

RECONCILING SOCCER AUTHORITIES AND EUROPEAN UNION INSTITUTIONS: WHO IS BEST PLACED TO ADMINISTER GOVERNANCE WITHIN THE EUROPEAN SOCCER MARKET?

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Introduction

The professional soccer¹ industry cannot evade the dominion of the European Union institutions (the "Institutions").² This does not imply that the soccer

1. In Europe, the term soccer is referred to as football. This article frequently quotes references to football or footballers, which merely refer to soccer, soccer players or soccer associations..

2. The administration of the European Union is carried out by four main

authorities have relinquished their attempts to circumvent Community law. On numerous occasions the industry has fouled and been cautioned for defiance. This reluctance to comply, however, is based on the rationale that such conformity is ruining the foundations of the game.

While much has been documented on the infamous *Union Royale Belges des Societies de Football Ass'n v. Bosman* ruling, which advocated the free movement of soccer players upon the expiration of their employment contract,³ many commentators have overlooked one particular ramification. This is ironic because it is one of the most prominent issues currently concerning the European soccer market. When the soccer industry was forced to comply with Community law, the landscape of the modern game and the composition of many European teams were radically transformed as a result of the increased use of foreign players. Soccer clubs could freely acquire developed and experienced players from within the European Union, as opposed to nurturing young homegrown players whose future and performance were uncertain.

The onus falls upon the soccer authorities to address this issue and to regulate the over-use of foreign players, thereby forcing European clubs to maintain their duty to seek and nurture their own domestic lifeblood. Neglecting this responsibility would result in perilous implications throughout every level of the game. Nevertheless, governance within the industry should be performed in a manner that is compatible with Community law.

This paper has been inspired by a strategy that will deter clubs from seeking the services of foreign players. As Europe's principal soccer authority, UEFA has compelled European clubs to manipulate the composition of their squads to include a quota of "locally trained" players in the 2006-07 UEFA organized competitions. This paper examines the legal viability of such a quota under the Community's legislative framework.

institutions: The Council of Ministers, the European Commission, the European Parliament and the European Court of Justice. Other bodies such as the Economic and Social Committee and the Committee of the Regions have particular roles to play in decision making. <http://www.europarl.org.uk/EU/EUinstitutionsmain.htm> (last visited May 21, 2008).

3. *Union Royale Belges des Sociétés de Football Ass'n v. Bosman*, 1995 E.C.R. I-04921.

While laws are enacted to guide the behavior of individuals and assist in maintaining social stability,⁴ existing Community law is endangering the longevity of the game by inadvertently eroding its grass roots. Consequently, the professional soccer industry in the European Union exists in a paradox. This illustrates the incompatible nature of the European soccer market and the law. Moreover, it underlines the disjointed relationship between the Institutions and the soccer authorities that seek self-regulation.

Ironically, the founding policymakers of the game refused to adopt "professionalism," by imposing regulations "prohibiting any payments to players other than strict expenses or compensation for wages lost through taking part."⁵ For a game that once consisted of "spontaneous and informal games of street football among working class men who lived and worked in the burgeoning industrial towns and cities,"⁶ soccer has developed into a fiercely competitive and globalized industry. The commercialization of professional soccer has been accelerated by a vast media investment, which has raised the stakes for competitors. In particular, the elite European club teams participate in European-wide competitions with an unparalleled financial incentive.⁷

Consequently, professional teams will bargain for the most talented players who will contribute to their winning formula and increase their prospects of financial gain. Those teams have the opportunity to explore the extensive European Union marketplace for the recruitment of players. This has the potential to make good business sense when compared to purchasing domestic players who may be valued at a considerably higher price.⁸ This unrestricted access to the

4. *Id.*

5. NORMAN BARRETT, *THE DAILY TELEGRAPH FOOTBALL CHRONICLE* 14 (4th ed. 1999).

6. David McArdle, *One Hundred Years of Servitude: Contractual Conflict in English Professional Football before Bosman*, 2 WEB J. CURRENT LEGAL ISSUES (2000), available at <http://webjcli.ncl.ac.uk/2000/issue2/mcardle2.html>

7. It was estimated that the income derived from television and commercial sponsorship for the UEFA Champions League 2005-06 was worth 591.6 million and that 508.9million was to be distributed between the 32 participating teams, *Higher revenue from UEFA Champions League*, UEFA.COM, Sept. 2, 2005, available at <http://www.uefa.com/uefa/keytopics/kind=16384/newsid=405653.html> (last visited Sept. 14, 2006).

8. AJ, *What's all the fuss about? The Case for Arsenal: Overpriced English Talent?*, SPORTNETWORK.COM, Mar. 30, 2005, available at

Continent's internal market was not always the case as the soccer authorities regulated the use of foreign players as a means of preserving the financial balance and competitive value of professional teams. As the financial incentives were raised, the soccer industry attracted the attention of the Institutions. There was significant concern that the buying and selling of players was analogous to "a latter day version of slave trade, a violation of the freedom of contract and the freedom of movement."⁹

Community law intervention sought to improve the welfare of players and standardize professional soccer with other industries. As a result, the soccer authorities have been monitored to ensure that players are treated akin to other workers in the European Union. Nevertheless, a key adjudicator suggested in *Bosman*¹⁰ that "it is unlikely that the influx of foreign players would be so great that native players would no longer get a chance."¹¹ This paper will demonstrate that such opinions were seriously miscalculated, resulting in adverse consequences that now require urgent appraisal from the soccer authorities.

This paper claims that a regulation compelling the use of "locally trained" players is legally viable, despite inadvertently restricting the use of foreign players and contravening aspects of Community law. It deems the soccer authorities more suitably placed to administer governance in the European soccer market than the Institutions. As the title suggests, the seemingly discriminatory nature of the regulations is likely to trigger legal action. However, in light of the pertinent case law and legislative loopholes, litigation is unlikely to succeed.

I. IDENTIFYING THE PARTIES

A. THE UNION OF EUROPEAN FOOTBALL ASSOCIATIONS

The Union of European Football Associations ("UEFA") is

<http://www.sportnetwork.net/main/s378/st68484.htm>

9. Janssen Van Raay, *Report of the Committee on Legal Affairs and Citizens' Rights on the Freedom of Movement of Professional Footballers in the Community*, European Parliament, Session Documents Series A, (1989).

10. Union Royale Belges des Sociétés de Football Ass'n v. Bosman, 1995 E.C.R. I-04921.

11. Advocate General Jacobs Opinion in *Bosman*, ¶ 146.

at the heart of European soccer. As Europe's supreme authority for the game, UEFA has the duty to represent and regulate some fifty-two national associations originating from European Union Member States, participating states of the European Economic Area, and other discretionary states.¹² Consequently, UEFA's regulatory domain extends from northwest Europe (Iceland) to western Siberia (Russia), and encompasses a portion of the Middle East (Armenia, Azerbaijan, Georgia, Israel). This capacity to transcend national borders is an integral feature in coordinating and ensuring "the social, educational and cultural benefits of football are fully utilized and appreciated where there is global acceptance of key issues."¹³

UEFA's competence in governing this extensive area is derived from its institutional structure, which has been likened to that of a "modern democratic government."¹⁴ Consisting of a President,¹⁵ Congress,¹⁶ Chief Executive,¹⁷ Executive Committee,¹⁸ Disciplinary,¹⁹ and Appeals Body,²⁰ these separate organs enjoy exclusive responsibilities that are necessary in establishing an equitable and fair decision-making procedure. This internal arrangement employs the democratic principle of the "separation of powers," ensuring a transparent and effective organization.

UEFA is commonly recognized for orchestrating the transnational competitions for European club and national teams. This paper will consider the European club competitions, namely the UEFA Champions League, UEFA Cup, UEFA Super Cup and UEFA Intertoto Cup. Since the inception of UEFA's European-wide competition in 1955,²¹

12. UEFA STATUTES, RULES OF PROCEDURE OF CONG., REGULATIONS GOVERNING THE IMPLEMENTATION OF THE STATUTES, art. 5(2), (2006).

13. Adam Szepter, *UEFA sets out its strategy*, UEFA.COM, Feb. 10, 2006, available at <http://www.uefa.com/uefa/keytopics/kind=8388608/newsid=403114.html> (last visited Dec. 10, 2006).

14. José Luis Arnaut, INDEPENDENT EUROPEAN SPORT REVIEW 56 (2006), available at <http://www.independentfootballreview.com> (last visited May. 21, 2006).

15. UEFA Statutes, *supra* note 12, art. 26.

16. *Id.* at art. 12.

17. *Id.* at art. 30.

18. *Id.* at art. 21.

19. *Id.* at art. 33.

20. *Id.* at art. 34.

21. *UEFA Champions League: History*, UEFA.COM, , Jul. 13, 2005, available at <http://www.uefa.com/competitions/ucl/history/index.html> (last visited Dec. 19, 2006).

these competitions have grown in stature, attributable to the development of viewing mediums and commercial interest. As the founder and architect of European competition, it is the responsibility of UEFA to draft rules and regulations as it sees appropriate, at times irrespective of external legal forces. Such rules and regulations require the approval of UEFA's senior counterpart, FIFA.

B. Federation Internationale de Football Association

The Federation Internationale de Football Association ("FIFA") is the governing body that regulates international soccer and has the "central competence...in staging world football championships,"²² most notably the FIFA World Cup. Therefore, FIFA is positioned at the apex of the soccer pyramid supervising the six continental confederations. UEFA is one of these confederations accountable to FIFA and must "comply fully with [its] Statutes, regulations, directives and decisions."²³ Moreover, the confederations must receive the authorization of the world's governing body before their regulations can be ratified at continental level.²⁴

The institutional structure of FIFA is analogous to that of UEFA, consisting of a Congress,²⁵ Executive Committee,²⁶ a general secretariat and President.²⁷ FIFA also employs twenty permanent and ad-hoc committees that address every aspect of modern soccer including: Marketing and Television,²⁸ Sport Medicine,²⁹ Women's Football,³⁰ and Legal³¹ matters. Importantly, the Legal Committee has the responsibility to "analy[z]e basic legal issues relating to football and the evolution of Statutes and regulations of FIFA, the

22. FIFA FINANCIAL REPORT FIFA FINANCIAL 2005 6 (2005), available at http://www.fifa.com/mm/document/affederation/administration/2005_fifa_financial_report_en_1770.pdf

23. FIFA STATUTES, REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, STANDING ORDERS OF THE CONGRESS, art. 13(1)(a), (2006).

24. *Id.* at art. 20(5).

25. *Id.* at art. 22.

26. *Id.* at art. 31.

27. *Id.* at art. 32.

28. FIFA STATUTES, REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, STANDING ORDERS OF THE CONGRESS, art. 13(1)(a), (2006). art. 46.

29. *Id.* at art. 46.

30. *Id.* at art. 41.

31. *Id.* at art. 48.

Confederations and Members.”³²

Like UEFA, the administrative hub of FIFA is based in Switzerland and is subject to Swiss law. Being domiciled in Switzerland, however, does not negate its obligation of drafting lawful regulations that take effect in the European Community. Accordingly, the rules of FIFA and UEFA “apply *inter alia* in all the Member States of the Community. The courts of each of those Member States are therefore in a position to raise the question of the compatibility of those rules with Community law.”³³ Although this discussion will focus primarily on regulations imposed by UEFA, as the international governing body that approves confederation regulations, FIFA is also responsible to the Institutions.

C. The Football Association

The inception of the Football Association (the “FA”) in 1863 led to the first official regulations to pioneer the soccer world.³⁴ Being the first association of its kind, the FA formally codified the vast array of rules that had been developed over the British Isles and became the architect for all modern day competitions by arranging the FA Challenge Cup (commonly known as the FA Cup) in 1871. In its modern form, the FA is a member of UEFA and FIFA, and ensures that all regulations issued by these bodies are implemented.

The FA’s institutional structure is akin to UEFA and FIFA, comprising a clearly defined legislature and executive.³⁵ The legislature consists of the Council,³⁶ various Committees³⁷ and the Main Board.³⁸ The Council has the duty of examining the current and proposed policies that are submitted by a Committee,³⁹ whereas the Main Board is responsible for coordinating strategies to achieve the commercial objectives.

32. *Id.*

33. AG Opinion in *Bosman*, *supra* note 11, ¶ 107.

34. *History of The FA*, Mar. 29, 2004, available at <http://www.thefa.com/TheFA/TheOrganisation/Postings/2004/03> (last visited Dec. 12, 2006).

35. *The FA: The Organisation’s Structure*, Mar. 31, 2004, available at http://www.thefa.com/TheFA/Postings/2004/03/THE_ORGANISATION.htm (last visited Dec. 12, 2006).

36. THE FA, ARTICLES OF ASS’N, provision 107 [hereinafter Articles] (2003).

37. THE FA, RULES OF ASS’N & LAWS OF THE GAME, provision 47 (2006-2007).

38. ARTICLES, *supra* note 36, provision 82.

39. *Id.* at provision 84.

The executive board consists of Divisional Heads⁴⁰ that are essential in running the everyday tasks of the FA under the supervision of the Chief Executive.⁴¹

The FA also governs the foremost league in England, the FA Premier League. It is this league that supplies some of the most successful teams in UEFA competitions. As the original draftsman for soccer, the FA has a significant role to play in the operation of soccer globally, occupying a permanent position on the International Football Association Board. This Board determines the formal "Laws of the game... such as the back pass rule...the offside Law [and] punishment for tackles from behind."⁴²

D. Federation Internationale Des Associations De Footballeurs Professionnels

The Federation Internationale Des Associations De Footballeurs Professionnels ("FIFPro") is the union that represents the individual and collective interests of all players worldwide. Established in 1965, the union emerged from a congress that would serve to accommodate the increasing changes of soccer on a global scale. Indeed, the annual congress still exists as the most significant aspect of FIFPro.⁴³ FIFPro's objective to "increase the solidarity between professional football players"⁴⁴ was crucial following the transformation of the European soccer market in the latter part of the twentieth century. The organization is internationally recognized in 42 countries and is now legally accepted in the Institutions.⁴⁵

FIFPro was established to defend the vulnerable position of the professional player, and was influential in "propagating and defending [their] rights."⁴⁶ Further, the organization advocated for "the freedom of the football player to be able to

40. *Id.* at provision 82.

41. *Id.* at provision 84.

42. INFOPLUS, FIFA/IFAB CONSULTATION PAPER (2004), available at http://www.fifa.com/documents/static/history/IP100_04E_IFAB.pdf (last visited Apr. 3, 2007).

43. FIFPRO, ARTICLES OF ASS'N art. 17.

44. *Id.* at art. 2(b).

45. *FIFPro History*, available at <http://www.fifpro.org/index.php?mod=pcat&sess=1872552> (last visited Dec. 2, 2006).

46. *Id.*

choose the club of his choice at the end of his contract."⁴⁷

FIFPro is conveniently placed to identify the disparity of earnings between soccer players worldwide. This is vital to ensure a reasonable income for every player, which in turn provides "stability for the profession."⁴⁸ As the international trade union for professional soccer, FIFPro has been influential in assisting FIFA with the drafting of regulations for the transfer system and the use of players' agents.⁴⁹

E. The Professional Footballers' Association

Established in 1907, the Professional Footballers' Association (the "PFA") was the first trade union of its kind in the sporting world to represent the individual and collective interests of its members in England.⁵⁰ Members of the PFA can use the organization as a sanctuary for advice regarding every aspect of their professional careers and beyond. Importantly, its members are entitled to union representation before disciplinary and transfer tribunals.

The internal structure of the PFA comprises departments of Finance, Commerce, Education, Player Management Agency and Coaching. The Chief Executive supervises the operations of the departments and has the responsibility of liaising with existing players who are elected to the Management Committee to discuss the objectives of the PFA.

F. The European Commission

The European Commission (the "Commission") is perceived as being the executive of the Institutions. It is responsible for the daily administration of the European Community and ensures that Member States, undertakings and individuals do not violate Community legislation. If a violation occurs, the Commission can initiate "infringement proceedings" in the European Court of Justice.⁵¹ Accordingly, the Commission is referred to as the guardian of the Treaty

47. *Id.*

48. *Id.*

49. *Id.*

50. JOHN HARDING, FOR THE GOOD OF THE GOOD OF THE GAME: THE OFFICIAL HISTORY OF THE PROFESSIONAL FOOTBALLS' ASSOCIATION 40 (1991).

51. Treaty Establishing The Elinspean Economic Community art. 226, Mar. 25, 1957, 1957 U.N.T.S. (C298) 3 [hereinafter EEC Treaty].

that seeks to maintain "the proper functioning and development of the common market."⁵²

The Commission plays a significant role in the creation of Community law, as the European Council and the European Parliament must act on its proposals. This duty of initiating legislation places the Commission at the forefront of European policy. Furthermore, it can also be instructed by the European Council and the European Parliament to amend or create regulations in areas such as technology, agriculture and competition.

The competence of the Commission in the professional sporting arena, however, has been unpredictable. Where the Commission has sought to confront professional soccer, its efforts have often been frustrated and ineffective.

G. The European Court of Justice

The European Court of Justice (the "ECJ") is the judicial organ of the Institutions, adjudicating only on matters concerning Community law. It is responsible for ruling on claims brought by the Commission for legislative infringements. It often receives questions from Member States regarding the interpretation of Community law.

The Court of First Instance (the "CFI") is an independent court attached to the ECJ, which may also receive questions regarding the interpretation of Community law "in specific areas laid down by the Statute."⁵³

The decision making process of the ECJ is assisted by the Advocate General ("AG") who is to adopt an impartial manner and provide "reasoned submissions" in the form of a written "opinion."⁵⁴ Although this opinion is not binding upon the Court, it will offer guidance on how the law should be applied and provide detailed observations of the case.

In a sporting context, the ECJ has operated on a case-by-case approach, catering to the unique characteristics of the area and high-pressure environment in which it evolves.

52. *Id.* at art. 211.

53. EEC Treaty, *supra* note 51, art. 225.

54. *Id.* at art. 222.

II. THE LEGAL ENVIRONMENT SURROUNDING SPORT IN EUROPE

The foundation for all Community legislation is derived from the Treaty establishing the European Community (the "Treaty"). The Treaty constitutes a primary source of law, providing a framework of fundamental principles that are binding in their entirety on Member States and can be relied upon by all individuals.

Article 2 of the Treaty explains the rationale in "establishing a common market" by coordinating the economic objectives of the signatory States. It suggests that in harmonizing the individual economies of the Member States, the European Community would experience "a balanced and sustainable development of economic activities."⁵⁵ The improvement of market conditions would have a corollary benefit on European citizens "by raising the standard of living and quality of life."⁵⁶ This interactive cross-border marketplace is designed to "encourage social cohesion and solidarity among Member States."⁵⁷

In order to create the "internal market," it would be necessary to abolish "all obstacles to the free movement of goods, persons, services and capital," per Article 3(c). Synchronizing the individual economies of the continent would improve the efficiency of trade and serve to maximize wealth creation in the Community. By mobilizing human resources, individuals could migrate to countries where their skills were required. Ultimately, the Community would evolve into a single economic area "without any internal frontiers in which the free movement of goods, persons, services and capital is ensured," in accordance with Article 14(2). It will become evident that this would be a contested factor in the European soccer market.

The convergence of nationalities, languages, cultures and religions, would inevitably be met with some resistance. Therefore, the Treaty compelled the signatory States to adapt and comply with Article 12, ensuring that "any discrimination on grounds of nationality shall be prohibited".⁵⁸

Article 234 assists the uniform application of Community

55. *Id.* at art. 2.

56. *Id.*

57. *Id.*

58. EEC Treaty, *supra* note 51, art.12

Law, which details the preliminary reference procedure. This legislative device has been influential in shaping the relationship of domestic and Community law, enabling Member State national courts to engage in dialogue with the ECJ regarding the interpretation of Community legislation.⁵⁹ Consequently, when a ruling of this nature is emitted, the ECJ can be perceived as providing “flesh and substance to an *outline Treaty*.”⁶⁰

While the Treaty conveys these fundamental provisions, it is not sufficient to independently administrate. Further qualification is granted by “secondary legislation” emitted from the Institutions, namely regulations, directives and decisions as outlined under Article 249.

Regulations are automatically binding on all Member States. They supersede domestic law and are uniformly and simultaneously applicable. An individual may utilize a regulation in an action against the state or against another individual. The former action is referred to as vertical direct effect and the latter is known as horizontal direct effect. Directives are addressed to individual Member States and provide an element of freedom in their implementation. Significantly, directives only possess vertical direct effect.⁶¹ Finally, decisions are directly effective and are binding in their entirety on those to whom they are addressed.

It is necessary to consider primary and secondary legislation that is concerned with the free movement of individuals, competition law and employment law, each area being significant in the European soccer market.

A. Free Movement of Individuals

The ability of an individual to migrate to any area of the European Union is an integral feature of the common market. Where there is a shortage of labor in a particular Member State, recruitment can take place from a larger pool of individuals from elsewhere in the Community. Similarly, where there is an overabundance of workers in one Member State, an individual may find better prospects in another

59. SIONIADH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 225-54 (2002).

60. PAUL CRAIG & GRAINNE DE BURCA, EU LAW (3rd ed. 2003) 87.

61. Marshall v. Southampton, 1986 E.C.R. 723 (Slynn, J., opinion).

Member State. The removal of obstacles that hamper the mobility of workers would stimulate a diffusion of individuals across the continent.⁶²

1. Article 39

This provision concerns the eligibility of an individual to seek employment and be employed in the Community. Article 39(2) of the Treaty provides that the "...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." Thus, all European citizens are granted the same employment opportunities regardless of their nationality. Article 39 also prohibits "indirect discrimination" by which a national of a particular Member State is preferred to a non-national in eligibility for employment or an employment benefit.⁶³ This freedom is subject to subsection 3 of Article 39, which permits a restriction in circumstances of "public policy, public security or public health".⁶⁴

2. Defining Discrimination

Enshrined in Community law is the principle of *non-discrimination*. The scope of the term "discrimination" is largely determined by Community case law. However secondary legislation has attempted to codify elements of this case law and provide a definition. These definitions elaborate on the prohibition of *nationality* discrimination detailed in Article 39. The relevant legislation consists of Council Regulation 1612/68 EEC concerning the "free movement of workers" and Council Decision COM (1999) 567 "establishing a Community Action Programme to combat discrimination 2001 – 2006."

A definition for "discrimination" is provided for in Council Decision COM (1999) 567, which states:

...discrimination shall be defined as one person or a group of persons being treated less favorably than another on grounds of

62. See Simon Gardiner & Roger Welch, 'Show Me The Money': Regulation Of The Migration Of Professional Sportsmen In Post-Bosman Europe in PROFESSIONAL SPORT IN THE EU: REGULATION AND RE-REGULATION 107 (2000).

63. Comm'n v. Belgium 2000 E.C.R. I-1221.

64. EEC Treaty, *supra* note 51, art. 39(3)

racial or ethnic origin, religion or belief, disability, age or sexual orientation; or as the application of an apparently neutral provision which is liable to disadvantage that person or group of persons on the same grounds, unless justified by objective reasons.⁶⁵

Council Regulation 1612/68 provides that "A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work," per Article 7.

Although Regulation 1612/68 prohibits explicit discriminatory measures, it also considers the effects of such apparently neutral provisions in Article 4(1). Thus, measures "which restrict by number or percentage the employment of foreign nationals in any undertaking...shall not apply to nationals of other Member States." These provisions of discrimination law will be crucial when testing the legal viability of a regulation compelling the use of "locally-trained" players.

B. Competition Law

To promote efficiency and innovation, the common market encourages interaction between organizations and individuals by increasing the number of participants in the marketplace. Stimulating intense competition would result in a reduction in prices and improved quality, benefiting the position of the consumer.⁶⁶ These factors are also important in the context of European soccer clubs and are applicable to their financial and competitive value.

Enshrined in Article 2 of the Treaty is the objective to "promote throughout the Community...a high degree of competitiveness." This also generates the need for regulatory measures to ensure this interaction is fair and balanced. In accordance with Article 3(g), the intention is to implement "a system ensuring that competition in the internal market is not distorted".⁶⁷

Guidance for determining the acceptable level of competition is contained in Articles 81 – 89 of the Treaty. For our purpose, it is necessary to consider Articles 81 and 82 that

65. Council Dec. art. 2 COM 567 (1999) final (Nov. 11, 1999).

66. MARK FURSE, COMPETITION LAW OF THE EC AND UK 1 (5th ed. 2006).

67. EEC Treaty, *supra* note 51, art. 3(g)

have been influential in regulating the European soccer market.

1. Article 81(1)

Article 81(1) prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states."⁶⁸ The term "undertaking" has been construed to mean any entity engaged in economic activity notwithstanding its legal status and funding.⁶⁹ This has a deliberately broad scope to regulate the actions of undertakings, including those of the soccer authorities. It is necessary to assess the object and effect of an action. Essentially, any actions between undertakings that seek to (a) "fix" prices, (b) "limit" commercial exchange, (c) "share markets," (d) inappropriately alter trading "conditions" and (e) fabricate "contracts," which adversely effect the competition process is prohibited.⁷⁰

2. Article 81(3)

In limited circumstances, an exemption may be granted under Article 81(3) for anti-competitive arrangements where they contribute to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit." It is necessary to satisfy four conditions. First, an arrangement should contribute to improving the production or distribution of goods (or services) or to promoting technical or economic progress. Second, consumers should receive a fair share of the resulting benefit. Third, the agreement should not impose restrictions that are not indispensable to the attainment of these objectives. Finally, these actions should not allow the possibility of eliminating competition.

3. Article 82

Article 82 is a significant regulatory measure, which ensures that market activity is fair and undistorted.⁷¹ This

68. *Id.* at art 81(1)

69. *Hofner v Macrotron GmbH* 1993 4 C.M.L.R. 306.

70. EEC Treaty, *supra* note 51, art. 81 (a) – (e).

71. EEC Treaty, *supra* note 51, art. 3(g).

prohibits the abusive conduct of an undertaking, which occupies a dominant position in the common market or a substantial part thereof.⁷² A dominant firm occupies a position of economic strength by which it can thwart effective competition and operate independently in the market.⁷³ Although Article 82 does not prohibit dominance *per se*, it will be activated where there is an abuse to the detriment of interstate trade. Abuse is considered an objective concept that can be present even in the absence of an intention.⁷⁴

C. Employment Law: Collective Bargaining

The purpose of collective bargaining is twofold: to enable employers or their associations to reach a compromise with trade unions as to their future relations, and to negotiate satisfactory employment contracts for employees. It is possible that terms, which are negotiated on behalf of a trade union, can be incorporated into individual contracts, rendering an express term as legally enforceable. However, in most circumstances it is presumed that the product of collective bargaining is not binding on either party⁷⁵ because the individuals whom the negotiations concern are not privy to the resulting terms.

III. REVISITING BOSMAN...QUITE LITERALLY

A. The First Blow for "Foreigners" in Soccer: Dona v Montero

The ECJ dealt its first blow on professional soccer against the Federazione Italiana del Gioco del Calcio (Italian Football Federation: "IFF"), initiating the games "collision course with the Treaty of Rome."⁷⁶ It had been established two years previously that "the practice of sport is subject to Community law in so far as it constitutes an economic activity in the meaning of Article 2 of the Treaty."⁷⁷ In the case of *Dona v.*

72. *Id. supra* note 51, art. 82.

73. *United Brands Co v. Comm'n* 1978 E.C.R. 207, ¶ 65.

74. *Hoffman La Roche v Comm'n* 1979 E.C.R. 461.

75. *Ford Motor Co Ltd. v. AEUW* 1962 2 Q.B. 303, now contained domestically in the Trade Union and Labour Relations (Consolidation) Act 1992 § 179.

76. S. Weatherill, *Discrimination on the Grounds of Nationality in Sport*, YEARBOOK OF EUROPEAN LAW 1989 at 92.

77. *Walrave v. Union Cycliste Int'l* 1974 E.C.R. 1405 at ¶ 4.

Montero,⁷⁸ the IFF enforced a system of compulsory membership for players who wished to play in Italy's professional leagues. However, in accordance with Article 28(g) of the Federation rules, those players who wished to register were to be of Italian nationality. The only exception was for non-nationals who resided in Italy and who had not previously been affiliated to a foreign association.

Gaetano Dona was an Italian soccer agent who was instructed to assess the recruitment of players from abroad on behalf of Montero, a chairman of an Italian soccer club. The prospect of playing in Italy was marketed in a Belgian sports newspaper. When Dona claimed the cost of advertising in his expenses to Montero, his request was rejected as it was claimed he had acted "prematurely" and in breach of IFF rules regarding the participation of foreign nationals.⁷⁹

The subsequent claim in front of the Giudice Conciliatore di Rovigo (Regional Judge) for the expenses also questioned the legitimacy of Article 28(g). The Regional Judge was confronted with an industry that had little legal precedence. Consequently, a preliminary reference to the ECJ would determine whether: professional soccer players were eligible to play anywhere in the European Union, and whether they enjoyed the same rights as other workers who earned a living. Should these questions be affirmatively answered, the ECJ was then to consider whether the regulations of the soccer authorities would override Community law. The Regional Judge held that measures which grant eligibility "solely to the nationals of the State...are incompatible with [Article 12] and...Articles [39] to [42]."⁸⁰ The ECJ permitted the exclusion of "foreign players from participation in certain matches for reasons which are not of an economic nature...and are thus of sporting interest only."⁸¹

Significantly, Advocate General Trabucchi held that UEFA could restrict the participation of non-nationals "in official championship matches so as to ensure the winning team will be representative of the state to which it is the champion team."⁸² Furthermore, AG Trabucchi also stated that a

78. *Dona v. Mantero*, 1976, 2 C.M.L.R. 578.

79. *Id.* at ¶ 579.

80. *Id.* at ¶ 586.

81. *Id.* at ¶ 587.

82. AG Opinion in *Dona* at 582.

limitation “seems all the more reasonable when it is borne in mind that the team which wins the national championship is often chosen to represent its own state in international competitions.”⁸³ This also applied to international competitions, such as the World Cup, where it was (and still is) obligatory for players to possess citizenship of their country.⁸⁴

Dona elaborated on the decision in *Walrave*⁸⁵ that had established professional athletics as being an “economic activity” predisposed to Community law. However, the ECJ failed to define a competition of “sporting interest only.” AG Trabucchi stated that “sporting activities run on a business basis may nevertheless fall outside the application of the fundamental rules of the Treaty.”⁸⁶ Nevertheless, the ECJ omitted to qualify what was meant by a “business basis.” The vague nature of this decision left an element of uncertainty. As the soccer authorities were not explicitly instructed to change their governing capacity, it was business as usual!

B. The UEFA and European Commission Compromise: The 3+2 Rule

The judgment in *Dona* incensed the Commission and provoked a campaign to confront the apex of the European game, UEFA. Following discussions in 1978 between UEFA and the Commission, it was agreed that UEFA would amend the existing discriminatory regulations. However, this promise to modify the nationality restrictions in European competitions would soon be forgotten.

The Commission threatened UEFA with legal action if it did not remove these restrictions by July 1, 1985. UEFA summoned the national associations to an assembly and agreed that the current restriction of two non-nationals per team would remain. Furthermore, foreign nationals who had continuously participated under one association for five or more years since the 1984-85 season were considered naturalized in a sporting context. These provisions were approved by the congregation despite the Commission's

83. *Id.*

84. FIFA WORLD CUP REGULATION GERMANY, art. 24(1)(a) (2006).

85. *Walrave*, 1974 E.C.R. 1405 at 4.

86. *Dona*, 2 C.M.L.R. at 587.

original commitment to unequivocally remove the restrictions.

Then in 1987, the Commission informed UEFA that they would dictate the regulations to take effect in the following season. Consequently, the quota of eligible non-nationals from Member States was increased to three.

After years of disagreement between the parties, a "gentleman's agreement" was reached. As of July 1992, UEFA agreed to amend its regulations by restricting domestic teams to using a maximum of three non-nationals and two "assimilated" players. These were players that had played under the same association for an uninterrupted period of no less than five years, with three of those at youth level. This gentleman's agreement had established the "3+2" rule.

Further down the soccer ladder but concurrent with this administrative fiasco was a deteriorating relationship that would circuitously commence the demolition of UEFA's regulatory measures.

C. Bosman Outlined

On May 10, 1988, a Belgian soccer player signed one of the most significant contracts in the history of professional sports. Jean-Marc Bosman began playing for Royal Club Liegeois SA ("RC Liege"), a club in the Belgian first division. He signed a two-year contract for 120,000 Belgian francs⁸⁷ ("BF") per month. Prior to the expiry of this contract, RC Liege offered the player a successive one-year extension. However, Bosman would be remunerated at a considerably reduced amount of 30,000 BF⁸⁸ per month, the minimum permitted in the transfer regulations of Union Royale Belge des Societes de Football Association ("Belgian Soccer Association").⁸⁹

Bosman rejected the offer and was placed on the transfer list.⁹⁰ Significantly, Article 5 of his contract stipulated that RC Liege was entitled to withhold the player's registration certificate under any circumstances (a common term in most contracts between soccer clubs and players).

There was little interest from prospective clubs due to the over-inflated price tag that RC Liege had requested. Under

87. Equivalent to \$4,586.00.

88. Equivalent to \$1,146.00.

89. URBSFA STATUTES, art. 40(3) (1982).

90. *Id.* at art. 46(2).

the association rules, the price was based on the annual income of the player multiplied by a figure between two and fourteen (depending on the players age).⁹¹ Unsurprisingly, the excessive price of nearly 12 million BF⁹² discouraged many clubs.

Consequently, Bosman negotiated his own deal with the French club SA d'Economie Mixte Sportive de L'Union Sportive du Littoral de Dunkerque ("US Dunkerque"). RC Liege agreed to loan the player for one season to US Dunkerque for 1.2 million BF⁹³ with the option of making the move permanent for an additional fee of 4.8 million BF.⁹⁴ This required RC Liege to convey the registration certificate to the French Football Federation before the start of the 1990-91 season, in compliance with UEFA and FIFA Regulations.⁹⁵

However, RC Liege was anxious about the solvency of US Dunkerque and withheld the certificate.⁹⁶ Because Bosman could not transfer to US Dunkerque and refused to sign a reduced deal with RC Liege, he was caught in limbo. The Belgian Football Association, UEFA and FIFA regulations prevented him from transferring to another club.

His only source of reprieve was in his application to the Tribunal de Premiere (Regional Tribunal). Bosman claimed that RC Liege should pay him 100,000 BF⁹⁷ per month until he found an alternative club, and that the regulations, which had ruined the livelihoods of many soccer players in the past, should be restrained. Finally, he claimed that the issue should be referred to the ECJ under Article 234.

The Regional Court sympathized with Bosman. RC Liege was instructed to pay 30,000 BF⁹⁸ per month, and restraining orders were issued against those provisions that impeded his ability to secure alternative employment. The Cour d'Appel (Court of Appeal) in Liege overturned the appeal regarding a preliminary reference to the ECJ.

The domestic judicial climax was reached in 1993 when

91. *Id.* at art. 46(3).

92. Equivalent to \$458,610.00.

93. Equivalent to \$45,861.00.

94. Equivalent to \$183,444.00.

95. UEFA TRANSFER RULES, art. 13 (1990); FIFA REGULATIONS, art. 7(1) (1994).

96. FIFA REGULATIONS, art. 7(2) (1994).

97. Equivalent to \$3,821.00.

98. Equivalent to \$1,146.00.

the Court of Appeal eventually agreed with the Regional Tribunal that the behavior of RC Liege in the transfer arrangement with US Dunkerque was unlawful. Bosman's persistence was rewarded and the preliminary reference to the ECJ was granted.

The ECJ was asked to determine the applicability of Articles 39, 81 and 82 to UEFA's current regulations. There were two main arguments to be resolved. First, the ECJ was to examine the existing requirement of a monetary transfer for a player, even though his contract had ceased with his club. The second issue is whether UEFA's existing 3+2 rule limiting the use of foreign players is permissible under Community law.

D. The First Argument: Pulling Down the Transfer System

The ECJ delivered its judgment in December 1995. The transfer regulations were deemed to "directly effect players' access to the employment market," hampering their mobility and restricting their opportunity to secure gainful employment.⁹⁹ Regardless of the unique characteristics of sport, players should be entitled to the same opportunities as individuals in other industries in accordance with Article 39. By the nature of the game, professional players enjoy a "very precarious career that lasts a short time."¹⁰⁰ The transfer system merely amplified such risks and had no relevance to a player's actual performance.

From the outset, the soccer authorities stressed that the existing system was indispensable to preserve a "financial and competitive balance between clubs."¹⁰¹ The system facilitated the downstream of money from larger clubs to the smaller clubs in return for the upstream of talent. Without this system, "the wealthy clubs would easily secure themselves the best players, while the smaller clubs...would get into financial difficulties and possibly even have to cease their activities."¹⁰² However, the ECJ rejected the argument

99. *Bosman*, 1995 E.C.R. 1-04921 at ¶ 210.

100. Gordon Taylor, PFA Chief Executive commenting in Anthony Browne, John Goodbody and Philip Webster, *Pay Cap Heads EU Law Proposals*, May. 24, 2006, available at <http://business.timesonline.co.uk/article/0,,11472-2194519,00.html> (last accessed May. 26, 2006).

101. *Bosman*, 1995 E.C.R. 1-04921 at ¶ 105.

102. AG Lenz Opinion, *supra* note 11 at ¶ 218.

that the “rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport[s].”¹⁰³

The ECJ and Advocate General Lenz could not foresee the repercussions that this decision would have on smaller clubs as “no specific arguments, let alone figures, have been submitted to support the assertion that the abolition of the transfer system would have life-threatening consequences for those clubs or at least some of them.”¹⁰⁴ The ECJ was willing to risk the existence of professional soccer in Europe by initiating the “comprehensive dismantling of the transfer system” with little consideration of the consequences.¹⁰⁵

AG Lenz empathized with UEFA, stating, “I thus entirely agree...that it is of fundamental importance to share income out between the clubs in a reasonable manner.”¹⁰⁶ However, it was suggested that there were “a number of alternatives to the transfer rules with which the objectives pursued by those rules can be attained.”¹⁰⁷

One such alternative was via a collective agreement that would impose a salary-cap on players’ earnings. This arrangement seemed unlikely and nearly impossible to implement. Another suggestion was to create a solidarity fund in which income derived from television rights and sponsorship could be distributed between all clubs throughout the professional leagues. The ECJ agreed with AG Lenz that “the redistribution of income appears sensible and legitimate from an economic point of view.”¹⁰⁸ However, it appears that the ECJ and AG Lenz could not comprehend the unique characteristics of soccer, whereby income is derived from competition between two mutually dependent clubs. The competitive value of participants would increase so long as clubs maintain their financial stability. A reduction in competing clubs would result in a more predictable outcome and reduce this competitive value.

103. *Bosman*, 1995 E.C.R. 1-04921 at ¶ 107.

104. AG Lenz Opinion, *supra* note 11 at ¶ 221.

105. D. McAuley, *They Think It's All Over...It Might Just Be Now: Unravelling the Ramifications for the European Football Transfer System Post-Bosman*, 7 E.C.L.R. 333 (2002).

106. AG Lenz Opinion, *supra* note 11 at ¶ 223.

107. *Id.* at ¶ 226.

108. *Id.* at ¶ 227.

AG Lenz argued that “the transfer fees are merely compensation for the costs incurred in the training and development of a player.”¹⁰⁹ The soccer authorities argued that this sum was measured against the financial expenses incurred by the clubs in training the player. Evidently, the disparity between the transfer fees demanded for players from the same club did not justify this argument. However, AG Lenz agreed that “a club should be compensated for the training work it has done, and the big, rich clubs should not be enabled to enjoy the fruits of that work without making a contribution of their own.”¹¹⁰

One significant point from the UEFA concerned the use of a transfer fee as a requirement to “search for talented players, an activity which is vital for football.”¹¹¹ However, the ECJ and AG Lenz were unable “to see why it should be necessary for that purpose to make the transfer of players depend on the payment of a transfer fee.”¹¹² The UEFA feared that clubs would become complacent. Before the decision, clubs were proactive in seeking new talent and sifting through the abundance of players to find what they were looking for. Now they could simply “hoard” players without paying a transfer fee. Moreover, without this initial payment for a player the “abolition of the transfer rules would lead to a general increase in players’ wages.”¹¹³

Most notably, the ECJ and AG Lenz could not foresee the ramifications that would impact every level of the game, despite the assertions of the soccer authorities. The response of AG Lenz who unconvincingly stated that this “argument appears to me to be directed essentially to the amateur sphere, which – to repeat it once again – is not concerned by the present proceedings.”¹¹⁴

In his concluding remarks regarding the status of the European soccer market following this judgment, AG Lenz anticipated that “in the medium and long term, however, no insuperable difficulties should arise.”¹¹⁵ This proved to be a grossly misjudged statement.

109. *Id.* at ¶ 235.

110. *Id.* at ¶ 239.

111. AG Lenz Opinion, *supra* note 11 at ¶ 241.

112. *Id.*

113. *Id.* at ¶ 244.

114. *Id.* at ¶ 245.

115. *Id.* at ¶ 247.

E. The Second Argument: Removing the 3+2 Rule

The ECJ followed the opinion of AG Lenz and found no sufficient justification for preserving the nationality restriction. It was held that a “rule which restricts that participation obviously also restricts the chances of employment of the player concerned.”¹¹⁶ The removal of the “3+2 rule” was justified by AG Lenz on three grounds.

1. The National Aspect

AG Lenz challenged the argument that supporters are better able to identify with players of the same nationality, alleging that they were more concerned with the “success of their club than in the composition of the team.”¹¹⁷ This was ironic considering the racial and xenophobic issues in European soccer at the time. One commentary suggested that “Chelsea was one of the most xenophobic of football clubs, with supporters booing foreign players when they came on to the field - even on occasion their own players.”¹¹⁸ AG Lenz cited examples of players and managers that had been successful while plying their trade abroad.¹¹⁹ He implied that the UEFA should be focusing on the benefits of a cosmopolitan team, purporting that “the reality of football today shows that...the most successful clubs of recent years...have several foreign players in their ranks.”¹²⁰ There could be no justification for a restriction that inhibits the improvement in the performance of European soccer teams.

2. Young Players & National Teams: The Defining Moment

The second argument concerned the development of young players.¹²¹ It was agreed that “most talented players...make their way upwards via small clubs.”¹²² Those who were successful enough to progress to the first team ranks would

116. *Bosman*, 1995 E.C.R. I-04921 at ¶ 120.

117. AG Opinion, *supra* note 11 at ¶ 143.

118. *Chelsea Allsorts*, GUARDIAN, Dec. 28, 1999, available at <http://www.guardian.co.uk/leaders/story/0,,247345,00.html> (last visited Jan. 2, 2007).

119. AG Opinion, *supra* note 11 at ¶ 143.

120. *Id.* at ¶ 142.

121. *Id.* at ¶ 145.

122. *Id.*

play alongside the foreign players, which "can only be an advantage to a young player."¹²³ This was a logical explanation. However, it was erroneous to pronounce that "nothing has demonstrated that the development of young players...would be adversely affected."¹²⁴

AG Lenz then contradicted this rationale stating, "admittedly...the number of jobs available to native players decreases the more foreign players are engaged by and play for the clubs."¹²⁵ It may well be the case that the influence of foreign players improves the overall quality of the game, but providing teams with the ability to recruit experienced players from abroad, would undoubtedly be preferred over risking a young, inexperienced domestic player.

In the defining moment, AG Lenz proclaimed that "the removal of the rules on foreign players would not oblige clubs to engage (more) foreigners, but would give them the possibility of doing so if they thought that promised success."¹²⁶ It was naïve to suggest that clubs *may* take advantage of this decision, considering the financial incentive to compete in European competition. Ultimately, AG Lenz scored the injury time winner, asserting that "it is unlikely that the influx of foreign players would be so great that native players would no longer get a chance."¹²⁷ The soccer authorities were unconvinced!

Further, AG Lenz could not foresee the adverse effects that the decision would have on Europe's national teams. One of the primary purposes of the rule was "to ensure that enough players develop for the national team."¹²⁸ It was said that it is "in a country's clubs' very own interest to contribute to the success of the national team by developing suitable players and making them available."¹²⁹ However, if European club teams were relying on experienced imports and neglecting the development of young talent, this would undoubtedly have a harmful effect on Europe's national teams.

123. *Id.*

124. *Id.*

125. AG Opinion, *supra* note 11 at ¶ 145.*Id.*

126. *Id.*

127. *Id.* at ¶ 146.

128. *Id.*

129. *Id.*

3. Preserving the Balance & Asserting the ECJ Authority

The final point for consideration related to “preserv[ing] the balance between clubs.”¹³⁰ AG Lenz agreed that the “big clubs would otherwise be able to secure the services of the best players from the entire Community and thereby increase further the economic and sporting distance between them and other clubs.”¹³¹ He pronounced that this concern was “a legitimate one,” but delegated the responsibility of rectifying this problem to the soccer authorities by suggesting that other measures could be used “in attaining that objective without affecting the right of freedom of movement”¹³² and infringing upon Article 39.

Significantly, AG Lenz expressed his discontent with the role played by the Commission. He stated that the 3+2 rule may have been negotiated, and “even approved by, the Commission [yet it still has] no legal significance.”¹³³ He criticized its actions, stating that “The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the E.C. Treaty by its actions.”¹³⁴ Furthermore, it is only for the ECJ “to give binding interpretations of those provisions.”¹³⁵ As the guardian of the Treaty, the Commission was intended to safeguard Community law; instead they negotiated its manipulation.

F. Consequences: The Changing Face of European Soccer (an English Perspective)

The impact of the *Bosman* ruling was immediate. Soccer clubs were given the license to recruit players in, “...a spectacular but scarcely illogical extreme...(which became more rampant in Britain than elsewhere) towards importing players by the planeload.”¹³⁶ By the end of the 1998-99 season, it was estimated that the presence of foreign talent had increased by 1800 per cent in the FA Premier League.¹³⁷ This

130. AG Opinion, *supra* note 11 at ¶ 147.

131. *Id.*

132. *Id.*

133. *Id.* at ¶ 148.

134. *Id.*

135. *Id.*

136. Hugh McIlvanney, *Hard to Enlist in Foreign Legion*, THE TIMES, Apr. 9, 2006, available at <http://www.timesonline.co.uk/article/0,,2094-2125264,00.html>

137. Gardiner and Welch, *supra* note 62 at 117.

feat was furthered in the following season when "Chelsea football club fielded a team consisting entirely of foreign players - the first time in the life of the Premier league or its predecessors."¹³⁸ One English soccer manager stated, "we are losing the soul of British football."¹³⁹ Those opportunistic sides that strived for success in European competitions found that they could acquire cheaper foreign talent in abundance.

Further, *Bosman* came at a convenient time in which the commercialization of soccer was accelerating through television and sponsorship deals.¹⁴⁰ Domestic and UEFA competitions experienced a sharp increase in income and players were now in a stronger position to bargain and demanded higher salaries.

However, the desperate state of the lower leagues became evident. Commentators voiced their concern as they witnessed the demise of the livelihoods of English players due to the intense competition from foreign players:

...[w]ithout meaning to sound xenophobic, players' organizations and lower league clubs believe that the influx of foreign players, combined with greater revenue for Premier League clubs from television and merchandising, is leaving a large number of lower league professionals on the scrap heap...¹⁴¹

The elite clubs in English soccer diverted their capital away from the lower league clubs. The *Bosman* ruling exacerbated the polarization of wealth in domestic leagues.

Those elite clubs could also redirect their investment to developed players from abroad as opposed to their youth academies. One soccer club chief executive stated, "It will become increasingly uneconomic to continue with the current youth academy system," and he predicted that more clubs would decide to close their youth academies and use the

138. *Chelsea Allsorts*, supra note 118.

139. Alan Pardew & Gary Jacob, *Pardew puts England at heart of 'race' dispute*, THE TIMES, Mar. 14, 2006, available at <http://www.timesonline.co.uk/article/0,,27-2084481,00.html> (last visited May 15, 2006).

140. "The first Sky television agreement [in 1992] was worth £191 million over five seasons. The next contract, negotiated to start from the 1997-98 season, rose to £670 million over four seasons. The Premier League's current £1.024 billion deal with BSkyB runs over the course of three seasons from August 2004'. *The History Of The Premier League*, available at <http://www.premierleague.com/fapl.rac?command=forwardOnly&nextPage=enHistory&categoryCode=History> (last visited Sept. 29, 2006).

141. Vivek Chaudhary, *A game of two halves*, GUARDIAN, Aug. 2, 1999, <http://www.guardian.co.uk/g2/story/0,,278766,00.html> (last visited Sept. 2, 2006).

savings made on player transfers.¹⁴² This prediction has genuine relevance. A survey conducted in 2005 revealed that 27% of top-flight English clubs favored recruitment of a foreign player rather than relying on a trainee.¹⁴³

The status of Europe's national teams was shrugged off as an inconsequential factor of *Bosman*. However, due to the overwhelming foreign presence with the English leagues, it was envisaged that "the Premiership would become so saturated with foreigners that England's team may be made up of reserve-team players."¹⁴⁴ While this is an extreme opinion, there is a cogent argument that the ramifications of the *Bosman* ruling have attributed to the poor results of the English national team.

As for the disparity of wealth between clubs, it became clear that it was not just the smaller clubs that were affected by the ruling, those clubs that flitted between the FA Premier League and Division One (now known as the Championship). Clubs such as Leicester City, Derby County and Bradford City toiled with administration, as the difference in financial reward between the top tier leagues was vast. Teams that were relegated from the FA Premier League became financially crippled due to the high operating costs of player's wages and reductions in television and commercial revenue. It was crucial that the soccer authorities intervened in whatever way they could to counteract these negative trends.

G. UEFA's Action Plan

This illustrated the paradox in which the European soccer market was evolving by complying with Community law and suffering deleterious effects. And yet, "the situation was all the more difficult because the Commission had turned *Bosman* into a kind of Bible that it does not want to amend in spite of increasing evidence of the negative consequences

142. P. Varney, *UEFA's Rules on Homegrown Players Will Have Increasing Impact*, THE POLITICAL ECONOMY OF FOOTBALL, Aug. 14, 2004, available at http://www.footballconomy.com/archive/archive_2005_aug_02.htm (last visited Jul. 10, 2006).

143. G. Thornton, *Financial pressures and cheap foreign players hamper investment in football youth academies*, Jul. 11, 2005, available at http://www.grant-thornton.co.uk/pages/press_room-homepage_news (last visited Aug. 7, 2006).

144. Pardew & Jacob, *supra* note 139.

generated by the ECJ.”¹⁴⁵ Consequently, as the administrator of the European game:

...UEFA has acted after what it sees as a number of negative trends in European football, including poor performances by the national sides of the leading leagues, professional leagues ignoring grassroots sources and the tendency of the wealthiest clubs to hoard players...¹⁴⁶

UEFA instigated a strategy to neutralize the ramifications of *Bosman* by engineering regulations that would assist in restoring the market equilibrium. UEFA would enforce these regulations at the summit of European competition, with the aim of gradually implementing this strategy throughout the domestic leagues.

IV. UEFA'S 2006-07 REGULATIONS FOR EUROPEAN COMPETITIONS

A. “Player Eligibility” for European Competitions

UEFA devised separate regulations for each European club team competition, detailing, for example, the grounds for entry, qualifying rounds to be played and incentives for competing. Thus, the format of one competition varies from another. However, the formalities that dictate the execution of matches, such as the “laws of the game,” do not differ. The formality of “player eligibility” has been significantly amended in all 2006-07 UEFA regulations and is central to this discussion.¹⁴⁷

Teams eligible to compete in UEFA organized competitions may register up to 25 players on “List A” on the condition that positions 22 to 25 are reserved exclusively for locally trained players. In addition, each club must have more than two association-trained players listed in position 22 to 25.¹⁴⁸ This

145. Scottish Parliament European Committee 5th Report, *Report on the Inquiry into football transfer fees and the position of the European Commission* (2000).

146. *Homegrown Quota To Be Kept Out Of Premiership*, THE POLITICAL ECONOMY OF FOOTBALL, Feb. 6, 2005, available at http://www.footballeconomy.com/archive/archive_2005_feb_02.htm (last visited Apr. 20 2006).

147. REGULATIONS OF THE UEFA CHAMPIONS LEAGUE, REGULATIONS OF THE UEFA CUP, REGULATIONS OF THE INTERTOTO CUP art. 15; REGULATIONS OF THE UEFA SUPER CUP art. 13. a

148. *Id.* at arts. 15.08, 13.08.

compels European club teams to register at least four players that are “locally trained.” A “locally-trained player” is identified as being a “club-trained player” or an “association-trained player.”¹⁴⁹

The regulations identify a “club-trained player” as:

...a player who - irrespective of his nationality and age - has been registered with his current club for a period, continuous or not, of three entire seasons...or of 36 months between the age of 15...and 21.¹⁵⁰

An “association-trained” player is defined as:

...a player who - irrespective of his nationality and age - has been registered with a club or with clubs affiliated to the same national association as that of his current club for a period, continuous or not, of three entire seasons...or 36 months between the age of 15...and 21.¹⁵¹

Should a club breach these requirements and register fewer than four locally trained players in its squad (i.e. in positions 22 to 25), the maximum number of players on List A shall be reduced accordingly.¹⁵² Those players who do not qualify as being “locally trained” but who are listed in positions 22 to 25, forfeit their opportunity to participate in the competition and cannot be replaced by the club.¹⁵³ Importantly, UEFA has worded the requirement for “locally trained” in neutral terms: “irrespective of his nationality.”

Furthermore, the club can register an “unlimited number of players” on “List B,” provided that they are “born on or after January 1, 1985 and [have] been eligible to play for the club for an uninterrupted period of two years since [their] 15th birthday.”¹⁵⁴

Each club must obtain a signature of approval for List A and List B from its national association before it can be submitted to UEFA.¹⁵⁵ These lists must stipulate the “name, date of birth, shirt number and name, nationality and

149. *Id.* at arts. 15.09, 13.09.

150. *Id.* at arts. 15.10, 13.10.

151. *Id.* at arts. 15.11, 13.11.

152. *Id.* at arts. 15.12, 13.12.

153. REGULATIONS OF THE UEFA CHAMPIONS LEAGUE, REGULATIONS OF THE UEFA CUP, REGULATIONS OF THE INTERTOTO CUP art. 15; REGULATIONS OF THE UEFA SUPER CUP arts. 15.12, 13.12.

154. *Id.* at arts. 15.14, 13.14.

155. *Id.* at arts. 15.02, 13.02.

national registration date of all players to be fielded in the UEFA cup competition in question.”¹⁵⁶ A club that fails to comply and fields an ineligible player “bears the legal consequences”¹⁵⁷ decided by the UEFA Administration.¹⁵⁸

Therefore, participating clubs may utilize players from List A and List B in UEFA competitions on the proviso that they identify at least four “locally trained players” on List A that have the potential to contribute in UEFA competitions. Those younger players registered on “List B” can participate so long as they have undergone training with their current club for a period of two years since their 15th birthday.

B. Comparisons with the 3+2 Rule

In assessing the feasibility of UEFA’s current measure, it is helpful to distinguish it from the previous 3+2 rule. It was evident in *Bosman* that “No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature.”¹⁵⁹ However, UEFA has now drafted its provision in an impartial manner with regard to nationality. These regulations explicitly operate “irrespective of nationality” in an attempt to mitigate the likelihood of them being precluded under Community law. Nevertheless, the objective of the new provision is not too dissimilar from that of the 3+2 rule.

It must be emphasized that the provision “refers only to where the players [are] trained,”¹⁶⁰ and is directed at the “overall squads [consisting of 25 players] not line-ups.”¹⁶¹ In practice this would imply, for example that “a Dutch club training a Brazilian player for three years would make that player eligible as home grown.”¹⁶²

However, based on the evidence, the effect of such a provision is to coerce clubs into nurturing players from their

156. *Id.*

157. *Id.* at arts. 15.03, 13.03.

158. *Id.* at arts. 15.04, 13.04.

159. AG Opinion, *supra* note 11, ¶ 135.

160. Rupe, *The real dope on “home-grown”*, ARSEWEB NEWSREEL, Feb. 7, 2005, available at <http://www.arseweb.org/www/newsreel/t9i325.html> (last visited Nov. 5 2006).

161. *Id.*

162. *UEFA ‘home grown player’ rule may end up in court, says EU law professor*, EURACTIV, Oct. 4, 2005, <http://www.euractiv.com/en/sports/uefa-home-grown-player-rule-may-court-eu-law-professor/article-139418> (last visited Jun. 5, 2006).

local area. Although this does not explicitly prevent clubs from registering a player from another European Union Member State or even a non-European Union Member State,¹⁶³ it may inhibit the prospect of doing so.

Clubs such as Arsenal, Ajax and Celtic may not be too concerned as to voice their opinions just yet. Those teams competing in European competitions this season (2006-07) are fully aware of the requirement to stipulate four "locally trained" players. The requirement has proven to be trouble-free. However, this quota is to be introduced incrementally so that in the 2007-08 season, participating teams are to name six "locally trained" players out of a squad list of 25. Eventually, the 2008-09 season will require eight "locally trained" players to be registered on "List A," which may be problematic for some European teams.

V. APPLYING EUROPEAN LEGISLATION AND ASSESSING THE PRECEDENCE OF THE INSTITUTIONS

A. Applying European Legislation

It is necessary to assess this regulation against the pertinent legislation considered earlier in this paper. From a critical viewpoint, the regulation may amount to an "obstacle to the free movement of ...persons" in the Community.¹⁶⁴ It could be deemed to be discriminatory, inadvertently creating "internal frontiers."¹⁶⁵ One should remember that the general principle of non-discrimination is enshrined in Community law and that "any discrimination on grounds of nationality shall be prohibited."¹⁶⁶

Ultimately, this measure may infringe Article 39, which "entail[s] the abolition of any discrimination based on nationality." The regulation may also constitute an indirect form of discrimination, as the apparently neutral wording of

163. Subject to restrictions imposed by some *national* associations for non-EU players within domestic competitions, e.g. Italy's Serie A competition- there is a limit of registering 3 non-EU players. *Maxwell-Internazionale FC Champions League: Athens 2007*, UEFA.COM, available at <http://www.uefa.com/competitions/ucl/players/player=60805/index.html> (last visited Apr. 10, 2006).

164. EEC Treaty, *supra* note 51, art. 3(c).

165. *Id.* at art. 14(2).

166. *Id.* at art. 12.

the regulation would put foreign players at a particular disadvantage.

UEFA's regulation will also have to surmount Council Regulation 1612/68 whereby a player may not "be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work," per Article 7.¹⁶⁷ Furthermore, the apparently neutral phrasing suggests UEFA would have to prove that it does not contravene Article 4(1) of 1612/68 by restricting by number or percentage the employment of foreign nationals in any undertaking.

Although UEFA's regulation may run afoul of these provisions, there is light on the horizon in the form of European competition law, which has been utilized in a number of cases to absolve apparently unlawful arrangements.

B. Granting an Exemption Under Article 81(3)

The fundamental objectives of the common market to promote a "balanced and sustainable development of economic activities" stimulating a "high degree of competitiveness"¹⁶⁸ should not be compromised. Further, the provisions of the Treaty exist to ensure fair and undistorted market activity.¹⁶⁹ Although UEFA's regulation may appear to be *anti-competitive* and restrictive, it may warrant an exemption under Article 81(3) due to the positive effects on the European soccer market as a whole. It must be demonstrated that the regulation does *not* jeopardize the market.¹⁷⁰ Further, the regulation must be deemed to be proportional and indispensable to warrant an exemption.¹⁷¹

The exemption under Article 81(3) is dependant, first, on the interpretation of Article 81(1), which aims to prevent anti-competitive arrangements. Where undertakings are caught by the broad scope of the latter provision, the Commission Guidelines acknowledge that some "agreements that restrict competition may at the same time have pro-competitive

167. See O'Flynn v. Adjudication Officer, 1996 E.C.R. I-2617.

168. EEC treaty, *supra* note 51, art. 2.

169. *Id.* at art. 3(g).

170. EEC treaty, *supra* note 51, art. 81(3).

171. *Id.*

effects.”¹⁷² The burden of proving the applicability of Article 81(3) is on UEFA, which must surmount four conditions.

First, the regulation must result in improvement in the product and its distribution, this being the quality of soccer. UEFA must prove that a regulation of this nature would assist in resolving the economic imbalance that exists between European clubs. This would compel the elite clubs to either nurture or acquire locally trained players. The ECJ has qualified this condition, stressing that the improvement must “show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.”¹⁷³

Second, UEFA must show that the regulation allows consumers (the supporters) a fair share of the benefits. The nature of this regulation would provide fans with a better opportunity to relate to those locally trained players.¹⁷⁴

Third, the regulation must be indispensable in achieving the objectives. This condition is dependant upon a dual test. The restriction must be reasonably required to achieve the efficiency and the restriction of competition following the agreement must be reasonably necessary for achieving the efficiencies.¹⁷⁵ It is a question of whether an agreement of this type “makes it possible to perform the activity in question more effectively than in the absence of the agreement.”¹⁷⁶ In practice, it may only be possible for UEFA to preserve the longevity of European competitions with this regulation, improving the balance and competitive value of soccer.

Finally, the agreement must not result in a substantial elimination of competition. As the guardian of the Treaty, it is the Commission’s duty to ensure the “protection of rivalry and [that] the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements.”¹⁷⁷ UEFA’s agreement may enhance the process of competition and support the market equilibrium, as wealthier clubs may look to acquire players from lower league clubs in the same country. As will be seen,

172. *Commission Guidelines on the Application of Article 81(3) of the Treaty* 2004 O.J. (C101/97), ¶ 33.

173. *Etablissements Consten SA & Grundig-Verkaufs-GmbH* 1966 E.C.R. 299, 341.

174. José Luis Arnaut, *supra* note 12, 106.

175. *Commission Guidelines*, *supra* note 172 at ¶ 73.

176. *Id.* at ¶ 74.

177. *Id.* at ¶ 105.

the Institutions have been willing to grant an exemption under Article 81(3) to other industries in similar theoretical circumstances to that of UEFA's.

1. Employment Benefits: Metro (No. 1), Remia BV & Others and Ford/Volkswagen

*Metro SB-Grossmärkte GmbH v. Commission (No. 1)*¹⁷⁸ held that an apparently unlawful selective distribution agreement warranted an exemption under Article 81(3), provided that the arrangement did not preclude price discounting in favor of consumers. In these circumstances, the parties to a specific agreement were able to restrict the distribution of items, regardless of the anti-competitive effects. Significantly, this arrangement was crucial in alleviating an unstable employment market, functioning as:

...a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are [unfavorable], comes within the framework of the objective to which reference may be had pursuant to Article [81(3)]...¹⁷⁹

Similarly, in *Remia BV and NV Verenigde Bedrijven Nutricia v Commission*,¹⁸⁰ an agreement contained a "non-compete" provision, designed to protect purchasers of a company from competition of the seller on the same market for a period immediately after the sale. The agreement also restricted the direct production of goods in the sellers' market. The ECH held that such a clause was reasonable under the circumstances and that its effect did not significantly restrict competition. It restated its justification from *Metro (No.1)* (as above) to grant an exemption.¹⁸¹

The Institutions have recognized the positive effects of some anti-competitive agreements that promote employment and economic investment to particular markets or regions of the European Union. In *Ford/Volkswagen*¹⁸² it was estimated that a joint venture would create "5,000 jobs and indirectly

178. *Metro SB-Grossmärkte GmbH v. Commission (No. 1)*, 1977 E.C.R. 1857.

179. *Id.* at ¶ 43.

180. *Remia BV and NV Verenigde Bedrijven Nutricia v Commission*, 1985 E.C.R. 2545.

181. *Id.* at ¶ 42.

182. *Ford/Volkswagen*, 1993 O.J. (L 20/14).

create up to another 10,000 jobs, as well as attracting other investment in the supply industry.”¹⁸³ Consequently, the Commission allowed an agreement that “contribute[d] to the promotion of the harmonious development of the Community and reduction of regional disparities which is one of the basic aims of the Treaty.”¹⁸⁴ Although this was not the sole reason to warrant an exemption under Article 81(3), it was a significant factor.

2. Social Benefits: Ford/Volkswagen and Metropole

In *Ford/Volkswagen*, the Commission considered the all-encompassing “social” benefits of a manufacturing project between two undertakings. The meticulous nature of the project was orchestrated not just to benefit the position of the manufacturers, but also to enhance the “social” status of a deprived area of Portugal that was rife with unemployment. Although either undertaking could have entered the market alone, the Commission recognized that both parties acting under one agreement would make the project more efficient and faster to complete.¹⁸⁵ Coordinating the operations of each party and combining their expertise would improve the quality of the product. Furthermore, the intricate networks that both companies had established in that area would create an effective system of distribution channels.

In *Metropole Television and Others v. Commission*,¹⁸⁶ the Commission held that a collaborative venture of broadcasters who coordinated their telecommunications networks resulted in an improvement in the overall service and minimized costs. The culmination of these factors produced significant social benefits and, “in the context of an overall assessment, the Commission is entitled to base itself on considerations *connected with the pursuit of the public interest* in order to grant exemption under Article 81(3) of the Treaty.”¹⁸⁷

C. Industry Regulations: The “Rule of Reason” (Wouters)

The above cases that have found sanctuary under Article

183. *Id.* at ¶ 36.

184. *Id.*

185. *Id.* at ¶ 17.

186. *Metropole Television and Others v. Commission*, 1996 E.C.R. II-649.

187. *Id.* at ¶ 118.

81(3) have all been indispensable in facilitating a commercial activity. However, it is possible to circumvent the scope of Article 81 entirely should a regulation possess anti-competitive features. This was the case in *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*,¹⁸⁸ where the Netherlands Bar Association imposed a regulation that prohibited multi-disciplinary partnerships, preventing Wouters from practicing as a lawyer in an accountancy firm.

The ECJ held that the regulation was required to promote production and technical development within the meaning of Article 81(1)(b), and that it adversely affected trade between Member States. However, the objective of the regulation was "to ensure that the ultimate consumers of legal services and the sound administration of justice are provided for with the necessary guarantees in relation to integrity and experience."¹⁸⁹ In comparison with previous decisions that required exemption under Article 81(3), it is suggested that this was an "ancillary regulation" that was not contingent on the execution of a commercial transaction but was instead necessary for the proper functioning of the legal sector.¹⁹⁰ A regulation which appears to be anti-competitive, but is "necessary to preserve a domestic mandatory requirement of public policy," has been identified as a "rule of reason," thus evading the breadth of Article 81.¹⁹¹ This label has been extremely divisive in its application in Community law.¹⁹² The Commission argues that Article 81(3) possesses "all the elements of a rule of reason"; however, it cannot be strictly utilized under Community law.¹⁹³

As a result of this judgement, the formal regulations of the soccer authorities that facilitate the operation of the game may avoid the scope of Article 81(1) via the "rule of reason."

D. Rules of "Purely Sporting Interest": Meca-Medina

This rationale has been applied to the sporting

188. *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten*, 2002 E.C.R. I-1577.

189. *Id.* at ¶ 97.

190. R. WHISH, *COMPETITION LAW* (5th ed. 2003) 120-124.

191. G Monti, *Article 81 EC and Public Policy*, CMLR 1087-8 (2002).

192. See JONES & SUFRIN, *EC Competition Law* (2nd ed. 2004) 182 - 251.

193. White Paper on the Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty, 1999 O.J. (C132/1) at ¶ 57.

environment in the recent decision of *Meca-Medina v. Commission*,¹⁹⁴ which concerned the anti-doping measures of the International Olympic Committee as implemented by the International Swimming Association-Federation Internationale des Natation ("FINA"). In *Meca-Medina*, two professional swimmers were subjected to "performance enhancing" drug tests in accordance with FINA regulations. When both athletes tested positive for using the prohibited substance nandrolone, FINA imposed a ban of four years on competitive participation. After two appeals to the Court of Arbitration for Sport ("CAS"), and upon revised scientific evidence, the ban was reduced to two years.

The athletes were dissatisfied with this decision and sought reprieve from the Commission claiming that the regulations contravened Articles 81 and 82 of the Treaty. The complaint was rejected because regulations of a "purely sporting nature" were beyond its authority. It was ambitious for the athletes to assume that the Commission could adjudicate on a scientific sporting regulation of this kind. This appeal did not justify intervention by the Commission, "which takes the view that it is not its job to take the place of the sporting bodies when it comes to choosing the approach they feel is best suited to combating doping."¹⁹⁵

A further appeal to the CFI proved futile, which emphasized that the regulations did not concern an "economic activity." Importantly, the CFI said that, provided the regulations were *not excessive or disproportionate*, then the appeal should be dismissed.¹⁹⁶ Further, so long as the regulation did not contain a discriminatory element then it would be permissible in achieving its objective.

Advocate General Léger said that the athletes had constructed a tenuous argument in applying the competition legislation in the Treaty.¹⁹⁷ However, the point at issue addressed matters of a primary sporting nature and not those of economic concern.

Again, the ECJ adopted a vague approach to the application of Community law to professional sport. It was held that "if the sporting activity in question falls within the

194. *Meca-Medina v. Comm'n*, 2006 E.U.E.C.J.

195. Press Release, Commission (2002) IP/02/1211 (emphasis added).

196. *Meca-Medina v. Commission*, 2004 E.C.R. II-3291 at ¶ 55.

197. AG Opinion in *Meca-Medina*, *supra* note 194 at ¶ 13.

scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty.”¹⁹⁸ The ECJ failed to qualify what constituted a sporting activity and whether the activity concerned merely professional sports or amateur sports as well. Furthermore, it was uncertain what should be considered to be a condition for engaging in a sporting activity. One commentary suggested that, based on the limited case law in this area, a regulation would be classed as a condition for engaging in sporting activity if it concerned an individual’s access to “gainful employment.”¹⁹⁹ A regulation must yield to the Treaty if it is a barrier to employment.

Nevertheless, if one can prove that such a measure is proportionate and “limited to what is necessary to ensure the proper conduct of competitive sport,”²⁰⁰ then there is a chance that it could either seek exemption via Article 81(3) or possibly via the *Wouters* “rule of reason.” Further, *Bosman* provided that “restrictions on freedom of movement are compatible with Community law only if they are justified by compelling reasons of the general interest and comply with the principle of proportionality.”²⁰¹

E. Regulation via Collective Agreement: Albany

UEFA may also seek to implement its regulation in a player’s contract through a collective agreement. The decision in *Albany International BV v. SBT*²⁰² provides an illustration. In that case, a *compulsory* pension scheme that was required to admit employees without a prior medical assessment was enacted via a collective agreement. *Albany International* held that, “by virtue of its nature and purpose,” the collective agreement fell outside of the reach of Article 81(1).²⁰³ Significantly, it stated that, although:

. . . certain restrictions of competition are inherent in collective

198. *Meca-Medina*, 2006 E.U.E.C.J at ¶ 28.

199. G. Infantino, *MECA-MEDINA: A STEP BACKWARDS FOR THE EUROPEAN SPORTS MODEL AND THE SPECIFICITY OF SPORT*, INF (2006), available at www.uefa.com/multimediafiles/download/uefa/keytopics/480401_download.pdf (last visited Dec. 10, 2007).

200. *Meca-Medina*, 2006 E.U.E.C.J at ¶ 47.

201. AG Opinion in *Bosman*, *supra* note 11 at ¶ 190.

202. Case C-67/96 *Albany International BV v SBT* [1999] ECR I-5751.

203. *Id.* at ¶ 60.

agreements between organisations representing employers and workers...the social policy objectives pursued by such agreements would be seriously undermined if management and [labor] were subject to Article [81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. . . .²⁰⁴

UEFA would be required to negotiate the inclusion of the regulation in a player's contract with FIFPro and the PFA. It has been suggested by FIFPro that the enactment of UEFA's "locally trained" regulation "should be done in the context of an international collective bargaining agreement accepted by clubs...and players."²⁰⁵ This measure appears to inadvertently cause some players to sign their ticket out of European competition. However, the social policy objective may outweigh the adverse effects that would cause harm to a small proportion of players.

CONCLUSION

A. Reconciling the Soccer Authorities and the Institutions

This paper has illustrated the paradox in which the European soccer market evolved and the tensions that exist between the soccer authorities and the Institutions. The evidence suggests that it is almost impossible to reach a compromise without overstepping each others' interests. On the one hand, the soccer authorities seek to protect the existence and competitive value of the game by compelling clubs to adhere to their social responsibility of developing "locally-trained" players. On the other hand, the Institutions are faced with a dilemma in yielding to a regulation which seemingly contravenes basic aspects of Community law.

Following the *Bosman* ruling, one commentator stated that the position of the Institutions had long been "an unenviable one-jammed in between...Community law compliance and...a responsibility to facilitate football bodies, notoriously renowned for being difficult to deal with."²⁰⁶ Having ripped the administrative backbone from the body of the soccer authorities, it was unsurprising that the

204. *Id.* at ¶ 59.

205. Theo Van Seggelen., *UEFA 'HOME GROWN PLAYER' RULE MAY END UP IN COURT, SAYS EU LAW PROFESSOR*, *supra* note 162.

206. D. McAuley, *supra* note 105, 332.

"relationships between the European Commission and the football governing bodies (FIFA, UEFA and FIFPro) continue[d] to be disharmonious."²⁰⁷

However, there was a desperate need to reconcile the parties if the European soccer market was to recover. They engaged in dialogue to rebuild and restore the market equilibrium. The soccer authorities could take solace in the fact that the Institutions were being proactive in tackling professional athletics, illustrated by their "first attempt to coordinate the Single Market and socio-cultural policy strands of its involvement in sport."²⁰⁸ The Helsinki Report 1999 demonstrated "this new approach [in] preserving the traditional values of sport, while at the same time assimilating a changing economic and legal environment."²⁰⁹

The first compromise was reached in 2001 when the soccer authorities agreed to a package deal with the Commission. The "transfer windows" were established to harmonize the spending power of clubs, allowing the purchase of players between two allotted periods per year. This prevented the buying of players anytime during the season, which added stability to the employment market.²¹⁰ However, as one commentator suggested, "*Bosman* primarily advocated free movement for sportsmen but the windows blatantly restrict it."²¹¹

Although these regulations were met with opposition from those in the game (such as the FA and the PFA),²¹² the transfer windows came into effect in the 2002-03 season and have not yet been challenged. The Institutions were willing to grant some leniency in these circumstances. However, to tolerate the regulation at issue would create, "an exemption for sport...[that] not only puts the supremacy of contract law at risk but also creates a dangerous precedent for other sectors of society to exploit."²¹³ This example further

207. *Id.* at 331.

208. R. Parrish, *Sports Law and Policy in the European Union* 16 (2003).

209. Report from the Commission to the European Council with a View to Safeguarding Sports Structures and Maintaining the Social Significance of Sport within the Community Framework, *The Helsinki Report on Sport* (1999).

210. See generally *Metro*, 1977 E.C.R. 1857.; *Remia BV and Others*, 1985 e.c.r. 2545.

211. D. McAuley, *Windows, Caps, Footballs and the European Commission. Confused? You Will Be*, 8 E.C.L.R. 396 (2003).

212. *New challenge to Transfer System*, Nov. 10, 2002, available at <http://news.bbc.co.uk/sport2/hi/football/2436183.stm> (last visited Mar. 29, 2007).

213. D. McAuley, *supra* note 105, at 340.

illustrates the paradox of the European soccer market, which finds it impossible to strictly comply with Community law.

B. Who is Best Placed to Administer Governance in the European Soccer Market?

It is evident that the institutional structures of the soccer authorities conform to contemporary corporate models. Their decision-making processes are akin to organizations in other industries that react to market conditions. The soccer authorities have not intentionally violated Community law, but administered governance as they saw appropriate to combat negative market trends. However, the transfer regulations of UEFA and FIFA pre-*Bosman* illustrated the debilitating consequences for professional players at the end of their contract and could not subsist. Nevertheless, it may be suggested that although the 3+2 rule possessed biased tendencies, the regulation served a social, developmental and financial purpose which the ECJ could not comprehend.

Many questions can be asked about the intervention of the Institutions. First, the opinion of AG Trabucchi in *Dona* provided very little guidance for the soccer authorities to administer governance, stating that measures that are run on a "business basis" may avoid the scope of the Treaty. Consequently, the Commission endured two decades of unrest with the soccer authorities. The decision in *Bosman* proved to be the defining moment. However, AG Lenz and the ECJ were unable to foresee the radical changes that were to happen to the industry through the diffusion of foreign players across the European Union. Based on the consequences detailed in this paper, it is questionable whether the Institutions were suitably positioned to determine the future of the game.

The soccer authorities have fought long and hard for self-regulation to no avail. The Institutions inadvertently deformed the European soccer market that seeks to break free from the paradox. The soccer authorities are corporate entities (like any other) in an economic market. However, the European soccer market is not strictly compatible with Community law and may not be standardized like other industries without causing injurious consequences. UEFA should be aware that although it appears to be more suitably placed than any other body to administer governance in its

competitions, there is only so far it can go before its regulatory capacity triggers the alarm bells of the Institutions. As a compromise cannot be reached, it may be suggested that now is the appropriate time to devise Community legislation specifically for the governance of sport before the threat of another *Bosman*-type situation ultimately destroys the industry.

C. Awaiting the Next Legislative Showdown

This paper has considered that UEFA's regulation may run afoul of Community law concerning discrimination, namely Articles 39 of the Treaty. Despite the *neutral* phrasing of the regulation, which operates "irrespective of nationality," it may be deemed unlawful under Article 4(1) of Council Regulation 1612/68 if it can be shown that it limits by number or percentage the employment of foreign nationals. Significantly, an Internal Market committee of the European Parliament recently held that "it is quite obvious that most of the home-grown players would be nationals of the specific state and not foreigners."²¹⁴ The regulation would "indirectly discriminate (against) foreigners, making it more difficult for foreign players to transfer to a country where they were not trained and educated."²¹⁵ One commentator stated that this regulation "may well end up in litigation. Even though UEFA claims the quota is neutral in terms of nationality, it is clear that the intention and effect of the rule is to indirectly discriminate on the grounds of nationality."²¹⁶

The incremental execution of this regulation will progressively burden teams that choose to neglect their youth-training policies. It is envisaged that a stakeholder residing in England or Italy may bring litigation, as they are the only Member States known not to be in favor of the regulation.²¹⁷

Ironically, the Internal Market committee devised the report intending to "create legal certainty... to prevent EU

214. European Parliament, *Professional Sport in the Internal Market* (Working Paper Project No IP/A/IMCO/ST/2005-004, September 2005), available at http://www.europarl.europa.eu/compar/imco/studies/0509_study_sport_en.pdf (last visited Mar. 11, 2006).

215. *Id.*

216. See Van Seggelen *supra* note 162.

217. *Id.*

court judges from determining the future of professional soccer, not by making new law but by forcing organizations like UEFA to act in accordance with EU law.”²¹⁸ However, the committee has not recognized the adverse ramifications as a result of *Bosman*. The soccer authorities cannot simply act in accordance with Community law and idly watch the demise of the industry. It may be perceived that UEFA and FIFA have reconciled their differences with the Commission to the dismay of the European Parliament. Is this a case of Institutional bickering? Or is this just another one of those “politicians and bureaucrats, especially European ones [interfering] in subjects they simply do not understand?”²¹⁹

As a result of the UK Presidency of the European Union in 2005, the Independent European Sport Review 2006 was published, offering a comprehensive assessment of the existing status of sport in Europe.²²⁰ Significantly, the Review examines UEFA’s regulation and takes into account the case-law surrounding Article 81(3) and the rulings in *Wouters*, *Albany* and *Meca-Medina*. It held that, “In the view of the authors, the purpose and nature of this rule is such that it would qualify for an exemption under EU competition law.”²²¹

The Review also provides a critical analysis of the financial disparities existing between professional soccer clubs as a concurrent factor influencing the recruitment of foreign players. The authors of the report agree that there is a desperate need to address this issue. It is suggested

...that the link between the financial budget of a club and its playing strength will become less direct if a club is encouraged to incorporate a minimum number of locally trained players into its squad (instead of simply buying talent on the market)...²²²

The Review emphasizes that “such a system which promotes education and training and competitive balance should be seen as compatible with Community law.”²²³ Furthermore, it highlights the need for appropriate

218. *MEP Wants to Avoid a Second 'Bosman' in Sport*, Sport Policy Section: EurActiv, Sept. 30, 2005, available at http://www.euractiv.com/en/sports/mep-wants-avoid-second-bosman-sport/article-145152?_print (last visited Sept. 5, 2006).

219. C. HEATON-HARRIS, YOUTH SCHEME FEATURES: TRANSFER CHANGES (2002) www.argyletrust.org.uk/youth.html, last accessed Dec. 23, 2006.

220. See Arnaut *supra* note 12.

221. *Id.* at 106.

222. *Id.* at 42.

223. *Id.*

Institutional guidelines in order to provide certainty to the industry.²²⁴ However, particular reference is made to the Nice Declaration of 2000, which identifies the unique characteristics of professional athletics.²²⁵ Although the Declaration is not legally binding, it provides added support for UEFA's regulation purporting:

...[t]raining policies for young sportsmen and women are the lifeblood of sport, national teams and top level involvement in sport and must be encouraged. Sports federations, where appropriate in tandem with the public authorities, are justified in taking the action needed to preserve the training capacity of clubs affiliated to them and to ensure the quality of such training, with due regard for national and Community legislation and practices...²²⁶

In the light of recent case law, it may be in the public interest to grant an exemption for this regulation.²²⁷ It must be noted that the decision in *Bosman* did not provide an outright ban on measures used to regulate team composition. However, it demonstrated that a restriction might be lawful if it "would be justified by imperative reasons in the general interest and did not go beyond what is necessary for attaining those objectives."²²⁸ Considering the existing conditions of professional soccer in Europe, it is undeniable that something must be done to address the imbalance.

UEFA's "locally trained" regulation will be permissible so long as it falls within the boundary of what is appropriate, proportional and necessary for attaining the objectives. This critical analysis has affirmed that soccer authorities are walking on a tightrope in a miasma of Community legislation and case law. For how long can the European soccer market exist in this paradox? Only time will tell...

224. *Id.* at 96.

225. Nice Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which account should be taken in Implementing Common Policies (2000).

226. *Id.* at ¶ 11.

227. *Metropole*, 1996 E.C.R. II-649; *Wouters*, 2002 E.C.R. 1-577.

228. AG Opinion in *Bosman*, *supra* note 11 at ¶ 212.