date after which a transfer is no longer admissible. The Community institutions have already pronounced their opinion on this matter on two different occasions. Firstly, the Court of Justice dealt with the compatibility of transfer periods with the Treaty provisions on freedom of movement for workers in the case of *Lehtonen*.<sup>577</sup> Secondly, the issue was also raised in the negotiations between the football authorities UEFA and FIFA and the European Commission in the infringement procedure against certain rules of the transfer system in professional football.<sup>578</sup> Furthermore, the federations have drafted provisions containing formal criteria which must also be respected for a transfer to be rendered fully effective. In this respect, it is possible to ascertain a great variety of formal prerequisites, ranging from official requests for a transfer to be made, over enrolment on a transfer list to the use of exit letters or

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<sup>575</sup> For more detail, consult Dubey, *o.c.*, at 277-318.

<sup>576</sup> See also Garrigues, *Activités sportives et droit communautaire* (thesis Strasbourg, 1982), at 298.

<sup>577</sup> Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball* [2000] ECR I-2681.

retain lists, the deliverance of international transfer certificates, etc. For the time being, especially some national courts or tribunals have rendered some decisions on this matter.<sup>579</sup> Finally, the transfer systems also contain provisions which materially restrict the possibility for players to change clubs. A first category of rules requiring respect for material conditions relate in some way or the other to numbers. One can detect clauses limiting the total number of players (or foreigners) under contract to a certain amount, clauses limiting the number of foreign players to be fielded in an official contest or clauses limiting the frequency with which players can be transferred. The principal material restriction, however, consists of the fact that the transfer of a player is dependent upon the payment, due by the new club to the previous club, of a transfer sum. In principle, the precise amount of the transfer fee must be agreed between the two clubs or determined in accordance with the relevant regulations of the sporting federations.<sup>580</sup> Strictly speaking, the player in question is no party to the contract.<sup>581</sup> In theory, the business relationships between the clubs should exert no influence on the activity of the player. Be that as it may, however, when the clubs fail to reach an agreement on the transfer sum to be paid, this eventuality will in practice prevent the player from providing sporting services to his new club. The questions raised by the material conditions linked to transfers, and especially the issue of transfer fees, have already been the subject of many intense debate at the heart of the European institutions. The judgement of the Court of Justice in the case of *Bosman* undoubtedly constitutes the most important expression in this respect.<sup>582</sup>

It will not be attempted to examine all these specific transfer requirements exhaustively upon their compatibility with the Community principles of freedom of movement. Instead, it has been preferred to deal only with some of these conditions in detail. It is submitted that the findings from this study can be applied, *mutatis mutandis*, to the other conditions. This chapter will almost entirely be dedicated to an analysis of the *Bosman* decision, in which the Court

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<sup>578</sup> The revised transfer rules will be analysed in detail in chapter 5.

<sup>579</sup> On the use of exit letters in Switzerland, see for example, *Case Perroud v Servette Genève (football)*, *Recueil officiel des arrêts du Tribunal fédéral suisse* 102 II, at 211, or *Case Monn, Peter and Torche (basketball)*, *Tribunal civil de l'arrondissement de la Sarine*, 20 June 1997, *Revue Fribourgeoise de Jurisprudence* (1998) at 51; on the use of the retain list in England, see *Eastham v Newcastle United Football Club Ltd.* [1963] All England Law Reports 139.

<sup>580</sup> *Dubey, o.c.*, at 275-276.

<sup>581</sup> *Baddeley, o.c.*, at 182.

<sup>582</sup> *Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

invalidated the long-standing practice of submitting the transfer of a player who wished to move to another club in another Member State after the expiry of his contract with his old club to the payment of a transfer sum by the new club. In the next chapter, the viability with Community Internal Market law of the new FIFA Regulations on international transfers, which were introduced after long negotiations with the European Commission in the framework of a procedure for infringement of the competition rules, will be critically evaluated. At the end of this part, some preliminary conclusions will be drawn on the place of sport within the Community framework and the extent to which account has been taken of the specific features of the sporting activity.

### *§1: The situation in the pre-Bosman era*

Before the Court of Justice decisively tackled the issue of transfer payments, the European Parliament and, albeit to a lesser extent, also the European Commission had already expressed their opinion on the matter.

## **1. THE POSITION OF THE EUROPEAN PARLIAMENT**

### **1. Initial Resolutions**

In a general Resolution on Sport and the Community from 1984,<sup>583</sup> the European Parliament requested the international sports federations to harmonise their rules in order to facilitate mobility and contacts among sportsmen. Already at the time, it requested the European Commission to take energetic steps against rules that limit the freedom of movement and establishment of Member State citizens engaged in certain sports and thus run counter to the Treaty of Rome.<sup>584</sup> Some time later, in a Resolution on Sport in the European Community and a

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<sup>583</sup> European Parliament, Resolution on Sport and the Community, 13 April 1984, (1984) OJ C 127/142.

<sup>584</sup> EP Resolution 1984, at 144, 8. Interestingly, it also requested the Commission to hold consultations with all those concerned, that is to say sports authorities, advertising agencies and television authorities, with a view to adopting a European charter on the allocation to sports clubs and federations of the proceeds from the broadcasting of European sporting events.

People's Europe,<sup>585</sup> the Parliament considered that Europe 1992 would affect the sporting world in a number of ways, such as the free movement of professional sportsmen and coaches, and called on the Commission to draw up specific proposals in these areas.<sup>586</sup> Moreover, it expressed the opinion that the Commission should strongly oppose regulations in certain sectors of sport, if they contravene the Treaty of Rome, and abolish or reform them where necessary, with a view to securing freedom of movement and freedom of establishment, while taking into account the position of the sports bodies responsible.<sup>587</sup>

## 2. The *Janssen van Raay* report

The Janssen van Raay Report on the freedom of movement of professional footballers in the Community,<sup>588</sup> drawn up on behalf of the Committee on Legal Affairs and Citizens' rights, recognised that professional football players are employees who, like any other employee in the Community, should enjoy the protection of European law and benefit, in particular, from the provisions guaranteeing freedom of movement. In this respect, it considered the regulations of UEFA and the national football associations in breach of national and European law insofar as they impose on these sportsmen under contract a system of indefinite extensions of contract which precludes them from joining any other club of their choice at the end of their contract, unless the freedom to enter into a new contract is severed by payment of a transfer fee, on penalty of international suspension.

In an explanatory statement, the report further elaborated on this issue, clarifying that if a professional football player wants to play in another Community country after his employment contract has expired, he needs clearance from his national association, which grants it only if his previous club has agreed to the transfer. It pointed out that the latter will do so only after obtaining a transfer fee which often runs into seven figures. Entering more in detail, the report specifically condemned the system of payment of transfer fees in its present form as a latter-day version of slave trade, a violation of the freedom of contract and the freedom of movement

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<sup>585</sup> European Parliament, Resolution on Sport in the European Community and a People's Europe, 17 February 1989, (1989) OJ C 69/234.

<sup>586</sup> EP Resolution 1989, at 236, pt. 4.

<sup>587</sup> EP Resolution 1989, at 236, pt. 7.

guaranteed by the Treaties and a contravention of Article 81 of the EC Treaty. If the restrictive practices are to be declared illegal and invalid, the plaintiffs or intervening parties could be the sportsmen involved, the clubs, or the European Commission. The report correctly emphasised that individual professional sportsmen rarely bring actions, as they have no absolute right to a professional contract and moreover, if they took court action, would have to reckon with being suspended and losing their jobs de facto. It also outlined that it is not primarily the task of professional footballers to assert their right to freedom of movement. Furthermore, it stipulated that even though also the clubs could bring actions in principle, they do not do so in practice, for the simple reason that most of them are happy with the existing arrangements and willingly apply them. In the light of this, it therefore explicitly called on the European Commission, as the guardian of the Treaties, to institute proceedings for infringement of Article 81 EC against UEFA and/or the national football associations, as well as individual clubs in the Community, in an endeavour to abolish the transfer fee system. In this respect, it did acknowledge, however, the benefit to the clubs of a controlled phasing-out of the system and the possibility of compensation for investment in apprenticeship and training, though this may be requested only while the apprenticeship is still in progress.

In annex to the Janssen van Raay report, the Committee on Social Affairs and Employment essentially confirmed the findings of the Committee on Legal Affairs and Citizens' rights, holding that in the European Community, the freedom of movement of professional footballers is decisively restricted by the rules governing transfer fees, as transfer fees obstruct workers in freely selecting their employer. Again, they didn't yield from using the categorisation of the transfer system as 'a modern form of serfdom'.<sup>589</sup> Equally, the Committee on Youth, Education, Information and Sport expressed a similar opinion.<sup>590</sup> However, against the background of these clear, unequivocal statements regarding the compatibility of the rules on the payment of transfer fees with Community law,<sup>591</sup> it must be acknowledged that within the seat of

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<sup>588</sup> European Parliament, Report Janssen van Raay on the freedom of movement of professional footballers in the Community, PE DOC A2-415/88, 1 March 1989.

<sup>589</sup> Annex to the report: Opinion of the Committee on Social Affairs and Employment, PE DOC A2-415/88, 29 March 1989, p.4.

<sup>590</sup> Annex to the report: Opinion of the Committee on Youth, Education, Information and Sport, PE DOC A2-415/88, 29 March 1989, p.6.

<sup>591</sup> Annex 2: motion for a resolution (document 2-1582/84) tabled by Vandemeulebroucke and Kuijpers, which calls on the Commission to take the necessary steps under the Treaty to ban the restrictive transfer system in all sports; or

the European Parliament, also some more cautious or dissonant positions have been voiced. Members of Parliament Ford and Stewart tabled a motion for a resolution in which they urged the Parliament to recognise the financial difficulties a change in the existing transfer rules will create because of differing economic strength of the football industry in Community countries and the consequent problems of harmonising subsidies from private, regional and national agencies to individual clubs, and demand that a full investigation of all issues be undertaken before premature decisions are taken.<sup>592</sup> A subsequent motion for resolution, prepared by Ephremidis, Adamou and Alavanos, went considerably further. They highlighted in detail the negative consequences which would be engendered by a modification of the current transfer system. According to them, the possibility for an unlimited number of professional footballers to move freely within the Community would directly distort the whole character of football in the Member States. It would also lead to the excessive development of certain large football clubs with limited company status at the expense of the small ones, with the result that the difference in potential between teams would become even more pronounced. Furthermore, arguably, a complete freedom of movement would give fresh impetus to the tendency for small clubs to be taken over by larger ones, would to all intents deliver this extremely popular sport into the hands of the offices of the various middlemen and commercial agents, and would lead to an increased outflow of foreign exchange through reckless transfers, particularly from small countries to larger ones, since the larger ones have a more developed infrastructure. Consequently, in order to prevent these unwarranted developments from occurring, they called on the Commission to simply put a stop to initiatives that would alter the existing arrangements for the movement of professional football players in the Community Member States.<sup>593</sup>

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also Annex 5: motion for a resolution (document B 2-81/87) tabled by Tridente, Alber, André, Bandres Molet, Betiza, Bombard, Bonino, Blumenfeld, Bueno Vicente, Chiabrande, Ciccimessere, De Bartolomei, Graziani, Mattina, O'Malley, Kuijpers, Pegado Liz, Roelants du Vivier, Segre, Selva, Tognoli, Vandemeulebroucke, van Dijk, Welsh, Wijsenbeek, Amadei and Rogalla, calling on the Commission to take all appropriate action, including bringing the matter before the Court of Justice, to enforce the spirit and letter of the Treaties with regard to the freedom of movement and establishment for Community citizens, with specific reference to this closed-door policy operated by some national football federations.

<sup>592</sup> Annex 1: motion for a resolution (document 2-1167/84) tabled by Ford and Stewart.

<sup>593</sup> Annex 4: motion for resolution (document B2 -1547/86) by Ephremidis, Adamou and Alavanos.

In the Resolution which the European Parliament finally issued pursuant to the Janssen van Raay report,<sup>594</sup> the Parliament adopted the conclusions of the report, regarding the system of the payment of transfer fees in its present form a violation of the freedom of movement and a contravention of Article 81 EC.<sup>595</sup> Besides, it called on the Commission to persuade UEFA and the national football associations to accept the solution suggested in the report and, failing this, to use every remedy to enforce the application of Community law.<sup>596</sup> It took the view that the Commission should use every remedy available to it under the Treaty to ensure complete freedom of movement by means of binding measures whose date of entry into force and duration are clearly defined.<sup>597</sup> In a subsequent Resolution on the same issue,<sup>598</sup> the Parliament reaffirmed its determined opposition to any restriction on or obstacle to the free movement of professional footballers in the Community.<sup>599</sup> As a result, it found unacceptable the practice of large sums of money being paid by a player's new club as a transfer fee to his old club, since it infringes both the contractual freedom and freedom of movement guaranteed by the Treaties and is incompatible with Article 81 EC.<sup>600</sup> Furthermore, it opposed any prior authorisation requirement laid down by employers' organisation vis-à-vis professional footballers seeking a transfer and took the view that Articles 12 and 14 of the FIFA constitution are automatically null and void in the Community since they constitute a breach of Community law.<sup>601</sup>

### 3. The Larive Report

At the time when the *Bosman* case was already pending at the Court of Justice in Luxembourg, the Larive report on the European Union and Sport vigorously condemned once again the existing system of payment of transfer fees as contrary to the Articles 39, 81 and 82 EC.<sup>602</sup> The Committee adopted the same critical stance, especially since these rules apply equally

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<sup>594</sup> European Parliament, Resolution on the freedom of movement of professional footballers in the Community, 11 April 1989, (1989) OJ C 120/33.

<sup>595</sup> EP Resolution 1989, at 33, pt. 1.

<sup>596</sup> EP Resolution 1989, at 34, pt. 14.

<sup>597</sup> EP Resolution 1989, at 35, pt. 17.

<sup>598</sup> European Parliament, Resolution on the freedom of movement of professional footballers, 21 November 1991, (1989) OJ C 326/208.

<sup>599</sup> EP Resolution 1991, at 209, pt. 2.

<sup>600</sup> EP Resolution 1991, at 209, pt. 4.

<sup>601</sup> EP Resolution 1991, at 209, pt. 3.

<sup>602</sup> European Parliament, Larive Report on the European Union and Sport, 27 April 1994, PE DOC A3-0326/94.

to children playing for a club already at a young age.<sup>603</sup> The findings of this report were subsequently finalised in another Resolution on the European Community and Sport,<sup>604</sup> in which the Parliament called for the right to join and leave sports clubs freely to be guaranteed without making it dependent on additional conditions which conflict with general law.<sup>605</sup> Moreover, it urged the Commission to investigate immediately whether both the rules and practices of FIFA, UEFA and the national football associations and clubs are compatible with EU legislation, to take the appropriate decisions following this investigation and to act accordingly.<sup>606</sup>

## 2. THE POSITION OF THE EUROPEAN COMMISSION

The constructive, pro-active and engaged approach of the European Parliament with regard to the issue of the lawfulness of the system of transfer payments in sport stands in stark contrast with the quasi-disinterested, virtually inert attitude of the European Commission regarding the matter. In spite of the fact that it has been formally requested on several occasions to undertake legal action against the transfer practices and institute proceedings against the responsible sporting associations for infringement of the Community competition rules, the Commission has consistently and obstinately refrained from doing so. The explanation for this at first glance incomprehensible stance is to be found in the Commission's formal answer to the written question addressed to it on behalf of a Member of Parliament, as to whether it considered that the FIFA rules in question did indeed contravene Articles of the Treaty.<sup>607</sup> The Commission firstly replied that the rules governing transfers which apply to all professional footballers, regardless of nationality, are not incompatible with the principle of freedom of movement of persons within the Community, as its scope is limited to abolishing all forms of discrimination based on nationality between workers who are nationals of the Member States. Secondly, as far as Article 81 EC is concerned, the Commission expressed the opinion that the provisions contained in the regulations of both national and international sports federations, including in particular football federations, and which establish a system of blockage and transfer for players

<sup>603</sup> Opinion of the Committee, 14 October 1993, PE DOC A3-0326/94, Part A. Proposition for resolution.

<sup>604</sup> European Parliament, Resolution on the European Community and Sport, 6 May 1994, (1994) OJ C 205/486.

<sup>605</sup> EP Resolution 1994, at 487, pt. 8.

<sup>606</sup> EP Resolution, at 488, pt. 9.

<sup>607</sup> Written Question N° 2391/83 by Vandemeulebroucke to the Commission of the European Communities regarding the violation of the Treaty of Rome by the FIFA, (1984) OJ C 222/21.

who wish to change clubs, do not fall under the Community's competition rules applicable to undertakings. Subsequently, it elaborated somewhat further on this statement. It held that individuals participating in professional sports normally do so as employees of a club on the basis of an employment contract and as such are not undertakings. As a result, limitations of their freedom to choose another club/employer resulting from this system do not constitute restrictions of competition in the sense of Article 81(1) EC. On the other hand, the Commission acknowledged that sport clubs will normally be deemed to be undertakings, so that the regulations of their federations could in principle constitute decisions of associations of undertakings under Article 81(1) EC. However, in this respect it submitted that even though the regulations may be found to have as their object or effect a restriction on the economic freedom of their member clubs and thus on competition, it is unlikely in the present situation that these restrictions could affect trade between Member States to any appreciable extent. Therefore one of the constitutive elements of Article 81(1) EC is lacking.<sup>608</sup>

As it didn't perceive any violation of Community law in the existing transfer rules, the Commission obviously had no incentive to open an infringement procedure before the Court of Justice. In 1985, in response to the request to state what position it had taken in the talks with UEFA on freedom of movement for footballers as regards the role of agents in the transfer of star footballers, exorbitant and completely uncontrolled transfer fees and the fact that the players themselves have no say in these transactions,<sup>609</sup> the Commission settled for the statement that at the meeting of the Commission and the UEFA on freedom of movement for footballers, the questions referred to were simply not discussed.<sup>610</sup> As far as it was concerned, the matter apparently was to be vertically classified. Also, it wasn't until 1994 that the Commission finally took position on the complaint filed by Jean-Marc Bosman against the existing transfer arrangements.<sup>611</sup> But then, when it was finally asked to submit its written observations in the framework of the preliminary ruling procedure, the Commission, quite surprisingly, held that the transfer rules under scrutiny constituted an infringement of Article 81 EC. Initially, it left open

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<sup>608</sup> Answer given by Richard on behalf of the Commission, 28 June 1984, (1984) OJ C 222/21.

<sup>609</sup> Written Question N° 1592/84 by Van Hemeldonck to the Commission of the European Communities on the freedom of movement for footballers, (1985) OJ C 111/31.

<sup>610</sup> Answer given by Sutherland on behalf of the Commission, (1985) OJ C 111/32.

<sup>611</sup> See also Dupont, "Le droit communautaire et la situation du sportif professionnel avant l'arrêt 'Bosman'", 1 *RMUE* (1996) 65.

the point whether they were also in breach of Article 39 EC. However, at the hearing before the Court, it regarded the transfer rules equally incompatible with the free movement of persons, unless they could be justified by imperative reasons in the general interest and did not go beyond what is necessary to attain those objectives.<sup>612</sup>

## §2: *The Bosman case: Crusade on football boots*

*"C-415/93: une lettre et cinq chiffres qui changent une vie."*

- Le Soir, 14 December 1995 -

Ultimately, and almost against all odds, the European Court of Justice was seized of the matter of transfer payments anyway, in a case which would virtually immediately turn out to become a true milestone, not only from a practical point of view, concerning the results it engendered for football, or sport in general, but also theoretically, with regard to the principles it enumerated or confirmed and the impact it effectuated on the whole of the European law construct. Much, if not all, of the credit of this goes to one man, one professional football player who defied everything and everyone when in 1990 he decided to undertake legal action because the existing football rules did not allow him to play for the club of his choice, even though he was no longer contractually bound to a club. The name is Bosman, Jean-Marc Bosman. Notwithstanding a distressing lack of support by his colleague football players, an almost general boycott by the clubs, heavy pressure and blackmail by the whole football establishment to drop the case or at least settle it out of court, coupled with sometimes cunning legal manoeuvres to slow down the process of the case in court, this lone cavalier persisted in his legal challenge, determined to go all the way. His personal crusade finally ended in Luxembourg, where the European Court of Justice, in an already legendary judgement,<sup>613</sup> made firewood of some of the ancient football customs.

The structure of this paragraph is the following: in a first section, a short overview will be given of the applicable transfer rules at the time of the proceedings in *Bosman*, both at

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<sup>612</sup> Lenz AG in Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921, at 5012, par. 212.

international and at domestic level. Secondly, the factual circumstances which gave rise to the particular dispute will be outlined. In a third section, the progress of the case before the national courts will be described. Subsequently, special attention will be devoted to the preliminary ruling of the Court of Justice on the transfer issue. In the fifth and final section, the more salient aspects of the case will be discussed in detail.

## **I. TRANSFER FEES**

### **1. International transfer rules**

In the case of football, both FIFA and UEFA have elaborated regulations on the status and the transfer of football players. FIFA organises football at world level. UEFA is the confederation of the European national football associations. According to the FIFA Statutes, UEFA must comply with and ensure compliance with the statutes and regulations of FIFA.<sup>614</sup> It is important to state from the outset that the applicable provisions elaborated by the international associations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players. In any event, however, the national federations are bound to respect the regulations of the international federations and must equally ensure compliance with these rules by their member clubs.

#### *1.1. FIFA transfer rules*

At the material time of the events leading up to the *Bosman* case, the relevant FIFA Regulations provided, in particular, that a professional player could not leave the national association to which he was affiliated so long as he was bound by his contract and by the rules of his club and his national association, no matter how harsh their terms might be. An international

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<sup>613</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

<sup>614</sup> Article 9(3) FIFA Statutes 2001.

transfer could not take place unless the former national association issued a transfer certificate acknowledging that all financial commitments, including any transfer fee, had been settled.<sup>615</sup>

In April 1991, FIFA had adopted new Regulations governing the status and eligibility of players whenever they effect a transfer from one national association to another. These Regulations, as amended in December 1991 and December 1993,<sup>616</sup> provided that a non-amateur player shall only be free to conclude a contract with another club if: (a) his contract with his present club has expired or will expire within six months; or (b) his contract with his present club has been rescinded by one party or the other for valid reasons; or (c) his contract with his present club has been rescinded by both parties after mutual agreement.<sup>617</sup> As 'non-amateur' players were regarded players who have ever received, in respect of participation in or an activity connected with association football, remuneration in excess of the actual expenses incurred in the course of such participation, unless they have reacquired amateur status.<sup>618</sup> According to these specific rules, if a non-amateur player is transferred, his former club is entitled to a compensation fee for his training and/or development.<sup>619</sup> If an amateur player concludes a contract with a new club which he joins in a non-amateur capacity, his former club shall be entitled to compensation for his development.<sup>620</sup> Finally, if an amateur player is transferred to another club and has the same status there, the former club has no claim to compensation.<sup>621</sup> However, if an amateur player who has been transferred as such to another club assumes non-amateur status within three years of his transfer to this club, his previous club is entitled to compensation for his development from the club with which he assumes non-amateur status.<sup>622</sup> The amount of compensation is to be agreed upon between the two clubs involved. In the event of disagreement, the dispute is to be submitted to FIFA, unless the confederation which has both clubs under its jurisdiction has drawn up its own regulations to settle differences of this kind.<sup>623</sup> Furthermore, it is also stipulated explicitly that any disagreement between two clubs regarding the amount of compensation for the training

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<sup>615</sup> *Bosman*, par. 16.

<sup>616</sup> The revised version of these Regulations entered into force on 1 January 1994. For the purposes of this chapter, see especially Chapter V on International Transfers of FIFA Regulations 1994: Articles 12-20.

<sup>617</sup> Article FIFA Regulations 1994, see also *Bosman*, par. 18.

<sup>618</sup> Article FIFA Regulations 1994, see also *Bosman*, par. 19.

<sup>619</sup> Article 14.1 FIFA Regulations 1994.

<sup>620</sup> Article 14.2 FIFA Regulations 1994.

<sup>621</sup> Article 14.3 FIFA Regulations 1994.

<sup>622</sup> Article 14.4 FIFA Regulations 1994.

<sup>623</sup> Article 16 FIFA Regulations 1994.

or development of a player shall not affect his sporting or professional activity. An international transfer certificate may not be refused for this reason.<sup>624</sup> The player shall therefore be free to play for the new club with which he has signed a contract as soon as the international transfer certificate has been received.<sup>625</sup>

### 1.2. UEFA transfer rules

The provisions applicable at the time of the facts in *Bosman* to transfers between clubs in different Member States or clubs belonging to different national associations within the same Member State<sup>626</sup> were contained in a document entitled '*Principles of Co-operation between Member Associations of UEFA and their Clubs*', approved by the UEFA Executive Committee on 24 May 1990 and entered into force from 1 July 1990. According to the provisions of this document, a player is free to enter into a new contract with the club of his choice at the expiry of his previous contract.<sup>627</sup> This new club must immediately notify the old club of the conclusion of the contract; in turn, the old club is to notify its national association, which must issue an international clearance certificate.<sup>628</sup> However, the former club is entitled to receive from the new club compensation for training or development of the player in question. Compensation for training is due when the player is transferred for the first time. For every subsequent transfer, a development fee is to be paid to compensate the selling club for the progress it allowed the player to make.<sup>629</sup> If the clubs concerned fail to reach an agreement on the precise amount of compensation due, it is to be fixed by a board of experts set up within UEFA.<sup>630</sup> When calculating this transfer fee, the board makes use of a scale of multiplying factors, from 12 to 1 depending on the players' age, to be applied to the players' gross income, up to a maximum of 5.000.000 Swiss Francs.<sup>631</sup>

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<sup>624</sup> Article 20.1 par. 1 FIFA Regulations 1994.

<sup>625</sup> Article 20.1 par. 2 FIFA Regulations 1994.

<sup>626</sup> This is the case of the United Kingdom, in which there are four different national associations: the English, Scottish, Welsh and the Northern Irish.

<sup>627</sup> Article 12 UEFA Regulations 1990.

<sup>628</sup> Article 13 UEFA Regulations 1990.

<sup>629</sup> Article 1.e Annex UEFA Regulations 1990.

<sup>630</sup> Article 14 UEFA Regulations 1990.

<sup>631</sup> Article 3 Annex UEFA Regulations 1990.

Furthermore, the document explicitly stipulates that the business relationships between the two clubs in respect of the compensation fee for training and development are to exert no influence on the activity of the player, who is to be free to play for his new club.<sup>632</sup> However, this does not exclude that if the new club does not immediately pay the fee to the old club, the UEFA Control and Disciplinary Committee is to deal with the matter and notify its decision to the national association concerned, which may also impose penalties on the debtor club.

After the events which gave rise to the main proceedings, UEFA started negotiations with the European Commission. In April 1991, it undertook specifically to incorporate in every professional players' contract a clause permitting him, at the expiry of his contract, to enter into a new contract with the club of his choice and to play for that club immediately. Provisions to that effect were incorporated in the new 'Principles of Co-operation between Member Associations of UEFA and their Clubs' adopted in December 1991 and entered into force from 1 July 1992.<sup>633</sup> Furthermore, this new version of the transfer rules introduced some modifications in the way the transfer sum was calculated, and there seemed no longer to exist a maximum transfer sum in the event of a transfer of a professional player.<sup>634</sup>

These rules have subsequently been replaced by an UEFA Regulation governing the fixing of a transfer fee supplementing the FIFA Regulation relating to the status and transfer of football players, adopted in June 1993<sup>635</sup> and in force since 1 August 1993.<sup>636</sup> This Regulation did not introduce substantial changes to the previous rules. The new rules retain the principle that the business relationships between the two clubs are to exert no influence on the sporting activity of the player, who is to be free to play for the new club with which he has signed the new contract.<sup>637</sup> In the event of disagreement between the clubs concerned, it is for the appropriate UEFA board of experts to determine the amount of the compensation fee for training or development.<sup>638</sup> For non-amateur players, the calculation of the fee is based on the basis of the player's gross income in the last 12 months or on the fixed annual income guaranteed in the new

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<sup>632</sup> Article 16 UEFA Regulations 1990.

<sup>633</sup> *Bosman*, par. 17.

<sup>634</sup> See *Lenz AG in Bosman*, par. 18.

<sup>635</sup> On the basis of Article 16.2 FIFA Regulations; see Preamble UEFA Regulations 1993.

<sup>636</sup> *Bosman*, par. 21.

<sup>637</sup> Article 2.2 UEFA Regulations 1993.

contract,<sup>639</sup> increased by 20% for players who have played at least twice in the senior national representative team for their country and multiplied by a factor between 12 and 0 depending on age, from 14 to 39 years.<sup>640</sup> In any event, the total amount of compensation can not be higher than the sum demanded by the previous club.<sup>641</sup> The compensation for training awarded to the club for which the player in question has played as an amateur by the club for which he will play as a non-amateur is calculated on the basis of the fixed yearly income guaranteed by the contract. However, it cannot exceed 600.000 Swiss Francs.<sup>642</sup> If an amateur player leaves a club for another one in which he will retain his amateur status, no compensation for training is due.<sup>643</sup>

## 2. National transfer rules

At the time of the events giving rise to the different actions in the main proceedings in the *Bosman* case, in Belgium the transfer rules were applicable as laid down in the Regulation of the Royal Belgian Football Association (the 'Koninklijke Belgische Voetbalbond', further referred to as the 'KBVB') of 1982. Under these KBVB rules, all professional players' contracts, which have a duration between one and five years, run to 30 June. Before the expiry of the contract, and by 26 April at the latest, the club must offer the player a new contract, failing which he is considered to be an amateur for transfer purposes as from 1 May and thereby falls under a different section of the rules. The player is free to accept or refuse that offer.<sup>644</sup> If he refuses, he is placed on a list of players available for a 'compulsory' transfer. The term 'compulsory' signifies that the transfer can be realised without the approval of the club of affiliation; as it suffices that there is an agreement between the player and the new club. However that may be, for the transfer to become effective, the acquiring club still owes the previous club payment of a compensation fee for 'training', calculated by multiplying the players' gross annual income by a factor varying from 14 to 2 depending on the players' age. These compulsory transfers can be effectuated

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<sup>638</sup> See also *Bosman*, par. 21.

<sup>639</sup> See in particular Article 8.2 UEFA Regulations 1993.

<sup>640</sup> Article 6 UEFA Regulations 1993.

<sup>641</sup> Article 10 UEFA Regulations 1993.

<sup>642</sup> Article 7.2&3 UEFA Regulations 1993.

<sup>643</sup> Article 7.1 UEFA Regulations 1993.

<sup>644</sup> *Bosman*, par. 7.

between 1 and 31 May.<sup>645</sup> June marks the opening of the period for 'free' transfers, involving the agreement of both clubs and the player, in particular as to the amount of the transfer fee which the new club must pay to the old club, and subject to penalties which may include striking off the new club for debt.<sup>646</sup> In the event that still no transfer takes place, the players' club of affiliation is obliged to offer him a new contract for the duration of one season on the same terms as that offered prior to 26 April. If the player refuses, the club has the opportunity until 1 August to suspend him, failing which he is reclassified as an amateur. A player who persistently refuses to sign the contracts offered to him by his club may obtain a transfer as an amateur, without his club's agreement, after not playing for two seasons.<sup>647</sup> Amateur players can be involved in a compulsory transfer subject to the payment of a lump sum of maximum 1.000.000 BF.

The 1993 KBVB transfer rules, which replaced the 1982 Regulation, also contain specific provisions dealing with the transfer towards a Belgian club of a player previously affiliated to a club belonging to a foreign federation,<sup>648</sup> making explicit reference to the applicable FIFA Regulation in this respect.<sup>649</sup> A player in a similar situation can only receive entitlement to play for a Belgian team if the federation of his previous club of affiliation has delivered an international transfer certificate to the KBVB.<sup>650</sup> If the foreign federation fails to produce the document, the competent body of the FIFA can order its deliverance or alternatively, take an official decision to the same effect.<sup>651</sup> In certain circumstances, the KBVB may also deliver a provisional certificate to the player in question.<sup>652</sup>

## II. FACTUAL CIRCUMSTANCES OF THE CASE <sup>653</sup>

Jean-Marc Bosman was a professional football player of Belgian nationality, born in 1964. In 1985, he signed his first professional contract for Standard Liège, one of Belgium's

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<sup>645</sup> *Bosman*, par. 8.

<sup>646</sup> *Bosman*, par. 9.

<sup>647</sup> *Bosman*, par. 10.

<sup>648</sup> Article IV/70 KBVB Regulation 1993.

<sup>649</sup> Article IV/70.11 KBVB Regulation 1993.

<sup>650</sup> Article IV/70.121 KBVB Regulation 1993.

<sup>651</sup> Article IV/70.122 KBVB Regulation 1993.

<sup>652</sup> Article IV/70.123 KBVB Regulation 1993.

<sup>653</sup> For a detailed description of the factual background of the case, see Blainpain and Inston, *The Bosman case: The End of the Transfer System?* (Peeters and Sweet & Maxwell, 1996).

leading clubs. This contract had a duration of two years and ran from 1 July 1985 until 30 June 1987. It guaranteed him a basic monthly salary of Belgian Francs ('BF') 30.000 and foresaw the possibility of gaining various bonuses, which resulted in an average monthly salary of BF 80.000. When his contract was about to expire, he was offered to prolong his stay at Sclessin with one year, against improved contractual terms providing him with average monthly earnings of BF 100.000. Subsequently, at the end of the 1987-88 season, he was transferred to the neighbours of RC Liège for a transfer fee of BF 3.000.000.

As a result, from 1988, he was employed by RC Liège, another Belgian first division club. He signed a contract for two seasons which was due to expire on 30 June 1990, and which assured him an average monthly salary of BF 120.000, including bonuses.<sup>654</sup> On 21 April 1990, in accordance with the applicable transfer rules, RC Liège offered Bosman a new contract with a duration of one season, considerably reducing his pay to BF 30.000, the minimum permitted by the federal rules of the KBVB. Bosman refused to sign and was put on the transfer list. The compensation fee was set at BF 11.473.000, in accordance with indicators such as age and salary.<sup>655</sup> Since no club showed any interest in a compulsory transfer, Bosman entered into contractual negotiations with US Dunkerque, a club playing in the French second division, which successfully resulted in his engagement for a period of one year. The contract concluded would provide him with a monthly salary around BF 100.000 plus a signing-on bonus of some BF 900.000.<sup>656</sup> On 27 July 1990, also the two clubs involved reached an agreement for the temporary transfer of Bosman, against payment by US Dunkerque to RC Liège of a fee of BF 1.200.000. This transfer sum was to be paid on receipt by the French Football Federation (the 'Fédération Française de Football', hereinafter referred to as the 'FFF') of the transfer certificate issued by the KBVB. The contract also contained a clause giving US Dunkerque an irrevocable option for the full transfer of the player for the prize of BF 4.800.000.<sup>657</sup> However, both contracts, the one between US Dunkerque and RC Liège on the one hand and the one between US Dunkerque and Bosman on the other hand, were subject to the suspensive condition that the required transfer certificate be sent by the KBVB to the FFF before 2 August 1990, which would allow US

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<sup>654</sup> *Bosman*, par. 28.

<sup>655</sup> *Bosman*, par. 29.

<sup>656</sup> *Bosman*, par. 30.

<sup>657</sup> *Bosman*, par. 31.

Dunkerque to field Bosman in the first match of the season.<sup>658</sup> Apparently, RC Liège had serious doubts as to US Dunkerque's solvency, and hence did not make a request to the KBVB to send the transfer certificate to the FFF. As a result, neither contract took effect. On 31 July 1990, RC Liège also proceeded to suspend Bosman, thereby effectively preventing him from playing for the entire 1990-91 season.<sup>659</sup>

### III. SUMMARY OF THE PROCEEDINGS BEFORE THE NATIONAL COURTS <sup>660</sup>

Bosman was determined, however, not to leave it at that. On 8 August 1990, he did the almost unthinkable, and instituted legal proceedings against RC Liège before the Tribunal of First Instance of Liège (the 'Tribunal de Première Instance'). This was the official starting shot of his long and lonesome journey through a legal labyrinth of actions, claims, injunctions and appeals, a journey which would only come to an end more than five years later in Luxembourg. With his claim, he challenged the lawfulness of no less than two of the sacred 'Football Commandments', claiming that the rules establishing a transfer regime allowing a club to ask a transfer fee for a player whose contract of affiliation with that club has already expired, and also the nationality clauses, limiting the number of migrant EU-nationals in national competitions, were contrary to the Treaty rules on freedom of movement of workers and the provisions on free competition. Concurrently with that first action, he applied for an interlocutory decision, firstly ordering RC Liège and the KBVB to pay him an advance of BF 100.000 per month until he found a new employer, secondly, restraining the defendants from impeding his engagement by another club, in particular by requiring the payment of a transfer sum, and finally, referring a question to the European Court of Justice for a preliminary ruling.<sup>661</sup> By order of 9 November 1990, the judge hearing the interlocutory application imposed on RC Liège the payment to Bosman of a monthly advance of BF 30.000 and ordered RC Liège and the KBVB to refrain from impeding Bosman's engagement. He also requested the Court of Justice for a preliminary ruling<sup>662</sup> on a question

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<sup>658</sup> *Bosman*, par. 32.

<sup>659</sup> *Bosman*, par. 33.

<sup>660</sup> See, *inter alia*, Dupont, *o.c.*, at 74-76; Blainpain and Inston, *o.c.*, at 12-20.

<sup>661</sup> *Bosman*, par. 34.

<sup>662</sup> This request was put on the roll of the Court of Justice as Case C-340/90.

concerning the interpretation of Articles 3c and 39 EC in relation to the rules governing the transfers of professional football players.<sup>663</sup>

In the meantime, Bosman had signed a contract with the French second-division club Saint-Quentin in October 1990, subject to the condition that his interlocutory application succeeded. His contract was terminated, however, at the end of the first season. In February 1992, he started playing for the French club Saint-Denis de la Reunion, but again only until the end of the season. After looking for further offers in Belgium and France, Bosman finally joined Olympic de Charleroi, a Belgian third-division club.<sup>664</sup> Since he decided to initiate legal proceedings, Bosman has evidently struggled to find a new employer. This may be partly due to the fact that his performances on the pitch did not live up to the expectations, raised probably by a promising start of a football career as member of the Belgian national youth team, evidenced by RC Liège's readiness to offer him only the minimum contract at the expiry of his initial contract. However, a more plausible explanation is readily available. In the opinion of the national judge, there was strong circumstantial evidence to support the view that, notwithstanding the 'free' status conferred on Bosman by the interlocutory order, he has been boycotted by all the European clubs which considered engaging him.<sup>665</sup> Clubs were apparently strongly 'encouraged' not to make use of the services of the player.<sup>666</sup>

On 28 May 1991, the Court of Appeal of Liège (the 'Cour d'Appel') revoked the interlocutory decision of the Tribunal of First Instance insofar as it referred a question to the Court of Justice for a preliminary ruling. Nevertheless, it upheld the order against RC Liège to pay monthly advances to Bosman and enjoined RC Liège and KBVB to make Bosman available to any club which wished to engage him, without it being possible to require payment of any transfer fee. By order of 19 June 1991, Case C-340/90 was removed from the register of the Court of Justice.<sup>667</sup> On 3 June 1991, the KBVB, which, contrary to the situation in the interlocutory proceedings, had not been summoned as a party in the main action before the Tribunal of First Instance, decided to intervene voluntarily in that action. Two months later, on

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<sup>663</sup> *Bosman*, par. 35.

<sup>664</sup> *Bosman*, par. 36.

<sup>665</sup> *Bosman*, par. 37.

<sup>666</sup> Read maybe: clubs were threatened with sanctions if they considered engaging him.

20 August 1991, Bosman issued a writ with a view to joining UEFA to the proceedings which he had brought against RC Liège and the KBVB and also with the purpose of bringing proceedings directly against it on the basis of its responsibility in drafting the rules as a result of which he claimed to have suffered damage. He requested that UEFA be enjoined to make an end to its practices concerning transfer fees and nationality clauses and withdraw these rules within 48 hours. On 5 December 1991, RC Liège joined US Dunkerque as a third party to the proceedings, in order to be indemnified against any order which might be made against it. On 15 October and 27 December 1991 respectively, a French professional footballers' union, the Union Nationale des Footballeurs Professionnels ('UNFP'), and an association of football players governed by Netherlands law, the Vereniging van Contractspelers ('VVCS'), also intervened voluntarily in the proceedings.<sup>668</sup>

In new pleadings lodged on 9 April 1992, Bosman not only amended his initial claim against RC Liège, he also brought a new preventive action against the KBVB and elaborated further upon his claim against UEFA. In those proceedings, he sought a declaration that the transfer rules and the nationality clauses were not applicable to him, and further an order against RC Liège, the KBVB and UEFA to pay him a sum of BF 11.368.350 in respect of damage suffered by him from 1 August 1990 until the end of his career, on the basis of their wrongful conduct or negligence at the time of the failure of his transfer to US Dunkerque, and another BF 11.743.000 in respect of loss of earnings since the beginning of his career as a result of the application of the transfer rules. In addition, he also applied again for a question to be referred to the Court of Justice for a preliminary ruling.<sup>669</sup> The Tribunal of First Instance rendered its judgement in the main action on 11 June 1992. Firstly, the Tribunal decided that it had the necessary jurisdiction to entertain the main actions. It also held admissible Bosman's claims against RC Liège, KBVB and UEFA, seeking in particular, a declaration that the transfer rules and nationality clauses were not applicable to him and orders penalising the conduct of these three organisations. Conversely, however, it dismissed RC Liège's application to join US Dunkerque as a third party and indemnifier, arguing that no evidence of fault in the latter's performance of its obligations had been adduced. Finally, deciding that the evaluation of

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<sup>667</sup> *Bosman*, par. 38.

<sup>668</sup> *Bosman*, par. 39.

<sup>669</sup> *Bosman*, par. 40.

Bosman's claims against UEFA and the KBVB involved consideration of the compatibility of the transfer rules with the EC Treaty, it made a reference to the Court of Justice for a preliminary ruling<sup>670</sup> on the interpretation of Articles 39, 81 and 82 EC.<sup>671</sup> The KBVB, RC Liège and UEFA appealed against this decision. Since those appeals had suspensive effect, the procedure before the Court of Justice was suspended.<sup>672</sup> No appeal was brought against the UNFP or the VVCS, which did not seek to intervene again on appeal.<sup>673</sup>

By order of 8 December 1993, Case C-269/92 was removed from the register in Luxembourg, following the judgement of the Court of Appeal of Liège. The Court of Appeal upheld the judgement under appeal insofar as the Tribunal of First Instance held that it had jurisdiction, that the actions were admissible and that an assessment of Bosman's claims against UEFA and the KBVB involved a review of the lawfulness of the transfer rules. Moreover, it considered that also a review of the lawfulness of the nationality clauses was necessary, since they perceived Bosman's claim to be based on Article 18 of the Belgian Judicial Code, which permits actions 'with a view to preventing the infringement of a seriously threatened right'. According to the Court, Bosman had brought forward factual evidence suggesting that the damage which he fears –that the application of those clauses may impede his career- would in fact occur.<sup>674</sup>

Besides, the national court was of the opinion that Article 39 EC, just like Article 28 EC, prohibits not only discrimination on grounds of nationality, but also non-discriminatory barriers to freedom of movement for workers if these could not be justified by imperative requirements in the general interest.<sup>675</sup> With regard to Article 81 EC, it considered that the FIFA, UEFA and KBVB regulations might constitute decisions of associations of undertakings by which the clubs restrict competition for players between themselves. Transfer fees were regarded as dissuasive and tended to depress the level of professional sportsmen's pay. In addition, the nationality clauses prohibited foreign players' services from being obtained over a certain quota. Finally,

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<sup>670</sup> This case was registered as Case C-269/92.

<sup>671</sup> *Bosman*, par. 41.

<sup>672</sup> *Bosman*, par. 42.

<sup>673</sup> *Bosman*, par. 43.

<sup>674</sup> *Bosman*, par. 44.

<sup>675</sup> *Bosman*, par. 45.

trade between Member States was affected, in particular by the restriction of players' mobility.<sup>676</sup> Equally, the Court of Appeal contemplated that the KBVB, or the football clubs collectively, might be in a dominant position within the meaning of Article 82 EC, and that the restrictions on competition mentioned in connection with Article 81 EC might constitute abuses prohibited by Article 82 EC.<sup>677</sup> The Court dismissed UEFA's request to ask the Court of Justice whether the reply to the question submitted on transfers would be different if the system permitted a player to play freely for his new club even where that club had not paid the transfer fee to the old club. It pointed out specifically that, because of the threat of severe penalties for clubs not paying the transfer fee, a player's ability to play for his new club remained dependent on the business relationships between the clubs.<sup>678</sup> Ultimately, in view of the foregoing, the Court of Appeal decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'Are Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as :

- Prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;
- Prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise?<sup>679</sup>

On 3 June 1994, the KBVB applied to the Belgian Supreme Court (the 'Cour de Cassation') for a review of the decision of the Court of Appeal, requesting that the judgement be extended to apply jointly to RC Liege, UEFA and US Dunkerque. By letter of 6 October 1994, the Principal Crown Counsel (the 'Procureur General') informed the Court of Justice that the appeal did not have suspensive effect in this case.<sup>680</sup> And on 30 March 1995, the Supreme Court dismissed the appeal and ruled that as a result the request for a declaration that the judgement be extended was otiose.<sup>681</sup>

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<sup>676</sup> *Bosman*, par. 46.

<sup>677</sup> *Bosman*, par. 47.

<sup>678</sup> *Bosman*, par. 48.

<sup>679</sup> *Bosman*, par. 49.

<sup>680</sup> *Bosman*, par. 50.

<sup>681</sup> *Bosman*, par. 51.

#### IV. DECISION OF THE EUROPEAN COURT OF JUSTICE – 16 DECEMBER 1995

After preliminarily having reached the conclusion that Article 39 EC applied to rules laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment,<sup>682</sup> the Court essentially had to ascertain in substance whether this Treaty provision precluded the application of these transfer rules, under which a professional football player who is a national of a Member State may not, on the expiry of his contract with a club, move to play for a club of another Member state unless the latter club has paid to the former a transfer, training or development fee.

##### 1. Existence of an obstacle to freedom of movement for workers

Initially, the Court reiterated that the provisions of the Treaty relating to freedom of movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.<sup>683</sup> It specified that in that context, nationals of Member States have the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity.<sup>684</sup> As a result, provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement are to be considered as constituting an infringement of that freedom, even if they apply without regard to the nationality of the workers concerned.<sup>685</sup> Subsequently, the Court drew a parallel between Articles 39 and 43 EC, emphasising that even though these provisions are directly mainly to ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, the rights guaranteed in these provisions would practically be rendered meaningless if the Member

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<sup>682</sup> *Bosman*, paras. 68-87.

<sup>683</sup> *Bosman*, par. 94. The Court also referred to Case 143/87 *Stanton v INASTI* [1988] ECR 3877, par. 13 and Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, par. 16.

<sup>684</sup> *Bosman*, par. 95. The Court also mentioned Case C-363/93 *Roux v Belgium* [1991] ECR I-273, par. 9 and *Singh*, par. 17.

<sup>685</sup> *Bosman*, par. 96. It based this conclusion on Case C-10/90 *Masgio v Bundesknappschaft* [1991] ECR I-1119, paras. 18-19.

State of origin could prohibit nationals from leaving that State in order to take up work in another Member State.<sup>686</sup>

The Court acknowledged that the contested transfer rules apply also to transfers of players between clubs belonging to different national associations within the same Member State and that similar rules govern transfers between clubs belonging to the same association.<sup>687</sup> However, this observation did not prevent the conclusion that those rules are nevertheless likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.<sup>688</sup> These transfer rules are regarded as an obstacle to freedom of movement of workers, since they provide that a professional football player may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations.<sup>689</sup> The Court specifically pointed out that this finding is in no way affected by the fact that the transfer rules adopted by UEFA in 1990 stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club. The new club must still pay the fee in issue, otherwise it faces penalties which may include its being struck off for debt, which thus prevents it just as effectively from engaging a player from a club in another Member State without paying that fee.<sup>690</sup> Furthermore, in the opinion of the Court, this conclusion isn't negated either by its previous decision in *Keck* in the field of goods, as was argued by the KBVB and UEFA.<sup>691</sup> In this respect, the Court simply noted that although the transfer rules at issue in the proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding the principle of freedom of movement for

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<sup>686</sup> *Bosman*, par. 97. In this respect, the Court referred to its judgement in the context of freedom of establishment in Case 81/87 *The Queen v HM Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* [1988] ECR 5483, par. 16.

<sup>687</sup> *Bosman*, par. 98.

<sup>688</sup> *Bosman*, par. 99.

<sup>689</sup> *Bosman*, par. 100.

<sup>690</sup> *Bosman*, par. 101.

<sup>691</sup> *Bosman*, par. 102.

workers, as prohibited by Article 39 EC. Hence, they could not be deemed comparable to the rules on selling arrangements for goods which in *Keck* were held to fall outside the ambit of Article 28 EC.<sup>692</sup>

## 2. Existence of a justification

At the first stage of its judgement, the Court did thus establish that the transfer rules constitute an obstacle to the free movement of persons and therefore infringe in principle Article 39 EC. Hereinafter, the Court immediately proceeded indicating that it could be otherwise only if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. Additionally, application of these rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose.<sup>693</sup>

In this respect, the Court accepted that the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players, were in principle legitimate objectives, in view of the considerable social importance of sporting activities, and in particular football, in the Community.<sup>694</sup>

Be that as it may, however, as regards the first of those aims, the Court stated that the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. It considered that those rules neither preclude the richest clubs from securing the services of the best players, nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.<sup>695</sup> Furthermore, as regards the second aim, the Court acknowledged

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<sup>692</sup> *Bosman*, par. 103. At this point, the Court recalled Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paras. 36-38, with regard to the freedom to provide services, in which it reached the same conclusion.

<sup>693</sup> *Bosman*, par. 104. Here, the Court remembered its decisions in Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, par. 32 and Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, par. 37.

<sup>694</sup> *Bosman*, par. 106.

<sup>695</sup> *Bosman*, par. 107.

that it must indeed be accepted that the prospect of receiving transfer, development or training fees is likely to encourage football clubs to seek new talent and train young players.<sup>696</sup> However, because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, it held that those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. It concluded therefore that the prospect of receiving such fees cannot be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.<sup>697</sup> Moreover, the Court ruled that these aims, even though legitimate in se, could be achieved at least as efficiently by other means which do not impede the freedom of movement for workers,<sup>698</sup> casually referring to the conclusions of the Advocate General.<sup>699</sup>

Furthermore, it has also been argued that the transfer rules are necessary to safeguard the worldwide organisation of football.<sup>700</sup> The Court rejected this argument by simply pointing out that the proceedings concern application of those rules within the Community and not the relations between the national associations of the other Member States and those of non-member countries. In any event, it also held that application of different rules to transfers between clubs belonging to national associations within the Community and to transfers between such clubs and those affiliated to the national associations of non-member countries is unlikely to pose any particular difficulties. The rules which have so far governed transfers within the national associations of certain Member States are different from those which apply at the international level.<sup>701</sup> Finally, also the argument that the rules in question are necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players could not be accepted by the Court, since it seeks to justify the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.<sup>702</sup>

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<sup>696</sup> *Bosman*, par. 108.

<sup>697</sup> *Bosman*, par. 109.

<sup>698</sup> *Bosman*, par. 110.

<sup>699</sup> *Lenz AG in Bosman*, at paras. 226 et seq.

<sup>700</sup> *Bosman*, par. 111.

<sup>701</sup> *Bosman*, par. 112.

In view of the foregoing considerations, the Court reached the conclusion that the transfer system failed to comply with the requirements of the principle of proportionality and could therefore not be justified. Hence, Article 39 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional football player who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training, or development fee.<sup>703</sup>

## V. ANALYSIS OF THE JUDGEMENT<sup>704</sup>

In this section, some more salient aspects of the *Bosman* decision relating to the transfer issue will be subjected to further scrutiny. The purpose of this examination is twofold: firstly, it will be assessed whether the Court has rendered a judgement which is acceptable from the point of view of Community law; and secondly, it will be evaluated whether it has duly respected the private autonomy of the sporting associations and whether it has adequately considered the specific features of sport.

### 1. Access to Justice

One of the most intriguing aspects of the *Bosman* case is probably not its final outcome, which is after all relatively unsurprising, but rather the factor of time. For years, strong doubts had been cast, both by the European Parliament<sup>705</sup> as in legal doctrine<sup>706</sup>, upon the compatibility

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<sup>702</sup> *Bosman*, par. 113.

<sup>703</sup> *Bosman*, par. 114.

<sup>704</sup> This particular case has been extensively commented in the legal doctrine. See, *inter alia*, Fernandez Martin, "Free Movement of Workers and Social Security: Re-defining obstacles to the free movement of workers", 21 *ELRev.* (1996), 313; Jessurun d'Oliveira, "Book Review: Blanpain, Droit et Sport. L'affaire Bosman: La Fin de l'ère des Transferts?", 34 *CMLRev.* (1997) 1061; Kranz, "The Bosman case: The Relationship between European Union Law and the Transfer System in European Football", 5 *Col. JEL* (1999) 431; Lee, "The Bosman Case: Protecting Freedom of Movement in European Football", 19 *Fordham Int. LJ* (1996) 1255; Morris, Morrow and Spink, "EC Law and Professional Football: Bosman and its Implications", 59 *MLR* (November 1996) 893; Mortelmans and Temmink, "UEFA vs J-M Bosman: Het vrije verkeer van beroepssporters in de Europese Unie", 45 *Ars Aequi* (1996) 166; O'Keefe and Osborne, "L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen", 1 *RMUE* (1996) 17; Ramsay, "Case and Comment: European Court Tackles UEFA Rules", *The Juridical Review* (1996) 289; Séché, "Quand les Juges Tirent au But: L'Arrêt Bosman du 15 Décembre 1995", 32 *CDE* (1996) 355; Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", 33 *CMLRev.* (1996), 991.

<sup>705</sup> See earlier on in this chapter 4, §1, I.

of the existing transfer rules with the Community provisions on the free movement of workers. Evidently, these interventions have had little or no practical impact, as the first real legal challenge against these unlawful practices within the world of football was launched only in the beginning of the nineties. The reasons for the fact that it took so long before the European Court of Justice finally got the opportunity to express its opinion on the matter are probably twofold. Firstly, there is the particular way in which the world of football is structured.<sup>707</sup> Football constitutes almost a world apart. Under the cloak of 'the autonomy of sport', the leading football organisations FIFA and UEFA operate as if they were immune from legal control. There is a deeply rooted aversion to any interference by state law in the world of football. Problems and conflicts are solved internally. Those who do not abide by the rules and seek to find justice through state courts, are outlawed. Moreover, legal proceedings tend to be extremely time-consuming, an important deterrent factor to be taken into consideration in a sector characterised by annual competitions and limited playing careers. This explains for a great deal the reluctance of individual players or clubs to actually file a complaint against existing rules or practices before the national courts. Secondly, some Community institutions such as the Commission have also adopted a cautious attitude towards the issue of the lawfulness of football rules. This prudent approach is definitely inspired by the immense popularity of the game and its potential impact on the on-going integration process within the European Union.<sup>708</sup> Of greater direct influence, however, is the acute awareness of the fact that the Community does not have direct powers in this domain. The Community institutions are very conscious of the fact that they must not act beyond their powers, especially in an area such as sport in which the responsible associations vigorously hold on to their prerogatives.

In the light of the foregoing, it is hardly surprising that when the Court of Justice finally got the opportunity to dot the i's and cross the t's and demarcate the borderlines of the competence and the powers of the football organisations, it was determined not to let this

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<sup>706</sup> See, *inter alia*, Steindorff, "Berufssport im Gemeinsamen Markt", *Recht der Internationalen Wirtschaft* (1975), at 253-255; Petzold and Safaris, "Europäische Freizügigkeit von Berufsfussballspielern", *Europarecht* (1982) 76; Hilf, "Die Freizügigkeit des Berufsfussballspielers innerhalb der Europäischen Gemeinschaft", *NJW* (1984) 517; Giardini, "Diritto comunitario e libera circolazione dei calciatori", *Diritto comunitario e degli scambi internazionali* (1988) 437.

<sup>707</sup> Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *o.c.*, at 991-993.

<sup>708</sup> See Jessurun d'Oliveira, *o.c.*, at 1061-1062.

occasion slip away. Furthermore, viewed in one way, the fact that an individual with necessarily limited –financial- resources and in spite of vigorous opposition has been able to achieve this particular result, can only be enthusiastically applauded. The story of David defeating Goliath has always been a popular one of course. This affair clearly demonstrates that individual rights conferred by the European Community Treaty cannot be dealt with light-heartedly.<sup>709</sup> However that may be, it would be simplistic to simply overlook the other –darker- side of the medal. In the end, Bosman had to pay a high price, both privately as professionally, for a little bit of legal glory and – taking everything into consideration- a relatively moderate amount of compensation, which was awarded to him after the matter was referred back to the Belgian courts.<sup>710</sup> As already indicated, the duration of a players' career is necessarily relatively short and therefore inevitably fits uncomfortably with lengthy legal proceedings. Bosman went to court at the age of 26, with a substantial part of his career and his best playing years in principle still laying ahead of him. When he finally obtained justice at the age of 31, he was playing for a fourth division club in Belgium, his career completely in tatters. In the light of this, it seems one may legitimately wonder whether this particular case doesn't also convey a message of warning to potential future litigants.<sup>711</sup> As O'Keeffe and Osborne put it generally, "for every Mr. Bosman there may be hundreds of European Union citizens deterred from the free exercise of their Community law rights."<sup>712</sup> It may very well be an acquired fact by now that sporting authorities or associations such as FIFA, UEFA or the national federations are not immune from legal challenge,<sup>713</sup> it remains unquestionably true that they are still extremely powerful and influential organisations. On the basis of the principle of freedom of association, they often still act under the presumption that they are legally untouchable and they remain extremely reluctant to accept legal intrusions into their perceived sphere of competence and to comply with the decisions of the national and supranational courts and tribunals. This point will be convincingly proven in the next chapter.

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<sup>709</sup> See also Dupont, *o.c.*, at 77.

<sup>710</sup> On 22 December 1998, after a legal struggle of almost eight years, the KBVB, desperate to start the organisation of the European Championships in 2000 with a clean sheet and a polished blazon, settled the dispute and awarded Bosman a compensation fee of 16 million Belgian Francs (approximately 400 000 Euro): see "Jean-Marc Bosman vooral opgelucht", *De Standaard*, 23 December 1998, 17.

<sup>711</sup> See Weatherill, "European Football Law", *Collected Courses of the Academy of European Law, Vol VII, Book I* (Kluwer, 1999), at 350.

<sup>712</sup> O'Keeffe & Osborne, "The European Court Scores a Goal", *The International Journal of Comparative Labour Law and Industrial Relations* (Summer 1996) at 113.

<sup>713</sup> See, for example, Nafziger, "International Sports Law as a Process for Resolving Disputes", 45 *ICLQ* (1996) 130.

Some examples may illustrate this point. Firstly, after the Court of Justice in its preliminary ruling in *Walrave and Koch*<sup>714</sup> had rendered a decision, which was apparently favourable to the applicants, the two pacers in question seemed almost guaranteed of a successful outcome of their complaint before the national court. Nevertheless, they snatched away defeat from the jaws of victory when they ultimately declined to press for judgement from the Dutch Arrondissementsrechtbank. Seemingly, the International Cycling Union had insinuated it was contemplating to withdraw the paced cycling race from the official programme of the world championships.<sup>715</sup> Secondly, the tragic events in the Heysel stadium in Brussels at the occasion of the European Cup final between Liverpool and Juventus induced UEFA to ban all English clubs for five seasons from participating in the three European Cups. As Weatherill rightly pointed out, this measure probably constituted a disproportionate interference with economic freedoms guaranteed under Community law, but it remained nevertheless unchallenged before the ordinary courts.<sup>716</sup> UEFA also did not respond immediately to the decision of the Court of Justice in *Bosman*. It decided unilaterally to uphold the transfer rules and nationality clauses until the end of the ongoing 1995-96 football season, so as to avoid disrupting the normal progress of the European Cups, in which one had reached the stadium of the quarter-finals by the time of the judgement.<sup>717</sup> Although this was a clear violation of the Court's ruling, not one of the quarter-finalists issued a complaint. Moreover, UEFA seems to have a particularly hard time drawing lessons from earlier experiences: when Anderlecht, Belgium's leading football team, was accused of having bribed the Spanish referee in the second leg of its semi-final tie with Nottingham Forest in the UEFA Cup edition of 1983, UEFA decided to ban the Brussels team for one year from the European scene, although there had been no conclusive evidence of corruption. Furthermore, and even more importantly, the limitation period for alleged corruption had already expired. When Anderlecht qualified for the UEFA Cup at the end of the season in the Belgian competition and subsequently decided to take the matter to court, the outcome was predictable: the Tribunal of First Instance of Brussels rendered an interlocutory decision enjoining UEFA to allow Anderlecht to its UEFA Cup competition, after which UEFA definitively threw the towel...

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<sup>714</sup> Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405.

<sup>715</sup> Van Staveren, *Sport and the Law* – 18th Colloquy on European Law (Council of Europe, Strasbourg, 1989) at 67.

<sup>716</sup> See Weatherill, "European Football Law", *o.c.*, at 351; also Evans, "Freedom of Trade under the Common Law and EC Law: the Case of the Football Bans", 102 *LQR* (1986) 510.

## 2. The contested transfer rules in *Bosman*

A first interesting feature of this part of the Court's actual decision concerns the approach it adopted when confronted with the issue of assessing which specific transfer rules were to be considered relevant for the purposes of the solution of this dispute.<sup>718</sup> During the proceedings, some controversy had indeed arisen as to which set of rules was applicable to the particular circumstances of the case. As has been demonstrated above, the rules relating to the transfer of professional football players are in the first place laid down in regulations of the national associations. Accordingly, there may be differences between the different national transfer systems. On top of the national regulations, there are supranational and international rules governing transfers elaborated by UEFA and FIFA, which are not directly applicable to players but are nevertheless enforced at national level so as to regulate the relationships between the players and the clubs. The Belgian Court of Appeal of Liège, which had stayed the national proceedings in order to refer the case to the Court of Justice for a preliminary ruling, considered that in the case at hand the FIFA regulations were applicable, rather than the UEFA regulations.<sup>719</sup>

Instead of examining the lawfulness of the particular details of the perceivably applicable transfer systems, however, the Court of Justice has preferred to focus its attention exclusively on the basic principle which invariably underlies all sets of transfer rules and thus operates as a kind of common denominator, namely the fact that professional football players whose contract with their club of affiliation has expired, are not free to sign a contract and play for a new club before the two clubs involved in the transaction have reached an agreement on the payment of a transfer sum by the 'buying' club to the 'selling' club for the services of the player. This longstanding practice, essentially consisting of a restraint on the contractual freedom, has finally been earmarked by the Court as amounting to a restriction to the right of freedom of movement of workers and therefore has been condemned as incompatible with Article 39 EC. The Court reached this conclusion despite the fact that the transfer rules supposedly had been significantly

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<sup>717</sup> "L'UEFA alza bandiera bianca", *La Gazzetta dello Sport*, 20 February 1996, 13.

<sup>718</sup> See Dupont, *o.c.*, at 70-71.

<sup>718</sup> *Bosman*, par. 34.

<sup>719</sup> *Bosman*, par. 15.

relaxed during the course of the court proceedings, by means of the introduction of a provision to the effect that the business relationship between the two clubs involved in the transaction is to exert no influence on the activity of the footballer, who is to be free to play for his new club. The Court rightfully completely failed to be impressed by this purely theoretical modification of the rules, which doesn't really bring along any change in practice, as the buying club is still bound to pay the transfer fee, under pain of severe penalties being imposed upon it. Consequently, as the Court correctly pointed out, the buying club is deterred just as effectively from contracting a player in another Member State without paying that fee,<sup>720</sup> which effectively entails that a player's opportunities of finding new employment are obstructed.

This somewhat more generalist – 'back to basics'- approach of the Court has contributed in conferring the ruling a supplementary dimension which exceeds the sphere of football, or sport in general. Stripped off the casual details and reduced to the essentialities, the *Bosman* judgement signifies that if rules drafted by collective arrangements of employers create obstacles to the worker's freedom to offer his services elsewhere on the employment market after the expiry of his contract of employment, they risk falling foul of Article 39 EC.<sup>721</sup> To this extent, this specific piece of the Court's judgement in *Bosman* can be considered as exemplary of the pro-active attitude the Court at times displays in this decision.<sup>722</sup> Hence, alternatively, instead of pursuing the greater goal by focusing on the true essence of all transfer systems and condemning it in unequivocal terms, the Court could easily have contented itself with a simple, case-based disapproval of the restrictive features of the Belgian transfer system applicable to *Bosman* as incompatible with the Community principles of freedom of movement for workers, which might have denied this decision the wider significance it has now managed to acquire. The Court's preference for the former approach may be explained by the fact it was acutely aware of the uniqueness of the opportunity to finally call a halt to the reprehensible features of the transfer system, and contemporaneously to firmly reiterate once again the basic principles of the Community's intervention in sports matters, a chance which it was clearly determined not to let slip sliding away. After all, since *Walrave and Koch* and *Donà* in the seventies, it had almost

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<sup>720</sup> *Bosman*, par. 101.

<sup>721</sup> See also Weatherill, "European Football Law", *o.c.*, at 359-360.

<sup>722</sup> Joerges, Furrer and Gerstenberg, "Challenges of European Integration to Private Law", *Collected Courses of the Academy of European Law, Volume VII, Book I* (Kluwer, 1999) at 331-332.

been 20 years since a sports related case had reached the stage of the European Court of Justice. Previously, in his opinion to the case, Advocate General Jacobs had already drawn the Court's attention to this particular circumstance.<sup>723</sup> Simultaneously, this approach arguably presents another advantage: by dealing with the transfer rules in a somewhat more generalised way, the Court has subtly avoided a clear-cut condemnation of any specifically designated rule. Viewed in this way, the Court's ruling is less 'interventionist' and more respectful for the position of the sporting organisations than might appear at first sight and clearly shows its sensitivity with regard to the issue.<sup>724</sup>

### 3. Article 39 EC v Articles 81-82 EC: the right choice?

The question referred to the Court of Justice by the Belgian Court of Appeal for a preliminary ruling not only made reference to the lawfulness under the Community free movement provisions of the rules on the payment of transfer fees by a new employing club for the engagement of players who have come to the end of their contract with their old club, but also included a request concerning the interpretation of the Treaty competition rules in this respect.<sup>725</sup> However, after having reached the conclusion that the transfer rules constituted an infringement of Article 39 EC, the Court did not deem it necessary any longer to examine whether the contested rules also violated Articles 81 and/or 82 EC.<sup>726</sup> This particular declination on behalf of the Court doesn't really have to surprise, as it belongs to a rather common practice of the Court to effectuate only a partial analysis once a breach of Community law has been established. Be that as it may, it cannot be contested that this hands-off approach of the Court on this particular point stands in stark contrast with its generalising, all-encompassing attitude when deciding which particular rules were to be scrutinised in these proceedings. Joerges, Furrer and Gerstenberg were thus undoubtedly correct when they pointed out that the Court of Justice deployed a remarkable mixture of judicial activism and of self-restraint in this case.<sup>727</sup> To a certain extent, the Court's silence on this point is to be deplored, for a number of reasons. First of all, the case presented an

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<sup>723</sup> Lenz AG in *Bosman*, paras. 112-117.

<sup>724</sup> In the sense that the Court renders a principled judgement and then passes the responsibility back to the sporting associations for resolution. Ultimately, if necessary, the matter may enter the 'political arena' for negotiation with Commission and the sport's representative organisations.

<sup>725</sup> See above, *Bosman*, par. 49.

<sup>726</sup> *Bosman*, par. 138.

excellent opportunity for the Court to set forth some of its views on the application of the competition rules to sports rules and practices. In his opinion to this case, Advocate General Lenz didn't shrink from this issue and dedicated some highly interesting paragraphs to it. Remarkably, the same pattern repeated itself when the next sports cases of *Deliège*<sup>728</sup> and *Lehtonen*<sup>729</sup> reached the Court in Luxembourg: while the respective Advocates-General Cosmas<sup>730</sup> and Alber<sup>731</sup> addressed the matter of the interpretation of the competition law provisions in their opinions, the Court solved both disputes on the basis of the free movement provisions<sup>732</sup> and consistently refused to tackle the sports issues from a competition angle.<sup>733</sup> This part of the Community's Internal Market law with regard to sports finds itself thus still very much in its infancy. However, regrettably as the Court's renunciation may be in principle or theoretically speaking, from a more practical point of view, this decision appears to be somewhat more understandable, and in the given context of the *Bosman* case maybe even rather wise. As former Commissioner in charge of competition Van Miert already indicated, because of the specific structure of the competition rules, they potentially have a much heavier impact on the sporting world than the free movement rules.<sup>734</sup> Arguably, the application of the principles of the freedom of movement of workers to the transfer rules at stake in *Bosman*, which, after all, definitely sufficed to resolve the case, already entail sufficiently strong consequences for the organisation of football. It may very well have been that the Court simply judged that, for the time being, its intervention into the organisation of football was sufficient and that it has granted the football authorities the opportunity to bring about some modifications to some of its other rules and practices autonomously, without interference from outside.<sup>735</sup> Again, also in this respect the Court has thus shown a lot of deference towards the sporting associations. Arguably, a solution of the case on the basis of the

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<sup>727</sup> Joerges, Furrer and Gerstenberg, *o.c.*, at 331-337.

<sup>728</sup> Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue Francophone de Judo et Disciplines ASBL and Others* [2000] ECR I-2549.

<sup>729</sup> Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball* [2000] ECR I-2681.

<sup>730</sup> Cosmas AG in *Deliège*, paras. 89-114.

<sup>731</sup> Alber AG in *Lehtonen*, paras. 94-114.

<sup>732</sup> *Deliège*, paras. 41-69; *Lehtonen*, paras. 31-60.

<sup>733</sup> In both cases, the questions referred with regard to the interpretation of the competition rules were considered to be inadmissible: *Deliège*, par. 40; *Lehtonen*, par. 30.

<sup>734</sup> Van Miert, "L'arrêt 'Bosman': la suppression des frontières sportives dans le Marché unique européen", 1 *RMUE* (1996) 3. Similarly, Spink and Morris, "EC Law and Professional Football: The *Bosman* Case", *European Business Law Review* (March 1996) at 57-58.

<sup>735</sup> See also Demaret, "Introduction. Quelques observations sur la signification de l'arrêt 'Bosman'", 1 *RMUE* (1996), at 12-13.

Community competition law provisions would probably have required an immediate, more all-encompassing settlement of all aspects of the transfer issue, whereas the currently chosen path of free movement, due to the inherent limitations of the free movement principles, is necessarily more piecemeal, incomplete and haphazard. But sometimes it is simply better to proceed slowly or more gradually.

Secondly, it has also been suggested that the competition provisions may have been the more correct legal basis for analysis and moreover, that the dispute in question simply may not have asked for resolution under the free movement provisions at all.<sup>736</sup> This observation merits to be scrutinised further. Firstly, the argument has been advanced that the provisions on freedom of movement for workers could not be applied to the contested transfer rules, as their scope of application was limited to prohibiting instances of direct or indirect discrimination, whereas the transfer rules are regarded as being genuinely non-discriminatory.<sup>737</sup> In the traditional conception of Article 39 EC, this constituted no doubt a valid and even decisive argumentation. However, in the light of the subsequent evolution from an exclusively discrimination-based analysis towards a broader restriction-orientated examination, which has gradually occurred in the field of the respective fundamental freedoms,<sup>738</sup> a similar line of reasoning nowadays no longer seems to be tenable. Admittedly, it must be acknowledged that, at the time of *Bosman*, the Court hadn't yet unequivocally extended the domain of the free movement of workers so as to cover equally really indistinctly applicable measures, but even though, after the Court's unambiguous statements in *Ramrath*<sup>739</sup> and *Kraus*<sup>740</sup>, its willingness to do so couldn't reasonably be questioned any longer. The waiting was simply for the right occasion, which finally presented itself in *Bosman*. As a result, it seems no longer possible to exclude the transfer rules *a priori* from the scope of application of Article 39 EC for the simple fact that they are non-discriminatory.<sup>741</sup>

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<sup>736</sup> Weatherill, "European Football Law", *o.c.*, at 364.

<sup>737</sup> Apart from the initial positioning of the European Commission, discussed above, see also Coccia, "L'indennità di trasferimento e la libera circolazione dei calciatori professionisti nell'Unione europea", *Rivista diritto sportivo* (1994) at 350-356.

<sup>738</sup> See *supra*, chapter 3.

<sup>739</sup> Case C-106/91 *Ramrath v Ministre de la Justice* [1992] ECR I-3351.

<sup>740</sup> Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

<sup>741</sup> In this respect, it must be recognised that it would not be entirely accurate to claim that all the transfer rules always required the fulfilment of exactly the same conditions, regardless of whether football players wanted to move between clubs within a single national federation or between clubs belonging to different federations. In its reasoning, the Court did not attach any importance to this fact though. What does matter in the eyes of the Court, the

If it is nevertheless submitted by an eminent author that the free movement rules may not have been the most appropriate legal basis for addressing the transfer fees issue under Community law, the reason for it must lay elsewhere. At stake in the *Bosman* case was the viability of certain restraints on the mobility of labour of football players created by the transfer rules of the different competent associations. The dispute in the case at hand arose in the context of a cross-border transfer, *Bosman* envisaging a transfer from a Belgian to a French club. However, if, hypothetically speaking, *Bosman* had preferred to play for another team in Belgium rather than to be transferred to a club in France, the Belgian club in question would just as well have had to pay a transfer sum to RC Liège to complete the transfer of the player. Basically, the problem encountered by *Bosman* and all the other players who arrive at the end of their contract of employment with their club of affiliation was thus that the transfer rules which denied them free access to the employment market existed in the first place, rather than that they existed in a certain Member State. From this point of view, the cross-frontier element in *Bosman* appears thus to be purely incidental and deprived of any material significance.<sup>742</sup>

However correct this argument may be, it is nevertheless not entirely convincing. It must be acknowledged that the restrictions resulting from the application of the transfer rules are in principle not conditional upon the exercise of the right to free movement. For the application of the contested transfer rules, it is indeed completely irrelevant whether the transfer in question contains a cross-border aspect or not. For this reason, it could legitimately be wondered whether this case really called for resolution under Article 39 EC.<sup>743</sup> However, it appears to be equally true that it cannot be denied that if a football player expresses the wish to move abroad at the end of his contract with his club, he is effectively deterred from doing so by the application of the transfer rules. Specifically, these rules are undoubtedly liable to impede access of players to the football markets of the other Member States. And this is precisely the definition of what constitutes a restriction prohibited under Article 39 EC. The mechanism of transfer payments

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different transfer systems essentially hinder all transfer moves identically. Conversely, Advocate-General Lenz did address the issue, but he too carried out his final analysis on the basis of the wider concept of 'restrictions'.

<sup>742</sup> Weatherill, "European Football Law", *o.c.*, at 364.

<sup>743</sup> See also Hoskins, "The impact of the free movement rules of the EC Treaty on sports", "Sports: Competition Law and EC Law" Conference, London, 10 February 1999: "Such rules have nothing to do with free movement, nor with the objective of the free movement rules, i.e. to facilitate the creation of the internal market."

starts working as a result of the move abroad of the player. Admittedly, the presence of a trans-frontier element may not have had any material significance in this respect, as it is the move as such which really matters for the application of the rules, but this appears to me being a factor of minor importance. It is submitted that the focus should be on the core of the business, namely the fact that the system of transfer payments effectively hinders players in the exercise of the Community free movement rights. To this extent, the *Bosman* case might even be considered as a paradigm example of a free movement case, as it truly concerns mobility of labour. This suggestion unmistakably implies a wide conception of the principle of freedom of movement, but arguably it fits squarely within a broad interpretation of the realisation of the internal market idea.<sup>744</sup> In a certain way, it would seem to follow from this that the criterion that restrictions should be conditional upon, or the result of the exercise of the free movement rights<sup>745</sup> may prove not to be very useful in the face of measures which are genuinely non-discriminatory. Summarising, the decision of the Court to deal with the transfer issue under the heading of Article 39 EC appears to be relatively unobjectionable in principle in a wide free movement context.

#### 4. Article 39 EC & the interpretation of the concept of 'restrictions'

In any event, the Court of Justice seemed to go through relatively little trouble in holding that the transfer rules constitute an obstacle to freedom of movement for workers prohibited by Article 39 of the Treaty. It is worth looking somewhat more in detail at some elements of the reasoning which brought the Court to this conclusion. Firstly, the Court specifically stated that the provisions of the Treaty relating to freedom of movement for persons "preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State."<sup>746</sup> Apparently, as has conclusively been demonstrated in the previous section, football players are no more disadvantaged by the contested transfer rules if they seek to move abroad than if they change clubs within the same Member State. The unlawfulness of the transfer rules resides in their simple existence, amounting to a hindrance of cross-border transfers. Clearly, the Court has thus given a very wide interpretation

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<sup>744</sup> Article 14 EC.

<sup>745</sup> See above, chapter 3, §3.

<sup>746</sup> *Bosman*, par. 94.

to the 'disadvantage' encountered by footballers wishing to make use of their free movement rights. As O'Keeffe and Osborne correctly pointed out, in this particular context, the notion of disadvantage<sup>747</sup> is used not so much in a comparative way, in the sense of comparing footballers with their colleagues in another Member State, but merely in an abstract way, clarifying the relative current disadvantage of the player as opposed to the ideal position in which he would find himself in a situation of complete market access.<sup>747</sup> Consequently, the Court appears to adhere to a market liberalising approach in its judgement.<sup>748</sup> According to these authors, by extending the scope of application of Article 39 EC beyond the principle of non-discrimination, the Court has pushed the concept of restriction to its outer limits. They argue that if the internal market is characterised as a market operating under the same conditions as a national market and if the conditions for access to markets are identical in both the cross-border and the domestic context, then to that extent the internal market has already been realised and there is no longer any justification for a Community intervention. Granting complete freedom of access may just have been one bridge too far. They warn that the Court may very well have opened a box of Pandora within the domain of persons similar to the famous *Dassonville*-formula for goods.<sup>749</sup> At this point, it is time to make some observations. First of all, the Court has clearly asserted the right to freedom of movement of workers in *Bosman*. However, I do not completely concur with the fact that the Court has adopted an extremely wide approach to the concept of restriction. It seems that the Court has already clearly hinted at the direction it intends to follow with the explicit reference to the market access principle, evidently in order to avoid similar escalated scenarios with which the Court was faced after *Dassonville* from occurring. Furthermore, I agree that guaranteeing complete freedom of access may indeed be regarded as going a little bit too far, but I fail to read in this decision any statement to this effect. After all, there is still the possibility for intrinsically restrictive measures of being upheld when there exist satisfactory means of justification. Finally, I am not entirely convinced by the argumentation that insofar as measures lay down identical or grossly similar conditions for access to markets in both the trans-frontier and the national sphere, the internal market has been established and hence there is no longer need for a Community intervention. According to the terms of Article 14 EC, the internal market

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<sup>747</sup> O'Keeffe & Osborne, "The European Court Scores a Goal", *o.c.*, at 117.

<sup>748</sup> O'Keeffe & Osborne, "The European Court Scores a Goal", *o.c.*, at 123.

<sup>749</sup> O'Keeffe & Osborne, "L'affaire Bosman: un arrêt important pour le bon fonctionnement du Marché unique européen", *o.c.*, 17.

is characterised by the abolition of restrictions to the fundamental freedoms. In my opinion, it cannot be excluded *a priori*, and the particular circumstances in *Bosman* somehow seem to make the point, that measures, even though they are genuinely non-discriminatory and impose grossly the same conditions for access to markets in both the trans-national and domestic context, nevertheless constitute a restriction to the freedom of movement of persons. If this effectively appears to be the case, it necessarily implies that the internal market is not yet fully realised and thus is there still room for legal intervention on behalf of the Court.<sup>750</sup>

Secondly, the Court swiftly dismissed UEFA's argumentation that the transfer rules are to be regarded as selling arrangements which comply with the *Keck*-criteria laid down in the field of goods, namely they apply to all relevant traders operating within the national territory and they affect in the same manner, in law and in fact, the marketing of domestic products and those of other Member States, and that as a result, by analogy with Article 28 EC, Article 39 EC should not apply to these measures. The Court simply noted that although the rules at issue were indeed factually and legally indistinctly applicable, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. Consequently, they could not be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 28 EC. Two short remarks deserve to be made in this regard.<sup>751</sup> Just like in *Alpine Investments*, the Court didn't explicitly exclude the possibility of transposing its *Keck* decision to the field of free movement of persons, but merely distinguished *Keck* on the basis of the specific circumstances of the case. Whereas the dispute in *Keck* turned around measures of the importing State concerning certain selling arrangements within that State, in *Bosman* the exporting State required compliance with its own rules in the territory of the other Member States. However, an even more important reason for not applying *Keck* to the facts of *Bosman* lies in the fact that the Court accepted the principle that factual and legal equality in application in se is not sufficient to place a measure outside the reach of the Community free movement provisions, for it may still directly affect access to the labour markets of the other Member States. Implicitly, the Court thus

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<sup>750</sup> One only has to imagine a system of very restrictive rules within a State: even if the European Court of Justice could not touch these rules, that is no reason for saying that the Court could not tackle the same rules if they are imposed between States.

<sup>751</sup> For more elaborate analysis, see above, chapter 3.

appears to retreat somehow from its earlier statements in paragraph 17 of its *Keck* decision, edging closer to the more flexible market access approach favoured by Advocate General Jacobs in his opinion in the case of *Leclerc-Siplec*.

## 5. The issue of justification

Having arrived at the partial conclusion that the contested transfer rules were in principle unlawful, the Court went on to address the logically subsequent issue, namely whether the condemned rules could be justified by overriding reasons in the general interest, in spite of their restrictive character. From the specific perspective of this research, this clearly constitutes the crucial aspect of the decision.

### 5.1. Two legitimate objectives

The Court considered that of all the arguments brought forward before it by the sporting associations, two could be withheld as possible grounds of justification. *A priori*, the need to maintain a certain sporting and financial equilibrium between clubs and the need to ensure the training and development of young players were conceived as legitimate objectives to be pursued,<sup>752</sup> possibly by the application of the transfer rules.

This assessment of the Court deserves is worth commenting upon. In the first place, it is beyond any doubt that the training and education of young football players constitutes a laudable aim in se, which clearly deserves to be achieved. Young players of today will be the stars of tomorrow. The youngsters represent the future of the ball game. Consequently, they must be treated with utmost care. However that may be, from this to saying that encouraging the recruitment and training of young players amounts to an overriding requirement in the general interest which justifies the erection or maintenance of regulations which are restrictive of the free movement of workers may be jumping to conclusions too hastily. Arguably, this is an objective which is pursued in all sectors of the industry and which is therefore not distinctive to sport. Clubs claim that if they were no longer to receive compensation for costs incurred in the training of young players, they would have no incentives to carry on with their recruitment programmes,

but this arguments fails to convince. Besides, clubs nor sporting associations have adduced any relevant evidence to support this statement. It is submitted that clubs will always continue training young talented players, even if it were only for compelling sporting reasons: clubs that neglect their youth training programmes simply risk sporting misfortune. Arguably, clubs should endeavour to ensure themselves of the continued services of young players after their training has been completed by offering them attractive contractual terms and agreeable working conditions. In this context, sport seems to be no different from other commercial industries. Consequently, by recognising the need to guarantee the recruitment and training of young players as a legitimate aim worthy of justification, the Court has presumably been too generous to the sporting associations and has overrated the special status of sport.<sup>753</sup>

Conversely, it does indeed seem desirable or even indispensable that there is a certain economic and competitive balance between clubs participating to a given league or championship. Football, or sport in general, contains some characteristic features which to a certain extent, distinguish it significantly as an economic sector from most other types of industry.<sup>754</sup> Undoubtedly in common with the other ordinary markets is the underlying and omnipresent motivation to grow, to improve, to win, to be stronger than the opponents. However, it is essential to realise that contrary to what is the case in many other market, the undertakings active in the field, *in casu* the sport clubs, in their quest to be the best, do not have the intention to drive their competitors out of the market. Intrinsically, the sportive strive does not have exclusionary effects. Conversely, football clubs are mutually dependent upon each other.<sup>755</sup> Football clubs are rivals and partners at the same time. In England, Manchester United would have never reached its current sportive status and financial wealth without the presence of and rivalry with other teams such as Liverpool, Arsenal or Newcastle. It takes two teams meeting each other to schedule a simple fixture. And even more teams are needed to set up an entire club

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<sup>752</sup> *Bosman*, par. 106.

<sup>753</sup> For a similar opinion, see Weatherill, "Do sporting associations make law or are they merely subject to it?", 13 *Journal of the Society for Advanced Legal Studies* (January 1999) 24.

<sup>754</sup> See Sloane, "Economics of Professional Football", *Scottish Journal of Political Economy* (June 1971) at 124: "A club cannot aim simply to maximise its financial benefits and to remove competitors from the market. The maximisation of success without any regard to the financial aspects is no more desirable either. The objective should be more that of obtaining the best result in the competitions, and thus the prestige, on condition of making a minimum profit."

<sup>755</sup> See also *Lenz AG* in *Bosman*, par. 227.

competition.<sup>756</sup> Furthermore, it is submitted that a professional league can only truly flourish if there is no too glaring sportive imbalance between the competing clubs.<sup>757</sup> To a certain extent, each club has thus a direct interest not only in the continued existence of the other clubs, but also in their financial health or economic viability as competitors.<sup>758</sup> If the outcome of the competition is a foregone conclusion or if the league is clearly dominated by only a few teams, necessarily reducing the attractiveness and/or the tension of the single matches or the whole contest, this is almost bound to have an adverse impact, both from a sporting point of view as economically. From a sporting point of view, not only on the national level, for the fact that the gold of the cup won after a hard-fought victory always shines more brightly, but also on the European plane, as teams coming from strong national leagues participating in the UEFA Cup competitions have more experience with even encounters and are better prepared to face strong opposition, factors which undoubtedly increase their chances of success. And also economically, as spectator interest is likely to wane gradually and contemporaneously sponsors', advertisers' and broadcasters' incentives to invest money in football. For these reasons, it is important that a certain balance of strength between clubs is carefully safeguarded. What the public at large really cares about, is a necessary degree of unpredictability of results and uncertainty about the final outcome of the championship's race.<sup>759</sup> Essentially, it doesn't matter all that much if traditional favourites such as Juventus, Internazionale or AC Milan at the end of the race clinch yet another Italian 'scudetto', as long as somewhat more occasional contenders such as Lazio or AS Roma regularly provide them with a good challenge and smaller teams such as Udinese or Perugia once in a while cause a minor or major upset. A certain competitive equilibrium is thus the recipe to keep spectators interested and investors happy. It speaks for itself that this goes hand in hand with a certain financial balance, for it cannot be denied that nowadays it takes a lot of money to acquire and employ the necessary football players in order to field a competitive team.<sup>760</sup> Both are inextricably linked. This particular assessment of the Court was thus certainly correct.

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<sup>756</sup> Késenne, "De economie van de sport. Een overzichtsbijdrage", *Economisch en Sociaal Tijdschrift* (1993) 376.

<sup>757</sup> Lenz AG in *Bosman*, par. 219.

<sup>758</sup> Sloane, "Sport in the Market?", *The Institute of Economic Affairs* (1980) at 16.

<sup>759</sup> See in this sense also Van Miert, "Sport and Competition: Recent Developments and the Commission's Action", *European Sports Forum*, Luxembourg, 28 November 1997.

<sup>760</sup> See Van Miert, "Sport and Competition: Recent Developments and the Commission's Action", *o.c.* : "In this logic of global interest, the market is unstable by nature as long as there is a financial imbalance between the clubs."

## 5.2. Test of proportionality

Now it may be one thing that both the training and development of young players as the maintenance of a competitive and financial balance between clubs are – appropriately or not – recognised *in se* as being legitimate ends to be pursued, it is still an entirely different matter whether the contested transfer rules are to be conceived as suitable and necessary means deployed to reach these particular objectives and consequently deserve to be justified. It is precisely on this final hurdle, constituted by the two-prong test of the principle of proportionality, that the system of transfer fees in the event of a player's move after the end of his contract has fallen.

The football associations have strenuously defended the transfer system as an indispensable means of redistribution of money within the game.<sup>761</sup> They argue that the system of transfer rules is necessary to ensure the organisation of football as such. Smaller clubs often invest a lot of time, effort and money to nurture young talented players. The transfer fees they receive when these youngsters move to a bigger club often take an important place in the club's budget, as they generally generate less income from ticket sales and sponsorship contracts, and enable these clubs to survive financially and to keep competing with the bigger teams. It is asserted that if transfer fees were no longer payable when players move, the wealthy clubs would easily secure themselves with the services of the best players, as they are able to offer these players more favourable contractual terms. The abolition of the transfer system would also remove the incentive for smaller clubs to search for and breed new talent, thereby not only undermining the future of the game, but also bringing these clubs into serious financial difficulties. The rich clubs would always become ever richer and the less well-off even poorer. Some would possibly even

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<sup>761</sup> UEFA submitted a study on English football carried out by Touche Ross to prove its point. In England there is a four-level professional league divided up into the Premier League and the First, Second and Third Divisions. From the figures mentioned in the report it can be derived that in the 1992-93 season, the clubs in the Premier League spent a total of around £ 18,5 million net (after deducting income from transfer fees received by them on new players). After deducting that sum from total receipts, the clubs still made a total profit of £ 11,5 million. The clubs in the First Division, by contrast, managed to make a surplus on transfer deals of some £ 9,3 million, those in the Second Division a gain of £ 2,4 million and those in the Third division a surplus of something like £ 1,6 million. It is also interesting to note that each of the latter three divisions was faced with a loss on ordinary trading, which nevertheless was more than covered by the receipts from transfers. As Advocate General Lenz pointed out, those figures are an impressive demonstration of what an important role the lower divisions play as a reservoir of talent for the top division. They also show that income from transfers represents an important item in the balance sheets of the lower division clubs. See Lenz AG in *Bosman*, par. 222.

have to cease their professional activities. Consequently, touching the transfer system somehow risks endangering or at least weakening the competitive and financial structure of the league.

#### 5.2.1. Maintenance of a certain sporting and financial equilibrium

In his opinion, Advocate General Lenz explicitly recognised the great importance of football in the Community, both from an economic and from a sentimental point of view. He was even prepared to go as far as considering it a possibility to regard the maintenance of a viable professional league as a reason in the public interest which might justify restrictions on freedom of movement.<sup>762</sup> Be that as it may, however, after detailed analysis, he came to the conclusion that it was doubtful whether the contested transfer rules were capable of fulfilling the objective as stated by the associations.<sup>763</sup> The Court shared the same opinion as the Advocate General on this particular point.<sup>764</sup>

##### 5.2.1.1. 'Suitability'

It is estimated that it is very likely one has reached the right conclusion in Luxembourg condemning the transfer system in its contested form as an inadequate means to reach the legitimate objectives desired by the sporting associations. First of all, the transfer system does not appear to be an appropriate instrument to achieve a reasonable distribution of player talent between the different clubs within a league. Arguably, the transfer rules are therefore not particularly suitable to preserve a certain competitive balance between the clubs.<sup>765</sup> According to the economic theorem of Coase, if clubs are free to buy and sell footballers on the players' market, the richest clubs will always secure the services of the best players, with or without the transfer system. The daily practice seems to confirm this theoretical model. Under the application of the transfer rules, many small professional clubs are –to a greater or lesser degree- dependent on the income they receive from transfer deals to their balance sheets. As a rule, the bigger clubs are only interested in the better or at least the most promising players of the smaller clubs.

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<sup>762</sup> Lenz AG in *Bosman*, par. 219.

<sup>763</sup> Lenz AG in *Bosman*, par. 223.

<sup>764</sup> *Bosman*, par. 107.

Almost inevitably, these transactions weaken the smaller clubs from a sporting point of view. Admittedly, this straightforward logic could easily be countered by the argument that the transfer fees, in principle, should enable these selling clubs to acquire on their turn equally valuable players from other clubs. Be that as it may, simple theory does not always correspond to reality. Small clubs can hardly ever compete with wealthier clubs on the issue of transfers for several reasons. First of all, most of these clubs are net-sellers of players, in the sense that generally, they reinvest only a partiality of their transfer income in the engagement of new players, while – necessarily- using the remainder to cover other expenses. Conversely, wealthy teams sometimes give the impression of having almost unlimited resources of money and are often prepared to spend astronomic amounts of money to engage a certain player. Furthermore, the transfer fees are normally calculated on the basis of the players' earnings. Top teams usually pay higher wages, rendering it virtually impossible for smaller clubs to pay the transfers sums required to buy a class player from these teams. As the Court correctly observed, the transfer rules do not prevent the availability of financial resources from being a decisive factor in competitive sport.<sup>766</sup> In this respect, the transfers rules thus even seem to strengthen the discrepancy which exists in any case between rich and less wealthy clubs, rather than safeguarding a certain equilibrium between the teams.<sup>767</sup> Indeed, empirical studies have failed to demonstrate a significant correlation between the existence of the transfer system and a competitive balance between clubs.<sup>768</sup>

Secondly, it seems that the thesis that the transfer rules are necessary to guarantee the survival of the smaller clubs can equally be rebutted on the basis of the law of economics. An analysis of the dynamics of the market shows that the abolition of the transfer system does not necessarily need to have a harmful effect on the financial position of the smaller clubs.<sup>769</sup> It is submitted that one of the consequences of the transfer system is that the smaller clubs pay their players too much in relation to their intrinsic value and productivity in comparison with the players of the big

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<sup>765</sup> See Késenne, "L'affaire Bosman et l'économie du sport professionnel par équipe", 1 *RMUE* (1996) 80-82. Rottemberg went even further, asserting that no type of regulation whatsoever is necessary to preserve a competitive equilibrium: see Rottemberg, "The Baseball Players' Labour Market", *J. Pol. Econ.* (1956) 64.

<sup>766</sup> *Bosman*, par. 107.

<sup>767</sup> See *Lenz AG in Bosman*, paras. 218-234.

<sup>768</sup> See, for example, Késenne, "Player Market Regulation and Competitive Balance in a Win Maximising Scenario", in Jeanrenaud & Késenne, *Competition Policy in Professional Sports – Europe After the Bosman Case* (Antwerp, 1998) at 117; or also Bourg, "Dualisme et rapport salarial dans le sport professionnel", in Bourg & Gougnet, *Analyse économique du sport* (Paris, 1998) at 171-172.

<sup>769</sup> Késenne, "L'affaire Bosman et l'économie du sport professionnel par équipe", *o.c.*, at 80-84.

clubs, with the sole objective of raising the amounts of the transfer payments, which are calculated on the basis of the salary of the player in question. Arguably, it will ensue from the abolition of the transfer system that players' financial rewards will be more in proportion to their contribution to the receipts of the club. Players will thus earn lower salaries in smaller clubs and higher salaries in big clubs. Clubs will therefore endeavour to compensate the loss of potential transfer income incurred as a result of the disappearance of the transfer system by offering their players reduced contractual conditions. In the end, the balance of power between big and small clubs will not undergo radical changes. Consequently, in principle the financial situation of the clubs shouldn't deteriorate in a market situation without the contested transfer rules. As Késenne suggested, if problems nevertheless arise, it is mainly due to the fact that many a club manager has not yet learned to cut his coat according to the cloth. He acknowledged that ultimately, some clubs may be driven out of the market, and that there may thus also be a reduction in the total number of professional footballers, but he explained this as a matter of sound management, rather than linking it to the removal of the transfer system.

This affirmation is further corroborated by empirical evidence. Analysis carried out by Deloitte & Touche for England has demonstrated that the transfer system has only a very limited redistributive effect between the bigger and the smaller clubs.<sup>770</sup> The study reveals that the money spent on transfers of players circulates in the first place between the big clubs of the same league, or is passed on to other big clubs abroad<sup>771</sup>. Only a small part of this comes to the benefit of a small number of smaller clubs.<sup>772</sup> The other clubs have to count on other means of income to

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<sup>770</sup> Deloitte & Touche, *Annual Review of Football Finance 1999* (seasons 1995/96, 1996/97 and 1997/98). Conversely, from a comparison of the transfer transactions of the big and smaller clubs, which often demonstrated a loss of money for the big clubs and a gain for the smaller ones, one author had derived the conclusion that the transfer sums allowed to keep the financial inequalities between the clubs within acceptable proportions: see Plath, *Individualrechtsbeschränkungen im Berufsfussball – Eine Untersuchung unter besonderer Berücksichtigung der Bosman-Entscheid des EuGH*, (Hamburger Studien zum Europäischen und Internationalen Recht, volume 17, 1999) at 164-165.

<sup>771</sup> In three years time, the total amount of money spent by English clubs for the transfer of football players abroad has increased from 16,9 million £ in 1993/94 to 100,4 million £ in 1996/97. (Source: Deloitte & Touche, *Annual Review of Football Finance 1999*, 35.)

<sup>772</sup> In the 1993/94 season, the clubs (21 out of 24 for whom the figures were available) of the second Division have realised a profit of £ 10,2 million on transfers. However, £ 8,9 million, or almost 87% of total profit, have been gained by only 7 clubs. The other clubs have only realised marginal profits, and 6 of them have even lost money on transfers. The figures for the other seasons are comparable. (source: Deloitte & Touche, *Annual Review of Football Finance 1999*, 74. Appendix 9)

survive financially. Consequently, the transfer system does not constitute an adequate means to realise a financial balance between the wealthier and the smaller clubs.

#### 5.2.1.2. 'Necessity'

In all likelihood, the contested transfer rules thus do not constitute an appropriate instrument to maintain a certain competitive and financial balance between clubs, an objective which the Court of Justice had recognised as being an imperative requirement in the general interest. In any event, however, both Advocate General Lenz as the Court seem to be convinced of the fact that there do exist alternative means which would guarantee with more certainty that the ends pursued by the contested transfer rules will effectively be attained and which are supposed to have less restrictive effect, or even better, no adverse effect at all, on the exercise of the right of the players to freedom of movement. The transfer rules are therefore not indispensable either for attaining the desired objective, and can thus not be regarded as complying with the principle of proportionality. Basically, the Court left it at that. To this principled general statement, it solely added a subtle reference endorsing the Advocate General's observations on this matter.<sup>773</sup> Arguably, the Court wisely showed self-restraint in this respect, essentially leaving it up to the sporting associations themselves to work out viable alternatives for the unlawful transfer system which will withstand the test of compliance with the Community free movement and competition law provisions.

Advocate General Lenz showed the football authorities the way forward, discussing in his opinion the possibility of adopting two different arrangements as alternatives to the transfer system. Firstly, he suggested that it could possibly be envisaged to determine by a collective wage agreement specified limits for the salaries to be paid to the players by the clubs.<sup>774</sup> He probably found the inspiration for this proposal in the USA, where in a number of professional sports, such as for example the National Basketball Association, the so-called system of 'salary caps' is effectively in force. In essence, this system entails that all teams performing in the league can only spend a certain nominal amount of money, to be specifically agreed upon in advance, on

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<sup>773</sup> *Bosman*, par. 110.

<sup>774</sup> Lenz AG in *Bosman*, par. 226.

players' salaries. In principle, as such, this system seems much better suited than the transfer rules to preserve a certain competitive balance between clubs participating in the same league. Moreover, it 'doesn't seem to raise any particular problems under Article 39 EC, as it doesn't really produce any directly restrictive effects on the right to freedom of movement of the sportsmen. However, it should be emphasised that the basic principle of salary caps can and is actually being circumvented to a certain extent by the existence of some secondary rules in the system, allowing the clubs under certain circumstances and to a limited degree to exceed the salary threshold. As a result, these loopholes threaten to disrupt again in some way the sportive equilibrium aimed at. Furthermore, before a transposition of the salary cap rule into sports disciplines in the European Union can even remotely be considered, it still very much remains to be seen whether it satisfactorily passes the test of compliance with the Treaty competition law provisions. In the EU, there exists no such thing – at least not for the time being – as a statutory or regulatory exemption from antitrust liability, from which for example professional baseball in the USA does benefit, so *a priori*, one has to go out from the assumption that the competition rules are in principle applicable to the sports sector. Wage agreements of the kind at issue are to be considered as private labour agreements. The application of Article 81 EC to this type of agreements is an intricate issue. It probably depends on the actual form they finally take whether they are excluded from competition scrutiny, or rather fall within the scope of Article 81 EC and subsequently might require an exemption under Article 81(3) EC. Collective or vertical agreements, involving both employing clubs' as employed players' associations, would appear to belong to the former category, whereas horizontal agreements between employers would be in the latter situation. In any event, probably precisely in view of the relative uncertainty surrounding the lawfulness of this proposal involving collectively agreed wage limits with regard to the Community competition rules,<sup>775</sup> the Advocate General didn't really attach much importance to it, considering it less effective than his second proposal.<sup>776</sup>

For his second proposal, the Advocate General started from the assumption that if every club were to rely exclusively on financing its sporting activities by the receipts from the sale of tickets,

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<sup>775</sup> See also Weatherill, "European Football Law", *o.c.*, 370-371.

<sup>776</sup> It must be pointed out though that this option of collectively introduced 'salary caps' has recently officially been mooted, both at the level of UEFA as at national level: many associations are contemplating the idea of introducing a rule enjoining clubs not to spend more than a certain % of their annual budget to players' salaries.

radio and television contracts and other sources of income such as advertising deals, members' subscriptions or donations from private sponsors, the balance between the clubs would very soon be endangered.<sup>777</sup> Certain clubs, of which Real Madrid, Bayern Munich and Manchester United are probably the paradigm examples, do indeed exercise in some way or the other a magnetic power of attraction on the crowd, due to a whole spectre of reasons, varying from particular traditions and legendary stories over social factors to sporting success, etc. This results in the first place in high attendance figures at the stadium for the home matches of the team in question. Correspondingly, this also raises the interest of the television broadcasters and the advertising sector to invest in these clubs, allowing them to generate sometimes enormous amounts of money. Conversely, other teams' comparatively relative lack of attractiveness almost inevitably leads to lower ticket sales and less and/or smaller commercial contracts and thus to a lower income. In turn, this reduces the possibilities of strengthening the team and of preserving the equilibrium between the different clubs. In view of these observations, the Advocate General launched a potential second method for achieving the aim of maintaining a certain balance between the clubs. He suggested it would be conceivable to distribute the clubs' receipts among the clubs.<sup>778</sup> "Specifically, that means that part of the income obtained by a club from the sale of tickets for its home matches is distributed to the other clubs. Similarly, the income received for awarding the rights to transmit matches on television for instance, could be divided up between all the clubs."<sup>779</sup>

Taking into consideration that the competitive relationship between undertakings on the football market differs significantly from that on the markets of other industries, in the sense that football clubs are dependent upon each other and thus do not strive to drive their opponents out off the market, it must be acknowledged that a reallocation of receipts does indeed appear a sensible solution. As big clubs have reached their name and fame and wealth also thanks to the smaller clubs, they have a certain interest in the health of these clubs and thus it seems logic that they financially support them. Furthermore, it can hardly be disputed that the model of redistribution of income appears as a reasonable alternative for the transfer system. To a certain

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<sup>777</sup> Lenz AG in *Bosman*, par. 227.

<sup>778</sup> Lenz AG in *Bosman*, par. 226.

extent, it was even already in use in professional football at European level at the time of the proceedings in *Bosman*. The proceeds of the UEFA Champions League are not only to be for the benefit of the clubs taking part, but all the national associations are to receive a share of it. This competition was introduced in 1992 with the specific objective of promoting the interests of football.<sup>780</sup> Moreover, while £49 million of the total amount of profit of £69 million realised during the final stage of the 1996 European Championships in England were divided between the 16 teams participating in the finals of the tournament, £22 million were deposited in a special UEFA fund for the development of the game in emerging countries of Central and Eastern Europe.

Importantly, a number of economic studies show that redistribution of a proportion of income may effectively represent an appropriate means of promoting the desired balance.<sup>781</sup> The crucial issue with regard to the viability of such a system presumably involves striking the right balance between the need for competition and the need for mutual support.<sup>782</sup> On the one hand, if too much of the income is divided between all clubs, the incentives for the clubs to perform well would be reduced too much, whereas on the other hand, if the redistributed share is too small, the system will simply not be effective.<sup>783</sup>

Sharing a part of income seems a substantially more suitable means to reach the desired purpose of maintaining a certain balance between clubs than the current system of transfer fees. It has the invaluable advantage of introducing a factor of stability and certainty into the world of football, a precious feature which the transfer system with its inherently hypothetical and

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<sup>779</sup> In this connection, it is interesting to note that the Advocate General explicitly did not include financial support by means of State subsidies among the alternatives discussed here. The reason for that is that such subsidies in his opinion would go beyond what is possible for the football associations, on the basis of their autonomy.

<sup>780</sup> A balance of the 1992/92 season makes this clear. According to that, the eight clubs which took part in the competition each X the receipts from the sale of tickets for their home matches. In addition to that, the competition produced an income of 70 million Swiss Francs from the marketing of television and advertising rights. That amount was divided as follows: the participating clubs received 38 million SFR (54%). A further 12 million (18%) was distributed to all the clubs which had been eliminated in the first two rounds of the three UEFA competitions for club teams. SFR 5,8 million (8%) was distributed between the 42 member associations of UEFA. The remaining SFR 14 million (20%) went to UEFA to be invested for the benefit of football, in particular for the promotion of youth and women's football.

<sup>781</sup> See, inter alia, Késenne, "De economie van de sport. Een overzichtsbijdrage", *Economisch en Sociaal Tijdschrift* (1993) 376.

<sup>782</sup> Weatherill, "European Football Law", *o.c.*, at 372-373.

uncertain is desperately lacking. It permits the clubs concerned to organise their activities on a considerably more reliable basis. As Advocate General Lenz correctly remarked, solidarity between clubs is probably better served by the guarantee of the receipt of a certain basic amount of money than by the possibility of receiving a large sum for one of the club's own players.<sup>784</sup> However, the absolutely crucial point in favour of a system of redistribution of income in relation to the transfer rules is that it does not appear to be objectionable from the point of view the application of Community law. Firstly, contrary to the transfer system, this particular expression of solidarity between football clubs does not adversely affect players' freedom of movement. And secondly, it does not appear to create insurmountable obstacles under Article 81 EC either. It is cautiously submitted that agreements between clubs on the issue of income sharing may either remain completely outside the scope of application of Article 81(1) EC for being indispensable for the working of the industry, or alternatively benefit from an exemption under Article 81(3) EC after notification of the agreement to the Commission.

#### 5.2.2. Compensation for the costs of training

The football authorities have also expressed their concern about the fact that clubs may be less inclined to continue investing the necessary money and energy in the training and development of young players, if they run the risk of having to let their talented youngsters move to another club without being properly compensated for their efforts as a result of the abolition of the transfer system. All parties involved in the dispute have recognised the fundamental importance of this issue. There is unanimous consensus about the fact that clubs should in some way or the other be entitled to enjoy the fruits of their labour in youth training centres. However, once again, it is submitted that the contested transfer rules in *Bosman* can not be considered as a suitable tool to realise this objective.<sup>785</sup> It cannot convincingly be asserted in the first place that the transfer fees are merely compensation for the costs incurred in the training and development of a player, if only for the simple reason that their amount is not linked to the actual costs borne by the training clubs, but to the player's earnings and therefore in many cases is an extravagantly

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<sup>783</sup> Cairns, Jennett & Sloane, "The Economics of Professional Team Sports: A Survey of Theory and Evidence", *Journal of Economic Studies* (1986) at 3.

<sup>784</sup> Lenz AG in *Bosman*, par. 233.

<sup>785</sup> See also Lenz AG in *Bosman*, paras. 236-238.

large sum of money. A second argument pleading against conceiving transfer fees as a simple reimbursement of the training expenses lies in the fact that such fees invariably have to be paid even when experienced professional players change clubs. Thirdly,<sup>786</sup> within this particular framework, reimbursement of training expenditure is entirely dependent on the eventuality of whether or not the player in question is actually transferred to another club. In this respect, the Court correctly stipulated that since it is impossible to predict the sporting future of young players with any certainty and because only a limited number of these players do effectively pursue a professional career, the transfer fees are by nature contingent and uncertain. In the light of this, the Court concluded that the "prospect of receiving those fees cannot [...] be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs."<sup>786</sup>

At this point, it is interesting to remark that in his opinion, Advocate General Lenz subtly observed that the fact that the transfer rules at issue in the *Bosman* case were not acceptable, doesn't necessarily entail that a demand for a transfer fee for a player would have to be regarded as unlawful in every case.<sup>787</sup> He thus appeared not to exclude *a priori* the possibility that the transfer rules could be construed in such a way that they might become acceptable.<sup>788</sup> However, as he pointed out himself, even if this were turn out to be the case, it would still remain to be seen of course whether the pursued objective of encouragement of training and development of young talents could not be attained by an alternative system which is less restrictive of the players' right to freedom of movement. In the next chapter this matter will be dealt with more extensively.

## **Conclusion**

The Court in *Bosman* was undoubtedly right in holding that the contested transfer rules were liable to hinder access of professional football players to the employment markets of the other Member States and therefore constituted a restriction to their right to freedom of movement for workers as prohibited by Article 39 EC. Even though the Court had to extend the material

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<sup>786</sup> *Bosman*, par. 109.

<sup>787</sup> Lenz AG in *Bosman*, par. 239.

scope of application of Article 39 EC to cover also non-discriminatory measures to obtain this specific result, this ruling did not really come as a surprise, as the Court had already hinted on earlier occasions that it was contemplating to make this step. The *Bosman* decision thus prominently constitutes an clear assertion of free movement rights.

Furthermore, detailed analysis has demonstrated that the Court correctly reached the conclusion that the transfer rules could not be safeguarded under the objective justification doctrine. However, there is something to be said about the way it reached this legally satisfactory outcome. It recognised the need to preserve the training and development of young players and the need to maintain a certain sporting and economic balance and as two imperative requirements in the general interest, thereby clearly evidencing its openness to the sporting cause and offering sport clubs and federations to a certain extent shelter from purely market-based solutions within the framework of the Treaty. Presumably, both the admission that the need to preserve a certain competitive and financial equilibrium between clubs is sport-specific and amounts to a legitimate aim and the subsequent assessment that the contested transfer rules were not an appropriate nor an indispensable means to realise this objective are in se unobjectionable. Conversely, arguably, the Court overestimated the specific character of sport in relation to other commercial activities in accepting the need to ensure the recruitment and training of young players as a legitimate objective for upholding regulatory barriers to freedom of movement. Consequently, in its search to reconcile the requirements of the internal market with the claims of autonomy of the sporting associations under the cloak of the freedom of association, the Court has tilted the balance too much in the direction of the latter. In practice, this particular – exaggerated - recognition of the special status of sport yielded no immediate consequences in this concrete context, as the Court subsequently regarded the contested transfer rules in their current form as an inadequate instrument to achieve the aim pursued and thus as a violation of the principle of proportionality. However, as will appear from the next chapter, it has significantly influenced the search for a revised transfer system.

The reluctance of the Court to interfere too much in sporting matters, inspired both by the consciousness of the lack of legislative competence in this field of the Community and the claims

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<sup>788</sup> See also *Dubey, o.c.*, at 591-595.

for self-regulation of the sporting associations, is clearly evidenced by other aspects of the judgement. The Court wisely refrained from imposing one or the other solution, ultimately leaving it up to the sports authorities themselves to elaborate possible alternatives for the condemned transfer system. Presumably, also the Court's decision to tackle the transfer rules – solely - from the point of view of their compliance with the Community free movement provisions, instead of addressing the issue of their lawfulness under the Treaty competition rules, has to be regarded in that perspective. Hypothetically, a principled pronouncement of the Court of Justice on the applicability of the competition rules to sports rules and practices would potentially have had a much wider impact on the sporting world than the current ruling on Article 39 EC, which, although it was couched in principled terms, strictly speaking remained limited to the factual circumstances of the case, and thus left several concrete issue unresolved. This way, the Court implicitly bought the sports authorities some extra time to autonomously implement some changes or modifications to probably contestable rules or practices without legal interference. Whether the sporting associations have actually made use of this opportunity offered by the Court, shall be examined in the next chapter. In any event, on top of reaching an after all legally satisfactory outcome on the transfer issue in the concrete case, also the way in which the Court has tackled and solved the issue can thus be described as rather intelligent.



## The Transfer Saga: The Sequel

### J'accuse!?

- Emile Zola, L'Aurore, 13/01/1898 -

#### *Introduction*

In this second chapter centred around transfers, the legal and factual developments which have occurred in the world of sport in the aftermath of the *Bosman* ruling will be subjected to further scrutiny. A kind of 'law in context approach' will be adopted with regard to the transfer issue in the following pages. In the first place, the focus will be on a legal analysis of the new FIFA Regulations on international transfers in football, which will be tested upon their conformity with Community law, in particular Article 39 EC. On top of the purely legal examination, special attention will be paid to the emergence of this new set of rules and to their potential practical impact. This should allow for an insight to be provided in the respective interests of the different actors in the field – the European institutions, the sporting associations, and the athletes - in the process of revising the traditional transfer rules and also in their mutual relationships.

#### *§1: Bosman: The Day After...*

##### 1. TO RECAPITULATE...

On 16 December 1995, the undivided attention of the entire sporting world was focused –for once- on the Grand Duchy of Luxembourg. That day, the European Court of Justice finally pronounced its long-awaited judgement in the *Bosman* case, simply outlawing certain provisions of the traditional transfer system in professional football for breach of the Community law

provisions on free movement of workers.<sup>789</sup> According to these long-standing transfer rules, professional football players whose contract with their club of affiliation had expired, were not free to play for a new club in another Member State of the European Union before the two clubs in question had agreed on the payment of a transfer sum by the new club to the former for the services of the player. The lawfulness of this particular system had already been questioned on previous occasions,<sup>790</sup> but in the end, what it took to effectively plunge the whole football industry into a temporary state of complete chaos, was a lone Belgian cavalier, in the person of Jean-Marc Bosman.

The decision, which in almost no time acquired a place in the Court's 'Hall of Fame' of legendary judgements, can be earmarked without the slightest exaggeration as a 'classic'. In the first place, this is due to the fact that the actual impact of the judgement goes far beyond the sphere of football, or sport in general. Some of the principles laid down by the Court in this case undoubtedly have a great relevance for the purposes of Community law as such. To mention but the obvious, for the first time, the Court applied Article 39 EC to measures which are genuinely non-discriminatory, thereby completing the trend initiated within the field of goods to extend the scope of application of the different free movement provisions from measures which discriminate on grounds of nationality to measures which are liable to restrict the freedom of movement.<sup>791</sup> Furthermore, the Court also paved the way for the recognition of horizontal direct effect of Article 39 EC, a matter which was subsequently unequivocally settled in the case of *Angonese*.<sup>792</sup> Be that as it may, however, at this stage, our attention will be predominantly focused on the legal and factual consequences of the judgement for the world of football, or sport in general.

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<sup>789</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman* [1995] ECR I-4921.

<sup>790</sup> Both by Community institutions such as the European Parliament, as in legal doctrine: see, *inter alia*, European Parliament, Report Janssen van Raay on the freedom of movement of professional footballers in the Community, PE DOC A2-415/88, 1 March 1989; Petzold and Safaris, "Europäische Freizügigkeit von Berufsfussballspielern, *Europarecht* (1982) 76. For more information, see *supra*, chapter 4, §1.

<sup>791</sup> See, for example, O'Keeffe and Osborne, "The European Court Scores a Goal", *The International Journal of Comparative Labour Law and Industrial Relations* (Summer 1996) at 125.

<sup>792</sup> Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139. For a more elaborate discussion, see *supra*, chapter 2, §1.

In its decision in *Bosman*, the Court of Justice displayed a principally judicially activist approach coupled with a dose of self-restraint in the practice of the principle.<sup>793</sup> In the first place, the Court firmly reiterated its previous statement from its *Walrave*<sup>794</sup> and *Donà*<sup>795</sup> decisions that sport is part of EC law insofar as it constitutes an economic activity.<sup>796</sup> In spite of the fact that the Community Treaty contains no explicit reference to sport and that the Community therefore in principle has no specific competence in this field on the basis of the principle of the attribution of competencies,<sup>797</sup> the Court thus expressed its determination to ensure respect for Community law from the part of the sports authorities. It also assured the *effet utile* of the Treaty free movement provisions by applying Article 39 EC to the strictly legally speaking private sphere of the football federations.<sup>798</sup> Essentially, in denouncing the transfer system as incompatible with Article 39 EC, the Court called the bluff of FIFA and UEFA, who had operated during the proceedings on the basis of the assumption that the autonomy of sport would be preserved and that they were immune from legal intervention.

As a result, it didn't come as a surprise that when finally confronted with the Court's judgement, clubs, associations and federations initially seemingly all cried blue murder, predicting with the necessary degree of pathos worthy of ancient Greek tragedy various doom scenarios ranging from the death of grassroots football due to the disappearance of local clubs, to the complete destruction of the popular ball game.<sup>799</sup> Incrementally, however, as the dust settled, one started looking at things somewhat more in perspective. Indeed, however unequivocal and sweeping the terms of the decision may have been at first glance, it should not be forgotten that the Court of Justice in *Bosman* also clearly showed signs of openness to the sporting cause. The Court did not abolish transfer sums all together.<sup>800</sup> It did recognise the aims of maintaining a financial and competitive balance between clubs and of supporting the search for talent and the

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<sup>793</sup> See supra, chapter 4, §2, V. In particular, also, Joerges, Furrer and Gerstenberg, "Challenges of European Integration to Private Law", *Collected Courses of the Academy of European Law, Volume VII, Book 1* (Kluwer, 1999) at 331-336.

<sup>794</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405.

<sup>795</sup> Case 13/76 *Donà v Mantero* [1976] ECR 1333.

<sup>796</sup> *Bosman*, par. 73.

<sup>797</sup> Article 5 EC.

<sup>798</sup> *Bosman*, paras. 82-83.

<sup>799</sup> For some spicy reactions from the sporting world to the *Bosman* decision, see Blainpain and Inston, *The Bosman case: The End of the Transfer System?* (Peeters and Sweet&Maxwell, 1996); or the editorials of Riccardi, *Europe*, 15-16 January 1996, at 2; 17 January 1996, at 2; 29-30 January 1996, at 2; 1 March 1996, at 2.

<sup>800</sup> See for example, Van Nuffel, "Case law: Bosman", 2 *Col. JEL* (1996), at 357-359.

training of young players as legitimate objectives compatible with the Treaty "in view of the considerable social importance of sporting activities and in particular football in the Community".<sup>801</sup> Be that as it may, in the opinion of the Court, the transfer system *in its current form* was not the most appropriate way to achieve these commendable objectives. Actually, the Court thus merely held that the transfer system failed to satisfy the requirements of the test of proportionality, as it considered that the perceived aims could be achieved at least as efficiently by other means which do not impede freedom of movement of workers.<sup>802</sup> At this point, however, the Court called a halt and did not impose its own judgement on the matter. It simply refrained from advancing concrete solutions, leaving the door thus very much ajar for the football authorities to formulate alternative proposals to the transfer system or to modulate the transfer system in such a way that it would become acceptable under EU law.

Furthermore, it must be borne in mind that strictly legally speaking, the immediate impact of the *Bosman* decision is restricted to the particular circumstances of the case.<sup>803</sup> This implies that only a transfer of a professional football player, who is a European Union national, and whose contract of affiliation with his club in one Member State of the European Union has expired, to another club in another Member State cannot be made subject to the condition of the payment of a transfer fee by the latter club to the former. As a result of the European Economic Area Agreement, the implications of *Bosman* have been extended from the 15 Member States of the EU to the territories of Iceland, Liechtenstein and Norway, because it grants workers and self-employed people the right to move and establish themselves freely within the Community.<sup>804</sup>

In their observations before the Court, UEFA and KBVB have drawn the Court's attention to the serious consequences which might ensue for the organisation of football as a whole if it were to consider the transfer rules to be incompatible with the Treaty and sought to limit the temporal

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<sup>801</sup> *Bosman*, par. 106.

<sup>802</sup> *Bosman*, par. 110.

<sup>803</sup> See especially, Thill, "L'arrêt Bosman et ses implications pour la libre circulation des sportifs à l'intérieur de l'Union européenne dans des contextes factuels différents de ceux de l'affaire Bosman", 1 *RMUE* (1996) 89; also Spink and Morris, "EC Law and Professional Football: The *Bosman* Case", *European Business Law Review* (March 1996) at 57-58.

<sup>804</sup> Blanpain, *Het statuut van de sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht* (Larcier, 2002), at 13.

effects of the judgement.<sup>805</sup> This submission did not entirely fall on deaf ears. The Court admitted that overriding considerations of legal certainty militate against calling into question legal situations whose effects have already been exhausted, providing an exception though in favour of persons who have timely taken steps to safeguard their rights.<sup>806</sup> Consequently, it held that Article 39 EC could not be relied upon "in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before the date of this judgement, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date."<sup>807</sup> Be that as it may, however, the Court's decision as such is immediately effective and does not provide for a transition period. This entails that the concrete terms of the ruling must be complied with as from 15 December 1995.<sup>808</sup>

According to the terms of Article 211 EC, it is up to the European Commission to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied "in order to ensure the proper functioning and development of the common market." In the wake of the *Bosman* ruling, the Commission did indeed express on several occasions its firm intention to effectively use its powers of 'guardian of the Treaty' to ensure that the principles spelled out in the Court's judgement were respected.<sup>809</sup> In this respect, its task was somehow complicated to a certain extent by the fact that the Court had contented itself with declaring the international transfer system only incompatible with the Community free movement rules and had failed to pronounce on its lawfulness with regard to the Community competition provisions, despite the fact that the national court in its request for a preliminary ruling had made an explicit reference to the competition rules as well. The reason for this particular circumstance is to be found within the specific structure of the Treaty and has to do with the precise attribution and division of competencies between the Community institutions. Within the domain of competition law, the Commission has been expressly empowered to undertake enforcement action against private undertakings under Regulation 17/62. Be that as it may, in the field of the fundamental

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<sup>805</sup> *Bosman*, par. 139.

<sup>806</sup> *Bosman*, par. 144.

<sup>807</sup> *Bosman*, par. 145.

<sup>808</sup> Blanpain, *Het statuut van de sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, at 13.

freedoms, the Commission has not been granted corresponding powers – at least not for the time being.<sup>810</sup> Here, the only –indirect- route open to the Commission to act against Treaty violations essentially consists of initiating infringement procedures against Member States on the basis of Article 226 EC for failure to take all necessary and appropriate measures to ensure that the fundamental freedoms are respected on their territory.<sup>811</sup> Appealing as this practice may appear at first sight, it must not be forgotten that the Court of Justice readily admitted that the Member States retain exclusive competence as regards the maintenance of public order and the safeguarding of public security and public health, and moreover, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the freedom of movement in a given situation.<sup>812</sup> Ultimately, the actual usefulness of this solution depends on how much discretion the Court is willing to grant the Member States and how much control it will exert over the ‘appropriateness’ of Member States acts.<sup>813</sup> However this may be, it seems clear that the Commission, when confronted with Treaty infractions committed by private parties, can operate much more efficiently and directly under the competition law provisions to enforce compliance with the Treaty than under the free movement Articles. For this purely practical reason alone already, the silence of the Court on the issue of the compatibility of the transfer rules at issue with the Community competition rules is therefore somehow to be deplored.

Be that as it may, this eventuality didn’t prevent the Commission from sending formal notification on 19 January 1996 to FIFA and UEFA with the message that it was launching an infringement procedure on the basis of Article 81(1) EC and Article 53(1) EEA against the transfer regulations the Court had declared incompatible with Article 39 EC.<sup>814</sup> The letter of the Commission informed FIFA and UEFA that in the light of the Court’s decision in the *Bosman* case, the condemned international transfer system, which had been notified to the Commission on 28 July 1995 with the purpose of obtaining a negative clearance or, alternatively, an individual

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<sup>809</sup> Van Miert, “L’arrêt ‘Bosman’: la suppression des frontières sportives dans le Marché unique européen”, 1 *RMUE* (1996) 3.

<sup>810</sup> See however, Council Regulation 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States, (1998) OJ L 337/8.

<sup>811</sup> See for example, Case C-265/95 *Commission v France* [1997] ECR I-6959.

<sup>812</sup> *Commission v France*, par. 35.

<sup>813</sup> Muylle, “Angry Farmers and Passive Policemen: Private Conduct and the Free Movement of Goods”, 23 *ELRev.* (1998) 469.

exemption, could not be granted such an exemption under Article 81(3) EC and Article 53(3) EEA. The Commission gave the football authorities six weeks to inform it of the steps undertaken to comply with the Court's decision. Subsequently, FIFA and UEFA duly let the Commission know that the international transfer system would no longer apply to football players who left their clubs at the end of their contracts to move to another team in a different country within the European Economic Area.<sup>815</sup>

In spite of the fact that the condemned aspects of FIFA's and UEFA's international transfer system had now been informally abolished within the Community and the European Economic Area, it still remained necessary to clarify the legality of a certain number of situations in the light of the rules of the Treaty. Hence, it was clear that the judgement of the Court in *Bosman* did not exhaustively cover all possible factual scenarios with regard to transfers. Proceeding along the lines of an *a contrario* reasoning, the Court did not pronounce itself on the conformity with European law of, for example, firstly, transfer fees in the event of internal transfers, within one Member State; or secondly, transfer payments in the event of international transfers, involving third countries; or thirdly, transfer fees for third-country national football players or; fourthly, transfer sums for football players who are still under contract with their club of affiliation.<sup>816</sup> As the Court stuck with the specific circumstances of the case, it thus did not explicitly invalidate the practice of transfer payments in these related situations. Albeit that it speaks for itself that the silence of the Court in this respect could in no way be interpreted as a safe-conduct on behalf of the Court, most of the football associations nevertheless grabbed the opportunity offered by the Court of Justice with both hands and, rather than being provident and working out a uniform, comprehensive solution encompassing also all above-mentioned situations, only complied – besides, with reticence, and only after the ongoing football season had finished – with the Court's decision to the minimum extent necessary, leaving the traditional system untouched to the greatest extent possible.<sup>817</sup>

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<sup>814</sup> Van Miert, *o.c.*, at 5-6.

<sup>815</sup> Blanpain, *Het statuut van de sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, at 13-15.

<sup>816</sup> See for an analysis of these situations, Thill, *o.c.*, 89; or Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", 33 *CMLRev.* (1996), 991.

<sup>817</sup> Exceptions always confirm the rule, of course, and for example, the English Football Association made use of the

This meant that one was left with a number of somewhat awkward and sometimes in se thoroughly unsatisfactory situations. If, hypothetically speaking, Italy's playmaker Francesco Totti, at the end of his contract, wanted to move from AS Roma to the arch rivals of Lazio Roma on the other side of the Tiber, a transfer sum would be due, just as would be the case if he wanted to defend the colours of the Turks of Galatasaray Istanbul, whereas he could freely walk out of the eternal city to join the ranks of the 'red devils' of England's Manchester United, always after the expiry of his contract with Roma. If United's manager Sir Alex Ferguson wanted to reinforce the attacking compartment of his picked troops while Totti was still under contract with Roma, again a considerable amount of money would have to be transferred to the bank account of the club of president Sensi. And the same would apply for the transfer of Roma's Brazilian defender Cafu to the Mancunians, regardless of whether or not he has arrived at the end of his contract with the 'giallorossi'.

The reaction of the European Commission wasn't long in coming. Already on 27 June 1996, it informed FIFA and UEFA of the fact that, in its opinion, two particular matters on which the Court had not explicitly ruled in *Bosman*, posed problems in the light of the Community competition rules. The Commission's concerns were about firstly, the payment of a transfer fee for an international transfer within the Community or the EEA of a player with the nationality of a third country at the end of his contract with a club from the Community or the EEA, and secondly, the obligation imposed by FIFA on the national football associations within the Community and the EEA to establish national transfer systems. Both issues were considered to be caught in principle by Article 81(1) EC and not in a position to be exempted under Article 81(3) EC. FIFA and UEFA were requested to take these observations into consideration when formally amending their regulations to comply with the dicta of the Court in *Bosman* within the European Economic Area. However, FIFA and UEFA refused to take up this suggestion and replied that they intended to carry through only the reforms which had become indispensable as a result of the judgement of the Court. The Commission alerted them that under these circumstances, it would find itself compelled to start formal proceedings to make an end to the perceived irregularities. At a later stage, we will come back to this issue and address it more in detail.

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opportunity to abolish also all internal systems immediately.

## II. ADJUSTMENTS IN THE GAME IN THE AFTERMATH OF BOSMAN

Most football clubs' way of adjusting their market behaviour to this new post-*Bosman* reality was rather predictable and twofold.<sup>818</sup> In the first place, as the nationality clauses limiting the number of foreign European Union football players to be fielded in an official match had been repealed,<sup>819</sup> there has been a rather spectacular influx of foreign EU players within the national domestic leagues. Many clubs have started engaging players from other Member States, not necessarily because these footballers were always qualitatively better than the national players, but predominantly since they had become more attractive to club managers than the local players, for the simple fact that they were often much cheaper, given that the clubs no longer had to pay a transfer sum to acquire them once their contract with their previous club had expired.<sup>820</sup> This tendency was further reinforced by the fact that many end-of-contract players openly aspired to an international transfer themselves as well, mainly for monetary purposes. As the obligation to pay transfer sums had disappeared for international transfers within the EU, players were often able to touch higher signing-on fees and negotiate ampler salaries with clubs in other Member States than they would receive in the event of a transfer to another club in the Member State of their club of registration, which still had to cough up transfer sums for the services of the players. In other words, money which was previously paid by the acquiring club to the selling club for it to release the registration of a player was now – at least partially- being pocketed by the player himself in the form of income. Contemporaneously, also the number of foreign non-EU players in the European leagues increased significantly. Strictly speaking, the *Bosman* decision of the Court of Justice had not changed their situation with regard to the transfer system or the nationality clauses, both sets of rules remaining applicable to them, but agents from the European clubs successfully roamed about the world in search for talents they could regularly hook for a bargain, so that it was economically still profitable to prefer them above local players. Especially

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<sup>818</sup> See also Gardiner & Welch, "'Show Me the Money': Regulation of the Migration of Professional Sportsmen in Post-Bosman Europe", in Caiger & Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000) 107

<sup>819</sup> *Bosman*, paras. 115-137; see *infra*, chapter 6.

<sup>820</sup> Conversely, for domestic transfers, transfer payments were still due in principle, even after the expiry of the contract of the player in question. The *Bosman* decision didn't expressly deal with this situation.

African, Eastern European and South American players proved to be in vogue.<sup>821</sup> And so it happened that already in 1999, Gianluca Vialli, the Italian manager of London based Chelsea Football Club, fielded not one single English player for a given Premier League game...

Secondly, clubs started more or less systematically signing on players on long-term contracts, in a desperate attempt to avoid the situation where players would arrive too easily at the end of their contract and subsequently walk out freely to another club. Evidently, this approach is not entirely risk-free, because one can never completely discard the possibility that the player's return on the pitch would not live up to the investment, in which case a considerable amount of contractually stipulated salary money would be sent down the drain. However, at least this technique of contractually binding the player to the club for longer periods of time has the advantage that a club is more or less ensured of the continued services of a player that it really wants to keep. And if the club nevertheless wanted to get rid of a player and his contract, it simply had to sell him before the expiry of his contract, as the *Bosman* decision did not concern this particular situation, so that it still would in principle be entitled to cash a transfer fee. In fact, it quickly became current practice to transfer players before the expiry of their contract. Furthermore, in this respect, clubs generally didn't shrink from using questionable methods in their efforts to receive transfer payments.<sup>822</sup> A footballer approaching the end of his contractual term was often presented the following choice: either he would accept a prolongation of his contract, or he would be transferred to another club without further due. If the player in question agreed with the former option, that of course didn't preclude him from being transferred prematurely anyway, in the event of a good financial offer from another club. The case of Brazil's superstar Ronaldo provides an excellent example of this: only a couple of months after he had extended his contract with FC Barcelona with several years in 1997, the pride of Catalonia yielded for the astronomic amount of money Internazionale's president Massimo Moratti was prepared to spend to engage 'il Fenomeno'. However, not all players were willing to play along with this game. Sometimes they refused to agree with the proposed extension of their contract and simply preferred to serve their originally contractually foreseen time, after which they would

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<sup>821</sup> In Belgium for example, first division club SK Beveren has concluded a co-operation agreement with the football academy of Jean-Marc Guillou in Ivory Coast. Currently, 5 out of the 11 players of the regular starting line-up of the former Belgian champion are Ivorians, with some others sitting on the bench.

<sup>822</sup> Meulenaere, "Commissie op transfers", *Knack* (2001) 7 March 2001, 136.

be in a position to offer their services freely on the player's market to the highest bidder.<sup>823</sup> It speaks for itself that the players are perfectly entitled to behave in this way, they have a right to refuse to renew their contract with their club. Experience has shown, however, that this kind of attitude hasn't gone down all that well at club level, as it necessarily entails the loss of a potential amount of transfer revenue. In such a situation, in order to 'persuade' the player in question to sign on, clubs often had recourse to drastic measures such as sidelining the player for the remainder of his contract or even relegating him to the reserve teams, or at least threatened to do so. These measures could possibly engender negative financial consequences for the player, in the form of decreased income, as a result of the loss of match premiums, or a lower market value, due to a lack of match play.<sup>824</sup> In the great majority of cases, they produced the desired effect. By way of summary, long term contracts were thus not always necessarily indicative of the willingness on behalf of the club to keep the player for the entire duration of the contract, they also – and I daresay sometimes even principally- served as a kind of insurance to the club, guaranteeing more or less that the player would not just walk out of the club for free.

It emerges clearly from the foregoing that the football world accommodated itself rather swiftly and handily to the new legal situation in the so-called post-*Bosman* era. It may indeed be one thing that transfer payments are no longer allowed when a player moves between clubs in different Member States after the expiry of his contract, but if players hardly ever arrive at the end of their contractually stipulated period of stay with a club, the rules are practically circumvented. In the first years after *Bosman*, the transfer market even blossomed as never before, players continuously changing clubs, transfer fees thereby being rocketed into unprecedented heights.<sup>825</sup> Whereas only in 1988, Holland's captain Ruud Gullit was transferred from PSV Eindhoven to AC Milan for 8,5 million Euro, hardly more than a decade later in 2000 Argentine strikers Gabriel Batistuta and Hernan Crespo moved from respectively Fiorentina and Parma to AS Roma and Lazio Roma for the sums of 37,5 and 57,5 million Euro. The pièce de

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<sup>823</sup> This is what happened for example in the summer of 2002 with Alin Stoica, the young Romanian start of Anderlecht. He consistently refused to extend his contract with the Brussels team, and finally joined the ranks of the arch-rivals of Bruges after the expiry of his contract, so that no transfer sum had to be paid between the two teams. Remember, since 1 April 1999 third-country nationals playing within the EU/EEA must be treated in the same way as EU citizens for transfer purposes: consult FIFA Circular 616 at <http://www.fifa.com>. See also supra, chapter 2, §3.

<sup>824</sup> Arguably, the lawfulness of these measures can successfully be challenged under national labour law.

<sup>825</sup> This had a lot to do with the fact that revenue from the selling of broadcasting rights suddenly increased enormously in the second half of the nineties.

résistance, topping all preceding transactions, was delivered by Florentino Perez, who won Real Madrid's presidential elections in 2000 by strapping away Portugal's Luis Figo from the enemies of Barcelona by paying more than 62,5 million Euro, as provided in the rescission clause of his contract. But only one year later, in the summer of 2001, Real pulled out another stunt, by luring to the Spanish capital and away from Juventus Turin France's Zinedine 'Zizou' Zidane, arguably the world's best player, for a record-breaking 70 million Euro. These gigantic transfer fees can be coughed up by the clubs thanks to the growing amount of money circulating within the football circuit, generated by gate receipts, world-wide sponsoring contracts and merchandising and above all by the revenues from the television deals.

## §2: CASE N° IV/36.583 - FIFA

### I. THE COURSE OF THE PROCEDURE

#### 1. Complaints

However harmonious and straightforward this current situation may seem at first sight, one shouldn't forget that mere appearances often deceive. And indeed, the football reality immediately under the surface of illusion is not simply a bed of roses.<sup>826</sup> The football world has managed to create this state of affairs by successfully making use of the loopholes in the law. Strictly legally speaking, FIFA rigorously complied with the letter of the law, amending its regulations where required to do so, while it at the same time imperturbably continued to apply its international transfer rules to situations not directly addressed by the ruling of the Court of Justice in *Bosman*. In principle, there is nothing inherently objectionable about this attitude as such. At most, one could reproach FIFA for an excess of tenacity and/or regret its lack of a long-term vision with regard to the remainder of the transfer system, the future of which had inevitably been put in doubt after the Court's intervention and the subsequent observations from the Commission. In practice, however, this new tendency to transfer players no longer at the end of their contract but rather before its expiry, so that transfer payments remain due, essentially boils

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<sup>826</sup> Gardiner & Welch, *o.c.*, 107; McAuley, "They think it's all over ...It might just be now: unravelling the ramifications for the European Football Transfer System Post-Bosman", *ECLR* (2002) 331.

down to circumventing the *ratio legis* of the Court's decision. Besides, it was also far from established that this new situation would withstand the test of conformity with the requirements of Community law.

In this vein, it was clear that the entire transfer issue would have to be addressed again sooner or later. Ultimately, it turned out to be the Walloon socialist trade union SETCA-FGTB (le 'Syndicat des Employés Techniciens et Cadres de la Fédération Générale de Travailleurs de Belgique') which filed a complaint with the European Commission on 1 July 1997, raising the question of the compatibility with Article 81 EC of the prohibition of unilateral termination of a contract, as foreseen in the applicable FIFA Regulations. Another complaint of 24 October 1997, issued by the Belgian association Sport and Freedom ('Sport en Vrijheid'), aimed at safeguarding the rights of amateur and professional sportsmen. Two further complaints were submitted by Italian Serie A football club Perugia, which refused to pay for the transfer of a player still under contract with his club, but they were withdrawn subsequently.<sup>827</sup> In 1998 and 1999, the Commission received two more complaints from Italian clubs, Reggiana and Palermo, dealing with the obligation to pay a transfer sum in the event of a transfer after the expiry of a contract of, respectively, a third-country national and a EU national.

## 2. Statement of objections

Further to these complaints, the Commission sent a statement of objections to FIFA on 14 December 1998, informing it that it intended to declare certain provisions of the FIFA Regulations for the Status and the Transfer of Players of 1 October 1997 incompatible with Article 81 of the EC Treaty (and Article 53 of the EEA Agreement). The Commission considered that the following constitute a restriction or distortion of competition within the meaning of Article 81 EC: (i) a number of situations not covered by the *Bosman* ruling; (ii) the standard-type contract between player and club drafted by UEFA, the introduction of which appears to be the responsibility of FIFA; (iii) the obligation imposed by FIFA on the national associations to elaborate national transfer systems; and (iv) the prohibition imposed by FIFA on national

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<sup>827</sup> Perugia recruited Massimo Lombardo, who was - at the material time - still under contract with Grasshoppers Zurich, from Switzerland, and refused to pay a sum for the transfer of the player.

associations, clubs and players to have recourse to national courts and tribunals in the event of a dispute regarding transfers.

In the remainder of this chapter, the attention will be predominantly focused on the first objection of the Commission, namely the payment of transfer sums in a number of situations not appreciated by the Court of Justice in *Bosman*.<sup>828</sup> The following circumstances were outlined:

- International transfers of third-country nationals from a non-EEA country to an EEA country and vice versa, at the end of their contract or during their contract;<sup>829</sup>
- International transfers of players following a *unilateral* termination of contract. These transfers are prohibited, even if the player has acted in accordance with the requirements stemming from national employment law;<sup>830</sup>
- International transfers of players within the EEA, during their contract, in the event of termination of the contract by *mutual consent* of the three parties involved - club, player and new club.<sup>831</sup>

The Commission considered that as a result of the agreement with or the decision of FIFA to pay a transfer sum in the event of a change of clubs of a player, the national federations and their associated clubs have voluntarily renounced the freedom to freely engage players without paying a transfer fee or a sum of compensation corresponding to the amount of money which has been effectively invested in the formation of the player and which has been calculated objectively. In this respect, it is of no importance whether the move is effectuated during the contract or only after the expiry of it. In the opinion of the Commission, the transfer rules therefore constitute an agreement between undertakings or a decision by associations of undertakings which directly or

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<sup>828</sup> In the remainder of this thesis, the Commission's concerns with regard to the issues of the standard-type contracts and the prohibition to have recourse to ordinary courts and tribunals will not be examined any further. May it suffice it to say in this respect that such standard-type contracts are no longer applied in most countries. In the Netherlands for example, the national federation KNVB already makes use of its own standard-type contract that is adapted to the requirements of Dutch national legislation since the 1954/55 season. (see van Staveren & Boetekees, *Voetbaltransfers onder vuur van de Europese Commissie en de FIFA?*, 50 *Ars Aequi* 4 (2001) at 226). Furthermore, the right to a fair trial before ordinary courts is guaranteed by several national constitutions and also by Article 6 of the European Convention for the Protection of Human Rights. Therefore, a prohibition on recourse to ordinary courts would not stand up to legal challenge for violation of the ECHR.

<sup>829</sup> Article 7, Article 12.4, Article 13.1 and 13.2, and Article 14 – apart from point 8 - of FIFA Regulation 1997.

<sup>830</sup> Point 2 of FIFA Circular n° 616 of 4 June 1997, interpreting Article 12.1 and Article 7.2a of FIFA Regulation 1997.

<sup>831</sup> Article 7, Article 12.4, Article 13.1 and 13.2, and Article 14 – apart from point 8 - of FIFA Regulation 1997.

indirectly fixes purchase or selling prices, which may appreciably affect trade between Member States and which has as its object or effect the restriction of competition between clubs within the common market in the terms of Article 81.1(a) EC. As a result of this agreement, the actual transfer amounts artificially inflate, which goes to the detriment of the global economy of the transfer system and consequently also of the production of the professional football scene.

Furthermore, the Commission also envisaged that the rules concerning the payment of compensation and those which prohibit a club to engage a player who has unilaterally breached his contract (after having complied with the conditions for breach of contract) have as their object and effect to limit the sources of supply of players for the clubs in the sense of Article 81.1(c) EC. The competition between clubs is restricted by reason of the fact that the normal regime of supply and demand has been replaced by a uniform mechanism that basically helps preserving the existing situation and denies many clubs of the opportunity to contract players who would present themselves under normal market conditions within the Community and the EEA. As a result of the transfer system, clubs cannot compete for the services of a player simply on the basis of salary or other working conditions for the football players. Consequently, these players would not be encouraged to improve their individual performances to obtain a higher income and to strive for sporting success which is indispensable for clubs to climb on the rankings and to attract larger audiences. Moreover, the small clubs are only rarely able to guarantee themselves of the skills of talented players as they simply cannot afford to pay the often exorbitantly high sums which are requested for the transfer of these players. Almost all of them end up at a big club, as these sums can only be paid by the rich clubs, which effectively allows them to maintain their position of strength within the league, whereas it remains difficult for small clubs to get to the top positions on the ranking. According to the Commission, all this leads to a decrease in the overall quality and in the attractiveness of the sporting spectacle.

Even though FIFA refused to acquiesce in the Commission's assertions, it nevertheless informed the Commission of its willingness to envisage modifications to the challenged transfer rules. The Commission in its turn displayed remarkable patience towards the football authorities, waiting for more than a year for FIFA to present alternatives to the present system, clearly in the hope that an equitable and mutually satisfactory solution could be reached by consensus.

However, in January 2000, in the absence of structured and clear proposals which would finally bring the transfer system into line with European competition rules, the Commission decided to trigger the mechanism of the formal procedure that would eventually lead to a negative decision. Even at this stage, the Commission remained loyal to its commitment to collaborate with FIFA in its search for a new system in accordance with the Treaty rules. At the end of April 2000, FIFA formulated some ideas of which it seemed they might lead to a – partial - breakthrough. In particular, it was proposed that (i) football players at the age of 18 would have to sign their first professional contract with their club of training, with a duration of 3 years; alternatively, the club would receive compensation for the training and development of the player; (ii) a certain percentage of the compensation would be redistributed over the all clubs which played a role in the ‘pre-training’ of the player; (iii) unilateral termination of a contract by the player or the club is permitted in principle, but it does give rise to the payment of compensation for breach of contract; (iv) the duration and the number of the periods during which transfers can be effectuated (‘transfer windows’) should be restricted. These reflections, though maybe a bit vague at times, provided much to comment upon and could definitely serve as a floor for discussion. Yet, instead of pushing forward for a solution which seemed within reach for the first time since the start of the whole affair, the momentum somehow got lost. Subsequently, the tone of the dialogue suddenly changed, especially after a letter of Commissioner Monti to FIFA Secretary General Zen-Ruffinen, dating from the end of July, in which he rejected FIFA’s request to suspend the ongoing procedure which would lead to a negative decision on the transfer system and urged FIFA to speed up proceedings while contemporaneously reiterating once again the Commission’s willingness to work out a solution which would be acceptable from the point of view of Community law, was leaked to the press, causing tumult. Football officials looked for and found support from some leading statesmen: French President Chirac declared that during the French Presidency, something concrete had to be achieved, and British Prime Minister Blair and German Chancellor Schroeder went even further, issuing an official statement in which they acknowledged that the current transfer system was not perfect, but urged the parties in the proceedings to elaborate a solution respectful of the legitimate interest at stake of both the football players, clubs and associations and pledged to fight for the preservation of the specific nature of professional football. At the end of August, FIFA announced for the first time publicly that it intended to carry through a reform of its transfer regulations. A special Task Force,

composed of representatives of FIFA, the national federations, the leagues and the professional football players, was entrusted with the specific mandate of drafting an official proposal concerning transfers which would have to reconcile the particularities of football with the exigencies of the application of European Union law. Its conclusions would be presented to the Commission by 31 October, so as to allow the new system to enter into force as from 1 January 2001.

### 3. FIFA/UEFA Task Force proposals of 31 October 2000

The FIFA/UEFA Task Force developed a kind of package proposal, claiming the different constituent elements to be indissolubly linked, "to take or to leave in their entirety". It distinguished the protection of young players, the education and training of young players, and the stability of contracts as the fundamental principles underlying its specific proposals. It emphasised that the whole package had been elaborated bearing in mind the aims of maintaining the uncertainty and the comparability of results and thus the regularity of competition, the solidarity between the top actors and the grass roots of the sport and the integrity of the game.

Broadly outlined, the actual proposals were the following:<sup>832</sup>

- *Prohibition on the international transfers of players under 18 years old, except when the family of the player is moving along to the other country for professional reasons involving one of the parents and sets up a home in that country.*
- Introduction of a '*training and education package*' intended to reward clubs investing in the training of young players.
- *Respect for contracts*: any contract for a period up to 3 years must be respected, both by the player and the club. The minimum duration of a contract would be of 1 year, the maximum being 5 years.
- Limitation in the timing and in the amount of transfers: transfers can only be effectuated during 2 unified *transfer periods* per year and are restricted to 1 transfer per player per season.

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<sup>832</sup> For the entire text of the Task Force's proposals, consult Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex V, at 175.

- Introduction of a new *arbitration system* in case of breach of contract (for a player of any age), based on the two pillars of respect for national labour law and respect for the specificity of sport. Arbitration will be voluntary, and will not preclude the right for the parties involved to freely agree on a transfer amount or to have recourse to national courts.
- Acceptance of appropriate *transitional measures* protecting, at a minimum, existing contractual arrangements between clubs and players

This document proved to be everything but a watertight solution. After profound analysis and reflection, the Commission services decided to approve only some of the individual proposals as they stood –for example the proposal on limited transfer windows–, describing the other principles at times as too general, vague, insufficiently precise or –sometimes even manifestly– contrary to Community law. In the end, the document almost raised almost as many questions as it answered. Is there no less restrictive way of protecting young players than an almost absolute prohibition on international transfers? How would the compensation fee for training and education be calculated exactly? Can contracts be unilaterally terminated during the first three years? etc. These were but some of the questions which begged for an answer. Hereupon, the Commission started a new round of discussions with the interested parties, with this document as the platform for the negotiations. Especially FIFPRO, the international association of professional football players, moved heaven and earth to obtain more freedom for the players, rejecting the original Task Force proposals as too restrictive.

#### **4. FIFA Working Document of 10 January 2001**

On 10 January 2001, FIFA presented a working document containing a set of new proposals to the Commission. It contained several elements which clearly constituted a significant step forwards in comparison with the ideas launched so far. First of all, international transfers of minors would be permissible in principle, albeit under certain well-defined circumstances, which thus cautiously but nevertheless unmistakably implied that the football authorities finally accepted to depart from the previously vigorously and stubbornly defended prohibition of international transfers of minors which was always going to be completely unacceptable for the Commission. Moreover, players would no longer be obliged to sign their

first professional contract with their club of formation within the EEA; an upper limit would be introduced to the amount of compensation payable in the event of a transfer of a player under the age of 23; ample explicit references were being made to the applicable national laws, etc. This new initiative constituted exactly the impetus needed to breathe new life into the negotiations which were slowly but surely threatening to drift into a stalemate. For the first time since the beginning of the whole affair really, a solution satisfying all different actors - both FIFA and FIFPRO and the Commission could find themselves to a great extent in this non-paper - seemed within reach, had it not been for UEFA, which vehemently opposed to these proposals, categorising them as creating too much freedom for the players. UEFA's stance was definitely dictated by the categorical 'njet' of the G-14, a group of 14 leading European clubs<sup>833</sup>, to the plans of FIFA. The G-14, openly contemplating the move towards a separate Euro-League, which would effectively reduce UEFA's Cup competitions, especially its Champion's League, to events of secondary importance,<sup>834</sup> and also flirting with the idea of no longer releasing their main players for games of their representative national teams, imperilling in this way the future of the European Championship, exerted heavy pressure on UEFA to bring FIFA to a halt. In a desperate attempt to secure the continued existence of its showpieces, UEFA decided to play its trump card and hinted that if FIFA were to continue playing *cavalier seul* and were to insist drawing the negotiations to an end on the terms and conditions as laid down in the non-paper of 10 January 2001, it just might leave the next FIFA World Cup in Japan and Korea for what it was and organise itself, contemporaneously, a European Championship in Belgium and the Netherlands, to which all the major European countries would participate, of course.<sup>835</sup> Questionable way of acting, maybe, but in any event, it paid off. FIFA got the message, weighed its chances and gave in, withdrawing the working document from the negotiation table.

Checkmate? This withdrawal, in practice essentially turning the clock back to 31 October 2000, leaving the Task Force proposals officially as the only remaining document on the

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<sup>833</sup> The G-14 are: Real Madrid and Barcelona from Spain; Juventus, Inter Milan and AC Milan from Italy; Bayern Munich and Borussia Dortmund from Germany; Manchester United and Liverpool from England; Marseille and Paris-Saint-Germain from France; PSV Eindhoven and Ajax from the Netherlands; and Porto from Portugal. They have set up a permanent office in Brussels, headed by Thomas Kurth.

<sup>834</sup> The last 10 years, the Champion's League has always been won by a team that belongs to the G-14.

<sup>835</sup> For the record: in the last World Cup, in 1998 in France, 6 quarter-finalists came from Europe, the rest of the world being represented by Brazil and Argentina; and in the previous World Cup '94 in the USA, even 7 European teams reached that stage of the competition, admittedly with Brazil as the final winner.

discussion table, definitely appeared to be the *coup de grâce* for the negotiations. It seemed no longer possible to come to a solution satisfying all parties involved in the debate, since they all firmly held on to their own - sometimes outright opposing- points of view, FIFPRO being zealous for the greatest player freedom possible, with UEFA, G-14 and the intervening leagues preventing or obstructing this at all costs, considering the actual system as the most appropriate one. In their opinion, if the Treaty opposed in some way to the current transfer system, then the Commission simply had to modify the Treaty, and the problem would be resolved. In this picture, FIFA could be situated somewhere floating in the middle, desperately trying to reconcile water and fire. The deadlock seemed complete, the ghost of the negative decision one small step away. And yet, contrary to all expectations, after a meeting on 14 February 2001, the Commission accorded the football authorities one final opportunity to escape the impasse, setting 5 March as the ultimate deadline to reach a solution. In the weeks that were to follow, many meetings were held to conclude the discussions.

#### **5. FIFA – European Commission Agreement of 5 March 2001**

And this time, in a meeting on 5 March 2001, the three Commissioners in charge of the affair, Monti, Reding and Diamantopoulou, and the Presidents of FIFA and UEFA Blatter and Johansson, did indeed manage at last to finalise their discussions on the FIFA Regulations on *international* football transfers, agreeing upon a set of principles which reconcile the specific needs of the sport with the requirements of Community law.

These principles are the following:<sup>836</sup>

##### *1. Protection of minors*

International transfers of players under the age of 18 shall be permitted, provided that (i) the family of the player moves into the country of the new training club for reasons not related to football; or (ii) within the territory of the EU/EEA and in the case of players between the minimum working age in the country of the new training club and 18, suitable arrangements are

guaranteed for their sporting training and academic education by the new training club. For this purpose a code of conduct will be elaborated by the football authorities.

## *2. Training compensation for young players*

All clubs, in particular the small ones, involved in the education process of young players should be appropriately rewarded for their contribution. The training and education of a player is conceived to take place between the ages of 12 and 23. When a player signs his first contract as a professional a sum of compensation shall be paid to the club(s) involved in the training and education of the player. Subsequently, on each occasion the player changes club up to the time his training and education is complete, regardless of whether his contract has expired or not, compensation still needs to be paid, possibly in addition to compensation for breach of contract, as the case may be. As a general rule, the amount to be paid shall reflect the costs incurred which were necessary to train the player. Moreover, there shall be a ceiling – still to be regularly established and quantified by FIFA in consultation with UEFA for the EU/EEA area – to ensure that training compensation sums levied are not disproportionate.

## *3. Maintenance of contractual stability in football*

Contracts shall have a minimum and maximum duration of respectively 1 and 5 years, subject to national law. Furthermore, with regard to all contracts signed up to the 28th birthday of the player, if there is unilateral breach during the first 3 years without just cause or sporting just cause, compensation shall be payable and additionally, sporting sanctions will be applied. In the case of contracts signed after the 28th birthday, the same principles shall be applicable, but only during the first 2 years. Moreover, unilateral breach without just cause or sporting just cause is prohibited during the sporting season. Unilateral breach without just cause or sporting just cause after the first 3 or 2 years will no longer result in the imposition of sanctions on the player, but compensation shall remain payable. The amount of compensation for breach of contract shall be calculated with due respect to applicable law, the specificity of sport, and all objective criteria which may be relevant to the case, unless otherwise provided for in the individual contract.

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<sup>836</sup> For the entire text of the agreement, *Principles for the amendment of FIFA rules regarding international transfers*, consult <http://www.fifa.com> or alternatively, Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XVI, at 195.

#### *4. Solidarity Mechanism*

In the event of a transfer of a player during the course of his contract after he has reached the age of 23 or after his second transfer (whichever comes first), a proportion of 5% of the compensation paid to the previous club of affiliation will be divided over the club(s) involved in the training and development of the player. The distribution will be effectuated in proportion to the number of years the player has been registered with the clubs in question between the age of 12 and 23.

#### *5. Transfer windows*

Two unified transfer windows per season will be introduced, with the proviso that there is a limit of one transfer per player per season. As to the mid-season transfer window, it shall be limited to transfers for strictly sport-related reasons, such as technical adjustments of teams or replacement of injured players, or exceptional circumstances.

#### *6. Rest-category*

Furthermore, the agreement provided for the creation of an effective, quick and objective dispute resolution and arbitration system. Recourse to arbitration is supposed to be voluntary and does not prevent players to seek redress before a civil court. Besides, transitional arrangements were inserted in the agreement, stipulating that these principles shall enter in full force and effect only for contracts concluded after the date of formal adoption of the principles by the appropriate authority. Finally, FIFA committed itself to analyse, in particular, the application of training compensation and review its findings with the various members of the football family in the third season after the adoption of these principles.

FIFA, in agreement with UEFA, undertook to proceed immediately to change its existing Regulations on the status and transfers of players, specifying that the amended rules were scheduled for adoption by the FIFA Executive Committee at its meeting in Buenos Aires on 5 July 2001, and would be submitted to the FIFA Congress for information in the following days. Hereupon the Commission indicated its readiness to terminate its competition procedure against FIFA, provided that the principles agreed upon are indeed fully reflected in the FIFA Regulations to be amended. These resolutions were formalised through an exchange of letters between FIFA

President Blatter and Commissioner Monti. In his letter, Blatter still could not refrain from emphasising once more that in the opinion of the FIFA, its current regulations did not violate European law, explaining the whole affair as follows: "While we continue to think that FIFA's present regime is compatible with all relevant laws, we have indicated for some time already that this system can be improved to better reflect the interests of the family of football."<sup>837</sup> Monti limited himself to solemnly replying that "Your undertaking contains sufficient elements for me to be able to confirm that I no longer have the intention to propose that the Commission adopts a negative decision in the procedure that is opened against FIFA as regards the international transfer rules, subject to compliance with Article 6 of Regulation 2842/98."<sup>838</sup>

An official press statement of the next day 6 March 2001 issued by the European Commission on behalf of President Prodi reflected its satisfaction with final outcome of the football transfer talks. "I am delighted that we have been able to find a satisfactory and workable outcome with FIFA on international player transfers in the European Union that not only respects the special needs of the sport but also Community law", commented the European Commission President. "Europe has risen to the occasion and won the match, ensuring a great victory both for football and for Europe. Club football represents much of what we are striving to achieve in Europe in terms of exchange of players, fans and ideas. Together, European football is stronger, more dynamic and more entertaining than if each national league played in its own corner. We have managed to achieve an outcome that will preserve the legitimate rights of players to move from one country to another whilst ensuring European football will be able to go from strength to strength. I pay tribute to all those involved and in particular my colleagues Mario Monti, Anna Diamantopoulou and Viviane Reding."

On 5 July 2001, the football family did effectively introduce the new transfer system at a congress in Buenos Aires. The date of entry into force was set at 1 September 2001 at the latest. All relevant clauses are laid down in two separate documents: firstly, the FIFA Regulations for

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<sup>837</sup> Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XI, at 190.

<sup>838</sup> Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XI, at 191.

the Status and the Transfer of Players,<sup>839</sup> and secondly, the Regulations governing the Application of the Regulations for the Status and the Transfer of Players.<sup>840</sup> These two sets of provisions were accepted with an overwhelming majority of 178 out of 186 votes. Only 8 representatives of the national federations voted against the introduction of the revised transfer rules. This result is somewhat remarkable, and to a certain extent probably even surprising, in view of the fact that FIFA Circular n° 769,<sup>841</sup> containing relevant additional information concerning the practical application of the transfer regulations, was made public only on 24 August 2001. En bloc, the members of the national associations had thus voted in favour of a new system of which they did not necessarily know all details. Or how the motto under which the congress had been held, 'one house, one game, one world' had effectively reflected the spirit of the participants! This induced a famous Dutch columnist to write that "in the landscape of FIFA, only the shadow of the clouds actually moves".

Embroidering on the same theme, even this undisputed sign of confidence from the national associations didn't affect the fact that a thick thundercloud-layer is still menacingly covering the sky above the amended FIFA transfer rules, however. Right from the outset, FIFPRO had already expressed its firm disapproval with the final agreement reached between the Commission and FIFA in March which led to the closure of the infringement procedure under Article 81 EC. As such, the dissent of FIFPRO with the outcome of the transfer discussions didn't really constitute an obstacle towards the finding of a solution, as the player's organisation was not officially a party to the proceedings, which were instituted against FIFA. Since the procedure touched transfers, a matter of general sporting interest, the Commission was found prepared to hear the observations of FIFPRO, which had been informally accorded the status of interested third party, but its agreement was not required to arrive at a kind of cease-fire, which strictly legally speaking only had to be agreed upon between the Commission and FIFA. However, as FIFPRO considered that its remarks weren't sufficiently taken into consideration

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<sup>839</sup> Hereinafter further referred to as 'FIFA Regulation 2001'. For the entire text of the Regulation, consult <http://www.fifa.com>, or alternatively Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XX, at 234.

<sup>840</sup> Hereinafter further referred to as 'FIFA Application Regulation 2001'. For the entire text of the Application Regulation, consult <http://www.fifa.com>, or alternatively Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XXI, at 247.

<sup>841</sup> Consult <http://www.fifa.com>, or alternatively Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex XXII, at 257.

and consequently that it did not share in the consensus reached between the Commission and FIFA, there was nothing to prevent it in principle from having formal recourse to national civil courts and thus basically reopening the whole affair. And that is precisely what the player's union did when it instituted proceedings against FIFA and UEFA on behalf of player José Amorim Goncalves before the Tribunal of First Instance of Brussels. FIFPRO submitted that the transfer system, even after the reform of March 2001, remained incompatible with the provisions of Article 39 EC and 81 EC. Apart from FIFA and UEFA, also the Belgian national football association KBVB was summoned to appear before the Court during the first audience scheduled on 28 May 2001. It was specifically requested not to apply the new transfer legislation in Belgium. As a result of FIFPRO's action, the revised transfer system thus immediately faced another test of conformity with European law. In view of the fact that the Commission had only just given his fiat to the new transfer rules, and hence had abandoned its infringement procedure under Article 81 EC against FIFA's old transfer regulation, the odds were that the national court would have stayed the proceedings and would have referred the hot potato to the European Court of Justice, requesting it to formulate a preliminary ruling on the issue. In the end, however, things didn't come that far. Ultimately, FIFPRO decided to accept a proposal of reconciliation from FIFA: in return for a guaranteed representation in the Dispute Resolution Chamber, which task will consist of settling all transfer disagreements within a month, FIFPRO withdrew its complaint.<sup>842</sup> Rather than seeking open confrontation to definitively solve the matter, the player's union thus settled for the promise of some influence within an organ which still has to be instituted as a result of the implementation of the new transfer system and therefore hasn't proven its efficiency yet.<sup>843</sup> As a result, there was nothing to prevent the new FIFA transfer system from entering into force on 1 September 2001 no longer.

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<sup>842</sup> Van Leeuwen, "FIFA brengt vakbond in gewetensnood", *Voetbal Internationaal* 30 (2001) 65.

<sup>843</sup> Theo Van Seggelen, spokesman of FIFPRO, defended the union's position as follows: "My heart says: continue proceeding. My brain says: do not proceed and opt for influence. If we proceed and we do not win, we will be excommunicated. Are we still defending the players' rights appropriately then? Not proceeding could be interpreted as a sign of collaboration. Conversely, proceeding stands for independence: we are not for sale. That is consistent, that is the task of a union. However, if there's anything I've learned over the past 20 years, it must be that being consistent doesn't bring you anywhere. It's not about being right, but about getting it right. And the chances of that happening are greater if we drop the complaint." See Van Leeuwen, "FIFA brengt vakbond in gewetensnood", *Voetbal Internationaal* 30 (2001) 65.

## II. ANALYSIS OF THE NEW TRANSFER RULES

When the Commission on 5 March 2001 reached an agreement with FIFA on the international transfer system reform and did not pursue any further its procedure of infringement of Article 81 EC, this meant that it considered that the new transfer rules were compatible with Community law. In the following analysis, it will be enquired whether this is actually the case. It will predominantly be evaluated whether the recently implemented transfer rules do comply with the requirements of the Community provisions on freedom of movement of workers. The examination will be effectuated in two steps: firstly, in this section, the main principles of the agreement concluded between the Commission and FIFA will be assessed separately, before subsequently, in the conclusion, a more general evaluation of the whole system will be expressed. For each aspect of the agreement, it will be evaluated whether the European Commission has satisfactorily reconciled the requirements of Community law with the special characteristics of sport. The starting point of the examination is that, if the Court were asked to express a judgement on the conformity of the FIFA rules with Article 39 EC, it would again strongly assert the rights to freedom of movement of the sportsmen, as it has previously done in *Bosman*. At this stage, it might also be worth pointing out already that even if the Commission has given its fiat to the new FIFA Regulations, the lawfulness of certain of its rules will ultimately hinge upon their compatibility with the relevant national legislation in the different Member States.

### 1. Protection of minors

It was only at the final stage of the negotiations that FIFA was found willing to mitigate its firm stance on the international transfers of minors. Even more so, in fact, it agreed upon making a complete U-turn, reversing the originally postulated prohibition of international transfers of minors into a principled permission, albeit subject to compliance with a certain conditions.<sup>844</sup> This ulterior development deserves no less than unequivocal approval.

Nowhere in the European Community Treaty, any mention is made of a minimum age one has to reach before one can legally be considered as a 'worker'. Indirectly, the European Court of

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<sup>844</sup> Article 12 FIFA Regulation 2001.

Justice has offered more guidance in this respect. In its case law on the subject, it has always emphasised that the term 'worker' in Article 39 EC may not be interpreted differently according to the law of each Member State, but has a Community meaning.<sup>845</sup> And it has added that since it defines the scope of that fundamental freedom, the Community concept of a 'worker' must be interpreted broadly.<sup>846</sup> It proclaimed that any person who pursues an activity which is "effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary", is to be treated as a worker. Entering more into detail in the seminal case of *Lawrie-Blum*<sup>847</sup>, the Court held that this concept of 'worker' must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. It specified that the essential feature of an employment relationship is that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."<sup>848</sup>

In view of the case law of the Court of Justice, it is clear that, as such, there is nothing to prevent young players who haven't reached the age of 18, a priori, from being regarded as workers within the meaning of Article 39 EC. Strictly speaking, from the point of view of the application of Community law, all that is required is that they fulfil the above-mentioned criteria laid down in the case law of the Court. Indeed, to complete the whole picture, in *Walrave*, the Court had already pointed out that the particular sphere – in casu football- in which the activity is carried out, is of no importance to the categorisation of someone as a 'worker'.<sup>849</sup> Moreover, even if the young players are initially merely employed by the clubs as trainees or apprentices, so that their work is perceived as a kind of practical preparation directly related to the actual pursuit of the occupation in point, that is not a bar to the application of Article 39 EC if the service is performed under the conditions of an activity as an employed person.<sup>850</sup>

<sup>845</sup> Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177.

<sup>846</sup> Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035.

<sup>847</sup> Case 66/85 *Lawrie Blum v Land Baden-Württemberg* [1986] ECR 2135.

<sup>848</sup> *Lawrie-Blum*, par. 17.

<sup>849</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405; also *Lawrie-Blum*, par. 20.

<sup>850</sup> See *Lawrie-Blum*, par. 19. This case involved Miss Lawrie Blum, a British national, who, after passing at the University of Freiburg the examination for the profession of teacher at a secondary school, was refused admission, on the grounds of her nationality, to the period of preparatory service leading to the Second State Exam, which qualifies successful candidates for appointment as teachers in a secondary school, by the Secondary Education Office in Stuttgart. See also Case C-27/91 *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie v Hostellerie Le Manoir* [1991] ECR 5531, par. 8. The case concerned employers' social

Undeniably, employment of minors is an economic reality. The European Union responded to this situation by drafting some legal and political instruments in which it manifested its accommodation to these situation, by permitting work to be carried out by young people to a certain extent. The Community Charter of the Fundamental Social Rights of Workers, adopted by the European Council in Strasbourg on 9 December 1989, states the following, in point 20: "Without prejudice to such rules as may be more favourable to young people, in particular those ensuring their preparation for work through vocational training, and subject to derogations limited to certain light work, the *minimum employment age* (emphasis added) must not be lower than the minimum school-leaving age and, in any case, not lower than 15 years." This resolution found its way in Community secondary legislation a couple of years later, when Directive 94/33 on the protection of young people at work stipulated explicitly in Article 1.1 that "Member States shall ensure, under the conditions laid down by this Directive, that the minimum working or employment age is not lower than the minimum age at which compulsory full-time schooling as imposed by national law ends or 15 years in any event."<sup>851</sup> Moreover, in its Article 5, the Directive allows even the employment of children<sup>852</sup> for the purposes of performance in cultural, artistic, sports or advertising activities, this possibility however being subject to prior authorisation to be given by the competent authority in individual cases.<sup>853</sup>

By the same token, these documents also convey the unequivocal message that young people are a particularly vulnerable category of workers, worthy and in need of specific protection. Hence, labour activities performed by minors, if permitted at all, must be strictly regulated. In the Community Charter of the Fundamental Social Rights of Workers, this concern was formulated as follows: "22. Appropriate measures must be taken to adjust labour regulations applicable to young workers so that their specific development and vocational training and access to employment needs are met. The duration of work must, in particular, be limited – without it

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security contributions due from *Le Manoir* in connection with practical vocational training which Miss Haugh, an Irish national who was undergoing vocational training at a technical college in Ireland, had undertaken at *Le Manoir*.

<sup>851</sup> Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, *OJ. L* 216/12.

<sup>852</sup> According to Article 3, for the purposes of this Directive: 'child' shall mean "any young person of less than 15 years of age who is still subject to compulsory full-time schooling under national law."

<sup>853</sup> To be complete, in Article 5.3, the Directive foresees in an exception to the first paragraph: "By way of derogation from the procedure laid down in par. 1, in the case of children of at least 13 years of age, Member States

being possible to circumvent this limitation through recourse to overtime – and night work prohibited in the case of workers of under 18 years of age, save in the case of certain jobs laid down in national legislation or regulations.” The same preoccupation underlies Directive 94/33 on the protection of young people at work, in which it is stipulated explicitly that “Member States shall ensure that young people are protected against economic exploitation and against any work likely to harm their safety, health or physical, mental, moral or social development or to jeopardise their education.”<sup>854</sup>

Consequently, it must be acknowledged that Community legislation cautiously approves of the employment of minors, under certain circumstances. Young football players of under 18 years of age can be considered as workers within the meaning of the Community Treaty. They should therefore be able to benefit from the right to freedom of movement. Nevertheless, for a long time during the negotiations, FIFA held on to the prohibition of international transfers of minors. At first glance already, this firm stance seems to violate the youngsters’ rights to freedom of movement. For a somewhat more accurate account of the particular issue, two distinct situations have to be distinguished. Firstly, when there exists no interdiction of transfers of minors at the national level, an international transfer prohibition does appear to be indirectly discriminatory. A purely hypothetical example serves to clarify this statement. Let us assume that young players under 18 can effectively be transferred between clubs in France. This means that a boy from Perpignan is entitled to move to PSG, whereas a boy from Lisbon or Brussels or Copenhagen couldn’t play for the Parisian team. The rule may be neutral in appearance, applying to all youngsters equally, regardless of their nationality, but in fact it works predominantly to the detriment of the non-French boys, because they will be much more affected by the rule than the French minors, since most of them don’t live in France. The same example could be used to point out already an inconvenience or an anomaly that the prohibition of international transfers of minors would engender. The rule is clearly aimed at the protection of young players, which is undoubtedly a legitimate objective, and one of the means to achieve this aim is to avoid these youngsters from being distanced too much from home and their family. But under the application of the rules, the same boy from Perpignan wouldn’t be allowed to play for Barcelona, a mere 200

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may authorise, by legislative or regulatory provision, in accordance with conditions which they shall determine, the employment of children for the purposes of performance in cultural, artistic, sports or advertising activities.”

<sup>854</sup> Article 1.3 Directive 94/33.

km away, whereas he could go to Paris, at almost 1000 km distance from home! Secondly, if there is a similar interdiction at the national level, then the prohibition of international transfers loses its discriminatory character, but remains in any event a clear restriction on the free movement of persons, for it precludes nationals of a Member State from leaving their country of origin to enter the territory of another Member State in order to pursue an economic activity there.<sup>855</sup> Even if this provision applies without regard to the nationality of the workers concerned, it still directly affects young players' access to the employment market in other Member States.<sup>856</sup>

At this stage of the affair, the questions that inevitably need to be addressed are whether the obstacle to the freedom of movement constituted by the prohibition of international transfers of minors, regardless of whether it has an indirectly discriminatory character, as in the first situation, or merely is of a non-discriminatory nature, as in the second situation, can be justified by a legitimate aim and whether the measure at issue passes the test of proportionality, in order to avoid an actual infringement of Article 39 EC. It is beyond the slightest doubt that the objective of protecting young players can be qualified as an imperative requirement in the general interest. And probably it can even be maintained to a certain extent that imposing a prohibition of international transfers is also an apt way of achieving this objective. However, it is highly questionable whether a ban on international transfers of minors is really necessary to reach that objective. It seems clear that the same aim can be achieved as effectively in a way which is less intrusive of the free movement rights. To give but an example, allowing transfers within precisely described frontier zones or within a certain mile or minute radius from home could already have amounted to a tentative first step in the right direction.

Ultimately, however, the final outcome of the negotiations is by far the most preferable result from the point of view of free movement. In principle, international transfers within the EU/EEA are thus allowed, provided that the new training club is able to offer stable and suitable training and education arrangements for the young players,<sup>857</sup> who are between the minimum

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<sup>855</sup> *Bosman*, par. 96.

<sup>856</sup> *Bosman*, par. 103.

<sup>857</sup> To that end, the football instances are required to set up an official Code of conduct.

working age in the country of the new training club<sup>858</sup> and 18.<sup>859</sup> In my opinion, this rule adequately reflects the exigencies of the Directive on the protection of young people at work and succeeds in reconciling them with the principles on freedom of movement of workers. In this respect, it is also to be applauded that the transfer of young third-country national players is made subject to the precondition that their family also comes to reside in the new country.<sup>860</sup> In principle, their relatives are expected to move along 'for reasons not related to football', but even a blind man can see that this requirement will probably often be successfully circumvented somehow. Presumably, many parents of prodigious players will suddenly find a job in the service of the new club of their child, or alternatively start working for one of the sponsors of the team in question. But in any case, apart from this slight 'inconvenience', this rule should be able to impede the unfortunately currently still widespread practice of slave-trade of young African, Asian, Eastern European or Latin or South American players.

## 2. Training compensation for young players

This particular aspect of the new FIFA Regulations is inspired by the idea that clubs should be compensated for their efforts to train young football players. In the previous chapter, it has been alleged that the need to ensure the training and development of young players, even though it undoubtedly constitutes a laudable objective, may not be sufficiently distinctive to sport so as to deserve being treated as an overriding requirement in the general interest justifying restrictions to the free movement of workers.<sup>861</sup> As a result, it is argued that the entire set of rules relating to compensation for training of young players may very well be incompatible with Article 39 EC. However, the Court of Justice has been more lenient to the sporting associations in this respect in *Bosman*, and has accepted this particular objective as a legitimate aim under the

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<sup>858</sup> In Belgium, for example, the Royal Decree of 18 July 2001, *Belgisch Staatsblad*, 2001, has set the minimum age at which an employment contract as remunerated sportsman can be concluded in basketball, football, volleyball and cycling at:

- 16 years when the athlete signs a contract for part-time work according to which he has to be at the disposition of his employer during less than 80 hours per month;
- 18 years when the athlete signs a contract for part-time work the terms of which stipulate that he has to be at the disposition of his employer for more than 80 hours per month, or when he concludes a labour agreement for full-time work.

<sup>859</sup> Article 12 (b) FIFA Regulation 2001.

<sup>860</sup> Article 12(a) FIFA Regulation 2001.

<sup>861</sup> Concurring, Weatherill, "Do sporting associations make law or are they merely subject to it?", 13 *Journal of the Society for Advanced Legal Studies* (1999) 24.

objective justification doctrine.. For the purposes of this analysis, I will therefore proceed on the assumption that this recognition still holds true.

## 2.1. Principles

The new FIFA Regulations provide that a player's training takes place between the ages of 12 and 23.<sup>862</sup> As a general rule, training compensation shall be payable up to the age of 23 for training received up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In the latter case, compensation shall be due until the player reaches the age of 23, but the calculation of the amount of compensation shall be based on the years between 12 and the age when it is established that the player has actually completed his training.<sup>863</sup> Consequently, in total, maximum 10 years of training are taken into consideration when calculating the amount of compensation to be paid in the event of a transfer.<sup>864</sup>

When a player signs his first contract as a non-amateur, a sum of compensation shall be paid to the club(s) involved in the training and education of the player.<sup>865</sup> Moreover, compensation shall be paid each time a player changes from one club to another up to the time his training and education is complete,<sup>866</sup> which, as a general rule, occurs when the player reaches 23 years of age,<sup>867</sup> irrespective of whether the player moves before or at the end of his contract.<sup>868</sup>

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<sup>862</sup> Article 13 FIFA Regulation 2001.

<sup>863</sup> Article 13 FIFA 2001. In Article 5.1 of the FIFA Application Regulation 2001, it is further stipulated that for the purposes of calculating compensation, the training period starts at the beginning of the season of the player's 12th birthday, or at a later age, as the case may be, and finishes at the end of the season of his 21st birthday.

<sup>864</sup> See Circular n° 769 of 24 August 2001.

<sup>865</sup> Article 14 FIFA Regulations 2001.

<sup>866</sup> Article 5.2 FIFA Application Regulations 2001 unequivocally stipulates that compensation for training is due:

- a) for the first time, when the player acquires non-amateur status according to Article 1 of the FIFA Regulations for the Status and Transfer of Players
- b) afterwards, for every transfer up to the age of 23, depending on the player's status, i.e.
  - from amateur to non-amateur status
  - from non-amateur status to non-amateur status.

*A contrario*, Article 5.3 FIFA Application Regulations 2001 provides that compensation for training is not due:

- a) for transfers from amateur status to amateur status or for transfers from non-amateur status to amateur status (reacquisition of amateur status), unless the player (re)acquires non-amateur status within a period of three years.
- b) if a club unilaterally terminates a player's contract without just cause, but without prejudice to the compensation due to the previous training clubs.

<sup>867</sup> Article 15 FIFA Regulations 2001.

<sup>868</sup> Article 18 FIFA Regulations 2001.

No training compensation has to be paid any longer when a player over the age of 23 is transferred.<sup>869</sup> The actual amount of compensation due for training and education must be calculated in accordance with the parameters set out in the Application Regulations, which also stipulate how the total sum shall be allocated between the clubs involved in the training and education of the player.<sup>870</sup>

## 2.2. First prong of principle of proportionality: test of 'appropriateness'

Embroidering on the principles enounced by the Court of Justice in *Bosman*, the principle of training compensation for young players is likely to restrict the freedom of movement of young players who wish to pursue their activity in another Member State, for it precludes or deters them from leaving the clubs to which they belong, even after the expiry of their contracts of employment with these clubs,<sup>871</sup> directly affecting their access to the employment market in other Member States.<sup>872</sup> At first sight, Article 39 EC therefore seems to be infringed by this aspect of the revised transfer rules. The objective which underlies this set of rules is that clubs should have the necessary financial and sporting incentives to invest in training and educating young players. It is important to emphasise once again that the Court already in *Bosman* readily acknowledged that "in view of the considerable social importance of sporting activities and in particular football in the Community, [...] the aim of encouraging the recruitment and training of young players must be accepted as legitimate."<sup>873</sup> The big issue to be addressed in this respect is thus whether the means deployed are appropriate and necessary to achieve this objective. In other words, it must be examined whether the new transfer rules, even though intrinsically still restrictive, nevertheless pass the test of the principle of proportionality.

In this respect, it is useful to recall that the Court in *Bosman* also accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players. Nevertheless, taking into account that it is impossible to predict the sporting future of young players with any certainty and that only a

<sup>869</sup> Article 20 FIFA Regulations 2001.

<sup>870</sup> Articles 16-18 FIFA Regulations 2001.

<sup>871</sup> *Bosman*, par. 96.

<sup>872</sup> *Bosman*, par. 103.

limited number of such players go on to play professionally, it ultimately held that “those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally.” The Court therefore concluded that “the prospect of receiving such fees cannot be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.”<sup>874</sup> In addition, it stated that the same aims could be achieved at least as efficiently by other means which do not impede freedom of movement for workers.<sup>875</sup> In the opinion of the Court of Justice, the transfer system as it stood at the material time of the proceedings in *Bosman* thus failed to pass the test of proportionality. Contrary to some expectations maybe, the Court didn't dwell on the issue any longer, seemingly contenting itself with a simple reference to Advocate General Lenz' opinion. Nevertheless, this should not lead us to underestimate the particular importance of this last statement of the Court. With its last sentence on the issue, the Court killed two birds with one stone. Firstly, it hinted clearly at the fact that it would not object to alternatives to the transfer system which effectively succeed in encouraging football clubs to invest in the search, development and training of young players and which at the same time do not pose particular problems from the point of view of freedom of movement. Secondly, the Court did well to step on the brakes at this point, wisely showing some self-restraint as to the issue of justification, not substituting its own assessment for that of the sporting federations, thereby leaving them the space or freedom so as to make up their own mind and work out possible solutions autonomously.

Be that as it may, the Court's last statement on the issue, containing the somewhat cryptic and at first sight rather deceptively simple reference to the opinion of the Advocate General, appears to be somewhat unfortunate at closer scrutiny. Admittedly, Advocate General Lenz did advance some propositions which he considered as more suitable than the transfer rules to reach the aim of maintaining the sporting and financial equilibrium,<sup>876</sup> pondering the possibility of determining by collective wage agreement specified limits for the salaries to be paid to the players and envisaging the distribution of the clubs' receipts amongst all clubs, but technically

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<sup>873</sup> *Bosman*, par. 106.

<sup>874</sup> *Bosman*, par. 109.

<sup>875</sup> *Bosman*, par. 110.

<sup>876</sup> See Lenz AG in *Bosman*, paras. 226-234.

speaking, he did not really unequivocally do the same with regard to the objective of encouraging the recruitment and training of young players.<sup>877</sup> In this respect, he rather examined which changes to the existing transfer rules were necessary to make them comply with the requirements of Community law. In the opinion of the Advocate General, the transfer fees at stake in *Bosman* could not be regarded as compensation for possible costs of training for a number of reasons.<sup>878</sup> First of all, there was the simple fact that their amount was not linked to those costs but rather calculated on the basis of the player's earnings.<sup>879</sup> A second argument against regarding those transfer fees as a reimbursement of the incurred training costs was the fact that such fees were demanded even when experienced professional players changed clubs. The Advocate General acknowledged that any reasonable club will certainly incur costs to train all its players and to provide them with all the development necessary, but he considered that as expenditure which is in the club's own interest and which the player recompenses with his performance, concluding that it is not evident therefore why such a club should be entitled to claim a transfer fee on that basis.<sup>880</sup> Finally, he claimed that the logic of the system entails that reimbursement of the expenditure incurred for the training and development of a player depends on whether or not that player is transferred to another club, even though it is clear that the training of that player involves expense even if he doesn't change club. However, in spite of the foregoing, he didn't reach the conclusion that a demand for a transfer fee for a player would have to be regarded as unlawful in every case.<sup>881</sup> On the contrary, he recognised that clubs should be able to seize the fruits of their training and development labour and considered that appropriate transfer rules for professional footballers might be acceptable, provided these rules satisfied two specific preconditions. Firstly, in his view the transfer fee would have to be limited to the amount actually expended by the previous club (or previous clubs) for the training of the player. And secondly, a

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<sup>877</sup> See Lenz AG in *Bosman*, paras. 235-239.

<sup>878</sup> Lenz AG in *Bosman*, paras. 237-238.

<sup>879</sup> A good demonstration of this argument can be found in the DFB transfer rule, for the transfer of an amateur player to a professional club. Under that rule, a first division club had to pay a transfer fee of DM 100 000, whereas a second division club had to pay only DM 45 000 for the same player. That shows that the amount of the transfer fee quite evidently is not orientated to the costs of training. Arens endorsed this statement in a humorous way: see Arens, "Der Deutsche Bosman – Anmerkungen zum Kienas-Urteil des Bundesarbeitsgericht vom 20.11.1996" [1997] *SpuRt* 127: "[w]ie hoffnungslos untalentierte müssten also Spieler vom Kaliber eines Romario oder eines Ronaldo sein, für die Transferentschädigungsforderungen in Größenordnungen von 30 Mio., 50 Mio. oder 70 Mio. Dm genannt werden, wenn sie Aus- und Weiterbildungskosten in dieser Größenordnung verschlungen haben sollen."

<sup>880</sup> In this respect, he referred to the regulations of the French and Spanish associations which provide that no transfer fees can be demanded any more after a specified moment in time.

<sup>881</sup> Lenz AG in *Bosman*, par. 239.

transfer fee would only be due by the acquiring club in the case of the player's first transfer and only if the previous club has trained the player. Additionally, account should be taken of every year the player has played for that club after having received his education, so as to reduce the transfer fee proportionally, since during that period the training club will have had the opportunity to benefit from its investment in the player.

Summarising, instead of elaborating a real alternative to the unlawful transfer fees of the pre-*Bosman* era, the Advocate General opined that revisited transfer rules could be acceptable under Community law. It goes without saying that this leaves us to a certain extent in an awkward situation: on the one hand, the Court decided that the transfer rules in *Bosman* constituted a restriction to the Treaty principle of freedom of movement of persons and could not be justified under the mandatory requirements doctrine for the aims it pursued could be reached as efficiently by *other means* which do *not* impede the freedom of movement of workers, explicitly referring to the Advocate General's opinion for this matter, whereas on the other hand, precisely the Advocate General declared that *appropriately* amended or modified transfer could possibly be regarded as compatible with the requirements of Community law (emphasis added). Admittedly, with some goodwill, the adapted transfer rules can indeed be regarded as another means than the traditional transfer system to reach the objective pursued, even though the basic features undeniably remain the same, rendering it somehow necessary to stretch the meaning of an 'alternative' to the illicit transfer system. Leaving this matter aside however, it still does not change anything about the fact that the Court clearly spoke of means not hindering the free movement of workers, whereas it is unmistakably so that even new transfer rules do still impede the right to move guaranteed under Article 39 EC and are therefore also in need of justification. However, it is submitted that this difference might be more apparent than real. In the legal doctrine, there is some theoretical debate on when a measure exactly constitutes an infringement of the free movement rights.<sup>882</sup> On the one hand, some maintain that a certain measure only amounts to an obstacle when it appears that there is no objective justification available, whereas on the other hand, others argue that one is confronted with a restriction as soon as the measure in question is liable to impede the free movement rights, even though it may still be upheld subsequently if it can adequately be justified. If the Court of Justice in the case of *Bosman*, at

least terminologically, adhered to the former group, this would explain the then purely textual difference of opinion between the Court and its Advocate-General. But even if this weren't the case, there would still be no need to dramatise this difference of opinion, for the Court of Justice always has the last word on the matter. All this could then be reduced to an imprecise and unnecessary or superfluous reference of the Court to the Advocate General's opinion. In this scenario, the Court could have avoided this inconvenience by referring more accurately to the opinion or simply omitting the reference to it. It would of course imply that in the opinion of the Court, even an amended transfer system would be incompatible with Article 39 EC. But then, Advocate General Lenz already explicitly acknowledged that it was not impossible that even a modified transfer system could be countered by the argument that the objectives pursued by it could also be attained by a system of redistribution of a proportion of income, without the players' right to freedom of movement having to be restricted for that purpose, which would therefore have to be preferred for that reason.<sup>883</sup>

Up to today, the main football authorities UEFA and FIFA did not manage to develop into practice a new system preserving the training and education of young football players which could provide a viable alternative to the former transfer rules and is contemporaneously also compatible with Community free movement law. Some ideas were brought forward, but they never went beyond the stage of good intentions. At the European Sports Forum in 1997, former Member of the Commission responsible for Competition Karel Van Miert pointed out that UEFA played with the idea of implementing a system consisting of a pool of solidarity out of which training clubs would be reimbursed for the charges for the actual training of young amateurs aged between 14 and 24 who are transferred to another national association which is a member of UEFA as non-amateur players.<sup>884</sup> Moreover, he indicated that UEFA also intended to recommend that national associations should implement the so-called 'pattern contract' for club players, divided in two periods of three years (three years training and three years as a first professional

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<sup>882</sup> Weiler, "From Dassonville to Keck and beyond: An Evolutionary Reflection on the Text and the Context of the Free Movement of Goods", in Craig & de Burca (eds.), *The Evolution of EU Law* (OUP, 1999), chapter 10.

<sup>883</sup> Lenz AG in *Bosman*, par. 239.

<sup>884</sup> Van Miert, "Sports and Competition: recent Developments and the Commission's Action", speech at the European Sports Forum, Luxembourg, 28 November 1997, point 4.

contract). This contract would contain a provision for the payment of compensation in the event of transfers taking place at the end of the first contract period.<sup>885</sup>

Even though both proposals were not finalised in the end, it seems nevertheless useful to examine them on their face value. The idea of the 'pattern contract' had its origins in France.<sup>886</sup> Article 15(1) of Chapter 4 of Title III of the French Professional Football Charter, dealing with the status of professional footballers, provides that "any move by a player from the club with which he had signed his first professional contract to another club shall entitle the former club (the club which has trained him) to receive compensation for training." Article 15 (2) furthermore stipulates that "the former club shall be entitled to compensation for training if that club has trained the player as a 'stagiaire' for a period of at least one season and if that training has taken place in a recognised football training centre." The French system is particular because it compels a football player to sign his first professional contract with the club that provided him his training. A compensation for training<sup>887</sup> is only due in the event of the first transfer of the player, and then only when the above conditions are fulfilled. This specific obligation to sign the first professional contract with the training club is unique in Europe. It enabled French football authorities to organise the system of payment of compensation in this given way, as every footballer only played for one club before being transferred for the first time. In the aftermath of *Bosman*, this system was abolished, only to be reintroduced already in 1999 in the French legislation in order to reverse or halt the trend which saw French clubs, some of whose 'centres de formation' are in excellent repute all over Europe<sup>888</sup>, all too frequently being stripped off their most talented youngsters by the big European clubs<sup>889</sup> whose financial means allow them to offer

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<sup>885</sup> Van Miert, "*Sports and Competition: recent Developments and the Commission's Action*", speech at the European Sports Forum, Luxembourg, 28 November 1997, point 4.

<sup>886</sup> For more detail, see See Dubey, *La libre circulation des sportifs en Europe* (Bruylant, Brussels, 2000), at 313-314.

<sup>887</sup> See Article 15 (3) et seq. of the 'Charte du Football Professionnel': The amount of the compensation for training corresponds to the basic compensation or part thereof, according to the length of the training. The basic compensation corresponds in principle to the player's gross income in the preceding two years. If the training has lasted for more than three seasons, the full basic compensation is payable; if it lasted for only one season, the transfer fee is only 10% of that amount.

<sup>888</sup> Especially the 'centre de formation' La Jonelière of FC Nantes and the one in Auxerre guided by Guy Roux often serve as an example for clubs wishing to invest in the development and education of young football players.

<sup>889</sup> Dubey even called it "pillage systématique".

to these players salaries with which most French clubs simply cannot compete.<sup>890</sup> The immediate cause or maybe the last straw which induced this legislative course of action might have been the much talked-of transfers of Sylvestre and Dabo from Rennes to Internazionale. The Italian giant acquired the two French prodigal talents almost for free, subsequently making huge profits selling them respectively to Manchester United and Parma only one year later, whereas Rennes, the team that had really 'formed' the players, was left with almost nothing. Quite understandably, many felt situations like this had to be avoided. As a result, during the recent transfer talks with the Commission, it was again suggested to adopt this obligation to sign the first professional contract with the club of training as a general FIFA rule, which would be applicable all over Europe. However, it became immediately apparent that this proposition would raise serious questions as to its compatibility not only with Article 39 EC, but also with Article 81 EC. For this reason, the Commission vigorously opposed this idea and it was not pursued any further. It is submitted however that as such, this ascertainment, which is no doubt correct, does not constitute sufficient ground for completely discarding the idea of the pattern-contract already. For it cannot be excluded *a priori* that there are simply no better alternatives available, which are less restrictive of free movement and are suitable to attain the objective of preserving the training of young players. Under these precise circumstances, the adoption of the pattern-contract could be envisaged anyway, in spite of the inherent weakness ingrained in this system. This final decision requires a comparative analysis of all proposals, which will be carried out in the end.

The major downside of this first proposition, namely its doubtful lawfulness under the Community free movement provisions, is nowhere to be found in the second proposition concerning the redistribution of a certain amount of income between clubs. A system of pooling of resources by clubs for the promotion of the development of young talent might indeed be a potential way forward.<sup>891</sup> In practice, such a system would consist in the establishment of a common, central fund which would be financed by contributions from all clubs and would be used to defray expenditure incurred by so-called 'breeding' clubs. Weatherill anticipates correctly

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<sup>890</sup> Article 15-4 de la Loi n° 84-610 du 16 juillet 1984 relative à l'organisation et à la promotion des activités physiques et sportives modifiée par la loi n° 2000-627 du 6 juillet 2000, reproduit in: *Dictionnaire Permanent Droit du Sport*, Bulletin 53 du 8 juillet 2000.

<sup>891</sup> See Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *Common Market Law Review* 33 (1996) 1015-1016; also Weatherill, "European Football Law", *Collected Courses of the Academy of European Law*, Volume VIII, Book I (1996), at 374.

that under such a system, clubs investing in the training of youngsters would no longer be able to accrue 'windfall profits' from the transfer of a promising young player, but on the other hand, it would provide them with a more reliable and predictable source of income through a collectively agreed system of support. He regards such a system as a "more sophisticated and reliable method than the transfer system for sustaining and improving the quality of youth training within the industry". Furthermore, it has the important additional advantage of being unconnected to any restrictions on the contractual freedom of the players. In the transfer reform negotiations between FIFA and the European Commission, the idea of introducing a pool of resources effectively came into the limelight. As mentioned above, it even figured amongst the official proposals of the UEFA/FIFA Task Force, which envisaged the establishment of a general Football Solidarity Fund for the purpose of promoting training of young players, by granting for example financial rewards to clubs that carry out very good youth development work. However, for some as yet obscure reason, in the final agreement reached in March, every reference to this solidarity fund was – again - omitted. This radical omission is to be deplored, for it is clear that such a redistribution of income, inspired by the wish to encourage recruitment and training of young players, lives up to the requirement of not impeding the right to freedom of movement of workers. At this stage of affairs, this solution therefore seems to be the one that – at first sight - succeeds better than all the alternatives in safeguarding and reconciling both the basic characteristic features of sport and the exigencies of the application of Community law. Interestingly, as Advocate General Lenz already pointed out, the associations have not submitted anything yet which might refute that objection.<sup>892</sup>

Be that as it may, however, when confronted with the Commission's allegations in the statement of objections, the football authorities ultimately decided to cling to the essential features of the old transfer system with regard to this issue of compensation for training and education of young players, introducing though a number of necessary modifications to it on the basis of the guidelines offered by both the Court of Justice and the Advocate General in *Bosman* in order to ensure compliance with Community law. This decision somewhat came as a surprise, in the light of the Court's apparently straightforward ruling that "the prospect of receiving such fees could neither be a decisive factor to encourage clubs to recruit and train young players nor an

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<sup>892</sup> Lenz AG in *Bosman*, par. 239.

adequate means of financing such activities.”<sup>893</sup> Taking into consideration this vigorous and unequivocal condemnation of the former transfer rules, the exercise of nevertheless trying to remould these rules into a lawful system without touching its traditional foundations appears to be a daunting, if not outright impossible task.<sup>894</sup> In this respect, FIFA and UEFA, together with the European Commission, might thus very well have been fighting a lost cause from the outset.

In order to examine whether this ‘rescue operation’ has nevertheless been carried out successfully, it seems useful to recall to mind at this point briefly the crucial statements of the Court and the Advocate General on this matter, out of which a number of criteria can indeed be extracted which a transformed transfer system in all likelihood would have to satisfy to be potentially acceptable under Community law. Firstly, the Court of Justice emphasised that transfer fees are by nature contingent and uncertain, as it is impossible to predict with certainty or precision the sporting future of young footballers and only a restricted number of them will actually play on a professional basis. Secondly, it stated that transfer fees are unrelated to the actual investments made by the clubs to train their youngsters. Leaving aside for a moment the conclusion it drew out of these assertions, and proceeding along the lines of an *a contrario* reasoning, one could estimate that fees which are no longer contingent and uncertain and moreover accurately reflect the costs borne by clubs in training and development, could in principle be accepted by the Court. Advocate General Lenz had outlined two further elements which according to him had to be taken into consideration. He was of the opinion that a transfer fee could only be demanded in the case of the first change of clubs where the previous club had trained the player. Also, transfer fees had to be reduced proportionately for every year the player had played for his training club, since the club would receive a return on its investments during that period. These last two elements were not explicitly taken up by the Court of Justice, but they nevertheless merit our closer attention. Let us now put the revised rules to the test.<sup>895</sup>

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<sup>893</sup> *Bosman*, par. 109.

<sup>894</sup> See, however, *Dubey, o.c.*, at 591-595: he is of the opinion that an appropriately modified transfer system might be acceptable under Community law.

<sup>895</sup> Similarly, see *Dubey, o.c.*, at 602-611.

### 2.2.1. Compensation based on actual expenses incurred

From a practical point of view, by far the most intricate problem to resolve was to find a coherent way to calculate the compensation fee for clubs which had to be based on the actual costs incurred by these clubs for the training and development of young football players. Previously, the amount of compensation was related to the earnings of the player, but both the Advocate-General and the Court in *Bosman* had categorically rejected this. For this reason, in the annex of the Agreement reached between FIFA and the Commission in March 2001, it was stipulated expressly, 'for the avoidance of doubt', that the salaries paid to any player who has ever played in the first team may not be included for the purposes of calculating training costs.

In its Application Regulation, FIFA effectively stipulated that as a general rule, the amount of compensation due shall reflect the expenses which were necessary to train the player and shall be paid for the benefit of every club which has contributed to the training of the player in question, starting from the age of 12.<sup>896</sup> Besides, it elaborated an intricate mechanism with different calculation parameters.<sup>897</sup> Firstly, FIFA engaged itself to establish 4 different categories in which all football clubs shall be divided in accordance with their financial investments in the training of players.<sup>898</sup> Each year the national associations in the EU/EEA shall determine the

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<sup>896</sup> Article 5.4(a) FIFA Application Regulation 2001.

<sup>897</sup> Article 6 FIFA Application Regulation 2001.

<sup>898</sup> Article 6.1 FIFA Application Regulation 2001. In Article 6.2 FIFA Application Regulation 2001, FIFA established the 4 categories according to the following guidelines::

- *Category 1* (top level, e.g. high quality training centre):
  - all clubs of the first division of national associations investing on average a similar amount in the training of players. These national associations will be defined on the basis of effective training costs, and this categorisation can be revised on a yearly basis
- *Category 2* (still professional, but on a lower level):
  - all clubs of the second division of the national associations of category 1
  - all clubs of the first division of all other countries having professional football
- *Category 3*:
  - all clubs of third division of the national associations of category 1
  - all clubs of second division of all other countries having professional football
- *Category 4*:
  - all clubs of fourth and lower divisions of the national associations of category 1
  - all clubs of third and lower divisions of all other countries having professional football
  - all clubs of countries having only amateur football

categories to which their clubs belong, after hearing the views of representatives of players and clubs.<sup>899</sup> Since it is considered impossible to calculate the effective training costs for every single player, a fixed rate will be set for each category which corresponds to the average amount of money necessary to train one player of a club belonging to that category for a period of one year. Subsequently, this flat rate will be multiplied by a so-called 'player factor', which determines the ratio between the number of players who need to be trained to produce one professional players.<sup>900</sup> Ultimately, the final sum of compensation due for the training and education shall be obtained by multiplying the amount corresponding to the category of the training club for which the player was registered by the number of years of training from the age of 12 until 21.<sup>901</sup>

As a general principle, compensation is based on the training and education costs of the country in which the new club is located.<sup>902</sup> However, within the EU/EEA area, the opposite applies, as compensation for training is based in principle on the costs of the country in which the training club was located. The following rules apply: (i) when a player is transferred to a club belonging to a higher category, the compensation amounts to the average of the training costs for the two categories involved in the transaction; (ii) when a player moves to a club in a lower category, the calculation is based on the training costs of the new –lower category – club; (iii) when a player goes from a club in category 1, 2 or 3 to a club in category 4, no compensation for training is to be paid.<sup>903</sup>

In addition, FIFA agreed to the introduction of a ceiling, to be defined objectively, to compensation fees to ensure that these fees levied by the training clubs are not disproportionate. In the EU/EEA area, every national association shall notify FIFA of a ceiling for every club category at the beginning of the sports season, after hearing the views of representatives of players and clubs. These ceilings will be acknowledged by FIFA, subject to their

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<sup>899</sup> Article 6.4 FIFA Application Regulation 2001. This provision further stipulates that the national associations shall notify FIFA of this categorisation at the latest by the mid-season registration period every year and FIFA will publish this information via a circular letter and its internet sites. The categorisation shall be valid for 12 months or two registration periods.

<sup>900</sup> Article 6.3 FIFA Application Regulation 2001.

<sup>901</sup> Article 7.1 FIFA Application Regulation 2001.

<sup>902</sup> Article 7.3 FIFA Application Regulation 2001.

<sup>903</sup> Article 7.4. FIFA Application Regulation 2001.

proportionality.<sup>904</sup> In another attempt to avoid training compensation reaching an unreasonably high level, FIFA also decided that for very young players between 12 and 15 years of age, compensation shall always be calculated on the basis of category 4.<sup>905</sup>

Finally, with regard to the distribution of the compensation for training and education, the Application Regulation also provides that in the event of a first payment, the amount to be paid is for the benefit of every club which has contributed to the training of the player, starting from the age of 12, and shall be distributed on a pro-rata basis depending on the full years of proper and proven training, and in relation to the category to which the clubs belong.<sup>906</sup> In the case of subsequent transfers from clubs belonging to the third or fourth categories, the new club shall pay the former club the costs which it incurred in training the player as well as the training compensation costs which it incurred when registering the player.<sup>907</sup> When a player moves from a club in the first or second category, the amount of training compensation payable shall be the training cost of the previous club.<sup>908</sup> Supplementary, the Application Regulation also stipulates that in certain prescribed circumstances, the redistribution of the amount of compensation is effectuated on the basis of the following cascade principle<sup>909</sup>:

- (a) For the transfer of a player from a club in the third or fourth category to a club in a higher category, 75% of the amount exceeding the costs of the category of the former club shall be redistributed on a pro-rata basis to all the club that have trained the player from the age of 12 onwards.
- (b) For the transfer of a player from a club in the second category to a club in the first category, 50% of the amount exceeding the costs of the category of the former club shall be redistributed on a pro-rata basis to all the club that have trained the player from the age of 12 onwards.
- (c) For a transfer between two clubs of the same category, 10% of the amount calculated as described under Article 7.3 and Article 7.4 shall be redistributed on a pro-rata basis to all the clubs that have trained the player from the age of 12 onwards.

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<sup>904</sup> Article 7.5 FIFA Application Regulation 2001.

<sup>905</sup> Article 7.2 FIFA Application Regulation 2001.

<sup>906</sup> Article 5.4(b) FIFA Application Regulation 2001.

<sup>907</sup> Article 5.4(c) FIFA Application Regulation 2001.

<sup>908</sup> Article 5.4(f) FIFA Application Regulation 2001.

<sup>909</sup> Article 8 FIFA Application Regulation 2001.

(d) If a player's career cannot be traced back to the age of 12, any missing years will be based on category 4 for the purposes of determining training compensation and the amount will be distributed to the player's national association of origin and be earmarked for training young players.

This entire set of rules appears to be extremely complicated.<sup>910</sup> Nevertheless, I will endeavour to illustrate these principles on the basis of some practical hypothetical examples. Presume that an Italian boy started playing for his local club at the age of 11. He is transferred to a non-amateur club in another Member State of the European Union at the age of 22 and 3 months. Firstly, his old club is still entitled to compensation for the training expenses it incurred, because he was transferred before his 23th birthday. It will be compensated for 10 years of training, even though the player has stayed longer at the club.<sup>911</sup> Ten years is simply the maximum. Furthermore, the amount of compensation will in principle be calculated on the basis of the category to which the old club belongs. In this respect, it should not be forgotten that between the age of 12-15, compensation is always calculated on the basis of category 4, regardless to which category the club actually belongs.

Presume that a Dutch boy has received training at a Dutch club of category 3 from the age of 15. At 18, he signs his first contract as a non-amateur with his training club. One year later, he is transferred to a non-amateur club in Belgium of category 3. The Belgian club has to pay for 4 years of training in a club of category 4. His training continues in Belgium for another year, until he starts regularly appearing into the first team. At the age of 21, he is subsequently transferred to an English club, also of the third category. The English club has to compensate the Belgian team for only one year of training in a club of category 3, and on top of that it has to reimburse the Belgian team for the compensation it paid to the Dutch team previously.

Finally, let us use figures once. Presume that a Belgian boy of 7 years old starts playing for Meerbeke, a fourth-division team in Belgium. At 15, he is transferred to Cambridge, an English

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<sup>910</sup> Johan Cruyff, one of the best players ever, once told a journalist who told him he hadn't understood his match analysis: "If I had really wanted you to understand, I would have explained it better." It seems FIFA might have borne in mind these words when drafting this set of rules...

<sup>911</sup> Again, unless it is clear that his training has ended before reaching the age of 21.

second-division club. Four years later, he moves abroad to Fiorentina, an Italian first-division team, where he signs his first non-amateur contract. After two years, he joins the ranks of Besançon, an French third-division team. At the age of 24, he returns to Belgium to play for first-division club Anderlecht. Supposedly, for the sake of the example, the KBVB has set the flat-rate sums of compensation in Belgium at 25.000 Euro for clubs from category 1, 15.000 Euro for category 2 clubs, 5.000 Euro for category 3 and 2.500 Euro for category 4. In England, Italy and France, the national federations have established the amounts due at respectively 30.000, 18.000, 6.000 and 3.000 Euro for the different categories. Furthermore, for the purposes of the example, the player factor is set at 10. Which sums of compensation for training and development are due?

- 1) *for the transfer from Meerbeke to Cambridge*: No compensation has to be paid as the player kept his amateur status.
- 2) *For the move from Cambridge to Fiorentina*: At the age of 19, the player acquired non-amateur status. Fiorentina has to pay an amount of compensation which is to the benefit of every club which has contributed to his training. Compensation for training and education only has to be paid from the age of 12 onwards. In casu, Fiorentina has to pay for 7 years of training. The money is to be distributed on a pro-rata basis, depending on the full years of proper and proven training. As a result, Meerbeke will be paid for 3 years of training, Cambridge for 4 years. Meerbeke is a fourth-division team, and thus belongs to category 4. In any event, compensation for players aged between 12 and 15 is always based on the training expenses for category 4. In the EU, compensation is based on the expenses of the country in which the training club was located, in casu Belgium. Meerbeke will thus receive the following amount of compensation: 2.500 Euro (category 4 Belgium) x 10 (player factor) x 3 years = 75.000 Euro. For Cambridge, the situation appears somewhat more difficult: as Fiorentina belongs to a higher category, compensation should in principle amount to the average of the training costs of both categories. However, as Cambridge belongs to category 2, this is not the case and the general rule applies. Therefore, it receives 18.000 Euro (category 2 England) x 10 (Player factor) x 4 years = 720.000 Euro .
- 3) *for the move from Fiorentina to Besançon*: Compensation is still due, as the player hasn't reached the age of 23 yet. Besançon belongs to a lower category than Fiorentina, and both clubs are located in the EU, thus the calculation of the compensation is based on the

training costs of the lower category club, Besançon, even though the player has been trained in Florence and moves to France. The Tuscan club will receive 6.000 Euro (category 3 France) x 10 (player factor) x 2 years = 120.000 Euro.

- 4) *for the change between Besançon and Anderlecht*: The player arrived in France at the age of 21. This is the age at which training ends. In principle, compensation remains due for every transfer up to the age of 23. However, the player returns to Belgium at the age of 24, or after the deadline of 23 years. In other words, in this instance no compensation needs to be paid.

Presume a Belgian boy starts his training at 13 at Tremelo, a Belgian team of category 4. At 16, he goes to Leuven, a Belgian team of category 3. At 18, he signs his first professional contract for Venezia in Italy, a second division team. After two years, he moves to Bilbao in the Spanish first division. The national federations have set the amounts for compensation at respectively 30.000, 18.000, 6.000 and 3.000 Euro for the different categories.

- 1) *for the transfer from Leuven to Venezia*: *Mutatis mutandis*, the same rules apply as in the previous example. Concretely, at the age of 18, the player acquired non-amateur status. Venezia has to pay 5 years of compensation for training to Tremelo (3 years) and Leuven (2 years). is a fourth-division team, and thus belongs to category 4. Tremelo will receive the following amount of compensation: 3.000 Euro (category 4 Belgium) x 10 (player factor) x 3 years = 90.000 Euro. Leuven will receive the average of the training costs of both clubs, as Venezia belongs to a higher category. In casu: Leuven: 6.000 Euro (category 3 Belgium) x 10 (player factor) x 2 years = 120.000 Euro; Venezia: 18.000 Euro (category 2 Italy) x 10 (playing factor) x 2 years = 360.000 Euro. The average of the two gives 240.000 Euro which Leuven finally receives as compensation.

- 2) *For the move from Venezia to Bilbao*:

This is the precise moment to call it a halt and make two observations, strictly related to the content of the rules. Firstly, it needs to be clarified whether the cascade principle laid down in Article 8 of the Application Regulation applies only in the event of subsequent transfers, or also already in case of a first payment. Arguably, the former option holds true, but this does not appear clearly from the text of the rules. Secondly, some rules simply seem to be completely incompatible with each other. The last example illustrate this point: Bilbao belongs to a higher

category than Venezia, thus in principle, the compensation payable by the Basque club should be the average of the training costs for the two categories.<sup>912</sup> Moreover, it is also stipulated that in the case of a player moving from a club in the first or second category, the amount of training compensation payable is the training cost of the previous club.<sup>913</sup> As such, there is no problem with that. However, this last rule is mutually exclusive with the rule providing that for a transfer of a player from a club in the second category to a club in the first category, 50% of the amount exceeding the costs of the category of the former club shall be redistributed on a pro-rata basis to all the club that have trained the player from the age of 12 onwards.<sup>914</sup> It is one or the other, you cannot have it both ways.

Apart from these preliminary remarks related to the content of these rules, there remains quite a lot to be said about the lawfulness of this renewed system of awarding compensation for training and development of young football players to breeding clubs in the event of a transfer of these players. In the first place, instead of reflecting the real costs incurred by a club for the training of the young football players, a requirement which clearly seemed to have been imposed by both the Advocate General and the Court in *Bosman* as an absolutely indispensable condition for a revised transfer system to be able to be considered as an appropriate means to reach the objective of preserving the training and development of young players, this system goes out from flat-rate estimated costs, corresponding to the average financial investments of clubs which approximately make the same or similar expenses for training and are therefore classified in the same category. The football authorities have worked out this alternative mechanism of calculating compensation on the basis of approximate expenses because they claim it is impossible or at least unworkable in practice to determine the effective training costs for a particular player. To a certain extent at least, the validity of this argumentation appears doubtful. Nowadays many football clubs – especially the clubs playing in the higher divisions of a national league - are large professional undertakings with big budgets and huge turnovers. It is therefore indispensable that they keep a detailed account of their revenue and expenses during a financial year. It seems thus only natural that one should be able to assess quite precisely the expenses made for the training and the development of young players on the basis of the club's

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<sup>912</sup> Article 7.4 (a) FIFA Application Regulation 2001.

<sup>913</sup> Article 6.4 (f) FIFA Application Regulation 2001.

<sup>914</sup> Article 8 (b) FIFA Application Regulation 2001.

accountancy. Admittedly, this may prove to be somewhat more difficult for smaller clubs and/or clubs playing in the lower divisions of a national league. Compensation based on approximate flat rate training expenses therefore appears to be more readily acceptable for players coming from these clubs. Presumably, however, for the sake of simplicity and homogeneity, this generalised way of calculating compensation might nevertheless be acceptable anyway, as long as the national associations ensure convincingly that the average approximate flat rate sums remain sufficiently close to the actual expenses.<sup>915</sup>

Secondly, according to the FIFA rules, the proposed flat training rates have to be multiplied, not only by the number of years the player in question has spent with the training club, which is perfectly logical and understandable, but also by the so-called 'player factor', in order to obtain the final amount of compensation due by the acquiring club. This factor is taken into account to clarify that for every young player who has the capacities and skills to make it professionally, the club also has to train a number of players who, ultimately, won't make it to the top. This issue has created some controversy. Advocate General Lenz was of the opinion that the compensation fee must be limited to the amount expended for the training of that particular player taken in isolation.<sup>916</sup> Be that as it may, the Court of Justice subsequently decided in *Bosman* that the transfer fees were "unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally".<sup>917</sup> The Court appears thus to disagree with its Advocate General on this point, conveying the impression that expenses incurred for the training of young players who won't pursue a professional career in the end can be included in the determination of the compensation fee to be paid for the transfer of a more gifted player. The position of the Court of Justice seems to be preferable. It seems reasonable that also expenses made for a certain number of less talented players are taken into consideration when calculating the compensation fee. Otherwise, clubs will continue to lose money on its youth programmes, which might have repercussions on their eagerness and determination to pursue their efforts to train young players. Arguably, a system of compensation for training excluding costs incurred for

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<sup>915</sup> In this respect, it is interesting to note that in Belgium, controversy has already risen about the first list of actual figures which has been sent by the KBVB to FIFA to constitute the basis for the calculation of the amount of compensation for training of young football players: Blanpain has rejected these figures as irresponsibly high and illegal (source: *De Standaard*, 22 August 2002)

<sup>916</sup> Lenz AG in *Bosman*, at par. 239.

<sup>917</sup> *Bosman*, par. 109.

training other youngsters than the one particular player who is the centre of the transaction between two clubs seems to be no adequate means to attain the objective of encouraging the recruitment and training of young players. The next issue is thus to fix a reasonable player factor, or the ratio between the number of trainees and the number of professional players. In other words, how many trainees does it take to form one professional player? In this respect, when determining this multiplying factor, account should be taken of the fact that it doesn't suffice simply to multiply the costs made to train one player by the number of players that do not succeed in professional football, for there are a number of fixed costs.<sup>918</sup> For example, a club does not necessarily need an extra coach for one more player, a second or third coach (or physical trainer or physiotherapist or keeper trainer, etc.) will only be required after a certain number of players has been exceeded. All in all, 10 seems to constitute a reasonable player factor. In practice, it should be avoided at all costs that the final compensation fee turns out to be a figure which amounts in fact to a restriction to the freedom of movement of players. At some point, rumours were that FIFA intended to accept player factors which would allow clubs with famous youth education centres such as Ajax to ask enormous compensations in the event of a transfer of a young player...<sup>919</sup> Be that as it may, the official contemporaneous introduction of a ceiling to the amount of compensation constitutes a sufficient guarantee to avoid this danger.<sup>920</sup>

In the initial transfer reform proposals forwarded to the Commission by the UEFA/FIFA Task Force in October 2000, mention was made of the possibility of adding still other multiplying factors to further increase the amount of compensation due.<sup>921</sup> It was argued that if the young football player in question had already participated in official games of the first team of his club on a number of occasions or if he had represented his country in matches of the national team a number of times, these factors also needed to be taken into consideration when calculating the amount of compensation to be paid in the event of a transfer of such a player. They were meant to reflect the added value of the player, from which the club which recruited and trained him should be able to benefit by way of an increased compensation due by the acquiring club. It is clear that

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<sup>918</sup> See Dubey, *o.c.*, at 605-607.

<sup>919</sup> Van Leeuwen, "FIFA brengt vakbond in gewetensnood", *www.viplanet.nl*.

<sup>920</sup> With regard to this ceiling, FIFA has suggested to calculate this ceiling by dividing the average costs for training of the breeding clubs by the number of players who are offered a contract of non-amateur. See Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, at 61-62.

these supplementary elements would take the amount of compensation beyond the level of the expenses the club made for the training and education of the player, and are therefore unacceptable from the point of view of compliance with Community law. FIFA wisely decided to drop every reference to these multiplying factors in the final agreement it reached with the Commission in March 2001.

For basically the same reason, namely ensuring that the compensation fee effectively reflects the costs incurred for training by the breeding clubs, the Commission has insisted during the transfer negotiations that the FIFA change its general principle of basing compensation on the costs corresponding to the category of the country in which the new club is located, within the EU/EEA area into a rule basing compensation on the costs of the category of the training club. Again, FIFA duly followed the Commission's instruction to this effect in its Application Regulation.<sup>922</sup> Arguably, the further specifications FIFA added to that general rule are acceptable only to the extent that they do not increase the level of compensation so as to arrive at an amount which exceeds the expenses made by a club for the training of the young player concerned. Practically speaking, upholding the rule envisaging the compensation fee to be the average of the training costs of the different categories involved if a player is transferred to a club belonging to a higher category<sup>923</sup> may therefore prove to be problematic, for this calculation method will lead to an excessive compensation fee. The underlying motive for this 'gesture' from the bigger clubs might very well be solidarity with the smaller clubs, but in holding that compensation for training had to be related to the actual costs borne by the clubs, the Court has implicitly indicated that it considers there are better ways to achieve this laudable aim. On the other hand, there seems nothing to object against rules dictating a lower compensation or even no compensation whatsoever in case of a transfer of a young footballer to a club from a lower category,<sup>924</sup> solidarity again being the guiding principle. As in these particular situations, compensation does not go beyond the expenses made by the training clubs, there is nothing wrong or objectionable about these rules.

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<sup>921</sup> See Blanpain, *Het Statuut van de Sportbeoefenaar naar internationaal, Europees, Belgisch en Gemeenschapsrecht*, annex, at 183.

<sup>922</sup> See Article 7.4 FIFA Application Regulation 2001.

<sup>923</sup> Article 7.4 (a) FIFA Application Regulation 2001.

### 2.2.2. Compensation due after every transfer before end training period?

The new FIFA rules stipulate that compensation shall be paid on each occasion the player changes clubs up to the time his training and education is complete. As a rule, training compensation is payable up to 23 for training incurred up to 21, unless it is evident that the player has already finished his training period earlier. These provisions evidently seem to be irreconcilable with the opinion of Advocate General Lenz in *Bosman*, according to whom for a compensation fee to be appropriate, it could come into question on only one occasion, namely in the case of a first change of clubs where the previous club had trained the player.<sup>925</sup> The Court of Justice didn't express its opinion on the issue yet, which at first sight leaves us to guess as to whether this silence should be interpreted as an implicit acknowledgement or rather as a rejection of its Advocate General's suggestion. However, further analysis permits us to ascertain what would be, in all likelihood, the position of the Court when asked about it. It is important to emphasise that the differences exposed between the new FIFA Regulations and Advocate General Lenz' considerations may turn out to be more apparent than real to a certain extent. The Advocate General's opinion is clearly inspired by the system prevalent in France, according to which a football player must sign his first professional contract with the club that provided him his training. Compensation is only due in the event of the first transfer between professional clubs. This implies that in France, the formation of the player is considered to be terminated in principle at the moment of his first transfer. The basic underlying principles of this system, that compensation is to be paid only until the end of the period of training and that the training club deserves to be rewarded for its efforts, also lie at the basis of the new FIFA Regulations. Only the practical elaboration, especially concerning the end of the period of training, is different in the two systems. Be that as it may, these differences should also not be entirely underestimated. Contrary to what happens in France, where players normally pass through all youth categories of one single club, in other countries it is not all that uncommon that players change clubs on a number of occasions before signing their first professional contract. The Advocate General himself recognised that a club should be compensated for the training work it has done. Transposed to the European scene, this rule becomes that all clubs which have invested time,

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<sup>924</sup> Article 7.4 (b) & (c) FIFA Application Regulation 2001.

<sup>925</sup> Lenz AG in *Bosman*, at par. 239.

effort and money in the formation of a player therefore deserve to be compensated in proportion to their contribution. Moreover, the way the French system is conceived, it may have the advantage of assessing the end of the period of training somewhat more flexibly and suited to the particular situation of each individual case, making it coincide in principle with the moment of the first transfer of the player in question, but this only holds true under the presupposition that a club transfers a player only after he has effectively finished his training. And it seems conceivable that this will not necessarily always be the case. Nantes may decide to transfer a young player to Bordeaux at the age of 19 simply because there is no place for him (yet?) in the first team of 'les canaris', or because Bordeaux shows particular interest in acquiring the services of the player. Arguably, in practice this does not necessarily mean that his formation is completed, but in any event, the way the French system is organised, it does entail that 'les girondins' won't be able to receive compensation in the possible event of a further transfer of the player concerned, even if he did actually complete his formation with them. As a result, the FIFA system setting an after all, also relatively flexible upper age limit to compensation for training and providing for this compensation to be paid for each transfer of the young footballer until the end of his formation period seems therefore to be preferable. It is submitted that the inherent weakness of the French system, namely that it is inherently restrictive from the point of view of free movement, is less prominently present in the revised FIFA Regulations, which nevertheless contemporaneously succeed in awarding all training clubs equitable compensation according to their investments.

### 2.2.3. Proportional reduction of the compensation fee?

In his opinion in *Bosman*, Advocate General Lenz imposed one more additional condition which must absolutely be satisfied for compensation fees in case of a transfer possibly to be considered as an appropriate means to reach the legitimate objective of preserving the training and education of young players. According to him, sums of compensation also have to be reduced proportionately for every year the player has spent with a club after having received its formation there.<sup>926</sup> It is useful to situate this precondition in its precise context. As has been outlined already at an earlier stage, in the French system, which the Advocate General took as the exemplary

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<sup>926</sup> Lenz AG in *Bosman*, par. 239.

model for his proposals, football players are obliged to sign their first professional contract with their club of formation. A first transfer to another club occurs therefore often only at a relatively later stage of their career in comparison with the situation of young players in other countries. Undoubtedly, the Advocate General derived the need for a proportional reduction of the compensation fee for training from the fact that, since players often stayed with a club even after they had terminated their formation, the training club was offered the opportunity during to benefit from its investments in the player during that period.<sup>927</sup> This reasoning appears logical and understandable, for it can indeed reasonably be maintained that for a player appearing for the first team of his club on the pitch is the most direct and proper way of reimbursing his club for the expenses it made for his training. In this context, the next issue would then be how to amortise the costs borne for the player: firstly, one would have to determine the number of years during which a fee can still be demanded in the event of a transfer, because after a certain period, the player will be estimated to have refunded all training costs, and secondly, one would have to establish a precise way of reducing the transfer sum for that period. This reduction could be effectuated in various ways: one could diminish the transfer sum with a fixed equal percentage throughout the whole amortisation period - for example 25% annually during a period of 4 years - , or opt for increasing or sinking percentages - for example, 40% after the first year, 30% after the second, 20% after the third and the remaining 10% after the fourth and final year- depending on whether one wishes to put the stress on the beginning or rather on the end of the amortisation period. To complicate things a little bit further, proceeding along the same reasoning, one could probably argue with equal force that young players can already render services to their club during - and thus not only after - their training period, which would possibly entail that they deserve to be taken into consideration as well and should somehow also lead to a further reduction of potential future compensation fees in the event of a transfer.

Interesting as the Advocate General's suggestion unmistakably may be, it is nevertheless important to emphasise that the Court of Justice, as yet, has not reiterated nor confirmed it implicitly. Again, this silence of the Court, however, does not entirely render the previous discourse devoid of purpose. Certainly, all the Court did in *Bosman* is stating that the transfer fees at issue were by nature contingent and uncertain and also unrelated to the actual expenses

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<sup>927</sup> Concurring with Advocate General Lenz in this respect: Dubey, *o.c.*, at 610.

borne by clubs for training and were therefore unacceptable. It limited itself to these observations for they sufficed to condemn the former transfer system. For now, the Court hasn't pronounced itself explicitly on which criteria would have to be satisfied for a new transfer system to be compatible with the exigencies of Community law. Consequently, it would be unwise and definitely premature to deduce positively from the foregoing that it is not vital for compensation fees in case of a transfer to be reduced proportionately under certain circumstances to be acceptable. Consequently, it still remains very much to be seen whether the new FIFA system of compensation for training and education can be regarded as appropriate even if it does not provide for an equitable reduction of the amount of compensation in case the player concerned has rendered services to the benefit of the training club.

The mechanism of compensation for training has been elaborated as an attempt to achieve the legitimate objective of encouraging football clubs to seek new talents and train young players. However, it is submitted one might wonder whether clubs will still have the necessary incentives to search for young players and train promising footballers if they are completely stripped of all advantages this training and education can engender. Already, the compensation fee to which training clubs are entitled in the event of a transfer of one of their young players to another club is limited to the actual costs incurred by this club for his training; if it has to be reduced further when or because the player has rendered services to the club which could be regarded as reimbursement for this training, clubs might just find this revised system of compensation completely 'denatured' and decide that it is no longer worth to pursue their efforts and investments in this field. One might just be balancing on a thin rope here.

Arguably, the specific terms of the FIFA Regulations could leave some interesting space for manoeuvring on this issue. The new FIFA rules provide firstly, that for the purposes of calculating compensation, the training period of a player finishes at the end of the season of his 21st birthday, and secondly, that a football club is entitled to claim compensation for training until the player in question has reached the age of 23. Therefore, it could be contemplated taking the Advocate General's proposal literally: if a player stays at the club after his training and education has terminated, in principle at the age of 21, then the compensation payable in case of a transfer before he has reached the age of 23 could possibly somewhat be reduced. If, conversely,

a young player already appears occasionally for the first team of the club while his training period has not been completed yet, these performances should probably still be considered as part of his learning process and/or as an acceptable benefit in kind for the training club and should not lead to a diminution of an eventual compensation fee. At present, no mention is made in the current FIFA Regulations of a possible proportional reduction of the compensation fee in the event of a transfer before the player has become 23 years old. Probably, this does not *per se* have to be problematic. Presumably, however, an auto-imposed proportional reduction of the compensation fee to which training clubs are entitled along the lines of the proposed subtle division might just render the Court of Justice more inclined to accept the mechanism of compensation for training and education as an appropriate means to reach the outlined aims of the system if it ever were forced to express its opinion on the issue.

#### 2.2.4. Contingent and uncertain character of compensation fees

In its *Bosman* decision, the Court of Justice has ruled that since the sporting future of young players cannot be predicted with any certainty and because only a limited number of them actually succeed in playing professionally, fees received in case of a transfer are by nature contingent and uncertain. For this reason also, it ultimately held that the prospect of receiving these fees cannot be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.<sup>928</sup> However correct and precise the premises may be, I respectfully disagree with the Court's conclusion, at least in part. Despite the indeed undoubtedly uncertain and aleatory character of transfer fees, football clubs in general do still count on transfer income to finance their activities. Statistics demonstrate that for many of them, transfer fees even constitute a principal means of revenue, as well as income from ticket sales, sponsoring, merchandising and the selling of television rights.<sup>929</sup> Some clubs are really dependent – to a greater or lesser extent – on regular income from out-going transfers.<sup>930</sup> Consequently, it seems that it cannot be ignored

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<sup>928</sup> *Bosman*, par. 109.

<sup>929</sup> See Demets & Killemaes, "Luis Figo naar Westerlo?", *Trends*, 10 August 2000, at 18, on the importance of transfers for the financial situation of the Belgian first division clubs.

<sup>930</sup> Also Demets & Killemaes, "Voetbalmecenassen in ademnood", *Trends*, 8 August 2002, at 38: one of the reasons for the currently precarious financial situation of many Belgian football clubs is the fact that they haven't been able to conclude lucrative transfer deals.

that the prospect of receiving compensation fees does effectively constitute a decisive motivation for many clubs to invest in the training and development of young players. Subsequently, the question remains whether compensation fees are an adequate means of financing these activities, in spite of their unpredictable and contingent character. In this respect, it is interesting to observe that Advocate General Lenz in his opinion in *Bosman* didn't seem to attach too much importance to this particular feature of the sums of compensation, for he didn't consider their uncertain nature as a stumble block for them to be regarded as appropriate. Obviously, however, the Court thought of this differently and seemed to attach a lot of weight to this element. It must be acknowledged that transfers are indeed a risky business, both from a financial and a sporting point of view.<sup>931</sup> The example of the recent adventures of Ajax Amsterdam serves perfectly to illustrate this point. Under the direction of coach Louis Van Gaal, the Dutch pride literally won everything there is to win in the world of club football in the mid nineties, from several national championship titles and cup victories over the UEFA Champion's League to the Intercontinental Cup, with a team that was almost exclusively composed of players who had received their training at the club. As a result, Ajax concluded several extremely lucrative transfer deals, as the likes of Kluivert, Davids, Seedorf, Reiziger, Overmars & co. left the Netherlands to try their luck in countries such as Italy, Spain or England. Subsequently, part of the money generated from these transfers was invested again in the youth education centre of the club. However, the next generation turned out to be much less talented, and immediately, the club had to adopt a much lower profile, financially, because the young players, if the club already managed to transfer them at all, yielded much lower fees, and contemporaneously also from a sporting point of view, as these players were simply less good as their predecessors. Inevitably, this casts some doubt on the adequacy of financing youth training programmes by means of compensation fees. However, it is submitted that the importance of this should not be overrated either. If this example proves something at all, it must surely be that it would indeed be a mistake to put all eggs in one basket. Admittedly, clubs which always and completely depend on the revenue generated from transfers to support the recruitment and training programmes of their youth categories are bound to get in to trouble sooner or later and will find themselves continuously facing ups and downs. Spreading of the risk is therefore to be recommended. However, immediately deriving from this that

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<sup>931</sup> Financial manager Smets of Belgian first division club Sint-Truiden formulated it as follows: "Basing the budget on the income from out-going transfers is as playing roulette."

compensation fees in case of a transfer of a young player cannot be considered as an adequate means of financing the formation of young football players is maybe jumping to conclusions a little bit too quickly. Arguably, where the money comes from does not really matter, whether it results from transfers or from gate receipts or other sources of income, what counts is that a certain percentage of the club's income is invested in the training of young football players. For this purpose, all bits and pieces help. Besides, it is submitted that compensation received for the training and education of a young player is essentially no more uncertain or contingent than revenue generated from ticket sales, sponsoring, merchandising or selling of television rights. For many a club's cashier, it makes a huge financial difference whether the visiting opponent in one of the European competitions is one or the other obscure and unappealing Eastern European team or rather a sporting blockbuster such as Real Madrid. Clearly, even a simple draw for a competition thus has an undoubted influence on the attendance at the stadium or on the viewing figures at the television. Also straightforward sporting results have a great impact on the balance sheets of the clubs: successful performances will increase the financial potential of a club, as more fans will come to cheer for their team live, television channels will be interested to broadcast the team's matches, sponsors and advertisers will be attracted by the team's success. Conversely, there's another side to the medal: a sporting disappointment or an elimination may forcefully induce a club to review its ambitions. Nobody wants to be associated with a losing team. Summarising, the point which is being made here is the following: compensation fees for the training of young players are admittedly inherently uncertain, the element of unpredictability is innate in their nature, for one will never be able to proclaim with absolute certainty that this or that young football player, however promising he may be, will make it into the professional world. The road to sporting success is covered with just too many hindrances. However, to a certain extent, the same can be said about virtually all other sources of income of football clubs. The elements of uncertainty and contingency are characteristic features of the football industry as a whole. Consequently, as such there seems to be no real reason why a system providing a club for compensation for training and education in the event of a transfer of one of its young players to another club could not be regarded as an acceptable means to attain the objective of preserving the recruitment and development of young players.

### 2.3. Second prong of the principle of proportionality: test of 'necessity'

At this stage of the analysis it is already crunch time for the possible subsistence of a system based on compensation for training and education in case of a transfer, because we have arrived at the parting of the ways. The new FIFA Regulations implementing this mechanism of compensation for training and development in case of a transfer of a player under the age of 23 are liable to constitute an obstacle to the freedom of movement of players, and are therefore in principle prohibited by Article 39 EC. However that may be, the restrictive features of this set of rules might be justifiable, as it does occupy an important place in the policy of encouraging football clubs to recruit and train young talents, which is recognised as a legitimate objective. Ultimately, the outcome of the proportionality test will therefore be decisive for the fate of the new compensation system. In this particular occasion, it is clear that this will be a close call.

Firstly, it is already not completely crystal clear whether the first hurdle of 'appropriateness', which means that application of the measure has to be such as to ensure achievement of the legitimate aim in question, is satisfactorily taken. The analysis effectuated above has demonstrated that it appears possible to regard the revised system as an appropriate one, but then, by the same token, it cannot be taken for granted either, as there are still a couple of *incognita* which will have to be clarified before one can render a final judgement on the issue. In the first place, and most importantly, it is still unclear exactly how much weight has to be attached to the fact that the element of uncertainty is again omnipresent in the new system, as a football club will only be financially compensated for the expenses it made for the training and the education of a young player when he is effectively transferred to another club. If the Court of Justice remains indeed strenuously opposed to the aleatory character of transfer fees, as it appeared to be in *Bosman*, then that would immediately mean the end of the story, given the fact that this uncertainty about transfers is clearly inherent. Under this worst case scenario, it would thus become virtually impossible to establish any alternative system of compensation in the event of a transfer, for the Court would in all likelihood reject any proposal as an inappropriate means to realise the aims of recruitment and training of young players. This would inevitably signify the end of the long-standing tradition of this important aspect of the transfer system. If however, on the other hand, the Court's objections against the uncertain and contingent nature of the

compensation mechanism prove to be less vigorous or exclusionary, and it has been argued above that this attitude seems to be preferable, there could possibly be a way out of the conundrum. However that may be, even if the Court of Justice were to be found willing to turn a blind eye to this particular feature of compensation fees, it still remains to be seen whether it would accept that the calculation of the amount of compensation payable by the acquiring club is based on an approximate lump sum, corresponding to the average of the expenses made for training and education of young players by all clubs belonging to the same category, rather than on the real costs incurred by the selling club for the training and education of the player in question. Presumably, this issue shouldn't pose too many problems, as the flat-rate sums should approach very much the actual costs. The new mechanism undoubtedly has the advantage of having established precisely in theory how the amount of compensation will be determined, but it is still unsure what will be the practical impact of the use of the 'player factor' and whether its application will not, in fact, amount to a restriction to the freedom of movement. Caution is therefore still required in this respect. Finally, it will also have to be ascertained in practice whether this mechanism, basically limiting compensation to the actual costs borne by the clubs for training of the player concerned and stripped of any other factors linked to the skills of the player and thus liable to increase the amount of compensation due, will still figure as a sufficient impetus or stimulus for the clubs to continue pursuing the objective of seeking and developing young footballers. Allegedly, this is going to be the case. Clubs with a youth training centre will always or at least regularly be able to draw out of their own reservoir some young talents to strengthen their first team. In this way, young football players can repay their club in kind on the field for the investments made in them. If these youngsters are transferred to another team, the application of the new rules on compensation for training does prevent selling clubs from asking extravagant transfer sums, as they sometimes used to do in the past in search for the jackpot, but the introduction of the player factor in the calculation mechanism guarantees the training clubs of an equitable and adequate return on investment if they can transfer one of their youth products on a more or less regular basis. Besides, the introduction of the so-called 'solidarity mechanism' in the new FIFA Regulations yields further potential financial rewards for training clubs: it is stated that if a non-amateur player moves during the course of a contract, a proportion of 5% of any transfer sum paid to the previous club will be distributed as a solidarity contribution to the club(s)

that played an active role in the training and education of the player.<sup>932</sup> This solidarity contribution will be apportioned between the clubs with which the player has been registered in function of the number of years they provided him with training and education between the ages of 12 and 23:<sup>933</sup>

- 12-13 years and 13-14 years: 5%
- 14-15 years and remaining years up until 23: 10%

Let us now briefly take up the previous hypothetical example again. If our player in question is transferred subsequently from Anderlecht to Benfica Lisbon for the amount of 2 million Euro, 5% or 100.000 Euro will be distributed over all the player's previous training clubs:

- Meerbeke: 3 years between 12 and 15: 20.000 Euro
- Cambridge: 4 years between 15 and 19: 40.000 Euro
- Fiorentina: 2 years between 19 and 21: 20.000 Euro
- Besançon: 3 years, out of which 2 useful between 21 and 23: 20.000 Euro

The prospect of potentially receiving supplementary amounts of money as a kind of 'delayed compensation', this time no longer strictly linked to the actual costs for training but also somehow reflecting the success of the sporting career of the player in question, might become an determining factor in a football club's decision to continue or even start with its youth recruitment and formation programmes. Adding it all up together, it is asserted that the entire compensation package remains sufficiently attractive for clubs to invest in the development of young football players.

However, even if the new system of compensation for football training elaborated by the football authorities were to be considered as an appropriate means to achieve the preconceived objective by their European counterparts, that does not do the thing yet, as it still has to receive the predicate 'necessary' in order to be finally acceptable from the point of view of the Community provisions on freedom of movement of workers, in the sense that it must be the least restrictive means to realise the objective pursued. This implies that there are no means available

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<sup>932</sup> Article 25 FIFA Regulation 2001.

<sup>933</sup> Article 10 FIFA Application Regulation 2001.

with which the same legitimate aim can be achieved in a less restrictive way, in other words in a way which poses less problems with regard to the relevant Treaty provisions on free movement.

### 2.3.1. Alternative 1: 'Pattern-contracts'

As has been demonstrated above, the football bodies FIFA and UEFA briefly flirted with some possible ideas, firstly in the aftermath of the *Bosman* decision and more recently during the transfer reform negotiations with the European Commission, but never gave a firm impression of considering these as real, valuable alternatives to the transfer system. In view of the specific requirements of Community law, we are compelled though to give these proposals somewhat more room for consideration. Firstly there is the possibility of introducing the mechanism of the so-called 'pattern contract', applicable already in France, which involves the obligation upon the player to sign the first professional contract with the football club that provided him with his training. Comprehensible and legitimate as it may appear at first scrutiny to allow the developing club to pick the first fruits of their efforts and investments in the young players, from a legal point of view this solution is clearly problematic: not only does it uphold the technique of compensating the training club for the training of the player when he is transferred for the first time, which has already been held to be restrictive under Article 39 EC in itself, it also introduces yet another obstacle to the rights of free movement of players, for it requires them to join the professional ranks of their training club. This particular obligation for players to sign their first professional contract with their training club goes even beyond a simple barrier to the exercise of the free movement rights, it amounts to a complete, albeit temporary, ban or negation of the right to freedom of movement. Instead of being less restrictive than the system of compensation for training, this proposed alternative seems to erect even more obstacles to the freedom of movement. In spite of its apparent strengths or advantages such as its simplicity, the security which it offers with regard to the protection of young football players and, importantly, its workability in practice, as the example of France clearly demonstrates, in the end this possibility should nevertheless probably be rejected in my opinion.

### 2.3.2. Alternative 2: Redistribution of income through pooling of resources

The second possible alternative then, which consists of a pooling of resources in a centrally administered fund which are subsequently to be redistributed over the football clubs that make efforts to recruit and train young players, sounds more appealing at first sight, for it is not hindered by two important downsides of the FIFA transfer mechanism of compensation for training. First of all, the element of uncertainty or unpredictability which is indissolubly connected to a system based on transfers of players from one club to another, is absent in this system. Clubs involved in the recruitment and development of young football players will no longer be dependent on a possible reimbursement *a posteriori*, they will *a priori* be ensured of financing for their costs and efforts, coming out of the central fund. This undoubtedly constitutes a significant step forwards, because it allows clubs to rationalise their efforts and to plan things more accurately. Secondly, also from a legal point of view, this solution seems to be laudable, for it does not create any obstacle to the freedom of movement of workers and does thus not risk to infringe any Treaty provisions. For these reasons, the mechanism of pooling and redistribution of resources deserves unequivocal support, provided it can be set to work in practice. Indeed, this alternative to the FIFA system of compensation for training is to be preferred if and only if it also succeeds in achieving the same objective of recruitment and training of young football players. Building castles in the air is relatively easy, realising them effectively is yet a completely different matter. This requirement might prove to be the Achilles heel of the proposal, for it will involve a complete change in the mindset of football clubs, which have all been dependent on revenue from transfers since decades, albeit in differing degrees. And practice has shown that football clubs are often extremely resilient to change.

Presumably, the crucial issue, namely how to finance this operation, will not prove to be too problematic. One can imagine many possibilities to finance the fund: first of all, in view of the undisputed educational or vocational characteristics of youth football training programmes, even more so now that the modified FIFA Regulations explicitly emphasise the need to guarantee suitable arrangements for the academic education of the youngsters, Member State governments appear to be at liberty to dedicate a specific item in the annual budget to this programme and

deposit a given amount of money in the central football fund. Furthermore, money could also be generated from various other sources: to name but a few, private undertakings, especially firms with products aimed at the market of the youngsters, could invest sums of money to sponsor the youth programmes, a part of the money received from the selling of television rights or a certain percentage of the clubs' gate receipts (ticketing) could be reserved for this purpose, etc. All the money will be gathered together in one central fund, preferably to be administered by the respective national football associations. Subsequently, one has to establish objective criteria on the basis of which all incoming revenue can be redistributed over the football clubs. Relevant criteria will include available materials, equipment and infrastructure, amount of personnel such as teachers, coaches, physical trainers, physiotherapists, numbers of young players, etc. It is probable one will also have to fix minimum standards, below which no money will be granted, and maximum numbers, above which clubs will have to bear the costs themselves. These criteria will have to be reviewed on a regular basis. And supervision will be necessary to verify that the money is used for the right purposes.

Feasible and appealing as all this may look, there remains one major issue which casts a dark shadow over the ultimate viability of this 'redistribution through pooling' project: the motivation of the clubs to organise the best training and education programmes possible. Basically, the entire system for the search of talent and the promotion of youth football boils down to the fact that clubs provide young players with a kind of education, schooling, as they receive vocational training, a 'training on the job', which culminates, ideally speaking, if everything turns out well, in a professional football career. It speaks for itself that clubs which undertake to nurture young football talents need financial means so as to be able to realise their endeavours. In the past, many clubs have invested a lot of money, time and effort in training centres in the hope of developing young talented football players who could represent the first team of the club and/or be transferred to another team. This way, they generated revenue through transfer fees for the training club part of which was reinvested in the club's youth work to keep it running. Nowadays, many clubs still count on income from outgoing transfers of young players to survive financially. In a new system based on pooling of resources in a central fund which would then be redistributed between the clubs, clubs would be assured of receiving money to invest in youth programmes for the simple reason that they exist, or that they have a youth

centre.<sup>934</sup> The reverse side of the medal is that clubs evidently will not be paid a second time for the training of the player if he then moves to another club at a later time. Just like a normal school or education centre does not receive money if a pupil changes school. This particular feature of this system may considerably weaken the incentive of the clubs to look for the so-called 'black pearl' or the 'white blackbird'. Guaranteed of the money and deprived of the potential 'extra advantages' of a transfer-based system, clubs risk falling into a state of complacency with regard to the recruitment and training of youngsters. It speaks for itself that this would have an extremely harmful effect on the functioning of the youth schemes. But then, it must be acknowledged that this risk also already exists in a system in which the compensation payable in case of a transfer appropriately reflects the costs incurred for the training of the player.

#### 2.4. Evaluation

In the first place, it must be reiterated once more that the new rules on compensation for training, which are liable to hinder the freedom of movement of footballers, can only be objectively justified if the Court were to confirm that the need to ensure the recruitment and training of young players constitutes an overriding requirement in the general interest.

Furthermore, it must be observed that the test of compliance with the principle of proportionality has been strictly applied in this context.<sup>935</sup> Admittedly, it is by no means certain that the Court of Justice would actually carry out such close scrutiny of the new rules on compensation for training if it were asked to deliver a judgement on their lawfulness under Community law. These rules are not manifestly inappropriate, and it cannot be excluded that the Court would not be willing to engage in a profound examination of the imponderables of the potential alternatives, for example the redistribution of money through pooling of resources, just to consider whether they might constitute a good 'less restrictive alternative'.

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<sup>934</sup> As also pointed out by Dubey, *o.c.*, at 640-605.

<sup>935</sup> Scott, "Mandatory or Imperative Requirements in the EU and in the WTO", in Barnard and Scott (eds.), *The Legal Foundations of the Single Market: Unpacking the Premises* (Hart, 2002) at 269-270: The principle of proportionality has been strictly applied by the Court in its case law to prevent Member States making abuse of the flexible instrument of 'objective justification.'

In any event, both the method of compensation for training in the event of a transfer as the mechanism of redistribution of money through pooling of resources in a central fund can probably be withheld as an appropriate means to ensure the need of preserving the search for talent and the training and education of young football players. However, both alternatives fail to convince completely. It could therefore be envisaged to combine the strengths of each system, in an attempt to eradicate the downsides of it. In this vein, Dubey already suggested that it would be a matter of introducing somehow an element of security or certainty into the general framework of transfers to compensate for the uncertain character of transfers for the whole picture to become acceptable to the Court.<sup>936</sup> He advanced the proposal that a system based on a redistribution of a fixed amount of money to all clubs, originating from a financial fund, to be used for youth development purposes, in combination with a mechanism of compensating for costs incurred for training in the event of a transfer, could turn out to be workable. The fund could, for example, be financed by a contribution of all clubs consisting of 5% of the budget they annually spent of players' wages. He considered that such a redistribution of a fixed sum would have the advantage of rendering the uncertain character of transfers unobtrusive, for it would be independent of the number of players formed or effectively transferred to another team. Subsequently, this sum of redistribution will be supplemented with a compensation in the event of a transfer, in order to ensure that clubs would effectively do efforts to recruit and train young football players in the best possible way. Clearly, the system of compensation in the event of a transfer constitutes the core of his proposal. This is effectively one possibility. And probably it is even an realistic one, in view of the club's and association's obvious reticence to renounce completely from a transfer-based system. Be that as it may, from a Community free movement law point of view, the opposite option, going out from a pooling of resources and with only a minor 'transfer touch', might be preferable. Evidently, this will require a more substantial amount of money to be collected in the central fund than in the system proposed by Dubey, as the clubs will receive no compensation for training anymore in the event of a transfer of a young player. On the basis of the money which is redistributed out of the pool, the clubs should be enabled to set up their training and education centres. It is clear that clubs are entitled to invest more money into their youth programmes than the amount they receive out of the pool. This way, a certain club's training centre may become an attraction pole for promising youngsters. Clubs may start

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<sup>936</sup> Dubey, *o.c.*, at 604-605.

competing with each other for the services of the talented young players, offering them a high-level formation. Generally, these clubs will be the first to benefit from their quality training and education as they can be repaid in kind by these players if or when they make it into the first team of the club. Of course, the danger always exists that some young players will be lured away by talent scouts of other clubs. It is even inevitable that this happens, as some clubs have simply much more financial means than others. However, it is submitted that this should not negatively affect club's efforts in their youth centres: well-structured clubs will never or rarely lose all their good youngsters at once, as many of them will be happy to stay at the club, at least during the initial stages of their career. France's newest superstar Djibril Cissé is probably the best example at the moment. In spite of the fact that managers from the best teams all over Europe promise him mountains of gold, he has decided to stay a little longer at Guy Roux' Auxerre, where he has received his formation and where he quietly gets the chance to improve gradually and steadily. Only a couple of hundred miles away, Nantes' young goalkeeper Michael Landreau took exactly the same decision, turning down a concrete offer from Barcelona. In any event, one could consider to transpose the so-called 'solidarity mechanism' which appears in the new FIFA Regulations into this system: if players move between clubs before the expiry of their contract at a later stage of their career, a portion of the transfer sum could be redistributed over the training clubs. The prospect of possibly receiving an extra later if a player really makes it in the professional world, success which is reflected in the transfer sum that clubs are willing to pay to engage him, should be an interesting additional incentive for clubs to keep up with the good work!

### 3. Maintenance of contractual stability

From the outset, it must be indicated that the issue of contractual stability is highly contentious. The FIFA rules relating to respect for contracts may prove to be not only problematic from the point of Community free movement law, but also risk falling foul of the relevant national labour laws in the different Member States of the European Union and even of the national contract laws.<sup>937</sup> Arguably, especially in this context the individual rights to freedom

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<sup>937</sup> In this respect, consult Caiger and O'Leary, "The End of the Affair: The 'Anelka' Doctrine – The Problem of Contract Stability in English Professional Football", in Caiger and Gardiner (eds.), *o.c.*, 197.

of movement of the sportsmen must be carefully weighed against the claims for special treatment of the sporting associations.

### *3.1. Minimum and maximum duration of contracts*

According to the new FIFA Regulations for the Status and the Transfer of Players, players' contracts shall have a minimum duration of one year and a maximum duration of five years.<sup>938</sup> Furthermore, it is specified that contracts for a different period are only permitted if this is consistent with national laws.<sup>939</sup>

In the first place, it must be observed that this additional reference to national legislation is to be applauded, for it clearly indicates that FIFA readily acknowledges that in this particular matter, its regulations are subordinate to the different national labour laws. The lawfulness of a clause within a player's contract providing for a duration of the employment relationship between the club and the player between one and five years is thus primarily dependent on the specific content of the national labour law provisions applicable to the given situation, which may, as the case may be, accept divergences in both directions and allow contracts with a duration of less than one year or more than five years. If this is indeed the case, in these circumstances absolute priority has to be given to the relevant national legislation.

From the point of view of the compatibility with the Community provisions on freedom of movement for workers, the clause permitting a contractual duration of maximum five years seems to be relatively innocuous.<sup>940</sup> In combination with a prohibition of a unilateral breach of contract, as previously used to be the case, a term of five years would probably have raised questions under Article 39 EC, but things look entirely different now that unilateral termination of a contract has been made possible in the new FIFA Regulations, as will be demonstrated below. Admittedly, the precise maximum of five years appears to be rather arbitrarily established, but essentially, there is nothing wrong about it. It can be considered as an equitable attempt to

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<sup>938</sup> Article 4.2 FIFA Regulations 2001.

<sup>939</sup> Article 4.2. FIFA Regulations 2001.

<sup>940</sup> See also van Staveren & Boetkees, "Voetbaltransfers onder vuur van de Europese Commissie en de FIFA?", 50 *Ars Aequi* 4 (2001) 224, at 231-232.

reconcile the various interests at stake in this matter. Both players and clubs often prefer to engage themselves for a somewhat longer period, the former to be guaranteed of a job for at least the duration of the contract, and the latter to be ensured of the continued services of these players or alternatively of receiving a transfer fee in the event of a premature termination of the contract. But by the same token, one wanted to avoid that players would commit themselves contractually for (almost) the entire duration of their sporting career to one club. Not only, this would be liable to hinder or preclude their rights to freedom of movement of workers; moreover it would basically exclude that they would ever arrive at the end of their contract, which would practically allow their clubs to easily circumvent the principles ensuing from the *Bosman* decision of the Court of Justice, as they would always be entitled to receive a transfer sum in the relatively likely event the player would nevertheless move to another club before the expiry of his contract.<sup>941</sup> The demands of both parties involved have duly been taken into consideration. The outcome of a maximum duration of five years for a contract seems to be an acceptable compromise in the light of the limited duration of a footballer's career, which generally does not extend beyond 10-15 years. Furthermore, in this connection it should not be forgotten that both the clubs as the players always still have the opportunity to prolong their employment relationship after these five years, if they wish to do so. However, again it needs to be reiterated that this rule of a maximum of five years only holds true as long as national legislation does not stipulate it differently.

Secondly, at first scrutiny, there seems to be nothing really objectionable either about the measure providing for a minimum contractual duration of one year. Strictly legally speaking, even this minimum duration could of course be conceived as a restriction to the right of freedom of movement for workers protected under Article 39 EC. However that may be, principally, it seems to correspond perfectly to the aim of preserving the regularity of sporting competitions<sup>942</sup> to impose on players the obligation to sign contracts of at least one year, so as to prevent them from club-hopping at any moment. Besides, this provision seems to comply with the requirements of proportionality, as the minimum duration remains limited in time to one year or a sporting season, which in sporting circles is always a closed entity. In this context, some additional observations deserve to be made, however. Firstly, the same proviso must be made as

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<sup>941</sup> To give but an example, Ronaldo had signed a contract with a duration of 9 years with FC Barcelona, but already after one year, he moved to Internazionale.

<sup>942</sup> This aim has been recognised as a legitimate one in the case of *Lehtonen*, which will be discussed below.

with the clause on the maximum duration of contracts: the FIFA rule is only valid insofar as it doesn't go against the relevant national legislation.<sup>943</sup> Secondly, if we associate this rule with the one on limited transfer windows, which will be discussed in detail below, the question arises as to whether the minimum contractual duration of one year should also apply to contracts signed during the mid-season transfer period? If this were indeed to be the case, then contracts concluded for one year would terminate during the mid-season transfer window of the next season. It is submitted that the rationale underlying the principle of the one year minimum, namely ensuring the club more or less of the services of the player for the entire duration of the sporting season, doesn't seem to apply in this particular circumstance, for it would entail that a player would be linked to a club for the second part of one championship and the first part of the next. And in the world of sport, these are completely separate events, which as such have nothing to do with each other, since at the beginning of each new sporting season, all competitors start again from scratch.<sup>944</sup> It is therefore respectfully advocated that, at least in the specific situation of transfers halfway through the championship, it could be envisaged to allow the conclusion of contracts for the remaining duration of the season, in other words for more or less six months. The alternative of imposing a duration of at least one year and a half in the event of a mid-season transfer, thus until the end of the next regular sporting season, seems to be more questionable from the Community free movement angle. More specifically, the criterion of necessity under the test of proportionality would appear not to be complied with in similar circumstances.

To a large extent, this is a rather theoretical discussion of course, against the background of the widespread tendency to agree upon long-term contracts in an attempt to avoid players walking out of a club for free at the end of their contract, but nevertheless, it might be worth examining the issue, for there will always be circumstances in which clubs may consider it more appropriate to call upon the services of a player only for a short term. For example, if a team finds itself at the bottom of the ranking at Christmas, it might contemplate to do an extra financial effort to avoid relegation and look for reinforcement of the squad, engaging players with that sole particular objective in mind. Often, these players' salary demands weigh heavily on the budget of

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<sup>943</sup> See also van Staveren & Boetekees, "Voetbaltransfers onder vuur van de Europese Commissie en de FIFA?", 50 *Ars Aequi* 4 (2001) 224, at 231-232.

<sup>944</sup> Exception made of course for the teams which have been promoted or relegated at the end of a sporting season. They will start in a new league, at a higher, respectively lower level than in the previous season.

the club, and can only be sustained – if at all – for a short duration. If such a club were constrained to offer these players a contract of at least one year, it might have to call the affair off, as it often cannot run the risk of remaining saddled with these contracts in the case of a negative outcome on the pitch. The situation would be entirely different if it were entitled to conclude contracts for only half a season, as it would be able to release itself from these contractual burdens after the ‘emergency operation’ at the end of the season, regardless of whether it has been successful or not. Arguably, therefore, in these and similar circumstances, it could be considered to permit contracts with a duration of only half a season.

Presumably, by the same token, the option of limiting contractual stability to the next transfer window rather than covering at least one year could also be extended to contracts agreed upon during the main transfer period in summer. Undoubtedly, valid arguments can be advanced supporting these short-term contracts also at the beginning of the season. Just consider the following example: after the departure of striker Jan Koller to Borussia Dortmund in the summer of 2001, Anderlecht had secured themselves of the services of Yugoslavia’s Nenad Jestrovic to replace the giant Czech in attack. However, already during the first training sessions of the new season, it became clear that the newcomer was severely injured, and that he would be out for the first part of the Belgian championship as well as for the initial stages of UEFA’s Champion’s League. It could possibly be advocated that the management of the Brussels’ club, when they returned to explore the transfer market for a suitable replacement, should have been allowed to offer that player in question only half a year contract, to get through the difficult period until Jestrovic returned to fitness. However plausible that argument may sound, I admit being somewhat more reticent about this. My personal opinion is that when a club signs a player during the transfer period at the beginning of the season, the starting point should be that the co-operation between the club and the player will last at least for the entire duration of the sporting competition. Admittedly, along the way, things may evolve in one or the other direction, even drastically, and precisely for that reason, one has instituted a second mid-season transfer window, to facilitate changes to be effectuated, and during which certain principles may be applied in a more flexible way, but I am inclined to say that one should leave intact the initial intention to honour a contract of one year. Consequently, it is submitted that derogations from the rule of a

minimum duration of a contract of one year should only be accepted under certain circumstances, and only during the mid-season transfer window.

### 3.2. *Unilateral breach of contract*

The former rule denying players to unilaterally denounce their running contracts with their club of affiliation has been replaced in the amended FIFA Regulations by a whole new set of provisions. In the first place, it is stipulated that in case a contract which has been signed up to the player's 28th birthday is unilaterally terminated without 'just cause' or 'sporting just cause' during the first 3 years, sports sanctions shall be imposed and compensation shall be payable.<sup>945</sup> For contracts concluded after the 28th birthday of the player in question, the same principles are applicable, but only during the first 2 years.<sup>946</sup> Unilateral breach without these excusable grounds of just cause or sporting just cause after the protected periods of 3 years or 2 years respectively will no longer result in sanctions, but compensation will remain due.<sup>947</sup> In any event, unilateral breach of contract without just cause is prohibited during the season.<sup>948</sup>

Even though it must be recognised that the newly drafted rules are undoubtedly substantially more flexible and permissible than its strict predecessor and thus clearly constitute a step forward in the right direction, it nevertheless cannot be denied that these rules – or at least parts of it - still run the risk of being considered contrary to Article 39 EC, for they remain liable to preclude or deter nationals of a Member State from leaving their country in order to exercise their right to freedom of movement.<sup>949</sup> Furthermore, it cannot be excluded that they also contravene national labour legislation and/or national contract laws.

#### 3.2.1. Duration of the 'protected period'

In order to escape that conclusion, FIFA stresses that contractual relations between players and clubs must be governed by a regulatory system which responds to the specific needs

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<sup>945</sup> Article 21.1(a) FIFA Regulations 2001.

<sup>946</sup> Article 21.1(b) FIFA Regulations 2001.

<sup>947</sup> Article 21.2(a) FIFA Regulations 2001.

<sup>948</sup> Article 21.1(c) and 21.2(b) FIFA Regulations 2001.

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of football and which strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition. It thus attempts to justify the existence of these rules on the ground of sporting stability, which it regards as being of paramount importance in football, from the perspective of both clubs, players and the public.<sup>950</sup> Firstly, management and board of clubs claim contractual stability is absolutely vital in view of the team building efforts of clubs. It is often argued it takes at least two or three years to form a homogeneous team out of a group of players and to make them perform at the best of their capabilities, so it is considered essential to be sure to be able to work throughout that whole period with the same players. Secondly, contractual stability is also estimated to be to the benefit of players for it provides them with valuable employment security. Finally, also the public and the fans are expected to welcome contractual stability with enthusiasm. Supporters often like to identify themselves with their favourite club's star players. They shouldn't be deprived of this sentiment by players leaving at the whim of the moment.

In my opinion, however, serious doubts may be raised as to the appropriateness and the necessity of this means of contractual stability to reach the perceived ends of team building, employment security for players or identification by the public, legitimate as they potentially might be. Arguably, all elements advanced to underscore the indispensability of contractual stability in professional football can easily be counterbalanced by arguments of –at least- equal authoritative force. Firstly, it must be recognised that the arguments as to team building of clubs has a certain appeal. Some clubs do indeed plan ahead and invest time, effort and money in view of future success, often at the expense of immediate results. During the transfer negotiations, Arsène Wenger, Arsenal's successful manager, set himself up as an eminent advocate of this working method, threatening to leave club management if contractual stability was drastically touched upon. However intelligent or admirable this approach may be, factors such as the enormous coverage of the media and the press, the huge investments of sponsors and shareholders or the ever-growing patterns expectation of the public –to name but a few- produce the result that in present-day football, clubs which adhere to a long-term vision are easily outnumbered by clubs opting for instantaneous success. Champion's League, Uefa Cup,

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<sup>949</sup> *Bosman*, par. 96.

<sup>950</sup> See <http://www.fifa.com>: *Principles for the amendment of FIFA rules regarding international transfers*, at p. 2.

Intercontinental Cup, Supercup, national championship, national cup, league cup, qualification in Europe, avoidance of relegation, promotion, etc.: during the course of a regular season, clubs are offered many platforms on which to excel. The only thing that really counts is winning, if possible preferably uninterruptedly from August until May. After watching his team obtain a string of disappointing results, AC Milan's president and Italy's prime minister Silvio Berlusconi engaged Turkish coach Fatih Terim, the former magician of Galatasaray Istanbul, in the summer of 2001 to make his team return to greatness, offering him, however, only a one-year contract, with an option for a second. The message being conveyed was clear as sunlight: "if you don't win today, you can go tomorrow". And effectively, so it happened: a couple of months later, after a series of somewhat ambivalent performances of the 'rossoneri', Terim was already sent packing, and was replaced by Carlo Ancelotti. So far for team building thus. In this respect, it could of course be argued that this particular example is not really an appropriate or accurate one, as it concerns a coach, not a player, and it is well-known that contractual stability linked to the job of a trainer almost sounds like a *contradictio in terminis*. However, to this it can be replied that this example illustrates perfectly the limited value of the team building aim, which is clearly subordinate to the economic need of immediate sporting success. Naturally, the players are the constituent parts of a team, but in general, it is the coach who moulds it concretely. Licensing the trainer, who is in charge of the building of the team, therefore inevitably means that the project risks stumbling. And if team building is not really an objective which is properly pursued, this already inevitably prompts the question why there should be such an extensive need for contractual stability. Secondly, as to the identification of the public with the player, also this argument does not seem watertight. It is submitted that fans identify in the first place with a team, and only in a subsidiary way with the players the team is composed of. Certain players may indeed become the symbol of their club and the idol for the supporters, such as Johan Cruyff for Ajax Amsterdam in the Netherlands in the seventies, Jan Ceulemans for Club Brugge in Belgium in the eighties or David Beckham for Manchester United in the nineties, but in general, this particular fame or glory is extremely superficial and volatile. Normally, it lasts only as long as the players in question are at the club. When they retire or leave, their representative or leading role is taken over by a new hero the fans will worship. For nine years Gabriel Batistuta was the undisputed king of Florence. But when he decided to make the move to AS Roma in the Summer of 2000 to finally realise his ambition to win a championship's title in the closing stages of his

playing career, Manuel Rui Costa immediately took his place in the hearts of the Fiorentina fans. "The king is dead, long live the king." To the contrary, affection or love for a particular club never dies. The bond of allegiance between a real fan and his preferred club is just like a marriage "for better and for worse." The real fan doesn't care who saves the penalties or scores the goals, as long as the team performs well. Again, there are already some doubts as to the objective pursued as such, let alone about the issue whether contractual stability is the best way to achieve it. Finally, also the importance of the aspect of players' employment security needs to be somewhat downplayed, or at least re-evaluated in my opinion. Job security for players appears as a laudable objective, worthy of adequate protection. It is indeed true that the new FIFA regulation of unilateral termination of a contract works equally in both directions, so that also clubs cannot unilaterally breach a contract without 'just cause' or 'just sporting cause', at least if they want to avoid sporting sanctions being applied to them. However that may be, it shouldn't be forgotten that termination of a contract under common consent remains possible at any moment, even within the so-called 'protected period'. Admittedly, at first sight, these two situations seem to cover two completely distinct realities: unilateral breach of contract occurs when one party to it wishes to bring an end to the co-operation, whereas for termination of a contract under mutual agreement, both parties need to consent. It simply takes two to tango. In the most likely scenario concerning the latter situation, the player concerned ultimately always has to consent to a transfer before the expiry of his contract. For example, in the summer of 2001, the transfers of Italy's national goalkeeper Francesco Toldo and Portugal's Manuel Rui Costa from Fiorentina to Parma fell through at the last moment because both players refused to sign a contract for the club of Emilia-Romagna even though both clubs had reached a transfer deal. However, it is cautiously submitted that care should be taken not to over-accentuate the theoretical differences between these two situations in current football practice. The preceding example may point in another direction, but these are top class players who put considerable weight in the balance during transfer negotiations. Conversely, in most cases, the player-club relation is still one of David versus Goliath, and if a club is really intended to get rid of a player's contract, it will often find ways to do so. And this is precisely where the shoe pinches. In principle, there's nothing wrong *in se* with termination of a contract by mutual consent being possible at any given moment whereas unilateral breach of contract is prohibited during a certain period: if club and player both come to the conclusion that it is better for all parties to end the collaboration, they should

definitely be able to do so. However, problems arise if the balance of powers between the actors involved is not equal: in that case, and unfortunately, this is the case of many football players, the termination of the contract, though mutually agreed upon at first scrutiny, may very well turn out to be not that consensual at all. Therefore, the very fact that this possibility exists renders the whole argument of contractual stability for reasons of employment security probably not nugatory, but at least less forceful or convincing in the current football practice. As long as clubs can basically force a player to accept a transfer, this deplorable practice effectively defeats the purpose of employment security to a large extent.

It derives from the foregoing that aims such as team building, identification of the public and the fans with the players of a team and, to a lesser extent, employment security for players, cannot really be considered as objectives which are always unequivocally pursued under all circumstances in the football world. This is not to say that the element of contractual stability has no important role to play in the transfer rules. On the contrary, it is an essential means to achieve the end of preserving the regularity and proper functioning of the sporting competition. Consequently, it is simply suggested that the importance of the element of contractual stability should somewhat be moderated. The actual FIFA provisions stipulating that when players and clubs which decide to unilaterally breach their contract during the first two or three years without adducing a 'just cause' or a 'sporting just cause' for this behaviour, compensation will be due and sporting sanctions will be imposed, do seem to go beyond what is really necessary to reach this preconceived objective from the point of view of the duration of this so-called 'protected period' and appear therefore to fail the test of proportionality and run foul of Article 39 EC. Arguably, the balance between the interests of the players and the needs of the clubs and federations should be tilted more in the direction of the former. A proposition which could be acceptable would consist of limiting the contractual stability to one year or, alternatively, even to the period between two transfer windows during which no transfers can be effectuated. It is submitted that a similar solution would comply with the requirements of proportionality and would be compatible with the objectives recognised by the Court in *Bosman* and *Lehtonen* as legitimate, for it could be seen as maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results<sup>951</sup>, as well as ensuring the regularity of sporting competitions<sup>952</sup>.

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<sup>951</sup> *Bosman*, par. 106.

Simultaneously, it would also constitute a recognition of the free movement rights of the individual athletes.

In any event, also in this context it shouldn't be forgotten that the matter concerning the possibility of unilaterally terminating employment contracts is a labour law issue, which belongs primarily to the realm of Member States' competence. It is unquestionable that the FIFA rules in their current form are incompatible with certain imperative provisions of the labour laws of some Member States. In Belgium, for example, Article 4 of the Act of 24 February 1978 stipulates that remunerated sportsmen who have concluded an employment contract with a specified duration can terminate it *at any time* on the condition of the payment of a 'buy-out indemnity' to their club of affiliation.<sup>953</sup> The FIFA Regulations may thus very well stipulate that unilateral breach of contract without excusable grounds is prohibited during the season, if a player in Belgium decides to invoke the provisions of the law of 1978, this latter one will always prevail.

### 3.2.2. The issue of compensation for breach of contract

According to the newly drafted FIFA rules, in the event of unilateral breach of contract without 'just cause' or 'just sporting cause', regardless of whether it is initiated by the player or the club, and irrespective of whether it occurs during or after the protected period, compensation shall always be payable. Moreover, it is provided that the amount of such compensation – if not provided for in the contract - shall be calculated with due respect to applicable national law, the specificity of sport and all objective criteria which may be relevant to the case, such as:

- Remuneration and other benefits under the existing contract and/or the new contract;
- Length of time remaining on the existing contract (up to a maximum of 5 years);
- Amount of any fee or expense paid by or incurred by the old club, amortised over the length of the contract;
- Whether the breach has occurred during the 'protected period' or afterwards.<sup>954</sup>

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<sup>952</sup> Lehtonen, par. 53.

<sup>953</sup> Wet van 24 Februari 1978 betreffende de arbeidsovereenkomst voor betaalde sportbeoefenaars, *Belgisch Staatsblad*.

<sup>954</sup> Article 22 FIFA Regulation 2001.

This enumeration conveys the impression that these elements are cumulative, and all have to be duly taken into consideration when determining the amount of compensation due. However, this appearance is deceptive, for this is not necessarily the case. In principle, the issue of indemnification for breach of contract belongs to the domain of national private law. Member States' legislation may contain specific provisions regulating this. If this is effectively the case, one should abide by these rules to calculate the amount of compensation and the other factors mentioned in the FIFA Regulation should not come into the equation. To take up the example of Belgium again, the Act of 24 February 1978 concerning employment contracts for remunerated sportsmen does deal with this issue in a detailed way. Originally, the Act stipulated that when a player prematurely terminated his contract, a compensation of maximum 6 months wages could possibly be due, in accordance with the terms of Article 40 of the Act on Employment contracts.<sup>955</sup> Hence, initially, this Act offered players the opportunity to walk out of their existing contracts relatively cheaply. However, with the Royal Decree of 10 March 1997,<sup>956</sup> the amount of compensation to be paid in case of unilateral breach of contract was substantially increased. The figures of compensation it introduced were the following:

- 12 months wages if the annual salary varies between 900.000 and 1.200.000 BF;
- 24 months wages if the annual salary lies between 1.200.000 and 3.600.000 BF;
- 36 months wages if the annual salary is higher than 3.600.000 BF.

This Royal Decree expired on 1 July 2000. It was replaced by another Royal Decree of 26 June 2000<sup>957</sup> dealing with the same topic. It establishes that when a party to an agreement concluded for a precise duration prematurely ends this contract without an urgent reason or without complying with the provisions of Article 5.1 of the Act of 24 February 1978, it has to pay the other contracting party a sum of compensation amounting to:<sup>958</sup>

- if the annual salary does not exceed 551.951 BF (13.682,51 Euro):
  - 4 ½ months wages if the contract is breached during the first two years after the beginning of the agreement;

<sup>955</sup> Article 5.2 Act of 24 February 1978.

<sup>956</sup> Koninklijk Besluit van 10 maart 1997 tot vaststelling van het bedrag van de vergoeding bedoeld in Artikel 5, tweede lid, van de Wet van 24 februari 1978 betreffende de arbeidsovereenkomst voor betaalde sportbeoefenaars.

<sup>957</sup> Koninklijk Besluit van 26 juni 2000 tot vaststelling van het bedrag van de vergoeding bedoeld in Artikel 5, tweede lid, van de Wet van 24 februari 1978 betreffende de arbeidsovereenkomst voor betaalde sportbeoefenaars, *Belgisch Staatsblad*, 5 juli 2000.

<sup>958</sup> Article 1 Royal Decree of 26 June 2000.

- 3 months wages if the contract is breached from the third year after the beginning of the agreement;
- if the<sup>s</sup> annual salary varies between 551.951 BF (13.682,51 Euro) and 900.000 BF (22.310,42 Euro):
  - 6 months wages if the contract is breached during the first two years after the beginning of the agreement;
  - 3 months wages if the contract is breached from the third year after the beginning of the agreement;
- 6 months wages if the annual salary varies between 900.000 BF (22.310,42 Euro) and 1.200.000 BF (29.747,22 Euro);
- 12 months wages if the annual salary varies between 1.200.000 BF (29.747,22 Euro) and 3.600.000 BF (89.241,67 Euro);
- 18 months wages if the annual salary exceeds 3.600.000 BF (89.241,67 Euro).

This Royal Decree entered into force on 1 July 2000 and is to expire on 30 June 2002.<sup>959</sup>

In the Netherlands, the situation is somewhat different: an employment contract between a club and a football player can only be terminated prematurely by mutual consent or by rescission of a judge (in casu the Commission of Arbitration of the Royal Dutch Football Association, the 'KNVB') on the grounds of a just cause<sup>960</sup> upon request of one of the parties involved.<sup>961</sup> A football player can file a request to rescind his contract if he can improve his financial and/or sporting situation with another club. It is the Commission of Arbitration which decides whether this change of circumstances constitutes a sufficient ground for the rescission of the player's contract with the club to which he is still affiliated and which establishes the actual amount of compensation due to this club for the breach of the contract.<sup>962</sup> The national legislation does not contain any specific requirements with regard to the determination of the sum of compensation. It is not yet crystal clear how the Commission of Arbitration will precisely approach this particular

<sup>959</sup> Article 2 Royal Decree of 26 June 2000.

<sup>960</sup> See Article 7:685 of the Dutch Civil Code.

<sup>961</sup> See van Staveren & Boetekees, "Voetbaltransfers onder vuur van de Europese Commissie en de FIFA?", *50 Ars Aequi* 4 (2001) 224, at 228-229.

<sup>962</sup> The player must pay this compensation to his former club on the basis of Article 7:685.8 of the Dutch Civil Code.

issue in the post-*Bosman* era,<sup>963</sup> as it refused the only request which has been made since then.<sup>964</sup> Because of the inherent risk of rejection of the request to rescind the contract by the Commission of Arbitration, parties generally opt for the possibility to terminate the contract by mutual consent.

When the national legislation does not prescribe imperative requirements as to the quantification of the compensation, the parties involved in the agreement can presumably also take care of this matter amongst themselves in the employment contract. In Spain, the practice of the so-called 'rescission clauses' in players' contracts is legally permissible since the adoption of the Royal Decree 1006/1985 of 26 June 1985 and really caught on in the aftermath of the *Bosman* ruling. At the time, Real Madrid developed this trend, signing star players such as Brazilian Roberto Carlos and Dutch Clarence Seedorf on long-term contracts and systematically inserting a specific rescission clause in their agreements. In reality, these clauses boil down to a mutual agreement between the club and the player who conclude a contract upon the conditions under which the contract can be rescinded. As a general rule, the principle of contractual freedom leaves the parties to the contract at liberty to agree upon the height of the compensation. This has increasingly led to astronomic figures being put into players' contracts. In the lobby of Nou Camp for example, it was murmured at the time that whomever wanted to acquire Brazilian Rivaldo before the end of his ongoing contract, had to deposit 175 million Euro on Barcelona's bank account.<sup>965</sup>

Even though this matter remains of course primarily an issue of national legislative competence, confronted with these figures, one may nevertheless probably legitimately wonder whether similar sums of compensation do not practically deter or preclude a player from breaching his contract and constitute a restriction of his Community free movement rights, even though strictly legally speaking, the possibility of prematurely walking out of his contract

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<sup>963</sup> In the period before the *Bosman* decision, the Commission of Arbitration based itself on the transfer value of the player according to the old system to assess the sum of compensation provided for in Article 7:685.8 of the Civil Code. See in this respect, the decision of the Cantonal Court of Rotterdam in the case of *Laseroms v Sparta* of 5 April 1967, *NJ* (1967) 418.

<sup>964</sup> Decision of the Commission of Arbitration of the KNVB of 30 July 1998, n° 702, *JAR* (1998), 171: it concerned the request of the de Boer twins to rescind their contract with Ajax at the end of the 1997/98 season to enable them to move to Barcelona.

<sup>965</sup> Meulenaere, "Commissie op transfers", *Knack*, 7 maart 2001, 136.

remains open to him. In this respect, it needs to be outlined that in its Statement of Objections to FIFA, the Commission had readily acknowledged the right of national legislation to impose obligations upon the players in the event of a premature breach of contract, even if these obligations constitute a restriction to the freedom of movement of players or to the competition between clubs, adding, however, the important proviso that this only holds true in so far as the obligations are in proportion to the objectives pursued. According to the Commission indemnification ensuing from breach of contract, regardless of whether it were fixed in the contract itself or agreed upon later between the contracting parties, could be considered as a kind of damages or as compensation due in case of non-compliance with a contractual obligation, and concerns only the two contracting parties involved.<sup>966</sup>

It derives from this that according to the Commission, compensation for breach of contract is lawful as long as it does not go beyond what is necessary to achieve the objectives pursued. As it appears hardly conceivable to establish a fix rule for this, it is submitted that this issue will have to be estimated on a case-by-case basis, taking into consideration the circumstances of the particular situation. In this context, it may be useful to take up the two above-mentioned situations again. It will become immediately clear that this issue will not be as simple as it may look at first. In principle, in the event of unilateral termination of a contract by a player, it is the player himself who has to pay the compensation to the club he has decided to leave. Viewed at in this regard, the obligation to pay for example 36 months wages imposed on players who earn more than 90.000 Euro annually by the Belgian legislation appears as particularly burdensome<sup>967</sup> and could effectively be regarded as an obstacle to his rights of free movement going beyond what is necessary to preserve contractual stability or the regularity of sporting competitions, were it not for the fact that in reality, this compensation is virtually always paid for by the new club acquiring the player (and for whom the player in question has breached his contract with his former club). And for this club, the amount of compensation reached at on the basis of this calculation will often only be peanuts, or at least only a fraction of the sum which would be paid

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<sup>966</sup> EC Commission DG IV Competition 14-12-1998, IV/36.583, *Statement of objections of the Commission of 14-12-1998 against FIFA with regard to a procedure under Article 81 EC*, 24-25.

<sup>967</sup> In my opinion, the same holds true for the lower wage categories, since players belonging to them will still have to pay one or two years of income to terminate a contract. See Blanpain, "Transfers van voetballers naar nationaal en Europees recht. Recente ontwikkelingen" (2000-2001) 20 *Rechtskundig Weekblad*, 766; see also Maesschalck, *Je rechten als sportbeoefenaar* (Brugge, die Keure, 2000), 36.

in case of termination of a contract by mutual consent.<sup>968</sup> When Ipswich Town wanted to engage Belgium's Gert Verheyen from Club Brugge in the beginning of 2001, they initially offered 3 million Euro,<sup>969</sup> an almost ridiculously low bid on the contemporary international transfer market, but still considerably higher than the sum it would have to pay Brugge if Verheyen decided to have recourse to the Act of 1978 and unilaterally breach his contract. If the transfer fell through, it was only because the player ultimately wanted to avoid an open conflict with Brugge and decided not to play hardball.<sup>969</sup> At first sight, in the light of its after all - and especially in comparison with the regulations in other countries - relatively low threshold, it is thus nothing less than remarkable that even though this Act already entered into force in 1984, it has only been applied one single time in a concrete case since.<sup>970</sup> Besides that, in a couple of occasions, players -successfully, by the way- threatened their club to invoke the Act to compel it to accept the offer from another club wanting to engage them<sup>971</sup>, but that's it really. The explanation is straightforward: Belgian clubs have concluded a gentlemen's agreement not to make use of the Act of 1978 for the purposes of national transfers and not to engage players who did do so.<sup>972</sup> And according to Luc Misson, one of the lawyers of Bosman, Michel D'Hooghe, at the time chairman of the KBVB, would have obtained a promise from FIFA that it would refuse to issue a licence to players who invoked the Act of 1978 to play abroad.<sup>973</sup> However, after the entering into force of the new FIFA Transfer Regulations in September 2001, it was feared that this gentlemen's agreement would no longer be sustainable and that players would take maximum advantage of the opportunity offered to them by the Act of 1978 to change clubs at a relatively low prize (compared for example to the figures inserted in Spanish rescission clauses), to the detriment of the competitive position of the Belgian clubs which would inevitably have to let them go.<sup>974</sup> Therefore, immediately after the Commission and FIFA had reached their agreement in March 2001 on the transfer system reform, the Belgian football association cautiously suggested to the national government that it would be advisable to modify the terms of the Act of

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<sup>968</sup> Hauspie, "Aan de zijlijn: Wet van '78", *Sport Magazine - Voetbal Magazine*, 21 February 2001, 19.

<sup>969</sup> Subsequently, the Flemish club also refused Ipswich last -higher- offer and the player remained in Belgium.

<sup>970</sup> In the case of *Mrmic v Charleroi*, in which the national judge ruled in favour of the club: see Van Laere, "Johnny Maesschalck (juridisch raadgever): 'Merkwaardige vrees'", *De Standaard*, 7 March 2001.

<sup>971</sup> Kjetil Rekdal put pressure on Lierse to obtain a move to Rennes, Bart de Roover also wanted to leave Lierse for NAC and Pieter Collen from Gent wished to try his luck at NEC.

<sup>972</sup> Hauspie, "Europa speelt op veilig", *Sport Magazine - Voetbal Magazine*, 28 February 2001, at 48.

<sup>973</sup> Demets & Killemaes, "Doorlichting Eersteklassevoetbal: Luis Figo naar Westerlo?", *Trends* 32, (2000) 22-23.

<sup>974</sup> Lambaerts, "Alain Courtois, secretaris-generaal voetbalbond, rekent op goodwill politieke wereld: "België dreigt slachtoffer te worden van wet van '78'", *De Standaard*, 7 March 2001.

24 February 1978 – read: make it harder for players to breach their contracts.<sup>975</sup> Summarising, from the point of view of compliance with the principle of proportionality that forms part of the objective justification test for measures which are liable to restrict the freedom of movement or workers protected in Article 39 EC, it might make a difference whether the compensation is actually paid by the player who breached his contract with his club of affiliation or rather by the team which induced the player to do so and for which he'll start playing afterwards.

In Spain, as has already been illustrated above, the situation is somewhat different, as the national legislation allows the private parties to deal with the issue of termination of contractual relations in the contract itself, by means of the so-called rescission clauses. Practice has shown that the amounts of compensation as laid down in these contractual clauses have rocketed to unprecedented heights. Apart from the morality issue, which is of no real concern here,<sup>976</sup> this inevitably also prompts the question whether these sums are lawful from the point of view of Community free movement law. The issue of compatibility with Article 39 EC may be addressed as the Court has explicitly recognised that Article 39 EC is horizontally directly effective and is thus applicable in a dispute between private parties. Interestingly, in this specific context, a recent dispute involving some Spanish First Division clubs concerned a request for compensation for breach of contract as agreed upon in the rescission clause.<sup>977</sup> The circumstances of the case were the following:<sup>978</sup> in the beginning of the nineties, Jorge O.B. played on a professional basis for Celta de Vigo in the Spanish Primera Division. His contract with Celta was due to expire on 30 June 1994. In accordance with the provisions of Article 16 of Royal Decree 1006/1985, his employment contract contained a rescission clause stipulating that if he breached his contract, a sum of 200 million pesetas would have to be paid to Celta. In February 1993, Jorge O.B. entered into a private agreement with Deportivo La Coruña, another Spanish First Division team, in which he undertook to provide his football services to the club from Galicia for the period from 1 July 1993 until 30 June 1997. In the agreement, it was explicitly recognised that for the 1993-94

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<sup>975</sup> Van Laere, "Onduidelijkheid troef na akkoord FIFA, UEFA en Europese Commissie over nieuw internationaal transfersysteem. Nationale wetgever heeft het laatste woord" [2001] *De Standaard*, 7 March 2001.

<sup>976</sup> See Mercy and Wauters, "Interview: Voormalig Europees Commissaris Van Miert overtuigd dat beslissing in transferdossier niet lang meer uitblijft", *De Standaard*, 27 February 2001: "The simple fact that a player 'costs' 2 Billion BF as such does not constitute a breach of European rules."

<sup>977</sup> See Tribunal Superior de Justicia de Galicia Social Federacion, sentencia de 3 Junio 1999, *Tribunales Superiores de Justicia* (1999) at 359.

<sup>978</sup> Tribunal Superior de Justicia de Galicia Social Federacion, sentencia de 3 Junio 1999, *o.c.*, 359-361.

season, the player was still under contract with Celta, and therefore, that the contract with Deportivo would only become effective as from the moment Celta had officially released the player, either because the two teams had reached an agreement as to this effect or because the player had made use of the rescission clause in his contract with Celta to terminate his employment with the club. The player also engaged himself not to sign any contract with another club during his agreement with Deportivo. Furthermore, the amount of compensation to be paid to Deportivo in case of rescission of the contract was set at 500 million pesetas. Two months later, in April 1993, Jorge O.B. extended his contract with Celta de Vigo until 30 June 1996. The sum of compensation mentioned in the rescission clause was reduced to 200 million pesetas. During these months, neither the player nor Deportivo acted in such a way so as to render their agreement effective. Consequently, during the 1993-94 season, the player simply continued to regularly defend the colours of Celta. In May 1994, Celta and Valencia, a third Spanish First Division team, agreed upon the transfer of Jorge O.B. On 1 July 1994, he signed a contract with Valencia for 6 years. Hereupon, Deportivo officially urged for the situation to be regulated and asked 500 million pesetas as compensation for the rescission of the contract it had concluded with Jorge O.B.. In the light of the factual circumstances, it was somehow to be expected that the Superior Tribunal of Galicia, which was seized of the matter, would condemn the player to pay a sum of indemnification, it mainly remained to be seen how much the Tribunal would effectively award Deportivo. For the purposes of its decision, the Tribunal made a distinction between a real employment contract on the one hand, and a pre-contractual agreement or a contract the fulfilment of which is dependent upon the realisation of a certain condition on the other hand.<sup>979</sup> It stipulated that recourse to the rescission clause could only be had in the former situation, when there was a real labour contract which had entered into force. As this had not been the case, it considered that the Royal Decree of 1006/1985 could not be applied in the present situation. Subsequently, it proceeded estimating the compensation due by the player on the basis of civil law grounds, taking into consideration factors such as the age of the player, the duration of the agreement, the salary agreed upon, the specific situation on this professional market, the amount of compensation foreseen in the rescission clause, the kind of responsibility imputed on the player for the non-execution of the agreement, possible 'dammum emergens' or 'lucrum cessans'

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<sup>979</sup> Tribunal Superior de Justicia de Galicia Social Federacion, sentencia de 3 Junio 1999, o.c., 362-365.

for the club, etc.<sup>980</sup> Ultimately, the Tribunal awarded Deportivo 90 million pesetas.<sup>981</sup> This undeniably constitutes a considerable amount of compensation, but equally, by the same token, it is abundantly clear that it is substantially less than the 500 million pesetas which Deportivo hoped for.

The question now is which concrete lessons can be drawn from this judgement. In the first place, it is essential to put the case in the correct framework and to see everything in the right proportions. Hence, these 90 million may appear little, certainly in comparison with the 500 million provided for in the rescission clause, but it shouldn't be forgotten that the contract has never become effective. Jorge O.B. didn't play one single match for Deportivo. This made it much harder, if not impossible, for the Tribunal to evaluate which was the actual damage inflicted upon the club or which potential profits it lost due to the non-execution of the agreement. Arguably, these are factors which would have substantially increased the total amount of compensation, probably bringing it closer to the requested 500 million. In any event, the Tribunal came to this amount of money taking into consideration certain prescribed factors of calculation, these 90 million pesetas do not simply represent a wild estimation on behalf of the Tribunal. Furthermore, it has to be considered that this affair dates from the pre-Bosman era, when one still used to work with completely different parameters in terms of money, which explains the – relatively speaking - lower amounts of money involved. Apart from this, the factual circumstances of the case give us a better insight in the concrete functioning of the mechanism of the rescission clauses. In principle, the underlying objective is undoubtedly primarily to ensure that contracts are honoured, or alternatively, that the parties to the agreement are compensated adequately in case one of them decides to terminate it prematurely. However, recently the amounts of compensation contained in the rescission clauses have sometimes reached such withering heights that in reality, it has become often practically impossible for a simple player to unilaterally breach his contract. In most circumstances, the players will simply not be able to cough up the contractually stipulated sums of money. Essentially, this means that the clubs again exert a great influence on a player's career. If a club is really interested in the services of one or the other player who is still contractually linked to another club, it will either

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<sup>980</sup> Tribunal Superior de Justicia de Galicia Social Federacion, sentencia de 3 Junio 1999, o.c., 365-366.

<sup>981</sup> Tribunal Superior de Justicia de Galicia Social Federacion, sentencia de 3 Junio 1999, o.c., 366.

have to pay the sum of compensation for the contractual breach itself, or try to enter into transfer negotiations with the other club to engage the player. And here we arrive at the crux of the matter: often the soup isn't eaten as hot as it is served and the transfer talks successfully result in an agreement on a transfer sum which is lower than the contractually specified compensation. But this depends exclusively on the goodwill of the selling club. It is not obliged to release the player for a lower bid than the figure that is contained in the rescission clause. For example, in the summer of 2000, there was no other option for Real Madrid to engage Luis Figo but to pay the entire sum contractually foreseen to rescind his contract with the arch rivals of Barcelona. Similarly, in July 2002 Barcelona publicly announced its willingness to co-operate to a transfer of its Brazilian star player Rivaldo, on the condition that he doesn't move to another Spanish side.<sup>982</sup> These examples illustrate plainly that basically, by means of the system of the rescission clauses, clubs have a considerable power over the players. To a certain extent, they definitely have an important word to say on the issues of whether the player stays at the club or not and furthermore, if the player leaves the club, where he actually moves. Therefore, rather than compensate the former club for the unilateral termination of the contract, these contractually stipulated sums of money often constitute transfer sums *pur sang*. Viewed from this perspective, one could thus probably reasonably argue that a factual situation in which a player can practically only leave his club of affiliation before the actual expiry of his contract at the discretion of this club because the amount of compensation provided for in the rescission clause is simply too high, is questionable from the point of view of its compatibility with Article 39 EC.<sup>983</sup>

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<sup>982</sup> In the end, Barcelona even agreed upon letting Rivaldo move to AC Milan at cost zero, after rescinding the contract by mutual consent.

<sup>983</sup> In this respect, it is necessary to make one small *caveat* though: these rescission clauses are genuinely non-discriminatory. Up until today, the Court has recognised the full horizontal direct effect of Article 39 EC only with regard to discriminatory measures. In chapter 2 of this thesis, it has been submitted that the Court will presumably extend this stance also to non-discriminatory measures. However, for the time being, this cannot be taken for granted yet. In any event, it is submitted that one might reach the same conclusion on the basis of a wide interpretation of certain specific terms of Regulation 1612/68 on the free movement of workers within the Community. Article 7(4) of Regulation 1612/68 stipulates that "any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States." Admittedly, this provision is aimed at discriminatory measures, whereas the rescission clauses in the individual player's contracts are genuinely non-discriminatory, but this used to be the original interpretation of the Community free movement provisions as well, before their scope of application was extended by the Court so as to cover also non-discriminatory restrictive measures. If this specific interpretation of Article 39 EC were to be transposed now to the domain of its implementing Regulation, then Article 7(4), which merely clarifies the terms of Article 39 EC and gives effect to the rights already conferred by Article 39 EC (Case C-419/92 *Scholz v Opera Universitaria di Cagliari* [1994] ECR I-505, par. 6; Case C-15/96 *Schöningh-Kougebetopoulou v Freie Und hansestadt Hamburg* [1998] ECR I-47, par. 12.) could maybe be held to prohibit also

Be that as it may, however, on the other hand, one shouldn't forget the fact that, legally speaking, the<sup>s</sup> - financial - conditions under which a contract can be prematurely terminated by one of the parties, have been freely discussed and negotiated and consequently, are the result of an agreement of the concluding parties. If the players have consented to a high sum of compensation, making it more difficult for them to buy-out their contract, this is their choice and in principle, nobody has any business with this. Besides, there are often also financial advantages attached to these clauses for the players, inducing them to accept the insertion of these clauses in the employment contract. As a result, it could equally be argued that even if high sums of compensation may theoretically amount to an obstacle to the free movement rights of the players, they should nevertheless not be considered as a restriction prohibited by Article 39 EC, as these barriers have been construed with the collaboration or at least the permission of the players themselves.<sup>984</sup>

Summarising, in principle, this system of providing which amount of compensation is due in case of breach of contract in a specific rescission clause of the contract does not appear to be at odds with the Community free movement provisions. This would only be the case if the amounts of compensation laid down in these rescission clauses proved to be transfer sums in disguise, going beyond reasonable compensation for premature breach of contract. And even then, one would be confronted with a clash of two fundamental rights, the right of freedom of movement for workers and the principle of *pacta sunt servanda*, the outcome of which is uncertain in this particular situation. Therefore, it is submitted that it would be highly preferable, in any event, to elaborate a transparent and uniform mechanism which would allow the calculation of sums of compensation to be inserted in rescission clauses a priori and on an objective basis, as this would remove a lot of misunderstandings and uncertainties.

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clauses in individual agreements which are simply restrictive of free movement, such as rescission clauses which provide for unduly high amounts of compensation payable in the event of a unilateral termination of a contract which resemble more like true transfer sums. Intrinsically, this argument clearly has some force. For a concurring opinion, see Thill, *o.c.*, at 110.

<sup>984</sup> Naturally, the entire situation would be different if it could be conclusively demonstrated that the balance of power at the discussion table was so distorted that rescission clauses were imposed on players against their will or that in some way or the other these clauses were fraudulently inserted in the employment contract without the consent or the knowledge of the player concerned. This will prove to be a daunting task though.

### 3.2.3. Imposition of sports sanctions

Finally, besides the payment of compensation, the new FIFA regulations on international transfers also provide for the imposition of sports sanctions in the event of unilateral termination of a contract within the 'protected period' – as seen above, amounting to two or three years depending upon the age at which the player signed the contract – if the breach wasn't prompted by a 'just cause' or a 'sporting just cause'. Firstly, when the contractual breach is caused by the player, if the breach occurs at the end of the first or the second year of the contract, the sanction shall consist of a restriction on his eligibility to participate in any official football matches for an effective period of four months as from the beginning of the national championship of the new club.<sup>985</sup> In the event of a unilateral breach at the end of the third year of contract (or at the end of the second year if the contract was signed after the age of 28), there will be no sanction, unless there was failure to give notice in due time after the last match of the season, in which case the sanction must be proportionate.<sup>986</sup> In the case of aggravating circumstances, such as failure to give notice or recurrent breach, sports sanctions may go up to, but not exceed, an effective period of six months.<sup>987</sup> Secondly, in the case of the club breaching a contract or inducing<sup>988</sup> such breach, if the breach occurs at the end of the first or second year of the contract, the sanction shall be a prohibition on registering any new player, either domestically or internationally, until the expiry of the second transfer window following the date on which the breach became effective. In all cases, no restriction for unilateral breach of contract shall exceed a period of twelve months following the breach or inducement of the breach.<sup>989</sup> Again, as was the case in the case of the player, if the unilateral breach occurs at the end of the third year of contract (or at the end of the second year if the contract was signed after the age of 28), no sanctions shall be imposed, except where there was failure to give appropriate notice after the last match of the season, in which case a proportionate sanction shall be applied.<sup>990</sup> Furthermore, it is also stipulated that, without prejudice to the foregoing, other sanctions of a sporting nature may be imposed on clubs by the

<sup>985</sup> Article 23.1(a) FIFA Regulation 2001.

<sup>986</sup> Article 23.1(b) FIFA Regulation 2001.

<sup>987</sup> Article 23.1(c) FIFA Regulation 2001.

<sup>988</sup> According to Article 23.2(c) FIFA Regulation 2001, a club seeking to register a player who has unilaterally breached a contract during the protected period will be presumed to have induced a breach of contract.

<sup>989</sup> Article 23.2(a) FIFA Regulation 2001.

<sup>990</sup> Article 23.2(b) FIFA Regulation 2001.

FIFA Disciplinary Committee where it considers these to be appropriate. These sanctions may include, in particular, fines, deduction of points or even exclusion from the competition.<sup>991</sup>

It may be useful to reiterate once again that the payment of a sum of compensation due for the breach of a contract – as we have described in the preceding paragraph - is regarded *in se* as an obstacle to the freedom of movement of players, which can however be objectively justified under certain circumstances. According to the applicable FIFA Regulations now, sports sanctions are to be imposed on a player on top of this obligation to compensate for his unilateral termination of the contract, if there's no valid reason available in support of this action. Furthermore, effectively inflicting upon a player a prohibition to play for a new club during a period of four up to six months appears to be a serious sanction, taking into account the relative brevity of a sporting career. *A fortiori*, such sanctions seem therefore at first sight to be liable to impede or deter a player from exercising his free movement rights and seem to be contrary to Article 39 EC, unless there exists a proper justification for it.

It is clear that in this respect, one of the key issues will turn out to be the exact interpretation of the concepts 'just cause' and 'sporting just cause', for there will be no sanctions if a player makes an end to his contract for a valid reason. In the Agreement struck between FIFA and the European Commission it was already stipulated that the presence of a sporting just cause shall be assessed on a case by case basis by the Dispute Resolution, Disciplinary and Arbitration System to be established. The examination will take place at the end of the football season and before expiry of the relevant registration period in the former club's national association. Each particular situation will be evaluated on its individual merits. For this purpose, all relevant circumstances will be taken into consideration, such as, for example, injury, suspension, the player's age, the field position of a player, the position in the team (e.g. reserve goal keeper), reasonable expectations on the basis of past career, etc.<sup>992</sup> In some ways it is to be regretted that apart from simply enumerating, by way of example, certain elements which may be regarded as relevant, the FIFA Regulation does not offer more precise guidance in this respect. As a result, it currently remains a largely unanswered question what constitutes precisely a 'sporting just

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<sup>991</sup> Article 23.2(d) FIFA Regulation 2001. Besides, it is provided that appeals against such sanctions may be lodged to the Arbitration Tribunal for Football.

<sup>992</sup> Article 24 FIFA Regulation 2001.

cause'. The only concrete mainstay one has to go by for the moment is a provision in the FIFA Regulations concerning the application of the basic FIFA Transfer Regulation, in which it is unequivocally stated that a player is entitled to terminate his contract with his club unilaterally for sporting just cause where he can show at the end of a season that he was fielded in less than 10% of the official matches played by his club.<sup>993</sup> Furthermore, and importantly, it also remains to be seen whether these concepts of 'just cause' and especially 'just sporting cause' will be interpreted in a broad or rather restrictive way. Here, however, it can already be anticipated that, in all likelihood, the football authorities will have a relatively strong inclination towards the latter option, especially in the light of football's plea for stability of contracts and its clear aversion to unilateral termination of contracts. Also the only practical situation which has been outlined in detail is conceived rather restrictively and this points in that direction.

Let us pause here for a moment, and try to illustrate the issue on the basis of some examples, be they hypothetical or fictitious or not. For the purposes of this research, only situations in which the players may be led to breach their contract will be dealt with. Would Vincenzo Montella, one of Italy's most prolific strikers, be entitled to unilaterally breach his contract, in other words, does he have a valid sporting reason, if AS Roma coach Fabio Capello almost consistently keeps him sidelined during most of the games, preferring the duo Batistuta – Delvecchio in attack and inserting him only when things seem to go wrong, even though he regularly decides games in favour of his team with highly influential goals and/or assists? Rivaldo, Barcelona's Brazilian star, got enmeshed in an open conflict with Dutch coach Louis Van Gaal because of a disagreement about the field position of the player. Could this be construed as a just sporting cause allowing the player to terminate his contract with the Catalan club? Does relegation of a club to a lower division as such constitute a just sporting cause for its players, or does it make a difference whether it involves Belgium's KV Mechelen, only a decade ago national champion and winner of the former European Cup Winners Cup, or only Harelbeke, a small club with no significant results? If France's Marseille gets penalised for corruption or sporting fraud, is that sufficient ground to leave for players who do not wish to be identified with the club any longer? What if a team such as Italy's Lazio Roma suddenly faces financial hardship and must readjust its ambitions for the near future, no longer aspiring to win the scudetto but

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<sup>993</sup> Article 12 FIFA Regulations governing the Application of the Regulations for the Status and Transfer of Players.

merely gain a place to participate in the UEFA Cup or even to simply extend its permanence in the Serie A? Could failure to attain a certain objective, such as the championship's title or qualification to participate to the European Cups, under certain circumstances be a valid reason to terminate a contract? Can it be considered as a 'just cause' if a player can simply financially improve himself, or is it also required that the player moves to a better club or league? And one could go on for a while. The point which I am trying to make here is that in my opinion, the matter of the imposition of sports sanctions and inevitably thus also the entire matter of the unilateral termination of contracts depends for a great deal on the content and the interpretation of the concepts 'just cause' and 'just sporting cause'. If these notions are interpreted restrictively, as is to be expected for the reasons outlined above, the financial compensation which is always due in case of breach of contract will frequently be accompanied by a sports sanction. In the light of the nature and the gravity of these sanctions, this particular circumstance will almost certainly have a strong deterrent effect on possible intentions of the players to buy out their previous contractual engagements. This prompts the question whether sports sanctions in the event of contractual breach are überhaupt tenable from a Community free movement point of view?

In principle, there is nothing to object to sporting associations pronouncing sanctions of a disciplinary nature upon players who do not comply with the sporting rules or fail to live up to a sporting obligation. Indeed, federations do have the right and the duty to elaborate a set of rules in order to regulate sporting events organised by them. This necessarily involves also the disciplinary authority to sanction sportsmen who act in contravention of these rules. For example, if Roma's Francesco Totti receives a red card during a Serie A game for, let's say, foul play or abusive conduct on the pitch, or if Lazio's Fernando Couto or Juventus' Edgar Davids test positive on nandrolone, a prohibited drug, and therefore fail to pass a doping test, the Italian Football Federation can legitimately suspend these players, thereby effectively preventing them temporarily from participating in official matches played by their respective clubs. However, it is an entirely different matter whether sport federations have the necessary competence to create sports sanctions in the event of a simple unilateral termination of contract. After all, this remains a labour law issue, and thus belongs primarily to the preserve of Member States' competence. In theory, national legislation could therefore provide in the imposition of an additional sanction, amounting effectively to a temporary prohibition for the player to exercise his profession, on top

of the more usual contractual sanction to which a breach of contract generally already gives rise, namely the payment of compensation. Be that as it may, it appears at least questionable whether such a supplementary sanction is really necessary to maintain contractual stability and ensure the regularity of sporting competitions, which are the most important objectives pursued by this measure. It seems that when a player who has unilaterally breached his contract has duly paid the amount of compensation due, he has adequately indemnified his old club for the incomplete execution of the employment contract. In principle, therefore there appears to be no reason to inflict any further sanctions upon him. Both club and player should be able to continue undisturbed their separate ways. That is to say, at least this appears to be so as long as there are no other shortcomings which can be imputed on the player. Some theoretical situations in which the imposition of additional sanctions on top of financial compensation could possibly be envisaged immediately spring to mind. Firstly, there is the circumstance of the player unilaterally terminating his contract during the course of the season. According to the FIFA Regulations, this is prohibited, but there is nothing to stop the player from doing so if the relevant national legislation doesn't prevent this. It is incontestable that this particular behaviour of the player could cause his club some trouble, for it simply cannot look for a replacement immediately, since the contractual breach occurs between two transfer periods. At first glance, one could reasonably consider the imposition of a disciplinary sanction in this particular context. However, an important specification needs to be made in this respect: in reality, this is clearly a purely hypothetical situation, which will hardly ever occur in practice. A player will simply not buy-out his ongoing contract in the course of a season without just cause or sporting just cause. Acting in this way, the player puts himself completely off-side, he places himself temporarily outside the labour market for the remainder of the season or until the next transfer window, for he cannot go to another club between two transfer periods. Consequently, if this scenario were to unfold itself anyway, there seems to be no need for a sanction in the form of a suspension to play for another team, as the player has effectively inflicted it already on himself. For this reason, if the applicable national legislation provided for such a sanction anyway, arguably it should not exceed the duration of the period until the next transfer window. Secondly, one could conceive the more likely situation of the player breaching his contract without notifying his club about this sufficiently in advance. Such behaviour is indeed liable to make it difficult for a club to find a fully-fledged substitute for the leaving player in time, that is to say before the expiry of the

transfer period. Under these circumstances, a proportionate sanction could therefore probably be contemplated. This could of course also simply take the form of an increased amount of compensation. Regard should be had again in the first place to the relevant national legislation.

### *3.3. Evaluation*

The lessons which must be drawn from this analysis are several: in the first place, the Commission has arguably attributed too much weight to the argument of the sporting associations that contractual stability is necessary to ensure objectives such as team building, identification by the public with the team and employment security. It is submitted that more importance should have been given to the free movement rights of the footballers in this context. Furthermore, it has also become clear that these FIFA rules are only valid insofar as they do not contradict the relevant provisions of the applicable national laws in the Member States. But even the event that the issue of contractual stability is actually regulated by the provisions of national legislation or even by provisions in the employment contracts of the players, these rules may still be checked upon their conformity Community law. As a result of the attribution of horizontal direct effect to Article 39 EC, Community law may now interfere deeply into the private sphere!

### **4. Transfer windows**

In order to protect the regularity and proper functioning of sporting competition, FIFA also consented to a limitation in time of the opportunity for clubs to reinforce their squads by means of transferring players. The revised FIFA Regulations stipulate that players can only be registered to play with a national association during one of two registration periods per year, as laid down by the national association for this purpose, with a limit of one transfer of registration per player in the same sports season in a period of 12 months.<sup>994</sup> In the FIFA Regulations governing the Application of the Regulation for the Status and Transfer of Players, it is established that each national association has to decide upon the institution of these two registration periods, according to the following principles:

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<sup>994</sup> Article 5.2 FIFA Regulations 2001.

a) The first registration period will start, at the earliest, when the national championship has ended and finish, at the latest, before the subsequent national championship begins. This period should, in principle, last for no longer than six weeks.

b) The second registration period will occur approximately in the middle of the season. This period should, in principle, last for no longer than four weeks and should be limited to registrations for strictly sport related reasons, such as technical adjustments to a team or the replacement of injured players, or in exceptional circumstances.<sup>995</sup>

This was the only point of the entire transfer reform soap upon which the football authorities and the European Commission reached almost immediately a consensus. This has a lot, if not everything, to do with the fact that the issue of restricted transfer periods had already been conclusively tackled by the Court of Justice in the case of *Lehtonen*.<sup>996</sup> In this case, the Court demonstrated again its sensitivity towards the special features of sport, correctly considering the need to ensure the regularity of sporting competitions as a legitimate objective to uphold measures which are liable to constitute a barrier to freedom of movement.

#### 4.1. The case of *Lehtonen*

##### 4.1.1. Regulatory setting of the case

This case involved basketball, another vastly popular ball game. Basketball is organised at world level by the International Basketball Federation (hereinafter referred to as 'FIBA'). The responsible Belgian federation is the Fédération Royale Belge des Sociétés de Basketball (the 'FRBSB'), which governs basketball both at professional and amateur level.<sup>997</sup> The FIBA rules governing international transfers of players apply in their entirety to all the national

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<sup>995</sup> Article 2 FIFA Application Regulation 2001.

<sup>996</sup> Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine v Fédération Royale Belge des Sociétés de Basketball ('FRBSB')* [2000] ECR I-2681. Perhaps this suggests that a bit more EU litigation on the transfer issue might not be such a bad thing after all.

<sup>997</sup> *Lehtonen*, par. 3.

federations.<sup>998</sup> For domestic transfers, the national federations are recommended to take the international rules as guidance and to draw up their own regulations on transfers of players in the spirit of the FIBA rules.<sup>999</sup> The FRBSB rules draw a distinction between affiliation, which binds the player to the national federation, registration, which is the link between the player and a particular club, and qualification, which is the necessary condition for a player to be able to take part on official competitions. A transfer is defined as the operation by which an affiliated player obtains a change of registration.<sup>1000</sup> In the version applicable at the material time, it was stipulated that "players of foreign nationality, including EU nationals, are qualified only if they have completed the formalities relating to affiliation, registration and qualification. They must in addition comply with the FIBA rules to obtain a licence."<sup>1001</sup> Furthermore, with regard to transfers, the Belgian federation distinguishes between three geographical zones: the national zone, the European zone, and finally the zone of the other countries. Rule 140 et seq. of the FRBSB rules concern the transfers between Belgian clubs of players affiliated to the FRBSB, which may take place during a defined period in each year, which in 1995 ran from 15 April to 15 May and in 1996 from 1 to 31 May of the year preceding the championship in which the club in question takes part. No player may be registered with more than one Belgian club in one season.<sup>1002</sup> For the European zone, comprising the 15 Member States of the European Union plus Switzerland, Iceland, Norway and Liechtenstein, the deadline for the registration of foreign players<sup>1003</sup> is set at 28 February. After that date it is still possible for players from other zones to be transferred.<sup>1004</sup> Specifically, for players coming from the third zone, the rules of the Belgian federation state that when they join after 31 March of the current season, they will no longer be qualified to play in competition, cup and play-off matches of the ongoing season.<sup>1005</sup> According to the FIBA regulations, after the deadline established for the zone in question, clubs are not

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<sup>998</sup> Rule 1(b) FIBA.

<sup>999</sup> Rule 1(c) FIBA.

<sup>1000</sup> See also *Lehtonen*, par. 8.

<sup>1001</sup> Rule 145(4) FRBSB.

<sup>1002</sup> *Lehtonen*, par. 9.

<sup>1003</sup> Rule 2(a) FIBA defines a foreign player as a player who does not possess the nationality of the State of the national federation which has issued his licence. A licence is the necessary authorisation given by a national federation to a player to allow him to play basketball for a club which is a member of that federation. Rule 4(a) FIBA prescribes that when a national federation receives an application for a licence for a player who has previously been licensed in a federation of another country, it must, before issuing him with a licence, obtain a letter of release from that federation.

<sup>1004</sup> Rule 3(c) FIBA.

<sup>1005</sup> Rule 144 FRBSB.

allowed to include in their team players who have already played in another country in the same zone during the same season.<sup>1006</sup>

#### 4.1.2. Factual circumstances of the case

The concrete factual circumstances of the case were the following: Jyri Lehtonen, was a professional basketball player of Finnish nationality. In March 1996, after the ending of the 1995-96 Finnish championship, he was transferred from his Finnish club to Castors Braine, a Belgian team affiliated to the FRBSB playing in the first division, to participate in the final stages of the sports season in Belgium.<sup>1007</sup> In Belgium the national men's first division basketball championship is divided into two stages: a first stage in which all clubs take part, and a second stage which includes only the best-placed clubs (play-off matches to decide the national title) and the clubs at the bottom of the league table (play-off matches to decide which clubs will stay in the first division).<sup>1008</sup> The Finnish federation issued a letter of release for Lehtonen on 29 March 1996. One day later, his engagement by Castors was registered with the FRBSB. However, according to the rules of FIBA governing the international transfers of players at the time of the proceedings, the deadline for the registration of players from the European zone was set at 28 February. In other words, Castors Braine had engaged Lehtonen after the expiry of the relevant transfer period. Consequently, on 5 April 1996 the FRBSB officially informed Castors Braine that if FIBA did not issue the required licence for Lehtonen, the club might be penalised and that if it fielded him it would do so at its own risk.<sup>1009</sup> Notwithstanding this warning, Lehtonen effectively took part in the competition match of 6 April 1996 against Quaregnon. Five days later, following a complaint by Quaregnon, the competition department of FRBSB decided to award the match to Quaregnon by 20-0, penalising Castors for fielding Lehtonen in clear violation of the FIBA rules on transfers of players within the European zone.<sup>1010</sup> Castors still included Lehtonen on the team sheet for the subsequent game against Pepinster, but in the end, it didn't field him. Nevertheless, the penalty was the same, the match being awarded to the opposing team. After that, the club decided to dispense with the services of Lehtonen for the remainder of the

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<sup>1006</sup> Rule 3(c) FIBA.

<sup>1007</sup> *Lehtonen*, par. 12.

<sup>1008</sup> *Lehtonen*, par. 4.

<sup>1009</sup> *Lehtonen*, par. 12.

<sup>1010</sup> Castors Braine had actually won the match on the field.

competition, since it clearly ran the risk of being penalised each time it included Lehtonen on the team sheet, or even of being relegated to a lower division in the event of a third default.<sup>1011</sup> However, both the club and the player involved instituted proceedings against the Belgian federation before the Tribunal of First Instance of Brussels. Essentially, they sought for the FRBSB to be ordered to lift the penalty imposed on Castors for the match against Quaregnon, and to be prohibited from imposing any penalty whatsoever on the club preventing it from fielding Lehtonen in the 1995-96 Belgian championship, on pain of a monetary penalty.<sup>1012</sup> The Tribunal decided to stay the proceedings and referred the following question to the Court of Justice for a preliminary ruling: "Are the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specified date contrary to the Treaty of Rome (in particular Articles 12, 39, 81 and 82) in the case of a professional player who is a national of a Member State of the European Union, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely to prevent distortion of the competitions?"<sup>1013</sup>

#### 4.1.3. Judgement of the European Court of Justice of 13 April 2000

The Court of Justice decided that the rules on transfer deadlines are "liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State, by preventing Belgian clubs from fielding in championship matches basketball players from other Member States where they have been engaged after a certified date."<sup>1014</sup> Consequently, these rules constituted an obstacle to the freedom of movement of workers. It rejected as irrelevant the fact that the rules in question do not concern the employment of such players, on which there is no restriction, but only the extent to which their clubs may field them in official matches, considering that "in so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts the participation obviously also restricts the chances of employment of the player concerned."<sup>1015</sup> When addressing the subsequent issue of justification, the Court readily acknowledged that "the setting of deadlines for transfers of players

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<sup>1011</sup> *Lehtonen*, par. 13.

<sup>1012</sup> *Lehtonen*, par. 14.

<sup>1013</sup> *Lehtonen*, par. 18.

<sup>1014</sup> *Lehtonen*, par. 49.

may meet the objective of ensuring the regularity of sporting competitions.”<sup>1016</sup> It specified that “late transfers might be liable to change substantially the sporting strength of one or the other in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.”<sup>1017</sup> It acknowledged that the risk of that happening was especially clear in a sporting competition such as the Belgian first division national basketball championship, as the teams participating in the play-offs for the title or for relegation could benefit from late transfers to strengthen their squads for the final stage of the competition, or even for a single decisive match.<sup>1018</sup> Be that as it may, however, in the particular case of *Lehtonen*, after the deadline for players from the European zone had expired, clubs could still engage players from federations from other zones, for example from Brazil or the United States, until 31 March. Accordingly, the Court was of the final opinion that the rule under scrutiny must be regarded as going beyond what is necessary to achieve the aim pursued, since it didn’t seem to the Court that the transfer between 28 February and 31 March of a player from a federation in the European zone jeopardises the regularity of the championship more than a transfer in the same period of a player from a federation in another zone.<sup>1019</sup> Ultimately, the European Court left it up to the national court to ascertain “the extent to which objective reasons, concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone, justify such a different treatment.”<sup>1020</sup>

#### *4.2. Relevance of the Lehtonen ruling for the football transfer windows*

In the light of the preceding case, it seems straightforward that the FIFA rules limiting the opportunity for clubs to effectuate transfers of football players to two transfer periods per year, are liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State” and thus constitute an obstacle to the freedom of movement of workers, contrary to Article 39 EC. Arguably, by the same token, the Court’s explicit admission that the setting of deadlines for transfers of players may meet the legitimate objective of ensuring the

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<sup>1015</sup> *Lehtonen*, par. 50; see also *Bosman*, par. 120.

<sup>1016</sup> *Lehtonen*, par. 53.

<sup>1017</sup> *Lehtonen*, par. 54.

<sup>1018</sup> *Lehtonen*, par. 55.

<sup>1019</sup> *Lehtonen*, par. 56-58.

regularity of sporting competitions<sup>1021</sup> can be transposed without any difficulty to the present case. Most importantly in this respect, FIFA clearly drew its lessons from the *Lehtonen* decision and ensured itself of not falling on the same last hurdle of the principle of proportionality - as the FIBA rules did - by introducing homogeneous transfer windows, restricting the possibility for any player, regardless of his nationality, to be registered to a national association to these transfer periods. Besides, on the specific request of the top-11 of the European football nations, UEFA decided to introduce completely uniform transfer periods: the main transfer period runs from the end of the national championships until 31 August, and the mid-season transfer period from 1 January until 31 January.<sup>1022</sup> Hence, the principle of limited but homogeneous and uniform transfer periods appears to be acceptable from the point of view of Community free movement law.

Be that as it may, some additional observations deserve to be made with regard to the issue of limited transfer periods. Firstly, apart from simply instituting two unified transfer periods, FIFA has also stipulated that there is a limit of one transfer per player per season. Evidently speaking, also this rule is inspired by the need to protect the regularity and proper functioning of sporting competition. Consequently, at first scrutiny there seems to be no direct objection against this rule. Be that as it may, however, it is important to grapple the precise scope of this provision in practice. The fact that only one transfer of registration of a player in a period of 12 months is allowed unequivocally implies that a player, newly acquired by a club in summer, can under no circumstances leave his new club during the mid-season transfer window to play for another team, because that would inevitably entail a second, and thus impermissible, change of registration within 12 months. It is submitted that this appears to be an infringement of the fundamental free movement rights of the players, just as the principled minimum duration of contracts of one year, as described above. It seems that for example, France's Zinedine 'Zizou' Zidane, who has been transferred from Juventus to Real Madrid in the summer of 2001, and who initially didn't thrive at all in the shirt of the 'merengues', legally speaking should have been able to leave the club already in winter, even though he just arrived there a couple of months ago. Players' careers are generally so short they can't really afford losing an entire season. This is not

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<sup>1020</sup> *Lehtonen*, par. 59.

<sup>1021</sup> *Lehtonen*, par. 53.

<sup>1022</sup> X, "Europees akkoord over uniforme transferperiodes", *De Standaard*, 5 December 2001.

at all meant to undermine the importance or the legitimacy of the aim of protecting the regularity and proper functioning of sporting competition. On the contrary, to underline the intrinsic value of these objectives, it is suggested that one considers the introduction of the following rule, instead of the 'one transfer per player per season': in order to preserve the sporting ethics, and to avoid players from having their bags packed at any moment, players should not be allowed to play for two different teams which are competing with each other in the same competition during the course of one season. To take up the previous example, in my opinion, in principle there is nothing to prevent Zidane from leaving Madrid and moving abroad to join Liverpool during the mid-season transfer window and play for 'the reds' in the English Premier League for the remainder of the season, even if he joined the ranks of Real only in the previous summer. However, if both teams participate in UEFA's Champions' League and Zidane has already played for Real in this European competition, he shouldn't be allowed to wear the Liverpool shirt any more in that competition during the same season. This alternative rule seems to me to be more easily acceptable from the point of free movement, while still adequately reflecting the need to preserve the regularity of sporting competition.

In this particular context, it might be interesting to explore also shortly a recent phenomenon which can be noticed on the football transfer markets. In the summer of 2001, Atalanta Bergamo's midfielder Cristian Zenoni was transferred to AC Milan, only to be inserted almost immediately in the deal between Milan and Juventus concerning the move from striker Filippo Inzaghi from Turin. During one and the same transfer period, the player was thus transferred twice. Only a couple of days later, AC Milan almost pulled the same trick again, acquiring Andrea Pirlo from the neighbours of Internazionale before offering him, together with 60 billion ITL, to Fiorentina in return for Florentine's captain Manuel Rui Costa. Had it not been for the desperate need for cash on behalf of the Italian cup winners 2001 in order to avoid bankruptcy, the affair would have gone through on these terms... Clearly, this novel way of negotiating is not an isolated fact and might quickly find acceptance in the football establishment if it is not prohibited instantly. Admittedly, both examples concern only national transfers, involving only Italian clubs, whereas the transfer deal struck between FIFA and the European Commission deals with international transfers. However that may be, it is advocated that this method, theoretically at least, can be transposed without too many problems to the international

level. And sooner than later probably, FIFA will be confronted with it. In July 2002, Italian newspapers reported about AC Milan's interest in Parma's defender Fabio Cannavaro. Supposedly, Parma were offered a certain amount of money plus Danish striker Jon Dahl Tomasson in return for the services of their captain.<sup>1023</sup> The Dane had just arrived at Milanello after his transfer from Holland's Feyenoord Rotterdam. These are all still mainly rumours of course, and besides, if the whole affair were to be concluded in this way, it would still only involve one international transfer, but from this to making a player change country twice in one and the same transfer period would definitely only be a small step, and no longer a giant leap. Therefore, this matter needs to be addressed. In all likelihood, FIFA will not readily consent to this method of football transfers. Its current regulations on international transfers of players unequivocally prescribe a limit of one transfer of registration per player in the same sports season in a period of 12 months. At the moment, this particular practice is therefore simply not possible under the applicable regulations. Besides, not only this rule, but also the principle of contractual stability would risk being – at least partially - undermined by this way of moving around players between clubs, almost as simple pieces on a chessboard. For once, Blanpain's vigorous condemnation of the football transfer system as ordinary human trade and its characterisation of modern slavery would definitely also find some echo in this specific context.<sup>1024</sup> However, it is important to look at this issue from the right perspective. First of all, it has previously already been submitted that the rule of only one transfer of registration per player per season appears to be incompatible with the requirements of Community free movement law. The alternative proposal, preventing players to play for two different teams who participate in the same competition during the same season, seems to be respected by this manner of concluding transfers, as players do not effectively represent the 'intermediate team' in official games. Moreover, the argument of contractual stability may be a valid one, but it especially holds true in the context of unilateral breach of contracts, and does not preclude the termination of contracts under common consent. Since all these transfer agreements are reached in a purely consensual sphere, also this objection against this way of trading seems to be removed. Consequently, in theory, there seems to be nothing inherently wrong about this practice. The fact that this practice is tolerated at national level (or at least in some places) could figure as an incentive to allow it

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<sup>1023</sup> See <http://www.kwsport.kataweb.it> of 26 July 2002: "Milan non vuole solo Rivaldo".

<sup>1024</sup> See Blanpain, *Les gladiateurs du sport. La mafia du sport* (de Keure, 1992).

also at international level, really consecrating the rights to freedom of movement of football players. It could even be argued that, even though strictly formally speaking there have been two transfers of registration, conceptually there has been only one transfer in the real sense of the term, as the player in question will not really wear the shirt of the intermediate team. Besides, one shouldn't make too much out of it either, as such a situation will probably not occur all that frequently, due to the supplementary formalities or practical difficulties linked to international transfers in comparison with domestic transfers. It is submitted that, for the official regularisation of this transfer practice, it is fundamental that the player involved has really consented to these subsequent moves. This could appear strange at first sight - why would one accept two different transfers in one transfer period - but one shouldn't forget that the circumstances at a club may change quickly - for example the sudden arrival of a new coach - which may induce the player to agree with a new transfer deal. It is also conceivable that, at the moment of the conclusion of the first transfer, one had already reached an agreement upon a subsequent move. Essentially, when the player in question does not pose objections to it, for whatever reason, this practice therefore seems to be acceptable. However, one final remark needs to be made in this respect: one should be aware of the fact that this practice may constitute a sham exercise of the rights to freedom of movement, with the purpose of profiting from the status of a worker who has made use of his Community rights.<sup>1025</sup> This could possibly be the case if, for example, a Spanish team acquires a player from a German team and subsequently immediately inserts him in a transfer deal with another German team. Both transfers may be homologated, but one could argue that under these circumstances, the player in question has not really effectuated his free movement rights.<sup>1026</sup>

Another interesting observation can be made specifically with regard to the conception of the second transfer window, situated more or less in the middle of the season. From the terms of the Regulation governing the Application of the Regulation for the Status and the Transfer of Players, it can clearly be deduced that FIFA at least has the intention to consider the second, mid-season registration period as of secondary importance in comparison with the first summer

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<sup>1025</sup> See Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman. Article 177 reference by the Cour d'Appel, Liège, on the interpretation of Articles 48, 85 and 86 EC. Judgment of the European Court of Justice of 15 December 1995", *Common Market Law Review* 33 (1996), at 1019-1020.

<sup>1026</sup> In the case law of the Court of Justice, one can find indications that the Court will actually look behind such a 'sham': see, *inter alia*, cases such as *Surinder Singh*.

registration period: not only will it last no longer than four weeks, and thus two weeks less than the first period, but transfers of registration will also only be allowed under certain prescribed circumstances.<sup>1027</sup> However, it is advocated that the terminology used is so wide so that in practice, virtually every transfer effectuated will be interpreted as a 'technical adjustment to the team' and explained as for a 'strictly sport related reason'. And the remaining category of transfers will probably be accepted under the heading of exceptional circumstances. As a result, the only substantial difference between the two registration periods seems to be their respective duration.

### *Conclusion*

As is commonly known by now, feelings had run high in the aftermath of the *Bosman* judgement of the European Court of Justice. The football authorities only complied reluctantly with the decision of the Court and tried to limit its impact as much as possible. However, it quickly became clear that the *Bosman* ruling had set a trend and that further judicial inroads in the self-proclaimed and strenuously safeguarded regulatory autonomy of the sporting organisations were to be expected. Even though it had overcome this first crisis, the world of football was still living on the edge of a grumbling volcano, as some important matters were still left unresolved by the Court of Justice. It therefore didn't come as a surprise that when FIFA and UEFA had another passage of arms with 'Europe', *in casu* the European Commission, in the sequel of the transfer saga a couple of years later, there was a lot of tension in the air again. However, contrary to all expectations and in sharp contrast with the outcome of *Bosman*, both parties involved in the proceedings gently and complaisantly complimented each other when they finally reached an agreement on the reform of the traditional transfer system in the beginning of March 2001 after months of grim discussions. Besides, both parties didn't miss an opportunity to emphasise their particular satisfaction with the outcome of the dispute, which is truly remarkable given the fact that the differences of opinion on several issues seemed to be almost irreconcilable. On closer scrutiny, these reactions are perfectly explicable. Arguably, behind the thin facade of contentment, both the European Commission and FIFA greeted the final transfer deal

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<sup>1027</sup> Article 2(b) FIFA Application Regulation 2001.

predominantly with a huge sigh of relief. Hence, there had been a lot at stake for both of them during the infringement procedure. In the first place, this was the case for the football authorities. The ruling of the Court of Justice in *Bosman* had struck a serious blow to their claims of autonomy and self-regulating power. And while they were still coming to terms with this decision, the remains of the transfer system, undeniably one of the fundamental pillars of the organisation of football and undoubtedly still one of the main sources of income for football clubs, were already put under fire again by the Community institutions. In the light of its previous bad experience in Luxembourg, FIFA clearly wanted to avoid the risk of another outright condemnation of its rules and preferred to enter into transfer reform talks with the Commission, if only to keep this affair out of the hands of the Court. This way of dealing with the matter out of court had the advantage that the parties to the proceedings could meet and discuss more openly and serenely. Furthermore, and importantly, FIFA could also –temporarily - evade once again a pronouncement in principle of the Court of Justice on the applicability of the Community competition rules to sporting matters, which intrinsically would have an impact which could reach far beyond the confines of the specific transfer debate. Secondly, the same also held true, and maybe even more, for the European Commission, albeit for predominantly different reasons. In the media, the Commission action with regard to these infringement proceedings was followed Argus-eyed. In their extensive coverage, the Commission was largely one-dimensionally portrayed as the villain that wanted to inflict harm on the football world by abolishing the transfer system. Somewhat biased, often narrow-minded or even outright misleading as this press attention may have been to a certain extent, as the Commission didn't want to abolish the transfer system all together, but merely intended to bring it possibly in line with Community law,<sup>1028</sup> it definitely did no good to the European cause at a truly delicate moment for the entire European Union construct. In the event of a failure to find an amicable solution out of court, it would definitely have been the Commission who would have taken the blame for it. This was something the Commission could do without in a period in which politically, it had already sustained considerable loss of face with the resignation of the Commission-Santer after serious allegations of fraud. The new Commission under the presidency of Prodi was still very busy rebuilding a positive image and could simply not afford to slip on this affair. Furthermore, several Heads of State and Government lobbied extensively to work out a satisfactorily solution without the

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<sup>1028</sup> In practice, this meant ensuring respect for the player's interests.

intervention of the Court of Justice. The option of engaging in transfer reform discussions was also favoured internally by the Commission, as the different Commission services charged with the affair seemed to differ in opinion on the final outcome of a negative decision procedure. Consequently, the Commission faced a daunting task: on the one hand, it had to try by all means to elaborate a transfer reform proposal with FIFA for which also the football authorities would settle, while on the other hand, by the same token, the agreement which they would reach also needed to be acceptable from the point of view of Community law. If the Commission wanted to avoid a repetition of the *Bosman* debacle, when the Court of Justice openly reprimanded the Commission for having given its approval to the so called '3+2' nationality clauses which engendered direct discrimination on grounds of nationality as prohibited by the Treaty, a cautious approach was necessary in this respect. In the institutional interplay, the Commission could not run the risk of being regarded as taking light-heartedly its role of guardian of the Treaties.

All this may very well explain for a great deal why the European Commission and the FIFA managed to finally reach an agreement on the reform of the transfer system in March 2001 after months of laborious discussions, which necessarily implied that the procedure leading up to a negative decision against some aspects of the traditional transfer system for infringement of Article 81 EC came to a halt before it arrived at the Court of Justice, it does not really say anything about the intrinsic value of this agreement though. Consequently, it is important to take this agreement for what it really is: it constitutes the formal recognition of the Commission that the revised transfer system is compatible with the requirements of Community law. However, it is no more than that: certainly, it does not preclude the Court from deciding otherwise, from ruling that the amended FIFA regulations nevertheless still contravene some provisions of Community law.

As has been demonstrated in the analysis effectuated above, if the Court of Justice were effectively asked to pronounce a judgement on the conformity of the new transfer system with Community law, in all likelihood it would come to the conclusion that some aspects of the new rules are - still - excessively restrictive of free movement and do infringe Article 39 EC (and/or

Articles 81-82 EC).<sup>1029</sup> This is not to say that the agreement reached between the Commission and FIFA necessarily is entirely useless. On the contrary, it definitely has some merits as some important changes have been introduced and progress has been achieved on previously completely unacceptable issues: for example, the untenable prohibition of international transfers for minors has been wisely transformed into a principled permission, albeit under strictly prescribed circumstances. The possibility has been created to unilaterally terminate a contract. And the football authorities have officially recognised that in case of a dispute, recourse to the ordinary civil courts and tribunals is possible. Also with regard to the other crucial issues of compensating clubs for the training and education of young football players, stability of contracts and transfer windows, some important steps have been made in the right direction. However, the major criticism of the new rules is that the modifications made are still not sufficiently far-reaching. The pursued liberalisation has probably not been carried through radically enough. The rights to freedom of movement of football players are still unduly restricted. Also on this occasion, the responsible Community institution has at times shown too much respect for the so-called specific needs of sport. Firstly, with regard to the issue of compensation for the training and education of young players is concerned, the Commission has simply accepted the decision of the Court in *Bosman* that the need to ensure the recruitment and training of youngsters constitutes a legitimate aim to justify obstacles to the free movement of workers. Arguably, this objective is not specific to sport and therefore may not deserve this preferential treatment under Community law. In any event, even if the special status for this in se undoubtedly laudable objective were confirmed at a later stage by the Court, one should have at least examined the potential feasibility in practice of some less restrictive alternatives to the FIFA rules, such as for example a system based on a redistribution of resources out of a central fund, possibly coupled or increased with a solidarity contribution consisting of a percentage of the fees paid in the event of later transfers between clubs. Contrary to the currently applicable mechanism of compensation due in the event of a transfer, this system based on pooling of resources does not have an uncertain or contingent character and it is not liable to constitute a barrier to the free movement rights of the football players. Besides, it remains to be seen whether the Court will accept that the element of uncertainty and contingency is still very much present in the current system. Also, the

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<sup>1029</sup> See also the analysis by Weatherill, "'Fair Play Please': Recent Developments in the Application of EC Law to Sport", 40 *CMLRev.* (2003) at 65-73.

national federations will have to be extremely cautious when they put concrete figures to the purely theoretical concepts such as the famous player factor and the flat-rate sums which constitute the basis for the calculation of the compensation, so as to avoid the sums of compensation payable going beyond the costs actually incurred for the training of the young players. Secondly, also with regard to the issue of contractual stability, which belongs to the realm of Member State's competence, the Commission has favoured too much the interest of the clubs and the associations over the interests of the players. The argument that contractual stability is necessary to ensure team building, identification of the public with the team and employment security cannot be construed in such a way as to justify the restrictions to free movement as laid down in the new FIFA rules, limiting the possibility for players to unilaterally terminate their contracts during the first two or three years, - depending on the vague concepts of just cause and sporting just cause - and providing for sports sanctions under certain circumstances to be inflicted upon the club or the player on top of the compensation due for the breach of contract. Contractual stability should presumably be limited to one year or one sports season. This seems to be in line with the need to guarantee the regularity of sporting competitions, which can legitimately be regarded as an overriding requirement in the general interest. From this point of view, it should also be possible to limit the duration of contracts concluded during the mid-season transfer window to half a season. Also the issues concerning the amount of compensation due for breach of contract and the imposition of sports sanctions belong in the first place to the preserve of Member State's competence and are regulated in national legislation and/or in individual contracts between the club and the player. However, if they amount to barriers to free movement in practice, the Community institutions may intervene in the matter. As a result of the recognition of horizontal direct effect, not only public measures, but also private rules fall nowadays under free movement scrutiny. Thirdly, limiting the possibility to effectuate transfers within certain prescribed periods - 'transfer windows' - seems to be acceptable, but the additional rule prohibiting more than one move per player per season again seems to be incompatible with Article 39 EC.

-Summarising, from the point of view of Community free movement law, even though the new FIFA Regulations on international transfers of football players undoubtedly constitute an improvement in comparison with the previous rules, the compatibility of some aspects of it with Article 39 EC still appears to be problematic. In view of the particular climate in which the

transfer reform meetings between the European Commission and the football authorities were held, this conclusion does not come as a big surprise. The final agreement which was reached in March 2001 was nothing more than a compromise, the best possible – or the least worst – solution one could arrive at under the given circumstances. Probably it does not entirely or precisely reflect the legal views of the Commission on the whole issue. Be that as it may, however, this time the Commission was very careful to cover its back: it ensured it did not consent to anything which is in blatant contravention of Community law, contrary to its previous approval of the '3+2' nationality clauses. Therefore, if the Court of Justice were to abolish some of the new transfer rules at a later stage for infringement of Article 39 EC, it will essentially be because it considers that these measures fail to comply with the requirements of the principle of proportionality. In view of the strong assertion of free movement rights in *Bosman* and other cases, it is possible the Court will indeed adopt a stricter approach to the elements of 'appropriateness' and 'necessity' than the Commission has done in this context. Admittedly, a condemnation on behalf of the Court of the new transfer system to which the Commission has given its approval would still boil down to a defeat for the Commission, but an 'overruling' of 'Big Brother' the Court of a Commission's action solely on the basis of the principle of proportionality is probably something one can live with at the Commission's headquarters in Brussels. After all, a similar outcome would be explained to the outside world as a simple difference of opinion about the concrete application of the contested rules with the given context rather than as a profound disagreement about the law itself. This whole affair conveys the impression that the Commission carefully balanced all interests at stake in these proceedings and subsequently made a calculated choice: it watered down its originally strictly legally inspired exigencies sufficiently so that FIFA would be found willing to strike a deal on the transfer issue, but not to such an extent that the new FIFA Regulations clearly would not stand a single chance before the Court of Justice. The compromise which ensued from the transfer talks is all together not too bad, but at the same time probably simply just not good enough.

Where does all that leave one now? The European Commission is probably relieved that it has been able to get rid of this hot potato without having incurred too much collateral damage, politically, legally or institutionally. And the football authorities are largely satisfied as well, as they managed to preserve important traits of the transfer system they regard as absolutely sacred.

Everybody happy? Not quite. In all likelihood, some aspects of the revised transfer system are going to be brought before the Court of Justice sooner or later. In the current constellation, it would be unrealistic to presuppose that another 20 years will go by without these revised transfer rules being legally challenged. And then, these rules probably won't be withheld by the Court. In the end, essentially, one has thus probably only been putting off the evil day. In some media, it has been reported that the Commission overplayed its hand and that FIFA has called the Commission's bluff. Arguably, however, the Commission had the necessary trump cards in its hands to force the football authorities to enter into a constructive dialogue on the peaceful existence of sport within the European Union construct. Regrettably however, for reasons which had nothing to do with the law or sport as such, the Commission has let this excellent opportunity slip sliding away. As a result, the football world is currently saddled with new transfer regulations that are clearly less restrictive than the former transfer rules, but that nevertheless still contain provisions which unduly obstruct the right to freedom of movement of football players within the EU/EEA and should therefore be abolished for infringement of Article 39 EC. At some point, the Court of Justice might rectify this, but in the meantime, precious time has been lost to make the transfer rules comply with Community law. If one wanted to grasp the whole affair in one catch-phrase, it would therefore be fairly accurate to say that the elephant has given birth to a mouse... Besides, it must not be forgotten that many aspects of the new FIFA rules actually belong to the sphere of competence of the Member States. In the event of a conflict between the FIFA rules and national legislation, the latter must prevail.

Moreover, that is not the end of the story yet: when the European Commission in December 1998, after having received a series of complaints, finally decided to institute formal proceedings against FIFA for infringement of the Community competition rules, it did so with a view to making an end to the unsatisfactory situations and the uncertainties still surrounding the remains of the transfer system in the post-*Bosman* era. Hence, the immediate impact of the *Bosman* judgement remained limited to the particular circumstances of an EU/EEA professional football player who had served the terms of his contract but was nevertheless hindered in the exercise of his free movement rights by the existence of transfer rules imposing on a club in another Member State wishing to engage him the obligation to pay a transfer sum to his former club. Strictly legally speaking, by means of an *a contrario* reasoning, domestic transfer systems

were thus left untouched, as the Court had held on several previous occasions that the free movement rules didn't apply to "wholly internal situations". Situations of reverse discrimination and of sham exercise of freedom of movement rights were an unfortunate consequence of a rigorous application of the Community rules. Moreover, most third-country national football players, namely those who couldn't rely on directly effective provisions of Europe, Co-operation or Accession Agreements extending – some of, as the case may be – the free movement rights to them, were not concerned by the decision either, and thus transfer payments remained due when they were transferred after the expiry of their contract, as the Treaty provisions on free movement were only applicable to Member States' nationals. Furthermore, EU/EEA footballers who were still under contract with their club were also left in a legal limbo. All these aspects of the transfer system were specifically individuated by the Commission in the official statement of objections it had sent to FIFA. The agreement upon the transfer reform which was ultimately reached in March 2001 was supposed to be a cease-fire between 'Europe and football', and it may gloriously have been presented as a kind of ultimate New Deal, but this is clearly raising hopes too high. The Commission and FIFA have concluded no more but a temporary truce. Not only, as has already been outlined above, do the new FIFA Regulations on the Status and Transfer of Players still contain several provisions which seem unjustifiably restrictive of free movement, even though it must be acknowledged that they undoubtedly constitute an improvement from the point of view of compliance with Community law in comparison with the previous rules. Also, specifically, if it were the purpose of the infringement procedure was to cover once and for all the loopholes left by *Bosman*, one has arguably failed to do so.

Firstly, it must be admitted that especially the situation of in-contract players has been taken care of, albeit not entirely satisfactorily. Secondly, as regards the treatment reserved to third-country nationals, the story is somewhat more complicated. Already in Circular n° 611 of 27 March 1997, FIFA had notified the national associations that, as from 1 April 1997, players who were not subjects of an EU or an EEA country would henceforth be classified as European citizens and that no compensation would be due for the transfer of these players between two countries on EU or EEA territory after the expiry of their contract. The Executive Committee of FIFA ratified this decision on 31 May 1997. However, at the request of several national associations and on the recommendation of the Players' Status Committee, it decided to postpone

the enforcement of the new rule until 1 April 1999. This implies that clubs and players affected by the decision had been granted a transitional period of two years to prepare for implementing it smoothly. In the interim period, a club domiciled on EU/EEA territory which transfers an out-of-contract third-country national player to another club domiciled in another country in the EU/EEA continued to be entitled to a transfer sum, in accordance with Article 14 of the applicable FIFA Regulation at the time. This Circular, however, didn't regulate the situation in the event of a transfer involving a club from a non-EU/EEA country. The lawfulness of transfer payments in this particular situation was subsequently explicitly questioned in the Commission's statement of objections to FIFA. Interestingly, contemporaneously with the Commission's proceedings, the *Balog*-case was pending before the Court of Justice, in which it was asked to deliver a preliminary ruling on the compatibility of the transfer system with the Treaty competition rules. Despite all this, however, neither in the agreement of March 2001, nor in the newly revised transfer regulations, is any specific mention made of the situation of third-country nationals with regard to the issue of transfer payments. And the *Balog* case was ultimately settled amicably out of court. It can therefore only be assumed that for transfers of out-of-contract third-country nationals involving a club of a non-EU/EEA country, transfer payments are no longer due, as the new FIFA Regulations contain no provisions to that effect. However, it seems that it can not be entirely excluded that national transfer systems still contain contrary provisions in this respect, as the matter has never been explicitly settled. Evidently, some more clarity in the amended transfer rules would have been helpful in this respect. Furthermore, if third-country nationals doubt the viability of the new FIFA transfer system, they of course still cannot rely on the free movement provision of the Treaty in principle, but need to have recourse to the competition law provisions.

Thirdly, and finally, in the preamble of the new FIFA Regulations it is provided explicitly that these regulations deal with the status and the eligibility of players, as well as with the rules applicable whenever players move between clubs belonging to different national associations.<sup>1030</sup> Moreover, it is stipulated that several of the principles outlined in the regulations are also-binding at national level.<sup>1031</sup> Besides, each national association is obliged to elaborate a system for

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<sup>1030</sup> Preamble, point 1 FIFA Regulations 2001.

<sup>1031</sup> Preamble, point 2 FIFA Regulations 2001.

domestic transfers and to draw up appropriate regulations which are to be approved by FIFA. These regulations must observe the general principles of the FIFA Regulations and contain provisions for the resolution of disputes that may arise in connection with a national transfer.<sup>1032</sup> This explicit preservation of domestic transfer systems comes as a surprise. First of all, it has been argued on several occasions that the maintenance of a restrictive domestic transfer system in a more liberalised market seems anomalous: not only does it give rise to circumstances of 'reverse discrimination' in which Member States nationals are liable to be worse off than nationals of Member states who have made use of their free movement rights, it also constitutes an incentive to circumvent or evade the national rules by artificial trans-frontier transactions.<sup>1033</sup> In the light of the Community internal market project, the hands-off approach of the Court does indeed seem outdated.<sup>1034</sup> Furthermore, importantly, the conformity of such national transfer systems in this particular context with the Community competition rules seems to be dubious.<sup>1035</sup> The Commission initially seemed determined to address the matter from this particular angle,<sup>1036</sup> but in the end obviously consented in a status quo. This may be indicative of the fact that even though the entire procedure was initiated for supposed infringements of the Community competition rules, the affair was primarily conceived as a free movement case. Instead of being abolished, the practice of domestic transfer payments has thus unfortunately once again been confirmed. One straightforward example will suffice to illustrate this conclusion. According to the revised transfer rules, the international transfer market has been closed at 31 August 2002, to reopen on 1 January 2003. In Italy however, the national football federation has decided to reopen the domestic market from 7 until 13 September 2002 to give Italian clubs the opportunity to effectuate additional internal transfers. Even though this measure may appear indistinctly applicable at first sight, as both Italian as foreign football players may move from one Italian club to another, it is submitted that it is indirectly discriminatory in practice, as more nationals of other Member States than Italians will be affected by it...

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<sup>1032</sup> Preamble, point 3 FIFA Regulations 2001.

<sup>1033</sup> Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *o.c.*, 1020-1021.

<sup>1034</sup> See also Mortelmans, "Zaak C-415/95 KBVB, Royal Club Liégeois, UEFA tegen J-M. Bosman", 4 *SEW* (1996), 141, at 144.

<sup>1035</sup> Weatherill, "Case C-415/93 Union Royale Belge des Sociétés de Football Association ASLB v Jean-Marc Bosman", *o.c.*, 1021-1026.

By way of summary, the final outcome of the formal infringement procedure launched by the Commission against some contested transfer practices tastes bitter twice: not only for what has actually been achieved, which is arguably insufficiently liberal from the point of view of freedom of movement, but also for what arguably should have been done, and has not (fully) been realised. The last word on the transfer saga clearly hasn't been said yet ...

## *Epilogue*

The new FIFA Regulations entered into force on 1 September 2001. In the final provisions of the Regulations, it is stipulated expressly that contracts concluded before this date remain in principle governed by the previous rules of the FIFA Regulations of 1997, unless players and clubs explicitly agree to base agreements signed after 5 July 2001 on the new Regulations.<sup>1037</sup> Barely one year has passed since the introduction of the new rules. It would therefore definitely be premature to pronounce already a judgement on their application or their workability in practice. Be that as it may, some tentative observations will nevertheless cautiously be made at this point. The football world currently faces a period of economic recession, after 10 years of seemingly unlimited growth, mainly due to a spectacular explosion of the revenue generated from the sale of the television rights for football matches. To give but an example, in the last three years only, the total income of the 20 richest European clubs increased by 70%. However, disappointing audience figures brought several private television channels on the edge of bankruptcy, and induced them to make lower bids for the football broadcasting rights. Almost immediately, the financial crisis in the media extended itself to the sector of football.<sup>1038</sup> All too many clubs had got enmeshed in the dangerous spiral of money, offering royal salaries to the players they employed and paying astronomic transfer sums for the services of a player in the aftermath of *Bosman*. To be able to cover their actual expenses, many a club's management even didn't hesitate to anticipate on the income it would receive from future commercial transactions. As it seems extremely likely that these future deals will turn out to be much less lucrative than

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<sup>1036</sup> See also Van Miert, "L'arret Bosman: la suppression des frontieres sportives sportives dans la Marche unique europeen", *o.c.*, 3.

<sup>1037</sup> Article 46 FIFA Regulations 2001.

<sup>1038</sup> Roox, "Na euforie komen magere jaren voor profvoetbal", *De Standaard*, 17 April 2002.

initially expected, for many clubs it really is all hands on deck to survive now.<sup>1039</sup> In this particular climate, it does not come as a surprise that there has been very little activity on the transfer market this summer in comparison with the previous years, even in a post-World Cup year. Most clubs simply do not have the necessary cash to effectuate transfers at the moment. Some exceptions do confirm the rule of course. The sting was clearly in the tail: on the last day of the transfer period in the summer of 2002, Real Madrid finally managed to concretise the transfer of Ronaldo from Internazionale. The 2002 European club champions paid 35 million Euro for the Brazilian world champion to the Italians, who could also pick one out of three players of the Spanish squad with a market value of 10 million Euro.<sup>1040</sup> In total, the deal thus cost Madrid 45 million Euro, still a gigantic amount of money, but significantly less than the 70 million Euro it paid only one year ago to convince Juventus to release Zidane. At exactly the same day, Alessandro Nesta, captain and symbol of Lazio Roma and arguably the best defender in the world, was transferred to AC Milan for 30 million Euro. Only one year ago, his value on the transfer market was still estimated almost twice as high. Both transfers were realised with the mutual consent of all parties involved. Presumably, this substantial fall of transfer amounts within a period of only one year is to be explained simply by the modified – financial – situation on the market of offer and demand rather than by the changes in the legal situation created by the new FIFA Regulations. This rebuts the criticism that everything would remain as it was before the introduction of the new transfer rules because the possibility of freely negotiating transfer sums by mutual consent had not been repealed. These two transfer soaps which lasted both more or less the entire summer reveal another element which is worth mentioning in this context: despite the fact that both players had clearly indicated from the outset that they wanted to leave their club of affiliation, they never hinted at possibly unilaterally breaking their contract and ultimately, would have stayed at their club, at least until the next transfer window, if the clubs involved in the transfer negotiations hadn't reached an agreement by mutual consent. Arguably, the new FIFA Regulations on contractual stability were not yet applicable to the particular situations of Nesta - whose transfer is a domestic one besides - and Ronaldo, who had signed their contracts with respectively Lazio and Internazionale before 1 September 2001, but still, the implementation of

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<sup>1039</sup> Minten, "Interview. Sporteconoom Stefan Késenne over voetbal en economie: "Betaal een voetballer als hoogleraar, dat is toch niet slecht", *De Standaard*, 9 August 2002; Colin, Financiële revolutie in Belgisch voetbal noodzakelijk", *De Standaard*, 13 August 2002.

<sup>1040</sup> According to press reports Munitis, Flavio Conceicao or Solari.

these new rules could have induced them to rely on the applicable Italian labour law to terminate their respective contracts unilaterally in case a transfer by mutual consent seemed to be impossible, even though the FIFA Regulations of 1997 prohibited this kind of behaviour. Essentially, the fact that they didn't even seem to take into consideration this course of action may mean two things: on the one hand, it is entirely plausible and even likely that, even though the possibility of unilaterally terminating a contract constitutes a real option nowadays, players will still prefer to follow the traditional road of a transfer by mutual consent of all parties involved in the transaction to avoid misunderstandings or displeasure in the after all small world of football, and will have recourse to unilateral action only as a kind of last resort. This illustrates that law and regulation only have a secondary role to play in the whole area of sport. On the one hand, it is often murmured that the new Regulations are too imprecise and complex and therefore didn't come to the fore during the transfer discussions.<sup>1041</sup> This criticism, which might become a real stumbling block for the existence of the new rules if it persists, must be taken seriously. FIFA should therefore clarify the existing ambiguities and uncertainties as soon as possible.<sup>1042</sup> The ongoing dispute between Belgian rivals Anderlecht and Bruges on the transfer of Alin Stoica may already constitute a golden opportunity to do so, even if it concerns a domestic transfer: the Brussels team claims a sum of 400.000 Euro of compensation for the training and education of the player, while Bruges refuses to pay anything, claiming that the Romanian midfielder was acquired transfer free after the expiry of his contract with Anderlecht. Undoubtedly to be continued...

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<sup>1041</sup> Mercy, "Acht maanden oude transferregeling Fifa ingewikkeld, onduidelijk en niet toegepast", *De Standaard*, 17 May 2002.

<sup>1042</sup> Van Laere, "Onduidelijkheid troef na akkoord Fifa, Uefa and Europese Commissie over nieuw internationaal transfersysteem", *De Standaard*, 7 March 2001.



## **The Nationality Issue: Alle Menschen werden Brüder?**

- Friedrich von Schiller, Ode an die Freude -

### *Introduction*

A second set of rules elaborated by the national and international sporting federations the viability of which has been contested from the point of view of conformity with the Community provisions on freedom of movement turn around the issue of nationality.<sup>1043</sup> The competent authorities within any given sports discipline have always imposed in their regulations a certain number of conditions which must be fulfilled by the athletes active in this discipline before they get the green light to take part in the official competitions staged by these associations. With these requirements which must strictly be complied with, the sporting federations generally pursue the objective of homogeneity and regularity of its competitions, characterised by a certain equality of chances and uncertainty with regard to the outcome of the tournament or the championship. Broadly summarising, these prerequisites normally have regard to different matters, ranging from specifically acquired capacities or skills of a sportsman to participate in a certain sporting contest, over his social status as amateur or professional sportsman, to his physical aptitude (age, gender, weight, etc), etc. In this context, often also nationality requirements pop up amongst these criteria of eligibility. Undeniably, just as was the case with the transfer rules discussed previously, in some way or the other, these provisions thus substantially limit the athlete's opportunities to compete in the sporting events of his choice. Specifically, in the case of conditions linked to nationality, these limitations basically take two different forms: firstly, some provisions absolutely and completely bar athletes from becoming

member of a certain team or deny them the right to perform their sporting activities in a sporting competition simply on grounds of their – foreign<sup>1044</sup> - nationality; secondly, other rules are less far-reaching and contain only quantitative restrictions on the possibility for clubs to contractually engage and/or field players of a foreign nationality in official contests or national federations to select individual athletes to participate in competitions. It has already been alleged on several occasions that these nationality requirements constitute also unlawful restrictions on the right to freedom of movement of persons as guaranteed in the European Community Treaty. In this chapter, this particular assertion will be examined in detail. It shall also be evaluated whether the Court of Justice in its case law has managed to reconcile the interests of the sportsmen to see their free movement rights safeguarded with the claims of the sporting associations to respect their freedom of association and to take duly into account the specific needs of sport. Particular attention will be paid to the status under Community law of national sports teams.

This chapter will be composed of two sections. The first section will consist of a broad overview of the different sorts of nationality clauses which are frequently found in the regulations of various sporting associations. Some attention will also already be paid to the reaction of the Court of Justice towards these nationality requirements in some of its case law. The second section will be entirely dedicated to an in-depth analysis of the Court's judgements on the compatibility of the nationality restrictions with Community law. Especially the Court's ruling in the *Bosman* case will constitute the core of the examination. It will be unveiled on the basis of some concrete examples that the concept of national teams is less than simply straightforward. In this context, the often somewhat peculiar situation of naturalised sportsmen and of athletes with a dual nationality will also be taken into consideration.

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<sup>1043</sup> For a more general analysis of to what extent the concept of nationality may constitute an obstacle to the full realisation of the internal market, see, inter alia, Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff, 1995).

<sup>1044</sup> As will become clear below, the concept of 'foreign nationality' may mean different things in sporting circles: it may refer to a foreign *legal* nationality, but equally to a foreign *sporting* nationality, which essentially means that the athlete in question cannot be selected to play for the national representative team. For a more elaborate analysis, see Dubey, *La libre circulation des sportifs en Europe* (Bruylant, 2000), at 417-437.

## ***§1: The Nationality Clauses: An Overview***

In general, nationality criteria take two different forms: either they impose an absolute ban on participation of foreign sportsmen in certain sporting competitions, be it at international or at domestic level, or they are somehow more flexible, involving quota, implying that they quantitatively restrict the participation of foreign athletes in sporting events, or even the actual engagement by sport clubs of foreign players. These two different types of nationality restrictions will be dealt with successively in this paragraph. On each occasion, specific reference will be made to the relevant case law of the Court of Justice on this matter.

### **I. ABSOLUTE PROHIBITION OF PARTICIPATION**

#### **1. At international level**

At international level, international sporting federations have organised some sporting competitions, such as continental championships or world championships, to promote their discipline and to improve the relations between the different national federations.<sup>1045</sup> During these events, the national or representative teams of the national federations which are a member of the international federation enter in the arena with each other in search for sporting glory. From the early beginning onwards, these competitions have been very peculiar events, surrounded by a lot of traditions and characterised by the presence of many typically national elements: the teams participating in these contests carry the name of the country they represent; they generally wear an outfit in the typical colours of the country; national anthems are played before or at the end of the games or the races, etc. Within this particular context, it is no surprise that the sporting federations have explicitly stipulated in their regulations that only athletes who possess the nationality of the country of the federation can represent their country during these sporting manifestations. In football, for example, the applicable FIFA Regulations provide that each player who is a citizen of a country on grounds of the laws of that country is qualified to play for the national or representative team of that country.<sup>1046</sup> Similarly, with regard to cycling,

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<sup>1045</sup> See for example Art 2.2 FIFA Statutes 2001.

<sup>1046</sup> Article 18 FIFA Regulations governing the Application of Statutes 2001.

the relevant UCI Regulations hold that the national federation can only select cyclists of its nationality to participate in the world championships.<sup>1047</sup>

At first sight, it appears nothing less than self-evident and belonging to common sense<sup>1048</sup> that the national team of a given country in a certain sports discipline is composed exclusively of athletes who have the nationality of the country which they officially represent. All the players of the 'Divine Canaries' that beat Germany in the final of FIFA's 2002 World Cup had the Brazilian nationality. However logical and socially acceptable the federations' rules to this effect may seem to be, they are undeniably discriminatory on grounds of nationality, as other sportsmen who do not have the nationality of a certain country are simply excluded from playing for the national team of that country. The world's number one and 2002 Wimbledon champion Lleyton Hewitt can only play Davis Cup tennis for Australia, he's not entitled to compete for, for example, France, whereas French nationals Sébastien Grosjean or Arnaud Clément can play for 'les bleus'. Now, Article 12 of the European Community Treaty unequivocally states that "within the scope of the Treaty, any discrimination on grounds of nationality shall be prohibited." From the point of view of the application of Community law, the lawfulness of this specific nationality condition therefore suddenly appeared to be problematic.

In the seventies, this issue was indirectly raised for the first time in the case of *Walrave and Koch v International Cycling Union*.<sup>1049</sup> Bruno Walrave and Noppie Koch were two Dutch nationals who used to act as pacemakers on motorcycles in medium distance cycle races with so-called stayers, who cycle in the lee of the motorcycle. They provided their services for remuneration under agreements with the stayers or the cycling associations or with private sponsors. Walrave and Koch were generally considered by the UCI itself to be amongst the best pacemakers in the world, and used to participate in these races as pacemakers for stayers of other nationalities, in particular Belgians and Germans, because of a paucity of top-class Dutch stayers at the material time.<sup>1050</sup> In 1970, the UCI undertook to amend its rules about the conduct of the World Championships for motor-paced races, so as to provide that, as from 1973, a pacer should

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<sup>1047</sup> Article 9.2.002 par. 1 UCI Regulation 2000.

<sup>1048</sup> This terminology was used by O'Keeffe & Osborne, "The European Court Scores a Goal", *The Industrial Journal of Comparative Labour Law and Industrial Relations* (Summer 1996) at 127.

<sup>1049</sup> Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405.

be of the same nationality as his stayer. The UCI declared that it had proceeded to this amendment because the World Championships were intended to be competitions between national teams. Walrave and Koch sought to repeal this rule, which they considered as a severe constriction of the market in which they could sell their skills, and instituted formal proceedings before the national courts, claiming that they were unlawfully discriminated against on grounds of nationality. The Dutch tribunal which was seized of the case (the 'Arrondissementsrechtbank' in Utrecht) decided to stay the proceedings and referred the matter to the Court of Justice, requesting for a preliminary ruling on the question whether Articles 12, 39 and 49 EC must be interpreted in such a way that the provision in the rules of the UCI relating to medium-distance world cycling championships behind motorcycles, according to which the pacemaker must be of the same nationality as the stayer, is incompatible with them.

Initially, the Court couched its preliminary ruling in terms of principle, holding that in view of the objectives of the Community, the practice of sport is subject to Community law only to the extent that it constitutes an economic activity within the meaning of Article 2 of the Treaty.<sup>1051</sup> It subsequently specified that when such activity has the character of gainful employment or remunerated service, it comes more particularly within the scope, according to the case, of the freedom of movement of workers or the freedom to provide services.<sup>1052</sup> These provisions, which give effect to the general rule of Article 12 of the Treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer.<sup>1053</sup> At this point, the Court introduced an important proviso, declaring that this prohibition of discrimination does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.<sup>1054</sup> It also added that this restriction on the scope of the provisions in question must remain limited to its proper objective.<sup>1055</sup> Ultimately, the Court left for the national court to determine, on the basis of the information furnished, the nature of the activity submitted to its

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<sup>1050</sup> Warner AG in Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1423.

<sup>1051</sup> *Walrave*, par. 4.

<sup>1052</sup> *Walrave*, par. 5.

<sup>1053</sup> *Walrave*, par. 6.

<sup>1054</sup> *Walrave*, par. 8.

<sup>1055</sup> *Walrave*, par. 9.

judgement and to decide in particular whether in the sport in question the pacemaker and the stayer do or do not constitute a team.<sup>1056</sup>

## 2. At national level

At national level, sporting federations have only occasionally reserved participation in the domestic competitions exclusively to the nationals of their country.<sup>1057</sup> In general, foreign sportsmen were allowed to freely take part in these championships as well.<sup>1058</sup> The most famous exception which proverbially confirms the rule was probably the formal decision of the Italian football federation to completely close the frontiers after the early exit of the national team at the 1966 World Cup in England following an unexpected elimination by North Korea. The idea behind this drastic measure excluding non-Italian nationals from playing in the Italian championship was to create more space again in the line-up of the Italian clubs for Italian football players, especially youngsters, so that ultimately, the 'squadra azzurra' would return to greatness again. This complete ban on foreign football players would only be lifted from the 1980/81 football season onwards, after the Italian federation had been forced to do so by the judicial authorities.<sup>1059</sup>

Indeed, on its turn, also this purely domestic condition of nationality had been subject to a legal challenge in the case of *Donà v Mantero*.<sup>1060</sup> The factual circumstances of this case were the following: Mario Mantero, former chairman of the Italian football club of Rovigo, had entrusted Gaetano Donà with the carrying out of some enquiries in football circles abroad in order to discover players potentially willing to play for his team Rovigo. In this respect, Donà arranged for the publication of an advertisement in a Belgian sporting newspaper with this object in view. However, Mantero refused to consider the offers submitted as a result of the advertisement and to repay to Donà the expenses incurred in the publication of the advertisement. Hereupon, Donà

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<sup>1056</sup> *Walrave*, par. 10. Ultimately, Walrave and Koch declined to press for judgement at national level, after the UCI had allegedly threatened to remove the paced races from the programme of the world championships.

<sup>1057</sup> For example, the presence of foreigners in professional football in Greece was completely prohibited until 1974.

<sup>1058</sup> See European Commission, *The Impact of European Union Activities on Sport* (Brussels, 1994), n° 1012.

<sup>1059</sup> When the federation didn't immediately comply with the terms of the *Donà* ruling, a second request for a preliminary ruling had been filed with the Court of Justice. In this context, it may be interesting to point out that already in the next World Cup in 1970 in Mexico, Italy forced its way through to the finals, only to bow for mighty Brazil. And 12 years later, Italy did win the 1982 World Cup in Spain. Coincidence?

commenced a legal action before the national judge, requesting that Mantero be ordered to pay the expenses in question. Mantero replied that Donà had acted prematurely, and in support of his statement he<sup>1060</sup> referred to the combined provisions of Articles 16 and 28<sup>(g)</sup> of the 'Rules of the Italian Football Federation', according to which only players who are affiliated to that federation may take part in matches as professional or semi-professional players, membership in that capacity being in principle only open to players of Italian nationality. In his opinion, it would be possible to consider the engagement of foreign players only when this 'blocking of the frontiers' has been abandoned. To this, Donà replied that the provisions quoted were invalid on the ground that they were contrary to Articles 12, 39 and 49 of the Treaty. By order of 7 February 1976, the national judge (the Giudice Conciliatore of Rovigo) referred to the Court of Justice under Article 177 of the Treaty various questions concerning the interpretation of Articles 12, 39 and 49 of the Treaty. Essentially, the Court was asked to rule whether these provisions confer upon all nationals of the Member States the right to provide a service anywhere in the Community and, in particular, whether football players also enjoy the same right where their services are in the nature of a gainful occupation.<sup>1061</sup> Moreover, the national judge asked the Court to rule whether this right may also be relied on to prevent the application of contrary rules drawn up by a sporting federation which is competent to control football on the territory of a Member State.<sup>1062</sup>

In its final judgement, the Court firstly stipulated that any national provision which limits an activity covered by the Treaty provisions on the freedom of movement for workers and the freedom to provide services to nationals of one Member State is "incompatible with the Community rule".<sup>1063</sup> Subsequently, it reiterated its principled decision from *Walrave* that "having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty", only to proceed that this "applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service."<sup>1064</sup> Consequently, it logically ruled that where such players are nationals of a Member State they benefit in all the other Member States from the provisions of Community law concerning

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<sup>1060</sup> Case 13/76 *Donà v Mantero* [1976] ECR 1333.

<sup>1061</sup> *Donà*, par. 2.

<sup>1062</sup> *Donà*, par. 3.

<sup>1063</sup> *Donà*, par. 11.

freedom of movement of persons and of provision of services.<sup>1065</sup> After having reached this partial conclusion, the Court repeated the exception it had previously made in *Walrave* to the application of the Community rules to sporting rules, albeit in a slightly modified version, holding explicitly that "those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as for example, matches between national teams from different countries."<sup>1066</sup> Before referring the matter back to the national court for the final decision as to the determination of the activity at stake in the proceedings,<sup>1067</sup> the Court still declared once again that the restriction on the scope of the provisions in question must remain limited to its proper objective.<sup>1068</sup>

## II. RELATIVE LIMITATION OF PARTICIPATION

Apart from the longstanding general practice of strictly reserving participation to matches of the national team of a country in any given sports discipline to sportsmen who are nationals of that country, and the relatively exceptional situation of a complete prohibition of foreigners to take part in competitions at domestic level, sporting federations have usually allowed foreign athletes to perform their sporting activities together with national athletes in competitions both at national and international level. However, that is not to say that foreigners enjoyed an unrestrained freedom to deliver their performances. On the contrary, many, if not all associations have set limitations on the total number of foreigners who could be recruited and/or fielded in official matches or races. The actual quantitative restrictions imposed could vary from one national federation to another, from one sporting discipline to another, from one season to another, they differed according to the level of the competition, the age or the gender of the athletes, etc.<sup>1069</sup> However, these relative limitations all have in common that they were the concrete answer of the responsible federations' balancing exercise between on the one hand, the

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<sup>1064</sup> *Donà*, par. 12.

<sup>1065</sup> *Donà*, par. 13.

<sup>1066</sup> *Donà*, par. 14.

<sup>1067</sup> *Donà*, par. 16.

<sup>1068</sup> *Donà*, par. 15.

<sup>1069</sup> See also Garrigues, *Activités sportives et droit communautaire* (thesis Strasbourg, 1982), at 273 et seq.

clubs' quest for the best sporting performance and the best spectacle, the attainment of which may be dependent on or facilitated by the presence and participation of foreign sportsmen, and on the other hand, the need to maintain a certain competitive balance between the different clubs, the concern to preserve the traditional link between a club and its country, and the need to create a sufficient pool of national players for the national team.

## 1. The example of football

At some point, just as was the case with the absolute prohibitions imposed on foreign athletes to participate in certain contest or championships, also the more liberal and only partially restrictive nationality requirements became the subject of legal scrutiny in the *Bosman* case. Again, as has become clear from the previous chapters, the circumstances giving rise to the concrete dispute were to be situated in the sphere of professional football. From the 1960s onwards, many national football associations introduced rules, the so-called 'nationality clauses', restricting the extent to which foreign players could be recruited and/or fielded in a match.

### 1.1. Rules limiting the recruitment of foreign players

The applicable rules in Italy, for example, provide a nice illustration of the former situation. Until 1987, the Italian national football federation forbade clubs from the Serie A to have more than two non-Italian football players under contract. In this respect, it didn't make a distinction between EU and non-EU nationals. From the 1988-89 season onwards, clubs were entitled to engage a third foreign player.<sup>1070</sup> The federation also started to differentiate between EU and non-EU nationals: for example, in the 1995-96 season, clubs could conclude employment contracts with as many EU nationals as they wished; however, the recruitment of non-EU footballers was still limited to maximum three per club.<sup>1071</sup> Also in France, clubs weren't allowed to have more than two foreign players under contract either until 1979. Afterwards, the federations authorised clubs to freely engage players with a nationality of a Member State of the

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<sup>1070</sup> Transitory provision to Article 40 NOI – Federazione Italiana Gioco Calcio (FIGC) 1995.

<sup>1071</sup> Article 40.7 NOI – FIGC 1995.

European Union without reservation.<sup>1072</sup> However, in the 1995-96 season, maximum two non-EU nationals could be contractually linked to a French club.<sup>1073</sup>

### 1.2. Rules limiting the participation of foreign players

Furthermore, instead of or on top of limiting the number of foreigners to be contractually engaged, UEFA and several national federations had had recourse to the latter situation, quantitatively regulating the number of foreigners who could effectively be played during an official match. Already in 1978, UEFA gave an undertaking to Mr. Davignon, a Member of the Commission of the European Communities, that it would remove the limitations on the number of contracts entered into by each club with players from other Member States and would set the number of such players who may participate in any one match at two, that limit not being applicable to players established for over five years in the Member State in question.<sup>1074</sup> In 1991, following further discussions with Mr. Bangemann, a Vice-President of the Commission, UEFA adopted the '3+2' rule permitting each national association to limit to three the number of foreign players whom a club could field in any first division match in their national championships, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior. The same '3+2' limitation also applied to matches in UEFA's European Cup competitions for club teams.<sup>1075</sup> Interestingly, for the purposes of those clauses, nationality was defined in relation to whether the player can be selected to play in a country's national or representative team.<sup>1076</sup> Importantly, the '3+2' rule didn't constitute a ceiling, but a threshold: the national federations were entitled to allow more foreigners on the pitch.<sup>1077</sup> The examples from rules laid down by national federations which will be furnished in this context are all taken from rules applicable in the 1995-96 season, not by chance the year when the Court of Justice pronounced its ruling in the *Bosman* case.<sup>1078</sup> At that time, in Spain, for example, clubs could only engage four players who could not be selected for the Spanish national team. Only three of them could be fielded during one and the same official

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<sup>1072</sup> Article 114.2 par. 1 RA- Ligue Nationale Française (LNF) 1995/96.

<sup>1073</sup> Article 114.2 par. 2 RA-LNF 1995/96.

<sup>1074</sup> *Bosman*, par. 26.

<sup>1075</sup> *Bosman*, par. 27.

<sup>1076</sup> *Bosman*, par. 25.

<sup>1077</sup> See *Lenz AG* in *Bosman*, par. 40.

game.<sup>1079</sup> In France, the official match sheet could contain maximum three names of foreign players, regardless of whether they were EU or non-EU nationals, plus two 'assimilated' players. Maximum two of these players could be non-EU nationals. To be considered as an assimilated player, a foreigner had to have played in France during an uninterrupted period of five years, at least three of which in the junior youth categories.<sup>1080</sup> The situation in Italy was relatively comparable: only five players, out of which two assimilated players, who were not eligible to play for the national team could participate in an official match.<sup>1081</sup> Assimilated players were those foreigners, nationals of a country which was a member of UEFA, who had been licensed to play by the Italian federation during five consecutive seasons, out of which at least three in the junior categories.<sup>1082</sup>

## 2. The *Bosman* case

In the context of the dispute in *Bosman*, the national court – after all rather surprisingly<sup>1083</sup> - referred to the Court of Justice a specific question relating to the lawfulness of these nationality clauses in professional football, with which in substance it sought to ascertain whether Article 39 EC precludes the application of rules laid down by sporting associations, under which, in matches in competitions which they organise, football clubs may field only a limited number of professional football players who are nationals of other Member States.<sup>1084</sup> In its preliminary ruling on this nationality issue, the Court of Justice followed exactly the same scheme as it had used previously to decide the transfer issue: firstly, it considered whether the nationality clauses amounted to a restriction of the right to the free movement for workers, prohibited by Article 39 EC, before secondly, analysing whether this obstacle could be justified by an imperative reason in the general interest.

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<sup>1078</sup> For more detailed information, see for example Dubey, *o.c.*, at 251-254.

<sup>1079</sup> Article 289 RG – Regulacion Federacion España de Futbol (RFEF).

<sup>1080</sup> Article 114 RA – LNF 1995/96.

<sup>1081</sup> Article 40.7bis NOI – FIGC 1995.

<sup>1082</sup> Article 40.8 NOI – FIGC 1995.

<sup>1083</sup> See analysis below, §2, I.

<sup>1084</sup> *Bosman*, par. 115.

### *2.1. Existence of an obstacle to freedom of movement for workers*

In the first place, the Court of Justice recalled that Article 39(2) EC expressly provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment.<sup>1085</sup> It declared that this provision has been implemented, in particular, by Article 4 of Regulation 1612/68<sup>1086</sup>, under which provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch, of activity or region, or at a national level, are not to apply to nationals of the other Member States.<sup>1087</sup> Subsequently, it decided that the same principle applies to clauses in the regulations of sporting federations which restrict the right of nationals of other Member States to participate, as professional players, in football matches.<sup>1088</sup> In this respect, the Court considered irrelevant the fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which the clubs may actually field them in official matches. It firmly ruled that “in so far as participation in such matches is the essential purpose of a professional player’s activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.”<sup>1089</sup>

### *2.2. Existence of justifications*

After having established the existence of an obstacle to the freedom of movement, the Court went on to consider whether that obstacle may be justified in the light of Article 39 of the Treaty.<sup>1090</sup> The KBVB, UEFA and the delegations of the intervening governments of Germany, France and Italy had forwarded a series of arguments so as to justify the contested nationality clauses on non-economic grounds, “concerning only the sport as such”.<sup>1091</sup> Firstly, they had

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<sup>1085</sup> *Bosman*, par. 117.

<sup>1086</sup> Regulation EEC No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ Special Edition 1968(II), at 475.

<sup>1087</sup> *Bosman*, par. 118.

<sup>1088</sup> *Bosman*, par. 119; *Donà*, par. 19.

<sup>1089</sup> *Bosman*, par. 120.

<sup>1090</sup> *Bosman*, par. 121.

<sup>1091</sup> *Bosman*, par. 122.

asserted that those clauses served to maintain the traditional link between each club and its country, a factor which they considered of great importance in enabling the public to identify with its favourite team and ensuring that clubs taking part in international competitions effectively represent their countries.<sup>1092</sup> Secondly, these clauses were arguably also necessary to create a sufficient pool of national players to provide the national team with top players to field in all positions.<sup>1093</sup> Thirdly, they advocated that these clauses also helped to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.<sup>1094</sup> Finally, UEFA pointed out that the '3+2' rule was drawn up in collaboration with the Commission and was to be reviewed regularly to remain in line with the development of Community policy.<sup>1095</sup>

In its reply to these submissions, the Court of Justice firstly reiterated its previous statement from the *Donà* decision to the effect that the provisions of Community law concerning freedom of movement of persons and of provision of services do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. Again, it also emphasised that such a restriction on the scope of the provisions in question must remain limited to its proper objective.<sup>1096</sup> Earlier in its judgement, the Court had already declared that this restriction therefore cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.<sup>1097</sup> In this particular context, the Court ruled that the contested nationality clauses did not concern specific matches between teams representing their countries but applied to all official matches between clubs and thus to the essence of the activity of professional players.<sup>1098</sup> Hence, it concluded that in those specific circumstances, the nationality clauses could not be deemed to be in accordance with Article 39 EC, "otherwise that provision would be deprived of its practical effect and the fundamental right to free access to

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<sup>1092</sup> *Bosman*, par. 123.

<sup>1093</sup> *Bosman*, par. 124.

<sup>1094</sup> *Bosman*, par. 125.

<sup>1095</sup> *Bosman*, par. 126.

<sup>1096</sup> *Bosman*, par. 127.

<sup>1097</sup> *Bosman*, par. 76.

<sup>1098</sup> *Bosman*, par. 128.

employment which the Treaty confers individually on each worker in the Community rendered nugatory.”<sup>1099</sup>

Subsequently, the Court of Justice judged that “none of the arguments put forward by the sporting associations and by the governments which have submitted observations detracts from that conclusion.”<sup>1100</sup> In the first place, it unequivocally quashed the argument based on the role served by the nationality clauses to maintain the traditional link between a club and country. According to the Court, a football club’s links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region or, in the case of the United Kingdom, the territory covered by each of the four associations. It subtly observed that even though national championships are played between clubs from different regions, towns or localities, there exists no such rule restricting the right of clubs to field players from other regions, towns or localities in such matches.<sup>1101</sup> Moreover, it pointed out that in international competitions, participation is limited to clubs which have achieved certain results in competition in their respective countries, without any particular significance being attached to the nationalities of their players.<sup>1102</sup> Secondly, the Court also failed to be convinced by the supposed indispensability of the nationality clauses for the good of the national team. It remarked that whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. In this respect, it referred to the rules of the sporting associations, according to which foreign players must be allowed by their clubs to play for their country’s national team in certain matches.<sup>1103</sup> Furthermore, it countered the defendant’s arguments by holding that “although freedom of movement for workers, by opening up the employment market in one Member State to nationals of the other Member States, has the effect of reducing workers’ chances of finding employment within the Member State of which they are nationals, it also, by the same token, offers them new prospects of employment in other Member States. Such considerations obviously apply also to professional footballers.”<sup>1104</sup> Thirdly, the Court rejected

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<sup>1099</sup> *Bosman*, par. 129. See on that last point Case 222/86 *Unectef v Heylens and others* [1986] ECR 4097, par. 14.

<sup>1100</sup> *Bosman*, par. 130.

<sup>1101</sup> *Bosman*, par. 131.

<sup>1102</sup> *Bosman*, par. 132.

<sup>1103</sup> *Bosman*, par. 133.

<sup>1104</sup> *Bosman*, par. 134.

the assertion that nationality clauses are an effective instrument to preserve a certain competitive equilibrium between clubs. It decided that although it has been argued that the nationality clauses prevent the richest clubs from engaging the best foreign players, those clauses are nonetheless not sufficient to achieve the aim of maintaining a competitive balance, since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to the same extent.<sup>1105</sup> Finally, as regards the argument that the 'three plus two' rule was drawn up in collaboration with the Commission, the Court firmly held that, "except in circumstances where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty"<sup>1106</sup>, and that "the Commission in no circumstances has the power to authorise practices which are contrary to the Treaty."<sup>1107</sup>

Consequently, as the Court refused to accept the grounds of justification invoked to uphold the nationality clauses, which were deemed to constitute an obstacle to the right to freedom of movement for workers, it ruled that Article 39 EC "precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States."<sup>1108</sup>

## §2: Legal Analysis

The decisions of the Court of Justice in the cases of *Walrave* and *Donà* in the seventies passed by relatively unnoticed. This had a lot to do with the fact that the Court remained after all relatively vague in the formulation of its rulings and left it up to the national courts to decisively settle the concrete disputes. Consequently, rather unsurprisingly, these judgements did not provoke a significant change in the mindset of the sporting associations, inducing them to make some modifications to their existing regulations and carry out some reforms in certain traditional

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<sup>1105</sup> *Bosman*, par. 135.

<sup>1106</sup> See also Joined Cases 142-143/80 *Amministrazione delle Finanze dello Stato v Essevi and Salengo* [1981] ECR 1413, par. 16.

<sup>1107</sup> *Bosman*, par. 136.

<sup>1108</sup> *Bosman*, par. 137.

sports practices, the conformity of which with the principles of Community law had become doubtful in the light of the Court's pronouncements. Conversely, the *Bosman* decision of the Court did produce a shock wave of dismay in sporting circles. It appears thus that the specificity rather than the novelty of the Court's stance in *Bosman* led to the supposed 'revolution'. The particular approach of the Court and the express statements made in Luxembourg relating to the issue of the nationality clauses in this case are therefore at the centre of the legal examination in this paragraph. Firstly, the issue of the jurisdiction of the Court to tackle effectively the compatibility of the rules on foreign players with the requirements of free movement law in *Bosman* will be subject to further scrutiny. Secondly, it will be examined what constitutes the exact legal basis for the privileged status granted by the Court in its sports-related case law to certain nationality requirements, and subsequently what is the precise extent of this restriction on the scope of the principle of non-discrimination on grounds of nationality. In this context, the legal position of naturalised athletes and sportsmen with dual nationality will be examined. Thirdly, some observations will be made on the particular way the Court in *Bosman* construed the infringement of Article 39 EC by the contested '3+2' rules. Fourthly, it will be evaluated whether the Court was right in rejecting as unmeritorious the various grounds of justification advanced by the sporting association and the several intervening governments to uphold the restrictive nationality clauses in *Bosman*.

## I. JURISDICTION OF THE COURT IN *BOSMAN*

It must be admitted that the second question the Belgian court referred to Luxembourg for a preliminary ruling in the *Bosman* case, in which it asked the Court of Justice specifically to pronounce its judgement on the compatibility of provisions contained in the regulations of national and international football federations restricting access of foreign players from the European Community to their competitions,<sup>1109</sup> somewhat came as a surprise. The contested nationality clauses undoubtedly affected the recruitment of players with a foreign nationality, but this appeared to be entirely irrelevant in the case at hand.<sup>1110</sup> After all, the French team of Dunkerque had effectively offered Bosman a contract of employment. At most, one could envisage the possibility of Bosman suffering a disadvantage in his future career because of the

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<sup>1109</sup> *Bosman*, par. 49.

<sup>1110</sup> See also Weatherill, "Case Note on *Bosman*", 33 *CMLRev.* (1996) at 1006-1008.

application of the rules on foreign players.<sup>1111</sup> The transfer rules which precluded a professional EU football player from freely moving to a club in another Member State, even after the expiry of his previous contract, constituted the real problem in this case. It was to be expected therefore that during the proceedings before the Court of Justice, the jurisdiction of the Court to give a preliminary ruling on the lawfulness of the nationality clauses has been challenged. More specifically, the KBVB, UEFA, the Danish, French and Italian governments and, in its written observations, the European Commission, have claimed that the question relating to nationality clauses has no connecting with the disputes, which concern only the application of the transfer rules. They asserted that the impediments to his career which Bosman claims arise as a result of the application of these clauses are purely hypothetical and therefore do not justify a preliminary ruling by the Court on the interpretation of the Treaty in that regard.<sup>1112</sup>

However, in its reply to those submissions, the Court stated that it had jurisdiction to rule on all questions referred to it by the national court.<sup>1113</sup> It generally ruled that the issues in the main proceedings, taken as a whole, were not hypothetical and that the national court had provided it with a clear statement of the surrounding facts, the rules in question and the grounds on which it believed that a decision on the questions submitted was necessary to enable it to render a judgement.<sup>1114</sup> Furthermore, with regard more particularly to the questions concerning nationality clauses, the Court indicated that the relevant heads of claim have been held admissible in the main proceedings on the basis of a national procedural provision permitting an action to be brought to prevent the infringement of a right which is seriously threatened. The national court considered that application of the nationality clauses could indeed impede Bosman's career by reducing his chances of being employed or fielded in a match by a club from another Member State,<sup>1115</sup> an assessment which the Court didn't call into question. The Court simply concluded

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<sup>1111</sup> In this context, consult also Lenz AG in *Bosman*, at par. 99: "A question is not hypothetical simply because the fact on which it is based has not yet occurred. A preventive action for a declaration is an important means of securing effective protection of legal rights."

<sup>1112</sup> *Bosman*, par. 57.

<sup>1113</sup> *Bosman*, paras. 59-61. The Court made reference to, *inter alia*, Case C-125/94 *Aprile v Amministrazione delle Finanze dello Stato* [1995] ECR I-2919, paras. 16-17; Case C-143/94 *Furlanis v ANAS* [1995] ECR I-3633, par. 12; Case C-83/91 *Meilicke v ADV/ORG* [1992] ECR I-4871, par. 32.

<sup>1114</sup> *Bosman*, par. 62.

<sup>1115</sup> *Bosman*, par. 64.

that these questions submitted by that court meet an objective need for the purpose of settling disputes properly brought before it.<sup>1116</sup>

Some commentators have criticised the Court's case law with regard to the admissibility of preliminary references as inconsistent, observing that "if the Court wants to answer a reference because it raises an interesting or important point of law, it will find a way to do so."<sup>1117</sup> Arguably, the precise reason lying at the basis of the readiness - or even eagerness - of the Court to settle the issue of the nationality clauses is to be found in the opinion which Advocate General Lenz delivered on this case. After an elaborate analysis of the recent relevant case law of the Court,<sup>1118</sup> the Advocate General conceded that that the Court of Justice "is at most entitled, but by no means obliged, to dismiss the question submitted in this case as inadmissible."<sup>1119</sup> Moreover, even though he acknowledged that rejection of the question is quite conceivable, he regarded it as "neither necessary nor appropriate".<sup>1120</sup> He emphatically recommended the Court not to make use of that possibility because he couldn't see how the question of the compatibility of the rules on foreign players with Article 39 EC could reach the Court in any other way than through individual challenge.<sup>1121</sup> In this respect, the Advocate General pointed out that the Commission, in spite of having frequently criticised those rules, has not brought an action under Article 226 EC for breach of Treaty obligations, as the prospects of success of such an action appeared it to be uncertain for procedural reasons. Furthermore, he also recalled that it has not been since *Donà* in the seventies that a request for a preliminary ruling concerning those rules has reached the Court. Presumably, players and clubs negatively affected by these nationality clauses are either unwilling or unable to have the matter clarified by the national courts. And even in the situation that a legal challenge is actually mounted, the Court of Justice is not ensured of being consulted by the national court. In the light of these considerations, Advocate General opined that it is extremely unlikely that a reference will ever again reach the Court which raises the question of the compatibility with Community law of the rules on foreign players.<sup>1122</sup> In his opinion, the Court would be "assisting in the administration of justice in the Member States" in answering the

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<sup>1116</sup> *Bosman*, par. 65.

<sup>1117</sup> Barnard & Sharpston, "The Changing Face of Article 177 References", 34 *CMLRev.* (1997) at 1144.

<sup>1118</sup> See Lenz AG in *Bosman*, paras. 68-119.

<sup>1119</sup> Lenz AG in *Bosman*, par. 111.

<sup>1120</sup> Lenz AG in *Bosman*, par. 98.

<sup>1121</sup> Lenz AG in *Bosman*, par. 112.

<sup>1122</sup> Lenz AG in *Bosman*, par. 117.

question; otherwise, regulation of this field would continue to be left to the whim of the sporting associations, something which he regarded as “scarcely tolerable”.<sup>1123</sup>

## II. PRIVILEGED STATUS OF NATIONALITY REQUIREMENTS IN SPORT

In this section, some issues which are of crucial importance for the purposes of this research are to be addressed: firstly, it will be examined whether the restriction on the scope of the principle of non-discrimination for certain matches of purely sporting interest must be situated inside or outside the Community Treaty framework. Secondly, the precise scope of this ‘restriction’ must be determined.<sup>1124</sup> In this context, the rights to freedom of movement of the athletes must be carefully weighed against the private interests of the sporting authorities.

### 1. Legal basis of the restriction

In *Walrave and Donà*, the Court accepted a restriction on the scope of Articles 39 and 49 EC, ruling that the principle of non-discrimination did “not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.”<sup>1125</sup> Substantially, there seemed to be nothing new under the sun with regard to this issue in *Bosman*, were it not for the fact that the Court this time seemingly introduced a conceptual difference, holding that the relevant Community provisions do not preclude “rules or practices *justified* on non-economic grounds which relate to the particular nature and context of certain matches.”(emphasis added)<sup>1126</sup> In its *Deliège* and *Lehtonen* decisions, the Court again conspicuously refrained from using the term ‘justified’, at least explicitly, and contented itself

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<sup>1123</sup> Lenz AG in *Bosman*, par. 117.

<sup>1124</sup> See also McCutcheon, “National Eligibility Rules After *Bosman*”, in Caiger & Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000) 127.

<sup>1125</sup> *Donà*, par. 14.

<sup>1126</sup> *Bosman*, par. 76.

with literally repeating its statement from the *Donà* judgement, referring however also to what it had ruled in *Bosman* in this respect.<sup>1127</sup>

It appears to be a complex task trying to analyse this 'restriction on the scope' of the relevant Treaty provisions in strictly legal terms on the basis of these judgements. Admittedly, in his opinion to the *Walrave* case, Advocate General Warner had already argued that an exception should clearly be made from the provisions of the Treaty against discrimination based on nationality for "rules of organisations concerned with sport that are designed to secure that a national team shall consist only of nationals of the country that that team is intended to represent". To this end, he referred to the test of the 'officious bystander', that is adopted, in the laws of some countries, to ascertain whether a term should be implied in a contract, and which seemed to him to be equally appropriate in the interpretation of the Treaty: "suppose that an officious bystander, at the time of the signing of the EEC Treaty, or, for that matter, at the time of the signing of the Treaty of Accession, had asked those round the table whether they intended that Articles 39 and 49 should preclude a requirement that, in a particular sport, a national team should consist only of nationals of the country it represented. Common sense dictates that the signatories, with their pens poised, would all have answered impatiently "Of course not" – and perhaps have added that, in their view, the point was so obvious that it did not need to be stated."<sup>1128</sup> This contribution of Advocate General Warner undoubtedly constitutes an interesting and valuable attempt to explain the existence of this restriction, but arguably, it is no more than that either, as he does not offer any further guidance on how to square this restriction within the specific framework of the Treaty. Equally, also Advocate General Lenz in *Bosman* was of the opinion that the Court's conclusion that rules prescribing that only nationals of a State are entitled to play for that country's national team are consistent with Community law appears "obvious and convincing", but he added immediately that "it is not easy to state the reasons for it."<sup>1129</sup>

In view of the relative obscurity surrounding the Court's decisions in this respect, several efforts have been undertaken in the legal doctrine to find a sound legal basis for these nationality restrictions. The search for an acceptable solution has been carried out both inside and outside the

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<sup>1127</sup> *Delière*, par. 43; *Lehtonen*, par. 34.

<sup>1128</sup> Warner AG in *Walrave*, at 1422.

<sup>1129</sup> Lenz AG in *Bosman*, par. 139.

formal Treaty framework. In the first place, one has examined whether the privileged status granted to certain matches of purely sporting interest could possibly be framed within the derogations to the free movement provisions which have been expressly provided in the Treaty. Concretely, the Treaty distinguishes between the public policy, public security and public health exceptions of Article 39(3) EC on the one hand, and the public service exception laid down in Article 39(4) on the other hand. Two out of the three grounds for exception laid down in Article 39(3) EC, namely those relating to public security and public health, could immediately be discarded, as they have nothing to do *in se* with the subject-matter concerned; it thus only remained to be seen whether the situation of these specified matches could be caught under the heading of public policy.<sup>1130</sup> Also this possibility was quickly abandoned though, in the light of the restrictive interpretation given to this derogation, both in the case law of the Court of Justice as in Council Directive 64/221<sup>1131</sup>. The Directive explicitly provides that measures taken on grounds of public policy must be based exclusively on the personal conduct of the individual concerned.<sup>1132</sup> Hence, it is clear that the public policy exception cannot be relied upon to uphold rules containing nationality requirements, whose general objective and effect is to prevent *a priori* nationals from other Member States to participate to specific matches which are considered to being of purely sporting interest.<sup>1133</sup> Furthermore, it has also been suggested to offer the national teams shelter from the application of the Community free movement provisions by means of the public service exception of Article 39(4) EC.<sup>1134</sup> However, in its case law,<sup>1135</sup> the Court has restrictively interpreted Article 39(4) EC in such a way that it “removes from the ambit of Article 39(1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities”, clarifying that “such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.”<sup>1136</sup> This

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<sup>1130</sup> See Dubey, *o.c.*, at 439-442.

<sup>1131</sup> Council Directive 64/221 of 25 February 1964 on the Co-ordination of Special Measures concerning the Movement and Residence of Foreign Nationals which are justified on Grounds of Public Policy, Public Security or Public Health (1963-1964) *OJ L* 117.

<sup>1132</sup> Article 3(1) Directive 64/221.

<sup>1133</sup> Weatherill, *Discrimination on Grounds of Nationality in Sport*, 9 *YBEL* (1989) at 66.

<sup>1134</sup> Van Nuffel, “Case Note on *Bosman*”, *Col. JEL* Vol. 2 (1996), at 359; Mortelmans, “Note to *Bosman*”, *SEW* (1996) at 147.

<sup>1135</sup> See, for example, Case 149/79 *Commission v Belgium* [1980] ECR 3881.

<sup>1136</sup> *Commission v Belgium*, par. 10.

possibility has effectively been rejected by most authors as being of no relevance to football.<sup>1137</sup> Arguably, even if one were still to accept generously that a national sports team in official competitions represents the nation and in some way or the other safeguards the general interests of the State, and that its constituent players are attached to their shirt and have a bond of allegiance with their country, it is indeed hard to sustain that representative national teams participate in the exercise of powers conferred by public law.<sup>1138</sup> It would presumably require too wide a reading of the different concepts involved to enable matches between national sides to be qualified as employment in the public service covered under Article 39(4) EC. Consequently, therefore, also Article 39(4) EC should in all likelihood be eliminated as a possible legal basis for the special treatment conferred by the Court to certain matches of purely sporting interest.

Since it appeared to be inconceivable to indicate an appropriate legal foundation to the Court's démarche with regard to specified matches of purely sporting interest within the Community Treaty, legal scholars have formulated some alternative propositions. According to Delanney, the nationality clauses had to be considered as a European custom which had been developed during the international competitions and which had continued to exist even after the entry into force of the Treaty of Rome, despite the fact that it has established principles which go against this custom. He argued that at that moment, the custom had simply acquired a *contra legem* character.<sup>1139</sup> In my opinion, it is not necessary to spend too much time on this thesis: firstly, written rules of sporting federations cannot be regarded as customs; and secondly, the adoption of a contrary law simply signifies that different rules have to be abolished or at least amended, it does not render them *contra legem*. Dubey advocated yet another explanation: according to him, the right to free movement of the individual athlete, guaranteed by the Community free movement provisions, collided with the right to freedom of association, protected by Article 11 of the European Convention for the Protection of Human Rights, and more specifically, the right of the associations to adopt rules and regulations.<sup>1140</sup> Within the European construct, both are considered being fundamental rights. To resolve a conflict of norms

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<sup>1137</sup> See, for example, Weatherill, "Discrimination on Grounds of Nationality in Sport", *o.c.*, at 66; Lenz AG in *Bosman*, par. 133.

<sup>1138</sup> See also Séché, "Quand les juges tirent au but", *CDE* (1996) at 374.

<sup>1139</sup> Delanney, "Observations à la suite de l'arrêt *Walrave*", *CDE* (1976) at 212.

<sup>1140</sup> Dubey, *o.c.*, at 449-450; see also Hilf, "Die Freizügigkeit des Berufsfussballspielers innerhalb der Europäischen Gemeinschaft", *NJW* (1984) at 522.

of equal rank in a particular situation, one proceeds to a careful balancing of all interests at stake, which is often referred to as the method of 'praktische Konkordanz',<sup>1141</sup> and which finally results in one fundamental right receiving priority over the other depending on the precise circumstances of the case. Consequently, he regarded the restriction on the scope of the free movement provisions conferred by the Court to certain matches of purely sporting interest as the outcome of the balancing exercise of these rights with the fundamental right of the football federations to adopt their own regulations for the practical organisation of the sport. Advocate General Lenz observed that the fundamental importance of Article 39 EC for the internal market, which has been expressly stressed by the Court, would not be given sufficient account by such a simple balancing of rights. He was of the opinion that only an "interest of the association which is of paramount importance" could justify a restriction on freedom of movement, and argued that such interests could be subsumed under the concept of imperative reasons in the general interest.<sup>1142</sup> This particular statement summarises a fundamental point of this thesis, which involves the clash of the supposedly private sphere of sport and the exigencies of Community law.

Interesting though the preceding theories may have been, the Court's special treatment of specific matches of purely sporting interest has nonetheless predominantly been explained in legal writing, either as a limited exception to the scope of the Community Treaty or as a restriction of the Treaty principles on freedom of movement which could nevertheless be justified by an overriding reasons in the public interest. After the Court's judgements in *Walrave* and *Donà*, the former explanation clearly prevailed over the latter; the Court's formulation in its *Bosman* decision threw the matter of the precise legal basis into turmoil again. O'Keeffe and Osborne asserted that the *Bosman* ruling effectively represented an important shift in the relationship between sport and Community law.<sup>1143</sup> They argued that, contrary to what the Court allegedly did in previous cases, namely examining whether a contested measure fell within the scope of the Treaty, the Court now found that all activities of professional football players have an economic character and therefore fall within the provisions relating to the free movement of persons. Consequently, arguments concerning the particular nature and context of certain matches of purely sporting interest may only serve as a possible justification to a measure which would

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<sup>1141</sup> Schroeder, *Sport und Europäische Integration* (thesis München, 1989) at 191 et seq.

<sup>1142</sup> See Lenz AG in *Bosman*, par. 216.

<sup>1143</sup> O'Keeffe and Osborne, "The European Court Scores a Goal", *o.c.*, at 120.

otherwise be qualified as unlawful. Summarising, the precise significance of this shift in perspective lies in the fact that once a sporting activity passes the threshold of 'economic activity', "sporting interest does not operate to take it outside the scope of the Treaty, but may constitute a justification for exceptions to the non-discrimination rule."<sup>1144</sup> Weatherill strongly objects to this point of view. His starting point was that discrimination on grounds of nationality is in principle only unlawful where it occurs within the scope of application of the Treaty. In his opinion therefore, a rule prescribing that only sportsmen who are nationals of a given country are entitled to be selected to play for the national team is not incompatible with EC law, even though it is discriminatory on grounds of nationality, "for the rationale for such choice lies in the function of the side as a representative of national pride, which is not a matter touched by EC law."<sup>1145</sup> He acknowledges that competitions between national representative sides nowadays have a strong commercial character and that players financially benefit from their 'international' status,<sup>1146</sup> but he maintains that national pride and identity are more important in this respect, and that the basis of team selection has no connection with economic objectives.<sup>1147</sup> The core of his argument is thus that such nationality-based discrimination is acceptable because it escapes the scope of application of the Treaty, not because it is justified. Weatherill therefore rejected the Court's terminology of justification in *Bosman* as improper and inexact, for it gives the wrong impression that discrimination falls within the scope of the Treaty, but is nevertheless permissible according to the standards of the mandatory requirements doctrine.<sup>1148</sup> Also Advocate General Lenz in *Bosman* adhered to this orthodox jurisdictional reading of the Court's judgements and referred to the limits of EC competence as the rationale for upholding such nationality clauses, in spite of their discriminatory nature.

There is something to be said for the latter point of view. When dealing with sport, the Community institutions have to be careful not to infringe the principle of attribution of competencies.<sup>1149</sup> Viewing the situation of these matches of purely sporting interest as an issue

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<sup>1144</sup> O'Keeffe and Osborne, "The European Court Scores a Goal", *o.c.*, at 121.

<sup>1145</sup> Weatherill, "European Football Law", *Collected Courses of the Academy of European Law, Vol VII, Book I* (Kluwer, 1999), at 354.

<sup>1146</sup> Players' contracts often contain specific clauses awarding financial bonuses to players who are selected for the national team.

<sup>1147</sup> Weatherill, "Case Note on *Bosman*", *o.c.*, at 1008-1009.

<sup>1148</sup> Weatherill, "European Football Law", *o.c.*, at 354.

<sup>1149</sup> See Article 5 EC.

which is in principle susceptible to Community law but which is nevertheless worthy of protection under the imperative requirements doctrine could be regarded as an encroachment of national or private competencies. However, it can no longer be maintained that matches between national teams are of purely sporting interest. Many championships in which national teams compete for sporting glory such as the football World Cup or the Olympic Games are huge commercial events generating enormous amounts of money. Equally, participation and/or success in these competitions has important financial repercussions for the athletes. From the perspective that there are obviously economic interests present alongside the traditional national pride and identity in these contemporary competitions, it seems thus more accurate and conceptually sound, even if practically interventionist, to adhere to the 'justification' theory. As has already been outlined above, the language of the Court in its judgements is not particularly revealing in this respect. The term 'justification' popped up for the first time in *Bosman*, only to disappear again in *Delière* and *Lehtonen*. Be that as it may, however, the Court did explicitly refer to its statement to this effect in *Bosman* in these last two decisions. The fact that the Court in these rulings dealt with this issue in the context of the applicability of the relevant free movement provisions then again might indicate that it considers the status of matches of sporting interest rather as an exception to the scope of the Treaty. This sole observation is however not sufficient to conclusively settle the matter. It is submitted that the Court should make an end to this controversy, not only for the sake of clarity, but also to avoid further disputes in the future. Up until now, in practice, it never actually mattered whether the Court regarded the restriction on the scope of the prohibition of discrimination on grounds of nationality as an exception to the scope of the Treaty or merely as an obstacle which was justifiable by imperative reasons in the general interest. The concrete outcome for the parties involved in the disputes was the same, as there was no infraction of Community law. Arguably, however, this will not always be the case. It is submitted that one can effectively conceive of situations in which it does make a difference whether the famous restriction amounts to an exception to the Treaty, placing the contested measure outside the reach of Community law, or rather to a justifiable barrier, which inevitably means that the delicate balance between sporting and economic interests one day might tilt in the other direction. The latter option gives the Community institutions or Community legislation, if such were introduced, much more say in how these issues must ultimately be determined and decided.

## 2. Precise scope of the restriction

After having analysed what could constitute the correct legal basis for the viability of this particular nationality restriction, in spite of its obviously discriminatory character, it still remains to be ascertained what the precise extent is of this restriction on the scope of the principle of non-discrimination on grounds of nationality. There has been considerable uncertainty surrounding this issue as well.<sup>1150</sup>

In *Walrave*, the Court held that the prohibition of discrimination for reasons related to nationality did not affect "the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity."<sup>1151</sup> Two years later, in *Donà*, the Court seemingly decided to narrow down this restriction for 'composition of teams' to 'certain matches', stipulating that Articles 39 and 49 EC did "not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries."<sup>1152</sup> On both occasions, the Court emphasised also that such a restriction on the scope of the provisions in question must remain limited to its proper objective and could, therefore, not be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.<sup>1153</sup>

The Court was criticised for not stating more precisely which matches it intended to be covered under the restriction of the scope of the principle of non-discrimination, and during which one could therefore lawfully discriminate on grounds of nationality. Only the fact that matches between national sides from different countries formed part of this restriction could be affirmed with absolute certainty. It may have turned out to be hard to find a rational legal explanation for this privileged status for national teams, as has been demonstrated in the previous

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<sup>1150</sup> See also *Dubey, o.c.*, at 455-466.

<sup>1151</sup> *Walrave*, par. 8.

<sup>1152</sup> *Donà*, par. 14.

<sup>1153</sup> See *Walrave*, par. 9; *Donà*, par. 15.

section, but substantially, the Court's concession in this respect has nevertheless met with unanimous approval. Presumably, plain common sense induced the judges in Luxembourg to arrive at this conclusion. In modern society, there are probably very few 'sacred houses' left, but the national sports teams definitely still constitute one of them.<sup>1154</sup> Apart from this after all rather self-evident assessment, however, the rulings in *Walrave* and *Donà* didn't really allow for more unequivocal assertions. At most, from the explicit use of the terminology "in particular" in *Walrave* or "such as, for example" in *Donà*, it could be inferred that the references to matches of national teams were probably of merely exemplary nature. Be that as it may, the Court didn't offer any further guidance as to which other situations might benefit from the same privilege it had conferred to national teams. This uncertainty led some authors to adopt a wide interpretation of this exception, so as to include also matches between clubs both at domestic and international level. In his opinion in *Donà*, Advocate General Trabucchi claimed that in the case of the composition of sports teams which compete for the national championship, there is "nothing to prevent consideration of purely sporting interest from justifying the imposition of some restriction on the signing of foreign players or at least on their participation in official championship matches so as to ensure that the winning team will be representative of the State of which it is the champion team. A condition of this kind seems all the more reasonable when it is borne in mind that the team which wins the national championship is often chosen to represent its own State in international competitions."<sup>1155</sup> And the Advocate General didn't even leave it there, holding that "the same naturally applies at the local level whenever there is a wish to make the local sports team really representative of the area or locality. Of course, in this second situation, the restrictions must extend not only to foreigners but to nationals who belong to a different locality from that represented by the local team. While, within those limits, the principle of engaging local players is, as one of the principles of freedom to manage one's own business, normally accorded unreservedly to sporting clubs, if the restriction means the exclusion only of foreign nationals, its justification as an exception to the full application of the rules on freedom of movement for workers or the freedom to provide services must be based on solid sporting or

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<sup>1154</sup> For a concurring opinion, see for example O'Keeffe and Osborne, "The European Court Scores a Goal", *o.c.*, at 127: "Although as Lord Mackenzie Stuart once memorably declared, as far as the Treaty is concerned, the Members of the Court could all be Russians, the same is not true, as far as the public is concerned, of the composition of national sporting teams."

<sup>1155</sup> Trabucchi AG in *Donà*, at 1344.

athletic requirements.”<sup>1156</sup> Conversely, other commentators favoured a more restrictive approach, arguing that discriminatory measures based on nationality could only be accepted for matches between national teams and matches between teams truly representative of other geographical entities.<sup>1157</sup> They considered that a professional football club cannot be regarded as a representative side analogous to the national team. In some way, a club may be viewed as representing a city, a region or a country, but in the great majority of cases,<sup>1158</sup> the players which constitute the team are not specifically engaged or selected on that basis or for that reason.<sup>1159</sup> As Hilf pointed out eloquently, ‘the identity and the origin of the individual player remain in the background’.<sup>1160</sup> Nowadays, teams composed of 11 home-grown players are really the rare exception. Understandably from this point of view, it was therefore submitted that Advocate General Trabucchi’s opinion that professional football teams could pursue discriminatory policies for reasons of pure sporting interest must be rejected.

In this respect, it might be interesting to look at what the Court of Arbitration for Sport (hereinafter further referred to as the ‘CAS’) had to say on this subject. The CAS was seized of a dispute between a professional basketball player and the international basketball federation.<sup>1161</sup> The player in question possessed both the Belgian as the American nationality. During the 1990-91 season, he played for a club in Switzerland. The next season, he was employed by a French team. On both occasions, his request for a licence from the national federations, signed by the player himself, only mentioned his American nationality. For the FIBA, the nationality of the player for sporting purposes was also the American one. Subsequently, the player was transferred to Maes Pils Mechelen in Belgium. He filed a request to be authorised to participate as a professional basketball player of Belgian nationality to the European competitions in which his club took part and to the international championships with the Belgian national basketball team. In first instance, FIBA and the Belgian basketball federation rejected his request, considering that the player was regarded as an American according to the applicable FIBA regulations. He was

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<sup>1156</sup> Trabucchi AG in *Donà*, at 1344.

<sup>1157</sup> See, for example, *Delaney, o.c.*, at 214.

<sup>1158</sup> Exceptions always confirm the rules of course: in Spain, Athletic de Bilbao still conscientiously adheres to its policy of contracting only players of Bask origin. Real Sociedad of San Sebastian surrendered the same policy at the beginning of the 1989-90 season.

<sup>1159</sup> Weatherill, “Discrimination on Grounds of Nationality in Sport”, *o.c.*, at 61.

<sup>1160</sup> Hilf, *o.c.*, at 521: “Die Person und die Herkunft der einzelnen Spieler bleibt im Hintergrund.”

<sup>1161</sup> CAS, 25 March 1993, *B. v FIBA*, Reports CAS 1986-1998, 287 et seq.

told that if he wanted to change his sporting nationality into Belgian, he had to comply with a waiting period of three years. Ultimately, the parties agreed to submit their dispute for resolution to the CAS. In its argumentation, the CAS affirmed that the participation of the player in ordinary matches of the national championship constitutes an economic activity, but emphasised that the same didn't hold true for performances in European club competitions.<sup>1162</sup> For the CAS therefore, matches played between clubs within the framework of the European Cup competitions could benefit from the exception for nationality clauses provided by the Court in *Walrave and Donà*.

Revealing or helpful as this arbitration may be, as long as the Court of Justice itself hasn't definitively settled the issue, some uncertainty will continue concerning the precise extent of the restriction of the scope of the prohibition of non-discrimination for the nationality clauses. In *Bosman*, the Court had another excellent opportunity to put an end to this, but again, it refrained from doing so. It firstly noted that "the nationality clauses do not concern specific matches between teams representing their country but apply to all official matches between clubs and thus to the essence of the activity of professional players."<sup>1163</sup> Subsequently, it held that "in those circumstances", the contested '3+2' nationality clauses could not be deemed compatible with Article 39 EC, because otherwise this provision would be deprived of its practical effect and the fundamental right of free access to employment conferred on each worker would be rendered nugatory.<sup>1164</sup> At first reading, these statements seem to imply that all matches to which these nationality clauses applied are excluded from the exception for matches of purely sporting interest. Practically, as the '3+2' clauses have been implemented both by the national federations and UEFA, this exclusion thus appears to concern the confrontations between clubs in the domestic championship as well as the matches they play in the European cup competitions. This is indeed the way the decision has been explained by most commentators. However, it is advocated that the Court's ruling in this respect also leaves room for an alternative interpretation. In the first place, in paragraph 128, the Court has used the terminology of 'teams representing their country', instead of the more usual 'nationals teams', as it had done in paragraph 127 or in *Donà*. The former concept seems to be larger than the latter one: the national teams unmistakably represent their country, but arguably, the same could equally be said about the clubs which

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<sup>1162</sup> CAS, 25 March 1993, *B. v FIBA*, Reports CAS 1986-1998, 287 et seq., points 9, 18 and 19.

<sup>1163</sup> *Bosman*, par. 128.

<sup>1164</sup> *Bosman*, par. 129.

participate in the European club competitions. After all, the actual number of football clubs a national federation is entitled to inscribe for UEFA's Champion's League or the UEFA Cup in a given season depends on the results which have been obtained by the clubs of that federation in the previous editions of these competitions. Sporting achievements of a certain club thus also come to the benefit of the other teams of the same country, which confirms the impression that a club not only competes for its own glory at international or European level, but also represents its country. Consequently, if the Court had really wanted to limit the exception for matches of purely sporting interest to matches between national teams, it should have simply said so, instead of using the wider and less straightforward concept of 'teams representing their country', with which it definitely conveys the impression that the exception may also include other matches which are not between national teams. Moreover, this partial conclusion is further reinforced by the following construction of the Court's decision: literally, the Court condemned the contested nationality clauses precisely because they applied to all official matches between clubs and thus to the essence of the activity of professional footballers. Upholding the contested '3+2' nationality clauses 'in those circumstances' would have meant to deprive Article 39 EC of all practical effect and to render the right of free access to employment redundant. Consequently, by means of an *a contrario* reasoning, it seems possible to assert that if nationality clauses were not applicable to all official matches, but only to matches between clubs competing at international level, they might be acceptable from the point of view of Article 39 EC, as these clubs are deemed to represent also their country during these competitions.<sup>1165</sup> This specific interpretation of the *Bosman* decision thus boils down to a recognition of the decision of the CAS in the previously described basketball case.

In the end, even after *Bosman* it was thus not unequivocally clear exactly which matches the Court considered being of purely sporting interest, and during which measures which discriminated on grounds of nationality could therefore be legitimately applied. Presumably however, some progress has nevertheless been made in this respect: on the basis of the ruling in *Bosman*, it seems possible to conclude that it is extremely improbable that matches between clubs in the domestic leagues will benefit from the sporting exception, as clubs cannot be regarded as representing their country when simply competing for the national title against the other teams of

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<sup>1165</sup> For a concurring opinion, see Dubey, *o.c.*, at 461-462.

the same country. From this perspective, it seems thus relatively safe to assume that Advocate General's Trabucchi's suggestion in *Donà* is effectively to be rejected.

Subsequently, the Court's ruling *Deliège* permitted another step forward. Purely textually, again nothing changed, as the Court initially simply referred to its earlier judgements in *Donà* and *Bosman* and maintained the exemplary nature of the exception for matches between national teams.<sup>1166</sup> However, some interesting observations can be made on the basis of the concrete application of the general principle to the particular circumstances of the case. Indeed, the Court decided that international sporting competitions of a high level – such as the Category A international judo tournaments in question – to which only athletes who have been selected for this purpose by the national federation to which they are affiliated can participate, regardless of their nationality, cannot be considered as events between national teams which might fall outside the scope of Community law.<sup>1167</sup> Arguably, it can be deduced from this statement that encounters between clubs in the context of international or European cup competitions, which are undoubtedly events of a high level, by analogy cannot benefit either from the exception for national teams, as the players which defend the colours of these clubs only have to be affiliated to the federation of which their employing club is a member, regardless of the specific nationality they possess.<sup>1168</sup> Besides, the Court did effectively drop the reference to 'teams representing their country' it used in *Bosman* and took up the language of 'national teams' again.

To sum up, the *locus standi* of the case law of the Court seems to be that both matches between clubs at domestic level as the international or European cup competitions in which clubs take part cannot benefit from the judicially created exception for sporting purposes which keeps Community law at bay. Currently, only matches between national teams fall beyond doubt under the scope of this exception. It is difficult to conceive of any other context in which certain matches may be considered of purely sporting interest. However, the Court rigorously holds on to the exemplary nature of the exception for national teams, so at least theoretically, this possibility still continues to exist. From the point of view of the application of Community law, this practical situation is probably rather satisfactory. It is submitted this issue could have been straightened out

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<sup>1166</sup> *Deliège*, par. 43.

<sup>1167</sup> *Deliège*, par. 44.

<sup>1168</sup> Similarly, *Dubey, o.c.*, 462-464.

much more quickly if the Court had been more explicit in the language of its decisions. However, it must be acknowledged though that the task of the Court in sports cases is not always all that easy: in the first place, it must necessarily render a judgement on the questions which are specifically put to it. Furthermore, it attempts to give enough guidance so that the national courts and the sporting associations can resolve the issues concerned, while it simultaneously tries to avoid providing too detailed information as to place itself in the role of the sporting authorities as rule maker. This fine line is not always easy to walk.

### **3. Naturalised athletes & sportsmen with dual nationality**

#### *3.1. Elaboration of the problem*

In all likelihood, the 'restriction on the scope' of Articles 39 and 49 EC is this limited to matches between national teams. In this respect, it is worth looking into a separate category of athletes who are confronted with instances of nationality discrimination, in spite of the fact that they do possess the legal nationality of the Member State in which they undergo this discrimination. This is the particular case of sportsmen who went through a naturalisation procedure and sportsmen with a dual nationality. In theory, the obstacles they encounter may be of an absolute and exclusionary or rather of a relative character, and may be situated both at club level as at the level of the national teams. In practice, most problems are related to the specific issue of the national teams.

Some practical examples, taken from the sporting associations' regulations governing the situation in different sports disciplines, may serve to illustrate this matter. In football, the relevant FIFA provisions stipulate that any footballer who is a citizen of a country in virtue of that country's laws shall in principle be eligible to play for the national or representative team of that country.<sup>1169</sup> However, if a player has been included in the national or representative team of a country, he shall not be permitted to take part in an international match for another country.<sup>1170</sup> This rule covers the situation of a naturalised athlete: once a football player has worn the national shirt of a country during an international match in an official competition, regardless of the level

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<sup>1169</sup> Article 18.1 FIFA 2001 Regulations governing the Application of the Statutes.

at which the competition takes place, he cannot play for another national team any more, even if he adopts the legal nationality of that country through official channels. For sporting purposes, he is considered to have the nationality of this first country. Equally, players who possess dual nationality and are therefore in principle qualified to play for more than one national association, will be deemed to have committed themselves to one association when they play their first international match in an official competition at any level for that association.<sup>1171</sup> According to the FIFA rules, the only players exempt from this rigid principle are those whose nationality has been changed not voluntarily, but as the result of an international decree either granting independence to a region, or ceding part of one country to another.<sup>1172</sup> At club level, there are in general no problems in this context: a player who obtains the legal nationality of a country through naturalisation is simply entitled to participate to both domestic and international club competitions under his newly acquired nationality, in the same way as the other native players.

In basketball, the situation of this particular group of athletes is similar. In the first place, according to the International FIBA Regulations, only a player who holds the legal nationality of a country and has fulfilled the terms of eligibility according to the appropriate internal regulations is eligible to play for the national team of that country.<sup>1173</sup> Subsequently, the FIBA rules stipulate that any basketball player with two legal nationalities or more, by birth or by naturalisation, may choose at any age the national team for which he wishes to play. Be that as it may, however, if a player is selected for the national team by a national federation after reaching the age of 18, he is under an obligation to make his choice. If the player turns down the summons, he may only still choose the nationality/nationalities of the other country/countries, unless he declares in writing, within 15 days of receiving the summons, that he has nevertheless opted for the national team of the country that summoned him first.<sup>1174</sup> Furthermore, just as in the FIFA regulations, it is also here provided that any basketball player having played in a main official competition for a national team for which he is eligible, is considered as having chosen the national team of that country. These choices are in principle irrevocable.<sup>1175</sup> However, there does exist a small

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<sup>1170</sup> Article 18.2 FIFA 2001 Regulations governing the Application of the Statutes.

<sup>1171</sup> Article 18.2 FIFA 2001 Regulations governing the Application of the Statutes.

<sup>1172</sup> Article 18.3 FIFA 2001 Regulations governing the Application of the Statutes.

<sup>1173</sup> Article 3.3.1. FIBA 2002 Regulations governing the National Status of Players.

<sup>1174</sup> Article 3.3.2. FIBA 2002 Regulations governing the National Status of Players.

<sup>1175</sup> Article 3.3.2. FIBA 2002 Regulations governing the National Status of Players.

exception to this general rule: with the express agreement of the two national federations concerned, FIBA may authorise a player having played on a national cadet team of a country in a main official competition of FIBA, to play for a national team of a new country of which he has acquired legal nationality. A player thus authorised to change national teams may do this only once in his lifetime though and may not, after his change, play again for the team of his first country.<sup>1176</sup> It is effectively stated that after having played in the junior, young people's or senior age category for a national team of a country in a main official competition of FIBA, a player may no longer, under any circumstances, play for any national team of another country.<sup>1177</sup> Moreover, the FIBA rules provide that a national team participating in an international competition may have only one player on its team who has acquired the legal nationality of that country by naturalisation or by any other means after having reached the age of 16.<sup>1178</sup> Finally, with regard to the international club competitions, it is stipulated that the composition of the teams is not subject to any limitation concerning the legal nationality of the players. The possibility is left open, however, for national federations to establish more restrictive regulations.<sup>1179</sup>

In athletics, the relevant rules are much more flexible. The statutes of the International Association of Athletics Federations (hereinafter referred to as the 'IAAF') firstly stipulate as a general rule that during the Olympic Games, the World Championships, the World Cups, the Continental Championships and some other important international meetings,<sup>1180</sup> the national federations which are members of IAAF shall be represented only by citizens of the country which the affiliated member represents.<sup>1181</sup> Subsequently, the statutes provide that once a contestant has represented any member federation in one of the aforementioned competitions or meetings, he may thereafter in principle no longer represent any other member in such

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<sup>1176</sup> Article 3.3.5. FIBA 2002 Regulations governing the National Status of Players.

<sup>1177</sup> Article 3.3.4. FIBA 2002 Regulations governing the National Status of Players.

<sup>1178</sup> Article 3.3.3. FIBA 2002 Regulations governing the National Status of Players. This provision does not apply to those athletes whose eligibility was defined prior to the new regulations come into force.

<sup>1179</sup> Article 3.4. FIBA 2002 Regulations governing the National Status of Players.

<sup>1180</sup> For more details, consult Rule 12.1 a), b) and d) IAAF Statutes:

- a) Olympic Games, World championships and World Cups;
- b) Continental, Regional, or Area Championships open to all IAAF Members in the Area or Region (i.e. Championships over which IAAF has exclusive control, comprising only athletics events);
- d) Continental, Regional, or Area Cups and Age Group Events.

<sup>1181</sup> Rule 12.10.1 IAAF Statutes.

championships or meetings. Nevertheless, the IAAF has agreed upon some exceptions to this principle in the following circumstances:

- a) the incorporation of one country into another;
- b) the creation of a new country created by Treaty;
- c) acquisition of a new citizenship. In this case, the athlete in question cannot compete for the new country for a period of at least three years after the date when the athlete last represented another member federation in a competition or meeting mentioned in one of the categories under Rule 12.1 a), b), d). This period may be reduced to one year, if the two member associations concerned agree.
- d) Where an athlete holds, or is legally entitled to hold, citizenship of two or more countries, provided that it is at least three years since the athlete last represented the first member in any competition under Rule 12.1. a), b), d). This period may be reduced to one year, if the two members concerned agree.

It emerges clearly from these almost randomly chosen examples of regulations from different sports disciplines that the international sporting associations have adopted a rather divergent attitude towards the phenomenon of athletes changing nationality or sportsmen with a dual or even multiple nationality, or at least in part. In the first place, there appears to be an almost general consensus amongst federations about the fact that athletes who possess a certain legal nationality, regardless of whether they obtained it through naturalisation or whether they also have yet another legal nationality, can take part in national and international competitions for their club of affiliation or on an individual basis without reservation or any further due, in exactly the same way as the 'ordinary' national sportsmen of that country. Secondly, however, opinions seem to differ somehow on the question of whether these two particular categories of sportsmen should be allowed to participate in international matches of the national team of the country of which they possess the legal nationality. As long as these sportsmen have not yet represented the national team of the country of their previous or other nationality in an official international game, the federations of the country of the new or the other nationality do not seem to object against the presence of these athletes in their representative national side. However, it becomes an entirely different story when these sportsmen have already defended the colours of another national team in official international matches. To cover this situation, the international

associations have introduced varying provisions in their respective regulations, ranging from a strict and unequivocal interdiction to wear the shirt of a second national team, such as in football, over an almost equally restrictive prohibition in basketball, with one small exception for members of the national representative side in the youth category of the cadets, to a principled permission in track and field athletics, provided that the athletes concerned comply with the waiting periods foreseen in the regulations. From a more legal point of view, the situation can be broadly summarised as follows: in order for an athlete to be able to represent the national team of a country in a certain sports discipline, it is absolutely necessary that he possesses the legal nationality of that country. However, this is not a sufficient condition: in principle, the athlete must also have the sporting nationality of that country. For some federations, a sportsman has irrevocably acquired the sporting nationality of a country once he has played for the national team of that country in an official contest during an international competition. Thereafter, he can no longer represent another national team. Other federations adopt a more lenient attitude and stipulate that a sportsman may change his sporting nationality provided he fulfils certain conditions.

It must be admitted that the lack of consensus amongst the international sporting associations appears somewhat as a surprise. To a certain extent at least, one would have expected that the federations, in the respective exercise of their tenaciously safeguarded regulatory autonomy, would have achieved more harmony on this particular point. After all, it concerns the composition of the representative national sides, which constitute the sign-board of a national federation and whose matches and specific performances at international level are supposed to be the ultimate crowning of their federation's efforts and investments at domestic level. However, the simple determination that the different international federations have failed to reach unanimity on this issue probably reflects the fact that the situation of sportsmen who have previously already taken part in international matches for any given national team and who are now desirous of playing for another national team is not all that straightforward. It is of course precisely this crucial role which a national team occupies in its federation's activities which has provoked this dilemma. Virtually every sporting association regards a selection for the national team as the highest honour which can be awarded to an athlete during his career, namely the right to represent his country during international matches. In the opinion of some associations, to earn

this honour, it does not suffice for a player to simply possess the nationality of the country in question and to figure amongst the best sportsmen of his generation. In addition, the player in question also has to give evidence of a special bond of allegiance with his country. In general, this specific bond of allegiance is presumed in the situation of athletes who have obtained the legal nationality of their country by birth. This is however not always the case for players who have acquired this nationality through naturalisation or for players who have more than one nationality. For some federations, the circumstance that these players on another occasion have already played for the national team of another country is sufficient to decisively exclude that they might have the required allegiance with their new country. Conversely, other federations proceed from the assumption that the mere possession of the legal nationality inherently comprises the necessary link with or the attachment to a particular country. At most, sportsmen who are naturalised or have a dual nationality might have to fulfil a waiting period before they are entitled to perform for the national side of the country of their new or other nationality if they have already represented another national team. In any event, whatever the precise underlying reason for any given sporting association's positioning on this particular issue may be, the disharmony between the various sporting disciplines is to be deplored.<sup>1182</sup>

### *3.2. Legal assessment*

Obviously unsatisfactory as it may appear to be that athletes performing in one discipline are entitled to compete for different national teams during their sporting career, whereas their colleagues from other disciplines are outright prevented from doing so, the question arises as to whether this is a matter for regulation by Community law. Hence, in this context, it should not be forgotten that this is an issue of considerable importance. In the current sporting constellation,

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<sup>1182</sup> When ice skating ace Bart Veldkamp won the gold medal on the 10.000 meter during the Olympic Games of Albertville in 1992, the Dutch national anthem echoed through the stadium, but eight years later, during the 2000 Olympic Games of Nagano, he won the bronze medal on the same distance for Belgium. Equally, 800 meter athletics world record holder Wilson Kipketer currently engrosses medals for Denmark at various World and European Championships, although he was prevented from taking the start at the 2000 Atlanta Olympics because the Kenyan federation refused to release him, which meant that he had to sit out a waiting period of three years after his naturalisation before he could run under the Danish flag. To the contrary, however, Bayern Munich talent Owen Hargreaves' acceptance of England coach Eriksson's call to play for England at the 2002 FIFA World Cup effectively meant that the youngster will never be able to defend the colours of the German Mannschaft, even though he possesses both nationalities. Indeed, former Belgium striker Luis 'Lulu' Oliveira was only allowed to score goals for the Red Devils because he had never played for the Brazilian seleção before he acquired the Belgian nationality through his marriage with a Belgian woman.

participation in these international events is not only extremely rewarding from a purely sporting point of view, but also has important and appealing financial repercussions for the sportsmen involved. Apart from the prize money to be won at these events and the financial bonuses awarded by the national federations to the athletes that compose the national team, sportsmen are generally also able to convert their international status during other competitions, in the form of start premiums or improved contractual terms. It is therefore quite comprehensible that most athletes are normally keen to acquire such an international status.

In this respect, the sporting associations have consistently claimed that the composition of the representative national sides is an issue which belongs to the preserve of the association's autonomous regulatory competence. In the case of *Walrave*, the Court of Justice did indeed acknowledge that the formation of national teams is a question of purely sporting interest and therefore amounts to a restriction on the scope of Community law.<sup>1183</sup> However, already in the subsequent case of *Donà*, the Court of Justice subtly modified the terms of this restriction, explicitly holding that the Community provisions "do not prevent the adoption of rules or of a practice *excluding foreign players* from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only" (emphasis added).<sup>1184</sup> Arguably, this specific wording represents a limitation of the proposition adopted by the Court in *Walrave*. Advocate General Lenz opined in *Bosman* that the Court was right in doing so, suggesting that the Court was presumably not unaware that the question of the composition of teams could very well be dominated by non-sporting motives.<sup>1185</sup> Two examples may illustrate this point: it is often murmured that former Brazilian team coach Zagallo was put under heavy pressure by shirt sponsor Nike to include superstar Ronaldo in the line-up for the 1998 World Cup final in Paris, in spite of the fact that the attacker was in an apparent state of illness and nowhere near able to play an international game of that calibre. Also, shortly after Italian football club AS Roma was quoted on the international stock exchange, its management board approved of the incoming transfer of Japanese midfielder Nakata. This decision provoked a substantial increase of the value of the shares, given the interest in the Far East in European football. In both situations, the composition of the team was thus

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<sup>1183</sup> *Walrave*, par. 8.

<sup>1184</sup> *Donà*, par. 14.

<sup>1185</sup> Lenz AG in *Bosman*, par. 138.

prompted by other factors than purely sporting considerations. Since its judgement in *Donà*, the Court has always rigorously referred to this latter statement in its later case law relating to this matter. It can thus relatively safely be assumed to be an acquired fact that the restriction on the scope of the Community provisions, granted by the Court to the sporting federations, does not comprise the whole issue of the composition of the national teams, but is more limited, presumably, taken literally, to rules or practices excluding foreign players from taking part in certain matches for reasons of purely sporting interest.

As has been discussed above, according to Weatherill, and concurred with in this respect by Advocate General Lenz, this restriction on the scope of the principle of non-discrimination on the grounds of nationality must be conceived as a kind of limited exception to the scope of application of the Treaty. Consequently, this exception must probably be interpreted strictly. By means of an *a contrario* reasoning, it might therefore be argued that rules or practices excluding *national* players from participation in certain matches, such as matches between national teams, even if it were for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, do not benefit from the limited exception on the scope of the Community Treaty provisions and thus have to be evaluated upon their compatibility with Community law. The regulations of the sporting federations preventing athletes who obtained a new legal nationality through a process of naturalisation or who possess a dual nationality from taking part in international matches with the national team of the country of their new or other nationality if they have previously already played for the national team of the country of their former or other nationality, seem to fall squarely within this category. Hence, essentially, stripped of all formalities, these rules boil down to effectively preventing sportsmen from representing the national team of the country of which they are nationals. Besides, it is submitted that exactly the same intermediary solution, namely that the rules of sporting associations prohibiting a naturalised sportsman or a sportsman with dual nationality under certain precise circumstances to play for their national side have to be examined upon their conformity with Community law, would be attained as well if one were to adhere to the proposition advanced by O'Keeffe and Osborne, according to whom the privileged status accorded by the Court to matches between national teams is not so much an exception to the scope of the Treaty, as a restriction which is justifiable for pressing reasons in the general

interest. As has already been outlined above, in their opinion sport is firmly subject to Community law insofar as it amounts to an economic activity. As soon as this threshold of an economic activity is passed, reasons of sporting interest must operate under the justification umbrella. Arguably, this is clearly the case in this situation.

At this particular stage, it remains of course to be verified whether the rules of the sporting associations under examination actually constitute an infringement of the principle of free movement of persons which is laid down in Article 39 EC. Provisions strictly reserving selection to the national team of a country to nationals of that country are as such clearly instances of direct discrimination on grounds of nationality, as non-nationals are simply denied the right to represent the national team of a country. However, in this context, one is confronted with rules prohibiting nationals of a country to play for the national team of their country, on the condition that they have already represented the national team of another country previously. In these precise circumstances, they are deemed to have the sporting nationality of that other country. The basis for the distinction is thus the sporting nationality rather than the legal nationality of the sportsmen in question. Legally speaking, these rules appear to be indistinctly applicable, as they are foreigners who might escape their application just as well as there are nationals who might be caught under these rules.<sup>1186</sup> Presumably, however, in practice, they turn out to be indirectly discriminatory, as these rules are principally aimed at foreigners, who are more likely to have already played for the national team of another country than the one of the country they wish to represent at a later stage, rather than at the nationals of that second country. Besides, in any event, evidently, these specific regulations of the sporting associations are liable to preclude or deter the access of naturalised sportsmen or sportsmen with a dual nationality to international matches with their national team in other Member States of the European Union and therefore constitute a restriction which is in principle prohibited by Article 39 EC.

Furthermore, whatever the precise grounds of justification may have been that were traditionally successfully invoked to preserve the discriminatory rules on the composition of the national team, strictly reserving places in the national team of a country to nationals of the Member State in question, they definitely cannot be used in this particular context: naturalised

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<sup>1186</sup> See also Dubey, *o.c.*, at 422-424.

athletes and athletes with a dual nationality are excluded from taking part in international matches with the national team of their country, in spite of the fact that they do possess the legal nationality of that country, on the negative condition that they have already represented another national team in the past. It is submitted that this proviso is too restrictive and should consequently be rejected. Sportsmen who have acquired a new nationality through a naturalisation process should be entitled to represent the national team of the country of their new nationality, even if they previously have already taken part in international matches for the national team of the country of their former nationality. The same should also hold true – possibly with even more force – for athletes with a dual nationality. To underpin this assertion, one could refer, by analogy, to the use of the public service exception in Article 39(4) EC.<sup>1187</sup> In the case of *Sotgiu*, the Court of Justice made clear that the use of Article 39(4) EC was limited to restricting the admission of foreigners into the public service. Once they were considered being sufficiently trustworthy or loyal to the state to be admitted to such employment, there was no reason any longer for treating them differently on account of their nationality.<sup>1188</sup> Similarly, one could convincingly argue that if foreigners are sufficiently integrated and loyal to a State for the nationality of that State to be conferred upon them, there are no grounds anymore for treating them differently from other nationals of that State and they should therefore be entitled to represent the national team of that country in the sporting discipline in which they are active. To further substantiate this submission with an extra-legal argument, it suffices to refer to the Olympic Charter, elaborated by the International Olympic Committee, the highest official sporting organ. In the bye laws to Rule 46 on the nationality of the athletes, it is stipulated that a competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant international federation, and who has changed his nationality or has acquired a new nationality, is nevertheless entitled to participate in the Olympic Games to represent his new country. The athlete in question only has to sit out a waiting period of at least three years since he last represented his former country. This period may be reduced or even cancelled, with the agreement of the National Olympic Committee's and international federation concerned, by the IOC Executive Board, which takes

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<sup>1187</sup> For more general information, see Craig & de Burca, *EU Law. Text, Cases and Materials* (OUP, 2003) at 722-728.

<sup>1188</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR, par. 4.

into account the circumstances of each case.<sup>1189</sup> The same also holds true, *mutatis mutandis*, for competitors who are a national of two or more countries.<sup>1190</sup>

After having postulated the general principle, it is necessary to add some further subtle refinements. In the first place, athletes who have adopted a new legal nationality through naturalisation normally lose their previous nationality. It speaks for itself that they are in these circumstances no longer entitled to participate in international matches with the national team of the country of their former nationality. Obviously, the situation of sportsmen with a dual nationality is somewhat different, as they contemporaneously possess two different legal nationalities. As such, it does not seem possible to exclude *a priori* that they have a strong bond of allegiance with both countries of their nationality at the same time. As a result, in principle, they should also be able to play for both national teams more or less concurrently. At this point, it is nevertheless felt some necessary limitations should be imposed. For reasons of clarity and, even more so, to preserve the homogeneity of international competitions, these players should be enjoined to make a choice of national team at the start of each international competition and subsequently stick to this choice, at least until the next championship starts. Take the hypothetical example of a skilful football player with a Belgian and French passport, born out of a Belgian-French couple. In August 2002, at the beginning of the pre-qualification stage for the UEFA European Championships to be held in Portugal in 2004, the player has to decide whether he will be available for selection for either the 'red devils' or 'les bleus'. Once he has made his choice, he can only represent the national eleven of his preference during the entire pre-qualification stage and the final stage of the tournament. This entails that if he were to choose for France and they do not manage to obtain a ticket for the finals, whereas Belgium does, he still cannot join the Belgian squad on their way to Portugal. However, in theory there is nothing to preclude the player from changing his choice at the start of the introductory phase in August 2004 leading up to the 2006 FIFA World Cup in Germany. Strictly legally speaking, it seems thus perfectly feasible that the player participates in the European Championships with France and in the World Cup with Belgium. Finally, several sporting associations make the admission to the national team of a country conditional upon the fulfilment of a waiting period since the athlete in question has

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<sup>1189</sup> Rule 46, Bye Laws 2, 2001 IOC Olympic Charter.

<sup>1190</sup> Rule 46, Bye Laws 1, 2001 IOC Olympic Charter.

last represented the national side of the country of his former or other nationality. Arguably, such a waiting period is acceptable provided it is proportionate in relation to the relatively short duration of a sporting career. In any event, the relatively frequently used waiting period of three years appears to be excessive. A period of one year seems to be more appropriately adapted to the particular circumstances.

#### **4. The difficult definition of what constitutes a national team**

From the analysis effectuated above, it has emerged clearly that, from the point of view of the application of Community law, it makes a crucial difference whether any given sports match or competition is to be considered as an encounter between national teams or a contest between individual athletes representing their country or alternatively, merely as a championship to which clubs and sportsmen participate in the first place for their own account. From this perspective, it is thus essential to determine with absolute precision what specifically constitutes the national team of a country in a sporting discipline and when an athlete competing in an individual meeting must be considered as representing his country. At first sight, this assessment may appear to be almost ridiculously easy. However, it is submitted that in practice, this question is not always as straightforward as it may seem. The following two examples, taken from two previous Court case, may serve to illustrate this point. In the case of *Walrave*, there was no discussion about the fact that the sporting activity in question was carried out in the framework of a competition opposing athletes representing their countries. The dispute turned around the question of whether the paced races constituted an individual sporting discipline or rather a team sport. Subsequently, in *Deliège*, it was unequivocally questioned whether the performances of the judoka during international category A tournaments were delivered while she was defending the colours of her country or not.

##### *4.1. Walrave: team sport v individual activity?*

###### **4.1.1. Dilemma**

In *Walrave*, the Court of Justice ultimately left it for the national court to determine the nature of the activity in question and thus also to decide whether one had to conceive a paced

race as one between teams each consisting of a man on a motorcycle, known as a pacemaker, followed by one on a bicycle, known as the stayer; or rather as one between men on bicycles each of which is preceded by a man on a motorcycle. The actual dispute was never really resolved, as Walrave and Koch declined to press for a judgement from the national court after successful 'lobbying' from the UCI. Apparently, the UCI had threatened to remove the medium-distance races from the programme of the World Championships if the two plaintiffs had actually pursued their action. In the academic doctrine, the whole issue was presented as if the pacemakers were denied probable success or victory. It was suggested that they probably would not have been considered to be part of the representative national team, which would thus be composed solely of the stayer. Hence, a similar assessment would have enabled them to benefit from the application of the Community free movement provisions.

#### 4.1.2. Analysis

Admittedly, the issue is deprived of direct practical relevance, but it might nevertheless be interesting to add some critical comments in this respect, if only to have also a look at the other side of the issue. After all, as Advocate General Warner correctly stressed, "it makes all the difference" whether the pacer and the stayer are to be regarded as a team or whether the stayer is to be considered the only participant in the competition.<sup>1191</sup> In its observations for the hearing of the case, the European Commission proposed some matters for consideration: the technical characteristics of the activity in question (qualities of the pacemaker as a sportsman), the frequency of participation in the activities of the team, the scope of the organisers in applying the rules of the events and the conditions of the award of prizes for winning. It also held that the mere fact that the pacer actually participated in the event was not such as to decisively conclude that pacer and stayer formed a team.<sup>1192</sup> To this conclusion, also the president of the Arrondissementsrechtbank had come before the Court of Justice was seized of the matter, arguing that in a motor-paced race, the pacer, despite the skill he was called upon to exert, was no more than an auxiliary, comparable to a manager or masseur.<sup>1193</sup> Now, if the task of the pacemaker consisted only of standing on the accelerator pedal during the races, one could indeed have

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<sup>1191</sup> Warner AG in *Walrave*, at 1427.

<sup>1192</sup> See Report for the hearing in *Walrave*, at 1409-1410.

<sup>1193</sup> Report for the hearing in *Walrave*, at 1412.

plausibly argued that he didn't really form part of a team with the stayer. However, it is submitted that his involvement goes much further than that. A good pacemaker must know his stayer inside out, and they must rely on each other. The pacer must 'read' the race as well, feel or know when to slow down or accelerate, look for the perfect line on the track, 'protect' his cyclist. After all, by reason of his position behind the pacemaker, the stayer has only a very limited view of the race, which inevitably entails that he has to rely, at least partially, on his pacer for the tactics of the race.<sup>1194</sup> Arguably, it could therefore be asserted with equal force that his participation to the race exceeds beyond what is generally regarded as merely a helping hand to the actual competitor. Presumably, it should also be taken into account that prizes are presented to both the cyclist and the pacemaker.<sup>1195</sup> Against this, however, it can be remarked that in the official results of the medium-distance races behind motorcycles at the world championships, only the cyclists are classified. Besides, stayer competitions are organised by the cycling federations, not the federations responsible for motorcycling. During the proceedings, the plaintiffs maintained that the fact that in spite of the very clear distinction in sporting competitions between amateurs and professionals, professional pacemakers may take part in competitions for amateur cyclists, is a decisive factor in holding that pacer and stayer do not form a team.<sup>1196</sup>

Summarising, valuable arguments exist both in favour of and against considering pacers and stayers as forming part of a team, rendering it difficult to satisfactorily settle the matter. Advocate General Warner declined to express his opinion on the issue, leaving it for the national court to decide, but intuitively felt correctly that "it looks very much like a borderline case".<sup>1197</sup> In any event, at the least, one cannot *a priori* exclude the possibility that the national team in cycling races behind a motorcycle is effectively composed of the pacemaker and the stayer, who therefore have to share the same nationality. This circumstance would enable the UCI to validly uphold the rule that in the World Championships, pacer and cyclist must be of the same nationality. To support this conclusion, it may be useful to add just this last observation: if the pacer really doesn't influence the result of the races and the cyclist does everything on his own

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<sup>1194</sup> Report for the hearing in *Walrave*, at 1412.

<sup>1195</sup> Report for the hearing in *Walrave*, at 1414.

<sup>1196</sup> Report for the hearing in *Walrave*, at 1416.

<sup>1197</sup> Warner AG in *Walrave*, at 1426.

anyway, why did everyone consider Walrave and Koch as the best pacers of the lot then and did everyone want to work with them?<sup>1198</sup>

#### 4.2. *Deliège: national team?*

If the facts of the Walrave case have clearly demonstrated that it is not always self-evident to state with absolute certainty what precisely constitutes a sports team, the circumstances lying at the basis of the dispute in the case of *Deliège* reveal that is sometimes also far from clear whether the particular sporting performances of an individual athlete are delivered in the context of the national team or not. In the light of the preferential treatment reserved by the Court of Justice to national teams, it is obvious that the importance of this particular issue is not to be underestimated.

##### 4.2.1. Organisation of judo

In this respect, it might therefore be interesting to have a somewhat closer look at the decision of the Court in *Deliège*. The facts of the case are to be situated in the sphere of martial arts. Judo, a martial art, is organised at world level by the International Judo Federation (hereinafter referred to as the 'IJF'). At European level, the various national federations are grouped into the European Judo Union (the 'EJU'). The Belgian federation (the Ligue Belge de Judo, the 'LBJ') deals essentially with international competitions and is responsible for the selection of athletes with a view to participation in international tournaments. It comprises two regional leagues, the Flemish Judo Federation (the 'Vlaamse Judofederatie', 'VJF') and the French speaking Judo League (the 'Ligue Francophone de Judo, LFJ). Individual judo athletes are member of a club which, in turn, is also a member of the regional league. The regional league issues the licences which enable the

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<sup>1198</sup> It might be interesting to compare these races to some extent with jumping in equestrian sports: also here, there is participation to the contest of the horse. Clearly, without a good horse, even a brilliant jockey can't do miracles and win races. In jumping, the 'nationality' of the horse does not seem to matter. Arguably, however, the co-operation between a stayer and his pacemaker goes further, is to be situated than the feeling between a jockey and his horse. And of course, there is the convincing argument that a pacer is a person, and a horse is an animal. Ultimately, after carefully balancing all arguments, I believe that the pacer and his stayer do form a team and thus that the nationality of the pacer does matter in certain races.

athletes to take part in courses or competitions. Licence holders are required to accept the obligations imposed upon them by the statutes and regulations of the regional leagues.<sup>1199</sup>

#### 4.2.2. Judo Regulations

Traditionally, judo athletes are classified into 14 different categories according to sex and weight. In 1994, the EJU adopted a set of rules relating to the participation of the sportsmen in European Category A Tournaments. On the basis of the results of these tournaments, a European ranking would be made up which could serve as a possible basis for qualification for the 1996 Olympic Games of Atlanta. Only the national federations could enrol athletes to take part in these tournaments. For each European federation, there was a limit of 7 athletes of each sex. This implied that a federation could, in principle, list one judoka for each category. However, a federation could opt to inscribe two athletes for a particular category, as long as it didn't exceed the maximum of 7 men and 7 women. Federations could only enter athletes who were a member of that particular federation, their specific nationality was irrelevant for that purpose.<sup>1200</sup>

The selection criteria for the 1996 Olympic Games adopted by the IJF in 1993 stipulated that would be qualified for the Games, in each category, firstly, the first 8 in the most recent world championships, and furthermore, a number of athletes of each continent,<sup>1201</sup> to be selected on the basis of the results obtained by each judoka in a specified number of tournaments in the period leading up to the Olympics. In this context, the EJU rules stated that account would be taken of the best three results obtained at these Category A tournaments and the senior European Championships in the period extending from the 1995 World Championships to the 1996 European Championships. Importantly, the EJU rules also indicated that the places would be allocated to the national federations, and not to the athletes individually.<sup>1202</sup>

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<sup>1199</sup> *Delière*, par. 3.

<sup>1200</sup> *Delière*, par. 4.

<sup>1201</sup> Specifically for Europe, 9 men and 5 women in each weight category.

<sup>1202</sup> *Delière*, par. 5.

#### 4.2.3. Factual circumstances of the case

Since 1987, Christelle Delière, a Belgian national, had achieved excellent results in the under –52 kg category in both national and international judo tournaments. Delière claimed that the national and regional federations had improperly frustrated her career development since 1992 by preventing her from participating in several important international competitions.<sup>1203</sup> In particular, she complained about not being selected for the 1992 Barcelona Olympics, the 1993 World Championships or the 1994 and the 1995 European Championships. In December 1995, she was also prevented from taking part in the Category A international tournament of Basel. The events directly giving rise to the main proceedings concerned participation in the Paris Category A International Tournament of 10 and 11 February 1996. When the Belgian federation selected two other athletes to take part in the under –52 kg category, Delière took the matter to the national court, making an application for interim measures to the Tribunal of First Instance in Namur.<sup>1204</sup> She maintained that her activities as a judoka were to be considered as a genuine economic activity and that she deserved protection under Community Law, thereby questioning the lawfulness of the rules laid down by the EJU regarding the limited number of athletes from each national federation and the authorisations issued by the federations for participation in individual Category A tournaments. The national court decided to stay the proceedings and referred the matter to the Court of Justice, requesting a preliminary ruling essentially as to whether or not these rules are contrary to the Treaty of Rome, in particular Articles 49 to 55, 81 and 82 EC.<sup>1205</sup>

#### 4.2.4. Difference of opinion between Advocate General & Court of Justice

Interestingly, Advocate General Cosmas and the Court of Justice somewhat differed in their opinion on the issue of whether the judokas fighting at Category A international tournaments were to be considered as representing the national team of their federation during their performances on the tatami, and consequently reached an opposite conclusion as to the

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<sup>1203</sup> *Delière*, par. 7.

<sup>1204</sup> *Delière*, par. 9.

<sup>1205</sup> See *Delière*, paras. 16 and 22.

applicability of Community law to the circumstances of the case. Advocate-General Cosmas considered that in these international Category A tournaments, the competition is not only between sportsmen, but also between national teams, the main trophy consisting of the right to send athletes to the next Olympic Games. He acknowledged that it might not directly be the nationals teams that meet in these judo tournaments, but insisted that this assessment does not detract from the fact that these tournaments are of crucial importance for each of the national teams of the European countries.<sup>1206</sup> According to the Advocate-General, the principal objective of the contested rules of the EJU is the selection of national teams for Atlanta. These rules logically stipulate that one has to send the best European national teams to the Olympic Games. These teams are composed of the athletes who have delivered the best performances in their discipline. In the opinion of the Advocate-General, therefore, the European selection is rightfully effectuated on the basis of the success athletes had at certain international tournaments and the European championships.<sup>1207</sup> He argues that within this particular framework, in which the selection of national teams for the Olympics depends for a great deal on the results obtained at these international category A tournaments, it is perfectly logical that the national federations, which bear the sole responsibility to promote the interests of the national team, are also exclusively competent to designate the athletes whom it considers fit to defend the colours of the national team.<sup>1208</sup> Besides, also within this context, he accepted that the EJU has deemed it appropriate to limit the number of participants of each federation to one or two per weight category, in order to guarantee the national federation a system of equality of opportunities to gain a final selection for the Olympics.<sup>1209</sup> In the light of the foregoing, he concluded that the contested rules of the EJU were justified for "reasons which are not of an economic nature, which relate to the particular nature and context of such matches" and thus regarded the Community provisions on the freedom to provide services as inapplicable to the circumstances of this case.<sup>1210</sup> The Court dealt with this issue only in a very concise way. Contrary to its Advocate General, however, it answered the question on the applicability of Article 49 EC in the affirmative. The Court immediately postulated that it considered that the selection rules at issue in the main proceedings did not relate to events between teams or selected competitors from

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<sup>1206</sup> Cosmas AG in *Deliège*, par. 70.

<sup>1207</sup> Cosmas AG in *Deliège*, par. 71.

<sup>1208</sup> Cosmas AG in *Deliège*, par. 72.

<sup>1209</sup> Cosmas AG in *Deliège*, par. 73.

different countries.<sup>1211</sup> It emphasised heavily the fact that the athletes selected by the national federations to take part in these competitions do not necessarily have to be nationals of the Member State of the federation they represent, for it simply suffices that they are affiliated to the federation which selected them. Furthermore, also the mere circumstance that the results achieved by the judokas in these tournaments are taken into consideration when determining which countries qualify to send athletes to participate in the Olympic Games was not such as to persuade the Court to treat these competitions as events between national teams which might fall outside the scope of Community law.<sup>1212</sup>

#### 4.2.5. Analysis

Undeniably, this divergence of opinion does appear surprising at first sight. One wouldn't have expected there to be any controversy possible around the question of whether a certain athlete or sports team represents or constitutes the national team of a country in a given sports discipline. However, the concrete situation in the case of *Deliège* perfectly highlights that even this issue is not always that straightforward. Arguably, *in casu*, the ambiguity is the consequence of the complexity of the contested rules of the EJU, which do not point clearly in one or the other direction. On the one hand, the Advocate General was undoubtedly right in holding that a system attributing the points won at these category A tournaments to the different national federations, rather than awarding them to the individual athletes of these federations who actually fought for them, seems to suggest that the athletes in question have represented the countries of the federations to which they are affiliated during these competitions. The individual performance of the athlete is then subordinate to the greater goal of qualification of the national team for the Olympics. On the other hand, the Court of Justice equally correctly stipulated that it is hardly sustainable that a judoka is representing the national team of his or her federation if it is not even required that the athlete possesses the nationality of that country. In the contemporary sporting constellation, this would arguably undermine the whole essence of competitions between national teams. Clearly, one can thus adduce both arguments in favour of and against the submission that the judokas deliver their performances during these Category A tournaments as representatives of

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<sup>1210</sup> Cosmas AG in *Deliège*, par. 74.

<sup>1211</sup> *Deliège*, par. 44.

<sup>1212</sup> *Deliège*, par. 44.

the national team of their federations. Presumably, the entire issue was complicated by the fact that one was confronted with an intrinsically individual sport in this case. Once a selection for a certain sporting competition is made, the chosen sportsmen perform in the first place for their own account. This is a characteristic feature of individual sports, distinguishing them from team sports. The idea of representation is less present in individual sports than in team sports. At the end of the day, even if an individual athlete is representing his country in a particular competition, the result obtained always reflects more on the individual than is the case in team sports. Brazil, and not only Ronaldo, won the last football World Cup. The Chicago Bulls have dominated the NBA championship in the nineties, and claiming they were simply composed of Michael 'Air' Jordan plus four other players would somehow be doing injustice to players like Scott Pippen & Co. The performances of the individual players in team sports are being heavily scrutinised and commented in the media, applauded by the public and highly valued and remunerated by sponsors and there will be awards for individual players, but ultimately it is, or at least should be, the team that matters. Individual competitions are different: Michael Johnson may have won the golden medal for the USA in the 200 meter athletics at the 1996 Atlanta Olympics, but it is his individual world record breaking performance that stands out. Consequently, it is submitted that in individual sports, it is harder to speak of national representative teams. Be that as it may, it might nevertheless be interesting to make some additional observations relating to this particular case. Firstly, as has been argued in a previous section, nowadays one can no longer reasonably deny that in the current sporting context, many competitions between national teams have a substantial economic impact. If one nonetheless wants to uphold the special status awarded to national teams, one has to find a better, updated justification for it.<sup>1213</sup> The Court was not directly concerned with this in this case, but it definitely could have been an additional factor which finally helped tilting the balance in favour of the applicability of Article 49 EC. Furthermore, it must also be taken into consideration that there does already exist a specific judo championship for national teams. During this competition, national teams compete with each other in the following way: for each of the 7 weight categories, there is one fight between the two athletes which have been selected by their respective federations to represent their country. The winner of each fight scores one point for his or her country, to be added to the partial results of the other direct meetings. The national team the

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<sup>1213</sup> See also O'Keeffe & Osborne, "The European Court Scores a Goal", *o.c.*, at 126-127.

athletes of which win at least 4 out of the 7 separate fights wins the entire contest. The existence of this separate championship for national teams could be taken to suggest that in the Category A tournaments,<sup>5</sup> the athletes fight predominantly for themselves, and only subsidiary for their country. After all, the Court has always expressly stated that the privileged position of the national teams must remain limited to its objective. Besides, in *Bosman*, it further specified that this special treatment cannot go so far as to exclude the whole of a sporting activity from the scope of the Treaty.<sup>1214</sup> Qualifying these international Category A judo tournaments as events between national teams may practically have precisely this unwarranted effect. After all, objectively speaking, what is left in the judo landscape if these Category A tournaments, plus the European and World Championships and the Olympic Games are reserved to national teams? Finally, it is submitted that in the end, the fact that the points gained by the individual athletes at these tournaments are in fact gained for the national federation, does not necessarily imply that these tournaments concern matches between national teams. An analogy with the situation in the European Cups in football serves to exemplify this assertion: the results of the club teams in these competitions are taken into account to calculate the national coefficient on the basis of which one decides how many clubs of a particular country will be authorised to participate in the European Cups during the next season, but these clubs take part for their own account and their matches cannot be considered as being matches between national teams. Consequently, all in all, the Court probably reached the better conclusion in declaring the Community provisions applicable to the contested rules in question.

### III. THE SPECIFIC VIOLATION OF ARTICLE 39 EC IN *BOSMAN*

Clearly, the way in which the Court of Justice dealt with the issue of its own jurisdiction in *Bosman* to seize the matter of the nationality restrictions is open to some criticism. Presumably, the Court decided to declare this particular part of the request for a preliminary ruling admissible for predominantly opportunity reasons. It accepted the invitation of the national court to clarify the state of Community law in this respect with open hands, even though it was well aware of the fact that the case before it was strictly speaking a purely hypothetical one. Arguments of strict legal orthodoxy nonetheless succumbed for the judicial consciousness that

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<sup>1214</sup> *Bosman*, par. 76.

such an exquisite occasion to denounce discriminatory practices based on nationality in sport might not easily present itself again. However, furthermore, as if this ascertainment did not in itself suffice, also the concrete way in which the Court actually examined the conformity of the contested nationality clauses with the Community provisions on free movement of workers led to some controversy.

Both in reports<sup>1215</sup> and official documents<sup>1216</sup> on behalf of the European institutions as in doctrinal writings from legal scholars<sup>1217</sup>, rules of sporting associations limiting the number of foreign players to be engaged by clubs or fielded in official matches have invariably been earmarked as paradigm examples of discrimination on grounds of nationality, prohibited by Article 39 EC. This determination is undoubtedly correct with regard to the '3+2' rules which were under scrutiny in *Bosman*, entailing that a maximum of five foreign players can participate in official football matches between club teams. Basically, it only needed to be verified whether the contested nationality clauses were of a directly or merely indirectly discriminatory nature. At first sight, this may have appeared to be a rather straightforward and trivial evaluation exercise, but on closer scrutiny, in practice this issue turned out to be somewhat more complicated.<sup>1218</sup> Hence, the UEFA and the national federations had not all implemented these nationality clauses in exactly the same way. Some associations had simply taken the legal nationality of the football players as the distinctive criterion for the nationality clauses: were considered as foreigners in a certain country the players who did not possess the nationality of this country. This was the case in France<sup>1219</sup> and Germany<sup>1220</sup>, for example.<sup>1221</sup> On the contrary, however, UEFA and certain

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<sup>1215</sup> See for example, European Parliament, Report Janssen van Raay on the freedom of movement of professional footballers in the Community, PE DOC A2-415/88, 1 March 1989: "Considers the restriction on the number of foreign players entitled to play for a professional football team to be a proscribed discrimination on grounds of nationality, a contravention of freedom of movement pursuant to Article 39 EC." Also European Parliament, Larive Report on the European Union and Sport, PE DOC A3-0326/94, 27 April 1994.

<sup>1216</sup> European Parliament, Resolution on the freedom of movement of professional footballers in the Community, 11 April 1989, (1989) OJ C 120/33, at pts. 4, 5 and 15; European Parliament, Resolution on the freedom of movement of professional footballers, 21 November 1991, (1989) OJ C 326/208, pts. 2 and 5; European Parliament, Resolution on the European Community and Sport, 6 May 1994, (1994) OJ C 205/486, pts. 6 and 9.

<sup>1217</sup> See *inter alia*, Delanney, *o.c.*, at 213; Forlati Picchio, "Discriminazioni nel settore sportivo e Comunità europee", *Rivista di diritto internazionale* (1976) at 754; Hilf, *o.c.*, at 521; Palme, Hepp-Schwab and Wilske, "Freizügigkeit im Profisport – EG-rechtliche Gewährleistungen und Prozessuale Durchsetzbarkeit", *Juristen Zeitung* (1994) at 344; Weatherill, "Discrimination on Grounds of Nationality in Sports", *o.c.*, at 66.

<sup>1218</sup> See also Dubey, *o.c.*, at 417-436.

<sup>1219</sup> Article 114 RA-LNF 95/96.

<sup>1220</sup> §22.2a SpO-Deutsche Fussball Bund (DFB) 95/96.

other national federations, such as the Spanish<sup>1222</sup> and the Italian<sup>1223</sup> one, relied on the concept of sporting nationality as point of departure for the rules on foreign players: they distinguished between players who could and those who couldn't play for the national team of a certain country. In the former category of rules, foreigners were directly discriminated on grounds of nationality; also the latter set of rules were based on nationality discrimination, but this time of an indirect nature through reliance on the notion of sporting nationality.<sup>1224</sup> Arguably, at the time of the proceedings in *Bosman*, this specific assessment was of crucial importance in the process of deciding whether the *prima facie* discriminatory nationality clauses amounted to an infringement of the free movement provisions, as it was traditionally accepted that directly discriminatory measures could only benefit from the expressly provided Treaty justifications of Articles 39(3) and (4) EC, whereas indirectly discriminatory rules could in addition also be objectively justified. In this respect, it was therefore somewhat problematic, in view of the largely hypothetical character of the issue, that it was not really clear which nationality clauses precisely fell to be scrutinised by the Court.

Be that as it may, the Court of Justice steered the same pragmatic course as it had previously already done with regard to the transfer issue and stripped the contested nationality clauses of all ballast, reducing them to their essence, namely a quantitative limit on the number of professional players who are nationals of other Member States who can be fielded in official matches in competitions organised by the sporting associations. However, this kind of back-to-basics approach may very well have turned out to be successful in the context of the contested transfer rules, as it allowed for the Court's decision on this point to take on a more general dimension overstepping the confines of the specific circumstances of the case, it is not entirely clear whether the decision to reiterate the same experiment once again in the context of the nationality restrictions, proved to be as fortunate in the end. Arguably, this has a lot, if not everything, to do with the fact the Court couched its final decision on the contested nationality clauses in terms of a restriction on the freedom of movement for workers, in spite of the fact that these rules on foreign players were obviously discriminatory. Admittedly, the Court made an

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<sup>1221</sup> Arguably, this is also the case in England, where Scottish, Welsh and Northern-Irish footballers were considered to be national players on the basis of their UK passport. See Weatherill, "Case Note on *Bosman*", *o.c.*, at 995.

<sup>1222</sup> Article 289 RG-RFEF.

<sup>1223</sup> Article 40.8 NOI-FIGC 95.

<sup>1224</sup> See also Dubey, *o.c.*, at 420-423; Weatherill, "European Football Law", *o.c.*, at 354.

explicit reference to Article 39(2) EC, which provides that the freedom of movement entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment,<sup>1225</sup> and it also invoked Article 4 of Regulation 1612/68 implementing this Treaty provision.<sup>1226</sup> However, it left it at this principled exposition of these provisions and did not examine the matter any further with regard to principle of non-discrimination. Instead, the Court proceeded with a more general reasoning. It rejected as irrelevant the fact that the nationality clauses do not concern the employment of professional football players, but only the extent to which their clubs may actually make use of them in official matches. Subsequently, it simply concluded that insofar as participation in such matches constitutes the essential purpose of a footballer's activity, a rule restricting that participation evidently also restricts the chances of employment of the player concerned and therefore amounts to an obstacle to the principle of freedom of movement for workers, prohibited by Article 39 EC.<sup>1227</sup> Hereinafter, the Court moved on to the justification issue. As such, there is presumably nothing inherently objectionable about the Court's approach of the nationality clauses. But then, it cannot possibly be denied that these rules on foreign players of the sporting associations have a directly or at times at least an indirectly – as the specific way of implementation of the '3+2' rule may have been – discriminatory character. Viewed from this perspective, the Court's refusal to deal with these different types of nationality clauses separately and its preference for grouping them together under the more general umbrella of 'restrictions' inevitably entails some consequences. In the first place, it appears to confirm that the concept of 'restriction' has become the common denominator for infringements of the Community free movement provisions, comprising both directly and indirectly discriminatory measures as well as genuinely indistinctly applicable rules. Secondly, and more importantly, the fact that the Court has implicitly put directly and indirectly discriminatory measures on the same par seems to have repercussions on the issue of justification. Whereas previously, it was generally accepted that measures which were considered to be directly discriminatory could only be safeguarded by means of justifications expressly provided in the Treaty, this judgement of the Court seems to imply that they can now also be upheld on the basis of the judicially created doctrine of imperative requirements in the general interest, just like indirectly discriminatory and

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<sup>1225</sup> *Bosman*, par. 117.

<sup>1226</sup> *Bosman*, par. 118.

<sup>1227</sup> *Bosman*, par. 120.

genuinely non-discriminatory measures. Intrinsically, the decision to open to directly discriminatory measures the escape route of the objective justification method can undoubtedly be concurred<sup>4</sup> with for several reasons. Firstly, it is not always easy to distinguish whether a contested measure directly or only indirectly discriminates on grounds of nationality. The difference is often very subtle, as the various types of nationality clauses demonstrate. In these circumstances, the traditional strict dichotomy between directly and indirectly discriminatory measures may sometimes have been too rigid. Furthermore, it is not because in theory now the possibilities of justification of directly discriminatory measures appear to have increased that this will also effectively occur in practice. Essentially, it remains undeniably and invariably the case that direct discrimination constitutes the most pervasive and reprehensible type of obstacle to the right of freedom of movement. It therefore has to be treated accordingly. Within the uniform mandatory requirements doctrine, there is still enough discretion to make use of the principle of proportionality in a sufficiently flexible way, so as to ensure that directly discriminatory measures will not pass the threshold of objective justification too lightly. Besides, invoking overriding requirements to justify directly discriminatory measures injects additional flexibility in this subject-matter, allowing to take into account some arguments and objectives which may have not necessarily been foreseen or foreseeable at the moment of the drafting of the Treaty and which are nevertheless worthy of protection. Consequently, taking all factors into consideration, the Court's decision in this respect appears to be comprehensible and acceptable in principle. However, this detracts nothing from the fact that it remains nonetheless somewhat regrettable that the Court refrained from stipulating explicitly that nowadays even directly discriminatory measures may potentially be justified under the imperative requirements doctrine. It may very well be true that the Court's statements unmistakably seem to yield this particular conclusion, but as long as the Court has not explicitly confirmed it, there inevitably remains room for speculation.

#### **IV. THE ISSUE OF JUSTIFICATION IN *BOSMAN***

Once the Court of Justice had established that the contested nationality clauses constituted an obstacle to the freedom of movement for workers, it moved on to the next issue of whether that obstacle could be justified in the light of Article 39 EC. Contrary to its previous approach of

the transfer issue, the Court adopted an uncompromising stance on this point, keeping the door firmly shut for any possible techniques of somehow granting preferential treatment to domestic players. As far as inter-club competitions are concerned, foreign players of EU nationality have to be treated in exactly the same way as national players.<sup>1228</sup> Firstly, as has already been demonstrated in an earlier section of this chapter, the Court rejected that the '3+2' rules could escape Community scrutiny in a similar way as the matches between national teams, for which discrimination based on nationality is deemed lawful. Secondly, it also refused to recognise any of the arguments advanced for justification purposes by the football associations and some intervening governments – the maintenance of the traditional link between each club and its country, the creation of a sufficient pool of players for the national team and the preservation of a competitive balance between clubs - as overriding requirements in the general interest. In this section, it will be examined somewhat more in detail whether the Court's unequivocally negative assessment of these three arguments was correct.

By way of preliminary, it is worth observing briefly that according to some scholars, the Court could have easily dispensed with each one of these arguments in the first place. It has been asserted that all the reasons invoked to justify the existence of these nationality restrictions essentially are of an economic nature. As a result, there was supposedly no need for the Court any longer to verify the viability of these arguments.<sup>1229</sup> It must be acknowledged that the elements brought forward do indeed undeniably have a certain economic connotation. Nevertheless, it is submitted that the objectives aimed at are predominantly of sporting interest. Consequently, as the sporting factor outweighs the economic one, the Court presumably did the right thing by exploring further whether the arguments invoked could effectively serve to justify the nationality restrictions.

### **1. Maintenance of the traditional link between each club and its country**

According to the KBVB, UEFA and the German, Italian and French governments, the nationality clauses serve to maintain the traditional link between each club and its country. Their

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<sup>1228</sup> See also Weatherill, "European Football Law", *o.c.*, at 355-359.

<sup>1229</sup> See, *inter alia*, Hilf, *o.c.*, at 521; Martin, "'Discriminations', 'entraves' et 'raisons impérieuses' dans le Traité CE: trois concepts en quête d'identité", *CDE* (1998) at 607.

importance is supposed to be twofold: firstly, they enable that the public will identify with its favourite team, and secondly, they ensure that clubs taking part in international competitions effectively represent the country of the federation of which they are a member.<sup>1230</sup>

### *1.1 Identification of the spectator with its team*

The Court adopted a rather pragmatic approach in its rejection of this first suggestion. It considered that a football club's links with the country in which it is established cannot be regarded as more inherent in its sporting activity than its links with its locality, town, or region. Subsequently, it contented itself with pointing out that in spite of the fact that the national league is made up of clubs from different regions, towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such championship matches.<sup>1231</sup> The idea behind this simple affirmation seems to be that if the presence of players from other regions, towns or localities does not prevent a spectator to identify with its favourite team, also the presence on the field of players with a different nationality should not be a disturbing factor. Arguably, this implicit conclusion is correct. It can be illustrated with an example: Francesco Totti, born and bred in the popular quarter of Testaccio in the eternal city, will always take a special place in the hearts of the 'tifosi' of AS Roma, but for the rest, the fans do not really care all that much whether it is Montella from Tuscany, Cassano from Puglia or Batistuta from Argentina who partners their captain in attack. Each one of them enjoys the affection and the admiration of the crowd.

As also Advocate General Lenz expressed in his opinion, the intrinsic weakness of this argument is apparent.<sup>1232</sup> The great majority of supporters of a particular club are predominantly interested in the performances and the success of their team; their interest in the individual players the team is composed of only comes in second place.<sup>1233</sup> In principle, therefore, the participation in official games of foreign players does not prevent spectators from identifying with their team. On the contrary, on many occasions, the popularity of foreign players with the local fans reaches high peaks. This has a lot, if not everything to do with the fact that most

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<sup>1230</sup> *Bosman*, par. 124.

<sup>1231</sup> *Bosman*, par. 131.

<sup>1232</sup> Lenz AG in *Bosman*, at par. 143.

players of foreign nationality who are engaged by a club occupy an important position on the field or within the team and therefore play a decisive role in the team's performances. The legendary side of AC Milan that conquered first Italy and subsequently Europe and the rest of the world in the eighties with several victories in the European Cup and the Intercontinental Cup was a collection of extremely skilful Italians, but the undisputed stars of the team, who constituted the cherry on the pie, were the three Dutchmen Gullit, Rijkaard and Van Basten.

Besides, the counter-argument that the presence or participation of foreign football players does not obstruct the spectators in their identification with their favourite team is further corroborated by the concrete facts and figures on the football scene: nowadays, almost every team counts one or more foreigners within its ranks. It even occurs regularly that teams are composed of a majority of foreign players.<sup>1234</sup> Teams that are entirely made up of players who possess the nationality of the country in which the club is located have almost become a curiosity. In this respect, it may be necessary to introduce *a caveat* though: fans often have a higher level of tolerance towards local players. In general, they are less inclined to accept mediocre performances and disappointing results from foreign players. They are supposed to bring an added value to the team, and they are judged on their performances. Putting in hard efforts does not suffice to the fans. In this context, a large contingent of foreign players in the line-up of a team combined with a string of bad displays and/or few successes may have as a result that the supporters – temporarily - turn their back to the team. And in times of sporting misadventure, the normally richly rewarded foreigners are always at the centre of criticism. The recent malaise in FC Barcelona illustrates this point:<sup>1235</sup> at some stage in the late nineties, the 'blaugrana' had a Dutch coach, a Dutch training staff and no less than seven Dutch players under contract.<sup>1236</sup> When the team failed to attain its preconceived goals, the fans started reacting against the 'hollandisation' of the squad and urged for a larger Catalan representation in the club. Ultimately, Barcelona's management had no other option but to listen to the voice of the people and sack coach Van Gaal and sell several of the under-performing Dutch players. It is important to look at this issue from the right perspective: this is not a plea for the introduction or maintenance of

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<sup>1233</sup> See also Forlati Picchio, *o.c.*, at 759.

<sup>1234</sup> In this respect, see also Explanatory Statement to the Report Janssen van Raay, p. 12, pt. 15.

<sup>1235</sup> Traini, "Barcelone vire à l'orange", *L'Equipe*, 30 January 1999, at 8.

former clauses restricting the number of foreign players. Spectators and fans are and remain in the first place concerned about the spectacle offered by their team and the concrete results obtained and cups and honours won. The specific composition of the teams' eleven is a factor of secondary importance. It only comes to the forefront when the team fails to live up to the supporters' expectations. Nobody likes to be associated or identified with a losing team. Under these circumstances, the fans' possible perception that the contingent of foreigners is too large might thus become an issue. However, it is submitted that even then, clauses laying down quantitative restrictions on the number of foreigners to be engaged or fielded during official matches are not really a viable option, for one because one cannot predict with absolute certainty whether the fans will actually turn against the foreign players, and also because one cannot state with sufficient precision where the critical threshold or saturation point for foreigners is to be situated. Some spectators may be against too much involvement of foreigners, whereas others don't really care or simply do not care at all about how many players of different nationality actually defend the colours of their favourite team. Ideally speaking therefore, the club's should draw the line for foreign participation themselves.<sup>1237</sup> Such an individual club policy is by far to be preferred over the nationality clauses under scrutiny in *Bosman*.

Summarising, the Court's decision in this respect appears to be correct: supporters are more interested in the team's success than in its individual players. And besides, the nationality clauses do not appear to be an appropriate or necessary means to achieve the objective of identification of the spectators with their favourite team. In this context, the market corrects itself.

### *1.2. Representation by the club of its country in international competitions*

The Court also failed to be convinced by the second aim pursued by the nationality clauses in this respect, namely guaranteeing that clubs taking part in international competitions effectively represent their countries. It limited itself to stating briefly that participation in international competitions is restricted to clubs which have achieved certain results in the

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<sup>1236</sup> At some point, Ronald and Frank de Boer, Philippe Cocu, Boudewijn Zenden, Winston Bogarde, Patrick Kluivert and Michael Reiziger contemporaneously played for Barcelona.

<sup>1237</sup> See also Explanatory Statement to the Report Janssen van Raay, p. 12, pt. 15.

competition of their respective country, without there being any particular importance being attached to the nationalities of their constituent players.<sup>1238</sup>

In deciding in this particular way, the Court followed the advice of Advocate General Lenz, who had rejected in his opinion the submission that clubs representing their Member State in the European Cup competitions must consist of at least a majority of nationals of that State. He finely observed that the title of 'national champion' of a Member State could be interpreted without any difficulty in an alternative way, noting that there is no reason why it cannot be taken as simply designating the club which has won the competition organised within the territory of that Member State.<sup>1239</sup> This alternative interpretation has also been embraced by several commentators. Basically, this argument boils down to the following: it is the club that wins the national championship, and not the individual players that compose the team; therefore it is the club that represents the country during the European cup competitions, rather than its players; consequently, it is the nationality of the team which counts, not that of the players.<sup>1240</sup> Manchester United will always represent England at the European scene, even if all its eleven players were foreigners. That this theoretically may lead to a rather strange situation in which in a European competition a German team composed of 11 French players meets a French team with 11 Germans,<sup>1241</sup> in principle does not detract anything from that conclusion. As the Court subtly noted, the idea that the nationality of the team prevails over the nationalities of its players is further reinforced by the fact that the regulations of football associations do not always have rules limiting the number of foreign players in the competitions they organise on the national territory.<sup>1242</sup> The Advocate General had illustrated this by pointing out that in Germany it is perfectly possible that an amateur team consisting of 11 foreigners, as no rules on foreign players apply for amateur teams, wins the national cup and hence qualifies to play in the European Cups. And the same could be said about the national league in Scotland for example. Now, if this is an accepted practice at domestic level that a club established within a country can win the national

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<sup>1238</sup> *Bosman*, par. 132.

<sup>1239</sup> Lenz AG in *Bosman*, par. 144. He had based himself on Zäch, "Wettbewerbsrecht und Freizügigkeit für Arbeitnehmer im Bereich des Sports nach dem Recht der EG", in Schlupe and others (eds.), *Festschrift für Arnold Koller* (Bern, Stuttgart and Vienna, 1993) at 847 et seq.

<sup>1240</sup> See for example Hilf, *o.c.*, at 522; Forlati Picchio, *o.c.*, at 759.

<sup>1241</sup> See Kahlenberg, "Anmerkung zum Urteil des Landesgerichts Frankfurt am Main – 2/14 O 392/93 – vom 18.1.1994", *SpuRt* (1994), 129 et seq.

<sup>1242</sup> The British football associations have special rules for their mutual relations.

championship or cup with the – sometimes unlimited - active involvement of foreign players, it is indeed difficult to conceive why this should be any different at European level. However, when taking part in these European Cups, these teams would be forced somehow to limit the number of players from other Member States during these matches, as a result of the application of the contested nationality clauses. According to Advocate General Lenz, the argument of the national representative function of the clubs cannot be used to justify “professional football players from the *European Community* being forbidden to take part in the *European cup competitions*.”<sup>1243</sup> Besides, the fact that the nationality clauses in any event allow clubs to field a certain number of foreign players in the European cup competitions also clearly demonstrates that the representative role fulfilled these clubs during these competitions is of an entirely different order and can therefore not be compared with the one carried out by the national teams.<sup>1244</sup> These European competitions are events between clubs, which compete in the first place for their own sporting glory, and only in second place for their country.

Furthermore, it must be remarked that it is indeed possible to detect a certain territorial attachment in the organisation of sporting events: London—based football club Wimbledon, playing in the English Premier League, had asked UEFA for authorisation to transfer its establishment to Dublin, in view of its large share of Irish fans, but expressed the wish to continue playing in the English competition. UEFA declined to give his fiat to this operation. By the same token, UEFA also denied Belgian border club Excelsior Moeskroen authorisation to play its home-leg of his contest against French club Metz in the first round of the UEFA Cup in the neighbouring city of Lille on French territory. In both circumstances, the Commission recognised the autonomy of the sporting federations in these matters and thus refused to apply Community law.<sup>1245</sup> In all likelihood therefore, if the football associations were to be confronted with the hypothetical question of whether Holland’s Ajax Amsterdam could play in the more attractive leagues of Italy, England or Spain, the answer would be negative.

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<sup>1243</sup> Lenz AG in *Bosman*, par. 144.

<sup>1244</sup> See also Dubey, *o.c.*, at 479.

<sup>1245</sup> IP/99/965, 9 December 1999; IP 99/956, 9 June 1999. See also Weatherill, “Fair Play Please”: Recent Developments in the Application of EC Law to Sport”, 40 *Common Market Law Review* (2003) at 61.

Summarising, in view of the foregoing considerations, the Court arguably correctly concluded that the nationality clauses were not a necessary means to ensure that clubs performing at international level effectively represent their country during these events. Clubs established in a certain Member State earn the right to participate in European competitions for their country as a result of a series of sporting performances on the territory of that State. It is the nationality of the team that is of prime importance, not that of the players that form the team. And besides, contrary to the national team, these clubs defend in the first place their own private interests during these European club competitions. Their role of representing the country in which they are established is only of secondary importance.

## **2. Creation of a pool of players for the national team**

A second group of considerations advanced as justification for the restrictive rules on foreign players concern the situation of the national team, albeit partially indirectly. The KBVB, UEFA and the Italian, German and French governments argued that without the nationality clauses, the development of young football players would be affected and also that these clauses were necessary to ensure that enough national players were available to provide the national team with top players to field in all team positions.<sup>1246</sup>

### *2.1. Development of young players*

Advocate General Lenz was not convinced by this line of argumentation. In his opinion, there was nothing to suggest that the development of young football players would be adversely affected if the rules on foreign players were dropped. He pointed out that there are only few top teams that pursue the promotion of young players as an active club policy. In general, talented youngsters start their career in smaller teams or teams playing in lower divisions, to which these rules often do not apply, and only subsequently make their way to the top by means of their performances on the pitch.<sup>1247</sup> He admitted that the number of jobs available to native players decreases, the more foreigners play for the clubs, but considered that as an inevitable

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<sup>1246</sup> *Bosman*, par. 124.

<sup>1247</sup> Lenz AG in *Bosman*, at par. 145.

consequence of the right to freedom of movement. Furthermore, the Advocate General also indicated that the abolition of the nationality clauses would not oblige clubs to engage more foreigners, it simply creates the possibility for them to do so if they deem it useful.<sup>1248</sup>

The Court followed its Advocate General and turned down this particular argument, albeit in a very concise way. It acknowledged that the principle of freedom of movement for workers, by opening up the labour markets of the different Member States to nationals of the other Member States, did have the effect of reducing the opportunities of workers to find an employment within the Member State of which they possess the nationality, but it observed that the same principle, by the same token, also offered these workers new prospects of employment in other Member States.<sup>1249</sup>

Evidently, the issue relating to the development of young players is a delicate one. On the one hand, the liberalisation of the employment markets in the European Union entails that many young players nowadays get the opportunity to acquire valuable international experience by playing in another Member State at a relatively early stage of their career. Conversely, on the other hand, it also inevitably leads to an increased presence of foreign players at domestic level, which somehow renders it often more difficult for young players to force a breakthrough in the highest divisions of the league of their own country. It is submitted that the concrete situation in the different Member States will vary considerably and therefore, ideally speaking, should be evaluated for each country separately.<sup>1250</sup> In France for example, many clubs have famous youth development centres where young players receive an excellent training and formation. Consequently, many young French footballers successfully go on to play abroad. Contemporaneously, they also get ample opportunities to play in the national league, as the French competition is not yet as pervaded by the exigencies of big business as other competitions in Europe. Youngsters often still get the chance to mature into experienced players at home, in teams such as Auxerre or Nantes. Whereas France can be considered as an 'exporter' of football

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<sup>1248</sup> Lenz AG in *Bosman*, at par. 145.

<sup>1249</sup> *Bosman*, par. 134.

<sup>1250</sup> In the Motion for resolution (doc B2-1547/86) tabled by Ephremidis, Adamou en Alavanos, in Annex 4, Report Janssen van Raay, p. 16, it was argued that an "unlimited number of footballers moving freely will doom talent to wither away unused, particularly in the small countries, since it virtually nips in the bud the development of such talent."

talent, a country such as Italy is more an 'importer' of foreign players. The last decade or so, the Italian championship has built up such a formidable reputation, mainly due to an impressive string of successes in the European Cups, that many sponsors and advertisers want to identify their products with the Serie A and invested enormous amounts of money in Italian football. Equally, the Italian football federation and the leading clubs have been able to conclude lucrative television deals with national and international broadcasters for the transmission of the championship matches. The money stream currently circulating in the peninsula has reached unprecedented heights. All this sounds very appealing, but there is another side to this medal as well: in return for their investments, sponsors and broadcasters want to see attractive games and require Italian teams to win as much silverware as possible. For commercial purposes, teams such as Milan, Internazionale or Juventus simply cannot afford to lose anywhere at any time. To meet the exigencies of the industry, and because they have the necessary financial means to do so, most Italian teams have adopted the policy of engaging the best players from the other competitions abroad, who can deliver more or less instantaneously performances of a high level and are a guarantee for sporting success. As a result, it is extremely difficult for young football players to gain a place in the teams of the big Italian clubs which are generally composed of experienced and skilful Italians and foreigners. Youngsters are often constrained to try their luck abroad or forced to play in the lower divisions of the national league.

Diverse as the practical training and/or playing opportunities may be for young football players in the various countries of the European Union, it appears nevertheless feasible to make some general observations. Admittedly, the participation of foreign players reduces the number of places available to national players in the domestic leagues, but as the Advocate General and the Court already correctly pointed out, this reduction is compensated for by the increased job opportunities abroad. Furthermore, there is much to say for the assertion that the participation of good foreign players promotes the development of football.<sup>1251</sup> In principle, they are recruited to give an additional value to the team, to improve the attractiveness of the team's performances and to increase the chances of sporting success.<sup>1252</sup> Essentially, therefore, early and intense contact with foreign players, be it at national level or abroad, "can only be of advantage to a young

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<sup>1251</sup> Giardini, "Diritto comunitario e libera circolazione dei calciatori", *Diritto comunitario e degli scambi internazionali* (1988) at 454.

<sup>1252</sup> Hilf, *o.c.*, at 521.

player.”<sup>1253</sup> In the short term, these foreigners may effectively bar the younger players from playing for the team, but in the long run, the youngsters will be able to benefit from the training with these more experienced players. Also playing in the lower divisions of a national league for a certain spell does not necessarily obstruct the career of a young player and often turns out to be a truly positive experience, in view of the fact that these young players will often occupy an important place within those teams and have to bear part of the responsibilities. This is definitely another important element in the learning process of young players.

Ensuring the development of young players definitely constitutes one of the principal objectives of the sporting federations. However, they failed to demonstrate that the rules limiting the number of foreign players to be recruited by a club or fielded during official matches constitute an appropriate and necessary instrument to reach this aim. Arguably, the presence of foreign players does not per se have to be to the detriment of the development of young footballers. Conversely, in principle young players can learn a lot from frequent and intense contacts with their older foreign colleagues, both mentally, tactically, technically as physically. Therefore, both Advocate General Lenz and the Court were probably right in holding that this particular argument does not serve to safeguard the nationality clauses at stake in *Bosman*.<sup>1254</sup> This is of course not to say that this objective of formation of young football players is not worth pursuing. It is only submitted that there are better ways to achieve this, which are acceptable under Community law. To ensure the continued investment of time, effort and money into the training and development of young players at all levels, it could possibly be conceived to impose on all clubs the obligation to have a certain minimum amount of young football players who are EU/EEA nationals under contract. The age until which footballers can be considered as young players for these purposes could be set at 23, which corresponds with the age until which compensation fees for training and education are due in the event of an international transfer.<sup>1255</sup> It does not appear to be strictly necessary to add the further requirement that these youngsters

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<sup>1253</sup> *Palme, Hepp-Schwab and Wilske, o.c.*, at 345.

<sup>1254</sup> See also Explanatory statement to Report Janssen van Raay, at point 16: “Finally, occasional warnings are heard about hampering the development of young players and producing a fall in standards, particularly in the case of the national teams. However, there are no grounds for believing this, given the large number of clubs, particularly in the amateur sector, and the mobility and exchange factors. On the contrary, there is every reason to expect that the game will receive a shot in the arm through the demonstration of a high level and possibly, a different kind of footballing skill.”

<sup>1255</sup> See *supra*, chapter 5, §2, II, 2.

possess the nationality of the Member State in which the club is established, as such a requirement risks to be rejected as indirectly discriminatory.<sup>1256</sup> It could also be envisaged to require that a certain amount of young players – three seems to be a fair number -have to be inscribed on the referee sheet for each official match. Ultimately, it would remain to the discretion of the coach of the team though to decide whether they will actually be fielded during these games or not. These propositions do not seem to raise problems with regard to the compatibility with Community law. Theoretically, clubs remain entitled to recruit and field as many footballers of foreign EU/EEA nationality as they deem fit or necessary to pursue their sporting goals. By the same token, contemporaneously, these minimum criteria as to the engagement and selection of youngsters somehow ensure that the framework is created for rigorously preserving the objective of developing young players.

## *2.2. Creation of a sufficient pool of players for the national team*

Also the argument that the rules on foreign players are needed to create a sufficiently large and strong pool of players eligible for selection for the national team,<sup>1257</sup> which is closely linked to the previous one, was rejected by Advocate General Lenz as unconvincing. He considered it unlikely that the abolition of the nationality clauses would result in such a great influx of foreign players that native players would no longer get a chance to play.<sup>1258</sup> Furthermore, the Advocate General pointed out that it is in the club's own interest to develop good players who are available to play for the national team. The prestige which these players acquire by representing the national colours also reflects on the clubs for which they play during the regular season. And the success or failure of the national side undoubtedly also has a positive or negative effect on the interest in the national championship of that country.<sup>1259</sup> He also indicated that the fact that the national teams of the Member States of the Community nowadays very often include players who play for a club abroad does not cause particular disadvantages, as

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<sup>1256</sup> See also Weatherill, "European Football Law", *o.c.*, at 358.

<sup>1257</sup> See for example the Motion for resolution (doc 2-1167/84) tabled by Ford and Stewart, Annex 1, Report Janssen van Raay, p.13: "Concerned that the quality of international teams from Community countries will inevitably decline in consequence of a free market."

<sup>1258</sup> Lenz AG in *Bosman*, par. 146.

<sup>1259</sup> Lenz AG in *Bosman*, par. 146.

the regulations of the football federations provide that these players have to be released for the matches of the national team.<sup>1260</sup>

The Court was again less elaborate than its Advocate General in its rejection of the argument. It limited itself to stressing that whilst “national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country.” In addition, it only still mentioned that under the rules of the sporting associations, “foreign players must be allowed by their clubs to play for their country’s national team in certain matches.”<sup>1261</sup>

It is unmistakably true that clubs all over the world have to release their players who are selected by their national federations to participate in matches of their national team. The relevant FIFA and UEFA Regulations explicitly provide that selected players must be enabled to join the training centre of the national squad a certain period of time before the matches in question. This amount of time varies according to whether the scheduled encounter is simply a friendly international game, or whether it is a qualification match in the preliminary phase of the UEFA European Championship or the FIFA World Cup. The regulatory framework being unequivocally clear, one would not expect there to arise any particular problems from the fact that many national players nowadays earn their living abroad. On the contrary, it is often perceived to be a positive factor that several national footballers play for a foreign team, as they can gain some international experience and improve by playing in foreign leagues, which can ultimately only be of benefit to the national team. However, foreign clubs are sometimes reluctant to let their players go to play for their national team, especially if the club more or less contemporaneously has to play a championship’s game for which it then cannot count on the services of their player. In these circumstances, clubs sometimes force the player in question to decline a national selection with the argument that he is an employee under contract with the club, his regular employer. Nevertheless, recently, the situation has much improved in this respect, as serious efforts have been undertaken to come to a more or less uniform international calendar. Currently, all European teams play their international games more or less at the same time.

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<sup>1260</sup> Lenz AG in *Bosman*, par. 146.

<sup>1261</sup> *Bosman*, par. 133.

Also the second factor invoked by the Advocate General to rebut the argumentation of the defendants in the proceedings, relating to the interest of the clubs in the success of the national team, has to be viewed somewhat in perspective. In principle, the national team is supposed to be the flagship of any given sport federation. Also for an athlete, a selection to represent one's country is considered to be the highest possible honour. Titles won by the national team on the international scene indeed often send a wave of enthusiasm through the country, attracting spectators to attend the matches of the national championship, inducing sponsors, advertisers and television broadcasters to invest in the sport, and appealing federations and clubs to continue and even intensify their efforts on the road to success. Clubs therefore undeniably do have a certain interest in ensuring that the national team remains or becomes competitive in international competitions. However, it should be taken into consideration that clubs are in the first place concerned about their own private interests. And these are not always concurrent with the interests of the national team. It is a general and recurring complaint of clubs that the matches of the national teams, especially the friendly matches and the qualification games which are normally played during the regular football season, overburden an already full playing calendar and demand too much of the international players, both mentally and physically. In the opinion of the clubs, players returning tired or even injured from international obligations and subsequently underachieving in the next competition games are more the rule than the exception.<sup>1262</sup> To reconcile the interests of both the clubs and the national teams, plans have been tabled to revise the international calendar, entailing that international matches would only be played during the winter- and summer breaks of the national championships in January and June-July.

According to the Advocate General, the removal of the nationality clauses would not lead to a massive intake of foreign players, so that native players would no longer find the necessary space to play. It must be acknowledged though that in the aftermath of *Bosman*, the number of foreign players in the national leagues has increased considerably. And it is a widespread criticism that the strong presence of foreign players on certain key positions in the team has on occasions led to a shortage of national players who are able to occupy these positions in the national team, as they are barred at club level from playing in these roles. These assertions must be evaluated on their merits. It can indeed not be denied that there are more foreigners participating in the

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<sup>1262</sup> An extreme example was the injury incurred by Club Brugge's and Belgium's goalkeeper Philippe Vandewalle during the friendly international Holland – Belgium in 'De Kuip' in Rotterdam in the autumn of 1998, effectively ending his playing career.

national championships than previously, but it would go too far to claim that they take up so much place that native players do not find a team any more. Besides, in general, the coach of the national team makes his selection of 16-22 players for international matches out of a group of some 40-50 names. These are supposed to be the best players of their country, and normally they do not encounter any particular problem finding a team that wants to engage them, either domestically or abroad. If there are only few native footballers playing in the national league, it must be either because they are simply not good enough in comparison with the players from other countries, or because they all go on to play abroad, where they may find more attractive playing circumstances. The suggestion that the increased participation of foreigners has resulted in an impoverishment of the qualities of the native players holds no ground: if players are good enough, they will make it anyway in the professional football world, be it in their own country or abroad. So if the coach of the Belgian Red Devils or the German Mannschaft were to complain that they have difficulties finding a fast striker or a skilful playmaker, this is not because there are too many foreign strikers or playmakers playing in the Belgian Eerste Klasse or the German Bundesliga, but mainly because there are currently simply no good Belgian or German strikers or playmakers. Some generations of players are simply better than others. Brazil had to wait for 24 years between its third and fourth world title. That is just the law of nature. It is not every day that a new Maradona sees the light. This whole argument concerning the creation of a pool of players eligible to play for the national team is of course closely related to the previous issue on the development of young players. If clubs were to neglect their youth training programmes, this would inevitable have a negative impact also on the strength of the national team sooner or later. Arguably, the measures proposed in that particular context are sufficient to ensure that clubs will continue to devote time and money and effort to the development of young footballers. The national team will be an indirect but important beneficiary of these efforts at club level.

This argument is probably the one that has been invoked most frequently by the proponents of the rules on foreign players. It must be admitted that it does have a certain appeal, as the health of the national team is an issue which is of interest to almost the entire nation. However, again, the Advocate General and the Court were probably right in concluding that the nationality clauses were not a necessary tool to guarantee that the national coach will have sufficient players out of whom to distil a strong representative eleven.

### 3. Maintaining a competitive balance between clubs

Finally, the KBVB, UEFA and the intervening governments claimed that the nationality clauses help to preserve a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.<sup>1263</sup> The Advocate General deemed the interest expressed to be a legitimate one, but he was nevertheless of the opinion that there were alternative means of reaching that objective without adversely affecting the right of freedom of movement.<sup>1264</sup> Moreover, he stressed that those rules were in any event only to a limited extent appropriate to ensure an equilibrium between clubs.<sup>1265</sup> The Court essentially confirmed the advice of its Advocate General, ruling that even though it had been argued that the rules on foreign players prevent the richest clubs from engaging the best players, those nationality clauses are not sufficient to achieve the aim of maintaining a competitive balance between clubs, "since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent."<sup>1266</sup>

In the first place, it appears already questionable whether the nationality clauses constitute an appropriate means to effectively attain the objective of preserving a certain competitive equilibrium, which the Court recognised to be a legitimate one, earlier on in its decision in the context of the contested transfer rules.<sup>1267</sup> With or without these rules, the richest clubs always have the opportunity to assure themselves of the services of the best and most expensive foreign players. In addition, they are also in a position to recruit the best domestic players, without being restricted in doing so by one or the other rule. Moreover, as Késenne pointed out, the removal of the nationality clauses definitely entails a substantial advantage for the smaller clubs, as it has as its effect that the total amount of players available on the market increases. Previously, the rules of the federations limiting the number of foreigners to be engaged or fielded kept the offer of players at an artificially low level. The abolition of these clauses promotes competition between

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<sup>1263</sup> *Bosman*, par. 125.

<sup>1264</sup> See for a more elaborate explanation, *supra*, chapter 4, §2, V, 5.

<sup>1265</sup> *Lenz AG in Bosman*, at par. 147.

<sup>1266</sup> *Bosman*, par. 135.

<sup>1267</sup> *Bosman*, par. 106.

players and should therefore lead to a reduction of the costs for recruiting them.<sup>1268</sup> However, conversely, it has also been advocated that the nationality clauses, by imposing a quantitative limit on the number of foreign players which can be fielded during an official match, in some way prevent the big teams from unlimitedly pushing through their financial market bargaining power by buying all the best players and thus serve to preserve the competitive balance to a certain extent at least.<sup>1269</sup>

It must be admitted that since the condemnation of the contested nationality clauses in the *Bosman* decision, the gap between the big and the smaller clubs has substantially widened. This determination forces the question whether it is a mere fortuitous conjunction of circumstances or rather whether it is – at least partially – due to the abolition of the rules on foreign players. In the nineties, and especially in their second half, one can also witness an exponential growth of financial injections in football on behalf of the industrial and commercial world. This had a lot to do with the more or less simultaneous definitive consecration of football as a television phenomenon, capable of attracting high audience rates. As a result, the figures paid by television channels for the exclusive rights for the broadcasting of football matches reached unprecedented heights. The explosion of revenue from advertising, sponsoring and the sale of television rights was especially to the benefit of the big clubs playing in the highest divisions of the national leagues. Small clubs had to content themselves with some crumbs that fell off the table. These are the principal factors that explain the increasing gap between the big clubs and the smaller ones. However, it is also true that the removal of the nationality clauses has led to an intensification of the international transfer activities. Money that was previously destined to circulate within the national leagues and constituted an important and often even indispensable means of income for many smaller clubs nowadays often disappears to clubs in other Member States, as clubs increasingly call upon the services of foreign players. Moreover, the exigencies of attractive play and sporting success induce the clubs to recruit predominantly foreign players who have already acquired a certain status and experience and who therefore normally already play in the higher divisions of their national championship. In this way, the abolition of the nationality clauses has

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<sup>1268</sup> Késenne, "L'affaire Bosman et l'économie du sport professionnel par équipe", 1 *RMUE* (1996) at 85.

<sup>1269</sup> See Dubey, *o.c.*, at 467-472.

arguably probably contributed to a certain extent to the growing differences in wealth and thus also in sporting competitiveness between the bigger and the smaller clubs.

However that may be, even if it were accepted that rules on foreign players could be helpful to preserve a certain competitive balance between clubs, it remains very much to be ascertained whether these rules are also necessary to attain this preconceived aim. Basically, if it were feasible to elaborate a set of measures with which this objective can effectively be reached, and which are moreover less restrictive from the point of view of Community free movement law than the nationality clauses, then preference has to be given to these alternative rules. Advocate General Lenz proposed in his opinion a system of collective wage agreements and especially a mechanism of redistribution of a certain amount of income between the clubs as viable alternatives which do not raise problems relating to freedom of movement.<sup>1270</sup> Both measures have been discussed in detail in the previous part.<sup>1271</sup> In this context, may it therefore suffice to make the following short observations: presumably, a system of so-called 'salary caps', fixing a maximum amount of money which can be dedicate to players' salaries, could be envisaged if it were agreed upon by all parties in the football industry. However, it is still not crystal clear whether it would be compatible with the Community competition rules. Consequently, most attention has been devoted to the other solution, based on the idea of solidarity between the clubs, and simply consisting of a redistribution of resources, originating mainly from gate receipts, sponsoring and advertising contracts, and the sales of broadcasting rights. In theory, this appears as the ideal solution, which creates no problems with regard to compliance with Community law. The bottleneck is whether this proposal of pooling and redistribution of income is sufficiently far-reaching to guarantee that a certain competitive balance between clubs is safeguarded. In practice, even though there is undoubtedly a mutual interdependence between clubs, the solidarity between them is not all-encompassing, but strictly limited to a certain level: on the one hand, clubs are very well aware of the fact that they need competitors to be successful themselves, and therefore the bigger clubs are found willing to contribute to preserve a certain uncertainty of results, which is essential for the appeal of the entire game, but on the other hand, they are not prepared to go as far in their solidarity with smaller clubs so as to risk their hard-

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<sup>1270</sup> Lenz AG in *Bosman*, at paras. 226-234.

<sup>1271</sup> See *supra*, chapters 4 and 5 on transfers, in particular chapter 4, §2, V, 5 and chapter 5, §2, 2.3.2.

fought position in the football hierarchy. Manchester United, Arsenal and Liverpool will not object to financially supporting the likes of Sunderland and Southampton, and they will probably greet the occasional upsets created by these clubs against their main rivals for the English Premiership title or the FA Cup with enthusiasm, as long as these clubs do not become another real contender to be seriously taken into consideration. Therefore, the solidarity to which clubs are willing to proceed seems to run the risk of being less substantial than what is needed to ensure a given competitive balance between them.

If this were effectively to be the case in practice, and moreover if it turned out to be impossible to attain the objective of a competitive equilibrium in an alternative way which is compatible with the requirements of Community law, one might, but only in last instance, potentially consider to combine such a system of redistribution of resources with adapted rules on foreign players to protect the pursued objective.<sup>1272</sup> Basically, however, in order to be possibly considered for legitimisation under Community law, these rules would have to be stripped of their restrictive character as much as possible. Concretely, this would entail that any limitations imposed could only possibly concern the practical use of the foreign players during official club matches, and not their recruitment. Furthermore, as they boil down to a restriction of the fundamental freedom of movement of workers, these limitations would have to be construed narrowly. Practically, that is to say that it should be possible to have at least five or six foreign EU/EEA nationals participating to a game. One might even try to go further and accept that it should be possible to have always at least five or six of these foreigners on the pitch, allowing thus for one foreigner to be substituted by another. Against this, it could probably be argued that such diluted nationality clauses are denatured of any practical sense, as only rich teams can financially afford to engage more foreign players than they can contemporaneously field during a game, so that it adds nothing really to the search for a competitive balance. This counter-argument definitely has a certain appeal. However, in the current period of recession which strikes the football constellation, and in which all clubs, the rare exception apart, are constrained

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<sup>1272</sup> See also Dubey, o.c., at 466-492. However, he effectively seems to consider re-introducing nationality clauses as a viable possibility to reach the objectives pursued, whereas I merely mention the theoretical possibility of very much watered down nationality limitations as an 'ultimum remedium'. In fact, I believe that rules based on nationality discrimination are doomed. See also Gardiner & Welch, "'Show Me the Money': Regulation of the Migration of Professional Sportsmen in Post-Bosman Europe", in Caiger & Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000) 107.

to cut their coat according to their cloth, very few clubs can permit not to make maximal use of their available player potential, so it is submitted that similar nationality clauses, in their proposed diluted form, might nevertheless provoke the desired effect. Besides, under these circumstances there is an additional psychological element which comes into the equation and which must not be underestimated, namely the fact that most, if not all, football players do not like the concept of 'turn-over' and simply detest spending time on the substitute's bench. Therefore, the nationality clauses may very well have as a practical consequence that foreign players prefer one club over another for the simple reason that they consider the contingent of foreigners in the latter one as too large, which potentially diminishes their playing opportunities.

### *Conclusion*

Rules relating to the nationality of athletes normally take two different forms. Firstly, some nationality clauses completely deny athletes the right to be part of a certain team or to participate in a certain competition simply on the basis of their nationality. In practice, this kind of provisions is nowadays predominantly used in the context of national sports teams. On several occasions, the Court of Justice has accepted the practice of excluding players with a foreign nationality from matches which are of purely sporting interest, such as matches between national teams, as a restriction to the scope of the principle of non-discrimination on grounds of nationality. This particular stance of the Court is clearly inspired by common sense. However, the Court should clarify the precise legal basis for this privileged treatment to this kind of nationality restrictions and cut the knot as to whether it constitutes a limited exception as to the scope of Community law or rather an overriding requirement in the general interest capable of justifying rules which constitute an obstacle to Articles 39 or 49 EC. Furthermore, the Court's readiness to accept the specificity of sport in this context is limited. Presumably, this restriction on the scope of Community law should remain exclusively reserved to match between national teams. Moreover, it is submitted that athletes with a dual nationality and naturalised sportsmen should not be prevented from representing the national team of the country of which they possess legal nationality, even if they have previously already defended the colours of the national team of another country.

Secondly, other nationality clauses take the form of quantitative restrictions on the possibility for players to be recruited and/or fielded by clubs during an official contest or to be selected by sporting federations to take part in competitions. In *Bosman*, the Court of Justice ruled that Article 39 EC precludes the application of the contested rules on foreign players, because they constitute an obstacle to the freedom of movement for workers. As such, this judgement is no doubt correct. Conceptually, it is somewhat regrettable though that the Court opted to couch its decision in terms of 'restrictions', whereas arguably it would have been legally more accurate to refer to the notions of direct and indirect discrimination. In addition, this would have allowed to affirm with more certainty perhaps that nowadays also directly discriminatory measures may be justified under the doctrine of the imperative requirements in the public interest. Just as was the case in the context of the contested transfer rules, the Court failed to be impressed by the various arguments invoked to justify the nationality clauses. Arguably, the Court was again right in holding that the submissions with regard to the maintenance of the traditional link between each club and its country, the creation of a sufficient pool of players for the national team and the preservation of a competitive balance between clubs were not such as to safeguard the nationality clauses under the objective justification doctrine. This time, the Court's condemnation of the rules on foreign players as a violation of Article 39 EC appears to be however more outspoken, leaving no longer room for the sporting associations to treat domestic athletes more favourable than foreign sportsmen with EU nationality. In all likelihood, this strict approach is preferable, in the light of the discriminatory nature of the nationality restrictions.

Finally, it is also interesting to observe that in the Court's decision in *Bosman* to declare the request for a preliminary ruling admissible with regard to the lawfulness of the rules on foreign players, clearly factors other than simply legal factors played an important role as well. Also opportunistic considerations pushed the Court to accept jurisdiction in this respect. Precisely because the sporting authorities so strongly hold on to their regulatory autonomy, the Court does not frequently get the chance to express a judgement on sporting issues. Therefore, it does not have to surprise that when an opportunity presents itself, the Court grabs it with both hands.

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## Conclusion

**-“If the mountain does not come to Mohammed,  
Mohammed must go to the mountain”-**

In the early days, the task of the authorities of a given sporting discipline consisted almost exclusively of ‘governance’: they had to create the regulatory setting within which the sporting performances were to be delivered and were responsible for the organisation of sporting events and competitions. Gradually however, as television broadcasters, sponsors and advertisers discovered the commercial potential of sport, a lot of sporting associations extended their activities to the commercial plane. The influx of money in the world of sport also resulted in the fact that many sportsmen could engage in sport on a professional basis. Inevitably, some of the activities of the federations started attracting the attention of the law enforcement authorities, both at national and at supranational level. The sporting bodies firmly clung to their self-proclaimed autonomy, ‘for the good of the game’, claiming that they were perfectly capable of taking care of their own affairs. In spite of their vigorous opposition against legal interference from outside into their business, soon it became evident that they were fighting a lost cause. In the case of *Walrave*, the European Court of Justice set the standard, ruling that sport is part of Community law, at least insofar as it constitutes an economic activity within the meaning of Article 2 EC. The Court would not depart from this principled statement any more. It constituted the new reality the sporting world had to cope with for the years to come. The assumption that they were completely immune from intervention or control from the ‘ordinary’ courts and tribunals had proved to be deceptive.

At first sight, it may somewhat appear surprising that the Court has subjected sport to Community law, given the conspicuous lack of direct legislative power of the Community in the domain of sport. However, this *démarche* of the Court becomes understandable in the light of the broad impact of general Treaty objectives such as those concerning the internal market. Evidently, the tentacles of the Community law reach further than one might deduce from a simple formal reading of the Treaty. Precisely because the sports federations vigorously seek to assert

their freedom of association, it is considered of the utmost importance to demarcate clearly the limits of Community intrusion in the sphere of sport. This proves to be all but a straightforward exercise. Theoretically, it seems possible to distinguish between two or three sets of rules or practices.<sup>1273</sup> Be that as it may, in practice it is not always easy to discern whether a given rule belongs to one or the other category. Firstly, there are the sports rules *sensu strictu*, which intrinsically have a non-economic character. They belong to the discretionary power of the public authorities of the Member States and the sporting associations and remain outside the scope of Community law. The 'rules of the game' constitute the most obvious example within this category. To mention but some examples, it is the sole responsibility of the International Tennis Federation to stipulate that there is to be no tie-break in the fifth set of Grand Slam tournaments. Only the rugby federations can provide that a match lasts 80 minutes. And if 100.000 people in Aztec stadium in Mexico and billions of people all over the world see Argentina's Maradona, 'el Pibe de Oro', score with 'the Hand of God' against England during FIFA's 1986 World Cup and the referee is the only person who fails to notice and awards the goal, there is nothing 'the law' can do about this afterwards; the arbiter has full authority in these matters. Secondly, there are the sports rules *sensu lato*, which have a certain economic dimension and therefore come in principle within the ambit of Community law. Within this category, one can further differentiate between regulations that actually violate the Treaty provisions and must thus be abolished and measures that can be justified. An illustration of the former rules is the Commission's condemnation of agreements involving the exclusive distribution of tennis balls which in practice made parallel import impossible and led to a foreclosure of the market.<sup>1274</sup> The latter set of rules are the most intriguing from the perspective of the relation between sport and EC law. In this context, the imperatives of the Treaty principles must be weighed against the claim for autonomy of the governing sporting bodies under the cloak of the freedom of association and the arguments concerning the special status of sport. It has been one of the principal objectives of this thesis to evaluate whether the Community institutions manage somehow to find an appropriate equilibrium in this respect. The issue has been approached from the free movement angle, as the

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<sup>1273</sup> See, *inter alia*, European Commission, "The Helsinki report on sport"; or European Commission, "The application of EC competition rules to sport", 5 June 2002. Consult <http://europe.eu.int/comm/sport>. For specific comments, see, in particular, Weatherill, "The Helsinki Report on Sport", 25 *ELRev.* (2000) 282; Dubey, *La libre circulation des sportifs en Europe* (Bruylant, 2000), at 82-87.

regulation of the mobility of sportsmen within the European Union has constituted the core of this research.

It has been demonstrated that the sporting performances of athletes can perfectly be considered as 'genuine and effective, and not merely marginal or ancillary activities' which are carried out in return for remuneration. *A priori*, there is thus nothing to preclude the categorisation of sportsmen as workers or service providers for the purposes of the application of Articles 39 and 49 EC. Furthermore, the Court of Justice has generally interpreted these free movement provisions in a broad way. 'Citius, altius, fortius'! This large conception of the principle of freedom of movement can easily be deduced from several aspects of the Court's relevant case law. Firstly, the Court of Justice has given a generous reading to the concept of 'economic activity', which has allowed many EU athletes to pass the crucial threshold for being entitled to exercise free movement rights under Articles 39 and 49 EC. These athletes possess the full gamut of free movement rights. In addition, the free movement protection has to a certain extent been extended to other athletes. Amateur sportsmen, who exercise sport in a non-economic way, and who may therefore not directly invoke Articles 39 and 49 EC, may nonetheless rely upon Community concepts such as 'corollary free movement rights', and, especially, 'citizenship of the European Union', and upon some provisions of Regulation 1612/68 to claim a limited version of free movement protection under Community law. Moreover, also certain categories of third-country nationals nowadays benefit from a certain degree of free movement rights. International agreements concluded by the Community with non Member State countries, generally constitute the largest source of free movement rights to third-country nationals. Third-country national spouses or dependent family members of Community workers may derive some rights from Regulation 1612/68. And it is even entirely conceivable that third-country nationals could successfully invoke the Community competition rules to object against the application of rules which somehow function as a barrier when they wish to migrate. Consequently, a large number of sportsmen have actually been conferred some form of free movement protection by the Community institutions. Secondly, as a result of the Court's decision to attribute horizontal direct effect to Article 39 EC, Community free movement law nowadays appears to be able to

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<sup>1274</sup> Commission Decision 92/261 *Newitt/Dunlop Slazenger International e.a.* OJ 1992 L131/32. See also Case T-43/92 *Dunlop Slazenger v Commission* ECR [1994] II-441. For more information, consult Temmink, "Sport en Europees recht", 45 *Ars Aequi* (1996) 235.

intervene deeply within the realm of private relations. It follows from the Court's judgement in *Angonese* that the principle of free movement of workers may be relied upon, not only in a dispute involving a sporting association regarding measures which regulate gainful employment or the provision of services in a collective way, but also in a conflict involving only purely private parties, for example a player and his club of affiliation, concerning contractual terms. Admittedly, some issues must still be decisively tackled in this respect. For the time being, it is still undecided whether this principle of full horizontal direct effect of Article 39 EC is limited to discriminatory measures or can also be extended to genuinely non-discriminatory measures. Moreover, it is not certain that the Court will go equally far with regard to Articles 43 and 49 EC. Somehow, it seems to be in the line of expectations that the Court will adopt a broad stance in both respects. Thirdly, it has been indicated that the traditional requirement of a cross-frontier element has come under serious doctrinal strain and that the Court recently might be showing signs of a possible more flexible or lenient approach to the matter, which could result in the application of Community law to situations which previously would have been earmarked as belonging to the exclusive preserve of Member States' competence. Without wanting to engage in the substantive debate on the issue, this possible development definitely seems to fit squarely within a wide conception of the internal market. Lastly, but certainly not least, the evolution in the case law of the Court from a pure discrimination-based analysis to a broader approach centred around the concept of restriction, which has also brought genuinely non-discriminatory measures under free movement scrutiny, has considerably widened the material scope of application of the free movement provisions. This development has been completed in principle, but the contours of the concept of restriction must still be fine tuned in future case law. In particular, the Court is requested to furnish some more guidance on the delimiting factor of market access.

Summarising, the personal scope of application of the Community free movement provisions has been widely conceived by the Court. Moreover, also with regard to the material scope of application, it can safely be stated that, mainly under influence of the Court of Justice, many discriminatory as well as indistinctly applicable measures, not only from public authorities but also from private actors, nowadays are susceptible to be tested upon their compatibility with free movement law. Concretely, this state-of-affairs boils down to a strong recognition of the free movement rights of Community workers and service providers. The sports sector does not escape

from this general conclusion. In practice, this signifies that through the relevant case law of the Court, the Community has gradually but certainly, deepened and extended its grip on the world of sport.

In sporting circles, the harsh criticism is regularly voiced that the Court has actually over-accentuated the importance of the migration rights of the individual athletes and has effectuated or allowed on this ground too many and too intrusive judicial inroads on the self-proclaimed spheres of autonomous competence of the sporting bodies, thereby infringing their freedom of association and failing to take sufficient account of the specific needs of sport. This submission has been evaluated upon its merits on the basis of some concrete examples. After close investigation, it must be rejected as unfounded. On the contrary, it is advocated that the Community institutions have at times shown probably too much respect for the autonomy of the sporting authorities and have overrated the special status of sport, both from a factual as from a legal point of view. This has led to the unsatisfactory situation that the free movement rights of the Community sportsmen are sometimes still unduly restricted. Sport may very well possess certain special features, but arguably, the special treatment legitimately accorded to sport under Community law should not go to the detriment of the rights of the sportsmen, or at least have only a minimal and proportionate impact. Presumably, currently the balance is still being tilted too much into the direction of the association's interests. As Advocate General Lenz correctly observed in his opinion in the *Bosman* case, only interests of the federations which are of "paramount importance" could justify a restriction on the rights to freedom of movement of the athletes.

These conclusions are drawn from the different encounters of the Community institutions with the sporting authorities studied in previous parts of the thesis. Firstly, from the earliest cases, the Court has accepted the practice of excluding players with a foreign nationality from matches which are of purely sporting interest, such as matches between national teams, as a restriction to the scope of the principle of non-discrimination on grounds of nationality. So far, this first recognition of the special status of sport has not met with real substantive criticism.<sup>1275</sup> Simple

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<sup>1275</sup> Alternatively, however, it could be suggested that players who have been legally resident in a country for a number of years, should be entitled to represent the national team of their country of residence in the sporting

common sense seems to have dictated the Court's position in this respect. The Court has only been urged to clarify the precise legal basis for this restriction on the scope of Community law and cut the knot as to whether it constitutes a limited exception as to the scope of the Treaty or rather an overriding requirement in the general interest capable of justifying rules which as such constitute an obstacle to Articles 39 or 49 EC. For the reasons outlined above, the latter option is to be preferred. However, the Court's readiness to accept the specificity of sport in this context should be limited. The privileged treatment should remain exclusively reserved to match between national teams. Moreover, athletes with a dual nationality and naturalised sportsmen should not be prevented from representing the national team of the country of which they possess the legal nationality, even if they have previously already defended the colours of the national team of another country. Possible waiting periods should not be of an excessive duration.

Secondly, in *Bosman*, the Court acknowledged that both the need to maintain a certain competitive and financial balance between clubs and the need to preserve the search for talent and the training and education of young football players could be considered as imperative requirements in the public interest to justify the contested transfer system, clearly offering sport clubs and federations to a certain extent shelter from purely market-based solutions within the framework of the Treaty. The former aim is indeed sports-specific and must be accepted. Contrary to other 'normal' or 'ordinary' commercial undertakings, which strive to compete their direct rivals out of the market, sports teams are mutually interdependent, they need each other to be successful. Presumably this is the most distinctive feature of sport. The outcome of a particular sporting event must be surrounded with a certain degree of uncertainty. If the final result were to be a foregone conclusion, spectators, television broadcasters, sponsors and advertisers would lose interest in the sports product, the competition, which would inevitably entail negative financial repercussions. Sports clubs must therefore cautiously maintain a certain competitive and financial equilibrium. Some form of 'internal solidarity' is therefore acceptable. Whereas this objective is unobjectionable, the same however cannot unequivocally be said about the latter objective. Supposedly, the need to ensure the recruitment and training of young players is not sufficiently distinctive to sport so as to objectively justify regulatory barriers to freedom of movement.

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discipline in which they are active, even if they do not possess the legal nationality of this country. This may seem a far-reaching proposal, but originally, the FIFA regulations were drafted in this way.

Arguably, this aim is pursued in all sectors of the industry and it is not readily evident why sport should be accorded special treatment in this respect. In any event, the sporting federations have failed to adduce any useful evidence which might prove the contrary. It is submitted that the Court in this respect may thus have overestimated the specific needs of sport. In practice, this exaggerated openness to the sporting cause yielded no immediate consequences, as the Court subsequently correctly regarded the contested transfer rules as an inadequate and not indispensable instrument to achieve both aims pursued and ruled that they infringed the principle of proportionality. However, this objective has been significantly relied upon during the transfer reform discussions between the Commission and FIFA. The comprehension and respect of the Court for the autonomy of the sporting federations clearly appears also from several other aspects of the judgement in *Bosman*. Ultimately, the Court wisely left it up to the sports authorities to elaborate possible alternatives for the condemned transfer system. It also conspicuously refrained from tackling the issue of the viability of the contested transfer system under the Treaty competition rules. A decision in terms of Article 39 EC left several concrete issues unresolved. This way of settling the dispute had the tactical advantage of giving the sports authorities the opportunity to autonomously make some changes or modifications to a number of questionable rules or practices. The Court even carefully considered various arguments invoked by the associations to safeguard the contested nationality clauses, such as the maintenance of the traditional link between each club and its country or the creation of a sufficient pool of players for the national team, albeit that it finally rightly rejected the possibility that they could serve to justify these nationality clauses anyhow.

Thirdly, during the transfer reform negotiations which ensued from the statement of objections sent by the European Commission to FIFA, the same pattern as had been witnessed already in *Bosman* repeated itself once again: the Community institution involved, *in casu* the Commission, was clearly willing to make an exception to the straightforward application of the predominantly economically inspired Community free movement rules in view of the particular characteristics of sport, albeit strictly within the confines of the Treaty framework, and consented to practices, in spite of their intrinsically restrictive character, for the sake of sport. Just as the Court did in *Bosman*, the Commission also arguably showed too much deference to the sporting authorities and gave the green light to a number of rules which probably would not withstand the

test of proportionality if the matter were to be brought before the Court of Justice.<sup>1276</sup> As a result, the rights to freedom of movement of the sportsmen concerned are unduly hindered by these collectively enforced regulations. In the first place, the Commission accepted a complex and moreover restrictive system of compensation for training in the event of an international move between clubs of a young player, on the basis of the allegedly wrong assumption that the need to ensure the training of young players constitutes a imperative requirement in the general interest. Instead, it is submitted that the Commission should have favoured less restrictive or non-restrictive alternatives to the FIFA rules, such as for example a system based on a redistribution of resources out of a central fund, possibly coupled or increased with a solidarity contribution consisting of a percentage of the fees paid in the event of later transfers between clubs. Secondly, also with regard to the issue of contractual stability, the Commission has given too much weight to the interests of the clubs and the associations. The argument that contractual stability is necessary to ensure team building, identification of the public with the team and employment security cannot be construed in such a way as to justify the restrictions to free movement as laid down in the new FIFA rules, limiting the possibility for players to unilaterally terminate their contracts during the first two or three years, - depending on the vague concepts of just cause and sporting just cause - and providing for sports sanctions under certain circumstances to be inflicted on top of the compensation due for the breach of contract. Contractual stability should presumably be limited to one year or one sports season. This seems to be in accordance with the need to guarantee the regularity of sporting competitions, which has been earmarked by the Court in *Lehtonen* as a legitimate objective in the general interest. Thirdly, with the same objective in mind, the possibility to effectuate transfers only within certain prescribed periods - 'transfer windows' - seems to be acceptable, but the additional rule prohibiting more than one move per player per season again seems to be too restrictive. A more flexible rule preventing players to play for different teams in the same competition during the same season seems sufficient to meet the objectives pursued.

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<sup>1276</sup> As already indicated above in chapter 5, I reach this conclusion on the basis of the Court's decision in *Bosman*, which clearly constitutes a strong assertion of the free movement rights of the sportsmen. Moreover, I would completely concur with such an outcome, in the sense that I do believe the Court should strike down those revised transfer rules which still unduly restrict the players' mobility rights. The effect of the privileges accorded to sport under Community law on the basis of its special features on the individual rights of the athletes should be as minimal as possible.

Which supplementary lessons can be drawn from these cases? When dealing with sports matters concerning the migration of sportsmen within the EU, the European Court of Justice has consistently adopted the same rigorous approach: in the first place, the judges evaluate whether the sporting activity in question has an economic character so as to bring it under the scope of application of Community law. Subsequently, it examines whether the contested sports rules or practices constitute a violation of the relevant Treaty free movement provisions. Finally, the Court considers whether *in se* restrictive measures can nevertheless be justified. In practice, the justification exercise involves a delicate balancing of the interests of the athletes concerned, who wish to see their free movement rights protected, with the interests of the sports federations and clubs, which strive for the recognition of the specificity of the sporting practice. The Court's search for a solution within the Community framework which takes into account the claims of the sporting authorities and at the same time complies with the exigencies of Community law is effectuated on a case-by-case basis, and is thus highly influenced by the specific circumstances of each case. In its own dealings with sporting affairs, the European Commission has proceeded largely along the same track under the heading of the Community competition rules.<sup>1277</sup> Almost inevitably, the outcome of these legal interventions into the sphere of sport has not always turned out to be entirely satisfying. Basically, the Community institutions have at times been too generous towards the governing bodies of sport. In the light of the concrete circumstances, this is not really surprising. In the current formal Treaty context, no official mention is made of sport. This entails that the Community institutions do not have specific competence in sporting matters. To intervene in those affairs, they have to fall back on their general competence with regard to freedom of movement or competition. This may explain why the Court and the Commission are occasionally somewhat reluctant to adopt a hard line with regard to the sporting associations. Also, the fierceness with which the associations continue to resist legal interventions into what they consider to be their prerogatives is a factor which should arguably not be underestimated. The sporting authorities are powerful entities which are able to generate a lot of - political - pressure in order to obtain what they want. The Commission in particular may be susceptible to this power play. It is therefore not unlikely that considerations other than purely legal issues have been influential in certain decisions. Besides, the simple perspective of facing long and expensive

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<sup>1277</sup> For a recent overview, see Weatherill, "Fair play please: Recent developments in the application of EC law to sport", 40 *CMLRev.* (2003) 51.

proceedings against a powerful opponent such as the sporting organisations often suffices to discourage athletes from lodging a complaint before the ordinary tribunals. In many aspects sport remains a world apart, in which the governing bodies try to rule with an iron hand. Relatively speaking, the Community institutions do not get many opportunities to set things straight from a Community law perspective. It is therefore maybe understandable that when the opportunity finally presents itself, the Community institutions – again, especially the Commission – endeavour to avoid an open conflict, and try sometimes too hard to elaborate an outcome which satisfies everybody, which means that the interests of the stronger party may slightly get the upper hand. Prudence is after all, still the mother of the china-cabinet.

All in all however, it must be acknowledged that the record of the Community institutions in dealing with the regulations on the free movement of sportsmen within the European Union is acceptable. It could be better, but it could certainly also have been worse. Therefore, the final issue to be shortly addressed is how the current situation could possibly be improved?<sup>1278</sup> In the first place, the prospect of effectively granting the sporting associations the outright exemption from the application of the Community rules they have constantly been looking for could be considered.<sup>1279</sup> This way, they would be able to settle all their affairs internally. And the Community institutions would no longer be saddled with difficult, long and costly disputes and proceedings relating to sport. However, it is highly questionable whether such a solution would actually turn out to be an improvement for all parties concerned, i.e. the clubs, the athletes and the associations. Moreover, for such an exemption to be formalised in a Treaty amendment or a Protocol attached to the Treaty, the Treaty would need to be revised, and for such a procedure the unanimous approval of all Member States is required.<sup>1280</sup> It is extremely improbable that such a consensus will ever be found.<sup>1281</sup> Besides, the sporting world has failed to come up with convincing arguments which would justify such a drastic step being taken.<sup>1282</sup> In all likelihood

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<sup>1278</sup> See also the recent observations of Weatherill on the wider terrain of of a policy on sport: Weatherill, "Fair Play Please": Recent Developments in the Application of EC Law to Sport", *o.c.*, at 86-93.

<sup>1279</sup> Foster, "Can Sport Be Regulated by Europe?: An Analysis of Alternative Models", in Caiger & Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000) 43.

<sup>1280</sup> Fernández Salas, "De la posibilidad de renverser l'arrêt 'Bosman' par une modification du Traité. Perspectives juridiques", 1 *RMUE* (1996) 155.

<sup>1281</sup> See also Van Nuffel, "Case law: Bosman", *Col. JEL* (1996), 345.

<sup>1282</sup> Weatherill, "Do sporting associations make law or are they merely subject to it?", *Journal of the Society for Advanced Legal Studies* 13 (January 1999) 24.

therefore, this hypothetical opportunity will remain a purely theoretical dream scenario for the sporting federations. In view of the observation that the current approach of the Community institutions with regard to sporting issues already produces relatively acceptable results, it is submitted that a small modification within the formal Treaty structure should suffice to arrive at a more relaxed relationship between Community law and the world of sport. Firstly and importantly, however, there must be a change in the mindset of the Community institutions concerning sport. At the European Union Conference on Sport in Olympia in 1999, for example, it was concluded that "sport must be able to assimilate the new commercial framework in which it must develop, without at the same time losing its identity and autonomy, which underpin the functions it performs in the social, cultural, health and educational areas."<sup>1283</sup> Similarly, the Helsinki report on sport of the Commission still gives pointers "to reconcile the economic dimension of sport with its popular, educational, social and cultural dimensions."<sup>1284</sup> More recently, in the Nice Declaration on sport, the European Council generally stipulated that "the Community must [...] take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured."<sup>1285</sup> Clearly, the Community institutions still treat sport in a generic way. However, sport is a societal phenomenon which covers different realities.<sup>1286</sup> It is submitted that currently it is no longer possible to deal with sport under all circumstances in a one-dimensional or uniform way. In many respects, professional and amateur sport belong to completely different worlds. Nowadays many sports teams operate as commercial undertakings and should be treated accordingly. The traditional values which do indeed undoubtedly characterise non-economic sporting practices are no longer always present in professional sport and are in any event subordinate to commercial motives. This means that these sports teams should be subject to EC trade law just like any other commercial undertaking. To the extent that the practice of sport possesses special features, such as in particular the mutual interdependence of sports teams, they may still be offered shelter from

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<sup>1283</sup> European Commission, First European Union Conference on Sport, 'Assises', Olympia, May 1999 (For the conclusions, consult <http://europe.eu.int/comm/sport>)

<sup>1284</sup> European Commission, "The Helsinki Report on sport", consult <http://europe.eu.int/comm/sport>

<sup>1285</sup> European Council, Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing Community place, attached to the Treaty of Nice, consult <http://europe.eu.int/comm/sport>

pure market-based solutions, but their privileged treatment should not go further than is strictly necessary. Arguably, the Community free movement rules, with the express Treaty exceptions and the judicially created objective justification doctrine, and especially the competition rules, with the possibility of individual and block exemptions under Article 81(3) EC, are construed or interpreted sufficiently flexibly so as to ensure respect for the special status of sport. These Treaty provisions should continue constituting the regulatory framework against which the lawfulness of sporting rules and practices is tested. In addition, in order to guarantee for the future a truly adequate consideration of the respective interests at stake in a dispute between a sportsman and a club or association, a formal, albeit moderate inclusion of sport within the EC Treaty is favoured.

Concretely, this inclusion would take the form of inserting the term 'sport' in the provisions of Article 151 EC relating to culture. Article 151 EC would then be entitled 'Culture and Sport'. It is suggested to put sport on the same footing as culture with regard to the first four paragraphs of the Article; only with regard to the last paragraph a small alteration may be considered.<sup>1287</sup> This subtle modification of the Treaty is suggested for the following reasons: in the first place, it would have the considerable advantage of creating clarity on the so-called 'legal environment of sport'. Presumably, the lack of an explicit reference to sport in the Treaty and the ensuing uncertainty concerning the precise role to play for the Community with regard to sport are factors which have significantly contributed to the fact that the Community institutions have sometimes shown too much respect for the self-proclaimed autonomy of the sporting authorities and have overrated the specificity of sport, to the detriment of the free movement rights of the individual sportsman. The express introduction of sport within the Treaty should allow for this imbalance to be rectified. Arguably, this inclusion has thus partially a symbolic character, in the sense that it would officially 'legitimate' the Community interventions in sporting affairs insofar

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<sup>1286</sup> Parrish, "Reconciling Conflicting Approaches to Sport in the European Union", in Caiger & Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (The International Sports Law Centre, TMC Asser Press, 2000), 21

<sup>1287</sup> Article 151(5) EC provides that "in order to contribute to the achievement of the objectives referred to in this Article, the Council shall [...] adopt incentive measures, *excluding any harmonisation of the laws and regulations of the Member States.*" (emphasis added) It is advocated that this last limitation should not apply to sport. Arguably, if the representatives of clubs and players so desire, they should be able to conclude collective labour agreements at Community level which in effect constitute a harmonisation of national laws. This possibility could for example be envisaged in the context of a unilateral breach of contract (so as to avoid discrepancies between the different national labour and contract laws).

as they have an economic dimension. Substantially, it does not go much further than that, the sporting associations do not have to fear that their regulatory competencies in the field of sport have been encroached upon. Admittedly, the putting of sport on a par with culture in Article 151 EC would inevitably mean that the Community is attributed for the first time expressly within the Treaty some competence with regard to sport. However, it is advocated that the sporting world will not object to this particular proposal. In any case, it would only boil down to a mere recognition of the role the Community had already assumed in practice on the basis of the links of sport with other Community policies. Furthermore, importantly, the terms of Article 151 EC clearly indicate that the competence in this context rests primarily with the Member States and the sporting federations and that the Community only has a role of secondary importance to play. Consequently, the mentioning of sport in this precise context of Article 151 EC would have the additional advantage of demarcating the role of the Community in the domain of sport. For these combined reasons, the insertion of 'sport' in an existing Treaty Article is to be preferred over political declarations on sport, which may be attached to the Treaty but do not have any concrete legal value.<sup>1288</sup> In recent discussions within the framework of the European Convention, this possibility of including sport within the context of the other Community policies has effectively been considered.<sup>1289</sup>

Summarising, if sport were expressly referred to among the Community policies within the Treaty, this small Treaty revision might very well constitute the decisive impetus for the Community institutions to firmly subject sport in its economic dimensions to the EC trade law rules and to reduce the privileged treatment linked with the special status of sport accorded to these sporting activities to more appropriate proportions. By the same token, it would clearly indicate the hierarchy of power within the world of sport: in principle, the competence lies with the Member States and the sporting associations, the Community can only support and

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<sup>1288</sup> The creation of a separate Treaty Article on sport could equally be envisaged already at this stage, but such a step does not seem necessary for the purposes of this research. If however, one were to agree to attribute the Community more competence within the field of sport, it could effectively be appropriate to deal with sport under a separate Treaty heading.

<sup>1289</sup> European Convention, "Contribution aux travaux de la Convention européenne sur la place du sport dans le futur Traité", 10 January 2003, CONV 478/03, consult <http://europe.eu.int/comm/sport>. In this vein, see also European Commission, "Conclusions of the working group on taking account of sport in Community policies and measures", XI European Sports Forum, 7-8 November 2002, consult <http://europe.eu.int/comm/sports>

supplement their actions. Be that as it may, to the extent that sport acquires an economic character, the Community free movement and competition rules come into play, but the Community is required to take the special needs of sport into account in its actions under these Treaty provisions. Arguably, under such circumstances, it should be perfectly feasible to respect as much as possible the regulatory autonomy of the sporting associations and the special status of sport while simultaneously sufficiently protect the rights to freedom of movement of athletes within the European Union. This way, an "All's well that ends well" could come into sight...

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