

## THE COMPATIBILITY OF THE RULES OF FIFA FOR TRANSFER OF PLAYERS WITH THE EU RULES ON FREE MOVEMENT OF WORKERS AND NON-DISCRIMINATION

*Boryana Kapchina*

**Introduction:** Historical development of the competences of the European Union in sport law issues and the changes brought by the Treaty of Lisbon

In December 2009, the Treaty of Lisbon entered into force and as a result brought some changes to the existing legal order of the European Union (EU). Important novelties were introduced in the area of sport law. Until the date of the entry into force of the Lisbon Treaty, this area was not mentioned anywhere in the text of any of the treaties. This meant that the European Union was not granted competences to act in the area of sport.<sup>1</sup> However, case law of the Court of Justice of the European Union (CJEU) show that despite the lack of explicit competences, the sport policy of the EU was guided namely by the CJEU. Now, Article 165 Treaty of the Functioning of the European Union (TFEU) explicitly mentions the area of sport among those, where the EU has power to take any actions. Important to point out, however, is the fact that this legal provision does not produce any horizontal effect, i.e. when making policies in other areas; it does not require that issues related to sport are taken into consideration.

Prior to the Lisbon Treaty, in 1997 a Declaration on Sport was annexed to the Treaty of Amsterdam, which amended the Treaty on the European Union and the Treaties Establishing the European Communities.<sup>2</sup> The main focus of this declaration was on the social importance on sport in bringing people together. However, the impact of this Declaration was considerably limited due to the fact that it has no legal force but is generally understood as a political statement.<sup>3</sup>

Three years later, in 2000 was adopted the Declaration on Sports as annex to the Presidency Conclusion of the Nice European Council. Its focus was on “specific characteristics of sport and its social function in Europe, of which account should be taken in implementing the social

---

<sup>1</sup> “Lisbon Treaty and EU sports policy” [2011] *International Sport Law Journal* 1-2, 145.

<sup>2</sup> Robert C.R. Siekmann, “The Specificity of Sport: Sporting Exceptions in EU Law” [2011] *International Sports Law Journal* 3-4, 76.

<sup>3</sup> *Ibid.*

policies”.<sup>4</sup> As basis of this Declaration was used the so-called Helsinki Report on Sport (1999)<sup>5</sup>.

While the importance of the two Declarations on Sport could not be denied, it has to be mentioned that they have no binding character and are viewed as soft law.<sup>6</sup> 2007 is another important year in the development of the area of sport law. On 11 July, the Commission adopted its White Paper on Sport- the first document with strategic aims in the area under consideration. This document focuses on three main areas- the social role of sport, the economic importance of sport and the organization on sport.<sup>7</sup> Important to mention in respect to the White Paper is that it respects the basic values and principles of the European Union and does not go beyond the established limits in the competences of the European Union.

In contrast to sport law area, free movement of people is one of the areas of European Union law that has been developed long ago, since migration of persons for working purposes has been seen as one of the basic economic rights of the citizens of the Member States of the European Union. Free movement of people and in particular, the free movement of workers is one of the basic fundamental freedoms, on which the European Union is based. Furthermore, it is important to be mentioned that it has been developed long ago and the case law of the CJEU is well-established and consistent on this matter. EU citizens as well as special category of third country nationals, such as family members are the people who are taking advantage of one of the basic freedoms of the backbone of the EU – the internal market.

Football is one of the most popular sports not only in Europe, but also in the whole world. Most citizens of the EU have their favorite team or are supporting the national team of their country of origin, residence, etc. However, not everyone is familiar with the rule of transfer of players, composition of the teams... Discrimination is another concept closely related to the area of sport and football in particular and therefore is going to be covered in the present document.

Another concept that will be discussed further is the so-called FIFA “6+5” rule. It is related mostly to the situation of non-EU players, for who restrictions continue to exist and are widely spread. According to this rule, at the beginning of a match, each club must have at the field at least six players, eligible to play for the national team of the country

---

<sup>4</sup> Ibid.

<sup>5</sup> COM (1999) 644.

<sup>6</sup> Robert C.R. Siekmann, “The Specificity of Sport: Sporting Exceptions in EU Law” [2011] *International Sports Law Journal* 3-4, 77.

<sup>7</sup> Ibid, 78.

concerned. The main aim of this rule is to restore the national identity of the football clubs that have signed mainly with foreign players. Furthermore, it is important to say that the decisive element when applying the rule under consideration is the entitlement of the players to take part in the relevant national team. Since there are no rules on the application of this rule, it has to be mentioned that FIFA is in favor of flexible application which allows for exceptions and transition periods. Nevertheless, rules leading to direct discrimination on the ground of nationality are not allowed under EU law. Same is valid for rules that are imposing some quotas for the composition of the team linked to the national identity of the players. Therefore, in the present document special attention will be paid on the European rules for free movement of workers and their application to sports people. The second chapter will be discussing the European system for transfer of players. The third will be focused on the aftermath of the ECJ judgment in *Bosman*. At last, in the final chapter of the present paper will be discussing future developments in the field of sport law.

### **I: Free movement of workers and non-discrimination**

This chapter is aimed at proving background information about the rules governing the free movement of people in the European Union, more specially the rules governing the free movement of workers. Furthermore, focus will be also directed to the prohibition of discrimination. This chapter is intended to serve as a basic for the analysis that will be made in the following chapters regarding the free movement of football players and the applicable rules before and after the famous *Bosman* judgment, as well as the possible future developments on matters related to sports law in the European Union.

#### **1.1. Historical development of the freedom of movement of workers**

The free movement of workers is one of the four fundamental freedoms, together with the freedom of movement of goods, freedom to provide services, and the freedom of movement of capital, which are the foundation of the single market of the European Union. Under Article 3 TEU, “the Union shall establish an internal market”, where the competences between the Member States and the Union are shared.<sup>8</sup> The legal provision that is regulating the free movement of workers is Article 45 TFEU. According to it, workers are free to seek and commence employment in the territory of an EU Member State different than that of their origin under the

---

<sup>8</sup> See Treaty of the Functioning of the European Union (TFEU), Article 4, C115/51.

same conditions as if they are nationals of that state.<sup>9</sup> The main purpose behind this provision is to give the opportunity to workers from MS with high unemployment rates to find jobs on the territory of the European Union. However, in practice it proved that workers prefer to stay unemployed in the MS, which they are familiar with, rather than risk everything and going to a country they do not know and starting to build their life from the beginning.<sup>10</sup>

Nevertheless, the situation changed significantly when in 2004, ten new members joined the European Union and among them were the so-called EU-8 countries of the former Eastern bloc: Poland, Lithuania, Latvia, Estonia, the Czech Republic, Slovakia, Hungary and Slovenia. The citizens of the EU-8 were very keen on taking advantage of their right of free movement and to find better life somewhere else in the European Union. Foreseeing such events transitional provisions were put in the Accession Treaties of those countries, which gave the other Member States the possibility to decide whether to open their market for workers, coming from the “new” Member States. The scheme is working under the “2+3+2” formula, which means that the final restraints on the working market could be imposed for total of seven years after the accession of particular country. For the ten countries that entered the EU on 1 May 2004, such restraints were removed on 30 April 2011. At present, these rules are applicable only for Bulgaria and Romania- the last two that joined the European Union and these limitations will be lifted on 31 December 2013.<sup>11</sup> However, important clarification that needs to be made is that these rules are not applicable for self-employed citizens of the EU.

## **1.2. Definition of “worker” according to the case law of the Court of Justice of the European Union**

In the Treaties’ text, there is not any provision defining the meaning of the term “worker”. As many notions in the area of European law, the definition has been made by the Court of Justice of the European Union, which based it on objective criteria that has to be applied uniformly by all European Member States.<sup>12</sup>

Worker is a person, who “for a certain period of time performs services for and under the directions of another person in return for which he

---

<sup>9</sup> See Treaty of the Functioning of the European Union (TFEU), Article 45, C115/51.

<sup>10</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 264.

<sup>11</sup> Commission, “The impact of the free movement of workers in the context of EU enlargement”, COM (2008) 765,5.

<sup>12</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 266.

receives remuneration”<sup>13</sup>. Furthermore, the CJEU specified in *Meeusen v. Hoofddirectie*<sup>14</sup> that it is up to the national court to take decision on the existence of subordinate relationship between the worker and his or her employee. Furthermore, what the sphere of employment<sup>15</sup> and the relationship worker-employee<sup>16</sup> are has minor importance. Further requirement is the existence of engagement in a genuine economic activity under Article 2 EC, which is now repealed by the Lisbon Treaty<sup>17</sup>. Additionally, as supported by the case law of the Court, most of the activities that were questioned by the national courts of the Member States satisfy the above-mentioned requirements. For the present paper, it is important to mention that professional football playing qualifies as genuine and effective economic activity. This was confirmed by the Court in its judgment of *Bosman*<sup>18</sup>. In addition, the Court said that if the condition of effective and genuine employment has been met, it does not matter whether the individual pays for his life with the money he makes, or that his pay is used to add to the income of another family member<sup>19</sup> or is supplemented by public funds<sup>20</sup>.

It is important also to mention that the Court has extended the definition of “worker” to include those who are seeking job in another Member State.<sup>21</sup> However, the CJEU have decided that the period, which a job-seeker will be given to find job depends on the national law of the particular Member State; nevertheless, there has to be given a period of at least three months during which job-seekers have to look for employment.<sup>22</sup> Despite this, if they are dependent on the social security system of the Member State under consideration, there exists the possibility that they will be asked to leave the country. However, in *Antonissen*<sup>23</sup> the Court found that if at the end of the period, the job seekers can prove that they have real chance of finding employment, than they cannot be forced to leave the state, where they are looking for job.

---

<sup>13</sup> Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 212, paras. 16-17.

<sup>14</sup> Case C-337/97 *Meeusen v. Hoofddirectie van de Informatie Beheer Groep* [1999] ECR-I 3289, para. 15

<sup>15</sup> Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 21.

<sup>16</sup> Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, para.5.

<sup>17</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 266.

<sup>18</sup> Case C-415/93 *Bosman* [1995] ECR I- 4921, para. 73.

<sup>19</sup> Case 53/81 *Levin* [1982] ECR 1053.

<sup>20</sup> *Ibid*, para 14.

<sup>21</sup> Case C-85/96 *Martinez Sala v. Friestaat Bayern* [1998] ECR I- 2691 , para 32.

<sup>22</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 268.

<sup>23</sup> Case C-292/89 *R v. IAT, ex p. Antonissen* [1991] ECR-745, para. 21.

### 1.3. Non-discrimination

Article 18 TFEU contains general prohibition of discrimination on the basis of nationality. Additionally, Article 45 contains the basic rules governing the free movement of workers within the European Union. Furthermore, Article 45 (2) contains provisions on the abolition of any discrimination based on nationality between workers of different Member States, as far as employment, remuneration and other conditions of work and employment are concerned.<sup>24</sup> Together with direct, the indirect discrimination is also forbidden under EU law. Under “indirect discrimination” is understood any measure that puts particular group of applicants for certain position at disadvantage due to conditions different than the requirement on nationality. Unless objectively justified<sup>25</sup>, indirectly discriminatory measures are in breach of European Union law. Additionally, Article 45 (3) provides that the right of free movement is composed of further sub-categories of rights like the right to accept offers of employment, to move freely on the territory of the Member States and to stay there for the purpose of employment, and also to remain in the Member State after having been employed.<sup>26</sup> The only exceptions where discrimination is allowed are cases, where public security, public security and public health are at stake.

Furthermore, in *O’Flynn*<sup>27</sup> the Court of Justice of the European Union has ruled that the conditions that are imposed by national law in regards to employment must be regarded as producing the effect of indirect discrimination, where the individuals that are affected by them are mainly migrant workers, or where there is a risk that they may operate to the particular detriment of migrant workers. The Court continued that these provisions could be justified only if objective considerations are made and they are not on the basis of the nationality of the workers in question; furthermore, the measures pursued by national law have to be proportionate to the legitimate aim they want to achieve.<sup>28</sup>

The present chapter provided general background information about the applicable rules in the European Union. The following chapters will be orientated towards the specific area of sport and the system of transfer of players.

---

<sup>24</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 269

<sup>25</sup> Case C-187/96 *Commission v. Greece* [1998] ECR I-1095.

<sup>26</sup> *Ibid* at 17.

<sup>27</sup> Case C-237/94 *O’Flynn v. Adjudication Officer* [1996] ECR I- 2617, paras. 18-19.

<sup>28</sup> Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010), 241.

## **II: *Bosman* ruling and its effect on the European system of transfer of players**

The aim of the present chapter is to provide information regarding the rules of transfer of players in the European Union. Professional sport is an interesting example for the application of the rules of free movement of workers and non-discrimination, which were discussed in the previous chapter. However, it is important to mention that prior to the entry into force of the Treaty of Lisbon the Union's competences in this sphere were limited. At present Article 165 TFEU provides that "the Union shall contribute to the promotion of European sporting issues"<sup>29</sup>.

Nevertheless, as early as 1976 the Court of Justice has established that as long as sport constitutes genuine economic activity, it is subject to the law of the European Union.<sup>30</sup> The Court continued further by clarifying professional and semi-professional football players and the activities that they produce fall in the discussed category.<sup>31</sup>

### **2.1. The system of transfer of players before the decision of the *Bosman* case**

Football is great love for many Europeans, who celebrate the victories and suffer at the losses of their favorite teams. However, nowadays football fans are faced with a dilemma- on the one hand they want their favorite teams to play in the highest club competitions and to perform at the highest possible level; however, on the other hand, they still are interested in the background and the nationality of the players of these teams. Having said this, the case of Jean-Mark Bosman is a clear example how player's nationality could hinder the development of his career due to rules in force imposing quota systems regarding the composition of the teams.

Jean-Mark Bosman was a football player, playing for the Belgium football club Liege. In 1988, the club acquired the rights over the player by completing a payment of 66, 000 pounds. However, two years later he was not anymore among the "favorite" players in the team and therefore, decided to move to France and play for the team of Dunkerque after the end of his contract with Liege. Making use of the player's evaluation system in force at that time in Belgium, Liege set a fee that the new team needed to pay for Mr. Bosman. The amount was estimated at 50,000 pounds. However, Dunkerque refused to pay the requested amount of money. As a result, Bosman was forced to stay with Liege and to make matters worse, his salary was reduced with 75% and the amount he was receiving equaled to 5, 000 pounds per

---

<sup>29</sup> See Treaty of the Functioning of the European Union (TFEU), Article 165, C115/51.

<sup>30</sup> Case 13/76 *Dona v. Mantero* [1976] ECR 1333, para. 12.

<sup>31</sup> Case 36/74 *Walrave and Koch v. Association Union Cycliste Internationale* [1974] ECR 1405, para.4.

month. Additionally, he was also removed from the first team. Therefore, he decided to look for his rights in court.

His case was taken to the Court of Justice of the European Union (European Court of Justice), which decided that the rules in force are contrary to the legislation of the European Union. In particular, they constituted restrictions on the free movement of workers. What the Court said is that every football player at the expiration of his contract is free to move to another football club. The only condition was that the players move from one European club to another. In addition, ten years after the decision in *Bosman*<sup>32</sup>, the CJEU ruled over the *Simutenkov*<sup>33</sup> case, where it decided that even football players originating from countries outside the European Union enjoys the right confirmed by the Bosman judgment as long as he was legally employed in the country of the European Union and his country of origin, as in the present case Russia, has signed Agreement on partnership and cooperation establishing a partnership with the European Union and its Member States.

The Bosman decision came out in 1995 and prior to it the transfer system of the European Union was very different – a player was allowed to move from one club to another only with the consent of the two clubs. In most of the cases this agreement was reached after agreeing on particular amount of transfer fees that the buying club has to pay to the selling one.<sup>34</sup> What is striking about this transfer system is the fact that these rules were applicable irrespectively of the fact whether the player's contract with the particular club has expired or not. This meant that players were practically owned by the football club even when their contract has ended.

Furthermore, the judgment changed another aspect of the system- there existed quota system of the national associations and also those of the European branch of FIFA, UEFA competitions. What this quota system consisted of are rules that allowed only particular number of players to take part in a particular game. The so- called nationality clauses are in force for a relatively long period of time- since the 1960s. As far as football and other sports are concerned nationality is defined in relation to whether players can be qualified to play in country's national or representative team.<sup>35</sup> Example are the UEFA's club competitions, in which only three foreign players

---

<sup>32</sup> Case C-415/93 *Union Royale Belgie des Societes de Football Association ASBL v. Bosman* [1995] ECR I-5040.

<sup>33</sup> Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579.

<sup>34</sup> "The Bosman case, EU law and the Transfer system", University of Liverpool, available at < <http://www.liv.ac.uk/footballindustry/bosman.html> > last accessed on 05/06/2012.

<sup>35</sup> Case C-415/93 *Union Royale Belgie des Societes de Football Association ASBL v. Bosman* [1995] ECR I-5040, para. 25.



together with two “naturalized” foreign players are allowed to play for the team. According to the proponents of so-called nationality clause, the purpose of the quota rules is not economic but rather they aim to preserve the link between the players and their teams. These rules allow the clubs to properly represent the countries to which association they play in international matches and to help the fans to identify themselves with the club. On the contrary, the opponents of the system claimed that it violates the prohibition of discrimination contained in Article 18 TFEU and Article 45 (2) TFEU. The CJEU concluded that due to its nature Article 45 TFEU precludes sporting associations from creating such regulations that limit the number of foreign players in a club that may play in matches.<sup>36</sup>

In the history of European law, there was not any other case like *Bosman* which reached such an effect. It produced huge shock and surprise among the professionals in the football field and in addition is the first case on sport-related matter to deal with the rules on free movement of persons. In addition, important part of the judgment is the opinion of the Advocate General Carl Otto Lenz, who basically stated that the transfer system used was not legal. Furthermore, two years ago, the CJEU once again confirmed its decision in *Bosman* in *Olympique Lyonnais*<sup>37</sup> - the first judgment on sport matters delivered after the entry into force of the Treaty of Lisbon.

## **2.2. The system of transfer of players after the decision of the *Bosman* case**

Following the judgment of the Court of Justice in 1995 the rules of the transfer of players needed to change. However, due to the restricted application of the judgment, both the International and the European football associations could impose transfer fees regarding players, whose contract was still in force.<sup>38</sup> As a result a new practice emerged, where clubs were extending the terms of the contracts of the players on purpose and were even forcing them to sign new contracts before the expiration date of the old ones.<sup>39</sup> Additionally the elimination of the “3+2” rule resulted in increase of the international transfers, which in turn produced negative effect on the national leagues in some European countries. For example, studies show that after the *Bosman* judgment, “clubs in countries such as Belgium, Denmark,

---

<sup>36</sup> Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL v. Bosman* [1995] ECR I-5040.

<sup>37</sup> Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177.

<sup>38</sup> Christina Lembo, “FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major changes in European Football and the Negative effect on minors”, *EMORY International Law Review* [25/2011], p.550.

<sup>39</sup> Wladimir Andreff & Stefan Szymański, *Handbook On The Economics Of Sport* (2006), 640.

France, Germany, the Netherlands, Sweden, and Switzerland, [saw] their young football talents ‘stolen’ by wealthier teams from England, Italy, and Spain who offer[ed] better-paid contracts.”<sup>40</sup> Therefore, for many clubs it was easier both from financial and technical point of view to employ young promising players from another European country, rather than to develop their own training academies.

In response to the *Bosman* ruling, in 2001 FIFA created the Regulations on the Status and Transfer of Players<sup>41</sup>. The new regulations contained five major provisions regarding the new system of transfers. Important requirement was introduced in relation to the contract of the players- minimum one year but no longer than five. Furthermore, rules were also included, regulating international transfers, which are allowed only during two transfer windows. However, they did not produce the expected effect and were revised in 2005. The new regulations entered into force on 1 July 2005 and were based on the 2001 regulations but made substantive changes.

In May 2008 came the FIFA’s new proposition- the so-called “6+5” rule. According to this rule, every team has to select at least six players that are eligible to play for the national team of the particular country

The judgment in *Bosman* changed professional football by putting an end to transfer fees for football players with expired contracts and changing the composition of the teams by pronouncing the so-called “2+3” rules contrary to European law.<sup>42</sup> In response many of the clubs came up with long-term contracts for their stars and also high salaries, which turned many of the players into millionaires. Bosman himself was the one, who benefited the least from his case, since his marriage broke; he was left in debts and with his professional career was over. Some professional association like the Spanish FA and FIFA blamed him for the high number of foreign players in the Spanish league.<sup>43</sup> Finally, more than eight years after the end of his contract, Bosman was paid his compensation.

---

<sup>40</sup> Paulo David, *Human Rights In Youth Sport: A Critical Review Of Children’s Rights In Competitive Sports* (2005) 174.

<sup>41</sup> FIFA Regulations on the Status and Transfer of Players, available at <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html>> last accessed on 06/06/2012.

<sup>42</sup> D. McAuley, “They think it’s all over...it might just be for now: Unraveling the ramifications of the European transfer system post-*Bosman*” (2002) 23 *ECLR* 331.

<sup>43</sup> D. Campbell, “Foreigners killing football:” UEFA chief’s call for firm action against “global teams” at big clubs’, *Observer*, 11/03/2001,1.

### **III. Aftermath of the *Bosman* case**

In the chapters so far, attention was mainly paid to the situation in the European Union before the famous *Bosman* case and the European rules prohibiting discrimination and those concerning the freedom of movement of workers. The aim of the present chapter is to show how the system changed after the decision of the Court of Justice of the European Union. As mentioned earlier important aspects in this respect are the judgment in the *Olympique Lyonnais* case and the introduction of the so-called “6+5 rule” by the World Football Association. Furthermore, the chapter will also touch upon the notion of nationality and the issue of naturalization, which in my opinion could be viewed as a method of fighting discrimination on the basis of nationality in sport, and football in particular.

#### **3.1. The notion of “nationality”**

When we talk about nationality, generally it is understood the belonging to a particular State, which is acquired on the basis of the laws for granting nationality of that State. However, except the nationality that is associated with the legal relationship between person and a state, there exists the so-called “functional nationality”<sup>44</sup>. However the grounds for acquisition of such nationality are not strictly defined and are dealt on case by case basis and on the basis of the laws of the different states.

Nationality is notion that plays very important role as far as sport law is concerned. Furthermore, as stated before, there are some cases, where nationality determines whether a player can play for certain team. In addition, nationality determines if an athlete could take part in the national team of a particular state. Therefore, in the field of sport law has been established the practice of naturalization. Generally, many legal dictionaries define this term as the process of acquiring the citizenship of a country that is usually different from the country of origin of the person concerned. In the area of sport the acquisition of other state’s nationality is done for the purpose of providing the athlete with the right to compete in international championships for the country under consideration. However the real problem that exists is the requirements for granting functional nationality.

Professor Doctor Gerard-René de Groot<sup>45</sup> is one of the most prominent scholars, who are discussing the issue of naturalization in the area

---

<sup>44</sup> Robert C.R. Siekmann, “Accelerated” nationalization for national representative purposes and discrimination issues in individual and team competitions under EU Law” [2011] *International Sports Law Journal* 3-4, 86.

<sup>45</sup> Gerard-René de Groot (1951) studied Law at the Rijksuniversiteit Groningen (Netherlands) and at the Westfälische Wilhelmsuniversität Münster (Germany). He has published many books and articles on comparative nationality law. In 2008/2009 he was the expert-consultant for the preparation of recommendation 2009/13 of the Council of Europe

of sport law. On numerous occasions he has spoken about the relationship between nationality and sport. In his opinion, it is important to develop specific requirements for granting sporting nationality, because different countries have different laws regulating this matter, which as a result creates a lot of complications. De Groot continues that the main requirement shall be the determination whether or not certain person qualifies to represent a country in international sporting competitions.<sup>46</sup> However, next to it, other conditions need to be established. Furthermore, in most cases legal nationality is granted to sports persons only if between him and the state concerned exist such link. The existence of a genuine link between the sports person concerned and the country in question must be established. Even though, in some cases this genuine link is lacking, than there is the possibility of imposing reasonable residence requirement.<sup>47</sup> However, another issue related to this matter is the length of the period of residence for the acquisition of sporting nationality. Here it is important to mention that the requirement of the length of residence for the regular naturalization is three years. However, de Groot suggested that as far as sporting nationality is concerned, the length of the residence period shall be shorter than that of the regular naturalization. Therefore, he suggested a period of two years of consecutive habitual residence. This requirement seems totally reasonable bearing in mind the fact that in order for a sports person to be able to represent a State at international sporting events, he or she must have some guarantee for the existence of a link with the country. Another possible situation is the one, where if the athlete has spent uninterrupted period of five years in the country concerned. Then, the condition of two years residence should not be required.

FIFA has also developed rules governing the eligibility of players to play for the national representative teams. They can be found in the Regulations governing the application of the statutes of FIFA<sup>48</sup>, section VII. The general rule is that if a player holds permanent nationality that is not dependant on any period of residence, than he is eligible to play for the representative team. However, there are further conditions attached to the present requirement. Article 15 (2) reads that if a player has once participated in a official competition of any category or match for one association is not

---

on the position of children in nationality law. In 2011 he wrote on invitation of the UNHCR a discussion paper on the 1961 Convention on the reduction of statelessness.

<sup>46</sup> Robert C.R. Siekmann, "Accelerated" nationalization for national representative purposes and discrimination issues in individual and team competitions under EU Law" [2011] International Sports Law Journal 3-4, 86.

<sup>47</sup> Ibid.

<sup>48</sup> Regulations Governing the Application of the Statutes of FIFA, available at <[http://www.fifa.com/mm/document/affederation/federation/fifa\\_statutes\\_0719\\_en\\_14479.pdf](http://www.fifa.com/mm/document/affederation/federation/fifa_statutes_0719_en_14479.pdf)> last accessed on 07/06/2012.

allowed to play in international games for a representative team of another association.

In addition, in the following legal provision are presented requirements that have to be fulfilled for the right to represent more than one football associations and for the acquisition of new nationality. First, a football player is allowed to represent more than one association on the basis of his nationality if he fulfills requirements allowing him to show genuine link with the countries in consideration. Among this requirements are the conditions that he was born on the territory of the Association concerned or that either his parents or grandparents were born there and that he has lived in the territory of that state for a period of continues two years. Furthermore, if a player wants to acquire the nationality of a new State, than the conditions that he has to fulfill are relatively similar. The only difference is in the amount of years of habitual residence- minimum of five years after reaching the age of eighteen<sup>49</sup>.

The case of Salomon Kalou<sup>50</sup> draws an example of a situation, where even though all the requirements contained in the FIFA Regulations and under the national law concerned are fulfilled, naturalization is not possible. The facts of the case are as follows- in 2005 the Netherlands wanted to give Dutch citizenship to the talented player of Feyenoord Rotterdam Solomon Kalou. Originally the player holds the nationality of the Ivory Coast; however due to the upcoming World Championship in Germany in 2006 in the Dutch football sphere was taken decision for the accelerated naturalization of the player. Among the supporters of these ideas were the coach of the national team Marco van Basten and the Minister of Sports. However, the Minister of Aliens Policy and Integration opposed the idea, even though in the Dutch law in force, there are provisions allowing exceptions for granting nationality for the purpose of promoting the Dutch cultural interest – a category under which sport falls. Furthermore, in a detailed Circular from the Ministry of Health, Welfare and Sports of 9 April 1999<sup>51</sup> was established the minimum criteria for granting accelerated naturalization- the sportsman concerned should serve as a role model for the young athletes and is participating and/or promoting fair play campaigns. The decision of the highest administrative law judicial instance in the Netherlands was in favor of Mr. Kalou. Despite this the Minister declined to amend her position. Some of the supporters of the decision of the Dutch Minister see in the reasoning of her decision being based on the fact that by acquiring Dutch citizenship Salomon Kalou would

---

<sup>49</sup> FIFA Eligibility Rules, available at [http://www.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa\\_statutes\\_072008\\_en.pdf](http://www.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa_statutes_072008_en.pdf) > Article 17 “Acquisition of new nationality”.

<sup>50</sup> Ibid, 88.

<sup>51</sup> Ibid.

become citizen of a Member State of the European Union. As such, he would be able to enjoy all the rights guaranteed to the citizens of the Union and thus to enjoy the freedom of movement of workers and without any difficulties to move to the English Premier League, which is one of the most prominent. Furthermore, in case Mr. Kalou was granted accelerated naturalization, he would have taken the place of a Dutch football player, who unlike him was present during the qualification process for the World Championship. Not at the last place, it is important to consider that Salomon Kalou had real chances in participating in the Championship since the team of Ivory Coast was also playing and he would have had the chance to play along with his older brother. Facts, that show that the link between Mr. Kalou and Ivory Coast are far stronger than the relationship he had with the Netherlands and that indeed there might have been some hidden motives behind his willingness to become Dutch citizen.

After discussing the role of nationality and the process of naturalization, the following section will focus on the FIFA's "6+5" rules that is also linked to the notion of nationality.

### **3.2. FIFA's "6+5" rule**

The rule was proposed at a meeting of the Association four years ago and generally it requires that at the beginning of each game, at least six players, who are qualified to play for the representative team of a state must be filed.<sup>52</sup> Furthermore, there was no limitation on the number of the players, who have contracts with the club and who can be used as substitutes during the game. The explanation for the introduction of this rule is that the nature of football as national sport has to be restored. Furthermore, it is intended to reduce the existing gap between small and large football clubs.

However, despite all the reasons used as justification, the European Commission has found this rule to violate the legislation of the European Union. Additionally, in 2008 the Commissioners Ján Figel' and Vladimír Špidla issued a statement, in which they presented their position that the newly introduced rule of FIFA constitutes direct discrimination on the basis of nationality and is therefore, contrary to EU law.<sup>53</sup> The CJEU has established an exception as far as the general principle of non-discrimination in sport cases is concerned.<sup>54</sup> According to it, the application of the nationality

---

<sup>52</sup> "FIFA Congress supports objectives of 6+5", accessible at <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783657.html#fifa+congress+supports+objectives>

<sup>53</sup> Statement of Commissioners Ján Figel' and Vladimír Špidla regarding FIFA's "6+5" rule, accessible at <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=424&furtherNews=yes>

<sup>54</sup> Case 13/76 *Dona v. Mantero* [1976] ECR 1333

requirement is only allowed as far as matches of the national teams of particular Member States are concerned. However, the “6+5” rule considers matches within the national leagues and between teams of different football associations and therefore, does not qualify under the above-mentioned exception. In addition, this practice was also opposed by football managers as the Arsenal’s Arsene Wenger, who is of the opinion that what the public wants to see is the best of football and the quality of football could not be improved by removing some of the best players from the team just because of the existence of nationality clause.

Prior to the entry into force of the Treaty of Lisbon, the functioning of the rule was impossible. However, now Article 165 TFEU provides a framework for implementing and enforcing the rule in question. Despite its supporters, among which is the Real Madrid’s coach Jose Mourinho<sup>55</sup>, the President of FIFA Joseph Blatter faces numerous obstacles – the rules of the European Union law, the jurisprudence of the Court of Justice of the European Union, and especially the decision of the *Bosman* case, which prohibits the imposition of quotas on foreign players<sup>56</sup>. One of the key problems with the FIFA’s rule is the fact that it requires the majority of players on the field to be of the same nationality as the football association to which the club belongs or to be eligible for participating in the national representation team.<sup>57</sup> Opponents of the rule further argue that it violated the rules of non-discrimination based on nationality and the rules on the free movement of workers. Nevertheless, the President of FIFA is expecting the new rule to be fully operational for the 2012-2013 season.<sup>58</sup> Overall, through the “6+5 Rule”, FIFA endeavors to ensure both financial and competitive balance in that field of football- something that the proposed measures fail to achieve.<sup>59</sup>

In 2010, during the World Cup in South Africa, Blatter announced that the rule will be neglected and the football association will be looking to employ other options.<sup>60</sup> However, it remains to be seen about what kind of other options the President of FIFA was talking about two years ago. One thing is certain, if something new is to be thought of, in order to obtain the approval of the European Commission and thus, be compatible with EU law,

---

<sup>55</sup> “Mourinho voices support for FIFA's "6+5" rule”, available at <http://soccer.net.espn.go.com/news/story?id=632412&sec=europe&cc=5739>

<sup>56</sup> David D’Orlando, “6+5 = Discrimination? Why FIFA’s Proposed Quota Rule Doesn’t Add Up” [2011] Penn State Law Review, p. 751.

<sup>57</sup> Blatter, “6+5” Rule is Crucial, FIFA, May 7, 2008, available at <http://www.fifa.com/aboutfifa/federation/president/news/newsid=762500.html>

<sup>58</sup> David D’Orlando, “6+5 = Discrimination? Why FIFA’s Proposed Quota Rule Doesn’t Add Up” [2011] Penn State Law Review, p. 753.

<sup>59</sup> *Ibid.*, p. 771.

<sup>60</sup> *Ibid.*, p. 772.

the new rules must take into consideration provisions of EU labor law, free movement of workers and non-discrimination. The future of the most popular game in Europe that for some has turned into religion is practically in the hands of FIFA and their new proposal.

### **3.3. CJEU's decision in *Olympique Lyonnais***

As mentioned earlier in this paper, the case under consideration is the first one that was delivered by the Court of Justice of the European Union after the entry into force of the Lisbon Treaty. The case confirmed the findings made in *Bosman* and the consequent case law on the matter.

As recognized by well established case law of the CJEU<sup>61</sup> national rules should not be in conflict with and should not make less attractive the application of the rules of the European Union law and the fundamental freedoms contained in the Treaties. There are cases, under which certain exceptions are allowed if they fulfill the requirements of the principle of proportionality – justification on the basis of public interest, appropriate, necessity and application in non-discriminatory manner. *Olympique Lyonnais* concerns young football player, who was trained by the club before signing professional contract with it. When the player was offered such contract, he was not satisfied with the financial conditions and therefore, signed a contract with the English club Newcastle United. After that, *Olympique Lyonnais* sued the player in the French courts, seeking an award of damages jointly against him and Newcastle United. The amount claimed was equivalent to the remuneration which the player would have received over one year if he had signed the contract offered by *Olympique Lyonnais*.<sup>62</sup>

Having read the facts of the case, it is very difficult to conclude that the training and employment of young football players is a legitimate aim within the EU. One of the conditions for the proportionality principle is not fulfilled and therefore, no justification is possible. On the other hand, since football is enjoying great popularity among young people, it could be argued that encouragement of the recruitment of young players is important aim to be perused. The Court stated in *Olympique Lyonnais* that the decision it took is based on the specific characteristics of sport in general, and football in particular and the fu social and educational function they have, as also could be read in 165(1) TFEU. The CJEU stated furthermore that the hope of getting training fees could result in encouraging football clubs looking for talented young players to train. However, the case under consideration is not dealing with compensation for training, but damages with unrelated amount

---

<sup>61</sup> Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

<sup>62</sup> Marios Papaloukas, “The sporting exception in European Case law (The *Olympique Lyonnais* case)” [2010] *Sport Management International Journal*, 6 (2) , p. 23.



to the real training costs incurred by the club. “The possibility of obtaining such damages goes beyond what is necessary to encourage recruitment and training of young players and to find those activities. Accordingly, the right to such damages cannot be justified and amounts to a restriction on the free movement of workers under Article 45 TFEU.”<sup>63</sup>

#### **IV: Future Development**

The paper so far discussed the history and the present situation of the development of sport law in the European Union. I also discussed that existing system of transfer of players, established by FIFA and its conflict with the law of the European Union on free movement of workers and non-discrimination. Nationality has also another role in the area of sport law—sports people are granted the nationality of another Member State for the purpose of representing that particular state at international championships. The present chapter is focused on the future development of the area of sport law in the European Union, and football in particular.

As described above, the CJEU decision in *Bosman* brought sufficient changes in the European system in respect to the composition of the teams and more specifically the number of foreign players that are allowed to play in it. Furthermore, the advisor of UEFA’s president William Gaillard stated at a conference on the Play of the Game that took place at Coventry University in June 2009<sup>64</sup> that the introduced by FIFA “6+5” rule is discriminatory and could never be applied in Europe. Furthermore, he explained the rules under which UEFA is operating and that in the future will be more widely implemented, starting from the English Premier League. For the UEFA club competitions the rules are as follows: teams of 25 players have to include a minimum of three players who were trained by the club during at least three years between the age of 16 and 21 and at least four more athletes, who were trained by another club of the same national association. In addition, data about the composition of the teams in Germany shows that it is one of the countries with the highest percentage of foreign players – between 45-50%, most of which are coming from the EU Member States like Poland and the Czech Republic.<sup>65</sup> However in countries like Spain and England, where football is also played at very high level, athletes still face discrimination. Despite this fact, with the enlargement of the European Union, naturally the

---

<sup>63</sup> Prof. Dr. Christa Tobler, “Equal Treatment Of Migrant Turkish Citizens In The Eu: Contrasting The Kahveci Case With The Olympique Lyonnais Case”, *Ankara Law Review* (2010) 7(1), p. 11.

<sup>64</sup> Nick Harris, ‘Uefa: ‘Fifa’s 6+5 quotas will never happen in Europe’, *The Independent* (2009), available at < <http://www.independent.co.uk/sport/football/news-and-comment/uefa-fifas-65-quotas-will-never-happen-in-europe-1701844.html>> last accessed on 08/06/2012.

<sup>65</sup> M. Thome, “Ausländer in der Fussball-Bundesliga“ (2003).

best players of the Eastern European Countries go play either in England or Spain. Therefore, in the recent years the total number of foreign players in the Premier League has grown sufficiently to reach the level of 63%. The situation in Spain is a bit different; there the most popular players are coming from either Brazil or Argentina and the total number of foreign players amounts to 40%.

Another consequence of the *Bosman* judgment was declaring transfer fees illegal in case, where the contract between the player and the club has expired. The expected consequence was that transfer fees will be abolished in general. However, this did not happen. On the contrary, nowadays the transfer fees have reached new level and do not show any tendencies of decreasing. The highest transfer fee was paid for Cristiano Ronaldo in 2009, when Real Madrid bought him from Manchester United for the shocking amount of □ 94 millions.<sup>66</sup> This confirms the raising opinion among scholars that football and sport in general are turning into professional business and separate economic sector.<sup>67</sup>

Generally, it could be concluded that sport, and football in particular are getting more international and this trend is likely to continue in the future. The athletes are free to choose the club for which they want to play and thus should not be scared of the existence of any discrimination clauses.

### **Conclusion**

The main issues that were discussed in this paper are related to the conflict between the rules of FIFA regulating the transfer of players and the rules of the European Union about the freedom of movement of workers and non-discrimination. The sequence that my analysis follows is first giving brief overview of the historical development of the competences that the European Union has over issues related to sport law. Next, I decided that it is important to make a brief overview of the development of the rules regulating the freedom of movement of works and also to clarify what is understood under the term “worker” and the conditions that an individual has to comply with, in order to classify as worker.

Then, I went deeper into the topic of sport law by discussing the famous *Bosman* judgment, which brought substantial changes to the system for transfer of players by forbidding the imposition of quotas based on nationality of the football players and declaring the payment of transfer fees after the expiration of the contract of the athlete with the club concerned. In the third chapter I discussed the aftermath of the *Bosman* case- in particular

---

<sup>66</sup> Player’s profile, available at [http://www.realmadrid.com/cs/Satellite/en/1193041476158/1202773887674/jugador/Jugador/Cristiano\\_Ronaldo.htm](http://www.realmadrid.com/cs/Satellite/en/1193041476158/1202773887674/jugador/Jugador/Cristiano_Ronaldo.htm) last accessed on 08/06/2012.

<sup>67</sup> Melchior Wathelet, ‘Sport Governance and EU legal order: Present and Future’, (2008).

the so-called “6+5 rule” of FIFA, naturalization as a measure for combating discrimination and last but not least, the first case on sport matter after the entry into force of the Lisbon Treaty. The last chapter is concerned with the future developments of the matter, which show that with time football is turning into professional business, and thus in a separate economic sector.

The future of one of the most popular games not only in Europe, but may be in the whole world is now in the hands of FIFA as now we are expecting the new proposition of the President Joseph Blatter as far as the composition of the teams is concerned. After the CJEU declared the “3+2 rule” being contrary to EU law, the 2008 proposal with which FIFA came up- the “6+5 rule” was dropped two years later. The reasons for this decision remain unrevealed, however, the rule had many opponents among which the then EU Commissioner on Sport Jan Figel and many successful players and coaches. One cannot make future predictions how the area of sport law, and in particular of the rules governing football, will develop because in this legal sphere the EU now has explicit competences thanks to the changes brought by the Lisbon Treaty. The future will show how the Union will make use of the powers that have been granted to it.

#### Literature

##### **Books and Articles:**

1. “Lisbon Treaty and EU sports policy” [2011] *International Sport Law Journal* 1-2, 145
2. Amikam Omer Kranz,, “The Bosman Case: The relationship between European Union Law and the Transfer system of the European Football” (1999) 5 *Columbia Journal of European Law* 431
3. Catherine Barnard, *The Substantive Law of the EU: The four freedoms* (OUP, Oxford, 2010)
4. Christina Lembo, “FIFA Transfer Regulations and UEFA Player Eligibility Rules: Major changes in European Football and the Negative effect on minors”, [2011] *EMORY International Law Review*, 25
5. Prof. Dr. Christa Tobler, “Equal Treatment Of Migrant Turkish Citizens In The Eu: Contrasting The Kahveci Case With The Olympique Lyonnais Case”, *Ankara Law Review* (2010) 7
6. Daniel Chalmers, Gareth Davis and Goergio Monti, *European Union Law*, (CUP, 2010)
7. David D’Orlando, “6+5 = Discrimination? Why FIFA’s Proposed Quota Rule Doesn’t Add Up” [2011] *Penn State Law Review*
8. D. McAuley, “They think it’s all over...it might just be for now: Unraveling the ramifications of the European transfer system post-*Bosman*” (2002) 23 *ECLR* 331

9. James A. R. Nafziger, "Defining the Scope and Structure of International Sports Law: Four Conceptual Issues" [2011] *International Sports Law Journal* 3-4, 14
10. Jan Figel, "No space for discrimination and exclusion in European Football and European Sport" [2008] *Equal Voices* 24, 6
11. Marios Papaloukas, "Sports Law and the European Union" (2007) 2 *Sport Management International Journal* 3
12. Marios Papaloukas, "The sporting exception in European Case law (The Olympique Lyonnais case)" [2010] *Sport Management International Journal*, 6
13. Melchior Wathelet, 'Sport Governance and EU legal order: Present and Future', (2008).
14. M. Thome, "Ausländer in der Fussball-Bundesliga" (2003).
15. Paulo David, *Human Rights In Youth Sport: A Critical Review Of Children's Rights In Competitive Sports* (2005)
16. Pavel Hamernik, "Variations of European Sports Law in Football Practice" [2011] *International Sports Law Journal* 3-4, 167
17. Rebert C.R. Siekmann, "The Specificity of Sport: Sporting Exceptions in EU Law" [2011] *International Sports Law Journal* 3-4, 75
18. Rebert C.R. Siekmann, ""Accelerated" nationalization for national representative purposes and discrimination issues in individual and team competitions under EU Law" [2011] *International Sports Law Journal* 3-4, 85
19. Stephen Weatherhil, "EU Sports Law: The effect of the Lisbon Treaty" [2011] *Legal Research Paper Series* 3
20. Wladimir Andreff & Stefan Szymański, *Handbook On The Economics Of Sport* (2006)

#### **Newspaper and online Articles:**

1. "The Movement of Football Players between Clubs", available at: <http://www.inbrief.co.uk/football-law/bosman-decision-football-transfers.htm>
2. "The Bosman case, EU law and the Transfer system", University of Liverpool, available at < <http://www.liv.ac.uk/footballindustry/bosman.html> >
3. FIFA Regulations on the Status and Transfer of Players, available at <<http://www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html> >
4. "Mourinho voices support for FIFA's "6+5" rule", available at <http://soccernet.espn.go.com/news/story?id=632412&sec=europe&cc=5739>
5. "FIFA Congress supports objectives of 6+5", accessible at <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783657.html#fifa+congress+supports+objectives>

6. Blatter, "6+5" Rule is Crucial, FIFA, May 7, 2008, available at <http://www.fifa.com/aboutfifa/federation/president/news/newsid=762500.html>
7. D. Pannick QC, "Sports minister will lose his war against foreigners", *The Times*, 27 November 2007
8. D. Campbell, "'Foreigners killing football:' UEFA chief's call for firm action against 'global teams' at big clubs", *Observer*, 11 March 2001
9. Mission and Statues of FIFA, available at < <http://www.fifa.com/aboutfifa/organisation/mission.html> > last accessed on 07/06/2012
10. Nick Harris, 'UEFA: 'FIFA's 6+5 quotas will never happen in Europe'', *The Independent* (2009), available at < <http://www.independent.co.uk/sport/football/news-and-comment/uefa-fifa-65-quotas-will-never-happen-in-europe-1701844.html> >
11. Player's profile, available at < [http://www.realmadrid.com/cs/Satellite/en/1193041476158/1202773887674/jugador/Jugador/Cristiano\\_Ronaldo.htm](http://www.realmadrid.com/cs/Satellite/en/1193041476158/1202773887674/jugador/Jugador/Cristiano_Ronaldo.htm) >
12. Premier League "The official website of the Premier League" Available online at: <http://www.premierleague.com/fapl.rac?command=forwardOnly&nextPage=homepage>
13. Primera Division "La Liga" Available online at: <http://www.lfp.es/>
14. Statement of Commissioners Ján Figel' and Vladimír Špidla regarding FIFA's "6+5" rule, accessible at < <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=424&furtHerNews=yes> >
15. "UEFA rule on "home-grown players": Compatibility with principle of free movement of persons", accessible at <http://www.europa.eu/rapiid/pressReleasesAction.do?reference=IP/08/807>

#### **Case law:**

1. Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921
2. Case C-187/96 *Commission v. Greece* [1998] ECR I-1095
3. Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 212
4. Case 13/76 *Dona v. Mantero* [1976] ECR 1333
5. Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579
6. Case 53/81 *Levin* [1982] ECR 1053

7. Case C-85/96 *Martinez Sala v. Friestaat Bayern* [1998] ECR I- 2691
8. Case C-337/97 *Meeusen v. Hoofddirectie van de Innformatie Beheer Groep* [1999] ECR-I 3289
9. Case C-237/94 *O'Flynn v. Adjuducation Officer* [1996] ECR I- 2617
10. Case C-325/08 *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010] ECR I-2177
11. Case C-292/89 *R v. IAT, ex p. Antonissen* [1991] ECR-745
12. Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165
13. Case 152/73 *Sotgio v Deutsche Bundespost* [1974] ECR 153
14. Case 36/74 *Walrave and Koch* [1974] ECR 1405