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# Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)

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## ABSTRACT

The Treaty establishing the European Community has amongst its foundational aims the purpose of an ‘ever closer union’, to be achieved inter alia by precluding nationality as a legitimate regulatory consideration within the internal market. The Court has interpreted Treaty derogations from this principle restrictively and has at times considered even entirely non-discriminatory measures as falling foul of Treaty fundamental freedoms because of their restrictive effects on trade. In sport, the judgment of the European Court of Justice in *Bosman* made clear that sport was not special in this respect. Nationality restrictions in sport, when not related to its limited and possibly dated case law regarding national team sports were not beyond the scope of Treaty prohibitions on discrimination. Non-discriminatory but excessively restrictive trading practices such as the disputed transfer system in *Bosman* were also not exempt from the Treaty and required justification despite an absence of discriminatory effects. Since *Bosman*, the Union of European Football Associations (UEFA) has argued that although commercial football is no longer organised with reference to nationality and does not require nationality rules for the sake of

maintaining such market divisions, other considerations should permit the imposition of rules that closely correlate with nationality. By introducing its home-grown player rules UEFA seeks to require in certain circumstances preferential treatment of players with local links by training or residence. We examine whether the home-grown players rule is in principle justifiable under the Treaty given its relationship with nationality discrimination and if so, whether the reasons put forward are capable of constituting such justification, suitable for the aims stated by UEFA and proportionate.

## KEYWORDS

Nationality Discrimination, Home Grown Players, Sporting Exception, Inherent Rules, Restriction of Free Movement and Competition, Objective Justification

## HOME-GROWN PLAYERS – THE DEBATE

In *Bosman* (Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v Bosman* [1995] ECR I-4921), the European Court of Justice held that rules which limit the right to take part in football matches as professional or semi-professional players to the nationals of the State in question are prohibited by Article 39 of the EC Treaty and Article 4 of Regulation 1612/68. Later in *Kolpak* (Case C-438/00 [2003] ECR I-4135), the Court of Justice extended some of the *Bosman* principles to non-EU workers protected by association agreements by finding that a number of these agreements prevent professional sportsmen and women of a state covered by the agreement, who are lawfully employed by a club established in an EU Member State, from being treated differently to member state nationals in terms of their working conditions, remuneration and dismissal. Thus the nationality element of *Bosman* was extended to such non-EU workers. Even nationality restrictions in amateur sport are under investigation. Here, nationality restrictions persist despite the Court’s finding that that access to leisure activities is a corollary to freedom of movement (Case C-334/94 *Commission v France* [1996] ECR I-1307 paragraph 21) and Article 12 of the EC Treaty which prohibits nationality discrimination in relation to those areas that are not linked to fundamental economic freedoms. A worker’s right to be joined by their family in the host country, and the integration of that family into their new surroundings, may not be undermined by directly discriminatory nationality rules employed by sports governing bodies (Commission of the European Communities 2004).

UEFA contend that the consequences of ECJ jurisprudence in this field are numerous. First, UEFA is concerned that the rulings expose essentially sporting activities to laws intended to regulate ordinary economic market activity. Sport, it is contended, operates under market conditions different to 'normal' industries with rules pertaining to nationality forming the bedrock of the European model of sport (Commission of the European Communities 1998). In other words, sport is special and the governing bodies should be afforded a wide margin of appreciation in the context of forming rules which are potentially prohibited by Community law (Declaration no.29 Treaty of Amsterdam and Presidency Conclusions (2000)). Second, UEFA allege that the rulings in *Bosman* and *Kolpak* have diminished the competitive balance in European football because they have promoted wage inflation and thereby jeopardised the financial stability of the sport. By creating a free market in the trade of players in Europe, the judgments encouraged the largest clubs to spend freely on players, creating competitive disparities and thus lessening the unpredictability of competition which is contrary to the basic ethos of sport. The problem, it is alleged, is compounded by clubs 'hoarding' players, a position strongly discouraged under the pre-*Bosman* 3+2 agreement in which clubs could only field a maximum of three non-national and two assimilated players. This agreement did not survive the *Bosman* judgment. UEFA is also concerned that the growing commercialism of the game has contributed to the larger clubs resisting attempts to redistribute money, which has a negative impact on competitive balance and also investment in amateur sport. Third, the judgments have provided disincentives for clubs to invest in the education and training of local talent and have instead contributed to a growing reliance on the transfer market to recruit players. This again raises concerns as to financial stability, competitive balance and 'short-termism'. Fourth, the proliferation in international player transfers has severed the link between clubs and their localities. Fifth, labour mobility has contributed to a weakening of national team sports by narrowing the pool of talent available to a national association to select from and caused problems over how national associations look after and monitor the progress of players who play in other associations.

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UEFA has responded to these concerns by amending their rules on squad composition for clubs entering European competitions, although in doing so they have encountered suspicion that they are merely attempting to re-fight the *Bosman* battle and reintroduce residence-based rules to replace the express nationality requirements recognised in *Bosman* as unlawful. This is denied by UEFA, who state that the home-grown player rules are 'not about rolling back the *Bosman* ruling and... not about limiting the number of foreign players. UEFA recognises and accepts the rule of EU law' (UEFA 2006). The new regulations were agreed at UEFA's Ordinary Congress in April 2005 in Estonia and were subsequently incorporated into the 2006/07 UEFA regulations (UEFA 2005, p. 22). The new rule states that squad lists for UEFA club competitions will continue to be limited to 25 players for the main 'A' list. From season 2006-2007, the final four places are reserved exclusively for 'locally trained players'. A locally trained player is either a 'club trained player' or an 'association trained player'. In the following two seasons, one additional place for a club trained player and one additional place for an association trained player will be reserved on the A list with the final numbers of four club trained and four association trained players in place for the 2009 season. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between the age of 15 and 21. An association trained player fulfils the same criteria but with another club in the same association. In the event that a club fails to meet the new conditions for registration, the maximum number of players on the 'A' list will be reduced accordingly. Should a club list an ineligible player in the places reserved for home-grown players, those players will not be eligible to participate for the club in the UEFA club competition in question and the club will be unable to replace that player on list 'A'. UEFA made the recommendation for national associations to apply the same rule for domestic competitions. UEFA originally wanted 'a minimum number of at least seven or eight home-grown players out of the 18 players on the match sheets' (UEFA 2004).

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## APPLICATION OF EC LAW TO SPORT

The need for the home-grown player rule arises from the gradual erosion of the 'sporting exception', also considered in this journal (Colomo 2005) prior to the seminal ECJ judgment in *Meca-Medina and Majcen v Commission* (Case C-519/04 P, [2006] ECR I-6991). In *Walrave* (Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405 paragraph 4) the ECJ held that '.... having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'. However, the prohibition on discrimination '.... does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity' (*Walrave* paragraph 8). After *Walrave*, it was widely argued that 'purely sporting' rules were subject to a sporting exception from the EC Treaty unless the rules were disproportionate and therefore not limited to their proper objectives. This encouraged some sports governing bodies to propose that the entirety of their regulation falls within this 'sporting exception' and thus outside the scope of the Treaty, and consequently Community regulatory competence. However, the exemption from the prohibition on nationality discrimination that relates to rules of purely sporting interest is limited to its 'proper objective', namely organising competitions on the basis of nationality (Case 13/76 *Donà v Mantero*

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[1976] ECR 1333, paragraphs 14 and 15 and *Deliège* Joined Cases C-51/95 and C-191/97 [2000] ECR I-2549 paragraph 44). The Court of First Instance also has categorised a number of rules not based on nationality as 'purely sporting' (*Meca-Medina and Majcen v Commission* Case T-313/02 ECR [2004] II-3291 paragraph 41). Even if, subsequent to the Court of Justice decision in the same case, a proportionate sporting rule cannot be considered 'pure' because its objectives are beyond the limited exception, it may fail to constitute an obstacle to free movement, restriction of fundamental freedoms or of competition if it is 'inherent' in the proper organisation of sport.

Whilst the earlier case law related to the 'purely sporting' rule supports the thesis that a 'purely sporting' rule justified on non-economic grounds effectively takes those rules outside the Treaty, those cases in which the Court of Justice has considered 'inherent' rules involve first a consideration of whether the rule falls within the definition of economic activity under a relevant Treaty provision, and only then continue with consideration of whether the purportedly 'inherent' rule is a restriction or obstacle. Since proportionality is a feature of those 'inherent' rules that are not restrictions, the process involves objective justification rather than the wholesale exclusion of sports governing bodies' self-regulation from the scope of the Treaty. For example, in *Deliège* the Court first assumes that the activity is economic, more specifically the provision of services (paragraph 60), proceeds to note that the rule is not a 'purely sporting' nationality restriction related to organising a competition on that basis (paragraphs 43 and 63) and only then states that '...limitation[s]... inherent in the conduct of an international high-level sports event... may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services...' (paragraph 64). The conclusion to be drawn is that 'inherent' rules are a broader category than 'purely sporting' nationality rules, and that their compatibility with the Treaty requires more detailed consideration than the mere recognition of their 'purely sporting' nature. A similar line of reasoning within EC competition law has been drawn from the judgment in *Wouters* (Case C-309/99, *Wouters and others* [2002] ECR I-1577 paragraph 97) and applied to sporting rules in *Meca-Medina* (paragraph 42).

The extent to which the acts of sports governing bodies could have economic impacts and yet remain outside the scope of the Treaty was further clarified by the European Court of Justice in *Meca-Medina* in which it stated that '... it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down' (paragraph 27). Whilst the prohibitions on nationality discrimination in Articles 39 and 49 do not affect rules of purely sporting interest which have nothing to do with economic activity, the 'purely sporting' rule is difficult to find in areas of commercial activity including commercial sport because most sporting rules in commercial sports have at least something to do with economic activity (Weatherill 2003 p. 56; Weatherill 2005 p. 420). However, sport is not intrinsically exempt from judicial scrutiny. Sporting rules that are neither 'pure' nor 'inherent' to the organisation of sporting competitions may be restrictions within the meaning of Articles 39, 49, and 81. Such restrictions must be justified where they have even a marginal economic effect: '...the rules which govern that activity must satisfy the requirements of... freedom of movement for workers, freedom of establishment, freedom to provide services, or competition' (*Meca-Medina* paragraph 28). The Court also recognised that even though certain rules do not constitute restrictions of free movement and fall outside those provisions of the Treaty, this does not exempt the rule from analysis under other provisions such as competition law as the Court of First Instance had erroneously stated (*Meca-Medina* paragraphs 31-33). While retaining the possibility that some rules inherent to the organisation of sports remain outside the scope of the fundamental freedoms, the clarification results in a greater emphasis on the process of justifying restrictions and reaffirms the limits of sporting autonomy even in those areas where rules 'inherent in the conduct' of sports events do not constitute restrictions of free movement of competition.

#### *WHAT IS AN 'INHERENT' RULE? ECJ PRACTICE FROM BOSMAN TO SIMUTENKOV*

The Court has never recognised that nationality restrictions can constitute 'purely sporting' exceptions to Treaty rights except in a tightly circumscribed set of circumstances, applicable only where nationality rules apply to national teams playing on behalf of a Member State. Its acceptance of rules 'inherent' to the proper organisation of sport also appears limited to non-discriminatory, indistinctly applicable rules that bear no relationship to nationality. When nationality affiliations are one, but not the only, method by which the sport is organised, the Court has denied that these rules fall outside the scope of the Treaty and within the 'sporting exception'. In *Bosman*, the 'inherency' of the nationality link was considered a factor potentially precluding the rule from constituting a restriction rather than one capable of exempting the rule from Treaty scrutiny because it was not confined to specific matches between teams representing their countries (paragraph 128). The same reasoning is repeated in *Kolpak* (paragraphs 54-56) and *Simutenkov* (Case C-265/03 ECR [2005] I-2579 paragraph 38), offering support for the view that nationality rules not linked to competitions organised exclusively on the basis of nationality always constitute restrictions that must be justified and that these restrictions of free movement can not be considered to be 'inherent' and therefore outside the notion of 'restriction' within the Treaty.

*Deliège* and *Lehtonen* involved rules that did not discriminate against Community citizens in favour of nationals of the state in which the rule was applied. In *Deliège*, the Court considered a rule that restricted the number of competitors in a high-level event 'inherent' to the proper organisation of sport (paragraphs 64 and 69). The rule applied to all nationals of Member States and allocated them to a quota based on membership of a national federation. These quotas were all of equal size. Membership of the federation, not the nationality of the athlete, formed the basis of allocation (paragraph 4). The reasons for the rule included a 'large number of considerations [all] unconnected with the personal situation of any athlete' (paragraph 65). Whilst it could be suggested that the form of words used to preclude 'certain selection rules or criteria' from constituting restrictions of fundamental freedoms could in principle permit distinctly applicable rules that treated nationals of Member States in an unequal way, this was not the case on the facts in *Deliège*. In *Lehtonen* (Case C-176/96 [2000] ECR 2549), decided two days after *Deliège*, transfer rules for persons entering from leagues outside the European zone were more lenient than those applicable for European and domestic transfers. The Court did not expressly consider the 'inherency' of the rule but considered that the European zone transfer rule was not capable of exemption from the Treaty (paragraph 36) and could in principle constitute an obstacle to free movement (paragraph 49) even though it did not discriminate in favour of national players (paragraph 48). Under the circumstances, the Court considered that obstacle could not be justified because the more lenient transfer period for players from beyond the European zone implied that the European transfer rule was disproportionate (paragraph 58).

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While the cases discussed above were all decided on the basis of the fundamental freedoms, in *Meca-Medina* the Court considered the relationship of 'inherent' rules to Article 81. In the field of EC competition law, an inherent relationship with non-economic aspects of sport may preclude the application of Article 81(1) to rules under scrutiny even where they have restrictive effects, (*Wouters* paragraph 97 and *Meca-Medina* paragraphs 42 and 45), but will not exempt such rules from the justificatory and proportionality analysis that is accorded to restrictive rules with economic effects (*Meca-Medina* paragraph 42). In *Meca-Medina*, while the Court denied that 'inherency' in relation to the fundamental freedoms *a priori* precluded a breach of competition law, it found that the indistinctly applicable anti-doping rules were incapable of constituting restrictions within the meaning of Article 81(1) so long as the proportionate restriction of competition that flowed from them was 'inherent' in the pursuit of legitimate objectives (paragraphs 42-43). Anti-doping rules were 'inherent' in the proper organisation of sport, and therefore outside the Article 81(1) prohibition (paragraph 45). Unlike the 'purely sporting' rules in *Walrave*, inherent rules do not need to demonstrate a lack of economic impact, merely that they were not primarily motivated by economic considerations (*Weatherill* 2006 656-657). However, from the perspective of nationality discrimination, despite its furtherance of the 'inherent' restriction doctrine in the field of competition law, *Meca-Medina* offers no support to the proposition that rules incorporating an element of nationality discrimination could be 'inherent' and thus fall outside either the fundamental freedoms or competition law. In sum, where a rule has discriminated against Community nationals, it has not been found 'inherent' to the proper organisation of sport outside the context of the original rule related to national team sports. Even where a rule does not discriminate against Community nationals, it can constitute an obstacle to free movement and require justification if it is not 'inherent' to the proper organisation of sport and demonstrably necessary and proportionate. The relevance of these requirements suggests that the determination of whether a rule is 'inherent' is similar to the process of objective justification.

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#### *TREATMENT OF NON-INHERENT RESTRICTIONS*

Where a rule is neither 'purely sporting' and therefore outside the scope of the Treaty nor 'inherent', thereby avoiding classification as a restriction and yet potentially that rule restricts the exercise of fundamental freedoms, the rule may constitute a prohibited restriction of free movement. Such restrictions survive scrutiny if they are justified either with reference to Treaty derogations or objective justifications that, whilst not expressly enunciated in the Treaty, are available in addition to the Treaty derogations. In terms of the fundamental freedoms, the process of objective justification is well-established and was applied by the ECJ in *Bosman* and subsequent free movement cases relevant to the governance of sport. Whenever a discriminatory nationality element is not restricted to national teams representing their countries, the rule falls within the Treaty, can constitute an obstacle to or restriction of free movement, and must be justified to remain compatible with Treaty rules (*Bosman* paragraph 128 and subsequent rulings). An organisational rule that is disproportionate constitutes a restriction of free movement or of competition that must be justified and cannot be 'inherent' even if it does not discriminate against non-nationals of the Member State in question (*Lehtonen* paragraph 56). Where disputed rules are not restrictions of the fundamental economic freedoms because a person is not undertaking genuine economic activity (*Deliège* paragraphs 50-56), an applicant may rely on the broader, citizenship-based rule of non-discrimination found in Article 12, which in the context of Article 18 litigation has already generated some independent case law (for example Case C-224/02 *Pusa* [2004] ECR I-5763). The essence of the Article 12 rule requires equal treatment of EU citizens in those fields that are not already regulated by a specific Treaty rule on non-discrimination. Curiously, unless the Court extends the limited form of the Article 39 and 49 sporting exception in a way that in *Meca-Medina* it did not accept

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was *a priori* the case, it seems that its reasoning could have the consequence of requiring an Article 12 analysis for 'inherent' or even 'purely sporting' rules that would not in an economic context contravene Articles 39, 43, 49, 81 or 82.

#### 'RESTRICTION', 'DISCRIMINATION' AND OBJECTIVE JUSTIFICATION

There are few indications that the court is prepared to accept a broad and general *Keck* –like category of indistinctly applicable rules that fall outside the scope of the Treaty freedoms to work and to provide services (Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1988] ECR 4269 paragraph 16). It will be recalled that in the field of goods, the Court of Justice recognised in *Keck* that a category of 'certain selling arrangements', applied without distinction to nationality and with no discriminatory effects either in law or in fact, were not restrictions of free movement and did not fall within the Article 28 prohibition. An analogy might be made with 'purely sporting' rules (*Walrave and Koch* paragraph 8), which the Court has recognised does not fall within the scope of Articles 39 and 49 or to 'inherent' rules, which are not deemed to constitute restrictions but which appear to require some examination of their objectives and proportionality (*Deliège* paragraph 64 and *Meca-Medina* paragraph 42). Although conceptually similar in that rules are excluded from the Treaty framework, the analogy to 'purely sporting' rules in *Walrave* is limited in substance because 'purely sporting' rules need not necessarily be indistinctly applicable but can in fact expressly discriminate on the grounds of nationality. In this sense the 'purely sporting' exception is more generous to the autonomy of sporting organisations than *Keck* is to national market regulation. However, since 'purely sporting' rules must be 'limited to their proper objective', it is submitted that this implies tests of proportionality and, in practice, requires the enunciation of a 'proper objective' that is not unlike the requirement for objective justification. In relation to rules 'inherent' to the proper organisation of sport, whilst the Court has recognised 'inherent' rules as conceptually incapable of constituting restrictions, in practice these are subject to tests of proportionality and require justification with reference to a legitimate objective (*Deliège* paragraph 64) - a feature absent from *Keck* 'selling arrangements' which afford national authorities a wide margin of appreciation. Furthermore, as the Court noted, it was a material factor that the 'inherent' rules were indistinctly applicable (*Deliège* paragraph 61). In this respect, 'inherency' is similar to 'certain selling arrangements' in that it appears to require indistinct applicability. This is not the position with the home grown-players rule because its effects are more pronounced on non-nationals than nationals. As a consequence, only objective justification or the limited 'sporting exception' may be invoked. The fundamental analytical process relevant to determining whether most sporting rules including UEFA's home-grown player rules are lawful under the Treaty is therefore not the determination of whether the rules fall within the scope of the Treaty, but rather whether they are justifiable on the basis of recognised objectives, suitable for the objectives pursued and proportionate.

Most rules which place migrants at a disadvantage will constitute indirect discrimination. In *Commission v Belgium*, the Court considered that '[i]t is not necessary to find that the provision in question does in practice affect a substantially higher proportion of migrant workers', but that the mere likelihood of discriminatory effect would suffice to prohibit such rules affecting Community workers (Case C-278/94, [1996] ECR I-4307 paragraph 20). In *O'Flynn*, such rules were recognised to include rules that affected essentially migrant workers; where migrant workers were the majority of those affected; where rules could be more easily satisfied by national workers than migrant workers; and where there was merely a risk that they might operate to the particular detriment of migrant workers (Case C-237/94 *O'Flynn* [1996] ECR I-261 paragraphs 18-21.) In *Angonese* (Case C-281/98 *Angonese* ECR [2000] I-4139), the Court recognised that nationals of the discriminating Member State could also be placed at a disadvantage, but that the only relevant threshold in relation to discrimination was whether the rule in question deterred migration (*Angonese* paragraph 41). The Court has '...consistently held that the equal treatment rule laid down in Article 39... prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which... lead in fact to the same result' (Case C-400/02 *Merida* ECR [2004] I-8471 paragraph 21). However, the Court does not treat overt and covert discrimination as identical with respect to the justification of such rules. A finding of direct discrimination, namely where a rule explicitly distinguishes on the basis of their nationality, can only be objectively justified under one of the Treaty categories that recognise legitimate objective differences between nationals and non-nationals and may not be founded on economic grounds (Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 paragraph 34). Indirectly discriminatory rules may be justified with reference to Treaty grounds and broader categories of objective justification based on public interest requirements. Unfortunately, the Court has not always addressed the distinction between directly and indirectly discriminatory rules. In *Angonese* it considered disproportionate rules that made no express reference to nationality to constitute 'discrimination on grounds of nationality contrary to Article [39] of the EC Treaty?' (*Angonese* paragraph 45). In *Bosman*, the European Court of Justice was not entirely clear as to whether 'pressing reasons of public interest' were considered Treaty or extraneous objective justifications in relation to the directly discriminatory 3+2 rule (*Bosman* paragraph 104). The court appeared prepared to consider justifications put forward, but did not consider any of these justifications fit for purpose or proportionate. (*Bosman* paragraphs 121-137). Nevertheless, indirectly discriminatory rules clearly constitute restrictions and must be justified. For example in *Angonese*, the Court noted that an indirectly discriminatory requirement

'...could be justified only if it were based on objective factors unrelated to the nationality of the persons concerned and if it were in proportion to the aim legitimately pursued' (paragraph 42). Despite observations on the lack of conceptual clarity in some of the relevant judgments, the tests in the early case law of the Court of Justice have evolved to accept indirectly discriminatory effects as objectively justifiable. However, the Court has as yet not accepted expressly discriminatory 'pressing reasons of public interest' that are not enunciated in the Treaty. (*Bosman* paragraph 104; Case 71/76 *Thieffry* [1976] ECR 765 paragraphs 12 and 15). No directly discriminatory sporting rules that fall within the fundamental freedoms have been recognised as objectively justifiable or as 'inherent' rules that do not constitute restrictions. Such rules may only be excused as falling within the narrowly construed 'sporting exception'

Non-discriminatory rules that impede free movement may also be prohibited. 'It is settled case-law that Article 39 EC prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement.' (Case C-464/02 *Commission v Denmark (Danish Company Cars)* [2005] ECR I-7929 paragraph 45). In *Kranemann*, the European Court of Justice cited its previous case law including *Bosman* declaring that ' [p]rovisions which... 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' (Case C-109/04 *Kranemann* [2005] ECR I-2421 paragraph 26). In the recent case of *Innovative Technology Center (Case C-208/05 ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-181), the Court has reiterated that a restriction may exist even where rules 'apply without regard to the nationality of the workers concerned' (paragraph 33, incorporating references to prior case law). Whilst the Community citizen's right to take up economic activities is restricted wherever workers are deterred from leaving their country of origin (Joined Cases C-151 and 152/04 *Criminal Proceedings against Nadin, Nadin-Lux and Durre* [2005] ECR I-11203, paragraph 35), Community rules relating to the pursuit of activities emphasise equality of treatment, the idea of indirect discrimination, and consequently focus on grounds of justification. Whether restrictive rules are issued by a public or private body is irrelevant in the field of workers. Article 39 '...applies in judging all legal relationships [that] can be located within the territory of the community' (*Angonese* paragraph 36) and is, contrary to the implication of the Treaty provisions on free movement, not limited to States or bodies exercising public law functions. This is not yet settled in the fields of services and establishment, but has been expressly raised as a solution by Advocate General Maduro in the *Viking* case (Case C-438/05, opinion of May 23, 2007, point 48). Affected rules may apply directly to the player or restrict his employment by binding the employer or club. In both cases, the rules will constitute a restriction of the fundamental freedom of movement (Case C-176/96 *Lehtonen* ECR I-2681 paragraph 50).

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#### TREATY DEROGATIONS

Outside the sporting context, The Court's modern case law maintains that 'a distinction on the basis of nationality... [is] compatible with Community law only if [it] can be covered by an express derogating provision... namely public policy, public security or public health' (Case C-388/01 *Commission v Italy* [2003] ECR I-721 paragraph 19). Key Treaty exceptions are substantially identical within the fundamental freedoms: public policy, public security and public health feature in Article 39(3) on workers, Article 46(1) on establishment which by virtue of Article 55 also applies to services; Article 58(1)(b) on capital omits public health. In relation to workers, the exceptions of ' public policy, public security [and] public health' are found in Article 39(3). The free movement of workers does not apply to the narrowly construed 'employment in the public service' exception in Article 39(4) of the Treaty (Case C-405/01 *Spanish Merchant Marine* [2003] ECR I-513 paragraphs 39-41). This exception applies only to those posts that involve '...participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State...' (Case 149/79 *Commission v Belgium* [1980] ECR 3881 paragraph 10) and permits exclusion from employment but not differential conditions once employed (Case 152/73 *Sotgiu* [1974] ECR 153 paragraph 4). Although initially thought to lie outside the requirement for equal treatment on the grounds of nationality, (Case 41/74 *Van Duyn* [1974] ECR 1337 paragraph 24) case law has later precluded the use of public policy exceptions where that policy is not equally applied to all Community nationals (Joined Cases 115/81 and 116/81 *Adoui and Cornaillie* ECR [1982] 1665). Even a hint of the use of a justification for 'economic ends'? will preclude the invocation of one of the Treaty exceptions (*Bond van Adverteerders* paragraph 34). Regulation 1612/68 also states that references to foreign nationals that limit employment do not apply to nationals of other Member States. This rule was recognised in *Dona* and *Bosman* as applicable to the rules of sports associations (*Dona* paragraph 19, *Bosman* paragraph 119). The justifications for the home-grown players rule include the commercial advantages created by those rules. It seems therefore unlikely that a sports governing body such as UEFA can rely on these for the same reasons that preclude their 'purely sporting' nature.

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#### THE PROCESS OF OBJECTIVE JUSTIFICATION

In the field of goods, indistinctly applicable restrictive rules that result in obstacles to free movement but are not in law *prima facie* based on nationality are justifiable by 'mandatory requirements', objective justifications not found within Article 30 (Case 120/78 *Cassis de Dijon* [1979] ECR 649 paragraph 8). Similar rules have been invoked by analogy within the other fundamental freedoms to justify rules that do not directly discriminate on the basis of nationality but which in fact may favour domestic factors of production. (Case C-288/89 *Gouda* [1991] ECR I-4096 paragraph 27; Case C-55/94 *Gebhard* [1995] ECR I-4165 paragraph 35). Indirectly discriminatory and non-discriminatory rules may be objectively justified, but the protection of domestic persons often precludes such objective justification because the rules must be applied in a non-discriminatory manner (*Gebhard* paragraph 37). In the context of UEFA's home-grown players rule, whether the rule is analysed under Article 39(3) public policy rather than case-law based grounds of objective justification is not material from the point of view of whether these justifications may be invoked. Whilst recognising the possibility that Treaty freedoms might limit private bodies' scope of autonomy, the Court also recognised in *Bosman* that individuals and private bodies could rely on the Treaty grounds of objective justification (paragraph 86). The rules do not constitute express nationality discrimination since they require residence but not nationality. It is therefore open to UEFA to argue that both Treaty and other recognised objective grounds are applicable. Although historical residence requirements unrelated to the present residence status of players such as those required for consideration as a home-grown player may effectively amount to express nationality discrimination, the Court has yet to rule unequivocally that this therefore precludes objective justification. What may constitute valid grounds for objective justification is discussed below. 15

If a rule constitutes an obstacle to freedom of movement, it may be objectively justified according to the test enunciated in *Gebhard*. This four-stage test applies to all '...national measures liable to hinder or make less attractive the exercise of fundamental freedoms...' and therefore to both Treaty and other objective justifications (*Gebhard* paragraph 37). In addition to the element of non-discrimination, the test involves scrutiny of whether a rule with discriminatory effects is 'justified by imperative requirements in the general interest', whether it is fit for the purpose it claims to serve, and whether it is proportionate to those aims. The categories of objective justification in workers, as the mandatory requirements in goods, are not closed. In relation to sport, the Court has already recognised 'maintaining a balance between clubs' and 'encouraging the recruitment and training of young players' (*Bosman* paragraph 106. See also section 3 below). The Court has not accepted every ground put forward as capable of forming an objective justification. For example, rules enacted for administrative convenience (Case C-18/95 *Terhoeve* [1999] ECR I-345 paragraph 45) and those which protect domestic undertakings against Community competition (Case C-398/95 *Greek Tourist Guides* [1997] ECR I-3091 paragraph 23) will not constitute objective justification. Recent cases that concern the legitimacy of residence criteria involve the expenditure of public funds that are contributed to by residents (C-388/01 *Commission v Italy* [2003] ECR I-721; C-138/02 *Collins* [2004] ECR I-2703; C-109/04 *Kranemann* [2005] ECR I-2421). It has been argued that in such circumstances, residency seeks to maintain the link between contribution and entitlement (Davies 2005). An analogy between these grounds and the training of young players is not beyond dispute. The reasoning of the Court in *Bosman* also demonstrates that it is not easily swayed to accept the proportionality or fitness for purpose of those rules that are not consistent with the factual context in which those grounds are relied upon. The link between the home grown players rule and all of the reasons contributing to its application would be scrutinised in detail in any future litigation. It is therefore necessary to consider some of these grounds in the context of the requirements of the objectives they pursue, their suitability for the pursuit of those objectives, and their proportionality in relation to the aims pursued. 16

## THE HOME-GROWN PLAYER RULE: JUSTIFICATIONS

In the White Paper on Sport the European Commission argued that '[r]ules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued' (Commission of the European Communities 2007, p. 6). The home-grown player rule seeks to achieve similar aims as the *Bosman* 3+2 rule. However, it is legally distinguishable in that although the objective is an attempt to link attributes of residence and players' club affiliations, the method employed does not constitute direct nationality discrimination but indirect discrimination which arises from requirements which more nationals than non-nationals are likely to fulfil. Since it is indirectly but not directly discriminatory, categories of objective justification beyond the limited Treaty grounds may be available. It does not fall within the ambit of the 'sporting exception' which in the light of modern case law appears restricted to nationality rules in national team sports. Whilst UEFA may make a case for the 'inherency' of the rule, it should be noted that those cases in which the 'inherent' nature of the rule precluded a restriction under either free movement or competition law were all limited to rules that were indistinctly applicable and non-discriminatory in both law and fact. This is not the case with the home-grown players rule, which favours nationals over non-nationals. Consequently, the rule will be tested against the strength and proportionality of the objective justifications presented by UEFA. In this 17

connection, the Commission is waiting on the findings of an ongoing study on training of young sportsmen and women which will inform their analysis of the home-grown rule (Commission of the European Communities 2007, p.6).

#### *COMPETITIVE BALANCE AND ENCOURAGING EDUCATION AND TRAINING OF PLAYERS*

UEFA allege that the introduction of the home-grown player rule will provide incentives to clubs to nurture local talent, thus allowing smaller clubs with productive youth training programmes to compete on a more equal footing. This would assist small clubs to overcome financial imbalances that currently threaten the competitive balance of the sport since young players can still command a training compensation fee on expiry of their contract (2005 FIFA Regulations for Status and Transfer of Players Article 20). In paragraph 106 of the *Bosman* judgment and paragraph 11 of the Nice Declaration on Sport (2000) the objectives of maintaining competitive balance and encouraging training programmes have been considered legitimate. The question then rests on the fitness for purpose and proportionality of the measure. In *Bosman* the ECJ held that nationality clauses '...are not sufficient to achieve the aim of maintaining a competitive balance, since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent' (*Bosman* paragraph 135). The richer clubs are still in a stronger position regarding the recruitment and remuneration of the best players. They will still be in a better position to invest in academies and recruit association trained players, thus maintaining their position of competitive superiority. On the question of clubs hoarding players, the clubs can defend large squad sizes on the grounds that modern competition and a crowded match calendar demands squad coverage. If players do not play regularly they can invoke the FIFA regulations on 'just cause' to seek contract termination without the payment of compensation or the imposition of sanctions of any kind (Article 15 of the 2005 FIFA Regulations for Status and Transfer of Players). Consequently, there already exists a disincentive for clubs to hoard players. 18

Clubs with financial strength will also be able to search for and recruit young foreign players to their academies in order to qualify them eventually as home-grown players. This is in potential contradiction to the EU's desire to protect young players from commercial exploitation as expressed in paragraph 13 of the Nice Declaration on Sport and in the sports related passages of the draft Reform Treaty. A concern for child protection was also raised in the European Parliament's Belet Report on The Future of Professional Football in Europe. The Report argued 'that additional arrangements are necessary to ensure that the home-grown players initiative does not lead to child trafficking, with some clubs giving contracts to very young children' (European Parliament 2006, para.18). Current FIFA Regulations contain protection for minors by way of a general prohibition, subject to three exceptions, on international transfers for those under the age of 18 (Article 19 of the 2005 FIFA Regulations for Status and Transfer of Players). Despite these concerns, the 2006 Independent European Sport Review gave its support to UEFA's home-grown rule. The Review concluded that '... such a system, which promotes education and training and competitive balance should be seen as compatible with Community law?'. The basis for this judgment is not elaborated upon although it appears the Review considers the rule to be a justifiable restriction rather than a rule of purely sporting interest or one inherent in the functioning of sport. 19

#### *CLUB IDENTITY*

UEFA believe that the proliferation in international player transfers has severed the link between the club and its locality and that supporters favour a strong link between the two. A UEFA survey revealed that three quarters of the supporters who responded agreed or strongly agreed that UEFA should adopt measures to maintain a link between clubs and their locality (UEFA 2005b). The counter arguments against the proposition that such a link exists, or ought to exist are threefold, deriving from economic, sociological and legal arguments. 20

From an economic perspective, it does not seem that the appearance of migrant workers within leagues has affected attendance at games or the value of broadcasting and other commercial rights. The 2006 Deloitte Review of Football Finance revealed that the big five leagues in Europe (England, France, Germany, Italy and Spain) generated revenues of €6.3bn in 2004/05 which represented 8 per cent growth on the preceding year. In England, Premier League games were, for the ninth consecutive season, over 90 per cent fully attended and since the birth of the Premier League in 1992 until the 2005/06 season, attendance has risen by 60 per cent. Ticket sales and commercial activity (such as merchandising) have clearly contributed to this growth as, of course, has the high price of broadcasting rights. All three are crude indicators of supporter satisfaction and there appears little in the figures to suggest supporters are substituting their interest in football for other activities. Only in Italy was matchday attendance in significant decline, with the Deloitte Review reporting that Serie A average attendances are estimated to have fallen by 15 per cent in 2005/06. However, the report also examined the state of play outside the big leagues and concluded that in those countries less reliant on broadcasting revenues, commercial and matchday revenue streams are still contributing to steady annual growth of turnover. The picture generally therefore seems to indicate that football is more popular than 21



ever and that revenues across Europe are rising rather than falling. As Késenne argues, '[i]f European supporters would hate the mobility of players, they would have turned away from football, which would have stopped the international transfers because clubs do not shoot themselves in the foot' (Késenne 2007, p.397).

The second counter argument derives from sociological studies of football. For instance, Ranc's study explores fan association and club identity at Glasgow Rangers, Glasgow Celtic, Arsenal and Paris Saint-Germain. Whilst the literature does point to the players as a means through which supporters identify with clubs, he concludes that '...the *Bosman* ruling is unlikely to have put an end to supporters' identification with their club... [because] players are not the only means through which fans can attach to their club and secondly that, because of their very nature, the symbols can be renewed' (Ranc 2006). Clubs may indeed symbolise a local, and not a national identity, but that does not necessarily translate into supporters favouring local players. Indeed, when local groups are from different nationalities, the presence of foreigners can actually be a means to attract support from such communities. In other words, clubs recruit players according to their needs.

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The third argument is legal. In *Bosman* the Court of Justice did not consider club identity claims as legitimate in defending nationality restrictions because in its estimation such a link did not exist (*Bosman* paragraph 131). UEFA's rule will not necessarily lead to a higher proportion of genuinely local players representing their local club as the rule is neutral in terms of nationality and it places no restriction on the number of home-grown players that must be *fielded* in a starting eleven. Thus it is still possible for a club, subject to the rule, to field eleven non-nationals. Furthermore, the ECJ added that '... in international competitions, moreover, 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' (*Bosman* paragraph 132). UEFA has only recommended that the home-grown player rule be implemented by national associations whilst the rule would be compulsory for those participating in European competitions. Consequently, if no home-grown restrictions are imposed on clubs who have qualified for European competitions by virtue of their domestic league placing, one wonders whether restrictions should be imposed on their participation in those European competitions. Clearly the proposition that participation in European competition is a representative honour for the clubs cannot be supported in light of this assessment.

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#### *WEAKENING OF NATIONAL TEAMS*

UEFA is also concerned that labour mobility in football is affecting the quality of national teams by discouraging investment in youth, narrowing the pool of talent available for national associations to select from and causing problems over how national associations monitor the progress of players who play in other national associations. This concern forms part of a wider agenda to protect national team competition and has assumed added significance following the referral to the Court of Justice of case C-243/06 *Charleroi* which concerns a challenge, supported by the G14 group of leading clubs, to FIFA rules on the obligatory release of players to national associations for the purposes of taking part in international matches. UEFA are concerned that a successful challenge to this rule will have a negative impact on national team competitions which will in turn damage UEFA's regulatory and commercial position (Weatherill 2005b).

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The importance of national team sport has long been accepted by the EU. The 'sporting exception' expounded in *Walrave* recognises the special position of national team sports and the legitimacy of nationality discrimination in that context (*Walrave* paragraph 8). In *Deliège*, Advocate General Cosmas remarked, '... the pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services' (Opinion of AG Cosmas in *Deliège*, paragraph 84). However, in paragraphs 133 and 134 of *Bosman* the Court pointed out that rather than restricting opportunities for national talent who are afforded fewer opportunities due to the presence of foreign players, labour mobility has enhanced their employment prospects through the creation of a larger market. Furthermore, one may conclude that labour mobility has actually enhanced competitive balance in national football competitions. The success of the French and Greek national teams in the 2000 and 2004 European Championships attests to this as both countries have significant numbers of their leading players playing outside their national associations, although it should be noted that all of Italy's winning 2006 World Cup squad played in Italy.

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The debate on the link between home-grown players and the protection of national teams took a new turn in November 2006 when FIFA and FIFPro published a joint Memorandum of Understanding in which it appears that FIFA has taken over the home-grown brief from UEFA. According to FIFA and FIFPro, '... only global solutions can offer a response to the challenges and threats that the growing universality of football brings to bear on the values of football' (FIFA/FIFPro Memorandum of Understanding, Nov. 2006, p. 1). On page 5 of the joint statement FIFA and FIFPro lend their support to the '... protection of national

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teams by FIFA introducing, over several seasons, the 6+5 system regarding eligibility for national teams'. Tactically, this initiative, based as it is on direct nationality discrimination, seems ill conceived given the efforts UEFA have expended in attempting to provide justification for their more limited home-grown proposals and the unequivocal refusal of the Court to accept this type of agreement in *Bosman*.

### PROPORTIONALITY: ALTERNATIVES TO FAVOURING 'HOME-GROWN PLAYERS'

Whilst the objectives of maintaining competitive balance, encouraging the development of education and training programmes and the protection of national teams are recognised by the ECJ as legitimate, there are doubts as to whether the home-grown player rule is an appropriate means of achieving these objectives. At greatest risk of condemnation is UEFA's objective of maintaining a link between clubs and their locality because of its correlation with prohibited nationality discrimination. This is unlikely to be considered legitimate, notwithstanding the need to encourage education and training. The justifications presented by UEFA also need to satisfy the proportionality test. This analysis has assumed heightened significance following the Court's clarification of the scope of the sporting exception in *Meca-Medina*. As alternatives, UEFA may be invited to consider a number of potentially more proportionate solutions. 27

### SOLIDARITY PAYMENTS

Solidarity payments refer to a redistribution of income from the richer clubs to the poorer clubs. Most effectively this can be achieved through the redistribution of television revenues. Solidarity payments may aid competitive balance by equipping financially smaller clubs with the opportunity to improve their relative position, although some are sceptical of this claim (Szymanski and Késenne 2004). Solidarity in sport is considered essential due to the mutual interdependence between clubs and the need to maintain public interest in unpredictable competitions. In both policy papers and jurisprudence, the EU has accepted the need for solidarity mechanisms in sport and to a certain extent UEFA has been allowed commercial freedom by the EU to continue with such payments (*Bosman*, Opinion of Advocate General Lenz paragraphs 233-243; Case No. IV37.398 *UEFA* [1999] OJ C 99). Whilst UEFA wishes to see the level of solidarity in football enhanced, their ability to achieve this is constrained by the pressure exerted by the G14 of leading clubs who wish to see a larger share of the generated revenues flow to those primarily large clubs responsible for generating the revenue. The imposition of greater solidarity mechanisms, whilst legally less questionable, could leave UEFA's regulatory position open to challenge as occurred with the 1998 Media Partners proposal to establish a breakaway European league (Case No. IV/37.400 *Project Gandalf*). The threat of such a breakaway led UEFA to reconfigure its club competitions in a manner more financially favourable to the larger clubs. 28

### SALARY CAPS

Commenting in *Bosman* on alternatives to the disputed rules on the international transfers of players, AG Lenz remarked, '...it would be possible to determine by a collective wage agreement specified limits for the salaries to be paid to the players by the clubs' (Opinion of Advocate General Lenz in Case C-415/93 *Bosman*). In an environment of financial instability in football, salary caps may be justified on the grounds that they maintain the economic viability of teams competing in the league, preserve competitive balance between clubs and encourage the development of locally trained talent. Whilst a salary cap would not be removed *a priori* from the scope of the Treaty, a cap might be considered as inherent in the proper functioning of sport and thus excluded from the scope of Article 81. Alternatively, the cap may be considered suitable for an exemption under Article 81(3). Much depends on the nature of the cap (hard or soft), the existence of less restrictive means of achieving the stated objectives, the definition of the market and whether caps have an appreciable effect on it. 29

Some commentators have argued that the softer the cap, the harder the law should intervene (Hornsby 2002). If the objective of the cap is to safeguard competitive balance then a hard cap should be preferred as this imposes a flat ceiling on the spending of all clubs whilst a soft cap, which links spending to revenue, disproportionately affects the ability of small clubs to improve their position. This places them at a competitive disadvantage and at risk of closure. Competition law, which is designed to promote competition, could not sanction a system which curtails competition to this level. Consequently, a hard cap is more likely to survive a competition law challenge. The fact that a hard cap is more restrictive and less appealing to the larger undertakings and high earners is not relevant under this analysis. As long as players have the rights of free movement to seek alternative employment, a hard cap should not amount to a breach of competition law. To achieve maximum legal certainty in this field the cap should form part of a collective agreement between the social partners and thus take advantage of the primacy of genuine collective bargains over the rules of competition law. Nevertheless, experience of US salary caps points to the practical difficulties of enforcing such restraints and the negative consequences for stable labour relations (Marburger 2006). A potentially less restrictive measure is the luxury tax in which a soft cap is imposed and any spending over and above the ceiling is subject to a luxury tax, the proceeds of which are 30

redistributed within the game (Taylor and Newton 2003).

### CLUB LICENSING

UEFA currently operates a club licensing scheme requiring each applicant club to run an approved youth development programme. Effective management of this programme should ensure the fulfilment of UEFA's youth training objectives, thus removing the need to impose home-grown restrictions on club squads. Consequently, the licensing system could be seen as a less restrictive means of meeting these objectives and should, at least, be given time to prove its worth. The scheme has scope for expansion and greater enforcement. For instance, the objective of encouraging clubs to invest in education and training programmes could potentially be achieved by extending the scheme to require clubs to spend a fixed sum on their youth academies or indeed by offering financial inducements to clubs in a way similar to that adopted by the England and Wales Cricket Board. In this instance, the ECB was concerned at a narrowing of the pool of English qualified talent available for selection for the English national team following the Court's decisions in *Bosman* and *Kolpak* (ECB 2005-2009 Strategic Plan, Building Partnerships). A minimum spending requirement could be implemented on a hard or soft basis as described above. Failure to fulfil the licensing conditions could result in barred entry into UEFA club competitions or the payment of a penalty (akin to a luxury tax) which is then reinvested into the game by the governing body. 31

In the White Paper on Sport the Commission acknowledged the 'usefulness of robust licensing systems for professional clubs at European and national levels as a tool for promoting good governance in sport' (Commission of the European Communities 2007, p.17). This is not to say that individual licensing conditions will be *a priori* removed from the scope of the EC Treaty. Each licensing condition has the potential to act as a restriction on competition and may be incompatible with Articles 81 and 82 EC. In assessing the compatibility of licensing conditions with competition law, the Commission would examine the context in which the condition was imposed and judge whether the objectives pursued, in this case those of encouraging youth training and the promotion of competitive balance, derive from a need inherent in the organisation of sporting competitions. Providing that the contested condition did not go beyond what is necessary for the attainment of these objectives it would then be removed from the scope of the Treaty competition provisions. Alternatively, in instances where the determination of inderency cannot be made, the rule may benefit from an exemption under Article 81(3). In forming this judgment the Commission would need to explore whether clubs are indeed under-investing in youth training programmes. It cannot be automatically be deduced that market based transfer activity is a sign of this under-investment. 32

### SOCIAL DIALOGUE

Many sectors regulate the employment relationship between employers and employees through a social dialogue which can lead to the creation of a collective bargaining agreement between the parties. Articles 138 and 139 of the EC Treaty provide a platform through which such collective agreements in European sport can be achieved and it has been suggested that a commitment to educate and train local talent could form part of such an agreement (Siekmann 2006). In the November 2006 Memorandum of Understanding between football's world governing body FIFA and FIFPro, both parties alluded to the need to seek solutions '...making use of methods of social dialogue such as collective agreements' (FIFA/FIFPro Memorandum of Understanding, Nov. 2006, p.2) which included recognising EPFL, the association of European professional football leagues, as a representative employer social partner (FIFA/FIFPro Memorandum of Understanding, Nov. 2006, p.4). In *Brentjens* the Court of Justice established that the social policy objectives of collective agreements would be undermined if agreements seeking to improve conditions of work and employment where subject to competition law (Joined Cases C-115-117/97 [1999] ECR I-6025). Parallels can therefore be drawn with US sport in which the non-statutory labour exemption operates. Should the collective agreements' commitment to educate and train local players be subject to a free movement challenge, the court would examine the discriminatory clause of the agreement which restricts free movement since after *Meca-Medina* compatibility with the fundamental freedoms can not be presumed simply because it is compatible with competition rules. 33

### PRODUCT MARKET LIBERALISATION

UEFA has chosen to respond to the effects of labour market liberalisation in football by pursuing a policy of gradual labour market re-regulation, such as that intended in the home-grown rule. Player market liberalisation allows players to circulate freely within the single market but competitions, and hence clubs, remain nationally tied. Késenne has argued that this could have potentially negative consequences on competitive balance in European sport in so far as the better players migrate from the small to the large markets thus widening the disparity between markets (Késenne 2006 and 2007). The establishment of pan-European leagues formed by a grouping of clubs from small- to medium-sized national associations under UEFA's regulatory control could serve to narrow competitive imbalances with the big five associations. Clearly this is a controversial policy proposal, the pursuit of which would fundamentally alter 34

the European model of sport based as it is on national segmentation in markets.

## CONCLUSIONS

With its adoption of the home-grown players rule, UEFA has reintroduced regulations that closely correspond to nationality requirements which the EC Treaty expressly prohibits and which the Court of Justice struck down in *Bosman* for that reason. If its arguments are based on a sporting exception that is much broader than that afforded to 'purely sporting' rules, they are questionable following the Court's clarification in *Meca-Medina*. In line with its historical case law, if the rule has even the slightest economic effect, a sporting rule other than a nationality restriction in the context of competitions organised exclusively on that basis cannot be considered *a priori* exempt but must be justified. Nationality rules have been found 'purely sporting' only in the context of competitions between ostensibly non-commercial national teams, a limitation that is reinforced by the ruling of the European Court of Justice in *Meca-Medina*. Since the home-grown player rule is capable of economic effects, where the competition is not structured around nationality, it is difficult to accept that the very fundamental Treaty objections to nationality discrimination in the context of commercial activity could be justified in the manner proposed by UEFA.

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UEFA's introduction of the rule has been justified with reference to considerations which in *Bosman* did not serve to justify the 3+2 rule. Unlike the 3+2 rule and FIFA's proposed 6+5 rule which constitute direct nationality discrimination, the notion of home-grown players is structured by reference to residence and other requirements which appear to indirectly favour nationals of the home state and thereby constitute indirect discrimination. The legal significance of this is that whatever doubts one might harbour regarding the justifiability of directly discriminatory rules, it is clear that indirectly discriminatory rules are in principle capable of objective justification beyond the limited Treaty grounds. Although the Court has had some time to enunciate a single, coherent framework to tackle the notion of discrimination across the fundamental freedoms, it has opted not to do so (Davies 2003, pp. 93-115). The reluctance of the Court to expressly treat overt discrimination on the basis of nationality and residence requirements as analogous is not entirely satisfactory, particularly where a residence requirement is a nationality provision in all but name and is intended to segment markets according to national boundaries. The rationale for requiring 'home-grown players' as per UEFA's regulations is to enable markets in commercial sport to maintain a geographic character and reinforce partitions within the Community by discriminating against Community workers. Had the rules contained express nationality clauses, they would be justifiable with reference only to the limited Treaty grounds, none of which would include those objective justifications currently relied on by UEFA.

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UEFA's justifications may be attacked on the grounds that they are disproportionate, unfit for the purposes they are relied upon or pursue economic as well as legitimate and justifiable non-economic objectives. In this connection, rules designed to preserve competitive balance in football, encourage youth development and protect national teams are legitimate objectives which the EU should permit as defences to the adoption of restrictions on free movement in sport. The issue rests on whether UEFA's home-grown player rule amounts to an appropriate and proportionate means of achieving these objectives and whether it genuinely seeks to achieve these rather than prohibited economic aims. Some of the analysis presented above suggests that the two proposed regimes are neither fit for purpose nor proportionate. The issue for UEFA is much wider. The cumulative effect ECJ jurisprudence in this field amounts to an effective prohibition on the use of nationality restrictions in sport. The erosion of the nationality principle is altering the European model of sport and this raises serious regulatory and financial questions for UEFA. Furthermore, at issue in the *Charleroi* case is not only the principle of obligatory player release clauses, but wider considerations of stakeholder participation and financial rebalancing. For UEFA, these issues, coupled with the inability to maintain a partitioned European market threatens to disturb the vertical channels of regulatory authority which have historically underpinned the European model.

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