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Player Quotas, National Eligibility Restrictions, and Freedom of Movement under EU Law

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Introduction

This paper explores certain consequences of the European Court of Justice's rulings in several 'sports law' cases, particularly (but not exclusively) its decision in *Union Royale Belge des Sociétés de Football Associations ASBL v. Bosman* Case C-415/93 [1995] ECR I-4921. Much attention has been paid to the impact of the *Bosman* ruling, especially its impact upon the system of transfer fees and the use of nationality quotas within professional sports. Although *Bosman* heralded the demise of player quota systems in club competitions, football's governing bodies have attempted simultaneously to retain the fundamental elements of the transfer system while safeguarding themselves from the possibility of a latter-day *Bosman* launching a new challenge at EU level. Specifically, the governing bodies have introduced 'transfer windows', the payment of compensation for player training and the imposition of sanctions upon those who breach the new rules following an agreement reached with the European Commission in March 2001. While the legality of these provisions falls outside the scope of this paper, it must be remembered that it is not for the European Commission to rule on the legality of particular measures with the Treaty of Rome. That task falls to the European Court of Justice or the domestic courts of the member states and the co-operation of the Commission in hammering out the new deal is no guarantee of its compatibility with EU law. Given that, as Morris et al. (2000/01) have pointed out, all the aspects of the March 2001 agreement are, *prima facie*, at odds with the law of the European Union, it is but a matter of time before a club, or a latter-day *Bosman*, launches a challenge in respect of them.

Instead, the focus here is the question of whether national eligibility criteria – i.e., those regulations that govern who can be selected to play for a *national* side as opposed to a club side – are compatible with freedom of movement provisions. This paper locates that question within the context of the abolition of 'quotas' pertaining to club sides. In various judgements

both prior to and after *Bosman* the ECJ has indicated that, were national eligibility criteria to be challenged the Court would be minded to uphold them. But in this paper I will contend that the legal basis upon which such a ruling would be made, is far from watertight. The ECJ's intimations that national eligibility restrictions are matters of 'purely sporting interest' and, as such, would be exempt from the rigours of EU law are problematic. National eligibility criteria contain the 'economic element' necessary to bring them within the purview of EU law in the wake of *Bosman* and the other cases.

The quota system pre-*Bosman*

Before dealing with the legal status of national eligibility restrictions, it may be instructive to reflect upon how the club quota system had caused consternation at European Community level long before *Bosman*. It will also serve to highlight how the game's governing bodies had resisted the Commission's pressure for change and remained immune to the European Union's overtures before the ECJ squarely laid the matter to rest, and give the lie to their assertions that the *Bosman* ruling was completely unexpected. It is a truism to say that UEFA – the organisation that runs professional football throughout Europe - had traditionally regarded itself as immune from external legal regulation and entitled to run its fiefdom in whatever way it saw fit. At various times, UEFA has been accused of acting in restraint of trade, placing unlawful restrictions on individuals' freedom of movement, engaging in racial discrimination and encouraging concerted practices. But, along with the transfer fee system, the use of 'quotas' to control the number of foreign players at each club was what excited most consternation within the Commission. This was particularly the case from the mid-1970s when, following the European Court of Justice's rulings in *Walrave and Koch v Association Union Cycliste Internationale* and *Donà v Mantero*, it was established beyond a peradventure that sport, in so far as it constituted an 'economic activity', fell under the purview of the Treaty of Rome and that measures such as eligibility criteria and quotas were open to challenge under the Treaty.

Back in 1978, a meeting between UEFA and the Commission led to minor changes to certain discriminatory practices and UEFA affirming its commitment to complying with EC law in full by abolishing the quota system and amending its transfer provisions. But by 1984 it had taken no steps in either respect and the Commission stated it would

instigate legal proceedings against UEFA if free movement had not been introduced by the start of the 1987/88 season. In 1986, an internal Commission report revealed that the 1978 agreement had not been implemented as UEFA had promised. UEFA was called to another meeting with the Commission in 1987 at which it agreed to make more minor changes, modify some of its quota practices from the start of the 1990/91 season and undertake a further review of quotas and transfers in 1991.

However, in 1989 the Van Raay report on restrictive practices in the European football industry proved to be a damning indictment of UEFA's ongoing discriminatory practices and questioned whether UEFA's commitment to change was genuine. The European Parliament recommended a programme for reform and the Commission threatened to resort to legal action to free the industry of restrictions altogether if UEFA continued to not toe the line. In April 1991, UEFA introduced a 'Gentlemen's Agreement' which provided that from July 1992 it would no longer set maximum limits on the number of foreign players that any club play in domestic matches were concerned. From that date, the domestic Leagues would be responsible for setting their own upper limits. However, those Leagues would have to comply with a UEFA-imposed *minimum* of three non-nationals (ie, those who were not eligible to play for the national side) plus two 'assimilated players' per team. An 'assimilated player' was one who had played in that country continuously for at least five years, including three at youth level.

In practice, the national Leagues used the UEFA minimum quota as their maximum. For its part, the Football League in England set no limits on other Britons appearing in domestic competitions but allowed a maximum of three 'real' foreigners. So, while there were no limits on the number of Scottish, Welsh or Northern Irish players who could play for English clubs, there were stringent limits on the number of players from other European Union member states or from outside the EU who could play for any club.

So far as the competitions run by UEFA were concerned, the 'Gentlemen's Agreement' initially allowed for a maximum of four foreigners per *squad* from the 1990/91 season, although only three of them could be on the pitch at anytime. The provisions caused a degree of confusion. Eintracht Frankfurt fielded four foreign players (one more than the domestic regulations allowed) in a Bundesliga match against Bayer Uerdingen. There was a celebrated occasion in 1992 when Leeds United's match against VfB Stuttgart in the European

Champions Cup had to be replayed because VfB, having started the game with two players who were not German nationals, added two more as substitutes. Therefore, they had all four of their foreign squad members playing at once - one more foreigner than the rules allowed. UEFA may have made some minor concessions, but its quota system, manifestly, still breached European Union laws and it fell to the European Court of Justice to make that point explicitly in *Bosman*.

The Bosman case

The facts

In 1986, Jean-Marc Bosman had signed professional forms with Belgian club Standard Liege. Two years later, he joined another, smaller Belgian club (SA Royal Club Liegeois) on a two-year contract with a monthly salary of approximately 120,000 Belgian Francs. Shortly before this contract expired in the spring of 1990 he was offered a new deal: a one-year contract with his wages slashed to 30,000 Francs - the lowest wage the club could offer under the rules of the Belgian Football Association. Unsurprisingly, Bosman refused to sign the new contract and he was placed on the club's transfer list.

Under the rules of the Belgian Football Association, for one month at the end of the domestic season a player on the transfer list was allowed to move to another club even if his old club objected to the move. The old club could not block the transfer by asking an unreasonable and prohibitive transfer fee because in such cases the Belgian Football Association determined the fee to be paid. They used a complex mathematical formula that involved multiplying the player's annual wage by a figure of between two and fourteen (depending upon the player's age). When this formula was applied to Bosman, the figure reached was almost 12 million Francs.

This was far more than other Belgian clubs were willing to pay, but in May 1990 Bosman negotiated a one-year transfer to a French second division club (US Dunkerque) for a tenth of that figure. Dunkerque also had an option to sign him permanently if they paid another 4,800,000 Belgian Francs by the beginning of August. However, RC Liegeois doubted Dunkerque would be able to raise the cash, so did not apply to the Belgian Association for the necessary clearance certificates to allow Bosman to move to France. The deal collapsed. RC Liegeois suspended Bosman in accordance with the rules of the Belgian Association (under which he would have been re-classified as an amateur player if the club had not done so).

In late 1990, Bosman started proceedings in the domestic courts. He sought an order that RC Liegeois pay him a salary while he found a new club and asked the court to prohibit the club from seeking a transfer fee for him. He also requested that the case be transferred to the ECJ for determination of the ultimate issue - the legality or otherwise of the Belgian transfer system. All three requests were granted at first instance, but on appeal the referral to the ECJ was overturned.

Over the next three years Bosman plied his trade at three lower-division clubs in France and Belgium on a succession of one-year contracts while his legal proceedings dragged on. In August 1991, UEFA was joined as a defendant in his action (which was now an action for damages) against RC Liegeois. He also started a separate case in the Belgian courts against UEFA itself, contending that its rules were a breach of the EC Treaty, Article 48 (freedom of movement between member states) and Articles 85 and 86 (imposition of restrictive practices and abuse of a dominant position). In April 1992, he amended his claim so as to seek an order that neither its transfer rules nor the rules concerning overseas player quotas were applicable to him.

In June 1992, the Belgian Court of Appeal restored the court of first instance's decision to make a reference to the European Court of Justice under EC Treaty, Article 177. The reference sought a preliminary ruling on the compatibility of both the Belgian transfer system and UEFA's rules with the provisions of Articles 48, 85 and 86. The questions that the European Court of Justice was asked to consider were: when a player whose contract with a particular club had expired joins another club, does the EC Treaty prohibit the first club from requiring payment from the club that sign him? Second (and more importantly for the purposes of this paper) do the provisions of the Treaty prohibit a national or international sporting association from restricting the right of foreign players from other countries in the European Community to play in the competitions that association has organised?

The applicability of EU law

The first point to be addressed concerned the extent of the ECJ's jurisdiction over UEFA's rules and regulations. UEFA is a confederation of FIFA, the game's international governing body, and UEFA's regulations require FIFA's approval. Both UEFA and FIFA are based in Switzerland and are governed by Swiss law. However, "its members are the national

associations of some fifty countries, including in particular those of the (European Community) member states which, under UEFA statutes, have undertaken to comply with those statutes and with the regulations and decisions of UEFA" (*Bosman*, op cit: 145). To illustrate the extent of UEFA's influence, in the qualifying stages for the 1998 World Cup there were nine European Groups accommodating an unprecedented 51 countries and playing across a geographical area that extended from Iceland to Azerbaijan. Israel is also a member of the UEFA confederation, for obvious political reasons.

So far as the Advocate General was concerned, the fact that UEFA was based in a non-member state, that the majority of countries playing under its auspices were non-members and that the practices complained of had been *formed* in a non-member country (ie Switzerland) were all immaterial so far as Community Law was concerned. If a company or other body based in a non-member state engages in practices that effect competition or freedom of movement within the Community, then the provisions of the Treaty will be applicable so long those practices have been *implemented* within the Community. See, for example, *Ahlstrom Osakyhtio v Commission*, where a concerted practice (namely, a cartel among wood pulp producers) "though formed outside the Community, was implemented within it and accordingly fell within the Community's jurisdiction under the territoriality principle uncontroversial in international law" (Weatherill and Beaumont, 1993: 614). The issue was irrelevant, despite Mr George's ejaculations about the benefits of being based in Switzerland. "The present proceedings concern application of (UEFA's) rules within the Community and not the relations between the national associations of the member states and those of non-playing countries" (*Bosman*, op cit: 159). There are obvious tax advantages for governing bodies who choose to base themselves in Switzerland, but they are still subject to Community law if their decisions impact upon the Community's citizens.

Once the jurisdictional issue had been resolved, the next plank of UEFA's and the Belgian Association's defence was the predictable one that recourse to law was not appropriate for dealing with sports issues. However, as explained above, *Walrave* and *Dona* had already established that Community law was applicable to sport if it constituted an economic activity. In summarising the effect of those two cases, Advocate General Lenz opined that:

" ... (i) the rules of private sports associations are also subject to community law. (ii) The field of sport is subject to Community law *in so far as it*

constitutes an economic activity. (iii) The activities of professional football players are in the nature of gainful employment and are therefore subject to Community law. (iv) Either Article 48 or Article 59 applies to those activities, with no differences arising therefrom. (v) The Court allows certain exceptions to the prohibitions contained in those provisions" (*Bosman*: 104. Emphasis added).

UEFA argued that it was only the 'superclubs' of Europe whose activities could possibly be said to "constitute an economic activity". The provisions of EC Treaty, Articles 48, 85 and 86 ought not to be extended to the activities of humble little clubs like RC Liegeois in any event, for the restrictions were certainly proportionate and appropriate when applied to them. However, the Advocate General's opinion was that once professional football had been deemed to be an economic activity, "the size of that activity is immaterial, as is the question of to what extent it leads to a profit" (op cit: 104). He had sympathy with UEFA's argument that transfers existed in order to subsidise the smaller clubs, and that applying the provisions of EC Treaty, Article 48 would have consequences for the entire organisation of football, not just the professional game. But "that argument relates to the *consequences* of the Court's decision, not the question of the *applicability* of Community law, and thus cannot be an obstacle to that applicability" (op cit: 105).

The Advocate General's most trenchant criticism was reserved for the Belgian Association's argument that as most professional clubs in Belgium did not make a profit Article 48 ought not to be applicable:

"If I understand that argument correctly, the (Belgian Football Association) is submitting that the rules on transfers relate merely to the mutual relationships of clubs, while Article 48 is relevant only to the employment relationship between the club and the player. That argument cannot be accepted. The distinction suggested ... is of an artificial character and does not correspond to reality. The rules on transfers are of direct and central importance for a player who wishes to change club. *That is shown precisely by the present case: if it had not been for the transfer rules, nothing would have hindered Mr Bosman's transfer to US Dunkerque.* It thus cannot

seriously be maintained that those rules concern merely the legal relations between clubs" (ibid. Emphasis in original).

Advocate General Lenz was equally dismissive of two other arguments out forward by UEFA. First, it suggested that even if Community Law was applicable to sport, Article 48 in particular was not appropriate for solving football's specific problems. The Advocate general reiterated that "professional football is an economic activity and is therefore subject to Community law" (ibid). He also dismissed the argument that the case concerned a dispute between a Belgian player and the Belgian Association, and that it was a purely internal situation to which Article 48 was inapplicable. The obvious response to such a suggestion was that "the main action originates in a failed transfer from a *Belgian* to a *French* club. ... There is thus evidently a situation which extends beyond the frontiers of one member state" (op cit: 105,6. Emphasis in original).

The legality of the quota provisions

Having reached the conclusion that Article 48 was applicable, the Advocate General went on to consider the specific issue of whether UEFA's quota rules breached its provisions. "No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature", he decided. "They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other member states whom a club in a particular member state can play in a match. Those players are thereby placed at a disadvantage with respect to access to employment, compared with players who are nationals of that member state" (op cit: 106). The rules may have only limited the number of foreigners who could *play* in any match rather than the number of foreigners a club could actually have on its books, but that still amounted to a restriction on freedom of movement. "Every club which plans and acts in a reasonable manner will take the rules on foreign players into account in its personnel policy. No such club will therefore engage more - or significantly more - foreign players than it may play in a match" (op cit: 107). By way of example, the Advocate General cited the two financially strongest clubs in his native Germany, Bayern Munich and Borussia Dortmund, who had just five and six foreign players respectively on their staff in the 1995/96 season out of squads of 21 and 25 players.

In Dona the Court had allowed the imposition of restrictions on the number of foreign players who could play in national leagues. But the justification for those restrictions lay in "reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of *sporting interest only*, such as, for example, matches between national teams of different countries" (Dona, op cit: 582). The Advocate General in Bosman was troubled by the ramifications of this decision. "In view in particular of the fact that matches between national teams - as in the football World Cup - nowadays indeed have considerable financial significance, it is hardly still possible to assume that this is not (or not also) an economic activity" (Bosman, op cit: 108). He was able to avoid the matter "since the question is not relevant to the present case" (ibid). Of more immediate were three other arguments put forward in an attempt to justify the discriminatory provisions:

"First, it is emphasised that the national aspect plays an important part in football; the identification of the spectators with the various teams is guaranteed only if those teams consist, at least as regards the majority of players, of nationals of the relevant member state. Moreover, the teams that are successful in the national leagues represent their country in international competitions. Second, it is argued that the rules are necessary to ensure that enough players are available for the relevant national team; without the rules on foreigners, the development of young players would be affected. Third and finally, it is asserted that the rules on foreigners serve the purpose of ensuring a certain balance between the clubs, since otherwise the big clubs would be able to attract the best players" (op cit: 109).

All these arguments have traditionally been trotted out by clubs and the various governing bodies when the need to defend quotas or the transfer fee system has arisen, and on this occasion the 'spectator identification' argument struck the Advocate General as particularly fallacious. "As to the identification of spectators with the teams, there is ... no need for extensive discussion to show the weakness of that argument. ... The great majority of a club's supporters are much more interested in the success of their club than in the composition of the team" (Bosman, op cit: 109). Even if the 'national aspect' arguments did have any merit, "it could not justify the rules on foreigners. The right to freedom of movement and the prohibition of discrimination ... are among the fundamental principles of the Community order. The rules on foreign players breach those principles in such a blatant and serious

manner that any reference to national interests which cannot be based on Article 48(3) must be regarded as inadmissible as against those principles" (ibid).

The Advocate General was also aware that the way in which young players were developed gave the lie to the argument that youngsters' development, citing Ajax Amsterdam as a rare example of a top club that had invested heavily and consistently in its youth policy (op cit: 111). This applies as much to English clubs as it does to Dutch ones, for with one or two notable exceptions most clubs have relied on established stars from other Premiership sides, or (post-Bosman) from other countries in an attempt to buy success. A quick trawl through the Rothman's guide shows that transfer turnover has doubled since the inception of the Premier League, but that the amount of money is being paid to smaller clubs by way of transfer fees is decreasing. Young players benefit enormously from playing with and against top-quality players of whatever nationality, but "it is admittedly correct that the number of jobs available to native players decreases the more foreign players are engaged by and play for the clubs. ... That is a consequence that the right to freedom of movement necessarily entails" (ibid).

The important point that this part of the judgment established was that professional football had consistently chosen to ignore the fundamental basics of Community law and hoped it would be left alone, rather than work out how it could best comply with its obligations under the EC Treaty. Bosman highlighted the need for clubs to develop lawful player development systems rather than rely on quotas and in buying and selling established players among themselves.

The argument that restrictions on foreign players preserved a balance between clubs because they prevented the biggest sides from swallowing up all the talent and thereby widening the gulf between those clubs and the smaller ones attracted a degree of sympathy from the Advocate General. But the onus fell on football's authorities to show their significance was so great that they ought to be regarded as an exception to the provisions of EC Treaty, Article 48 under the 'appropriate and proportionate' test. They had failed to discharge that burden. The Advocate General also pointed out that while the rules on foreign players had been worked out with, or approved by, the Commission, this did not give them any particular legal significance or place them in a privileged position. "The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the Treaty by its actions. It is for the Court of Justice alone to give binding interpretations of those provisions" (op cit: 112).

Advocate General Lenz went on to say that young players and smaller clubs could be protected by means other than an unlawful restriction on freedom of movement. He suggested that a policy of collective wage capping or the distribution of funds on a more equitable basis might have the desired result while preventing further breaches of the EC Treaty. The issue has come full circle, for the perceived need to protect smaller clubs had, of course, been one of the reasons why a maximum wage and retain-and-transfer had been introduced in England a century before. The Bosman ruling might oblige football's authorities to go down the 'redistribution of funds' route in preference to trying to carve out a path through the legal minefield of wage restraint and transfer systems. Walrave and Dona prevented UEFA and the Belgian FA from arguing that the restrictions were of a non-economic nature and that Article 48 did not apply (op cit: 135). Having reviewed all the authorities' other points at length, the advocate General was moved to conclude that "the transfer rules hitherto in force are not justified by reasons in the general interest" (op cit: 145). The problem was that, although the end results of the transfer system might be in the sport's best interests, the means of achieving those ends had to be lawful. Failing that, there had to be sufficiently compelling reasons for maintaining a transfer system that was manifestly incompatible with Article 48. The authorities had failed to satisfy the court on either point.

The Court shared the Advocate General's view that the transfer system was unlawful under Article 48 and held that because this was the case, "it is not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty" (op cit: 161). However, the decision not to rule on Articles 85 and 86 means the legality of transfers that take place between two clubs based in the same state remained unclear. Article 48 only applies to restrictions that prevent free movement between one state and another, but as Weatherill points out:

"The juxtaposition of a domestic system requiring the payment of transfer fees and an absence of fees payable on cross-border deals affects inter-state trade patterns. The distortive effect on the wider market of a horizontal agreement between clubs relating to player acquisition brings it within Article 85(1)" (Weatherill, 1996: 1021).

In other words, while the football authorities knew that, post-Bosman, the payment of a fee for an out-of-contract player moving from, say, Brøndby to Arsenal was unlawful, it was unclear

whether the position was the same in respect of an out-of-contract English-qualified player moving from Portsmouth to Southampton.

The impact of Bosman on the club quota system

Early in 1996, the Commission threatened UEFA with a seven-figure fine if it failed to change its quota rules to take account of *Bosman*. UEFA's stance had been supported by FIFA (general secretary Sepp Blatter opining that the *Bosman* ruling "went against the principles of football") and Tom Pendry (then shadow sports minister) called for European Law to be amended so that football's transfer system and quota rules would be protected. But the Commission would not be denied. An exasperated spokeswoman for the Commissioner, Pdraig Flynn, was adamant that the Commission would not stand idly by while UEFA flouted the Treaty and the "clear ruling" of the Court in *Bosman*. "Nobody is above European Law. Individual states are not above European Law so you can't have a private organisation like UEFA saying that they are" (Guardian, 17 January 1996, p 20). Rick Parry, the English Premier League Chief executive, also took the Commission's side. "I feel very sceptical that the Community will exempt football from its Article 48 on freedom of movement of workers because it is the bedrock of Community Law. ... The idea of a blanket exemption for sport is absurd", he said (Guardian, 13 February 1996, p 24).

UEFA countered by reminding the Commission that the existing quota rules had been the result of a 'Gentleman's Agreement' reached between the two in 1991, but of course the Advocate General in *Bosman* had expressly stated that this agreement had no validity at all. It was not for the Commission to rule on how Community Law was to be interpreted. But UEFA continued to be characteristically bullish. In January 1996, it told national associations (by fax) to abide by the quota restrictions for UEFA competitions for the rest of 1995/96 "in the interests of continuity and fairness". But its subsequent climbdown was as humiliating as it was predictable. Shortly after this missive, Commissioner Flynn instigated proceedings under Article 171 (as amended by the Maastricht Treaty and now Article 228) and gave UEFA six weeks to comply with *Bosman* or risk the case being returned to the court and fines being levied. On February 19th, two weeks before the deadline expired, UEFA announced that the so-called 3+2 rule (three foreigners plus two assimilated players) would be scrapped forthwith. However, it called upon all those clubs still involved in UEFA competitions to observe a 'Gentlemen's Agreement' until the end of the 1995/96 season. The Commission said

it was 'partly satisfied' with this, but stressed that UEFA would have no way of enforcing the 'Gentlemen's Agreement' if any club unilaterally decided to flout it (Guardian, 21 February 1996, p 24). In October 1996, UEFA announced that all references to player nationality would be removed from its regulations governing club competitions, paving the way for a 'free-for-all' in which the issue of players' nationality has become irrelevant so far as players hailing from the member states and the EEA are concerned.

“Rules which are inherent to a sport or which are necessary for its organisation or for the organisation of competitions so-called 'sporting rules' should not, in principle, be subject to the application of competition rules. Sporting rules applied in an objective, transparent and non-discriminatory manner do not constitute restrictions of competition. This approach is in line with the recent judgement in the Deliège case. ... Selection rules applied by a Federation to authorise the participation of professional or semi-professional athletes in an international sports competition have inevitably the effect of limiting the number of participants in a tournament. Such limitation does not in itself constitute a restriction of the freedom to provide services as long as it derives from a need inherent in the organisation of the international sports event in question” (www.europa.eu.int).

National eligibility restrictions

To summarise, in *Bosman* the European Court of Justice held, *inter alia*, that the imposition of national quotas on teams participating in European competitions violated the right of free movement. The particular rule in issue was that which limited teams in UEFA competitions to fielding three foreign players and two assimilated players: the other team members had to be nationals of the country from which the team emanated. This measure was an obvious breach of the principle of free movement and the Court was unconvinced by the arguments advanced to justify the restrictions it imposed (see articles referred to on the reading list for more details). *Bosman* resulted in the consequent abolition of national quotas in competitions that involved clubs from different European countries competing against one another under the auspices of UEFA, the game's governing body within Europe. A further consequence was the elimination of quotas in domestic league and cup competitions, although initially there was doubt about whether the use of quotas in these circumstances was unlawful as a consequence

of the *Bosman* ruling. However, the question of rules that prescribe eligibility to represent a national side did seem to be unaffected by *Bosman*. It is the legality of these rules that is central to the rest of this paper.

National eligibility rules confine the right to represent a national side and, thus, to participate in international competition: the criteria employed include nationality, place of birth and residence in the territory for a prescribed period of time. The sporting motivation behind national eligibility rules is to preserve a genuine link between athletes and the countries they represent. This is perfectly understandable as the prospect of athletes changing their national affiliations as fortunes fluctuate is viewed by many to undermine the very essence of international sporting competition. However, it seems clear that these rules impede the free movement of professional athletes who are denied the opportunity to seek employment from different national federations. The question therefore is whether these rules are compatible with Community law and, in particular, the right of free movement.

The indications in the case law are that the European Court of Justice is disposed to holding national eligibility rules compatible with Community law. The Court has tended to view the composition of national teams as a purely sporting matter that lacks the economic significance necessary to raise a question of European law. In *Walrave and Koch* it stated that European law

did not affect the composition of sports teams, *in particular national teams*, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.

In *Donà v Mantero* the Court opined that the free movement provisions

do not prevent the adoption of rules or of a practice of excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.

These sentiments were echoed in *Bosman*. The Court reiterated the observation made in *Donà* and reiterated that ‘the restriction on the scope of [EC law] must remain limited to its proper objective.’ The Court did not spell out what the ‘proper objective’ entails but simply noted that national teams must be composed of players having the nationality of the country in question.

The general consensus appears to be that, were a ruling required on the point, the European Court of Justice would hold that national eligibility rules do *not* violate European Law. Nevertheless it is more difficult to discern the legal basis on which this conclusion might rest. One argument that has been invoked is that the composition of a national team is purely a sporting matter and does not give rise to economic considerations: as Steven Weatherill put it ‘national identity, not money, predominates.’ This view may be reinforced by what Michael Beloff, among others, has called ‘a sporting exception in European law’. However, as far as professional sport is concerned a distinction between the sporting and the economic is difficult to draw and in any event in many sports international competition represents the most commercially lucrative element. Moreover, the decision in *Bosman* emphasises that the significant feature is that the impugned practices affected the free movement of professional athletes, not the sums of money involved. Perhaps Advocate General Lenz offers the best explanation when he observed in *Bosman* that the compatibility of nationality rules with EU law is ‘obvious and convincing’ but that it ‘is not easy to state the reasons for it’.

National quotas were considered in a different context in *Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL*. This case concerned eligibility to participate in international competitions in an individual sport. In *Bosman* the free movement of workers was the central issue but in *Deliège* the principle of freedom to provide services was invoked because the athlete was in essence self-employed. Under the relevant rules individuals were entered into major European judo tournaments by their national federations, with each federation being confined to a stipulated number of entrants in each competition. Qualification to participate in the Olympic Games depended in large part on a judoka’s performance at these tournaments and in the European championships. One consequence of limiting the number of athletes that a national federation could enter in the competitions in question was to dilute selection on the basis of merit. Talented judokas from ‘strong’ nations

might be excluded and thus denied the possibility of competing in the Olympic Games, while less talented competitors from 'weaker' nations could participate. In *Deliège* the applicant was a leading judoka who had fallen into dispute with her national federation, resulting in her not being selected for international competitions, which in turn affected her chances of becoming eligible for the Olympic Games. She contended that these rules were in breach of the freedom to receive and provide services guaranteed by EU law.

The European Court of Justice restated the well established point that sport is subject to Community law only in so far as it constitutes an economic activity. The Court also observed that the Treaty does not preclude the adoption of sports rules that exclude foreign athletes from certain matches for reasons that are not economic in nature, thus echoing the judicial observations noted previously to the effect that eligibility criteria for national teams are compatible with EU law. On the assumption that the applicant was engaged in the provision of services (and this matter is considered below) the question was whether the rules restricted her freedom under Article 59 of the Treaty. The Court contrasted the rules in this case with those that were considered in *Bosman*:

'the selection rules at issue ... do not determine the conditions governing access to the labour market by professional sportsmen and do not contain nationality clauses limiting the number of nationals of other Member States who may participate in a competition.'

The rules in this case were considered to be an inherent part of elite international sports events and thus did not involve a restriction on the freedom to provide services. The Court also concluded that it fell within the discretion of the sporting bodies organising the events to choose the appropriate system of selection. However, this freedom was not unfettered and the Court stated that the adoption of a particular set of criteria must be based on 'considerations unconnected with the personal situation of any athlete, such as the nature, the organisation and the financing of the sport concerned.'

The decision in *Deliège* reinforces the autonomy of sports associations where the issue is primarily sporting in nature, but the difficulty is that although such rules may be 'primarily' sporting they are not always exclusively so. As Paul McCutcheon has asserted, devising some means of limiting the numbers of participants in international competitions is an obvious

necessity that entails the implementation of selection criteria that will favour some athletes over others, and that alone does not mean that athletes' rights are violated. The fact that a different system that is more favourable to the applicant could be pointed to, as was the case in *Deliège*, did not detract from the conclusion that her rights were not violated. It is also significant that the Court was prepared to tolerate a system of nomination by national federations as that is 'the arrangement adopted in most sporting disciplines, which is based in principle on the existence of a federation in each country.' But the fact remains that when choosing, say, a squad of 16 players to represent Scotland at the soccer world cup there is an *a priori* provision that one must have been born in Scotland, or be of Scottish parentage (English or Welsh will not suffice), or be a 'naturalised' citizen of the United Kingdom before one can be even considered for selection. This means that an accident of birth is the sole determinant of whether one can have the opportunity of playing at the very highest level and commanding the salary and employment opportunities that go with it; as such, it flies in the face of the principle of freedom of movement. It is not a 'purely' sporting issue because competing on the international stage is likely to present opportunities to join the biggest club sides (Manchester United, Barcelona, AC Milan etc.), to command a higher salary and to secure lucrative sponsorship deals. These provisions contain an 'economic element' that brings them within the purview of European Union law. While it may be 'common sense' to say that, of course, only English-born or English-qualified players should be able to play for England, 'common sense' does not on this occasion transmute into a rational, articulate and legally grounded basis for the maintenance of such criteria. Either the European Union must negotiate a 'sporting exemption' from EU Law, or national eligibility criteria must be abolished.

Conclusions

Drawing a distinction between the 'economic' aspects of a sporting contest - to which EU law applies - and purely sporting matters to which it does not, verges on the impossible, at least so far as this writer is concerned because a coherent legal basis for such a distinction is lacking. In *Bosman* Advocate General Lenz suggested that the duration of a match and the number of points to be awarded for a win are purely sporting matters. Fair enough. But the real difficulty lies with the myriad rules that are not so clear-cut. National eligibility rules fall within this latter category. They are an example of a provision that could never be 'purely sporting' because they will always possess an 'economic' element. While in one sense the concern of

those rules is solely to determine who may represent a nation in certain competitions, in another they determine the conditions under which athletes are permitted to pursue their livelihoods. The rules indicate that, for the moment at least, the composition of national teams will continue to be regarded as a purely sporting matter rather than one that invokes free movement principles. But the legal basis for it is tenuous, and that's really all I'm saying...

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