

OPINION OF ADVOCATE GENERAL
STIX-HACKL

delivered on 11 July 2002 ¹

I — Introduction

II — Relevant legislation

A — *Community law*

2. Article 38 of the Agreement provides:

‘1. Subject to the conditions and modalities applicable in each Member State:

1. This case concerns the restriction, laid down in the rules of a sports association, on the number of players from non-members countries allowed to play in certain competitions. In particular, clarification is sought as to whether that restriction is compatible with the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part (‘the Agreement’).² This addresses a legal issue which has already been raised before and resolved by a number of national courts.³

— treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals,

— the legally resident spouse and children of a worker legally employed in the

1 — Original language: German.

2 — OJ 1994 L 359, p. 2; Decision 94/909/ECSC, EEC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 359, p. 1).

3 — For the corresponding German case-law, see the comments of Krogmann, *Sport und Europarecht*, 2001, p. 23 et seq.

territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral agreements within the meaning of Article 42, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.

under bilateral agreements ought to be preserved and if possible improved,

- the other Member States shall consider favourably the possibility of concluding similar agreements.

2. The Slovak Republic shall, subject to the conditions and modalities applicable in that country, accord the treatment referred to in paragraph 1 to workers who are nationals of a Member State and are legally employed in its territory as well as to their spouse and children who are legally resident in the said territory.'

2. The Association Council shall examine granting other improvements including facilities of access for professional training, in conformity with rules and procedures in force in the Member States, and taking account of the labour market situation in the Member States and in the Community.'

3. Article 42 of the Agreement provides:

4. Article 59(1) of the Agreement provides:

'1. Taking into account the labour market situation in the Member State, subject to its legislation and to the respect of rules in force in that Member State in the area of mobility of workers:

'1. For the purpose of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement. This provision does not prejudice the application of Article 54.'

- the existing facilities for access to employment for Slovak Republic workers accorded by Member States

B — *National law*

letter A may play in a league or cup match.

5. Extracts from Rule 15 of the Spielordnung (federal regulations governing competitive games, hereinafter 'the SpO') of the Deutscher Handballbund e.V. (German Handball Federation) ('the DHB') in the version relevant to these proceedings read as follows:

'(1) The letter A is to be inserted after the licence number on the licences of players

(a) who do not possess the nationality of a State of the European Union (EU State),

(b) who do not possess the nationality of a non-member country associated with the EU whose nationals have equal rights as regards freedom of movement under Article 48(1) of the EC Treaty,

(c) ...

(2) In teams in the federal and regional leagues, no more than two players whose licences are marked with the

...

(5) The marking of a licence with the letter A is to be cancelled from 1 July of the year if the player's country of origin becomes associated within the meaning of Paragraph 1(b) by that date. The DHB shall publish and continually update the list of the States correspondingly associated.'

III — Facts and main proceedings

6. Maros Kolpak, a Slovak national, plays as goalkeeper for the second division club TSV Östringen e.V. Handball. In March 1997 he concluded with that club a playing contract for the period to 30 June 2000, and in February 2000 concluded a further playing contract for the period to 30 June 2003. He receives a monthly salary, is resident in Germany and holds a valid residence permit. The DHB, which is the national sports association for handball in Germany and organiser of the federal handball league, issued him with a player's licence marked with the letter A on account

of his foreign nationality. Mr Kolpak, who seeks to obtain from the DHB a player's licence without a suffix indicating his foreign nationality, regarded that suffix as discriminatory on the ground that Slovakia is one of the non-member countries whose nationals are entitled, under the defendant's rules governing competitive games and by virtue of the prohibition of discrimination resulting from the Treaty on European Union in conjunction with the Agreement, to an unrestricted right to play, in the same way as Germans and nationals of other EU Member States.

7. The Landgericht (Regional Court) Dortmund ordered the DHB to issue the player's licence requested, stating essentially by way of reasons that it followed from the interpretation of the playing rules themselves that Mr Kolpak was not to be treated under Rule 15 of the SpO as a player with the nationality of a non-member country. The DHB appealed against that judgment.

8. The Oberlandesgericht (Higher Regional Court) Hamm, which has made the reference, takes the view that Mr Kolpak has a right of action under German national law before the ordinary courts of the State and that, even if he is not himself directly or indirectly a member of the DHB, he is individually entitled under the SpO, as a player in the federal league under contract with a member club, to be issued with a licence to play if certain conditions are met.

9. However, the single point at issue in this regard is whether or not Mr Kolpak is, on the basis of Rule 15(1) of the SpO, merely to be issued with a player's licence restricted by the suffix 'A', and consequently the matter turns solely on whether Rule 15(1) of the SpO is at all applicable.

10. In the referring court's view, the decisive factor in the dispute is the manner in which the reference to Article 48 of the EC Treaty (now, after amendment, Article 39 EC) in Rule 15(1)(b) of the SpO is to be construed.

11. The Oberlandesgericht interprets that reference as covering only players who have exactly the same rights as EU nationals with regard to free movement of workers. Thus, Mr Kolpak would not be entitled to an unrestricted player's licence without the suffix 'A'. After all, as pointed out by the referring court, Slovakia is not included on the list kept by the DHB pursuant to Rule 15(5) of the SpO.

12. The referring court therefore seeks to ascertain whether, notwithstanding the provision to the contrary in Rule 15(1)(b) of the SpO, Mr Kolpak is none the less

entitled to be issued with an unrestricted player's licence because, by virtue of that provision of its rules governing competitive games, the DHB is in breach of Article 38 of the Agreement, which has direct effect against third parties, including the DHB.

13. The Oberlandesgericht assumes that, by refusing to issue Mr Kolpak with an unrestricted player's licence on the ground of his nationality, the DHB is acting in breach of the prohibition of discrimination contained in Article 38 of the Agreement. It states that Rule 15 of the SpO also governs Mr Kolpak's employment relationship. The player's contract is a contract of employment since Mr Kolpak is obliged, in return for a fixed monthly remuneration, to provide (sporting) services on an employed basis during training and games, and this is his main professional activity.

14. According to that court, by restricting Mr Kolpak's opportunities to play in matches, Rule 15(1)(b) in conjunction with Rule 15(2) of the SpO also treats him unequally as regards working conditions in so far as a player who has already secured lawful access to employment and is consequently no longer himself affected by an obstacle to employment does not, by virtue of that rule, enjoy the same opportunity as that granted to other players likewise to play in official matches as part of such employment.

15. As, in the view of the Oberlandesgericht, Mr Kolpak is lawfully employed in German territory, is resident in Germany, is in possession of a valid residence permit and does not require a work permit in accordance with German legislation pertaining to foreign nationals, he has gained access to the German labour market specifically pursuant to national German law, independently of Article 38 of the Agreement. The prohibition of discrimination laid down in Article 38 therefore applies, unless precluded by the proviso therein with respect to 'the conditions and modalities applicable in each Member State'.

16. The referring court tends to the view that the rules adopted by the defendant within the scope of its autonomy as an association are not covered by those conditions and modalities because the prohibition of discrimination contained in the Agreement would thereby be rendered nugatory.

17. The referring court further assumes that Article 38 of the Agreement, like Article 39 EC, is directly applicable. If that is so, however, third-party effect will also have to be taken to exist in such a way that Article 38 of the Agreement not only applies to the action of public authorities but also extends to rules of any other nature aimed at the collective regulation of employment because, otherwise, the abolition of public barriers could be rendered meaningless by obstacles resulting from associations or organisations not governed by public law exercising their legal autonomy.

18. The Oberlandesgericht therefore concludes that Rule 15(1)(b) of the SpO infringes Article 38 of the Agreement and that, since the other conditions are satisfied, Mr Kolpak is entitled to be issued with an unrestricted player's licence.

20. As the Commission correctly points out, it is not for the Court, in preliminary ruling proceedings, to answer questions as to whether a rule of national law is compatible with Community law. In light of the observations made by the referring court, the Commission also points to the fact that the question referred is, strictly speaking, raised only in relation to nationals of non-member countries that are outside the European Economic Area (EEA).

IV — Question referred for a preliminary ruling

19. By order of 15 November 2000 the Oberlandesgericht Hamm referred the following question to the Court of Justice for a preliminary ruling:

21. In light of the Court's comparable judgment in *Pokrzeptowicz-Meyer*,⁴ the question should therefore be reworded as follows:

'Is it contrary to Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part — Final Act — if a sports federation applies to a professional sportsman of Slovak nationality a rule that it has adopted under which clubs may field in league and cup matches only a limited number of players who come from countries not belonging to the European Communities?'

'Does Article 38 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, preclude the application to a Slovak national, as in this case, of a rule adopted by a sports federation under which clubs may field in league and cup matches only a limited number of players who come from countries outside the European Economic Area (EEA)?'

⁴ — Case C-162/00 [2002] ECR I-1049.

V — Submissions of the parties

A — Admissibility

22. The *Italian Government* considers that the description of the facts in the order for reference is incomplete, in particular as regards the precise damage actually suffered by the Slovak player. It was not clear from the order for reference either whether the player did in fact play at all or whether the frequency with which he played in matches actually depended on the association's rule rather than on strictly technical decisions or considered views of the trainer. On those grounds, the Italian Government proposes that the Court should declare the reference for a preliminary ruling to be inadmissible pursuant to Article 92 of its Rules of Procedure.

23. Referring to case-law, the *Commission* takes the opposite view that this case does not involve a hypothetical situation and that there has, on the contrary, been an adequate description of the facts.

B — Interpretation of Article 38 of the Agreement

24. At the hearing, Mr *Kolpak* drew attention to the fact that he was restricted in the

exercise of his profession, in particular where club transfers were concerned, and that what mattered to him was the establishment of a lawful situation. He was, he stated, an employed person and benefited from the direct applicability of Article 38 of the Association Agreement, which applies also to rules of sports associations. Moreover, Rule 15 of the SpO fell short of its objective because it did not apply to all clubs.

25. The *DHB*, the *Spanish Government* and the *Italian Government* essentially take the view that the SpO rules which are the subject-matter of these proceedings are not contrary to Article 38(1) of the Agreement. In their view, Article 38(1) is not directly applicable and therefore does not confer any (subjective) right on an individual, that is to say, on a player. The *DHB* considers that this follows from the previous decisions on the absence of horizontal effect of directives and from the fact that the Court has not as yet ruled that a provision contained in an association agreement has direct effect.

26. At the hearing, the *DHB* referred to the implication of the argument that it is necessary to proceed from the premiss of lawful employment even in the case of a restricted work permit.

27. The *DHB* and the Spanish and Italian Governments argue that the prohibition of

discrimination laid down in Article 38 of the Agreement does not contain any clear, unequivocal or absolute obligation. Rather, that provision applies '[s]ubject to the conditions and modalities applicable in each Member State'. They maintain that Rule 15 of the SpO is one such condition.

At the hearing, the Italian Government pointed out that the task of assessing the legal provisions of a given Member State falls to the relevant national court and that the rule at issue in these proceedings can be justified on sporting grounds.

28. The DHB and the Spanish and Italian Governments submit further that the restricted scope of the prohibition of discrimination laid down in Article 38 of the Agreement, that is to say, the fact that Slovak workers are not afforded entirely the same treatment as EU citizens, is confirmed by the subject-matter, purpose and context of the Association Agreement, which is the expression of a transitional phase in the process of bringing the Slovak Republic closer to the EU. The Court's interpretation of freedom of movement for workers, as provided for in Article 39 EC, and its application to the sports sector is therefore, they argue, confined to EU citizens and nationals of EEA Contracting Parties. The Italian Government in addition takes the view that the EEA Agreement does not contain any restriction relating to conditions and modalities. At the hearing, the Spanish Government again highlighted the significance of the proviso set out in Article 38(1) of the Association Agreement

and pointed out that the scope of the prohibition of discrimination laid down in that provision is not as broad as that in respect of the prohibition contained in Article 39 EC.

29. Moreover, the DHB takes the view that Mr Kolpak had never been prevented from playing in a match on the basis of the association's statutes and that the club concerned merely sought to employ other nationals from non-member countries. Finally, the DHB submits that the judgment in *Bosman*⁵ does not preclude the application of the SpO rule at issue in these proceedings because that rule serves purely sporting purposes and the DHB's decision to introduce a nationality clause is protected by the fundamental right to freedom of association guaranteed by the German Basic Law.

30. At the hearing, the *Greek Government* referred to the Court's case-law on the direct applicability of agreements with non-member countries and to the case-law on professional sport. It also pointed to the fact that the scope of Article 38 of the Association Agreement is narrower than that of Article 39 EC inasmuch as Article 38 does not provide a comprehensive right to free movement for workers. As Member States may adopt rules in accordance with Article 42 of the Association Agreement and as rules of sports federations are to be

⁵ — Case C-415/93 [1995] ECR I-4921.

afforded the same treatment as public-law provisions by reason of their legislative and collective nature, the Greek Government concludes that the provision at issue in the main proceedings is compatible with Article 38 of the Association Agreement.

31. Conversely, the *German Government* and the *Commission* proceed on the basis that Article 38(1) of the Agreement is directly applicable and that Mr Kolpak may rely on that provision as against a federation such as the DHB. The reference to conditions and modalities, in their view, does not preclude the direct applicability of the prohibition of discrimination.

32. The nationality clause which is the subject-matter of these proceedings is, they argue, discriminatory and therefore infringes Article 38 of the Agreement which, amongst other things, relates to working conditions. However, only those Slovak workers who are lawfully employed in a Member State may rely on its direct applicability.

33. So far as the direct applicability of Article 38 of the Agreement to sports associations is concerned, the German Government and the Commission take the view that reference must be made to the Court's case-law on Article 39 EC. Otherwise, the DHB could issue rules which, as

acts of an authority, would be contrary to Community law. At the hearing, the Commission pointed out that Article 38 of the Association Agreement had the same wording as the provision that the Court had held in *Pokrzeptowicz-Meyer*⁶ to be directly applicable. Article 38 of the Association Agreement, however, does not provide for the comprehensive free movement of persons laid down in Article 39 EC.

34. Having regard to the judgment in *Bosman*, the German Government and the Commission submit that Rule 15 of the SpO constitutes discrimination as regards conditions of employment but does not constitute a restriction on access to the labour market.

35. Such a restriction, they argue, is also by no means justified because the relevant nationality clause is neither appropriate nor reasonable for securing the establishment of a reserve of high-quality German players. German clubs are thus permitted to field teams which do not include a single German player.

⁶ — Cited in footnote 4.

VI — Assessment

B — *Interpretation of Article 38 of the Agreement*

A — *Admissibility*

1. Direct applicability of Article 38 of the Agreement

36. With regard to the Italian Government's reservations concerning admissibility, it should be noted that the main proceedings do not centre on the issue of whether or not a player plays in a particular match, that is to say, whether or not Mr Kolpak actually plays. On the contrary, they concern Mr Kolpak's claim to the general and fundamental right to equal treatment and to an unrestricted entitlement to play, that is to say, entitlement to an unrestricted player's licence.

39. First of all, it should be pointed out that this case involves the legal status of Slovak nationals within the European Community. The answer to the question referred must for that reason be confined to consideration of that aspect and, by extension, to consideration of Article 38(1) of the Agreement. Given that these proceedings do not concern additionally the legal status of spouses and children, the question referred can refer only to the first indent of Article 38(1).

37. However, as the Italian Government itself stated, the Court⁷ has on numerous occasions held that it is for the national court alone to determine whether a preliminary ruling is necessary. Furthermore, the assertion that the Court does not have the information necessary to enable it to give an appropriate decision is incorrect.

40. It must therefore be examined in what follows whether an individual may rely before a national court on the first indent of Article 38(1) of the Agreement, that is to say whether that provision is directly applicable.

38. In view of those circumstances, the question referred is admissible.

41. For the purpose of answering that question, reference may be made to the Court's case-law concerning the parallel provision in another Europe agreement which likewise governs freedom of movement for workers, namely the case-law on Article 37 of the Association Agreement

⁷ — Reference need only be made to Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 13 with further references, and Joined Cases C-332/92, C-333/92 and C-335/92 *Enrico Italia and Others* [1994] ECR I-711.

with Poland. In its judgment in *Pokrzeptowicz-Meyer*, which was cited on several occasions during the hearing, the Court held in this regard that:

‘In view of the foregoing considerations, the first indent of Article 37(1) of the Europe Agreement must be held to have direct effect, so that Polish nationals who assert it may also rely on it before the national courts of the host Member State.’⁸

42. A comparison of the two agreements and of the two articles indicates that they possess decisive common features. First, the agreements do not in principle differ as regards their subject-matter and nature. Second, the first indent of Article 37(1) of the Europe Agreement with Poland and the first indent of Article 38(1) of the Europe Agreement with Slovakia have essentially the same wording.

43. Consequently, the Court’s findings with regard to the Agreement with Poland can be applied to the Agreement with Slovakia. This is true, first of all, as regards the clear and unconditional nature of the

prohibition of discrimination against workers from the relevant association country.⁹ In addition, Article 59(1) of the Agreement with Slovakia, which is comparable to Article 58(1) of the Agreement with Poland, cannot preclude direct applicability either.¹⁰

44. It must therefore be concluded that the first indent of Article 38(1) of the Agreement is directly applicable.

2. Applicability of Article 38 of the Agreement to measures taken by sports federations

45. It falls to be determined in what follows whether a sports federation such as the DHB in the main proceedings is amongst the addressees of Article 38 of the Agreement.

46. As correctly observed by the Commission, reference on this point must be made to the Court’s case-law on the parallel provision of the EC Treaty, that is to say, Article 48 of the EC Treaty (now, after amendment, Article 39 EC), and to that on

⁹ — In that regard, see *Pokrzeptowicz-Meyer* (cited in footnote 4), paragraph 21.

¹⁰ — In that regard, see *Pokrzeptowicz-Meyer* (cited in footnote 4), paragraph 28.

⁸ — Cited in footnote 4, paragraph 30.

the prohibition of discrimination laid down in Article 6 of the EC Treaty (now, after amendment, Article 12 EC).

would be a risk of creating inequality in its application.’¹³

47. As the Court has consistently held, Article 48 of the EC Treaty (now, after amendment, Article 39 EC) ‘not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner’.¹¹

50. As, therefore, it has been established in accordance with case-law that individuals may rely on the prohibition of discrimination laid down in Article 48 of the EC Treaty (now, after amendment, Article 39 EC) as against sports federations too, it remains to be examined whether that interpretation can also be applied to Article 38 of the Agreement.

48. The Court has also ‘held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law’.¹²

51. Suffice it in this context to refer to the Court’s findings in *Pokrzeptowicz-Meyer* as regards the Association Agreement with Poland. The reasoning applied by the Court with regard to the transposition of case-law on Article 48 of the EC Treaty (now, after amendment, Article 39 EC) to the comparable provision of the Association Agreement with Poland may also be applied in the present proceedings.

49. ‘It has further observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of a public authority there

52. Thus, the Court has ruled that ‘a mere similarity in the wording of a provision of one of the Treaties establishing the Communities and of an international agreement...’ is not sufficient. The crucial factor is, rather, ‘the aim pursued by each provision in its own particular context. A comparison between the objectives and context of the agreement and those of the

11 — *Bosman* (cited in footnote 5, paragraph 82), as well as Joined Cases C-51/96 and C-191/97 *Deliege* [2000] ECR I-2549, paragraph 47, and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 35; cf. Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17.

12 — *Bosman* (cited in footnote 5), paragraph 83; cf. *Walrave and Koch* (cited in footnote 11), paragraph 18.

13 — *Bosman* (cited in footnote 5), paragraph 84; cf. *Walrave and Koch* (cited in footnote 11), paragraph 19.

Treaty is of considerable importance in that regard'.¹⁴

53. The Court accordingly concluded that Article 37 of the Association Agreement with Poland establishes, in favour of workers of Polish nationality, once they are legally employed within the territory of a Member State, a right to equal treatment as regards conditions of employment of the same extent as that conferred by Article 48(2) of the Treaty.¹⁵

54. This means that the interpretation given to Article 48(2) of the EEC Treaty in the judgments in *Walrave and Koch*¹⁶ and in *Bosman*¹⁷ can be transposed in the present case to the first indent of Article 38(1) of the Agreement.

3. Substance of Article 38 of the Agreement

(a) The persons covered by that provision

55. It is at this point necessary to examine whether Mr Kolpak, that is to say, in

general terms any professional sportsman such as the one in the main proceedings, is entitled to the benefit of the first indent of Article 38(1) of the Agreement. In this regard it should be pointed out that the provision concerned applies only to employed persons who are lawfully resident in the territory of the State concerned. It is apparent from the documents before the Court that Mr Kolpak possesses a valid residence permit and does not require a work permit.

56. As regards Mr Kolpak's status as a worker, regard should be had to the judgment in *Lehtonen and Castors Braine*, in which the Court held as follows:

'As to the concept of worker, it must be borne in mind that, according to settled case-law, it may not be interpreted differently according to each national law but has a Community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration.'¹⁸

14 — *Pokrzeptowicz-Meyer* (cited in footnote 4), paragraphs 32 and 33.

15 — *Pokrzeptowicz-Meyer* (cited in footnote 4), paragraph 41.

16 — Cited in footnote 11.

17 — Cited in footnote 5.

18 — Cited in footnote 11, paragraph 45.

57. According to the findings of the Oberlandesgericht and the documents submitted to the Court, Mr Kolpak entered into an employment contract with a club, namely TSV Östringen e.V. Handball, with a view to carrying on gainful employment as goalkeeper for that club.

58. It therefore follows from the foregoing that Mr Kolpak comes within the category of persons entitled to the benefit of that provision.

(b) Existence of an obstacle to freedom of movement for workers

59. It remains to be examined whether the restriction on players who are nationals of non-member countries which is laid down in Rule 15 of the SpO constitutes an obstacle to freedom of movement for workers or, in other words, whether the first indent of Article 38(1) of the Agreement precludes a provision such as that laid down in the SpO.

60. It is first necessary to determine in that connection whether Rule 15 of the SpO concerns conditions of employment. As the Commission has correctly submitted, that is the case inasmuch as nationals of non-

member countries, nationals of EEA Contracting Parties excepted, have only limited opportunities to play in certain matches, that is to say, in league and cup matches in the federal and regional leagues.

61. As the Court held in *Bosman*, ‘participation in such matches is the essential purpose of a professional player’s activity’, a fact which explains why ‘a rule which restricts that participation... also restricts the chances of employment of the player concerned’.¹⁹

62. It clearly follows, therefore, from the case-law that a rule such as that at issue here constitutes an obstacle to the free movement of workers.²⁰

63. Since no such restriction applies to nationals of EEA Contracting Parties, and thus EU citizens, discrimination arises in this case against Slovak nationals.

19 — *Bosman* (cited in footnote 5), paragraph 120, and *Lehtonen and Castors Braine* (cited in footnote 11), paragraph 50.

20 — See *Bosman* (cited in footnote 5), paragraphs 99 and 100, and *Lehtonen and Castors Braine* (cited in footnote 11), paragraph 49.

64. It now remains to be established whether this obstacle to the free movement of workers can be justified objectively.

In this respect, the objection that clubs are free to field in matches nationals of EEA Contracting Parties, which include the EU Member States, in particular cannot be disregarded.

65. It should first be mentioned that the rules at issue here are not, unlike in the case of *Delière*,²¹ selection rules which do not contain a nationality clause, nor are they rules meeting the objective of ensuring the regularity of sporting competitions, as in *Lehtonen and Castors Braine*.²² This case, in contrast, involves a rule that restricts the number of players who are nationals of other countries, essentially, a rule corresponding to the one at issue in *Bosman*,²³ although that case did in fact relate to nationals of other Member States.

68. As regards the argument raised during the proceedings to the effect that Rule 15 of the SpO in the version applicable in the main proceedings was, for purely sporting purposes, necessary in particular to create a sufficient reserve of players of German nationality, it must be observed that the Court expressly rejected that argument in *Bosman*.²⁵

66. Moreover, there has been nothing in the proceedings to demonstrate that Rule 15 of the SpO is appropriate for the pursuit of purely sporting objectives.

69. Finally, it should be pointed out that up-and-coming young German players are not restricted to playing for a German club. They likewise have the chance to engage in this high-performance sport with foreign clubs.

67. However, should Rule 15 of the SpO be considered appropriate for the pursuit of an objective in the public interest, that still does not mean that it is proportionate. Accordingly, measures taken by sports associations may not go beyond what is necessary for achieving the aim pursued.²⁴

70. It follows that a rule such as that in the main proceedings impedes the exercise of the right to free movement laid down in the first indent of Article 38(1) of the Agreement.

21 — Cited in footnote 11, paragraph 61.

22 — Cited in footnote 11, paragraph 53 et seq.

23 — Cited in footnote 5.

24 — *Bosman* (cited in footnote 5), paragraph 104, and *Lehtonen and Castors Braine* (cited in footnote 11), paragraph 56.

25 — Cited in footnote 5, paragraph 130 et seq.

VII — Conclusion

71. In the light of the foregoing I propose that the Court should answer the reworded version of the question referred as follows:

Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, which is directly applicable, precludes the application to a Slovak national, as in this case, of a rule adopted by a sports federation under which clubs may field in league and cup matches only a limited number of players who come from non-member countries outside the European Economic Area (EEA).