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MASTER THESIS

Football Transfer System Compatibility to European Law

Futbola transfēru sistēmas savietojamība ar Eiropas tiesībām

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Abstract:

As sport is considered as an economic activity thus transfer system of footballers falls under the free movement provisions of EU law and maybe deemed as restriction. Sport is also an issue of competition law. This thesis seeks to analyze if transfer system constitutes free movement violations and endangers fair competition.

Free movement of workers is restricted as footballers are bound under transfer system and they have time limits when they can enjoy their rights. It concerns competition so far as the essence of competition is to facilitate creation of single market to protect consumer's welfare and not to effect negatively trade between the Member States. Despite the fact that Lisbon Treaty declared the specific nature of sport, these issues were not dealt effectively and it may still create problems for the European Union. So the role of Court of Justice was and will remain significant.

Anotācija:

Tā kā sports tiek uzskatīts par saimniecisku darbību, futbolistu pārvietošanās kārtību nosaka ES tiesību akti par brīvu pārvietošanos, kas var tikt uzskatīts par ierobežojumu. Sports attiecas arī uz konkurences likumu. Šajā darbā tiek analizēts, vai pārvietošanās rada brīvas pārvietošanās pārkāpumu un apdraud godīgu konkurenci.

Darba ņēmēju brīva pārvietošanās ir ierobežota, jo futbolistus ierobežo pārvietošanās noteikumi un ir noteiktas robežas, kad tie var izmantot savas tiesības. Tas attiecas uz konkurenci, ja konkurences būtība ir veicināt vienota tirgus attīstību, lai aizsargātu patērētāju labklājību, nevis negatīvi ietekmētu tirdzniecību starp dalībvalstīm. Neskatoties uz to, ka Lisabonas līgumā ir noteikta sporta specifika, šie jautājumi netika efektīvi izskatīti, un tas joprojām var radīt problēmas Eiropas Savienībai. Tādēļ Eiropas Kopienu Tiesas loma bija un būs nozīmīga.

Abbreviations

CCPR- Central Council for Physical Recreation

DG- Directorate General

EC- European Community

ECJ- European Court of Justice

EU – European Union

EYES- European Year of Education through Sport

FA- The English Football Association

FIFA- Fédération Internationale de Football Association

TFEU- Treaty on Functioning of European Union

UEFA – Union of European Football Association

URBSFA- Belgian Football Association

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Introduction

Football-the word which is getting more and more popular. We generally are interested in football because of its sport nature competing, winners, losers, fair play, end etc. However, as time has passed football broke borders of understanding of sport and lead it in more broader definition. Now it touches politics, economy, our social live and even culture. "Football extends beyond borders, football irons out differences, and football unleashes passions"¹ These words were said by UEFA president Michel Platini in a speech to the European Parliament in Brussels. As we see football became the initial part of interest for European Institutions too. And there are lots of reasons for that which we will discuss further in this thesis.

One of the most influential statements emerging from the Court is that sport is subject to Community law in so far it constitutes an economic activity. In recent years, the sport and the law versus sports law debate has taken on a new dimension. Commercial pressures and the public's desire to see top class competition has fuelled the internationalization of sport. To regulate this cross-border activity, sports governing bodies have established rules governing relations between participants. The international and nongovernmental character of modern sport has not however ushered in for sport a new form of international autonomy insulated from law. The growth of the EU's Single Market has been central to the internationalization of sports law.²

Whilst some actors see sport primarily in economic terms, others wish to see the socio-cultural characteristics of sport protected from EU law³. In the same speech directed to Euro Parliament Platini said:

"Unfortunately, this refusal to recognize the specificity of sport ... still exists in certain circles, in certain sectors, which consider competition law to be the fundamental law of Europe. We refuse

¹ UEFA President urges protection of football's values,
<http://www1.uefa.com/uefa/aboutuefa/organisation/president/news/newsid=801478.html>

² Richard Parrish, Sports law and policy in the European Union, Manchester Press, 2003 pg16,

³Richard Parrish The Birth of European Union Sports Law, introduction
<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume2/number2/parrish.pdf>

*categorically to be held in a straitjacket or tied to prefabricated models that are based on the false equation that professional sport equals a purely economic activity-*⁴

In Bosman case The German government had claimed that football is not an economic activity at all and sport should be seen in the same light as culture. In addition, the German government, referring to freedom of association argued that the EU must limit their involvement in this area to what is strictly necessary.⁵

The argument, that football is not an economic activity at all and sport should be seen in the same light as culture, has often been used by federations and clubs in order to prevent sport from an application of European Law.

But one of the most arguable point between football governing bodies and European Union institutions was Fédération Internationale de Football Association (FIFA) transfer system the part of that system known as the transfer windows. Under the practice of transfer windows footballers are only allowed to move between clubs during certain dates, restricting the ability of players to seek alternative employment and restricting the ability of clubs to hire them. The use of this system can therefore be considered to be an issue for both free movement and competition law.⁶

Article 45 (ex article 39) prohibits restrictions on the free movement of workers and Article 101 (ex article 81) prohibits anti-competitive agreements. Although 'seen as two distinct areas of European law' they are both looked upon as essential elements in the creation and maintenance of the European internal market. On the other hand, as seen above, sport possesses characteristics not shared by other sectors of the economy what has been formulated later in Lisbon Treaty. The question is: how much special treatment does the transfer windows justify?

In the thesis, I would like to deal with the hypothesis that some aspects of FIFA transfer system, especially transfer windows, undermine freedom of players and therefore clubs.

⁴ UEFA President urges protection of football's values,
<http://www1.uefa.com/uefa/aboutuefa/organisation/president/news/newsid=801478.html>

⁵ Bosman, para. 72

⁶ Parrish R, Miettinen S, The Sporting Exception in European Union Law, T.M.C. Asser Press, The Hague, 2008, p. 2-3.

The goal of this thesis is to examine the FIFA transfer window system and to determine whether it violates Article 45, freedom of movement for workers, and/or Article 101, prohibiting anti-competitive agreements between undertakings, of the Treaty on Functioning of the European Union.

In first part of work I will describe the EU relation to sport, European sports model , policy of EU on sport and first cases which was brought to court about sport. Next discussion will be about Free movement and footballers this chapter should be useful for examining Article 45. Bosman case will be also an important part in this thesis which made the new revolutionary development of football and sport as hole, which was resulted also in new transfer system, and with this issue the case of Lehtonen will be important to discuss too. Next part involves EU Competition law in the framework of sporting related issues. The European Court of Justice has, when addressing the rules regarding player movement, unconditionally focused on the restraints on free movement of workers and never on the application of competition law. This absence of relevant case law turns the second half of the thesis into a rather open question. Last part of thesis deals with Future of sport under Lisbon treaty, which for the first time includes special article related to sport. In the end will be main conclusion and proposals for resolving current problems.

I will try to cover both political, legal, social aspects of the theme. The following research methods were used:

Primary law , general principles of law (the principle of proportionality), secondary law (regulations, directives, decisions, recommendations, opinions) and rulings by the European Court of Justice. These sources of law, with the exception of recommendations and opinions, are all binding. When considering case law, guidance and clarification will sometimes be acquired from the advisory opinion brought by the Advocate Generale. In addition to the sources of EU law, the 2008 FIFA regulations on the status and transfer of players will be used. As the subject is somehow new the availability of material has been limited. But I will try to use all the possible sources which were linked to my topic-Literature, academic papers, researches, conference working materials and articles available on internet.

Transfer system

What may be new to some is the subject matter of this thesis; the transfer system. I will therefore devote a few lines to explain the system that has managed to stir so much attention over the last ten years.

Football has since its transition from purely amateur to more professional leagues operated a transfer system. A “transfer” is in principle defined as the process by which a player belonging to one club changes his club affiliation.⁷ The transfer system was created in order to control player movement between football clubs and has existed since the late nineteenth century. In practice the transfer system meant that a club could retain the services of a player even at the expiry of his contract. Alternatively the club could sell the player to another club and charge a transfer fee. Should the player initiate a transfer, either under contract or at the expiry of his contract, the transfer was contingent upon the payment of a transfer fee to be paid by his new to his old club. The obligation to pay a transfer fee is to be seen in conjunction with the player license system. A football player must be registered under the national association that his club is affiliated to. Any change in club affiliation would require that the national association to which his former club belonged had transferred his player license certificate to the national association of his new club. The transfer of the license was contingent upon the payment of the transfer fee. Should the new club choose to field the player without having received the validly transferred player license, all the matches in whom he participated were disqualified, since he would be regarded as an “illegitimate” player. In addition the clubs fielding the “illegitimate” player could be sanctioned through fines or even forced relegation by the relevant football authority. The player license system is thus an intrinsic part of the transfer system.

The transfer system in conjunction with the license system in other words acted as a severe restriction on the mobility and freedom of contract of football players. It also served to distort the competition on the player market since the clubs could not compete for the services of players under normal competitive conditions.

⁷Halgreen, “European Sports Law” page 174

The European football has been linked to financial developments in the sport.⁸ One of the main financial activities were proceed during transfer windows. The latest transfer system were introduced into Europe, from the beginning of the 2002-2003 season, by UEFA as a result of the UEFA/FIFA negotiations with the EU over the changed transfer system. They constitute a mechanism so that football player only can be registered to play with a national association during one of the two registration periods per year, generally known as the transfer windows. The idea was to bring the transfer system in line with EU law and give football players the same rights as any other European citizen under the Treaty and to apply a special rule to preserve the regularity and proper functioning of competition.

⁸ R. Parrish, Football's Place in the Single European Market

1. EU Relation to Sport

The Commission started, in the mid 1980's, to show an interest in sport. The specific object was the Adonino report on European citizenship which was a part of a publicity campaign to raise awareness of the EU via sport.

Remainder of the 1980's the EU sponsored and promoted a series of sporting events but it was first in 1992 that sport was referred in a declaration accompanying the Treaty. It was the Maastricht Treaty which noted the importance of amateur sport and the social significance of sport.⁹ This was however legally questionable given the lack of specific sports competence in the Treaty. 1995 The European Court of Justice rules in the Bosman case concerning free movement for professional sportspeople; the transfer system in European professional cross-border football is redefined and the rights of football players as workers are strengthened. 1997 Amsterdam Declaration, annexed to the Treaty but without binding legal value: the EU recognizes the non-economic aspects of sport. 2000 Nice Declaration, annexed to the Presidency Conclusions and without binding legal value: the EU will check that its policies and decisions are sport-friendly:

"...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 nurtured¹⁰."

2004 European Year of Education through Sport (EYES 2004). Around 200 projects are co-financed by the Commission, accompanied by a communication campaign. 2004 Specific provisions on sport are included in the draft Treaty. 2006 The European Court of Justice rules in the Meca-Medina case: EU competition rules must be applied with due regard to the specificity of sport; proportionality test; the assessment whether a sporting rule is compatible with EU law can only be made on a case-by-case basis; the notion of "purely sporting rules" is irrelevant for

⁹ <http://www.euractiv.com/en/sports/sports-policy-eu-introduction/article-117541>

¹⁰ The Nice Declaration

http://www.sport-ineurope.eu/index.php?option=com_content&task=view&id=51&Itemid=146

the question of the applicability of EU competition rules to the sports sector. 2007 White Paper on Sport adopted by the Commission. For the first time, the Commission provides a comprehensive vision for sport in a high-profile policy document. Same year specific provisions on sport are included in the draft Treaty, creating a soft, complementary EU competence for sport and paving the way towards an EU sport program¹¹. The Lisbon Treaty entered into force on 1 December 2009 and the EU now has competence in sporting matters “to carry out actions to support, coordinate or supplement the actions of the Member States” to make the EU more democratic, more transparent and more efficient. Article 165 provides the EU with a formal yet ‘soft’ competence on sport. Article 165 states:

“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function. Union action shall be aimed at...developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.”¹²”

1.1 European Sport Model¹³

What, then, do we mean exactly by the European Sports Model? In 1997 the Treaty of Amsterdam, which amended the Treaty Establishing the European Economic Community, attached several single-paragraph declarations, including Declaration 29 on Sport. It was the first to acknowledge the economic and social roles of sport in the process of European integration. Later, in preparation for a 1999 Conference on Sport in Olympia, Greece, the European Commission expanded on this declaration by publishing a detailed consultation document entitled “The European Sports Model.” The same year, the Commission published the Helsinki Report on Sport in response to which the European Council published a definitive statement, the 2000 Nice Declaration on Sport. Neither of these latter two documents specifically reiterates the features of

¹¹ http://ec.europa.eu/sport/information-center/information-center141_en.htm

¹² Article 165 (TFEU)

¹³ James A.R. Nafziger, A Comparison of the European and North American Models of Sports Organisation, The International Sports Journal, Accer publishing 2008. Pg 100-102

the European Sports Model although they both confirm values closely associated with the model. Then, in 2007, the Commission issued a White Paper on Sport that puts several features of the model in the larger context of sport as an economic and social phenomenon of fundamental importance to human welfare. The European Commission's Consultation Document identified six specific features that continue to form the core of the European Sports Model:

A. Pyramid Structure

In each country, a single, comprehensive structure for each sport includes four integrated, interdependent levels of professional and nonprofessional organizations. This structure is described as a pyramid. At its base are the largely autonomous and nonprofessional clubs that are said to be fundamental institutions in European society from the smallest communities on up. For example, it is estimated that 39% of the population in Austria belongs to a sports club. At the next higher level are regional federations within each country. They are responsible for organizing competition among the constituent clubs in a particular sport. At the third level up are national federations. They are responsible for overseeing the work of the regional federations, organizing competition among clubs from different regions, staging national championships, and regulating sports activity. For each sport, there is a separate national federation, each of which therefore enjoys both a monopolistic position in a particular sport and the competence to regulate itself, subject to national legislation. At the top of the pyramid are the European federations, again, one for each sport, such as the Union of European Football Associations (UEFA), with one member from each country. They organize European championships in each sport, based on the rules of international sports federations (IFs), such as the Fédération Internationale de Football Associations (FIFA) in football/soccer. A primary function of this pyramid structure is to facilitate an equitable distribution of revenue among the constituent sports clubs so as to encourage mass participation and competitive balance among clubs.

B. Promotion and Relegation

In Europe's open system of promotion and relegation, clubs may move up or down from year to year depending largely on their win loss records. The purposes of this system are primarily to

give smaller medium-sized clubs a better chance to reward merit and generally to enhance competition. A dynamic, hierarchical system therefore operates at all levels of the pyramid. The English Football Association (FA) hierarchy, for example, consists of seven tiers. Each year, the best performing teams on any of the bottom six tiers may advance to a higher tier and, if they are consistently successful, end up in the national league system, the highest tier of competition. The FA itself is the exclusive, recognized national federation in English football and is therefore a member of UEFA.

The specific rules and criteria for the process of promotion and relegation are defined by the national federations, such as the FA in England, but they all seek to reward merit and promote equality of opportunity and balance competition among teams. In addition, the promotion-and-relegation system performs an ethical function by mandating relegation to a lower tier of any team that has engaged in specified questionable practices. Thus, for example, English football clubs finishing in the last four places of the National Football Conference at the top are relegated to either of two second-tier leagues for the following season. Two clubs are therefore relegated to the North League and two clubs to the South League. Conversely, the top team in each of these second-tier leagues is promoted to the geographically undifferentiated National Football Conference. Its remaining two spots for promoted clubs, one from each league, are filled after a series of playoff games among clubs finishing second through fifth in each of the leagues. These playoffs not only add to the excitement of competition each year but also offer an equitable second chance to some clubs, particularly late bloomers and non-champions. Promotion and relegation of teams in the lower tiers is also merit-driven, but clubs must affirmatively request promotion upward if they qualify. Overall, the European Commission “has taken the position that the pyramid structure of sport, along with promotion and relegation, are important aspects of the culture of sport in Europe, and that preservation of [such cultural] institutions (and presumably after such cultural aspects of sports) is an important interest that should be considered in determining whether the rules and policies of leagues and governing bodies are lawful under EU law, including competition law”. As we shall see, this is the crux of an ongoing legal tournament in Europe, involving substantial litigation.

C. Grassroots Involvement.

Another feature of the European Sports Model is a strong commitment to voluntary, grassroots leadership. Some 700,000 clubs at the local level are expected to be actively involved in training athletes and organizing competition in their communities, usually by enlisting volunteers (an estimated 10 million) rather than paid professionals. Such grassroots involvement is a foundation of European sports. For example, Portuguese football/soccer clubs rely on approximately 70,000 unpaid coaches. While there may be some funding and other involvement at the grassroots from the regional and national federations, the clubs bear most of the responsibility for developing players and putting together teams. The role of sports is idealized in Europe as a vital means for communities to bind their citizens together, from the grassroots to the top professional level. Indeed, throughout the world, “[s]port is central enough to the experience of the vast majority of people to be a useful tool to break down the barriers which divide citizens.” It is unclear, however, how to define a genuine sports community above the level of highly localized, essentially neighborhood competition. Consequently, it is unclear whether the vaunted grassroots involvement ever comes close to achieving the ideal of communitarianism championed by the European Sports Model. Even if that identification is generally valid, the community is not always coterminous with a particular municipality. Sports can divide municipalities and separate them from other municipalities. For example, football/soccer loyalties in Liverpool, an English bastion of the sport, have historically been divided between a Protestant-oriented and a Catholic-oriented club. That kind of division certainly does not bespeak an optimal outgrowth of grassroots in an important community.

D. National Identity

The European Commission has described sport in Europe as “one of the last national passions. The commitment to national identity, therefore, is one of the features of sport in Europe.” Declaration 29 on Sport, annexed to the Treaty of Amsterdam, articulated this principles follows: The Conference emphasizes the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at

issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.

The Commission's 2007 White Paper amplifies this appeal by noting reciprocal roles of patriotic emotions and solidarity, on one hand, and personal commitments to physical exercise and healthy social relationships, on the other.

E. International Competitions

The European Commission, acknowledging a psychological need for people to confront one another, promotes sports competition as an alternative to conflict, if not bloodshed, and as a safeguard of cultural diversity. International competitions therefore are seen as a means of harnessing national identity in the production of regional peace and integration.

1.2 EU Policy on Sport

1.2.1 White Paper on Sport

In July 2007 a White Paper on Sport was published by the European Commission in order to raise the awareness and status of sport within the EU and in particular highlight the specific characteristics of sport.¹⁴ The Review was initiated by the UK EU Presidency in 2005 and was encouraged by UEFA and FIFA. Published in 2006, the final version of the review recommended the European Commission to provide the citizens of Europe with clear guidance of 'sport rules' compatible with EU law.¹⁵

The White Paper is structured around three areas where it proposes a number of actions to be implemented. These three areas are:

1. The societal role of sport: In which doping, volunteering, combating racism and violence, social inclusion and public health are dealt with.

¹⁴ The Commission's White Paper on Sport, Brussels, July 11, 2007, COM(2007), 391 Final

¹⁵ EU Sports Policy: 12 March 2009, <http://www.euractiv.com/en/sports/eu-sport-policy/article-165956>

2. The economic dimension in sport: Where the actual economic importance of sport and the ensuring of financial support for grass root sport organizations are attended to.

3. The organization of sport: In which the specific nature of sport, player transfers, media rights, protection of minors and freedom of movement are discussed.

The White Paper clearly stresses that sport is subject to EU law but as you can see it is within this last chapter, the organization of sport, that the evidence based justifications can be found.¹⁶ Two dimensions to the specificity of sport can be recognized in this category. The first is the specificity of the sport structure. This includes the autonomy of sports organizations, the pyramid structure and solidarity mechanisms. The second is the specificity of sporting activities and rules which refers to the traditional rules of the game and the legitimate objectives to sustain a competitive balance and a degree of uncertainty in the sport.¹⁷ For the purpose of this thesis, focus will be on the latter.

The dimension includes the issues of mutual interdependence, competitive balance and the integrity of competition. As mentioned before, the whole point of competition is, of course, ruined if sport opponents are, literally, beaten out of sight since sporting competition cannot take place unilaterally.¹⁸ For that reason, there are clear features of mutual interdependence between competitors in the success of sport which precludes the application of aggressive competition within leagues. Sporting dominance would not serve anyone and it is therefore suggested that sport requires uncertainty of result to maintain public interest. Without this interest, the fans would stay away from the matches, broadcasters would switch interest to another entertainment industry and the revenue stream would slowly fade away. Unequal competition can also rise

¹⁶ Parrish R, Miettinen S, *The Sporting Exception in European Union Law*, T.M.C. Asser Press, The Hague, 2008, p. 43.

¹⁷ Parrish R, Miettinen S, *The Sporting Exception in European Union Law*, T.M.C. Asser Press, The Hague, 2008, p. 44.

¹⁸ Parrish R, Miettinen S, *The Sporting Exception in European Union Law*, T.M.C. Asser Press, The Hague, 2008, p. 2.

through inequality of resources which can lead to a concentration of success in a small number of teams.¹⁹

1.2.2 Lisbon Treaty

The recent White Paper on Sport failed to provide any legal certainty as to the principle while the Lisbon Treaty for the first time includes an article on sport; it introduces “sport as a new area of EU competence.” Many believe the Treaty will at long last bring certainty to the exact meaning behind the specificity of sport.

“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function²⁰”

Europe will have a so-called soft-competence meaning it can ‘support, coordinate and supplement’ sport, i.e. provide funding, platforms for best practice and define sport with respect to current legislation, without creating new legislation directly in the field of sport. Meanwhile, legislation in other areas must take sport into account- namely its ‘specific nature’ (e.g. sport is entitled to prevent people competing in competition for taking performance enhancing drugs even though the drugs are not illegal and it theoretically impinges on EU law on free provision of services).²¹

Europe can act “in accordance with ordinary legislative procedure.... excluding any harmonization of the laws and regulations of Member State”.

In other words, Europe cannot harmonize sporting regulations across Europe and the preference is for self-regulation at a national level. As in policy areas such as education and policing, Europe could not define national legislation or objectives.

¹⁹ Parrish R, Miettinen S, *The Sporting Exception in European Union Law*, T.M.C. Asser Press, The Hague, 2008, p. 4.

²⁰ Article 165 (TFEU)

²¹ The EU & Sport After Lisbon Treaty Ratification. <http://www.eusportfuture.eu/docs/pt/PPT%20EU-Sport-Future%20Lisbon%20X.09.pdf>

Effects of the Treaty

European Commission

Following the ratification of the Lisbon Treaty, the European institutions now have a competence in sport for the very first time. The policy process will start with the European Commission (DG Culture) creating two key papers in 2010.

- Firstly, an evaluation of the White Paper on Sport (from 2007), which will also include new work streams missed in the initial analysis. Intellectual Property Rights and match fixing have been touted as additional agenda items. The consultation for this is yet to be launched, but will run up to the EU sports forum in Madrid in April.
- The second paper is a draft decision to the Parliament and Council. This is due in the autumn after the initial consultation has been digested and will form the basis of future EU sports policy. The initial scope of the policy is likely to be limited to 2012-2013, with further revisions to tie into the Parliament's negotiations for new budgets for the 2014-2020 period²².

Now the European Commission aims to develop a specific EU sports program (supported by a budget) expected to be launched in 2012. Michal Krejza unsurprisingly stated the new competence will help the EU add value to sport by supporting platforms of exchange and debate and so providing legal clarity, by promoting the transfer of knowledge, innovation, dialogue and good governance in the sector. As the head of the European Commission's Sports Unit, nothing to the contrary can be expected from Krejza, however, it is submitted that his reasoning has merit. Legal certainty in sporting matters is a necessity in view of the inconsistent rulings surrounding the ECJ and the recent White Paper, thus ratification of an 'overarching legal base' respecting the special nature of sport is a step in the right direction.²³

²² <http://www.ccpr.org.uk/NR/exeres/E646DBB0-1BDB-4B01-A6D7-6DA60AEFD2C0.htm>

²³ The EU & Sport After Lisbon Treaty Ratification. <http://www.eusportfuture.eu/docs/pt/PPT%20EU-Sport Future%20Lisbon%20X.09.pdf>

National Governments

National governments will have more influence on how European law affects sport. Sports Directors and Sports Ministers meetings will become formal meetings with issues voted on by qualified majority voting. The outcomes of these meetings and votes will set priorities for European action (e.g. which areas of policy the Commission addresses)²⁴. On 20-21 April the Spanish presidency will host the first sports ministers' meeting since the ratification of the Lisbon Treaty, following the EU sports forum on April 19-20. The Lisbon Treaty means the ministers' meetings now have the power to pass recommendations onto the Council. The first formal meeting will be held on 10 May in Brussels - previous meetings were considered informal and could not recommend action to the EU.²⁵

European Parliament

In accordance with Article 165(4) of the TFEU, in order to contribute to the achievement of the objectives referred to in this Article which relate to education, vocational training, youth and sport, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions, are to adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States. Under the same provision, the Council is also to adopt recommendations in the same area, on a proposal from the Commission.²⁶

Sport is currently part of the remit of the culture committee in the European Parliament. It will remain there, but with a stronger emphasis on sport. The culture committee has proposed a hearing on sport, possibly leading to a European Parliament own-initiative report. While these reports are non-legislative, it is the Parliament's way of setting the sporting agenda. Any legislation from the Commission will be voted on by Parliament and by announcing what it would like beforehand, the Parliament forces the Commission's hand to pursue particular avenues in a particular way if it wants smooth passage of proposals through Parliament.

²⁴ The EU & Sport After Lisbon Treaty Ratification. <http://www.eusportfuture.eu/docs/pt/PPT%20EU-Sport-Future%20Lisbon%20X.09.pdf>

²⁵ <http://www.ccpr.org.uk/NR/exeres/E646DBB0-1BDB-4B01-A6D7-6DA60AEFD2C0.htm>

²⁶ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-4571&language=EN>

Funding

Another important issue is that of providing a legal base to support funding streams specific to sport. The Department for Culture, Media and Sport stated that the Treaty would provide the basis for a dedicated EU budget line. In one case, referred to by Dr Parrish, the ECJ did in fact annul a Commission decision on grants due to a lack of a legal base, and the current lack of a dedicated sport funding stream meant that “sporting projects must be sculpted to meet other aims and not developed for sport’s sake²⁷” The European Commission has funded 18 European sports projects from its preparatory actions in the field of sport. The projects focus on the four fields of health enhancing physical activity, gender equality, disability sport and education and training.

These pilot projects represent the first true sport projects funded by the European Union. Funding for 2011 will focus on doping, volunteering and social inclusion, with a further set of topics yet to be established for 2012. It is hoped that the preparatory actions will develop into more significant funding streams for the next full budget period of the EU alongside a full sports program from 2014-2020.²⁸

European Court of Justice

Many cases reach the ECJ where the world of sport collides with other European competences. The Meca-Medina case concluded that while the specificity of sport must be considered, it was not a catch-all and cases must be considered on a case-by-case basis. This lack of legal certainty always played bad role for sport. The Treaty will allow the Commission to define the impact of EU law on sport and recommend a position to the courts rather than the other way round, which will provide clarity for sports.

The CCPR (Central Council for Physical Recreation) expressed the view that “sport desperately needs to have its status within EU law clarified.” They argued that the “specificity” of sport related to the need, because of its special nature, for sport to have partial exemptions from some

²⁷ House of Lords European Union Committee, 10th Report of Session 2007–08. The Treaty of Lisbon: an impact assessment, Volume I pg 210-211

²⁸ <http://www.ccpr.org.uk/NR/exeres/E646DBB0-1BDB-4B01-A6D7-6DA60AEFD2C0>

of the general principles of Community law, such as free movement and competition. The CCPR referred to a range of ECJ rulings that have, on the one hand, accepted the “autonomy” of sport governing bodies and the “specificity” of sport but, on the other, applied principles of Community law equally to sport as they might be applied to other sectors. In *Meca Medina*, the Court established a methodology for applying competition law to sport, allowing rules inherent to sport to be removed from the scope of EU competition law²⁹.

In the light of the case-law EU legal base for sport would allow the ECJ and the other European institutions to recognize the “specificity” of sport more systematically than had been the case thus far. Dr Parrish explained, “it can be envisaged that the Treaty Article could be invoked in the context of justifying measures otherwise contrary to free movement or competition law³⁰”

Latest Judgment:

After Lisbon Treaty came into force outcome of key case on compensation for young players announced:

In 1997 Olivier Bernard signed a three-year training contract as a “joueur espoir” (trainee) with the French club Olympique Lyonnais. At the end of the contract, he decided not to take up the offer of a professional contract with the French club but instead signed for Newcastle United.

At the time, the French Professional Football Charter required contracted trainees between the ages of 16 and 22 to sign with the club which trained them if offered a contract at the end of their training. If they chose not to take up that offer they could not sign with another French club for three years without the consent of the club which had trained them.

The ECJ ruled that while the French rules are a restriction on freedom of movement for workers, in the view of the social importance of football in the European Union, the objective of encouraging the training of young players must be accepted as legitimate. By taking into account

²⁹ House of Lords European Union Committee, 10th Report of Session 2007–08. The Treaty of Lisbon: an impact assessment, Volume I. pg 209-210

³⁰ House of Lords European Union Committee, 10th Report of Session 2007–08. The Treaty of Lisbon: an impact assessment, Volume I. pg 210

the specific nature of sport it ruled that, receiving training fees is permissible as it is likely to encourage football clubs to seek new talent and train young players.

However, the court ruled that compensation should only be limited to the costs borne by the clubs in training both future professional players and those who will never play professionally; in other words not direct compensation for the player's current or future value³¹.

1.3 The First Relations of Sport and ECJ

Before the EU's attempts to get sport in line with European law, two rulings from the ECJ helped to establish the borders between areas where sporting associations could and could not establish regulations free from EU interference.

1.3.1 Walrave Case

In *Walrave*, a question was referred to the ECJ concerning the rules of a Dutch national cycling association, which stipulated that the pacemaker had to have the same nationality as the rider.³² The question was whether this was in conflict with EU principles of free movement.³³ The cycling organization argued that this rule was a legislative act of an association and consequently did not fall under public law.³⁴ The ECJ did not accept this argument, stating that freedom of movement which is a fundamental objective of the Community 'would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law'.³⁵ Actions of a 'purely sporting interest hindering the freedom of movement would however be acceptable'³⁶. Furthermore, before sending the case back to the national court, the ECJ held that 'having regard to the objectives of the community, the practice of sport is subject to

³¹ Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC*. PRESS RELEASE No 30/10Luxembourg, 16 March 2010- available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-03/cp100030en.pdf>

³² The rider (a cyclist) is assisted on long rides by a pacemaker on a motorcycle to ensure a fast time for the rider. The one who sets the pace in a race.

³³ Case 36/74 *Walrave* [1974] ECR 1405 para. 1

³⁴ Case 36/74 *Walrave* [1974] ECR 1405 para. 15

³⁵ Case 36/74 *Walrave* [1974] ECR 1405 para. 18.

³⁶ Case 36/74 *Walrave* [1974] ECR 1405 para. 8

community law only in so far as it constitutes an economic activity within the meaning of article 2 (now article 3 TFEU) of the treaty'³⁷. The Court then clarified that such an activity could be defined by the 'character of gainful employment or remunerated services'.³⁸

1.3.2 Dona Case

The other case is *Dona* where the national judge, under Article 234 EC (now Article 276 TFEU), referred to the ECJ a number of questions concerning the interpretation of Articles 18, 45 and 56 of the Current Treaty.³⁹ The factual circumstances evolved around two provisions in the 'Rules of the Italian Football Federation' which stated that one had to be affiliated to that federation to be able to take part in matches as a professional or semi-professional player. This meant in practice that membership only was open to players of Italian nationality. The Court was asked to rule whether the abovementioned provisions in the Treaty granted all nationals of the Member States of the Community 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.⁴⁰ Additionally, the Court was asked to rule whether this right could 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.⁴¹

The ECJ started off by stipulating that any national provision which limits an activity covered by the Treaty provisions on the freedom to provide services and the freedom of movement for workers is 'incompatible with the Community rule'⁴². Thereafter the Court referred to its decision from *Walrave* stating 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'⁴³. The Court then continued to state that this 'applies to the activities of professional or semi-professional football players, which are in the nature of

³⁷ Case 36/74 *Walrave* [1974] ECR 1405 para. 4

³⁸ Case 36/74 *Walrave* [1974] ECR 1405 para. 5

³⁹ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 1

⁴⁰ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 2

⁴¹ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 3.

⁴² Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 11.

⁴³ Case 36/74 *Walrave* [1974] ECR 1405 para. 4. And Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12

gainful employment or remunerated service’ and that ‘where such players are nationals of a Member State they benefit in all other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services’.⁴⁴ Thereafter the Court provided an example of a regulation that was purely sporting in nature. They held 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.’⁴⁵ Before referring the case back to the national court for their final judgment, the Court declared that the ‘restriction on the scope of the provisions in question must however remain limited to its proper objective.’⁴⁶

Conclusion

The European model of sport can be described as a pyramid. At the pinnacle of the “European football pyramid” is the UEFA which is affiliated with the world governing body, FIFA. Below UEFA, starting from the top, are the national associations, the sport clubs and the players.⁴⁷ The system of promotion and relegation and merit-based as opposed to financially based access to European competitions are central features in this model, meaning that clubs instead of focusing on their financial situation should focus on their sportive achievements.

When exercising their duties, FIFA and UEFA draw up statutes and regulations and ensure their enforcement. The regulatory bodies therefore possess dominant positions created by the pyramid structure. The position is defended by the international governing bodies on the grounds that they must be allowed to take decisions in their capacity as guardians of the sport, decisions that sometimes has a difficulty to comply with European competition law and the rules of the internal market.⁴⁸

⁴⁴ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 12-13

⁴⁵ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 14

⁴⁶ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 15-16.

⁴⁷ Parrish, Miettinen, p. 18

⁴⁸ Szyszczak E, *The regulation of sport in the European Union – Is sport special?*, Edward Elgar Publishing Limited, Cheltenham, 2007, p.6

Walrave and Dona, two decisions by the ECJ, helped to establish the lines of the regulations sporting associations could and could not create without enduring EC interference. In these cases the Court found that sport was subject to Community law in so far it constituted an economic activity and that it applies to the activities of non-amateur football players which are in the nature of gainful employment or remunerated service.⁴⁹ In Walrave the Court also created an exception, stating that activities restricting freedom of movement would be acceptable if they were of a 'purely sporting interest' in which Dona provided the legitimate example of foreign players participating in matches played by a national team of that Member State.⁵⁰ But the Court added a warning when saying that such a provision must remain limited 'to its proper objective', clearly referring to the principle of proportionality.⁵¹ The Court did also, in Walrave, acknowledge that Article 45 TFEU covered the rules of private employment, such as professional football, and not only public employment.

⁴⁹ Case 36/74 Walrave [1974] ECR 1405 para. 4 and 5. And Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 12

⁵⁰ Case 36/74 Walrave [1974] ECR 1405 para. 4 and 5. And Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 14

⁵¹ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 15

2. Footballers and Freedom of Movement

Judging from the court decisions, before sport gained its 'specific' provision in Lisbon Treaty it has been the fact without question that sport could fall within the EC Treaties Articles of the Court's decisions in Walrave and Dona and regarding the transfer windows there were two obvious candidates. As discussed before these were article 45 TFEU and Article 101 TFEU. For the purpose of better examining these two articles we would somehow avoid the current status of sport in new Treaty by now. The differences between the scopes of the provisions are however substantial and the two provisions will therefore be considered separately, first, Article 45 (TFEU).

2.1 Freedom of Movement

To be able to exercise the right of freedom of movement, three basic requirements must be fulfilled. First, in order to trigger the Treaty provisions guarding this right the person in question must be a national of a Member State of the European Union. The less obvious second and third prerequisites state that he or she must be engaged in some kind of economic activity and that the activity also requires a territorial dimension beyond the borders of a single Member State.⁵² Once these preconditions are fulfilled, the next issue to be addressed is whether any national measures infringe the relevant Treaty Article and, if so, if this violation is justified and proportionate?

But before addressing these issues a brief explanation of the rules surrounding the freedom of movement for workers will be provided along with the preliminary question of whether this provision in fact can be relied upon in disputes between private entities.

2.1.1 Article 45 (ex Article 39 EC) - freedom of movement for workers

The freedom of movement for workers, granted in Article 45(1), is part of the free movement of persons which is one of the four economic freedoms in EU law. These freedoms strive, in the

⁵² Van den Bogaert S, Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman, Kluwer law international, the Hague, 2005 pg 23

spirit of Article 3(1)(c) EC, to eliminate obstacles to free movement between Member States, creating a free flow of economic factors, in pursuit of greater prosperity within the Union.

The freedom of movement for workers enables citizens of one Member State to enter any other Member State within the Union and stay there permanently or temporarily for the purpose of gainful employment. The idea behind this legislation is that citizens of the Union should be treated equally and should be able to enjoy the same rights as the workers of the host country⁵³. This prohibition of discrimination on the grounds of nationality, reflected in Article 45(2) TFEU, relates to any discrimination regarding employment, pay or other working conditions. The article represents an application, regarding workers, of the general prohibition on nationality discrimination as set out in Article 18 TFEU. It is also important to understand that Article 39 is strictly related to the creation of a common market and therefore can have no effect on situations entirely internal to a Member State.⁵⁴

One of the principal objections concerning the Treaty provisions on free movement of workers in relation to sporting associations and clubs is that the provisions are not horizontally directly effective meaning that Article 45 TFEU only is applicable with regard to public authorities and does not apply in disputes between private entities. As a result it has been said that restrictions, drafted by sport associations or clubs cannot fall under free movement scrutiny as these associations or clubs are regarded as private entities.⁵⁵

The issue of horizontal direct effect regarding the Treaty provisions on the free movement of persons was presented to the Court for the first time in *Walrave*. In brief the Court had to decide whether Articles 18, 45 and 56 TFEU were to be interpreted in such a way that the provision in the rules of a national cycling association was incompatible with them. It was unquestionable that the national cycling association was a private organization. However, the cycling association advocated that the prohibitions laid down in Articles 18, 45, 56 TFEU 'refer only to restrictions

⁵³ Vieweg K, *Globalisation, Europe and the Re-regulation of Sport*, in Caiger and Gardiner, *Professional Sport in the EU: Regulation and Re-Regulation*, T.M.C. Asser Press, The Hague, 2000, p. 92

⁵⁴ McAuley, *European Competition Law Review*, 2002, 23(7), p. 332

⁵⁵ Van den Bogaert, p. 23-24

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'⁵⁶.

This allegation was however refuted by the Court who held that the prohibition of discrimination 'does not only apply to the action of the 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'.

This decision was based upon three grounds: first, the effect utile argument, in which the Court 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 EC Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law'.⁵⁷

Second, the Court proceeded stating, what could be referred to as the uniform application argument, that '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'⁵⁸.

Third, in what has been named the general wording argument, the Court emphasized the general nature of the terms of the Treaty provisions in question, not distinguishing between the source of the restrictions to be abolished and extending to rules and agreements that do not originate from public authorities.⁵⁹

The Walrave decision was later extended in Bosman from not only seizing measures regulating employment in a collective manner but also non-discriminatory private collective measures. In

⁵⁶ Case 36/74 Walrave [1974] ECR 1405 para. 15

⁵⁷ Case 36/74 Walrave [1974] ECR 1405 para. 18.

⁵⁸ Case 36/74 Walrave [1974] ECR 1405 para. 19

⁵⁹ Case 36/74 Walrave [1974] ECR 1405 para. 20-21

the latter case the Court ruled that even though the rules established by a regulatory body did not discriminate on grounds of nationality, they still directly affected access to the employment market of other Member States and could therefore obstruct freedom of movement of workers.⁶⁰

2.1.2 Free movement provisions and sporting federations regulations

From now on, regulations elaborated by public and private entities, in so far the regulation concerned a whole group, would be dealt with in the same way by the Court, meaning that an association which acts as a regulatory body, like FIFA and UEFA, and creates regulations in its field of competence is caught by the free movement provisions in so far as the regulations of the organisation contain discriminatory provisions.⁶¹ The Court made it clear in Walrave that Article 45 was not just of vertical direct effect. This decision was extended in Bosman to involve non-discriminatory private collective measures, such as the transfer rules.

To be able to fall within the scope of Article 45 TFEU, and enjoy the status of ‘worker’, the activity must fulfill three conditions. It must have a sufficient economic dimension and it must also have some Community dimension beyond the borders of an individual Member State. The person in question must also be a national of a Member State of the European Union. However, this will be left out of consideration here.

The Community territorial dimension can favorably be illustrated from a perspective of reverse discrimination. An individual’s activity which has no Community dimension or relation and only occurs within that person’s Member State of nationality is defined as a ‘wholly internal situation’ and falls outside the scope of EU law since there is no attempt to move freely.⁶² However, where a citizen has attempted to exercise his or her right to free movement, Community law may govern the situation even in their Member State of nationality and residency, and Member States of origin are forbidden to restrict a citizen’s right to establish in another Member State⁶³.

⁶⁰ Case 415/93 Bosman [1995] ECR I-4921, para. 103

⁶¹ Case 36/74 Walrave [1974] ECR 1405 para. 17

⁶² Case 175/78 La Reine v. Vera Ann Saunders [1975] ECR 1129 Para. 11

⁶³ Case 115/78 Knoors v. Secretary of State for Economic Affairs [1979] ECR 399 Paras. 20 and 24.

As mentioned above the activity also requires a sufficient economic dimension. The economic test applied to workers derive from the cases *Lawrie-Blum v. Land Baden-Wurttemberg* and *Levin v. Staats secretaris van Justitie* where in the former the Court stated 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...remuneration’⁶⁴

In *Levin*, the Court held that the work performed must be ‘genuine and effective’ and cannot be of a ‘purely marginal and ancillary’ nature⁶⁵. However, the salary in itself need not to be sufficient to support the worker as shown in *Levin* where the remuneration was less than the national minimum wage.⁶⁶ Lastly, before someone can be regarded as a worker there must also be an element of subordination. Subsequently, it has to be evaluated whether or not a person is regarded as being in a position of subordination towards a person who orders him to carry out the economic activity.⁶⁷

Most sports, including football, require special skills in particular mental and physical capacities and it takes years and years of training to be able to perform at a certain professional level. Once footballers have reached this level they have to keep working to continue improving to keep up with the rest. According to a survey, carried out in Finland, football players devoted on average 24 hours per week to warming up, training, matches and travelling to the matches⁶⁸. In contrast the ECJ have held that giving 12 hours of music lessons per week or being a trainee for 11 hours per week during a period of eight months should constitute as genuine and effective work. “Subsequently, it seems quite obvious that football, when performed at a certain level, should also.

To be considered as an economic activity, within the meaning of Article 3 TFEU, the sporting activity must also be carried out in return for remuneration, as held in *Lawrie-Blum*. In *Dona*, as mentioned above, the Court came to the conclusion that the activities of professional or semi-

⁶⁴ Case 66/85 *Lawrie-Blum v. Land Baden-Wurttemberg* [1986] ECR 2121 Para. 17. And Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035

⁶⁵ Case 53/81 *Levin* [1982] ECR 1035 Para 17

⁶⁶ Case 53/81 *Levin* [1982] ECR 1035 Para 15

⁶⁷ Case 66/85 *Lawrie-Blum* [1986] ECR 2121 Para. 18

⁶⁸ Huttunen M, A comparative analysis of the legal position of professional sportsmen under Finnish, English and European Community Law. The borderline of employment, thesis EUI, Florence, 1999, p. 169-177

⁶⁹ Case 139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741 para. 14. And Case 66/85 *Lawrie-Blum* [1986] ECR 2121 para. 17

professional football players are ‘in the nature of gainful employment or remunerated service’.⁷⁰ This position is supported by an analysis carried out for the 2000/01 season showing that Belgian First division football players earned on average 3750 Euro per month plus free car and apartment⁷¹. All included, this is 4 to 5 times as much as the minimum wage level in Belgium.⁷² However, these figures are trivial compared to the massive amounts that players in the English, Italian, French, Spanish or German leagues make.⁷³

Consequently, viewed against The ECJ’s decision in Levin, where the remuneration was less than the national minimum wage, it seems clear that most professional and semiprofessional football players are ‘in the nature of gainful employment or remunerated service’⁷⁴. The particular situation of each football player will however be objectively evaluated on a case-by-case basis.⁷⁵ Considering the abovementioned, it is clear that football players carry out an economic activity within the meaning of Article 3 .

Having established that football should be considered as an economic activity within the meaning of Article 3 TFEU, the next logical step is to examine whether football players are to be qualified as workers or as service providers.

In neither Walrave nor Dona was the Court able to come to a conclusion whether the provisions of Article 45 on workers or the provisions of Article 56 on services should apply to cyclists alternatively football players. However, in Dona, Advocate Generale Trabucchi had an interesting opinion, declaring that ‘in the case of a football team, the element of athletic subordination [...] is not present; the fact remains, however, that the players have a professional or semi-professional status in which, in fact, puts them in the position of employees as against the club which runs the

⁷⁰ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 12.

⁷¹ Demets F, Killemaes D, ‘Luis Figo naar Westerlo?’, Trends, 10 August 2000

⁷² In 2004 the minimum wage in Belgium was 1 210 EUR per month.

<http://www.eurofound.europa.eu/eiro/2005/07/study/tn0507101s.htm>

⁷³ For instance, in 2006 the average player salary in the British Premier league was £676 000 per year.

<http://www.independent.co.uk/sport/football/news-and-comment/163676000-the-average-salary-of-apremiership-footballer-in-2006-473659.html>

⁷⁴ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 12

⁷⁵ Van den Bogaert, p. 46

team⁷⁶. The AG was referring to the test of subordination as laid down in Lawrie-Blum. Footballers do not choose the services they perform. They are being paid to play football and they have little free choice regarding which interviews or other representative tasks they should show up to. Moreover, they do not have the freedom to choose their working hours. Football players have to be present at the club fixtures regardless of whether these matches are played during the day or in the evening, at a weekend or in a weekday, home or away. Most football players must also follow more general rules imposed by the club. These may concern issues like dress codes, bedtime hours and limits on alcohol consumption.

The criteria laid down in Lawrie-Blum regarding the existence of a relationship of subordination are thus fulfilled. Footballers should therefore be considered as workers within the meaning of Article 45 TFEU, a conclusion which is verified in Bosman.

It is quite clear that a provision which prevents or prohibits a national of a Member State from leaving his home state in order to exercise his right to freedom of movement is a restriction to that freedom. This notion of restriction is however very wide and viewed in this way it covers almost every regulatory rule which has something to do with freedom of movement. Measures captured by the free movement provisions will therefore be protected if their existence can be defended by an acceptable means of justification.

Rules which are directly discriminatory must typically be justified with reference to a specific Treaty derogation, whilst other restrictions may be justified on recognized additional grounds of objective justification based on the case law of the Court or on Treaty grounds.

Regarding free movement of workers the grounds for derogation are expressed in Article 45(3) TFEU which can be applied on the grounds of ‘public policy, public security and public health’ and excludes in Article 45(4) work in the public sector from the free movement of workers.

In addition to the types of justification provided in the Treaty the Court decided as mentioned to produce a new doctrine of ‘objective justifications’ which boiled down to an open category of

⁷⁶ Trabucchi A, AG in Case 13/76 Donà v. Mantero [1976] 2 CMLR 578, [1976] ECR 1333 p. 1343

supplementary grounds of justification, in literature referred to as, the rule of reason.⁷⁷ The objective justification test for workers was established in *Kraus v Land Baden-Wuerttemberg* where the ECJ held that Article 45 TFEU prevents the legislation of a Member State from 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’⁷⁸.

The principle of proportionality

For the purpose of objective justification it is not enough that the measures are ‘in the general interest’ and ‘pursues a legitimate aim’, the national measures must also be suitable for achieving the desired end and they must not go beyond what is necessary in order to attain it⁷⁹. These additional requirements are imposed by the Court in respect of the principle of proportionality. They imply that the Court will examine the suitability of the means chosen to achieve the objective and review if it is not possible to apply a measure which is less restrictive to freedom of movement but still generates the same result⁸⁰. It has, however, been suggested that this test of proportionality also contains a third condition. This condition establishes that even though there are no alternatives less restrictive it must still be determined that the measure under investigation does not have an excessive or disproportionate effect⁸¹. However, in practice the Court does not always act with consistency on this matter, sometimes referring to three elements and sometimes to two, without making it clear to which they are referring.

The test of proportionality could be seen as a balancing exercise between the restrictive effects on the right to freedom of movement and the aims pursued. A highly realistic scenario is therefore one in which the Court first states that a national measure is hindering the right to freedom of movement, but acknowledges that the measure pursues a justifiable aim, only to conclude that it does not comply with the requirements of the principle of proportionality, and therefore should be invalidated.

⁷⁷ Van den Bogaert, p. 146

⁷⁸ Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, para. 32

⁷⁹ Case 55/94 *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Case C-106/91 *Ramrath v. Ministre de la Justice* [1992] ECR I-3351, Paras. 29-30. And Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32

⁸⁰ Van den Bogaert, p. 148

⁸¹ Van den Bogaert, p. 148-149

A final issue to resolve is the whether, in Article 267 proceedings, the principle of proportionality should be applied by the Court itself or whether the issue should be left to be decided by the national courts. In this respect, Advocate General Jacobs, argued that ‘it might be difficult to always draw the dividing line in the right place’, nevertheless expressing his opinion that it might be preferable for the Court to make the ultimate assessment itself when it has sufficient knowledge of the facts of the case and the necessary technical expertise.⁸²

2.2 Bosman Case

The importance of the Bosman case cannot be understated. Without Bosman there probably wouldn't be anything called European sports law and policy.⁸³

In December of 1995 the legality of the transfer system was challenged by a Belgian first division player named Jean-Marc Bosman.

Jean-Marc Bosman was a Belgian national who played professional football with the Belgian club RC Liège from 1988 to 1990. When his contract expired, RC Liège offered him to renew his contract at the minimum salary established by the Belgian football association. The salary cut was in the range of 75%. Mr Bosman refused the offer and was put on the so-called compulsory transfer list. Since no club expressed any interest in a compulsory transfer, Mr Bosman contacted the French second division club US Dunkerque on his own and managed to negotiate a contract, which was considerably more favorable than the terms offered by RC Liège. A contract was concluded between his old and new club for a temporary transfer for one year, against the payment of 1 200 000 BFR. The transfer was conditional on the transfer certificate for Mr Bosman (his player license) being sent from the Belgian to the French Football Association. RC Liège did however not request the certificate being sent since they had doubts as to US Dunkerque's solvency. The deal fell through and as a consequence Mr Bosman was suspended from playing for the remaining season of 1990. Since Mr Bosman was effectively hindered from playing professional football, even though there was a

⁸² Jacobs F, ‘Recent Developments in the Principle of Proportionality in European Community Law’, in E Ellis ‘The Principle of Proportionality in the Laws of Europe’, Hart, Oxford, 1999, p.19-20

⁸³ Parrish, "Sports Law and Policy in the European Union", chapter 1 pg8

club prepared to employ him, the situation left him no other choice than to go to court.⁸⁴ After a prolonged journey through the Belgian court system, a reference for a preliminary ruling under Article 267 EC was requested from the ECJ on the legality of the Transfer system and nationality quotas under Articles 45, 101 and 102 of the Treaty.

The Reasoning of the Court

The ECJ confirmed that sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 3 of the Treaty. The Court acknowledged the difficulties of severing the economic aspects from the sporting aspects of football. Reiterating what it had said in the *Dona* judgment, the Court stated: “the provisions of Community law concerning freedom of movement of persons and of provisions of services do not preclude rules or practices justified on non-economic grounds, which relate to the particular nature of certain matches”. Such a restriction on the provisions in question must, however, remain limited to its proper scope. It cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty⁸⁵.

Having confirmed that a sporting exception from EC law, indeed was limited, the Court held that; “Article 48 (now article 54 TFEU) of the Treaty therefore applies to rules laid down by sporting associations such as URBSFA (Belgian Football Association), FIFA and UEFA, which determine the terms on which professional sportsmen can engage in gainful employment”. With this, the Court, confirmed the horizontal direct effect of Article 45; that the reach of the Article went beyond the acts of public authorities to rules of any nature aimed at regulating employment in a collective manner.⁸⁶

On the transfer rules’ compatibility with Article 45, the Court concluded that since they provide that a professional football player may not pursue his activity with a new club in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or

⁸⁴ The Bosman ruling at paras. 28-34

⁸⁵ The Bosman ruling at para. 76

⁸⁶ The Bosman ruling at paras. 82 and 87

determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to the freedom of movement of workers.⁸⁷

As regards the existence of justifications for obstructions to freedom of movement for European workers within the sport industry, the ECJ pronounced the most important passages of the judgment. The Court held: “In view of the considerable social importance of sporting activities and in particular football in the Community, 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 must be accepted as legitimate⁸⁸”. These aims represent two justifications in law and must thus be considered when applying EU law to the practice of sport.

As for the transfer rules under review under the first of those aims “the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. 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 clubs⁸⁹”.

As regards the second aim “it must be 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.⁹⁰”

The Court went on; “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, 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 prospect of receiving such fees cannot, therefore, be either a

⁸⁷ *ibid*, para. 100

⁸⁸ *ibid*, para. 106

⁸⁹ *ibid*, para. 107

⁹⁰ *ibid*, para. 108

decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs⁹¹”.

On the achievement of the above aims, the Court concluded, that the same aims can be achieved at least as efficiently by other means which do not impede freedom of movement of workers, referring to the means suggested by the Advocate General.

The Court dismissed the argument that the transfer rules were necessary to safeguard the worldwide organisation of football, since the proceedings did not affect the relations between the national associations of the Member States and those of non-member states. Finally it was argued by the football associations that the said rules are necessary to compensate clubs for the expenses, which they have had to incur in paying fees on recruiting their players. This is essence would be to seek justification for the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past⁹².

The Verdict

The Court declared that Article 45 of the Treaty precluded 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 paid to the former club a transfer, training or development fee.⁹³

The Article further precludes the application of rules laid down by sporting associations under which in matches in competitions, which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States (invalidation of nationality quotas).⁹⁴

2.2.1 The Effects of Bosman

The two most obvious effects of the ruling were the dismantling of out-of-contract transfer payments for transnational transfers within the EU/EEA for EU/EEA citizens and the abolition of nationality quotas for EU/EEA citizens in club football in the EU/EEA.

⁹¹ *ibid*, para. 109

⁹² *ibid*, para.111-113

⁹³ *ibid* at para. 114

⁹⁴ *ibid* at para. 137, as this part is outside the scope of this thesis I have not elaborated on the reasoning of the Court on this question

As regards the transfer system as a whole, the ruling left some parts of the system in a status quo. National transfers and transfers that take place during the course of a contract were outside the scope of the ruling. The limited scope of the judgment relates in part to the scope of Article 45. Article 45 does not apply to relations that only concern a Member State internally.

Regardless of which specific rules that were under scrutiny in Bosman, the judgment is directed at the general system, which restricts post-contractual labor mobility in the EU.

The greatest beneficiaries of the judgment were the football players whose contracts have expired and their agents. The money that was exchanged between clubs in the form of transfer fees before Bosman, now went directly to the player in the form of signing-on-fees and salaries.

Since out-of-contract players were no longer restrained by the transfer system they could enter into free negotiations with potential employers, considerably increasing their bargaining power.

The clubs obviously lost out on the transfer fees that they would have received pre-Bosman. But one club's loss is another club's gain; the clubs could now sign out-of-contract players without having to compensate the former club.

Since the transfer system was a closed system before Bosman in the sense that money remained in the game, the transfer fee money for out-of-contract players now ended up with the players. It was argued that transfer fee money that remained amongst the clubs could be re-invested in new players, new stadiums and training facilities⁹⁵. But while the clubs certainly lost out on transfer fee payments for players whose contracts had expired, they compensated this by signing the players on longer contracts, enabling them to demand a transfer fee under contract.

Bosman certainly did not mark the end of transfer payments. Some of the highest transfer fees in history were recorded after Bosman, e.g. for the French player Zinedine Zidane, who transferred from the Italian Club Juventus to the Spanish club Real Madrid at a sensational 45.62 million GBP.⁹⁶ And

⁹⁵Fact Sheet 16: The Bosman Ruling, Football Transfers and Foreign Footballers, available at www.le.ac.uk/so/css/resources/factsheets/index.html

⁹⁶ www.footballtransfers.co.uk

the latest all time record sum was paid for Cristiano Ronaldo who was transferred from Manchester United to Real Madrid for 80 million GBP⁹⁷.

Following the abolition of nationality quotas by FIFA and UEFA in Europe, the migration of players increased since there were no longer any limits as to how many non-nationals a club in the EU could field. Football clubs could now recruit labor from all parts of the EU/EEA.

It is important to note that the ECJ did acknowledge that sport had a unique character that should be considered when applying EU law.

After Bosman it was clear that EU law applied to the realm of European club football. Even though Bosman was not adjudicated under the competition law provisions of the Treaty, the principles extracted from the judgment, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition.⁹⁸

Maybe the most important effect of the judgment was in the sudden active involvement by the Commission in the practice of sport. The Commission had not enforced the earlier sports related judgments from the ECJ. After Bosman, however, the Commission became more energetic in enforcing the competition policy implications of the ruling.⁹⁹

2.2.2 The new transfer system

Bosman decision had woken the Commission which now had become suspicious of the entire transfer system. Subsequently, following the “Ronaldo transfer incident”, in April 1998, FIFA was ordered to revise the transfer rules or the Commission would be forced to take official action¹⁰⁰. Even so, FIFA did not immediately listen to the Commission, but as the cases challenging the transfer system grew FIFA reconsidered in order to avoid an abolishment of the

⁹⁷ Cristiano Ronaldo transfer: World-record deal shows football is booming, says Sepp Blatter
<http://www.telegraph.co.uk/sport/football/leagues/premierleague/manutd/5517910/Cristiano-Ronaldo-transfer-World-record-deal-shows-football-is-booming-says-Sepp-Blatter.html>

⁹⁸ Case T-313/02, David Meca-Medina and Igor Majcen v Commission of the European Communities, European Court reports 2004

⁹⁹ Richard Parrish, Sports law and policy in the European Union, 2003 pg 101.

¹⁰⁰ <http://www.indianexpress.com/res/web/pIe/ie/daily/19970625/17650543.html>

transfer system altogether. The conflicting interests of the parties involved has meant that the passage of reform has not been an easy one. Nevertheless, the new regulations, including a set of Application Regulations, were adopted by FIFA's Executive Committee on the 5th of July 2001 in Buenos Aires¹⁰¹. The regulations on the status and transfer of players, as the rules were entitled, were thereafter revised in 2005 and in 2008. So the main principles of new Transfer system were following:

- In the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training efforts of clubs, in particular small clubs;
- Creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs;
- Creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season;
- Minimum and maximum duration of contracts of respectively 1 and 5 years;
- Contracts to be protected for a period of 3 years up to 28; 2 years thereafter;
- The system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season;
- Financial compensation can be paid if a contract is breached unilaterally whether by the player or the club;
- Proportionate sporting sanctions to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period;
- Arbitration is voluntary and does not prevent recourse to national courts.

The transfer rules are quite comprehensive and due to the purpose of this thesis I will focus on the most controversial regulation, the transfer window. However, for the same purpose it is important to understand that the transfer system operates on the basis of a rule of registration, meaning that a club that holds the registration for a player under contract is under no circumstances required to release that registration until and if a transfer fee has been agreed.

¹⁰¹ Braian Foley, *Bosman and the new fifa rules for international transfers*. 2003 pg 1

2.3 Transfer windows

The “windows system” represents a simple philosophy, in theory at least, which is that footballers will only be allowed to move between teams during certain dates.

In the “transfer settlement”, negotiated between FIFA, UEFA and the Commission, it was accepted that a breach of contract during the season could upset the balance of competition and should therefore be restricted. It was considered necessary to reinforce the contractual stability and to apply a special rule to preserve the regularity and proper functioning of competition¹⁰².

Transfer windows, a term given to a period in sport when a club can transfer players either in or out of their roster, were brought into compulsory effect by the FIFA during the 2002- 03 football season. It was greeted with hostility from several clubs. However, the system of limited transfer periods had already been in use in several European football leagues such as France, Italy and Spain..

More specific this regulation stipulates that a football player can only be registered to play with a national association during one of the two registration periods per year.¹⁰³ The institutions of these two transfer periods depends on the league’s season cycle and are decided by each national association, according to the following principles:

a) The first registration period shall begin after the completion of the national championship and finish, at the latest, before the national championship begins. This period should, in principle, last for no longer than twelve weeks¹⁰⁴.

b) The second registration period will occur approximately in the middle of the season. This period may not exceed four weeks. Players may be registered with a maximum of three clubs during one season but are during this period only eligible to play matches for two of

¹⁰² The Independant European Sports review, 2006, para. 3.34

¹⁰³ Article 6.1 FIFA Regulations 2008

¹⁰⁴ Article 6.2 FIFA Regulations 2008

them.¹⁰⁵ An international transfer is finalized once the new association has received an International Transfer Certificate (ITC) and the player becomes registered.¹⁰⁶

As mentioned above, the two transfer periods are decided by each national association and depend on the league's season cycle. Normally, in a season played from autumn to spring, the first transfer window is open from 1 of July until 31 of August in year A and the second from 1 of January until 31 of January in year B. This system is adopted by most major European leagues. However, when the season runs throughout a whole year, from spring to autumn, the transfer periods usually differ. This is the case for most Nordic countries. In these countries the transfer window is usually open between the 1 of March until 30 of April, followed by the second registration period from 1 of August to 31 of August.

2.3.1 Lehtonen Case

At first sight the *Lehtonen* do not surprise as they confirm the principles of *Bosman* especially that sport is subject to EU law. However, the Court gave clearer guidelines for sporting justification arguments. The significance of these rulings lies in the way the Court acknowledged the special character of sport and dealt with the question on how to reconcile it with EU law. In the previous cases the ECJ had elaborated that law applies to sport as far as it constitutes an economic activity. With the two judgments at hand, the ECJ provided possible exemptions to this rule on the basis that they are inherent to the organization of sports.

The issue of restricted transfer periods have already been before the Court of Justice in the case of *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*.¹⁰⁷ In *Lehtonen* the Court of First Instance in Brussels, Belgium, referred the following question to the ECJ for a preliminary ruling under article 267 TFEU:

‘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 specific date contrary to the Treaty of

¹⁰⁵ Article 5.3 FIFA Regulations 2008

¹⁰⁶ Article 5.1 and 9.1 FIFA Regulations 2008.

¹⁰⁷ Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, 13 April 2000

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 the need to prevent distortion of the competitions?’¹⁰⁸

The dispute had its origin in the transfer of the Finnish basketball player, Jyri Lehtonen, who was transferred from a Finnish team to a Belgian team. The Belgian Basketball Federation however, refused to register his transfer on the grounds that the transfer had not taken place within the relevant time limits and that, as an un-registered player, Lehtonen was unable to compete in the Belgian National Basket League.¹⁰⁹ Even so Lehtonen played and his club won. The win was however overturned by the Belgian federation due to the breach of the transfer rules.¹¹⁰ Regarding to the question referred, the Court stated that it was going to give a preliminary ruling in so far as it relates to discrimination on grounds of nationality and freedom of movement for workers but not in so far as it relates to competition rules applicable to undertakings.¹¹¹

Concerning the inadmissibility of the question the Court considered that it did not have enough information to give guidance as to the definition of the market or markets at issue, nor did it have the relevant information that shows the character and number of undertakings operating on that market or markets.¹¹² The incapability of the national court to define the factual and legal context of the question resulted in the ECJ not being able to make meaningful findings regarding the volume of trade between Member States or as to the possibility of that trade being affected by the rules on transfers of players¹¹³.

Referring to Walrave and Bosman, the Court then stated that ‘sport is subject to Community law in so far as it constitutes an economic activity within the meaning of article 3 of the EC Treaty’ and that ‘...the Community provisions on freedom of movement for persons...not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating

¹⁰⁸ *ibid*, para 18

¹⁰⁹ *Ibid* para. 6 and 10

¹¹⁰ *Ibid* para 13

¹¹¹ Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, 13 April 2000, par 30.

¹¹² *Ibid* para 28.

¹¹³ *Ibid* para. 22 and 28.

gainful employment...in a collective manner.¹¹⁴ Consequently, Articles 18 and 45 of the Treaty are applicable to sporting activities and to rules laid down by sporting associations such as those at issue.¹¹⁵ However article 18 EC is only applicable in so far as the Treaty does not lay down a specific rule prohibiting discrimination which, with regards to workers, Article 45 TFEU does.¹¹⁶

Having determined the scope of the treaty the Court now had to consider whether Mr Lehtonen should be regarded as a worker and if he could carry on an economic activity.

Considering that Mr Lehtonen was a professional basketball player with a contract of employment under which he was to be paid a fixed monthly salary and bonuses he met the requirements stated in *Dona* and his work should subsequently be regarded as an economic activity within the meaning of Article 3 TFEU.¹¹⁷ As to the concept of worker the essential feature of an employment relationship is that a person for a certain period of time performs services for and under the direction of another person, in return for which he receives remuneration. In Mr Lehtonen's case this was considered to be fulfilled since he had entered into a contract of employment with a club in another Member State with a view to exercise employment in that state, hence accepting an offer of employment within the meaning of Article 45(3)(a) TFEU.¹¹⁸ Stating that Mr Lehtonen should be regarded as a worker within the meaning of this article, the Court had to consider whether the rules on transfer periods, as laid down by the International Basketball Federation, constituted an obstacle to freedom of movement for workers, prohibited by that article.

When examining the rules the Court found that they did amount to such a restriction on a players' mobility even though the rules did not concern the employment but the extent to which their clubs may field them; stating that 'in so far 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'.¹¹⁹ On the question whether this obstacle

¹¹⁴ Case 36/74 *Walrave* [1974] ECR 1405, para. 4 and 17-18. And Case 415/93 *Bosman* [1995] ECR I-4921, para. 73 and 82-83. And Case 176/96 *Lehtonen*, 13 April 2000, para. 32 and 35

¹¹⁵ Case 176/96 *Lehtonen*, 13 April 2000, para. 36

¹¹⁶ Case 176/96 *Lehtonen*, 13 April 2000, para. 37-38

¹¹⁷ Case 13/76 *Donà* [1976] ECR 1333, para. 12. And Case 176/96 *Lehtonen*, 13 April 2000, para. 41-43

¹¹⁸ Case 66/85 *Lawrie-Blum* [1986] ECR 2121 Para. 17. And Case 176/96 *Lehtonen*, 13 April 2000, para. 45

¹¹⁹ Case 176/96 *Lehtonen*, 13 April 2000, para. 49-50

may be objectively justified the Court held that without transfer deadlines the sporting strength of a team could be substantially altered. Stating that:

‘late transfers might be liable to change substantially the sporting strength of one or other team 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.’¹²⁰

This risk was especially clear in the case of a sporting competition which followed the rules of the Belgian first division national basketball championship. The judgment was based on observations submitted to the Court claiming that the rules on transfer periods are justified on non-economic grounds concerning only sport as such and the Court stated that the setting of deadlines may meet the objective of ensuring the regularity of sporting competitions. ‘However, measures taken by sports federations with a view to ensuring the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued’.¹²¹

To sum up, transfer windows in basketball have the intention to protect the regularity and proper functioning of sporting competitions, or more specifically, to prevent late transfers which can substantially alter the sporting strength of the teams.

2.3.2 Transfer Windows and Freedom of Movement

It has been established that football players, performing at a certain professional level, fulfil the requirements of gainful employment or remunerated service and football therefore should be considered as an economic activity within the meaning of Article 3 TFEU. It has also been established that a football player is in a position of subordination towards the club who orders him to carry out the economic activity and that he or she therefore should be treated as a worker within the meaning of Article 45 TFEU. Furthermore, the prohibition of discrimination safeguarding the freedom of movement for workers does apply to nondiscriminatory private

¹²⁰ Ibid para. 54

¹²¹ Case 176/96 Lehtonen, 13 April 2000, para. 56. And Case 415/93 Bosman [1995] ECR I-4921, para 104

collective measures, such as transfer windows, applied by public authorities, such as FIFA and UEFA. However, rules that have a ‘purely sporting interest’ do not fall under European law and are therefore not a hinder to freedom of movement.¹²²

This “constitutional immunity” is only granted to sporting rules in the strict sense such as the rules regulating the length of a match or the number of foreign players participating in matches played by a national team of that Member State.¹²³ The transfer rules, however, does not possess this ‘intrinsic sporting nature’ and therefore goes beyond such sporting rules.¹²⁴

Because the FIFA “windows system” is not granted this “immunity” it seems logical, at first sight, to stipulate that the FIFA rules limiting the opportunity for football players to move between teams to two transfer periods per year are liable of restricting the ability of players to seek alternative employment in another Member State and should therefore be regarded as a violation of Article 45 . This seems even more logical when reviewing the Court’s decision in *Bosman*, that football players should be treated like any other employee; a decision that the FIFA transfer windows clearly contradicts.

On the other hand it follows that both the Commission and the ECJ have accepted that this restriction on labour mobility is justified in order to protect certain important features of sporting competition. It has been argued that transfer windows support the notion of team stability by limiting the possibilities for clubs to buy players at any time, a view supported by the Court in *Lehtonen*. Additionally, in the “transfer settlement” it was accepted that a breach of contract during the season could upset the balance of competition and should be restricted. It was therefore considered necessary to apply restricted transfer periods to reinforce contract stability¹²⁵.

Consequently, at a second glance, it seems clear that the FIFA transfer windows, supporting contractual stability and preventing players from changing clubs in the later stages of a

¹²² Case 36/74 *Walrave* [1974] ECR 1405 para. 8

¹²³ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 14

¹²⁴ Beloff M, ‘The Sporting Exception in EC Competition law’ [1999] *European Current Law*

¹²⁵ *The Independant European Sports review*, 2006, para. 3.34.

competition, are compatible with Article 45 TFEU. Then again, is the Courts decision in Lehtonen regarding transfer windows in Basketball relevant and applicable to the discussion on the FIFA transfer windows and do these transfer periods fulfill the principle of proportionality or do they go beyond what is necessary to achieve their objective?

The fact that transfer windows has been justified as having sporting benefits in one sport does not automatically mean that this has to be the case in all other sports. The benefits were especially clear in the case of a sporting competition which followed the rules of the Belgian first division national basketball championship. This championship followed a play-off model involving knock-out rounds where the winner advanced and the loser was eliminated.¹²⁶ The national European football leagues, however, features the system of promotion and relegation and do not involve knock-out rounds. Consequently, since a single match is not as decisive within a league as it might be during a play-off it is not as beneficial to bring in late transfers in a club playing in such a league. The rules in European club championships, however, are a mix of league play and knock-out rounds. Although, a team which, in the middle of the UEFA Champions league for example, wishes to register new players for the remaining matches is only eligible to register one player who has played UEFA club competition matches for another competing club in the current season. Furthermore, the registration of any new players for the “second half” of the tournament must be concluded roughly 4 months before the tournament finishes.¹²⁷ These rules eliminate the risk of financially powerful clubs acquiring the best players from the competition before a finale or even before the knock-out rounds. It can therefore be questioned if the ruling in Lehtonen, concerning transfer windows in basketball, is applicable on the transfer windows in football.

However, for the sake of the analysis and for the purpose of the thesis the possibility that The Court’s decision in Lehtonen is not applicable to the transfer windows in European football will, for now, be ignored. Nevertheless, if the FIFA “windows system” was found to be objectively

¹²⁶ Case 176/96 Lehtonen, 13 April 2000, para. 55

¹²⁷ Article 17.17 -17.18 in the Regulations of the UEFA Champions League 2008/09,
http://www.uefa.com/multimediafiles/download/regulations/uefa/others/70/22/60/702260_download.pdf

justified, it may not, as the Court stated in Lehtonen, ‘go beyond what is necessary for achieving the aim pursued’.¹²⁸ Consequently, does it pass the test of the principle of proportionality?

Firstly, when considering if a measure will pass the test of the principle of proportionality, the appropriateness of the means chosen to achieve the desired end has to be verified. Concretely, is the “windows system” suitable for achieving team and player contract stability?

Limiting the possibility for clubs to buy and sell players obviously results in fewer opportunities for clubs to alter their rosters. Furthermore, since the restriction also limits the possibility for players to move to another team and, thus, hinders them from breaking their contract, it seems like the first condition of the principle of proportionality is satisfied.

Secondly, does the measure of transfer windows in football go beyond what is necessary to achieve team and player contract stability? The Court in Lehtonen held that without transfer deadlines the sporting strength of a team could be substantially altered. However, the Court concluded that the core problem was ‘late transfers’; transfers taking place at the end of the championship.¹²⁹ Consequently, the FIFA transfer windows do not have the objective of producing team stability during the entire season, but within the period constituting ‘late transfers’.

However, since European football clubs only are allowed to conduct player transfers in 16 out of the 52 weeks of the year and since the notion of late transfers impossibly can represent two thirds of the year, the FIFA transfer windows must be regarded as going beyond what is necessary to achieve team stability.¹³⁰ Furthermore, regarding the objective to bring about stability of employment during a season, this is already secured by the FIFA rules preventing a player from changing teams without his current club’s consent.¹³¹ The transfer system operates on the basis of a rule of registration which means that a club that holds the registration for a player under contract is under no circumstances required to release that registration until and if a transfer fee

¹²⁸ Case 176/96 Lehtonen, 13 April 2000, para. 56. And Case 415/93 Bosman [1995] ECR I-4921, para 104

¹²⁹ Case 176/96 Lehtonen, 13 April 2000, para. 54.

¹³⁰ Article 6.2 FIFA Regulations 2008

¹³¹ Article 5 and 8-9 FIFA Regulations 2008

has been agreed. When reviewing these facts, it is likely that the FIFA transfer windows go beyond what is necessary to achieve the desired end.

Conclusion

The FIFA rules limiting the opportunity for football players to move between teams to two transfer periods per year are liable of restricting the ability of players to seek alternative employment in another Member State and should therefore be regarded as a violation of Article 45, freedom of movement for workers. The ECJ has, however, agreed that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity and proper functioning of sporting competitions, if it corresponds with the specificity of the organisation of a sport. Because of the organisational differences between the Belgian basketball league and the European national football leagues the sporting benefits that transfer windows bring to football can, however, be questioned. The FIFA “windows system” has, additionally, been considered necessary in order to reinforce player contract stability. It is, however, likely that the “window system” goes beyond what is necessary to achieve team and player contract stability since they are too restrictive and somewhat redundant.

Consequently, the FIFA transfer windows do not comply with the requirements of the principle of proportionality and should therefore, if challenged, be regarded as a violation of Article 45.

3. EU Competition Law relation to Sport

Competition law issues are undoubtedly some of the most significant in shaping the legal structure of professional sport in Europe today. At the same time, this area of the law was and still is the one of the greatest legal challenges in European sports law. The competition taking place in the field of sport always has a character different from the one you can find between enterprises in the economy. Its focus is not to eliminate the others, but to preserve a well balanced competition by conserving the other teams/athletes. Teams are not only interested in victories, but also in maintaining a good competitive level of the other teams in the league. To stress this point: Mercedes-Benz could still sell its cars and make profit, even if it was the only car building company in the world. Manchester United couldn't exist if there was no opponent left. However, if a few teams were able to collect all the best players so that the other teams were not able to provide reasonable competition, results would become predictable, the financial gap between the rich and the poor clubs would grow and fans, advertisers and broadcasters would all lose interest. The European Court of Justice has, when addressing the rules regarding player movement between clubs, unconditionally focused on the restraints on free movement of workers and never on the application of competition law. In *Bosman*, the Court held that since the transfer system was in violation of Article 45 TFEU, it was 'not necessary to rule on the interpretation of Article 81 and 82 of the Treaty'.¹³² This declination belongs to a rather common practice of the Court where only a partial analysis is effectuated once a breach of EU law is established. The pattern repeated itself in *Lehtonen*, when the Court held that it did not have enough information to give a preliminary ruling in so far the question related to competition rules applicable to undertakings. The Court would therefore only be able to give a preliminary ruling associated to freedom of movement for workers.

3.1 Applicability of Article 101 TFEU

The article is divided into three parts: 101 (1) lays out behavior that is prohibited as anti-competitive; 101(2) disqualify behavior that falls within 101(1); and 101(3) lays down the requirements for exemptions to Article 101. Article 101(1) catches agreements, a term which is broadly interpreted and can be applicable on any joint intention of undertakings regarding

¹³² Case 415/93 *Bosman* [1995] ECR I-4921, para. 138

specific conduct in the market. Such agreements can be made between firms at the same level, horizontal agreements, and they can be made between firms at different levels, vertical agreements. Also anticompetitive decisions made by “associations of undertakings” are prohibited under this article.

Agreements which restrict competition by object are agreements that have such a high potential of negative effects on competition that it is unnecessary to apply Article 101(1) to demonstrate the effects.¹³³ If the agreement is not restrictive by object, competition may be restricted by its effect if it ‘affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.’ Furthermore, Article 101(1) is only applicable if the effect on competition is “appreciable” and affects a defined common market.¹³⁴ Finally, Article 101 does only apply to agreements that affect trade between Member States.

Unless an agreement within Article 101(1) qualifies for an exemption under Article 101(3) it is automatically void under Article 101(2). An agreement may be exempted under 101(3) if its pro-competitive benefits outweigh its restrictive effects which are determined by four conditions that all must be fulfilled.

First, the agreement must increase efficiency by promoting technical or economic progress, or by improving production or distribution of goods or services.

Second, a fair share of the benefits created by the agreement must be passed on to the consumers who under Article 101(3) are defined as the customers of the parties to the agreement in question.

Third, the restrictions have to be indispensable to achieving the created efficiencies, meaning that there cannot be any other economically practical and less restrictive means of creating the same efficiencies.

Lastly, the agreement cannot provide the parties with an opportunity to eliminate ‘competition in respect of a substantial part of the products concerned’, determined by the degree of competition prior to the agreement contra the degree to which competition is reduced by the agreement.

¹³³ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para. 97 and 100.

¹³⁴ Ibid.

In short, for the Article to be applicable, there must be some form of collusion between at least two undertakings, a decision by an association of undertakings or a concerted practice. The agreement must affect trade between Member States and have as its object or effect the prevention, restriction or distortion of competition within the common market. According to settled case law the effects on competition and trade between Member States must furthermore be appreciable in order for the Article to be applicable .

3.1.1 Undertakings Under Article 101 TFEU

It has to be clarify whether clubs , FIFA/UEFA and/or the players can be regarded as undertakings in the sense of Article 101(1). The concept of an undertaking is not defined in the Treaty, but has been given a wide interpretation by the Community institutions. Article 101 TFEU applies to “undertakings” and “associations of undertakings”. The ECJ has defined the term “undertaking” broadly to include “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.”¹³⁵ Economic activity is any activity consisting of “offering goods or services on the market”.¹³⁶ Economic activity may take place at various levels in the sport sector, including by individual athletes, sport clubs and sports associations.

The Clubs

A football club, regardless of its legal form may thus constitute an undertaking, since the legal form of an undertaking is not a determining factor. The concept of an undertaking is furthermore not conditional on that the activities of the entity are carried out with a profit-making motive or even with an economic purpose.

Professional football clubs, these days, are involved in a wide range of economic activities such as the sale of tickets, sports merchandising, television rights and advertising. There can thus be no doubt that professional football clubs constitute undertakings in the sense of Article 101(1). Evidence to that assertion is not least the fact that some of the biggest football clubs in Europe, such as Manchester United, Chelsea FC and Arsenal are publicly listed companies on the stock market. Football clubs more and more resemble enterprises in their own right.

¹³⁵ Case C-41/90 Höfner and Elser v Macotron GmbH(1991) ECR I-1979 at para. 21

¹³⁶ Case 118/85 Commission v Italy ECR 1987 2599, para. 7

Finally, the size of an undertaking is not decisive. The Belgian football association argued in *Bosman* that only large clubs may constitute undertakings in the sense of Article 101(1) and that clubs like RC Liège, only carry on minor economic activity and thus do not constitute undertakings in the above sense. A.G. Lenz dismissed this argument as incorrect. What differentiates small and medium sized clubs from the larger clubs is the degree of success they derive from their commercial activity. The degree of success is however immaterial to the question of whether there is an undertaking in the sense of Article 101(1).¹³⁷

FIFA

International and national associations such as FIFA, UEFA or the Latvian Football Association may also constitute undertakings under Article 101(1) in so far as they themselves are engaged in economic activity.

The fact that both FIFA and UEFA are responsible for the administration and negotiation of the television rights for the competitions they organize and more importantly profit of must be regarded as being engaged in economic activity, especially given the value of the rights. To illustrate the financial stakes that are at hand, the Television rights for the UEFA Champions league alone were worth 800 million CHF in 2001.¹³⁸ The TV rights alone accounted for 80% of the Champion's League's total revenue, illustrating further the value of television rights compared to other sources of revenue. Out of the total revenue of 800 CHF, 25% remains with UEFA to cover organizational and administrative costs. After further deductions, UEFA makes 47.2 million CHF.¹³⁹

If these associations are not themselves deemed to be engaged in economic activity they may still constitute associations of undertakings, under Article 101(1).¹⁴⁰ The fact that the associations also comprise a large number of amateur clubs makes no difference to this conclusion.

The FIFA Regulations were adopted by the FIFA Executive Committee and are based on Article 5 of the FIFA Statutes of August 2009 and establish binding rules for its members i.e. all the

¹³⁷ Advisory Opinion by A.G. Lenz in the *Bosman* case at para. 255

¹³⁸ Commission memo: "UEFA-Champions League-Background) of July 20 2001 (Memo/01/271)

¹³⁹ *Ibid*

¹⁴⁰ Advisory Opinion by A.G. Lenz in the *Bosman* case at para 110.

associations and clubs.¹⁴¹ The FIFA Regulations can therefore be regarded as a decision adopted by a private body establishing binding rules for its members. These bodies may, as referred to above, be regarded as associations of undertakings. By support of this simple reasoning it can fairly be asserted that the FIFA Regulations laid down are therefore to be regarded as a decision by an association of undertakings. The character of a decision is furthermore apparent by the fact that the Regulations were adopted on the legal basis of the federation's statutes, which are to be regarded as a collective act.

The distinction of whether FIFA should be regarded as an undertaking or an association of undertakings is irrelevant for the application of Article 101, since the Article is equally applicable to both forms.

A Football Player

The ECJ has held that individuals can constitute undertakings if they act independently as an economic actor.¹⁴²

A worker, however, in the sense of EU law cannot constitute an undertaking within the meaning of Article 101(1) since he forms an integral part of the economic entity by which he is employed. A worker cannot, in that capacity, act as an independent economic actor. 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.¹⁴³

It is submitted that a football player is not self-employed, even though he may employ activities by his own right in his capacity as professional football player such as closing advertising deals, endorsements and sponsor contracts for his own benefit. Those are however, as pointed out, for his own benefit and not to that of his club, even if they can benefit from his image. A football player is under contract with a club and in that relationship he is an employee and the club his employer.

¹⁴¹ Fifa statutes 2009, available at :

http://www.fifa.com/mm/document/affederation/federation/01/24/fifastatuten2009_e.pdf

¹⁴² Case 42/84 Remia v Commission (1985), ECR 2545 at paras. 49-50

¹⁴³ Case 66/85 Deborah Lawrie-Blum v Land Baden Württemberg (1986) ECR 2121 at para. 17

Even if the player should employ economic activities on the side in his capacity as a football player, the centre of gravity of his activities lies with the club i.e. his main occupation is training and participating in matches for his club, by which he is employed and remunerated.

Agreement

The second element that needs to be established for the application of Article 101 is whether the FIFA Regulations constitute an agreement between undertakings or a decision by associations of undertakings. In this regard transfer fees under contract should be considered separately since these are not explicitly regulated in the Regulations.

An agreement in the sense of Article 101(1) has been given a wide interpretation by the Community institutions. Neither the precise legal form of the agreement nor its actual contents are of any direct relevance.¹⁴⁴ Thus it is not a condition that an agreement must be in the form of a legally enforceable contract. As Article 101(1) applies equally to both decisions of associations of undertakings and agreements between undertakings this distinction is irrelevant for the application of the Article.

Effect on Trade between Member States

The scope of Article 101 is limited to agreements, decisions or concerted practices, which may affect trade between Member States. This is a jurisdictional condition that defines "the boundary between the areas respectively covered by Community law and the law of Member States".¹⁴⁵

The inter-state trade clause has been given a wide interpretation by the Community institutions so that "most agreements of any commercial significance within a single Member State will satisfy the inter-state trade threshold".¹⁴⁶

The ECJ has developed a test for assessing the required effect; the so called STM test: "it must be possible to foresee with a sufficient degree of probability on the basis of a set objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or

¹⁴⁴ Weatherill and Beaumont, "EU Law-The Essential to the Legal Workings of the European Union" at pages 794-795

¹⁴⁵ Case 22/78 Hugin Kassaregister AB v Commission (1979) ECR 1869 at para. 17

¹⁴⁶ Weatherill and Beaumont at page 810

potential, on the pattern of trade between member states".¹⁴⁷ The effect must thus not be direct or actual for Article 101(1) to apply, considerably widening the scope of the Article. Thus, it suffices to establish that an impact on the patterns of trade between member states can be made probable, to fulfill the inter-state trade requirement.

It has been argued that the "trade" in football players would escape Article 101 because they are neither goods nor services. On the same note, UEFA argued in *Bosman* that transfers of players do not affect "trade". This argument was dismissed by A.G. Lenz on the basis that "trade" in Article 101 is not restricted to trade in goods but covers all economic relations between Member States¹⁴⁸.

Needless to say, football players form the very essence of a football match. The players are thus an inherent element in the product that is a football match or to a greater extent a football competition or league. It is not the trade in football players *per se* but the services they provide that affects inter-state trade. This is to be seen against the background that football, especially in Europe, employs a wide range of commercial activities. The football players form the very foundation for those activities. In this regard trade is certainly affected by the transfer of football players.

According to A.G. Alber in the *Lethonen* case it must further be possible to find that trade is affected in a case in which the exercise of fundamental freedoms is obstructed.¹⁴⁹ The rules concerning *inter alia* training compensation must be seen as obstructing the freedom of movement of workers, Article 45 TFEU, since any change of clubs for a player under the age of 23 requires the payment of a training compensation, even at the expiry of a player's contract under the same rationale as in *Bosman*. However, in case *Olympic Lyonnais vs Olivier Bernard* Court ruled that in the view of the social importance of football in the European Union, the objective of encouraging the training of young players must be accepted as legitimate. By taking into account the specific nature of sport it ruled that, receiving training fees is permissible as it is likely to encourage football clubs to seek new talent and train young players.

¹⁴⁷ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* (1966) ECR 235 at para. 249

¹⁴⁸ Advisory Opinion by A.G. Lenz in the *Bosman* case at para 261

¹⁴⁹ See Opinion by A.G. Alber in Case C-176/96 at para. 104

That the Regulations may affect inter-state trade is further evident from the scope of the rules since they establish global rules *inter alia* for the transfer of players between clubs belonging to different national associations, including the associations of the Member States. It is not even required that trade between Member States has been affected, since according to the STM test, it would be sufficient that it is reasonably foreseeable that it might do so. In this regard the abolition of nationality quotas in European club football is material. European clubs have every incentive to look across their national borders to recruit from other countries, either for economic or sporting reasons. Chelsea's first team consists of players from *inter alia* Germany, France, Portugal and Spain.¹⁵⁰ Moreover, in English premier league there are more foreign players than locals. Same situation is in Germany.¹⁵¹ The same applies for the players that by virtue of the *Bosman* judgement and the new Regulations can move freely at the expiry of their contract if they are over 23 years old. This provides the players with every incentive to move to a club where they are paid according to their skill and since Europe is the home to the largest and most financially viable clubs in the world, movement is likely to be confined to Europe.

As stated, the primary purpose of the Regulations is to regulate transfers of players between clubs belonging to different national associations. Agreements between sports leagues or clubs located in different Member States must therefore be capable of affecting inter-state trade.

That player movement affects inter-state trade can thus be concluded.

To satisfy the inter-state trade requirement, the effect has moreover to be appreciable.¹⁵² If an agreement has an appreciable effect has to be determined on the basis of economic evidence. I don't have access to sufficient information in order to make a quantitative analysis to assess the appreciable effect of player transfers between the Member States of the EU. A.G. Lenz, however, found that the requirement was fulfilled in *Bosman* based on statistics showing that in the 1995-1996 season, 18 clubs in the Italian first division spent more than 51 000 000 Euros on foreign players.¹⁵³

¹⁵⁰ <http://www.chelseafc.com/page/PlayerHome/0,,10268,00.html>

¹⁵¹ <http://news.bbc.co.uk/sport2/hi/football/7417746.stm>

¹⁵² Case 28/77 Tepea v Commission (1978) ECR 131 at para. 47

¹⁵³ Advisory Opinion by A.G. Lenz in the *Bosman* case at para 57

It can further be deduced from the calculation principles for the training compensation that the rules are capable of having an appreciable effect on trade since the payments for a single player can reach amounts in the vicinity of 580 000 Euros, if a player transfer from one category 1 club to another and training compensation has to be paid for the full ten years of training.

The National competition authorities and courts in the Member States are also competent to apply Articles 101 to national agreements that have an appreciable effect on inter-state trade. This since Article 101 is directly applicable and produces direct effects. The national NCA's and courts are now also competent to apply Article 101(3) by virtue of Regulation 1/2003 ("Modernization Regulation"), which according to the old rules was exclusively in the jurisdiction of the Commission. This means that the future of the national transfer systems, and the FIFA Regulations for that matter, may be tried in a national court under Article 101. The effects of an infringement finding before a national court would have the same implications as a Commission decision or an ECJ ruling since it is based on EU law and consequently applies in all the Member States.

Professional football clubs are considered to be undertakings if they engage in economic activity. National associations which bunch clubs together are associations of undertakings. UEFA which have national association within Europe as their members is, thus, an association of associations of undertakings. The rules regarding transfer windows are therefore a decision made by an association of associations of undertakings within the sense of Article 101(1) TFEU.

3.2 Transfer windows and EU Competition law

The FIFA transfer window system was designed to put all clubs on parity with each other regarding player transfers. The Commission had strongly disapproved at the way larger and richer clubs controlled the player market, acquiring any player at any time for any price. The Commission was confident that this measure would bring about stability of employment and proper competition which would result in a more equal buying market¹⁵⁴.

¹⁵⁴ McAuley Darren, Windows, caps, footballs and the European Commission. Confused? You will be, European Competition Law Review, 2003, 24(8) p. 396

Unfortunately, the window system has had the opposite effect on equality in player transfers. As we already concluded, the system restricts the free movement of sportsmen. By restricting the freedom of players to move between teams at any time during the season, the Commission prevents the resources (the players) from being allocated when and where there is a need for them. Under the window system, it is argued that the gap between the financially rich teams and the financially poor teams increases. The rich teams can wait until the window open to pay the enormous salaries for the player they need. If smaller clubs are forced out of business, then the larger clubs will have to take over the training duties of football's future stars. This may also result in severe consumer dissatisfaction because fewer people will be able to afford or obtain tickets to the games of larger teams¹⁵⁵.

Judging from the league tables of top European countries football championship in recent years we can see that: In England's Premier League, four clubs, Manchester United, Chelsea, Arsenal and Liverpool have finished in the top five spots the last six seasons and in four of those six seasons they were the top four clubs.¹⁵⁶ In Germany, Bayern Munich has won the competition 7 out of the last eleven seasons.¹⁵⁷ In the last seven seasons of Italy's Serie A, either Juventus, AC Milan or Inter Milan have won the league and they have been among the top four clubs in three of those seven seasons.¹⁵⁸ In Scotland, Celtic and Rangers have finished in the top two spots in six of the last seven seasons¹⁵⁹. It became obvious that commissions goal to make competition more balanced in football was not achieved by "transfer windows". In England championship there were several opinions against setting deadlines for footballers market, one of the arguments was that restricting transfer periods effects negatively for clubs which are in debts. A club facing financial problems would not have to wait months before it could sell one of its players (more precisely put, transfer the player's contract to another club), and maybe earn a fee that would keep the proverbial wolf from the door. An ambitious club could, in the later part of the season, reinforce its squad, and make a promotion challenge, or find a replacement for a crucial player who suffered a significant injury during the run-in to the end of the season. How it can work with case of English Premier League Club "Portsmouth", already at the bottom of the

¹⁵⁵ Camatsos, 12 Sports Law Journal 155, 2005 p. 170-171

¹⁵⁶ <http://stats.football.co.uk/>

¹⁵⁷ <http://en.wikipedia.org/wiki/Fu%C3%9Fball-Bundesliga#Champions>

¹⁵⁸ <http://www.soccerway.com/national/italy/serie-a/archive/>

¹⁵⁹ http://www.scotprem.com/content/default.asp?page=home_Statistics

Premier League table fighting for survival, supposed to pay off their debts, otherwise the Football Association of England is ready to deduct 10 points in case Portsmouth will be relegated in lower division, that will affect crucially for club. To avoid that Portsmouth appealed to the Premier League for permission to sell players outside of the transfer window¹⁶⁰.

As manager of football club “Reading” Steve Coppell said after rumors that there key footballers was going to leave club:

“I don’t anticipate losing any of my players... ‘I cannot see the logic in a transfer window. It brings on a fire-sale mentality, causes unrest via the media and means clubs buy too many players,.. The old system, where if you had a problem you could look at loans or make a short-term purchase, was far better than this system we have at the moment. ...Nobody has ever explained to me what the benefit [of a transfer window] is and people are putting in faxed offers when they’ve already been told there’s no interest.”¹⁶¹

The “Bolton” manager, Gary Megson accused current window system as an direct restraint of trade and called it “rubbish”:

“The transfer window is rubbish. It is unfair and I would like to see it challenged in court. Look at other businesses. If a haulage company wanted a new lorry and someone said in September you cannot have one until January, you are not allowed to do those kind of things. Yet football clubs are told they have to do their business in a certain time, not when they would like to do it. It suits only very few clubs at the top end of the game.”¹⁶²

One of the other disadvantages of transfer windows that can be argued is that regulations of Football governing bodies allow national associations to decide the exact dates of transfer periods in their country. For example in Latvian football League Transfer windows is open from: 15

¹⁶⁰ Point deductions & transfer embargos make existence hopeless, February 18, 2010,

<http://wdfk.co.uk/2010/02/18/point-deductions-transfer-embargos-make-existence-hopeless/#more-6752>

¹⁶¹ Steve Coppell calls for end to transfer window, Times Online, January 2, 2008
http://www.timesonline.co.uk/tol/sport/football/premier_league/reading/article3120658.ece

¹⁶² Managers hit out at 'rubbish' transfer system, Published in Telegraph, 01 January, 2008
<http://www.telegraph.co.uk/sport/football/2287651/Managers-hit-out-at-rubbish-transfer-system.html>

February to 31 March (first period) and 9 July to 8 August (second period)¹⁶³. A problem could therefore arise for cross border transfers if for example Latvian Highest league transfer dates are different than Scottish Premier league dates. In Scotland summer transfer dates are 01 July till 31 August. So clubs from Scotland can buy after 8 August players from Latvia while the Latvian clubs cannot replace them since their window is closed. Same example we can take regarding with Swedish Championship. They have different dates comparing to English Premier league. In practice many English clubs buying best players from Swedish clubs, and because transfer period is closed in Sweden same time best clubs from Sweden cannot replace footballers and they getting weaker what affects therefore in their results.

The transfer windows obviously prevent clubs from developing their economic activity and restrict the free play of the market forces of supply and demand. Furthermore, the “windows system” prevents certain clubs from raising the quality of their sporting performance since clubs in minor leagues with a closed window are losing their best players to clubs in a better league with an open window, without being able to replace them. This affects the small and economically weak clubs and strengthens the position of the financially strong clubs. As a result a few strong clubs will, contrary to the best interest of consumers, continue to dominate European football.

Sport is subject to community law only in so far as it constitutes an economic activity. As established football players carry out such an economic activity and the practice of football subsequently falls under competition law. The ECJ has, however, acknowledged a certain type of sporting rule that will not fall under Article 101 TFEU, even though it restricts competition. To be able to escape Article 101 TFEU in its entirety the rule in question must pursue a legitimate objective and the effects of the restriction must be inherent in the pursuit of that objective and should be proportionate to it.¹⁶⁴ Article 101 has the objective to protect consumers, enhance their welfare and to facilitate the creation of a single European market. The article prohibits all agreements between undertakings that restrict competition and affect trade between Member States.

¹⁶³ The Regulation of Latvian Football Championship. Article 6,7

¹⁶⁴ Case 36/74 Walrave [1974] ECR 1405 para. 4.

The issue of transfer windows was dealt with in Lehtonen, albeit under Article 45 TFEU, wherein the Court found that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity and proper functioning of sporting competitions, if it corresponds with the specificity of the organization of a sport. Because of the rationale to eliminate unfair competition there is an assumption that any challenges on the windows under competition law would fail. However, the application of competition law to the transfer rules remains uncertain; partly due to the ECJ's unwillingness to focus on anything else but the restraints on free movement.

In order to determine whether the FIFA transfer windows violate Article 101 of the Treaty it has to be established whether the rule could be regarded as a sporting rule that pursues a legitimate objective, whose effects are inherent and proportionate to its objective and if it therefore should escape Article 101 EC in its entirety.¹⁶⁵

Due to the rationale of the windows, one might, argue that the “windows system” should be regarded to carry a legitimate objective justified on the grounds relating to the ‘organization and proper conduct of competitive sport’.¹⁶⁶ However, when examining this argument one will find that it is not necessarily true.

It has been established that the transfer windows restricts the free play of the market forces of supply and demand and that this restriction has been part of the creation of a small elite of clubs within each domestic league. This lack of parity has had the effect of predictable results which is causing attendance to drop. A declination in attendance might result in bankruptcy for small clubs which will not only hurt the industry, but also the consumers. It seems therefore very ambiguous to claim that the FIFA transfer windows should be justified on the grounds relating to the ‘organization and proper conduct of competitive sport’ when they clearly restrict concrete measures covered by this heading, such as the ensuring of financial stability of sport clubs/teams and the ensuring of uncertainty of results.¹⁶⁷ The “windows system” also prevents clubs from raising the quality of their sporting performance since clubs in minor leagues with a closed

¹⁶⁵ Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45

¹⁶⁶ Beloff, ‘The Sporting Exception in EC Competition law’ [1999] *European Current Law* xvi at 1x

¹⁶⁷ Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45-46.

window are losing their best players to clubs in better leagues with an open window, without being able to replace them. This is a result of FIFA leaving the two registration periods to be decided by each national association.

Although established by FIFA to be fixed at certain points of the season, the dates of the windows cannot be found harmonized since the national seasons in some cases varies considerably.

When assessing if the windows pursues a legitimate objective one must however also consider the distinctive features of sport in general and football in particular. It could be argued that the “windows system” offers stability in a league during season and that it would be no sport if a large-market club, before a final, simply buys the best players from the competition. As the Court stated in Lehtonen:

‘late transfers might be liable to change substantially the sporting strength of one or other team 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.’¹⁶⁸

However, as mentioned before, the fact that transfer windows has been justified as having sporting benefits in one sport does not automatically mean that this has to be the case in all other sports. It can therefore be questioned if the ruling in Lehtonen, concerning transfer windows in basketball, is applicable on the transfer windows in football.

According to the above mentioned it seems unlikely that the FIFA transfer windows could be regarded as a sporting rule that pursues a legitimate objective and should therefore fall under Article 101 TFEU. However, if the FIFA “window system” was found to pursue a legitimate objective, the effects of the restriction would still have to be characterized as inherent in the pursuit of that objective and proportionate to it.

¹⁶⁸ Case 176/96 Lehtonen, 13 April 2000, para. 54.

The basic argument used by the football governing bodies to validate this restriction is that transfer windows was designed to put all clubs on parity with each other regarding player transfers and that this measure would bring about stability of employment and proper competition which would result in a more equal buying market. However, this argument should be founded to be too broad and that football has a great chance of surviving without this far reaching restriction since it favors larger wealthier clubs and has a negative effect on results, making them more predictable, causing attendance to drop. Furthermore, the commission's objective to bring about stability of employment, and thus, proper competition is already secured by the FIFA rules preventing a player from changing teams without his current club's consent.¹⁶⁹ Moreover, as discussed before, in Lehtonen the Court concludes that the core problem is 'late transfers'; transfers taking place at the end of the championship. However, the FIFA regulations stipulate that a football player can only be registered to play with a national association during one of the two registration periods per year.

Consequently, football clubs are forbidden to conduct any player transfers in 36 out of the 52 weeks of the year, a restriction that must be regarded as going beyond what is necessary to achieve the aim pursued since the notion of late transfers impossibly can constitute two thirds of the year. The restraints on competition brought by the transfer windows are therefore clearly not proportional to their desired effects and a less restrictive measure would be a preferred alternative.

It seems unlikely that the FIFA transfer windows could be regarded as a sporting rule that pursues a legitimate objective and should subsequently fall under Article 101 TFEU.

3.2.1 Transfer window under Article 101(1) TFEU

While UEFA argues that the rationale of transfer windows is to eliminate unfair competition they have to admit that the effect of the regulation restricts competition in the market for players. It is within this supply market clubs compete to acquire players' services which is essential for the finished product: a football match. Transfer windows do not allow the market to dictate when and where players' services are most wanted which allow the big clubs to hold onto their money so that they can pick and choose between the top players available when the windows reopen.

¹⁶⁹ Article 5 and 8-9 FIFA Regulations 2008

Furthermore, it prevents clubs with a closed window to replace players obtained by clubs with an open window and consequently deny clubs an opportunity which they would have in the absence of the restriction. The market for players is, however, not the only relevant market where transfer windows restrict competition. The selling market where football is sold to media, spectators and other consumers is also affected. This market would benefit by competitively balanced football and less predictable results. However, the transfer windows have the opposite effect. Results and championship winners are becoming more and more predictable which is causing attendance to drop. A phenomenon that in the long run will hurt both the industry and the consumers.

The effect of the transfer windows is certain to be appreciable since all clubs in the professional European football market is organized under UEFA. Finally, the transfer windows are affecting trade between Member States. An example of such an effect can be seen when a club in one Member State only is able to sell, and not purchase, players due to the fact that their transfer window is closed while clubs in a league with an open window still can purchase players from that club. Without transfer windows clubs would be able to buy and sell players between Member States when necessary.

As a result it is likely that the FIFA transfer windows falls within Article 101(1) TFEU and should be rendered void according to Article 101(2) unless it meets the criteria for an exemption under Article 101(3) TFEU.

3.2.2 Transfer window under Article 101(3) TFEU

As stated above an agreement can be exempted under 101(3) TFEU if its competitive benefits outweigh its restrictive effects. This is determined by the means of four conditions which are cumulative.¹⁷⁰ The fourth condition, aimed at protecting competitors not party to the agreement from being pushed out of the market can, however, be dismissed. This has to do with the fact that all professional European football clubs are organized under UEFA and therefore part of the agreement which means that there is no competition to be eliminated.¹⁷¹ The other conditions under Article 101(3) TFEU are; there must be some efficiency gained from the agreement; the

¹⁷⁰ Craig, De Búrca, p. 976.

¹⁷¹ Ibid. p 976

benefits created must be passed on to the consumers and the restriction must be the least restrictive means of creating such benefits.²⁸²

The “windows system” was supposed to prevent larger, richer clubs from buying any player at any time and hopefully eradicate the notion of an European elite. This has, as shown above, failed and can consequently not be regarded as an efficiency gain or benefit, rather the opposite. Transfer windows can, however, be held to improve competition in the way of preventing late transfers and therefore safeguarding the proper functioning of sporting competitions. This limit in the supply market has the effect that clubs are not able to, in a late stage of the competition, alter the sporting strength of their team in the race for the championship. The restriction can also be held to bring about some sort of stability of employment and team stability. This means that a better product, football match, can be sold to advertisers, spectators and broadcasters in the selling market and because the improved product is passed on to the consumers the first two conditions are satisfied.

However, it is not clear that the FIFA transfer windows would be regarded as the least restrictive means of creating these benefits. The restrictive agreement, the regulation stating that football clubs are forbidden to conduct any player transfers in 36 out of the 52 weeks of the year cannot be deemed necessary in order to achieve these efficiencies.

Conclusion

Transfer windows are too restrictive and the same competitive benefit, preventing late transfers, can be created with a less restrictive measure such as a transfer prohibition covering the last month of the league or the period necessary to comprise the notion of “late transfers”.

Furthermore, team stability and stability of employment is already secured by the FIFA rules preventing players from changing teams without their current clubs consent.

According to the analysis, the FIFA “windows system” should not be regarded as a sporting rule that pursues a legitimate objective and whose effects are inherent and proportionate to its objective. Furthermore, the rule is likely to fall under Article 101(1) EC and should be rendered void according to Article 101(2) unless it meets the criteria for an exemption under Article 101(3) EC. It is, however, unlikely that the pro-competitive benefits of the FIFA transfer windows outweigh its restrictive effects since it is improbable that they would be considered the least restrictive means of creating these benefits. Instead of allowing the market to decide when and where players' services are needed most by having an unrestricted transfer period, the EU Commission's window system achieved the opposite result. In essence, it created a concerted practice which has the effect of hindering competition. It is a rule that fixes trading conditions and controls the production of the market and the market itself--all of which article 101(1) lists as prohibited results of agreements between undertakings, in this case, teams. Subsequently, the FIFA “windows system” would not qualify for an exemption under Article 101(3) TFEU and should, if challenged, be void under Article 101(2) TFEU

4. The Future of Sport under Lisbon Treaty

Lisbon Treaty for the first time includes an article on sport; it introduces sport as a new area of EU competence. Many believe the Treaty will at long last bring certainty to the exact meaning behind the specificity of sport.

The overall promotion of sport is now a Community objective to the delight of Jacques Rogge (President of International Olympic Committee), who stated, it “is time to move from a case-by-case approach to an environment where the specific characteristics of sport can be taken into account properly.”¹⁷² Governing bodies such as FIFA are also content with Article 165 of the Treaty which mentions “the specific nature of sport” allowing sport to be viewed not only from a purely economic standpoint, but also acknowledging its voluntary structures and its social and educational roles. More importantly, sporting authorities feel concrete recognition of purely sporting rules is attained with the hope of avoid frustrating decisions such as Bosman and Meca Medina.

Legal certainty in sporting matters is a necessity in view of the inconsistent rulings surrounding the ECJ and the recent White Paper, thus ratification of an ‘overarching legal base’¹⁷³ respecting the special nature of sport is a step in the right direction.

Does the Treaty provide legal certainty? This is a fundamental question and it is respectfully submitted that the wording of Article 165 but in particular Article 6 of the Lisbon Treaty allows for deviations and different interpretations as to sports special nature. Therefore, reading between the lines of the latter Articles, is the specificity of sport truly respected by the wording in the Treaty?

The EU is not given direct legal competencies in relation to sport and so, in the words of Patrick Hickey, “should support and not regulate sport”¹⁷⁴ in line with the subsidiarity principle.

¹⁷²Lisbon Treaty gives a boost to sport, 30 November 2009 <http://www.fifa.com/aboutfifa/developing/releases/newsid=1141618.html#lisbon+treaty+gives+boost+sport,%20accessed%205th%20December%202009>

¹⁷³ *Motosykletistiki Omospondia Ellados Npid v Elliniko Dimosio* (Case C-49/07) [2008] 5 C.M.L.R. 11 at pg 821 as per Advocate General Kokott(MOTOE)

However, careful examination illustrates, in reality, Article 6 allows EU institutions to regulate sport ‘through the back-door.’ Before such a legal base was ratified, EU regulation in sport occurred on an incremental basis, now ‘support’ is available as ‘sports specific nature’ is documented in the Lisbon Treaty. ‘Support’ could and will inevitably lead to increased regulation, as the EU can ‘coordinate or supplement the actions of Member States’. The latter extract of Article 6 can also be interpreted as follows; the EU can ‘coordinate or supplement the actions of sports governing bodies’ and not simply of Member States. Choosing their words carefully legislators cunningly show the EU ‘respects’ the specificity of sport. If it is about protecting sport’s autonomy on the one side, and safeguarding the integrity of sporting competitions and governance on the other, it is submitted that EU regulation of sport is unavoidable in view of the modern notions of commercialization, globalization, juridification and the growing political importance of sport. The Lisbon Treaty is aimed at reorganizing EU institutions to ensure competent functioning, though opponents declare it is part of a ‘federalist EU agenda’ that undermines domestic sovereignty¹⁷⁵ which in turn would undermine the autonomy of sports governing bodies.

When interpreting Article 165 and in particular Article 6. “Treaty is open to varied interpretations on the part of both sports associations and governments. It is submitted action in this area will go further than supporting, coordinating or complementing as European institutions have the power to waive such ‘soft promises’ in favor of political and diplomatic manifestations. ‘Supplement’ is a word expressly included in Article 6 of the Treaty and will be a prominent feature in the development of EU Sports law and thus increased ‘supplementation’ of sporting rules will occur in conformity to EU political agenda, once again undermining the specificity of sport. Such EU institutional power is clear to see from the ECJ case law (discussed below) which to some extent accept the specificity and autonomy of sport but on the flip side, apply principles of EU law regularly and equally to sport as they are applied to other sectors.

¹⁷⁴ FIFA and IOC welcome new dawn for sport under EU's Treaty of Lisbon November 30th 2009, <http://www.sportsfeatures.com/soccernews/story/46297/fifa-and-ioc-welcome-new-dawn-for-sport-under-eus-treaty-of-lisbon>

¹⁷⁵ Q&A: The Lisbon Treaty, 5 February 2010, <http://news.bbc.co.uk/2/hi/europe/6901353.stm>

Treaty is a new phenomenon, and only time will tell whether recognition to the specificity of sport remains at the forefront of EU institutional development or whether deliberate circumspect wording in the Treaty allows for EU institutional norms to prevail.

As the inception of Articles 6 & 165 of the Lisbon Treaty, will undesirably aid the developing trend of political regulation and therefore, increasingly 'intrude' on sporting matters, often with unwanted outcomes. The burning question is therefore how far sport is or will remain special?

4.1 Self-regulatory nature of sport

The foundations of such special characteristics surround self-regulation which symbolizes the specificity of sport. Sporting authorities have no official legal or institutional association with government and so are designated competent authorities to implement rules and regulations¹⁷⁶. Sport possesses its own 'micro legal systems' with autonomous legislative, executive and adjudicative functions justifying parliamentary and judicial restraint in fashioning legal doctrines to question determinations by sporting bodies.¹⁷⁷ Little argues that the ECJ performs a 'fail-safe' function concerning cases of self-regulatory failure or the presence of a compelling public interest dimension warranting external judicial involvement¹⁷⁸. For example: if a person complains that the rules of a sporting body are discriminatory, how will and should the courts take action? Should courts identify and endorse the person's rights against the actions of the body or should it preserve and respect the autonomy of the association to formulate and interpret its own rules?¹⁷⁹

The commercialization and globalization of sport brings in its wake escalating juridification in the shape of legislative and judicial colonization which ultimately leads to a lessening of the "myth of sport as an autonomous and separate sphere where the law has no place."¹⁸⁰

¹⁷⁶. For example, in advertising the Advertising Standards Authority and in football the FA has to be in compliance with FIFA.

¹⁷⁷ G Little and P Morris, 'Challenging sports bodies' determinations', (1998) 17(Apr) C.J.Q. 128 at pg 128/9

¹⁷⁸ G Little and P Morris, *op cit* en.46 at pg 129

¹⁷⁹ *Ibid* at pg 24

¹⁸⁰ C Hill, 'Developments in Sporting Law', in L. Allison, *The Changing Politics of Sport* (Manchester University Press : Manchester, 1993) at pg 105

4.2 Specificity of sport and the ECJ

“The study of sport ...has gone from a mere recompilation of sport related decisions to open debates about governance, regulation, participation and europeanisation.”¹⁸¹

However, the Treaty of Lisbon, many academics and some sporting federations all claim that sport has remained ‘special.’ The ECJ in the fundamental Bosman ruling acknowledged the ‘specificity of sport’ when it accepted that “the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results¹⁸²” was lawful. Participants in sports are interdependent as clubs do not aim to drive competitors from the market, such an occurrence could have grave financial consequences for all concerned; sports clubs need credible rivals¹⁸³. Sport “has a need for healthy internal competition which is not the hallmark of ‘normal’ industry.”¹⁸⁴

It is clear political interests have manifested in sport resulting in increased demands from the EU on sporting federations to conform to facets of the Single market and competition rules. The ECJ increased willingness to intervene in sporting determinations highlights the notion that sports flexibility and autonomy is conditioned by subjection to the rules of the EU legal order.

EU law calls for a ‘pro-competitive agenda’ which is divergent to sports governing bodies’ calls for self regulation¹⁸⁵. In view of the wording of Articles 6 & 165, many varied interpretations are probable and so the Lisbon Treaty seems unlikely to end the longstanding game of political ‘ping pong’ between sports governing bodies and legislative authorities regarding the specificity of sport. If anything, the wording discreetly points towards the formalization of sport from an area of soft EU competence to something more concrete, following the examples set by other jurisdictions. The ECJ’s involvement in sport began with Walrave; sport is subject to EU law to

¹⁸¹ B Garcia, ‘Sport and EU Workshops: The EU and the Governance of Sport, Policy and Perspectives. University of Chester 6-7 July 2007 at para 11

<http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number2/garcia/garcia.pdf>

¹⁸² The Bosman ruling at par.106

¹⁸³ S Weatherill, ‘Do sporting associations make law or are they merely subject to it?’, (1999) 13(Jan) Amicus Curiae 24 at pg 26

¹⁸⁴ Ibid . pg 27

¹⁸⁵ Ibid.

the extent that it constitutes an “economic activity” and “the prohibition of discrimination based on nationality does not affect the composition of sports 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.”¹⁸⁶ In *Dona v Montero* the restriction on non-Italian nationals being employed as professional footballers in Italy was a form of direct nationality discrimination contrary to Article 12 EC . The ECJ stated that Article 12 EC applied to sports rules “unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature.”¹⁸⁷

In *Bosman* the ECJ held that Article 39 EC (now Article 45) applies to rules dealing with “the term of which professional sportsmen can engage in gainful employment”, thus in almost all cases post-Bosman, it was comprehensible that the activity at stake was economic and therefore subject to EU law.¹⁸⁸ For instance this was illustrated in *Lehtonen*, concerning transfer rules preventing a professional basketball player competing in certain games. Once again the ECJ was swift to rule out any argument based on the idea of general organizational autonomy of sports associations.

The early case law clearly states contradictions and inconsistencies in the differing approaches adopted by the ECJ in handling sport related cases. Certain academics submitted that the ‘economic test’, which the ECJ continues to refer to, may no longer be appropriate to fit the circumstances of professional sport today. For example, national football teams engage in very significant economic activity and so a rule restricting the composition of such teams to nationals of a particular member state is difficult to characterize as a ‘sporting’ rule. Continuance of this notion makes it a hazardous task to draw the line between legitimate sporting rules and non-sporting rules. *Lehtonen* constitute perfect example of the confusion concerning the application of ‘rules of purely sporting interest’;

The rules in *Lehtonen* could have been considered to be ‘of purely sporting interest’ and thus outside the scope of Article 45 TFEU.

¹⁸⁶ *Walrave v Union Cycliste Internationale* (Case 36/74) [1974] ECR 1405

¹⁸⁷ *Gaetano Dona v Mario Mantero* (Case 13/76) [1976]

¹⁸⁸ P Colomo, ‘The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the *Meca Medina* and *Piau* cases’, *ESLJ* Vol 3 No 2 at para 4

Whether the new Lisbon Treaty will clarify the uncertainties associated with the specificity of sport is a contentious matter as it seems to add little to the Nice Declaration 2000 and the White Paper 2007 which also expressly respected the autonomy of sport.

Conclusion

In summation, the true consequences of the provisions contained in the Lisbon Treaty is that it has left the door wide open to return to the continued debates concerning the specificity of sport. Cuendet stated that ratification of a well-established legal framework such as the Lisbon Treaty, will avoid fundamental sporting policies being resolved incrementally via the courts.¹⁸⁹

However, this article demonstrates that due to the uncertainties surrounding the varied interpretations possible in relation to Articles 6 & 165; Sports law will continue to develop on a case by case basis as it has done for many years irrespective of the inception of the Lisbon Treaty. Therefore, what has changed? Apart from the obvious change that sport is an area of new EU competence and perhaps aims to develop a specific EU sports program (supported by a budget and funding streams), sport law issues will continue to develop on a judicial incremental basis often causing ambiguities and inconsistencies due to a smaller interpretive community overlap. As the UEFA President, Mr Platini stated; the Lisbon Treaty “does not go far enough to protect (sport) from the rampant commercialism which assails it on all sides.”¹⁹⁰ The “malign and ever-present influence of money”¹⁹¹ justifies the ECJ’s intervention in sporting matters. In view of the latter, continued EU intervention based on the single market and competition rules on an incremental basis seems an inevitable consequence, as uncertainty once again subsists in EU sporting policy as it did with the Nice Declaration 2000 and the White Paper 2007. Once again, but on this occasion through the Lisbon Treaty, EU institutions have failed to ‘constitutionalise’ the specificity of sport.

¹⁸⁹ Editorial, ‘A European Treaty provision for Sport?’, (2007) SLA & P Oct 6-7 at pg 6

¹⁹⁰ Letter from Mr Platini to Gordon Brown, 7 September 2007.

http://www.uefa.com/multimediafiles/download/uefa/keytopics/590358_download.pdf

¹⁹¹ <http://www.telegraph.co.uk/sport/football/european/2321482/Michel-Platini-wages-war-on-money-men.html>

Conclusions and Proposals

Conclusions

1. Lisbon Treaty declared the specific nature of sport but was not able to handle the issues relating to transfer system and possible violations of free movement of workers and competition law.
2. Sport is considered as an economic activity under the EU law as it is provided for remuneration. Accordingly football is an economic activity.
3. Football players should be treated as workers, because they are in subordination towards the club and orders to carry out an economic activity.
4. Transfer system restricts the ability of footballers to seek alternative employment in other Member States which is guaranteed under the free movement of workers.
5. Transfer system imposes the limits to footballers and they are unable to change their working conditions when they want.
6. As transfer system is settled by the FIFA regulations, and equally concerns all the EU Member State nationals, it is not discriminatory in nature.
7. FIFA Transfer Windows system is considered necessary in order to reinforce player contract stability, but this system is too restrictive and not proportionate to the aim that is necessary for team and player contract stability. Thus, transfer system violates the free movement of workers.
8. Transfer windows system has no genuine sporting nature and involves financial and economic aspects.

9. Football players fall under the general definition of workers and must be considered as other workers, but transfer windows system contradicts the EU law in this sphere.
10. Team stability and stability of employment is already secured by contracts between football player and club and further restrictions like transfer windows system is not appropriate.
11. Transfer system impedes the fair competition as giving more opportunity to rich clubs rather than poor ones.
12. The Court of Justice abstained from judgments and opinions on competition law regarding transfer system, focusing only to free movement of workers.
13. Transfer windows period in different Member States does not match each other and are open in different periods. When transfer window is opened for one Member State and closed for another, the clubs with open window are in better situation undermining the equality and competition.
14. Transfer system leads to creation rich and poor clubs, what then leads to predicted results, thus affecting also consumers, who's interest rates goes down, especially when they have already bought season tickets and their costs are losing its value. As a result attendance drops down.
15. Transfer system which restricts clubs to buy or sell players when they want affects negatively to clubs in minor leagues and to clubs which have big financial problem and struggle for surviving. They can not sell players when they need it for surviving what sometimes lead them to bankruptcy.
16. Windows system should not be regarded as sporting rule that pursues a legitimate aim and whose effects are proportionate to its objective.

Proposals

1. FIFA should take some actions to balance transfer windows system in different EU Member States as to coincide the open and closed periods.
2. European Commission's sport unit, UEFA and Members States must collect data as transfer windows system really hardens the situation of poor clubs and are in benefit to rich clubs.
3. More attention has to be paid to sport on the EU level as FIFA and other associations under it may adopt by themselves some regulations in contradiction to EU law.
4. Every sporting regulation must be checked whether it undermines the general principles of the TFEU by the analyzing certain regulations among experts from the European Union, Member States and independent professionals.
5. As the football can be differentiated from other sports as multibillion global industry and the biggest subject of interest among EU citizens, European Institutions must adopt special regulation directive on football.
6. Due to the fact that transfer windows system provides little benefit to sport, the FIFA rules should be liberalized.
7. To clubs, who are in big financial crises should be provided with some exceptions about time restrictions and they must be able to sell their footballers in order to maintain financial stability and competitive

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