



INTERNATIONELLA HANDELSHÖGSKOLAN
HÖGSKOLAN I JÖNKÖPING

Reglerade transferperioders legalitet inom den europeiska fotbollen

En studie mot bakgrund av Artikel 39 och 81 i EG-fördraget

Magisteruppsats inom Idrottsjuridik och EG-rätt

Författare: Daniel Andersson

Handledare: Jakob Heidbrink

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JÖNKÖPING INTERNATIONAL BUSINESS SCHOOL
Jönköping University

The Legality of Transfer Windows in European Foot- ball

A study in the light of Article 39 and 81 EC

Master's thesis within Sports Law and EC Law

Author: Daniel Andersson

Tutor: Jakob Heidbrink

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Författare:	Daniel Andersson
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Sammanfattning

Transfersystemet skapades i slutet av 1800-talet i syfte att kontrollera spelarövergångar mellan fotbollsklubbar. Under förhandlingarna till dagens transferregler insåg parterna att kontraktsbrott under pågående säsong kunde leda till negativ inverkan på konkurrensen. För att förhindra detta infördes en regel, generellt känd som transferfönsterna, som stärkte spelaravtalen i syfte att skydda regelbundenheten i ligaspelet och samtidigt säkerställa att spelet äger rum på ett korrekt sätt. Regeln innebär att en fotbollsspelare endast kan registreras hos ett nationellt förbund inom ett av två registreringstillfällen per säsong.

Sport har aldrig införlivats i EG-fördraget och har därför kommit att regleras genom rättspraxis från EG-domstolen. Ett av de mest betydande domsluten är det som fastställer att idrottsutövande omfattas av gemenskapsrätten i de fall den utgör en ekonomisk verksamhet i den mening som avses i artikel 2 i EG-fördraget. Detta innebär således att om verksamheten utgör en ekonomisk verksamhet så kan den prövas mot bestämmelserna i EG-fördraget. Syftet med denna uppsats är att utvärdera om FIFA:s regler om transferfönster strider mot Artikel 39 och/eller Artikel 81 i EG-fördraget.

Eftersom regeln om transferfönster begränsar möjligheten för spelare att söka alternativ anställning kan den således anses utgöra ett hinder mot den fria rörligheten för arbetstagare. Legaliteten gällande regler om reglerade transferperioder har dock stärkts genom ett rättsfall från EG-domstolen. För att artikeln om fri rörlighet för arbetstagare ska komma under övervägande så måste personen i fråga vara en EU-medborgare som lämnar ett EU-land för att söka arbete i ett annat. Vidare måste personen i fråga utföra ett faktiskt och verkligt arbete under tillsyn av någon annan samt erhålla betalning för detta arbete. Fotbollsspelare som är EU-medborgare och som vill söka arbete i ett annat EU-land och som utövar sin idrott på professionell eller semi-professionell nivå har ansetts uppfylla dessa krav. Detta innebär att en sådan fotbollsspelare ska anses som arbetstagare enligt Artikel 39 EC och att denne därför kan förlita sig på det diskrimineringsförbud som artikeln inbegriper; ett diskrimineringsförbud som även omfattar regler såsom transferreglerna, som är stiftade av idrottsförbund, såsom FIFA och UEFA.

Vid en första anblick uppfattas det som självklart att regeln om transferfönster bidrar till att begränsa möjligheten för spelare att söka alternativ anställning och att den således ska anses strida mot Artikel 39 i EG-fördraget. Likafullt så har EG-domstolen funnit att frister för spelarövergångar kan vara objektivt berättigade då de kan tjäna syftet att säkerställa att idrottstävlingar äger rum på ett korrekt sätt. Domstolen ansåg att sådana restriktioner var särskilt befogade när det rörde sig om en idrottstävling som ägde rum enligt reglerna för den

belgiska mästerskapsserien i basket. Det är dock väldigt troligt att transferfönsterna som de fungerar inom den Europeiska fotbollen går utöver vad som är nödvändigt för att uppnå den eftersträvade stabiliteten inom klubbar och spelaravtal till följd av att de är alltför inskränkande och i viss mån även överflödiga. Detta innebär att FIFA:s regler om frister för spelarövergångar inte uppfyller kraven i enlighet med proportionalitetsprincipen och därför, vid en eventuell prövning, skall anses strida mot Artikel 39 i EG-fördraget.

Nyttjandet av transferfönster inom den europeiska fotbollen kan även anses utgöra ett hinder mot EU:s konkurrensregler och då i synnerhet Artikel 81 i EG-fördraget. Enligt denna artikel är alla avtal mellan företag som märkbart begränsar konkurrensen förbjudna. Syftet med denna regel är att skydda konsumenter och förbättra deras välfärd samt att underlätta uppbyggnaden av en enhetlig europeisk marknad. EG-domstolen har dock accepterat att en viss sorts idrottsregler, som trots att de utgör ett hinder mot konkurrensen, ska vara exkluderade från en skärskådning från reglerna i Artikel 81. Bestämmelserna om frister för spelarövergångar, såsom reglerat av FIFA, kan dock inte anses utgöra en sådan idrottsregel då de inte uppfyller de uppställda kraven.

Den nytta som FIFA:s transferfönster tillför den konkurrensmässiga balansen inom den europeiska fotbollen kan starkt ifrågasättas. Dock så kan de i viss mån anses upprätthålla charmen och oförutsägbarheten av slutfasen av en säsong. Transferfönsterna hindrar emellertid även möjligheten för klubbar att stärka sin tillväxt och motverkar fri konkurrens då reglerna om tillgång och efterfrågan sätts ur spel. Vidare motverkar transferfönsterna möjligheten för vissa klubbar att öka sin sportsliga standard. Detta då klubbar i mindre ligor, med stängda transferfönster, mister sina bästa spelare till klubbar i de större ligorna vars transferfönster är öppna. De mindre klubbarna har då ingen möjlighet att ersätta dessa spelare. Sammantaget har detta en negativ inverkan på de små och ekonomiskt svaga klubbarna medan det har en stärkande effekt på de stora och förmögna klubbarna. Denna utveckling har bidragit till att det bildats en dominerande elit inom den europeiska klubb fotbollen som inte på något sätt gagnar konsumenterna. FIFA:s regler angående frister för spelarövergångar faller därför troligtvis inom ramarna för reglerna i Artikel 81 i EG-fördraget.

Det är osannolikt att transferfönsternas positiva bidrag till konkurrensen inom den europeiska fotbollen uppväger dess negativa inverkan då de ej kan anses utgöra det minst inskränkande sättet att åstadkomma detta bidrag. FIFA:s regler angående frister för spelarövergångar skulle således inte uppfylla kraven för ett undantag enligt Artikel 81(3) och skall därför, vid en eventuell prövning, anses ogiltigförklarad enligt Artikel 81(2) i EG-fördraget.

Master's Thesis in Sports Law and EC Law

Title:	The Legality of Transfer Windows in European Football – A study in the light of Article 39 and 81 EC
Author:	Daniel Andersson
Tutor:	Jakob Heidbrink
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Abstract

The transfer system was created in order to control player movement between football clubs and has existed since the late nineteenth century. During the negotiation of today's transfer rules FIFA, UEFA and the Commission found that a breach of contract during the season could upset the balance of competition and therefore should be restricted. It was considered necessary to strengthen the contractual stability and to apply a special rule to preserve the regularity and proper functioning of competition. This was done by the means of a provision stipulating that a football player only can be registered to play with a national association during one of the two registration periods per year, generally known as the transfer windows.

Sport has never been included in the formal structures of the European Union and the regulation of sport has instead materialized through verdicts from the European Court of Justice. One of the most influential statements emerging from the Court is that sport is subject to Community law in so far it constitutes an economic activity. Consequently, if the activity is economic there is a risk that it infringes EU law. The purpose of this master thesis is to examine the FIFA transfer window system and to determine whether it violates Article 39 and/or Article 81 EC.

The transfer windows, a regulation strengthened by the ECJ in the case of *Lehtonen*, restrict the ability of players to seek alternative employment and could therefore be regarded as a violation of the free movement of workers. In order to trigger the Treaty provisions guarding the right of freedom of movement the person in question must be a national of a Member State of the European Union and the activity must have a territorial dimension beyond the borders of a single Member State of the European Union. The person in question must also be engaged in some kind of economic activity. It is, however, clear that football players who are members of the European Union and are applying for a job in another Member State, and are performing at a certain level, fulfil these requirements. Footballers should therefore be considered as workers within the meaning of Article 39 EC and the prohibition of discrimination contained in that article which catches non-discriminatory private collective measures, such as the transfer system, invented by regulatory bodies like FIFA and UEFA.

When considering the FIFA "windows system" it is clear that it is liable of restricting the ability of players to seek alternative employment in another Member State and should therefore be regarded as a violation of Article 39 EC. Nevertheless, restricted transfer periods have been found by the ECJ to be objectively justified as having sporting benefits in

the Belgian Basketball league. It is, however, likely that the “window system”, as it operates in European football, goes beyond what is necessary to achieve team and player contract stability since it is too restrictive and somewhat redundant. Consequently, the FIFA transfer windows do not comply with the requirements of the principle of proportionality and should therefore, if challenged, be regarded as a violation of Article 39 EC.

The use of transfer windows in European football can also be considered to be an issue for competition law and in particular Article 81 EC. The article prohibits all agreements between undertakings that restrict competition and affect trade between Member States and has the objective to protect consumers, enhance their welfare and to facilitate the creation of a single European market. The ECJ has, however, acknowledged a certain type of sporting rule that, even though it restricts competition, will be granted immunity from Article 81 EC. The FIFA “windows system” should not be regarded as such a rule since it does not fulfil the required conditions.

The transfer windows do little for the competitive balance within the European football. It may be argued that it preserves the appeal and the unpredictability of the finishing stages of a championship. However, they also prevent clubs from developing their economic activity and restrict the free play of the market forces of supply and demand. Furthermore, the “windows system” hinders certain clubs from raising the quality of their sporting performance since clubs in minor leagues with a closed window are losing their best players to clubs in a better league with an open window, without being able to replace them. All of this affects the small and economically weak clubs and strengthens the position of the financially strong clubs. As a result a few strong clubs will, contrary to the best interest of consumers, continue to dominate European football. The FIFA regulation of transfer windows is therefore likely to fall under Article 81(1) EC.

It is unlikely that the pro-competitive benefits of the FIFA transfer windows outweigh its restrictive effects since it is improbable that they would be considered the least restrictive means of creating these benefits. Subsequently, the FIFA “windows system” would not qualify for an exemption under Article 81(3) EC and should, if challenged, be void under Article 81(2) EC.

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1 Introduction

1.1 Background

In the past few years' European football has undergone several changes such as new financial aspects of the game, altered sources of revenue and increased operating costs.¹ But most importantly there has been an increased judicial scrutiny of the game and its rules. The game of football has always been managed in a conservative way and changes forced by legislative bodies have not always been received with open arms. As the famous coach and footballer Sir Bobby Robson said:

'[W]hy restrict the game...why change it for some guy in a suit who works in some office and says this is what should happen?'²

No-one would agree that the law has a role to play in dictating the rules of a football game, for example, the length of a football match. In the same way nobody would deny that the law has a legitimate role to play when regulating, for example, cartel arrangements among football agents. However, the most interesting category of practices is the one in between, the one that consist of practices highly unusual in other sectors than the sport sector, but which also carry commercial consequences. It is within this intermediate category we can find the Fédération Internationale de Football Association (FIFA) transfer system and the part of that system known as the transfer windows.

Under the practice of transfer windows footballers are only allowed to move between clubs during certain dates, restricting the ability of players to seek alternative employment and restricting the ability of clubs to hire them. The use of this system can therefore be considered to be an issue for both free movement and competition law. There is, however, one key characteristic in professional sport, not found elsewhere, which has to be kept in mind, namely the interdependency between participants in sporting competitions. In sport, like in other sectors or markets, opponents are there to be beaten. The difference between the sport sector and the other sectors is that the whole point of competition is demolished if sport opponents are, literally, beaten out of sight.³ As a result, mutual interdependence or the aim of maintaining a balance between clubs opens up a prospect of approval of rules that would not be approved in other industries. This means that it might be possible for football regulatory bodies to behave contrary to the free movement of workers and to competition law if the measure supports competitive balance.⁴

The importance of comparatively level teams for the success of sporting leagues was first recognised in England in the late nineteenth century when the first transfer system was created.⁵ Today's system has been modified several times but the main purpose has always

¹ Camatsos Stratitis, 'European sports, the transfer system and competition law: Will they ever find a competitive balance?', 12 Sports Law Journal 155, 2005, p. 155.

² Elliot Martin, 'Sir Bobby attacks transfer restraints', November 5, 2002, <http://www.newcastleunited-mad.co.uk/news/loadnews.asp?cid=TMNW&id=72305>.

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

⁴ Weatherill Stephen, *European Sports law – Collected Papers*, T.M.C. Asser Press, The Hague, 2007, p. 2.

⁵ Irving James G., 'Red card: The battle over European football's transfer system', 56 U. Miami L. Rev. p. 668.

been the same, to control player movement and to secure compensation for the smaller clubs when they sell their best players.⁶ The greatest change occurred after the *Bosman* ruling in 1995 which transformed the football landscape for years to come.⁷ The decision placed the football world under a microscope and the European Commission (Commission), which had not shown much interest in the football industry prior to *Bosman*, was now suspicious of the entire transfer system. After a lot of bargaining and dealing between the FIFA, the Union of European Football Associations (UEFA) and the Commission, trying to align the system with EC law, the new rules entered into force in September 2001 and were modified again in 2005 in the hope to make them even more robust and bullet proof against future litigation.⁸ Transfer windows, which had been used in many European football leagues before, were brought into compulsory effect by the FIFA during the 2002/03 season. They have been accused of increasing the gap between financially rich teams and the financially poor teams, distort the market and in the long run seriously harm the sport.⁹

Sport is not mentioned in the Treaty establishing the European Community (EC Treaty) mostly due to the fact that sport for a long time was viewed as an amateur leisure activity for the great majority of people.¹⁰ Sport activities within the European Union (EU) can therefore not be based on an explicit competence.¹¹ However now a day's an ever-increasing number of sportsmen makes a living of their sport and sporting events often generates huge amounts of revenue for organisers, sponsors and television broadcasters.¹² These economic implications may cut across fundamental rules of the EC Treaty such as Article 39 EC prohibiting restrictions on the free movement of workers and Article 81 EC prohibiting anti-competitive agreements. Although 'seen as two distinct areas of Community law' they are both looked upon as essential elements in the creation and maintenance of the European internal market.¹³ Consequently, if the EC Treaty is to be interpreted in a way fit to achieve its objectives it cannot afford to offer sport unconditional immunity. On the other hand, as seen above, sport possesses characteristics not shared by other sectors of the economy. The question is: how much special treatment does the transfer windows justify?

⁶ Camatsos, 12 Sports Law Journal 155, 2005, p. 157.

⁷ Case 415/93 Union Royale Belge des Societes de Football Association and Others v. Bosman and Others [1995] ECR I-4921. For further discussion see chapter 3.2.1.

⁸ Drolet Jean-Christian, *Extra time: 'are the new transfer rules doomed?'*, The International Sports Law Journal, Jan-April, 2006, p. 1.

⁹ See Inter alia, Camatsos, 12 Sports Law Journal 155, 2005 p. 170-171 and Elliot Martin, 'Sir Bobby attacks transfer restraints' November 5, 2002, <http://www.newcastleunited-mad.co.uk/news/loadnews.asp?cid=TMNW&id=72305>.

¹⁰ Van den Bogaert S, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, Kluwer law international, The Hague, 2005, p. 4-5.

Also, sport is given a special status in the Treaty of Lisbon, which exempts the sector from much of the EU's economic rules. The Treaty was signed on 13 December 2007 and was planned to be ratified in all Member States by the end of 2008. The treaty was however rejected by the Irish electorate and cannot currently be ratified.

¹¹ The European Commission on Sport, http://ec.europa.eu/sport/about/about23_en.htm.

¹² Van den Bogaert, p. 5.

¹³ O'Loughlin Rosemary, 'EC competition rules and free movement rules: an examination of the parallels and their furtherance by the ECJ Wouters decision', European Competition Law Review, 2003, 24(2), p. 62-63.

1.2 Purpose

The purpose of this master thesis is to examine the FIFA transfer window system and to determine whether it violates Article 39, freedom of movement for workers, and/or Article 81, prohibiting anti-competitive agreements between undertakings, of the Treaty establishing the European Community.

1.3 Methodology

To process the information shaping this master thesis the sources of EC law will be used. EC law consists of primary legislation, secondary legislation and case law which together form the “*acquis communautaire*” – the body of EC law. The primary legislation includes the various Treaties and other agreements having similar status and the secondary sources are “laws” passed by the institutions under Article 249 EC.¹⁴

In order to answer the purpose primary law (The EC Treaty), general principles of law (the principle of proportionality), secondary law (regulations, directives, decisions, recommendations, opinions) and rulings by the European Court of Justice (ECJ or The Court) will be applied. These sources of law, with the exception of recommendations and opinions, are all binding. When considering case law, guidance and clarification will sometimes be acquired from the advisory opinion brought by the Advocate Generale. In addition to the sources of EC law, the 2008 FIFA regulations on the status and transfer of players will be used. Ultimately I will use academic writing.

When applying the methodology on the purpose of the thesis two minor difficulties can be noticed. Firstly, the legality of the European Commission’s White Paper on Sports whose existence is a result of the lack of EU competence on the subject. The White Paper should, regardless of what some may think, only be seen as a proposal for EU action in this specific area and should not be seen as giving sports any exclusivity over EU rules until it has materialised in the Treaty of Lisbon. The bearing of the White Paper on Sports is therefore, at best, questionable.¹⁵ However, a few rules mentioned in the White Paper, protecting the specificity of sport has emerged from rulings by the ECJ and are consequently legally binding.

Secondly, the overlap of legal orders. That is the relation between the legal order established by the EU and the legal order governing sport, or rather the set of rules established by FIFA. Sport bodies have always tried to keep their autonomy and keep sport somewhat free from the intrusion of EC law. However, every so often sport rules falls within the frames of the Treaty and when they do an issue of the need to safeguard the ‘specificity of sport’ contra the need to uphold an effective European internal market arises. However, the European Court of Justice has, when addressing the rules regarding player movement, unconditionally focused on the restraints on free movement of workers and never on the application of competition law. This absence of relevant case law turns the second half of the thesis into a rather open question.

¹⁴ The European Commission’s glossary, http://ec.europa.eu/justice_home/glossary/glossary_a_en.htm.

¹⁵ Figel Ján, EU Sport Policy, February 5, 2008, <http://www.euractiv.com/en/sports/eu-sport-policy/article-165956>.

2 The EU vs. Sport: is Sport Special?

In order to understand European football and its relationship with Community law, a basic understanding of the structure of European sport in general will be of use.

2.1 The European Sports Model

Although there are distinctive national and regional specificities concerning sport, some European characteristics and traditions can be identified. These values and structures of European sport are vital to understand since they are the foundation upon which the social and cultural functions of sport in Europe are based.¹⁶

In 1998 the European Commission published 'The European Model of Sport' in which the model of sport in Europe was described as a pyramid structure which refers to both the competitive and organisational dimensions to European sport.¹⁷ In organisational terms, the structure includes European federations, national federations, regional federations and the clubs. In competitive terms, the central features in the European model are the system of promotion and relegation and merit based as opposed to financially based access to European competitions. The Commission insists that these key features should be taken into account when shaping the future development of sport.¹⁸

2.1.1 The organisational structure

In football the organisational structure translates into the Union of European Football Associations (UEFA) which is a confederation of 53 national associations recognised by the Fédération Internationale de Football Association (FIFA), the sport's global body. FIFA, an association registered in accordance with the Swiss Civil Code, establishes the constitutional framework governing the organisation of the game worldwide whilst UEFA, also registered according to Swiss Civil Code, is the responsible body for the governance of the game within Europe and settles disputes between national associations. Both these associations, when exercising their duties, draw up statutes and regulations and ensure their enforcement. However the superiority of FIFA rules must be observed by every person and organisation involved in the game of football, including UEFA. Consequently a clear distinction between amateur and professional football cannot be made since the governing bodies owe a duty to all the various levels in their capacity as guardian of the sport.¹⁹

This structure clearly places FIFA, and to a certain degree also UEFA, in a monopolistic and dominant position. The channels of authority within this structure are vertical and are defended by the international governing bodies on the grounds that they must be allowed to take decisions in their capacity as guardians of the sport. These bodies firmly believe that the essential value of sport and the organisational efficiency would be seriously destabilised if commercially powerful stakeholders were able to exercise their influence over decision

¹⁶ Parrish, Miettinen, p. 18.

¹⁷ Commission of the European Communities, *The European Model of Sport*, Consultation Document of DG X (1998).

¹⁸ Parrish, Miettinen, p. 18-19.

¹⁹ Parrish, Miettinen, p. 18.

making processes.²⁰ Some stakeholders, however, argue that this structure is undemocratic since it excludes stakeholder representation and impacts on the commercial freedoms of the stakeholders.²¹

2.1.2 The competitive structure

The professional European football leagues are organised by nation and features a divisional hierarchy within each league where the system of promotion and relegation applies.²² The clubs within these leagues play at different levels and at the end of the season a limited number of top performing clubs is promoted to the immediately higher division, while the same number of the worst performing clubs is relegated to the immediately lower division.²³ Apart from the national leagues UEFA organises European competitions, including the UEFA Champions League, which bring together the top clubs from the national leagues. These competitions generally follow a format closer to the American model involving knock-out rounds, where the winner advances and the loser is eliminated.²⁴

In addition to the system of promotion and relegation there is also the matter of the underlying economic model when discussing the competitive structure.²⁵ This model can be characterised as a model where clubs instead of focusing on their financial situation focus on their sportive achievements. However, a new tendency can be observed since more and more football clubs are being publicly listed companies and foreign ownership of football clubs, particular in the UK, are increasing.²⁶

2.2 EU and the Lack of a Policy on Sport

To be able to understand the controversies surrounding the transfer windows a basic understanding of the EU and some of its organisational bodies will be required, along with a presentation on the initial relations between EU and sport.

2.2.1 The European Union for dummies

The Treaty of Rome (EU Treaty) was in 1957 signed by six nations, thus forming the European Economic Community (EEC) which had the objective to remove obstacles to trade between the Member States.²⁷ To achieve this objective and subsequently form a

²⁰ Parrish, Miettinen, p. 18.

²¹ Parrish, Miettinen, p. 18-19.

²² Schiera Thomas M., *Balancing act: Will the European Commission allow European football to re-establish the competitive balance that it helped destroy?*, 32 Brooklyn Journal of International Law, 2007, p. 712.

²³ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 712-713.

²⁴ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 713.

²⁵ Caiger A, Gardiner S, *Professional Sport in the EU: Regulation and Re-regulation*, T.M.C. Asser Press, The Hague, 2000, p. 6.

²⁶ Parrish, Miettinen, p. 20.

²⁷ Craig Paul, De Búrca Gráinne, *Eu Law - Text, cases, and materials* Fourth edition, Oxford, Oxford University Press Cop. 2008, p. 6-7.

common market, the EC Treaty attempts to stimulate international movement of workers in Article 39 and prohibits agreements that restrict competition in Article 81.²⁸

When developing the EEC four governing bodies of the EU was established which included the Commission and the ECJ.²⁹ The ECJ is the highest court of the European Union and has the responsibility of ensuring universal application of the laws of the EU.³⁰ Armed with 27 judges, one from each Member State, and 8 Advocates General (AG) it rules on the legality of actions taken by the other EU governing bodies and gives preliminary rulings concerning the interpretation of EC law, when requested by national courts.³¹ When so doing, the ECJ relies heavily upon the principle of proportionality. A principle which has the purpose to prevent legitimate objectives from being accomplished by means more excessive than what is necessary.³² The AG has the function of giving detailed recommendations before the ECJ gives its judgement. The recommendations, or rather ‘advisory opinions’, is not binding on the parties involved but are considered by many as final.³³

The Commission is equipped with one Commissioner from each Member State, of which today there are 27. The Commissioners are bound to represent the interest of the EU and not their home state.³⁴ The Commission has far-reaching legislative powers, of which the right of initiative is the most important.³⁵ It also has significant administrative responsibilities, administrating policies and implementing legislation. But most importantly it possesses an absolute power of enforcement and control over competition law.³⁶ Together, these powers provide the Commission with a significant tool for the development of Community policy.³⁷

2.2.2 The European Union’s initial relation to sport

Sport was until the late twentieth century viewed upon as a leisure-time activity for amateurs and has, within the EU, according to the subsidiary principle, been regarded as a matter for the Member States.³⁸ It has never been included in the formal structures of the

²⁸ Craig, De Búrca, p. 743 and 950.

²⁹ Craig, De Búrca, p. 6-7.

³⁰ Craig, De Búrca, p. 67.

³¹ Craig, De Búrca, p. 67.

³² Van den Bogaert, p. 148.

³³ Irving, 56 U. Miami L. Rev. p. 673.

³⁴ Craig, De Búrca, p. 39.

³⁵ Craig, De Búrca, p. 43-44.

³⁶ Craig, De Búrca, p. 44.

³⁷ Craig, De Búrca, p. 45.

³⁸ Van den Bogaert, p. 4-5.

Article 5(2) EC reads as follows:

‘In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community’.

European Union and EU has, subsequently, played a minor and mostly indirect role in forming a sport policy.³⁹ Although constitutionally restrained, the Commission started, in the mid 1980's, to show an interest in sport. The specific object was the Adonino report on European citizenship which was a part of a publicity campaign to raise awareness of the EU via sport. The report was in reality an invitation to the sport associations to consider a number of initiatives; the creation of European Community sport teams and the wearing of a Community emblem in addition to the national emblem were for instance discussed. Throughout the remainder of the 1980's the EU sponsored and promoted a series of sporting events but it was first in 1992 that sport was referred in a declaration accompanying the Treaty.⁴⁰ It was the Maastricht Treaty which noted the importance of amateur sport and the social significance of sport. This was however legally questionable given the lack of specific sports competence in the Treaty.⁴¹ EU relations to sport appeared to be a fuzzy, late woken and aimless hobby rather than a properly functioning policy. Until *Walrave and Koch v. Association Union Cycliste Internationale* and *Donà v. Mantero* there had been no serious attempts to explore the borders between sporting regulations and community law.⁴²

2.3 Sport 'Appears Before the Court'

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

2.3.1 Walrave

In *Walrave*, a question was referred to the ECJ concerning the rules of a Dutch national cycling association, which stipulated that the pacemaker had to have the same nationality as the rider.⁴³ The question was whether this was in conflict with EU principles of free movement.⁴⁴ The cycling organization argued that this rule was a legislative act of an association and consequently did not fall under public law.⁴⁵ The ECJ did not accept this argument, stating that freedom of movement which is a fundamental objective of the Community 'would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law'.⁴⁶ Actions of a 'purely sporting interest'

³⁹ Hoy Marcus, 'EU Sports at the Crossroads' November 1, 2007, http://playthegame.org/News/Up To Date/EU_sports_policy_at_the_crossroads0111200795.aspx.

⁴⁰ Parrish, Miettinen, p. 31-32.

⁴¹ Parrish, Miettinen, p. 31.

⁴² McAuley Darren, 'They think it's all over... It might just be non: Unravelling the Ramifications for the European football transfer system post Bosman', *European Competition Law Review*, 2002, 23(7), p. 333. And Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale* [1974] ECR 1405. And Case 13/76 *Donà v. Mantero* [1976] 2 CMLR 578, [1976] ECR 1333.

⁴³ The rider (a cyclist) is assisted on long rides by a pacemaker on a motor cycle to ensure a fast time for the rider. The one who sets the pace in a race.

⁴⁴ Case 36/74 *Walrave* [1974] ECR 1405 para. 1.

⁴⁵ Case 36/74 *Walrave* [1974] ECR 1405 para. 15.

⁴⁶ Case 36/74 *Walrave* [1974] ECR 1405 para. 18. See chapter 3.1.2 for a thorough discussion on the horizontal direct effect.

hindering the freedom of movement would however be acceptable.⁴⁷ Furthermore, before sending the case back to the national court, the ECJ held that ‘having regard to the objectives of the community, the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of article 2 of the treaty’.⁴⁸ The Court then clarified that such an activity could be defined by the ‘character of gainful employment or remunerated services’.⁴⁹

2.3.2 Donà

The other case is *Donà* where the national judge, under Article 234 EC, referred to the ECJ a number of questions concerning the interpretation of Articles 12, 39 and 49 of the Treaty.⁵⁰ The factual circumstances evolved around two provisions in the ‘Rules of the Italian Football Federation’ which stated that one had to be affiliated to that federation to be able to take part in matches as a professional or semi-professional player. This meant in practice that membership only was open to players of Italian nationality.⁵¹ The Court was asked to rule whether the abovementioned provisions in the Treaty granted all nationals of the Member States of the Community the right to provide a service anywhere in the Community and, in particular, whether football players also enjoy the same right where their services are in the nature of a gainful occupation.⁵² Additionally, the Court was asked to rule whether this right could be relied on to prevent the application of contrary rules drawn up by a sporting federation which is competent to control football on the territory of a Member State.⁵³

The ECJ started off by stipulating that any national provision which limits an activity covered by the Treaty provisions on the freedom to provide services and the freedom of movement for workers is ‘incompatible with the Community rule’.⁵⁴ Thereafter the Court referred to its decision from *Walrave* stating that ‘having regard to the objectives of the community, the practice of sport is subject to community law only in so far as it constitutes an economic activity within the meaning of article 2 of the treaty’.⁵⁵ The Court then continued to state that this ‘applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service’ and that ‘where such players are nationals of a Member State they benefit in all other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services’.⁵⁶ Thereafter the Court provided an example of a regula-

⁴⁷ Case 36/74 *Walrave* [1974] ECR 1405 para. 8.

⁴⁸ Case 36/74 *Walrave* [1974] ECR 1405 para. 4.

⁴⁹ Case 36/74 *Walrave* [1974] ECR 1405 para. 5.

⁵⁰ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 1. (Referred to the current Articles).

⁵¹ Van den Bogaert, p. 23.

⁵² Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 2.

⁵³ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 3.

⁵⁴ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para. 11.

⁵⁵ Case 36/74 *Walrave* [1974] ECR 1405 para. 4. And Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12.

⁵⁶ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12-13.

tion that was purely sporting in nature. They held that ‘those provisions do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.’⁵⁷ Before referring the case back to the national court for their final judgement, the Court declared that the ‘restriction on the scope of the provisions in question must however remain limited to its proper objective.’⁵⁸

2.4 Summary of the Chapter

The European model of sport can be described as a pyramid. At the pinnacle of the “European football pyramid” is the UEFA which is affiliated with the world governing body, FIFA. Below UEFA, starting from the top, are the national associations, the sport clubs and the players.⁵⁹ The system of promotion and relegation and merit-based as opposed to financially based access to European competitions are central features in this model, meaning that clubs instead of focusing on their financial situation should focus on their sportive achievements.

When exercising their duties, FIFA and UEFA draw up statutes and regulations and ensure their enforcement. The regulatory bodies therefore possess dominant positions created by the pyramid structure. The position is defended by the international governing bodies on the grounds that they must be allowed to take decisions in their capacity as guardians of the sport, decisions that sometimes has a difficulty to comply with European competition law and the rules of the internal market.⁶⁰

Since sport has never been included in the formal structures of the European Union and has been regarded as a matter for the Member States, the EU has played a minor and mostly indirect role in forming a sport policy.⁶¹ However *Walrave* and *Dona*, two decisions by the ECJ, helped to establish the lines of the regulations sporting associations could and could not create without enduring EC interference. In these cases the Court found that sport was subject to Community law in so far it constituted an economic activity and that it applies to the activities of non-amateur football players which are in the nature of gainful employment or remunerated service.⁶² In *Walrave* the Court also created an exception, stating that activities restricting freedom of movement would be acceptable if they were of a ‘purely sporting interest’ in which *Dona* provided the legitimate example of foreign players participating in matches played by a national team of that Member State.⁶³ But the Court

⁵⁷ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 14.

⁵⁸ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 15-16.

⁵⁹ Parrish, Miettinen, p. 18.

⁶⁰ Szyszczak E, *The regulation of sport in the European Union – Is sport special?*, Edward Elgar Publishing Limited, Cheltenham, 2007, p.6.

⁶¹ Hoy Marcus, ‘EU Sports at the Crossroads’ November 1, 2007, http://playthegame.org/News/Up_To_Date/EU_sports_policy_at_the_crossroads0111200795.aspx.

⁶² Case 36/74 *Walrave* [1974] ECR 1405 para. 4 and 5. And Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12.

⁶³ Case 36/74 *Walrave* [1974] ECR 1405 para. 8. And Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 14.

added a warning when saying that such a provision must remain limited ‘to its proper objective’, clearly referring to the principle of proportionality.⁶⁴ The Court did also, in *Walrave*, acknowledge that Article 39 EC covered the rules of private employment, such as professional football, and not only public employment.⁶⁵

⁶⁴ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 15.

⁶⁵ See chapter 3.1.2 for a thorough discussion on the horizontal direct effect.

3 The European Labour Market and Footballers

It has been clear that sport may fall within the Treaty because of the Court's decisions in *Walrave* and *Dona* and regarding the transfer windows there are two obvious candidates. As discussed before these are Article 39 EC and Articles 81 EC. The differences between the scopes of the provisions are however substantial and the two provisions will therefore be considered separately, first, Article 39 EC.⁶⁶

3.1 Freedom of Movement

To be able to exercise the right of freedom of movement, three basic requirements must be fulfilled. First, in order to trigger the Treaty provisions guarding this right the person in question must be a national of a Member State of the European Union. The less obvious second and third prerequisites state that he or she must be engaged in some kind of economic activity and that the activity also requires a territorial dimension beyond the borders of a single Member State.⁶⁷ Once these preconditions are fulfilled, the next issue to be addressed is whether any national measures infringe the relevant Treaty Article and, if so, if this violation is justified and proportionate?⁶⁸

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

3.1.1 Article 39 EC - freedom of movement for workers

The freedom of movement for workers, granted in Article 39(1) EC, is part of the free movement of persons which is one of the four economic freedoms in EC law.⁶⁹ These freedoms strive, in the spirit of Article 3(1)(c) EC, to eliminate obstacles to free movement between Member States, creating a free flow of economic factors, in pursuit of greater prosperity within the Union.⁷⁰

⁶⁶ Article 39 EC reads as follows:

'1. Freedom of movement for workers shall be secured within the Community. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States 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 be embodied in implementing regulations to be drawn up by the Commission. 4. The provision of this Article shall not apply to employment in the public service.'

⁶⁷ Van den Bogaert, p. 23.

⁶⁸ Van den Bogaert, p. 119.

⁶⁹ Free movement for Persons Article 39-48 EC. The Four Freedoms is a term for a set of treaty provisions, secondary legislation and decisions from the ECJ, protecting the ability of goods, services, capital and labour to move freely within the internal market of the EU.

⁷⁰ Article 3(1)(c) reads as follows:

Broadly defined, the freedom of movement for workers enables citizens of one Member State to enter any other Member State within the Union and stay there permanently or temporarily for the purpose of gainful employment. The idea behind this legislation is that citizens of the Union should be treated equally and should be able to enjoy the same rights as the workers of the host country.⁷¹ This prohibition of discrimination on the grounds of nationality, reflected in Article 39(2) EC, relates to any discrimination regarding employment, pay or other working conditions. The article represents an application, regarding workers, of the general prohibition on nationality discrimination as set out in Article 12 EC.⁷² It is also important to understand that Article 39 is strictly related to the creation of a common market and therefore can have no effect on situations entirely internal to a Member State.⁷³

3.1.2 Horizontal direct effect

One of the principal objections concerning the Treaty provisions on free movement of workers in relation to sporting associations and clubs is that the provisions are not horizontally directly effective meaning that Article 39 EC only is applicable with regard to public authorities and does not apply in disputes between private entities. As a result it has been said that restrictions, drafted by sport associations or clubs cannot fall under free movement scrutiny as these associations or clubs are regarded as private entities.⁷⁴

The issue of horizontal direct effect regarding the Treaty provisions on the free movement of persons was presented to the Court for the first time in *Walrave*.⁷⁵ In brief the Court had to decide whether Articles 12, 39 and 49 EC were to be interpreted in such a way that the provision in the rules of a national cycling association was incompatible with them. It was unquestionable that the national cycling association was a private organisation. However, the cycling association advocated that the prohibitions laid down in Articles 12, 39, 49 EC 'refer only to restrictions which have their origins in acts of an authority and not to those resulting from legal acts of persons or associations who do not come under public law'.⁷⁶ This allegation was however refuted by the Court who held that the prohibition of discrimination 'does not only apply to the action of the public authorities but extends likewise

For the purposes set out in article 2, the activities of the Community shall include, as provided in this Treaty an in accordance with the timetable set out therein: an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'.

⁷¹ Vieweg K, *Globalisation, Europe and the Re-regulation of Sport, in Caiger and Gardiner, Professional Sport in the EU: Regulation and Re-Regulation*, T.M.C. Asser Press, The Hague, 2000, p. 92.

⁷² Article 12 EC reads as follows:

'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. The council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

⁷³ McAuley, *European Competition Law Review*, 2002, 23(7), p. 332.

⁷⁴ Van den Bogaert, p. 23-24.

⁷⁵ For background to the case see chapter 2.3.1.

⁷⁶ Case 36/74 *Walrave* [1974] ECR 1405 para. 15.

to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services'.⁷⁷

This decision was based upon three grounds: first, the *effet utile* argument, in which the Court stipulated that the

‘abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law’.⁷⁸

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

‘working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application’.⁷⁹

Third, in what has been named the *general wording* argument, the Court emphasised the general nature of the terms of the Treaty provisions in question, not distinguishing between the source of the restrictions to be abolished and extending to rules and agreements that do not originate from public authorities.⁸⁰

The *Walrave* decision was later extended in *Bosman* from not only seizing measures regulating employment in a collective manner but also non-discriminatory private collective measures. In the latter case the Court ruled that even though the rules established by a regulatory body did not discriminate on grounds of nationality, they still directly affected access to the employment market of other Member States and could therefore obstruct freedom of movement of workers.⁸¹

3.1.2.1 Are regulations elaborated by sporting federations caught by the free movement provisions?

The Court made it clear in *Walrave* that Article 39 EC was not just of vertical direct effect. From now on, regulations elaborated by public and private entities, in so far the regulation concerned a whole group, would be dealt with in the same way by the Court, meaning that an association which acts as a regulatory body, like FIFA and UEFA, and creates regulations in its field of competence is caught by the free movement provisions in so far as the regulations of the organisation contain discriminatory provisions.⁸² This decision was ex-

⁷⁷ Case 36/74 *Walrave* [1974] ECR 1405 para. 17.

⁷⁸ Case 36/74 *Walrave* [1974] ECR 1405 para. 18.

⁷⁹ Case 36/74 *Walrave* [1974] ECR 1405 para. 19.

⁸⁰ Case 36/74 *Walrave* [1974] ECR 1405 para. 20-21.

⁸¹ Case 415/93 *Bosman* [1995] ECR I-4921, para. 103.

⁸² Case 36/74 *Walrave* [1974] ECR 1405 para. 17.

tended in *Bosman* to involve non-discriminatory private collective measures, such as the transfer rules.⁸³

3.1.3 The economic and territorial tests

To be able to fall within the scope of Article 39 EC, and enjoy the status of ‘worker’, the activity must fulfil three conditions. It must have a sufficient economic dimension and it must also have some Community dimension beyond the borders of an individual Member State.⁸⁴ The person in question must also be a national of a Member State of the European Union. However, this will be left out of consideration here.

The Community territorial dimension can favourably be illustrated from a perspective of reverse discrimination. An individual’s activity which has no Community dimension or relation and only occurs within that person’s Member State of nationality is defined as a ‘wholly internal situation’ and falls outside the scope of EU law since there is no attempt to move freely.⁸⁵ However, where a citizen has attempted to exercise his or her right to free movement, Community law may govern the situation even in their Member State of nationality and residency, and Member States of origin are forbidden to restrict a citizen’s right to establish in another Member State.⁸⁶

As mentioned above the activity also requires a sufficient economic dimension. The economic test applied to workers derive from the cases *Lawrie-Blum v. Land Baden-Württemberg* and *Levin v. Staatssecretaris van Justitie* where in the former the Court stated that the essential feature of an employment relationship is that ‘...for a certain period of time a person performs services for and under the direction of another person in return for...remuneration’.⁸⁷ In *Levin*, the Court held that the work performed must be ‘genuine and effective’ and cannot be of a ‘purely marginal and ancillary’ nature.⁸⁸ However, the salary in itself need not to be sufficient to support the worker as shown in *Levin* where the remuneration was less than the national minimum wage.⁸⁹ Lastly, before someone can be regarded as a worker there must also be an element of subordination. Subsequently, it has to be evaluated whether or not a person is regarded as being in a position of subordination towards a person who orders him to carry out the economic activity.⁹⁰

⁸³ Case 415/93 *Bosman* [1995] ECR I-4921, para. 85-86 and 103.

⁸⁴ Parrish, Mietinen, p. 56.

⁸⁵ Case 175/78 *La Reine v. Vera Ann Saunders* [1975] ECR 1129 Para. 11.

⁸⁶ Case 115/78 *Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399 Paras. 20 and 24. And Case 81/87 *R.v. HM Treasury and Commissioners of Inland Revenue, ex p. Daily Mail and General Trust plc* [1988] ECR 5483, Para. 16.

⁸⁷ Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121 Para. 17. And Case 53/81 *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035.

⁸⁸ Case 53/81 *Levin* [1982] ECR 1035 Para 17.

⁸⁹ Case 53/81 *Levin* [1982] ECR 1035 Para 15.

⁹⁰ Case 66/85 *Lawrie-Blum* [1986] ECR 2121 Para. 18.

3.1.3.1 Do footballers carry out an economic activity?

As can be seen in *Levin* a sporting activity must be a genuine and effective, and not merely marginal or ancillary activity to be considered as an economic activity within the meaning of Article 2 EC.

Most sports, including football, require special skills in particular mental and physical capacities and it takes years and years of training to be able to perform at a certain professional level. Once footballers have reached this level they have to keep working to continue improving to keep up with the rest. According to a survey, carried out in Finland, football players devoted on average 24 hours per week to warming up, training, matches and travelling to the matches.⁹¹ In contrast the ECJ have held that giving 12 hours of music lessons per week or being a trainee for 11 hours per week during a period of eight months should constitute as genuine and effective work.⁹² Subsequently, it seems quite obvious that football, when performed at a certain level, should also.

To be considered as an economic activity, within the meaning of Article 2 EC, the sporting activity must also be carried out in return for remuneration, as held in *Lawrie-Blum*. In *Dona*, as mentioned above, the Court came to the conclusion that the activities of professional or semi-professional football players are ‘in the nature of gainful employment or remunerated service’.⁹³ This position is supported by an analysis carried out for the 2000/01 season showing that Belgian First division football players earned on average 3750 Euro per month plus free car and apartment.⁹⁴ All included, this is 4 to 5 times as much as the minimum wage level in Belgium.⁹⁵ However, these figures are trivial compared to the massive amounts that players in the English, Italian, French, Spanish or German leagues make.⁹⁶ Consequently, viewed against The ECJ’s decision in *Levin*, where the remuneration was less than the national minimum wage, it seems clear that most professional and semi-professional football players are ‘in the nature of gainful employment or remunerated service’.⁹⁷ The particular situation of each football player will however be objectively evaluated on a case-by-case basis.⁹⁸

Considering the abovementioned, it is clear that football players carry out an economic activity within the meaning of Article 2 EC.

⁹¹ Huttunen M, *A comparative analysis of the legal position of professional sportsmen under Finnish, English and European Community Law. The borderline of employment*, thesis EUJ, Florence, 1999, p. 169-177.

⁹² Case 139/85 *Kempf v. Staatssecretaris van Justitie* [1986] ECR 1741 para. 14. And Case 66/85 *Lawrie-Blum* [1986] ECR 2121 para. 17.

⁹³ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12.

⁹⁴ Demets F, Killemaes D, ‘*Luis Figo naar Westerlo?*’, Trends, 10 August 2000.

⁹⁵ In 2004 the minimum wage in Belgium was 1 210 EUR per month. <http://www.eurofound.europa.eu/eiro/2005/07/study/tn0507101s.htm>.

⁹⁶ For instance, in 2006 the average player salary in the British Premier league was £676 000 per year. <http://www.independent.co.uk/sport/football/news-and-comment/163676000-the-average-salary-of-a-premiership-footballer-in-2006-473659.html>.

⁹⁷ Case 13/76 *Donà* [1976] 2 CMLR 578, [1976] ECR 1333 para 12.

⁹⁸ Van den Bogaert, p. 46.

3.1.3.2 Are footballers workers or self-employed?

Having established that football should be considered as an economic activity within the meaning of Article 2 EC, the next logical step is to examine whether football players are to be qualified as workers or as service providers.

In neither *Walrave* nor *Dona* was the Court able to come to a conclusion whether the provisions of Article 39 on workers or the provisions of Article 49 on services should apply to cyclists alternatively football players. However, in *Dona*, Advocate Generale Trabucchi had an interesting opinion, declaring that ‘in the case of a football team, the element of athletic subordination [...] is not present; the fact remains, however, that the players have a professional or semi-professional status in which, in fact, puts them in the position of employees as against the club which runs the team’.⁹⁹ The AG was referring to the test of subordination as laid down in *Lawrie-Blum*.

Footballers do not choose the services they perform. They are being paid to play football and they have little free choice regarding which interviews or other representative tasks they should show up to. Moreover, they do not have the freedom to choose their working hours. Football players have to be present at the club fixtures regardless of whether these matches are played during the day or in the evening, at a weekend or in a weekday, home or away. Most football players must also follow more general rules imposed by the club. These may concern issues like dress codes, bedtime hours and limits on alcohol consumption.¹⁰⁰ The criteria laid down in *Lawrie-Blum* regarding the existence of a relationship of subordination are thus fulfilled.

Footballers should therefore be considered as workers within the meaning of Article 39 EC, a conclusion which is verified in *Bosman*.¹⁰¹

3.1.4 Justifying restrictions to free movement

It is quite clear that a provision which prevents or prohibits a national of a Member State from leaving his home state in order to exercise his right to freedom of movement is a restriction to that freedom. This notion of restriction is however very wide and viewed in this way it covers almost every regulatory rule which has something to do with freedom of movement. Measures captured by the free movement provisions will therefore be protected if their existence can be defended by an acceptable means of justification.¹⁰²

Rules which are directly discriminatory must typically be justified with reference to a specific Treaty derogation, whilst other restrictions may be justified on recognised additional grounds of objective justification based on the case law of the Court or on Treaty grounds.¹⁰³ Regarding free movement of workers the grounds for derogation are expressed in Article 39(3) EC which can be applied on the grounds of ‘public policy, public security

⁹⁹ Trabucchi A, AG in Case 13/76 *Donà v. Mantero* [1976] 2 CMLR 578, [1976] ECR 1333 p. 1343.

¹⁰⁰ Van den Bogaert, p. 58.

¹⁰¹ Case 415/93 *Bosman* [1995] ECR I-4921, para. 74 and 87.

¹⁰² Van den Bogaert, p. 130-131.

¹⁰³ Inter alia, Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media* [1991] ECR I-4007, para. 31; Case C-388/01 *Commission v. Italy* [2003] ECR I-721 Para. 19. And Parrish, Mietinen, p. 63.

and public health' and excludes in Article 39(4) work in the public sector from the free movement of workers.

In addition to the types of justification provided in the Treaty the Court decided as mentioned to produce a new doctrine of 'objective justifications' which boiled down to an open category of supplementary grounds of justification, in literature referred to as, the rule of reason.¹⁰⁴ The objective justification test for workers was established in *Kraus v Land Baden-Wuerttemberg* where the ECJ held that Article 39 EC prevents the legislation of a Member State from hindering the rights of freedom of movement, unless such legislation 'pursues a legitimate aim, compatible with the Treaty, and is justified on imperative grounds of general interest'.¹⁰⁵

3.1.5 The principle of proportionality

For the purpose of objective justification it is not enough that the measures are 'in the general interest' and 'pursues a legitimate aim', the national measures must also be suitable for achieving the desired end and they must not go beyond what is necessary in order to attain it.¹⁰⁶ These additional requirements are imposed by the Court in respect of the principle of proportionality. They imply that the Court will examine the suitability of the means chosen to achieve the objective and review if it is not possible to apply a measure which is less restrictive to freedom of movement but still generates the same result.¹⁰⁷ It has, however, been suggested that this test of proportionality also contains a third condition. This condition establishes that even though there are no alternatives less restrictive it must still be determined that the measure under investigation does not have an excessive or disproportionate effect.¹⁰⁸ However, in practice the Court does not always act with consistency on this matter, sometimes referring to three elements and sometimes to two, without making it clear to which they are referring.¹⁰⁹

The test of proportionality could be seen as a balancing exercise between the restrictive effects on the right to freedom of movement and the aims pursued.¹¹⁰ A highly realistic scenario is therefore one in which the Court first states that a national measure is hindering the right to freedom of movement, but acknowledges that the measure pursues a justifiable aim, only to conclude that it does not comply with the requirements of the principle of proportionality, and therefore should be invalidated.¹¹¹

¹⁰⁴ Van den Bogaert, p. 146.

¹⁰⁵ Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, para. 32.

¹⁰⁶ Case 55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Para. 37. See also, Case C-106/91 *Ramrath v. Ministre de la Justice* [1992] ECR I-3351, Paras, 29-30. And Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32.

¹⁰⁷ Van den Bogaert, p. 148.

¹⁰⁸ Van den Bogaert, p. 148-149.

¹⁰⁹ Van Gerven W, 'The effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe', in E Ellis, 'The Principle of Proportionality in the Laws of Europe', Hart, Oxford, 1999, p. 37.

¹¹⁰ Van den Bogaert, p. 149.

¹¹¹ See, Inter alia, Case 415/93 *Bosman* [1995] ECR I-4921 and Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

A final issue to resolve is the whether, in Article 234 proceedings, the principle of proportionality should be applied by the Court itself or whether the issue should be left to be decided by the national courts. In this respect, Advocate General Jacobs, argued that ‘it might be difficult to always draw the dividing line in the right place’, nevertheless expressing his opinion that it might be preferable for the Court to make the ultimate assessment itself when it has sufficient knowledge of the facts of the case and the necessary technical expertise.¹¹²

3.2 The Transfer System

The rise of professional football started in Britain in the 1870’s due to a legislation that restricted the number of hours in a work week. With more leisure time on their hands, British workers turned to the sport of football and it was not long before some entrepreneur thought to charge admission to the matches. Professional football was born, and the phenomenon spread to the other European countries. But with professionalism there came labour troubles and the primary trouble has been the transfer system.¹¹³

The transfer system, dating back to the late nineteenth century, was created to ensure the notion of comparatively level teams for the success of sporting leagues. This was done by controlling player movement so that wealthier clubs could not rampage the player market, acquiring the best players from the smaller clubs without compensation.¹¹⁴ The system required clubs to, at the end of the season, produce a list of players to be retained for the next season and a list of players that were available for transfer. If placed on the “retention list” one had no right to demand a transfer. However, being placed on the transfer list was no guarantee for an actual transfer since the buying club would have to pay the purchase price, or “transfer fee”, placed on the player in order for the transfer to be completed. A player whose contract had expired was not exempted from the system.¹¹⁵

Comparable transfer rules were later set out by both FIFA and UEFA and even if the transfer system obviously violated player rights it was defended on the basis that it ‘helped impose competitive balance throughout European football’.¹¹⁶ Although displeased with the system almost a century past before a player challenged the system on an European level.¹¹⁷

3.2.1 Bosman

In December of 1995 the legality of the transfer system was challenged by a Belgian first division player named Jean-Marc Bosman. The contract between Bosman and his club FC Liege was set to expire in June of 1990.¹¹⁸ He was therefore in April of 1990 offered a new

¹¹² Jacobs F, ‘Recent Developments in the Principle of Proportionality in European Community Law’, in E Ellis ‘The Principle of Proportionality in the Laws of Europe’, Hart, Oxford, 1999, p.19-20.

¹¹³ Irving, 56 U. Miami L. Rev. p. 667.

¹¹⁴ Irving, 56 U. Miami L. Rev. p. 669.

¹¹⁵ Irving, 56 U. Miami L. Rev. p. 669.

¹¹⁶ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 714.

¹¹⁷ Irving, 56 U. Miami L. Rev. p. 669. And Case 415/93 Bosman [1995] ECR I-4921.

¹¹⁸ Case 415/93 Bosman [1995] ECR I-4921, para. 28.

contract but with a reduced salary. Mr Bosman rejected the offer and was consequently placed on the transfer list with the significant transfer fee of BFR 11,7 million.¹¹⁹ The fee was calculated in accordance with the rules set out by the Belgian national association (URBSFA). However, no interest was shown for the Belgian midfielder and, according to the rules, a “free” transfer period began in which a club could negotiate a different and mutually agreeable fee with FC Liege, for Mr Bosman. A contract was arranged with US Dunkerque but due to different circumstances the deal was not completed. FC Liege suspended Bosman, in accordance to the URBSFA transfer rules, for the entire 1990-91 season.¹²⁰

Mr Bosman decided to bring action against his club before the Belgian Court of First Instance and after four years the Belgian national court referred two questions to the ECJ for a preliminary ruling.¹²¹ The first question was: are Articles 39, 81 and 82 of the Treaty to be interpreted as ‘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 organize?’ The other question, more important here, focused on whether the same articles prohibited ‘a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club?’¹²²

The ECJ first ruled that Article 39 applied to the rules laid down by sporting associations ‘which determine the terms on which professional sportsmen can engage in gainful employment.’¹²³ Further, the Court determined that ‘the transfer rules constitute an obstacle to freedom of movement for workers’ prohibited by Article 39 EC.¹²⁴ As a result the Court reasoned that the transfer rules survival depended on whether ‘those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest.’ But even so, the ‘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’.¹²⁵

Before reaching its conclusion, the Court held that ‘the aim of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results’ was legitimate.¹²⁶ However, the Court found that the transfer rules did not adequately maintain the ‘financial and competitive balance in the world of football’ because they did not preclude the richest clubs from acquiring the best players.¹²⁷ The court pointed out that the same aim can be achieved ‘at least as efficiently by other means which do not impede free-

¹¹⁹ Case 415/93 Bosman [1995] ECR I-4921, para. 29.

¹²⁰ Case 415/93 Bosman [1995] ECR I-4921, para. 31-33.

¹²¹ Case 415/93 Bosman [1995] ECR I-4921, para. 34 and 49.

¹²² Case 415/93 Bosman [1995] ECR I-4921, para. 49.

¹²³ Case 415/93 Bosman [1995] ECR I-4921, para. 87.

¹²⁴ Case 415/93 Bosman [1995] ECR I-4921, para. 104.

¹²⁵ Case 415/93 Bosman [1995] ECR I-4921, para. 104.

¹²⁶ Case 415/93 Bosman [1995] ECR I-4921, para. 106.

¹²⁷ Case 415/93 Bosman [1995] ECR I-4921, para. 107.

dom of movement for workers.¹²⁸ Consequently, the ECJ found, regarding the second question, that Article 39 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.’¹²⁹

Finally, the Court held that since the transfer system was in violation of Article 39 EC, it was ‘not necessary to rule on the interpretation of Article 81 and 82 of the Treaty.’¹³⁰

3.2.2 The new transfer system

Prior to Bosman the EU had largely stayed out of the way for FIFA, but the highly public Bosman decision had woken the Commission which now had become suspicious of the entire transfer system.¹³¹ Subsequently, following the “Ronaldo transfer incident”, in April 1998, FIFA was ordered to revise the transfer rules or the Commission would be forced to take official action.¹³² Even so, FIFA did not immediately listen to the Commission, but as the cases challenging the transfer system grew FIFA reconsidered in order to avoid an abolishment of the transfer system altogether.¹³³ Finally, after negotiations between the Commission, FIFA, UEFA and FIFPro (the players union), FIFA adopted a new transfer system in 2001.¹³⁴ The regulations on the status and transfer of players, as the rules were entitled, were thereafter revised in 2005 and in 2008.¹³⁵

The transfer rules are quite comprehensive and due to the purpose of this thesis I will focus on ‘the most controversial regulation’, the transfer window.¹³⁶ However, for the same purpose it is crucial to understand that the transfer system operates on the basis of a rule of registration, meaning that a club that holds the registration for a player under contract is under no circumstances required to release that registration until and if a transfer fee has been agreed.¹³⁷

¹²⁸ Case 415/93 Bosman [1995] ECR I-4921, para. 110.

¹²⁹ Case 415/93 Bosman [1995] ECR I-4921, para. 114.

¹³⁰ Case 415/93 Bosman [1995] ECR I-4921, para. 138.

¹³¹ Irving, 56 U. Miami L. Rev. p. 689.

¹³² ‘FIFA rules halt Ronaldo’, Indian Express Newspapers (Bombay) Ltd, June 25, 1997, <http://www.indianexpress.com/res/web/pIe/ie/daily/19970625/17650543.html>. And ‘Football: Fifa faces EU challenge to transfer rules’, Independent, The (London), July 5, 1997, http://findarticles.com/p/articles/mi_qn4158/is_19970705/ai_n14126430/pg_1.

¹³³ Irving, 56 U. Miami L. Rev. p. 689-690.

¹³⁴ Drolet, The International Sports Law Journal, Jan-April, 2006, page. 2.

¹³⁵ The 2008 FIFA regulations on the status and transfer of players, http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf.

¹³⁶ Camatsos, 12 Sports Law Journal 155, 2005 p. 167.

¹³⁷ Gardiner Simon, Welch Roger, *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules ‘The Beautiful Game’?*, Entertainment and Sports Law Journal, July 2007, Vol 5 no 1, page. 2.

3.2.3 Transfer windows

In the “transfer settlement”, negotiated between FIFA, UEFA and the Commission, it was accepted that a breach of contract during the season could upset the balance of competition and should therefore be restricted. It was considered necessary to reinforce the contractual stability and to apply a special rule to preserve the regularity and proper functioning of competition.¹³⁸

Transfer windows, a term given to a period in sport when a club can transfer players either in or out of their roster, were brought into compulsory effect by the FIFA during the 2002-03 football season. It was greeted with hostility from several clubs and was labelled ‘the most notorious piece of glass in Europe’.¹³⁹ However, the system of limited transfer periods had already been in use in several European football leagues such as France, Italy and Spain. The “windows system” represents a simple philosophy, in theory at least, which is that footballers will only be allowed to move between teams during certain dates.

More specific this regulation stipulates that a football player can only be registered to play with a national association during one of the two registration periods per year.¹⁴⁰ The institutions of these two transfer periods depends on the league’s season cycle and are decided by each national association, according to the following principles:

- a) The first registration period shall begin after the completion of the national championship and finish, at the latest, before the national championship begins. This period should, in principle, last for no longer than twelve weeks.
- b) The second registration period will occur approximately in the middle of the season. This period may not exceed four weeks.¹⁴¹

Players may be registered with a maximum of three clubs during one season but are during this period only eligible to play matches for two of them.¹⁴² An international transfer is finalized once the new association has received an International Transfer Certificate (ITC) and the player becomes registered.¹⁴³

As mentioned above, the two transfer periods are decided by each national association and depend on the league’s season cycle. Normally, in a season played from autumn to spring, the first transfer window is open from 1 of July until 31 of August in year A and the second from 1 of January until 31 of January in year B. This system is adopted by most major European leagues. However, when the season runs throughout a whole year, from spring to autumn, the transfer periods usually differ. This is the case for most Nordic countries. In these countries the transfer window is usually open between the 1 of March until 30 of April, followed by the second registration period from 1 of August to 31 of August.¹⁴⁴

¹³⁸ The Independent European Sports review, 2006, para. 3.34.

¹³⁹ Bascombe Chris, August 21, 2002, www.liverpoolfc.tv/news/opinion/drilldown

¹⁴⁰ Article 6.1 FIFA Regulations 2008.

¹⁴¹ Article 6.2 FIFA Regulations 2008.

¹⁴² Article 5.3 FIFA Regulations 2008.

¹⁴³ Article 5.1 and 9.1 FIFA Regulations 2008.

¹⁴⁴ See Appendix.

3.2.4 Lehtonen

The issue of restricted transfer periods have already been before the Court of Justice in the case of *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*.¹⁴⁵ In *Lehtonen* the Court of First Instance in Brussels, Belgium, referred the following question to the ECJ for a preliminary ruling under Article 177 (now article 234 EC):

‘Are the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specific date contrary to the Treaty of Rome (in particular Articles [12, 39, 81 and 82]) in the case of a professional player who is a national of a Member State of the European Union, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely the need to prevent distortion of the competitions?’¹⁴⁶

The dispute had its origin in the transfer of the Finnish basketball player, Jyri Lehtonen, who was transferred from a Finnish team to a Belgian team. The Belgian Basketball Federation however, refused to register his transfer on the grounds that the transfer had not taken place within the relevant time limits and that, as an un-registered player, Lehtonen was unable to compete in the Belgian National Basket League.¹⁴⁷ Even so Lehtonen played and his club won. The win was however overturned by the Belgian federation due to the breach of the transfer rules.¹⁴⁸

Regarding to the question referred, the Court stated that it was going to give a preliminary ruling in so far as it relates to discrimination on grounds of nationality and freedom of movement for workers but not in so far as it relates to competition rules applicable to undertakings.¹⁴⁹ Concerning the inadmissibility of the question the Court considered that it did not have enough information to give guidance as to the definition of the market or markets at issue, nor did it have the relevant information that shows the character and number of undertakings operating on that market or markets.¹⁵⁰ The incapability of the national court to define the factual and legal context of the question resulted in the ECJ not being able to make meaningful findings regarding the volume of trade between Member States or as to the possibility of that trade being affected by the rules on transfers of players.¹⁵¹

Referring to *Walrave and Bosman*, the Court then stated that ‘sport is subject to Community law in so far as it constitutes an economic activity within the meaning of article 2 of the EC Treaty’ and that ‘...the Community provisions on freedom of movement for persons...not only apply to the action of public authorities but extend also to rules of any other nature

¹⁴⁵ Case 176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga*, 13 April 2000.

¹⁴⁶ Case 176/96 *Lehtonen*, 13 April 2000, para. 18.

¹⁴⁷ Case 176/96 *Lehtonen*, 13 April 2000, para. 6 and 10.

¹⁴⁸ Case 176/96 *Lehtonen*, 13 April 2000, para. 13.

¹⁴⁹ Case 176/96 *Lehtonen*, 13 April 2000, para. 30.

¹⁵⁰ Case 176/96 *Lehtonen*, 13 April 2000, para. 28.

¹⁵¹ Case 176/96 *Lehtonen*, 13 April 2000, para. 22 and 28.

aimed at regulating gainful employment...in a collective manner.¹⁵² Consequently, Articles 12 and 39 of the Treaty are applicable to sporting activities and to rules laid down by sporting associations such as those at issue.¹⁵³ However article 12 EC is only applicable in so far as the Treaty does not lay down a specific rule prohibiting discrimination which, with regards to workers, Article 39 EC does.¹⁵⁴

Having determined the scope of the treaty the Court now had to consider whether Mr Lehtonen should be regarded as a worker and if he could carry on an economic activity. Considering that Mr Lehtonen was a professional basketball player with a contract of employment under which he was to be paid a fixed monthly salary and bonuses he met the requirements stated in *Dona* and his work should subsequently be regarded as an economic activity within the meaning of Article 2 EC.¹⁵⁵ As to the concept of worker the essential feature of an employment relationship is that a person for a certain period of time performs services for and under the direction of another person, in return for which he receives remuneration.¹⁵⁶ In Mr Lehtonen's case this was considered to be fulfilled since he had entered into a contract of employment with a club in another Member State with a view to exercise employment in that state, hence accepting an offer of employment within the meaning of Article 39(3)(a) EC.¹⁵⁷

Stating that Mr Lehtonen should be regarded as a worker within the meaning of this article, the Court had to consider whether the rules on transfer periods, as laid down by the International Basketball Federation, constituted an obstacle to freedom of movement for workers, prohibited by that article.¹⁵⁸ When examining the rules the Court found that they did amount to such a restriction on a players' mobility even though the rules did not concern the employment but the extent to which their clubs may field them; stating that '[i]n so far participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned'.¹⁵⁹

On the question whether this obstacle may be objectively justified the Court held that without transfer deadlines the sporting strength of a team could be substantially altered. Stating that

[l]ate transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the compa-

¹⁵² Case 36/74 Walrave [1974] ECR 1405, para. 4 and 17-18. And Case 415/93 Bosman [1995] ECR I-4921, para. 73 and 82-83. And Case 176/96 Lehtonen, 13 April 2000, para. 32 and 35.

¹⁵³ Case 176/96 Lehtonen, 13 April 2000, para. 36.

¹⁵⁴ Case 176/96 Lehtonen, 13 April 2000, para. 37-38.

¹⁵⁵ Case 13/76 Donà [1976] ECR 1333, para. 12. And Case 176/96 Lehtonen, 13 April 2000, para. 41-43.

¹⁵⁶ Case 66/85 Lawrie-Blum [1986] ECR 2121 Para. 17. And Case 176/96 Lehtonen, 13 April 2000, para. 45.

¹⁵⁷ Case 176/96 Lehtonen, 13 April 2000, para. 46.

¹⁵⁸ Case 176/96 Lehtonen, 13 April 2000, para. 47.

¹⁵⁹ Case 176/96 Lehtonen, 13 April 2000, para. 49-50.

rability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.¹⁶⁰

This risk was especially clear in the case of a sporting competition which followed the rules of the Belgian first division national basketball championship.¹⁶¹

The judgement was based on observations submitted to the Court claiming that the rules on transfer periods are justified on non-economic grounds concerning only sport as such and the Court stated that the setting of deadlines may meet the objective of ensuring the regularity of sporting competitions.¹⁶² ‘However, measures taken by sports federations with a view to ensuring the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued’.¹⁶³

To sum up, transfer windows in basketball have the intention to protect the regularity and proper functioning of sporting competitions,¹⁶⁴ or more specifically, to prevent late transfers which can substantially alter the sporting strength of the teams.¹⁶⁵

3.3 Community Policy

In July 2007 a White Paper on Sport was published by the European Commission in order to raise the awareness and status of sport within the EU and in particular highlight the specific characteristics of sport.¹⁶⁶ As mentioned above this was not the birth of an EU sports policy but rather a summary of the arguments from a range of EU policy interventions reaching back to the mid 1980’s.¹⁶⁷ It is however fair to say that the White Paper has been most influenced by the Independent review of European Sports.¹⁶⁸ The Review was initiated by the UK EU Presidency in 2005 and was encouraged by UEFA and FIFA. Published in 2006, the final version of the review recommended the European Commission to provide the citizens of Europe with clear guidance of ‘sport rules’ compatible with EU law.¹⁶⁹

Constitutionally restrained, the European Commission had no other option but to compose a White Paper, a document containing the proposals for EU action in sport.¹⁷⁰ However, when materialised in the Treaty of Lisbon, provided that all Member States ratifies the

¹⁶⁰ Case 176/96 Lehtonen, 13 April 2000, para. 54.

¹⁶¹ Case 176/96 Lehtonen, 13 April 2000, para. 55.

¹⁶² Case 176/96 Lehtonen, 13 April 2000, para. 52-53.

¹⁶³ Case 176/96 Lehtonen, 13 April 2000, para. 56. And Case 415/93 Bosman [1995] ECR I-4921, para 104.

¹⁶⁴ Case 176/96 Lehtonen, 13 April 2000, para. 53.

¹⁶⁵ Case 176/96 Lehtonen, 13 April 2000, para. 54.

¹⁶⁶ The Commission’s White Paper on Sport, Brussels, July 11, 2007, COM(2007), 391 Final.

¹⁶⁷ Parrish, Miettinen, p. 25.

¹⁶⁸ Arnaut José Luis, Independent European Sport Review 2006, Final Version October 2006. http://www.independentfootballreview.com/doc/Full_Report_EN.pdf.

¹⁶⁹ EU Sport Policy, February 5, 2008, <http://www.euractiv.com/en/sports/eu-sport-policy/article-165956>.

¹⁷⁰ Parrish, Miettinen, p. 42-43.

new Treaty, the EU will have a competence in sport that stretches further than today's 'economic activity'.¹⁷¹ The legality of the White Paper is however, until then, questionable.¹⁷²

3.3.1 The Commission's White Paper on sport

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

- The societal role of sport: In which doping, volunteering, combating racism and violence, social inclusion and public health are dealt with.
- The economic dimension in sport: Where the actual economic importance of sport and the ensuring of financial support for grassroots sport organisations are attended to.
- The organisation of sport: In which the specific nature of sport, player transfers, media rights, protection of minors and freedom of movement are discussed.

The White Paper clearly stresses that sport is subject to EU law but as you can see it is within this last chapter, the organisation of sport, that the evidence based justifications can be found.¹⁷³ Two dimensions to the specificity of sport can be recognised in this category. The first is the specificity of the sport structure. This includes the autonomy of sports organisations, the pyramid structure and solidarity mechanisms. The second is the specificity of sporting activities and rules which refers to the traditional rules of the game and the legitimate objectives to sustain a competitive balance and a degree of uncertainty in the sport.¹⁷⁴ For the purpose of this thesis, focus will be on the latter.

The dimension includes the issues of mutual interdependence, competitive balance and the integrity of competition. As mentioned before, the whole point of competition is, of course, ruined if sport opponents are, literally, beaten out of sight since sporting competition cannot take place unilaterally.¹⁷⁵ For that reason, there are clear features of mutual interdependence between competitors in the success of sport which precludes the application of aggressive competition within leagues. Sporting dominance would not serve anyone and it is therefore suggested that sport requires uncertainty of result to maintain public interest. Without this interest, the fans would stay away from the matches, broadcasters would switch interest to another entertainment industry and the revenue stream would slowly fade away. Unequal competition can also rise through inequality of resources which can lead to a concentration of success in a small number of teams.¹⁷⁶

¹⁷¹ EU Sport Policy, February 5, 2008, <http://www.euractiv.com/en/sports/eu-sport-policy/article-165956>.

¹⁷² Figel Ján, EU Sport Policy, February 5, 2008, <http://www.euractiv.com/en/sports/eu-sport-policy/article-165956>.

¹⁷³ Parrish, Miettinen, p. 43.

¹⁷⁴ Parrish, Miettinen, p. 44.

¹⁷⁵ Parrish, Miettinen, p. 2.

¹⁷⁶ Parrish, Miettinen, p. 3.

Consequently, the promotion of competitive balance and the integrity of competition are, according to the Commission, legitimate policy objectives which may require measures not generally seen elsewhere. This includes transfer windows.

3.4 Summary of the Chapter

In order to trigger the Treaty provisions guarding the right of freedom of movement the person in question must be a national of a Member State of the European Union and the activity must have a territorial dimension beyond the borders of a single Member State of the European Union. This relates to the fact that the articles concerning freedom of movement are strictly related to the creation of a common market and therefore can have no effect on situations entirely internal to a Member State.¹⁷⁷ To be able to fall under the scope of the freedoms one must also be engaged in some kind of economic activity.

The economic test derive from the cases *Lawrie-Blum* and *Levin* wherein the Court states that the essential feature of an employment relationship is that the work performed must be 'genuine and effective' and carried out in return for remuneration.¹⁷⁸ It is clear that football players, performing at a certain level, fulfil these requirements and football should be considered as an economic activity within the meaning of Article 2 EC. This is confirmed by the ECJ in *Dona* and *Bosman*. The particular situation of each football player should however be objectively evaluated on a case-by-case basis.¹⁷⁹

A football player is also regarded, according to the test of subordination, as being in a position of subordination towards the club who orders him to carry out the economic activity. Footballers should therefore be considered as workers within the meaning of Article 39 EC and the prohibition of discrimination contained in that article. This conclusion is verified by the Court in *Bosman*.¹⁸⁰

The prohibition of discrimination does not only apply to measures of public authorities, this was made clear by the ECJ in *Walrave*. Regulatory bodies like FIFA and UEFA is therefore caught by the free movement provisions in so far as the regulations of the organisation contain discriminatory provisions.¹⁸¹ This was later extended in *Bosman* to also include non-discriminatory private collective measures, such as the transfer system.¹⁸²

The transfer system was created in order to control player movement and has existed since the late nineteenth century.¹⁸³ Even though violating player rights, it has been defended on the basis that it helps to impose competitive balance throughout European football.¹⁸⁴ However, following the Courts judgement in *Bosman*, FIFA were forced by the Commis-

¹⁷⁷ McAuley, *European Competition Law Review*, 2002, 23(7), p. 332.

¹⁷⁸ Case 53/81 *Levin* [1982] ECR 1035 Para 17. And Case 66/85 *Lawrie-Blum* [1986] ECR 2121 Para. 17.

¹⁷⁹ Van den Bogaert, p. 46.

¹⁸⁰ Case 415/93 *Bosman* [1995] ECR I-4921, para. 74 and 87.

¹⁸¹ Case 36/74 *Walrave* [1974] ECR 1405 para. 17.

¹⁸² Case 415/93 *Bosman* [1995] ECR I-4921, para. 103.

¹⁸³ Irving, 56 U. Miami L. Rev. p. 669.

¹⁸⁴ Schiera, 32 *Brooklyn Journal of International Law*, 2007, p. 714.

sion to adopt a new set of transfer rules. The transfer rules applicable today were adopted by FIFA in 2001 and was revised in 2005 and in 2008.

When negotiating the new rules, FIFA, UEFA and the Commission found that a breach of contract during the season could upset the balance of competition and should be restricted. It was therefore considered necessary to strengthen the contractual stability and to apply a special rule to preserve the regularity and proper functioning of competition.¹⁸⁵ This was done by the means of a provision stipulating that a football player only can be registered to play with a national association during one of the two registration periods per year and this measure was brought into compulsory effect by the FIFA during the 2002-03 season.¹⁸⁶ The transfer windows, decided by each national association, restricts the ability of players to seek alternative employment and could therefore be regarded as a violation of the free movement of workers.

However, the legality of transfer windows has been strengthened by the Court of Justice in the case of *Lehtonen*. On the question whether this obstacle may be objectively justified the Court held that without transfer deadlines the sporting strength of a team could be substantially altered. Stating that:

[L]ate transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.¹⁸⁷

This risk was especially clear in the case of a sporting competition which followed the rules of the Belgian first division national basketball championship.¹⁸⁸ The Court therefore agreed that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity and proper functioning of sporting competitions, if it corresponds with the specificity of the organisation of a sport. However, the Court stated that measures taken by sports federations with a view to ensuring the proper functioning of competitions may not go beyond what is necessary for achieving the aim pursued.¹⁸⁹

The same viewpoint is taken by the European Commission in their White Paper on sport, a document containing the proposals for EU action in sport. In this, although legally questionable document, the Commission emphasises that sport is subject to EU law. Restricted transfer periods should, however, be justified on the basis of the promotion of competitive balance and the integrity of competition.

¹⁸⁵ The Independent European Sports review, 2006, para. 3.34.

¹⁸⁶ Article 6.1 FIFA Regulations 2008.

¹⁸⁷ Case 176/96 Lehtonen, 13 April 2000, para. 54.

¹⁸⁸ Case 176/96 Lehtonen, 13 April 2000, para. 55.

¹⁸⁹ Case 176/96 Lehtonen, 13 April 2000, para. 56. And Case 415/93 Bosman [1995] ECR I-4921, para 104.

4 Transfer Windows and Freedom of Movement

4.1 Analysis

It has been established that football players, performing at a certain professional level, fulfil the requirements of gainful employment or remunerated service and football therefore should be considered as an economic activity within the meaning of Article 2 EC. It has also been established that a football player is in a position of subordination towards the club who orders him to carry out the economic activity and that he or she therefore should be treated as a worker within the meaning of Article 39 EC. Furthermore, the prohibition of discrimination safeguarding the freedom of movement for workers does apply to non-discriminatory private collective measures, such as transfer windows, applied by public authorities, such as FIFA and UEFA. However, rules that have a ‘purely sporting interest’ do not fall under Community law and are therefore not a hinder to freedom of movement.¹⁹⁰ This “constitutional immunity” is only granted to sporting rules in the strict sense such as the rules regulating the length of a match or the number of foreign players participating in matches played by a national team of that Member State.¹⁹¹ The transfer rules, however, does not possess this ‘intrinsic sporting nature’ and therefore goes beyond such sporting rules.¹⁹²

Because the FIFA “windows system” is not granted this “immunity” it seems logical, at first sight, to stipulate that the FIFA rules limiting the opportunity for football players to move between teams to two transfer periods per year are liable of restricting the ability of players to seek alternative employment in another Member State and should therefore be regarded as a violation of Article 39 EC. This seems even more logical when reviewing the Court’s decision in *Bosman*, that football players should be treated like any other employee; a decision that the FIFA transfer windows clearly contradicts.

On the other hand it follows that both the Commission and the ECJ have accepted that this restriction on labour mobility is justified in order to protect certain important features of sporting competition. It has been argued that transfer windows support the notion of team stability by limiting the possibilities for clubs to buy players at any time, a view supported by the Court in *Lehtonen*.¹⁹³ Additionally, in the “transfer settlement” it was accepted that a breach of contract during the season could upset the balance of competition and should be restricted. It was therefore considered necessary to apply restricted transfer periods to reinforce contract stability.¹⁹⁴

Consequently, at a second glance, it seems clear that the FIFA transfer windows, supporting contractual stability and preventing players from changing clubs in the later stages of a competition, are compatible with Article 39 EC. Then again, is the Courts decision in *Lehtonen* regarding transfer windows in Basketball relevant and applicable to the discussion

¹⁹⁰ Case 36/74 Walrave [1974] ECR 1405 para. 8.

¹⁹¹ Case 13/76 Donà [1976] 2 CMLR 578, [1976] ECR 1333 para 14.

¹⁹² Beloff M, ‘*The Sporting Exception in EC Competition law*’ [1999] European Current Law xvi at xix.

¹⁹³ Case 176/96 Lehtonen, 13 April 2000, para. 54.

¹⁹⁴ Arnaut, *The Independant European Sports review*, 2006, para. 3.34.

on the FIFA transfer windows and do these transfer periods fulfil the principle of proportionality or do they go beyond what is necessary to achieve their objective?

4.1.1 The relevance of the Courts decision in Lehtonen for the FIFA transfer windows

The fact that transfer windows has been justified as having sporting benefits in one sport does not automatically mean that this has to be the case in all other sports.¹⁹⁵ The benefits were especially clear in the case of a sporting competition which followed the rules of the Belgian first division national basketball championship.¹⁹⁶ This championship followed a play-off model involving knock-out rounds where the winner advanced and the loser was eliminated.¹⁹⁷ The national European football leagues, however, features the system of promotion and relegation and do not involve knock-out rounds.¹⁹⁸ Consequently, since a single match is not as decisive within a league as it might be during a play-off it is not as beneficial to bring in late transfers in a club playing in such a league. The rules in European club championships, however, are a mix of league play and knock-out rounds. Although, a team which, in the middle of the UEFA Champions league for example, wishes to register new players for the remaining matches is only eligible to register one player who has played UEFA club competition matches for another competing club in the current season. Furthermore, the registration of any new players for the “second half” of the tournament must be concluded roughly 4 months before the tournament finishes.¹⁹⁹ These rules eliminate the risk of financially powerful clubs acquiring the best players from the competition before a finale or even before the knock-out rounds. It can therefore be questioned if the ruling in *Lehtonen*, concerning transfer windows in basketball, is applicable on the transfer windows in football.

However, for the sake of the analysis and for the purpose of the thesis the possibility that the Court’s decision in *Lehtonen* is not applicable to the transfer windows in European football will, for now, be ignored. Nevertheless, if the FIFA “windows system” was found to be objectively justified, it may not, as the Court stated in *Lehtonen*, ‘go beyond what is necessary for achieving the aim pursued’.²⁰⁰ Consequently, does it pass the test of the principle of proportionality?

4.1.2 Can the FIFA transfer windows be justified?

Firstly, when considering if a measure will pass the test of the principle of proportionality, the appropriateness of the means chosen to achieve the desired end has to be verified.²⁰¹

¹⁹⁵ Welch Roger, ‘Player Mobility, The FIFA Transfer Rules and Freedom of Movement’, International Sports Law Review, 2006, 4 November, p. 84.

¹⁹⁶ Case 176/96 Lehtonen, 13 April 2000, para. 55.

¹⁹⁷ Case 176/96 Lehtonen, 13 April 2000, para. 55.

¹⁹⁸ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 712.

¹⁹⁹ Article 17.17 -17.18 in the Regulations of the UEFA Champions League 2008/09, http://www.uefa.com/multimediafiles/download/regulations/uefa/others/70/22/60/702260_download.pdf.

²⁰⁰ Case 176/96 Lehtonen, 13 April 2000, para. 56. And Case 415/93 Bosman [1995] ECR I-4921, para 104.

²⁰¹ Van den Bogaert, p. 148.

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

Secondly, does the measure of transfer windows in football go beyond what is necessary to achieve team and player contract stability?²⁰² The Court in *Lehtonen* held that without transfer deadlines the sporting strength of a team could be substantially altered. However, the Court concluded that the core problem was ‘late transfers’; transfers taking place at the end of the championship.²⁰³ Consequently, the FIFA transfer windows do not have the objective of producing team stability during the entire season, but within the period constituting ‘late transfers’. However, since European football clubs only are allowed to conduct player transfers in 16 out of the 52 weeks of the year and since the notion of late transfers impossibly can represent two thirds of the year, the FIFA transfer windows must be regarded as going beyond what is necessary to achieve team stability.²⁰⁴ Furthermore, regarding the objective to bring about stability of employment during a season, this is already secured by the FIFA rules preventing a player from changing teams without his current club’s consent.²⁰⁵ The transfer system operates on the basis of a rule of registration which means that a club that holds the registration for a player under contract is under no circumstances required to release that registration until and if a transfer fee has been agreed.²⁰⁶ When reviewing these facts, it is likely that the FIFA transfer windows go beyond what is necessary to achieve the desired end.

The third and last condition, establishing that even though there are no alternatives less restrictive, it must still be determined that the measure under investigation does not have an excessive or disproportionate effect, is subsequently redundant.²⁰⁷

4.2 Conclusion

The FIFA rules limiting the opportunity for football players to move between teams to two transfer periods per year are liable of restricting the ability of players to seek alternative employment in another Member State and should therefore be regarded as a violation of Article 39 EC, freedom of movement for workers. The ECJ has, however, agreed that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity and proper functioning of sporting competitions, if it corresponds with the specificity of the organisation of a sport. Because of the organisational differences between the Belgian basketball league and the European national football leagues the sporting benefits that transfer windows bring to football can, however, be questioned. The FIFA “windows system” has, additionally, been considered necessary in order to reinforce player contract stability. It is, however, likely that the “window system” goes beyond what is necessary to

²⁰² Craig, De Búrca, p. 545.

²⁰³ Case 176/96 *Lehtonen*, 13 April 2000, para. 54.

²⁰⁴ Article 6.2 FIFA Regulations 2008.

²⁰⁵ Article 5 and 8-9 FIFA Regulations 2008.

²⁰⁶ Gardiner, Welch, *Entertainment and Sports Law Journal*, July 2007, Vol 5 no 1, page. 2.

²⁰⁷ Craig, De Búrca, p. 545.

achieve team and player contract stability since they are too restrictive and somewhat redundant. Consequently, the FIFA transfer windows do not comply with the requirements of the principle of proportionality and should therefore, if challenged, be regarded as a violation of Article 39 EC.

5 EC Competition Law: an Open Question

The European Court of Justice has, when addressing the rules regarding player movement between clubs, unconditionally focused on the restraints on free movement of workers and never on the application of competition law. In *Bosman*, the Court held that since the transfer system was in violation of Article 39 EC, it was ‘not necessary to rule on the interpretation of Article 81 and 82 of the Treaty’.²⁰⁸ This declination belongs to a rather common practice of the Court where only a partial analysis is effectuated once a breach of EC law is established.²⁰⁹ The pattern repeated itself in *Lehtonen*, when the Court held that it did not have enough information to give a preliminary ruling in so far the question related to competition rules applicable to undertakings. The Court would therefore only be able to give a preliminary ruling associated to freedom of movement for workers.²¹⁰

Be that as it may, it cannot be disputed that this was two great opportunities for the ECJ to declare its views on the relation between competition law and sport practices and the absence of relevant case law turns the second half of the thesis into a rather open question.

5.1 EC Competition Law

The precise role of EC competition law is uncertain and its rationale includes a number of different objectives. One of them is to *enhance efficiency*, optimise the distribution of resources and consequently maximise consumer welfare. An objective that, according to traditional economic theory, is easier to accomplish where there is perfect competition, or more realistic, workable competition.²¹¹ This primary policy goal is stated in Article 2 EC. Besides the efficiency goal, competition law also has the objective to *protect consumers and smaller firms* from large corporations and other economic powers that abuse their dominant market positions. A third objective is to facilitate the *creation of a single European market*, and to prevent this market from being disturbed by actions of private undertakings.²¹²

5.1.1 Article 81 EC

The principal means for control of anti-competitive agreements is Article 81 EC. The article is highly complex and will be narrowly presented to provide for a basic, but sufficient, framework for the discussion and conclusion that follows.

Article 81 prohibits all agreements between undertakings that restrict competition and affect trade between Member States.²¹³ The article is divided into three parts: 81(1) lays out

²⁰⁸ Case 415/93 *Bosman* [1995] ECR I-4921, para. 138.

²⁰⁹ Van den Bogaert, p. 194.

²¹⁰ Case 176/96 *Lehtonen*, 13 April 2000, para. 30.

²¹¹ Craig, De Búrca, p. 950.

²¹² Craig, De Búrca, p. 951.

²¹³ Article 81 EC reads as follows:

‘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, and in particular those which: (a) directly or indirectly fix purchase or sell-

behaviour that is prohibited as anti-competitive; 81(2) disqualify behaviour that falls within 81(1); and 81(3) lays down the requirements for exemptions to Article 81.

Article 81(1) catches agreements, a term which is broadly interpreted and can be applicable on any joint intention of undertakings regarding specific conduct in the market.²¹⁴ Such agreements can be made between firms at the same level, horizontal agreements, and they can be made between firms at different levels, vertical agreements.²¹⁵ Also anticompetitive decisions made by “associations of undertakings” are prohibited under this article.

An agreement can only fall within Article 81(1) if it prevent, restrict or distort competition and an agreement can do so either by its object or its effect. Agreements which restrict competition by object are agreements that have such a high potential of negative effects on competition that it is unnecessary to apply Article 81(1) to demonstrate the effects.²¹⁶ If the agreement is not restrictive by object, competition may be restricted by its effect if it ‘affect[s] actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.’²¹⁷ Furthermore, Article 81(1) is only applicable if the effect on competition is “appreciable” and affects a defined common market.²¹⁸ Finally, Article 81 does only apply to agreements that affect trade between Member States.²¹⁹

ing prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions in paragraph 1 may, however, be declared inapplicable in the case of: -any agreement or category of agreements between undertakings; -any decision or category of decisions by associations of undertakings; -any concerted practice or category of concerted practices, 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, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

²¹⁴ Case T-1/89 Rhone-Poulenc v. Commission, 1991 E.C.R. II-867, para. 120.

²¹⁵ Craig, De Búrca, p. 950.

²¹⁶ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para. 97 and 100.

²¹⁷ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para. 97 and 100.

²¹⁸ The agreement will not be deemed to appreciably restrict competition if the aggregate market share held by the parties to the agreement does not exceed 10%. European Commission, Commission Notice on Agreements of Minor Importance Which Do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (De Minimis), 2001 OJ (C 368) 13.

²¹⁹ This involves three elements:

First, the concept of “trade” which is broadly defined to include ‘all cross-border economic activity’. European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 OJ (C 101) para. 81 and 83.

Second, an “effect” requires that ‘it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, di-

Unless an agreement within Article 81(1) qualifies for an exemption under Article 81(3) it is automatically void under Article 81(2). An agreement may be exempted under 81(3) if its pro-competitive benefits outweigh its restrictive effects which are determined by four conditions that all must be fulfilled.²²⁰ First, the agreement must increase efficiency by promoting technical or economic progress, or by improving production or distribution of goods or services.²²¹ Second, a fair share of the benefits created by the agreement must be passed on to the consumers who under Article 81(3) are defined as the customers of the parties to the agreement in question.²²² Third, the restrictions have to be indispensable to achieving the created efficiencies, meaning that there cannot be any other economically practical and less restrictive means of creating the same efficiencies.²²³ Lastly, the agreement cannot provide the parties with an opportunity to eliminate ‘competition in respect of a substantial part of the products concerned’, determined by the degree of competition prior to the agreement contra the degree to which competition is reduced by the agreement.²²⁴

5.2 EC Competition Law and Sport

According to the case law 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.²²⁵ As established before football players carry out such an economic activity and the practice of football subsequently falls under competition law. Furthermore, as settled by the ECJ, Community law does not hinder regulations which have a genuine sporting interest.²²⁶ Transfer rules, however, goes beyond such sporting rules.²²⁷

Nevertheless, the ECJ has acknowledged a certain type of sport rules which will not fall under Article 81 EC. If the rule in question pursues a legitimate objective and the effects of the restriction is inherent in the pursuit of that objective and are proportionate to it, the

rect or indirect, actual or potential, on the pattern of trade between Member States.’ European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 OJ (C 101) para. 81 and 83.

Third, The factor of “appreciability” which considers ‘the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned.’ European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 OJ (C 101) para. 85.

²²⁰ Craig, De Búrca, p. 977.

²²¹ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para 104-105.

²²² European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para 109.

²²³ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para 107-108.

²²⁴ European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ (C 101) para 113.

²²⁵ Case 36/74 Walrave [1974] ECR 1405 para. 4.

²²⁶ Case 36/74 Walrave [1974] ECR 1405 para. 8.

²²⁷ The transfer rules do not have the “intrinsic sporting nature”. Beloff M, *The Sporting Exception in EC Competition law* [1999] European Current Law xvi at xix.

sporting rule will escape Article 81 in its entirety.²²⁸ Legitimate objectives of such a rule will normally relate to the ‘organisation and proper conduct of competitive sport’ which may include, the ensuring of financial stability of sport clubs/teams, the ensuring of uncertainty of results and the ensuring of fair sport competitions with equal chances for all athletes.²²⁹ When assessing the existence of a legitimate objective, the distinctive features of sport, such as the interdependency between participants in sporting competitions, must also be taken into consideration.²³⁰

Examples of sporting rules which is inherent in the pursuit of its objective are the penalties relating to the anti-doping rules in *Meca Medina* and the prohibition on the ownership of several sport clubs in *ENIC*. These were found inherent for the proper conduct of competitive sport and the healthy rivalry of athletes and the latter was found to be inherent for ensuring the uncertainty of results.²³¹

In order for the sporting rule to not infringe Article 81 EC it must also be proportionate and applied in a transparent, objective and non-discriminatory manner. The proportionality of each rule must however be considered on a case-by-case basis.²³²

5.3 The Competitive Balance in European Football

It is accepted that there must be a competitive balance between clubs in order to preserve some sort of integrity of sporting competition, to keep fans interested and to enjoy commercial success. However, if a few teams were able to collect all the best players so that the other teams were not able to provide reasonable competition, results would become predictable, the financial gap between the rich and the poor clubs would grow and fans, advertisers and broadcasters would all lose interest.²³³ Consequently, a competitive imbalance could be devastating for football.

The FIFA transfer window system was designed to put all clubs on parity with each other regarding player transfers. The Commission had strongly disapproved at the way larger and richer clubs controlled the player market, acquiring any player at any time for any price. The Commission was confident that this measure would bring about stability of employment and proper competition which would result in a more equal buying market.²³⁴

²²⁸ Case C-309/99 Wouters ECR 2002 I-1577, para. 97 and 110. See also Case C-519/04 P David Meca Medina and Igor Majcen v. Commission ECR 2006 I-6991, para. 45.

²²⁹ Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45-46.

²³⁰ The Commission on Sport – Competition law, section 2.1.5. http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm#1.

²³¹ Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45, 54-55. And Case COMP/37 806: ENIC/UEFA para 28 and 34.

²³² The Commission on Sport – Competition law, section 2.1.5. http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm#1.

²³³ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 710.

²³⁴ McAuley Darren, *Windows, caps, footballs and the European Commission. Confused? You will be*, European Competition Law Review, 2003, 24(8) p. 396.

It can be argued that restricted transfer periods preserve the appeal and the unpredictability of the end of a championship which benefit the consumers.²³⁵ However, transfer windows also restrict the market and restrain competition. It does not allow the market to dictate when and where players' services (the resources) are most wanted which allow the big clubs to hold onto their money so that they can pick and choose between the top players available when the windows re-open. It seems therefore likely that the small-market clubs will be outmanoeuvred by the wealthier ones when it comes to acquiring top players in an open window, thus creating a small elite of clubs within each domestic league.²³⁶

Examining the league tables of recent years one will find that this is exactly what has happened. In the last seven seasons of Italy's Serie A, either Juventus, AC Milan or Inter Milan have won the league and they have been among the top four clubs in three of those seven seasons.²³⁷ In Germany, Bayern Munich has won the competition four out of the last seven seasons, never finishing worse than number four.²³⁸ In France, Olympique Lyonnais has won the recent seven championships.²³⁹ In Scotland, Celtic and Rangers have finished in the top two spots in six of the last seven seasons.²⁴⁰ In England's Premier League, four clubs, Manchester United, Chelsea, Arsenal and Liverpool have finished in the top five spots the last six seasons and in four of those six seasons they were the top four clubs.²⁴¹ The lack of competitive balance was so extreme in the English Premier League that an Irish betting agency, seven matches into the season of 2005/06, declared Chelsea the winner of the league and began paying out bets made on them as champions.²⁴²

This complete lack of parity was exactly the opposite of what the Commission intended to create with the "windows system". The tendency is clearly not positive for the sport and predictable results are causing attendance to drop.²⁴³ In an attempt to halt a sharp fall in attendance the Italian Football Federations (FIGC) President Franco Carraro called, in 2005, on Serie A clubs to reduce their ticket prices. The average number of spectators turning up to a match had at that point dropped 20 percent compared to the previous season and although this was not entirely due to predictable results, they were a factor.²⁴⁴ The English

²³⁵ Gardiner, Welch, Entertainment and Sports Law Journal, July 2007, Vol 5 no 1, p. 6.

²³⁶ Camatsos, 12 Sports Law Journal 155, 2005 p. 170.

²³⁷ The Scudetto was not handed out in season 2004/05 due to a bribe scandal and the following relegation of the "winner", Juventus. The Rec. Sport Soccer Statistics Foundation (RSSSF), <http://www.rsssf.com/tables/italchamp.html>.

²³⁸ Das Deutsche Fussball-Archiv (in German), <http://www.f-archiv.de/>.

²³⁹ Olympique Lyonnais official web site, <http://www.olweb.fr/index.php?lng=en&pid=0>.

²⁴⁰ In the season of 2005/06 Hearts of Midlothian was able to finish second and force themselves in between Celtic and Rangers. The Rec. Sport Soccer Statistics Foundation (RSSSF), <http://www.rsssf.com/tables/scotchamp.html>.

²⁴¹ The Rec. Sport Soccer Statistics Foundation (RSSSF), <http://www.rsssf.com/tablese/engchamp.html>.

²⁴² *Bookmaker pays out on Chelsea title victory*, Reuters, London, September 29, 2005, <http://soccer.net.espn.go.com/news/story?id=344274&cc=5739>.

²⁴³ *Premier League probes crowd slump*, BBC Sport (UK), September 20, 2005, http://news.bbc.co.uk/sport1/hi/football/eng_prem/4264936.stm.

²⁴⁴ *Italian clubs need to cut prices*, Reuters, Rome, October 5, 2005, <http://soccer.net.espn.go.com/news/story?id=344995&cc=5739>.

leagues have faced similar problems and appointed in 2005 a working group to solve the problem.²⁴⁵

A lot of English clubs have also argued that the transfer windows are too inflexible and that this restriction on player transfers hinders them to climb out of debt.²⁴⁶ As the chief executive of the English Football League, David Burns, said before the implementation of the transfer windows:

‘It is not uncommon for any business to find itself with a short-term cash flow problem and one remedy is to sell an asset. Football is no different; clubs often need to sell a player to meet a cash shortage. By limiting clubs’ freedom to trade as they see fit, according to their own short-term demands, such a proposal could very possibly wreak havoc on the future of our club system.’²⁴⁷

Furthermore, these clubs argue that teams like Arsenal, Liverpool, Chelsea and Manchester United all have the resources to cope when the transfer window is closed while the poorer clubs do not have the resources to handle the impossibility of adding to their squad until one of the windows opens. It is a proven fact that this leads to small-market clubs fielding weaker teams and as a result loses out on gate receipts.²⁴⁸ A declination in attendance might result in bankruptcy for small clubs. This would not only hurt the industry, but more importantly, the consumers.

Another difficulty with the two transfer windows is that the regulations leave the exact dates of these windows to be decided by each national association. A problem could therefore arise for cross border transfers if, for example, Sweden’s transfer windows are open on different dates than the English Premier Leagues’.

As can be seen in the Appendix the Swedish summer window is open between the first of July and the 31 of July while the same window in the English Premier League is open between the end of the previous season until the first of September. Consequently, between the 1 of August and the first of September clubs in the F.A. Premier League are able to buy players from the Swedish clubs while the Swedish clubs cannot replace them since their window is closed. There are numerous examples of great players leaving the Swedish top division in August severely altering the rosters and the conditions in the race for the championship.²⁴⁹ As a result, the punching power of Swedish clubs is weakened and they are having a hard time competing successfully in European competitions. This is however just one example. There are several summer windows open in August allowing clubs to buy

²⁴⁵ *Premier League probes crowd slump*, BBC Sport (UK), September 20, 2005, http://news.bbc.co.uk/sport1/hi/football/eng_prem/4264936.stm.

²⁴⁶ Harris Nick, ‘*Football: Premiership clubs face transfer window*’, The Independent, London, December 5, 2001, http://findarticles.com/p/articles/mi_qn4158/is_/ai_n14426085.

²⁴⁷ Harris Nick, ‘*Football: Premiership clubs face transfer window*’, David Burns, The Independent, London, December 5, 2001, http://findarticles.com/p/articles/mi_qn4158/is_/ai_n14426085.

²⁴⁸ McAuley, *European Competition Law Review*, 2003, 24(8) p. 397.

²⁴⁹ Inter Alia, Svab Marjan, *Sverige vill glänta mer på transferfönstret* (In Swedish), September 12, 2008, <http://hd.se/sport/2008/09/12/strong-transferfoenstrets-strong-i/>. Taxén Mats, *Petter Andersson - en profil lämnar Allsvenskan* (In Swedish), September 3, 2008, <http://www.svenskfotboll.se/t2all.aspx?p=152184&x=1&a=1143125>. Ek Mattias, *Marcus Berg klar för Groningen* (In Swedish), August 10, 2007, <http://www.expressen.se/sport/fotboll/1.792942/marcus-berg-klar-for-groningen>.

players from Sweden. The Irish leagues are in the same situation as the Swedish and there are several other differences in transfer dates between nations. For instance, the Italian windows closes on the first of September and the second of February allowing them to buy players from leagues where the transfer windows closes in the 31 of August respective the 31 of January without them having the possibility to replace the player(s).

However, the Swedish winter window is open between the first of January until the 31 of March and the same window in the English Premier League closes the second of February, it can therefore be argued that the Swedish clubs are offered the same opportunity to buy players that the English first division clubs are not able to replace. Subsequently, one might claim that this works both ways and that the system therefore does not have a negative effect on competition. However, this might work in theory but not in practice. The possibility of clubs in smaller leagues, like the Swedish first division, in 28th place in UEFA's national league rankings, or the Premier Division in the Republic of Ireland, in 35th place, should be able to acquire players from the English Premier league, in second place, seems highly unlikely.²⁵⁰

5.4 Summary of the Chapter

Sport is subject to community law only in so far as it constitutes an economic activity. As established football players carry out such an economic activity and the practice of football subsequently falls under competition law.²⁵¹ The ECJ has, however, acknowledged a certain type of sporting rule that will not fall under Article 81 EC, even though it restricts competition. To be able to escape Article 81 EC in its entirety the rule in question must pursue a legitimate objective and the effects of the restriction must be inherent in the pursuit of that objective and should be proportionate to it.²⁵²

Article 81 has the objective to protect consumers, enhance their welfare and to facilitate the creation of a single European market. The article prohibits all agreements between undertakings that restrict competition and affect trade between Member States. The article is divided into three parts: 81(1) lays out behaviour that is prohibited as anti-competitive; 81(2) disqualify behaviour that falls within 81(1); and 81(3) lays down the requirements for exemptions to Article 81.

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

²⁵⁰ UEFA coefficient ranking for the 2008/09 European campaigns, <http://www.uefa.com/uefa/keytopics/kind=64/newsid=584172.html>.

²⁵¹ Case 36/74 Walrave [1974] ECR 1405 para. 4.

²⁵² Case C-309/99 Wouters ECR 2002 I-1577, para. 97 and 110. See also Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45.

6 Transfer Windows and EC Competition Law

6.1 Analysis

Transfer windows was designed to put all clubs on parity with each other regarding player transfers and the Commission was confident that this measure would bring about stability of employment and proper competition which would result in a more equal buying market.²⁵³ The issue of transfer windows was dealt with in *Lehtonen*, albeit under Article 39 EC, wherein the Court found that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity and proper functioning of sporting competitions, if it corresponds with the specificity of the organisation of a sport.²⁵⁴ Because of the rationale to eliminate unfair competition there is an assumption that any challenges on the windows under competition law would fail.²⁵⁵ However, the application of competition law to the transfer rules remains uncertain; partly due to the ECJ's unwillingness to focus on anything else but the restraints on free movement.²⁵⁶

6.1.1 A sporting rule pursuing a legitimate objective whose effect is inherent and proportionate to its objective

In order to determine whether the FIFA transfer windows violate Article 81 of the Treaty it has to be established whether the rule could be regarded as a sporting rule that pursues a legitimate objective, whose effects are inherent and proportionate to its objective and if it therefore should escape Article 81 EC in its entirety.²⁵⁷

Due to the rationale of the windows, one might, argue that the “windows system” should be regarded to carry a legitimate objective justified on the grounds relating to the ‘organisation and proper conduct of competitive sport’.²⁵⁸ However, when examining this argument one will find that it is not necessarily true.

It has been established that the transfer windows restricts the free play of the market forces of supply and demand and that this restriction has been part of the creation of a small elite of clubs within each domestic league.²⁵⁹ This lack of parity has had the effect of predictable results which is causing attendance to drop.²⁶⁰ A declination in attendance might result in bankruptcy for small clubs which will not only hurt the industry, but also the consumers. It seems therefore very ambiguous to claim that the FIFA transfer windows should be justi-

²⁵³ McAuley, *European Competition Law Review*, 2003, 24(8) p. 396.

²⁵⁴ Case 176/96 *Lehtonen*, 13 April 2000, para. 54.

²⁵⁵ McAuley, *European Competition Law Review*, 2003, 24(8) p. 396. And Parrish, *Miettinen*, p. 188-189.

²⁵⁶ Case 415/93 *Bosman* [1995] ECR I-4921, para. 138 and Case 176/96 *Lehtonen*, 13 April 2000, para. 30.

²⁵⁷ Case C-309/99 *Wouters* ECR 2002 I-1577, para. 97 and 110. See also Case C-519/04 *P David Meca Medina* ECR 2006 I-6991, para. 45.

²⁵⁸ Beloff, *The Sporting Exception in EC Competition law* [1999] *European Current Law* xvi at 1x.

²⁵⁹ *Camatsos*, 12 *Sports Law Journal* 155, 2005 p. 170.

²⁶⁰ Premier League probes crowd slump, BBC Sport (UK), September 20, 2005, http://news.bbc.co.uk/sport1/hi/football/eng_prem/4264936.stm.

fied on the grounds relating to the ‘organisation and proper conduct of competitive sport’ when they clearly restrict concrete measures covered by this heading, such as the ensuring of financial stability of sport clubs/teams and the ensuring of uncertainty of results.²⁶¹ The “windows system” also prevents clubs from raising the quality of their sporting performance since clubs in minor leagues with a closed window are losing their best players to clubs in better leagues with an open window, without being able to replace them. This is a result of FIFA leaving the two registration periods to be decided by each national association. Although established by FIFA to be fixed at certain points of the season, the dates of the windows cannot be found harmonised since the national seasons in some cases varies considerably.²⁶²

When assessing if the windows pursues a legitimate objective one must however also consider the distinctive features of sport in general and football in particular.²⁶³ It could be argued that the “windows system” offers stability in a league during season and that it would be no sport if a large-market club, before a final, simply buys the best players from the competition. As the Court stated in *Lehtonen*:

‘[I]ate transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.’²⁶⁴

However, as mentioned before, the fact that transfer windows has been justified as having sporting benefits in one sport does not automatically mean that this has to be the case in all other sports.²⁶⁵ It can therefore be questioned if the ruling in *Lehtonen*, concerning transfer windows in basketball, is applicable on the transfer windows in football.²⁶⁶

According to the above mentioned it seems unlikely that the FIFA transfer windows could be regarded as a sporting rule that pursues a legitimate objective and should therefore fall under Article 81 EC. However, if the FIFA “window system” was found to pursue a legitimate objective, the effects of the restriction would still have to be characterised as inherent in the pursuit of that objective and proportionate to it.²⁶⁷

The basic argument used by the football governing bodies to validate this restriction is that transfer windows was designed to put all clubs on parity with each other regarding player transfers and that this measure would bring about stability of employment and proper competition which would result in a more equal buying market.²⁶⁸ However, I find this ar-

²⁶¹ Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45-46.

²⁶² See Appendix.

²⁶³ The Commission on Sport – Competition law, section 2.1.5. http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm#1.

²⁶⁴ Case 176/96 Lehtonen, 13 April 2000, para. 54.

²⁶⁵ Welch Roger, *International Sports Law Review*, 2006, 4 November, p. 84.

²⁶⁶ See discussion in chapter 4.1.1.

²⁶⁷ Case C-309/99 Wouters ECR 2002 I-1577, para. 97 and 110. See also Case C-519/04 P David Meca Medina ECR 2006 I-6991, para. 45.

²⁶⁸ McAuley Darren, *European Competition Law Review*, 2003, 24(8) p. 396.

gument to be too broad and that football has a great chance of surviving without this far-reaching restriction since it favours larger wealthier clubs and has a negative effect on results, making them more predictable, causing attendance to drop. Furthermore, the commission's objective to bring about stability of employment, and thus, proper competition is already secured by the FIFA rules preventing a player from changing teams without his current club's consent.²⁶⁹ Moreover, as discussed before, in *Lehtonen* the Court concludes that the core problem is 'late transfers'; transfers taking place at the end of the championship.²⁷⁰ However, the FIFA regulations stipulate that a football player can only be registered to play with a national association during one of the two registration periods per year.²⁷¹ Consequently, football clubs are forbidden to conduct any player transfers in 36 out of the 52 weeks of the year, a restriction that must be regarded as going beyond what is necessary to achieve the aim pursued since the notion of late transfers impossibly can constitute two thirds of the year.²⁷² The restraints on competition brought by the transfer windows are therefore clearly not proportional to their desired effects and a less restrictive measure would be a preferred alternative.

It seems unlikely that the FIFA transfer windows could be regarded as a sporting rule that pursues a legitimate objective and should subsequently fall under Article 81 EC.

6.1.2 Article 81(1) EC

Professional football clubs are considered to be undertakings if they engage in economic activity.²⁷³ National associations which bunch clubs together are associations of undertakings.²⁷⁴ UEFA which have national association within Europe as their members is, thus, an association of associations of undertakings.²⁷⁵ The rules regarding transfer windows are therefore a decision made by an association of associations of undertakings within the sense of Article 81(1) EC.

A limited transfer period is a form of horizontal agreement that falls within Article 81(1) because it, by its effect, restricts competition.²⁷⁶ While UEFA argues that the rationale of transfer windows is to eliminate unfair competition they have to admit that the effect of the regulation restricts competition in the market for players. It is within this supply market clubs compete to acquire players' services which is essential for the finished product: a football match.²⁷⁷ Transfer windows do not allow the market to dictate when and where

²⁶⁹ Article 5 and 8-9 FIFA Regulations 2008.

²⁷⁰ Case 176/96 *Lehtonen*, 13 April 2000, para. 54.

²⁷¹ Article 6.1 FIFA Regulations 2008.

²⁷² Article 6.2 FIFA Regulations 2008.

²⁷³ Case COMP/37 806: ENIC/UEFA para 25.

²⁷⁴ The Commission on Sport – Competition law, section 2.1.3. http://ec.europa.eu/sport/white-paper/whitepaper112_en.htm#1.

²⁷⁵ Case 37398 *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2203 L 291/25, para. 106.

²⁷⁶ It is vertical because it is an agreement among clubs stating that they are going to operate at the same level within the market. All clubs are buyers (contract players etc.) and sellers (sell tickets, broadcasting rights etc.).

²⁷⁷ Schiera, 32 *Brooklyn Journal of International Law*, 2007, p. 733.

players' services are most wanted which allow the big clubs to hold onto their money so that they can pick and choose between the top players available when the windows re-open. Furthermore, it prevents clubs with a closed window to replace players obtained by clubs with an open window and consequently deny clubs an opportunity which they would have in the absence of the restriction. The market for players is, however, not the only relevant market where transfer windows restrict competition. The selling market where football is sold to media, spectators and other consumers is also affected.²⁷⁸ This market would benefit by competitively balanced football and less predictable results. However, the transfer windows have the opposite effect. Results and championship winners are becoming more and more predictable which is causing attendance to drop. A phenomenon that in the long run will hurt both the industry and the consumers.

The effect of the transfer windows is certain to be appreciable since all clubs in the professional European football market is organised under UEFA.²⁷⁹ Finally, the transfer windows are affecting trade between Member States. An example of such an effect can be seen when a club in one Member State only is able to sell, and not purchase, players due to the fact that their transfer window is closed while clubs in a league with an open window still can purchase players from that club. Without transfer windows clubs would be able to buy and sell players between Member States when necessary.

As a result it is likely that the FIFA transfer windows falls within Article 81(1) EC and should be rendered void according to Article 81(2) unless it meets the criteria for an exemption under Article 81(3) EC.

6.1.3 Article 81(3) EC

As stated above an agreement can be exempted under 81(3) EC if its competitive benefits outweigh its restrictive effects. This is determined by the means of four conditions which are cumulative.²⁸⁰ The fourth condition, aimed at protecting competitors not party to the agreement from being pushed out of the market can, however, be dismissed. This has to do with the fact that all professional European football clubs are organised under UEFA and therefore part of the agreement which means that there is no competition to be eliminated.²⁸¹ The other conditions under Article 81(3) EC are; there must be some efficiency gained from the agreement; the benefits created must be passed on to the consumers and the restriction must be the least restrictive means of creating such benefits.²⁸²

The "windows system" was supposed to prevent larger, richer clubs from buying any player at any time and hopefully eradicate the notion of an European elite. This has, as shown above, failed and can consequently not be regarded as an efficiency gain or benefit, rather the opposite. Transfer windows can, however, be held to improve competition in the way of preventing late transfers and therefore safeguarding the proper functioning of sporting competitions. This limit in the supply market has the effect that clubs are not able to, in a late stage of the competition, alter the sporting strength of their team in the race for the

²⁷⁸ Schiera, 32 Brooklyn Journal of International Law, 2007, p. 733.

²⁷⁹ History of UEFA, <http://www.footymash.com/history-of-uefa/>.

²⁸⁰ Craig, De Búrca, p. 976-977.

²⁸¹ Craig, De Búrca, p. 979. And Schiera, 32 Brooklyn Journal of International Law, 2007, p. 737.

²⁸² Craig, De Búrca, p. 977-979.

championship. The restriction can also be held to bring about some sort of stability of employment and team stability. This means that a better product, football match, can be sold to advertisers, spectators and broadcasters in the selling market and because the improved product is passed on to the consumers the first two conditions are satisfied.

However, it is not clear that the FIFA transfer windows would be regarded as the least restrictive means of creating these benefits. The restrictive agreement, the regulation stating that football clubs are forbidden to conduct any player transfers in 36 out of the 52 weeks of the year cannot be deemed necessary in order to achieve these efficiencies. Transfer windows are too restrictive and the same competitive benefit, preventing late transfers, can be created with a less restrictive measure such as a transfer prohibition covering the last month of the league or the period necessary to comprise the notion of “late transfers”. Furthermore, team stability and stability of employment is already secured by the FIFA rules preventing players from changing teams without their current clubs consent.

6.2 Conclusion

According to the analysis, the FIFA “windows system” should not be regarded as a sporting rule that pursues a legitimate objective and whose effects are inherent and proportionate to its objective. Furthermore, the rule is likely to fall under Article 81(1) EC and should be rendered void according to Article 81(2) unless it meets the criteria for an exemption under Article 81(3) EC. It is, however, unlikely that the pro-competitive benefits of the FIFA transfer windows outweigh its restrictive effects since it is improbable that they would be considered the least restrictive means of creating these benefits. Subsequently, the FIFA “windows system” would not qualify for an exemption under Article 81(3) EC and should, if challenged, be void under Article 81(2) EC.

7 Discussion

Sport is special. Football clubs need each other - they need their opponents. Without a healthy rivalry among clubs, professional leagues would cease to exist and this interdependency between the operators is what separates the sport market from “normal markets”. However, within the European Union there is a fundamental need to uphold an effective internal market and I find it obvious that sport should be subject to EC law. Nevertheless, due to the above mentioned, I believe that the law must respect the special characteristics of sport and that it should not be applied in a way that ignores these special features. However, the difficulty is to decide where sport has a credible claim to special treatment.

I believe that there is a need for a rule that prevents football clubs from altering their rosters towards the end of the season for the reason that it would preserve the appeal and the unpredictability of the end of a championship. This type of restriction would preserve the only pro-competitive benefit produced by the transfer windows. However, the FIFA rules regarding restricted transfer periods, are too restrictive. As designed today they limit the freedom of movement for players in an excessive way and do more harm than good to the competitive balance in European football. The attempt to establish an equal buying market and subsequently eliminate unfair competition must be regarded as a total failure and I do not believe that this was the effect that the Commission was looking for. My opinion is therefore, due to the fact that they provide little benefit to the sport, that the FIFA rules regarding restricted transfer periods should be radically liberalised.

Following the *Bosman* ruling, the EU has struggled to solve the dilemma of the relations between the legal order established by the EC Treaty and the legal order governing sport. A solution to this dilemma might lie in the Treaty of Lisbon which was planned to be ratified throughout the EU by the end of 2008. Within this Treaty sport is given a special status and EU's competence in sport will subsequently be increased. However, since the Lisbon Treaty has not yet been ratified, the EU, for the moment, has to settle for a rather toothless document labelled “the White Paper on Sport” and a bunch of precedent cases as their only tools to regulate sport.

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Appendix

The dates for the transfer periods.

Organisation	Division	Type	Championship dates		Mid-Season Break		Transfer Summer Window		Transfer Winter Window	
			Start	Finish	Start	Finish	Start	Finish	Start	Finish
Deutsche Fussball Liga GmbH	Bundesliga	Top Division	15.08.2008	31.05.2009	16.12.2008	29.01.2009	01.07.2008	31.08.2008	01.01.2009	31.01.2009
	2. Bundesliga	Division #2	15.08.2008	31.05.2009	16.12.2008	29.01.2009	01.07.2008	31.08.2008	01.01.2009	31.01.2009
FAI eircom League	eircom Premier Division	Top Division	07.03.2008	14.11.2008	09.06.2008	18.06.2008	01.07.2008	31.07.2008	01.12.2008	22.02.2009
	eircom First Division	Division #2	07.03.2008	14.11.2008	09.06.2008	18.06.2008	01.07.2008	31.07.2008	01.12.2008	22.02.2009
Finnish Football League Association	Veikkausliiga	Top Division	27.04.2008	26.10.2008	27.05.2008	24.06.2008	01.08.2008	31.08.2008	01.03.2009	30.04.2009
Divisionforeningen	SAS Ligaen	Top Division	19.07.2008	31.05.2009	07.12.2008	28.02.2009	12.06.2008	31.08.2008	01.01.2009	31.01.2009
	Viasat Divisionen	Division #2	09.08.2008	13.06.2009	23.11.2008	21.03.2009	12.06.2008	31.08.2008	01.01.2009	31.01.2009
	2. Division Øst /	Division #3	09.08.2008	13.06.2009	23.11.2008	21.03.2009	12.06.2008	31.08.2008	01.01.2009	31.01.2009
Föreningen Svensk Elitfotboll	Allsvenskan	Top Division	30.03.2008	09.11.2008	No break	No break	01.07.2008	31.07.2008	01.01.2009	31.03.2009
	Superettan	Division #2	11.04.2008	25.10.2008	No break	No break	01.07.2008	31.07.2008	01.01.2009	31.03.2009
Super League Greece	A National Division	Top Division	31.08.2008	03.05.2009	21.12.2008	04.01.2009	01.07.2008	31.08.2008	01.01.2009	31.01.2009
Koninklijke Nederlandse Voetbalbond - Eredivisie	Eredivisie	Top Division	29.08.2008	03.05.2009	01.01.2009	16.01.2009	08.06.2008	31.08.2008	03.01.2009	31.01.2009
Koninklijke Nederlandse Voetbalbond - Eredivisie	Eredivisie	Division #2	08.08.2008	05.05.2009	19.12.2008	16.01.2009	08.06.2008	31.08.2008	03.01.2009	31.01.2009
Lega Nazionale Professionisti	SERIE A TIM	Top Division	31.08.2008	31.05.2009	No break	No break	01.07.2008	01.09.2008 (19hs)	07.01.2009	02.02.2009 (19hs)
	SERIE B TIM	Division #2	30.08.2008	to be defined	No break	No break	01.07.2008	01.09.2008 (19hs)	07.01.2009	02.02.2009 (19hs)
Liga Nacional de Fútbol Profesional	Liga BBVA	Top Division	31.08.2008	31.05.2009	22.12.2008	03.01.2009	01.07.2008	01.09.2008	01.01.2009	31.01.2009
	Liga Adelante	Division #2	31.08.2008	31.05.2009	22.12.2008	03.01.2009	01.07.2008	01.09.2008	01.01.2009	31.01.2009
Liga Portuguesa de Futebol Profissional	Liga Sagres	Top Division	01.07.2008	31.06.2009	No break	No break	01.07.2008	31.08.2008	01.01.2009	31.01.2009
	Liga Vitalis	Division #2	01.07.2008	31.06.2009	No break	No break	01.07.2008	31.08.2008	01.01.2009	31.01.2009
Ligue de Football Professionnel	Ligue 1 Orange	Top Division	09.08.2008	31.05.2009	21.12.2008	02.01.2009	25.06.2008	01.09.2008	01.01.2009	31.01.2009
	Ligue 2 Orange	Division #2	01.08.2008	31.05.2009	21.12.2008	02.01.2009	25.06.2008	01.09.2008	01.01.2009	31.01.2009
Ligue Professionnelle de Football	Jupiler League	Top Division	16.08.2008	15.05.2009	22.12.2008	14.01.2009	01.06.2008	31.08.2008	01.01.2009	31.01.2009
Österreichische Fußball-Bundesliga	T-Mobile Bundesliga	Top Division	08.07.2008	30.05.2009	14.12.2008	21.02.2009	08.06.2008	31.08.2008	01.01.2009	31.01.2009
	Red Zac Erste Liga	Division #2	11.07.2008	29.05.2009	28.11.2008	20.03.2009	08.06.2008	31.08.2008	01.01.2009	31.01.2009
Scottish Premier League	The Scottish Premier	Top Division	09.08.2008	24.05.2009	No Break	No Break	09.06.2008	31.08.2008	01.01.2009	31.01.2009

Organisation	Division	Type	Championship dates		Mid-Season Break		Transfer Summer Window		Transfer Winter Window	
			Start	Finish	Start	Finish	Start	Finish	Start	Finish
Swiss Football League	Axpo Super League	Top Division	16.07.2008	07.06.2009	14.12.2008	07.02.2009	10.06.2008	31.08.2008 (int'l)	15.01.2009	15.02.2009 (int'l)
	Challenge League	Division #2	26.07.2008	07.06.2009	07.12.2008	21.02.2009	10.06.2008	31.08.2008 (int'l) 30.09.2008 (nat)	15.01.2009	15.02.2009 (int'l) 28.02.2009 (nat)
The Premier League	The F.A. Premier League	Top Division	16.08.2008	24.05.2009	No break	No break	End of Season 07/08	01.09.2008	01.01.2009	02.02.2009 TBC
The Football League	Coca-Cola Championship	Division #2	09.08.2008	03.05.2009	No break	No break	End of Season 07/08	31.08.2008	31.12.2008 Midnight	31.01.2009
	Coca-Cola League 1	Division #3	09.08.2008	03.05.2009	No break	No break	End of Season 07/08	31.08.2008	31.12.2008 Midnight	31.01.2009
	Coca-Cola League 2	Division #4	09.08.2008	03.05.2009	No break	No break	End of Season 07/08	31.08.2008	31.12.2008 Midnight	31.01.2009
Bulgarian Professional Football League	Bulgarian A Professional Football Group	Top Division	09.08.2008	June 2009	30.11.2008	March 2009	01.07.2008	31.08.2008	01.01.2009	28.02.2009
Norsk Toppfotball	Adeccoligaen	Division #2	06.04.2008	02.11.2008	09.06.2008	29.06.2008	01.08.2008	31.08.2008	01.01.2009	31.03.2009
Polish Professional Football League	Orange Ekstraklasa	Top Division	26.07.2008	30.05.2009	08.12.2008	28.02.2009	01.07.2008	31.08.2008	01.02.2009	28.02.2009
Welsh Premier League	Principality Welsh	Top Division	15.08.2008	25.04.2009	No break	No break	04.07.2008	28.09.2008	02.01.2009	30.01.2009
Russian Football Premier League	Russian Premier League	Top Division	14.03.2008	22.11.2008	16.05.2008	05.07.2008	07.07.2008	31.08.2008	14.02.2009	12.03.2009
Professional Football League of Ukraine	Vyscha Liha	Top Division	19.07.2008	to be defined	29.11.2008	to be defined	01.07.2008	31.08.2008	28.01.2009	28.02.2009
	Persha Liha	Division #2	21.07.2008	to be defined	23.11.2008	to be defined	01.07.2008	31.08.2008	28.01.2009	28.02.2009
	Druha Liha	Division #3	21.07.2008	to be defined	26.11.2008	to be defined	01.07.2008	31.08.2008	28.01.2009	28.02.2009