

COMMENT SECTION

Am I So Round with You as You with Me? The Bosman Case before the European Court of Justice

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The European Court of Justice's judgment in the *Bosman* case marks the end of more than 20 years of negotiations between the Commission of the European Communities and UEFA concerning transfer clauses. The judgment covers also the lawfulness of nationality clauses. The European Court of Justice's judgment has important consequences not only for the professional football sport but also for other sports where professionals compete in teams.

Could Mr Bosman have been attributed the classic words:

Am I so round with you as you with me,
That like a football you do spurn me thus?
You spurn me hence, and he will spurn me hither:
If I last in this service, you must case me in leather.¹

The teams of the football clubs RC Liège (Belgium) and US Dunkerque (France) and many other clubs in Europe would certainly like kicking such a ball. The outcome of the legal action which this Belgian footballer brought before the courts has had a marked impact on the practice of clubs which employ and transfer football players against the payment of money.

In the *Bosman* case² the European Court of Justice issued a preliminary ruling under Article 177 of the Treaty on European Union on the interpretation of Article 48 of the Treaty.³ The issue was referred to the ECJ by a

¹ William Shakespeare, 'The Comedy of Errors', Act II, Scene 1.
² European Court of Justice, 15 December 1995, Case C-415/93, '*Bosman*'.

³ Article 48 of the Treaty on European Union states:

- (1) Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
(2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers and the Member States as regards employment, remuneration and other conditions of work and employment.
(3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
- (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall

judgment of the Belgian Court of Appeal of Liège,⁴ and it was raised in various proceedings.

Facts

Mr Bosman, the plaintiff, a Belgian professional football player, played for the RC Liège. His monthly salary amounted to BFr.120,000. His contract was due to expire on 30 June 1990. In April 1990 his club offered him a new contract for one season at a salary of BFr.30,000. Mr Bosman did not sign the contract. His club put him on the transfer list and the transfer fee was fixed at BFr.11,743,000. Mr Bosman contacted the French football club US Dunkerque which was in the French second division, and a contract was signed between them according to which Mr Bosman would earn a monthly salary of BFr.100,000 and a bonus of BFr.30,000. In July 1990 this club and the RC Liège concluded a contract for the temporary transfer of Mr Bosman for one year. The compensation fee was fixed at BFr.1,200,000 payable by US Dunkerque to RC Liège on receipt by the French Football Federation of the transfer certificate issued by the Royal Belgian Union of Clubs of the Football Association. US Dunkerque obtained an option for an irrevocable full transfer at BFr.4,800,000. Both contracts were subject to the suspensive condition that the transfer certificate was sent by the Royal Belgian Union of Clubs of the Football Association to the French Football Federation before the time of the first match of the season on 2 August 1990. This did not happen. On 31 July 1990 RC Liège suspended Mr Bosman which prevented him from playing for the full season.

Mr Bosman brought an action against RC Liège. In June 1991 the Royal Belgian Union of Clubs of the Football Association intervened voluntarily in the main action and in August 1991 Mr Bosman issued a writ with the purpose to extend the proceedings against UEFA, the Union of European Football Associations. In December 1991 the French football club US Dunkerque was joined to the proceedings as a third party by RC Liège.

In April 1992 Mr Bosman, the plaintiff, amended his pleadings, seeking a declaration that the transfer rules and nationality clauses were not applicable to him. He applied for an order against RC Liège, the Royal Belgian Union of Clubs of the Football Association and UEFA for the payment of BFr.11,368,350 of damages suffered from 1 August 1990 until the end of his career, and of BFr.11,743,000 in respect of loss of earnings as a result of the application of the transfer rules. He also asked that the

3 continued

be embodied in implementing regulations to be drawn up by the Commission.

(4) The provisions of this Article shall not apply to employment in the public service.

⁴ Belgian Court of Appeal of Liège, order of 1 October 1993, Riv. dir. sport. 1994/528.

question on the interpretation of Article 48 be referred to the European Court of Justice.

On 11 June 1992 the Court of First Instance of Liège held, among others, that the plaintiff's claims against RC Liège, the Royal Belgian Union of Clubs of the Football Association and UEFA were admissible. The three defendants appealed. The Court of Appeal of Liège decided to stay the proceedings and to refer the question to the European Court of Justice for a preliminary ruling whether Article 48 of the Treaty on European Union (Treaty of Rome of 25 March 1957) should be interpreted as:

- prohibiting a football club from requiring and receiving payment of a sum of money on the engagement of one of its players who has come to the end of his contract by a new employing club;
- prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organise.

The Negotiations Relating to Transfer Clauses and Nationality Clauses between the European Commission, UEFA and the National Football Associations

1950 to 1970

In the 1950s and 1960s foreign football players used to play in teams without any limitations. From the 1960s onwards, many national football associations introduced nationality clauses in their regulations which limit the number of foreign players to be recruited or fielded in a match.

National sports organisations considered this development as favourable for their young players and their prospective careers. The nationality clauses also aimed at a limitation of the increasing commercialisation of the sport and at a retention of the national element in competitions which is typical for the sports movement. In these clauses, nationality is in general defined with respect to the eligibility of a player for a country's national or representative team.⁵

1970

Since the beginning of the 1970s the Commission of the European Community was concerned with the question whether professional footballers are subject to the principle of the freedom of movement for workers according to Article 48 of the Treaty on European Union.⁶

1978

In a conference between representatives of UEFA and the Commission on 23 February 1978 the following principles were agreed on: the clubs of the first and the second

national leagues have the right to limit the number of foreign players to two; this foreigner clause was not applicable to players from other Member States who had already played for five years in that Member State. These principles were accepted by the conference of the National Football Associations of the Member States of the Union on 10 July 1978. In order to avoid a sudden change of the system with regard to matches and competitions, it was envisaged to establish a transitional system according to which teams of the first and second leagues could field two football players from another Member State. It was envisaged that finally, any direct (limitation of recruitment) or indirect (limitation of fielding) discrimination should be overcome.⁷

1984

In 1984 the Commission demanded a further improvement of the compromise agreement of 1978 and a full liberalisation of the system until 30 June 1985. The national associations proposed that, first, two foreign players from Member States should be fielded simultaneously, second, a professional player who is active in a Member State for a period of five years shall be treated as a 'national' of that State, and third, in June 1989 the freedom of the movement of football players should be discussed again. The Commission considered that this proposal was not satisfactory.⁸

1989

In its report of 1989 the European Parliament assumed the position according to which the transfer rules of UEFA and the national associations which limited the number of foreign players in a team violated Community law.⁹

1990

The Commission issued a communication concerning access to employment of professional football players.¹⁰

1991

In the 'Gentleman's Agreement' between UEFA and the Commission of 17 April 1991, UEFA adopted the '3 + 2' rule which permits a national association to limit to three the number of foreign players a club may field in any first division match in their national championships, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior.¹¹ The same limitation also applied to UEFA matches in competitions for club teams. UEFA and the Commission agreed to continue their consultations every four years in order to

7 Antonio d'Harmant François, 'La Libera Circolazione nel Calcio Professionistico: Alcune Riflessioni', Riv. dir. sport. 1987, 617 at 625.
8 *Ibid.*, at 627.

9 European Parliament, Report Janssen van Raay, 1 March 1989, document Series A, A2-425/88.

10 Communication of the Commission: access to employment of professional football players, document SEC(90) 117, 24 January 1990.

11 European Court of Justice, paragraph 27 of the judgment of the *Bosman* case.

5 European Court of Justice, paragraph 25 of the judgment of the *Bosman* case.

6 See Gerhard Renz, 'Freizügigkeit von Berufsfußballspielern innerhalb der Europäischen Gemeinschaft', in: *Sportrecht in Europa*, ed. by Michael R. Will, C.F. Müller, Heidelberg, 1993, 191 to 205, at 191.

verify the functioning of the system. It was envisaged to achieve a final solution in 1996.¹²

1994

On 6 May 1994 the European Parliament, in its resolution on the European Community and sport, called for the obstacles to participation in sport by EU citizens based on nationality, such as 'foreigner rules', to be phased out more rapidly,¹³ and called for the right to join and leave sports clubs freely to be guaranteed without making it dependent on additional conditions which conflict with general law (the transfer system),¹⁴ and it urged the Commission to investigate immediately whether both the rules and practices of FIFA and UEFA and the national football associations and clubs are compatible with EU legislation, to take the appropriate decisions following this investigation and to act accordingly.¹⁵

Examples of Nationality Clauses

The relevant UEFA Regulations of the European Cup Winners' Cup, Season 1995/1996 which concern the eligibility of players state in Article 12 that only those players who are eligible to play for their club on 1 August may play in the matches of the preliminary round, and in the first and second rounds only players who are eligible to play for their clubs on 15 August may play. The following matches of the competition may be played by players who are eligible to play on 15 January.

Article 12(3) and (4) of the UEFA Regulations of the European Cup Winners' Cup, Season 1995/1996 states:

(3) The sixteen (or fewer) players chosen by a club to take part in any match in the competitions as indicated on the referee's report form under article 10(3) of these Regulations, shall not include more than *three* players who are not eligible to play for the national team of the national association to which that club belongs.

(4) In addition, *two* names of assimilated* players may also appear on the referee's official report form if they have played for an uninterrupted period of five years in the country of the national association concerned, three years of which must have been spent in playing youth football.

* In clause 2 of the agreement between the EC Commission and UEFA concerning the reduction in the number of 'non-selectable' players, the term 'matches in the youth sector' is understood to mean all competitive activity by players younger than 19 years of age on the deadline of 1 August. The matches must be played under the auspices of the national association or affiliated organisations.

Similar rules are found in Article 12 of the Regulations of the European Champion Clubs' Cup, Season 1995/1996 and in the Regulations of the UEFA Cup 1995/96. Corresponding rules are contained in the regulations of national football associations concerning the eligibility of players in licensed teams, for example in Article 22 of the Rules of the Game of the German Football Federation.

Concerning the eligibility of players in national association representative matches the Regulations Governing

the Status and Transfer of Football Players of FIFA¹⁶ state:

Article 35 (1) Any club which has concluded a contract with a player who is ineligible to play for the national association of which the club is a member shall be obliged to release him to the national association of which he is a national, in the event that he is selected for one of its representative teams, irrespective of his age. The same provision applies to a club of a national association for any of its players who are nationals of the same national association if they are summoned to play in a representative match.

Examples of Transfer Clauses

Article 1(1) of the Regulations of UEFA governing the fixing of a transfer fee of 1993 states: 'The international transfer of football players from one club to another shall be governed by the FIFA Regulations governing the Status and Transfer of Players'. According to Article 2(1) of the Regulations a player shall be free, subject to the conditions of Article 12 of the FIFA Regulations, to conclude a new contract with the club of his choice, to commence after the expiry of his existing or previous contract. Article 3(1) of the Regulations provides that one of the clubs concerned may submit a request to the UEFA General Secretariat for the amount of compensation for training and/or development to be fixed. A Board of Experts will then fix the amount of compensation for training and/or development for a non-amateur player (Article 6 of the Regulations) and for training for an amateur player (Article 7 of the Regulations). In the case concerned the 'Principles of Cooperation between Member Associations of UEFA and their Clubs' were applicable, approved by the UEFA Executive Committee on 24 May 1990 and in force from 1 July 1990.¹⁷

The UEFA and FIFA Regulations concerning the status and transfer of players and governing the fixing of a transfer fee are not directly applicable to players, but they are included in the rules of the national football associations of the Member States of the European Union which enforce them and which are, by reason of the contract concluded between the player and his club and the licence of the player which he obtains from the national association, applicable to the player. UEFA issued Regulations governing the Fixing of a Transfer Fee ('UEFA's Regulations'). These Regulations are based on Article 16(2) of the FIFA Regulations Governing the Status and Transfer of Players ('FIFA's Regulations'), since Article 1(1) of UEFA's Regulations states that the international transfer of football players from one club to another shall be governed by FIFA's Regulations. Article 2(1) of UEFA's Regulations establishes as a principle that the player shall be free to conclude a new contract with the club of his choice, to commence after the expiry of his existing contract. As a matter of procedure, Article 3(1) of UEFA's Regulations provides that one of the clubs concerned may submit a request to the UEFA General Secretariat for the amount of compensation for training and/or development to be fixed 30 days at the earliest after the international transfer certificate has been issued. In particular this claim for a compensation for the development and the training of young

¹² See Giorgio Bernini, 'Lo Sport e il Diritto Comunitario dopo Maastricht: Profili Generali', Riv. dir. sport. 1993, 653 at 663.

¹³ European Parliament, resolution on the European Community and Sport of 6 May 1994, OJ 1994 C 205/486, point 6.

¹⁴ *Ibid.*, point 8.

¹⁵ *Ibid.*, point 9.

¹⁶ January 1994.

¹⁷ European Court of Justice, paragraph 12 of the judgment of the *Bosman* case.

players is used by the clubs for the justification of the transfer sum.

In the past the Commission had suggested that a model contract be drafted which contained the transfer regulation for the players and which implemented the principle that any professional football player should be free to choose a new club after the termination of his contract, and independent of the usual negotiations between the two clubs for the payment of a compensation, but it was admitted that this task fell within the ambit of UEFA's activities.¹⁸

The Ruling of the European Court of Justice

(1) Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

(2) Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States.

(3) The direct effect of Article 48 of the EEC Treaty cannot be relied on in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date.

Are Sports Activities Subject to the Jurisdiction of the European Court of Justice?

The Treaty on European Union does not endorse the Community with the development of a fully fledged sports policy. This may be the reason behind the reticent attitude of the Commission which, during a period of some 20 years, attempted a modification of UEFA's rules towards a recognition of the freedom of movement of football players in the European Union.¹⁹

The applicability of the Treaty on European Union to the sports movement

According to Article 2 of the Treaty on European Union²⁰ the power of the Community relates to economic

activities. This principle was advanced by the European Court of Justice²¹ which advanced its jurisprudence according to which 'sport is subject to Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty'.²² Accordingly, purely cultural events may also assume the nature of economic activities by reason of their marketing. The principle of the applicability of the Community law to sports activities is thus established: the sport enters within the field of applicability of the Treaty on European Union insofar and up to the extent that it constitutes an economic activity, independent of the existence of an original sports policy of the European Union.²³ In consequence, the principle of the freedom of movement for workers, enshrined in Article 48 of the Treaty on European Union, is also directly applicable to football players within sports relationships, provided that the relation has the quality of an economic activity in the sense of Article 2 of the Treaty.

The Court referred to the case *Donà v Mantero*²⁴ and specified that 'this applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service'. In the same case²⁵ the Court held that practices which limit this freedom may be justified on non-economic grounds which relate to the particular nature and context of certain matches. However, any such restriction on the scope of Article 48 of the Treaty must remain limited to its proper objective and cannot, therefore, be relied on to exclude the whole of a sporting activity from the scope of the Treaty.²⁶ This means that the existence of an economic activity will have to be analysed on the individual circumstances and that, accordingly, no classes of sports as such are excluded from the application of the prohibition.

The definition of the term 'worker' in Article 48 of the Treaty

The European Court of Justice employs a broad definition of the term 'worker' in the sense of Article 48 of the Treaty on European Union. This definition is supported by legal writers. The term includes a person who earns an income which is below the subsistence level. The terms 'professional' and 'worker' in the sense of Article 48 of the Treaty may coincide insofar as a 'professional' football player is a player who exercises his sport regularly against a remuneration, for example if he is paid an annual bonus and monthly instalments.²⁷ However, in practice amateur players may also have an income and accordingly be

18 See Coopers & Lybrand Europe, 'L'Impatto delle Attività della Comunità Europea sullo Sport', November 1992, Riv. dir. sport. 1993, 51 at 60.

19 Gian Pietro Fontana-Rava, 'L'Action de la Communauté Européenne dans le Sport à la Lumière de Maastricht', in: Association of the European National Olympic Committees AENOC, 2nd Juridical Seminar, Sport Laws and Regulations in Europe, Rome, 26 and 27 March 1993, pages 59 to 61 at 59.

20 Article 2 of the Treaty on European Union states: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

21 European Court of Justice, paragraph 73 of the judgment of the *Bosman* case.

22 The Court referred in paragraph 73 of its judgment to its Case 36/74, *Walrave v Union Cycliste Internationale* [1974] ECR 1405, paragraph 4.

23 See for example Giorgio Bernini, Note 12 above, at 655.

24 European Court of Justice, Case 13/76, *Donà v Mantero* [1976] ECR 1333, paragraph 12.

25 *Ibid.*, paragraphs 14, 15.

26 European Court of Justice, paragraph 76 of the judgment of the *Bosman* case.

27 Jean Pierre Karaquillo, 'Le Professionalisme dans le Sport', in: Association of the European National Olympic Committees AENOC, Note 19 above, at 123; comment to the French Court of Cassation of 14 June 1979, D 1980/96 at 99.

considered as 'workers'.²⁸ It has been suggested that football players should, in case of doubt, be considered as 'workers' in the sense of the law.²⁹

Concerning the existence of an employment relationship it is not necessary that the employer should be an undertaking – what is required is the existence of, or the intention to create, an employment relationship.³⁰ For the application of Article 48 of the Treaty it is also not relevant whether the transfer rules concern business relationships between clubs rather than an employment relationship between a club and his player. What is decisive is that a working relationship exists and that the freedom of movement of the employee is restricted so that the fact that a new club will have to pay fees on recruiting a player from another club will suffice to render Article 48 of the Treaty applicable – the duty to pay affects the players' opportunities for finding employment and the terms under which such employment is offered.³¹

The freedom of association versus the freedom of movement

Football players conclude contracts with their clubs, and they are granted a licence to play from the national football associations. This licence contains the express recognition by the player of the statutes and rules of the relevant national and international associations (UEFA and FIFA). The power of the associations to establish statutes and rules is based on the principle of the freedom of association. The freedom of association is guaranteed in many national legal systems and by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³²

Occasionally, the scope of the freedom of association has had to be cleared by the courts. Thus the Spanish Constitutional Court of 24 May 1985³³ described sports federations as private administrative associations to which public administrative functions are entrusted. In the past, football associations argued that the regulations concerning the status and transfer of players in the statutes and

28 With regard to the difference between the amateur and the non-amateur status of players the relevant FIFA Regulations state in Article 2(1) that players who have never received any remuneration other than for the actual expenses incurred during the course of their participation in or for any activity connected with association football shall be regarded as amateur. Subsection 2 provides that 'travel and hotel expenses incurred through involvement in a match and the costs of a player's equipment, insurance and training may be reimbursed without jeopardising a player's amateur status', and according to subsection 3 'any player who has ever received remuneration in excess of the amount stated under subsection 2 in respect of participation in or an activity connected with association football shall be regarded as non-amateur unless he has reacquired amateur status under the terms of Article 25 below'.

29 Manfred Zuleeg, 'Der Sport im Europäischen Gemeinschaftsrecht', in: *Sportrecht in Europa*, Note 6 above, at 4.

30 European Court of Justice, paragraph 74 of the judgment of the *Bosman* case.

31 *Ibid.*, paragraph 75.

32 Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others. . . .
- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety . . . for the protection of health or morals or for the protection of the rights and freedoms of others. . . .

rules of national and international associations were based on the freedom of association and, accordingly, not subject to the prohibition of prejudices of the freedom of movement of workers. In particular, the power of the associations to take disciplinary measures is presumably based on the principle of the freedom of association. In the organised sports movement the statutes and rules of the national and international associations ensure that athletes can compete under standardised conditions, and these rules are applicable to any athletes – it does not matter to which club within the association the athletes belong. It is expected that the sportsmen or sportswomen comply with these conditions which are not considered as limiting them in their personal or professional freedom. These statutes and rules and their enforcement constitute a condition for the effective organisation of the competitions of the sport concerned so that their recognition is indispensable for anybody actively involved in the sports movement.³⁴

However, the scope of the basic right of freedom of association is limited. Taking into account the purpose of the freedom of association it may be argued that these statutes and rules may not exceed what is necessary for the regulation of the sport concerned. Concerning the application of labour law Karaquillo³⁵ indicated that 'even mandatory requirements of the sporting legal system . . . and agreements between the parties do not prevent the application of the rules of labour law when the factual circumstances require it'. In this respect the European Court of Justice held that the rules which concerned the nationality of players and the limitation of movement were not covered by the principle of the freedom of association.³⁶

The applicability of Article 48 of the Treaty to terms of employment relationships

The statutes and rules of the national and international football associations do not belong to the contract of work concluded between the player and his club, but they are, in general, understood as a collective agreement which regulates the contractual obligations of the parties in private law.³⁷ However, depending on the national sports legislation, the nature of these regulations may also

33 In a lawsuit in which the Sala Spanish Football Federation challenged principles of the Spanish Sports Act of 1980, quoted by José Bermejo Vera, 'Sport and the Law, an Overview of the Issues', in: Council of Europe, Proceedings of the Eighteenth Colloquy on European Law, Maastricht, 12 to 14 October 1988, pages 11 to 38 at 31.

34 See for example German Federal Supreme Court of 28 November 1994, NJW 1995/583 at 584 which based the right of the associations to develop their statutes and rules on Article 9 of the German Basic Law which contains the constitutional freedom of association.

35 Jean-Pierre Karaquillo, 'The Rules of the Sports Community and the Law of the State', in: Council of Europe, Note 33 above, pages 45 to 63 at 55.

36 European Court of Justice, paragraph 80 of the judgment of the *Bosman* case.

37 Michael Schweitzer, 'Die Freizügigkeit des Berufssportlers in der Europäischen Gemeinschaft', in: *Einbindung des nationalen Sportrechts in internationale Bezüge*, C.F. Müller, Heidelberg 1978, pages 71 to 88 at 77.

assume a public law character.³⁸ The European Court of Justice recognised the problem which would be created by a differentiated applicability of Article 48 of the Treaty to the regulations of the sports associations in Member States of the Union. The Court focused on the national qualification of the nature of statutes and rules by holding that 'there would be the risk of creating inequality in its application (see *Walrave* cited above, paragraph 19).' The Court considered this risk all the more obvious in a case where transfer rules 'have been laid down by different bodies or in different ways in each Member State'. Thus the Court established the principle that the freedom of movement according to Article 48 of the Treaty is directly applicable to working relations of whatever nature, whether public or private.³⁹

The Court explained:

Once the objections concerning the application of Article 48 of the Treaty to sporting activities such as those of professional footballers are out of the way, it is to be remembered that, as the Court held in paragraph 17 of its judgement in *Walrave* cited above, Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.⁴⁰

The Court rejected the argument that the principle of subsidiarity, according to which the intervention of public authorities must be limited to what is strictly necessary, would limit the applicability of Community law, because this 'cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty'.⁴¹

Thus the statutes and rules of international sports federations are also subject to the freedom of movement for workers. The Court observed that any curtailments on this freedom which Member States have to remove may not 'be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (see *Walrave*, cited above, paragraph 18)'.⁴²

The limitation of the freedom of movement for workers on grounds of public policy, Article 48(3) of the Treaty

A limitation of the freedom of movement may be justified on the grounds of public policy according to Article 48(3) of the Treaty. Can foreigner clauses or transfer rules of the associations be considered as part of the public policy? It has been argued⁴² that regulations of the sports associations which can be based on the constitutional principle of the freedom of association should be considered as

belonging to the public policy. According to this view the freedom of association is considered as appertaining to the legal values which establish the public order. Thus statutes and rules issued by sports associations which relate to their public tasks insofar as they regulate the football game and the competitions and to which in particular allegedly appertain the foreigner clauses, might be considered as part of the public policy mentioned in Article 48(3) of the Treaty. However, the Court rejected the argument that the regulations concerned could be based on the freedom of association⁴³ and held⁴⁴ that Article 48 of the Treaty also applies to rules laid down by sporting associations such as the Royal Belgian Union of Clubs of the Football Association or the international associations which determine the terms on which professional sportsmen can engage in gainful employment.

Reverse discrimination

According to UEFA's interpretation of the judgment, domestic transfers are not affected by the prohibition of restraints of the freedom of movement of workers in the Community.⁴⁵ It may be asked whether a national football player can claim to be discriminated against in relation to players from other Member States. In application of Article 48 of the Treaty other clubs in the Member State where he plays would not have to pay transfer fees if they recruited players from other Member States whereas they would be liable to such a payment if they recruited him. It seems that discrimination of a Member State against its own nationals would fall under the prohibition of Article 48 of the Treaty.⁴⁶ However, the European Court of Justice held⁴⁷ that Article 48 of the Treaty may be invoked only where the case in question comes within the area to which Community law applies. Accordingly, the provisions of the Treaty concerning the free movement of workers cannot be applied to cases which have no factor linking them with any of the situations governed by Community law. In the view of the Court such is undoubtedly the case with workers who have never exercised the right of freedom of movement within the Community. It may be conceded, however, that the circumstances in which the rules on the free movement of workers do not apply should be construed narrowly.⁴⁸ In conclusion, it may be cheaper for a European club to contract a European player from another Member State of the Union, because in this case the club will not have to play the transfer fee.

Can Article 6 of the Treaty on European Union⁴⁹ which prohibits discrimination be invoked by a player in a case

43 Paragraph 80 of the judgment of the *Bosman* case; the Court held that the clauses which concerned the nationality of players and the limitation of free movement were not covered by the principle of the freedom of association.

44 *Ibid.*, paragraph 87.

45 UEFA press release of 17 January 1996.

46 Anthony Arnall, *The General Principles of EEC Law and the Individual*, Leicester University Press, 1990, at 51 with reference to the case *Code du Travail Maritime* of the European Court of Justice, *Commission v France*, Case 167/73, [1974] ECR 359, paragraph 45.

47 European Court of Justice joined cases 35 and 36/82, *Mossion and Jhanjan*, [1982] ECR 3723.

48 Anthony Arnall, Note 46 above, at 61.

49 Article 6(1) of the Treaty on European Union states: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

38 See, for example, the Italian Law 81 of 23 March 1991, and the order of the Italian State Council of 20 December 1993, no. 1167, Riv. dir. sport. 1994, at 49, according to which the disciplinary measures of associations have a public law nature.

39 The principle of the freedom of movement of workers is directly applicable insofar as it will prevent discrimination in relations between nationals of Member States: Rudolf Geiger, *EG Vertrag*, commentary, C.H. Beck, Munich, 1995 (2nd edn), no. 4 to Article 48, with reference to the judgment of Van Duyn of the European Court of Justice [1974] ECR 1347.

40 European Court of Justice, paragraph 82 of the judgment of the *Bosman* case.

41 *Ibid.*, paragraph 81.

42 Gerhard Renz, Note 6 above, at 204; see also Michael Schweitzer, Note 37 above, at 84.

where he is discriminated against in relation to players from other Member States? Can the national club which wants to recruit a national football player assert that it is discriminated against by the Member State where it is registered in relation to clubs of other Member States, because it would have to pay the transfer fee which clubs of other Member States would not have to pay according to the jurisprudence of the European Court of Justice? The European Court of Justice did have to decide on these questions.

Article 6 of the Treaty is directly applicable and can be relied on by any person in the Community. In principle, the rule of the prohibition of discriminations contained in Article 6 of the Treaty is also applicable in cases which relate to the special rules of the freedom of movement.⁵⁰ The prohibition of discrimination in Article 6 of the Treaty covers any differentiated treatment for reasons of nationality within the scope of applicability of the Treaty. Accordingly, it would appear that clauses which oblige a club to pay a transfer fee in the case where the club contracts a player from another club of the same Member State discriminate against national players if the club can contract players from other Member States without having to pay the transfer fee. Under these circumstances clubs are likely to contract players from other Member States, because they would not incur any liabilities in relation to the payment of a transfer fee so that national players are discriminated against. However, it is asserted that the discrimination against nationals with regard to foreigners does not fall within the scope of the Treaty insofar as discrimination by reason of national rules or regulations does not have a relation to Community matters.⁵¹ In such a case it seems that national players can only rely on the prohibition of discriminatory treatment of employees provided for by national law, for example in Germany according to Article 3 of the German Basic Law.

But reverse discrimination may also occur with regard to nationality clauses, say if the 'sports nationality' of a player shall be determined by the territory where he is born. In a case decided by the German Provincial Court of Munich the FIBA, the International Federation of Basketball Associations, refused to issue a licence to a player on the reasoning that although he also had German nationality, his 'sports nationality' according to the FIBA Regulations was U.S.-American.⁵² The player, who was born in the United States, based his claim on a violation of the constitutional principle of the freedom of the choice of

work.⁵³ In the comment to the judgment it was said that the court had failed to discuss the application of Article 48 of the Treaty on European Union which would be directly applicable in national law so that an individual player could rely on the freedom of movement.⁵⁴ However, whether the national of a Member State of the European Union may rely on Article 48 of the Treaty in a claim arising from discrimination with regard to his nationality in the Member State of which he is a national appears questionable in the absence of a 'Community connection'.

UEFA and FIFA and the applicability of Community law

The European Court of Justice expressly held⁵⁵ that the principle of the freedom of movement of workers within the European Union is applicable to the statutes and rules of the international football associations FIFA or UEFA, and with this respect Article 48 of the Treaty on European Union is of direct applicability. This means that national courts have to apply this rule without any transformation into national law being necessary, and any professional or semi-professional may rely on Article 48 of the Treaty irrespective of any conflict with national laws.⁵⁶ Yet UEFA consistently asserted that the organisation and its rules were not subject to the ordinary jurisdiction or to the Treaty on European Union,⁵⁷ arguing that it has its registered office in Switzerland outside the territory of the European Community, that its member associations also come from states which do not belong to the European Community, that the contracts concluded by football players have a *sui generis* nature so that they would not be subject to labour law, that the limitation concerning foreign players would not relate to the number of foreign players under the contract of a club but rather to the putting them on the field. However, according to the European Court of Justice it is decisive that the regulations of UEFA or FIFA have the actual effect of restraining the football player's freedom of movement within the European Union and for this reason they are unlawful and not enforceable in the Member States of the European Union.

It may be said that decisions, statutes and rules of UEFA affecting the individual player are not subject to national legislation unless they violate basic principles, for example those which are applicable in the case of the recognition of foreign judgments or arbitral awards. Accordingly, in application of these principles the decision of an international sports association to ban a professional athlete for life may not be enforceable in his

50 European Court of Justice, Case 152/82, *Forcheri* [1982] ECR 2323.

51 Rudolf Geiger, Note 39 above, no. 11 to Article 6; Grabitz and Hilf, *Kommentar zur Europäischen Union*, C.H. Beck, Munich, 8th supplement 1995, no. 54 to Article 6.

52 In the case decided by the German Provincial Court of Munich of 2 November 1993 the plaintiff was a US American with a second German nationality. The player and his club obtained an injunction obligating FIBA to issue a licence to the player so that his club could field him in a match of the European Cup in November 1993 in Germany. The rules of the Association concerning nationality provided that in the case of a dual nationality, the player's 'basketball nationality' would be determined, *inter alia*, by the territory where he was born (No. 4.3a of the Regulations concerning the Nationality of Players).

53 Article 12(1) of the German Basic Law states: 'Every German has the right to choose freely the profession, the place of work and place of education. The exercise of the profession can be regulated by a law or on the basis of a law.' The Court expressly refrained from stating whether the Association's regulations had the quality of a 'law' in the sense of Article 12(1) sentence 2 of the German Basic Law, but it held that on a construction of the terms the regulations were lacking definitiveness and any obscurities had to be blamed on the Association.

54 Martin Schimcke, comment to Provincial Court of Munich of 2 November 1993, SpuRT 1994/91 at 93.

55 Paragraph 87 of the judgment of the *Bosman* case.

56 Christoph Palme, Hermann Hepp-Schwab and Stephan Wilske, 'Freizügigkeit im Profisport – EG-rechtliche Gewährleistungen und prozessuale Durchsetzbarkeit', JZ 1994/343 to 349 at 346.

57 Jaime Andreu, 'La Comunità Europea e lo Sport', Riv. dir. sport. 1992/629 to 645 at 640, 641.

national country, but such a decision may nevertheless prejudice the professional's career insofar as his participation in matches or competitions abroad is concerned.⁵⁸ Also a professional may not be deprived by decisions, statutes or rules of international sports associations of rights based on mandatory provisions which protect him as employee and which are applicable in the country where he customarily performs his obligations or in which the employer has his place of business. Bernini asks how could Community law not be applicable in cases which have a clear Community dimension when the applicability of these rules is admitted in national law?⁵⁹ Depending on the facts, it may be possible to sue UEFA directly, for example in application of the Swiss law concerning associations.⁶⁰

Attempts of the Community to achieve an amendment of the rules of the international associations based on Articles 169, 85 and 86 of the Treaty

The Commission of the European Communities had initially aimed at an amendment of the nationality and transfer clauses of the international football associations.

First, the Commission could have instituted proceedings against a Member State according to Article 169 of the Treaty on European Union if this Member State had violated its obligations under the Treaty according to Article 5 of the Treaty. Articles 169 and 170 of the Treaty authorise the Commission and Member States to institute proceedings in the case of a violation of the Treaty. However, it appears that the Commission was not sure

58 See District Court of Münster of 5 February 1979, quoted by Eike Reschke, *Handbuch des Sportrechts*, Luchterhand, Darmstadt/Neuwied, 1986, supplement 1994, no. 13-49-3; in this case the FIVB (Fédération Internationale de Volley-ball) excluded the plaintiff from playing within the association, its organisations or clubs for life. The District Court of Münster held that the life ban issued by the FIVB violated the player's constitutional rights so that it had to be ignored in Germany. The court applied the rules of German international private law applicable in the case of employment contracts.

59 See for example Giorgio Bernini, Note 12 above, at 663.

60 Article 72 of the Swiss Civil Code concerns expulsion from an association. It states: 'Expulsion. (1) The statutes [of an association] may determine the reasons for which a member may be excluded; but they may also permit the expulsion without the indication of reasons. (2) In these cases an appeal against the expulsion based on the reasons is not permissible. (3) In the case in which the statutes do not contain a provision in this respect, the expulsion is only permissible on a decision of the association and for grave reasons.' Article 75 of the Swiss Civil Code concerns the protection of membership. It states: 'Protection of Membership. Decisions which violate the law or statutes may be appealed against by law to a judge by any member which did not agree with the decision within the term of one month after the member had obtained the knowledge of the decision.' In the case of the elimination of the football club Olympic Marseille from the European UEFA competitions for the reason that the club was allegedly involved in a corruption scandal, the president of the club, Mr Tapie, attempted to appeal against the decision before a Swiss court where UEFA is registered. Here UEFA had taken its decision without giving Olympic Marseille the possibility to explain its own position; see Giorgio Bernini, Note 12 above, at 665. By reason of the particular nature of the proceedings, the court did not give a lengthy explanation of the decision. Even though the decision of Trib. Berne of 9 September, *SA Olympique Marseille v UEFA* Riv. dir. sport. 1994/533, did not refer to a particular provision of the civil law as a basis for its decision, Francesco Caringella, in a comment, *ibid.*, at 536, assumes that the court applied Article 72(2) of the Swiss Civil Code.

that the toleration of foreigner and transfer clauses by a Member State could justify the institution of legal proceedings according to Article 169 of the Treaty, since the applicability of this provision would have presumed that a Member State must have been obligated to intervene in the interests of a football player.⁶¹ In particular, the Commission considered that the existence of a 'foreigner clause' cannot be the subject matter of this kind of proceedings,⁶² because Article 169 of the Treaty can only be resorted to in the case of violations of the Treaty by Member States.

Second, foreigner and transfer clauses agreed on between UEFA, FIFA, the national associations and the clubs could violate Article 85 of the Treaty on European Union⁶³ as agreements in restraint of competition and Article 86 of the Treaty⁶⁴ as an abuse of a dominant position in the market. In the *Bosman* case the European Court of Justice did not have to decide whether the agreements relating to both types of clauses violated Articles 85 and 86 of the Treaty, because the clauses were already held unlawful by reason of the violation of Article 48 of the Treaty.⁶⁵ It seems that an international sports association like UEFA would qualify as an 'undertaking' in the sense of Articles 85 and 86 of the Treaty on European Union, taking into account that UEFA also exercises an economic activity, and that in this respect it does not matter which legal status the organisation has, how it is financed or whether the purpose of the organisation is profit or non-profit making.⁶⁶ In the *Bosman* case the Belgian Court of Appeals of Liège of 1 October 1993,⁶⁷ recalling the numerous arguments of the parties concerning the applicability of Articles 85 and 86 of the Treaty, alleged that the anti-trust law of the Community was applicable to football associations, because the clubs were also active as undertakings and the federations as associations of undertakings. But whereas the qualification of the international or national sports associations as 'undertakings' in the sense

61 Peter Karpenstein, 'Der Zugang von Ausländern zum Berufsfußball innerhalb der Europäischen Gemeinschaft', in: *Sportrecht in Europa*, Note 6 above, pages 171 to 189 at 185.

62 See the position of the Commission OJ 1992 C102/41.

63 Article 85 of the Treaty on European Union states: '(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market... (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void. (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings;... which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.

64 Article 86 of the Treaty on European Union states: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.'

65 Paragraph 138 of the judgment of the *Bosman* case.

66 Italian Authority for Competition and Market, decision of 18 November 1989, 'Italian Federation for Sailing', Riv. dir. sport. 1994/80; the Italian Antitrust Law of 10 October 1990 applies principles which are similar to those of Community anti-trust law; European Court of Justice of 23 April 1991, Case 41/90, *Höfner* [1990] ECR 2010.

67 Riv. dir. sport. 1994/517 at 528, 529.

of these provisions seems possible,⁶⁸ it remains questionable whether the clauses affect the trade between Member States.⁶⁹ Which trade is concerned? It can hardly be the trade in football players who are, themselves, neither goods nor services. Conceiving of this market as a market of soccer players would mean abolishing principles of labour law in favour of the introduction of a kind of slavery trade. Since the concept of 'trade' is very broad so that it comprises any economic activities relating to goods and services⁷⁰ one might consider that within this context the clubs' activities could be conceived of as relating to the service of the providing of entertainment. The Belgian Court of Appeals of Liège of 1 October 1993⁷¹ considered in the *Bosman* case that the anti-trust law of the Community may be applicable to football associations, because these 'undertakings' offer spectacles against a payment and also transmissions by television or radio, and the actors, the football players, can thus receive a remuneration. The Court of Appeals also considered whether the clubs themselves should be regarded as executory agents of the powerful associations which, in turn, should be regarded as undertakings in a dominant position.

Yet in its judgment of the *Bosman* case the European Court of Justice held that the maintenance of transfer clauses would not necessarily affect the position of competition between the clubs:⁷² the application of the transfer rules is no adequate means of maintaining a financial and competitive balance in the world of football, because these rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs. With regard to transfer clauses it is argued⁷³ that their purpose is rather to improve the competitive position of clubs so that their effect is to increase the individual market value of a club, and concerning the nationality clauses it should be taken into consideration⁷⁴ that the equilibrium which was achieved in the Gentleman's Agreement⁷⁵ by implementing the '3 + 2 rule' would also correspond with the interests of the clubs themselves, taking into account that the value of the clubs for the entertainment industry, sponsors and advertisers might decrease if they employed too many foreign players. Additionally, the European Court of Justice recognised⁷⁶ that nationality clauses are not sufficient to prevent the

richest clubs from engaging the best players so that these clauses cannot maintain a certain competitive order. Accordingly, the susceptibility of these clauses to prevent, restrict or distort competition in the common market or to constitute an abuse of competition in this market appears rather limited. It seems that the position in competition of the small clubs is more affected by excluding them from playing in the first league than by those transfer and nationality clauses which regulate the rights of players to play and work for certain clubs or, conversely, the rights of clubs to contract and field players.

The enforcement of a judgment against UEFA

After the European Court of Justice had rendered its judgment, UEFA declared that in its view the judgment allowed restrictions on the number of foreign players in specific matches between teams 'representing their countries'. UEFA considered that these matches included the UEFA club competitions.⁷⁷ UEFA thus asserted that it would not change the regulations of the three European club cup competitions in the course of the 1995/1996 season but maintain the '3+2 rule' which was accepted in writing by all participants at the beginning of the season. FIFA declared that it would maintain its regulations for international transfers of its 193 member associations.⁷⁸ In UEFA's view the judgment does not affect national transfers so that the transfer rules which do not relate to a transfer beyond national borders within the European Union would have to be modified anyway. Further, UEFA alleges that, concerning international transfers, a transfer fee could not be claimed in the following case: if the player is no longer under a contract, if he is a national of a Member State of the European Union and if the transfer relates to another Member State of the Union. UEFA also considers that the regulations concerning non-eligibility of players in the national competitions of the European Union are not applicable if they concern players from Member States of the Union.⁷⁹

The European Commission reacted promptly by threatening sanctions should UEFA refuse to amend its transfer regulations and the rules concerning the limitations of foreign players insofar as they concern players from Member States of the European Union. The Commission also declared that UEFA could not expect to be granted an exemption from the applicability of the anti-trust laws of the Treaty on European Union.⁸⁰ The Commission declared that it would initiate infringement proceedings under Regulation 17⁸¹ according to which the Commission can enforce Articles 85 and 86 of the Treaty,⁸² thus lifting

68 Martin Klose, *Die Rolle des Sports bei der europäischen Einigung*, Duncker & Humblodt, 1989, at 137, 138; Mike Pullen, 'Summary of the Advocate General's Opinion in the *Bosman* Case' [1996] 1 ECLR 51 to 58, at 56.

69 *Ibid.*, at 138 to 140.

70 Valentine Korah, *EC Competition Law and Practice*, Sweet & Maxwell, 1994 (5th edn), at 49.

71 Note 67 above.

72 The European Court of Justice, judgment of the *Bosman* case, paragraph 107.

73 Massimo Coccia, 'L'Indennità di Trasferimento e la Libera Circolazione dei Calciatori Professionisti nell'Unione Europea', Riv. dir. sport. 1994/350 to 363 at 358; to show that the clauses are unobjectionable the author even invokes the 'rule of reason' test of US anti-trust law according to which individual cases which do not constitute *per se* violations of the anti-trust laws have to be evaluated according to their specific anti-trust aspects.

74 *Ibid.*, at 362.

75 Gentleman's Agreement concluded between the European Commission and UEFA on 17 April 1991.

76 European Court of Justice, judgment of the *Bosman* case, paragraph 135.

77 UEFA press release of 16 January 1996.

78 UEFA press release of 17 January 1996.

79 *Ibid.*

80 In the judgment the European Court of Justice did not have to decide on the applicability of Articles 85 and 86 of the Treaty on European Union, because the Court found that the regulations already violated Article 48 of the Treaty.

81 OJ 1959-1962 at 87.

82 Article 3 of Council Regulation 17 states: '(1) Where the Commission, on application or on its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.' Article 4 of the Regulation which concerns the notification of new agreements

the immunity from fines which UEFA and FIFA enjoyed since both associations notified to the Commission their transfer rules on 28 July 1995.⁸³ During the pending proceedings of the *Bosman* case the Commission did not take any measures according to Regulation 17, but it had indicated that it could not exempt clauses which were in breach of Article 48 of the Treaty.⁸⁴

The preliminary ruling of the European Court of Justice according to Article 177 of the Treaty on European Union on the interpretation of the Treaty will not be enforced in Switzerland. It determines the interpretation of Article 48 of the Treaty in general and in particular for the Belgian Court of Appeals of Liège⁸⁵ which, in application of the European Court of Justice's interpretation will render its judgment which then, after having obtained legal force, may be enforced in Switzerland where UEFA has its office. Concerning the enforcement of a foreign judgment in Switzerland the Swiss law of civil procedure is applicable. The Swiss Federal Act concerning the International Private Law of 1989 regulates the conditions for the recognition and the enforcement of foreign decisions in international relations.⁸⁶

The recognition and execution of foreign judgments is regulated in Articles 25 to 32 of the Swiss Act. According to Article 25 of the Act a foreign judgment will be recognised if the court had competence, if the decision was final and if the decision is compatible with Article 27 of the Act which establishes as a condition in subsection 1 that the decision must not be in evident contrast with the Swiss public order.⁸⁷ It may be asked whether UEFA's Statutes and Rules merit protection as elements of the public order. This may, in particular, be the case, if they are covered by the freedom of association which is established as a constitutional basic right in Switzerland. Article 56 of the

82 continued

which would restrict competition and for which an exemption is sought according to Article 85(3) of the Treaty states: '(1) Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission.' Articles 15 and 16 of the Regulation provide for fines and periodic penalty payments which the Commission may impose on associations or undertakings which infringe Article 85 or 86 of the Treaty.

83 EEC DGXIII Information Service, document IP/96/62 of 19 January 1996.

84 EEC DGXIII Information Service, document IP/95/1411 of 19 January 1996.

85 Which had in its order of 1 October 1993 referred the issue to the European Court of Justice according to Article 177 of the Treaty on European Union.

86 Article 1(1)(c) of the Swiss Federal Act concerning the International Private Law of 1989. According to Articles 2, 20(1)(c) and 21(1) and (2) of the Act, the Tribunal of Nyon where UEFA has its offices might be competent in the case of the enforcement of a foreign judgment against UEFA.

87 It has to be examined whether the content of the judgment is compatible with the principles of the Swiss legal order. In the past Swiss jurisprudence refused the recognition of a judgment which ordered the payment of exemplary damages according to common law principles, see Paul Volken (ed.), *IPRG Kommentar*, commentary of the Swiss International Private Law Act, Schulthess, 1993, at 286, with reference to the Civil Court of Basle of 1 February 1989, BJM 1991/31, which admitted the execution of an order for the payment of punitive damages, and to the Presidential Committee of the District Court of Sargans of 1982, SJZ 1986/310, which refused the recognition of a judgment of a Texan court awarding exemplary damages.

Swiss Constitution protects the freedom of association. The law of associations is regulated in Articles 60 to 79 of the Swiss Civil Code. With regard to its aims and the means which an association employs in the pursuit of these aims, an association is subject to the general legal order.⁸⁸ Thus the freedom of association is subject to the principle of legal reservation. Accordingly, it appears that the enforcement of a judgment against UEFA which declares unlawful certain provisions of its Statutes or Rules concerning nationality and transfer clauses would not violate the nucleus of the freedom of association in a manner violating the Swiss public order.

Transfer Clauses can Affect the Freedom of Workers within the European Union

The European Court of Justice concluded 'that Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee'.⁸⁹

Do transfer clauses limit the players' freedom of movement?

Even before the judgment of the European Court of Justice in the *Bosman* case it was generally accepted that the transfer system used by the clubs denied the football players' freedom of choice of a new employer, because it limited the number of potential new clubs to those which were prepared to pay the transfer fee, and that UEFA, national associations and clubs would, sooner or later, be compelled to dismantle the transfer system which contravened the principle of the free movement of workers according to Article 48 of the Treaty.⁹⁰

The European Court of Justice held that provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.⁹¹ The Court held that the transfer rules in question 'are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs'. The Court found that the rules, even though they are not written in the contract between the player and his club, affect his freedom to seek a new employment, because they determine the conduct of the football clubs. The Court held⁹² that even though UEFA's transfer rules stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club, 'the new club must still pay the fee in issue, under pain of penalties which may

88 Swiss Federal Court BGE 44 I 133 at 142 onward.

89 Paragraph 114 of the judgment of the *Bosman* case.

90 See for example Eric J.A. Vile: 'Economic and Commercial Pressures on Sport: Critical Perspectives and Legal Responses', in: *Sport and the Law*, Note 33 above, pages 93 to 98 at 97.

91 Paragraph 96 of the judgment of the *Bosman* case.

92 *Ibid.*, paragraph 101.

include it being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee'. Concerning the direct effect of the transfer clauses on the player's position the Court held:

It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 30 of the Treaty...⁹³

The Court's interpretation of Article 48 of the Treaty thus excludes the employment of transfer clauses categorically, insofar as the transfer to another Member State of the Union is concerned. And yet it may be argued that transfer clauses which establish the transfer fees on an assessment reflecting the actual costs incurred by the clubs for education, training or development serve a reasonable function and may only seemingly affect the player's freedom of movement, since Article 48 of the Treaty cannot be interpreted to guarantee the employee's right to exercise his activity at a certain desired club when the player, in principle, is free to choose a new club which is prepared to pay the transfer fee.

Justified transfer clauses

On the finding that the transfer clauses violated the principle of the freedom of movement of workers in the sense of Article 48 of the Treaty the Court held: 'It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose'.⁹⁴

It is not quite clear on which legal provisions the Court based its reasoning. Limitations of the principle of the freedom of movement of workers may be made according to Article 48(3) of the Treaty provided that they are justified on grounds of public policy, public security or public health. The Treaty does not admit any other exceptions from the principle of the freedom of movement of workers, and in general exceptions have to be interpreted narrowly.⁹⁵

The only legally sound basis for a justification of the limitation of the freedom of movement may thus be

⁹³ *Ibid.*, paragraph 103. With regard to the freedom to provide services the Court referred to Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141, paragraphs 36 to 38. According to the cases decided by the Court national regulations affecting trade may be permissible, if they are applicable to national services and those from other Member States without differentiation.

⁹⁴ Paragraph 104 of the judgment of the *Bosman* case. The Court referred to the judgment in Case C-19/92 *Kraus v Land Baden Württemberg* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-0000, paragraph 37.

⁹⁵ Meinhard Hilf, 'Die Freizügigkeit des Berufsfußballspielers innerhalb der Europäischen Gemeinschaft', NJW 1984/517 to 523 at 520.

founded on public policy reasons. Concerning sport and in particular the organisation of the football game, this means that the clubs must be able to organise themselves in a manner which corresponds with their public tasks. These tasks can only be fulfilled by clubs and the national and international associations if they may organise the operation of their bodies and the competitions and matches in a sensible manner. In the proceedings before the European Court of Justice the Royal Belgian Union of Clubs of the Football Association, UEFA, the French and the Italian Governments asserted that the transfer rules were justified by the need to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players.

The Court rejected the first argument by indicating that the application of the transfer rules would not be an adequate means of maintaining a financial and competitive balance in the world of football, because these rules would neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.⁹⁶ Yet it has been held⁹⁷ with regard to national law that the impeding of a change of clubs is not necessarily unlawful, because it may be justified by the purpose to maintain the order of the competitions and matches and by the purpose to avoid distortions of competition between the clubs.

The second argument was rejected by the Court on the consideration that the prospect of receiving such fees cannot be a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, because even though the prospects to receive fees for transfer, development or training are likely to encourage the football clubs' activities of seeking for new talent and training young players,⁹⁸ the impossibility to predict the sporting future of young players with any certainty and the fact that only a very limited number of these players will play professionally,⁹⁹ exclude purposeful planning. Yet it has been held in national jurisprudence that the stipulation of the payment of a transfer fee can serve this aim, and it may be justified as compensation for the costs incurred by the club for training, and smaller clubs may thus retain their position in competition.¹⁰⁰ The judgment of the European Court of Justice did not provide any information on the actual expenses incurred by the club RC Liège for training, education and development of the player Bosman. It could have been helpful for the European sports movement if

⁹⁶ Paragraph 107 of the judgment of the *Bosman* case.

⁹⁷ German Provincial Court of Hamm, order of 3 March 1992, NJW-RR 1992/1211; the court, concerned with the lawfulness of a transfer clause in professional ice-hockey according to German law, referred to the German Federal Supreme Court of 13 November 1975, NJW 1976/565, which held the clause admissible in contracts of professional football players. Also the German Provincial Court of Karlsruhe, NJW 1978/324, held that the stipulation involving the payment of a transfer fee concerning the transfer of an amateur player agreed on between two clubs was not *contra bonos mores*.

⁹⁸ Paragraph 108 of the judgment of the *Bosman* case.

⁹⁹ *Ibid.*, paragraph 109.

¹⁰⁰ German Provincial Court of Hamm, Note 97 above; however, the court conceded that transfer clauses are inadmissible which establish the fees by reference to schedules according to which the value is abstractly calculated and which are not related to the actual costs incurred, but rather to the market value of the player.

the judgment of the European Court had permitted a smaller club to recover these expenses through the payment of a transfer fee.

Transfer clauses in national jurisprudence

In English law the retention and transfer system which was used by the Football Association Ltd of England and the Football League Ltd was held to be in restraint of trade in 1963. Without going into the details of this very restrictive system, the interesting parallel to the *Bosman* case lies in the assessment of the rules of the Football Association and the Football League and their impact on the working relationship of the football player. In *Eastham v Newcastle*¹⁰¹ Wilberforce J did not rely on the mere words of the regulations concerning the retention and transfer provisions when evaluating whether they were in restraint of trade, but said: 'How and to what extent they do so operate can only be judged by seeing how they work in practice'. Wilberforce J considered the Football League as a ring within the wider ring of the Football Association which in the case of clubs that are members of the League and of their players imposes additional regulations affecting the right of professional players to change their employment.¹⁰² This principle also appears to be applicable to the rules of UEFA or FIFA with regard to the individual football player. Even if the relevant rules are not written in the individual contract between the football player and his club, it will be sufficient, if the rules are adhered to by the clubs so that they affect directly the working relationship of the player, and will be held unlawful accordingly. The Football League had modified the regulations which then provided for a limited right to move, but on the UK Commission on Industrial Relations' report in 1974¹⁰³ the players' association and the Football League amended the system so that the player has the right to move and the old club a right to a compensation or transfer fee. This system was accepted and used as a model for UEFA's transfer system.¹⁰⁴

The German Provincial Labour Court of Düsseldorf of 7 September 1988 and the Provincial Labour Court of Munich, sustained by the German Federal Labour Court of 20 December 1989, all quoted by the Provincial Court of Hamm,¹⁰⁵ held that transfer clauses which obligate the new club or the player to the payment of a transfer fee violate Article 12 of the German Basic Law which contains the constitutional right of the freedom of work. Article 12(1) sentence 1 of the German Basic Law states: 'Each German has the right to choose his profession or job, his place of work and place of training.' The German District Court of Traunstein of 20 April 1993¹⁰⁶ upheld a transfer clause which obligated the new club which belonged to the first division of the German ice-hockey teams to pay a transfer fee of DM228,000 which was reduced subsequently to DM205,000 by the Expert Commission of the German Ice-Hockey Association. The court upheld the

transfer clause, stating that the clause, which was contained in the Rules of the Game of the German Ice-Hockey Federation, appeared purposeful, reasonable and sensible, taking into account that the clause assured the clubs an appropriate financial compensation for a qualified and cost intensive education of young players. The court rejected the argument that the clause would limit the player's freedom to choose his job by pointing out that this freedom does not provide the guarantee to exercise a certain job, and that the player was free to choose a club which was prepared to pay the transfer fee.

The German Provincial Court of Schleswig-Holstein¹⁰⁷ upheld the transfer clause of the Schleswig Holstein Football Association according to which a club of amateur players could, in the case of a change of clubs by a player, demand the payment of DM1,500¹⁰⁸ from the new club as a condition for the release of a player. The court held: 'This regulation which is covered by the freedom of association does not violate the principle of good faith by reason of its limited effects.' The plaintiff sued the old club which had refused to release him, and asserted that, since there was no working relationship by reason of his amateur status, the refusal violated his general personality right in the free development of his personality and freedom of action and also his human dignity. The court rejected these arguments and held that the claim for the payment of a transfer fee did not amount to the alleged 'despicable trade with the freedom of a human being' and that it did not affect the human dignity of the player, because the transfer rules of the association were not discretionary but compatible with generally accepted practices.

Concerning the Dutch legal system van Staveren¹⁰⁹ alleged that with regard to transfer clauses no particular rules of labour law would be opposed to the stipulation of a transfer fee. However, he questioned whether the implementation of the UEFA principles concerning the transfer of a player during the validity of his contract which was made dependent on the agreement between the new and the former club and the player, which he analysed as the reinforcement of the principle that *pacta sunt servanda*, would be in accordance with Dutch labour law which gave the employer the right, under certain circumstances, to terminate the contract if this was found to be reasonable, and in such a case a court may order the new employer to pay a compensation to the old employer.¹¹⁰

101 [1963] 3 All ER 139 at 147.

102 *Ibid.*, at 145.

103 Commission on Industrial Relations, Report 87, 'Professional Football', HMSO, 1974.

104 John Wood, 'Economic and Commercial Pressures on Sport: Critical Perspectives and Legal Responses', in: Council of Europe, Note 33 above, pages 70 to 92 at 82.

105 Note 97 above, at 1212.

106 SpuRt 1995/75.

107 20 June 1991, MDR 1991/90.

108 Approximately £600.

109 Heiko T. van Staveren, 'The Rules of the Sports Community and the Law of the State', in: Sport and the Law, Note 33 above, pages 64 to 69 at 68, 69.

110 In Arbitragecommissie KNVB of 12 June 1974, Official News KNVB of 20 June 1974/7; SMA 1974/544 the Court of Arbitration held that the player Johan Neeskens could leave his club Ajax Amsterdam and join the new club Barcelona which offered him better conditions of employment. However, the Court of Arbitration ordered the payment of a compensation payable by Barcelona to Ajax Amsterdam which took into account the transfer fee which would have been payable after the ordinary termination of the contract.

Do the Nationality Clauses of the International and National Sports Associations and of the Clubs Affect the Freedom of Movement for Workers within the European Union?

The European Court of Justice held that Article 48(2) of the Treaty 'expressly provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment'.¹¹¹ Accordingly, clauses which have the effect of limiting the number of foreign players, who are 'workers' in the sense of Article 48 of the Treaty from other Member States of the European Union, are unlawful. It will be sufficient if these clauses reduce the possibility to find an engagement for players from other Member States.

Within the European Community Article 48 of the Treaty prohibits any discrimination of workers based on their nationality. The European Court of Justice held:

That provision has been implemented, in particular, by Article 4 of the Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community,¹¹² under which provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch or activity or region, or at a national level, are not to apply to nationals of the other Member States'.¹¹³

This principle is also applicable to clauses contained in the regulations of sporting associations which restrict the right of nationals of other Member States to take part as professionals in football matches.¹¹⁴ Accordingly, nationality clauses contained in the rules of associations or used by clubs are, in principle, prohibited by Article 48 of the Treaty on European Union within the Community insofar as they relate to professional players from Member States of the Union.

The 'nationality' of players

It is a general principle of international private law that the nationality of a person is determined by application of the *lex causae*, according to the laws of the state the nationality of which is in question.¹¹⁵ This principle may lead to difficulties in sports competitions when a player has the nationality of several states. For that reason many international sports associations attempt to avoid any conflicts by issuing nationality rules with the aim to regulate the nationality of a player for the purposes of the sport concerned.

The present Regulations Governing the Status and Transfer of Football Players of the FIFA provide in Article 3(1) that 'a player's status shall be determined by the national association with which he is registered'. That it

may be difficult to define the nationality of an athlete was highlighted in the Spanish case *Smith v Asociación de Clubs de Baloncesto*.¹¹⁶ According to the rules of the Spanish Basketball Association only players who were Spanish by birth were to be counted as 'Spanish'. The plaintiff who was Spanish by marriage appealed. The court held that the rule of the Spanish Basketball Association complained of was invalid. Without reference to Article 48 of the Treaty the court held that the law of the European Community does not permit discrimination between professional athletes from the Community by reason of their different nationality. This means that there is a need to define the sports nationality of players by international associations. However, these rules may not conflict with mandatory principles of labour law.

The violation of the freedom of movement of players

The European Court of Justice explained that Article 48 of the Treaty on European Union is applicable to conditions of any economic activities in the sense of Article 2 of the Treaty. Whereas in the *Donà* case the Court held that discriminations on the basis of nationality were admissible by reason of Article 48 of the Treaty insofar as they relate to the sport as such,¹¹⁷ the Court specified this relation in the *Bosman* case by merely differentiating between economic activities which are, by reason of Article 2 of the Treaty, subject to Article 48, and those activities which do not have an economic nature and which are not subject to the freedom of movement, no matter whether they belong to sport or culture. The Court held: 'The fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. Insofar as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned'.¹¹⁸ Thus, in principle, nationality clauses restrict the freedom of movement of players who are 'workers' in the sense of Article 48 of the Treaty.

Nationality clauses based on non-economic reasons

Before the European Court of Justice the Royal Belgian Union of Clubs of the Football Association, UEFA, the German, French and Italian Governments argued that the nationality clauses were justified on non-economic grounds, concerning only the sport as such. However the Court rejected these arguments, because:

a football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region or, in the case of the United Kingdom, the territory covered by each of the four associations. Even though national championships are played between clubs from different regions,

¹¹¹ Judgment of the *Bosman* case, paragraph 117.

¹¹² OJ English Special Edition, 1968(II), at 475.

¹¹³ European Court of Justice, judgment in the *Bosman* case, paragraph 118.

¹¹⁴ *Ibid.*, paragraph 119; the Court referred to the judgment in *Donà v Mantero*, Note 24 above, paragraph 19.

¹¹⁵ For example Article 22 of the Swiss Federal Act concerning the International Private Law of 1989.

¹¹⁶ Court of the First Instance 23 of Barcelona of 18 November 1991, Riv. dir. sport 1992/392; see also the German Provincial Court of Munich of 2 November 1993, Note 52 above, which concerned the validity of another nationality clause.

¹¹⁷ See Hilf, Note 95 above, at 520, 521.

¹¹⁸ European Court of Justice, judgment in the *Bosman* case, paragraph 120.

towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such matches.¹¹⁹

Furthermore, in international competitions, 'participation is limited to clubs which have achieved certain results in competition in their respective countries, without any particular significance being attached to the nationalities of their players'¹²⁰ and 'whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. Indeed, under the rules of the sporting associations, foreign players must be allowed by their clubs to play for their country's national team in certain matches.'¹²¹

The European Court of Justice's judgment in the *Donà* case led to a discussion about the scope of applicability of Article 48 of the Treaty and the exemption from the prohibition of nationality clauses for reasons of sport. In paragraphs 14 and 15 of the judgment¹²² the Court held that Article 48 would not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature. It is argued¹²³ that, accordingly, foreigner clauses are admissible, if the exclusion of foreign players can be based on non-economic reasons. The subsistence of economic activities is, according to Article 2 of the Treaty, a condition for the application of Article 48 of the Treaty. Consequently, the reasoning of the Court would be without legal basis, should it mean that a foreigner clause could only be admissible if it is exclusively based on non-economic reasons, because under these circumstances there is no economic activity in the sense of Article 2 of the Treaty so that Article 48 of the Treaty would not be applicable. It may be inferred that the Court must have meant that also in the case where the clause is founded on economic reasons but prevalently motivated by reasons of sport, it should be excluded from the application of Article 48 of the Treaty. However, such an interpretation would have to conceive of these 'prevalently non-economic reasons' as constituting a justification in the sense of Article 48(3) of the Treaty, because Article 48 of the Treaty does not permit any other exemptions from the prohibition of discrimination.

Justified nationality clauses

The admissibility of foreigner clauses for reasons of sport may be indicated by the purpose of the promotion of talents. The limitation of foreigners improves the chances of young nationals to compete and it will make the sport concerned more attractive for the viewers. It is also asserted¹²⁴ that the Maastricht Treaty, the Treaty on European Union which entered into force on 1 November 1993, will strengthen the national elements, which allegedly supports the argument for the exclusion of foreigners, because otherwise it would be possible that, *in extremis*, a French national team consisting of Germans might fight a German national team consisting of French

players. The establishment of the principle of the freedom of movement for professional football players in the internal market of the European Union reduces the chances of a player to find employment by clubs of that Member State of which he is a national, but it improves his chances of employment in other Member States.¹²⁵ The nationality clauses do not achieve a competitive balance between the richer and poorer clubs, since the richer clubs are not restricted in their possibility to recruit the best national players. Another argument concerned national teams: the number of experienced national players is likely to decrease the more foreigners are admitted to the teams of the national leagues. The Commission's participation in the drafting of the '3 + 2 rule' did not create a legal position on which UEFA and the national associations or clubs can rely.¹²⁶ In fact, the European Court of Justice's judgment in the *Bosman* case is not susceptible to establish confidence in the Commission's activities, and the Court might well have attempted to appreciate the Commission's enduring efforts to obtain a solution in the interest of the sports movement.

What kind of nationality clauses are admissible according to the jurisprudence of the European Court of Justice? Subsequent to the judgment in the *Bosman* case the following principles may be summarised.

- (1) International sports associations are free to stipulate those terms in their statutes and regulations as they think fit in order to organise the sport concerned.¹²⁷
- (2) In the case in which the terms of international sports associations affect the contractual relation of a sportsman with his club or national association in a Member State of the European Union, the labour law of the European Union will also concern the regulation contained in the rules or statutes of the international sports association insofar as this regulation entered the contractual arrangement with the sportsman.
- (3) In the view of the European Court of Justice the principle of the freedom of association did not favour UEFA when evaluating whether nationality clauses are unlawful. But the principle may possibly be invoked by UEFA or an international sports association against the enforcement of a legal decision according to the principles of international civil law, for example by reference to the *ordre public* of the country where the execution of the decision is sought.

125 European Court of Justice, judgment of the *Bosman* case, paragraph 134.

126 *Ibid.*, paragraph 136.

127 The right of sports associations to organise the sport and to establish rules for their operation can be based on customary law or on the freedom of association which is established in many constitutions and international law, for example in Article 11 of the European Convention of Human Rights which states: (1) 'Everybody has the right of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. (2) No restriction shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

119 *Ibid.*, paragraph 131.

120 *Ibid.*, paragraph 132.

121 *Ibid.*, paragraph 133.

122 *Donà v Mantero*, Note 24 above, paragraphs 14 and 15.

123 Harald Kahlenberg, 'Zur EG-rechtlichen Zulässigkeit von Ausländerklauseln im Sport', EWS 1994/423 to 431 at 427.

124 See for example *ibid.*, at 429.

(4) Article 48 of the Treaty is applicable in the case where an economic activity underlies the contractual relation between the parties. This means that freedom of movement will not be affected if the player is not an employee in the sense of Article 48 of the Treaty, for example if he is an amateur. In cases in which Article 48 of the Treaty is not applicable, nationality clauses are admissible subject to the prohibition of discrimination according to Article 6 of the Treaty which prohibits any discrimination of nationals of Member States based on nationality.

(5) Nationality clauses are admissible, if they concern specific matches between teams representing their countries and if they do not apply to all official matches between clubs constituting the essence of the activity of professional players.¹²⁸ Parallels to nationality clauses in other sports cannot easily be drawn, because the conditions for competitions may differ from those in football. However, the permissibility of nationality clauses is considerably limited.

Nationality clauses in national jurisprudence

The German District Court of Frankfurt of 18 January 1994¹²⁹ was concerned with the validity of a foreigner clause in table tennis. According to the Rules for Competitions of the German Table Tennis Association only one foreigner may play in the teams of the first federal league, consisting of four players each, and in those of the second league which consist of six players. The court held that the Rules for Competitions were valid and compatible with Article 48 of the Treaty on European Union. In the view of the court Article 48 of the Treaty is applicable to sports activities insofar as such activities relate to economic activities in the sense of Article 2 of the Treaty on European Union; that is to say if they concern professionals or semi-professionals who are employed for valuable remuneration. The court had no doubt that

the participation of professional players in matches of the first Federal league and of the championship competitions are an economic activity in the sense of Article 2 of the Treaty on European Union. There is further no doubt that the [nationality] Rule . . . limits the activity of foreign players, because a player can only be fielded if no other foreign player belongs to the team. The prohibition of discrimination which results from Articles . . . and 48 of the Treaty is binding not only for public authorities but also for internal collective regulations of associations which relate to the performance of work and services.

The District Court of Frankfurt held that the Rules in question did not violate Article 48 of the Treaty, because the limitations of the participation of foreign players in official matches of the first Federal league and in matches of the championship are not based on economic reasons but on reasons based on the sport, and because they do not reach further than necessary for the reasons of sport. The District Court referred to the principles concerning the admissibility of foreigner clauses relating to national teams established by the European Court of Justice in the

cases *Walrave*¹³⁰ and *Donà*¹³¹ and explained that the reference to national teams in both judgments

was merely exemplary and does not permit the inference that only in the case of few competitions comparable to matches between national teams a limitation of the number of foreign players is admissible. It is the nucleus of the reasoning of the European Court of Justice that a limitation of the participation of foreign players from other Member States in competitions of the sport which constitute an economic activity, are admissible if and insofar as they are based on reasons of the sport.

The court considered the clause which limited the number of foreign players in teams of the first league to one as justified, because 'in the case of a limitation of the participation of foreign players to half of the available number of players in a team (namely 2) a sufficient promotion of young talents and the creation of a sufficient reservoir of players for the national team could not be ensured. As a reason based on the sport as such the court accepted the purpose of the encouragement of new talent: if more than one player within a team could be a foreigner, young German players might lose the incentive to compete for membership in a club which participates in the league. The court also considered that the unlimited admission of foreigners might have a negative impact on the establishment of a national team, because under such conditions fewer national players might qualify for membership in the national team.

The Provincial Court of Frankfurt also upheld the foreigner clause of the German Table Tennis Federation. In proceedings concerning the grant of a preliminary injunction the Provincial Court of Frankfurt held in an order of 26 August 1993¹³² that the rules of the German Table Tennis Federation which limit the right of clubs to elect foreign players, including those from other Member States of the European Union, for their teams did not violate Community law, because the limitation was based not on economic reasons but on reasons relating to the sport, in particular by reason of the concern for the recruitment of young German players for the teams. Concerning the admissibility of foreigner clauses the court held that in the cases *Walrave* and *Donà* a limitation of the participation of nationals from other Member States in competitions which also constitute an economic activity are admissible insofar as these limitations are based on reasons of the sport as such. In the view of the court the law concerning foreigner clauses was settled by the judgments *Walrave* and *Donà* so that the court did not see a reason to refer the matter to the European Court of Justice according to Article 177 of the Treaty.

The broad interpretation of the exemption from the prohibition of limitations of the freedom of movement concerning professional sportsmen for reasons of the sport as such cannot be upheld by national courts after the judgment of the European Court of Justice in the *Bosman* case, according to which it is decisive whether the nationality clauses concern specific matches between teams representing their countries or whether they apply to all official matches between clubs and thus to the essence of the

128 See European Court of Justice, judgment of the *Bosman* case, paragraph 128.
129 EuZW 1994/511.

130 Note 22 above.

131 Note 24 above.

132 MDR 1993/1250.

activity of professional players.¹³³ The Court, which referred to the arguments advanced by UEFA and other parties to the proceedings according to which nationality clauses are necessary to create a sufficient pool of national players to provide the national teams with top players to field in all team positions,¹³⁴ did not deal with this argument subsequently so that it must be inferred that the Court did not consider this argument as relevant. However, with regard to the particularities of table tennis, which is characterised by smaller teams and stronger differences between the competitive levels on a national basis, it may be asserted that nationality clauses in this kind of sport should deserve to be exempted from the prohibition of Article 48(2) of the Treaty by reason of the justification on grounds of the sport as such. This exemption would be based on grounds of public policy according to Article 48(3) of the Treaty.

Does the Judgment Have Retroactive Effect?

Concerning a possible retroactivity of the judgment in the case of claims relating to a transfer fee, payable under an obligation which arose before the judgment entered into force, the Court held that for overriding considerations of legal certainty the effects of the judgment cannot be applicable to legal situations the effects of which have already been exhausted, that is to say for transaction fees paid in the past. However, an exception must be made in favour of persons who have taken timely steps to safeguard their rights, so that Article 48 of the Treaty cannot be relied on in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date.¹³⁵ Accordingly, executed contracts and also contracts concerning transfer fees concluded before 15 December 1995 are not affected by the judgment. With regard to nationality clauses the Court denied any limitation of the temporal effects of the judgment so that these clauses are without effect.¹³⁶

133 European Court of Justice, judgment of the *Bosman* case, paragraph 128.

134 *Ibid.*, paragraph 124.

135 *Ibid.*, paragraph 145.

136 *Ibid.*, paragraph 146.

Comparative Advertising after *Barclays Bank v RBS Advanta*

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In what is likely to be the leading case in this area, the High Court has upheld the legitimacy of comparative advertising and given guidance on the interpretation and construction of section 10(6) of the Trade Marks Act 1994, establishing a test based on reasonableness in the light of the full facts and against what is reasonably to be expected by the relevant public of advertisements for the particular goods or services in question.

Background

Comparative advertising has recently become common in some areas of business, especially in those where competition is fierce, notably telecommunications and financial services. It was forbidden prior to the introduction of the Trade Marks Act 1994 ('the 1994 Act'),¹ but by September 1990, when the White Paper 'Reform of Trade Marks Law'² was published, the Government had come to the view that comparative advertising was generally more acceptable than it had been. The White Paper proposed that in the interests of better consumer awareness comparative advertising should be allowed provided the interests of the consumer and the trade mark owner were properly balanced.

Comparative Advertising under the 1994 Act

The 1994 Act attempts to safeguard the interests of consumers by allowing comparative advertising but protect owners of registered marks by including appropriate safeguards to circumscribe comparative use of their marks by competitors. Section 10(6) qualifies the provisions of section 10 setting out what constitutes infringement of a registered mark by providing that:

Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying the goods or services as those of the proprietor or a licensee.

But any such use otherwise than in accordance with honest practices in industrial or commercial matters shall be treated as infringing the registered mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark.

The origins of this section (based in part on the EU Council Directive on trade mark harmonisation,³ which makes no mention of comparative advertising) make it unclear how it should be applied in practice. As drafted, it requires two elements to be satisfied for there to be infringement. The competitor's use of a rival's mark must be otherwise than in accordance with honest practices in industrial or commercial matters, and it must without due

1 See section 4(1)(b) of the Trade Marks Act 1938, and also the Court of Appeal in *Bismag v Amblins (Chemists) Ltd* (1940) 57 RPC 209.

2 Cm. 1203.

3 First Trade Marks Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (Directive 89/104/EEC, OJ 1989 L40/1).