THE INTERNATIONAL ENGAGEMENT OF PROFESSIONAL PLAYERS: ISSUES OF PRIVATE INTERNATIONAL LAW AND EUROPEAN COMMUNITY LAW

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I. OVERVIEW

1. Introductiou

1. The legal as well as economic significance of the international engagement of players affiliated with a national federation club by another club belonging to that federation has recently come to light. There is no need to consult a specialised newspaper or periodicals library to realise that the international recruitment of players is the order of the day at a time when negotiations are held in order to conclude, renew or terminate employment contracts between professional players and sporting clubs. Cases come to mind such as that of *Ronaldo* or *Lizarazu*[1] in football, or *Olssen*[2] in basketball. In any event, the *leading case*, without a doubt, has been that of *Bosman*. Indeed, things have not been the same in the world of sport since 15 December 1995, when the *Bosman* judgement revolutionised the structures of the football market in particular, and of sport in general. The European Court of Justice[3] declared that article 48 of the Treaty Establishing the European Community[4] 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 be employed by a club of another Member State unless the latter club has paid to the former a transfer, training or development fee; and under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States.[5]

Although the ECJ so far has only ruled on football, the scope of the *Bosman* judgment generally extends to any professional sport.[6] It will shortly have the chance to State its opinion on three questions that have been referred for a preliminary ruling.

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1. It is interesting to recall the controversy triggered in May/June 1997 when Ronaldo (then a player of Barcelona FC) was signed up by Milan's Inter. In a similar way to the *Ronaldo* case, consideration was also given to whether it was valid for *Athletic de Bilbao* player Lizarazu to be signed up by Bayern. See, in this connection, *http://www.iusport.es/casos/ronaldo.htm.*

2. See the judgment of 14 October 1996 by Social Affairs Court no. 2 in Santander (*G.J.C.E.*, B-117, 1996, p. 55 *et seq.*) in a case of discrimination for reasons of nationality.

3. Hereinafter, ECJ.

4. Hereinafter, EEC Treaty.

5. ECJ Judgment of 15 December 1995, *Bosman* case, C-415/93, *Rec.* 1995, p. I/4921 *et seq.*

6. This was stressed by the Commission (Marcelino Oreja's reply to written question E-2773/95, OJ C 137, 8 May 1996, p. 3) and the doctrine (see, especially, A. BAÑEGIL ESPINOSA, "La aplicación del Derecho comunitario europeo al deporte después de la sentencia del Tribunal de Justicia de la CE sobre el caso Bosman", *Actualidad Jurídica Aranzadi,* no. 228, II January 1996, p. 6).

These relate to the application of community law to judo[7] and basketball.[8] As a result, it should be made clear that the thoughts contained in this paper refer to sport in general, although they are based preferably on cases taken from football since this sport has been most illustrative in raising such issues.

2. This international mobility of players raises different problems that deserve to be considered from a joint perspective based on private international law and community law. Indeed, from this legal point of view, when he moves from a national club to a foreign one – or vice-versa, as occurs more often – a professional player gives rise to an extremely complex situation owing to the existence of several different angles from which it should be approached: federative rules that aspire to regulate these cases exclusively, situations connected with several types of rules, applicability of community law...

Bearing in mind the above considerations, this article will analyse the following points in connection with the engagement of professional players: description of contractual relations, determination of the applicable law and hindrance of the free movement of community workers, as well as the possible effects on the market of restrictive practices.

2. Employment Natnre of the Contractual Relationship: Identification of the Player as Weaker Party

3. There is no doubt in the domestic sphere that the contractual relationship between the professional player and the sporting entity is one of employee-employer. Indeed, reservations had been expressed as to the exercise of jurisdiction this field, namely the lack of jurisdictional authority, since labour regulations are expressly excluded from this sector pursuant to sporting regulations.[9] This distortion, caused by the federation regulations as a parallel set of rules, continues to exist today owing to the exclusionist

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7. Application of articles 59–66, 85 and 86 of the EEC Treaty to the *Deliège* cases, C-51/96 (OJ C 133, 4 May 1996, p. 12) and C-191/97 (OJ C-21, 12 July 1997, p. 18) on preliminary rulings referred to the Court of First Instance of Namur (Belgium). For an approach to the content of the *Deliège* cases, see N. PARISIS, M. FERNÁNDEZ SALAS, "Le sportif individuel au regard de l'arrêt Bosman: les ordonnances Deliège", *R.M.U.E.*, 1996-1, p. 135 *et seq.*

8. Application of articles 6, 48, 85 and 86 of the EEC Treaty, *Lehtonen* case, C-176/96 (*OJ C* 197, 6 July 1996), preliminary ruling referred to the Court of First Instance of Brussels.

9. Analysing the arguments of case law pronounced at the time, see T. SALA FRANCO, *El trabajo de los deportistas profesionales*, Madrid, Mezquita, 1983, pp. 10–11.

aim of federative regulations.[10] This situation changed in Spain following the recognition that the contractual relationship between clubs and footballers – and, by extension, professional sportsmen[11] – was one of employment and that, therefore, labour law should be applicable.[12] The basic premise on which case law is based is the establishment of the relationship between a professional player and his employer as one of employment, since the former meets the requirements for being considered an employee. Therefore, the related exclusions established in the statutes of the sporting Federations are invalid, "since the contracts must be classified in accordance with the nature of the rights and obligations deriving from them", and any clauses in which the player waives, whether expressly or tacitly, his right to seek a court settlement are likewise declared null and void. In actual fact, the judgment, the doctrine of which will be contained and maintained in most subsequent case law[13], accepts the position of the scientific doctrine that had advocated a change of direction in case law.[14]

The classification of the legal relationship between a sporting club and the professional player as one of employment was taken up by the legislator. Indeed, the Physical Culture, Sport and Professional Sport Act[15] clearly establishes that "the labour relations of professional players and of managers and trainers shall be regulated in accordance with the legislation in force".[16] The labour relations of professional players, owing to their special nature, were later regulated by Royal Decree 318/1981[17], subsequently abrogated by RD 1006/85[18], article 19 of which

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10. See *infra* the section on the free movement of workers, which clearly states, in relation to the *Bosman* case, that federations have a set of regulations that are aimed at regulating exclusively the contractual relations between professional players and sporting bodies.

11. This problem has still been found in some sports such as basketball. See *infra* section III.1 the *Olssen* case.

12. See the judgment of the TC of 24 June 1971, which marked a turning point in Spanish case law with respect to labour affairs.

13. See T. SALA FRANCO (El trabajo de los deportistas profesionales, *op. cit.*, pp. 11–12), which contains the subsequent case law displaying the new approach of Spanish labour courts.

14. In this connection see the abundant doctrine cited by R. ROQUETA BUJ, *El trabajo de los deportistas profesionales*, Valencia, Tirant lo Blanch, 1996, p. 26, note 7. A. V. SEMPERE NAVARRO, in the preface to the monograph by M. CARDENAL CARRO (*Deporte y Derecho. Las relaciones laborales en el deporte profesional*, Murcia, Universidad de Murcia, Eusko Jaurlaritza, Bilbao Bizkaia Kutxa, 1996, p. 18) attributes the change of direction of case law to the article by M. ALONSO OLEA ("Derecho y Deporte", *CPS*, n. 47, 1960), which was both triggered and directly inspired this change of viewpoint.

15. Ley 13/1980, 31 March, *BOE*, 12 April.

16. See article 8.1 of the aforesaid.

17. Royal Decree 318/1981, 5 February, establishing regulations for the special labour relations of professional players, *BOE*, 6 March 1981.

18. Royal Decree 1006/1985, 26 June, regulating the labour relations of professional players, *BOE*, 27 June 1985, errors corrected in *BOE*, 28 June and *BOE*, 4 July 1985.

establishes the jurisdiction of labour tribunals with respect to "disputes arising between professional players and their clubs or sporting bodies, as a result of the employment contract". Thus, any complaint deriving from a relationship in which the professional player is working for a sporting body is regarded as pertaining to employment and, therefore, must be settled by the courts, as a mandatory requirement of the effective protection of the judges and courts, to which all persons in our state are entitled according to article 24 of the Spanish Constitution (*CE*).

4. However, insofar as these cases have an international dimension, the employment relationship arising from a contract between a professional player and a sporting body does not necessarily have to be based on the concepts of our legal system. Indeed, this relationship is classified according to the legislation – and related case law – of which we may avail ourselves: The 1968 Brussels Convention[19], *LOPJ*[20], RD 1006/1985, the 1980 Rome Convention[21] or community law. We can disclose that in all these cases the contractual relationship between the professional player and the sporting club is one of employment.

5. Jurisdiction of the Spanish courts will be carried out by applying the BC[22], or the *LOPJ*, in accordance with the relevant applicability criteria.

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19. Hereinafter, Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (*OJ* L 299, 31 December 1972), ratified by the 6 founder states of the EEC. Later amended by successive accessions of new Member States. For the so-called consolidated version, or amended text, which has no binding force but contains and integrates the different amendments resulting from the 1968 BC, see *OJ* C 189, 28 July 1990, text reflected in *Legislación básica de Derecho internacional privado*, A. BORRÁS RODRÍGUEZ et al., p. 116 et seq. See also the official report by *Almeida Cruz, Desantes Real and Jenard*, *OJ* C 189, 28 July 1990. It should also be borne in mind that a new Accession Convention was signed to incorporate Austria, Finland and Sweden to the BC, signed on 29 November 1996 in Brussels (OJ C 15, 15 January 1997).

20. *Ley Orgánica* 6/1985 (1 July) *del Poder Judicial*, *BOE* 2 July 1985; corrected in *BOE*, 4 November 1985.

21. Hereinafter, RC. Convention on the law applicable to contractual obligations, made in Rome on 19 June 1989, *BOE*, 19 July 1993, corrected in *BOE*, 9 August 1993.

22. The application of the BC does not depend on the nature of the court or tribunal hearing a case. The bulk of Spanish jurisdiction regarding individual employment contracts in Spain is governed by the BC, whenever this is applicable, even though in Spain these matters are dealt with by the labour courts. See article 1 BC and ECJ Judgment of 21 April 1993, *Sonntag v. Waidmann*, C-172/91, Rec. 1993, p. I/1963 et seq.

As for the BC[23], in the *Shenavaï* case[24] the ECJ declared that the criterion for conferring jurisdiction, specifically applied to individual employment contracts, derives from the circumstance that these contracts display certain specific features in that they create a lasting relationship which places the worker within the framework of a certain organisation of the affairs of the undertaking or the employer, and in the sense that they are located in the place where the activities are carried out, the place that determines the application of rules of mandatory law and of collective bargaining agreements[25], constituting an autonomous concept that would apply to a contract between professional player and sporting club. Thus, the Spanish courts, pursuant to article 2 of the BC, will have jurisdiction in cases in which the plaintiff is domiciled in Spain or – when the plaintiff is domiciled in another contracting state – pursuant to article 5.1 of the BC[26], when the plaintiff habitually carries out his work in Spain.[27]

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23. It is also worth considering the Lugano Convention of 16 September 1988 relating to jurisdiction and the enforcement of judgments in civil and commercial matters (*BOE*, 20 October 1994, errors corrected in *BOE*, 10 January 1995), which is very similar to the BC, to which it owes its content. See A. BORRÁS RODRÍGUEZ, "Competencia judicial internacional y ejecución de resoluciones judiciales en materia civil y mercantil: del Convenio de Bruselas de 27 de septiembre de 1968 al Convenio de Lugano de 16 de septiembre de 1988", Noticias CEE, n. 50, 1989, pp. 92–103. The *Jenard/Möller* report, *OJ* C 189, 28 July 1990, p. 73, on the Lugano Convention, establishes that an employment contract is one which entails a link of dependence of the worker on the employer, availing itself of the case law of the ECJ established thitherto in developing article 5.1 BC.

24. See ECJ Judgment, 15 January 1987, *Shenavaï v. Kreischer*, n. 266/85, Rec. 1987, p. 239 *et seq.*, point 16 of grounds.

25. As J. L. IRIARTE ANGEL points out ("El Convenio de Bruselas de 27 de septiembre de 1968 y la competencia judicial internacional respecto de los litigios derivados del contrato individual de trabajo", *Relaciones Laborales*, 1996, I, p. 1322), two notes emerge from the building of case law on this autonomous concept: the performance of work for an employer and the worker's dependence on the employer. For his part, H. GAUDEMET-TALLON (*Compétence internationale, reconnaissance et exécution des jugements en Europe*, 2nd ed., Paris, 1996, p. 123) states that according to the new wording of article 5.1 BC introduced by the San Sebastián Convention, it should be a contract of employment in the strict sense where there is a relationship of subordination of worker to employer.

26. The ECJ introduced a forum specifically applicable to individual employment contracts based on the characteristic performance of the contract, that is, the place where the work is carried out, in order to protect the worker (ECJ Judgment, 26 May 1982, *Ivenel v. Schwab*, 133/81, *Rec.* 1982, p. 1891 *et seq.*). Later confirmed by ECJ Judgment on 15 January 1987, *Shenavaï v. Kreischer*, 266/85, *Rec.* 1987, p. 239 *et seq.* Subsequently, the ECJ, in a judgment of 13 July 1993 (*Mulox IBC Limited v. H. Geels*, C-125/92, *Rec.* 1993, p. I/4075 *et seq.*), established that place is where or from which the worker mainly performs his duties towards the employer. The amendment was introduced into the regulatory text by means of the 1989 Accession Convention.

27. As regards the latter element, it should be borne in mind that owing to the very nature of the work and the characteristics of the environment in question, the work is habitually performed at the site where the sporting association has its headquarters (where the sports and training facilities and infrastructure are,

Furthermore, when a Spanish court hears a case arising from a claim deriving from a contract between a professional player and a sporting association pursuant to the *LOPJ*, that case will be classified under Spanish law, through the concept established in article 1 of RD 1006/1985, which will determine whether the relationship is one of employment[28]. The *LOPJ* will have a very narrow margin of application, compared to the scope and applicability criteria of the BC. The autonomous system of international jurisdiction in this field, regulated by article 25 *LOPJ*[29], will only come into the scene when, first, the defendant is not domiciled in any of the Member States of the BC or LC and, second, the services have been rendered in Spain or the contract has been concluded on Spanish territory[30].

6. As for establishing which is the applicable law, the notion of individual employment contract is not defined in the RC in such a way that we shonld have

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where most of the competitive or sporting events are played), even though some of the sporting activities may be carried out abroad, with varying frequency. The criterion contained in article 5.1 *in fine* BC or LC, which differ on this point, is not applicable See ECJ Judgment, 13 July 1993 (*Mulox IBC Limited v. H. Geels*, C-125/92, *Rec.* 1993, pp. I/4105--4107), where the place the work is performed is established as being that in which or from which the worker mainly performs his duties with respect to his undertaking. See also ECJ Judgment, 9 January 1997 (*Rutten v. Cross Medical Ltd., Rec.* 1997, p. I/70 *et seq.*), settled by applying the amendment included by the 1989 Accession Convention, which confirms the same case-law criterion. See M. CHECA MARTÍNEZ's comment, "El foro del lugar de cumplimiento de la obligación contractual en el Convenio de Bruselas: avances en el contrato de trabajo plurilocalizado", *La Ley. Unión Europea*, 25 March 1997, pp. 4–6.

28. In this precept the elements that make up labour relations are: regularity, voluntary devotion to playing sport for an employer (in the framework of the organisation and management of a club or sporting body) and remuneration of the professional player; the compensation of expenses arising from playing this sport cannot be considered remuneration.

29. Concerning this provision see E. ZABALO ESCUDERO "La competencia en materia de contrato de trabajo. El artículo 25.1 de la Ley Orgánica del Poder Judicial de 1985", *R.E.D.I.*, 1986, p. 615 *et seq.*

30. Article 25 *LOPJ* contains other law courts but they are not relevant to this article. Indeed, this provision also includes the attribution "when the defendant is domiciled in Spanish territory", but in that case the BC and not the *LOPJ* is applicable. This is also the case when the defendant has "an agency, branch, delegation or any other representation in Spain" but the sporting bodies do not operate through this type of establishment. In the same way, the Spanish courts have jurisdiction "when the worker and the employer are of Spanish nationality, wherever the services are provided or the contract was concluded", but in the sporting world if a Spanish club hires a Spanish professional player it does so in order for the player to perform his work in Spain. At any rate, this is an improper forum (for exorbitant) which it was feared could have been included in article 3 BC at the time Spain acceded to the BC, see E. ZABALO ESCUDERO "La competencia en materia de contrato de trabajo...", *op. cit.*, p. 629. But this was not so, although it deserves to be included, also I. GUARDANS & CAMBÓ, "Artículo 3", in Comentario al Convenio de Bruselas...," *op. cit.*, pp. 71–72. Finally, article 25 *LOPJ* provides for a law court with jurisdiction over shipping contracts.

recourse to Spanish law[31] as the *lex fori*[32], since, despite the protocols attributing jurisdiction to the ECJ in order to ensure a uniform interpretation of the Convention, these have not come into force[33]. Nonetheless, it should not be forgotten that article 18 RC[34] advocates an interpretation of the Convention that takes into account its international character and the desirability of achieving uniformity in its interpretation and application. An autonomous interpretation[35] should thus be followed, but it should be realised that the very classificatory elements[36] provided with respect to individual employment contracts, contributed by the *Giuliano/Lagarde* Report[37], are very limited. It is obvious that the application of the Convention in this aspect is called into question because it is difficult to avoid the influence of the *lex fori*[38]. However, it does not appear that a regular, established relationship between a professional player and a sporting association for which he plays a sport cannot be considered an individual employment contract for the purpose of the RC, on the basis of Spanish law. It is not clear that the jurisdiction of another contracting State would follow the same classification. Indeed, the contract under which professional players render their services is one of the cases where

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31. Pursuant to article 12.1 *CC*, in accordance with which the classification in order to establish the regulations applicable to disputes shall always be done pursuant to Spanish law. See, above all, S. ÁLVAREZ GONZÁLEZ, "Artículo 12.1 *Cc.*", in M. ALBALADEJO & S. DÍAZ ALABART (Dirs.), *Comentarios al Código Civil y a las Compilaciones forales*, 2nd ed., book I, vol. II, Madrid, Revista de Derecho Privado/EDERSA, 1995, pp. 842--880.

32. This is the position of A. KASSIS (*Le nouveau droit européen des contrats internationaux*, Paris, LGDJ, 1993, pp. 480–482), who considers that classification should be carried out *ex lege fori*.

33. We share the position expressed in the *Giuliano/Lagarde* report (*OJ* C 327, 11 December 1992, p. 35), which maintains that the classification should be established in the framework of article 18 RC.

34. See A. L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, "El Convenio de Roma sobre la ley aplicable a las obligaciones contractuales de 19 de junio de 1980", in A. L. CALVO CARAVACA & L. FERNÁNDEZ DE LA GÁNDARA (Dirs.), *Contratos internacionales*, Madrid, Tecnos, 1997, pp. 41–137. On article 18 RC in particular, see pp. 50–55.

35. See the *Giuliano/Lagarde* report (OJ C 327, of 11 December 1992, pp. 34–35), establishing that to achieve these autonomous concepts with a meaning of their own, the objectives and system of the Convention must be taken into consideration, bearing in mind the function of these concepts in the context of the Convention.

36. J. CARRASCOSA GONZÁLEZ & M. C. RODRÍGUEZ-PIÑERO ROYO ("Contrato internacional de trabajo y Convenio de Roma sobre la ley aplicable a las obligaciones contractuales: impacto en el sistema jurídico español", *Relaciones laborales*, 1996, I, p. 1350) point out that this does not apply to interpretation, but rather to classification.

37. See *OJ* C327, 11 December 1992, p. 23, which includes in the scope of article 6 RC contracts that are null and *de facto* labour relations.

38. See A. L. CALVO CARAVACA & J. CARRASCOSA GONZÁLEZ, "El Convenio de Roma sobre la ley aplicable a las obligaciones contractuales de 19 de junio de 1980", *op. cit.*, p. 53.

classification differences could arise[39]. However, bearing in mind community case law with respect to this issue, not only can we deduce that the ECJ would classify these contracts as employment[40], but it is furthermore advisable that the national jurisdiction of the Member States follow the same classification. Otherwise, a dichotomy would arise between classification for the purposes of community law and classification for the purposes of establishing the applicable law.[41]

7. As for community law, the application of the rules on the free movement of workers to sport in general and to football in particular is a fait accompli nowadays. Back in 1976, the ECJ judgment of 14 July on the *Donà* case classified professional and semi-professional football players as workers[42], and this was confirmed by the later *Bosman* judgment.[43] In other judgments it has stated that article 48 has a direct horizontal effect, both as regards freedom of movement and with respect to non-discrimination on the grounds of nationality, and that it applies to sport in that it constitutes an element of economic activity as referred to in article 2 of the EEC Treaty.[44] Otherwise, the ECJ has pointed out that the concept of worker pertains to the community law[45] and must be interpreted extensively.[46] The doctrine supports this position.[47]

Now, in all cases the ECJ has stated that, in accordance with the literal sense of article 48.2 EEC Treaty, the precept only applies to community nationals who engage in paid activities.[48] This means, adversely, that neither amateur players nor professional players from third states benefit from the community system unless other

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39. See J. CARRASCOSA GONZÁLEZ & M. C. RODRÍGUEZ-PIÑERO ROYO, "Contrato internacional de trabajo y Convenio de Roma...", *op. cit.*, p. 1352.

40. With respect to employment contracts in general, see *ibid*, p. 1351.

41. A professional player of the nationality of an EU Member State who is hired, or capable of being hired by a sporting body with headquarters in another EU Member State can exercise the free movement of workers, since he is a worker. However, following a classification *ex lege fori*, the same case is classified as a rendering of services – and the law applicable to the contract is established by articles 3 and 4 RC (uniform rules), and not by article 6 RC, a protective rule provided for individual employment contracts.

42. ECJ Judgment, 14 July 1976, *Donà* case 13/76, *Rec.* 1976, p. 1333 *et seq.*

43. ECJ Judgment, 15 December 1995, *Bosman case* C-415/93, *Rec.* 1995, p. I/4921 *et seq.*

44. For example, ECJ Judgment of 12 December 1974, *Walrave case* 36/74, *Rec.* 1974, p. 1405 *et seq*; 23 February 1994, *Scholz* case C-419/92, *Rec.* 1994, p. I/505 *et seq.*

45. ECJ Judgment, 19 March 1963, *Unger* case 75/63, *Rec.* 1964, p. 347 *et seq.*

46. ECJ Judgment, 23 February 1982, *Levin* case 53/81, *Rec.* 1982, p. 1035 *et seq.*

47. See, above all, M. CASTELLANETA, "Libera circolazione del calciatori e disposizioni della FIGC", *D.C.S.I.*, 1994-4, pp. 646–650.

48. The Court of Justice could not have been clearer when it pointed out that professional or semi-professional football players "who are nationals of a Member State benefit in all other Member States from the community provisions on the free movement of persons and services" (ECJ Judgment of 14 July 1976, *Donà* case, n. 13/76, *Rec.* 1976, p. 1340, point 12 of grounds).

provisions of community law are applicable to them, such as, for example, the case of Regulation 1612/68 for amateur sportsmen[49] and the association agreements concluded by the Community containing a non-discrimination clause for non-Community players.[50] A different matter is that sporting federations, national and international alike, extend this right *motu propio* (and not because community case law or article 48 of the EEC Treaty and its regulations on implementation so require) to non-EC players, just as they are prepared to do with regard to players from states that are not part of the European economic area from 1 April 1999.[51]

8. Having established that the contractual relationship between professional player and sporting club is one of employment, it should be concluded that the professional player, as the worker, should be protected since he is the weaker party. The professional player is the weaker party as opposed to the sporting club, since he is inside an organisation where he performs his work and on which he depends for sustenance. The fact that a handful of players are paid astronomical sums should not affect this.[52] The international recruitment of professional players also occurs with employees who receive less media coverage. Furthermore, it should be borne in mind that they are paid in relation to the pressure they are under at work and to the costs arising from their image. It should also be stressed that the professional career of a

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49. See in this context M. THILL, "L'arrêt Bosman et ses implications pour la libre circulation des sportifs à l'intérieur de l'Union européenne dans des contextes factuels différents de ceux de l'affaire Bosman", *R.M.U.E.*, 1996-1, p. 105.

50. This is upheld by the Commission in an *unpublished* opinion by its Legal Service of April 1996, which declared that the nationals of the following 13 countries would find themselves in this situation: the three European countries that are part of the European economic area, plus Morocco, Tunisia, Algeria, Turkey, Poland, Hungary, Slovakia, the Czech Republic, Bulgaria and Romania. Nationals of Switzerland, Cyprus, Malta, Slovenia, Latvia, Estonia and Lithuania would not benefit from this, neither would nationals of South American countries (Directorate General X, *Information on the Bosman Case, unpublished text*, 29 October 1996, pp. 3–6 and 12–13). In Spain, this interpretation has been corroborated by the Ministry of Foreign Affairs, following consultation with the Professional Football League. As a result, the *Vigo club Celta* has managed to register a national of the European economic area (Norway, to be precise) as a community player despite the controversy with the Professional Football Association (As, 26 August 1997, p. 19). See also, in the doctrine, L. NYSSEN and X. DENOEL, "La situation des ressortissants de pays tiers à la suite de l'arrêt Bosman", *R.M.U.E.*. 1996-1, p. 119 *et seq.* In this connection, the sporting federations have ended up accepting the ruling of the *Bosman* judgment and have also acknowledged that players from the European economic area are not foreigners (Circular 592, 19 February 1996, of FIFA and Book 12 of the General Rules of the Spanish Royal Football Federation, following amendments of 20 March 1997).

51. Circulars 611, 27 March 1997, and 616, 30 May 1997, of FIFA *(http://www.fifa.com/fifa/handbook/statutes)*.

52. Nonetheless, the wages earned by professional players should not be confused with the compensation they must pay in the event that the labour relations are terminated voluntarily by the professional player.

player is very short, 15 years at most, and there is considerable risk it will end before that owing to injury. The consideration of the professional player as the weak party in the contractual relationship is necessarily reflected in the regulation of the international jurisdiction and in the determination of the applicable law.

II. ESTABLISHMENT OF THE APPLICABLE LAW

1. The Law Applicable to the Individual Employment Contract ex Article 6 RC

9. The RC, of universal scope according to article 2, is the regulatory text that provides the choice of law rule on determining the law that governs an individual contract of employment[53], in which the contractual relationship between professional player and sporting association is included under the aforesaid conditions. Article 6 RC provides, in the same sense as the regulation of jurisdiction in the BC, a rule protecting the worker's interests.[54] The law objectively applicable is that of the country where the worker habitually carries out his work in performing the contract.[55] However, this precept does not prevent the parties from choosing a law applicable to the contract, although the mandatory provisions of the legislation applicable in the absence of this choice, those which cannot be derogated from by contract, will provide the worker with a minimum level of protection. Thus, if the parties agree on an applicable law other than that of the country where the work is performed, the

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53. The entry into force of the RC in Spain on 1 September 1993 not only entailed the virtual derogation of article 10.6 CC – conflict rule applicable to employment contracts – but also of article 1.4 of the Workers' Charter (*ET*) – a rule whereby the scope of Spanish labour legislation was extended to include cases in which services are rendered abroad by a Spanish worker hired in Spain by a Spanish undertaking –, a doubt raised by F. J. GARCIMARTÍN ALFÉREZ ("España se adhiere al Convenio de Roma de 19 de junio de 1980 sobre ley aplicable a las obligaciones contractuales", *R.E.D.I.*, vol. XLVI, 1994-1, pp. 446–450) and settled by J. CARRASCOSA GONZÁLEZ & M. C. RODRÍGUEZ-PIÑERO ROYO ("Contrato internacional de trabajo...", *op. cit.*, pp. 1344–1346).

54. *Giuliano/Lagarde* report (OJ C 327, 11 December 1992, p. 25), considering the worker, like the consumer, to be the weaker party in the contractual relation.

55. In principle, the rest of the rules contained in article 6 RC are not relevant to employment contracts of professional players. Rule b) is not applicable since the professional player habitually carries out his work in the same country, and the rule about closer connections with another country is difficult to apply, as the work is habitually carried out in the country where the undertaking has its principal place of business is and of which it is a national.

mandatory rules of the law governing that contract must provide an equal or greater level of protection than the law which would have been applied in the absence of this choice. The choice of law with respect to contracts of employment tends to be merely a question of subject matter rather than of conflictual aspects.[56]

Consequently, the law that will govern an employment contract between a professional player and a sporting body will be either the law of the country in which the work is carried out, or the law that the parties have established, provided that it respects, as a minimum, the level of protection afforded by the mandatory rules of the law of the country where the work is habitually carried out.

The issue is seemingly easy to settle. A Spanish court with jurisdiction in accordance with the rules examined previously[57] will apply RD 1006/85 if the sporting work has been carried out habitually in Spain, unless the parties have agreed that the contract be governed by another law. In this case, the *ius cogens* rules of Spanish labour law will serve to establish the minimum protection of the worker, without prejudice to the application of *lex contractus* insofar as its rules offer better protection. If, on the contrary, the work has been carried out in a foreign country, the law of that country will be applied, unless the parties have agreed that the contract be governed by another law. The protective rule is then based on the rules of the labour law of the country in which the work is carried out, which cannot be derogated from by the parties. In either case, the mandatory rules of Spanish law are applicable pursuant to article 7.2 RC.[58] However, the picture is distorted owing to the existence of lex sportiva.

2. Scope of lex sportiva in Regulating the Contract

10. The main stumbling block which needs to be overcome *ex ante,* in order to avoid confusion, arises from the circumstance that the sporting world has created its own set of institutions and rules – with a scope that transcends state borders –designed to take the place of the State and of State and community laws.[59] It is another matter that this

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56. R. M. MOURA RAMOS, "El contrato individual de trabajo", *op. cit.*, p. 1896.

57. See section I.2.

58. It is necessary to distinguish between rules on domestic public policy, rules that cannot be derogated from by contract and pertain to contractual law, and rules on international public policy (ordre public). For a distinction between internal and international public policy, see, above all, J. C. FERNÁNDEZ ROZAS & S. SÁNCHEZ LORENZO, *Curso de Derecho internacional privado,* Madrid, Civitas, 1996, pp. 381–382.

59. J. F. MERINO MERCHÁN expresses this in much harsher terms ("Valor jurídico de la cláusula de rescisión de Ronaldo. Conflicto jurídico entre la normativa de la FIFA y el Derecho comunitario europeo", *La Ley,* 1997-4, p. 1311) stating that "The international sporting structures (FIFA, UEFA) are stuck in an

process of supercession should effectively take place, that is, that it should eventually be permitted.[60] It is thus a fact that, as a result of the intervention of the sporting federations, the relationship between the professional player and the club that has engaged him has certain specific conditioning factors, which are not found quite as much in other types of labour relations. In this connection, it should be borne in mind that the rules produced by the federation fall into two clearly distinguished categories: sporting, directly related to the practising of sport, whether from a professional or amateur perspective, and extra-sporting, related to aspects of the professional playing of sport. On the one hand, the aim of playing sport in the framework of a federation is that the player should take part in a sporting competition, or in several[61], organised by one or several sporting associations (federations). The national federation organises the league in question and, in co-ordination with the relevant international federation, passes a set of rules for playing the game, be it football, basketball or handball. The exercise of this function is not only reasonable but necessary: when football is played, in principle players cannot touch the ball with their hands, otherwise they would be invalidating the rules of the game and could end up playing rugby or handball, for example. Disciplinary rules are thus adopted to ensure that the rules of the game are abided by.[62]

However, in addition to these genuinely sporting rules, an actual regulatory scheme is established – owing to the sanctioning power entailed – and is applicable to cases of engagement of players, whether national federates or players belonging to other national federations. The subject matter regulated is of such importance that it can condition not only the conclusion of the contract but also its termination. These are the regulations which have legal repercussions on employment contracts. Thus, the federation rules can regulate, among other aspects[63]:

- the "mandatory" *transfer certificate* issued by the federation to which the player belongs so that he may play in a league organised by another federation,
- the payment of a compensation fee for training or development costs following

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archaic and incomplete statutory position that upholds an autonomous, closed set of laws that are binding for all their members and isolated from the general system of sources of national and community law".

60. Indeed, Spanish law has chosen to grant the federations certain jurisdictional and sanctioning powers, see the *Ley del Deporte* 10/1990.

61. The Spanish football league and the *Champions League*, for example.

62. For example, the rules on doping and the possibility that the federation's own agencies may establish an appropriate sanction. See, in this connection, in the international sphere J. A. R. NAFZINGER ("International Sports Law as a Process for Resolving Disputes", *I.C.L.Q.*, vol. 45, 1996, pp. 130–149), analysing several cases and reaching the conclusion that the courts would be well-advised to take sporting rules into consideration, and allow the decisions delivered by arbitration boards.

63. See K. van MIERT, "Sport et concurrence: développements récents et action de la Commission", *R.M.U.E.*, 1997-4, p. 7.

expiry of his contract, the determination of the nationality of the players in the team, an issue that affects the participation of a foreign player in the competition organised by this federation or, lastly,

– the payment of an indemnity fee for termination of the contract when the latter is terminated unilaterally on the wishes of the professional player.

11. Therefore, the employment contract is not only governed by the law governing the contract – whether it be the law chosen by the parties or the law objectively applicable; rather, it is also usually necessary to have recourse to the rules produced by the national federation to which the contracting club belongs and, in cases where the player comes from another federation, to the rules of the relevant international federation, by means of a contractual clause of waiver. This situation blurs the legal framework of these contracts. It is difficult to establish the set of laws that govern these labour relations. The reason for this is that the rules of the national and international federation are aimed at regulating the contract as the only applicable legal system. The federation rules are designed to become a regulatory scheme, the *lex sportiva*[64], that is independent of State laws – like a sort of *lex mercatoria*. Indeed, the application of prevailing customs or practices with respect to the hiring of players is feasible. However, there are no contracts without law, nor are there contracts governed by *lex mercatoria*, although this does not prevent international trading practices from being incorporated into contracts .[65] The applicable State and community law establishes mandatory applicable material limits that cannot be avoided through the application of the "sporting rules" established by any federation.[66] The frame of reference, which provides the mandatory rules protecting the worker, is State law.[67]

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64. See A. BORRÁS RODRÍGUEZ, "Existe-t-il un droit international du sport", *Nouveaux itinéraires en Droit. Hommage à F. RIGAUX*, Brussels, Bruylant, 1993, pp. 111–120.

65. Article 6 BC – on individual employment contracts- establishes the law that will govern the contract and this law is always the law *of a country*, which means that there is no place for contracts without law, or contracts subjected to a transnational or anational law. As argued by A. KASSIS, Le nouveau droit européen..., *op. cit.*, p. 373 *et seq.*

66. See A. BORRÁS RODRÍGUEZ, "Existe-t-il un droit international du sport", *op. cit.*, pp. 111–120.

67. The tension between federation rules and state law is clearly displayed in article 1.4 of the Statutes of the R.F.E.F, approved by decision of the Consejo Superior de Deportes (Higher Council for Sports) on 19 February 1993, which establishes that the R.F.E.F. "accepts and undertakes to fulfil" the statutes of FIFA and UEFA, though it adds that "provided this is within the Spanish legal system". See the text in *Aranzadi* 1993, n. 772, amended in other parts by a Decision of 15 October 1993, Aranzadi 1993, n. 2961, and a Decision of 25 October 1996, *Aranzadi* 1996, n. 2836.

3. Voluntary Termination of Contract by the Professional Player

12. This is one of the points on which Spanish law differs from other European legal systems.[68] Indeed, the regulation of the employment contracts of professional players marked a major innovation with respect to previous rules, in that it introduced the possibility that professional players could terminate the sports employment contract voluntarily. This was established in article 13 i) of RD 1006/85, which provides that the wishes of the professional player[69] may constitute grounds for terminating the contract, which is compensated for by an indemnity payment.[70]

The question is raised, in an international contract between a professional player and a sporting organisation, in the following terms[71]: a player engaged by a Spanish club may terminate the labour relationship unilaterally and be hired by a foreign club. This is because, unless another applicable law is agreed on, the contract is governed by RD 1006/85, which allows this possibility. By contrast, a Spanish club may not recruit a professional player working abroad for a foreign club because, in general, the contractual relationship cannot be terminated unilaterally, unless the application of a law providing for this possibility has been agreed.

As a result, there are two different cases in which it is apparently not possible for the contract to be terminated unilaterally by the worker: first, that of the professional player who carries out his work habitually in Spain, but whose labour relations are governed by a foreign law pursuant to an agreement; and second that of the professional player who habitually works abroad, in which the *lex contractus*, whether applicable objectively or agreed on by the parties, does not provide for termination in this manner. However, we must consider whether this is effectively the case.

With regard to the first case, the work is carried out in Spain, and the mandatory rules of Spanish law afford the worker a minimum degree of protection, since this is established in article 6 RC. Thus, even though the law agreed on may not provide for unilateral termination by the worker as a cause for the rescission of the employment

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68. Except for Portuguese law (in this connection, see, at *http//www.iusport.es/cronicas.htm*, p. 6, M. CARDENAL CARRO's review of J. LEAL AMADO's book, *Contrato de trabalho desportivo*).

69. For a specific analysis of this cause for termination, see E. BORRAJO DACRUZ "Extinción del contrato de trabajo deportivo por voluntad del futbolista profesional", in *Homenaje a J. GARCÍA ABELLÁN*, Murcia, Universidad de Murcia, 1994, pp. 27–39. Also, R. ROQUETA BUJ, *El trabajo de los deportistas profesionales*, Valencia, Tirant lo Blanch, 1996, p. 305 *et seq*; M. CARDENAL CARRO, *Deporte y Derecho. Las relaciones laborales en el deporte profesional*, Murcia, Universidad de Murcia, Eusko Jaurlaritza y Bilbao Bizkaia Kutxa, 1996, p. 353.

70. Similarly, in article 9.j) of RD 318/1981, although with problems, since in practice it was difficult to use this cause for termination.

71. It is necessary to bear in mind that the different grounds for discharge from duty are included within the scope of *lex contractus*, in accordance with article 10.1, d) RC.

contract, article 13, i) RD 1006/85 is applicable in that as a non-dispositive rule it offers a favourable option to the professional player.[72]

Concerning the second case, the minimum level protection is provided by the law of the country where the sporting work is carried out. As a result, even if a Spanish tribunal hears the case, the cause for rescission established in RD 1006/85 would not, in principle, be allowed, unless the parties have chosen Spanish law, in which case the contract could be terminated for this reason, even if the law of the country where the work is carried out does not provide for such a reason. The application of the reason for rescission provided for in our law could, hypothetically, be addressed from two angles:

- through article 7.2 RC, if we were dealing with a mandatory rule, though it cannot be regarded as such[73], since the spatial scope of this provision must not be established autonomously[74],
- or, through defence of ordre public, pursuant to article 16 RC. More doubts arise here, since the unilateral termination of the contract by the worker has constitutional roots[75] and, precisely, the regulation of the engagement of professional players was carried out in order to afford the latter greater

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72. The comparison between the foreign law chosen and Spanish law should be restricted to the subject-matter under dispute. In this case, the unilateral termination of the contract by the worker. On this issue, see J. CARRASCOSA GONZÁLEZ, M. C. RODRÍGUEZ-PIÑERO ROYO "Contrato internacional de trabajo y ...", *op. cit.*, pp. 1352–1353.

73. By contrast, the rules on health and safety of workers or those on dismissal are mandatory, see STS, 10 December 1990, fifth ground, 2 c.) See E. ZABALO ESCUDERO, *El contrato de trabajo en el Derecho internacional privado español*, Barcelona, Bosch, 1983, pp. 179–195; in Portuguese doctrine, R. M. MOURA RAMOS, *Da lei aplicável ao contrato de travalho internacional, Coimbra, Almedina*, 1990, pp. 724–725, note 738, and pp. 783–792; in French doctrine, P. COURSIER, *Le conflit de lois en matière de contrat de travail*, Paris, L.G.D.J., 1993, p. 129.

74. See R. M. MOURA RAMOS, Da lei aplicável ao contrato de travalho internacional, op. cit., p. 790.

75. Indeed, the possibility of voluntary termination of contract by the worker is derived from the right of free choice of profession or trade, applying it to RD 1006/85, see E. BORRAJO DACRUZ "Extinción del contrato de trabajo deportivo por voluntad del futbolista profesional", op. cit., p. 29. Also, L. M. CAZORLA PRIETO, "La nulidad de las cláusulas", *El Mundo*, 7 November 1997, p. 54. For a general approach, I. ALBIOL MONTESINOS, "Dimisión del trabajador", in *Comentarios a las Leyes laborales. El Estatuto de los trabajadores*, book IX, vol. 1, Madrid, Edersa, 1983, p. 166 (even in temporary contracts, see. p. 171). See also A. MARTÍN VALVERDE, "El ordenamiento laboral en la jurisprudencia del Tribunal Constitucional" R.P.S., n 137, 1983, p. 136.

It is necessary to distinguish between freedom to work and right to work. From the latter emerges a limit to the discretion of the employer with regard to termination of the employment contract, see R. SASTRE IBARRECHE, *El derecho al trabajo*, Madrid, Trotta, 1996, p. 231 *et seq.* See also J. A. SAGARDOY BENGOECHEA & I. SAGARDOY DE SIMÓN, "Artículo 35 CE" in O. ALZAGA VILLAAMIL (Dir.), *Comentarios a la CE de 1978*, Madrid, Civitas, 1996, pp. 594–595.

contractual freedom. The application of a foreign legislation that does not allow this termination, which is the guarantee of contractual balance between the sporting club and the professional player[76], could, from this viewpoint, contradict ordre public. However, the defence of ordre public must operate restrictively[77] and has a limited scope in the framework of the employment contract, owing to the fact that *forum* and ius are usually the same and to the fact that the minimum protection of the worker is established by the law of the country where the work is carried out. Moreover, it should be borne in mind that the contract is temporary and, above all, that it is the right to retention that really offends ordre public, in that it constrains freedom to change jobs.[78]

13. However, as a consequence of the particular characteristics of the world of sport, the main problem of this clash between the rules of the member states of the EC stems from the FIFA rules, which are binding for UEFA, with respect to the granting of transfers by the national federations. hideed, Circular 616 of 30 May 1997 enables a national association to refuse to issue an international transfer certificate to a player who terminates his contract unilaterally without justification. When Spanish law is the applicable law, this cause of rescission cannot be derogated from by a federation rule, since it would amount to restricting the exercise of a worker's right that is not dispositive.[79] Nonetheless, it should be added that some cases in this situation are covered by community law, which prohibits the application of federation rules insofar as they hinder the exercise of the free movement of workers established in article 48 EEC Treaty.[80]

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76. This is despite the penalties agreed on, because they would be very likely to be considered abusive by the judge of a Spanish labour court. Precisely the sum of money (consider the exaggeration – the termination clause in Francisco López's contract with the *Espanyol* team amounts to 70,000 million pesetas – the situation has reached at *http://www.iusport.es/opinion/clausula.htm*, the source of which is the sporting daily *Marca*) established in these clauses invalidates the protective aim of RD 1006/85. See, in this context, E. BORRAJO DACRUZ "Extinción del contrato de trabajo deportivo...", op. cit., p. 35; L.M. CAZORLA PRIETO, "La nulidad de las cláusulas", *El Mundo,* 7 November 1997, p. 54.

77. See P. COURSIER, Le conflit de lois en matière de contrat de travail, *op. cit.*, p. 178 *et seq.*

78. The problem would then lie in the compensation fee for training, which, as pointed out by J.A. SAGARDOY BENGOECHEA & J. M. GUERRERO OSTOLAZA (*El contrato de trabajo del deportista profesional,* Madrid, Civitas, 1991, p. 61), entails "an indirect form of maintaining the aforementioned right of retention". Insofar as community law is applicable, the question is settled by the ECB (see *infra* heading IV).

79. See J. F. MERINO MERCHÁN, "Ronaldo podrá fichar por el Inter o cualquier otro club de la Unión Europea", *La Ley,* 1997-4, pp. 1160–1161.

80. See *infra* section IV.I.B.

III. THE COMMUNITY LAW VIS-À-VIS SPORTING FEDERATION RULES

14. The impact that community law can have on the legal system governing the engagement of professional football players basically boils down to the question of whether its provisions on the free movement of workers and/or free competition affect sporting regulations on nationality clauses, transfer fees and termination of contracts.

1. Consequences of the Bosman Judgment

A) The Prohibition of Nationality Clauses and Transfer Fees

15. The facts of the *Bosman* case are well known, owing to the major coverage given by all the media. In its judgment of I October 1993, the Cour d'Appel of Liege (Belgium) referred two questions for a preliminary ruling in the framework of different disputes between Jean-Marc *Bosman* and RC Liege (the team to which he belonged), the Uniou Royale Belge des Sociétés de Football Ass'n (ASBL, equivalent to the Spanish Professional Football Federation) and the Union of European Football Associations (UEFA). The questions referred related to the interpretation of articles 48, 85 and 86 of the EEC Treaty (the free movement of workers and competition law) and addressed the compatibility of the football organisation's rules on the transfer of players and the nationality clauses.[81]

Following Mr LENZ's extremely interesting opinion analysing *in extenso* the different issues raised by the judge *a quo*[82], on 15 December 1995 the ECJ announced its decision of such far-reaching consequences, declaring that 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 be

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81. The rules on transfers (which are defined as the operation whereby an affiliated player obtains a change of encumbrance – contract – becoming bound to another club) required any player whose contract was expiring and who wanted to conclude another with a different club to pay a compensation for transfer, training and development. The nationality clauses were known as the 3 + 2 rule, according to which national associations were able to limit to three the number of foreign players that a national club could field for a first-division national championship match, plus two players who had played for a period of five years without interruption in the country of the national association in question, three in a junior category. This limitation was also applied to competition matches by teams organised by UEFA (that is, to European competitions).

82. Opinion of Advocate-General LENZ, 20 September 1995, *Bosman* case, C-415/93, *Rec.* 1995, p. I/4930 *et seq.*

employed by a club of another Member State unless the latter club has paid to the former a transfer, training or development fee; and under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States. Although this interpretation of article 48 produces *ex tunc* effects with respect to the nationality clauses, it has prospective effects with regard to the rules on transfers, which may only be invoked from the date of the decision, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before the date of the judgment.[83]

16. This clear example of *judicial activism* has given rise to many doubts and discussions as well as praise and criticism by Spanish doctrine and that of other States, which have analysed its repercussions on the world of sport so profusely that no further comments are required.[84] Logically, it has also triggered reactions from the sporting authorities – who are largely unfavourable towards its liberalising and open nature[85], although they have ended up abiding by it. Indeed, although at first the

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83. ECJ Judgment, 15 December 1995, *Bosman* case, C-415/93, *Rec.* 1995, p. I/4921 *et seq.*

84. In addition to the authors specifically mentioned, see, among many others, G. AUNEAU, "Le mouvement sportif européen à l'épreuve du droit communautaire", *R.T.D.E.*, 1996-1, pp. 101–119; A. BAÑEGIL ESPINOSA, "Derecho comunitario europeo y derecho del deporte: efecto directo y derecho de la competencia", *La Ley. Unión Europea*, n. 3954, 17 January 1996, p. 1–8; A. KORMAN, "The Repercussions in England of the European Court of Justice Judgment in the Jean-Marc Bosman Case", *Sports Law and Finance*, November–December 1995, pp. 44–47; F. VANDAMME, "La Communauté européenne et le sportif professionnel", *R.M.C.U.E.*, n. 398, 1996, pp. 353–357.

85. So deep an impression did it make that on 29 March 1996, at the beginning of the Intergovernmental Conference in Turin, they even asked the heads of state and government to include a specific clause on sport in the Treaty on European Union, just as there is one on culture (*Europe*, no. 6680, 4/5 March 1996, p. 9). Although this proposal had some impact on the Italian and Belgian governments (see F. FERNÁNDEZ SALAS, "De la possibilité de renverser l'arrêt Bosman par une modification du Traité", *R.M.U.E.*, 1996-1, pp. 155–156) and on the community institutions (see European Parliament, "Resolución sobre la Conferencia Intergubernamental de 1996 y la preparación de la Conferencia de Turín", 13 March 1996, *G.J.C.E.*, 1996, B-111, p. 40), it was not included in the Amsterdam Treaty of 2 October 1997, which in a declaration on sport that was annexed to the Final Act (and as such is non-binding) merely acknowledges the social importance of sport and in particular its role in forging identity and reconciling peoples, and appeals to the European Union bodies to listen to sporting associations when important issues are at stake that interest sport, particularly amateur sport.

Refusing to be deterred, FIFA began 1998 with an attitude of confrontation that does not presage anything positive. On the one hand, it has again requested that the EEC Treaty be amended to exclude football from the scope of community law, particular in social issues (*Europe*, 8 January 1998, p. 14). On the other hand, FIFA, at the request of Juventus of Turin, is demanding that *Atlético de Madrid* pay 4136 million lira (some 325 million pesetas) as a supplementary amount that it claimed was outstanding for the transfer of Vieri to the Spanish club after he signed up for 2600 million (*El País*, 14 January 1998, p. 46), even though this player is Italian.

international sporting federations threatened to wage war, to which the Commission reacted by suggesting that it would study whether the *Bosman* judgment was applicable to the nationals of certain third States[86], and that they risked having fines imposed on them[87], the Executive Committee of UEFA, at its meeting in London on 19 February 1996, agreed that sporting regulations should be amended to adapt to the changes introduced by the *Bosman* judgment. After the sporting authorities involved subsequently amended the federation rules, since the 1996–1997 season the free movement of footballers who are EU nationals has been fully in force, and they are considered to be workers (article 48 of the EEC Treaty). Circular 592 of FIFA and Book 12 of the General Rules of the Spanish Football Federation thus abolished transfer fees and nationality clauses for EU nationals.

Influenced no doubt by the resigned acceptance of the *Bosman* decision by the European football authorities, the national federations that initially displayed reluctance have expressed their willingness to open their doors to all EU nationals, as in the case of the Spanish Football Federation and the Professional Football League.[88] In figures, this situation led the 1996–1997 Leagne to register 64 EU players with Spanish First and Second Division clubs. The number increased to 80 in the current 1997/1998 League.[89] Furthermore, the first reactions are occurring along the same lines in other sports, such as basketball.[90] Exceptionally, there has been tenacious reluctance to abide by them in handball, though today their correct enforcement has practically been achieved.[91]

B) Limits on the Termination of a Contract by a Professional Player

17. Circular 616 of the Players' Status Committee of the International Federation of Amateur Football (FIFA), of 30 May 1997, sent out to all the national football

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86. See *supra* no. 7 for greater detail.

87. These fines would be based on the fact that such rules infringe competition rules, not the free movement of workers (Commission-Directorate General X-, *Information on the Bosman Case, unpublished text,* 29 October 1996, especially. pp. 3–6).

88. See a general overview of the response of professional football to the Bosman judgment in J. DÍEZ-HOCHLEITNER, and A. MARTÍNEZ SÁNCHEZ, "La contribución de la sentencia *Bosman* a la libre circulación de trabajadores)y al deporte?", G.J.C.E., 1996, D-26, p. 280 *et seq.*

89. El País, 27 August 1997, p. 28.

90. In the recent strike the basketball players threatened to stage with respect to the 1998 King's Cup, the goal of reducing the excessive number of foreigners in this sport only affected nationals of third states, not EU nationals (*El Mundo*, sports section, 24 January 1988, p. 39).

91. The conflict stemmed from the different positions of the parties involved. The Spanish Handball Federation and the Association of Players considered that the Bosman judgment was not applicable because handball is not a professional sport, and EU players would thus continue to be regarded as foreigners for the

associations affiliated as of 4 June 1997, amended article 12 of the UEFA regulations of 12 June 1993 concerning the status and transfers of football players. It specifically indicates that a non-amateur player shall not be free to conclude a contract with another club unless his contract has expired (or expires in six months), has been rescinded by one of the parties for valid reasons or has been terminated by the two parties acting by mutual agreement. And, by way of a clarification, it adds that in the case of rescission of the contract, only the last two hypotheses are applicable, meaning that a player who terminates his contract unilaterally and without justification may be refused an international transfer certificate by the national association to which his club is affiliated.

18. The provisions of Circular 616 limiting an EU player's freedom to sign up to a club of another Member State not only bind the judge to decide whether the termination is valid or not, but also contradict article 48.[92] It is not sufficient that the agreement binding the player to his club should have terminated for whatever reason, even those established by contract and recognised by national labour legislation, as in the case of Spain; indeed, it even limits the grounds for rescission of contract (and particularly cases of unilateral termination by the player) and authorises federations not to allow international transfers between Member States or with third states without the agreement of the club when these grounds are not fulfilled. As a result, these rules prevent, or are conducive to deterring footballers, from leaving the clubs to which they belong before their contracts expire to go and carry out their activity at the club of another Member State, since they will no longer be able to work unless they have previously reached an agreement with their club. That it should apply indistinctly to nationals of member or third States is of no significance from the perspective of community law, since it amounts to a clear restriction of the right to the free

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purposes of the agreement signed on 7 April 1995 between ASOBAL (Association of Clubs) and the Association of Handball Players, whereby the maximum number of players who cannot be fielded, that is, foreigners – whether EU or third-country nationals – who could take part in official handball competitions was limited to 3. ASOBAL was opposed to this, as were clubs with more foreign players than those permitted by these rules, even though several are nationals of other member states, such as the case of *Caja Cantabria* and *Teucro*. The dispute was settled following the decision of Social Affairs Court no. 2 in Santander on 14 October 1996 (as *Olsson G.J.C.E.*, B-117, 1996, p. 55 et seq.; for a commentary, see A. MARTÍNEZ SÁNCHEZ, "Asunto Olsson: una juez de Santander aplica la sentencia *Bosman* en favor de un jugador sueco de balonmano", *G.J.C.E.*, 1996, B-117, p. 5 *et seq.*) and the approval by the government on 14 November 1997 of a Royal Decree including handball players in the Social Security system from 1 January 1998 (RD 1708/1997, *B.O.E.* 284, 27 November 1997, p. 34875 *et seq.*).

92. There are, by contrast, other provisions in Circular 616 that are not incompatible with community law, particularly those establishing a compensation fee for the training or development of footballers, although – in accordance with the *Bosman* judgment – it expressly excludes from its scope those who are EU nationals.

movement of EU workers within the Community and would therefore not be applicable with regard to them.[93]

Given the similarity in content of all the sporting rules questioned, the arguments used by the *Bosman* judgment are likewise applicable to this case, and no further comments are required.[94] In comparison, it is worth underlining that article 48 is applicable horizontally and enjoys the primacy of community law. It could therefore be invoked by players with respect to clubs and professional associations and between associations, in order to prevent the application of the contrary federation rules in national tribunals, which could even establish damages. It is deduced *a fortiori* that the laws of the Member States that impose the same difficulties on professional players in terminating employment contracts unilaterally would also be contrary to article 48 of the EEC Treaty[95], so that this type of provision could not be applied by the jurisdiction of any Member State, and without having recourse – in a somewhat forced and, therefore, arguable manner – to defence of ordre public.

We should nonetheless remember that the free movement of workers applies only to EU nationals and therefore does not prevent the aforementioned rules relating to the nationality clauses, transfer fees and termination of contract from continuing to be applied to cases not governed by that principle of community law. That would explain the recourse to the rules of competition law.

2. The Inapplicability of Competition Law to the Sporting Federation Rules

19. Without prejudice to its far-reaching consequences, the *Bosman* judgment has left several questions hanging in the air, in particular the applicability of community

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93. In comparison, the Spanish Football Federation put forward a report by the Professor of Labour Law of the Universidad Complutense of Madrid, Juan Antonio Sagardoy, stating that Circular 616 does not affect article 48 of the EEC Treaty because refusal to transfer a footballer "does not prevent him playing or working; rather, it denies him a federation licence, a formalism similar, for example, to that required by a Spanish lawyer or doctor to exercise their profession in another EU country" (see summary at *http://www.iusport.es/casos/ronaldo.htm*, pp. 14–15).

94. The competition and employment commissioners, Karel Van Miert and Padraig Flynn have expressed similar opinions (letter of 2 July 1997, to the Secretary-General of FIFA, IP/97/615, 4 July 1997, at *http://Europa.eu.int/eu/comm/spp/rapid.htm*), explaining their *preliminary position* that Circular 616 may lead, "in the event of termination of a contract by a player who is the national of a member state, wishing to exercise his right of freedom of choice within the Community, to the denial of this right", and recommend that the Executive Committee of FIFA bear in mind that the aforementioned circular "constitutes an unjustified obstacle to the free movement of workers for it not to be sanctioned".

95. Indeed, the Commission would take a favourable view if FIFA were to amend circular 616 in line with RD 1006/85 (*El País*, 5 and 7 July 1997, p. 43 and 49 respectively).

competition law to professional players and, more specifically, whether the clauses on nationality, the rules on transfers and the clauses limiting termination of contracts preclude article 85 of the EEC Treaty. Advocate-General LENZ[96] and the Commission[97] believe that they do, basing their opinions on abundant doctrinal material[98] that is even earlier.[99] This attitude is easily understood since *anti-trust* law seems to be the only possible judicial means in the Community of condemning sporting rules that are questioned in the case of non-EU players and national players of a Member State intending to change from one club to another of their own nationality. For opposite reasons, it is understandable that the sporting federations[100], backed by another sector of doctrine[101], should be determined to deny that their rules fall within the content and scope of the community provisions.

Now, in this debate legal issues have often been mixed up with political options of *lege ferenda*, owing, no doubt, to the complex and varied interests at stake, which

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96. Opinion of Advocate-General LENZ on the *Bosman* case, C-415/93, Rec. 1995, pp. I/5026–5039. See also his article "La jurisprudencia del TJCE en materia deportiva", *Boletín Europeo de la Universidad de La Rioja*, 1997-1, supl., p. 2 *et seq.*).

97. Observations of the Commission in the MANCINI's hearing report to the *Bosman* judgment, multi-copy text, p. 20–21. The EU executive has subsequently endorsed its position in favour of applying article 85 in letters to FIFA and UEFA dated 19 January 1996 and 2 July 1997 (both at *http://Europa.eu.int/eu/comm/spp/rapid.htm*); in a document on the consequences of the Bosman judgment (Directorate General X, *Information on the Bosman Case, unpublished text*, 29 October 1996, particularly. pp. 3–6); in written replies to questions asked by Euro-MPs (for example, to question P-0647/96, OJ C 217, 26 July 1996, pp. 87–88); and in other cases (see, for example, the joint declaration by commissioners Van Miert and Flynn of 7 January 1998, Europe, 8 January 1998, p. 14), including doctrinal writings by its members (K. VAN MIERT, "L'arrêt Bosman: la suppression des frontières sportives dans le marché unique européen", R.M.U.E., 1996-1, p. 5 *et seq.*).

98. For example, J. VÍAS ALONSO, "Las normas de la FIFA sobre traspasos de jugadores no comunitarios,)son compatibles con el Derecho comunitario de la competencia?", G.J.C.E., B-126, 1997, pp. 19–20; R. BLANPAIN and M. CANDELA SORIANO, M., *El caso Bosman.)El fin de la era de los traspasos?*, Madrid, Civitas, 1997, pp. 31–33; G. CAMPOGRANDE, "Les règles de la concurrence et les entreprises sportives professionnelles après l'arrêt Bosman", R.M.U.E., 1996-1, pp. 45–50; J.-L. DUPONT, "Le droit communautaire et la situation du sportif professionnel avant l'arrêt Bosman", R.M.U.E., 1996-1, pp. 73–74 and 77.

99. This is the case of A. GIARDINI, "Libera circolazione dei calciatori nella CEE", D.C.S.I., 1988-3, pp. 451–455; J. L. RUIZ-NAVARRO PINAR, "La libre circulación de deportistas en la Comunidad Europea", *Boletín de Derecho de las Comunidades Europeas*, no. 22, 1989, pp. 179–182; S. WEATHERILL, "Discrimination on Grounds of Nationality in Sport", *Y.E.L.*, vol. 9, 1989, pp. 68–80.

100. Observations of URBSFA and UEFA in the *Bosman* case, the MANCINI's hearing report to the *Bosman* judgment, multi-copy text, pp. 17–19.

101. Mainly A. BAÑEGIL ESPINOSA, "La aplicación del Derecho comunitario europeo al deporte después de la sentencia del Tribunal de Justicia de las CE sobre el caso Bosman", *op. cit.*, pp. 5–6; M. CARDENAL CARRO, Deporte y derecho..., *op. cit.*, spec. p. 172 *et seq.*

have clouded the analysis so much that it can be said that although the arguments are very suggestive from the political perspective, from the legal viewpoint it is not so clear that competition law can be applied to rules on transfer, the rescission clauses of a contract and the provisions on nationality.

20. The issue is centred on article 85 of the EEC Treaty, whose applicability has been upheld by the aforementioned using the following reasoning, in general: football clubs are undertakings and federations are associations of undertakings in the sense of article 85, because there is no doubt that if they exercise economic activities, the volume of their economic activity or whether they are profit-making is not relevant. And the provisions questioned are decisions of associations of undertakings that must be examined in the light of that precept because they have been created by the clubs and their associations. These rules restrict competition because they artificially replace the normal system of supply and demand with a uniform mechanism that leads to a sharing of sources of supply in the sense of article 85.1,c) of the EEC Treaty, a system that is not essential for the organisation of the sports competitions. On the one hand, because they curb the possibilities of the different clubs of fielding players and, on the other, of competing owing to their mediation. And also, because they deprive clubs of the possibility of making the most of highly favourable opportunities for hiring footballers that they would have under normal competition conditions. And they affect trade between Member States in view of the considerable number of foreigu players who play in the national leagues of Member States and the substantial sums established in rescission clauses and transfers, with the result that they jeopardise the achievement of the aims of the common market, since they prevent or hinder the free engagement of players in other Member States according to the principle of supply and demand, which is basic in a market economy.[102]

21. It is not at all clear from the wording of article 85 of the EEC Treaty that competition rules can be applied to the labour market. And this is borne out by community case law, which does not establish that gainful employment comes under its protection, even though it is a principal economic activity; rather, to the contrary, both the ECJ and the Court of First Instance have maintained repeatedly and specifically that the competition intended to be preserved is that of the market of goods and services, and footballers, as paid workers, are neither.[103] This State of affairs makes article 85 inapplicable, since for it to be used it is not sufficient for there

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102. It should be pointed out that the critics of the applicability of article 85 have generally merely denied each of these premises somewhat simplistically and in excessively categorical terms, so much so that they have scarcely contributed any arguments of substance to the debate in favour of their thesis (as compared to the opposite case, specifically cited below).

103. It is true that the ECJ has maintained that articles 85 and 86 the EEC Treaty are applicable, in principle, to all sectors of the economy, so that exclusion only operates when it is the object of a specific provision of the Treaty (for example, Judgment of 30 April 1986, the *Asjes* case, 209 213/84, Rec. 1986, p.

to be an economic activity; rather, the concurrence of three conditions is required: *agreements between undertakings* which have as their object or effect the *appreciable restriction of competition* within the common market in *the market of goods and/or services* and which, furthermore, may significantly affect *trade* between Member States.[104]

22. Given the extensive meaning given to the notions of agreement, undertaking and association of undertakings in article 85[105], it can perfectly be considered that the UEFA and FIFA rules relating to the nationality clauses, transfer fees for training or development and those limiting the possibility of terminating a contract meet this requirement, because these sporting associations exercise an economic activity (approval of the rules governing the exercise of amateur and professional football, and connected activities, receiving different types of financial compensation for the services they provide), and reach *agreements* that are compulsory for their affiliates, the national federations and, accordingly, clubs. Specifically, the aforementioned acts are decisions of an association of enterprises in the sense of article 85 EEC Treaty,

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1425 *et seq.*). But in the approximately 500 decisions relating to competition law consulted, the question of whether gainful employment was included in the scope of article 85.1 of the EEC Treaty was not raised – formally, at least. And it could well have referred to this issue, at least in cases that generally require its scope. It is also significant that on the first occasion that the issue is raised directly the court should have preferred to opt for the comfortable attitude of not commenting, on the simplistic basis that nationality clauses and transfer rules for EU footballers were already prohibited under another precept (article 48 of the EEC). And it is symptomatic that the ECJ, which followed very closely LENZ's position on article 48 in its judgment, did not however make any comment about the application of competition rules, when its Advocate-General had done so in great detail.

The above is reasonable grounds to consider that the precept in question is not applicable to the labour market or, at least, that the issue is not at all clear within the ECJ and, in view of the differing opinions of its members, it has preferred to remain silent about such a sensitive issue in order – as the doctrine has pointed out – that a time for thought will allow "on the one hand, the rippling effect of the *Bosman* judgment on the organisation of professional sport and, on the other, the result of the future negotiations between the Commission and UEFA on the systems for sharing out earnings" (P. DEMARET, "Introduction. Quelques observations sur la signification de l'arrêt Bosman", *R.M.U.E.*, 1996-1, pp. 14–15).

104. For greater detail on these issues, see, in general, Ch. BELLAMY & G. CHILD, *Derecho de la competencia en el mercado común*, Madrid, Civitas, 1992, p. 71–171; I. VAN BAEL & J.-F. BELLIS, *Competition Law of the EEC*, 2nd ed., Oxford, CCH Editions Limited, 1990, p. 20–46 and 59–66; Ch. GAVALDA & G. PARLEANI, *Droit communautaire des affaires*, 2nd ed., Paris, Litec, 1992, p. 417–539; M. WAELBROECK & A. FRIGNANI, Concurrence, vol. 4 of *Commentaire J. MEGRET. Le droit de la CE*, 2nd ed., Bruselas, Editions de l'Université de Bruxelles, 1997, pp. 7–51 and 123–208; R. WHISH, *Competition Law*, 3rd ed., London, Butterworths, 1994, p. 186–242.

105. See, for example, ECJ Judgment of 11 January 1990, *Sandoz* case, n. C-277/87, *Rec.* 1990, p. I/45 *et seq.*; CFI Judgment 11 July 1996, *Metropole Télévision et al*, n. T-528, 542, 543 y 546/93, *Rec.* 1996, p. II/649 *et seq*; Decision of the Commission, 16 February 1994 ("Poutrelles"), *OJ* L 116, 6 May 1994, p. 1.

whose effects, even though they are private Swiss associations, are deployed in the common market. They are, therefore, governed by article 85.1 of the EEC Treaty.[106]

Irrespective of the favourable position of Mr LENZ, as commented on early, and much of the doctrine, the Commission has stated in this regard that FIFA and the Italian national football association, as organisers of the distribution system for tickets for the world football championships of 1990, held in Italy, exercised economic activities and should thus be regarded as undertakings.[107] And, in the written reply to question P-0647/96, it has stated that "sporting clubs are undertakings by virtue of the economic activities they carry out and their organisations constitute associations of undertakings in the sense of both articles [85 and 86] of the EEC Treaty".[108] For its part, the Court of First Instance has tacitly acknowledged that the EU executive is entitled to ask sporting federations for information about their activities.[109] Moreover, it should be pointed out that sporting federations collect royalties for every ball used in official competitions, and that sport in general generates significant economic activities, which have been put at about 2.5% of world trade and 1% of the gross national product of the European Union.[110]

Workers and employees cannot, however, be considered undertakings, since they do not exercise an autonomous economic activity.[111] This is the case of footballers.[112]

23. It can be asserted *a priori* that the clanses on nationality, the rules on transfers and the regulations limiting the freedom to terminate a contract distort – whether effectively or potentially, consciously or involuntarily is immaterial here – competition within the common market, since they affect the free organisation of the football market. This is because by imposing conditions for transfers unilaterally, they artificially raise the price of products and services and restrict the freedom of football clubs to carry out economic transactions. As a result, they limit their sources of

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106. For the opposite view, see the observations of the Belgian Royal Union, according to which "only the major clubs may be regarded as undertakings" and "sporting federations may not be regarded as associations of undertakings because the essential feature of their activity would not fall within the economic sphere" (the MANCINI's hearing report to the *Bosman* judgment, *multi-copy* text, p. 17).

107. Decision of the Commission, 27 October 1992 (on distribution of tickets), *OJ* L 326, p. 31.

108. *OJ* C 217, 26 July 1996, p. 88.

109. CFI Judgment 9 November 1994, *Scottish Football* case T-46/92, *Rec.* 1994, p. II/1039 *et seq.*

110. *Commission*, "La Communauté européenne et le sport", *Doc. SEC* (91) 1438 end, 19 September 1991.

111. The ECJ defines an undertaking as "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". (J. 17 February 1993, *Poucet* case, C-159 and 160/93, *Rec.* 1993, p. I/637 *et seq.*).

112. Reply of the Commission to written question 2391/83, *OJ* C 222, 23 August 1984, p. 21.

supply (article 85.1.c) EEC Treaty).[113]

But things are not so clear a *posteriori*, because the ECJ has pointed out that, in order for an agreement to be prohibited, its purpose or effect must be to restrict, prevent or distort competition, "preventing the existence of the degree of competition necessary to respect the fundamental requirements and to achieve the aims of the Treaty, in particular the creation of a single market", which must be assessed in accordance with "the products or services considered and the economic structure of the sectors of the relevant market".[114] Reference to the market of products and services is constant when it rules on the basis of articles 85 and 86[115], even by way of sources of supply, because so far this term has only been applied to goods and services.[116]

In accordance with this approach, the Council and the Commission stress the need to determine the products and services to which competition applies.[117] For its part, the doctrine also points out that the competition of the market in question is made up of products or services.[118]

24. The assessment of a conduct contrary to competition law thus requires the market in question to be defined.[119] The essential issue is thus to know whether footballers can be regarded as a "product or service" and, as such, whether the market of the *sources of supply* of football is protected by article 85.[120]

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113. It should be recalled that this is the reasoning used by the Commission, LENZ and a substantial amount of doctrine to justify the existence of a restriction on competition (see *supra*). For the opposite reasoning see A. PAPPALARDO & N. PARISIS ("Le droit de la concurrence et le sport professionnel par équipe: quelques appréciations critiques sur la notion de marché en cause, en marge de l'affaire *Bosman*", *R.M.U.E.*, 1996-1, pp. 62–63) state that it is by no means clear what the restrictions on compeitition are in the market of sources of supply. And other authors deny that the sporting regulations in question affect competition, because there is no competition between the clubs of different member states (for example, M. CARDENAL CARRO, "La libre circulación de los futbolistas profesionales: diez consideraciones sobre la sentencia del caso Bosman", *Aranzadi Social*, vol. 205, 1996, pp. 2661–2663).

114. ECJ Judgment 25 October 1977, *Metro* case, 26/76, *Rec.* 1977, p. 1875 *et seq.*

115. For example, ECJ Judgment, 13 July 1966, *Grundig* case, 56 and 58/64, *Rec.* 1966, p. 496 *et seq.*; 28 February 1991, *Delimitis* case, C-234/89, *Rec.* 1991, p. I/935 *et seq.*

116. Application of the notion of "sources of supply" by the EU institutions ex article 85 of the Treaty establishing the European Community is very ambiguous, since it is usually mixed up with other types of restrictions on competition and, in particular, the limitation or distribution of goods and services markets. Bearing in mind this warning, see for examination, I. VAN BAEL & J.-F. BELLIS, Competition Law of the EEC, *op. cit.*, pp. 173 *et seq.* and 812 *et seq.*; M. WAELBROECK & A. FRIGNANI, Concurrence, *op. cit.*, p. 596 *et seq.*

117. For example, article 1, section 2, of Council Regulation (EC) 1310/97, of the Council amending Regulation (CEE) no. 4064/89, on the control of concentration operations between undertakings, *OJ* L 180, 9 July 1997, p. 1; Commission notice on the definition of the market for the purpose of community competition law, *OJ* C 372, 9 December 1997, pp. 5–6.

118. See any of the general monographs quoted previously.

119. CFI Judgment, 10 March 1992, *Vetro* case, T-68/89, Rec. 1992, p. II/1403 *et seq.*

It is indeed feasible to classify as "undertakings" in the sense of article 85 self-employed persons who carry out an economic activity in exchange for payment, in which case they would meet this requirement.[121] But footballers cannot be so in view of the community case law pointed out earlier. They are obviously not goods[122], nor are they providers of services, but wage-earning persons[123], subject to a special labour system. In short, they are workers and, as such, they lack independence.[124] It is appropriate to stress in this regard that the ECJ and the Court of First Instance have pointed out that the relevant market and the effects on trade are inseparable elements[125], and therefore should have the same or similar object[126], and yet the term trade only includes goods and services.[127]

If the labour market is not governed by competition rules, the logical consequence

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120. Even so, LENZ did not expressly comment on the relevant market, neither did the doctrine supporting his opinion, and neither did the Commission. This is surprising, because in other cases he has been careful to specify that "it is necessary to establish the relevant market, which entails defining both the market of the product and the geographical market of reference" (point 13 of the notice on agreements of minor importance which do not fall within the meaning of article 85 of the Treaty establishing the European Community, OJ C 372, 9 December 1997, p. 13). Indeed, this attitude can only be understood bearing in mind that those who uphold the application of these rules have had to acknowledge that "there is a lack of a clear definition of the market in which the anti-competition effects would occur" (J. VÍAS ALONSO, "Las normas de la FIFA sobre traspasos de jugadores no comunitarios...", *op. cit.*, p. 19).

121. L. RITTER, W.D. BRAUN & F. RAWLINSON (*EEC Competition Rules. A Practitioner's Guide*, Deventer, Kluwer, 1991, p. 32–33) cite, among other examples, plant growers and opera singers.

122. Supporting this viewpoint in the specific sphere of professional sport, J-P COT ("Jean-Marc Bosman: travailleur ou marchandise?", Gazette du Palais, 23 May 1996, p. 499) maintains textually that it should be deduced from the attitude of the ECJ in the *Bosman* case that it "has refused to consider professional players as goods".

123. To cite E. SAGARRA TRIAS ("La cessió obligatòria de jugadors a les seleccions nacionals", *Món Jurídic*, no. 133, May–June 1997, p. 53), "one of the most important innovations of the *Bosman* judgment is the statement that the legal relationship binding football players to their clubs is one of employment".

124. Even those who advocate the application of competition rules to professional sport cannot fail to recognise this fact (hence, point 263 of LENZ's general conclusions on the *Bosman* case).

125. For example, CFI Judgment of 21 February 1995, *VSPOB* case, T-29/92, *Rec.* 1995, p. II/289 *et seq.*

126. Only in exceptional cases is the competition of certain goods and services restricted and the trade in completely different goods and services affected, since normally when the competition of one is restricted the trade in this good or service or another regarded as interchangeable or substitutable by the consumer is affected owing to their properties, price and the use to which they are destined (point 14 of the Commission notice on agreements of minor importance which do not fall within the meaning of article 85 of the Treaty establishing the European Community, *OJ* C 372, 9 December 1997, p. 13).

127. For example, goods such as the right of ownership of sound supports (ECJ Judgment 8 June 1971, *Deutsche Grammophon* case 78/70, *Rec.* 1971, p. 487 *et seq.*) or services such as air transport (ECJ Judgment 30 April 1986, *Asjes* case 209- 213/84, *Rec.* 1986, p. 1425 *et seq.*).

is that the rules on transfers, nationality clauses and the termination of contracts, although they can also affect economic relations of clubs, are excluded from their scope insofar as they directly concern labour law.[128] Furthermore, footballers are neither competitors, nor clients, nor consumers, the three categories on which the application of competition law is based.[129]

A fortiori, it seems that several attempts have been made to describe professional football players as *economic transactions* in the hroad sense of the word, on account of the fact that, for example, in order to benefit from the tax allowances of the Member States where they work, they may set up a company to exploit their image, collect their contract payment, etc.: but irrespective of the legal form with which footballer arm themselves (even companies) for such purposes, they are nonetheless wage earners and proof of this is that they sign up with clubs as individuals.

25. Summing up, it would be essential to revise (at least, to broaden the scope of its content) community case law so that the community rules on competition could be applied as opposed to the sporting rules in question, even though they restrict competition within the common market, because as things stand, article 85, as it has been interpreted, can only be invoked against restrictions on competition in the market of goods and services, and not against possible restrictions on competition in the labour market, as in the case of sport.

A line of argument worth considering in this connection would be as follows: article 85 of the Treaty establishing the European Community protects freedom of competition between undertakings, whereas the community rules on the free movement of workers and social policy regulate relations between workers and their employers. The difference in subject matter means *a priori* that they fall outside the scope of antidumping regulations. Now, there are legal rules that affect both labour relations and economic relations between undertakings. This is the case of the sporting regulations on transfers, for irrespective of the fact that they also affect labour relations between clubs and players, they mainly regulate the economic relations between clubs, which must necessarily agree on a fee for the training and/or development of players who are transferred. As an economic activity, they would fall within the scope of article 85 and would be prohibited because, without an agreement between the clubs in question and payment of the agreed sums, there could be no transfers. And on restricting their possibilities of hiring players and the conditions

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128. See, for this position, R. ZACH, "Wettbewerbsrecht und Freizügigkeit für Arbeitnehmer im Bereich des Sports nach dem Recht der EG", in W.R. SCHLUEP, *Hommage à Arnold KOLLER*, Berne, Stuttgart and Vienna, Stämpfli, 1993, pp. 852–853.

129. Nonetheless, it has been argued to overcome this barrier that "once the players' contract has ended, they are not employees, but rather suppliers 'fournisseurs' of their own work" (D. O'KEEFFE and P. OSBORNE, "L'affaire *Bosman*: un arrêt important pour le bon fonctionnement du marché unique européen", *R.M.U.E.*, 1996-1, p. 43).

under which they could employ them, they are hindering the competition that could occur between them.

26. There is reason to believe that the ECJ leaves an avenue open for this change of case law in ground 75 of the *Bosman* judgment when it declares that the application of Article 48 of the Treaty is not precluded by the fact that the transfer rules govern the business relationships between clubs rather than the employment relationships between clubs and players, since the fact that the employing clubs must pay fees on recruiting a player from another club affects the players' opportunities for finding employment and the terms under which such employment is offered (ground 75).[130] Indeed, this may mean that the same fact (transfer of players) can be regulated by two different sets of community rules, those on competition (aspects of economic relations between clubs) and those on free movement of workers (aspect of labour relations between player and club). And if there is nothing to prevent economic relations between clubs from being regulated by competition rules, considering the economic relationship in itself, and the rules on the free movement of workers, taking the economic relationship to be compensation for a service rendered when a player is transferred, the aforementioned relations would be applicable to the rules on transfer, considered to be economic relations between clubs.

In other words, in order for these rules to fall within the scope of article 85, all that is needed is to ignore the fact that, subjectively, they affect persons (the players transferred) and to focus on the fact that, objectively, they have repercussions on the economic relations of the clubs behind those persons, which would be different if those rules did not exist.

27. All in all, it is difficult to accept this line of argument because it requires us to consider only one side of the coin, the economic relations between clubs, in order for competition regulations to be applied, and ignores the other side, the players, whose employment relationship with their club gives rise to the economic relationship, because these regulations are not applicable to them as wage-earning employees. Indeed, the economic relationships enjoyed by clubs do not occur of their own accord, rather, they stem from the transfer of the player (therefore, of the person), and are a sort of material compensation for this operation. Since these two aspects are closely linked[131], and there is a certain subordination of the objective element to the subjective, since the economic relationship depends on the transfer of the person, this

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130. To an extent, the Court of Justice also maintains this in point 101 of the grounds, and it can likewise be deduced from LENZ's opinion on the *Bosman* case when, in point 263, he points out that the competition restricted by these rules is competition between clubs, irrespective of the fact that the rules in question restrict the player's freedom.

131. It has even been considered that "the position of players and the restriction on competition" between the clubs who carry out the sporting rules is "inseparable" (M. CARDENAL CARRO, "La libre circulación de los futbolistas profesionales...", *op. cit.*, p. 2660).

relationship should be regulated by the rules applying to the player (the free movement of workers), and subsequently fall outside the scope of competition law.[132] In such conditions it would be perfectly feasible for the dissociation of the two elements to be judged unacceptable.[133]

28. Irrespective of these reservations concerning a change in case law, there is another drawback to applying article 85 to the federation rules in question; namely, it would be necessary to establish whether the regulations on transfer *restrict competition significantly* and this would raise doubts in view of the sums of money involved[134] and the number of players who have been affected.[135]

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132. To an extent, the economic relations that take place between clubs for the purpose of transfers are comparable to the economic compensation for services rendered deriving from the exercise of the freedom of movement of persons and services, and in this case the ECJ has maintained that this compensation does not constitute an autonomous movement of capital, governed as such by this freedom, but rather a transaction that underlies a provision in the sphere of the free movement of persons and services and, for this reason, pertains to that legal system (J. 31 January 1984, *Luisi v. Carbone,* 286/82 and 26/83, *Rec.* 1984, p. 377 *et seq.*).

133. Particularly when the practice of the ECJ reveals that changing the direction of case law is no easy task, since it only occurs when there are substantial reasons, such as a settlement that was originally erroneous, or a correct one that has become antiquated. It is controversial if such conditions should apply to this case.

134. According to LENZ (points 57 and 260 of his opinion on the *Bosman* case), in the United Kingdom some 51 million pounds were spent during the 1992/1993 season on transfers; and about 96 million marks in Germany in the 1995/1996 season. While the Advocate-General considers that these data prove the importance of the transfer system in today's professional football and, therefore, the existence of a significant restriction on competition and significant effects on trade between Member States, these sums seem more characteristic of a *de minimis* agreement not prohibited by article 85.1 of the EEC Treaty, as he stresses that the Commission should have included as a criterion to delimit article 85 during the period of the *Bosman* case the fact that the total turnover of the participating companies did not exceed 300 million ecus (Communication, 23 December 1994, *OJ* C 368, 23 December 1994).

135. For example, with respect to such an important market as Spain, the figures supplied by the media speak for themselves: in the 1996/1997 league 64 community players were registered in Spain in the first and second divisions. The figure rose to 80 in the current 1997/1998 league. In percentage terms, this means that community players accounted for 4.87% and 6.03% of total players in the aforementioned leagues (*El País*, 27 August 1997, p. 28). This is a year in which competition football has been called the *league of the stars*....

These matters, like others that could arise[136], have not been subjected to a global legal and economic examination[137], even though they are indispensable for being able to establish whether sporting rules affect trade between Member States or restrict competition significantly, since – according to the ECJ – in order to decide, it is necessary to have "a sufficient degree of probability on the basis of a set of objective factors of law"[138], which entails previously carrying out an economic assessment of the market in question and the effects of the agreement on that market.[139] And in the absence of such an examination, or if the results are insufficient, the community jurisdictions have in the past overruled decisions of the Commission.[140]

The answer to the question of whether article 85 is applicable to them would, then, require a prior analysis that duly takes into account the particular characteristics of sport and establishes reasonably to what extent it really influences competition law. Until these conditions are met, it is hazardous to advocate specifically the applicability of community rules.

29. Since the relevant market that is to be safeguarded and the effects on trade are inseparable elements and as such must have the same or a similar object[141], it is difficult to consider that footballers are an object of trade in the sense of article 85.1, when trade between Member States[142] has so far referred only to goods and services,

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136. There is a lack of data on transfers for, for example, the four most expensive leagues, the Spanish, English, German and Italian; it would have to be established approximately how many community players could be affected; it would be necessary to examine the influence of broadcasting rights on player transfers, since players are becoming more and more expensive and, as a result, termination clauses and transfer fees are too in that they are an important element for establishing them; it would be appropriate to ascertain the volume of these broadcasting rights as a whole with a view to specifying the relevant market; it should be examined in detail whether, and, if so, to what extent, the structure of the football market is affected by them, leading to compartmentalisation.

137. As an exception, albeit partial, see the detailed study of "the symbiotic relationship" from the economic, programming viewpoint, etc., between professional sport and television, and its influence on competition law, by R. ALLENDESALAZAR CORCHO, "Derecho de la competencia, deporte profesional y televisión", *G.J.C.E.*, 1995, D-23, p. 73 *et seq.*; and also an approach, more theoretic than practical, to the consequences of the abolishment of the transfer system and nationality clauses on clubs' revenues, the balance of competition, the financial situation of small clubs and players' salaries, by S. KÉSENNE, "L'affaire *Bosman* et l'économie du sport professionnel par équipe", *R.M.U.E.*, 1996-1, p. 79 *et seq.*

138. ECJ Judgment, 11 July 1985, *Remia* case, 42/84, *Rec.* 1985, p. 2545 *et seq.*

139. ECJ Judgment, 28 February 1991, *Delimitis* case, C-234/89, *Rec.* 1991, p. I/935 *et seq.*

140. Such as CFI Judgment, 10 March 1992, *Società Italiana Vetro* case T-77/89, *Rec.* 1992, p. II/1403 *et seq.*

141. For example, CFI Judgment, 21 February 1995, *VSPOB* case, no. T-29/92, *Rec.* 1995, p. II/289 *et seq.*

142. Trade refers to economic exchanges between member states as a whole, according to the ECJ (Judgment, 14 July 1981, *Züchner* case, 172/80, *Rec.* 1981, p. 2021 *et seq.*).

and has thus not encompassed wage-earning employment, and footballers are workers.[143] And if their economic activity does not fall within the current meaning of the term trade as it appears in article 85 of the EEC Treaty[144], that means a change of case law would be needed to include wage earners in its framework.

30. It is furthermore highly unlikely that a footballer's lot "could significantly affect" trade between Member States, upsetting the balance of trade to the extent that it influences the achievement of the aims of the single market. Although a study has yet to be carried out in order to quantify with a certain practical reliability to what extent sporting rules influence trade between Member States[145], existing data point in this direction[146], since the sums virtually established in rules on transfers and termination of contracts can hardly have a significant effect on trade between Member States[147] compared to the turnover generated by professional sport (and even less so the overall figure for trade in goods and services) within the community; nor are there so many quality players compared to the total number of professionals for us to be able to affirm categorically that they affect trade in the Community.[148]

31. Regarding article 86 of the EEC Treaty, the arguments pointed out by Mr LENZ, the Commission, most doctrine and even the sporting federations themselves are convincing in their refutation of the applicability of this precept to the aforementioned rules concerning nationality clanses, termination of contracts in force and transfers. Basically, it has been argued that the sporting federations do not enjoy a dominant position, and at most it could be said that the clubs as a whole have such a

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143. See the case law cited *supra* section I.2. In this connection, UEFA (observations on the *Bosman* case, in MANCINI's hearing, *multicopy* text, p. I/18) observed that "transfers of players cannot be regarded as trade".

Furthermore, regarding common trade policy, the ECJ has clarified that the notion of "trade" includes the exchange of goods and some – not all – services, without referring at all to workers (for example, Opinion 1/94, 15 November 1994, *Rec.* 1994, p. I/5267 *et seq.*).

144. For the opposite opinion, see M. WAELBROECK & A. FRIGNANI (Concurrence, op. *cit.*, p. 195, note 372) pointing out briefly and citing expressly LENZ's opinion on the *Bosman* case, that the term trade would include not only goods and services, but also "transfers of players between undertakings of different member states".

145. It is worth recalling that the ECJ and the Court of First Instance require proof that interstate trade is not affected solely in theory (for example, CFI Judgment 14 July 1994, *Parker Ten* case, T-77/92, *Rec.* 1994, p. II/549 *et seq.*).

146. See the figures stated *supra* no. 37.

147. The Commission has stated in this regard that the contracts of professional players do not have a significant effect on trade between Member States (reply to written question 2391/83, *OJ* C 222, 23 August 1984, p. 21).

148. The Belgian Royal Union points out in this connection that "the transfer system only concerns a minority of clubs and a small number of professional players", and would not "significantly affect trade between member states" (observations on the *Bosman* case, report for the hearing, p. I/17).

dominant position in that they are bound by economic links and must be dependent on each other in order to be successful. This means that the possible abuse that might occur in the hiring of players would not come from the federations, which organise football, but from the clubs, which provide the football events for which they hire players. But professional players do not fall into any of the categories on which the application of article 86 is based, since they are neither competitors nor clients nor consumers. This precept would therefore be inapplicable in these cases.[149]

32. Nor does it seem possible to invoke other rules of community competition law against the sporting rules examined, particularly article 90 of the EEC Treaty, on the basis of its content: this precept applies to public undertakings and undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, in both cases from a Member State.[150] FIFA and UEFA, however, are private associations of a non-community State (Switzerland, to be precise) and, although of recognised public interest, are not public undertakings or undertakings with special or exclusive rights, or undertakings entrusted with the operation of general services, or revenue-producing monopolies – which are the categories established in article 90 – because their legal status remains unchanged.[151]

33. Finally, it should be stated for the record that this paper by no means recommends that competition rules (and, in particular, article 85 of the EEC Treaty) should not be invoked with respect to the world of sport; rather, for the reasons pointed out, it seems that the rules on transfers, clauses on termination of contracts and provisions on nationality cannot be invoked when they directly and chiefly affect professional players (such as footballers) acting as paid employees. But other regulations of sporting federations, and indeed the conduct of clubs as undertakings, can perfectly fall within its scope and be prohibited by competition law, without prejudice to a possible subsequent exemption.

Thus, articles 85 and 86 could be applicable with respect to FIFA regulations that impose a compulsory system of licences and royalties on manufacturers of footballs[152], grant exclusive rights over ticket sales and radio and television

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149. By contrast, some authors advocate the application of article 86 EEC Treaty, such as D. O'KEEFFE & P. OSBORNE, "L'affaire Bosman: un arrêt important...", *op. cit.*, pp. 41–43; and L. NYSSEN & X. DENOEL, "La situation des ressortissants de pays tiers...", *op. cit.*, pp. 129–132.

150. In general, on the system of this article, see any of the monographs cited *supra*.

151. See especially points 3 to 5 of the *Bosman* judgment, specifying the legal status of international federations.

152. The Commission is studying the issue after receiving complaints from football manufacturers and the World Federation of Sporting Goods Industry in 1995, and had carried out a spot inspection on the headquarters of the English Football Federation (BIO/96/23, 22 January 1996, *at http://Europa.eu.int/eu/comm/spp/ rapid.htm*).

broadcasting[153], require that the federations approve those who operate as footballers' representatives[154] or share out areas of respective influence among national federations.[155] And, on the basis of articles 92 and 93, exception could be taken to the distribution of profits from the bets that public authorities usually make between sporting companies.[156]

Furthermore, it is feasible to think that, in certain circumstances, competition rules could be invoked vis-à-vis private sporting regulations affecting professional players who carry out their activities as providers of services, such as judokas when they take part in an international tournament.[157]

IV. CONCLUSIONS

34. Professional players must be regarded as workers and therefore enjoy the protection deserved by this condition. This statement is evident in purely internal contracts, since Spanish legislation contains rules specifically governing the labour relations between professional players and sporting associations. However, this approach should also be taken to contracts characterised by the presence of a foreign element. The nature of the relationship does not vary despite the existence of that element. Therefore, the application of the rules governing international jurisdiction and the determination of the applicable law should be carried out in consideration of

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153. The European Parliament Committee on Culture, Yough, Education and the Media, Report on "The European Community and Sport", of 29 April 1994, *Document PE* 206.671/A/Fin. This controversy, which arose during the Barcelona Olympic Games, has reoccurred in relation to the exclusive system of the sale of tickets for the World Football Championship in France, held in June 1998, since the Commission is demanding that FIFA and the organising committee change the system to introduce greater competition (*G.J.C.E.*, B-128, 1997, p. 54).

154. According to a press release from the Commission on 7 January 1998, (*El Mundo*, 8 January 1998, p. 39), proceedings have been opened against this system, on the consideration that this requirement is abusive, redundant and contrary to community legislation.

155. The case was recently raised before the Commission in view of UEFA's refusal to grant Wimbledon, a small English first division team, the right to move their headquarters to Dublin and nonetheless take part in the English League, because this measure goes against the exclusive jurisdiction granted to each national federation over their area of influence under sporting rules (*El País*, 10 February 1998, p. 44).

156. M. CAMPOGRANDE, "Les règles de la concurrence et les entreprises sportives professionnelles après l'arrêt Bosman", op. cit., p. 56.

157. Pending settlement of the *Deliège* case by the ECJ, see interesting arguments in favour of this application in N. PARISIS & M. FERNÁNDEZ SALAS, "Le sportif individuel au regard de l'arrêt *Bosman...*", *op. cit.*, pp. 148–152.

this quality. This entails applying rules that give preferential attention to the interests of professional players as workers and, as such, the weaker party in the contractual relationship.

35. The determination of the law governing the contract is established pursuant to the RC. The law designated by the parties or the objectively applicable law is state law (habitual place of work). Indeed, this does not prevent the operation of sporting rules adopted by the federations, but it does entail a legal framework into which these sporting regulations must be integrated. Sporting rules do not act, nor can they be regarded, as a legal system, despite the existing institutional framework in this sector. Thus, the mandatory rules of law that are objectively applicable provide the minimum statutory protection for the professional players, and sporting rules may only modify this in melius. RD 1006/85 lays down some mandatory rules of law that cannot be freely chosen, and therefore, insofar as Spanish law is the objectively applicable law, there is no room for derogation, unless the law freely chosen by the parties provides greater protection for the worker. In this regard, one of the most controversial points is the contradiction between the possibility – recognised under Spanish law – of the worker voluntarily annulling the contract, without justification, and the limitation of grounds for rescission by FIFA sporting rules (circular 616). The conflict is settled on the basis of the principle that the legal framework of the employment contract pertains to the State. Having established that Spanish law is objectively applicable, this sporting rule goes against the level of protection established in the state law governing the contract, and thus the opportunity that article 16 RD 1006/85 provides the professional player cannot be suppressed.

By the same line of reasoning, sporting rules cannot infringe the basic principles of community law and, specifically, the free movement of persons. Thus, neither nationality clauses, nor transfer fees can be accepted insofar as a community national exercises freedom of movement. However, this subjection to the principle of precedence of community law is also advocated with respect to national legislation, so that if the law designated pursuant to article 6 RC envisages this type of obstacle to that freedom, the rules should be adapted to the requirements of European community law.

36. In this regard, the ECJ had the occasion to comment expressly on the restriction on the aforesaid freedom, declaring in the *Bosman* case that the sporting rules on the nationality clauses and transfer fees are prohibited in that they constitute an unjustified obstacle to the free movement of footballers as wage earners within the Community, provided these players are EU nationals. Similarly, the Commission later extended the application of this judgment to the nationals of third states with which the Community has concluded an association agreement, which seems reasonable.

37. It also seems plausible to think that sporting regulations can restrict competition and affect trade within the common market, in that they distort the normal interaction of supply and demand. This occurs, for example, when they influence goods or services, such as the establishment of royalties for the use of balls

in official competition matches or, even, when they require footballers' representatives to take out a licence. It is not however clear that article 85 of the EEC Treaty can be applied to regulations on transfers, nationality clauses and those limiting the freedom to terminate a contract. While these regulations can affect the economic activity of clubs, which are undertakings in the sense of the prececpt, the object of those rules is not goods or services but rather wage earning persons and so far community jurisdiction has restricted its ambit to goods and services.

38. Although this position seems more in line with a literal sense, it should not however reach the point of absolutely ruling out the possibility that such sporting regulations may fall within the scope of competition law. But a change of case law would be required, and in order to take this step, which in itself is never an easy task, a serious study would probably have to be carried out. This study should, on the one hand, duly take into account the particular characteristics of sport and, on the other, establish with sufficient likelihood, using the expression of the Court of Justice in the *Remia* case, to what extent it really influences competition law.

It should be borne in mind, regarding the first condition, that the legal system whereby footballers are hired is very complex in nature, on account of its opacity and also owing to the peculiarities of sporting organisations. And it is even surprising from the legal point of view that sporting rules should spring up mysteriously when a club needs them to keep a certain player, or that disputes over these regulations with the national and community legal systems should be settled in their favour. This is surely because this legal system reflects the clashes between the different interests at stake – those of the players (individual right to work, making the most of the years his contract lasts), of clubs (impossibility of continually improving players' contracts to keep them on the payroll), of spectators (quality of competition, since the all the best players are not concentrated in one club), of the media (establishment of TV broadcasting rights depending on a particular plantilla), to cite but a few examples.

Regarding the second condition, suffice it to consider that debate is currently being held on the application of competition law to sporting rules, and it is even maintained that there is a relevant restriction on competition and trade is noticeably affected between Member States, though it is not known how many community players could be affected. Neither are there details of the transfer figures for all the leagues, nor is it known what influence television rights have on player transfers. While this situation persitst, it seems hazardous to defend outright the applicability of community rules.

39. The legal system of football cannot continue indefinitely in its current state of uncertainly, and it is therefore appropriate, through constructive dialogue, to seek de lege ferenda solutions to harmonise the different interests as satisfactorily as possible, thus putting behind the process begun by the *Bosman* judgment in this sport. The parties involved do not, however, seem willing, as evidenced by the fact that the sporting federations have again called for the EEC Treaty to be revised in order to exampt sport from the application of community law to sport, and the community

institutions continue to open proceedings against sporting regulations. Indeed, new battlefronts are even emerging, for example over the royalties on competition footballs or over the authorisation required by footballers' representatives to exercise their activity.

ADDENDA

This paper was completed on 12 April 1998. It should be borne in mind that since then, the following changes have occurred as of 20 October 1999:

First, the 2 October 1997 Treaty of Amsterdam came into force on 1 May this year and the numbering of the articles cited in this study has been modified. Specifically:

— article 48 of the EEC Treaty is now article 39
– article 85 is now article 81
– article 86 is now article 82
– article 90 is now article 86

Second, although the ECJ has not yet ruled on the cases referred to in notes 7 and 8, Advocates-General *Cosmas* (18-5-99, cases C-51/96 and C-191/97, *Deliège*) and Alber (22-6- 99, case C-176/96, Lehtonen) have drawn up their Conclusions, which support the considerations stated in this paper. Regarding the proceedings instituted by the European Commission in connection with breach of community law, the final result has not yet been made public.

Third, with respect to Spanish judicial practice, two judgments have been passed (Judgment of Social Affairs Court no. 1, Pontevedra, 23-9-98, subsequently overruled by a Judgment of the social affairs division of the TSJ Galicia on 22-3-99) that raise the question of the improper nature of the cancellation clauses. Thus, whereas the Social Affairs Court considered that this was a penal clause and that art. 114 Cc was accordingly applicable, the TSJ rejected this observation, considering that it is a penalty for change of mind and that the amount agreed in the cancellation clause should therefore be maintained.