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EUROPEAN FOOTBALL'S HOME-GROWN PLAYERS RULES AND NATIONALITY DISCRIMINATION UNDER THE EUROPEAN COMMUNITY TREATY

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I. INTRODUCTION

Sport in Europe is considered to embody important social and cultural functions,¹ and the economic impact of sport is also significant.² There is no bigger sport in Europe than football. In recent years, football has been uncomfortably confronted by the application of provisions of the Treaty of the European Union (the “Treaty”) to its activities. These confrontations have compelled major adjustments to the sport’s organization.³

This article examines the legal status of recent proposals for “home-grown player” rules in football—rules that involve quotas on the selection of football players in European club competitions. The conclusions of the home-grown player rules’ analysis indicate that further uncomfortable moments may be in store for the football authorities in Europe.

Protection against discrimination on the basis of nationality is a fundamental protection provided by the Treaty.⁴ Yet the home-grown player proposals—of their very nature—involve nationality based discrimination or

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1. See, e.g., Case C-415/93, *Union Royale Belge Sociétés de Football Ass’n v. Bosman* (Bosman), 1995 E.C.R. I-4921, ¶ 106 (recognizing “the considerable social importance of sporting activities and in particular football in the Community”).

2. Sport accounts for 3.7% of the GDP of the European Union and 5.4% of the European labor market. *Commission White Paper on Sport*, § 3, COM (2007) 391 final (July 11, 2007); see also RICHARD PARRISH & SAMULI MIETTINEN, *THE SPORTING EXCEPTION IN EUROPEAN UNION LAW* 49 (2008).

3. For example, football’s transfer regulations and its regulations imposing nationality restrictions in European football were invalidated as inconsistent with the Treaty of the European Union (the “Treaty”) in *Union Royale Belge Sociétés de Football Ass’n v. Bosman*. *Bosman*, 1995 E.C.R. I-4921, ¶ 137.

4. *Id.* ¶ 93.

at least constitute obstacles to the exercise of freedom of movement rights that are protected by the Treaty.⁵ When faced with the application of the Treaty, sport has argued that it has special characteristics that entitle it to special consideration or exemption from the Treaty. This “specificity” of sport is in fact recognized by the European Court of Justice in its application of Treaty provisions to sporting activity.⁶ However, the scope of any sporting exemption from the Treaty is very narrow and will not assist in a challenge to the validity of the home-grown rules. Ultimately, to the extent that the home-grown rules impinge on the freedoms contained within the Treaty, they will need to be objectively justified by the football authorities.⁷

This article outlines the background to the home-grown rules and the perspectives of the European institutions on the rules. The operation of the general Treaty law relating to nationality discrimination is then described, followed by a specific discussion of the application of the Treaty provisions in the sporting context, including the scope of any sporting exception to the Treaty and any special treatment for sport in the application of the Treaty. The final part of the article then deals with the justifications of the home-grown player rules and includes a discussion of other non-discriminatory alternatives. The conclusion of this analysis is that the home-grown player rules are not consistent with the fundamental freedoms of the Treaty and are unlikely able to be objectively justified.

II. BACKGROUND

A. *The Organization of European Football*

The European Court of Justice (the “Court”) in the landmark *Union Royale Belge Sociétés de Football Ass’n v. Bosman* case⁸ succinctly described the organization of football in Europe:

Association football, commonly known as “football,” professional or amateur, is practised as an organized sport in clubs which belong to national associations or federations in each of the Member States. . . . The associations hold national championships, organized in divisions depending on the sporting status of the participating clubs.

5. *See id.* ¶ 104.

6. *See* Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681, ¶ 33.

7. *See Bosman*, 1995 E.C.R. I-4921, ¶ 121.

8. *See generally id.*

The national associations are members of the Fédération Internationale de Football Association (“FIFA”), an association governed by Swiss law, which organizes football at world level. FIFA is divided into confederations for each continent The confederation for Europe is UEFA [(Union des Associations Europeennes de Football)], also an association governed by Swiss law. Its members are the national associations of some 50 countries, including in particular those of the Member States which, under the UEFA Statutes, have undertaken to comply with those Statutes and with the regulations and decisions of UEFA.⁹

Local professional clubs are members of the national associations, and each player is required to be registered with the national association for the club that he plays for in order to be eligible. To play in UEFA sponsored matches, clubs must comply with UEFA rules.¹⁰

B. UEFA’s “Home-Grown” Player Rule

In 2004, there were calls to “create [a] level playing field” by the introduction of a Europe-wide policy on clubs using home-grown players.¹¹ UEFA claimed that its studies showed that, compared to 1995-1996 when the *Bosman*¹² ruling was made, the number of players trained in an association and playing in that association’s top league had reduced by thirty percent.¹³

9. *Id.* ¶¶ 3-4. The conduct of football matches was described as: “[e]ach football match organized under the auspices of a national association must be played between two clubs which are members of that association or of secondary or subsidiary associations affiliated to it. The team fielded by each club consists of players who are registered by the national association to play for that club. Every professional player must be registered as such with his national association and is entered as the present or former employee of a specific club.” *Id.* ¶ 5; see also PARRISH & MIETTINEN, *supra* note 2, at 18 (noting that there are now fifty-three members of UEFA).

10. See generally Case C-415/93, Union Royale Belge Sociétés de Football Ass’n v. Bosman, 1995 E.C.R. I-4921.

11. Proposals called for the inclusion of at least seven or eight home-grown players out of the eighteen on a club’s team-sheet for any given match. Simon Hart, *Call to ‘Create Level Playing Field’*, UEFA.COM, Oct. 4, 2004, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=242608.html>. The policy would also limit the number of players on a team squad to twenty-five. *Id.*

12. See generally *Bosman*, 1995 E.C.R. I-4921.

13. Mark Chaplin, *UEFA Out to Get the Balance Right*, UEFA.COM, Feb. 3, 2005, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=277348.html> [hereinafter Chaplin, *UEFA Balance*] (quoting UEFA Chief Executive Lars-Christer Olsson). There are some questions about this claim. It is not clear whether this trend immediately followed *Bosman*, or was a continuation of a longer term trend. Nor is it clear that this was a uniform trend across European nations with an analysis of training in English football showing that there was not a substantial decrease in training

Negative trends in European football identified by UEFA included “lack of incentive in training players, lack of identity in local/regional teams, lack of competitive balance,¹⁴ [and the] ‘hoarding’ of players and related problems for national teams.”¹⁵

In early 2005,¹⁶ UEFA adopted regulations with the effect of requiring each club by 2008-2009 to have four club-trained players and four players trained by other clubs belonging to the same national association in its twenty-five man squad.¹⁷ These regulations are known as the “home-grown players rule.” The regulations remain principally limited to club competitions conducted by FIFA and do not generally apply within the national football leagues conducted by the member associations of UEFA.¹⁸

levels following *Bosman*. Braham Dabscheck, *Labor Hoarding in English Football*, SPORTING TRADITIONS, Nov. 2002, at 43. This study also showed that the practice of player hoarding had in fact produced an increase in the number of players employed by clubs. *Id.*

14. UEFA studies showed that for approximately ten years, European football competitions had become less balanced with the same clubs frequently competing for honours in many countries. Chaplin, *UEFA Balance*, *supra* note 13.

15. Mark Chaplin, *Homegrown Player Plans Revealed*, UEFA.COM, Feb. 3, 2005, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=276829.html> [hereinafter Chaplin, *Homegrown Player*]; see also UEFA, INVESTING IN LOCAL TRAINING OF PLAYERS, KEY MESSAGES (2005), available at http://www.uefa.com/multimediafiles/download/uefa/uefamedia/273604_download.pdf. Despite the linking of these claims with the *Bosman* decision, the home-grown player proposal was claimed to not be “about quotas or foreigners or nationality or reversing *Bosman*.” Hart, *supra* note 11 (quoting Gianni Infantino, UEFA’s director of legal services); see also UEFA, INVESTING IN LOCAL TRAINING OF PLAYERS, Q & A (2005), available at http://www.uefa.com/multimediafiles/download/uefa/uefamedia/273606_download.pdf (“Our proposals have nothing to do with the nationality of players and we are not trying to impede free movement.”). *Id.*

16. Europe’s national football associations approved UEFA’s proposals on April 21, 2005. *Homegrown Plan Wins Approval*, UEFA.COM, Apr. 21, 2005, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=297230.html>.

17. The proposal to limit squads to twenty-five players was designed to prevent a practice that had been identified where clubs “hoarded” players in bigger squads to prevent other clubs from obtaining these players, many of whom ended up not even playing for their club. Chaplin, *UEFA Balance*, *supra* note 13. “[S]hould we accept that a very rich club can buy an unlimited number of players, pay them massive salaries, and ensure that their smaller rivals never have a chance to win a competition? That is not what sport is about.” UEFA, INVESTING IN LOCAL TRAINING OF PLAYERS, Q & A *supra* note 15. A “club trained player” is a player who irrespective of his nationality and age has been registered with his current club for three years between the ages of fifteen and twenty-one. An association trained player is required to meet the same criteria but at another club belonging to the same football association. Richard Parrish & Samuli Miettinen, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 ENT. & SPORT L. J. 2, ¶ 3 (2007), available at http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number2/miettinen_parrish.

18. There are currently two Europe wide football competitions for club teams organised by UEFA, the UEFA Cup and the Champion’s League. See generally UEFA.COM, <http://www.uefa.com> (last visited Oct. 29, 2009). UEFA has asked its fifty-two member associations to consider implementing complementary regulations. However, in the absence of complementary regulations

While UEFA's "4+4 rule" bears a strong resemblance to the organization's "3+2 rule," which was adopted in 1991 but became unenforceable after *Bosman*,¹⁹ the proposal was thought by UEFA to be legal "because it is a sporting rule, not a restriction, to develop and promote young players."²⁰ It is argued that the relevant difference between the 4+4 rule and the 3+2 rule is that the 3+2 rule required the club to field the requisite number of locally trained players while the 4+4 rule merely requires that these players be retained in a club's playing squad. If this is correct, in this sense, any discriminatory effect of the UEFA home-grown players rule is likely to be indirect rather than direct. The rule is not directly discriminatory as it does not by its terms impose a restriction on the employment of non-nationals. Instead, employment opportunities for non-nationals—when compared with the employment opportunities for nationals—may be indirectly reduced because the training requirements of the 4+4 rule are more likely to be fulfilled by nationals than non-nationals.²¹ The indirect nature of any nationality-based discrimination produced by the rule raises the question as to whether there are sufficient grounds under European Union (EU) law prohibiting nationality discrimination to objectively justify the rule.

applying to the domestic competitions conducted by each member association, the 4+4 rule and the 25-man squad rule would apply only to the club competitions conducted by UEFA. National associations appear to have been slow to adopt the home-grown player rule. The rules relating to the English Premier League for example contain neither the 4+4 requirement, nor the 25 man squad limit. See PREMIER LEAGUE, *Rules of the Premier League*, PREMIER LEAGUE HANDBOOK (2008), available at <http://www.premierleague.com/staticFiles/bb/3b/0,,12306~146363,00.pdf>; see also Benitez Brands *UEFA's Home-Grown Rule a Mistake*, ESPNSOCCER.NET, Sept. 10, 2008, <http://soccer.net.espn.go.com/news/story?id=570809&cc=3436> (quoting Premier League club Liverpool's coach, Rafa Benitez as saying, "[c]learly I think it is a mistake. When you play in the Champions League, you need the best players you have on the pitch. It is not about where you are from, it is about the best players. I would understand if this rule came in for the Premier League, but not for the Champions League.").

19. Case C-415/93, *Union Royale Belge Societes de Football Association v. Bosman* (Bosman), 1995 E.C.R. I-4921, ¶ 27; Lindsey Valaine Briggs, *UEFA v The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 447-48 (2005). Interestingly, following the *Bosman* decision, UEFA refused to recognize the decision and maintained its transfer rules until threatened with fines by the EU Commissioner of Competition. Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 295 (2005); see Rachel Arndt, *European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT'L L. REV. 1091, 1104 (1998) (describing the 3+2 rule); see also William Duffy, *Football May be Ill, But Don't Blame Bosman*, 10 SPORTS LAW. J. 295, 301-02 (2003).

20. Chaplin, *Homegrown Player*, *supra* note 15 (quoting UEFA Chief Executive Lars-Christer Olsson).

21. See Parrish & Miettinen, *supra* note 17, ¶ 17. However, players are employed by their clubs even if they do not take the field in a match. This distinction may therefore be illusory.

C. FIFA 6+5 Rule

In a divergence of opinion amongst football's governing bodies, FIFA—the world governing body of football—considers that the 4+4 or home-grown rule of UEFA has a major shortcoming in that it does not protect players eligible to play for the national team of the country where the club is based.²² FIFA considers that the rule could be subverted by clubs merely buying in players from abroad at younger ages.²³

Accordingly, FIFA proposed a rule known as the “6+5 rule.”²⁴ The 6+5 rule provides that a club team must start a match with at least six players that would be eligible for the national team of the country in which the club is domiciled.²⁵ FIFA's rationale for the 6+5 rule echoes the concerns of UEFA that led to its home-grown players rule:

Over the years and decades, by signing more and more foreign players, clubs have gradually lost their identity, first locally and regionally, and today even nationally as in some cases all players hail from abroad or even from a different continent[.] . . . “Young players lose their motivation in the same way as their perspectives dwindle in terms of one day getting a chance to play in their favourite club's first team. Strong club competitions with huge prize money for the

22. *Blatter: '6+5' Rule Is Crucial*, FIFA.COM, May 7, 2008, <http://www.fifa.com/aboutfifa/federation/president/news/newsid=762500.html>.

23. *Id.*

24. *Id.*

25. Media Release, FIFA, Yes In Principle to 6+5 Rule (Feb. 5, 2008), *available at* <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=684707.html> [hereinafter *Yes in Principle*]. The rule carries no limitation on the number of non-eligible players who may be contracted to a club and does not limit the use of substitutes during a match, with the effect that a team that begins a match with 6+5 may end it with 3+8. The rule is proposed to be incrementally implemented beginning in the 2010-2011 season with 6+5 operating for the 2012-2013 season. Media Release, FIFA, FIFA Congress Supports Objectives of 6+5 (May 30, 2008) *available at* <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783657.html> [hereinafter *Congress Supports Objectives*]. The rule resembles a proposal of UEFA that was rejected by EU officials in 2000 for six players in each club team to be required to be eligible for the national team of the country in which the club was based. *See Briggs, supra* note 19, at 448. A significant majority of delegates (155 in favour with 5 opposing) to the 58th FIFA Congress held in Sydney on May 29-30, 2008 voted in favour of a resolution that supported the objectives of “6+5” and requested the Presidents of FIFA and UEFA “all possible means within the limits of the law to ensure that these crucial sporting objectives be achieved” *Congress Supports Objectives, supra* note 25. FIFA has also claimed that continents like South America and Africa are supportive of the rule “as they are the suppliers for the big European clubs and they are suffering from the exodus of their players.” *Blatter: '6+5' Rule is Crucial, supra* note 22.

participating clubs have brought about a two-tier society in many countries as the gulf between the haves and the have-nots has widened. Only two or three teams play for the league title and all others are fighting against relegation.²⁶

FIFA claims that in the five main European championships,²⁷ four-fifths of the teams are battling to avoid relegation to a lower division and that this is “proof that a minority of clubs control everything – money, players and means.”²⁸

Like UEFA, FIFA claims that its 6+5 rule is compatible with European laws relating to nationality discrimination.²⁹ Somewhat strangely in light of the restrictions the rule imposes on its members’ fundamental rights, it also appears that the international footballers’ union, FIFPro, also supports the 6+5 rule.³⁰ The FIFA 6+5 rule amounts to direct nationality discrimination.³¹ As will be demonstrated, it is highly unlikely that such a rule would survive a challenge to its legality under the Treaty. A challenge to the home-grown player rules would be ultimately determined by the Court.³² Before examining the approach that the Court would take to the analysis of these rules, the context of the debate about these rules will be framed by reference to

26. Yes In Principle, *supra* note 25 (quoting FIFA President Joseph S Blatter).

27. The five main European Championships include: Italy, Germany, England, Spain, and France.

28. Blatter: ‘6+5’ Rule Is Crucial, *supra* note 22. Associated with the 6+5 rule is a proposal by FIFA to stem what it considers misuse of the requirement for a player to reside in a country for a minimum of two years in order to take on the nationality of the player’s new home country. FIFA proposes to increase this period to five years. *Id.* (quoting FIFA President Sepp Blatter as claiming, “[i]f we do not, I would not be surprised if in 2014, half the players in the world cup were of Brazilian origin . . .”).

29. *Id.* It makes this claim on the basis that clubs would remain free to employ as many foreign players as they want. *Id.* However they would be required to begin each match with six players who are eligible to play for the national team of the country in which the club is based. *Id.* The rule is also claimed to support economic competition rules by promoting the broadest and fairest competition and restricting the concentration of finances and economic monopolies. *See id.*

30. FIFA & FIFPRO, MEMORANDUM OF UNDERSTANDING, Nov. 2, 2006, cl. 2.6, available at www.pfa.net.au/uploads/FIFPro-MOU-FinalSig.pdf. It may be speculated that FIFPro’s support of the rule is predicated upon the alleged beneficial effects of the rule in supporting the domestic football competitions in which its members are employed. As discussed below, these alleged benefits may be doubted. It should also be noted that FIFPro has “form” in not supporting the loosening of restrictions on the player market. The player Jean-Marc Bosman was not supported by the player union in his challenge to the restrictive transfer and nationality restrictions in *Bosman*, though he did receive some support from individual national football player unions. *See generally* C-415/93, *Union Royale Belge Sociétés de Football Association v. Bosman* (Bosman), 1995 E.C.R. I-4921.

31. PARRISH & MIETTINEN, *supra* note 2, at 197.

32. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) art. 225 [hereinafter EC Treaty].

the views of the other European Community institutions, the European Parliament and the European Commission, and by what is known as the European Model of Sport.

D. European Parliament's View of Home-Grown Player Rules

Despite the view of FIFA on the legality of its 6+5 rule, the European Parliament has formed a contrary opinion. In May 2008, the European Parliament passed a resolution on the European Commission's *White Paper on Sport*.³³ Amongst the declarations in its resolution on the White Paper, the European Parliament affirmed "the basic applicability of EU non-discrimination legislation to the field of sports in Europe . . ."³⁴ Reflecting existing European Court of Justice jurisprudence, it expressed the view that "a sports body is free to govern its sport where its rules are purely sporting ones, but where they involve restrictions, these must be proportionate, that is, reasonably necessary to achieve their sporting objective(s), within the framework of EU law."³⁵ It also expressed the view that the 6+5 rule proposed by FIFA was directly discriminatory.³⁶

In contrast, UEFA's home-grown player scheme was considered "more proportionate and non-discriminatory."³⁷ In fact, the UEFA home-grown player scheme was enthusiastically and wholeheartedly endorsed by the European Parliament.³⁸ It believed that the rule could "serve as an example to other federations, leagues and clubs."³⁹

33. *Commission White Paper on Sport, supra* note 2.

34. Parliament Resolution of 8 May 2008 on the White Paper on Sport (INI/2007/2261) ¶ 96 (May 8, 2008) [hereinafter Parliament Resolution] (providing that the European Parliament "[a]ffirms the basic applicability of EU non-discrimination legislation to the field of sports in Europe and calls on the Commission to ensure that any derogations due to the specificity of sports are both legal and limited in scope; considers that there are certain instances, in view of the specific characteristics of sport, where limited and proportionate restrictions on free movement may be appropriate, useful and necessary in order to promote sport in Member States.").

35. *Id.* ¶ 7.

36. *Id.* ¶ 98.

37. *Id.* (providing that the European Parliament "[c]alls on the Member States and sports associations not to introduce new rules that create direct discrimination based on nationality (such as the 6 + 5 rule proposed by FIFA, in contrast to UEFA's more proportionate and non-discriminatory home-grown player scheme); advocates political dialogue with the Member States as a means of combating discrimination in sport by way of recommendations, structured dialogue with those involved in sport and infringement procedures when considered appropriate.").

38. *Id.*

39. *Id.* ¶ 34. The European Parliament openly expressed itself "in favour of stricter application of the FIFA regulations banning transfers of players aged under 16 within the EU and [endorsed] the principle that players should sign their first professional contract with the club which has trained them." *Id.* ¶ 37. It also suggested that "to combat the exploitation of girls and boys in sports and

E. *European Commission's View of Home-Grown Player Rules*

The European Commission is the “guardian” of the EU treaties, and “it is the Commission’s duty to uphold the free movement of people in the Internal Market.”⁴⁰ Following *Bosman*, which prohibited discrimination on grounds of nationality in sport where sportspeople can be considered to be workers,⁴¹ the Commission pledged to “continue its efforts to combat discrimination based on nationality in all sports.”⁴² Yet limited and proportionate restrictions to the principle of free movement are accepted by the Commission.⁴³ The right to select national athletes for national team competitions,⁴⁴ the need to limit the number of participants in a competition,⁴⁵ and the setting of deadlines for transfers of players in team sports⁴⁶ are examples of accepted limited and

child trafficking . . . a higher level of legal security, in particular in the application of the ‘home-grown players rule’, is desirable.” *Id.* ¶ 38. Perhaps elevating the European Commission beyond its role, the Parliament called on the Commission “to recognise the legality of measures favouring the promotion of players who have come through training schemes, such as a minimum number of locally-trained players, irrespective of their nationality, on the professional staff[.]” *Id.* ¶ 36. In *Bosman*, the Court observed “except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty. Case C-415/93, *Union Royale Belge Societes de Football Association v. Bosman* (*Bosman*), 1995 E.C.R. I-4921, ¶ 136. In no circumstances does it have the power to authorize practices which are contrary to the Treaty.” *Joined Cases 142/80 and 143/80 Amministrazione delle Finanze dello Stato v. Essevi and Salengo* [1981] ECR 1413, ¶16.

40. European Commission, *Free Movement of Sports People*, EUROPEAN COMMISSION, Mar. 14, 2008, available at http://ec.europa.eu/sport/what-we-do/doc51_en.htm.

41. *Bosman*, 1995 E.C.R. I-4921, ¶¶ 195-96. “[N]ationals of [a] Member State[] have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to free movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned” *Id.*

42. European Commission, *supra* note 40.

43. The historical organization of sport on the basis of nation-state and competitions between national teams “cannot be a reason to discriminate. The Treaties, which establish the right of every citizen of the Union to move and reside freely in the territory of the Member States, prohibit discrimination on grounds of nationality.” *Commission Staff Working Document Accompanying Document to the White Paper on Sport*, SEC (2007) 935, § 4.2.1 (July 11, 2007) [hereinafter *Commission Staff Working Document*].

44. The composition of national teams is inherent in the organization of competitions of opposing national teams. Accordingly, rules that exclude non-national sportspeople from national teams are considered not to infringe the Treaty’s free movement provisions. Case C-36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 8; Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333, ¶ 14; *Bosman*, 1995 E.C.R. I-4921, ¶ 127.

45. *Joined Cases C-51/96 and C-191/97, Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 64.

46. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681, ¶ 53.

proportionate restrictions.⁴⁷

Like the European Parliament, the European Commission considers that the FIFA 6+5 rule is directly discriminatory and incompatible with EU law.⁴⁸ Regarding the UEFA 4+4 rule, the Commission's position is more equivocal. It has launched a study on the training of young sportsmen and sportswomen in Europe and so has effectively reserved its judgment, though the Commission clearly considers that quotas of locally trained players could be compatible with the Treaty protections for free movement.⁴⁹

Whatever view the Commission finally comes to, it cannot be assumed that the Commission's view of the UEFA home-grown players rule would be shared by the European Court of Justice. It is the Court that has the role of ruling on the validity of the rule under the terms of the Treaty.⁵⁰ *Bosman* is one example of the Court coming to a different view to the Commission.⁵¹ The Commission's inaction on the 4+4 rule, pending further evidence and information on its operation, is also open to be criticised as being plainly inconsistent with European Court of Justice decisions regarding indirect discrimination. The Court has made it clear that the mere likelihood of discriminatory effect is sufficient to prohibit such rules affecting Community workers.⁵² It is to be observed that the two different versions of home-grown player rules proposed by FIFA and UEFA differ only in degree. The discriminatory effect of the 4+4 rule may be less than that of the 6+5 rule, but

47. European Commission, *supra* note 40.

48. Press Release, European Commission, UEFA Rule on 'Home-Grown Players': Compatibility with the Principle of Free Movement of Persons (May 28, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807>.

49. *Commission White Paper on Sport*, *supra* note 2, § 2.1(9) (noting that, to be valid, such quotas would not be allowed to lead to direct discrimination, and any indirect discrimination would need to be "justified as proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players"). Following the Independent European Sports Review 2006, the European Commission's *White Paper on Sport* was designed to state the Commission's policy position on sport. PARRISH & MIETTINEN, *supra* note 2, at 43.

50. Case C-415/93, *Union Royale Belge Societes de Football Association v. Bosman* (*Bosman*), 1995 E.C.R. I-4921, ¶ 67.

51. Of the Commission's participation in the drafting of the impugned rule, the court said: "Finally, as regards the argument based on the Commission's participation in the drafting of the '3 + 2' rule, it must be pointed out that, except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty" *Id.* ¶ 136. See also *Joined Cases 142/80 and 143/80 Amministrazione delle Finanze dello Stato v. Essevi SpA and Carlo Salengo*, 1981 E.C.R. 1413, ¶ 16 (noting that in no circumstances does it have the power to authorize practices which are contrary to the Treaty).

52. Case C-278/94, *Commission of the European Community v. Kingdom of Belgium*, 1996 E.C.R. I-4307, ¶ 20; Case C-237/94, *O'Flynn v Adjudication Officer*, 1996 E.C.R. I-2617, ¶¶ 18-21; Case C-281/98, *Angonese v Cassa di Risparmio di Bolzano*, 2000 E.C.R. I-4139, ¶ 41; Case C-400/02, *Merida v. Bundesrepublik Deutschland*, 2004 E.C.R. I-8471, ¶ 23.

the intent of both rules may be argued to be the same—to sidestep the effects of the freedom of movement provisions of Article 39 of the Treaty.⁵³

F. The “Specificity of Sport” and European Law

The European Parliament considers that “European sport is an inalienable part of European identity, European culture and citizenship”⁵⁴ and that “sport has a special role in society as an instrument of social inclusion and integration.”⁵⁵ It is argued that due to the special characteristics of sport, allowance or exceptions should be made in the application of general laws to sport. The European Parliament comments that “in certain [circumstances], in view of the specific characteristics and essential and singular features of sport, it cannot be compared with an ordinary economic activity.”⁵⁶

While subject to the general law of the Union, sport has particular characteristics – the specificity of European sport — that are taken into account in the application of EU law.⁵⁷ This specificity is recognised in the nature of sporting activities and rules⁵⁸ as well as in sporting structures.⁵⁹ However, while this specificity is recognised by the case law of the European courts and the decisions of the European Commission, specificity “cannot be construed so as to justify a general exemption from the application of EU law.”⁶⁰

53. Briggs, *supra* note 19, at 449 (making this point in respect of the different versions of home-grown player rules proposed by UEFA at different times). *Id.* at 451 (“The intended effect of the Homegrown Rule is to increase the number of local players on any given club team without expressly requiring selection of players based on nationality. UEFA can thus create de facto nationality quotas without ever using the word ‘nationality’, and UEFA will argue in support of the Homegrown Rule that is largely non-discriminatory in its application. This argument focuses on the *degree* of de facto discrimination.”).

54. Parliament Resolution, *supra* note 34, ¶ B.

55. *Id.* ¶ D (considering that sport “makes an outstanding contribution to the development and promotion of important societal, cultural and educational values, such as fairness, tolerance and mutual respect, solidarity, respect for rules, team spirit, and self-discipline” and “plays a particularly important role in European society in terms of . . . social integration and cultural values . . .”); see also *id.* ¶¶ 45-60.

56. *Id.* ¶ J.

57. *Commission White Paper on Sport*, *supra* note 2, § 4.1.

58. *Id.* “Such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty of outcomes and [the maintenance of] competitive balance between [teams in a league].”

59. *Id.* Such as the autonomy and diversity of sport organizations, a pyramid competition structure from grass roots to the elite level, solidarity measures between different levels and operators, the national organization of sport and the principle of a single federation per sport. *Id.*

60. *Id.* This conclusion was not well received by the sports governing bodies. Gianni Infantino, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?*,

G. The "European Sport Model"

In addition to the specificity of sport, political debate on sport in Europe often refers to the "European Sport Model,"⁶¹ frequently contrasting this model with the "United States Model."⁶² The European Sport Model is considered to be characterised by:

A pyramid structure for the organi[z]ation of sport and sport competitions, and a central role for the sports federations;⁶³

A system of open competitions based on the principle of promotion and relegation;⁶⁴

A broadly autonomous sports movement that may develop partnerships with the public authorities;

Structures based on voluntary activity; and

Solidarity between the various constituent elements and operators.⁶⁵

UEFA.COM, Oct. 2, 2006, 9-11; Media Release, UEFA, EU White Paper on Sport: Much Work Remains to Be Done: Statement of the European Team Sports (July 11, 2007), *available at* <http://www.uefa.com/newsfiles/560350.pdf> [hereinafter EU White Paper on Sport].

61. *Commission Staff Working Document*, *supra* note 43, § 4.1.

62. Stephen Weatherill, *Resisting the Pressures of "Americanisation": The Influence of European Community Law on the "European Model of Sport,"* 8 WILLAMETTE J. INT'L L & DISP. RESOL. 37, 59 (2002). "The Commission's European model is to an extent defined by what it is not: it is not an American model."

63. However, the legitimacy of the role and level of autonomy of the governing bodies of football may be questioned when significant stakeholders are not formally or properly represented in the decision making structures of the governing bodies such as the major football clubs. Further, there is simply no guarantee that the democratic structures of the governing bodies are adequate to deal with contentious issues such as the home-grown player rules. See PARRISH & MIETTINEN, *supra* note 2, at 41. It could also be argued that the character of the discrimination issues involved in the rules mean that the football governing bodies are simply inappropriate to be determining the validity of such rules. The goal of avoiding discrimination within the European Union on the basis of nationality should not be subordinated to the interests of a football governing body nor delegated to such a single interest body. Stephen Weatherill, *Anti-Doping Revisited: The Demise of the Rule of Purely Sporting Interest*, 27 EUR. COMPETITION L. REV. 645, 651 (2006). "There is room for sporting autonomy – but it is a conditional autonomy."

64. Weatherill, *supra* note 63. In closed leagues, teams are usually privately owned and the access of the teams to the leagues is determined by the league organiser. Access may be through the purchase of a franchise, rather than through a system of promotion and relegation.

65. *Commission White Paper on Sport*, *supra* note 2, § 4.1. Other factors have also been stressed including the importance of national teams and competitions between these teams, the focus on health and the fight against doping, the involvement of the public sector in the financing of sport, and common management of amateur and professional sport by sport associations. See COMMISSION

Despite the fact that the European Sport Model is advanced in support of measures to recognise the specificity of sport in Europe, the European Commission itself is unable to define an “increasingly illusory” unified model of the organization of sport in Europe.⁶⁶ It considers that it is unable to do so for a range of reasons including “the diversity and complexities of European sport structures.”⁶⁷

Significantly in the context of nationality based discrimination, the organization of sport and of competitions on a national basis is considered by the European Commission to be part of the historical and cultural background of the European approach to sport.⁶⁸ This national organization of competitions is considered to correspond to the wishes of European citizens with national teams playing an essential role in terms of identity and in securing solidarity with grassroots sport.⁶⁹ This leads to the question of how the home-grown player rules fall for consideration under the Treaty of the European Union (EU).

III. EC TREATY RULES

A. *Sport and the EC Treaty*

Sport is not mentioned in the current EU Treaty, and the EU has “no Treaty competence to intervene directly in sports policy.”⁷⁰ There is no EU

CONSULTATION CONFERENCE, *EU & Sport: Matching Expectations*, June 14-15, 2005, available at http://ec.europa.eu/sport/library/doc/b1/doc322_en.pdf.

66. *Commission White Paper on Sport*, *supra* note 2, § 4.

67. *Id.* It is conceded that precise definition of the “European Model” is limited. Some of the characteristics of the European way of doing sport must be qualified. For example, promotion and relegation is confined to some team sports. It is also mitigated by licensing systems that require financial qualifications as a condition of participation. Some European sports are closed or partially closed, such as motor sports and cycling, reducing the importance or relevance of the pyramidal structure for the organization of competitions. Some European characteristics are in fact employed in other parts of the world and new issues such as increasing commercialisation are challenging existing structures.

68. *Id.* § 4.2.

69. *Id.* § 4.

70. *See also* PARRISH & MIETTINEN, *supra* note 2, at 26. The Community may only act within the limits of the powers conferred on it by the Treaty. EC Treaty, art. 5. The EU has no direct powers over sport. Council Declaration on the Specific Characteristics of Sport and its Social Function in Europe, Of Which Account Should Be Taken in Implementing Common Policies, Nov. 30, 2008, available at <http://europe.eu.int/comm/sport> [hereinafter Council Declaration on Sport]. The absence of any reference to sport is about to change with the adoption of the Lisbon Treaty on 25 October 2007 containing a sport specific Article 124(a). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 82. “The Union shall contribute to the promotion of European sporting issues while taking into account its specific nature, its structures based on voluntary activity and its social and educational

legal instrument that applies exclusively to sport.⁷¹ Sport, nevertheless, is subject to the application of EU law. This arises in the following ways:

Economic activities in the context of sport fall within the scope of European law;⁷²

EC Treaty Article 12 provides that “any discrimination on the grounds of nationality shall be prohibited;”⁷³

EC Treaty Article 18 provides every citizen of the Union with “the right to move and reside freely within the territory of the

function.” Community institutions would be bound to observe the terms of the new Article. The Article however carries no horizontal requirement on Member States to take the specific nature of sport into account in domestic legislation. It has been observed that political recognition of the “specific nature of sport” may have some influence in the legal reasoning of the Court and the Commission in other fields with impacts on sport, although the impact of the new Treaty Article should not be overstated. The specificity of sport is already well recognised in European jurisprudence. PARRISH & MIETTINEN, *supra* note 2 at 39-40; Weatherill, *supra* note 62 at 49-50. Examples cited include the decisions of the European Court of Justice in the decisions of the Court in Case C-36/74, Walrave & Koch v. Association Union Cycliste Internationale, 1974 E.C.R. 1405, ¶ 4; Case C-415/93, Union Royale Belge Sociétés de Football Association v. Bosman (Bosman), 1995 E.C.R. I-4921, ¶ 73; and Case C-519/04P, Meca Medina v. Commission, 2006 E.C.R. I-6991, ¶ 22, and the Commission’s interpretation of the role of sport in justifying transfer system restrictions that would not otherwise be justified. Press Release, European Commission, IP/02/824, Commission Closes Investigations Into FIFA Regulations on International Football Transfers, (June 5, 2002); see also Richard Parrish, *The EU’s Draft Constitutional Treaty and the Future of EU Sports Policy*, 3 INT’L SPORTS L. J. 2 (2003). In addition, the context of the recognition of the specific nature of sport in the new Article may be narrower than sporting bodies may desire. FIFA for example has expressed its desire to “use the legal basis of the Treaty of Lisbon, which acknowledges the specificity of sport and its structures and organisations” to justify its 6+5 rule. FIFA.com, *Congress Supports Objectives*, *supra* note 25. The new Article, however, is not all encompassing but is limited to activities of the Union in the promotion of European sporting issues. The court, for example, would not be automatically required to respect the specificity of sport in all sport related cases. PARRISH & MIETTINEN, *supra* note 2, at 39-40.

71. *Commission Staff Working Document*, *supra* note 43, at Annex II.

72. EC Treaty, *supra* note 32, at art. 3 (defining the areas of competence of the EU. Sport is not listed but Article 3(c) provides that an activity of the Community is “an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital” and Article 3(g) establishes the Community activity of “a system ensuring that competition in the internal market is not distorted”). For the practical implementation of the EC Treaty to sport, see, for example, *Walrave & Koch*, 1974 E.C.R. 1405, ¶ 4; *Donà*, 1976 E.C.R. 1333, ¶ 12; *Bosman*, 1995 E.C.R. I-4921, ¶¶ 73, 87; Case C-519/04, *Meca-Medina*, 2006 E.C.R. I-6991, ¶ 22.

73. EC Treaty, *supra* note 32, at art. 12. The European Court of Justice has applied the general Article 12 of the Treaty so as to prohibit any discrimination on the basis of nationality in the performance of sport activities. *Donà*, 1976 E.C.R. 1333, ¶ 19. Collective agreements and any regulations concerning employment must also be non-discriminatory. See generally Council Regulation 1612/68, 1968 O.J. (L 257).

Member States.”,⁷⁴

EC Treaty Articles 39–42 relate to free movement of workers;⁷⁵

EC Treaty Articles 49–55 relate to free movement of services;⁷⁶ and

EC Treaty Articles 81–82 relate to anti-competitive agreements and practices and abuse of market power.⁷⁷

These provisions of the Treaty of the EU prohibit discrimination on the grounds of nationality;⁷⁸ any citizen of the Union also has the right to move and reside freely in the Member States. These rules apply for the benefit of citizens of Member States. In addition, citizens of States that have signed agreements with the EU that contain non-discrimination clauses who are legally employed in the territory of the Member States are also provided with the right to equal treatment.⁷⁹ For non-EU citizens, these clauses only apply protection when the worker is legally employed and do not carry a right to free movement within the EU.

The next section of this article outlines the general law of the EU relating to nationality discrimination. This section will then be followed by an examination of how these laws are applied in the “special” case of sport.

B. *Nationality Discrimination under General EU Law*

Nationality discrimination will arise where there is arbitrary or unjustified unequal treatment between nationals of the host Member State and nationals of

74. EC Treaty, *supra* note 32, at art. 18(1) (noting that this right is “subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”).

75. EC Treaty, *supra* note 32, at art. 39(1) (providing that “[f]reedom of movement for workers shall be secured within the Union”). *Id.* at art. 39(2) (providing that “such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”). Freedom of movement for workers is one of the fundamental principles of the Community. *Bosman*, 1995 E.C.R. I-4921, ¶ 93.

76. EC Treaty *supra* note 32, at arts. 49–55.

77. *Id.* at arts. 81–82.

78. *Id.* at art. 18.

79. Case C-438/00, *Deutscher Handballbund v. Kolpak*, 2003 E.C.R. I-4135, ¶ 46; Case C-265/03, *Simultenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, 2005 E.C.R. I-2579, ¶ 41. In these cases, the relevant clauses specifically provided that the treatment accorded by each Member State to workers from partner countries legally employed in its territory would be free from discrimination based on nationality in respect of working conditions, remuneration and dismissal as compared with host country nationals.

other Member States of the EU. It also arises where a Member State treats nationals of a given State more favorably than nationals of another member State.⁸⁰ Protection from discrimination on the grounds of nationality is considered to be one of the fundamental freedoms contained within the Treaty.⁸¹

1. The Relationship Between General and Specific Treaty Non-Discrimination Provisions.

The compatibility of a sporting rule with a particular Article of the Treaty does not release the rule from the requirement to comply with other Articles of the Treaty.⁸² However, the general protection against nationality discrimination in Article 12 can only be independently invoked where there is no other more specific treaty provision relating to nationality discrimination,⁸³ although a breach of the non-discrimination provisions in Articles 39, 43, and 49 also automatically involves a breach of Article 12.⁸⁴ Similarly, the general right of freedom of movement of citizens in Article 18 only applies in the absence of more specific free movement rights, such as those provided by Article 39.⁸⁵

In *Lehtonen and Castors Canada Dry Namur-Braine v. Fédération Royale Belge des Sociétés de Basket-ball (FRBSB)*,⁸⁶ a sport related case, it was

80. STEFAAN VAN DEN BOGAERT, PRACTICAL REGULATION OF THE MOBILITY OF SPORTSMEN IN THE EU POST BOSMAN 120 (2005).

81. The general principle of equality is "one of the fundamental principles of Community Law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified." Joined Cases 117/76 and 16/77, *Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen*, 1977 E.C.R. 1753, ¶ 7; Case C-415/93, *Union Royale Belge Sociétés de Football Association v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 121; Joined Cases 80/177 and 81/77, *Société Les Commissionnaires Réunis SALR v. Recevuer des Douanes*, 1978 E.C.R. 927, ¶ 36; see also JO SHAW ET AL., *ECONOMIC AND SOCIAL LAW OF THE EUROPEAN UNION* (2007) 44-45.

82. Case C-519/04, *Meca-Medina and Majcen v. Commission of the European Union*, 2006 E.C.R. I-6991, ¶ 31.

83. See Case C-186/87, *Cowan v. Trésor Public*, 1989 E.C.R. 195, ¶ 14; Case C-179/90, *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli*, 1991 E.C.R. I-5889, ¶ 11; Case C-379/92, *Criminal Proceedings Against Peralta*, 1994 E.C.R. I-3453, ¶ 18; Case C-262/96, *Sürül v. Bundesanstalt für Arbeit*, 1999 E.C.R. I-2685, ¶ 64; Case C-55/98, *Skatteministeriet v. Vestergaard*, 1999 E.C.R. I-7641, ¶ 16; Case C-422/01, *Skandia v. Riksskatteverket*, 2003 E.C.R. I-6817, ¶ 61; Case C-185/04, *Öberg v. Försäkringskassan*, 2006 E.C.R. I-1453, ¶ 25.

84. Case C-305/87, *Commission of the European Communities v. Hellenic Republic*, 1989 E.C.R. 1461, ¶ 12.

85. See Case C-345/05, *Commission of the European Communities v. Portuguese Republic*, 2006 E.C.R. I-10633, ¶ 1.

86. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681.

observed:

According to settled case-law, Article [12] of the Treaty, which lays down as a general principle that there shall be no discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination As regards workers, that principle has been implemented and specifically applied by Article [39] of the Treaty.⁸⁷

2. From “Discrimination” to “Obstacles” and “Restrictions.”

It has been observed that the decisions of the European Court of Justice indicate a move towards a purposive, market access approach to the assessment of restrictions on freedom of movement.⁸⁸ The effect of the approach of the European Court of Justice has been that all measures which place non-nationals at a disadvantage to nationals are prohibited by the free movement provisions of the EC Treaty.⁸⁹ The application of the freedom of movement provisions has evolved to apply beyond situations of discrimination only and to apply more broadly to “obstacles” or “restrictions” to movement.⁹⁰ The scope of the freedom of movement protection is further

87. *Id.* ¶¶ 37-38. At the time of the judgment, Article 12 was numbered Article 6 and Article 39 was numbered Article 48; *see also Surul*, 1996 E.C.R. I-2119, ¶ 64; *Vestergaard*, 1999 E.C.R. I-7641, ¶ 16; *Skandia*, 2003 E.C.R. I-6817, ¶ 61; *Öberg*, 2006 E.C.R. I-1453, ¶ 25.

88. An example of this purposive market based approach is Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37. *See* CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2007), 273-283; SHAW, *supra* note 81, 302-3; PARRISH & MIETTINEN, *supra* note 2, at 53. “Free movement rules often require even indirectly discriminatory or entirely non-discriminatory obstacles to trade to be justified.” *Id.*

89. *Portuguese Republic*, 2006 E.C.R. I-10633 at ¶ 15; Case C-464/02, *Commission of the European Communities v. Kingdom of Denmark*, 2005 E.C.R. I-7929, ¶ 34; PARRISH & MIETTINEN, *supra* note 2, at 59-60. *See also* Case C-415/93, *Union Royale Belge Societes de Football Association v. Bosman*, 1995 E.C.R. I-4921, ¶ 96 (identifying provisions that deterred nationals from leaving their countries to exercise freedom of movement as obstacles, even if such provisions applied without reference to nationality); PARRISH & MIETTINEN, *supra* note 2, at 59-60. “The jurisprudence of the Court now routinely ventures beyond discrimination and notions of formal equality to suggest that substantial restrictions to the free movement that are not ‘too uncertain and indirect’ and those which ‘preclude or deter’ a national from exercising his free movement rights must be justified even in the absence of discriminatory intent or effects. In relation to workers, ‘it is settled case law that Article 39 EC [(now Article 45 EC)] prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede freedom of movement.’” *Id.* (references omitted).

90. This evolution was first experienced in relation to the movement of goods within the

broadened in relation to workers as there is a low threshold for employment to exist.⁹¹

3. Objective Justification.

The adoption by the Court of the concept of restriction or obstacle to the freedom of movement protections, rather than discrimination, has also meant that “the legality of a national measure under scrutiny hinges for a great deal on the specific reasons invoked to justify the continued existence of the measure.”⁹² Two types of justification are identified. First, there are derogations that are expressed within the Treaty such as the public policy, public security, public health,⁹³ public service,⁹⁴ and official authority⁹⁵ derogations. Second, there are objective justifications identified by the European Court of Justice. Expressed in terms of “mandatory requirements,”⁹⁶ “overriding reasons relating to the public interest,”⁹⁷ or “imperative or pressing requirements of general interest,”⁹⁸ the Court will protect national measures that pursue objectively legitimate purposes even though these measures may strictly constitute a barrier to freedom of movement and may not be justified under an express Treaty derogation.⁹⁹

4. Proportionality.

In addition to valid grounds of objective justification, the Court also

Community. Case 8-74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, ¶ 5; Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, ¶ 8; Case C-267/91, *Criminal Proceedings against Keck and Mithouard*, 1993 E.C.R. I-6097, ¶ 15. This evolved further to also apply to the other free movement provisions of the Treaty. Case C-76/90, *Säger v. Dennemeyer & Co.*, 1991 E.C.R. I-4221 ¶ 12; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissaraat voor de Media*, 1991 E.C.R. I-4007, ¶¶ 13-16; Case C-143/87, *Stanton v. Institut National d'Assurances Sociales pour Travailleurs Indépendants (INASTI)*, 1988 E.C.R. 3877, ¶ 13; Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 15-16; *Bosman*, 1995 E.C.R. I-4921, ¶ 89.

91. Case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 1986 E.C.R. 2121, ¶ 17; Case C-392/05, *Alevizos v. Oikonomikon*, 2007 E.C.R. I-3505, ¶ 67 (citing *Lawrie-Blum*, 1986 E.C.R. 2121, ¶¶ 16-17).

92. VAN DEN BOGAERT, *supra* note 80, at 140.

93. See EC Treaty *supra* note 32, at arts. 39(3), 46(1), 55.

94. *Id.* at art. 39(4).

95. *Id.* at art. 45.

96. Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649, ¶ 8.

97. Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissaraat voor de Media*, 1991 E.C.R. I-4007, ¶ 13.

98. Case C-19/92, *Kraus v. Land Baden-Württemberg*, 1993 E.C.R. I-1663, ¶ 32.

99. VAN DEN BOGAERT, *supra* note 80, at 147-49.

imposes a requirement of proportionality. This means that in addition to an overriding reason in the general interest, national measures must be “suitable for securing the attainment of the objectives which they pursue and they must not go beyond what is necessary in order to attain it.”¹⁰⁰ This proportionality requirement obliges the court to first consider the appropriateness of the means chosen to achieve the objective. Secondly, the court will consider whether measures less restrictive on freedom of movement could have been chosen to achieve the same result in the circumstances.¹⁰¹

The prohibition of the Treaty against discrimination on the grounds of nationality applies to both direct¹⁰² and indirect discrimination.¹⁰³ Moreover, potential as well as actual discrimination are covered. It is not necessary to prove a disparate impact although there must be the potential for such an impact.¹⁰⁴ A potential restriction on freedom of movement that is too uncertain and indirect will not enliven the protection of Article 39 of the Treaty.¹⁰⁵

5. Direct and Indirect Discrimination.

Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned¹⁰⁶

The traditional position has been that direct discrimination will generally

100. Case C-106/91, *Ramrath v. Ministre de la Justice*, 1992 E.C.R. I-3351, ¶ 29-30; *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37.

101. VAN DEN BOGAERT, *supra* note 80, at 149-50. The author notes that it has been suggested that the transfer restrictions in *Bosman* failed the proportionality test. *Id.*

102. Case 2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631, ¶ 14. This case invalidated rules imposed by Belgian authorities that required lawyers in Belgium to possess Belgian nationality. *Id.*

103. Case 71/76, *Thieffry v. Conseil de L’Ordre des Avocats à la Cour de Paris*, 1977 E.C.R. 765, ¶ 13. In this case, while not drawing an explicit distinction based on nationality, a French rule that required professionals to possess French qualifications was invalidated. *Id.* While not directly discriminatory, the rule was indirectly discriminatory in that it imposed a requirement that French nationals were more likely to meet. *See also generally* Case 107/83, *Ordre des Avocats au Barreau v. Klopp*, 1984 E.C.R. 2971.

104. Case C-237/94, *O’Flynn v. Adjudication Officer*, 1996 E.C.R. I-2617, ¶ 21.

105. Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH*, 2000 E.C.R. I-0493, ¶ 25.

106. Case C-415/93, *Union Royale Belge Sociétés de Football Association v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 96.

be unlawful unless expressly allowed by an exception provided for in the Treaty.¹⁰⁷ Indirect discrimination on the other hand is unlawful unless it is justified by a Treaty exception¹⁰⁸ or by objective conditions independent of nationality provided the discrimination is proportionate to the legitimate aim pursued.¹⁰⁹ As noted above, to be proportionate, a measure must be suitable for achieving the objectives pursued, and those objectives must be unable to be achieved by less restrictive measures.¹¹⁰

There is now some question as to whether direct discrimination may be able to be objectively justified.¹¹¹ The position remains uncertain.¹¹² The Court in *Deutscher Handballbund v. Kolpak*¹¹³ and *Simutenko v. Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol*¹¹⁴ appeared to accept that there could be objective justification of directly discriminatory rules. Although in neither case was the Court required to rule on any such argument. Allowing the objective justification of directly discriminatory rules is contrary to the Court's "established rules requiring market access to

107. Case C-288/89, *Stiching Collectie Antennevoorziening Gouda v. Commissaraat voor de Media*, 1991 E.C.R. I-4007, ¶ 11; Case C-388/01, *Commission of the European Communities v. Italian Republic*, 2003 E.C.R. I-0721, ¶ 19; see C. Barnard, *EC Employment Law* (2000), 182-84; Case C-352/85, *Bond van Adverteerders v. Netherlands State*, 1988 E.C.R. 2085, ¶ 34.

108. See EC Treaty *supra* note 32, at art. 39(3) (subjecting rights conferred to "limitations justified on grounds of public policy, public security or public health.>").

109. *O'Flynn*, 1996 E.C.R. I-2617, ¶ 19; Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37 (identifying the conditions required to justify a measure in what has become known as the "Gebhard-formula" as "(i) applied in a non-discriminatory manner; (ii) justified by imperative requirements in the general interest; (iii) suitable for securing the attainment of the objective which they pursue; and (iv) not go beyond what is necessary to attain it"). See also SHAW ET AL., *supra* note 71, at 300.

110. *Gouda*, 1991 E.C.R. I-4007, ¶ 15; Case 17/00, *De Coster v. Collège des Bourgmestre et Échevins de Watermael-Boitsfort*, 2001 E.C.R. I-9445, ¶ 37; Case C-433/04, *Commission of the European Communities v. Kingdom of Belgium*, 2006 E.C.R. I-10653, ¶¶ 35-42.

111. *Bosman*, 1995 E.C.R. I-4921, ¶ 104. "The transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose." *Id.*; see generally Case C-2/90, *Commission v. Belgium (Walloon Waste)*, 1992 E.C.R. I-4431.

112. See VAN DEN BOGAERT, *supra* note 80, 152-58.

113. Case C-36/74, *Walrave & Koch v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 56-57.

114. Case C-265/03, *Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, [2005] ECR I-2579, ¶ 39. "Moreover, no other argument has been put forward in the observations submitted to the Court that is capable of providing objective justification for the difference in treatment between, on the one hand, professional players who are nationals of a Member State or of a State which is a party to the EEA Agreement and, on the other, professional players who are Russian nationals." *Id.*

economic activity”¹¹⁵

While for present purposes it is not clear whether direct discrimination can be objectively justified, particularly because of the Court’s approach to direct discrimination in a sporting context in *Bosman*, the basis of objective justification of both the direct discriminatory effect of FIFA 6+5 rule and the indirect discriminatory effect of FIFA 4+4 rule will be examined below. It is also to be noted that the Court has not yet found the facts of any sport related case sufficient to objectively justify discrimination on the basis of nationality.¹¹⁶

It is settled case-law that Article 39 EC prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement¹¹⁷

This brings us to the application of nationality discrimination in the sporting context.

C. Nationality Discrimination under EU Law as it Applies to Sport

Rules of sports governing bodies that attempt to prescribe the selection of a minimum number of home-grown players such as the rules proposed by UEFA and FIFA give rise to a number of issues in relation to the Treaty. To what extent do such rules fall within the scope of the Treaty? “Purely sporting rules” are said to be outside the Treaty as they do not relate to economic activity as required by Article 2. What is the extent of this sporting exception? If the home-grown rules are within the scope of the Treaty, how are such rules assessed against the Treaty provisions? Would the home-grown rules breach the freedom of movement provisions of the Treaty? More generally, are the home-grown rules consistent with the fundamental right provided by the Treaty to freedom from discrimination on the basis of nationality?

1. Valid sporting rules.

Various sporting rules that have imposed “restrictions” have been upheld as valid when challenged under the Treaty. The European Court of Justice has

115. PARRISH & MIETTINEN, *supra* note 2, at 94.

116. *Id.* at 65.

117. Case C-464/02, Commission of the European Communities v. Kingdom of Denmark, 2005 E.C.R. I-7929, ¶45.

held that rules governing the composition of national sports teams were not invalidated by the Treaty provisions protecting against nationality based discrimination.¹¹⁸ Nor did the free movement provisions of the Treaty invalidate sporting rules that excluded foreign players from certain matches for reasons not of an economic nature.¹¹⁹ A rule that limited the number of competitors able to compete in a tournament was found not to constitute a restriction on the freedom to provide services and thereby not prohibited by Article 59 of the Treaty.¹²⁰

In addition, rules prohibiting the multiple ownership of football clubs have been considered by the European Commission not to be an anticompetitive restriction on the basis that the elimination of the suspicion of match fixing is indispensable to genuine sporting competition. Accordingly, a restriction on the commercial opportunity to acquire football clubs was not considered a breach of Article 81(1).¹²¹ Anti-doping rules have been found to be subject to Articles 81 and 82 of the Treaty but are upheld as being inherent in the organization and proper conduct of sport, and therefore are not disproportionate.¹²² It has also been decided that the organization of football on a national territorial basis was not called into question by Community law as the rule was indispensable for the organization of national and international competitions as well as to ensure competitive balance between clubs.¹²³

2. Invalid Sporting Rules.

On the other hand, sporting rules that imposed nationality-based restrictions in football league competitions, and rules which restricted the transfer of players between football clubs, have been invalidated as being incompatible with Treaty protections of freedom of movement,¹²⁴ as have rules regulating the times at which players could transfer between clubs that differed according to nationality.¹²⁵ Ticketing arrangements that

118. *Walrave & Koch*, 1974 E.C.R. 1405, ¶ 8.

119. *Case C-13/76, Donà v. Mantero*, 1976 E.C.R. 1333, ¶ 19.

120. *Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 64.

121. Commission Decision, COMP 37 806, (June 25, 2002), available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37806/en.pdf>.

122. *Case C-519/04, Meca-Medina v. Commission of the European Union*, 2006 E.C.R. I-6991, ¶ 55.

123. Press Release IP/99/965, European Commission, Limits to Application of Treaty Competition Rules to Sport: Commission Gives Clear Signal (Dec. 9, 1999).

124. *Case C-415/93, Union Royale Belge Societes de Football Association v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 104.

125. *Case C-176/96, Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681.

discriminated against ticket purchasers outside of France, the then host of the FIFA 1998 World Cup finals, were found to be in breach of Article 82 of the Treaty.¹²⁶

Difficult questions remain despite this history of court and Commission decisions. What sporting rules fall under the Treaty, and which rules escape the application of the Treaty? For those sporting rules that fall for assessment against the Treaty, how is their compliance to be assessed? To what extent can sporting rules validly discriminate on the basis of nationality?

3. The Sporting Rules Exception – the *Walrave* Case.

The exception of sporting rules from the Treaty provisions relating to discrimination may arise either through the exemption of rules from the scope of the Treaty, or by the process of applying the Treaty to rules in a way so as to give effect to a justification of the rule. The decision of the Court in *Walrave v. Ass'n Union Cycliste Internationale*, the first sporting case to reach the Court,¹²⁷ is an example of the exemption of rules from the application of the Treaty. In *Walrave*, the practice of sport was found to be subject to Community law only in so far as it constituted an economic activity within the meaning of Article 2 of the Treaty.¹²⁸ The Court found that the prohibition against discrimination on the basis of nationality in the Treaty did not affect the composition of national sport teams.¹²⁹ This was said to be a question of purely sporting interest with nothing to do with economic activity.¹³⁰ However, this restriction on the scope of the Treaty provisions relating to discrimination was required to “remain limited to its proper objective.”¹³¹

Depending on what constituted “purely sporting rules,” the effect of *Walrave* could have been to establish a potentially broad exception of sporting rules from the Treaty. However, the reasoning in *Walrave* is brief and undeveloped. Uncertainty has existed since the decision on the nature of the “sporting exception,” in particular whether sport is the beneficiary of an exception to the Treaty, or whether *Walrave* in fact represents a justification of sporting rules on the narrow grounds that such rules must be purely sporting in

126. Commission Decision 2000/12, European Commission, *1998 Football World Cup*, (July, 20 1999).

127. Weatherill, *supra* note 63, at 645.

128. Case 36/74, *Walrave & Koch v Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 4. This was restated in Case 13/76, *Donà v Mantero*, 1976 E.C.R. 1333, ¶ 12; *see also* Case C-415/93, *Bosman*, 1995 E.C.R. I-4921, ¶ 73.

129. *Walrave & Koch v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 8.

130. *Id.*

131. *Id.* ¶ 9.

nature, lack economic motivations, and be limited to proper objectives.¹³² In addition, the distinction between non-economic rules and the economic nature of the activity¹³³ to which the rules were applied is a difficult one.¹³⁴

In the twenty-four years that have elapsed since the sporting exception was proposed in *Walrave*, the Court of Justice has refined the scope of the so-called sporting exception.

4. The Refining of *Walrave*.

In *Dona v. Mantero*,¹³⁵ which followed shortly after *Walrave*, the exception for sport from the application of the Treaty provisions relating to discrimination on the basis of nationality was limited to the exclusion of foreign players from certain matches for reasons that are not of an economic nature.¹³⁶ Then, nearly two decades later, in *Union Royale Belge Societes de Football Ass'n v. Bosman*,¹³⁷ hopes for an expansive view of the *Walrave* exception were extinguished.¹³⁸

In *Bosman*, a UEFA rule restricting the number of foreign players who could be fielded by clubs in competitions was found to infringe the freedom of movement protections of the Treaty.¹³⁹ Professional football was an economic activity to which the Treaty could apply.¹⁴⁰ The transfer fee system between clubs aimed at compensating an old club for the training invested in a player who wanted to leave upon the expiration of his contract was an obstacle

132. See *infra* Part III(C).

133. PARRISH & MIETTINEN, *supra* note 2, at 82. "The basis for exempting the composition of sports teams, in particular national teams, from the prohibition on nationality discrimination is not that the activity in itself is uneconomic, but that the motives for the rule on team composition are . . . of purely sporting interest and as such has nothing to do with economic activity." *Id.*

134. *Id.* at 73-78, 82-83.

135. Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333.

136. *Id.* ¶¶ 12, 14.

137. Case C-415/93, *Union Royale Belge Sociétés de Football Ass'n v. Bosman* (*Bosman*), 1995 E.C.R. I-4921.

138. *Id.* ¶ 76. As regards to the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds that relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty. See PARRISH & MIETTINEN, *supra* note 2, at 88 (citing *Donà*, 1976 E.C.R. 1333, ¶¶ 14-15).

139. *Bosman*, 1995 E.C.R. I-4921, ¶ 137. Advocate General Lenz also considered that the rule limiting the employment of foreign players also infringed Article 81 because it restricted the possibilities for individual clubs to compete with each other by engaging players. *Id.* ¶ 262.

140. *Id.*

that was incompatible with the free movement of workers.¹⁴¹ In addition, rules limiting the number of players from other Member States who could play in football competitions were precluded by the Treaty.¹⁴² The nationality restrictions could not be justified on non-economic grounds, such as the link between sporting clubs and their country, the need to train sufficient players of a particular nationality, or the need to maintain competition between clubs.¹⁴³ The nationality restrictions in *Bosman* did not relate to specific matches between teams representing their countries and were therefore incompatible with Article 39.¹⁴⁴

5. Purely Sporting Rules and Economic Activity

According to *Walrave*, to fall within the terms of the Treaty, an activity must have a sufficient economic dimension and involve some form of extraterritorial dimension.¹⁴⁵ Economic activity is interpreted widely.¹⁴⁶ In *Walrave*, the court found that sport would be subject to the Treaty “in so far as it constitutes an economic activity within the meaning of Article 2.”¹⁴⁷ As recently as 2006, in *Meca-Medina v. Commission*, the Court restated the prescription derived from earlier cases¹⁴⁸ that “having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 [EC].”¹⁴⁹

Yet this distinction is difficult to draw,¹⁵⁰ and in any event, sporting rules will rarely escape Treaty application because they have no economic

141. *Id.* ¶ 114. The Court also rejected the justifications argued in support of the transfer restrictions. *Id.* ¶¶ 105-15.

142. *Id.* ¶ 114.

143. *Id.* ¶¶ 131-137.

144. *Id.* ¶¶ 128-9. “Implicit in this reasoning is the principle that the free movement of workers takes precedence over nationality rules except when the competition is structured around competition between national teams.” PARRISH & MIETTINEN, *supra* note 2, at 88.

145. European Union Treaty, art. 2, Dec. 29, 2006, C 321 E/37.

146. Cases C-51/96 and C-191/97, *Deliège v. Lingue francophone de Judo et disciplines Associees Asb*, 2000 E.C.R. I-2549, ¶ 52.

147. Case C-36/74, *Walrave & Koch v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 4.

148. *See also* Case C-519/04P, *Meca Medina v. Commission*, 2006 E.C.R. I-6991, ¶ 22 (citing Case C-36/74, *Walrave & Koch*, 1974 E.C.R. 1405, ¶ 4; Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333, ¶ 12; Case C-415/93, *Union Royale Belge Sociétés de Football Ass’n v. Bosman*, 1995 E.C.R. I-4921, ¶ 73; Cases C-51/96 and C-191/97, *Deliège*, 2000 E.C.R. I-2549, ¶ 41; Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-268, ¶ 32).

149. *Id.* ¶ 22.

150. *Bosman*, 1995 E.C.R. I-492, ¶ 76; *Meca-Medina*, 2006 E.C.R. I-6991, ¶ 26.

effects.¹⁵¹ On the distinction between sport and economic activity within the meaning of the Treaty, Parrish and Miettinen observe, “[t]his is increasingly awkward given the recent extension of citizenship rights, because it implies that where citizenship rights are concerned, all non-economic sporting activity is excluded from the scope of Treaty rules.”¹⁵²

This implication could explain any reticence of the Court to find the distinction made out in any particular case. European law has developed significantly since the decision in *Walrave*. The non-economic exception has a greatly diminished justification under the current Treaty. Yet in the absence of a decision to the contrary, sport may be regarded as providing an exception to the application of the Treaty to non-economic sporting activity, albeit a narrow exception, that is observed only in passing and rarely applied. A wider scope for exemption for sporting rules lies in the prospect of restrictive sporting rules being objectively justified.

6. Justification of Restrictive Rules.

In both *Bosman* and *Deliège v. Ligue francophone de Judo et disciplines Associees Asb*, rules that were not directly discriminatory were required to be justified in the context of the Treaty provisions protecting against discrimination on the basis of nationality.¹⁵³ Similarly, in *Lehtonen*,¹⁵⁴ a market access analysis was applied, rather than an inquiry into whether the rules challenged were discriminatory.¹⁵⁵ In all three cases, rather than require a restrictive sporting rule to fall within a Treaty exemption, the Court held

151. The decision in *Deliège v. Ligue francophone de Judo et disciplines Associees Asb*, made it clear that “the decisions of national amateur associations could be subject to EC law even where the sport itself had no direct economic dimension and the rule in question was non-discriminatory.” PARRISH & MIETTINEN, *supra* note 2, at 91; see also Weatherill, *supra* note 63, at 647. Weatherill considers that sports rules escape condemnation under EC law because “they are shown to be necessary elements in sports governance Perhaps there are some rules which are beyond the reach of the Treaty – the detail of the offside rule perhaps, or the length of a match – but most rules of sporting interest are not purely of sporting interest, they also impinge on economic activity.” *Id.* at 647.

152. PARRISH & MIETTINEN, *supra* note 2, at 99.

153. *Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 61.

154. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681.

155. *Id.* ¶ 49. Reflecting the approach in *Bosman*, the test applied in *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, was whether the rule restricted participation in matches that were an essential purpose of a player’s activity. Such a restriction would affect the player’s access to employment. Similarly, in *Deutscher Handballbund v. Kolpak (Kolpak)*, the rule invalidated limited the foreign players opportunity in comparison with EC nationals to participate in matches that were considered by the Court to constitute the player’s “essential purpose of his activity as a professional player.” 2003 E.C.R. I-4135, ¶ 51.

such rules could validly operate if objectively justified.¹⁵⁶

While striking down the transfer and foreign player limitation rules, the Court in *Bosman* recognized “novel categories of objective justification relevant to sport” and accepted the application of justification even apparently in the case of directly discriminatory rules.¹⁵⁷ In particular, the objectives of “maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players” were accepted as legitimate.¹⁵⁸ Other justifications were argued, such as maintaining the traditional link between each club and its county,¹⁵⁹ and maintaining a sufficient pool of players able to be selected in national teams.¹⁶⁰ The court rejected these justifications on the facts of *Bosman* and did not expressly accept these justifications as legitimate.¹⁶¹ However, the analysis conducted by the court in assessing these justifications leaves open the possibility that these justifications may be available if supported by the facts of an appropriate case.¹⁶²

Like *Bosman*, *Lehtonen* resulted in the Court invalidating rules because the rules unjustifiably distinguished between players on the basis of nationality, but indicated that transfer windows—set periods of time during a year in which players could transfer from one club to another—could, in principle, be justified to ensure the regularity of competition, enhance competitive balance, and avoid the damage caused by unrestrained late transfers.¹⁶³ Again, the Court noted that a rule that places a restriction on

156. PARRISH & MIETTINEN, *supra* note 2, at 93.

157. *Id.* ¶ 89.

158. Case C-415/93, Union Royale Belge Sociétés de Football Ass’n v. Bosman (*Bosman*), 1995 E.C.R. I-4921, ¶ 106.

159. *Id.* ¶ 123.

160. *Id.* ¶ 124.

161. *Id.* ¶¶ 131-32, 134.

162. See *Commission White Paper on Sport*, *supra* note 2. *Bosman* liberated the players market. Yet the organization of sport through segmentation on national lines constrains other markets within sports. Clubs for example are condemned to be restricted to competing in leagues in the countries in which they are based. The European Commission endorses this national segmentation. See PARRISH & MIETTINEN, *supra* note 2, at 51. The authors speculate that competitive balance in European sport may be affected “as players migrate from smaller markets to the larger markets leaving the larger clubs in smaller markets seriously disadvantaged.” *Id.* The Glasgow Rangers and Celtic football clubs in Scotland may be regarded as examples of such clubs. This issue is discussed *infra* Part IV in the context of the objective justification of discriminatory rules.

163. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681, ¶ 53. “On this point, it must be acknowledged that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity of sporting competitions. Late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in

players from other EU nations does not necessarily breach Treaty provisions—the qualifications being that the exclusion must be for non-economic reasons, and it must be limited to and relate to the particular nature and context of certain matches, thus being of sporting interest only.¹⁶⁴ A match between national teams was the example provided.¹⁶⁵ Finally, the “restriction on the scope of the Treaty must remain limited to its proper objective and may not be relied on to exclude therefrom the whole of a sporting activity.”¹⁶⁶

The prospect of objective justification of discriminatory rules was also raised by the decision of the court in *Kolpak*.¹⁶⁷ In that case, it was argued that a rule imposing a quota on the number of foreign players was “justified on exclusively sporting grounds, as its purpose is to safeguard training organised for the benefit of young players of German nationality and to promote the German national team.”¹⁶⁸ This argument was rejected because there was no corresponding limit on the number of players from other EC countries.¹⁶⁹ The limit applied only to nationals of non-EC countries.¹⁷⁰ In addition, the rule was not limited in its application to the context of specific matches, such as games between national teams.¹⁷¹

In *Simutenkov*,¹⁷² the Court restated the scope of the sporting exception as refined in the cases that have followed *Walrave*. On facts similar to *Kolpak*, the Court of Justice ruled that:

the limitation based on nationality does not relate to specific matches between teams representing their respective countries but applies to official matches between clubs and thus to the essence of the activity performed by professional players. As the Court has also ruled, such a limitation cannot be justified

that championship, and consequently the proper functioning of the championship as a whole.” *Id.* ¶¶ 53-54.

164. *Id.* ¶ 34.

165. *Id.* ¶ 55.

166. *Id.* ¶ 34. “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.” *Id.* ¶ 56; see also *id.* ¶ 60.

167. Case C-438/00, *Deutscher Handballbund v. Kolpak*, 2003 E.C.R. I-4135.

168. *Id.* ¶ 52.

169. *Id.* ¶ 55.

170. *Id.* ¶ 56.

171. *Id.* ¶¶ 52-56.

172. Case C-265/03, *Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, [2005] ECR I-2579, ¶ 396-8 (assessing claims brought by a Russian football player lawfully employed in Spain who was denied a license *on equal terms* to EC nationals).

on sporting grounds.¹⁷³

The question arises whether sport is or should be considered “special” in that justification of discrimination is allowed if the motives for a discriminatory sporting rule are not primarily economic.¹⁷⁴

7. Inherent Restrictions.

In *Deliege*, a new form of exclusion for sporting rules was expressed.¹⁷⁵ A selection rule, which was not itself discriminatory but had the effect of limiting the number of competitors able to compete in a tournament, was found by the Court to be a limitation that was “inherent in the conduct of an international high-level sports event, which necessarily involves certain selection rules or criteria being adopted. Such rules may not therefore in themselves be regarded as constituting a restriction on the freedom to provide services prohibited by Article 59 of the Treaty.”¹⁷⁶ However, the “inherency” exception was qualified.¹⁷⁷ For the exception to apply “the rules or practices in question must be justified by specific, non-economic reasons that relate purely to sport; the organization of matches between national teams is a prime example of such a reason.”¹⁷⁸ In a limiting word of caution, the Court said “the gap created in the application of Community law is clearly delimited; departures from Community obligations may not exceed the purpose for which they are created.”¹⁷⁹ Another qualification or limitation on the exemption of the application of Treaty provisions to sporting rules arises from the decision in *Meca-Medina*.¹⁸⁰

173. *Id.* ¶ 38.

174. Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333, ¶ 14; Case C-36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, ¶ 8; see PARRISH & MIETTINEN, *supra* note 2. The authors suggest that the court in *Kolpak* and *Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol* impliedly required that any discrimination be justified objectively on a basis other than nationality (e.g. the personal characteristics of the players). *Id.* at 94-95. While open, this conclusion is not necessarily required from the language of either judgment. See *Simutenkov*, 2005 E.C.R. I-2579, ¶ 39; Case C-438/00, *Deutscher Handballbund v. Kolpak*, 2003 E.C.R. I-4135, ¶ 57.

175. *Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 69.

176. *Id.* ¶¶ 63-64. The context of the selection rules related “not to a tournament whose purpose is to set national teams against each other but to a tournament in which, once selected, the athletes compete on their own account.” *Id.* ¶ 63.

177. *Id.* ¶ 43.

178. *Id.*

179. *Id.*

180. Case C-519/04, *Meca-Medina v. Commission of the European Union*, 2006 E.C.R. I-6991.

8. Freedom from Discrimination and Protection of Economic Competition Under the Treaty.

In *Meca-Medina* the Court of Justice determined that the challenged sports anti-doping rules did not infringe the economic competition provisions of Articles 81 or 82 of the Treaty, as the rules were inherent in the organization and proper conduct of sport and not disproportionate.¹⁸¹ The decision in *Meca-Medina* has made it clear that the fundamental freedoms under the Treaty, which include freedom from discrimination and freedom of movement, are to be considered separately from the Treaty protections of economic competition.¹⁸² Accordingly, even if no breach of the freedom of movement provisions is established because the restriction imposed by a sporting rule is intrinsic to sporting activity, there is still a need to examine the validity of the rule against the competition provisions.¹⁸³ Any other result would be “difficult to reconcile with the drive towards abolition of nationality rules in other sensitive contexts, and with the overall trends in European political integration.”¹⁸⁴

9. The Scope of the Sporting Exception – Conclusions from the Case Law.

The sporting exception to nationality discrimination for purely sporting rules propounded in *Walrave*¹⁸⁵ appears now to be narrowly constrained.¹⁸⁶

181. *Id.* ¶¶ 43-45, 54-55. The court left open the possibility that anti-doping rules could be incompatible with the Community rules on competition by producing effects that were restrictive on competition and which were not inherent in the pursuit of the legitimate objectives pursued by the anti-doping rules. *Id.* ¶ 42. It also left open the possibility of an argument that the rules go beyond what is necessary to satisfy the legitimate objectives pursued and are excessive. *Id.* ¶¶ 47-48. One author has suggested that the conclusion of the Court upholding the validity of the anti-doping rules imports the formula derived from *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, which concerned rules regulating the formation of multi-disciplinary profession practices of lawyers and accountants. Weatherill, *supra* note 63, at 651; Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577. The court stated that account must be taken of “the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, [account must be taken] of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.” *Meca-Medina*, 2006 E.C.R. I-6991, ¶ 42. The author argues that this *Wouters* formulation—adopted in *Meca-Medina v. Commission of the European Union*—provides a basis for the assessment of sporting rules against the competition provisions in Article 81 of the Treaty. Weatherill, *supra* note 63, at 651. He also suggests that the process of assessment between the competition provisions of the Treaty and the freedom of movement provisions should not be distinguished. *Id.* at 649.

182. *Meca-Medina*, 2006 E.C.R. I-6991, ¶¶ 27-28, 31.

183. *Id.*

184. PARRISH & MIETTEN, *supra* note 2, at 100.

185. Case C-36/74, *Walrave & Koch v. Association Union Cycliste Internationale*, 1974 E.C.R.

Meca-Medina is regarded as having struck the final blow against the idea of a broader sporting exception to the application of EC law,¹⁸⁷ yet a clear statement on the application of the Treaty to sporting rules remains difficult to construct.¹⁸⁸

An attempt at an explanation of the scope and operation of the application of the Treaty to sporting rules commences with the initial observation that the Court accepts that sport is subject to the Treaty only in so far as it constitutes economic activity,¹⁸⁹ though this concession to sport lacks any real content.¹⁹⁰ Rules that are considered to restrict a professional sportsperson's activity will not escape sanction under the Treaty merely because they are sporting rules.¹⁹¹ Only nationality rules in national team sports have been accepted as being beyond the scope of the Treaty on this basis.¹⁹²

Next, sporting rules that involve economic activity, and that are not nationality rules applying to national team sports, may nevertheless escape sanction under the Treaty in two closely related circumstances. The first is when those rules can be shown to be inherent to the organization of sport.¹⁹³ The second circumstance is when a sporting rule that imposes a restriction that would otherwise breach a Treaty provision can be objectively justified.¹⁹⁴

The difference between these two circumstances appears to be in the approach of the court to the assessment of the conformity of sporting rules

1405, ¶¶ 8-9.

186. *Meca-Medina*, 2006 E.C.R. I-6991.

187. PARRISH & MIETTINEN, *supra* note 2, at 96; Weatherill, *supra* note 63; *see also Meca-Medina*, 2006 E.C.R. I-6991, ¶ 27 (noting “the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule of the body which has laid it down”). The court in *Meca-Medina* did not examine the freedom of movement provisions of the Treaty; the case involved the competition provisions of Articles 81 and 82. *Id.* ¶ 58. Therefore, the case is of limited relevance in illuminating the scope of the sporting exception remaining since the *Walrave & Koch* decision.

188. PARRISH & MIETTINEN, *supra* note 2, at 100-01 (describing a tiered approach with four levels to this analysis).

189. *Meca-Medina*, 2006 E.C.R. I-6991, ¶ 22; Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681, ¶ 32; *Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 41; Case C-415/93, *Union Royale Belge Sociétés de Football Ass'n v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 73; Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333, ¶ 12; *Walrave & Koch*, 1974 E.C.R. 1405, ¶ 4.

190. PARRISH & MIETTINEN, *supra* note 2, at 100. In addition, real questions exist as to how this concession relates to non-economic Treaty provisions created after the statement was first made. *Id.*

191. *Bosman*, 1995 E.C.R. I-4921, ¶¶ 100; PARRISH & MIETTINEN, *supra* note 2, at 100.

192. *See generally* Case C-13/76, *Donà v. Mantero*, 1976 E.C.R. 1333; *Walrave & Koch*, 1974 E.C.R. 1405.

193. *See generally* *Deliège*, 2000 E.C.R. I-2549.

194. *Bosman*, 1995 E.C.R. I-4921, ¶ 104.

with the Treaty in each circumstance. Inherent rules are not considered obstacles or restrictions but are required to be proportionate to the achievement of their objectives. Those challenging the rule will be required to demonstrate that the rule is not proportionate.¹⁹⁵ In cases of rules that are sought to be objectively justified, the party relying on the rule will need to show that there are not less restrictive means of achieving the same objective.¹⁹⁶ There are some sport-specific objective justifications identified in the decisions.¹⁹⁷

10. Case-by-Case Approach Required.

The final point to be made in this section is to note that whether a particular sporting rule is compatible with EU competition law can only be made on a case-by-case basis.¹⁹⁸ The specificity of sport is taken into account in that restrictive effects that are inherent in the organization and proper conduct of competitive sport are not in breach of EU competition laws, provided that the rules are proportionate to the legitimate sporting interest that is being pursued. This requirement for an assessment of proportionality requires a case-by-case analysis of the circumstances of each individual case. Therefore, general rules are unable to be formulated.¹⁹⁹ While the uncertainty of the case-by-case approach to deal with the specificity of sport has been criticized as unsatisfactory by the European Parliament, it is considered necessary by the Commission²⁰⁰ and required by the approach of the Court in *Meca-Medina*.

195. *Id.*

196. *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37.

197. PARRISH & MIETTINEN, *supra* note 2, at 101. "These are distinguished from the classic notions of objective justification in free movement, and in this sense some vestige of the sporting exception still remains even in the context of objective justification, because the analytical process has in the sporting context been applied to rules that are directly discriminatory, not only in *Bosman* but also in *Kolpak* and *Simutenkov*." *Id.*

198. *See generally* Case C-519/04, *Meca-Medina v. Commission of the European Union*, 2006 E.C.R. I-6991.

199. *Commission White Paper on Sport*, *supra* note 2, § 4.1; *see also* PARRISH & MIETTINEN, *supra* note 2, at 44.

200. Parliament Resolution, *supra* note 34, cls. F.4. The Parliament called on the European Commission to "provide more legal certainty by creating clear guidelines on the applicability of European law to sports in Europe" and by implementing a range of other administrative initiatives. *See id.* at cl. 4.

IV. JUSTIFICATIONS OF THE HOME-GROWN PLAYER RULES

“There are too many foreign players in every league, which means that the local youngsters can’t be brought on properly.”²⁰¹

A. *The “Restriction” or “Obstacle” of the Home-Grown Player Rules*

Despite claims to the contrary by UEFA and FIFA,²⁰² the home-grown rules of each organization would be considered to restrict employment.²⁰³ FIFA’s 6+5 rule would clearly limit the opportunities for foreign players on football teams.²⁰⁴ However, UEFA’s 4+4 rule may not always be discriminatory. It applies without regard for the nationality of the workers concerned and does not expressly restrict the movement of players within Europe, but its overall application and effect would be to undoubtedly limit or reduce the hiring of foreign players.²⁰⁵

B. *Burden of Proving Objective Justification*

The burden then of demonstrating that either the 4+4 rule or the 6+5 rule was justifiable would fall on the football authorities seeking to rely on them.²⁰⁶ The rules could not be said to be “inherent,” thereby requiring the party challenging the rule to establish that it was not proportionate, since inherent rules are required to be indistinctly applicable. The effects of home-grown player rules are more pronounced on non-nationals than nationals.²⁰⁷

As noted above, these assessments are made on a case-by-case basis. In the case of home-grown player rules, UEFA or FIFA would have to demonstrate that the rules pursued legitimate objectives, and that no less

201. FIFA, *Hitzeld in Favour of “6+5”*, FIFA.COM, Sept. 25, 2008, <http://www.fifa.com/aboutfifa/federation/insidefifa/news/newsid=835997.html> (quoting New Switzerland coach Ottmar Hitzfield in support of FIFA’s 6+5 rule).

202. See Chaplin, *supra* note 11.

203. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball*, 2000 E.C.R. I-2681, ¶ 50; see Case C-415/93, *Union Royale Belge Sociétés de Football Ass’n v. Bosman* (Bosman), 1995 E.C.R. I-4921, ¶ 120. “The fact that the rules in question concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player’s activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.” *Bosman*, 1995 E.C.R. I-4921, ¶ 120

204. Briggs, *supra* note 15, at 451-53.

205. *Id.*

206. Case C-370/05, *Festersen*, 2007 E.C.R. I-1129, ¶ 39.

207. Joined Cases C-51/96 and C-191/97, *Deliège v. Ligue Francophone de Judo et Disciplines Associées*, 2000 E.C.R. I-2549, ¶ 61; Parrish & Miettinen, *supra* note 17, ¶¶ 11, 17.

restrictive means could be adopted to achieve those objectives.²⁰⁸

C. Arguments in Support of the Home-Grown Player Rules

The arguments that have been raised in support of home-grown player rules include the need to promote the training and education of young players, the adverse effects on national team competitions caused by a lack of junior player training and a reduced pool of suitable players, the need to maintain competitive balance, and the need to maintain clubs' connections with their local communities.²⁰⁹

1. Justifications and *Bosman*.

In *Bosman*, the football clubs argued that the transfer fee rules were justified in restricting freedom of movement by the need to maintain competitive balance between clubs, and the need to support the search for talent and the training of young players.²¹⁰ While these objectives were accepted by the court as legitimate,²¹¹ the Court rejected the justifications.²¹² The transfer rules did not prevent the richest clubs from obtaining the best players, and therefore, did not protect the competitive balance between clubs.²¹³ The payment of transfer fees as a factor encouraging the recruitment and training of young players, or as a means of financing those activities, was also rejected as a justification.²¹⁴ It was also accepted that the same objectives could be achieved at least as efficiently by other means, which did not impede the free movement of workers.²¹⁵

Another argument made in *Bosman* was that the limitations on the number of foreign players were justified as they served "to maintain the traditional link between each club and its country, a factor of great importance in enabling the public to identify with its favourite team and ensuring that clubs taking part in

208. *Bosman*, 1995 E.C.R. I-4921, ¶ 104; PARRISH & MIETTINEN, *supra* note 2, at 66.

209. *Bosman*, 1995 E.C.R. I-4921, ¶ 105.

210. *Id.* ¶ 105.

211. *Id.* ¶ 106.

212. *Id.* ¶ 109.

213. *Id.* ¶ 107.

214. *Id.* ¶ 109. This argument was rejected "because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally." *Id.*

215. *Id.* ¶ 110.

international competitions effectively represent their countries.”²¹⁶ In addition, the rule was supported as necessary to create a sufficient pool of international players to provide the national teams with top players to field in all team positions,²¹⁷ and because it helped to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.²¹⁸ Before turning to these arguments in support of the home-grown player rules, it is worth noting that “since the *Bosman* ruling, conspicuously little has been done in football to address the need for wealth distribution among clubs[, despite the] [h]eavy emphasis [that] was placed on the need for such a system in the football authorities” pleadings that defended the transfer system.”²¹⁹

2. Encouraging the Training of Young Players.

The training of young players and maintaining competitive balance have been recognized as legitimate objectives.²²⁰ However, both the UEFA and the FIFA home-grown player rules can only be claimed to indirectly promote the training of young players. The rules do not impose any obligation on clubs to invest any particular funds into young player training or development.²²¹ They do not require that clubs implement any particular development program or initiative, or that home-grown players be of any particular age. Instead, to achieve the objective of providing an incentive to train young players, the rules depend upon an indirect “incentive.” Clubs are required to train young players so that they have a sufficient number of home-grown players who are sufficiently skilled and able to compete at the requisite standard for the club’s elite team.

The indirect nature of the home-grown player rules presents an immediate justificatory difficulty. The preference for a discriminatory indirect rule to rules more directly related to the training of young players, such as rules that impose training obligations on clubs or that require minimum levels of investment in young player training, may lead to a finding that the rule is not suited to the attainment of its objective. In these circumstances, there is the prospect for the inference to be drawn that the rules are, at least in part, motivated by a discriminatory objective. Other objections to the home-grown

216. *Id.* ¶ 123.

217. *Id.* ¶ 124.

218. *Id.* ¶ 125.

219. Weatherill, *supra* note 62, at 52.

220. *Bosman*, 1995 E.C.R. I-4921, ¶ 106; *see also* Council Declaration on Sport, *supra* note 70, ¶ 11.

221. In contrast to the UEFA licensing rules, which are discussed *infra* note 237.

player rules may also be made.

The need to train staff is a common feature of all business activity, but the sports sector is said to be unique due to the participants being at their prime in their youth, with development of talent occurring at a very early age.²²² It is argued that there would be a disincentive to spend time and money on developing talented footballers if the talent was being lost to a rival without compensation.²²³ As noted above, this argument was rejected in *Bosman*.²²⁴

It is also disputed that the sports sector is in fact unique in this respect:

I cannot see any compelling reason for supposing that a football club is any less likely to train young employees because they might subsequently quit the company than a supermarket or a university would be. . . . No empirical or economic evidence suggests any plausible basis for such claims. Quite the reverse: all employers need to train employees in order to take the benefit of their skills for as long as they are able to attract them to stay with the company. Football is not different. A club that neglected youth training would simply perform poorly.²²⁵

There is also a need for evidence to support assertions that the relaxation of the foreign player restrictions has inhibited the development of youth talent, particularly when these assertions are used to justify a discriminatory rule.²²⁶ Not all agree with this assertion.²²⁷

Nor does FIFA's home-grown players rule actually require clubs to field home-grown players who have actually been trained by the clubs on whom the rule is imposed. The rule does not even require that the players come from the clubs' city or region, merely that the player be eligible to be selected for the

222. See PARRISH & MIETTINEN, *supra* note 2, at 7.

223. *Id.*

224. *Bosman*, 1995 E.C.R. I-4921, ¶¶ 108-10.

225. Weatherill *supra* note 62, at 53-54. The author observes that "the economics of football are special when it comes to preserving the competitive equality between clubs; the economics of football are much less obviously special when it comes to compensating and thereby encouraging the training of young players." *Id.* at 54.

226. Duffy, *supra* note 19, at 3312-13.

227. *Id.* Duffy provides the example of the French successes in the World Cup in 1998 and the European Championship in 2000 as anecdotal refutation of these assertions. *See id.* At the time, the French league paid relatively poorly due to the nationalisation of its football league television rights. *See id.* Because of this, most of the best French players play abroad and the French league is full of foreign players. *See id.* A youth development scheme in place since the 1980s was believed to be responsible for the national team's successes. *See id.*

national team of the country in which the club is based. So it is not a “club-grown player” rule but a “nation-grown player” rule that is imposed at the club level. Clubs within a nation remain free to acquire the services of the best young players from within their country. They are not required to field players they have trained themselves.

The UEFA home-grown player rule at least requires clubs to retain four club-trained players in their twenty-five player squads. However, some evidence to support the assumption that this requirement encourages clubs to invest in young player training would be required to justify the discriminatory effect of the rule. There is no reason to assume that the requirement to retain only four locally trained players in a club’s senior team squad of twenty-five players provides any increased incentive for the club to train young players over and above its normal activities.

It could also be argued in relation to the UEFA 4+4 rule that the additional requirement for clubs to retain another four players trained in the same country creates the inference that the rule is directed at nationality based discrimination rather than promoting young player training. This additional requirement has no relevance to the objective of providing incentive for clubs to train their own players. It is a nationality-based restriction imposed in the unrelated context of local clubs.

The concern about the lack of investment in youth training extends to a concern that this lack of investment will weaken the quality of national teams by reducing the pool of local players who may be selected for national teams. This proposition could only be true if the pool of players able to be selected for national teams was restricted to players playing for clubs in their national league. Of course, this is not the case.²²⁸ In fact, it may be argued that labor mobility following *Bosman* has enhanced competitive balance in international football by increasing the market for prospective national team players.²²⁹ It is also argued that the early contact with skilled and experienced foreign players may be beneficial to a young players development.²³⁰

228. *Bosman*, 1995 E.C.R. I-4921. “Secondly, whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. Indeed, under the rules of the sporting associations, foreign players must be allowed by their clubs to play for their country’s national team in certain matches.” *Id.* ¶ 133. The rules requiring the release of foreign players for national team duties by their clubs suggest that a solution has been found for this problem. *Id.*

229. *Id.* ¶ 134; see Parrish & Miettinen, *supra* note 17, ¶ 25.

230. VAN DEN BOGAERT, *supra* note 80, at 377-80.

3. Competitive Balance.

As noted above, the objective of maintaining competitive balance in a sporting competition is a legitimate objective for a sport's governing body.²³¹ The Independent European Sports Review 2006 considered that the UEFA rules concerning home-grown players were compatible with Community law on the basis that they were justified as being designed to ensure competitive balance.²³²

As noted in *Bosman*, the rules are not sufficient to achieve the aim of maintaining a competitive balance, since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent.²³³ In addition, to meet the UEFA rule requirements, strong clubs will be able to search for and recruit young foreign players to their training academies so that they meet the qualification requirements of the home-grown player rules.²³⁴ As well as being better placed to do this, strong clubs will also enjoy the advantage of being better able to invest in academies to train players and maintain their superior position.²³⁵ FIFA concedes that rich clubs will always be able to buy the best players in the country.²³⁶

On FIFA's own admission, its 6+5 rule may have little real effect in achieving its objectives.²³⁷ The five main European championships that are said to be beset with competitive imbalance (England, Germany, Spain, Italy, and France) are actually close to the 6+5 rule requirement.²³⁸ If the rule

231. See generally Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basketball*, 2000 E.C.R. I-2681; *Bosman*, 1995 E.C.R. I-4921.

232. JOSE LUIS ARNAUT, INDEPENDENT EUROPEAN SPORT REVIEW 2006 (2006), available at http://independentfootballreview.com/doc/Full_Report_EN.pdf; see also PARRISH & MIETTINEN, *supra* note 2, at 41.

233. *Bosman*, 1995 E.C.R. I-4921, ¶ 107.

234. Parrish & Miettinen, *supra* note 17, ¶ 19. Some mitigation of this recruitment of foreign players would be imposed by the FIFA Regulations for Status and Transfer of Players 2005, Article 19, that restrict the international transfer of players under the age of 18 unless their families also relocate to the country of the recruiting club but for reasons independent of football. FIFA Regulations on the Status and Transfer of Players, art. 19 (2005) [hereinafter FIFA Regulations].

235. PARRISH & MIETTINEN, *supra* note 2, at 199.

236. *Blatter: '6+5' Rule Is Crucial*, *supra* note 22.

237. *Id.*

238. *Fewer Eligible Players in the Main European Leagues* (2008), FIFA.COM, <http://www.fifa.com/aboutfifa/federation/releases/newsid=849543.html> at 25 September 2008. During the 2007-08 season, 42.4% of squads in the five main competitions were made up of players who are not eligible to play for their clubs' relevant national team. *Id.* Only two of the championships are above 50% (England with 59.5% and Germany). *Id.* This is borne out by the fact that 52.6% of players in the top five clubs in each league were "ineligible" players. *Id.* Non-European players represented

would have little practical effect in achieving its objective, this must reduce the weight of the justification for the discriminatory nature of the rule.

Further, the evidence of the effect of free agency on competitive balance in baseball in the United States has found competitive balance unchanged or increased.²³⁹ Nor has free agency destroyed fans' allegiances to their teams despite increasing team roster volatility.²⁴⁰ The evidence in Europe does not support any detrimental effect on fan support or the popularity of football, such as to justify a discriminatory rule.²⁴¹ Evidence should be required showing that the home-grown player rules would have the effect of improving the competitive balance in European club football competitions as intended. It should also be noted that the idea that competitive balance is essential to maintain fan interest has itself been challenged.²⁴²

Finally, an unlimited pool of skilled players throughout the world would allow smaller clubs to employ a team of better-skilled players, maintaining the competitive balance of football.²⁴³

It is inexplicable how consumer welfare is benefited by the employment of less skilled players if more skilled players can generate increased broadcasting revenue, which necessarily connotes fan interest. How is uncertainty of outcome injured if all teams can field more skilled players versus less skilled players at the same relative cost?²⁴⁴

4. Connection with Local Communities.

UEFA argues that fans strongly support measures to maintain links between clubs and their localities.²⁴⁵ FIFA claims not to be fighting over

50% of the total number of foreign players, rising from around 30% before the introduction of freedom of movement in European football. *Id.*

239. Oscar N. Pinkas, *The Wisdom of Major League Baseball: Why Free Agency Does Not Spell Doom for European Football*, 16 SETON HALL J. SPORTS & ENT. L. 257, 262 (2006); Gary, *supra* note 19, at 317-18, 323-24; Peter Fishman, *Competitive Balance and Free Agency in Major League Baseball*, 14 DUKE J. ECON. 4, 7-12 (2002).

240. Gary, *supra* note 19, at 318. Baseball attendance is higher than when free agency began. *Id.*

241. Parrish & Miettinen, *supra* note 17, ¶ 21 (citing DELOITTE, ANNUAL REVIEW OF FOOTBALL FINANCE (2006)).

242. See generally Salil K Mehra & T. Joel Zuercher, *Striking Out "Competitive Balance" in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499 (2006).

243. Pinkas, *supra* note 239, at 279.

244. UEFA, *Fan Support for Homegrown Plan*, UEFA.COM, Apr. 19, 2005, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=296293.html>.

245. *Id.*

money, but fighting to keep a minimum of local, regional, or national identity.²⁴⁶

There is an initial conceptual difficulty in accepting the legitimacy of this local community argument in support of the home-grown player rules. At its core, the objective of restricting entry to foreign players in favor of local players is discriminatory in itself. The discriminatory nature of the effect of the rule is not the consequence of a rule designed to achieve some other non-discriminatory purpose. The rule would accordingly then struggle to meet the proportionality test on this ground.²⁴⁷

Further, the structure of the UEFA 4+4 rule itself raises a question as to the appropriateness of the objective. To the extent that the rule includes a local training requirement, it would appear to be consistent with the objective of fostering a connection with local communities—accepting for the purposes of argument that such a connection is promoted by the inclusion of locally trained players in club teams. The second part of the rule however, in requiring four association-trained players, imposes a training requirement that is related to other clubs in the same national association. Such a requirement would have no obvious role to play in promoting connections between a particular club and its local communities. This combination of requirements may impugn the genuineness or appropriateness of the objective.

Nor on a practical level can UEFA's rule be said to result in more local players representing their clubs.²⁴⁸ The rule does not require that these local players take the field. Such players may be maintained on squads merely to satisfy the requirements of the rule and never represent their club in a match.²⁴⁹ Clubs are not prevented from fielding an entire team of foreign players.²⁵⁰

The Court in *Bosman* did not need to consider the appropriateness of the rule in achieving its objective in rejecting this local community argument.²⁵¹ It dismissed the argument, as it did not consider that such a link existed.²⁵²

246. *Blatter: '6+5' Rule Is Crucial*, *supra* note 22.

247. Case C-106/91, *Ramrath v. Ministre de la Justice*, 1992 E.C.R. I-3351, ¶¶ 29-30; Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, ¶ 37; *Parrish & Miettinen*, *supra* note 17, ¶ 36. "The rationale for requiring "home-grown players" as per UEFA's regulations is to enable markets in commercial sport to maintain a geographic character and reinforce partitions within the Community by discriminating against Community workers." *Id.*

248. *Parrish & Miettinen*, *supra* note 17, ¶ 23.

249. *Id.*

250. *Id.*

251. Case C-415/93, *Union Royale Belge Sociétés de Football Ass'n v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶¶ 131-34.

252. *Id.*; see *PARRISH & MIETTINEN*, *supra* note 2, at 10.

There are strong grounds to support this conclusion of the court. In particular, the “nationality of individual player is disassociated from the sporting identity of clubs, in contrast to that of national representative sides.”²⁵³

While clubs may symbolize a local identity, that does not mean that supporters will favor local players.²⁵⁴ Evidence from both Europe²⁵⁵ and the United States²⁵⁶ supports the view that the presence of foreign players in club teams does not result in a decline in local support.²⁵⁷ In fact, the presence of foreign players may assist in attracting support from immigrant groups in the local communities and from the foreign communities themselves.²⁵⁸

Having considered the arguments in support of the home-grown player rules, it remains to be considered whether there are less restrictive alternatives available to the football authorities to meet their legitimate objectives. If there are such alternatives, the rules will not meet the proportionality test.

D. *Less Restrictive Alternatives*

There are ranges of measures that could be adopted that have the benefit of being more directly targeted to achieve the legitimate objectives of the football associations. These measures are less restrictive than the home-grown players rules in that they do not involve nationality discrimination, or impose obstacles or restrictions on the free movement of professional football players.

1. Training Related Measures.

With respect to the objective of encouraging the education and training of young players, non-discriminatory alternatives include training compensation measures²⁵⁹ and creating a pool of money to compensate teams committed to

253. Weatherill, *supra* note 62, at 66. It has also been observed that “[i]t matters not to supporters that teams are composed of players from other towns, cities and indeed countries. The performance of the team is key.” PARRISH & MIETTINEN, *supra* note 2, at 10; *see also* VAN DEN BOGAERT, *supra* note 80, at 372-74.

254. Parrish & Miettinen, *supra* note 17, ¶ 21.

255. *Id.* Revenues of the big five leagues have increased and, for nine successive years to 2006, English Premier League games were ninety percent attended with attendance rising sixty percent between 1992 and the 2005/06 season. *Id.* Only in Italy has match day attendance declined *Id.* (citing DELOITTE, ANNUAL REVIEW OF FOOTBALL FINANCE (2006)).

256. Gary, *supra* note 19, at 321; Pinkas, *supra* note 231, at 279-80. Following the influx of foreign players in the 1990s in baseball, both game attendance and market size abroad for the sport increased. *See* Gary, *supra* note 19, at 321; Pinkas, *supra* note 231, at 279-80.

257. Parrish & Miettinen, *supra* note 17, ¶ 21.

258. *Id.* ¶ 22.

259. Case C-415/93, Union Royale Belge Sociétés de Football Ass’n v. Bosman (Bosman), 1995 E.C.R. I-4921, ¶ 239. An adjusted transfer system was suggested by Advocate General Lenz whereby

training young talent.²⁶⁰

While these measures may impose restrictions on labor mobility, they may nevertheless be objectively justified. Training obligations can also be imposed directly as part of a club-licensing program.²⁶¹ In fact, UEFA has adopted rules imposing direct requirements on clubs applying to be licensed relating to approved youth development programs.²⁶² The capacity for UEFA to further strengthen and enforce such rules that relate directly to the legitimate objective of promoting youth training raises the question as to why it has instead preferred to attempt to introduce a discriminatory rule. While licensing regimes would not escape scrutiny under the Treaty, such rules may be justified as inherent in the organization of football and thereby beyond the scope of Article 81(1), or as justified and exempt under Article 81(3).²⁶³

2. Income Redistribution Measures.

Income redistribution measures or solidarity payments to redistribute income from richer to poorer clubs have also been suggested.²⁶⁴ “Systems of internal wealth distribution, designed to reflect the interdependence of clubs which is the peculiar hallmark of a sports league, might be treated as inherent to sport (and therefore outside the reach of the competition rules) or as economically motivated and therefore requiring exemption.”²⁶⁵ A specific income redistributing measure is the collective selling of football broadcast

fees were limited to training costs incurred and if the fee payable was limited to the first time club change. *Id.* Some reductions would be required for each year the player spent with the original club after being trained. *Id.* Lenz however also noted that such a system may be invalid if it could be shown that there were less restrictive measures available to achieve the same ends. See Weatherill, *supra* note 62, at 53. Weatherill considers that the decision in *Bosman* excludes a system as suggested by Advocate General Lenz. *Id.* The transfer rules adopted by FIFA following *Bosman* do include restrictions on the recruitment of young players, a training compensation mechanism for players twenty-three years of age or younger and a mechanism to reimburse costs associated with training young players. See FIFA Regulations, art. 20; Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 SPORTS LAW. J. 155, 167 (2005).

260. Brian Wilson, *Bosman Ruling Won't Go Offside*, HERALD (Glasgow, Scot.), July 1, 1996, at 11.

261. Parrish & Miettinen, *supra* note 17, ¶¶ 31-32.

262. UEFA, CLUB LICENSING SYSTEM MANUAL VERSION 2.0 cl. 6.4.1 (2005), available at <http://www.uefa.com/newsfiles/358508.pdf>.

263. Parrish & Miettinen, *supra* note 17, ¶ 32.

264. Distribution of income from broadcast rights sales and ticket sales was suggested by Advocate General Lenz in his opinion. Case C-415/93, *Union Royale Belge Sociétés de Football Ass'n v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 226.

265. Weatherill, *supra* note 62, at 67.

rights.²⁶⁶ The funds generated can be distributed between clubs, providing a balancing mechanism to benefit the weaker clubs.²⁶⁷ Other suggested distributive measures include the establishment of a solidarity fund to redistribute money between clubs and the investment in structural football projects in aid of youth football.²⁶⁸

UEFA may have difficulty in obtaining agreement within the sport to greater levels of income redistribution,²⁶⁹ however, this should not provide any justification for the adoption of a discriminatory rule in lieu of non-discriminatory measures.

3. Other Non-Discriminatory Measures.

Other non-discriminatory proposals include measures such a player draft,²⁷⁰ a collective wage agreement between clubs that would limit player salaries,²⁷¹ a salary or budget caps,²⁷² and a “farm” or “feeder” system where

266. Pinkas, *supra* note 231, at 285; Jens Pelle van den Brink, *EC Competition Law and the Regulation of European Football*, 7 *SPORTS LAW. J.* 105, 134-37 (2000).

267. Pelle van den Brink, *supra* note 266 at 137-38; Pinkas, *supra* note 231, at 285-86.

268. *Id.* at 137-38; Weatherill, *supra* note 62, at 67. “Uncertainty of outcome may be regarded as a means of improving the quality of the product, but, more than that, it may be treated as essential to the very conduct of sport in the first place. The latter view might lead to the conclusion that the establishment of a solidarity fund within a sport, to which the wealthier clubs are required to contribute from the proceeds of, *inter alia*, the sale of broadcasting rights and ticket income and on which poorer clubs may draw for financial support, may escape the supervision under EC competition law.” Weatherill, *supra* note 62, at 67.

269. Parrish & Miettinen, *supra* note 17, ¶ 28. The group of leading clubs in Europe (the “G14”) conversely wish to see a larger flow of revenues flow to the clubs that generate the revenue. *Id.* These tensions have led to threats to create a breakaway league, challenging UEFA’s authority and position as the sole governing body of football in Europe. *Id.*

270. Pelle van den Brink, *supra* note 266, at 138-41.

271. Case C-415/93, *Union Royale Belge Sociétés de Football Ass’n v. Bosman (Bosman)*, 1995 E.C.R. I-4921, ¶ 226. The use of collective agreements is alluded to in the FIFA/FIFPro Memorandum of Understanding. FIFA/FIFPro Memorandum of Understanding, at clause 1.3, Nov. 2006, available at www.pfa.net.au/uploads/FIFPro-MOU-FinalSig.pdf. *Collective agreements may not be subject to competition law restrictions.* See Case C-115-117/97, *Brentjens*, 1999 E.C.R. I-6025. Although such rules would need to nevertheless comply with other Treaty provisions such as freedom of movement protections. See Case C-519/04, *Meca-Medina v. Commission of the European Union*, 2006 E.C.R. I-6991; Parrish & Miettinen, *supra* note 17, ¶ 33.

272. Weatherill, *supra* note 62, at 73. These measures may be “legally problematic.” It has been argued that the European Commission should not strike down salary caps as violations of competition law but instead should find them to be ancillary restraints under Article 81(1). See Camatsos, *supra* note 259, at 177; see also Thomas Schiera, *Balancing Act: Will the European Commission Allow European Football to Re-establish the Competitive Balance that it Helped Destroy?*, 32 *BROOK. J. INT’L L.* 709, 731 (2007) (arguing that a salary cap is necessary to the long term existence of European football and should be allowed as not falling under Article 81(1) or as exempted under Article 81(3)).

senior clubs affiliate with small market or junior league clubs and place development players in those clubs.²⁷³ While measures such as salary caps may otherwise be considered to be in breach of Article 81 as anti-competitive agreements, such measures may be able to be justified as inherent to the proper functioning of the sport and outside the scope of Article 81(1), or as exempt under Article 81(3).²⁷⁴

Limitations on squad sizes could also be adopted to prevent hoarding of players by clubs that can afford to do so.²⁷⁵ While the UEFA rule limits squad sizes for UEFA competitions to twenty-five players, UEFA has not imposed this rule in national club competitions. As far as it is concerned, the FIFA 6+5 rule does nothing to address the issue of hoarding that can favor the larger clubs.²⁷⁶

Other more controversial proposals may also be available. Although abandoning the use of open competitions may be unpalatable to European ears and inconsistent with the European Sports Model, it nevertheless may be appropriate for European sports governing bodies to re-examine their attachment to that type of system - or at least re-examine the belief that it is required to promote competitive balance.²⁷⁷ There is considerable opinion that this is simply not the case.²⁷⁸

273. This system is successful in American baseball. See Gary, *supra* note 19; Pinkas, *supra* note 231, at 287.

274. Parrish & Miettinen, *supra* note 17. The authors note that a hard salary cap may be more justifiable than a soft cap as being more appropriately directed at achieving the objective of promoting competitive balance. *Id.* ¶¶ 29-30.

275. See generally Braham Dabscheck, *The Globe at the Feet: FIFA's New Employment Rules – II*, 9 SPORT IN SOC'Y 1 (2006).

276. On the issue of hoarding, it has been noted that “clubs can defend large squad sizes on the grounds that modern competition and a crowded match calendar demands squad coverage.” Parrish & Miettinen, *supra* note 17, ¶ 18. Moreover, there is a disincentive against the hoarding of players in the FIFA rules. Players who do not receive match time have the prospect of contract termination on just cause without compensation or sanction. FIFA Regulations, art. 15.

277. See, e.g., FIFA, 58TH FIFA CONGRESS AGENDA (2008); see also Press Release, FIFA, Yes to 6+5 and New WADA Code (May 30, 2008), available at <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783663.html>

278. Jonathan Michie & Christine Oughton, *Competitive Balance in Football: An Update*, SPORTS NEXUS, July 2005, available at <http://www.sportsnexus.co.uk/resources/12028/assets/football/CB-2005-Update.pdf>; see generally Luigi Buzzacchi et. al., Equality of Opportunity and Equality of Outcome: Open Leagues, Closed Leagues and Competitive Balance, 3 J.INDUSTRY, COMPETITION & TRADE 167; Stefan Szymanski, Americans Don't Want to Take the Drop, OBSERVER (London, Eng.), Apr. 29, 2007. However, it is not clear that greater competitive balance in fact produces greater attendances. Stefan Szymanski, The Champions League and the Coase Theorem, 54 SCOT. J. POL. ECON. 355, 371 (2007); see generally TROELS TROELSEN & TRUDO DEJONGE, THE NEED OF COMPETITIVE BALANCE IN EUROPEAN PROFESSIONAL SOCCER: A LESSON TO BE LEARNED FROM THE NORTH AMERICAN PROFESSIONAL SOCCER LEAGUES (2006); Roger G.

Another alternative league structure that has been suggested involves the grouping of clubs from small to medium sized national associations under the regulatory control of UEFA.²⁷⁹ This change would have the effect of narrowing the competitive imbalance between these leagues, and the big five national football associations.²⁸⁰ The proposal proceeds from the observation that player market liberalization allows players to move between leagues but that clubs remain tied to leagues within their national association.²⁸¹

V. CONCLUSION

Protection under the Treaty from nationality-based discrimination and the associated right of freedom of movement is fundamental. Sport is not exempt from the Treaty to any appreciable extent, though the process by which Treaty protections are applied does allow sport specific grounds on which some activities that would otherwise be invalid under the Treaty can be justified. The home-grown player rules are directly discriminatory in the case of the FIFA 6+5 rule and indirectly discriminatory in the case of the UEFA 4+4 rule. The case for either of these rules to be allowed to operate in a discriminatory manner is weak, and there is a range of non-discriminatory alternatives that do not appear to have received any serious consideration from the football governing bodies.

In light of this, the current ambivalence of the EC to the UEFA home-grown rule appears inappropriately deferential to the objectives of UEFA. The support of FIFPro for an even greater restriction on the rights of its members on the basis of nationality in the form of the proposed FIFA rule may be even more perplexing. As the analysis presented above reveals, it may reasonably be expected that the European Court of Justice would be far less accommodating if a challenge to the home-grown player rules was litigated.

Noll, *The Economics of Promotion and Relegation in Sports Leagues: The Case of English Football*, 3 J. SPORTS ECON. 169 (2002) (concluding that promotion and relegation has a positive effect on attendances but is ambiguous in its effect on competitive balance).

279. See Parrish & Miettinen, *supra* note 17, ¶ 34

280. *Id.*

281. *Id.* (citing Stefan Kesenne, *The Bosman Case and European Football*, HANDBOOK ON THE ECONOMICS OF SPORT 636 (2006)); see generally Stefan Kesenne, *The Peculiar International Economics of Professional Football in Europe*, 54 SCOT. J.POL. ECON. 388. The authors also note that, because of this factor, UEFA may need to convince a court that its 4+4 rule was not an attempt to re-regulate the labor market as a means of shoring up its regulatory power. PARRISH & MIETTINEN, *supra* note 2, at 198-99.

