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## The Bosman Case: Protecting Freedom of Movement in European Football

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Andrew L. Lee

## Abstract

This Comment argues that the IGC should reject proposals to exempt sports associations from Community law, because freedom of movement for workers is a strictly protected right of fundamental importance to the European Union and because the public's interest in sport and the sporting associations' interest in maintaining financial and competitive balance between clubs are better served by alternatives to the transfer system that do not obstruct freedom of movement. Part I discusses the importance of the common market in the European Union and outlines Community law designed to maintain the common market. Part I also discusses application of those measures in the context of sport, including a description of organized professional football and the rules regarding freedom of movement for players. Part II presents the background of the dispute in *Bosman*, followed by an analysis of the ECJ's ruling declaring the transfer system and the rules on foreign players incompatible with Community law. Part III argues that amending the Treaty on European Union ("TEU") to exempt sports associations from Community law on freedom of movement for workers would be inappropriate in light of the importance of freedom of movement in the European Union and the transfer system's failure to promote any legitimate goals. Part III advocates that viable alternatives exist to replace the transfer system without obstructing freedom of movement. This Comment concludes that an amendment to the TEU would create a dangerous precedent in favor of unjustified obstructions to freedom of movement for workers in an entire segment of the EU internal market, thereby threatening the existence of the common market itself.

# THE BOSMAN CASE: PROTECTING FREEDOM OF MOVEMENT IN EUROPEAN FOOTBALL

Andrew L. Lee\*

## INTRODUCTION

While tension between management and labor may exist in every industry, it dominates the professional sports industry<sup>1</sup> in the 1990's.<sup>2</sup> The unique characteristics of the sports industry, such as highly specialized job functions and varying levels of skills, affect the nature of agreements between employers and employees by making it difficult to characterize their respective rights.<sup>3</sup> Controversy commonly arises over the right, known as free agency,<sup>4</sup> of professional athletes to change teams or clubs at the end of their contracts without restriction.<sup>5</sup> Players argue that restraints on movement interfere with their freedom to work

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\* J.D. Candidate, 1997, Fordham University. This Comment is dedicated to Kelly, for her love and patience, and to our families. I would also like to thank Samuel R. Hill, Esq. of Proskauer Rose Goetz & Mendelsohn LLP, for his contributions.

1. Peter N. Katz, Comment, *A History of Free Agency in the United States and Great Britain: Who's Leading the Charge?*, 15 COMP. LAB. L.J. 371 (1994).

Imagine telling a law student from [Fordham University] that her rights to practice law have been obtained by a law firm in Anchorage, Alaska, and her only options are to practice law there or in another country. This concept seems quite ridiculous[, but] it is exactly what happens to . . . virtually all professional athletes when they try to move within their respective markets.

*Id.* at 371.

2. *Sports Log*, BOSTON GLOBE, Feb. 22, 1996, at 32. According to a study by the Associated Press, the lowest increase since 1989 in salary arbitration for Major League Baseball players is the 1996 73 % average increase. *Id.* See also *Jones Facing Future Shock: The Cowboys Owner Must Deal With Looming Higher Salaries to Keep His Team Intact*, FORT WORTH STAR-TELEGRAM, Jan. 28, 1996, at Sports 13 (discussing expected National Football League ("NFL") salary cap increase from US\$37.1 million to approximately US\$40-42 million).

3. Joseph Z. Fleming et al., *Analysis of Relevant Labor, Employment Discrimination, and Humanitarian Relief Laws Affecting the Sports, Arts, and Entertainment Industries*, C627 ALI-ABA COURSE OF STUDY 507, 511 (1991). Consider, for example, the recent lockout that threatened to wipe out the entire 1995 National Hockey League season and the prolonged 1995 strike in Major League Baseball. Gary Roberts, *The Salary Cap in Professional Sports: Overview & Commentary*, SPORTS LAW., Spring 1995, at 1, 5. These situations result, in large part, from "the fundamental philosophical difference in views about how sports should be organized and governed and who should assume risks and get rewards for the productive activity of [a] league." *Id.*

4. See Richard E. Bartok, *NFL Free Agency Restrictions Under Antitrust Attack*, 2 DUKE L.J. 503, 503 n.1 (1991) ("Free agency is the system that enables professional athletes to change sports teams after their contracts expire.").

5. Katz, *supra* note 1, at 416.

where they want to, at salaries determined on the open market.<sup>6</sup> Club owners and leagues respond that restraint practices maintain competitive balance within a professional league.<sup>7</sup>

In the European Union,<sup>8</sup> league-imposed restrictions on a player's ability to change clubs at the end of his contract<sup>9</sup> amplify

6. Shant H. Chalian, Note, *Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead*, 67 ST. JOHN'S L. REV. 593, 594 (1993); see also *Flood v. Kuhn* 407 U.S. 258, 265-66 (1972) (discussing professional baseball player's claim that Major League Baseball restrictions on player movement amounted to form of involuntary servitude); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 873-74 (S.D.N.Y. 1975) (discussing claim that National Basketball Association draft, uniform player contract, and reserve clause violated antitrust laws by allocating and dividing market of professional player talent).

7. Chalian, *supra* note 6, at 594; see *Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (discussing NFL's unsuccessful defense of Rozelle Rule, which forced compensation for transfers of free agents, on grounds that it promoted competitive balance between clubs).

8. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)). The TEU established a single Union comprised of the three European communities already in existence. *Id.* art. A, ¶ 3, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727. The TEU represents the latest stage in the process of creating an "ever closer union among the peoples of Europe." *Id.* The TEU modifies and adds to the Treaties establishing the three European communities, but it does not replace them. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 4 (6th ed. 1995). "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." TEU, *supra*, art. F(1), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. The Communities, which continue to fulfill their respective responsibilities, form the first of the "three pillars" upon which the European Union is based. DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 655 (3d ed. 1993). The second and third pillars identified by the TEU, are, respectively, Provisions on a Common Foreign and Security Policy (C.F.S.P.) and Provisions on Co-operation in the fields of justice and home affairs. TEU, *supra*, tits. V, VI, O.J. C 224/1, at 94, 97 (1992), [1992] 1 C.M.L.R. at 729, 735. The reference to "pillars" is derived from the image of a Greek temple: an illustration of the structure of the European Union. WYATT, *supra*, at 655. The term "European Union" refers to the political relationship between the three pillars. *Id.* Member States were not ready to include the second and third pillars within the "European Community," therefore, the structure of the three pillars was created. *Id.* That structure is held together by "a single institutional framework" which functions to ensure the consistency and the continuity of the activities carried out in order to attain EU objectives while at the same time respecting and building upon the *acquis communautaire*. TEU, *supra*, art. C, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727. The term *acquis communautaire* refers to the body of rules governing the Communities in any field of activity. MATHIJSEN, *supra*, at 6 n.7.

9. See *Soccer in the Dock; the Bosman Trial Promises to Change the Face of European Football*, ECONOMIST, June 17, 1995, at 90 (discussing "transfer system" in European football,

the free agency debate.<sup>10</sup> Specific provisions of Community law protect the right of workers to move freely between Member States for employment-related purposes.<sup>11</sup> In contrast, a similar right to travel between states exists in United States law, although there is no such express provision for this right in the U.S. Constitution.<sup>12</sup>

Under Community law,<sup>13</sup> the express protection of freedom of movement for workers<sup>14</sup> is designed to promote the establishment of the common market, one of the European Union's main goals.<sup>15</sup> Nevertheless, the transfer system has traditionally limited the bargaining positions of players by putting control of player movement in the hands of club management.<sup>16</sup> Accordingly, until recently, free agency did not exist in European football.<sup>17</sup>

The Court of Justice<sup>18</sup> ("ECJ"), in *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*,<sup>19</sup> recently changed the nature

under which players whose contracts expire may not be employed by another club unless transfer fee is exchanged). The sport known as soccer in the United States and Canada is known by most of the world as football. Katz, *supra* note 1, at 397. This Comment uses "football" in order to avoid confusion with U.S. football.

10. Paul Gains, *A Fight for Free-Agent Rights in Europe*, N.Y. TIMES, Sept. 20, 1995, at 18.

11. See Treaty Establishing the European Community, art. 48, Feb. 7, 1992, [1992] 1 C.M.L.R. 573, 612 [hereinafter EC Treaty], incorporating changes made by TEU, *supra* note 8, O.J. C 224/1 (1992), [1992] C.M.L.R. 719 (prohibiting obstacles to freedom of movement for workers).

12. See GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 470 (1993) (discussing free movement of workers in United States and citing several U.S. Supreme Court cases protecting that right).

13. MATHIJSEN, *supra* note 8, at 4. The term "Community" refers to the European Economic Community ("EEC"). *Id.* The other two communities, the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"), have essentially been absorbed into the EEC, therefore, the name "Community" is mostly used in the singular. *Id.* at 4 n.3.

14. EC Treaty, *supra* note 11, art. 48, [1992] 1 C.M.L.R. at 612.

15. See *id.* arts. 2-3, [1992] 1 C.M.L.R. at 588-89 (providing for establishment of common market).

16. See *supra* note 9 and accompanying text (discussing transfer system in European football).

17. See Gains, *supra* note 10, at 18 ("Free agency doesn't exist in European soccer.").

18. EC Treaty, *supra* note 11, art. 164, [1992] 1 C.M.L.R. at 684. The European Court of Justice ("ECJ") is the highest authority on the interpretation of Community Law. *Id.*

19. Union Royale Belge des Sociétés de Football Ass'n v. Bosman, Case C-415/93 (Eur. Ct. J. Dec. 15, 1995) (not yet reported).

of labor relations in EU professional sports by introducing free agency to the European Union.<sup>20</sup> Invoking provisions of the Treaty Establishing the European Community<sup>21</sup> ("EC Treaty") that guarantee freedom of movement to workers<sup>22</sup> and prohibit discrimination based on nationality,<sup>23</sup> the ECJ dismantled European football's century-old transfer system<sup>24</sup> and rules which limited the number of foreign players fielded<sup>25</sup> by clubs.<sup>26</sup> In response to *Bosman*, football clubs and associations seeking to maintain as much of their bargaining power as possible<sup>27</sup> are lobbying<sup>28</sup> Member State governments for an amendment of the EC Treaty to exempt sports associations from Community law on freedom of movement for workers.<sup>29</sup> If Member State<sup>30</sup> govern-

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20. Christopher Clarey, *Free Agency Crosses the Atlantic, Anxiety on Board*, N.Y. TIMES, Dec. 20, 1995, at 21(1). "No longer will players be tied to their clubs after their contracts expire. Instead, they theoretically will become American-style free agents, able to negotiate with other clubs in the European Union, which, henceforth, will not have to pay a transfer fee for their services." *Id.*

21. EC Treaty, *supra* note 11, [1992] 1 C.M.L.R. 573.

22. *Id.* art. 48, [1992] 1 C.M.L.R. at 612.

23. *Id.* arts. 6, 48, [1992] 1 C.M.L.R. at 591, 612.

24. See Katz, *supra* note 1, at 400-01 (discussing evolution of Britain's Football League, which operated under transfer system since its inception in 1888).

25. See Opinion of Advocate General Lenz, *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, Case C-415/93, slip op. at 16, ¶ 37 (Eur. Ct. J. Sept. 20, 1995) (Court decision not yet reported). Since the 1960's, most football associations have operated under rules restricting the possibility of fielding players of foreign nationality as a means of ensuring local interest and maintaining fan support. *Id.*

26. *Bosman*, slip op. at 27.

27. See Bert Lauwers, *EU, UEFA Step Up Warfare Over Bosman Soccer Case*, REUTERS EUR. COMMUNITY REP., Jan. 18, 1996, available in LEXIS, News Library, CURNWS File (discussing football associations' intention to maintain rules on foreign players and transfer rules, at least for the 1995-96 season, despite immediate effect of *Bosman* judgment).

28. *IGC T96: UK and European Parliament Produce Shopping List*, EUR. REP., Mar. 16, 1996, available in LEXIS News Library, CURNWS File (discussing Opinion of European Parliament calling for recognition of sport in new treaty). *Free Movement of People: Belgian Premier Says IGC Should Examine Football Rules*, EUR. REP., Dec. 20, 1995, available in LEXIS, News Library, CURNWS File (reporting Union of European Football Association's ("UEFA") calls for IGC on treaty reform to treat rules of sporting associations as special).

29. EC Treaty, *supra* note 11, art. 48, [1992] 1 C.M.L.R. at 612.

30. TEU, *supra* note 8, pmbi., O.J. C 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 725. Until 1995, there were 12 EU Member States: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. *Id.* On January 1, 1995, Austria, Finland, and Sweden acceded to the European Union. *Fact Sheet: European Union, U.S. Dep't of State Dispatch*, June 26, 1995, at 524. Cyprus, Malta, Turkey, Switzerland, Poland, and Hungary recently applied for membership, and other Central European states have indicated their desire to join. *Id.*

ments agree to propose the amendment,<sup>31</sup> the issue could be raised at the intergovernmental conference<sup>32</sup> ("IGC") scheduled to begin at the end of March 1996.<sup>33</sup>

This Comment argues that the IGC should reject proposals to exempt sports associations from Community law, because freedom of movement for workers is a strictly protected right of fundamental importance to the European Union and because the public's interest in sport and the sporting associations' interest in maintaining financial and competitive balance between clubs are better served by alternatives to the transfer system that do not obstruct freedom of movement. Part I discusses the importance of the common market in the European Union and outlines Community law designed to maintain the common market. Part I also discusses application of those measures in the context of sport, including a description of organized professional football and the rules regarding freedom of movement for players. Part II presents the background of the dispute in *Bosman*, followed by an analysis of the ECJ's ruling declaring the transfer system and the rules on foreign players incompatible with Community law. Part III argues that amending the Treaty on European Union<sup>34</sup> ("TEU") to exempt sports associations from Community law on freedom of movement for workers would be inappropriate in light of the importance of freedom of movement in the European Union and the transfer system's failure to promote any legitimate goals. Part III advocates that viable alternatives exist to replace the transfer system without ob-

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31. See TEU, *supra* note 8, art. N(2), O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739 (providing for conference of Member State governments in 1996 to discuss revision of TEU).

The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties . . . .

*Id.* art. N(1), O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

32. See *id.* (setting forth procedure for amendment of TEU by conference of Member State governments).

33. Jude Webber, *Italian Olympic Body Wants Bosman Ruling on IGC Agenda*, REUTER EUR. COMMUNITY REP., Jan. 27, 1996, available in LEXIS, News Library, CURNWS File.

34. TEU, *supra* note 8, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719.

structing freedom of movement. This Comment concludes that an amendment to the TEU would create a dangerous precedent in favor of unjustified obstructions to freedom of movement for workers in an entire segment of the EU internal market, thereby threatening the existence of the common market itself.

### I. MEASURES IMPLEMENTING THE GOALS OF THE EUROPEAN UNION AND THEIR APPLICATION TO THE FIELD OF SPORT

The EU goal of establishing a common market<sup>35</sup> involves eliminating barriers to the movement of the factors of production across Member State boundaries<sup>36</sup> and maintaining effective competition in the market.<sup>37</sup> EC Treaty Article 48 provides for the freedom of movement for workers,<sup>38</sup> while Articles 85 and 86 establish the EC competition rules.<sup>39</sup> These provisions, as implemented and interpreted by the EU institutions,<sup>40</sup> affect sports in the Community by regulating rules and agreements that influence player movement<sup>41</sup> and market competition.<sup>42</sup>

#### A. *EC Treaty Provisions on Freedom of Movement and Competition*

Community law aims to eliminate economic and political barriers between Member States,<sup>43</sup> thereby establishing a common market.<sup>44</sup> Article 48<sup>45</sup> contributes to this goal by guaranteeing EU citizens<sup>46</sup> the freedom to move throughout the Commu-

35. See EC Treaty, *supra* note 11, art. 2, [1992] 1 C.M.L.R. at 588 (establishing common market is principal means of achieving Community tasks).

36. See *id.* art. 3(c), [1992] 1 C.M.L.R. at 588 (providing for elimination of barriers between Member States to free movement of goods, persons, services, and capital).

37. See *id.* arts. 85, 86, [1992] 1 C.M.L.R. at 626-28 (EC competition rules).

38. *Id.* art. 48, [1992] 1 C.M.L.R. at 612.

39. *Id.* arts. 85-86, [1992] 1 C.M.L.R. at 626-28.

40. *Id.* art. 4, [1992] 1 C.M.L.R. at 590. The European Union is served by five main institutions: the European Parliament, the Council, the Commission, the ECJ, and the Court of Auditors. *Id.*

41. *Id.* art. 48, [1992] 1 C.M.L.R. at 612 (providing for free movement of workers).

42. *Id.* arts. 85, 86, [1992] 1 C.M.L.R. at 626-28 (establishing EC competition rules).

43. See *id.* art. 3, [1992] 1 C.M.L.R. at 588-89 (describing European Community activities).

44. See *supra* note 35 and accompanying text (discussing common market as means for achieving EU goals).

45. EC Treaty, *supra* note 11, art. 48, [1992] 1 C.M.L.R. at 612.

46. *Id.* art. 8(1), para. 2, [1992] 1 C.M.L.R. at 593 (defining citizenship of Union).



nity for employment-related purposes.<sup>47</sup> EC competition law also contributes to the establishment of the common market, by promoting an efficient and fair competitive environment.<sup>48</sup>

### 1. Establishment of a Common Market

The Treaty Establishing the European Coal and Steel Community<sup>49</sup> ("ECSC Treaty") initiated a movement towards European unity by providing for specific economic objectives, including a Community-wide market for coal and steel.<sup>50</sup> The Treaty Establishing the European Economic Community<sup>51</sup> ("EEC Treaty") continued the movement toward European unification by providing for the establishment of a common market.<sup>52</sup> The common market requires elimination of obstacles to intra-Community trade, thereby merging the national markets of the Member States into a single internal market<sup>53</sup> having economic conditions similar to those in the market of a single state.<sup>54</sup> The 1985

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"Every person holding the nationality of a Member State shall be a citizen of the Union." *Id.*

47. *See id.* art. 48, [1992] 1 C.M.L.R. at 612 (free movement of workers).

48. *See id.* art. 85, [1992] 1 C.M.L.R. at 626-27 (prohibiting restrictive trade agreements); *id.* art. 86, [1992] 1 C.M.L.R. at 627-28 (prohibiting abuse of dominant market positions).

49. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

50. *Id.* art. 1, 261 U.N.T.S. at 145. The ECSC Treaty instituted a community "based on a common market, common objectives, and common institutions." *Id.*

51. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty] *in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

52. *Id.* art. 1, 298 U.N.T.S. at 15, 1973 Gr. Brit. T.S. No. 1, at 3.

53. *See* EC Treaty, *supra* note 11, art. 3(c), [1992] 1 C.M.L.R. at 588 (describing one common market activity as establishing an internal market characterized by free movement of goods, persons, services, and capital).

54. *Schul v. Inspecteur der Invoerrechten en Accijnzen*, Case 15/81, [1982] E.C.R. 1409, 1431-32, [1982] 3 C.M.L.R. 229, 251 (describing common market). "It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market." *Id.* The EC Treaty expressly identifies the establishment of an internal market as a principal goal of the common market. EC Treaty, *supra* note 11, art. 3(c), [1992] 1 C.M.L.R. at 588. In the TEU, the Member States stated their determination to "promote economic and social progress for their peoples[ ] within the context of the accomplishment of the internal market." TEU, *supra* note 8, pmb1., ¶ 19, O.J. C 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 726. One of the objectives of the European Union is the promotion of "economic and social progress . . . in particular through the creation of an area without internal frontiers." *Id.* art. B, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727.

Luxembourg IGC resulted<sup>55</sup> in the Single European Act<sup>56</sup> ("SEA"), a principal goal of which was completion of the internal market<sup>57</sup> by the end of 1992.<sup>58</sup> Two 1990 IGC's, held in Rome, resulted in the signing of the TEU,<sup>59</sup> which, along with continuing the goal of an area without internal frontiers,<sup>60</sup> changed the name of the EEC Treaty to the EC Treaty.<sup>61</sup>

The TEU represents the latest stage in the process of European Unification.<sup>62</sup> Under Community law, the TEU supersedes national laws of Member States not consistent with its provisions.<sup>63</sup> The forum for discussing amendment of the TEU is an IGC, consisting of representatives of Member State governments.<sup>64</sup> Recognizing the potential for further evolution of the European Union, the TEU itself requires the holding of an IGC

55. *See id.* art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739. In order to amend the founding Treaties "a conference of representatives of the governments of the Member States . . . shall be convened . . . for the purposes of determining by common accord the amendments to be made to those Treaties." *Id.* art. N(1), para. 2, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

56. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 51, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II)).

57. *See supra* notes 53-54 and accompanying text (discussing internal market).

58. WYATT, *supra* note 8, at 14.

59. David O'Keeffe, *From Maastricht to the 1996 Intergovernmental Conference: The Challenges Facing the Union*, 2 LEGAL ISSUES OF EUR. INTEGRATION 135, 135-36 (1994).

60. TEU, *supra* note 8, art. B, ¶ 1, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727. Other objectives of the TEU include the establishment of economic and monetary union, including a single currency; the implementation of a common foreign and security policy; the introduction of EU citizenship; the development of close co-operation on justice and home affairs; and the overall maintenance and development of Community law. *Id.*

61. *Id.* art. G, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 729.

62. *See id.* art. A, ¶ 2, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727 ("This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe . . .").

63. *See* BERMANN, *supra* note 12, at 166 ("At a minimum . . . Member State institutions are bound to act in conformity with the rules and principles laid down by Community law."). The EC Treaty represents a series of self-imposed limitations on Member State sovereignty:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

*Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, 594, [1964] C.M.L.R. 425, 455.

64. TEU, *supra* note 8, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

in 1996<sup>65</sup> to discuss proposals for further treaty amendments.<sup>66</sup>

One of the EC Treaty's primary goals is the establishment of a common market,<sup>67</sup> designed to promote economic development and performance,<sup>68</sup> high levels of employment and social protection,<sup>69</sup> high standards and quality of life,<sup>70</sup> economic and social unity among Member States,<sup>71</sup> and sustainable, non-inflationary economic growth.<sup>72</sup> The internal market represents a limited objective within the broad concept of a common market comprised of several community activities.<sup>73</sup> The EC Treaty describes the internal market as an area in which goods, persons, services, and capital move freely across Member State boundaries.<sup>74</sup> Furthermore, to facilitate the establishment of the common market, the EC Treaty protects competition from distortion.<sup>75</sup> Pursuit of these objectives is indispensable to the achievement and existence of the common market.<sup>76</sup>

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65. See *id.* art. N(2), O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739. ("A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B.")

66. *Id.* The intergovernmental conference ("IGC") is currently scheduled to begin on March 29, 1996, in Turin. WEBBER, *supra* note 33, available in LEXIS, News Library, CURNWS File.

67. See EC Treaty, *supra* note 11, art. 2, [1992] 1 C.M.L.R. at 588. The establishment of a common market is one of the Community's principal means for achieving its tasks. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. See WYATT, *supra* note 8, at 357-58 (comparing Article 7a's specific definition of internal market with Article 2's broad enumeration of tasks to be achieved by establishment of common market).

74. See EC Treaty, *supra* note 11, art. 7a, ¶ 2, [1992] 1 C.M.L.R. at 592 ("The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."); see also *supra* notes 53, 73 and accompanying text (discussing internal market).

75. EC Treaty, *supra* note 11, art. 3(g), [1992] 1 C.M.L.R. at 589 ("[T]he activities of the Community shall include . . . a system ensuring that competition in the internal market is not distorted."); see also WYATT, *supra* note 8, at 377 (concluding that establishment of common market entails preservation of effective market competition, although "distortion" implies any deviation from perfect competition).

76. *Europemballage and Continental Can v. Commission*, Case 6/72, [1973] E.C.R. 215, 244, [1973] C.M.L.R. 199, 223-24 [hereinafter *Continental Can*]. "[P]ursuit of the objectives laid down by Article 3 is indispensable for the achievement of the Community's task." *Id.*

## 2. Article 48: Prohibiting Obstacles to Freedom of Movement for Workers within the European Union

The four fundamental freedoms<sup>77</sup> of the European Union include:<sup>78</sup> the free movement of goods,<sup>79</sup> persons,<sup>80</sup> services,<sup>81</sup> and capital.<sup>82</sup> In the context of the free movement of persons,<sup>83</sup> Article 48<sup>84</sup> specifically protects freedom of movement for workers.<sup>85</sup> Freedom of movement for workers entails the right to move between Member States for purposes of seeking, accepting, and maintaining employment.<sup>86</sup>

Discrimination on grounds of nationality is prohibited

77. *See, e.g.*, Levin v. Staatssecretaris van Justitie, Case 53/81, [1982] E.C.R. 1035, 1049 ¶ 3, [1982] 2 C.M.L.R. 454, 467 (discussing fundamental freedoms).

78. *See* BERMANN, *supra* note 12, at 315 (discussing fundamental freedoms).

79. EC Treaty, *supra* note 11, art. 3(c), [1992] 1 C.M.L.R. at 588.

80. *Id.* The EEC Treaty expressly identified freedom of movement for workers between Member States among the "Foundations of the Community." EEC Treaty, *supra* note 51, pt. Two, title III, ch. 1, art. 48, 298 U.N.T.S. at 36, 1973 Gr. Brit. T.S. No. 1, at 23.

81. EC Treaty, *supra* note 11, art. 3(c), [1992] 1 C.M.L.R. at 588.

82. *Id.*

83. *See id.* tit. III, [1992] 1 C.M.L.R. at 612-23 (free movement of persons, services and capital). The EC Treaty distinguishes between two categories of "persons" with respect to freedom of movement: workers and self-employed persons. *Id.* arts. 48-66, [1992] 1 C.M.L.R. at 612-18. For the latter, there are two freedoms: the freedom of establishment, and the freedom to provide services. *Id.* arts. 52-58, 59-66, [1992] 1 C.M.L.R. at 613-16, 616-18. These freedoms are based on the same principles as freedom of movement for workers as far as entry, residence, and treatment are concerned. *State v. Royer*, Case 48/75, [1976] E.C.R. 497, 509, [1976] 2 C.M.L.R. 619, 636.

84. EC Treaty, *supra* note 11, art. 48, [1992] 1 C.M.L.R. at 612.

85. *See id.* (providing for free movement of workers).

86. *Id.* art. 48(3), [1992] 1 C.M.L.R. at 612.

[Freedom of movement for workers] shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

*Id.* A corollary to the right of freedom of movement is the right to remain in the host country after being employed there, under certain conditions embodied in implementing regulations of the Commission. *Id.* art. 48(2)(d), [1992] 1 C.M.L.R. at 612. Under Council Regulation No. 1612/68, provisions laid down by Member States which restrict the number or percentage of foreign nationals in any activity, or at a national level, are not to apply to Member State nationals. Council Regulation No. 1612/68, art. 4(1), O.J. L 257/2, at 3 (1968).

within the EC Treaty's scope of application.<sup>87</sup> Article 48 expressly extends this prohibition of discrimination to employment relationships.<sup>88</sup> Consequently, Member State nationals have the right to be employed in other Member States under the same terms and conditions as nationals of that state.<sup>89</sup>

The free movement of workers is intended to contribute to the goal of establishing a common market by ensuring that labor, one of the main factors of production,<sup>90</sup> flows freely between Member States.<sup>91</sup> Conversely, Article 48 does not extend to situations wholly internal to a Member State,<sup>92</sup> because such internal situations do not affect the common market.<sup>93</sup> For example, a worker is not entitled to the protection of Article 48 unless he exercises, or attempts to exercise, his right to move freely between Member States.<sup>94</sup>

Article 48's provisions are subject to limitations justified by considerations of public policy, public security, or public health,<sup>95</sup> and do not apply to public service employment.<sup>96</sup> The

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87. EC Treaty, *supra* note 11, art. 6, [1992] 1 C.M.L.R. at 591. "Within the scope of application of this Treaty . . . any discrimination on grounds of nationality shall be prohibited." *Id.*

88. *Id.* art. 48(2), [1992] 1 C.M.L.R. at 612. "[Freedom of movement for workers] 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." *Id.*; see also *Donà v. Mantero*, Case 13/76, [1976] E.C.R. 1333, 1339, [1976] 2 C.M.L.R. 578, 586 (discussing free movement of workers).

89. *Donà*, [1976] E.C.R. at 1339, ¶ 6, [1976] 2 C.M.L.R. at 586. The concepts of employment and working conditions extend beyond the literal meanings of these terms, for example, the right of free movement extends to a worker's family. Council Regulation No. 1612/68, *supra* note 86, O.J. L 257/2, at 2 (1968). The concept of free movement of workers also includes certain social and political considerations. See Council Regulation No. 1612/68, *supra* note 86, art. 7(3), O.J. L 257/2, at 4 (1968) ("[A worker who is a national of a Member State] shall enjoy the same social and tax advantages as national workers").

90. WYATT, *supra* note 8, at 237.

91. EC Treaty, *supra* note 11, art. 48(1), [1992] 1 C.M.L.R. at 612. "Freedom of movement for workers shall be secured within the Community . . ." *Id.*

92. *Iorio v. Azienda Autonoma Delle Ferrovie Dello Stato (Italian State Rys.)*, Case 298/84, [1986] E.C.R. 247, [1986] 3 C.M.L.R. 665; *Regina v. Saunders*, Case 175/78, [1979] E.C.R. 1129, [1979] 2 C.M.L.R. 216.

93. See *supra* note 53-54 and accompanying text (describing common market as area characterized by freedom of movement across Member State boundaries).

94. *Morson v. Netherlands*, Cases 35, 36/82, [1982] E.C.R. 3723, [1983] 2 C.M.L.R. 221. In general, Community law can only be invoked and applied when trans-frontier activities are concerned. MATHIJSEN, *supra* note 8, at 185.

95. EC Treaty, *supra* note 11, art. 48(3), [1992] 1 C.M.L.R. at 612.

96. *Id.* art. 48(4), [1992] 1 C.M.L.R. at 612.

public policy, security, and health exceptions apply, by their terms, only to the specific employment rights conferred by Article 48(3).<sup>97</sup> Accordingly, nationality discrimination, prohibited by Article 48(2), cannot be justified by resort to the exceptions.<sup>98</sup>

### 3. Articles 85 and 86: Regulating Market Competition

Unimpeded<sup>99</sup> economic competition is vital to an effective,<sup>100</sup> market-based<sup>101</sup> economic system.<sup>102</sup> Most economists<sup>103</sup> encourage competition for its ability to allocate resources according to consumer choice,<sup>104</sup> to avoid waste in acquiring market power,<sup>105</sup> and to stimulate efficiency in the marketplace,<sup>106</sup> thereby promoting opportunities for job creation.<sup>107</sup> Accordingly, EC competition rules, articulated in Articles 85 and 86,<sup>108</sup> address activities, both of Member States<sup>109</sup> and of private per-

97. *Id.* art. 48(3), [1992] 1 C.M.L.R. at 612.

98. *Württembergische Milchverwertung-Südmilch-AG v. Ugliola*, Case 15/69, [1969] E.C.R. 363, 365, [1970] C.M.L.R. 194, 202.

99. See WYATT, *supra* note 8, at 377 (arguing that EC Treaty Article 3's requirement of competition free from "distortion" is not realistic, because "the idea of 'distortion' implies deviation from a state of perfect competition."). "What is needed is the preservation of *effective* competition . . ." *Id.* Effective competition requires "a level of challenge from other operators sufficient to make efficiency and innovation a condition of ultimate survival as a market participant." *Id.*

100. See *supra* note 99 and accompanying text (discussing effective competition).

101. VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE* 7 (5th ed. 1994). "Resources in the world are limited, but demand for them is not. In socialist economies or wartime, resources have been allocated by officials and rationing. The free market solution is to ration through the market." *Id.* On the supply side of the market, firms good at producing goods that people want will flourish and have more to spend than firms less good at it, thereby encouraging efficient production. *Id.* On the demand side, if cost increases, some consumers may switch to less expensive substitutes, thereby encouraging competitive pricing. *Id.*

102. *Competition*, EUR. UPDATE, June 2, 1994, available in WESTLAW, EURUPDATE Database; see also WYATT, *supra* note 8, at 377 ("Competition is an essential aspect of the market mechanism because the availability of choice between goods and services establishes a link between the success of an undertaking and its ability to satisfy customers' wishes.").

103. See KORAH, *supra* note 101, at 7 ("Most economists welcome the 'invisible hand' of competition . . .").

104. *Id.*

105. *Id.*

106. *Id.*

107. *Competition*, *supra* note 102, § 1.1.

108. EC Treaty, *supra* note 11, arts. 85-86, [1992] 1 C.M.L.R. at 626-28.

109. *Id.* art. 90, [1992] 1 C.M.L.R. at 629. "In the case of public undertakings . . . Member States shall neither enact nor maintain in force any measure contrary to the rules contained in . . . Articles 85 [and 86]." *Id.*; see *Pigs Marketing Board v. Redmond*,

sons and firms,<sup>110</sup> that are likely to restrict competition within the European Union.<sup>111</sup>

Article 85(1) prohibits agreements between undertakings<sup>112</sup> and associations of undertakings<sup>113</sup> that distort competition within the common market and affect trade between Member States.<sup>114</sup> An agreement falls within the scope of Article 85(1) if

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Case 83/78, [1978] E.C.R. 2347, [1979] 1 C.M.L.R. 177 (applying competition rules to Member States when they carry out commercial and economic activities).

110. See EC Treaty, *supra* note 11, art. 85, [1992] 1 C.M.L.R. at 626-27 (prohibiting agreements between undertakings in restriction of competition). EC Treaty provisions designed to create an area without internal frontiers would be of little value if the governmental barriers between Member States, which they prohibit, were simply replaced by restrictive trade practices and cartels. KORAH, *supra* note 101, at 1.

111. EC Treaty, *supra* note 11, arts. 85-86, [1991] 1 C.M.L.R. at 626-28.

112. See WYATT, *supra* note 8, at 382 ("A rough synonym [for undertaking] would be a 'business concern.'"); MATHIJSEN *supra* note 8, at 220-21. "Undertaking" is a broad concept that embraces any entity, private or public, engaged in economic or commercial activities. *Id.*; see Opinion of Advocate General Roemer, *Italy v. Council and Commission*, Case 32/65, [1966] E.C.R. 411, 418, [1969] C.M.L.R. 39, 52 ("[U]ndertakings are natural or legal persons which take part actively and independently in business and are not therefore engaged in a purely private activity . . ."). Professor Roger J. Goebel points out that the term "enterprise" is a more appropriate English translation of the original text of Article 85 than the term "undertaking". Roger J. Goebel, Lecture at European Community Law Course, at Fordham University School of Law (Fall 1995).

113. MATHIJSEN, *supra* note 8, at 220. The term "association" is not limited to a particular form of association. *Id.*; see *Nederlandse Vereniging voor Fruit en Groentenimporthandel v. Commission*, Case 71/74, [1975] E.C.R. 563, 583, [1975] 2 C.M.L.R. 123, 146 (applying Article 85(1) to associations of undertakings).

114. EC Treaty, *supra* note 11, art. 85(1), [1992] 1 C.M.L.R. at 626-27. "[A]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market [shall be prohibited]." *Id.* art. 85(1), [1992] 1 C.M.L.R. at 626. Article 85(1) goes on to provide a non-exhaustive list of clearly prohibited agreements or practices, including those which "apply dissimilar conditions to equivalent transactions," and those which "make the conclusion of contracts subject to the acceptance . . . of supplementary obligations which . . . have no connection with the subject of such contracts." *Id.* art. 85(1)(d)-(e), [1992] 1 C.M.L.R. at 627. This prohibition applies equally to agreements between competitors ("horizontal" agreements) and agreements between a manufacturer and its distributor ("vertical" agreements), where more than one undertaking, or association of undertakings, is involved. *Centrafarm v. Sterling Drug*, Case 15/74, [1974] E.C.R. 1147, 1167 ¶ 41, [1974] 2 C.M.L.R. 480, 506-07. "Article 85 . . . is not concerned with agreements or concerted practices between . . . parent company and subsidiary [if] the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with . . . internal allocation of tasks . . ." *Id.* Although Article 85 presupposes the existence of an agreement or decision, the agreement does not have to be legally binding. See *ACF Chemifarma NV v. Commission*, Case 41/69, [1970] E.C.R. 661, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083 (applying Article 85 to so-called gentleman's agreement). The category of "concerted practices" catches informal agree-

it will potentially or actually, directly or indirectly, prevent, restrict, or distort competition in the common market<sup>115</sup> to an appreciable extent.<sup>116</sup> Pursuant to Article 85(2), any agreements or practices prohibited under Article 85 are automatically null and void.<sup>117</sup>

Just as agreements between undertakings may adversely affect competition and interstate trade, so may abuse of a dominant position<sup>118</sup> in the marketplace by one or more undertakings.<sup>119</sup> The concept of abuse under Article 86 focuses on the

ments once they have been implemented. KORAH, *supra* note 101, at 40. The precise scope of the term "agreement," therefore, is not a crucial point. *Id.*

115. *Société Technique Minière v. Maschinenbau Ulm GmbH*, Case 56/65, [1966] E.C.R. 235, 251, [1966] C.M.L.R. 357, 377. In this context, an agreement that only impacts the internal trade of a Member State generally is not covered by Article 85(1), unless it leads to market partitioning, for example, by isolating a national market. *Société Technique Minière*, [1966] E.C.R. at 251, [1966] C.M.L.R. at 377. Similarly, Article 85(1) is not concerned with agreements or practices that interfere with the functioning of the market in third countries, as long as the consequences are not likely to spill back into the common market. WYATT, *supra* note 8, at 384.

116. *Völk v. Vervaecke*, Case 5/69, [1969] E.C.R. 295, [1969] C.M.L.R. 273. In other words, the "*de minimis*" rule applies. See MATHIJSEN, *supra* note 8, at 224. Article 85(1) also applies to agreements involving only undertakings situated outside of the European Union, as long as the agreement affects trade between Member States and competition within the common market. *Ahlström et al. v. Commission*, Joined Cases 89, 104, 114, 116 & 125-29/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901.

117. EC Treaty, *supra* note 11, art. 85(2), [1992] 1 C.M.L.R. at 617. This "nullity" provision only applies to agreements and practices that offend Article 85 in the aggregate, meaning those not exempted under Article 85(3). KORAH, *supra* note 101, at 66. According to the ECJ, only those provisions of an agreement contrary to Article 85 are void. *Société de Vente de Ciments et Bétons v. Kerpen & Kerpen*, Case 319/82. [1983] E.C.R. 4173, [1985] 1 C.M.L.R. 511.

118. EC Treaty, *supra* note 11, art. 86, [1992] 1 C.M.L.R. at 627-28. Dominance refers to a degree of market power that allows an undertaking to operate without taking into account the activities of its competitors and customers. *United Brands v. Commission*, Case 27/76, [1978] E.C.R. 207, 277, [1978] 1 C.M.L.R. 429, 486-87. Article 86 "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately . . . consumers." *United Brands*, [1978] E.C.R. at 277, ¶ 65, [1978] 1 C.M.L.R. at 486-87. "In order to determine whether a [market] position is dominant, it must be viewed in relation to the 'relevant product market' and the 'relevant geographical market'." MATHIJSEN, *supra* note 8, at 237. At any rate, the *United Brands* judgment suggests that a dominant position exists if a firm has over 45 % of the relevant market and is considerably larger than its competitors. KORAH, *supra* note 101, at 105. Such a position allows an undertaking to essentially ignore the competitive pressures of an efficient marketplace, thus distorting competition. *Id.* at 69.

119. MATHIJSEN, *supra* note 8, at 236. One of the models for Article 86 was section 2 of the U.S. Sherman Antitrust Act, which provides that no person shall "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to



effect of hindering competition in the marketplace.<sup>120</sup> Accordingly, Article 86 prohibits abuse of a dominant position<sup>121</sup> within the common market or a substantial part of it, insofar as such abuse negatively affects trade between Member States.<sup>122</sup>

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monopolize . . . trade or commerce . . .” 15 U.S.C. § 2 (1994); see BERMANN, *supra* note 12, at 802 (discussing influence of Sherman Act on Article 86).

120. *Hoffmann-LaRoche v. Commission*, Case 85/76, [1979] E.C.R. 461, 541, [1979] 3 C.M.L.R. 211, 290-91. If the practice in question has beneficial effects, it would not be considered abusive and Article 86 would not apply. *Hoffmann-LaRoche*, [1979] E.C.R. at 541, ¶ 91, [1979] 3 C.M.L.R. at 290-91.

121. See *Hoffmann-LaRoche*, [1979] E.C.R. at 541, ¶ 91, [1979] 3 C.M.L.R. at 290-91. The concept of abuse of a dominant position is an objective concept relating to behavior that influences the structure of the market and has the effect of hindering the maintenance or growth of existing competition through methods other than those normally conditioning competition. *Id.*

122. EC Treaty, *supra* note 11, art. 86, [1992] 1 C.M.L.R. at 627-28. “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.” *Id.* art. 86, ¶ 1, [1992] 1 C.M.L.R. at 627. It has been argued that “abuse” is an inadequate translation of the term “abusive exploitation” used in the authentic texts of the EC Treaty in most languages. KORAH, *supra* note 101, at 3. Article 86 goes on to provide a non-exhaustive list, similar to that contained in Article 85(1), of clear examples of such abuse, including “directly or indirectly imposing unfair . . . trading conditions[,]” EC Treaty, *supra* note 11, art. 86(a), [1992] 1 C.M.L.R. at 627, “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage[,]” *id.* art. 86(c), [1992] 1 C.M.L.R. at 627, and “making the conclusion of contracts subject to acceptance . . . of supplementary obligations [not] connect[ed] with the subject of such contracts.” *Id.* art. 86(d), [1992] 1 C.M.L.R. at 627-28.

In the United States, the approximate equivalent of Articles 85 and 86 is the Sherman Antitrust Act of 1890 (“Sherman Act”), which prohibits agreements in restraint of trade. 15 U.S.C. § 1 (1994). The Sherman Act also prohibits activities which monopolize or attempt to monopolize a market. 15 U.S.C. § 2 (1994). Every trade agreement restrains trade, thus falling within the literal prohibition of the Sherman Act. See *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”) (Brandeis, J.). In response to this literal prohibition of all trade agreements, U.S. courts developed the rule of reason, which insulates an agreement from the Sherman Act if its pro-competitive effects outweigh its anti-competitive effects on the market as a whole. Richard Whish & Brenda Surfin, *Article 85 and the Rule of Reason*, 7 Y.B. EUR. L. 1, 5-8 (1987). The rule of reason is applied to decide whether a restraint of trade falls under the Sherman Act, except in those cases where an agreement is illegal *per se*. See *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958) (certain types of agreements are conclusively presumed to fall within Sherman Act because of “pernicious effect on competition and lack of any redeeming virtue . . .”). Examples of *per se* violations of the Sherman Act are price fixing agreements and market-sharing agreements. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (regarding horizontal price fixing agreements); *Dr. Miles Medical Co. v. John D. Park and Sons Co.*, 220 U.S. 373, (1911) (regarding vertical price fixing agreements); *U.S. v. Topco Associates*, 405 U.S. 596 (1972) (market sharing agreements). In such cases, the plaintiff’s burden of proof is satisfied by merely showing that the agreement existed. Whish, *supra*, at 7.

### B. EU Institutions Implementing Community Law

The tasks of the European Union,<sup>123</sup> including the objectives of the common market,<sup>124</sup> are carried out by five institutions:<sup>125</sup> the European Parliament,<sup>126</sup> the Council,<sup>127</sup> the Commission,<sup>128</sup> the ECJ,<sup>129</sup> and the Court of Auditors.<sup>130</sup> The TEU empowers each institution to act within the limits of the powers expressly conferred upon it.<sup>131</sup> The Council's functions are legislative in nature.<sup>132</sup> The Commission performs executive functions,<sup>133</sup> and the ECJ functions as the judiciary branch of the European Union.<sup>134</sup> The European Parliament represents the interests of Member State populations regarding EU activity<sup>135</sup> and the Court of Auditors audits the EU budget.<sup>136</sup>

#### 1. The Council and Implementation of Article 48

The Council is the primary legislative and decision-making body of the European Union.<sup>137</sup> Council responsibilities include

123. See TEU, *supra* note 8, art. B, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727 (EU objectives, including creation of balanced and sustainable economic and social progress through maintenance of internal market).

124. See *supra* notes 67-76 and accompanying text (discussing objectives of common market).

125. EC Treaty, *supra* note 11, art. 4, [1992] 1 C.M.L.R. at 590. Since the signing of the Treaty establishing a Single Council and a Single Commission of the European Communities ("Merger Treaty"), in April 1965, the three European communities have been served by a single set of institutions, whose powers vary depending upon which Treaty they act under for any given purpose. WYATT, *supra* note 8, at 9.

126. EC Treaty, *supra* note 11, arts. 137-44, [1992] 1 C.M.L.R. at 676-79.

127. *Id.* arts. 145-54, [1992] 1 C.M.L.R. at 679-82. The Council is also known as the "Council of Ministers" in order to distinguish it from other "Councils." BERMANN, *supra* note 12, at 51.

128. EC Treaty, *supra* note 11, arts. 155-63, [1992] 1 C.M.L.R. at 682-84.

129. *Id.* arts. 164-88, [1992] 1 C.M.L.R. at 684-91.

130. *Id.* arts. 188a-c, [1992] 1 C.M.L.R. at 691-93.

131. *Id.* art. 4(1), para. 2, [1992] 1 C.M.L.R. at 590. "Each institution shall act within the limits of the powers conferred upon it by this Treaty." *Id.*

132. See BERMANN, *supra* note 12, at 51 (indicating that Council "exercises primary legislative power within the Community").

133. See *id.* at 57 (stating that Commission is often referred to as "Community's executive organ").

134. See EC Treaty, *supra* note 11, art. 174, ¶ 1, [1992] 1 C.M.L.R. at 688 ("If [an] action is well founded, the Court of Justice shall declare the act concerned to be void.").

135. BERMANN, *supra* note 12, at 63.

136. EC Treaty, *supra* note 11, art. 188a, [1992] 1 C.M.L.R. at 691.

137. MATHIJSEN, *supra* note 8, at 57. "Although the Council has the largest legislative role in the Community, it operates under highly unusual constraints." BERMANN,

ensuring that EC Treaty objectives<sup>138</sup> are attained.<sup>139</sup> One way the Council fulfills its responsibilities is by conferring powers on the Commission via implementing regulations.<sup>140</sup>

In 1968, the Council promulgated Regulation 1612/68 on the freedom of movement for workers<sup>141</sup> to reiterate and expand upon the provisions of Article 48.<sup>142</sup> Regulation 1612/68 establishes the right to take up an activity as an employed person,<sup>143</sup> limited to Member States nationals.<sup>144</sup> Regulation 1612/68 refers to freedom and dignity<sup>145</sup> in the worker's exercise of the fundamental right to freedom of movement.<sup>146</sup> Article 7 of Regulation 1612/68 expressly expands upon the EC Treaty's prohibition of nationality discrimination.<sup>147</sup> Article 7 provides for the rights of migrant workers who are Member State nationals to be treated the same as host-state nationals regarding social and tax advantages,<sup>148</sup> access to vocational training,<sup>149</sup> and collective or

*supra* note 12, at 51. The Council is made up of ministers representing each Member State, with the Presidency held in turn by each Member State for a six month term. EC Treaty, *supra* note 11, art. 146, [1992] 1 C.M.L.R. at 680.

138. *See supra* notes 67-76 and accompanying text (discussing EC Treaty objectives including common market).

139. EC Treaty, *supra* note 11, art. 145, [1992] 1 C.M.L.R. at 679.

140. *Id.* art. 145, [1992] 1 C.M.L.R. at 680. The procedure by which the Council confers power on the Commission "must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament." *Id.*

141. Council Regulation 1612/68, *supra* note 86, O.J. L 257/2 (1968).

142. WYATT, *supra* note 8, at 254; *see also supra* notes 84-98 and accompanying text (discussing EC Treaty Article 48 on free movement of workers).

143. Council Regulation 1612/68, *supra* note 86, art. 1(1), O.J. L 257/2, at 2 (1968).

144. *Id.* The Court has found that the distinction between "workers" and "self-employed persons" is not crucial because the freedom of movement, the freedom of establishment, and the freedom to provide services, are all based on the same principles and, therefore, merit uniform application. *See Walrave v. Union Cyclists Internationale*, Case 36/74, [1974] E.C.R. 1405, 1419, [1975] 1 C.M.L.R. 320, 333 (concluding that distinction between activities referred to in Articles 48 and 59 "cannot justify a more restrictive interpretation of the scope of the freedom to be ensured").

145. Council Regulation 1612/68, *supra* note 86, pmbl. ¶ 9, O.J. L 257/2, at 2 (1968).

146. *Id.* pmbl. ¶ 8, O.J. L 257/2, at 2 (1968).

147. *Id.* art. 7, O.J. L 257/2, at 4 (1968); *see supra* notes 87-89 and accompanying text (discussing EC Treaty Articles 6 and 48, which prohibit nationality-based discrimination).

148. Council Regulation 1612/68, *supra* note 86, art. 7(2), O.J. L 257/2, at 4 (1968).

149. *Id.* art. 7(3), O.J. L 257/2, at 4 (1968).

individual agreements on employment conditions.<sup>150</sup> Recognizing that a worker's ability to have his family live with him promotes mobility of labor,<sup>151</sup> the Council also provided for the protection of the migrant worker's family from nationality discrimination.<sup>152</sup>

## 2. The Commission and Exemptions Under Article 85

The responsibilities of the Commission include providing for the proper functioning and development of the common market.<sup>153</sup> The Commission operates as the European Union's chief executive body,<sup>154</sup> performing tasks commonly identified as executive in nature,<sup>155</sup> such as enforcing Community law.<sup>156</sup> In contrast to the Council, whose members directly represent the interests of their governments, the Commission represents the interests of the European Union as a whole.<sup>157</sup> It is the Commission's task to ensure that EU interests prevail when action is taken by Member States, by the Council, or by natural or legal persons.<sup>158</sup>

The EC Treaty authorizes the Commission to implement competition policy in the European Union.<sup>159</sup> Council Regula-

150. *Id.* art. 7(4), O.J. L 257/2, at 4 (1968).

151. BERMANN, *supra* note 12, at 469.

152. Council Regulation No. 1612/68, *supra* note 86, art. 10-12, O.J. L 257/2, at 5 (1968).

153. EC Treaty, *supra* note 11, art. 155, [1992] 1 C.M.L.R. at 682.

154. WYATT, *supra* note 8, at 29. According to Wyatt, describing the Commission as an executive body is misleading because EC Treaty Article 4(1) makes it clear that the Commission's powers of implementation are limited to those directly conferred by the Treaty or the acts of the Council. *Id.*

155. BERMANN, *supra* note, 12, at 57.

156. EC Treaty, *supra* note 11, art. 155, [1991] 1 C.M.L.R. at 682; *see id.* art. 169, [1991] 1 C.M.L.R. at 686 (stating that Commission may bring Member States before ECJ for failing to fulfill treaty obligations).

157. MATHIJSEN, *supra* note 8, at 67.

158. *Id.* The twenty Commission members must all be nationals of Member States and they must be completely independent of outside influence in the performance of their duties. EC Treaty, *supra* note 11, arts. 157(1)-(2), [1991] 1 C.M.L.R. at 682-83. The Council, acting unanimously, may alter the number of members of the Commission. *Id.* art. 157(1), para. 2, [1991] 1 C.M.L.R. at 682. This power might be exercised, for example, to accommodate newly admitted Member States, in order to satisfy the requirement that the Commission include at least one, but not more than two, nationals of each member state. *Id.* art. 157(1), para. 4, [1991] 1 C.M.L.R. at 682.

159. *See id.* art. 87, [1991] 1 C.M.L.R. at 627. Under Article 87, the Council has the duty and power to give effect to the principles of Articles 85 and 86 and to create means of enforcing those principles, through regulations or directives. *Id.* "The EC competi-

tion 17/62<sup>160</sup> empowers the Commission to impose fines for violation of the competition rules.<sup>161</sup> The Commission has the exclusive authority to grant block exemptions<sup>162</sup> and, in certain circumstances, individual exemptions from EC competition rules.<sup>163</sup>

Acknowledging that some forms of economic collaboration are beneficial,<sup>164</sup> Article 85 includes mechanisms to exempt certain agreements from the rules even though they restrict competition.<sup>165</sup> The Commission's power to grant such exemptions is final, subject only to review by the Court of Justice.<sup>166</sup> Pursuant to authority granted by the Council,<sup>167</sup> the Commission has adopted regulations providing for automatic exemption of certain agreements or practices from Article 85(1).<sup>168</sup> In the ab-

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tion rules and the way in which they are implemented by the Commission are . . . of utmost importance to all companies operating in Europe." *Competition*, *supra* note 102, § 1.1.

160. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87. The Commission has wide discretion as to what its base for computing fines will be. KORAH, *supra* note 101, at 127-28.

161. Council Regulation No. 17/62, *supra* note 160, arts. 15-16, O.J. Eng. Spec. Ed. 1959-62, at 91-92.

162. MATHIJSEN, *supra* note 8, at 227-28.

163. Council Regulation No. 17/62, *supra* note 160, art. 9(1), O.J. Eng. Spec. Ed. 1959-62, at 89.

164. KORAH, *supra* note 101, at 63.

165. See EC Treaty, *supra* note 11, art. 85(3), [1991] 1 C.M.L.R. at 627.

The provisions of [Article 85(1)] may . . . be declared inapplicable in the case of [any agreement, decision, or practice] which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

*Id.* The aim of the competition rules is what the ECJ described as "workable competition." *Metro v. Commission*, Case 26/76, [1977] E.C.R. 1875, 1904, [1978] 2 C.M.L.R. 1, 33-34.

166. Council Regulation No. 17/62, *supra* note 160, art. 9(1), O.J. Eng. Spec. Ed. 1959-62, at 89. In this regard, the jurisdiction of national courts is limited to determining whether an agreement or practice is in accordance with Article 85(1) and to declaring it void, if appropriate, under Article 85(2). *L'Oreal v. DeNeuwe AMCK*, [1980] E.C.R. 3775, 3790, [1981] 2 C.M.L.R. 235, 252.

167. MATHIJSEN, *supra* note 8, at 227-28. The Council decides by regulation on the principle of the exemption and delegates the task of working out the details to the Commission. *Id.*; see Council Regulation No. 19/65, 8 J.O. 533 (1965), O.J. Eng. Spec. Ed. 1965-66, at 35 (providing for application of Article 85(3) to certain categories of agreements and concerted practices).

168. See, e.g., Commission Regulation No. 1983/83, O.J. L 173/1 (1983); Commis-

sence of qualifying for one of these block exemptions, an agreement may be granted an individual exemption<sup>169</sup> under Article 85(3),<sup>170</sup> provided that the Commission is first notified of the agreement.<sup>171</sup>

If all of the conditions for exemption from Article 85 are satisfied,<sup>172</sup> the Commission may decide to grant an individual exemption, although it is under no obligation to do so.<sup>173</sup> Rather than grant an individual exemption, often the Commission sends a comfort letter<sup>174</sup> informing the parties that further Commission action is not warranted and that the Commission is closing the file.<sup>175</sup> Alternatively, upon proper application, the Commission may issue a negative clearance,<sup>176</sup> certifying that there are no grounds under the competition rules for Commission action as to a particular agreement, decision, or practice.<sup>177</sup>

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sion Regulation No. 1984/83, O.J. L 173/5 (1983); Commission Regulation No. 417/85, O.J. L 53/1 (1985) (discussing exclusive distribution agreements, exclusive purchasing agreements, and specialization agreements).

169. MATHIJSEN, *supra* note 8, at 226.

170. EC Treaty, *supra* note 11, art. 85(3), [1991] 1 C.M.L.R. at 627.

171. Council Regulation No. 17/62, *supra* note 160, art. 4(1), O.J. Eng. Spec. Ed. 1959-1962, at 88. "Until they have been notified, no decision in application of article 85(3) may be taken." *Id.* Notification provides protection from fines from the date of notification until the Commission rules on it. KORAH, *supra* note 101, at 128. It is also possible that abuse of the notification procedure to delay sanctions against blatantly illegal agreements may be considered grounds to impose fines despite notification. *Id.* at 143.

172. See *supra* note 165 and accompanying text (quoting and discussing Article 85(3)). Application of the Article 85(3) conditions is essentially a technical analysis of whether the agreement, decision, or practice is more beneficial to competition than it is harmful. See KORAH, *supra* note 101, at 63 ("The prohibition in article 85(1) may be declared inapplicable to any agreements or category of agreements provided that they have certain characteristics . . ."). The counterpart to Article 85(3) in U.S. antitrust law is the rule of reason. WYATT, *supra* note 8, at 404-05; see also *supra* note 122 (discussing rule of reason in U.S. antitrust law).

173. See KORAH, *supra* note 101, at 37 ("[T]he Commission [does not have] the resources to grant many individual exemptions ad granted only 16 in the four years from 1990-1993.").

174. *Id.* at 115. Comfort letters emanate from top officials, and are not binding on the Commission. MATHIJSEN, *supra* note 8, at 243. Undertakings commonly ask for such letters, as they entail less delay than a formal decision and are likely to influence national courts. *Id.* at 243-44.

175. See KORAH, *supra* note 101, at 115.

176. Council Regulation No. 17/62, *supra* note 160, art. 2, O.J. Eng. Spec. Ed. 1959-62, at 88.

177. See *id.* The negative clearance procedure applies to Articles 85 and 86. *Id.*

### 3. The Court of Justice and the Common Market

The ECJ contributes to the common market by ensuring that EU and Member State activities, including the interpretation and application of treaty provisions, comport with provisions of law.<sup>178</sup> The fifteen-judge ECJ<sup>179</sup> entertains legal actions against Community institutions<sup>180</sup> and against the Member States<sup>181</sup> for alleged non-observance of Community law.<sup>182</sup> Furthermore, the ECJ has jurisdiction to answer requests from Member State national courts for preliminary rulings<sup>183</sup> on the interpretation of treaty provisions and the validity of acts of EU institutions.<sup>184</sup> ECJ decisions shape Community law on specific treaty

178. EC Treaty, *supra* note 11, art. 164, [1991] 1 C.M.L.R. at 684.

179. Council Decision of 1 January 1995, art. 10(1), O.J. L 1/1, at 4 (1995). The judges are chosen from qualified persons whose independence is "beyond doubt" and appointed by common accord of the Governments of the Member States for six year terms. EC Treaty, *supra* note 11, art. 167, [1991] 1 C.M.L.R. at 685.

180. *Id.* arts. 173, 175, 178, 184, [1991] 1 C.M.L.R. at 687-88, 689, 690.

181. *Id.* arts. 169, 170, [1991] 1 C.M.L.R. at 686-87.

182. BERMANN, *supra* note 12, at 69. The ECJ is assisted in its duties by nine Advocates General, chosen and appointed according to the same standards and procedures as the judges. EC Treaty, *supra* note 11, art. 166, [1991] 1 C.M.L.R. at 685; *see supra* note 179 (discussing criteria for appointment to ECJ). The Advocate General is not a judge, but his role is judicial in nature. WYATT, *supra* note 8, at 106. It is the Advocate General's duty to present reasoned submissions in cases brought before the ECJ. EC Treaty, *supra* note 11, art. 166, ¶ 2, [1991] 1 C.M.L.R. at 685. The Advocate General functions by conducting an independent examination of the case and recommending a decision to the ECJ, based on the case file and the reporting judge's report, and setting forth an analysis of the relevant facts and law in light of the evolving pattern of ECJ case law in the form of a formal Opinion. WYATT, *supra* note 8, at 106-07. Although the ECJ is not bound to follow the Advocate General's Opinion, ECJ decisions often follow the Advocate General's rationale. *Id.* at 106. "[I]t is an important safeguard that, even where the Court of Justice sits as a court of first and last resort, its decisions are in effect judicially considered twice over." *Id.*

To further assist the ECJ with its growing docket and to reduce delays in the adjudication of cases, the Council established the court of First Instance ("CFI"). *See* EC Treaty, *supra* note 11, art. 168a(2), [1991] 1 C.M.L.R. at 686 (authorizing Council to establish Court of First Instance, by unanimous vote). All EC Treaty provisions relating to the ECJ are applicable to the CFI as well, unless the Council decides to the contrary, and except that the CFI is not competent to hear questions referred for a preliminary ruling. *Id.* The CFI provides relief to the court of Justice by assuming primary jurisdiction over certain categories of cases. *Id.* art. 168(a)(1), (2), [1991] 1 C.M.L.R. at 686. CFI decisions are subject to a right of appeal to the ECJ on points of law. *Id.* art. 168a(1), [1991] 1 C.M.L.R. at 686. If the appeal succeeds, the ECJ may quash the decision and either issue its own final judgment or remand the case to the CFI. WYATT, *supra* note 8, at 175.

183. EC Treaty, *supra* note 11, art. 177, [1991] 1 C.M.L.R. at 689.

184. *Id.*

provisions and also give rise to general principles of law.<sup>185</sup>

a. Preliminary Rulings on Community Law in Response to Requests from National Courts

Any court or tribunal of a Member State may refer a question to the ECJ for a preliminary ruling<sup>186</sup> if it considers resolution of the question necessary<sup>187</sup> to a judgment in its case.<sup>188</sup> The primary purpose of the preliminary rulings procedure is to ensure uniformity in the interpretation and application of Community law.<sup>189</sup> In addition, this procedure provides private parties with access to the ECJ, when they otherwise lack standing to seek ECJ relief.<sup>190</sup>

b. Interpretation of EC Treaty Provisions in Accordance With Promotion of the Common Market

According to the ECJ, in order to avoid frustration of the free movement of workers, the terms "worker"<sup>191</sup> and "activity as an employed person"<sup>192</sup> must be given uniform meaning throughout the European Union.<sup>193</sup> In other words, these terms

185. See *Handelsgesellschaft v. Eihfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283. "[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice." *Handelsgesellschaft*, [1970] E.C.R. at 1134, [1972] C.M.L.R. at 283.

186. See WYATT, *supra* note 8, at 142-43 (describing rulings as preliminary in that they constitute steps in proceedings of referring national courts, which must then apply preliminary ruling to cases before them).

187. EC Treaty, *supra* note 11, art. 177, ¶ 2, [1991] 1 C.M.L.R. at 689. Where such a question arises before a court or tribunal of last resort in a Member State, that court or tribunal is required to request a preliminary ruling from the ECJ. *Id.*

188. *Id.* The ECJ is without jurisdiction to issue a preliminary ruling once the proceedings before the referring court are terminated. *Pardini v. Ministero del commercio con l'estero*, Case 338/85, [1988] E.C.R. 2041, 2075, [1991 Transfer Binder] 1 C.E.C. (CCH) 190.

189. *Rheinmühlen v. Einfuhr-und Vorratsstelle Getreide*, Case 166/73, [1974] E.C.R. 33, [1974] 1 C.M.L.R. 255.

190. See *International Fruit Co. v. Produkschap voor Groenten en Fruit*, Cases 21-24/72, [1972] E.C.R. 1219, 1226 ¶ 6, [1975] 2 C.M.L.R. 1, 20 ("Since [the competence of the Court] extends to all reasons for invalidity capable of marring these acts, the Court is obliged to examine whether their validity could be affected by their being at variance with a rule of international law.").

191. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

192. Council Regulation 1612/68, *supra* note 86, art. 1(1), O.J. L 257/2, at 2 (1968).

193. *Levin v. Staatssecretaris van Justitie*, Case 53/81, [1982] E.C.R. 1035, 1049, [1982] 2 C.M.L.R. 454, 467.



have Community meaning<sup>194</sup> and may not be defined by reference to Member State national law.<sup>195</sup> These terms define the scope of a fundamental freedom<sup>196</sup> and, therefore, the ECJ interprets them broadly,<sup>197</sup> according to their ordinary meanings and in light of EC Treaty objectives.<sup>198</sup> In contrast, because Article 48's exceptions<sup>199</sup> impose limitations on the fundamental freedom of movement for workers, the ECJ interprets these exceptions narrowly.<sup>200</sup>

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194. *Levin*, [1982] E.C.R. at 1049, ¶ 11, [1982] 2 C.M.L.R. at 467. Certain terms are given Community meaning in order to preserve their uniform application throughout the Community. *Id.* For example, if the terms "worker" and "activity as an employed person" did not have Community meaning:

[T]he Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of person from the benefit of the Treaty.

*Id.*

195. *Id.*

196. *See supra* notes 77-85 and accompanying text (discussing fundamental freedoms, and free movement of workers in that context).

197. *Lawrie-Blum v. Land Baden-Württemberg*, Case 66/85, [1986] E.C.R. 2121, 2144, [1987] 3 C.M.L.R. 389, 414.

198. *Levin*, [1982] E.C.R. at 1048, ¶ 9, [1982] 2 C.M.L.R. at 467. The ECJ has interpreted the term "worker" on several occasions. *See, e.g.*, *Betray v. Staatssecretaris van Justitie*, Case 344/87, [1989] E.C.R. 1621, [1991] 1 C.M.L.R. 459 (guaranteeing freedom of movement only for persons in pursuit of effective and genuine economic activities); *see also Sotgiu v. Deutsche Bundespost*, Case 152/73, [1974] E.C.R. 153, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8257 (applying freedom of movement provisions to persons pursuing part-time work and earning below minimum wage). A person is a worker for purposes of Article 48 if the essential features of an employment relationship are present: performance of services for a certain period of time in return for remuneration, under the direction of another. *Lawrie-Blum*, [1986] E.C.R. at 2144, ¶ 17, [1987] 3 C.M.L.R. at 414.

199. *See supra* notes 95-98 and accompanying text (discussing exceptions to Article 48).

200. *See, e.g.*, *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, 1231, [1976] 1 C.M.L.R. 140, 155 (interpreting Article 48(3) narrowly); *Sotgiu*, [1974] E.C.R. 153, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8257 (interpreting Article 48(4) narrowly). Measures taken by a Member State pursuant to the exception in Article 48(3) regarding refusal of entry, or expulsion, must be based on the personal conduct of the worker, who must be afforded the same remedies available to nationals. *WYATT, supra* note 8, at 266-67; *see, e.g.*, *van Duyn v. Home Office*, Case 41/74, [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1 (regarding refusal of entry); *Romano v. Institut National d'Assurance Maladie-Invalidité*, Case 98/80, [1981] E.C.R. 1241, [1983] 2 C.M.L.R. 698 (regarding expulsion). In *Commission v. Belgium*, the ECJ held that the public service exception only applies to positions "designed to safeguard the general interests of the State," which presume "the existence of a special relationship of alle-

The ECJ contributes to the maintenance of effective<sup>201</sup> competition<sup>202</sup> in the internal market<sup>203</sup> by interpreting Articles 85<sup>204</sup> and 86<sup>205</sup> broadly, in order to promote competition.<sup>206</sup> In accordance with the case-specific effects of restraints on competition,<sup>207</sup> the ECJ has given expansive meaning to the terms “undertaking” and “associations of undertakings.”<sup>208</sup> The Court has also found that “abuse of a dominant position” is a flexible concept,<sup>209</sup> focusing on the overall effects of a practice on competition in the common market.<sup>210</sup>

### c. A New Legal Order and General Principles of Law

The ECJ has found implicit in the EC Treaty a new legal order<sup>211</sup> that transcends traditional international law<sup>212</sup> and operates for the benefit of Member State nationals as individuals, as well as for the benefit of signatory states.<sup>213</sup> According to this principle, known as the doctrine of direct effects,<sup>214</sup> certain pro-

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giance to the State.” Case 149/79, [1980] E.C.R. 3881, 3900, [1981] 2 C.M.L.R. 413, 439.

201. See *supra* note 99 and accompanying text (discussing effective competition).

202. See *supra* notes 101-07 and accompanying text (discussing market-based economic systems).

203. See *supra* notes 53, 74 and accompanying text (discussing internal market).

204. EC Treaty, *supra* note 11, art. 85, [1991] 1 C.M.L.R. at 626-27 (stating that agreements between undertakings, in restriction of competition, are incompatible with common market).

205. *Id.* art. 86, [1991] 1 C.M.L.R. at 627-28 (stating that abuses of dominant positions by undertakings are incompatible with common market).

206. See *supra* note 75 and accompanying text (discussing rules on competition in terms of preventing distortion of competition in common market).

207. See *supra* note 122 and accompanying text (discussing that all trade agreements, by nature, restrain competition).

208. See *supra* note 112-13 and accompanying text (discussing “undertaking” and “associations of undertakings” as broad concepts).

209. See, e.g., *Hoffmann-LaRoche*, [1979] E.C.R. 461, 541 ¶ 91, [1979] 3 C.M.L.R. 211, 290-91 (finding that abuse is a flexible concept); see also *supra* note 118 and accompanying text (discussing concept of dominant market position).

210. See, e.g., *Hoffmann-LaRoche*, [1979] E.C.R. at 541, ¶ 91, [1979] 3 C.M.L.R. at 290-91 (focusing concept of abuse on overall effects of practices on market).

211. *van Gend en Loos v. Neederlandse Tarief Commissie*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

212. See AIDAN O’NEILL, *DECISIONS OF THE EUROPEAN COURT OF JUSTICE AND THEIR CONSTITUTIONAL IMPLICATIONS* 12 (1994). Under a traditional “dualist theory” of international law, international agreements do not affect the internal legal order of a signatory state until and unless specifically implemented into national law. *Id.*

213. *van Gend en Loos*, [1963] E.C.R. at 12, [1963] 3 C.M.L.R. at 129.

214. *Id.* at 13, [1963] 3 C.M.L.R. at 130 (“The very nature of [Article 12] makes it

visions of Community law create individual rights, enforceable before national courts by Member State nationals.<sup>215</sup> Furthermore, Community law, being a distinct legal order,<sup>216</sup> is independent of national law<sup>217</sup> and, therefore, the enforcement of EC laws having direct effect does not require supporting national legislation.<sup>218</sup> Article 48, which imposes clear and precise obligations on Member States and does not require subsequent implementation, has vertical direct effect<sup>219</sup> and may be invoked by individuals against Member States or institutions.<sup>220</sup>

Apart from treaty provisions<sup>221</sup> and the various implement-

ideally adapted to produce direct effects in the legal relationship between Member states and their subjects.”).

215. *Id.* at 12, [1963] 3 C.M.L.R. at 129. The ECJ’s jurisdiction to give preliminary rulings under Article 177, “the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.” *Id.*; see also *supra* notes 186-90 and accompanying text (discussing preliminary rulings).

216. See *supra* notes 211-13 and accompanying text (discussing new legal order of Community law).

217. MATHIJSEN, *supra* note 8, at 149.

218. *van Gend en Loos*, [1963] E.C.R. at 12, [1963] 3 C.M.L.R. at 129; see O’NEILL, *supra* note 212, at 13. The doctrine of “direct applicability” should be distinguished from the doctrine of direct effects. WYATT, *supra* note 8, at 53. Direct effects refers to the aspect of a Community provision that directly confers rights and imposes obligations without the need for specific legislative incorporation into a particular national legal order. *Id.* Direct applicability refers to the legal autonomy of Community law with regard to national law, i.e., once enacted as Community law, a provision also becomes part of the national legal order of Member States. MATHIJSEN, *supra* note 8, at 150-51.

219. See BERMANN, *supra* note 12, at 180. The term “direct effect” refers to the “vertical” relationship that exists between governments and their subjects. *Id.*

220. See *Commission v. France*, Case 167/73, [1974] E.C.R. 359, [1974] 2 C.M.L.R. 83 (finding direct effect of Article 48); *Reyners v. Belgium*, Case C-2/74 [1974] E.C.R. 631, [1974] 2 C.M.L.R. 305 (discussing direct effect of Article 52); see also Opinion of Advocate General Mayras, *van Duyn*, [1974] E.C.R. at 1354, [1975] 1 C.M.L.R. at 8 (discussing direct effect of Article 48). A corollary to this conclusion is the concept of horizontal direct effect, as between private rather than public establishments or individuals. See BERMANN, *supra* note 12, at 180. Horizontal direct effect refers to direct effect in relations between private parties. *Id.* The ECJ has found horizontal direct effect for only a few EC Treaty provisions, including Articles 85 and 86. *Id.*; see *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, Case 43/75, [1976] 1 E.C.R. 455, 476, [1976] 2 C.M.L.R. 98, 125 (holding that Article 119’s mandatory prohibition on discrimination between men and women “extends to all agreements . . . intended to regulate paid labour collectively, as well as to contracts between individuals”).

221. See WYATT, *supra* note 8, at 148 (stating that treaty provisions constitute primary Community law).

ing acts and measures of the institutions,<sup>222</sup> certain general principles<sup>223</sup> of law are discernible in the ECJ's case law.<sup>224</sup> Derived from provisions of national law common to all Member States,<sup>225</sup> these general principles supersede secondary Community law<sup>226</sup> and are often of sweeping application.<sup>227</sup> General principles of Community law recognized by the ECJ include the principle of proportionality,<sup>228</sup> the principle of equal treatment,<sup>229</sup> and the principle of legal certainty.<sup>230</sup>

The general principle of proportionality provides that legitimate objectives may not be accomplished through excessive means.<sup>231</sup> According to the ECJ, limitations on the free movement of persons<sup>232</sup> are permissible only to the extent that they are necessary for the public interest.<sup>233</sup> Initially, an appropriate relationship between the means used and the end sought must exist.<sup>234</sup> Stated differently, the means must be capable of achieving the proposed goal.<sup>235</sup> When a choice exists between several measures to achieve a legitimate goal, the measure least restrictive<sup>236</sup> of individual freedom is the only permissible alterna-

222. *See id.* (discussing that implementing acts and measures of institutions constitute secondary Community law).

223. *See supra* note 185 and accompanying text (discussing general principles of law).

224. WYATT, *supra* note 8, at 88.

225. *Id.*

226. *See e.g.*, Commission v. Belgium, Case 102/79, [1980] E.C.R. 1473, 1484-85, [1981] 1 C.M.L.R. 282, 292 (finding that Member States are bound to implement directives in accordance with general principle of legal certainty).

227. BERMAN, *supra* note 12, at 128-29.

228. *See* O'NEILL, *supra* note 212, at 56. "Although finding its original source in German law, the proportionality test has been independently developed by the European Court in the course of its own case law." *Id.*

229. *See* Royal Scholten-Honig (Holdings) Ltd. v. Intervention Bd. for Agricultural Produce, Joined Cases 103, 145/77, [1978] E.C.R. 2037, [1974] 1 C.M.L.R. 675 (discussing general principle of equality as fundamental principle of Community law).

230. Administration des Douanes v. Société anonyme Gondrand Frères, Case 169/80, [1981] E.C.R. 1931, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8769.

231. O'NEILL, *supra* note 212, at 55.

232. *See supra* note 83-84 and accompanying text (discussing freedom of movement for workers as part of broader concept of freedom of movement for persons).

233. Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris, Case 71/76, [1977] E.C.R. 765, 776, 777, [1977] 2 C.M.L.R. 373, 403.

234. O'NEILL, *supra* note 212, at 57.

235. *Id.*

236. *See, e.g.*, Commission v. Germany, Case 205/84, [1986] E.C.R. 3755, 3803,

tive.<sup>237</sup> Finally, the means employed must be proportionate; the disadvantages caused, such as restriction of a fundamental freedom,<sup>238</sup> must not be disproportionate to the aims pursued.<sup>239</sup>

The principle of equal treatment provides a basis for judicial review of Community action in any area.<sup>240</sup> This general principle of law prohibits treating similar situations differently, unless different treatment is objectively justified.<sup>241</sup> Furthermore, the principle of equal treatment prohibits treatment of different situations in identical manners.<sup>242</sup>

In addition, the ECJ developed the principle of legal certainty, which requires the effect of a provision of law to be clear and predictable.<sup>243</sup> Generally, the ECJ considers that its rulings on Community law merely clarify the proper interpretation of a rule of law that already existed, as opposed to creating new and distinct rules of law.<sup>244</sup> Accordingly, ECJ rulings relate back to the inception of the rule of law in the Community legal order.<sup>245</sup> Occasionally, the Court limits the temporal effects of its judgments to preclude retroactive effect, based on the principle of

[1987] 2 C.M.L.R. 69, 102 (requiring least onerous means in cases of conflict with individual's freedom of action).

237. *Queen v. Ex parte Fedesa and Others*, Case C-331/88, [1990] I E.C.R. 4023, 4063, [1991] 1 C.M.L.R. 507, 532; *see also* O'NEILL, *supra* note 212, at 57 (discussing *Fedesa*).

238. *See supra* note 77, 80 and accompanying text (discussing fundamental freedoms, including free movement of persons).

239. *Fedesa*, [1990] I E.C.R. at 4063, ¶ 13, [1991] 1 C.M.L.R. at 532.

240. WYATT, *supra* note 8, at 96.

241. *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen* ("Quellmehl"), Joined Cases 117/76 & 16/77, [1977] E.C.R. 1753, [1979] 2 C.M.L.R. 445 (invalidating Council action abolishing production refunds on maize used for quellmehl and gritz production, while continuing to pay refunds on maize used to make starch, as unjustified discriminatory action).

242. *See, e.g.,* *Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH*, Case 114/76, [1977] E.C.R. 1211, [1979] 2 C.M.L.R. 83 (finding that imposition of financial burden on agricultural producers was not justified by goal of counteracting chronic imbalance in milk market, where burden resulted in much higher costs for producers not involved in milk production industry).

243. *Douanes*, [1981] E.C.R. 1931, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8769.

244. *See Amministrazione delle Finanze dello Stato v. Denkavit Italiana*, Case 61/79, [1980] E.C.R. 1205, 1223, [1981] 3 C.M.L.R. 694, 707 ("The interpretation which . . . the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force.").

245. *Denkavit Italiana*, [1980] E.C.R. at 1223, ¶ 17, [1981] 3 C.M.L.R. at 707-08.

legal certainty.<sup>246</sup> This limitation reflects the rationale that before persons can conduct themselves in accordance with the law, the scope of the law must be discernible.<sup>247</sup>

#### 4. The European Parliament and The Court of Auditors

The primary role of the European Parliament is to express the political sentiments of the Member State populations with regard to EU and Member State activity.<sup>248</sup> The European Parliament consists of representatives of Member State populations,<sup>249</sup> elected by direct universal suffrage.<sup>250</sup> Under the consultation procedure,<sup>251</sup> before the Council makes a final decision regarding certain areas of Community law,<sup>252</sup> the European Parliament must be consulted.<sup>253</sup> Consultation with the European Parliament is required before the Council may issue an opinion in favor of convening an IGC.<sup>254</sup>

The Court of Auditors assists the European Parliament and

246. *Defrenne*, [1976] I E.C.R. at 481, ¶¶ 74-75, [1976] 2 C.M.L.R. at 128; *Blaizot v. University of Liège*, Case 24/86, [1988] E.C.R. 379, [1989] 1 C.M.L.R. 57.

247. *See* *Racke v. Hauptzollamt Mainz*, Case 98/78 [1979] E.C.R. 69, 84, [1979-82 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8541, at 7760 ("A fundamental principle in the Community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it."). In *Defrenne*, the Court found that the plaintiff, an airline hostess, was entitled to pay parity with male cabin staff pursuant to the direct effect of the principle of equal pay for men and women in EC Treaty Article 119, [1976] 1 E.C.R. at 476, ¶ 40, [1976] 2 C.M.L.R. at 125. Although Ms. Defrenne could claim back pay, the court avoided opening the floodgates to litigation by denying the judgment retroactive effect based on considerations of legal certainty because, in such circumstances, "important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past." *Id.* at 481, ¶¶ 74-75, [1976] 2 C.M.L.R. at 128.

248. *BERMANN*, *supra* note 12, at 63.

249. EC Treaty, *supra* note 11, art. 137, [1991] 1 C.M.L.R. at 676.

250. *Id.* art. 138(1), [1991] 1 C.M.L.R. at 676.

251. *See* *WYATT*, *supra* note 8, at 37 (discussing the consultation procedure).

252. *Id.* "[T]he consultation procedure [is] used . . . for legislation in several important policy areas, including the common agricultural policy, harmonization of indirect taxation[,] certain aspects of the protection of the environment[, and] matters on which a specific legal basis is to be created for the first time . . ." *Id.*

253. *Id.* Generally, the TEU provides that the European Parliament should be consulted regarding most important matters prior to Council action on Commission proposals. *See* *MATHIJSEN*, *supra* note 8, at 29 n.30 (citing 33 treaty provisions requiring such consultation).

254. TEU, *supra* note 8, art. N(1), ¶ 2, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739; *see supra* notes 31-33 and accompanying text (discussing IGCs). Where a treaty provision specifically provides for consultation of the European Parliament, that requirement must be strictly complied with. *WYATT*, *supra* note 8, at 37.

the Council in the implementation of the budget.<sup>255</sup> The Court of Auditors examines EU revenue and expenditure accounts<sup>256</sup> to assure the reliability of the accounts and the legality of the underlying transactions.<sup>257</sup> In addition, the Court of Auditors examines whether financial management of EU income and expenditures has been sound<sup>258</sup> and publishes an annual report on the results of its audit.<sup>259</sup>

*C. Freedom of Movement and Competition Law in the Context of Labor Relations in Sports*

In the European Union, where the relative bargaining strength of players and player unions under the transfer system is restricted,<sup>260</sup> players must resort to their national court systems to resolve disputes with management.<sup>261</sup> The ECJ has found that EC Treaty provisions on freedom of movement for workers<sup>262</sup> apply to rules of sporting associations in certain circumstances.<sup>263</sup> Comparatively, in the United States two competing interests shape laws concerning player movement:<sup>264</sup> antitrust restraint of trade<sup>265</sup> and collective bargaining by unions.<sup>266</sup>

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255. EC Treaty, *supra* note 11, art. 188c(4), para. 4, [1991] 1 C.M.L.R. at 693. The Court of Auditor's annual report, and the replies of the institutions under audit to its observations, are essential elements in implementation of the EU budget by the Commission. WYATT, *supra* note 8, at 20.

256. MATHIJSEN, *supra* note 8, at 115.

257. EC Treaty, *supra* note 11, art. 188c(1), para. 2, [1991] 1 C.M.L.R. at 692.

258. *Id.* art. 188c(2), para. 1, [1991] 1 C.M.L.R. at 692.

259. *Id.* art. 188c(4), para. 1, [1991] 1 C.M.L.R. at 693.

260. See *supra* note 9 and accompanying text (discussing transfer system, which requires clubs to pay transfer fees to player's old club before contracting with that player).

261. Katz, *supra* note 1, at 416.

262. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

263. See *Walrave v. Union Cycliste Internationale*, Case 36/64, [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320 (applying Article 48 to professional cycling); *Donà v. Mantero*, Case 13/76, [1976] E.C.R. 1333, [1976] 2 C.M.L.R. 578 (applying Article 48 to professional football).

264. Katz, *supra* note 1, at 415.

265. Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1994). Under the Sherman Act, all agreements in restraint of trade are illegal. *Id.* A judicial counterpart to the Sherman Act is the "Rule of Reason," according to which an agreement does not violate the Sherman Act if its pro-competitive effects outweigh its anti-competitive effects. *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231 (1918).

266. See, e.g., *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (discussing non-statutory labor exemption for collective bargaining agreements), *cert. denied*, 434 U.S. 801, (1977). In the United States, a non-statutory exemption protects an agreement or practice from antitrust laws where it concerns a mandatory subject of

## 1. The Organization of Professional Football in the European Union

Organized football in the European Union is played by clubs joined together in national associations.<sup>267</sup> Each national association,<sup>268</sup> including Belgium's *ASBL Union Royale Belge des Sociétés de Football Association*<sup>269</sup> ("URBSFA"), belongs to the *Fédération Internationale de Football Association*<sup>270</sup> ("FIFA"), which organizes football internationally from its headquarters in Switzerland.<sup>271</sup> FIFA is further divided into confederations for each continent, such as the Union of European Football Associations<sup>272</sup> ("UEFA"), which is comprised of European national associations, including those from Member States.<sup>273</sup> Football matches are played within national associations by clubs belonging to that association or an affiliate.<sup>274</sup> Every professional player must be registered with his national association in order to play for a club.<sup>275</sup>

The URBSFA rules define a transfer as the transaction by which a player affiliated with an association obtains a change of

bona-fide arm's length collective bargaining, primarily affecting only parties to the agreement, and where the particular circumstances of the case require federal labor policy to prevail over federal antitrust policy. *Mackey*, 543 F.2d at 614.

267. Opinion of Advocate General Lenz, *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, Case C-415/93, slip op. at 4, ¶ 4 (Eur. Ct. J. Sept. 20, 1995) (Court decision not yet reported). One national association exists in each Member State, except the United Kingdom where, for historical reasons, there are four. See Katz, *supra* note 1, at 397-400 (discussing evolution of professional British football).

268. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 4, ¶ 3. National associations are further divided into secondary associations responsible for organizing football in certain sectors or regions. *Id.*

269. *Id.* at 4, ¶ 4. *Union Royale Belge des Sociétés de Football Association* ("URBSFA") is the association that organizes football on the national level in Belgium. *Id.*

270. *Id.* at 4, ¶ 5. National associations, such as URBSFA are joined together worldwide in *Fédération Internationale de Football Association* ("FIFA"). *Id.* Within FIFA, there are several groupings made up of the national associations of each continent. *Id.*

271. *Id.* at 4-5, ¶ 5.

272. *Id.* UEFA is comprised of the national associations of Europe, including associations from the 18 Member States. *Id.* UEFA currently has approximately 50 members. *Id.* UEFA organizes the European Championship for national teams and the European Champions Cup, the European Cup-Winner's Cup and UEFA Cup for club teams. *Id.* at 5, ¶ 5.

273. Opinion of Advocate General Lenz, *Bosman*, slip op. at 4, ¶ 4.

274. *Union Royale Belge des Sociétés de Football Ass'n v. Bosman*, Case C-415/93, slip op. at 4, ¶ 5 (Eur. Ct. J. Dec. 15, 1995) (not yet reported).

275. Opinion of Advocate General Lenz, *Bosman*, slip op. at 4-5, ¶ 5.



club affiliation.<sup>276</sup> Under those rules, clubs are required to offer professional players new contracts at least sixty-five days before the end of their current contract,<sup>277</sup> failing which the player is designated an amateur and thereby falls under a different set of transfer rules.<sup>278</sup> If the player rejects his club's offer, he is put on a list of players available during the month of May for "compulsory transfers"<sup>279</sup> without the consent of his affiliate club<sup>280</sup> and subject to payment of a compensation fee to that club for training and development costs.<sup>281</sup> These transfer fees are calculated by multiplying the player's gross annual income by a factor depending on his age.<sup>282</sup>

If a compulsory transfer does not take place before June 1, the "free transfer"<sup>283</sup> period begins, during which transfers require agreement between both clubs on the amount of a freely negotiable transfer fee.<sup>284</sup> A club's failure to pay an agreed upon transfer fee may result in sanctions imposed by the national association.<sup>285</sup> In the event that a player's affiliate club does not conclude a free transfer agreement, the club must offer him a new contract for one season on the same terms offered before his original contract expired.<sup>286</sup> If the player refuses this offer, his affiliate club will either suspend him or reclassify him as an ama-

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276. *Id.*

277. *Id.* at 6-7, ¶ 9. Under URBSFA rules, professional contracts run for terms of one to five years and all end on June 30. *Id.* These contracts are negotiated, but association rules require certain minimum amounts of compensation, for example a minimum monthly salary of BFR30,000 for professional players. *Id.*

278. *Bosman*, slip op. at 4, ¶ 7.

279. Opinion of Advocate General Lenz, *Bosman*, slip op. at 5, ¶ 7 (discussing "compulsory transfer" period in contrast to "free" transfers, which require agreement of former and new clubs).

280. *Id.*

281. *Bosman*, slip op. at 4-5, ¶ 8.

282. *Id.* at 4, ¶ 8.

283. See *supra* note 279 and accompanying text (discussing free transfers). The free transfer period ranges from June 25 to December 31, depending on which division the particular club is in. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 5, ¶ 9, n.17.

284. Opinion of Advocate General Lenz, *Bosman*, slip op. at 7, ¶ 9. Free transfers favor a player's affiliate club, as that club can essentially demand any transfer fee, thereby earning a substantial gain over a player's contract, or allowing the club to lock the player in, requiring him to play for them, play on their terms, or not play at all. *Id.*

285. *Bosman*, slip op. at 5, ¶ 9. "[T]he new club must pay the old club [the agreed upon transfer fee], subject to penalties which may include striking off the new club for debt." *Id.*

286. *Id.* at 5, ¶ 10.

teur.<sup>287</sup> Once suspended, a player's only options are to reach an agreement with his affiliate club or wait two years, after which he may obtain a transfer as an amateur without his club's consent.<sup>288</sup>

Before an international transfer takes place, the UEFA and FIFA regulations<sup>289</sup> require that a player's former national association issue a transfer certificate acknowledging settlement of all financial commitments, including those related to transfer fees.<sup>290</sup> Those regulations also stipulate that business relationships between the clubs are not to influence a player's ability to play for his new club.<sup>291</sup> Under the most recent regulations,<sup>292</sup> any dispute as to the amount of a transfer fee is submitted to UEFA or FIFA<sup>293</sup> for calculation according to a function of the player's income, age, and, in some cases, achievement.<sup>294</sup>

Beginning in the 1960's, football associations, including UEFA,<sup>295</sup> introduced rules limiting the number of players of foreign nationality any club could field in a match.<sup>296</sup> These foreign player rules use the term "nationality" to refer to whether a player is qualified to play for a country's national team, as opposed to a literal reference to a player's country of origin.<sup>297</sup> In

287. *Id.* Amateur transfers fall under a different set of rules. *Id.* at 4, ¶ 7.

288. *Id.* at 5, ¶ 10.

289. *Id.* at 5-8, ¶¶ 11-21. "The UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations . . ." *Id.* ¶ 11.

290. *Bosman*, slip op. at 6, ¶ 16. Only the new club's national association is entitled to request issuance of the transfer certificate. Opinion of Advocate General Lenz, *Bosman*, slip op. at 11, ¶ 23. These requests may only be refused on grounds not related to the transfer fee. *Id.*

291. *Bosman*, slip op. at 10, ¶ 21. "Without prejudice to the player's freedom of contract, the acquiring club shall be obliged to pay compensation to the club with which he was last registered." Opinion of Advocate General Lenz, *Bosman*, slip op. at 7, ¶ 10 (quoting URBSFA regulations).

292. *Id.* at 11, ¶ 21. The most recent FIFA regulations came into force on January 1, 1994. *Id.*

293. *Id.* at 11-12, ¶ 24. Submission to FIFA is appropriate, for instance, when one of the relevant clubs is not affiliated with UEFA. *Id.*; see *Bosman*, slip op. at 6, ¶ 20 (discussing requirement of submission to FIFA of UEFA in cases of disagreement over transfer fees).

294. *Bosman*, slip op. at 6-7, ¶ 21. In the case of players who have played at least twice on their country's senior national team, income is increased by 20% before calculating the transfer fee. *Id.*

295. Opinion of Advocate General Lenz, *Bosman*, slip op. at 16, ¶ 38.

296. *Bosman*, slip op. at 7, ¶ 25.

297. *Id.* Qualification to play for a national team often attaches importance to the length of time a player has been affiliated with an association, as well as his actual national origin. Opinion of Advocate General Lenz, *Bosman*, slip op. at 16, ¶ 37.

1978, the Commission issued a press release<sup>298</sup> describing a gentleman's agreement between UEFA and the Commission.<sup>299</sup> UEFA agreed to amend its rules to allow clubs to field not more than three players who are nationals of other Member States, plus two players counted as assimilated<sup>300</sup> based on how long they have played in the host Member State.<sup>301</sup>

## 2. Case Law Dealing With Freedom of Movement in the Field of Sport

In the 1970's, the ECJ held, in two preliminary rulings, that rules of sporting associations are subject to Community law on freedom of movement for workers.<sup>302</sup> The first ruling, *Walrave v. Association Union Cycliste Internationale*,<sup>303</sup> involved two Dutch nationals who wanted to work as motorcycle pacemakers<sup>304</sup> for the cycling teams of other Member States but were prohibited from doing so by the rules of the *Association Union Cycliste Internationale*,<sup>305</sup> requiring pacemakers of the same nationality as the team's cyclists.<sup>306</sup> In the second ruling, *Donà v. Mantero*,<sup>307</sup> the ECJ considered Italian Football Federation rules allowing only players affiliated with the federation, whose membership was limited to Italian nationals, to participate in matches.<sup>308</sup>

In *Walrave*, the Court ruled that the practice of sport has the character of gainful employment or remunerated services when

298. Commission Press Release, IP (91) 316 (Apr. 18 1991).

299. See *Bosman v. Commission*, Case 117/91, [1991] E.C.R. I-3354, [1991] 3 C.M.L.R. 938 [hereinafter *Bosman v. Commission*].

300. Opinion of Advocate General Lenz, *Bosman*, slip op. at 16, ¶ 39. Assimilated players are players who have played in the country in question for five uninterrupted years, including three years on junior teams. *Id.*

301. *Bosman v. Commission*, [1991] E.C.R. I-3355, ¶ 2, [1991] 3 C.M.L.R. at 939-40. Under the agreement, the rule initially applied to first division clubs in Member States and was to extend to all non-amateur leagues by the end of the 1996-97 season. *Id.*

302. *Walrave v. Union Cycliste Internationale*, Case 36/64, [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320; *Donà v. Mantero*, Case 13/76, [1976] E.C.R. 1333, [1976] 2 C.M.L.R. 578.

303. Case 36/64, [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320.

304. *Id.* at 1407, [1975] 1 C.M.L.R. at 321. The pacemaker rides a motorcycle ahead of a "stayer," who cycles behind the pacemaker in cycling competitions. *Id.*

305. Opinion of Advocate General Warner, *Walrave* [1977] E.C.R. at 1422, [1975] C.M.L.R. at 324. *Association Union Cycliste Internationale* is an association of national bodies concerned with cycling as a sport. *Id.*

306. *Id.* at 1407, [1975] 1 C.M.L.R. at 322.

307. Case 13/76, [1976] E.C.R. 1333, [1976] 2 C.M.L.R. 578.

308. *Walrave*, [1974] E.C.R. at 1417, ¶ 4, [1975] 1 C.M.L.R. at 322.

it constitutes an economic activity within the meaning of EC Treaty Article 2.<sup>309</sup> In such circumstances, the practice of sport is subject to Community law, including Article 48's prohibition of nationality discrimination against workers.<sup>310</sup> The Court, however, excluded from the scope of Article 48 activities of purely sporting interest, having nothing to do with economic activity, including the formation of sport teams, particularly national teams.<sup>311</sup>

The Court further held that Article 48 extends to any rules designed to collectively regulate gainful employment services.<sup>312</sup> The Court drew support for this conclusion<sup>313</sup> from Article 7(4) of Regulation 1612/68,<sup>314</sup> which prohibits nationality discrimination in agreements and collective regulations concerning employment.<sup>315</sup> The Court also noted that the abolition of obstacles to freedom of movement contained in EC Treaty Article 3(c)<sup>316</sup> would be meaningless if such barriers could simply be replaced by equally intrusive obstacles imposed by associations or organizations not subject to public law.<sup>317</sup>

In *Donà*, the Court stated that the adoption of discriminatory rules based on nationality, even by a "sporting organization,"<sup>318</sup> is incompatible with Article 48.<sup>319</sup> The Court held that the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated services,<sup>320</sup> constitute an economic activity subject to Community law.<sup>321</sup> Sporting association rules that discriminate based on na-

309. *Id.* at 1417, ¶ 4, [1975] 1 C.M.L.R. at 322.

310. *Id.* at 1417, ¶ 5, [1975] 1 C.M.L.R. at 331.

311. *Id.* at 1418, ¶ 8, [1975] 1 C.M.L.R. at 332.

312. *Id.* at 1418, ¶ 17, [1975] 1 C.M.L.R. at 332.

313. *Walrave*, [1974] E.C.R. at 1419, ¶ 22, [1975] 1 C.M.L.R. at 332-33.

314. Council Regulation No. 1612/68, *supra* note 86, O.J. L 257/2 (1968).

315. *Id.* art. 7(4), O.J. L 257/1, at 4 (1968).

316. EC Treaty, *supra* note 11, art. 3(c), [1991] 1 C.M.L.R. at 588.

317. *Walrave*, [1974] E.C.R. at 1419, ¶ 18, [1975] 1 C.M.L.R. at 332. The Court concluded with the observation that Article 48 applies to all legal relationships that can be located within the Community by reason of the place where they are entered into or the place where the relationships take effect. *Id.* at 1420, ¶ 28, [1975] 1 C.M.L.R. at 333.

318. *Donà*, [1976] E.C.R. at 1340, ¶ 13, [1976] 2 C.M.L.R. 578, 587.

319. *Id.*; see *Union Nationale Des Entraîneurs et Cadres Techniques Professionnels du Football v. Heylens*, Case 222/86, [1987] E.C.R. 4097, [1989] 1 C.M.L.R. 901 (holding that nationality discrimination regarding sports trainers violates Article 48).

320. *Donà*, [1976] E.C.R. at 1339, ¶ 9, [1976] 2 C.M.L.R. at 586.

321. *Id.*

tionality fall outside the scope of the EC Treaty only if they are unrelated to economic activity and based on reasons purely of sporting interest in light of the particular nature and context of the matches involved.<sup>322</sup> According to the Court, matches between national teams from different countries qualifies as a situation where rules discriminating on grounds of nationality are justified as relating to purely sporting interests.<sup>323</sup>

### 3. Competition Law in the Field of Sport

As a consequence of the Commission's exclusive role in granting exemptions<sup>324</sup> from EC competition rules,<sup>325</sup> the ECJ lacks the power to grant such exemptions.<sup>326</sup> Judicial consideration of sporting association rules is common, however, in U.S. antitrust law,<sup>327</sup> which grants exemptions to practices of sporting associations in certain circumstances.<sup>328</sup> U.S. courts developed a non-statutory labor exemption to the Sherman Antitrust Act<sup>329</sup> as a standard for evaluating the substance of agreements between unions and non-labor groups.<sup>330</sup> The non-statutory labor exemption protects an agreement<sup>331</sup> from the antitrust laws if a court finds that the facts surrounding the agreement justify giving precedence to relevant federal labor policy over federal antitrust policy.<sup>332</sup> Non-statutory labor exemptions have been

322. *Id.* at 1340, ¶ 10, [1976] 2 C.M.L.R. at 587.

323. *Id.*

324. *See supra* notes 164-73 and accompanying text (discussing exemption procedure under Article 85(3), which generally focuses on overall market effect of agreements).

325. *See supra* notes 108-22 and accompanying text (discussing EC Treaty Articles 85 and 86).

326. *See supra* note 131 and accompanying text (discussing limited powers of EU institutions).

327. *See Chalian, supra* note 6, at 595-605 (discussing U.S. antitrust law and its application to professional sports).

328. *See Fleming, supra* note 3, at 530-31 (discussing non-statutory labor exemption to U.S. antitrust law).

329. 15 U.S.C. §§ 1-7 (1994).

330. FLEMING, *supra* note 3, at 530-31.

331. *See Chalian, supra* note 6, at 597 n.12 ("Unions, by their very nature, are groups of people acting together in restraint of free competition and trade."). The U.S. Supreme Court "has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965).

332. *Id.* The non-statutory labor exemption has three elements:

[T]he labor policy favoring collective bargaining may potentially be given pre-

granted to preclude antitrust scrutiny of collective agreements between sporting associations and players.<sup>333</sup>

## II. *IN BOSMAN THE ECJ HELD THE TRANSFER SYSTEM AND THE RULES ON FOREIGN PLAYERS INCOMPATIBLE WITH COMMUNITY LAW*

In the *Bosman* judgment,<sup>334</sup> the ECJ issued a preliminary ruling invalidating two long-standing football traditions under Article 48.<sup>335</sup> The Court held that the transfer system<sup>336</sup> illegally obstructed players' freedom of movement.<sup>337</sup> The Court also held that the rules on foreign players<sup>338</sup> resulted in nationality-based

eminence over the antitrust laws where the restraint of trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of a bona fide arm's length bargaining. *Mackey*, 543 F.2d at 614 (8th Cir. 1976) (citations omitted).

The statutory labor exemption to the Sherman Act insulates legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests, because such activities are favored by federal labor policy. Fleming, *supra* note 3, at 530-31.

The concept of a labor exemption finds its source in sections 6 and 20 of the Clayton Act, 15 U.S.C. section 17 and 29 U.S.C. section 52, and the Norris-LaGuardia Act, 29 U.S.C. sections 104, 105 and 113. Those provisions declare that labor unions are not . . . in restraint of trade, and specifically exempt certain union activities . . . from the coverage of the antitrust laws.

*Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 963-64 (1987).

333. See e.g., *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995) (non-statutory labor exemption to NBA collective bargaining agreement); *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989) (applying non-statutory labor exemption to NFL collective bargaining agreement), *cert. denied*, 498 U.S. 1040 (1991).

334. *Bosman* (Eur. Ct. J. Dec. 15, 1995) (not yet reported).

335. *Id.* at 22, 25, ¶¶ 114, 137.

336. See *supra* notes 276-94 and accompanying text (describing transfer system, under which player's ability to change clubs depends on business transactions between clubs).

337. *Bosman*, slip op. at 20, ¶ 100. The ECJ found that the transfer system obstructed freedom of movement for workers:

Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

*Id.*

338. See *supra* notes 296-301 (describing foreign player rules which restrict how many non-nationals clubs may field).

discrimination prohibited by Article 48.<sup>339</sup> The *Bosman* case began when Belgian national Jean-Marc Bosman claimed he was prevented from working for another club after his contract ended with *Royal Club Liègeois*<sup>340</sup> ("RC Liège"), in violation of Articles 48, 85, and 86.<sup>341</sup> The ECJ agreed that Article 48 precludes the application of both the transfer and foreign player rules to Member State nationals,<sup>342</sup> but refrained from discussing the application of Articles 85<sup>343</sup> and 86<sup>344</sup> to Bosman's claims.<sup>345</sup>

### A. History of the Bosman Case

Belgian national Jean-Marc Bosman contracted with RC Liège as a professional football player for an average monthly salary of approximately 120,000 Belgian francs ("BFR").<sup>346</sup> On April 21, 1991, with Bosman's contract drawing to a close, RC Liège offered him a one-year contract<sup>347</sup> at BFR30,000,<sup>348</sup> the league minimum.<sup>349</sup> Bosman refused the offer and was placed

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339. *Bosman*, slip op. at 25, ¶ 137; see *supra* notes 87-88 and accompanying text (discussing Article 48's express prohibition of nationality based discrimination regarding employment terms and conditions).

340. Opinion of Advocate General Lenz, *Bosman*, slip op. at 17, ¶ 42. *Royal Club Liègeois* ("RC Liège") is a football club in the Belgian first division. *Id.*

341. See *Competition: New Complaint Revives Controversy Over Football Transfer System*, EUR. REP., Feb. 2, 1993, available in LEXIS, News Library, CURNWS File.

342. *Bosman*, slip op. at 27, ¶¶ 1-2. The ECJ found that the transfer rules and the rules on foreign players should not apply to Member State nationals:

Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee[, and] precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States."

*Id.*

343. EC Treaty, *supra* note 11, art. 85, [1991] 1 C.M.L.R. at 626-27.

344. *Id.* art. 86, [1991] 1 C.M.L.R. at 627-28.

345. *Bosman*, slip op. at 9, ¶ 38.

346. *Id.* at 8, ¶ 28.

347. See *supra* note 277 and accompanying text (discussing URBSFA rules requiring clubs to offer players new contracts at least 65 days before their current contract expires).

348. *Bosman*, slip op. at 8, ¶ 29.

349. See *supra* note 277 and accompanying text (discussing URBSFA rules and minimum player salary).

on the compulsory transfer list,<sup>350</sup> with a transfer fee set at BFR11,743,000.<sup>351</sup> Because he did not secure a contract by the end of the compulsory transfer period,<sup>352</sup> Bosman contacted US Dunkerque, a French second division team and signed a contract with them for BFR100,000 a month plus a BFR900,000 signing bonus.<sup>353</sup>

In accordance with the procedure for free transfers,<sup>354</sup> US Dunkerque and RC Liège concluded a separate contract for Bosman's temporary one season transfer for a compensation fee of BFR1,200,000 plus an irrevocable option in favor of US Dunkerque on a full transfer for BFR4,800,000.<sup>355</sup> Both contracts were conditioned on receipt of the transfer certificate by the French national association before August 2, 1990.<sup>356</sup> Due to doubts about US Dunkerque's solvency, RC Liège never requested issuance of a transfer certificate from URBSFA and the contracts never took effect.<sup>357</sup> In addition, RC Liège suspended Bosman, thereby preventing him from playing for the entire season.<sup>358</sup>

Shortly afterward, Bosman sued RC Liège before the Tribunal de Première Instance, Liège, for lost wages.<sup>359</sup> The judge ordered RC Liège and URBSFA to pay Bosman a monthly advance, issued a restraining order prohibiting RC Liège and URBSFA from interfering with his search for employment, and referred a question to the ECJ on the compatibility of the transfer

350. See *supra* note 279 and accompanying text (discussing that compulsory transfer status lasts for one month and allows players to sign with new clubs in exchange for non-negotiable transfer fee to player's old club, but not subject to old club's agreement).

351. *Bosman*, slip op. at 7-8, ¶ 29; see *supra* note 282 and accompanying text (discussing compulsory transfer fee calculation).

352. See *supra* notes 279, 283 (discussing that compulsory transfers are available only during month of May).

353. *Bosman*, slip op. at 8, ¶ 30.

354. See *supra* note 283 and accompanying text (discussing free transfers).

355. *Bosman*, slip op. at 8, ¶ 31.

356. *Id.* at 8, ¶ 32; see *supra* note 290 and accompanying text (discussing rules requiring transfer certificates before international transfers take place).

357. *Bosman*, slip op. at 8, ¶ 33.

358. *Id.*

359. Opinion of Advocate General Lenz, *Bosman*, slip op. at 18, ¶ 45. In addition, to seeking compensation from RC Liège and URBSFA of BFR 100,000 a month until he found a new employer, Bosman sought an order restraining URBSFA and RC Liège from damaging his employment opportunities by claiming or demanding a transfer fee. *Id.* Bosman also sought a reference to the ECJ for a preliminary ruling. *Id.*



system with Community law.<sup>360</sup> On appeal, the Cour d'Appel, Liège, upheld the injunctive relief, but revoked the reference to the ECJ for a preliminary ruling.<sup>361</sup> Meanwhile, according to the Cour d'Appel,<sup>362</sup> circumstances suggested that despite Bosman's free transfer status by virtue of the court order,<sup>363</sup> all the European clubs in positions to sign Bosman boycotted him instead.<sup>364</sup> Bosman eventually did sign a contract with a Belgian third division club.<sup>365</sup>

In a separate action, Bosman applied to the ECJ for annulment of the Commission's gentleman's agreement with UEFA.<sup>366</sup> The Court, however, found that the Commission's actions were limited to taking formal notice of UEFA's proposed rule changes<sup>367</sup> and, therefore, without legal effect and incapable of affecting the interests of third parties, including Bosman.<sup>368</sup> Accordingly, the Court dismissed Bosman's claim as inadmissible.<sup>369</sup>

Thereafter, on April 9, 1992, Bosman amended his original claim against RC Liège, brought a new action against URBSFA, and developed his claim against UEFA.<sup>370</sup> The new claim sought a declaration that the transfer system and the rules on foreign players were null and void on grounds of breach of Articles 48,

360. *Id.*

361. *Id.* at 18, ¶ 46.

362. *Bosman*, slip op. at 9, ¶ 37.

363. *See supra* note 360 and accompanying text (discussing order of Tribunal de Premier Instance, Liège, in Bosman's favor).

364. *Bosman*, slip op. at 9, ¶ 37.

365. *Id.* at 9, ¶ 36.

366. *Bosman v. Commission*, [1991] E.C.R. at I-3355, ¶ 1, [1991] 3 C.M.L.R. at 939; *see also supra* note 180 (discussing ECJ jurisdiction to hear claims against EC Institutions).

367. *Bosman v. Commission*, [1991] I E.C.R. at I-3355, ¶ 2, [1991] 3 C.M.L.R. at 939-40. "[I]t is clear from a press release distributed by the Commission that it confined itself . . . to taking formal notice of [rule changes proposed by UEFA]." *Id.*

368. *Id.* at I-3356, ¶ 5, [1991] 3 C.M.L.R. at 940.

369. *Id.* at I-3357, ¶ 9, [1991] 3 C.M.L.R. at 941.

370. Opinion of Advocate General Lenz, *Bosman*, slip op. at 19, ¶ 49. URBSFA voluntarily intervened in the action on June 3, 1991, seeking a declaration that the transfer system was lawful. *Id.* at 18-19, ¶ 48. On August 20, 1991, Bosman joined UEFA as a defendant. *Id.* Bosman's claim, as of April 9, 1992, sought an order restraining RC Liège, URBSFA, and UEFA from hindering his freedom to contract with a new employer, an order for compensatory damages or more than BFR23,000,000. *Id.* at 19, ¶ 49. Bosman also sought a declaration that the transfer rules and rules on foreign players were not applicable to him, and a reference to the ECJ on the legality of those rules under Community law. *Id.*

85, and 86 of the EC Treaty.<sup>371</sup> After finding jurisdiction and holding Bosman's claims admissible, the Tribunal de Première Instance, Liège, made a reference to the ECJ for a preliminary ruling on the interpretation of Articles 48, 85, and 86.<sup>372</sup>

On appeal, the Cour d'Appel upheld the judgment as to jurisdiction and admissibility.<sup>373</sup> The Cour d'Appel also found that an assessment of Bosman's claims involved a review of the legality of the transfer rules, thereby making a preliminary ruling<sup>374</sup> necessary to its judgment.<sup>375</sup> The Cour d'Appel further held that a preliminary ruling as to the lawfulness of the rules on foreign players was necessary,<sup>376</sup> in that Bosman based his claim on Belgian law permitting actions to prevent the infringement of a seriously threatened right,<sup>377</sup> such as the potential damage to Bosman's career by the application of the transfer rules.<sup>378</sup> The court stayed the proceedings and referred two questions to the ECJ<sup>379</sup> regarding the compatibility of the transfer rules and the rules on foreign players with EC Treaty Articles 48,<sup>380</sup> 85,<sup>381</sup> and 86.<sup>382</sup>

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371. *Id.* at 19, ¶ 48.

372. *See Bosman*, slip op. at 10, ¶¶ 41, 44 (discussing judgment of Cour d'Appel).

373. *Id.* at 10, ¶ 44.

374. *See supra* notes 186-90 and accompanying text (discussing preliminary rulings under Article 177).

375. *Bosman*, slip op. at 10, ¶ 44; *see supra* notes 186-87 and accompanying text (discussing preliminary rulings as appropriate only when necessary to judgment of referring court).

376. *Bosman*, slip op. at 10, ¶ 44.

377. *Id.*

378. *Id.*

379. *Id.* at 11, ¶ 49. The ECJ considered two questions referred to it for a preliminary ruling:

Are Articles 48, 85, and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as:

(i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;

(ii) prohibiting the national and international sporting associations from including in their respective regulations provisions restriction access of foreign players from the European Community to the competitions which they organize?

*Id.*

380. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

381. *Id.* art. 85, [1991] 1 C.M.L.R. at 626-27.

382. *Id.* art. 86, [1991] 1 C.M.L.R. at 627-28.

### B. *The ECJ Decision*

The ECJ held that the transfer system and the rules on foreign players offended the principle of freedom of movement for workers<sup>383</sup> guaranteed by Article 48.<sup>384</sup> The Court answered both of the referred questions in the affirmative, but limited its judgment and analysis to Article 48.<sup>385</sup> The Opinion of Advocate General Carl Otto Lenz, however, did examine the transfer rules and the rules on foreign players under EC competition rules, finding a restriction of competition<sup>386</sup> in violation of Article 85(1),<sup>387</sup> but no infringement of Article 86.<sup>388</sup>

#### 1. Jurisdiction and Applicability of Article 48

After finding jurisdiction under Article 177<sup>389</sup> to rule on the referred questions,<sup>390</sup> the Court restated the applicability of Article 48 to rules laid down by sporting associations.<sup>391</sup> According

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383. *Bosman*, slip op. at 22, 25, ¶¶ 113, 137.

384. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

385. *Bosman*, slip op. at 25, ¶ 138.

386. Opinion of Advocate General Lenz, *Bosman*, slip op. at 103-04, ¶ 262.

387. *See supra* notes 112-14 and accompanying text (discussing Article 85(1)'s prohibition of agreements restricting competition).

388. Opinion of Advocate General Lenz, *Bosman*, slip op. at 113, ¶ 286.

389. *See supra* notes 186-90 and accompanying text (discussing preliminary rulings under Article 177).

390. *Bosman*, slip op. at 12-15, ¶¶ 55-67. Initially, the Court states that it is clear from the statement submitted by the Cour d'Appel that the issues relating to the submitted questions are not merely hypothetical, and, therefore, are appropriate. *Id.* at 14, ¶ 62. Nevertheless, the Court went on to imply that even if the rules on transfers and foreign players were not applied to *Bosman*, the Court's interpretation would still be appropriate as it "may be useful" to the national court in resolving the dispute over *Bosman's* preventative actions. *Id.* at 14, ¶¶ 62-63. "[T]he questions submitted by [the national court] meet an objective need for the purpose of settling disputes properly brought before it." *Id.* at 14, ¶ 65.

391. *Id.* at 15-18, ¶¶ 69-87. Although the Court restated the *Walrave* holding that Article 48 extends to any rules designed to regulate gainful employment in a collective manner, the Court did not go so far as to expressly confer horizontal direct effect on Article 48. *Bosman*, slip op. at 17, ¶ 82 (discussing *Walrave*, [1974] E.C.R. at 1419, ¶ 24, [1975] 1 C.M.L.R. at 333; *see supra* note 220 (discussing horizontal direct effect)). The extent of regulation required for application of Article 48 depends on the extent to which the rules in question frustrate Community policy by creating the functional equivalent to Member State barriers to freedom of movement and the risk of unequal application of Article 48 created by those rules. *See Bosman*, slip op. at 17-18, ¶¶ 83-84 (applying Article 48 to rules of any nature aimed at collectively regulating gainful employment); *see also Walrave*, [1974] E.C.R. at 1418-19 ¶¶ 17-19, [1975] 1 C.M.L.R. at 332-33 (holding that Article 48 applies to rules of any nature aimed at collectively regulating gainful employment); *Donà*, [1976] E.C.R. 1333, 1341, ¶ 17, [1976] 2 C.M.L.R. 578, 587 (citing *Walrave*).

to the Court, sport constitutes an economic activity subject to Community law<sup>392</sup> if an employment relationship, or the intention to create one, exists.<sup>393</sup> *Bosman* satisfied the criteria of Article 48 by accepting an offer of employment actually made<sup>394</sup> in another Member State.<sup>395</sup> By virtue of Article 48's direct effect,<sup>396</sup> *Bosman* could seek to have his right to move freely between Member States for purposes of employment judicially enforced.<sup>397</sup>

## 2. The ECJ's Interpretation of Article 48 with Respect to the Transfer Rules

The Court considered the transfer rules an obstruction<sup>398</sup> to the fundamental Community principle<sup>399</sup> of freedom of movement for workers guaranteed by Article 48.<sup>400</sup> The UEFA stipulation that the business relationship between clubs does not affect the player's activity<sup>401</sup> was irrelevant to the Court<sup>402</sup> because the required payment of a transfer fee has the effect of hindering player access to employment.<sup>403</sup> The Court noted that obstacles to freedom of movement are only justified by pressing concerns

392. *Bosman*, slip op. at 16, ¶ 76; *Walrave*, [1974] E.C.R. at 1417-18, ¶¶ 5, 8, [1975] 1 C.M.L.R. at 331-32; *Donà*, [1976] E.C.R. at 1340, ¶¶ 12, 14, [1976] 2 C.M.L.R. at 587. The proviso that Community law does not apply to rules or practices justified on non-economic grounds related to the particular nature and context of certain matches remains limited to its proper objective: protecting activities of purely sporting interest from the constraints of Community law aimed at economic activities. *Bosman*, slip op. at 16, ¶ 76; *Walrave*, [1974] E.C.R. at 1418, ¶ 8, [1975] 1 C.M.L.R. at 332; *Donà*, [1976] E.C.R. at 1340, ¶ 14, [1976] 2 C.M.L.R. at 587.

393. *Bosman*, slip op. at 16, ¶¶ 73-74.

394. EC Treaty, *supra* note 11, art. 48(3)(a), [1991] 1 C.M.L.R. at 612.

395. *Bosman*, slip op. at 18, ¶ 89; see notes 92-93 and accompanying text (discussing that Article 48 does not apply to situations wholly internal to a Member State).

396. See *supra* notes 211-20 and accompanying text (discussing direct effect).

397. See *supra* notes 214-20 and accompanying text (discussing that treaty provisions having direct effect create directly enforceable rights in Member State nationals).

398. See *Bosman*, slip op. at 20-21, ¶ 104 ("[T]he transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty.").

399. See *supra* notes 77-82 and accompanying text (discussing fundamental freedoms).

400. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

401. See *supra* note 291 and accompanying text (discussing UEFA's regulations).

402. *Bosman*, slip op. at 20, ¶ 101.

403. *Bosman*, slip op. at 20, ¶ 99. Despite the stipulation that business relations between clubs are not to affect a player's activity, "[t]he new club must still pay the fee in issue, under pain of penalties . . . , which prevents it . . . from signing up a player from a club in another Member State without paying that fee." *Id.* at 20, ¶ 101; see *supra* note

of public interest in pursuit of a legitimate aim compatible with the EC Treaty.<sup>404</sup>

The ECJ found no adequate justification for the obstacles to freedom of movement imposed by the transfer rules.<sup>405</sup> The Court did, however, accept UEFA's goal of maintaining the financial and competitive balance<sup>406</sup> as legitimate in light of the social importance of sporting activity in the European Union.<sup>407</sup> The Court found that the transfer rules did not advance financial or competitive balance because those rules failed to preserve the degree of equality and uncertainty of results necessary to maintain the sporting equilibrium.<sup>408</sup> The rules did nothing to prevent the richest clubs from securing the best players or to prevent financial resources from being a decisive factor in competition.<sup>409</sup> The Court also accepted UEFA's goal of encouraging the recruitment and training of young talent as legitimate,<sup>410</sup> but found no relationship between the transfer system and the achievement of that goal.<sup>411</sup> The Court found no relationship to exist because the amount of a transfer fee is unrelated to the actual cost of training and recruitment, and because receipt of such fees for any particular player is speculative.<sup>412</sup> The Court

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285 and accompanying text (discussing sanctions imposed on clubs for not paying agreed upon transfer fees).

404. *Bosman*, slip op. at 20-21, ¶ 104; see also *supra* note 231 and accompanying text (discussing general principle of proportionality). According to Advocate General Lenz, only an interest of the association of "paramount importance" can justify a restriction on freedom of movement. Opinion of Advocate General Lenz, *Bosman*, slip op. at 87, ¶ 216.

405. *Bosman*, slip op. at 21-22, ¶¶ 105-14.

406. Opinion of Advocate General Lenz, *Bosman*, slip op. at 88, ¶ 219. A professional league will flourish only if the competitive balance between clubs is maintained. *Id.* If the league is clearly and consistently dominated by any one team, the necessary tension is absent and the fans will lose interest. *Id.*

407. *Bosman*, slip op. at 21, ¶ 106. "In view of the considerable social importance of sporting activity and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate." *Id.*

408. *Id.* at 21, ¶ 107.

409. *Id.*

410. See *supra* note 407 and accompanying text (discussing legitimate goals of maintaining sporting equilibrium and encouraging recruitment).

411. *Bosman*, slip op. at 21, ¶ 109; see also *supra* note 234 and accompanying text (discussing requirement of means-end relationship in context of proportionality principle).

412. *Bosman*, slip op. at 21, ¶ 109.

further held that even if an adequate means-end relationship<sup>413</sup> did exist, the transfer system was not justified by either of these goals, because less restrictive means of achieving them existed,<sup>414</sup> such as a collective wage agreement<sup>415</sup> or a profit sharing plan.<sup>416</sup>

### 3. The ECJ's Interpretation of Article 48 with Respect to the Rules on Foreign Players

The Court also found that the rules on foreign players obstructed freedom of movement for workers in Member States.<sup>417</sup> Article 48's prohibition on nationality-based discrimination regarding employment,<sup>418</sup> as implemented by Council Regulation 1612/68,<sup>419</sup> precludes the application of rules restricting access

413. See *supra* note 234 and accompanying text (discussing proportionality principle).

414. *Bosman*, slip op. at 21, ¶ 110. The Court also found that the potential for differing systems inside and outside of the Community was not a compelling justification for infringement on Article 48 because differing systems already existed between certain national associations and the rules on international transfers. *Id.* at 22, ¶ 112. Also, the losses that clubs will suffer in the future by not gaining a return on transfer fees already paid in recruitment efforts is a necessary expense of eliminating obstacles to freedom of movement. See *Id.* at 22, ¶ 113 (dismissing argument that transfer rules are necessary to compensate clubs for expenses incurred in recruiting players).

415. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 90-91, ¶ 226 (discussing possibility of collective wage agreement).

416. See *id.* at 90-94, ¶¶ 226-33 (discussing possibility of profit sharing plan). Advocate General Lenz described the wisdom of a profit sharing plan, observing that the competitive nature of sport differs from that existing in other markets in that sports leagues are characterized by mutual economic dependence between clubs. *Id.* at 91, ¶ 227. Redistributing a proportion of income would make it possible for clubs to promote their own interests and those of football in general. *Id.* at 92, ¶ 228. If limited to a small part of income, profit sharing measures appropriately ensure competitive balance between clubs, thereby preserving the incentive for a club to perform well. *Id.* at 92, ¶ 228-30. The feasibility of such a system is evidenced by its current existence in some Member States, and also at the UEFA level in certain competitions. *Id.* at 92-93, ¶¶ 230-31. Such systems permit clubs to budget on a more reliable basis than the transfer system, in which the discovery of a gifted player who can be transferred to a big club for good money is often a matter of chance. *Id.* at 94, ¶ 233. Finally, any negative effects on the self-esteem of any individual club would be purely psychological and insufficient to justify a continued restriction on freedom of movement. *Id.* at 93-94, ¶ 232.

417. *Id.* at 43, ¶ 120.

418. EC Treaty, *supra* note 11, art. 48(2), [1991] 1 C.M.L.R. at 612; see *supra* notes 87-89 and accompanying text (discussing freedom of movement for workers as based mainly on principle of non-discrimination on grounds of nationality).

419. See *supra* notes 141-51 and accompanying text (discussing Council Regulation No. 1612/68).

of Member State nationals to participation in competitions organized by those associations.<sup>420</sup> According to *Walrave*<sup>421</sup> and *Donà*,<sup>422</sup> this prohibition applies to rules of sporting associations designed to collectively regulate gainful employment services.<sup>423</sup> The Court found that by restricting a player's opportunity to participate in matches based on his nationality, the rules on foreign players limited that player's choices of employment<sup>424</sup> in violation of Article 48.<sup>425</sup>

No sufficient justification existed for the obstacle imposed on freedom of movement by the rules on foreign players, therefore, the Court declared those rules incompatible with Article 48.<sup>426</sup> The Court further held that UEFA's reliance on its gentleman's agreement with the Commission was misplaced, because the Commission cannot guarantee compatibility with Community law except where expressly authorized to do so.<sup>427</sup> Under no circumstances may the Commission authorize practices that are contrary to the TEU.<sup>428</sup> The rules on foreign players did not adequately maintain the sporting equilibrium be-

420. *Bosman*, slip op. at 25, ¶ 137. It is irrelevant that the rules do not expressly limit the number of foreign players that may be employed. *Id.* By limiting participation in matches, the essential element of a professional player's activity, the rules obviously also restrict a player's chances of employment. *Id.*

421. *See supra* notes 309-10 and accompanying text (discussing sport as an economic activity contemplated by EC Treaty Article 2). "Prohibition of [nationality] discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services." *Walrave*, [1974] E.C.R. at 1418, ¶ 18, [1975] 1 C.M.L.R. at 332-33.

422. *See supra* notes 318-23 and accompanying text (discussing the *Donà* judgment). *Donà* specifically held that Article 48 precluded rules limiting foreign players: [R]ules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question, are incompatible with Article 7 and . . . Article[ ] 48 . . . unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature . . .

*Donà*, [1976] E.C.R. at 1341, ¶ 19, [1976] 2 C.M.L.R. at 587 (relying on *Walrave*).

423. *Walrave*, [1974] E.C.R. at 1418, ¶ 18, [1975] 1 C.M.L.R. 320, 332-33; *Donà*, [1976] E.C.R. at 1341, ¶ 19, [1976] 2 C.M.L.R. 578, 587.

424. *Bosman*, slip op. at 23, ¶ 120. "In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment." *Id.*

425. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

426. *Bosman*, slip op. at 25, ¶ 137.

427. *Id.* at 25, ¶ 136.

428. *Id.*

tween clubs,<sup>429</sup> because those rules did nothing to prevent affluent clubs from acquiring the best national players, which would undermine the competitive balance despite the foreign player rules.<sup>430</sup> The Court emphasized that while freedom of movement for workers may reduce employment opportunities for Member State nationals within their own countries, it also creates new prospects of employment in other Member States.<sup>431</sup>

#### 4. The ECJ's Limitation of the Temporal Effects of the *Bosman* Judgment

In the interests of legal certainty,<sup>432</sup> the ECJ limited the temporal effects of its judgment to preclude retroactivity.<sup>433</sup> The Court eliminated the possibility of suits based on transfer fee obligations arising before the *Bosman*<sup>434</sup> judgment by expressly restricting reliance on Article 48's<sup>435</sup> prohibition of the transfer system<sup>436</sup> to claims initiated after that date.<sup>437</sup> The Court did not extend this limitation to claims regarding the rules on foreign players.<sup>438</sup> According to the Court, in light of the *Walrave*<sup>439</sup> and *Donà*<sup>440</sup> judgments,<sup>441</sup> it was unreasonable to con-

429. See *supra* note 407 and accompanying text (discussing legitimate goals of maintaining sporting equilibrium and encouraging recruitment, in light of social importance of football in European Union).

430. *Bosman*, slip op. at 25, ¶ 135. The Court rejected the proposition that maintaining the public perception of a link between clubs and their countries justifies the obstruction of freedom of movement. *Id.* at 24, ¶ 131-32. The Court found this argument unconvincing in light of the lack of measures to maintain a link between a club and its locality within a Member State, and because international competitions are organized based on team performance, rather than player nationality. *Id.* Finally, the court felt that maintaining a pool of national players for national teams was an inadequate goal, because association rules permitted players to play for their national team regardless of where they are registered to play. *Id.* at 24, ¶ 133.

431. *Id.* at 25, ¶ 134.

432. See *supra* notes 230, 243-46 and accompanying text (discussing considerations of legal certainty which have led ECJ to limit temporal effects of some judgments to preclude retroactive effect).

433. *Bosman*, slip op. at 26, ¶ 145.

434. *Id.*

435. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

436. See *supra* notes 399-416 and accompanying text (discussing ECJ's holding that transfer system constitutes unjustified violation of Article 48).

437. *Bosman*, slip op. at 26, ¶ 145.

438. *Id.*

439. *Walrave*, [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320.

440. *Donà*, [1976] E.C.R. 1333, [1976] 2 C.M.L.R. 578.

441. See *supra* notes 309-23 (discussing *Walrave* and *Donà*, which held that sporting association rules discriminating based on nationality violate Article 48).



sider the discrimination resulting from the foreign player rules compatible with Article 48.<sup>442</sup>

##### 5. Interpretation of Article 85 with Regard to the Transfer Rules and the Rules on Foreign Players

The ECJ did not address the transfer rules and the rules on foreign players under Articles 85<sup>443</sup> and 86<sup>444</sup> once it found those rules illegal<sup>445</sup> under Article 48.<sup>446</sup> Advocate General Lenz's opinion<sup>447</sup> did present a clear analysis of the rules in that context.<sup>448</sup> The Advocate General found no abuse of a dominant position in violation of Article 86, because the rules affected only the relationship between clubs and players, as opposed to the power on the market exercised by the clubs in relation to competitors, customers, or consumers.<sup>449</sup>

The Advocate General also concluded that both sets of rules fell within the scope of Article 85(1),<sup>450</sup> as restrictions of competition.<sup>451</sup> The rules on foreign players restrict the opportunities for clubs to compete with each other in recruiting players, thereby constituting an agreement sharing sources of supply<sup>452</sup> within the meaning of Article 85(1)(c).<sup>453</sup> In Advocate General Lenz's opinion, the transfer rules restricted competition by replacing the normal system of supply and demand.<sup>454</sup> He found that holding players to their former clubs after their contracts expire preserves the existing competition situation, thereby depriving clubs of the opportunities that would otherwise exist

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442. *Bosman*, slip op. at 26, ¶ 146. "With regard to nationality clauses . . . there are no grounds for a temporal limitation of the effects of this judgment." *Id.*

443. EC Treaty, *supra* note 11, art. 85, [1991] 1 C.M.L.R. at 626-27.

444. *Id.* art. 86, [1991] 1 C.M.L.R. at 627-28.

445. *Bosman*, slip op. at 25, ¶ 138.

446. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

447. *See supra* note 182 (discussing role of Advocate General as non-binding advisor to ECJ whose opinions are often followed).

448. Opinion of Advocate General Lenz, *Bosman*, slip op. at 99-113, ¶¶ 253-86.

449. *Id.* at 112-13, ¶ 286.

450. EC Treaty, *supra* note 11, art. 85, [1991] 1 C.M.L.R. at 626-27.

451. Opinion of Advocate General Lenz, *Bosman*, slip op. at 113, ¶ 287.

452. *Id.* at 103, ¶ 262.

453. EC Treaty, *supra* note 11, art. 85(1)(c), [1991] 1 C.M.L.R. at 627. "[I]t is . . . perfectly clear that the effect of the rules at issue in this case is a restriction of competition within the meaning of Article 85(1)." Opinion of Advocate General Lenz, *Bosman* slip op. at 103, ¶ 262.

454. Opinion of Advocate General Lenz, *Bosman*, slip op. at 103, ¶ 262.

under normal competition conditions.<sup>455</sup> While the Advocate General observed that it is theoretically possible for the Commission to grant such rules an exemption<sup>456</sup> from Article 85,<sup>457</sup> he concluded that an exemption would not remedy the breach<sup>458</sup> of Article 48.<sup>459</sup> Accordingly, the Advocate General dismissed the possibility of exemption due to the significance of a breach of Article 48.<sup>460</sup>

III. *EXEMPTING SPORTS ASSOCIATIONS FROM APPLICATION OF ARTICLE 48 WOULD BE INCONSISTENT WITH THE COMMON MARKET AND WOULD DISREGARD THE EXISTENCE OF ALTERNATIVES THAT DO NOT OFFEND ARTICLE 48*

The *Bosman* case represents a sound and fair judgment, in light of established Community policy, doctrine, and tradition, that should not be overridden by amendment at the 1996 IGC.<sup>461</sup> Exempting professional sports associations from Article 48<sup>462</sup> contradicts the consistently strong protection given to Article 48 by the TEU and the ECJ in furtherance of the common market.<sup>463</sup> Furthermore, creating such an exemption would be premature because the interests asserted by the sporting associations<sup>464</sup> to support the proposed amendment are better served

455. *Id.*

456. *Id.* at 110, ¶ 278; *see supra* notes 164-73 and accompanying text (discussing Art. 85(3) exemption procedure).

457. EC Treaty, *supra* note 11, art. 85, [1991] 1 C.M.L.R. at 626-27.

458. Opinion of Advocate General Lenz, *Bosman*, slip op. at 110, ¶ 278.

459. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

460. Opinion of Advocate General Lenz, *Bosman*, slip op. at 110, ¶ 278. In the Advocate General's opinion, exemption from Article 85 was not appropriate:

[A]n exemption would . . . make no difference to the breach of Article 48, it would make sense for the Commission to take that factor into account in the exemption procedure. A uniform result ought to be aimed at in any case. That would mean that an exemption under Article 85(3) would also have to be ruled out.

*Id.*

461. *See supra* note 32 and accompanying text (discussing TEU's requirement of 1996 IGC to discuss proposals for amendments).

462. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

463. *See supra* note 35 and accompanying text (discussing common market as means for achieving EU goals).

464. *See supra* notes 406-07 and accompanying text (discussing ECJ's acceptance of maintaining sporting equilibrium as legitimate goal); *see also supra* note 410 (discussing ECJ's acceptance of goal of encouraging recruitment and development of young talent as legitimate).

by alternative means that do not offend Article 48.<sup>465</sup> Freedom of movement for workers and the abolition of nationality discrimination are pervasive themes of the EC Treaty.<sup>466</sup> As necessary components of the common market,<sup>467</sup> fundamental freedoms<sup>468</sup> must not be infringed, except in circumstances involving pressing concerns of public interest.<sup>469</sup> Even then, such infringements may result only from utilization of the least restrictive means available.<sup>470</sup>

A. *Article 48's Fundamental Freedoms Merit Vigilant Protection That Should Not be Circumvented by Amendment of the TEU*

The free movement of workers guaranteed by Article 48<sup>471</sup> is central to the framework of the European Union.<sup>472</sup> The absence of an exception to Article 48<sup>473</sup> based on considerations relevant to rules of sporting associations evidences the intent of the TEU<sup>474</sup> to protect freedom of movement for professional athletes.<sup>475</sup> Furthermore, the broad interpretation and correspondingly expansive protection given to Article 48 by the EU

465. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

466. *See supra* notes 80, 87 and accompanying text (discussing freedom of movement, characterized by abolition of nationality discrimination, as Community foundation).

467. *See supra* note 67 and accompanying text (discussing common market as one principal method through which European Union is to accomplish its tasks).

468. *See supra* notes 77-85 and accompanying text (discussing freedom of movement for workers as fundamental freedom).

469. *See supra* note 233 and accompanying text (discussing principle of proportionality, under which limitations on individual's freedom of action must be necessary to public interest).

470. *See Bosman*, slip op. at 20-21, ¶ 104 (holding that transfer rules violate principle of proportionality); *see also supra* notes 231-39 and accompanying text (discussing proportionality).

471. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

472. *See supra* notes 67-72 and accompanying text (discussing common market as principal Community activity).

473. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

474. *See TEU, supra* note 8, pmbl., O.J. C 224/1, at 2-3 (1992), [1992] 1 C.M.L.R. at 726 (setting forth Member States' "respect for . . . fundamental freedoms," determination to promote "the accomplishment of the internal market," and "[reaffirming] their objective to facilitate the free movement of persons.>").

475. *See id.* art. B, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727 (providing for EU objective of promoting economic progress through creation of internal market); EC Treaty, *supra* note 11, art. 7a, ¶ 2, [1992] 1 C.M.L.R. at 592 (defining internal market as area without internal frontiers, in which freedom of movement for persons is ensured); *id.* art. 2, [1992] 1 C.M.L.R. at 588 (describing EU task of promoting "a harmonious and balanced development of economic activities"); *see also supra* notes 309-11,

institutions<sup>476</sup> exposes the impropriety of an amendment creating an exemption from Article 48.

### 1. Freedom of Movement for Workers is a Pervasive Theme of the EC Treaty and is Essential to the Goal of a Common Market

Freedom of movement for persons<sup>477</sup> and, more particularly, for workers,<sup>478</sup> are pervasive themes of the EC Treaty<sup>479</sup> that should not be compromised by amendment.<sup>480</sup> Free movement of persons is one of the primary means of achieving and maintaining the common market, which is a principal goal of the TEU.<sup>481</sup> An amendment permitting obstruction of the free movement of workers would derogate the TEU by preventing the European Union from achieving a common market with respect to an entire segment of the market, the sports industry.<sup>482</sup>

Excepting rules imposed by non-public authorities intended to regulate gainful employment from Article 48 would render the abolition of government-imposed obstacles to freedom of movement meaningless and would simply replace one form of obstruction with equally offensive alternatives.<sup>483</sup> Allowing this continued obstruction of the free movement of workers would

320-22, 391-97 and accompanying text (discussing ECJ holdings in *Walrave, Donà*, and *Bosman*, that sport is subject to Community law when it constitutes economic activity).

476. See *supra* notes 84-98, 141-52, 191-200 (discussing Article 48, Council Regulation No. 1612/68 on freedom of movement for workers, and ECJ's broad interpretation of freedom of movement).

477. EC Treaty, *supra* note 11, art. 3(c), [1991] 1 C.M.L.R. at 588.

478. *Id.* art. 48, [1991] 1 C.M.L.R. at 612.

479. See e.g., *id.* art. 3(c), [1991] 1 C.M.L.R. at 588 (requiring free movement of persons); *id.* art. 7a, ¶ 2, [1991] 1 C.M.L.R. at 592 (describing internal market as "an area . . . in which the free movement of goods, persons, services and capital is ensured"); *id.* arts. 48-51, [1991] 1 C.M.L.R. at 612-13 (providing for free movement of workers); *id.* arts. 52-58, [1991] 1 C.M.L.R. at 613-16 (providing for right of establishment, as sub-part of free movement of persons).

480. See *supra* notes 27-28 and accompanying text (discussing lobbying efforts of football associations for amendment of TEU).

481. See *supra* note 35 and accompanying text (discussing common market as means for achieving Community goals).

482. See EC Treaty, *supra* note 11, art. 2, [1992] 1 C.M.L.R. at 588 ("[B]y establishing a common market [the Community shall] promote . . . a harmonious and balanced development of economic activities . . ."); see also *supra* notes 309-11, 320-22, 391-97 and accompanying text (discussing that sport is subject to Community law when it constitutes economic activity within the meaning of EC Treaty Article 2).

483. See *supra* note 317 and accompanying text (discussing ECJ's application of Article 48 to non-public authorities).

contradict one of the fundamental objectives of the Community<sup>484</sup> and create a risk of inequality in the application of Community law.<sup>485</sup> The objectives of the common market<sup>486</sup> are primarily achieved by establishing and maintaining an internal market,<sup>487</sup> characterized by the abolition of obstacles to freedom of movement for persons throughout the Community.<sup>488</sup> Article 6<sup>489</sup> and the general principle of equal treatment<sup>490</sup> prohibit nationality discrimination within the scope of application of the TEU.<sup>491</sup> Article 48 specifically integrates the general concepts of non-discrimination and the internal market by ensuring freedom of movement for workers,<sup>492</sup> such as professional athletes,<sup>493</sup> within the European Union.<sup>494</sup> Exempting rules of sports associations from Article 48 would eliminate the firmly established principles of freedom of movement<sup>495</sup> and non-discrimination<sup>496</sup> in a significant segment of the internal market,<sup>497</sup> thereby frustrating the goals of the common market.<sup>498</sup>

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484. *Walrave*, [1974] E.C.R. at 1418-19, ¶ 17-18, [1975] 1 C.M.L.R. at 332-33; *Donà*, [1976] E.C.R. at 1341, ¶ 17 (citing *Walrave*), [1976] 2 C.M.L.R. at 587; *Bosman*, slip op. at 17, ¶ 82; see also *supra* note 391 and accompanying text (discussing applicability of Article 48 to rules laid down by sporting associations).

485. See *Walrave*, [1974] E.C.R. at 1419 ¶ 19, [1975] 1 C.M.L.R. at 333 (justifying application of Article 48 beyond public authorities).

486. See *supra* notes 67-72 and accompanying text (discussing EC Treaty objectives enumerated in Article 2).

487. EC Treaty, *supra* note 11, art. 3(c), [1991] 1 C.M.L.R. at 588; see *supra* notes 72-74 and accompanying text (discussing internal market).

488. EC Treaty, *supra* note 11, art. 3(c), [1991] 1 C.M.L.R. at 588.

489. *Id.* art. 6, [1991] 1 C.M.L.R. at 591.

490. See *supra* notes 240-42 and accompanying text (discussing general principle of equal treatment under Community law).

491. See *supra* note 63 and accompanying text (discussing TEU's precedence over national laws inconsistent with TEU).

492. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

493. See *supra* note 309 and accompanying text (discussing *Walrave* holding that sport is subject to Community law insofar as it constitutes economic activity).

494. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

495. *Id.*

496. *Id.* arts. 6, 48, [1992] 1 C.M.L.R. 591, 612.

497. See *supra* notes 406-07 and accompanying text (discussing ECJ's recognition of need to preserve viability of sports leagues in light of their social importance).

498. See *supra* notes 67-72, 486 and accompanying text (discussing common market objectives).

## 2. The Structure of Article 48 Recognizes Specific Exceptions Based on Principles Not Relevant to the Practice of Sport

EC Treaty Article 3 provides for the abolition of obstacles to fundamental freedoms,<sup>499</sup> including freedom of movement for persons,<sup>500</sup> as a means of promoting development of economic activities.<sup>501</sup> Subsequent articles, such as Article 48,<sup>502</sup> provide additional, specific protection for these freedoms.<sup>503</sup> The deliberate structure of the EC Treaty in this regard illustrates the EC Treaty's intended application to all economic activities between Member States, except as specifically provided for.<sup>504</sup>

The only exceptions recognized by Article 48<sup>505</sup> deal with protecting the general interests of a Member State or other public health, safety, or policy concerns specifically relevant to the individual whose freedom of movement is affected.<sup>506</sup> The inference from the absence of special provisions for the practice of sport is that the prerogative of a sporting association to regulate itself at the expense of EU citizens<sup>507</sup> does not rise to a level deserving exemption from Article 48.<sup>508</sup> Sporting association interests do not resemble interests of the general welfare,<sup>509</sup> which are specifically given overriding importance by the exceptions contained in Article 48.<sup>510</sup>

499. See *supra* notes 43, 53 (discussing EU goal of establishing internal market).

500. See *supra* notes 77-85 and accompanying text (discussing fundamental freedoms, including freedom of movement for persons).

501. EC Treaty, *supra* note 11, art. 3, [1991] 1 C.M.L.R. at 588-89.

502. *Id.* art. 48, [1991] 1 C.M.L.R. at 612.

503. See *id.* arts. 48-51, 52-58, 59-66, 67-73h, [1991] 1 C.M.L.R. at 612-13, 613-16, 616-18, 618-23 (providing for free movement of workers, right of establishment, freedom to provide services, and free movement of capital and payments).

504. See *supra* notes 95-98 and accompanying text (discussing specific exceptions enumerated in Article 48(3)).

505. *Id.* art. 48(3), [1991] 1 C.M.L.R. at 612.

506. See *supra* notes 95-98, 200 (discussing exceptions to Article 48, and ECJ's narrow interpretation of those exceptions).

507. See *supra* note 46 and accompanying text (discussing EU citizenship).

508. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

509. See *supra* notes 95-98 and accompanying text (discussing Article 48's exceptions for public policy, security, or health reasons, and exemption for jobs in public service).

510. EC Treaty, *supra* note 11, art. 48(3), [1991] 1 C.M.L.R. at 612; see also *supra* notes 95-98 and accompanying text (discussing Article 48(3)).

### 3. Amending the TEU in Favor of Sports Associations Would Be Contrary to the Rigid Protection and Broad Scope Given to Article 48 by EU Institutions

The ECJ's deferential treatment<sup>511</sup> of Article 48 and the restrictive approach taken toward application of Article 48's exceptions<sup>512</sup> strongly counsel against creating a wholesale exemption from the application of Article 48<sup>513</sup> for rules laid down by sporting associations. The ECJ, as the final authority on interpretation of TEU provisions,<sup>514</sup> ruled that because the terms of Article 48 define a fundamental freedom,<sup>515</sup> they must be interpreted broadly.<sup>516</sup> Conversely, because the exceptions contained in Article 48(3) impose limitations on a fundamental freedom, the Court interprets them narrowly.<sup>517</sup> The ECJ's rigid protection of freedom of movement for workers,<sup>518</sup> particularly in the context of sport,<sup>519</sup> illustrates Article 48's significance to the European Union, suggesting that an amendment to circumvent Article 48 is improper.<sup>520</sup>

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511. See *supra* notes 193-98 and accompanying text (describing ECJ's broad application of Article 48).

512. See *supra* notes 199-200 and accompanying text (discussing ECJ's narrow interpretation of Article 48's exceptions).

513. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

514. See EC Treaty, *supra* note 11, art. 164, [1991] 1 C.M.L.R. at 684 ("The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."); see also *supra* note 178 (discussing role of ECJ).

515. See *supra* notes 193-94 and accompanying text (discussing Community meaning of term "worker").

516. See *Lawrie-Blum v. Land Baden-Württemberg*, Case 66/85, [1986] E.C.R. 2121, 2144 ¶ 16. [1987] 3 C.M.L.R. 389, 414 (interpreting Article 48 broadly); *Levin v. Staatssecretaris van Justitie*, Case 53/81, [1982] E.C.R. 1035, 1049 ¶ 9, [1982] 2 C.M.L.R. 467 (same); see also *supra* note 197 and accompanying text (discussing ECJ's broad interpretation of Article 48).

517. See *supra* note 200 and accompanying text (illustrating ECJ's limited interpretation of Article 48(3)).

518. See *supra* notes 193-200 and accompanying text (discussing ECJ's interpretation of Article 48 in ways that promote common market).

519. See *supra* notes 303-23, 399-431 and accompanying text (discussing ECJ's holdings in *Walrave, Dona*, and *Bosman*, against sporting associations under Article 48).

520. See *supra* notes 27-29 and accompanying text (discussing lobbying efforts of football associations for TEU amendment).

B. *Amending the TEU to Perpetuate the Transfer Rules or the Rules on Foreign Players is Unjustifiable and Unnecessary because the Objectives Offered in Support of Such an Amendment are Better Served by Means that do not Obstruct Freedom of Movement*

An amendment in favor of the transfer system or the rules on foreign players would legalize rules that lack legitimate objectives.<sup>521</sup> Even if an appropriate relationship did exist between the ends asserted by the sporting associations and the transfer system or the foreign player rules, an amendment would still be unnecessary because the sporting associations could utilize alternative methods of achieving those same objectives without obstructing freedom of movement.<sup>522</sup> Accordingly, allowing sporting associations to obstruct freedom of movement is unnecessary and unjustifiable.

1. *The Potentially Legitimate Objectives Asserted in Favor of Rules on Foreign Players Are Already Provided for by the Existing Treaty Provisions*

A TEU amendment exempting sporting associations from Article 48 based on the cultural or sporting aspects of sporting activities is not warranted because such aspects are already protected by Article 48. Article 48 does not apply to the practice of sport in situations of purely sporting interest,<sup>523</sup> but only to activities in the nature of gainful employment or remunerated services.<sup>524</sup> The ECJ has recognized that the sporting interests asserted in support of rules on foreign players are beyond the scope of Article 48.<sup>525</sup> When association rules discriminate with respect to an economic activity, however, Article 48 intervenes to

521. See *supra* notes 405-16, 426-31 and accompanying text (discussing *Bosman* decision, which held that transfer system and rules on foreign players were not justified by public interest concerns).

522. See *supra* notes 415-16 and accompanying text (discussing existence of less restrictive alternatives to transfer system).

523. See *Walrave*, [1974] E.C.R. at 1418, [1975] 1 C.M.L.R. at 332 (restricting application of Article 48 to rules of economic nature); *Donà*, [1976] E.C.R. at 1341, ¶ 19, [1976] 2 C.M.L.R. 587 (citing *Walrave*).

524. EC Treaty, *supra* note 11, art. 48, [1991] 1 C.M.L.R. at 612.

525. *Donà*, [1976] E.C.R. at 1340, ¶ 14, [1976] 2 C.M.L.R. at 587. In *Donà*, the ECJ specified that rules excluding foreign players from certain matches of sporting interest only, such as those between national teams, are not prohibited by Article 48. *Id.*



promote the general principle of equal treatment<sup>526</sup> and the specific EU goal of eliminating nationality discrimination within the common market.<sup>527</sup>

The argument for special treatment of professional sport as a mixed economic and cultural activity lacks merit because the practice of sport is not confined within Member States, but extends its cultural and social sporting aspects to all Member States.<sup>528</sup> Permitting barriers between Member States in any market sector contradicts the Community's task of promoting economic and social cohesion among Member States.<sup>529</sup> In contrast, the evolution of the practice of sport on a Community-wide basis would directly promote economic and social unity by eliminating barriers to inter-Member State club development and recruitment.

## 2. No Relationship Exists Between the Transfer System and the Objectives Asserted in Support of that System

The ECJ conceded two potentially legitimate goals of the transfer system,<sup>530</sup> but found that the transfer system was an inadequate means of achieving those objectives.<sup>531</sup> Because transfer fees are calculated as a function of the player's earnings,<sup>532</sup> and because bigger clubs usually pay higher wages,<sup>533</sup> smaller clubs rarely will be in a position to acquire good players from the big clubs. The transfer system perpetuates this disparity by widening the gap between richer and poorer clubs, thereby distorting the sporting equilibrium more than stabilizing it. Furthermore, the transfer system does not encourage recruitment or training of young talent because receipt of a transfer fee for

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526. See *supra* notes 240-42 (discussing principle of equal treatment, which prohibits treating similar situations differently, and different situation similarly, unless objectively justified).

527. See *supra* notes 87-89 and accompanying text (discussing principle of non-discrimination on grounds of nationality).

528. See *supra* notes 406-07, 429, 497 (discussing importance of sport in European Union).

529. EC Treaty, *supra* note 11, art. 2, [1991] 1 C.M.L.R. at 588.

530. See *supra* note 407 and accompanying text (discussing ECJ's conclusions that maintaining sporting equilibrium and encouraging recruitment and training of young talent are legitimate goals).

531. See *Bosman*, slip op. at 22, ¶ 14.

532. See *supra* notes 282, 294 and accompanying text (discussing calculation of transfer fees).

533. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 90, ¶ 224.

any given player is uncertain, and because transfer fees are not related to the actual costs of recruitment and development.<sup>534</sup>

Once it is established that no relationship exists between the transfer system and the legitimate goals offered in its support, the argument in favor of amending the TEU becomes circular. Essentially, creating an exemption from Article 48<sup>535</sup> for sporting associations would allow a restriction on freedom of movement to stand merely for the sake of restricting freedom of movement.<sup>536</sup> Member State governments at the 1996 IGC<sup>537</sup> should be wary of the deceptive logic in favor of an amendment and should examine any purportedly legitimate objectives offered in support of the transfer system with this argument in mind.<sup>538</sup>

### 3. The True Goals of the Rules on Transfers and Foreign Players Are Not Legitimate

The tenuous relationship between the transfer system and public interest concerns<sup>539</sup> illustrates that the true objective of those seeking to preserve the transfer system, despite the *Bosman* judgment,<sup>540</sup> is to maintain the status quo.<sup>541</sup> European football under the transfer system is feudalistic in nature, tying players to

534. *Bosman*, slip op. at 21, ¶ 108.

535. See *supra* notes 27-29 and accompanying text (discussing football association lobbying efforts for TEU amendment).

536. See *Bosman*, slip op. at 22, ¶ 113.

[T]he argument that the rules in question are necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players cannot be accepted, since it seeks to justify the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.

*Id.*

537. See *supra* notes 32-33, 64-66 (discussing IGCs, including IGC scheduled to begin at end of March 1996).

538. See *Bosman*, slip op. at 22, ¶ 112 (dismissing arguments that eliminating transfer system in European Union would cause demise of worldwide organization of football, because different systems have existed in different countries in past); see also *id.* at 22, ¶ 113 (dismissing as circular argument that transfer system is necessary to compensate clubs for recruitment expenses).

539. See *supra* notes 530-34 and accompanying text (describing absence of relationship between transfer system and legitimate objectives).

540. *Bosman* (Eur. Ct. J. Dec. 15, 1995) (not yet reported).

541. See *supra* note 416 (describing mutually codependent economic positions of sports teams). Although the unique nature of competition in a sports market suggests that the necessary balance between clubs occurs almost automatically, "[e]xperience shows . . . that club managements do not always calculate that way, but may at times

clubs like medieval serfs.<sup>542</sup> In effect, the freedom of movement guaranteed to players by Article 48 is bought and sold like a commodity on the open market, without any requirement of player consent.<sup>543</sup> While it may be logical from an economic point of view for the clubs benefiting from such a system to attempt to entrench themselves in their positions of control, these efforts are not consistent with the purposes underlying the EC Treaty<sup>544</sup> or its reform.<sup>545</sup>

In addition to offending Article 48 through the obstruction of freedom of movement for workers,<sup>546</sup> the transfer system violates Article 85(1)<sup>547</sup> by distorting competition within the common market.<sup>548</sup> The transfer system constitutes an agreement sharing sources of supply,<sup>549</sup> thereby restricting the opportunities for clubs to compete with each other in recruitment.<sup>550</sup> Member State governments should reject proposals for an amendment to the TEU, because the anti-competitive effects of the transfer system reveal its self-serving nature.<sup>551</sup> The level of economic control exercised by sporting associations under the transfer system restricts competition and freedom of movement to an extent not merely incidental to attempting to promote a

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allow themselves to be led by considerations other than purely sporting or economic ones." Opinion of Advocate General Lenz, *Bosman*, slip op. at 88-89, ¶ 221.

542. *Court Advocate-General Puts Boot in Football's Transfer System*, EUR. SOC. POL'Y, Oct. 1, 1995, available in WESTLAW, PTS-NEWS Database; see also Nick Matthews, *A Game of Two Halves: Moving the Goal Posts*, NEW STATESMAN & SOC'Y, Dec. 1, 1995 at 26 ("Football clubs have always treated players like slaves . . .").

543. See *supra* note 284 and accompanying text (discussing free transfer period).

544. See *supra* note 67-72 and accompanying text (discussing Community objectives found in Article 2).

545. See *supra* note 33 and accompanying text (discussing 1996 IGC).

546. See *supra* note 398 and accompanying text (discussing and quoting ECJ's holding in *Bosman*, that transfer system illegally obstructs freedom of movement for workers).

547. EC Treaty, *supra* note 11, art. 85(1), [1991] 1 C.M.L.R. at 62-27 (prohibiting agreements and practices that restrict common market competition).

548. See *supra* note 451 and accompanying text (discussing Advocate General Lenz's conclusion that transfer system violates Article 85(1)).

549. EC Treaty, *supra* note 11, art. 85(1)(c), [1991] 1 C.M.L.R. at 627 (such an agreement falls within Article 85(1)).

550. See *supra* notes 453-55 and accompanying text (discussing Advocate General's analysis).

551. See *supra* notes 27-29 (discussing possibility of proposals for TEU amendment).

legitimate public interest.<sup>552</sup>

#### 4. Amending the TEU is Unnecessary Because Alternative Means Exist to Finance and Maintain Competitive Balance in Sports Without Offending Article 48

While, in principle, there is nothing offensive about sports associations exercising their autonomy by implementing rules to regulate their activities, those rules may not legally obstruct a fundamental freedom of the European Union.<sup>553</sup> Even if legitimate objectives supported the transfer system,<sup>554</sup> its rules would only withstand judicial scrutiny if they were necessary to achieve those legitimate objectives.<sup>555</sup> These criteria are not satisfied when there are adequate alternative means of protecting the association's interest without infringing on fundamental freedoms.

The possibility of transfer systems continuing in non-Member States belonging to UEFA or FIFA does not undermine the feasibility of alternative systems. To the contrary, this possibility corresponds to the logic of the internal market<sup>556</sup> by placing all Member States on equal footing regarding transfers within the European Union and transfers from non-Member States.<sup>557</sup> In fact, some Member States<sup>558</sup> already operate under systems different from the FIFA system for international transfers<sup>559</sup> without disastrous results.<sup>560</sup>

In order to preserve their own interests,<sup>561</sup> the associations should begin looking into alternative systems as quickly as possi-

552. See *supra* note 233 and accompanying text (discussing principle of proportionality).

553. See *supra* note 239 and accompanying text (discussing principle of proportionality with respect to fundamental freedoms).

554. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 87, ¶ 216. In such circumstances, "only an interest of the association which is of paramount importance could justify a restriction on freedom of movement." *Id.* (citation omitted).

555. See *supra* notes 236-37 and accompanying text (discussing requirement of least restrictive means in cases of conflict with fundamental freedoms).

556. See *supra* notes 53, 74 and accompanying text (discussing internal market).

557. Opinion of Advocate General Lenz, *Bosman*, slip op. at 97-98, ¶ 246.

558. *Bosman*, slip op. at 7, ¶ 22-23 (discussing transfer system in France and Spain).

559. See *supra* notes 290-91 and accompanying text (describing FIFA regulations).

560. *Bosman*, slip op. at 7, ¶ 22-23.

561. See *supra* note 407 and accompanying text (discussing ECJ's conclusions that maintaining sporting equilibrium and encouraging recruitment and training of young talent are legitimate goals).

ble.<sup>562</sup> After *Bosman*, professional athletes in the European Union are essentially free agents,<sup>563</sup> with significantly more bargaining power than they have had in the past.<sup>564</sup> Once player unions organize and realize the full potential of their bargaining strength, the clubs and associations will be forced to negotiate with them. To ease the transition into the collective bargaining process, the associations should initiate a system likely to be acceptable to all parties involved.

One possible alternative is a revenue-sharing system, whereby clubs contribute a certain percentage of their income to the association, to be redistributed among its clubs.<sup>565</sup> Revenue-sharing systems preserve the competitive and financial balance<sup>566</sup> between clubs by ensuring the financial viability of clubs, including the smaller clubs, as long as the association remains viable. The association will remain viable as long as the dues are not too large in relation to the club's overall income.<sup>567</sup> By not requiring clubs to contribute too much money, the incentive to perform well is preserved, which in turn maintains spectator interest.<sup>568</sup> That incentive satisfies the public's and the associations' interests in encouraging the recruitment and development of talent.

Another feasible alternative is to establish a farm system<sup>569</sup> similar to that of American baseball.<sup>570</sup> The big, high profile clubs could sponsor the smaller clubs with the money tradition-

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562. Opinion of Advocate General Lenz, *Bosman*, slip op. at 89, ¶ 223. "[I]t is of fundamental importance to share income out between the clubs in a reasonable manner." *Id.*

563. See *supra* note 4 and accompanying text (discussing free agency systems, under which professional athletes may freely change sports teams after their contracts expire).

564. See *supra* note 4 and accompanying text (discussing free agency, which gives players control over where they play).

565. See *supra* note 416 and accompanying text (discussing Advocate General Lenz's description of revenue sharing system).

566. See *supra* note 406-07 and accompanying text (discussing legitimate goal of maintaining sporting equilibrium).

567. See Opinion of Advocate General Lenz, *Bosman*, slip op. at 90-91, ¶ 226 (discussing possibility of collective wage agreements).

568. See *supra* note 406-07 and accompanying text (discussing legitimate goal of maintaining sporting equilibrium).

569. See Katz, *supra* note 1, at 377 n.46. The system is a "farm" system in that the clubs are "growing, developing, and training" new talent. *Id.*

570. See *id.* at 377-78 (discussing evolution of Minor League Baseball in United States).

ally allocated to transfer fees.<sup>571</sup> The smaller clubs would, in turn, recruit and develop talent<sup>572</sup> to compete in the farm league with hopes of moving on to the higher division clubs. Introducing this system in conjunction with an income-sharing plan would ensure competitive balance among clubs to an even greater extent.<sup>573</sup> Income contributions could be placed in a fund toward maintenance of a competitive farm system. This would preclude any one big club from dominating the farm clubs and monopolizing the flow of new talent. Another possibility is the institution of an amateur draft<sup>574</sup> in conjunction with the farm league to maintain an equal distribution of talent among the smaller clubs, thereby contributing to the sporting equilibrium.

Another alternative is to simply sign new players to longer contracts. For example, instead of concluding a two-year contract and then demanding a transfer fee, clubs could issue four-year contracts and negotiate with other clubs after two years to buy-out the balance of the contract. The former club has a legitimate interest in the contract, which they have a right to be compensated for, thereby achieving a result equivalent to that of the transfer system. A contractual buy-out would not offend Article 48 because the player's freedom of movement is limited by virtue of his own bargained-for contractual obligations as opposed to restrictions unilaterally imposed by the relevant association.<sup>575</sup>

These proposed alternatives are certain to be compatible with Article 48 because whatever system is finally employed will necessarily be refined through collective bargaining between players and clubs.<sup>576</sup> The relative bargaining positions of players

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571. See *supra* notes 9, 276-88 and accompanying text (discussing transfer system, under which players whose contracts expire may not be employed by another club unless transfer fee is exchanged).

572. See *supra* note 410 and accompanying text (discussing ECJ's acceptance of encouraging recruitment and training of talent as legitimate goal).

573. See *supra* notes 406-07 and accompanying text (discussing ECJ's acceptance of maintenance of competitive and financial balance between clubs as legitimate goal).

574. Katz, *supra* note 1, at 378 (discussing development of amateur draft in Major League Baseball after it became clear that farm system alone was not adequately maintaining competitive balance).

575. See *supra* notes 399-416 and accompanying text (discussing *Bosman*, which held that transfer rules violate Article 48).

576. See *supra* notes 561-62 and accompanying text (discussing need for system to maintain sporting equilibrium between clubs and encourage recruitment and development of new talent).

and clubs after *Bosman*<sup>577</sup> necessitates some form of collective agreement.<sup>578</sup> Collective bargaining is beneficial<sup>579</sup> and consistent with TEU objectives<sup>580</sup> because it shifts control of the player's freedom of movement from the clubs to the players, in contrast to the unilateral restrictions imposed under the transfer system.<sup>581</sup> Similarly, collective bargaining avoids the direct effect of Article 48<sup>582</sup> that attaches to unilaterally imposed rules aimed at regulating employment.<sup>583</sup>

Finally, any agreement should be negotiated in accordance with the conditions of Article 85(3)<sup>584</sup> for an exemption from EC competition rules.<sup>585</sup> The beneficial economic effects of collective bargaining are recognized in the United States by the non-statutory labor exemption.<sup>586</sup> Considering these beneficial economic effects and considering that continued competition between clubs presupposes the existence of an effective system to maintain the sporting equilibrium,<sup>587</sup> it would be appropriate for the Commission to grant an exemption to an agreement that promotes these goals.<sup>588</sup>

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577. See *supra* notes 563-64 and accompanying text (describing bargaining position of players, as free agents, after *Bosman*).

578. See *supra* notes 562-63 and accompanying text (indicating that adopting alternatives to transfer system is in club's own interests).

579. See *supra* notes 327-33 and accompanying text (discussing non-statutory labor exemption in U.S. antitrust law, which protects collective agreements from antitrust scrutiny if their beneficial effects on labor are greater than their anti-competitive effects).

580. See *supra* note 43 and accompanying text (describing recurrent theme in Community law of eliminating economic barriers between Member States).

581. See *supra* notes 276-91 and accompanying text (describing transfer system).

582. See *Commission v. France*, Case 167/73, [1974] E.C.R. 359, [1974] 2 C.M.L.R. 83 (finding direct effect of Article 48); see also *supra* note 391 and accompanying text (discussing direct effect of Article 48).

583. See *supra* note 391 and accompanying text (discussing application of Article 48 to rules laid down by sporting associations).

584. EC Treaty, *supra* note 11, art. 85(3), [1991] 1 C.M.L.R. at 627.

585. See *supra* notes 165-73 and accompanying text (discussing exemption from EC competition rules under Article 85(3)).

586. See *supra* notes 329-33 and accompanying text (describing non-statutory labor exemption to U.S. antitrust law, and common application of that exemption to collective bargaining agreements in sports).

587. See *supra* note 406-07 and accompanying text (discussing need for competitive and financial balance among clubs in sporting leagues).

588. See *supra* notes 165-71 and accompanying text (describing Commission's exclusive role in granting exemptions under Article 85(3)).

*CONCLUSION*

Consistent with the fundamental importance of Article 48 in the framework of the common market and the availability of workable alternatives to the transfer system, the TEU should not be amended to provide an exemption for sports associations under Article 48. Amending the TEU to perpetuate the transfer rules or the rules on foreign players would create a dangerous precedent, threatening the very existence of the common market by allowing an entire segment of the internal market to disregard the fundamental principles of Community law designed to eliminate economic barriers between Member States. Consequently, Member States should not raise the issue of amending the TEU to exempt sports associations from Article 48 for discussion at the 1996 IGC. If the amendment is formally proposed, the IGC should reject it entirely, to avoid creating a loophole for management-dominated industries, such as professional sports. The inevitable result of such a loophole would be the entrenchment of industry management in positions of control over the movement of workers within the European Union merely for the sake of management convenience in avoiding compliance with EC laws designed to protect the common market.