OPINION OF ADVOCATE GENERAL LENZ

delivered on 20 September 1995 *

Summary

* Original language: German.

A — Introduction

I — *The problems raised*

1. This reference from the Cour d'Appel (Court of Appeal), Liège, for a preliminary ruling raises two questions relating to the compatibility with Community law of certain rules applying in football. The first question concerns the rules which permit a football club, if a player under contract with it moves to another club after that contract has expired, to demand a certain sum of money (the so-called transfer fee) from that club. The second question which has been referred concerns the rules which restrict the access of foreign footballers to the various competitions (the so-called rules on foreign players).

2. I shall first describe the facts which are at the origin of the national proceedings and the rules whose compatibility with Community law is at issue in this case. Since the facts of the action pending in the Liège Cour d'Appel can be understood only in the context of those rules, it makes sense to begin by looking at those rules.

II — *The organization of football*

3. The rules to be discussed here were adopted by private associations. As will be demonstrated, only in a few Member States so far has the national legislature enacted provisions which are of relevance in this field. Since the rules of those associations interlock and are more or less aligned to each other, in order to understand them one must first form a concept of how football is organized.

4. Football as an organized sport is played in clubs which are joined together in associations. As a rule there is a single association in each Member State, which organizes the sport at national level. In Belgium this is the ASBL Union Royale Belge des Sociétés de Football Association (hereinafter 'URBSFA'). An exception is the United Kingdom, where for historical reasons England, Wales, Scotland and Northern Ireland each have their own association.

5. Those associations are joined together worldwide in the Fédération Internationale de Football Association ('FIFA'), whose seat is in Zürich, Switzerland. [1] Within FIFA there are several groupings which comprise the associations of a particular continent.

1 — Article 1(6) of the 1992 FIFA statutes.

One of them is the Union des Associations Européennes de Football (Union of European Football Associations, 'UEFA'), whose members are the football associations of Europe. In addition to the 18 associations from the Member States of the EC, a large number of other associations from European countries belong to UEFA. UEFA currently has around 50 members in all. UEFA has *inter alia* the function of organizing the European Championship for national teams and the European Champions' Cup, European Cup-Winners' Cup and UEFA Cup for club teams. [2] UEFA too has its seat in Switzerland. [3]

III — *Transfer rules*

1. Belgium

6. Under the URBSFA statutes of 1982, three kinds of relationships are to be distinguished: the player's affiliation to an association ('affiliation'), [4] his affiliation to a club ('affectation') [5] and his entitlement to play ('qualification'). Only a player who is entitled to play may take part in the matches organized by the association. Entitlement to play presupposes that the player belongs to the Belgian association and a Belgian club. A transfer is defined as the process by which a player belonging to the association changes his club affiliation. [6] That definition as such thus covers only changes of club within Belgium, since in the event of a move abroad or to Belgium from abroad the player's affiliation to an association also changes. In the event of a temporary transfer, the player continues to belong to his previous club but is entitled to play for his new club.

7. The association's statutes distinguish between three kinds of transfer: so-called compulsory transfer ('transfert imposé'), so-called free transfer ('transfert libre') and administrative transfer ('transfert administratif'). [7] For a 'transfert imposé' the consent of the player and his new club is required, but not that of his former club. A 'transfert libre' requires agreement between the player and both clubs involved. 'Transfer administratif' is not relevant for the present case. [8]

8. The URBSFA statutes distinguish between a change of clubs by an amateur on the one hand and a change of clubs by a

2 — Article 2(e) in conjunction with Article 13 of the UEFA statute (1990 edition).

3 — Article 1(4) of the UEFA statute.

4 — Article 42(a)(1) of the 1982 URBSFA statutes. It should be noted in this connection that I have seen only the French text of the URBSFA statutes. The FIFA and UEFA regulations to be discussed below were also not all available in authorized translations. Where such translations were not available, I have quoted the provision in question in the original and usually added a free translation.

5 — Article 42(a)(1) of the 1982 URBSFA statutes.

6 — Article 44(1) of the 1982 URBSFA statutes.

7 — Article 44(2) of the 1982 URBSFA statutes.

8 — That is evidently a possibility of intervention given to the association in special circumstances ('circonstances spéciales'): see Article 46a(1) of the 1982 URBSFA statutes.

professional or non-amateur player [9] on the other hand. The rules on transfers of amateurs need no further description here. It is, however, important for an understanding of what is stated below that an amateur may change clubs by means of a compulsory transfer, with the new club having to pay a transfer fee of up to BFR 1 000 000. [10]

9. The rules on transfers of professional and non-amateur players may be described as follows. The clubs conclude contracts with those players, in which provision is made in particular for remuneration and minimum bonuses. The terms of those contracts are negotiated, but the association's statutes prescribe certain minimum amounts, for example a fixed monthly amount of at least BFR 30 000 for a professional player. [11] All the contracts, which may run for a period from one year to a maximum of five years, [12] must terminate on a 30 June. [13] Before expiry of the contract — in fact at the latest by 26 April of the year in question — the club must offer the player a new contract. Otherwise the player in question is regarded as an amateur from 1 May on for the purposes of the transfer rules. [14]

The player is free to reject the offer. If he does so, his name is included on a transfer list, which must be transmitted to URBSFA by 30 April at the latest. [15] For players whose names have been put on that list, a compulsory transfer is permissible between 1 May and 31 May. That means that a transfer can take place even without the consent of the old club if the new club pays the old club the transfer fee provided for. The amount of that transfer fee, which is described by the 1982 URBSFA statutes as compensation for training the player ('indemnité de formation'), is calculated by taking the player's gross annual income and multiplying it by a factor from 14 to 2 (for professionals) or from 16 to 4 (for non-amateurs) depending on the player's age. [16] In the case of a professional player aged 25 or 26, for instance, the transfer fee is ten times his gross income.

The 'free' transfer period follows, from 1 to 25 June. [17] The transfer fee is negotiated freely. A change of clubs is only possible, however, if the former club and the new club have reached agreement on the amount of that transfer fee. [18] If the fee is not paid, sanctions may be imposed on the club by the association. [19]

9 — On the distinction between professional and non-amateur players see Articles 39 and 40 of the 1982 URBSFA statutes.

10 — See Article 48b(2) and (3) of the 1982 URBSFA statutes.

11 — Article 40(3) of the 1982 URBSFA statutes.

12 — Articles 39(4) and 40(4) of the 1982 URBSFA statutes.

13 — Article 36b(4) of the 1982 URBSFA statutes.

14 — Article 46(1)(2) of the URBSFA statutes.

15 — Article 46(2) of the 1982 URBSFA statutes.

16 — Article 46(3) of the 1982 URBSFA statutes.

17 — For first division clubs the period is extended to 31 December of the relevant year: see Article 46(4) of the 1982 URBSFA statutes.

18 — See Article 45(2) of the 1982 URBSFA statutes.

19 — See for instance Article 45(6) in conjunction with Article 128(3) of the 1982 URBSFA statutes.

If no transfer takes place, the club to which the player belongs must offer him a new contract for one season on the same terms as were offered in April. If the player rejects that offer, the club can until 1 August take measures to suspend him. If it does not do so, the player is automatically reclassed as an amateur. [20] If a suspension has been imposed and still no new contract is concluded or transfer effected, then after two seasons during which he is not allowed to play, the player can have himself transferred as an amateur. [21]

10. Since 1 January 1993 URBSFA has applied a new transfer system. Since that new system is, however, very similar to the rules which have just been described, I shall only point out a few differences here. In the new system the player's freedom of contract is emphasised, but at the same time it is stated that the new club is to pay a transfer fee to the previous club:

'Sans préjudice de la liberté contractuelle du joueur, le club acquéreur est tenu de verser une indemnité au dernier club d'affectation (Art. IV/61.4).'

('Without prejudice to the player's freedom of contract, the acquiring club shall be obliged to pay compensation to the club with which he was last registered (Art. IV/61.4).') [22]

In the provision referred to, the transfer fee is defined as a payment intended as compensation for the training and development of the player, his skill, and the cost of replacing him ('une indemnité compensant la formation, la promotion, le savoir-faire et le remplacement').

As under the previous rules, the transfer fee is calculated, in the event of a compulsory transfer, by multiplying the player's gross income by a specified factor depending on the player's age. [23] The figures have been changed slightly, however. Thus for a professional aged from 25 to 27 in the first division, the transfer fee is now eight times his gross income.

11. The 1993 URBSFA statutes also contain provisions which apply if a player who has hitherto belonged to a foreign club moves to a Belgian club. They refer in this respect to the corresponding FIFA rules. [24] The player in question cannot be given entitlement to play for a Belgian club until URBSFA is in possession of an international transfer certificate issued by the association which the player wishes to leave. The association may be ordered by FIFA to issue the certificate, and FIFA can also issue a corresponding certificate itself. Under certain conditions URBSFA can itself issue a provisional certificate. [25]

20 — Article 46(5)(a) of the 1982 URBSFA statutes.

21 — Article 46(5)(b) of the 1982 URBSFA statutes.

22 — Article IV/85.321 of the 1993 URBSFA statutes.

23 — Article IV/85.322 of the 1993 URBSFA statutes.

24 — Article IV/70.121 of the 1993 URBSFA statutes.

25 — See Article IV/70.122 and 123 of the 1993 URBSFA statutes.

2. The UEFA rules

12. The UEFA rules on transfers applicable at the material time for the national proceedings in the Liège Cour d'Appel are contained in a document entitled 'Principles of Cooperation between Member Associations of UEFA and their Clubs' (hereinafter 'the 1990 UEFA transfer rules'), which was adopted by the UEFA Executive Committee on 24 May 1990 and was to come into effect, in accordance with its final provision, on 1 July 1990.

13. According to those rules, on expiry of his contract the player is free to conclude a new contract with the club of his choice. [26] The new club must immediately notify the former club of the conclusion of the contract. The former club must immediately inform its national association. The association must then immediately issue the international clearance certificate. [27]

14. The former club is, however, entitled, to 'compensation for ... training and development' from the new club. Compensation for training is payable on the occasion of a first change of club. At each further change of club, compensation for development is payable, that being intended to compensate the progress which the club has enabled the player to make. [28] In the event of differences of opinion between the clubs, a board of experts set up by UEFA makes a binding determination of the amount of that transfer fee. [29] That is done by taking the player's gross income in the preceding season, including bonuses and royalties, and multiplying it by a specified factor between 12 and 1, depending on the player's age. For a player aged 25 or 26, for example, the transfer fee payable is eight times that sum. The transfer fee may not, however, exceed 5 000 000 Swiss francs. [30]

15. The following provision can be found in Article 16 of those rules:

'The business relationships between the two clubs in respect of the compensation fee for training and development shall exert no influence on the sporting and professional activity of the player. The player shall be free to play for the club with which he has signed the new contract.'

16. At the end of the text of the 1990 UEFA transfer rules it is stated to be desirable that the principles of the national transfer

26 — Article 12 of the 1990 UEFA transfer rules.

27 — Article 13 of the 1990 UEFA transfer rules.

28 — Article 1(e) of the enclosure to the 1990 UEFA transfer rules.

29 — Article 14 of the 1990 UEFA transfer rules.

30 — Article 3 of the enclosure to the 1990 UEFA transfer rules.

systems for top-class football should be adapted as soon as possible to the system as defined in that document.

17. The principles defined in the 1990 UEFA transfer rules for all members of UEFA are already largely to be found, as far as the territory of the Community is concerned, in a document adopted by the UEFA Executive Committee on 2 May 1988, entitled 'Principes de collaboration entre les clubs de différentes Associations nationales des Etats-membres de la CEE' (Principles of cooperation between clubs of different national associations of the Member States of the EEC).

18. On 5 December 1991 UEFA adopted a new version of the 'Principles of Cooperation between Member Associations of UEFA and their Clubs', which was to come into force on 1 July 1992 (hereinafter 'the 1992 UEFA transfer rules'). The provisions therein concerning transfers largely correspond to those of the 1990 UEFA transfer rules. There are differences, however, with respect to the question of the calculation of the transfer fee. The new rules appear in particular no longer to contain any maximum amount for the transfer of a professional player. [31]

19. Those rules were replaced by the 'UEFA Rules on the determination of compensation for transfers' (hereinafter 'the 1993 UEFA transfer rules'), adopted by UEFA on 16 July 1993, to come into force on 1 August 1993. Those rules are based on Article 16(2) of the FIFA regulations — to be discussed below — on the status and transfer of footballers, and provide that 'international changes of club by footballers' are to be governed by those FIFA regulations. The provisions of the 1993 UEFA transfer rules govern 'exclusively the procedure and type of calculation' with respect to 'compensation for training and/or development in accordance with Article 14 of the FIFA regulations', but only in the event of the clubs being unable to agree on the amount of that transfer fee. [32]

The 1993 UEFA transfer rules confirm that on expiry of his contract a player is free to conclude a new contract with a club of his choice and that the question of the transfer fee payable is to have no influence on the player's sporting activity. The player 'shall be able to play freely for the club with which he has concluded the new contract'. [33]

The 1993 UEFA transfer rules also provide, as the earlier rules had already done, that in the event of a dispute the amount of the transfer fee is to be determined by a committee, which does so by multiplying the

31 — See Article 3 of the annex to the 1992 UEFA transfer rules. However, the rules include (in Article 5 of the annex) a maximum amount of SFR 600 000 for the compensation for training, but that applies only to amateur players.

32 — Article 1(1) and (2) of the 1993 UEFA transfer rules.

33 — Article 2 of the 1993 UEFA transfer rules.

player's gross income by a factor from 12 to 0 depending on the player's age. [34] It appears that the basis of the calculation is more narrowly defined than in the earlier rules. [35]

3. The FIFA rules

20. The FIFA transfer rules which applied in 1990 can be found in regulations which were adopted on 14 and 15 November 1953 and last amended on 29 May 1986 (hereinafter 'the 1986 FIFA Regulations').

21. Those regulations provide that each national association is to determine the status and qualification of its players, and that those decisions are to be recognized by the other associations and by FIFA itself. [36]

Under Article 14(1) of those rules a professional player may not leave his national association while he is bound by his contract and by the rules of his club, league or national association, however harsh those may be. A transfer thus presupposes the issue of a certificate of transfer by his former national association. In that certificate the national association confirms that all commitments of a financial nature, including any transfer fee, have been settled. [37] No national association may register a player until it is in possession of the transfer certificate. [38]

22. FIFA too has amended its transfer rules since then. The new regulations were adopted by FIFA in April 1991 and amended in December 1991 and December 1993. Only the new version which came into force on 1 January 1994 (hereinafter 'the 1994 FIFA Regulations') will be considered here.

23. The 1994 FIFA Regulations regulate the status and eligibility of footballers who 'effect a transfer from one national association to another'. [39] Such players can be registered with a club affiliated to another association only if that association has received 'an international transfer certificate issued by the national association which the player wishes to leave'. [40] Only the new association

34 — The factor 0 applies to players who are aged 39 or over. Such players can therefore transfer without a transfer fee becoming due.

35 — See Article 8(2) of the 1993 UEFA transfer rules, on the calculation of the relevant gross income.

36 — Article 1 of the 1986 FIFA Regulations.

37 — Article 12(5) of the 1986 FIFA Regulations: 'The issuing of this certificate shall imply on the part of the previous Association that all commitments of a financial nature, including the transfer fee where applicable, have been settled'.

38 — Article 12(1), third sentence, of the 1986 FIFA Regulations.

39 — Paragraph 1 of the preamble to the 1994 FIFA Regulations.

40 — Article 7(1) of the 1994 FIFA Regulations.

is entitled to request the transfer certificate to be issued. [41] Issue of the certificate may be refused only if the player in question 'has not fulfilled his obligations under the terms of his contract with his former club' or if 'there is a dispute other than that of a financial nature ... regarding the player's transfer' between the old and new clubs. [42] FIFA can order an association to issue such a transfer certificate or itself adopt a decision which takes the place of the certificate. If the player's former association does not issue the transfer certificate within a period of 60 days from the making of the request by the new association, the new association may issue a provisional certificate itself. [43]

24. Under Article 14(1) of the 1994 FIFA Regulations, in the event of the transfer of a non-amateur player, his former club is entitled to 'compensation for his training and/or development'. If an amateur player concludes a contract with a new club, as a result of which he loses his amateur status, his former club is entitled to 'compensation for his development'. [44] If the two clubs cannot reach agreement on the amount of compensation, the dispute is to be submitted to FIFA for a decision. [45] However, the rules allow the confederations within FIFA [46] to adopt their own regulations for settling such disputes. In such a case the confederation alone is competent to decide corresponding disputes between clubs under its jurisdiction. [47] As stated above, UEFA has made use of that possibility. [48]

25. Article 20(1) of the 1994 FIFA Regulations provides that disagreements concerning the amount of the transfer fee must not have any influence on the player's sporting or professional activity, and goes on to state that:

'... an international transfer certificate may not be refused for this reason. The player shall therefore be free to play for the new club with which he has signed a contract as soon as the international transfer certificate has been received'.

26. According to paragraph 2 of the preamble to the 1994 FIFA Regulations, 'the rules laid down under Chapters I, II, III, VII, VIII and X' are also binding at national level. Chapter V, which is entitled 'Players

41 — Article 8(1) of the 1994 FIFA Regulations.
42 — Article 7(2) of the 1994 FIFA Regulations.
43 — Article 7(2), (3) and (4) of the 1994 FIFA Regulations.
44 — Article 14(2) of the 1994 FIFA Regulations.
45 — Article 16(1) of the 1994 FIFA Regulations.
46 — These are the associations within FIFA mentioned above (see point 5).
47 — Article 16(2) to (4) of the 1994 FIFA Regulations.
48 — See point 19 above.

transferred from one national association to another' and comprises Articles 12 to 20, is not mentioned. Under paragraph 3 of the preamble, each national association is obliged to provide a system for transfers effected within its own association and to adopt appropriate regulations. Those regulations are to 'include the binding rules stipulated in paragraph 2, observe the general principles stipulated in the following articles and contain provisions for any dispute that may arise during a transfer'.

4. Rules in other Member States

27. To complete the picture, it is useful to look at the transfer rules of the other Member States of the Community. In response to a written request by the Court of Justice, UEFA has produced the regulations it states to be currently in force in the various Member States and has also helpfully provided a summary of them. A discussion of all those regulations is neither possible nor sensible in the present context. I shall therefore restrict myself to some Member States and concentrate on the points which appear to me to be noteworthy. It should be noted that the following account is based exclusively on the texts produced by UEFA, which are for the most part in the language of the country in question. It may therefore be the case that the occasional minor inaccuracy has crept in.

28. In *Austria* the corresponding rules can be found in the 'Regulativ für die dem ÖFB angehörigen Vereine und Spieler' (Regulations for clubs and players affiliated to the Österreichischer Fußball-Bund (Austrian Football Federation)), in force since 1 July 1994. Under Paragraph 25(3) of those regulations, the player's former club is entitled in the event of a transfer to demand compensation for the transfer. Under Paragraph 30(1) of the regulations that transfer compensation represents 'a financial equivalent of the worsening of the club's competitive position as a result of the player's departure. The transfer compensation further includes also a proportion of the costs of training.'

Article 30(4) of the regulations provides that disputes between clubs concerning the transfer fee are to 'have no influence on the player's eligibility. The player shall be eligible to play once he is registered for the new club, in accordance with the provisions relating thereto.'

Under Paragraph 32(5) of the regulations, 'the corresponding FIFA or UEFA regulations' apply to transfers abroad or from abroad.

29. In *Germany* the rules on transfers are mainly contained in the 'Lizenzspielerstatut' (Statute of professional players) of the Deutscher Fußballbund (German Football

Federation, 'DFB'). In addition, the DFB's 'Spielordnung' (rules on matches) are to be noted. Under Paragraph 29(1) of the Lizenzspielerstatut, a club which concludes a contract with a player of another club must pay a transfer compensation to that club. The validity of the contract of employment 'may not be dependent on a specified amount and/or on agreement on the transfer compensation'. The provisions on the transfer of amateurs to professional clubs are of interest. In the 1994/95 season a Bundesliga club which concluded a professional contract with an amateur from another club had to pay a transfer fee of DM 100 000. A second division Bundesliga club had to pay DM 45 000 for the same player in that season. That transfer fee was to be divided between the clubs for which the player in question had been eligible within the last seven years before the transfer. [49]

In the case of a transfer abroad, the player's former club is entitled to 'compensation for training and development'. [50] For transfers to other associations within the Community, the 'UEFA rules on the payment of compensation for training and development apply' in the version in force at the time. [51]

30. For *Denmark* UEFA has produced to the Court the Danish Football Association's model contract for footballers. Section 3 of that contract contains the provisions on the transfer of players under contract. It appears that a transfer fee is payable only if the contracted player moves to a Danish first division club or a foreign club. [52] In the case of a transfer to a Danish first division club, the transfer fee is calculated on the basis of the player's gross income multiplied by various factors from 0 to 3 according to the player's age and income. For players from 25 to 27 years of age, for example, the factor is 0.80 for the first DKR 100 000 of gross income, 1.60 for gross income exceeding DKR 100 000 but less than DKR 200 000, and 2.40 for the remaining income. [53] In the event of a transfer abroad, on the other hand, the transfer fee is calculated by multiplying the player's gross income by a uniform factor between 12 and 1. For a player aged from 25 to 27 the factor is 8. [54]

At the hearing before the Court, however, the representative of Denmark stated that a law abolishing transfer fees is being drafted.

31. In *Spain* Real Decreto (Royal Decree) No 1006/1985 of 26 June 1985 prescribes

49 — See Paragraph 32(1) of the Lizenzspielerstatut.
50 — See Paragraph 9(1) of the Spielordnung.
51 — See Paragraph 28(3) of the Lizenzspielerstatut.
52 — See clauses 2 and 7 of Section 3 of the model contract.
53 — Clause 4 of Section 3 of the model contract.
54 — Clause 7 of Section 3 of the model contract.

that, in the event of a transfer, a transfer fee ('una compensación por preparación o formación') in accordance with a collective wage agreement may be demanded. [55] UEFA has produced to the Court such a collective agreement, Article 4 of which states that it is to be in force from 1 June 1992 to 30 May 1995. According to Article 18 of the agreement, in the event of a transfer a transfer fee is due if the player in question and the price determined have been included in a transfer list. Professionals aged 25 or over cannot be included in that list. Those players can therefore transfer *in Spain* [56] without a transfer fee being payable.

Under Article 21 of the collective agreement the player is entitled to 15% of the transfer fee in the event of a transfer.

32. In *France* the relevant rules can be found in the 'Charte du Football Professionnel' (Professional Football Charter). Chapter 4 of Title III of the charter deals with the status of professional footballers.

Article 15(1) and (2) of that chapter provides:

'1. Any move by a player from the club with which he has signed his first professional contract to another club shall entitle the former club (the club which has trained him) to receive compensation for training.

2. The former club shall be entitled to compensation for training if:

— that club has trained the player as a "stagiaire" for a period of at least one season;

— that training has taken place in a recognized football training centre.' [57]

The amount of the compensation for training corresponds to the basic compensation or part thereof, according to the length of the training. The basic compensation

55 — Article 14(1) of the decree.

56 — For transfers abroad Article 14(2) of the abovementioned decree should be noted. It provides that in cases where the other country's rules differ from the Spanish regulations, 'criteria of reciprocality' are to be applied.

57 — It should be observed, for clarification, that under Article 3(1) of that chapter the first professional contract has a term of four years.

corresponds in principle to the player's gross income in the preceding two years. If the training has lasted for more than three seasons, the full basic compensation is payable; if it lasted for only one season, the transfer fee is only 10% of that amount. [58]

A transfer fee is thus due only for the *first* transfer, and then only when the above conditions are fulfilled. Apart from such cases, no transfer fee is thus payable within France in the event of a transfer.

33. In the event of a transfer abroad, in accordance with Article 18 of that chapter the transfer fee due under Article 15 is doubled.

34. In *Greece*, according to UEFA's information, on expiry of a football player's former contract, he is free to join a new club without a transfer fee becoming due, in accordance with Article 29(1) of Law No 1958 of 5 August 1991. Article 29(3) of that law, however, permits the insertion in the contract between the club and the player of a term stating that he can leave the club only if he has paid it a specified sum. That sum must be stated in the contract. In practice, however, according to UEFA, it is usually the new club which pays the money.

35. In *Italy* Law No 91 of 23 March 1981 applies to football (and sport in general). Under Article 6 of that law, a transfer fee ('indemnità di preparazione e di promozione') may be demanded in the event of a transfer; the recipient must invest it for sporting purposes. Details of the calculation are governed by the rules of the Italian Football Association, adopted in implementation of that law.

36. Finally, *the Netherlands* should be mentioned. Article 49(1)(a) of the Netherlands Football Association's regulations, produced to the Court by UEFA, states that in the event of a transfer of a player abroad, the association will issue the transfer certificate provided for 'in Article 12 of the FIFA Regulations' only after the transfer fee has been paid to the player's former club. [59]

58 — On this point, and for further details, see paragraph 3 et seq. of Article 15 of that chapter.

59 — This would appear to mean Article 12 of the 1986 FIFA Regulations, in other words the previous regulations. It may therefore be that the Netherlands association has not yet adapted its rules to the new 1994 FIFA Regulations.

IV — Rules on foreign players

37. From the 1960s on, many — but not all — football associations introduced rules restricting the possibility of engaging players of foreign nationality. It should be observed here, however, that in some cases the relevant rules are based on a definition of nationality for sports law purposes which not only focuses on nationality as such but also attaches importance to the fact that a player has already played for an association for a certain time. [60]

38. After the Court's judgment of 14 July 1976 in *Donà* v *Mantero* [61] negotiations took place between the European football associations and the Commission of the European Community. In 1978 UEFA undertook to the Commission to abolish the restrictions on the number of foreign players which a club can have under contract, in so far as they are nationals of Member States. Secondly, UEFA agreed to fix at two the number of such players who were allowed to take part in a match, with that restriction not applying to players who have been resident for five years in the territory of the relevant association.

39. After further discussions with the Commission, UEFA in 1991 adopted the so-called '3 + 2' rule, under which from 1 July 1992 the number of foreign players whose names can be included on the team-sheet may be restricted to not less than three per team, plus two players who have played in the country in question for five years uninterruptedly, including three years in junior teams. [62] That rule was to apply initially to clubs in the first division in the relevant Member State of the Community and to be extended to all non-amateur leagues by the end of the 1996/97 season.

40. Since that UEFA rule is merely a minimum, it is open to the individual associations to allow more foreign players. The English association, for instance, does not count players from Wales, Scotland, Northern Ireland and Ireland as foreigners. There is no restriction of the number of foreign players in Scotland.

41. The '3 + 2' rule also applies to club matches organized by UEFA itself. [63]

60 — See for example Paragraph 22(2)(b) of the Spielordnung of the German Football Federation (DFB), which came into force on 30 August 1994, under which a player who 'does not possess German nationality but has been eligible to play for German clubs for the preceding 5 years, including at least 3 years as a junior, uninterruptedly' is regarded as a German player.

61 — Case 13/76 [1976] ECR 1333.

62 — The reference to the team-sheet means that all five foreigners can play together. If one of them is substituted, however, he cannot be replaced by an additional (sixth) foreigner.

63 — On which see point 5 above.

V — Facts of the main action and procedure in the national courts

42. Mr Bosman was born in 1964 and is a Belgian national. He joined the Belgian football association while still young and started playing — at first in the youth teams — for Standard Liège, a Belgian first division club. In 1986 he signed his first contract of employment with that club, thereby becoming a professional player. In May 1988 he was transferred for a transfer fee of BFR 3 000 000 from Standard Liège to a local rival, SA Royal Club Liégeois (hereinafter 'RC Liège'), which until the end of last season also played in the Belgian first division. The contract with RC Liège, which ran until 30 June 1990, guaranteed Mr Bosman a gross basic salary of BFR 75 000 a month. With bonuses and other supplements, Mr Bosman's average monthly earnings amounted to about BFR 120 000.

43. In April 1990 RC Liège offered Mr Bosman a new contract for one season in which his basic wage was reduced to BFR 30 000, in other words, the minimum provided for in the URBSFA statutes. Mr Bosman refused to sign that contract and was placed on the transfer list. The transfer fee for a compulsory transfer was fixed at BFR 11 743 000, in accordance with the relevant rules of the association.

44. Since no club had expressed interest in a compulsory transfer, Mr Bosman eventually made contact with a French club, SA d'économie mixte sportive de l'Union Sportive du Littoral de Dunkerque (hereinafter 'US Dunkerque'), who played in the French second division. That club engaged Mr Bosman by a contract concluded on 30 July 1990 which provided for a basic monthly salary of the equivalent of some BFR 90 000. US Dunkerque had already reached agreement with RC Liège on 27 July 1990 on the terms of the player's (temporary) transfer. It was agreed that RC Liège would transfer the player to US Dunkerque for one season in return for payment of BFR 1 200 000 compensation payable on receipt of the URBSFA clearance certificate. At the same time US Dunkerque was given an irrevocable option for the permanent transfer of the player for an (additional) sum of BFR 4 800 000. Both contracts — the contract between Mr Bosman and US Dunkerque and that between RC Liège and US Dunkerque — were, however, subject to the condition that they would become void if the clearance certificate from the Belgian association did not reach the French Football Federation by 2 August. The reason for that appears to have been US Dunkerque's intention to play Mr Bosman in an important match as early as 3 August 1990.

Because of doubts as to US Dunkerque's ability to pay, RC Liège failed to request URBSFA to issue the certificate, so that both contracts lapsed. As early as 31 July, moreover, RC Liège had Mr Bosman suspended and thereby prevented him for the time being from playing in the new season.

45. Mr Bosman thereupon applied to the Tribunal de Première Instance (Court of First Instance), Liège, on 8 August 1990. In addition to his main claim, he submitted an application for an interim order, seeking firstly an order for RC Liège and URBSFA to pay him BFR 100 000 a month until he found a new employer, secondly an order restraining the defendants from damaging his opportunities of finding employment by claiming or levying any sum on that occasion, and thirdly an order referring a question to the Court of Justice for a preliminary ruling. The court thereupon on 9 November 1990 ordered RC Liège provisionally to pay Mr Bosman the sum of BFR 30 000 a month, made the restraining order sought, and referred a question to the Court of Justice on the compatibility of the transfer system with Articles 3c and 48 of the EEC Treaty. The Court of Justice numbered the case as Case C-340/90.

46. On appeal, the Cour d'Appel, Liège, on 28 May 1991 quashed the decision of the Tribunal de Première Instance, Liège, in so far as it referred a question to the Court of Justice for a preliminary ruling. However, it upheld the order for RC Liège to pay the monthly amount to Mr Bosman, and ordered URBSFA and RC Liège to make Mr Bosman available to any club wanting to engage his services, without demanding compensation from that club. The Court of Justice thereupon removed Case C-340/90 from its register by order of 19 June 1991.

47. The interim order made it possible Mr Bosman to be engaged by the French second division club Saint-Quentin in October 1990. However, that contract was terminated at the end of the first season. In February 1992 Mr Bosman signed a new contract with the club Saint-Denis de la Réunion; that was also later terminated. After a long search, Mr Bosman concluded a contract on 14 May 1993 with Royal Olympic Club de Charleroi, who played in the Belgian third division. According to the national court, there are clear grounds for suspicion that despite the freedom of manoeuvre given him by the interim order, Mr Bosman was boycotted by all the European clubs which could have taken him on.

48. In the main proceedings, also brought before the Tribunal de Première Instance, Liège, on 8 August 1990, Mr Bosman first claimed damages from RC Liège provisionally assessed at BFR 30 000 000. That claim was based firstly on breach by the defendant of its contractual obligations and secondly on the unlawfulness of the transfer system. On 3 June 1991 URBSFA intervened in the proceedings, seeking a declaration that its rules and the corresponding UEFA rules were lawful. On 20 August 1991 Mr Bosman joined UEFA as a defendant. At the same time he brought an action against UEFA for a declaration that in so far as the UEFA rules provided for a transfer system which provided for a transfer fee to be demanded in the event of a change of clubs by a player whose contract had expired, and in so far as they did not put players from other Member States of the Community in the same position as national players with respect to access to the national competitions, they were null and void on the ground of breach of Articles 48, 85 and 86 of the EC Treaty. Mr Bosman also sought an order that UEFA terminate those practices and withdraw the void rules within 48 hours. On 5 December

RC Liège joined US Dunkerque as a defendant.

49. On 9 April 1992 Mr Bosman submitted further applications to the Tribunal de Première Instance, Liège, in which he amended the original claim against RC Liège and also brought separate proceedings against URBSFA and developed the claims against UEFA. The action now sought an order restraining RC Liège, URBSFA and UEFA from hindering his freedom to conclude a contract with a new employer, and an order for those parties individually or jointly to pay him BFR 11 368 350 as compensation for the loss incurred from 1 August 1990, BFR 11 743 000 as compensation for the loss caused him by the application of the transfer system from the beginning of his career until 9 November 1990, and a provisional sum of BFR 1 for the costs of the proceedings. Mr Bosman further sought a declaration that the transfer rules and rules on foreign players of URBSFA and UEFA were not applicable to him. Mr Bosman also proposed that a preliminary ruling should be sought from the Court of Justice.

50. Two professional players' unions — the French Union Nationale des Footballeurs Professionnels (hereinafter 'UNFP') and the Netherlands Vereniging van Contractspelers (hereinafter 'VVCS') — intervened in the proceedings in support of Mr Bosman.

51. In its judgment of 11 June 1992 the Tribunal de Première Instance, Liège, rejected UEFA's objection that proceedings against it had to be brought in the courts of Switzerland and held that it had jurisdiction to decide the case pending before it. The intervention of UNFP and VVCS was declared admissible. The court also declared all the claims admissible. It held that RC Liège had acted unlawfully in causing Mr Bosman's transfer to US Dunkerque to fail, and was to compensate the resulting loss. However, the court refused RC Liège's application to join US Dunkerque as a defendant, since no fault on the part of the French club had been shown. Finally, the court made a reference to the Court of Justice for a preliminary ruling on the interpretation of Articles 48, 85 and 86 of the EC Treaty with reference to the transfer system. That case was given the number C-269/92 by the Court of Justice.

52. On appeal, the Cour d'Appel, Liège, in a judgment of 1 October 1993 upheld the decision, in so far as it had held that the interventions were admissible, the court had jurisdiction, and the claims were admissible. The Cour d'Appel also agreed with the Tribunal de Première Instance that the examination of the claims raised against RC Liège, URBSFA and UEFA involved an examination of the lawfulness of the transfer system. It therefore itself made a reference to the Court of Justice for a preliminary ruling. The Court of Justice thereupon removed Case C-269/92 from its register, as it had become devoid of purpose as a result of the new reference. Following a suggestion by Mr Bosman, the appellate court moreover concluded that the lawfulness of the rules on foreign players should also be examined, since Mr Bosman's claim in that respect was

based on Article 18 of the Belgian Code Judiciaire (Judicial Code), which permits the bringing of actions 'to prevent infringement of a right which is seriously threatened'.

On the other hand, the Cour d'Appel rejected UEFA's application to ask the Court of Justice whether the answer to the questions referred would be different if a transfer system allowed a player to play freely for his new club even if that club had not yet paid the transfer fee to his former club.

VI — *The questions referred to the Court of Justice*

53. The Cour d'Appel, Liège, thus referred the following questions to the Court of Justice for a preliminary ruling:

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

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

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

VII — *Further procedure and procedure before the Court of Justice*

54. URBSFA lodged an appeal in cassation against the judgment of the Cour d'Appel, Liège, and applied for the decision to be extended to RC Liège, UEFA and US Dunkerque. The Cour de Cassation dismissed the appeal on 30 March 1995 and held at the same time that the dismissal of the appeal made the applications for extension of the decision devoid of purpose. [64]

55. In the proceedings before the Court of Justice Mr Bosman, URBSFA, UEFA, the French Government, the Italian Government and the Commission submitted written

64 — The Cour de Cassation has helpfully provided the Court with the text of its decision.

observations. They also took part in the hearing before the Court on 20 June 1995. On the occasion of that hearing, the Danish Government and the German Government also expressed their opinion on the reference for a preliminary ruling.

B — Opinion

I — *Preliminary observation*

56. The importance of the present case is obvious. The answer to the question of the compatibility with Community law of the transfer system and the rules on foreign players will have decisive influence on the future of professional football in the Community.

57. A few figures may suffice as examples to demonstrate the importance of the transfer system in professional football today. A study by an English firm of accountants states that the clubs of the English first division — the Premier League — spent nearly £51 000 000 (some ECU 62 000 000 at the then exchange rate) on transfer fees in the 1992/93 season. [65] According to press reports, the 18 clubs in the Italian first division spent the equivalent of more than DM 96 000 000 (over ECU 51 000 000) on foreign players alone for the 1995/96 season. [66] The most expensive transfer in football history to date took place in Italy and cost the new club a transfer fee of the equivalent of about ECU 19 000 000. [67]

As to the rules on foreign players, it should be noted that professional clubs in the Community already employ a considerable number of players today from other Member States and non-member countries. According to figures supplied by URBSFA, for example, the playing staff of the 18 clubs in the Belgian first division at the beginning of the 1993/94 season comprised 398 players with Belgian nationality and 175 foreign players, although only 61 of them were regarded as foreign for the purposes of the rules on foreign players. [68] In the event that the Court declares the rules on foreign players to be contrary to Community law, it is to be expected that the number of footballers from the Community earning their living with a club in another Member State will increase even more.

58. Transfer rules and rules on foreign players also exist in some form or other in other

65 — Touche Ross & Co., *Survey of Football Club Accounts*, Manchester 1994 (written by Gerry Boon, Dale Thorpe and Anuh Shah).

66 — *Süddeutsche Zeitung*, No 183, 10 August 1995, p. 31.

67 — This was the transfer of Gianluigi Lentini from Torino to AC Milan in July 1992 (see *The Economist*, 17 June 1995, p. 96).

68 — That makes sense if one remembers that the rules on foreigners are mostly based on a definition of foreigner for the purposes of sports law (on this point see point 37 above).

sports played in the Community. The Court's ruling will therefore be of great importance for those sports too.

59. It is now over five years since the events which were at the origin of the main action before the Cour d'Appel, Liège, took place. Since then several courts have dealt with the case. The Court of Justice has already been asked three times for a preliminary ruling in this connection, but — as stated above — the first two requests did not lead to a judgment. If the Court of Justice makes a decision on the substance in the present proceedings, that will by no means be the end of the national proceedings. The time which a professional footballer has in which to pursue his career is, however, limited, as experience has shown. Not only the importance of the case for football, but also the interests of Mr Bosman therefore in my opinion require the present case to be brought to a decision as swiftly as possible. I have borne that in mind when drafting this Opinion.

60. It should be observed that the scope of the questions which have been referred is restricted, since they do not concern the entire sphere of the sport of football. The *first* question, on the transfer system, relates to the transfer of a player who is under contract with a club. The question thus relates only to players who play football for wages, in other words, to the field of professional football. The field of amateur football is thus not included. The Court will therefore not have to decide whether it is compatible with Community law to demand a transfer fee when a player, who was previously an amateur and now signs a contract as a professional, changes clubs. The *second* question appears at first sight to be broader and, if construed literally, could even be understood as calling for an examination of the compatibility with Community law of all rules on foreign players — regardless of whether it is the professional or amateur sphere which is concerned and possibly even relating to all types of sport. It is clear, however, from the order for reference that the question is meant to relate only to the rules on foreign players in professional football. All those who have taken part in the present proceedings have correctly assumed that the question is to be understood in that sense.

61. As justification of the rules at issue in the present proceedings, the associations concerned have put forward not only sporting but also economic considerations. All those arguments have been discussed in detail, in particular by Mr Bosman himself, but also by the Commission and the other participants in the proceedings. It is in my opinion self-evident in view of the importance of the case that those arguments should be examined in depth.

62. The outcome of these proceedings is of interest to a large number of citizens in the Community who are football enthusiasts. Many play the game themselves or work — often on a voluntary basis — in their clubs in other ways. Perhaps even greater is the number of those who follow the game as spectators and are especially interested in matches

in the professional leagues. Precisely those factors oblige the Court of Justice, and myself most of all, to consider the questions referred objectively and without prejudice.

II — *Admissibility of the questions referred*

1. The positions of the parties

63. In the opinion of *UEFA*, the questions which have been referred for a preliminary ruling are inadmissible and should therefore not be answered by the Court. UEFA considers that Mr Bosman's transfer to US Dunkerque failed precisely because the UEFA transfer rules which should have been applied in that case were not complied with. Had its rules been applied, the transfer could have been carried out and the proceedings would not have arisen. Referring to the Court's case-law, which I shall discuss further below, UEFA submits that an answer to the questions referred is not necessary for the decision in the proceedings pending before the Cour d'Appel, Liège. It therefore has grave doubts as to admissibility of the first question. It considers that the second question, on the other hand, is a purely hypothetical one, since Mr Bosman's career was at no time hindered by the rules on foreign players. The present case, it argues, is an artificially constructed procedure for political purposes: those concerned are in fact making an attempt to get the Court of Justice to rule on the compatibility with Community law of practices which have nothing to do with the real dispute. The national court gave no reasons at all why an answer to its second question should be necessary for the outcome of the main proceedings.

Should the Court nevertheless decide to answer the questions in whole or in part, UEFA considers that it should in any event proceed with the greatest caution, since those questions call into question the organization of football as such.

64. In its written observations *URBSFA* expressed no opinion on the admissibility of the questions referred. At the hearing before the Court it submitted that two sets of proceedings should be distinguished in the present case. The first was a dispute between Mr Bosman and RC Liège. That could be resolved without a preliminary ruling by the Court being required. The second was an artificial dispute brought by certain interest groups of professional players against UEFA and URBSFA. URBSFA also referred on this point to the decision of the Cour de Cassation in the main proceedings. It indicated that it was desirable that the Court of Justice should take that decision into account when considering the case.

65. The *French*, *Italian* and *Danish Governments* also adopted the position that the rules on foreign players were of no relevance for the main proceedings. In their view, the dispute concerned only the admissibility of the transfer system. The second question

referred was therefore a purely hypothetical question. The French Government noted *inter alia* that the rules on foreigners were not even mentioned in the claim originally brought by Mr Bosman.

After several of those appearing at the hearing before the Court had referred to the abovementioned decision of the Cour de Cassation, the representative of the French Government expressed the opinion that it appeared that as a result of that decision the Court no longer had to answer the second question, as that question was possibly non-existent, or no longer existent.

66. The *Commission*, in its written observations, at first put forward the view that the second question referred was inadmissible, since it was a hypothetical one. At the hearing before the Court, the representatives of the Commission indicated that the Commission's view had changed. I understand those statements as meaning that the Commission is now inclined to regard the second question too as admissible, although that was not expressly stated.

67. *Mr Bosman* emphatically denies that the present case is an artificial dispute. He points out that the national court declared the various applications made by him admissible, *inter alia* on the basis of Article 18 of the Belgian Code Judiciaire, which permits preventive actions for the purpose of averting threatened serious damage. According to the national court's findings, the dispute therefore requires, he says, in accordance with the relevant provisions of Belgian law, an examination of the lawfulness of the transfer system and the rules on foreign players. The Court of Justice can scarcely call into question that interpretation by the Cour d'Appel, Liège, of provisions of national law. If it nevertheless were to do so, the process of cooperation between national courts and the Court of Justice, which is the basis of Article 177 of the EC Treaty, would be damaged. Mr Bosman argues that the national court was aware of the case-law of the Court of Justice on the admissibility of references for a preliminary ruling and it more than fulfilled the obligations arising therefrom, in particular the obligation to give reasons for making the reference.

Nor is this case, in Mr Bosman's view, an abuse of the procedure under Article 177 of the EC Treaty. With respect in particular to the rules on foreign players permitted under UEFA's regulations, he has an interest in having them declared invalid or inapplicable, since they are the foundation of the rules of the various European football associations which reduce his chances of finding employment in other Member States.

In his view, the questions therefore comply with the conditions of admissibility which follow from the Court's case-law.

2. Article 177 and the Court's case-law on the admissibility of references for preliminary rulings

68. Under the first paragraph of Article 177 of the EC Treaty, the Court of Justice is to give preliminary rulings on the interpretation of the EC Treaty and on the validity and interpretation of the rules and measures adopted on the basis of that Treaty.

The second paragraph of Article 177 of the EC Treaty [69] reads as follows:

'Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.'

It follows from the wording of that provision that it is the national courts which decide on whether it is necessary to obtain a preliminary ruling from the Court of Justice. Power for the Court to refuse to answer such references for preliminary rulings is not provided for in Article 177.

69. The Court has also confirmed in consistent case-law that it is 'solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court'. [70] That is also supported by the fact that the national court, which alone has direct and precise knowledge of the facts of the case, is in the best position to assess those points. [71] Where the questions put by national courts concern the interpretation of Community law, 'the Court is, in principle, bound to give a ruling'. [72] The Court has nevertheless in a number of cases allowed exceptions to that principle and declined to answer some or all of the questions referred. [73]

70. If one attempts a systematic classification, one reaches the conclusion that various groups of cases can be distinguished. I am inclined to consider that three groups of cases can essentially be distinguished. The first group consists of those cases where the national court has not provided the Court of Justice with all the information it requires to be able to make a proper decision. Secondly, the Court has refused to answer the questions referred in a series of cases in which

69 — The third paragraph of Article 177 of the EC Treaty, under which courts of final instance are obliged to obtain a preliminary ruling from the Court of Justice, is not relevant to the present case.

70 — Thus, for example, the judgment in Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17.

71 — Consistent case-law; see for instance the judgment in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 25.

72 — See for example the judgment in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 20.

73 — An example of the former is the judgment in Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, where the Court answered only some of the questions referred (paragraph 16 of the judgment).

they clearly had no connection with the dispute before the national court. In the third group, finally, are the cases in which the Court declined the reference for a preliminary ruling because it was of the opinion that the national court had abused the procedure under Article 177. I also include in the last group the cases where the Court considered that the questions referred were general or hypothetical ones. The classification is of course open to debate, especially as the boundaries between the second and third groups I have distinguished are fluid. Thus one could perfectly well take the view that the last cases mentioned should be put into the second group. For reasons which I will explain later, however, the above classification seems to me to be more useful.

71. The answer to the question of the admissibility of the questions put by the Cour d'Appel, Liège, in the present case in my opinion requires the Court's previous decisions in this field to be examined first. In so doing I shall use the classification I have just described.

72. The *first* group has only very recently become of substantial importance. The Court admittedly observed earlier that 'the need to afford a helpful interpretation of Community law' makes it essential to describe to the Court the legal and factual context in which the interpretation sought is to be placed. [74] For the Court to be able to perform its task, 'it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment'. [75] In cases where the necessary information has not been provided, the Court has stated that it is not in a position effectively to answer the questions referred. [76]

73. That point of view has, however, only become of more significance since the Court's judgment of 26 January 1993 in *Telemarsicabruzzo*. [77] In that judgment the Court started from its previous case-law by stating that 'the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. [78] The Court emphasized that that was especially the case in the field of competition, which 'is characterized by complex factual and legal situations'. Since the orders for reference contained no such details, the Court declined to answer the questions referred. [79]

74 — See for example the judgments in Case 244/78 *Union Laitière Normande* v *French Dairy Farms* [1979] ECR 2663, paragraph 5, and in Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* v *Ireland* [1981] ECR 735, paragraph 6.

75 — Judgment in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 17. That requirement becomes comprehensible if one considers the cases in my second group of cases.

76 — Judgment in Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraph 22 (with respect to some of the questions put).

77 — Joined Cases C-320/90, C-321/90 and C-322/90, [1993] ECR I-393.

78 — *Telemarsicabruzzo*, paragraph 6.

79 — Ibid., paragraphs 7 to 10.

It can scarcely be doubted that the Court was thereby following the advice of the Advocate General, who had recommended 'a slightly more restrictive attitude on the part of the Court' with respect to the question of the requirements for references for preliminary rulings. [80]

74. The Court has since confirmed that attitude in several decisions. [81] It has noted at the same time that the purpose of that requirement is not only to enable the Court to give proper answers, but also to enable the Member States and other interested parties usefully to exercise their right to submit observations pursuant to Article 20 of the EEC Statute of the Court. [82]

75. The thinking behind all those cases is obvious. The Court of Justice can as a rule give a useful answer to the questions put by a national court only if it knows the circumstances of the national proceedings. I am, however, of the opinion that a benevolent approach is required here. Rejection of a reference for a preliminary ruling on the ground of an inadequate account of the factual and legal context should therefore be restricted to exceptional cases. In several of the cases I have cited, the Court seems to me to have applied an inappropriately strict standard.

76. The first of the cases to be included in the *second* group is the Court's judgment in the *Salonia* case. [83] In that judgment the Court noted that Article 177 is based on 'a distinct separation of functions between national courts and the Court of Justice' and does not allow the latter to criticize the reasons for the reference. The Court then stated:

'Consequently, a request from a national court may be rejected only if it is *quite obvious* that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action.' [84]

77. In *Salonia* those conditions were not fulfilled, and the Court consequently answered the questions put to it. It acted differently in

80 — Opinion of Advocate General Gulmann [1993] ECR I-409, at p. I-417.

81 — Order in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4 et seq.; order in Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, paragraph 6 et seq.; order in Case C-378/93 *La Pyramide* [1994] I-3999, paragraph 14 et seq.; order in Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 12; order in Case C-167/94 *Grau Gomis* [1995] ECR I-1023, paragraph 8. But see also the judgment in Case C-316/93 *Vaneetveld and Others* [1994] ECR I-763, where the rigour of that principle was mitigated for a restricted area (paragraphs 13 and 14).

82 — See the order in *Saddik*, cited above (note 81), paragraph 10, and the order in *Grau Gomis*, cited above (note 81), paragraph 10, both with references to the earlier case-law.

83 — Case C-126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563.

84 — Ibid., paragraph 6 (my emphasis).

Falciola, [85] a 1990 case which I shall briefly consider here as a representative of this group of cases. The main action concerned a road-building project which, according to the court making the reference, fell within the scope of certain EC directives on public works contracts. The questions had no visible connection with the main action. It was clear from the grounds of the order for reference that the order's ultimate purpose was to obtain a ruling from the Court of Justice on whether, following the enactment of Italian Law No 117/88 of 13 April 1988 on compensation for damage caused in the exercise of judicial functions and the civil liability of the judiciary, the Italian courts could still offer whatever guarantees Community law might require to ensure that they were able to carry out their duties as Community judges satisfactorily. [86] The Court reached the conclusion that the Italian court was concerned only with the possible 'psychological reactions' of certain judges as a result of the enactment of that law. Since there was clearly no connection with Community law, the Court held that it had no jurisdiction to rule on the questions submitted to it. [87]

78. The Court has repeated and confirmed the abovementioned reasoning in the *Salonia* judgment, not only in *Falciola* but also in a large number of other cases. [88]

79. It must be observed, however, that in a further series of decisions the Court has merely focused on whether the interpretation of Community law sought 'bear [s] no relation' to the main action. [89] The number of those decisions invites the conclusion that the Court in each case deliberately omitted the additional factor that the lack of a connection must be *manifest*. Whether that was actually the case appears doubtful, however, for several reasons. First, all those judgments refer to the decision in *Salonia*, where the possibility of not answering a question submitted was made to depend precisely on the presence of that additional factor. Second, in an order of 16 May 1994 the Court spoke of its 'consistent case-law', with an express reference to the judgment in *Salonia* and the order in *Falciola*. [90] Finally, no chronological order can be discerned. Decisions in which

85 — Order in Case C-286/88 *Falciola* [1990] ECR I-191.

86 — See the account in paragraph 5 of the order cited in note 85.

87 — Ibid., paragraph 8 et seq.

88 — See the judgments in Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001, paragraph 11; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 40; *Gmurzynska-Bscher*, cited above (note 72), paragraph 23; Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 11; Case C-186/90 *Durighello* [1991] ECR I-5773, paragraph 9; Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 26; and *Eurico Italia*, cited above (note 70), paragraph 17. The order in Case C-428/93 *Monin Automobiles* [1994] ECR I-1707, where the Court, referring to the judgment in *Salonia* and the order in *Falciola*, held that it 'manifestly' had no jurisdiction to answer the questions submitted (paragraph 16), also belongs here. So does the judgment in Case 132/81 *Rijksdienst voor Werknemerspensioenen* v *Vlaeminck* [1982] ECR 2953, where the national court had mistakenly supposed that provisions of Community law were applicable.

89 — Judgments in Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673, paragraph 18, and *Corsica Ferries*, cited above (note 73), paragraph 14; order in *La Pyramide*, cited above (note 81), paragraph 12.

90 — Order in *Monin Automobiles*, cited above (note 88), paragraph 16.

that criterion is mentioned alternate with decisions in which there is no such mention.

80. In any event it should be observed that only the opinion that the Court is entitled to reject a request for a preliminary ruling only if it quite *manifestly* bears no relation to the main action appears acceptable. It should be remembered that the Court's practice is not supported by the wording of Article 177. As the *Salonia* judgment rightly states, that provision is characterized by a 'distinct separation of functions' between the Court of Justice and the national courts. An examination by the Court of Justice of the need for a preliminary ruling can therefore take place only *exceptionally*, if at all. For that purpose it is necessary that this power of the Court is limited to cases where there is *manifestly* no connection between the main action and the questions submitted. If the only criterion was the objective lack of such a connection, the division of functions provided for in Article 177 would be turned upside down. I do not regard that as acceptable.

81. The *third* group of cases, finally, starts with the Court's decisions in *Foglia* v *Novello*. The main action in the Italian court concerned a dispute between an Italian wine merchant and a customer who was also Italian. Mrs Novello had agreed with the wine merchant that the cases of Italian liqueur wine she had bought would be sent to France and that she would not be liable for any duties charged by the Italian or French authorities which were contrary to the provisions of the EC Treaty on the free movement of goods. A similar clause was included in the contract between the wine merchant and the transporting undertaking. The French authorities levied certain duties on the imported goods, which the transport firm paid and charged to the wine merchant. He then sued Mrs Novello for payment of that amount. The court in which the action was brought submitted several questions to the Court of Justice on the compatibility of the French tax rules with the EC Treaty. In its judgment of 11 March 1980 the Court declined to answer those questions, pointing out in particular that the 'artificial nature of this expedient' was unmistakeable. [91]

82. The national court thereupon made another reference to the Court for a preliminary ruling. In its judgment [92] the Court confirmed its refusal to answer the questions submitted and explained the reasons for its attitude in more detail.

Its starting-point was that in principle the national courts decide on the need for a preliminary ruling and have a 'power of appraisal' in so doing. [93] There were, however, certain limits:

91 — Judgment in Case 104/79 *Foglia* v *Novello* [1980] ECR 745, paragraph 10.

92 — Case 244/80 *Foglia* v *Novello*, cited above (note 75).

93 — Ibid., paragraphs 15 and 16.

'It must in fact be emphasized that the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it.' [94]

The Court stated in addition that in exercising the jurisdiction conferred on it by Article 177 it must have regard 'not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States'. It would be failing in its duty if it remained indifferent to the assessments made by the national courts of the need for preliminary rulings 'in the exceptional cases in which such assessments may affect the proper working of the procedure laid down by Article 177'. [95] The 'spirit of cooperation' which characterizes Article 177 requires that 'the national court, in the use which it makes of the facilities provided by Article 177, should have regard to the proper function of the Court of Justice in this field'. [96]

83. The finding in that decision that the Court does not have the function under Article 177 of expressing an opinion on general or hypothetical questions has since been repeated by the Court in a number of judgments. [97] It must be observed, however, that that aspect represents only one part of the reasoning of the Court in its decisions in *Foglia* v *Novello*. Those judgments were in my opinion ultimately based on the consideration that the procedure under Article 177 must not be misused. In the particular case the misuse no doubt consisted in the fact that the parties to the action were apparently colluding in attempting to use an artificial dispute constructed by them in Italian proceedings to call into question the compatibility of French provisions with Community law.

84. That the basis of that case-law is indeed the idea of misuse of procedure can be seen especially clearly from two already cited judgments of 1990, in which the justification for the cases in the second group is also

94 — Ibid., paragraph 18.

95 — Ibid., paragraph 19.

96 — Ibid., paragraph 20.

97 — See the judgments in Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171, paragraph 19; *Lourenço Dias*, cited above (note 89), paragraph 17; and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; and the orders in *La Pyramide*, cited above (note 81), paragraph 11; and *Saddik*, cited above (note 81), paragraph 17.

mentioned. In *Gmurzynska-Bscher*, for instance, the Court qualified as follows the statement of principle that it is for the national courts to decide on the need for a preliminary ruling:

'It would be otherwise only in cases where either it appears that the procedure of Article 177 of the Treaty has been misused and been resorted to, in fact, in order to elicit a ruling from the Court by means of a spurious dispute or if it is obvious that the provisions of Community law submitted for the interpretation of the Court cannot apply.' [98]

An identical statement can be found in the *Dzodzi* judgment. [99]

85. It need not be demonstrated further that there are no objections in principle to that case-law. If the procedure under Article 177 is misused, the Court of Justice can refuse to answer the questions submitted to it. It must, however, be examined very closely whether such misuse is in fact present.

98 — *Gmurzynska-Bscher*, cited above (note 72), paragraph 23.

99 — *Dzodzi*, cited above (note 88), paragraph 40. The English text of the judgment speaks of a 'contrived' instead of a 'spurious' dispute.

3. Examination of the admissibility of the questions submitted by the Cour d'Appel, Liège

86. If the questions submitted by the Cour d'Appel, Liège, are examined in the light of the above considerations, there can surely be no reasonable doubt that the cases in the first group are not relevant here, since the national court can by no means be criticised for not having informed the Court of Justice of the factual and legal context of the questions it has referred.

87. The order for reference comprises some 80 closely written pages. It not only describes the factual circumstances of the case in detail, it also explains the legal considerations which induced the national court to regard the claims as admissible and refer the questions to the Court. Few orders for reference from national courts are as thorough and detailed as this one.

88. It is admittedly correct that the order for reference deals mainly with questions relating to the transfer system. The problem of the rules on foreign players, on the other hand, is dealt with comparatively briefly. Despite that brevity, however, the essential points of the national court's reasoning are clear. They may be summarized as follows. The corresponding part of Mr Bosman's claim seeks a declaration that those rules on

foreign players are invalid or are not applicable to him. That application is based on the claim that the existence of those rules results in a serious threat to Mr Bosman's future career. The admissibility of that application is in the opinion of the Cour d'Appel, Liège, to be assessed with reference to the situation which existed when the application was lodged. At that time, in the national court's opinion, Mr Bosman fulfilled the necessary conditions for an action under Article 18 of the Belgian Code Judiciaire to be admissible, since it could not be excluded that on expiry of his contract with the club in Réunion he might find a new club in the Community outside Belgium. The national court therefore held that the claim was admissible in that respect.

In that court's view it was consequently possible that Mr Bosman might seek to find a foreign club within the Community. The rules on foreign players would prove to be an obstacle in that search. According to that view, Mr Bosman thus had an interest in obtaining a declaration in advance that those rules were not to be applied in his case. For that purpose a preliminary ruling was to be obtained from the Court of Justice, since the compatibility of the rules on foreign players with Community law had not yet altogether been clarified.

89. Those considerations are concisely expressed, but make it possible to follow the national court's reasoning without difficulty. That is all that matters here. Whether the national court's opinion is correct or merely plausible is not relevant in this connection. The Court of Justice must simply be put in a position to make a proper preliminary ruling in awareness of the circumstances of the main proceedings. In my opinion, the order for reference allows it to do so.

90. A more difficult question is whether the admissibility of the request for a preliminary ruling might perhaps give rise to doubts against the background of the cases in the second group. In other words, the point is whether the questions submitted manifestly have no relation to the 'actual nature of the case or to the subject-matter of the main action'. That difficulty only arises, however, for the second question. The attempts by UEFA and URBSFA to cast doubt on the admissibility of the first question are not convincing. Whether Mr Bosman's transfer to US Dunkerque would have come to pass if the UEFA rules which were allegedly applicable had been applied correctly, is not decisive for the present case. That point relates at most to resolving the question of who is to be held directly responsible for the failure of that transfer. Mr Bosman has, however, raised the broader question of whether those transfer rules as such are lawful. In order to decide that question, a preliminary ruling by the Court of Justice is undoubtedly necessary. Should the transfer rules prove to be unlawful, that will influence the decision of the national court. There is thus certainly a connection between the interpretation of Community law sought by the first question and the main action.

91. The second question too is connected with the '*subject-matter*' of the main action. That subject-matter is defined by the plaintiff's claims. In the proceedings before the national courts the plaintiff has sought a declaration that the rules on foreign players are not applicable to him. That head of claim is based on the assertion that those rules infringe Community law. Given those circumstances, I do not see how there can be any doubt that there is a connection between the interpretation of Community law sought and the main action.

92. That is confirmed, in my opinion, by looking at the previous decisions in which the Court has declined in such cases to answer the questions submitted to it. The facts behind the decision in *Falciola* have already been described. [100] In that case it was easy to see that the questions referred had nothing to do with the main action. That is not the case here, as I have already shown. In *Lourenço Dias* [101] the proceedings before the Portuguese court which made the reference concerned a new vehicle constructed in 1989 and imported from France. The Court of Justice declined to answer six of the eight questions submitted, on the ground that they 'manifestly bore no relation to the facts at the origin of the main action'. [102] Two examples may suffice to make that clear. The first question submitted related to the import of secondhand cars, while the seventh question concerned motor vehicles built before 1951. [103] In the present case, on the other hand, it is plain that the questions submitted relate to the factual situation which the national court had to assess. In the second order it made in *Monin Automobiles* the Court found that the questions submitted could only be relevant to a possible action to establish the liability of the French authorities or an action before the French competition authorities. The judge making the reference, however, merely had to carry out certain functions in the winding-up proceedings. Neither of the two actions referred to had been brought before him or could be brought before him. The judge therefore did not have the function of applying the provisions of Community law at issue. [104] In the present case, by contrast, the national court has held precisely that it has jurisdiction to decide the action brought before it. Even more important in this context is the *Corsica Ferries* judgment. [105] In that case the Court held that the Commission had rightly observed that the *application* which was before the national court related only to certain facts. The questions which related to other facts were consequently rejected. [106] As I have already mentioned several times, however, Mr Bosman's application in the proceedings before the national courts is precisely for a declaration that the rules on foreign players are not applicable to him. The order in *La Pyramide* is very lapidary, but the reasoning appears to correspond to that used by the Court in *Corsica Ferries*. [107]

100 — See point 77 above.
101 — Cited above (note 89).
102 — Ibid., paragraph 42.
103 — Ibid., paragraphs 24 to 25 and 40 to 41.
104 — Cited above (note 88), paragraphs 12 to 15.
105 — Cited above (note 73).
106 — Ibid., paragraphs 15 to 16.
107 — *La Pyramide*, cited above (note 81), paragraph 17.

93. There is therefore in my opinion a connection between the second question submitted and the subject-matter of the main action. But even if that conclusion were not accepted, it would have to be observed that a rejection of the question submitted would be possible only if such a connection was *manifestly* lacking. That at least can be ruled out, in view of what has been said above.

94. The grounds stated in the decisions which fall within this group of cases, however, not only focus on the absence of a connection between the interpretation of Community law sought and the *subject-matter* of the main action, but also refer to the fact that such a connection must exist also with respect to the *actual nature* of the main action. [108] That consideration, which played no part in the judgments in this group which have been discussed above, clearly links up with the reasoning used by the Court in judgments in the third group of cases. The question of the 'actual nature' of a dispute can only mean that it must be examined whether the case is basically a fictitious or artificial dispute. I shall address this point in a moment, when I discuss the relevance for the present proceedings of the decisions in the third group of cases.

95. First, however, the objections based on the decision of the Cour de Cassation of 30 March 1995 must still be mentioned, as this seems to me to be the most sensible place to discuss them. The French Government's submission that the second question referred may have become otiose as a result of that decision does not withstand examination. That second question was not directly at issue in the cassation proceedings and was therefore not discussed by the Cour de Cassation. In the grounds stated for its decision that court demonstrates its view that the Liège Cour d'Appel had *not*, in its judgment of 1 October 1993, declared admissible Mr Bosman's application for a declaration that the *URBSFA* rules on foreign players did not apply to him. That may well be regarded as making a correction to the judgment of the court making the reference, since that court — as mentioned above — had regarded *all* the claims as admissible. In my opinion, however, the decision is limited in this respect to a correction of a possible mistake by the Liège Cour d'Appel. The *Belgian* association's rules on foreign players can indeed in no way affect the rights of Mr Bosman as a *Belgian* national. However, that has no consequences for the assessment of the second question submitted, relating to the rules on foreign players, since Mr Bosman also brought a corresponding application for a declaration of non-applicability against UEFA, and that application concerned the UEFA rules or the rules of the national associations based on them.

96. Let us now turn to the cases in the third group, which are of decisive importance for the admissibility of the questions submitted. As I have already mentioned, several of the participants in the proceedings are of the opinion that the second question is an attempt to induce the Court to express its opinion on general or hypothetical questions. UEFA and URBSFA also submit that this case is a fictitious or artificial dispute.

108 — See point 76 above.

97. It cannot be denied that the one and the other opinion both have a certain justification. That applies only to the second question submitted, however. With respect to the question on the compatibility of the transfer system with Community law, there can be no doubt that Mr Bosman is pursuing a concern which is both legitimate and understandable. As a result of the — correct or incorrect — application of the transfer rules Mr Bosman has suffered damage, for which he would like to obtain compensation from the national courts. If in the process he also challenges the lawfulness of the transfer system as such, he is perfectly entitled to do so.

It is less obvious, however, why he is also fighting the rules on foreign players. It does not appear that Mr Bosman has as yet been obstructed in any specific case, by the application of those rules, in the exercise of his professional activity as a footballer. It has rightly been observed that he has already played for foreign clubs. His difficulties in finding a new club after the events of summer 1990 are — disregarding other circumstances — probably attributable less to his nationality than to the boycott which appears to have been directed against him. It would therefore be quite possible to adopt the view that the possibility of Mr Bosman suffering a disadvantage in future because of the application of the rules on foreign players is altogether questionable and purely hypothetical.

Moreover, it is noticeable that the question as to possible disadvantages resulting from the application of the rules on foreign players played no part either in the action originally brought or in the proceedings for an interim order. It appears that the point became important only with the claim lodged by Mr Bosman in August 1991. The reasoning by which the court making the reference seeks to support its opinion that this question was raised in Mr Bosman's applications from the outset does not seem to me to be free of all doubt.

98. The Court could therefore, on the basis of its previous case-law, indeed reach the conclusion that the second question submitted should be rejected as inadmissible. I would, however, emphatically recommend the Court not to take that step. In my opinion it is not enough to focus on the fact that the question is based on a — possibly — hypothetical factual situation. Instead the spirit and purpose of the possibility of rejecting questions submitted for a preliminary ruling should be the focus. Such an examination leads in my opinion to the conclusion that rejection of the question is possible, but neither necessary nor appropriate. The reasons for that conclusion will be explained below.

99. First, however, the question of the hypothetical nature of the question referred should be considered briefly. The proceedings before the Belgian courts relate to an action which is intended to prevent the occurrence of future damage. It surely needs no lengthy explanations to show that the fact that the damage in question is damage which is to be expected to occur only in the *future* is of no relevance in the present connection. A question is not hypothetical simply because the fact on which it is based has not yet occurred. A preventive action for a declaration is an important means of securing effective protection of legal rights. A court

hearing such an action must therefore also have the possibility of asking the Court of Justice for an interpretation of the applicable provisions of Community law.

On the other hand, it is clear that that possibility cannot be unbounded. Since the Court of Justice, as it has itself rightly held, has the duty under Article 177 of the EC Treaty of 'assisting in the administration of justice in the Member States', [109] it need only intervene where its help is actually needed. That is not the case with purely hypothetical questions, the answer to which does not contribute to the administration of justice in the Member States. That must also apply to actions of the present kind.

100. Now it is of course true that the admissibility of such questions is subject to restrictions under national law too, for comparable reasons. The national courts are to act only where this is really necessary. According to the national court, the abovementioned Article 18 of the Belgian Code Judiciaire therefore imposes a number of conditions on the admissibility of such an action. Under that article, the action is *inter alia* admissible only if the threat to the right in question is grave and serious, not merely hypothetical. Since the Cour d'Appel, Liège, declared the action admissible in the present case, it was evidently of the opinion that the dispute was by no means purely hypothetical.

101. That view taken by the national court is not binding on the Court of Justice. What the Cour d'Appel, Liège, had to decide was the admissibility of the action pending before it. What the Court of Justice, by contrast, has to decide, in the context of Article 177 of the EC Treaty, is whether the question referred for a preliminary ruling would occasion it to give an opinion on a hypothetical question. It is clear, however, that the Court must take the national court's opinion into account. It follows from the Court's consistent case-law that the national court is best able to assess whether a preliminary ruling from the Court of Justice is required. The Court should depart from that assessment only in well-founded exceptional cases. That circumstance itself is a reason for not regarding the relevant question in the present case as inadmissible.

102. Furthermore, the national court was aware of the case-law of the Court of Justice on the possible inadmissibility of questions referred for a preliminary ruling and summarized it briefly in its order for reference. If the Cour d'Appel nevertheless submitted the second question, that means that regardless of that case-law it considered that it required an answer of the Court of Justice to that question, in order to be able to reach a decision in the proceedings pending before it. That too will have to be taken into account by the Court in this connection.

109 — See the passage from the *Foglia* v *Novello* judgment quoted in point 82 above.

103. As I have already indicated above, however, the question of the possibly hypothetical nature of the question submitted does not seem to me to be decisive. The question should rather be asked whether there is in the present case a *misuse* of the Article 177 procedure which would entitle the Court to reject the question submitted. One must therefore ask whether the procedure under Article 177 has been used in the present case 'for purposes other than those appropriate for it', as the Court put it in *Foglia* v *Novello*. [110]

104. In that decision the Court observed that the procedure under Article 177 confers on it the task of 'assisting in the administration of justice in the Member States'. [111] That assistance consists in giving national courts an answer which is binding on them on the interpretation of Community law, which they require in order to decide the cases pending before them. That task is an emanation of the Court's general duty, laid down in Article 164 of the EC Treaty, of ensuring that in the interpretation and application of the EC Treaty the law is observed. In my opinion, therefore, the Court need act under Article 177 of the EC Treaty only in so far as that is necessary to fulfil that task. The Article 177 procedure would thus be misused if questions were referred to the Court when it would not contribute to the administration of justice in the Member States by answering them.

105. To decide whether one can speak of such a misuse in the present case, the two most important of the Court's judgments in this field — *Foglia* v *Novello* and *Meilicke* — should be examined more closely. In the *Meilicke* [112] case, the main action was an action before a German court in which a shareholder was suing the company's board for certain information. That information directly concerned an increase in capital by the company and the application of the funds obtained thereby. What the shareholder was really concerned with, however, was whether the doctrine of disguised contributions in kind developed by the Second Senate of the German Bundesgerichtshof (Federal Court of Justice) was compatible with the relevant provisions of Community law. The questions submitted concerned the interpretation of those provisions of Community law. The national court stated that the action pending before it would have to be dismissed if the said case-law of the Bundesgerichtshof was incompatible with Community law.

The Court of Justice observed that, according to the national court, it was not certain that those decisions of the Bundesgerichtshof applied at all in the particular case, and concluded that the questions which had been submitted were hypothetical questions. At the same time it adopted the position that the national court had not provided it with all the information it needed in order to answer the questions. For those reasons the Court rejected the questions as inadmissible. [113]

110 — See point 82 above.

111 — *Foglia* v *Novello*, cited above (note 75), paragraph 18.

112 — Cited above (note 97).

113 — Ibid., paragraphs 29 to 34.

That reasoning leaves many points open. It is easier to understand if one compares it with the clear statements of Advocate General Tesauro. The Advocate General observed that in the proceedings before the national court (and even before then) Mr Meilicke had argued that the relevant case-law of the Bundesgerichtshof was contrary to Community law. Mr Meilicke was thus advancing an argument which would necessarily lead to his claim being dismissed. Advocate General Tesauro thus concluded, correctly and succinctly, that 'the dispute before the national court [had] been visibly "orchestrated" by Mr Meilicke himself'. [114]

106. The present case cannot be compared with that one. The question submitted relates *directly* to Mr Bosman's claim. Mr Bosman furthermore argues that the rules on foreign players are contrary to Community law. The correctness of that argument is one of the conditions for his claim to *succeed* before the Belgian courts.

107. The facts of *Foglia* v *Novello* have already been described. Three points catch the eye. First, it is obvious that in that case *all* the parties were clearly collaborating to obtain a preliminary ruling from the Court of Justice. Second, the Court clearly attached importance to the fact that in that case legal provisions of one Member State were being called into question by an artificial procedure in another Member State. That is not stated in the judgment, but the reference to the interests of the Member States which are to be taken into account by the Court [115] is in my opinion clear enough. Third, it is evident that the rejection of the questions submitted had no consequences, in that any court confronted with an actual dispute concerning those provisions of French law retained the possibility of asking the Court of Justice for a preliminary ruling on those points. Thus the firm which transported the shipment of wine, for instance, or another of the parties could have challenged the determination by the French authorities of the duties in question before the competent French courts. Those courts could then have requested the Court of Justice for a preliminary ruling.

108. In the present case it is clear to begin with that the dispute before the Belgian courts could be 'artificial' or 'fictitious' at most with reference to the *plaintiff's* application. The *defendant associations* precisely disagree with Mr Bosman's way of proceeding and argue that the question referred is inadmissible. Not least the hearing before the Court made it clear that the present case is a genuine (legal) dispute and by no means a 'fictitious' or 'artificial' one.

114 — Opinion of 8 April 1992, [1992] ECR I-4897, at p. 4900.

115 — *Foglia* v *Novello*, cited above (note 75), paragraph 19.

109. As to the question whether the main action has perhaps been brought before a court of a Member State in a manner which could endanger the rights of other Member States or other parties from other Member States, UEFA at most could be affected, its base being not in Belgium but in Switzerland. UEFA indeed used that argument in the main action to challenge the jurisdiction of the Belgian courts. It is beyond doubt, however, that the rules of UEFA apply *inter alia* in all the Member States of the Community. The courts of each of those Member States are therefore in a position to raise the question of the compatibility of those rules with Community law. Finally, it should be observed that *that* question could not be discussed at all in the *Swiss* courts or referred to the Court of Justice under Article 177 of the EC Treaty.

110. I therefore conclude that the questions which have been submitted are admissible both under the wording of Article 177 and under the most recent case-law on it.

111. Even if one wishes to challenge that conclusion in the light of the recent case-law, one cannot but concede that the Court of Justice is at most entitled, but by no means obliged, to dismiss the question(s) submitted in this case as inadmissible. The question therefore arises whether the Court ought to make use of that possibility.

112. The reason why I answer that question in the negative is that I cannot see how the question of the compatibility of the rules on foreign players with Article 48 of the EC Treaty (it may be different with Articles 85 and 86) could reach the Court in any other way. Although the Commission has long criticized those rules, it has not brought an action under Article 169 for breach of Treaty obligations, since the prospects of success of such an action appeared to it to be uncertain for procedural reasons. [116] No request by a national court for a preliminary ruling concerning those rules has reached the Court since the *Donà* case (to be discussed below) in 1976. That seems to me not to be a matter of chance. Those affected are either unwilling or unable to have the matter clarified by the courts.

113. That is confirmed by recent experience. In at least two cases already the rules on foreign players have played a decisive part, without those affected instituting court

116 — In its answer to a written question by a member of the European Parliament, the Commission explained on 18 December 1991, for example, that infringement proceedings against a Member State posed 'special problems' as the possible restriction of freedom of movement was imposed 'by private individuals rather than public authorities' (OJ 1992 C 102, p. 41).

proceedings against them. [117] In one case, in the Netherlands, the match was replayed. [118] The second case occurred recently in Germany. In spring 1995 1. FC Nürnberg, threatened with relegation, were at home to SV Meppen in a German second division match. A few minutes before the end Nürnberg, who were leading 2-0, by mistake brought on as substitute a fourth foreigner, who had Austrian nationality. Because of that infringement, the DFB awarded the match, which had ended 2-0 to Nürnberg, to SV Meppen by two goals to nil and two points to nil. Nürnberg accepted the deduction of the points. That confirms the view that those involved in sport as a rule voluntarily abide by the agreed rules and are unwilling to bring their disputes before the national courts. [119]

114. Regardless of that, one can scarcely conceive how such a dispute could reach the Court except along the path trodden in the present case. If 1. FC Nürnberg, for instance, in the case described above, had applied to the national courts and if those courts had sought a preliminary ruling from the Court, considerable time would have elapsed — as the present procedure shows — until an answer was given. That could have meant that the question of relegation from the second division of the Bundesliga (with all the associated consequences for other teams) would have been settled only after two years or even later. That that would have been intolerable is obvious.

115. It is conceivable that a player might bring an action before the national courts if the club he wished to play for had rejected his application for a contract of employment on the ground that he was a foreigner and could not be engaged because the club in question would be unable to play him because of the rules on foreign players. However, there is every indication that that is a hypothetical case which would hardly ever become reality. Moreover, it is hardly conceivable that a player would be able to initiate such proceedings and bring them to a conclusion. The example of Mr Bosman is a very clear demonstration of the difficulties such a player would have to deal with.

116. If, on the other hand, proceedings before national courts actually are brought,

117 — The cases in which a breach of the rules on foreign players for one reason or another had no consequences do not belong here. That is the case for the match in which Ajax Amsterdam defeated FC Utrecht 2-1 on 21 August 1977, Ajax using one foreign player more than allowed by the rules. FC Utrecht's complaint against allowing the result to stand was rejected by the association (see N. J. P. Giltay Veth, 'Uitsluiting van buitenlandse voetballers: mogelijk binnen de EEG?', *Nederlands Juristenblad* 1978, p. 504, at p. 505). The breach of the rules on foreign players by 1. FC Köln in an away match at Eintracht Frankfurt on 29 January 1977 had no consequences, since Köln had lost the match 4-0 in any event (see Michael Schweitzer, 'Die Freizügigkeit des Berufssportlers in der Europäischen Gemeinschaft', in Dieter Reuter (ed.), *Einbindung des nationalen Sportrechts in internationale Bezüge*, Heidelberg 1987, p. 71). Probably the most spectacular case so far concerned VfB Stuttgart, who had beaten Leeds United 3-0 in the first leg of the first round of the European Champions' Cup in autumn 1992. In the second leg the English side won 4-1, which under the rules would have meant that the German club went through to the next round. However, since Stuttgart had brought a fourth foreign player on as substitute, the second leg was awarded by UEFA to Leeds by 3-0, and Leeds then also won the play-off which thereby became necessary. The case is of no relevance to the present proceedings, however, since the foreign players in question were from non-member countries.

118 — Giltay Veth, op. cit. (note 117), p. 510.

119 — This is summed up by Alessandra Giardini, who says that clubs prefer a sort of 'quiete sportiva' ('Diritto comunitario e libera circolazione dei calciatori', *Diritto comunitario e degli scambi internazionali* 1988, p. 437, at p. 444).

experience from other sports shows that the Court of Justice will not necessarily be consulted. [120] The Liège courts which dealt with the main action are in this respect an exception to the rule.

117. The conclusion may be drawn from the above considerations that it is extremely unlikely that a reference will ever again reach the Court which raises the question of the compatibility with Community law of the rules on foreign players. It is equally clear that the football associations take the view that the rules on foreign players are compatible with Community law and that they are unwilling to abandon them. Answering the question submitted would enable the Court to clarify the question and remove the uncertainties which the previous case-law has left over. The Court would thereby in my opinion indeed be 'assisting in the administration of justice in the Member States'. In any case, under the circumstances, the Liège Cour d'Appel can hardly be accused of a *misuse* of the procedure under Article 177 of the EC Treaty. If, on the other hand, the Court declines to answer the question, regulation of this field will continue to be left to the whim of the sporting associations. I regard that as scarcely tolerable.

120 — In a judgment, produced to the Court by UEFA, of the Hof van Beroep, Brussels, of 16 March 1994 (*Te Velde*), which concerned basketball, the question appears not to have been discussed at all. A judgment of the Landgericht Frankfurt, relating to the German table tennis association's rules on foreign players, holds that they are compatible with Community law and refuses to make a reference to the Court of Justice on the dubious ground that the question has already been decided by the Court of Justice 'with sufficient clarity' (judgment of 18 January 1994, *Europäisches Wirtschafts-und Steuerrecht* 1994, 405).

Nor can I see what interest deserving of protection the associations in question might have in the question submitted for a preliminary ruling not receiving an answer. The insistence with which they have put forward their argument that the second question submitted is inadmissible might easily give an impartial observer the impression that they simply do not want the rules on foreign players to be tested by reference to Community law. That such an intention — if it really did exist — should not be taken into account is self-evident.

118. As I have already explained, the Court of Justice has the *possibility* under certain circumstances of rejecting a question submitted for a preliminary ruling. That does not mean that it has to make use of that possibility in every case. In the present case the better arguments, in my opinion, are in favour of answering the question. I may also point out that in the *Meilicke* case Advocate General Tesauro, for example, also considered that the Court should answer the questions which had been referred, despite the circumstances described above. [121]

119. Finally, the judgment in the *Donà* case also speaks for answering the question. It is necessary here to call to mind the facts which lay behind that judgment. At the material time (1976) it was in principle completely prohibited for foreign players to play in Italian professional football. The chairman

121 — Opinion in *Meilicke*, cited above (note 114), p. 4901.

of a football club had, however, commissioned Mr Donà to sound out footballing circles abroad to see if players could be found who might be prepared to play for that Italian club. Mr Donà thereupon put a corresponding advertisement in a Belgian sports newspaper. His principal refused to reimburse the costs incurred thereby, however, on the ground that Mr Donà had acted overhastily. He referred to the Italian association's rules preventing the use of foreign players. Mr Donà therefore sued for the amount in question before the Giudice Conciliatore, Rovigo. The judge asked the Court of Justice whether the rules on foreign players were compatible with Community law. [122]

Several commentators have expressed the suspicion that the main action was an artificial construction whose aim was solely to induce the Court of Justice to give a ruling on the rules on foreign players. [123] That suspicion can indeed not be dismissed out of hand. The Court nevertheless answered the questions submitted — and rightly so. It should therefore do as much in the present case and not refuse to make the contribution to the administration of justice in the Member States which it has repeatedly been asked for.

122 — See the account of the facts in the judgment, cited above (note 61), p. 1334 et seq.

123 — See, for example, Meinhard Hilf, 'Die Freizügigkeit des Berufsfußballspielers innerhalb der Europäischen Gemeinschaft', *Neue Juristische Wochenschrift* 1984, p. 517, at p. 520; Hans-Ulrich Marticke, 'Ausländerklauseln und Spielertransfer aus europarechtlicher Sicht', in: Michael R. Will (ed.), *Sport und Recht in Europa*, Saarbrücken 1988, p. 53, at p. 54.

III — *Previous decisions of the Court in the field of sport*

120. In two important decisions in the 1970s the Court ruled on the applicability of Community law in the field of sport. Those were firstly the *Walrave* judgment [124] and secondly the *Donà* judgment, which has already been referred to several times. Those decisions have been discussed at length in the present proceedings. It is therefore of use for the examination of the two questions submitted to start with a short account of those two decisions.

121. The former case concerned two Netherlands nationals, Mr Walrave and Mr Koch, who acted professionally as pacemakers in cycle races — 'motor-paced bicycle races'. In that sport each participant cyclist has a pacemaker on a motor cycle in whose lee he rides. The races the persons in question took part in included the world championships. The Union Cycliste Internationale (the international association for cycling sport) had drawn up rules for those championships, under which from 1973 the pacemaker and the stayer had to be of the same nationality. Mr Walrave and Mr Koch considered that those rules were contrary to Community law. They brought an action in the Arrondissementsrechtbank (District Court) Utrecht, which referred several questions to the Court of Justice, *inter alia* concerning Articles 7, 48 and 59 of the EEC Treaty.

124 — Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405.

122. The Court first examined the question whether Community law can be applicable in the field of sport:

'Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.

When such activity has the character of gainful employment or remunerated service it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty.

These provisions, which give effect to the general rule of Article 7 of the Treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer.

In this respect the exact nature of the legal relationship under which such services are performed is of no importance since the rule of non-discrimination covers in identical terms all work or services.

This prohibition however does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity.

This restriction on the scope of the provisions in question must however remain limited to its proper objective.' [125]

The Court left it to the national court to determine whether the case concerned an activity which was thus subject to Community law and whether the pacemaker and stayer constituted a team. [126] It added that its answers to the questions were given 'within the limits defined above of the scope of Community law'. [127]

123. The Court then turned to the problem of whether Community law could also be applied to the rules of private sporting associations. It held that it could be:

125 — Ibid., paragraphs 4 to 9.
126 — Ibid., paragraph 10.
127 — Ibid., paragraph 11.

'Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.

The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.' [128]

The Court held that that conclusion, which had initially been reached with respect to Article 48, applied equally to Article 59:

'The activities referred to in Article 59 are not to be distinguished by their nature from those in Article 48, but only by the fact that they are performed outside the ties of a contract of employment.

This single distinction cannot justify a more restrictive interpretation of the scope of the freedom to be ensured.' [129]

124. Even more important for the present case is the judgment in *Donà*, the facts of which have already been described. [130] In that judgment the Court, citing *Walrave*, confirmed that Community law applies to the rules of sporting associations. [131]

On the substance of the case, the Court stated as follows:

'Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it

128 — Ibid., paragraphs 17 and 18.

129 — Ibid., paragraphs 23 and 24.

130 — See point 119 above.

131 — *Donà*, cited above (note 61), paragraphs 17 and 18.

constitutes an economic activity within the meaning of Article 2 of the Treaty.

This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service.

Where such players are nationals of a Member State they benefit in all the other Member States from the provisions of Community law concerning freedom of movement of persons and of provision of services.

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

This restriction on the scope of the provisions in question must however remain limited to its proper objective.

Having regard to the above, it is for the national court to determine the nature of the activity submitted to its judgment.' [132]

125. From those two judgments the following conclusions, of relevance for the present case, may be drawn:

(1) The rules of private sports associations are also subject to Community law.

(2) The field of sport is subject to Community law in so far as it constitutes an economic activity.

(3) The activities of professional football players are in the nature of gainful employment and are therefore subject to Community law.

(4) Either Article 48 or Article 59 applies to those activities, with no differences arising therefrom.

132 — Ibid., paragraphs 12 to 16; see also paragraph 19.

(5) The Court allows certain exceptions to the prohibitions contained in those provisions. While in *Walrave* the question of the formation of teams in competitions is still excepted from the prohibition, in *Donà* the Court restricts the exception to the exclusion of foreign players from certain matches. In both judgments the exceptions are linked with non-economic grounds which relate exclusively to sport.

IV — *Interpretation of Article 48*

1. Applicability of Article 48

126. Although the Court decided in *Donà* that the activities of professional or semi-professional football players constitute an economic activity within the meaning of Article 2 of the EC Treaty and are thus subject to Community law, URBSFA and UEFA have advanced various arguments which in their opinion show that neither Article 48 nor the provisions of EC competition law are applicable to the present case. None of those arguments is convincing.

127. URBSFA submits that only the big football clubs in Europe exercise an economic activity. It submits that that does not apply to the clubs concerned by the present case, RC Liège and US Dunkerque. It submits that if the activity of those clubs none the less does constitute an economic activity, it is one of a trivial nature only. That submission must be rejected. As the Court has rightly held, professional football is an economic activity. The size of that activity is immaterial, as is the question of to what extent it leads to a profit.

128. UEFA submits with respect to the rules on transfers that the application of Article 48 to those rules and the consequences could scarcely be limited to the field of professional football. It argues that since the purpose of those rules is *inter alia* to subsidize the smaller clubs, a decision by the Court which was restricted to the field of professional football would necessarily have consequences for the entire organization of football. That argument relates to the *consequences* of the Court's decision, not the question of the *applicability* of Community law, and thus cannot be an obstacle to that applicability. The possible consequences of the Court's decision will, however, have to be taken into account in answering the questions submitted for a preliminary ruling.

129. Referring *inter alia* to the fact that most of the football clubs which belong to it have the status of an 'association sans but lucratif' (non-profit-making association), URBSFA has attempted to show that the rules on transfers have no connection with the relationship between a club and its player and Article 48 is thus not applicable. If I understand that argument correctly, URBSFA is

submitting that the rules on transfers relate merely to the mutual relationships of clubs, while Article 48 is relevant only to the employment relationship between the club and the player. That argument cannot be accepted. The distinction suggested by URBSFA is of an artificial character and does not correspond to reality. The rules on transfers — as will be demonstrated below — are of direct and central importance for a player who wishes to change club. *That is shown precisely by the present case: if it had not been for the transfer rules, nothing would have hindered Mr Bosman's transfer to US Dunkerque.* It thus cannot seriously be maintained that those rules concern merely the legal relations between the clubs. That does not in itself mean that those rules are contrary to Article 48. On the contrary, that will have to be examined below. It will also have to be examined whether those rules — as UEFA in particular submits — are of a purely sporting nature.

130. UEFA also advances some arguments of a political nature. It raises the question *inter alia* whether Article 48, which allows of no exceptions, is appropriate for solving the problems of sport. In my opinion, however, that question does not arise. Professional football is an economic activity and is therefore subject to Community law. The particular features of that sector can be taken into account in the interpretation of the relevant provisions. Similar considerations apply to the reference by UEFA to the principle of subsidiarity now enshrined in Article 3b of the EC Treaty. The principle of subsidiarity, according to the wording of Article 3b, does not apply in the field of the Community's exclusive competence, such as the fundamental freedoms. Nor can it be deduced from that principle that Community law could not be applied to the field of professional sport.

131. UEFA argues, finally, that this case concerns a purely internal situation, to which Article 48 is of course inapplicable. It bases its argument on the fact that this case concerns a dispute between a football player of Belgian nationality and the Belgian association relating to the issue of the clearance certificate which would have allowed him to leave his club. That argument fails to convince. It is settled case-law that the provisions of the Treaty on freedom of movement admittedly 'cannot be applied to activities which are confined in all respects within a single Member State'. [133] However, the main action originates in a failed transfer from a *Belgian* to a *French* club. That failure prevented Mr Bosman from transferring to the French club and thereby exercising his right to freedom of movement. There is thus evidently a situation which extends beyond the frontiers of one Member State. For the rules on foreign players, that is self-evident in any case.

132. I shall now examine whether the rules on transfers on the one hand and the rules on foreign players on the other hand are compatible with Article 48. It seems to me to be appropriate to start by considering the rules on foreign players.

133 — See, for instance, the judgment in Case C-332/90 *Steen* v *Deutsche Bundespost* [1992] ECR I-341, paragraph 9.

2. Article 48 and the rules on foreign players

(a) Breach of the prohibition of discrimination in Article 48

133. The first two paragraphs of Article 48 of the EC Treaty read as follows:

'1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'

Under Article 48(3), freedom of movement is to give workers the right, 'subject to limitations justified on grounds of public policy, public security or public health', to accept offers of employment actually made, to move freely within the territory of Member States for that purpose, to stay in the territory of another Member State for the purpose of employment there, and in certain cases to remain there after having been employed. Article 48(4), which provides for an exception for employment in the public service, is not relevant to the present case.

134. The Court left it open in its *Donà* judgment whether the provisions of Article 48 on workers or the provisions on services (Article 59 et seq.) apply to the activities of professional footballers. The questions submitted relate to Article 48 only. It appears indeed correct that the professional footballers active in a football club are to be regarded as workers within the meaning of that provision. The following observations will therefore deal with that provision only. However, the result would be no different if the examination had to be done with reference to Article 59 et seq.

135. No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature. They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other Member States whom a club in a particular Member State can play in a match. Those players are thereby placed at a disadvantage with respect to access to employment, compared with players who are nationals of that Member State. The Commission rightly refers in this context to Article 4(1) of Regulation (EEC) No 1612/68 on freedom of

movement for workers within the Community, [134] which provides that provisions laid down by law, regulation or administrative action of the Member States which restrict 'by number or percentage' the employment of foreign workers are not to apply to nationals of other Member States. The rules on foreign players are therefore incompatible with the prohibition of discrimination under Article 48(2), in so far as they relate to nationals of other Member States. [135]

136. UEFA argues that those rules are nevertheless not in breach of Article 48, since they relate only to the question of how many foreign players a club can *play* in a match. It argues that each club still remains free to give contracts to as many foreign players as it wishes. Mr Bosman and the Commission rightly submit that that does not change the fact that the rules in question adversely affect the right to freedom of movement. Every club which plans and acts in a reasonable manner will take the rules on foreign players into account in its personnel policy. No such club will therefore engage more — or significantly more — foreign players than it may play in a match. [136] Only a few big clubs will be in a position to afford the luxury of engaging more foreign players than they can play. [137] Reference has also rightly been made to the provision in Article 48(3)(c) that workers from other Member States may stay in the territory of a Member State for the purpose of employment 'in accordance with the provisions governing the *employment of nationals of that State* laid down by law, regulation or administrative action'. [138] The current rules, under which only the number of foreign players who can play at one time is limited, but not the number of players a club can engage, admittedly in that respect definitely represent progress compared with the previous situation, but do not alter the fact that those rules are still in breach of Article 48. [139] The same is true of the fact that under the amendments introduced by UEFA in 1991, more foreign players can now be played than previously.

(b) Possible exception or justification

137. It must, however, be considered whether the rules on foreign players can nevertheless be regarded as lawful in the light of the Court's case-law. As mentioned above, in

134 — OJ, English Special Edition 1968 (II), p. 475.

135 — This view is shared by Hans Arnold Petzold and Athanase Safaris, 'Europäische Freizügigkeit von Berufsfußballspielern aus deutscher und griechischer Sicht', *Europarecht* 1982, p. 76, at p. 80; José Luis Ruiz-Navarro Pinar, 'La libre circulación de deportistas en la Comunidad Europea', *Boletín de Derecho de las Comunidades Europeas* 1989, p. 169, at pp. 180-181; Stephen Weatherill, 'Discrimination on Grounds of Nationality in Sport', *Yearbook of European Law* 9 (1989), Oxford 1990, p. 55, at p. 66 ('plainly in breach of Article 48').

136 — This is also the opinion of Hilf, op. cit. (note 123), p. 521; Marticke, op. cit. (note 123), p. 65; Maria Castellaneta, 'Libera circolazione dei calciatori e disposizioni della FIGC', *Diritto comunitario e degli scambi internazionali* 1991, p. 635, at p. 643.

137 — There are limits even for those clubs, however. Thus the financially strongest clubs in the German Bundesliga, Bayern München and Borussia Dortmund, at present (including amateurs under contract) have six and five foreign players respectively under contract in the 1995/96 season. As a comparison: Borussia Dortmund's playing staff for this season comprises 25 players, Bayern München's 21 players (see the sports magazine *Kicker*, Bundesliga 1995/96 special issue, pp. 67 and 71).

138 — Hilf, op. cit. (note 123), p. 521 (my emphasis).

139 — As Castellaneta, for instance, says: op. cit. (note 135), p. 644 ('solo un mutamento della violazione del Trattato').

the *Walrave* judgment the Court was of the opinion that the prohibition of discrimination under Article 48 does not affect 'the composition of sport teams, in particular national teams'. In *Donà*, on the other hand, it held that that prohibition was not infringed if foreign players were excluded 'from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries'. [140]

138. In my opinion it should be observed to begin with that in the present context the formulation used in *Donà* is to be considered. That is not only because the *Donà* judgment was given after *Walrave* and, unlike the latter, related to football, which is the sport concerned in this case. In addition to that, the wording of the *Donà* judgment represents a limitation of the proposition adopted in *Walrave*. That is evident merely from the fact that the *Donà* case concerned the composition of teams. If the question of the composition of teams was indeed 'of purely sporting interest', as the Court appeared to assume in *Walrave*, the Court could have contented itself in *Donà* with a simple reference to that judgment. It rightly did not do so, since it was presumably not unaware that the question of the composition of teams may very well be dominated by non-sporting motives.

139. The Court has, however, justifiedly been criticized for not giving a clear answer, either in the *Walrave* judgment or in the *Donà* judgment, to the questions submitted to it. [141] Neither the basis of the 'exception' nor its extent can be deduced with certainty from the judgments. According to the wording of the two judgments — which speak of a 'restriction on the scope' of Community law — it appears to be a sort of limited exception as to scope. [142] It is plain, however, that in those judgments the Court expressed the view that rules which prescribe that only players who possess the nationality of a State can play in that country's national team are consistent with Community law. That conclusion appears obvious and convincing, but is not easy to state the reasons for it. In view in particular of the fact that matches between national teams — as in the football World Cup — nowadays indeed have considerable financial significance, it is hardly still possible to assume that this is not (or not also) economic activity. [143] The exception accepted

140 — See point 124 above.

141 — For a very critical position, see for instance Laura Forlati Picchio, 'Discriminazioni nel settore sportivo e Comunità Europee', *Rivista di Diritto Internazionale* 59 (1976), p. 745, who speaks of 'escamotage' (p. 757); Hilf, op. cit. (note 123), p. 520, notes the existence of two 'eher sibyllinischer Entscheidungen'; Christoph Palme, Hermann Hepp-Schwab and Stephan Wilske, 'Freizügigkeit im Profisport — EG-rechtliche Gewährleistungen und prozessuale Durchsetzbarkeit', *Juristenzeitung* 1994, p. 343, at p. 344, speak of 'äußerst vagen und unklaren Feststellungen'.

142 — See for instance Schweitzer, op. cit. (note 117), p. 83.

143 — Already observed by Marticke, op. cit. (note 123), p. 58.

by the Court cannot be based on Article 48(3). [144] Since the question is not relevant for the decision in the present case, I need not discuss it further in this context. [145]

140. Whatever the basis for that exception may be, it is in any event not applicable in the present case, in my opinion. In *Donà* the Court expressly limited the exclusion of foreign players to *specified* matches distinguished by a *special* character and context, and moreover stated expressly that that limitation had to remain limited to its proper objective. If it were accepted that players from other Member States could also be excluded from matches in the national leagues, the right to freedom of movement would be devalued or in extreme cases completely done away with for such persons. [146] That cannot be right. It is admittedly correct that in those two judgments the Court mentioned national teams merely as examples. However, it cannot be deduced therefrom that the Court considered that rules on foreign players were acceptable for national leagues. Advocate General Trabucchi had admittedly regarded that as possible in his Opinion in *Donà*. [147] I think, however, that that is not compatible either with the extremely restrictive delimitation of the exception by the Court in *Donà* or with the *effet utile* of Article 48. It has rightly been observed that when the Court mentioned matches between national teams as an example, it may also have been thinking of matches between regions or provinces or similar representative matches. [148]

141. A number of further considerations have been advanced as justification for the rules on foreign players, and these must now be examined. Three groups of arguments can essentially be distinguished. First, it is emphasized that the national aspect plays an important part in football; the identification of the spectators with the various teams is guaranteed only if those teams consist, at least as regards a majority of the players, of nationals of the relevant Member State; moreover, the teams which are successful in the national leagues represent their country in international competitions. Second, it is argued that the rules are necessary to ensure that enough players are available for the relevant national team; without the rules on foreigners, the development of young players would be affected. Third and finally, it is asserted that the rules on foreigners serve the purpose of ensuring a certain balance between the clubs, since otherwise the big clubs would be able to attract the best players.

144 — Rightly stated by Castellaneta, op. cit. (note 135), p. 653. Similarly Manfred Zuleeg, 'Der Sport im europäischen Gemeinschaft', in: Michael R. Will (ed.), *Sportrecht in Europa*, Heidelberg 1993, p. 1, at p. 6.

145 — But see point 214 et seq. below. One may note, for example, the attempts to state reasons by Advocate General Warner in *Walrave* (Opinion, [1974] ECR 1405, at p. 1426 — the 'officious bystander' test) and by Hilf, op. cit. (note 123), p. 521 ('die sportliche Gesichtspunkte' were still predominant).

146 — As rightly stated by Hans Georg Fischer, 'EG-Freizügigkeit und Sport. Zur EG-rechtlichen Zulässigkeit von Ausländerklauseln im bezahlten Sport', *SpuRt* 1994, p. 174, at p. 176.

147 — [1976] ECR 1333, at p. 1344.

148 — Already observed by Ernst Steindorff, 'Berufssport im Gemeinsamen Markt', *Recht der internationalen Wirtschaft* 1975, p. 253, at p. 254.

142. The arguments in the first group would appear to latch on to the Court's observation in *Donà* that matches from which foreign players can be excluded must have a *special* character and context. In this connection the representative of the German Government spoke with particular emphasis at the hearing before the Court. He asserted that the 'national character of the performance' characterized first division professional football. A glance at the reality of football today shows that that does not correspond to the facts. The vast majority of clubs in the top divisions in the Member States play foreign players. In the German Bundesliga, for example, I am not aware of any club which does without foreign players altogether. If one considers the most successful European clubs of recent years, it becomes clear that nearly all of them have several foreign players in their ranks. In many cases it is precisely the foreign players who have characterized the team in question — one need only recall the AC Milan team in the early 1990s, whose pillars included the Dutch players Gullit, Rijkaard and Van Basten. There may indeed be certain differences from country to country with respect to the playing style or the mentality of players. That has, however, by no means prevented foreign players playing in the national leagues.

Even if the 'national aspect' had the significance which many people attribute to it, however, it could not justify the rules on foreign players. The right to freedom of movement and the prohibition of discrimination against nationals of other Member States are among the fundamental principles of the Community order. The rules on foreign players breach those principles in such a blatant and serious manner that any reference to national interests which cannot be based on Article 48(3) must be regarded as inadmissible as against those principles.

143. As to the identification of spectators with the teams, there is also no need for extensive discussion to show the weakness of that argument. As the Commission and Mr Bosman have rightly stated, the great majority of a club's supporters are much more interested in the success of their club than in the composition of the team. [149] Nor does the participation of foreign players prevent a team's supporters from identifying with the team. Quite on the contrary, it is not uncommon for those players to attract the admiration and affection of football fans to a special degree. One of the most popular players ever to play for TSV 1860 München was undoubtedly Petar Radenkovic from what was then Yugoslavia. The English international Kevin Keegan was for many years a favourite of the fans at Hamburger SV. The popularity of Eric Cantona at Manchester United and of Jürgen Klinsmann at his former club Tottenham Hotspur is well known.

The inconsistency of those who put forward that view is moreover apparent if one considers an argument advanced by URBSFA in

149 — Also noted by Forlati Picchio, op. cit. (note 141), p. 759.

this context. It is argued that since the clubs often bear the name of a town, the spectators should be able to see players of the same nationality in the team in question. However, if a club adopts a name which contains the name of a place, it could at most be expected or demanded that that club's players should come from the place in question. Yet it is a well-known fact that in the case of Bayern München, for instance, only a few of the players come from Bavaria (let alone Munich). If nationals who come from other parts of the relevant State are accepted without question, one cannot see why that should not also be the case for nationals of other Member States.

Finally, it should be observed that the success and playing style of a team are largely determined by the manager. The Court has already held, however, that football trainers enjoy the right to freedom of movement under Article 48. [150] It did not even consider that those persons might perhaps be subject to restrictions other than those expressly permitted by Article 48. In practice frequent use is in fact made of that right. The best-known example is probably FC Barcelona, which has had a Dutch manager for a long time. Hamburger SV achieved its greatest success with an Austrian manager, and Bayern München has had a whole series of foreign managers in recent decades. A country's national team is not always managed by a national of that country either. Thus the manager of the Irish national team, for example, is an Englishman. That emphasizes that a 'national' characterization of football, in the sense that players and managers must be nationals of the country in which the club in question is based, hardly comes into question.

144. It is further argued that the clubs which are successful in the national leagues represent the Member State in question in the European competitions and must therefore consist of at least a majority of nationals of that State; and that the 'German champions', for example, can thus emerge only from a competition between club teams for which 'at least a minimum number of German players play'. [151] That argument too fails to convince. Firstly, the proponents of that view are unable to explain why precisely the rules currently applied are necessary to ensure that. If what mattered was that a team should consist predominantly of nationals of the State concerned, with eleven players in a team it would suffice generally to allow up to five foreign players. And if only a 'minimum number' of players had to possess the nationality of the State concerned, even more foreign players would have to be allowed. Moreover, it should be observed that the concept of 'German champions' can be interpreted without difficulty in a different way from that sought by the proponents of that view. There is no reason why that term cannot be taken as designating the club which

150 — Judgment in Case 222/86 *Unectef* v *Heylens* [1987] ECR 4112.

151 — See, for example, Harald Kahlenberg, 'Zur EG-rechtlichen Zulässigkeit von Ausländerklauseln im Sport', *Europäisches Wirtschafts-und Steuerrecht* 1994, p. 423, at p. 429.

has finished in first place following the matches played *in Germany*. [152]

The argument fails to convince, however, for another reason too. In Germany, for example, the rules on foreign players do not apply to amateur teams. Some of those teams take part in the cup competition organized by the DFB. It is thus theoretically possible for an amateur team consisting of 11 foreign players to win the DFB cup and thus qualify to enter the European Cup-Winners' Cup. That this is not a purely hypothetical case is shown by the example of the Hertha BSC Berlin amateurs who reached the German cup final in 1993. The weakness of the argument becomes even more apparent if one considers that an association such as Scotland has no rules on foreign players and the other British associations have special rules for their mutual relations. [153] It can thus perfectly well happen that clubs from those associations use a large number of players from other Member States in the leagues and competitions organized by their associations, but are forced to limit the number of such players when they take part in UEFA competitions. I cannot see how in such a case the abovementioned argument could be used to justify professional footballers from the *European* Community being forbidden to take part in the *European* cup competitions.

145. The arguments in the second group are not convincing either. Nothing has demonstrated that the development of young players in a Member State would be adversely affected if the rules on foreign players were dropped. Only a few top teams set store on promoting their own young players as, for instance, Ajax Amsterdam do. Most talented players, by contrast, make their way upwards via small clubs to which those rules do not apply. [154] Moreover, there is much to support the opinion that the participation of top foreign players promotes the development of football. [155] Early contact with foreign stars 'can only be of advantage to a young player'. [156]

It is admittedly correct that the number of jobs available to native players decreases, the more foreign players are engaged by and play for the clubs. That is, however, a consequence which the right to freedom of movement necessarily entails. Moreover, there is little to suggest that abolition of the rules on foreign players might lead to players possessing the nationality of the relevant State

152 — See Roger Zäch, 'Wettbewerbsrecht und Freizügigkeit für Arbeitnehmer im Bereich des Sports nach dem Recht der EG', in: Walter R. Schluep and others (ed.), *Festschrift für Arnold Koller*, Bern, Stuttgart and Vienna 1993, p. 837, at p. 847 et seq.

153 — See point 40 above.

154 — To mention only two well-known examples of players whose careers began in small amateur clubs: Franz Beckenbauer started playing football at SC München 1906; Gerd Müller scored his first goals for TSV 1861 Nördlingen.

155 — See, for example, Giardini, op. cit. (note 119), p. 454.

156 — Palme, Hepp-Schwab and Wilske, op. cit. (note 141), p. 345.

becoming a small minority in a league. The removal of the rules on foreign players would not oblige clubs to engage (more) foreigners, but would give them the possibility of doing so if they thought that promised success.

146. The argument that the rules on foreign players are needed to ensure that enough players develop for the national team is also unconvincing. Even if that consideration were to be regarded as legitimate in the light of the Court's judgments in *Walrave* and *Donà*, it could not justify the rules on foreigners. As I have already mentioned, it is unlikely that the influx of foreign players would be so great that native players would no longer get a chance. It is also significant here that the success or failure of the national team also has an effect on the interest in the club matches of the country in question. Winning the World Cup, for instance, generally brings about increased interest of spectators in national league matches as well. It is therefore in a country's clubs' very own interests to contribute to the success of the national team by developing suitable players and making them available. The prestige which those players acquire in the national team also benefits the clubs as such. Moreover, the example of Scotland may be noted, where the lack of rules on foreign players has plainly not led to a shortage of players for the national team. [157]

157 — It cannot be objected that the national team of Scotland has had relatively little success for some considerable time, since Scottish club sides have also not achieved any great successes in the European cup competitions in recent years. No doubt this will change again one day.

Moreover, the national teams of the Member States of the Community nowadays very often include players who carry on their profession abroad, without that causing particular disadvantages. It suffices that the players have to be released for the national team's matches, as is also provided for in the current rules of the associations. The best example is perhaps the Danish national team which won the European Championship in 1992. In the German national team which became world champions in 1990 there were several players who played in foreign leagues. It is therefore not evident that the rules on foreigners are necessary in order to ensure the strength of the national team.

147. Third and finally, it is argued that the rules on foreign players serve to preserve the balance between clubs. In the opinion of URBSFA, the big clubs would otherwise be able to secure the services of the best players from the entire Community and thereby increase further the economic and sporting distance between them and the other clubs. The interest thus given expression is — as I shall explain later — a legitimate one. Like Mr Bosman, however, I am of the opinion that there are other means of attaining that objective without affecting the right of freedom of movement. Moreover, the rules are in any case only to a very limited extent appropriate to ensure a balance between the clubs. The richest clubs are still in a position to afford the best — and thus as a rule the most expensive — foreign stars. At the same time, such clubs have the opportunity to engage the best native players, without any comparable rule setting them limits.

148. Merely for the sake of completeness, I observe that the fact that the current rules on foreign players may possibly have been worked out with, and perhaps even approved by, the Commission has no legal significance. The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the EC Treaty by its actions. It is for the Court of Justice alone to give binding interpretations of those provisions.

3. Article 48 and the rules on transfers

(a) The applicable rules

149. Let us now turn to the question whether the rules on transfers are compatible with Article 48. The preliminary question first arises of *which* rules are to be the subject of examination. If the player's previous club and his new one belong to the same association, that association's transfer rules apply to the transfer. For a transfer within Belgium, for example, the URBSFA rules thus apply. It is not entirely clear, on the other hand, which rules were applicable in the territory of the Community when the previous club and the new one belonged to different associations. The question appears to have been clarified since the adoption of the 1993 UEFA transfer rules, which, as stated above, provide that the FIFA regulations are to apply to international transfers in the territory of UEFA. Only for calculation of the transfer fee is it necessary to fall back on the 1993 UEFA transfer rules, if the clubs concerned are unable to reach agreement on the amount of the fee. [158] The collapse of Mr Bosman's transfer to US Dunkerque took place in 1990, however, in other words before the 1993 UEFA transfer rules came into force. It is disputed which rules were applicable at that time to international transfers within the Community. UEFA maintains that its then valid rules were the relevant ones. The national court considers, however, that the then valid FIFA regulations were actually applied.

150. I consider, however, in agreement with the national court, that the question is of no consequence for the present case. It is admittedly correct that the 1990 UEFA transfer rules laid down that the business relationships between the clubs concerned were not to affect the player's sporting activity, in so far as the question of the transfer fee was concerned. [159] That is certainly progress compared with the 1986 FIFA regulations then in force, according to which the previous association's transfer certificate, required for entitlement to play, certified that the question of the transfer fee had been settled. [160] In contrast to those FIFA regulations, it was thus possible under the UEFA rules for a player already to play before the clubs concerned had reached agreement on the amount of the transfer fee. However, that progress is only apparent. Under the UEFA rules too a transfer fee was payable. In the event that the clubs could not agree on its

158 — See point 19 above.

159 — See point 15 above.

160 — See point 21 above and the wording of the relevant provision of the 1986 FIFA regulations quoted in note 37.

amount, it was determined — as under the rules in force today — by UEFA. If the new club did not pay that transfer fee, it was threatened with substantial sanctions. It is thus plain that no club which plans reasonably and cautiously is likely to be prepared to engage a player before the amount of the transfer fee is settled or it has at least made sure of the maximum amount it might have to pay. A club will take the player on only if it is ready and able to pay that amount. [161] The amount of the transfer fee thus even if the newer UEFA rules are applied has a decisive part in the question whether a player can change club. The national court therefore rightly declined to adopt UEFA's suggested amendment to the wording of the questions it submitted. [162]

(b) Article 48 as prohibition of discrimination

151. Under Article 48(2) of the EC Treaty freedom of movement for workers entails the 'abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. The Court has applied that prohibition of discrimination in a large number of decisions and observed in so doing that the general prohibition of discrimination on grounds of nationality laid down in Article 6 of the EC Treaty (formerly Article 7 of the EEC Treaty) has been implemented by that provision in regard to its particular domain. [163] The prohibition of discrimination on grounds of nationality must be interpreted broadly. The Court has consistently held that Article 48 prohibits 'not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result'. [164]

152. It must therefore be examined whether the transfer rules at issue here lead to nationals of other Member States being discriminated against in any way.

153. That is denied by URBSFA, on the ground that its rules on transfers are applied to all players in the same way without distinguishing according to their nationality. UEFA too denies that its rules on transfers lead to discrimination by reason of nationality. It submits that those rules are applied without distinction to all players who are covered by them. The Governments of Italy,

161 — The case of the transfer of Heiko Herrlich from Borussia Mönchengladbach to Borussia Dortmund in summer 1995 does not contradict that view. That player had admittedly to all appearances signed a contract with his new club before the negotiations between the clubs on a possible transfer had even started. The special feature, however, was that the player, according to the allegations of his previous club, was still contractually bound to that club and had thus committed a breach of contract by signing the new contract.

162 — See point 52 above.

163 — See, for example, the judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 12.

164 — Judgment in Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 7.

France and Germany have also taken the view that the rules on transfers do not lead to discrimination within the meaning of Article 48(2). The Commission stated in its written observations that the transfer rules did not lead to discrimination. At the hearing, on the other hand, it expressed the opinion that discrimination is possible. Mr Bosman considers that the system of transfer rules in principle does not have discriminatory character. He has, however, drawn attention to certain aspects of the application of those transfer rules which show, in his opinion, that discrimination is possible. The representative of the Danish Government expressed the view at the hearing that it has not been clarified whether the transfer rules lead to such discrimination or whether that is not the case.

154. In my opinion there can be no doubt that the application of the transfer rules in the Community may *in principle* lead to discrimination. Three different factual situations must be distinguished here.

155. The first factual situation is at first sight the most obvious. These are the cases where an association's rules, either taken alone or in conjunction with the UEFA and FIFA rules, necessarily lead to a transfer to a club abroad being treated less favourably than a transfer within the association. On the basis of the material produced to the Court, that appears to be the case in Denmark, for instance. If one examines the way in which the transfer fee is calculated for a transfer within Denmark on the one hand and for a transfer abroad on the other hand, it can be seen that the transfer fee is likely to be significantly higher in the latter case. [165] That can be shown even more clearly by reference to the abovementioned rules of the French association under which the transfer fee payable is doubled in the case of a transfer abroad. [166]

In those cases it is thus the rules of *one* association which *taken alone* lead to players who wish to transfer abroad being treated less favourably than players who wish to move to a club within the same association. That is admittedly discrimination which is not (or at least not directly) based on the player's nationality. However, it can be left open whether in such a case there might be covert discrimination by reason of nationality, since it is clear that by such differential treatment a player can be deterred from exercising his right to freedom of movement under Article 48. Such discrimination is thus in breach of Article 48, whose purpose is precisely to give workers the possibility of moving to another Member State without having to reckon with disadvantages as a result. The Court has already often based its decisions on that consideration, for instance in the field of social security for migrant workers. [167] In a recent judgment it stated quite generally, referring to its previous case-law, that 'the provisions of the Treaty

165 — See point 30 above.

166 — See point 33.

167 — See, for instance, the judgment in Joined Cases C-45/92 and C-46/92 *Lepore and Scamuffa* [1993] ECR I-6497, paragraph 21.

relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'. [168]

156. Comparable are the cases where the rules of an association *in conjunction with* the rules of UEFA or FIFA lead to unequal treatment. Here too the French rules can be taken as an example. As has already been seen, under those rules a transfer fee can be payable on the transfer of a player only if it is a professional player's *first* change of club. [169] Further transfers within France are therefore possible without a transfer fee becoming due. For transfers abroad, however, the UEFA and FIFA rules apply, which presume in principle that a transfer fee is to be paid. For a player who can move freely to another French club, a transfer fee is consequently payable if that same player moves abroad. The Commission and Mr Bosman have rightly drawn attention to that circumstance. A player who was in Mr Bosman's position, but played in the French league, would indeed have been able to move freely to another club. If, on the other hand, he had intended to move to a Belgian club, that club would have had to pay a transfer fee for him. The interplay of the national association's rules and the rules of the international football federations thus has the consequence that a player in France can transfer to another French club more easily than to a club abroad. That too is a breach of Article 48.

The transfer rules which apply in Spain probably produce similar effects. Professional players aged at least 25 can transfer freely within Spain without transfer fees becoming due. [170] On a transfer abroad, by contrast, the player's previous club can demand a transfer fee under the UEFA and FIFA rules.

157. Those cases of discrimination are not relevant to the present proceedings, however, since the URBSFA rules at issue here do not, either taken alone or in conjunction with the UEFA or FIFA rules, produce corresponding effects which would lead to a transfer abroad being treated less favourably than a transfer within the Belgian association.

158. The position might be different with respect to the second factual situation. There could also be less favourable treatment of

168 — Judgment in Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 16.

169 — See point 32 above.

170 — See point 31 above.

players who wish to move abroad if the transfer fees payable in such cases were higher in each case than the transfer fees arising in the case of a transfer to a club in the same association. Since transfer fees are as a rule freely negotiated, the only transfer fees which can be compared with each other here are, however, those payable on the basis of the rules in question if the clubs do not reach agreement on the amount. In the present case the application of the URBSFA statutes led to the transfer fee being determined at BFR 11 743 000 for a compulsory transfer. [171] Mr Bosman submitted at the hearing that determination of the transfer fee on the basis of the criteria applied by UEFA practically necessarily leads to an amount being fixed which is far above the player's actual market value. In his written observations he submitted that the transfer fee calculated according to the UEFA rules would in his case have amounted to BFR 14 000 000. At the hearing he even spoke of a good BFR 20 000 000.

159. Should it actually be the case that determination of transfer fees on the basis of the UEFA and FIFA criteria always or usually leads to higher sums than would be payable for a transfer of the same player to a club in the same association, that would be discrimination against those players who wish to exercise their right to freedom of movement. That discrimination would be prohibited under Article 48, in accordance with what has been said above. Some indication that the UEFA rules might have pursued the objective of making transfers of players to another association more difficult than transfers within an association is offered by the considerations which appear to have been applied at a meeting of a UEFA committee on 24 November 1976. [172] What is decisive, however, is whether such a result can be derived from the corresponding UEFA or FIFA rules. That question will have to be clarified — should it be necessary — by the national court.

160. The third and last factual situation which might establish a breach of the prohibition of discrimination was not raised until the hearing. An investigation of the UEFA and FIFA rules in question leads to the conclusion that in all cases in which a player transfers to a club in another association, a *clearance certificate* from his previous association is required. There appears to be no such requirement, on the other hand, for a transfer within an association. At the hearing I therefore put to the Commission the question whether those circumstances led to transfers to clubs abroad encountering greater difficulties, or at least entailing greater expense, than transfers within one and the same association. The Commission's representative answered the question in the affirmative, relying on information from Mr Bosman. UEFA did not comment on this point at the hearing.

171 — See point 43 above.

172 — Mr Bosman produced to the Court the minutes of a meeting of a 'Commission des Professionels et Non Amateurs', whose authenticity was not disputed by UEFA. According to the minutes, one of those present was of the opinion that the legal position with respect to the rules on foreign players had been clarified by the Court's judgments. The context shows that the person in question assumed that under Article 48 players could simply transfer to other Member States. He drew the conclusion therefrom that it was now a question of circumventing that provision ('tourner la loi').

161. It can thus easily be seen that transfers abroad are treated differently from transfers within an association and that in the former cases the ceding association must agree to the transfer. That difference in treatment would have no influence on the examination to be carried out in the present case only — if at all — if it was a pure formality which derived solely from the fact that a transfer to a club abroad involves a change of association at the same time. UEFA asserts that that is so. However, it is indeed open to doubt whether it really only is such a formality.

The 1990 UEFA transfer rules admittedly provide in the first sentence of Article 16 that the question of the transfer fee is to exert no influence on the player's sporting activity. It is noticeable, however, that the following sentence uses a future tense ('shall be free to play', in German 'wird ... spielen können'). [173] That could be understood as meaning that the player in question can play for his new club *once* the clearance certificate from the previous association has been received. The 1990 UEFA transfer rules admittedly prescribe that that clearance certificate is to be issued immediately. They appear, however, not to deal with the question of what is to happen if for whatever reason that is not done.

The 1993 UEFA transfer rules contain a provision, in Article 2, which coincides with Article 16 of the 1990 UEFA transfer rules. Under that provision too, the player 'shall be able to play' for his new club. As I have already mentioned, the 1993 UEFA transfer rules refer largely to the corresponding FIFA rules. According to the 1994 FIFA Regulations, a player transferring to a club in another association cannot be given entitlement to play until that association has received the transfer certificate from the previous association. Issue of that certificate can be refused if the player concerned 'has not fulfilled' his contractual obligations to his former club or if there is a dispute 'other than that of a financial nature' between the clubs in question regarding the transfer. [174] Now it is certainly obvious that a player whose contract with his previous employer has not yet expired and who has therefore not yet fulfilled his contractual obligations to that club can be prevented from playing for a new club. The cited wording of the 1994 FIFA Regulations is so widely phrased, however, that it can cover a great many other cases too.

How that fits in with the player's supposed possibility of playing 'freely' for his new club need not be gone into. Those rules in any event show clearly, in my opinion, that the transfer certificate is no mere formality. Article 7 of the 1994 FIFA regulations regulates what happens if the player's previous association refuses — for whatever reason — to issue the transfer certificate. In that case

173 — For the wording, see point 15.

174 — See point 23 above.

the competent bodies in FIFA 'may' order the previous association to issue the certificate, or substitute its own decision for that certificate. If the previous association does not issue the transfer certificate within 60 days, the new association 'may' issue a provisional certificate. [175] A transfer certificate or a corresponding decision by FIFA is therefore required in all cases. Moreover, a player has to rely on his previous association, FIFA or his new association taking the necessary steps to have the transfer certificate issued. His previous association is obliged to issue that certificate, but can however rely if necessary on an exception which is broadly and relatively unclearly worded. FIFA and the new association *may* act themselves. There is no provision that they *must* act in order to make it possible for the player to play for his new club.

If, despite what has already been said, further confirmation were to be required of the fact that the transfer certificate is not a mere formality, a glance at a provision in the 1994 FIFA Regulations would be enough. That provision relates to the case where the previous association does not issue the transfer certificate and the new association issues a provisional certificate itself after the above-mentioned period of 60 days has expired. The provision reads: 'A player shall not, *under any circumstances*, be authorized to play in official matches for his new club during the 60-day period mentioned above'. [176]

162. Since the transfer certificate is required only for a transfer to another association, in other words — apart from the special case of the associations in the United Kingdom — a transfer abroad, transfers abroad are thus subject to less favourable rules than transfers within one and the same association. That difference in treatment *may* lead to players being deterred from exercising their right to freedom of movement. That too can be regarded, in accordance with the considerations set out above, as a breach of the prohibition of discrimination in Article 48. It is not relevant to that conclusion that the application of the transfer rules in practice leads to such difficulties only in exceptional cases. It suffices that the possibility exists of freedom of movement being restricted by that difference in treatment.

163. I add merely for the sake of completeness that, contrary to Mr Bosman's opinion, I am unable to regard the fact that the transfer fee varies according to the player as a case of discrimination relevant to Article 48. It is indeed true that there is a difference in treatment. Since the provisions of the individual rules on calculation of transfer fees refer to the player's salary, a larger transfer fee is payable on the transfer of a well-paid (and hence no doubt as a rule talented) player than on the transfer of a less well-paid

175 — See point 23 above.

176 — Article 7(4), third subparagraph, of the 1994 FIFA Regulations (my emphasis).

player. That, however, is not a differentiation which relates directly or indirectly to nationality or which particularly affects players who wish to exercise their right of freedom of movement.

164. In the light of what has been said above, the opinion could very well be maintained that the transfer rules infringe the prohibition of discrimination in Article 48(2) in one respect or other. The Court would have to examine those questions, however, only if Article 48 did no more than establish a prohibition of discrimination on grounds of nationality. I consider that that is not the case. In my opinion, *all restrictions on freedom of movement* are prohibited *in principle* by Article 48. I shall demonstrate that below, beginning with the Court's previous case-law.

(c) Article 48 as a prohibition of restrictions on freedom of movement

(aa) Previous case-law on Articles 48 and 52

165. In considering the case-law on Article 48 with reference to the question whether that provision not only prohibits discrimination by reason of nationality but may also preclude rules applied without distinction which hinder freedom of movement, the judgments which have been given on Article 52 must also be taken into account. That is justified firstly on the basis of the consideration that both provisions rest on the same foundation, namely Article 3(c) of the EC Treaty. According to that provision, the activities of the Community are to include 'an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. The free movement of persons referred to here is regulated precisely by Articles 48 and 52, the former article applying to employees and the latter to the self-employed. [177] There are therefore clear parallels between the two provisions, which lead one to expect them to provide identical solutions to certain factual situations. Secondly, the Court has indeed already frequently made observations in its case-law which were aimed both at Article 48 and Article 52. For that reason too it is appropriate to refer to decisions given on both of those articles.

In some cases the Court has developed solutions intended to apply not only to Article 48 or 52 but also to Article 59 as well. The *Walrave* and *Donà* judgments, for example, already more than once cited above, could be mentioned as examples. I shall nevertheless not deal with the case-law on Article 59 until later. That appears appropriate since the

177 — Under Article 58, certain companies and firms are treated in the same way as natural persons who are nationals of Member States.

question to be discussed here has already been clarified with respect to that provision.

166. As mentioned above, there are many judgments in which Article 48 has been understood as a provision which prohibits discrimination by reason of nationality. I shall, however, discuss below primarily those cases in which the beginnings of a broader understanding of that provision can be found.

167. The first judgment to be mentioned here is in *Rutili*, [178] a case decided in 1975. That decision concerned a prohibition imposed by the French authorities on an Italian national, banning him from residing in specified parts of France. The Court held that such measures restricting the right of residence were permissible as against nationals of other Member States only in cases where they could also be applied to that State's own nationals. That conclusion is easily derived from Article 48(2). Interestingly, however, the Court said in the judgment that the questions submitted to it concerned the 'principles of freedom of movement and equality of treatment'. [179] However, it is debatable whether the Court intended thereby to state that freedom of movement was not exhausted by the mere prohibition of discrimination by reason of nationality.

168. The *Thieffry* judgment [180] in 1977 concerned the freedom of establishment of lawyers. In that case a Belgian advocate had applied for admission to the Bar of the Paris Cour d'Appel. Mr Thieffry held a Belgian diploma which had been recognized by a French university as equivalent to a French 'licence en droit'. He had also passed an examination, in accordance with the French regulations, by means of which he had obtained a qualifying certificate for the profession of advocate. He was refused admission to the Paris Bar, however, on the ground that he did not have a *French* diploma. The Court of Justice held that there was an unjustified restriction on freedom of establishment if a person in Mr Thieffry's situation was refused admission to the legal profession in a Member State solely by reason of the fact that he did not possess a diploma from that Member State. The Court did not discuss whether the French rules were discriminatory, but based its reasoning on Articles 5 and 52 of the EC Treaty. [181] It should be noted, however, that Advocate General Mayras had expressed the opinion that this was a case of disguised discrimination. [182]

169. In *Kenny*, [183] a 1978 judgment which has been referred to in the present proceedings, there are passages which appear to make it clear that in the Court's opinion Article 48 establishes only a prohibition of discrimination: according to the judgment, disparities

178 — Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219.

179 — Ibid., paragraph 7.

180 — Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

181 — Ibid., paragraphs 15 to 19.

182 — Opinion in Case 71/76, [1977] ECR 780, at p. 790.

183 — Judgment in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489.

in treatment which result from differences between the laws of the Member States are acceptable 'so long as [those laws] affect all persons subject to them in accordance with objective criteria and without regard to their nationality'. [184] It appears to me, however, doubtful whether the judgment must in fact be understood in such a way; if Article 48 were restricted to the 'principle of non-discrimination', the question would arise why the Court additionally pointed out the need for the rules in question to be applied 'in accordance with objective criteria'.

170. The judgment given in 1978 in the *Choquet* case, [185] on the other hand, seems of importance. Those proceedings concerned a French national who lived in Germany and was employed there. Mr Choquet held a French driving licence. The German authorities none the less brought criminal proceedings against him for driving without a licence, since under the German rules a foreigner who lived in Germany for more than one year was obliged to obtain a German driving licence. At the material time the Community had not yet adopted any measures in that field.

The Court held that in the absence of provisions for the harmonization of conditions for granting driving licences in the Member States, it was not in principle an infringement of the provisions on freedom of movement, freedom of establishment and freedom to provide services for a Member State to insist that persons resident in its territory who held driving licences issued by another Member State satisfied the requirements laid down for the first State's own nationals. Such provisions could be considered to contravene Community law only if their application to the persons in question were to cause 'such difficulties that those persons would in fact be hindered in the free exercise of the rights which Articles 48, 52 and 59 of the Treaty guarantee them in connection with the free movement of persons, freedom of establishment and freedom to provide services'. [186] That might for instance be the case if a driving test was required which clearly duplicated the tests already taken or if 'exorbitant charges' were imposed on the persons concerned. [187]

The Court thus did not address the question whether the German rules disadvantaged nationals of other Member States. Instead it assessed those rules according to the principle of proportionality. It is also noteworthy that the Court referred to Articles 48, 52 and 59 at the same time, although Mr Choquet was an employee.

171. Especially significant is the 1984 judgment in *Klopp*. [188] That was a case about a German lawyer who wished to open chambers in Paris. To that end he had applied to

184 — Ibid., paragraph 18.

185 — Judgment in Case 16/78 *Choquet* [1978] ECR 2293.

186 — Ibid., paragraphs 7 and 8.

187 — Ibid., paragraph 8.

188 — Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971.

be registered with the Paris Bar as a lawyer undergoing training. He had stated that he wished to retain his chambers in Germany. Mr Klopp's application was rejected by reference to the French provisions that a lawyer can have chambers in one place only.

The Court noted that it had not been determined whether the French rules in question were discriminatory, and that the question referred by the national court therefore had to be answered on the basis that that was not the case. [189] It went on to say that a rule such as that in force in France meant that a lawyer established in one Member State could exercise the right to freedom of establishment in another Member State only if he abandoned the establishment he already had. The Court held that that was incompatible with Article 52, which expressly provides that freedom of establishment also applies to the setting up of agencies, branches or subsidiaries in another Member State. [190] It acknowledged that Member States had the right 'in the interests of the due administration of justice' to subject the activities of lawyers to certain rules. However, that must not prevent nationals of other Member States 'from exercising properly the right of establishment guaranteed them by the Treaty'. [191] In the specific case, the legitimate aims pursued by the French rules — to guarantee sufficient contact with clients and courts and observance of the rules of the profession — could be ensured in other ways. [192]

172. The action by the Commission against France for failure to fulfil Treaty obligations, in which judgment was given in 1986, [193] concerned similar facts. It related to French provisions which required doctors and dentists established in another Member State to cancel their registration in that State if they wished to practise in France as an employee, locum or principal in a practice. However, the Court based its judgment on reasoning which differed from that in *Klopp*. It stated as a general proposition that all restrictions on freedom of movement for workers, freedom of establishment and freedom to provide services are compatible with the Treaty only if they 'are actually justified in view of the general obligations inherent in the proper practice of the professions in question and apply to nationals and foreigners alike'. [194] The Court's subsequent observations show that those are indeed two different criteria: the Court first found that the rules in question were applied more strictly for doctors from other Member States than for French doctors. [195] It then found that the general rule prohibiting doctors and dentists established in other Member States from practising in France was 'unduly restrictive'. [196]

The same reasoning can be found in a 1992 judgment in an action for failure to

189 — Ibid., paragraph 14.
190 — Ibid., paragraphs 18 and 19.
191 — Ibid., paragraph 20.
192 — Ibid., paragraph 21.
193 — Case 96/85 *Commission* v *France* [1986] ECR 1475.
194 — Ibid., paragraph 11.
195 — Ibid., paragraph 12.
196 — Ibid., paragraph 13.

fulfil obligations brought by the Commission against Luxembourg, which concerned the same problems. [197]

173. The Court decided quite differently, however, in 1987 in an action by the Commission against Belgium for failure to fulfil Treaty obligations. [198] That case concerned a rule under which certain services provided by laboratories were excluded from reimbursement under the social security scheme if those laboratories were operated by legal persons whose members, partners or directors were not all natural persons authorized to carry out medical analyses. The Commission submitted that that was in breach of Article 52. It expressly argued that the restrictions on freedom of establishment prohibited by Article 52 were not confined to discriminatory measures, but also included measures applied without distinction which constituted 'an unjustified constraint' for nationals of other Member States. [199]

The Court, however, adopted the position that Article 52 is intended to ensure that nationals of other Member States 'receive the same treatment as nationals' of the State in question. Since in the Court's opinion there was no indication in that case of discrimination against nationals of other Member States, it dismissed the Commission's application. [200] The Court did not discuss the abovementioned judgment in *Commission* v *France* in its decision.

174. The 1987 judgment in the *Heylens* case [201] is of interest for the present case not least because it relates to football. Mr Heylens, a Belgian national and the holder of a Belgian football trainer's diploma, had been engaged as trainer by a French team. Under the French rules a French football trainer's diploma or a foreign diploma recognized by the competent authorities as equivalent was necessary for the practice of that occupation. In Mr Heylens's case such recognition was refused without material reasons being stated for that decision.

The Court observed that freedom of movement for workers was one of the 'fundamental objectives' of the EC Treaty. [202] Referring to the *Thieffry* judgment, it held that Member States were obliged to examine objectively, in the procedure for recognizing the equivalence of the relevant diploma, whether the foreign diploma certified that its holder had knowledge and qualifications which were, if not identical, at least equivalent to those certified by the national diploma. In addition, the possibility had to be ensured of having the decision given in that procedure

197 — Judgment in Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, paragraph 14. Unlike *Commission* v *France*, this case related also to the activities of veterinary surgeons. The examination was restricted to Articles 48 and 52, however.

198 — Judgment in Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

199 — Ibid., paragraph 5.

200 — Ibid., paragraphs 10 to 12.

201 — Cited above (note 150).

202 — Ibid., paragraph 12.

reviewed by a court. [203] The Court stated in this connection that free access to employment is a 'fundamental right which the Treaty confers individually on each worker in the Community'. [204]

175. The *Gullung* judgment, [205] delivered in 1988, concerned a lawyer of French and German nationality, who was a Rechtsanwalt in Germany and relied on the basic freedoms guaranteed by the EC Treaty in order to be able to practice his profession in France, after he had previously been refused admission to practice as a lawyer in France because of lack of good character.

The Court held that freedom of establishment under the second paragraph of Article 52 includes the right to take up and pursue activities as a self-employed person 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. The requirement for lawyers to be admitted was therefore lawful under Community law, provided that such admission was open to nationals of all Member States 'without discrimination'. At the same time, however, the Court pointed out that that requirement pursued 'an objective worthy of protection'. [206] A further requirement thus seems to appear in addition to the prohibition of discrimination.

176. The *Stanton* judgment, [207] also from 1988, concerned a Belgian provision under which self-employed persons could be exempted under certain circumstances from paying contributions to the Belgian social security scheme for self-employed persons. One of those conditions was that they pursued by way of principal occupation another occupational activity. The Belgian authorities took the view that that had to be an occupation covered by a Belgian social security scheme. Mr Stanton was employed in the United Kingdom and paid the corresponding contributions there.

The Court considered that the Belgian provision was not of a discriminatory nature. [208] However, citing *Klopp*, it observed that freedom of establishment included the right to maintain more than one place of work within the Community. It applied that reasoning to the case of a person employed in one Member State who wished to work in addition in another Member State in a self-employed capacity. In the Court's opinion, the provisions of the Treaty relating to the free movement of persons are intended to 'facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community'. They therefore 'preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State'. Since the Belgian provision placed persons who pursued occupational activities outside Belgium at a disadvantage, it was incompatible with Articles 48 and 52. [209] It is

203 — Ibid., paragraphs 13 and 14.

204 — Ibid., paragraph 14.

205 — Case 292/86 *Gullung* v *Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne* [1988] ECR 111.

206 — Ibid., paragraphs 28 and 29.

207 — Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

208 — Ibid., paragraph 9.

209 — Ibid., paragraphs 11 to 14.

noteworthy, apart from the fact that the Court did not focus on possible discrimination, that Article 48 and Article 52 were treated in the same way.

The Court reached the same decision in the *Wolf* case, [210] in which judgment was given on the same day.

177. The *Daily Mail* judgment [211] of 1988 related to the question whether a company established in one Member State can transfer its central management and control to another Member State without changing its identity. The Court stated that the provisions on freedom of establishment were directed 'mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State', but also prohibited the State of origin from 'hindering the establishment in another Member State' of its nationals. The rights guaranteed by Article 52 et seq. would be 'rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State'. [212] In the particular case, however, the Court considered that there was no infringement.

178. The *Groener* judgment [213] of 1989 concerned a provision that for lectureships at public vocational training establishments in Ireland an adequate knowledge of Irish was required. The Court found that the Treaty did not prohibit the adoption by a Member State of a policy for the protection and promotion of its language. However, free movement of workers must not be encroached on thereby. The corresponding measures 'must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'. [214] Here too the Court thus apparently examined not only whether the provision in question discriminated against nationals of other Member States, but also whether that provision complied with the principle of proportionality.

179. The *Corsica Ferries France* judgment, [215] also of 1989, relates to freedom to provide services, and therefore need not be considered in detail here. The following passage in that judgment is, however, of interest in the present context:

'As the Court has decided on various occasions, the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction,

210 — Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

211 — Case 81/87 *The Queen* v *Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust* [1988] ECR 5483.

212 — Ibid., paragraph 16.

213 — Case C-379/87 *Groener* v *Minister for Education and the City of Dublin Vocational Education Committee* [1989] ECR 3967.

214 — Ibid., paragraph 19.

215 — Case C-49/89 *Corsica Ferries France* v *Direction Générale des Douanes* [1989] ECR 4441.

even minor, of that freedom is prohibited.' [216]

180. The *Biehl* judgment, [217] delivered in 1990, concerned the Luxembourg provisions on the repayment of excess income tax deducted. Such a repayment could be made only if the taxpayer was resident in Luxembourg for the whole of the tax year. Mr Biehl, a German national, had been employed in Luxembourg from 1973; on 1 November 1983 he returned to Germany. The Luxembourg revenue authorities refused to repay him the amount of tax deducted in the first ten months of 1983, which exceeded his total liability to tax. The Court adopted the view that the criterion of permanent residence in the national territory applied irrespective of nationality, but there was nevertheless a risk that it would work in particular against nationals of other Member States, since it was often such persons who left the country or took up residence there in the course of the year. [218]

That judgment has rightly been criticized on the ground that the reasoning adopted by the Court, based on covert discrimination, would not have been adequate if the case had concerned not a German but a Luxemburger. Yet the exercise of the right to freedom of movement would have been subjected to the same unfavourable conditions in both cases. [219]

181. The 1991 judgment in *Vlassopoulou* [220] once again concerned the freedom of establishment of lawyers. A Greek lawyer who was a member of the Athens Bar had obtained a doctorate in law from the University of Tübingen (Germany) and had worked with a firm of German lawyers since 1983. In 1988 she applied for admission as a lawyer (Rechtsanwältin) in Germany. Her application was refused on the ground that she did not fulfil the conditions required under German law.

The Court stated that 'even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty'. That could be the case if the knowledge and qualifications acquired in another Member State were not taken into account. [221] Such knowledge and qualifications therefore have to be assessed by the Member State in question. If it proves that they correspond only partially to the requirements of the Member State in question, 'the host Member State is entitled to require the person concerned to show that

216 — Ibid., paragraph 8.

217 — Case C-175/88 *Biehl* [1990] ECR I-1779.

218 — Ibid., paragraph 14.

219 — Brigitte Knobbe-Keuk, 'Niederlassungsfreiheit: Diskriminierungs-oder Beschränkungsverbot?', *Der Betrieb* 1990, p. 2573, at p. 2576.

220 — Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

221 — Ibid., paragraph 15.

he has acquired the knowledge and qualifications which are lacking'. [222]

182. The 1992 judgment in *Ramrath* [223] concerned the regulation of the profession of auditor in Luxembourg. The provisions in force required an auditor *inter alia* to have a professional establishment in Luxembourg and not to carry on any activity likely to impair his professional independence. Mr Ramrath had been granted authorization to practice as an auditor in Luxembourg in 1985. He was employed at the time by a firm established in Luxembourg, which likewise had such authorization. In 1988 he informed the authorities that he was now employed by an auditing company authorized to practise in Germany and that his professional establishment was in Germany; that employer would, however, exert no influence on him when he carried out audits in Luxembourg. The Luxembourg firm stated that when Mr Ramrath worked in Luxembourg he was still to be regarded as its employee. The Luxembourg authorities nevertheless withdrew Mr Ramrath's authorization.

The Court first stated that conditions such as those laid down by Luxembourg law had to be measured against 'all the Treaty provisions relating to freedom of movement for persons', without considering whether the auditor had the status of employee, a self-employed person or a provider of services. [224] It then recalled its previous case-law in those fields and on that basis reached the conclusion that 'Articles 48 and 59 of the Treaty are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community' and preclude national legislation which might place them at a disadvantage when they wish to extend their activities to another Member State. [225] The special nature of certain activities might, however, require the imposition of specific conditions. 'Nevertheless, as one of the fundamental principles of the Treaty, freedom of movement of persons may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings pursuing those activities in the territory of the State in question', and only in so far as the general interest is not already safeguarded by the rules of the Member State of origin. [226] Those requirements must in addition 'be objectively justified'. [227] It must therefore be shown that there are 'compelling reasons in the general interest which justify restrictions on freedom of movement' and that the desired result 'cannot be achieved by less restrictive rules'. [228]

Mr Ramrath had argued before the Luxembourg courts that he was discriminated

222 — Ibid., paragraph 19.

223 — Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351.

224 — Ibid., paragraph 24.

225 — Ibid., paragraph 28.

226 — Ibid., paragraph 29.

227 — Ibid., paragraph 30.

228 — Ibid., paragraph 31.

against by the provisions in question. It is scarcely a matter of chance that the Court's reasoning, described above, does not consider that point further. It is also remarkable that the Court does not consider the question of Mr Ramrath's nationality. [229]

183. Mr Bosman refers to the *Singh* [230] judgment, also delivered in 1992. That decision concerned the disadvantages caused to the spouse of a national of a Member State by reason of the fact that the latter had made use of her right to freedom of movement. In the judgment the Court confirmed the finding in *Stanton* that freedom of movement precludes national provisions which might place citizens at a disadvantage when they wish to extend their economic activity to the territory of another Member State. Apart from that, the case is in my opinion of no great significance for the examination to be conducted in the present case.

184. More significant, on the other hand, is the 1993 judgment in *Kraus*. [231] That case concerned a German national who had obtained an academic degree in Great Britain after completing a course of postgraduate study there. Under the relevant German rules, however, he could use that degree in Germany only if he was granted permission to do so. An infringement of those rules could lead to the imposition of a fine or imprisonment for up to one year.

The Court observed that Articles 48 and 52 implemented a 'fundamental principle' enshrined in Article 3(c) of the EC Treaty, namely the removal of obstacles to the free movement of persons between the Member States. [232] It further noted the obligations arising in this respect for Member States under Article 5. [233] The Court concluded:

'Articles 48 and 52 therefore preclude all national provisions on the conditions for the use of a further academic degree obtained in another Member State which, although applicable without discrimination on the ground of nationality, are nevertheless liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the EEC Treaty by Community citizens including the nationals of the Member State which has enacted the provisions. It would be different only if such provisions pursued a legitimate aim which was compatible with the EEC Treaty and justified by compelling reasons of the general interest (see the judgment in Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 12 and 15). In such a case, however, the application of the national provisions in question would in addition have to be appropriate for guaranteeing the realisation of the objective pursued, and could not go beyond what was necessary for achieving that objective (see the judgment in Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 29 et seq.).' [234]

229 — Mr Ramrath was apparently German.
230 — Cited above (note 168).
231 — Case C-19/92 *Kraus* [1993] ECR I-1663.
232 — Ibid., paragraph 29.
233 — Ibid., paragraph 31.
234 — Ibid., paragraph 32.

(bb) Conclusions from the previous case-law

185. The question arises what conclusions can be drawn from the Court's previous case-law. It must be remembered that — as I stated at the outset — the cases discussed above are a selection which is by no means representative of the case-law in this field. It is clear, however, that a large number of the judgments mentioned point beyond the traditional view that Article 48 consists only of a prohibition of discrimination on grounds of nationality.

186. The *Thieffry* judgment already points in that direction, given that the Court did not focus there on the question of possible discrimination. [235] It could be maintained, however, that that was basically a case of (indirect) discrimination, since French nationals were much more likely to be able to produce a *French* diploma than nationals of other Member States were. The *Choquet* judgment already, however, can scarcely be explained in that way. [236] The Court's statement in that judgment that there could be a breach of Articles 48, 52 and 59 if a Member State imposed 'exorbitant charges' for examining whether a driving licence obtained abroad satisfied the requirements laid down in that Member State could admittedly still be interpreted as a case of covert discrimination. [237] The Court did not, however, focus on that aspect, but — as the passage cited itself shows — assessed the provision by reference to the principle of proportionality. [238] The *Vlassopoulou* judgment also related to conditions which could be fulfilled much more easily by nationals of the host State than by those of other Member States. Here too, however, that aspect played no part in the decision. Instead the Court expressly presumed that there was no discrimination.

187. The *Klopp* judgment is much clearer still. Here too the Court started from the assumption that there was no discrimination. The Court's examination basically came down to the question whether there was a restriction of freedom of establishment and whether that could be justified by certain superior considerations. [239] The Court used a corresponding approach in *Stanton* and *Wolf*. The answer to the question whether the restriction on freedom of movement was justified was very concise. The Court merely observed that the persons in question were already insured in other Member States and that the Belgian social security scheme

235 — See, for instance, Ernst Steindorff, 'Reichweite der Niederlassungsfreiheit', *Europarecht* 1988, p. 19, at p. 24.

236 — See Albert Bleckmann, 'Die Personenverkehrsfreiheit im Recht der EG', *Deutsches Verwaltungsblatt* 1986, p. 69, at p. 71.

237 — For another view, however, see José Carlos de Carvalho Moitinho de Almeida, 'La libre circulation des travailleurs dans la jurisprudence de la Cour de justice (art. 48 CEE/art. 28 EEE)', in: Olivier Jacot-Guillarmod (ed.), *Accord EEE*, Zürich 1992, p. 179, at p. 188, according to which such rules do not discriminate either directly or indirectly.

238 — As rightly noted by José Carlos Moitinho de Almeida, 'Les entraves non discriminatoires à la libre circulation des personnes; leur compatibilité avec les articles 48 et 52 du traité CE', in: *Festskrift til Ole Due*, Copenhagen 1994, p. 241, at p. 247.

239 — See Wulf-Henning Roth, 'Grundlagen des gemeinsamen europäischen Versicherungsmarktes', *Rabels Zeitschrift* 54 (1990), p. 63, at p. 81.

therefore afforded them no additional social protection. [240]

It need not be decided whether those judgments could also have been reached on the basis of a — broadly interpreted — prohibition of discrimination. [241] What is decisive is that in the above cases the Court precisely did *not* choose that path. That the approach chosen by the Court is justified can moreover be seen if one changes the facts which gave rise to the *Stanton* case. If a Belgian national who worked on a self-employed basis in Belgium had also taken up employed activity in another Member State, he would have found himself, in accordance with the provisions at issue, in the same position as Mr Stanton. He would have been placed at a disadvantage because he had made use of his right to freedom of movement. That case, however, can be solved with the aid of the prohibition of discrimination only if the view is taken that it suffices that citizens who exercise that right are placed at a disadvantage compared with those who do not. Such an interpretation in my opinion corresponds to the spirit of Article 48(2). [242] It is admittedly evident that it is then no longer discrimination on grounds of nationality which is being focused on.

188. The line applied in *Klopp* is continued and clarified in *Commission* v *France* and *Commission* v *Luxembourg*. [243] In those cases the Court examines whether a restriction on freedom of movement (and freedom to provide services) is justified and proportionate. The *Gullung* judgment is less clear in this respect, but there too it is observed that the restriction in question serves 'an objective worthy of protection'. In *Groener* not only the existence of an objective worthy of protection, but also the question of proportionality is examined.

189. That the right of freedom of movement cannot be limited to the principle of treatment like a national of the host State is also shown by the *Daily Mail* judgment, from which it follows that Article 52 can also be infringed by the State of origin and that restrictions imposed by that State on the right of establishment in another Member State must therefore be assessed by reference to that provision.

190. All doubt as to whether the requirements of Article 48 go beyond the principle of treatment like a national of the host State has in my opinion been removed by the *Ramrath* and *Kraus* judgments. In those decisions the Court stated clearly that restrictions on freedom of movement are compatible with Community law only if they are justified by 'compelling reasons of the general interest' and comply with the principle of proportionality. In view of those unambiguous statements by the Court, it is irrelevant whether the provisions examined

240 — *Stanton*, cited above (note 207), paragraph 15; *Wolf*, cited above (note 210), paragraph 15.

241 — See, for example, Ulrich Everling, 'Das Niederlassungsrecht in der Europäischen Gemeinschaft', *Der Betrieb* 1990, p. 1853, at p. 1855 (on the *Klopp* judgment); Andreas Nachbaur, 'Art. 52 EWGV — Mehr als nur ein Diskriminierungsverbot?', *Europäische Zeitschrift für Wirtschaftsrecht* 1991, p. 470 at p. 471.

242 — See, for example, the cases of discrimination discussed in point 155 et seq. above.

243 — See point 172 above.

by the Court were perhaps cases of (covert) discrimination. [244] If Article 48 was indeed limited to imposing an obligation on the Member States to treat its own nationals and nationals of other Member States in the same way, it would be neither necessary nor admissible to examine whether the relevant national provisions are *lawful*. Precisely that question, however, is what the Court is examining here. That shows that in the Court's opinion Article 48 may also apply to provisions of a Member State which apply without distinction for its own nationals and for nationals of other Member States.

191. As I have already stated, however, there is in the case-law of the Court to date a large number of judgments which focus, when examining Article 48, on the presence of discrimination on the ground of nationality. Those judgments as a rule do not deal with the question whether the content of Article 48 might extend beyond the prohibition of such discrimination. If I am not mistaken, among those decisions there are only two in which the Court had to consider that question. Those are firstly the *Kenny* judgment and secondly the 1987 judgment in the action for failure to fulfil obligations, *Commission* v *Belgium*. I have already explained why the former judgment in my opinion does not permit of any very far-reaching conclusions. [245] The latter judgment on Article 52, on the other hand, could indeed be understood as a rejection of the view put forward here. The Commission had after all expressly put forward the view that Article 52 can also cover non-discriminatory measures, whereas the Court held that that provision was intended to secure treatment like nationals of the host State. It is noticeable, however, that the Court did not expressly reject the Commission's opinion and that it did not refer at all to the *Commission* v *France* judgment, [246] delivered shortly before, which supported the Commission's view. Moreover, it should also be observed in any event that the *Ramrath* and *Kraus* judgments were delivered several years *after* that judgment.

192. From the coexistence of those two currents in the case-law, it can therefore only be concluded, in my opinion, that the Court does not consider that there is necessarily a contradiction between them. That coexistence can easily be explained. Ernst Steindorff has said with reference to the case-law on Article 52 that the predominant interpretation of that provision as a prohibition of discrimination was 'necessitated by the problems to be decided'. 'Those problems could be overcome by means of a prohibition of discrimination.' Other, different situations might, however, require a new approach. [247] I consider that view both appropriate and convincing.

244 — In *Kraus*, for example, Advocate General Van Gerven had expressed the view in his Opinion that in that case there was discrimination contrary to Article 48(2) ([1993] ECR I-1674, p. 1677).

245 — See point 169 above.

246 — See point 172 above.

247 — Op. cit. (note 235), p. 20 et seq.

193. It must therefore be examined what reasons can be found for seeing Article 48 as not only a prohibition of discrimination but a general prohibition of restrictions on freedom of movement.

(cc) Reasons for interpreting Article 48 as a general prohibition of restrictions on freedom of movement

(1) Wording

194. The wording of the provision itself indicates that the content of Article 48 extends beyond the mere prohibition of discrimination on grounds of nationality. Under *paragraph 1* of Article 48, freedom of movement for workers is to be created by the end of the transitional period. Under *paragraph* 2 of Article 48, that is to 'entail' the prohibition of any discrimination based on nationality. There is thus nothing to prevent Article 48(2) being interpreted as a part of a more comprehensive regulation of freedom of movement. [248] The special reference to discrimination in paragraph 2 could be explained by that being the 'most evident and most serious' restriction on freedom of movement. [249]

In this connection it has rightly been observed that Article 67(1), which deals with free movement of capital and payments, distinguishes between 'restrictions' and 'discrimination'. [250]

195. The wording of Article 48(3) could also be an indication that the content of Article 48 goes beyond a mere prohibition of discrimination. In that paragraph certain rights are expressly guaranteed to workers, without that being made to depend on the Member State concerned allowing its own nationals the same rights. [251]

(2) Systematic context

196. From a systematic point of view, an interpretation of Article 48 which goes beyond the traditional view suggests itself simply from the fact that that provision is

248 — Ernst Steindorff, op. cit. (note 235), p. 21 (on the second paragraph of Article 52).

249 — See Brigitte Knobbe-Keuk, op. cit. (note 219), p. 2574 (also with reference to the second paragraph of Article 52).

250 — Albert Bleckmann, op. cit. (note 236), p. 72.

251 — An exception to that is admittedly Article 48(3)(c), which refers to 'the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action'.

based on Article 3(c), which imposes in general terms the 'abolition ... of obstacles' to the free movement of goods, persons, services and capital. If Article 48 were really nothing more than a prohibition of discrimination by reason of nationality, that provision — or at least Article 48(2) — would no longer have been necessary, in view of Article 6 of the EC Treaty, in which all such discrimination is prohibited generally.

197. It must be borne in mind, moreover, that not only Article 48 but also the provisions on free movement of goods (Article 30 et seq.) and the provisions on freedom to provide services (Article 59 et seq.) are based on Article 3(c). With respect to the field of the *movement of goods*, it has been recognized since the *Cassis de Dijon* judgment [252] that in principle even national provisions which apply to domestic and imported goods without distinction may represent measures having equivalent effect, prohibited under Article 30, if their application cannot be justified by compelling requirements of the general interest. That principle has been limited, but not abolished, by the line of case-law starting with the *Keck and Mithouard* judgment. [253] Similarly in the field of *freedom to provide services*: following *Gouda* [254] and *Säger* [255] it is established that 'Article 59 requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services'. Such restrictions are therefore lawful only if they are 'justified by imperative reasons relating to the public interest'. They must not 'exceed what is necessary to attain those objectives'. [256]

198. There would in my opinion be a scarcely tolerable contradiction of assessment if that approach were not also used as the basis of the interpretation of Article 48 (and Article 52).

199. It must first be noted, however, that the structure of the provisions on the provision of services is comparable to that of Article 48. Under the first paragraph of Article 59, restrictions on freedom to provide services are to be abolished by the end of the transitional period. Under the third paragraph of Article 60, a person providing a service may pursue his activity in the Member State where the service is provided under the same conditions 'as are imposed by that State on its own nationals'. According to the wording, then, the principle of treatment like a national of the host State is laid down here. That may be compared with the relationship between Article 48(1) and Article 48(2). It is thus not surprising that Article 59 et seq. was also first interpreted as a prohibition of

252 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

253 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

254 — Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007.

255 — Case C-76/90 *Säger* [1991] ECR I-4221.

256 — Ibid., paragraphs 12 and 15.

discrimination. [257] For that reason alone, one is inclined to apply the development which has taken place in the recent case-law of the Court with respect to the interpretation of Article 59 to Article 48 as well.

200. The 'convergence of the economic freedoms in European Community law' [258] encouraged by such an interpretation is, however, also objectively necessary. The fundamental freedoms of the common market are not only based on a common foundation. They also in my opinion form a unity, and the same criteria should be applied as far as possible in dealing with them. [259] For example, there is no sensible reason discernible why free movement of goods ought to be better protected than free movement of persons, since both are of fundamental importance for the internal market. [260] The Treaty sets up a sort of order of priority of the fundamental freedoms only in so far as it lays down in the first paragraph of Article 60 that Article 59 et seq. apply only where the facts in question are not governed by the provisions relating to freedom of movement for goods, capital and persons. It would thus be strange if different criteria were to apply for the interpretation of *those* provisions, while the residual possibility common to all of them, freedom to provide services, was to be interpreted uniformly.

Moreover, I am in any event of the opinion that in examining the compatibility of national provisions with the provisions of Community law on the fundamental freedoms, it is not so important which specific fundamental freedom a particular factual situation is to be measured against. What should be decisive is rather whether the provisions in question hinder trans-frontier economic activity and — if that is the case — whether those restrictions are justified. That does not exclude the possibility that distinctions are to be made with respect to justification according to whether the hindrance is of a discriminatory or non-discriminatory nature. The circumstance of a permanent or only a temporary activity in another Member State being concerned may also justify distinctions in that respect, as is already accepted in the case-law.

201. That is by no means a purely academic point. The Court's case-law shows that there is often considerable difficulty in distinguishing between factual situations which come under one and those which come under another of the fundamental freedoms. The present case is a good example. As a rule it is no doubt correct — as I have already explained — to classify football players as workers within the meaning of Article 48. Under the third paragraph of Article 60, the essential criterion for distinguishing between Article 48 and Article 59 is that the latter only covers activities which are 'temporarily'

257 — See only the passage from *Walrave* cited in point 122 above.

258 — The programmatic title of an article by Peter Behrens, 'Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht', *Europarecht* 1992, p. 145.

259 — For this view see also Alfonso Mattera, 'La libre circulation des travailleurs à l'intérieur de la Communauté européenne', *Revue du Marché Unique Européen* 4/1993, p. 47, at p. 68.

260 — I note merely in passing that that consideration appears especially appropriate in connection with the examination of the rules on transfers.

pursued in another Member State. What does that mean, for example, with respect to a contract by which a club engages a player for a few matches? [261] It is debatable whether in such a case it would not be better to speak of a provision of services. The transfer rules currently in force admittedly ensure for the most part by means of specified time-limits that contracts with players have a term of at least a whole season, or at any rate half a season. However, that is not necessary, as the example of other sports shows. [262]

The Court has therefore quite rightly left it open in a number of cases whether Article 48 or Article 59, for example, was applicable in the particular case. It did that in the *Walrave* and *Donà* cases, which are of special interest in the present case. [263] The Court thereby clearly indicated that those two provisions employ comparable criteria and that their application led to the same result in the specific case. That confirms my opinion set out above.

202. Interpreting Article 48 in the sense proposed here would also make it possible to remove an inconsistency in the previous case-law: if one adopts the position that the content of the freedom of movement protected by Article 48 consists only of the prohibition of discrimination spelt out in that provision, then logically only the grounds of public policy, public security and public health mentioned in Article 48(3) could be adduced as justification of such discrimination. The Court has, however, held on several occasions already that in the case of *indirect* discrimination other 'objective grounds' can also justify a restriction on freedom of movement. [264] That the examination in such a case is the same examination as that employed in the context of Article 59 with respect to non-discriminatory restrictions on freedom to provide services follows expressly from the judgments handed down in 1992 in *Bachmann* [265] and *Commission* v *Belgium*. [266] The opinion put forward here would make it possible to do away with that contradiction.

(3) Article 48 as a fundamental right

203. Finally, it seems to me that only the interpretation I have put forward is capable of doing justice to the character of the right to freedom of movement as a 'fundamental

261 — Thus earlier this year FC Bayern München, for example, because of the unavailability of several players, borrowed a player from a Spanish team for the second half of the 1994/95 Bundesliga season.

262 — When the North American ice hockey league was paralysed by a strike last autumn, ingenious German club managers engaged some star players from that league for one match or a few matches in the German ice hockey league.

263 — See point 122 above and the *Donà* judgment, cited above (note 61), paragraph 19.

264 — See only the judgment in Case C-272/92 *Spotti* [1993] ECR I-5185, paragraph 18. See also on this point Denis Martin, 'Réflexions sur le champ d'application matériel de l'article 48 du traité CE (à la lumière de la jurisprudence récente de la Cour de justice)', *Cahiers du droit européen* 1993, p. 555, at p. 577 et seq.

265 — Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, paragraphs 27 and 32-33 taken together.

266 — Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraphs 20 and 23 taken together.

right which the Treaty confers individually on each worker in the Community'. [267] Any restriction of the right to freedom of movement infringes a fundamental right of the person concerned and therefore requires justification. Since it is a fundamental right which is being infringed, I cannot see, any more than Advocate General Jacobs in his Opinion in the *Konstantinidis* case, how the non-discriminatory character of the measure could mean that it did not fall within the scope of Article 48. [268] For that reason too, I am therefore of the opinion that Article 48 must also apply to non-discriminatory restrictions on freedom of movement. That must at least be the case when the restriction relates to *access* to the employment market in other Member States.

(dd) Possible objections to that view

204. There are some objections which can be raised against the opinion put forward here, and they must still be discussed. The most important counter-argument is certainly that based on the Court's recent case-law on Article 30. As is well-known, in its above-mentioned judgment in *Keck and Mithouard* the Court revised its earlier case-law on Article 30. According to that judgment, 'contrary to what has previously been decided', Article 30 is not intended to preclude the application of national provisions 'restricting or prohibiting certain selling arrangements', 'so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. [269] That decision has since been confirmed on several occasions. [270] It follows from those judgments that they apply only to rules on *selling arrangements*. National provisions which relate to the *presentation* of goods and the like are still to be assessed by reference to Article 30, even if they are applied to domestic and imported goods without distinction. [271] Nevertheless, the scope of Article 30 was thereby restricted by the Court. The question therefore arises whether in view of that an *extension* of the scope of Article 48 appears appropriate. Several of those taking part in the present proceedings have referred to that point of view.

205. I consider that the recent case-law on Article 30 does not preclude the view I have put forward with respect to the interpretation of Article 48. I share the opinion that the scope of Article 30 has at times been stretched too far in the past. [272] The recent decisions have remedied that, although one may well wonder whether the approach

267 — As stated in the passage from *Heylens* cited above (see point 174 above).

268 — Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1198, at p. I-1212.

269 — Cited above (note 253), paragraph 16.

270 — See, most recently, the judgment of 11 August 1995 in Case C-63/94 *Belgapom*, [1995] ECR I-2467, paragraph 12.

271 — See, for example, the judgment of 6 July 1995 in Case C-470/93 *Mars* [1995] ECR I-1923, paragraphs 12 to 14.

272 — One need only recall the difficulties for the case-law caused by the question of the treatment of the prohibition of Sunday trading.

chosen by the Court represents the best solution. It must not be forgotten, however, that the initial situation in the field of Article 48 is altogether different, since here there is as yet no settled case-law to the effect that even measures which apply without distinction are caught by that provision. The extended interpretation of that provision which I propose does not mean that *all* non-discriminatory measures which actually or potentially restrict freedom of movement must necessarily be subjected to the same strict conditions for justification. If one wished to adduce the case-law on Article 30 by analogy in this respect, one might consider drawing a distinction between measures which regulate *access* to occupational activity and measures which are directed more to the *exercise* of that activity. [273]

206. I think that I too can invoke the Court's case-law in this respect, however. My view on the interpretation of Article 48 is based — as has been seen — to a large extent on the parallels with Article 59 and the case-law on that provision. Since that case-law has been developed by analogy with that on Article 30, one might have expected that the *Keck and Mithouard* judgment would not have been without influence on it. As yet, however, that has not been the case.

In the *Schindler* judgment in 1994 the Court confirmed once again that non-discriminatory measures can fall within Article 59. [274] An express confrontation with the later case-law on Article 30 can be found in the recent judgment in *Alpine Investments*. [275] That case concerned a Netherlands measure prohibiting a company which specialized in commodities futures from contacting potential clients in the Netherlands and abroad by telephone without their prior consent in writing. The question arose whether that prohibition of 'cold calling' infringed Article 59. The Netherlands and the United Kingdom had argued, citing the *Keck and Mithouard* judgment, that the prohibition did not fall within the scope of Article 59, since it was generally applicable and non-discriminatory and neither its object nor effect was to create an advantage for the national market.

The Court rejected that argument. It considered that the ground for the decision reached in *Keck and Mithouard* lay in the fact that the provision at issue in that case was not such as to 'prevent' *access* of foreign products to the market or 'impede such access more than it impedes access by domestic products'. The prohibition at issue in *Alpine Investments*, by contrast, 'directly affects

273 — The distinction made in Article 48(3)(a) and Article 48(3)(c) might perhaps be taken as a starting-point.

274 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 43.

275 — Judgment of 10 May 1995 in Case C-384/93 *Alpine Investments*, [1995] ECR I-1141.

access to the market in services in the other Member States and is thus capable of hindering intra-Community trade in services'. [276]

That reasoning can be applied to the field of Article 48. It must be noted in particular that the transfer rules at issue in the present case directly affect access to the employment market in other Member States. [277]

207. A further argument against an extended interpretation of Article 48 and Article 52 is based on the case-law on Article 34, which prohibits quantitative restrictions on exports and measures having equivalent effect. The Court has of course held that Article 34 concerns measures which 'have as their *specific* object or effect the restriction of patterns of exports' and thereby provide a '*particular* advantage' for national production. [278] If one assumed that measures of a Member State applicable without distinction which made it difficult for its own nationals or third parties to exercise their right to freedom of movement fell within Article 48, one would, however, in the view of many writers, find oneself contradicted by that case-law. [279] Even if that were the case, one should not in my opinion conclude therefrom that Article 48 should be given a restrictive interpretation. Rather the case-law on Article 34 would have to be reconsidered instead. A hindrance to the exercise of the right to freedom of movement must thus always be assessed by reference to Article 48. [280]

208. I have already stated my position on the significance for the present case of the principle of subsidiarity. [281]

(ee) Application to the transfer rules

209. Even if one were to assume that the transfer rules were applied throughout the Community without distinction to transfers within a Member State and to transfers to another Member State, it would still be a fact that they restrict freedom of movement: contrary to what Article 48 requires, a professional football player cannot under those rules move freely to another Member State in order to work for another club there. Rather it is necessary in every case for the transfer fee due to be paid to his former club. As I have already explained, the fact that

276 — Ibid., paragraphs 37 and 38.

277 — See point 210 below.

278 — Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409, paragraph 7 (my emphasis).

279 — For example, Moitinho de Almeida, op. cit. (note 238), p. 251 et seq.

280 — Advocate General Jacobs reached an analogous conclusion on the question of the applicability of Article 59 in his excellent Opinion of 26 January 1995 in the *Alpine Investments* case ([1995] ECR I-1141, I-1144, point 52 et seq.).

281 — See point 130 above.

under the current UEFA and FIFA rules entitlement to play for the new club is no longer to depend on the transfer fee being settled makes no difference to that circumstance. [282] There is thus a clear restriction here on the right to freedom of movement, which is caught by Article 48. That those rules also restrict the possibility of changing clubs freely within one and the same Member State can make no difference, on the view taken here.

210. The transfer rules directly restrict *access* to the employment market in other Member States. Therein they differ very significantly from other rules applicable without distinction which affect the exercise of an occupation. One example may suffice to make the difference clear. The question has just been raised again whether a professional league should for instance have 16, 18 or more clubs. It is perfectly plain that the number of clubs available affects a player's chances of finding employment with a club. The smaller the number of clubs, the more difficult it is likely to be as a rule to find employment. Nevertheless, provisions of *that* nature do not appear to me to raise doubts with respect to Article 48. They do not concern the possibility of access for foreign players as such, but the exercise of the occupation. The situation with respect to the rules on transfers is quite different: under the applicable rules a player can transfer abroad only if the new club (or the player himself) is in a position to pay the transfer fee demanded. If that is not the case, the player *cannot* move abroad. That is a *direct* restriction on access to the employment market. Since the transfer fee is demanded by the previous club and the hindrance to the transfer — even if it is also required by the rules of the international federations — thus originates in the sphere of the Member State of origin, the situation can very well be compared with that in the *Alpine Investments* case.

211. URBSFA has relied, in support of its view that Article 48 cannot apply here, *inter alia* on a decision of the European Commission of Human Rights in 1983. [283] That case concerned a Dutch professional football player, who argued that the rules on transfers infringed in particular Article 4(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Under that provision, no one may be required to perform 'forced or compulsory labour'. The European Commission of Human Rights dismissed the complaint. [284] It based its decision on two considerations. First, the applicant had decided of his own free will to become a professional footballer, in the knowledge that he would be affected by the rules in question. Second, those rules did not directly affect the player's freedom of contract.

282 — See point 150 above.

283 — Decision of 3 May 1983 in Application No 9322/81 (X v the Netherlands), European Commission of Human Rights, *Decisions and Reports* 32, p. 180.

284 — The complaint was rejected as manifestly unfounded and hence inadmissible (see *Nederlandse Jurisprudentie* 1984, p. 977, at p. 978 — in so far as not reproduced in the official reports).

Those considerations are of no significance for the present case. The transfer rules indeed do not 'directly' force the player to perform 'forced or compulsory labour'. The provisions of Community law, however, are directed at quite different objectives. Article 48 of the EC Treaty protects generally the right to trans-frontier freedom of movement in the Community. Moreover, the European Human Rights Commission's reasoning that an infringement of rights could be excluded because the person concerned had by choosing that occupation accepted any restrictions which might be bound up therewith seems to me to be altogether questionable. Much more convincing is the decision handed down in 1979 on the basis of German law by the Landesarbeitsgericht (Higher Labour Court) Berlin in a comparable case. The Landesarbeitsgericht adopted the position that the transfer rules restricted the free choice of place of employment and therefore infringed Article 12 of the Grundgesetz (Basic Law). In the Landesarbeitsgerichts's opinion it was not permissible even for private agreements to conflict with that provision, with the result that any acceptance of those rules by the player was irrelevant. [285]

212. I therefore consider, in agreement with Mr Bosman, that the transfer rules are in breach of Article 48 and would be lawful only if they were justified by *imperative reasons in the general interest* and did not go beyond what is necessary for attaining those objectives. The representative of Denmark put forward the same view at the hearing before the Court. The Commission admittedly initially left the point open in its written observations. At the hearing before the Court, however, referring to its observations in Case C-340/90, in which it had already put forward that view, it indicated that it shared the opinion put forward here.

213. Most of the other participants in the proceedings, who consider that Article 48 cannot apply to non-discriminatory obstacles to freedom of movement, also put forward the view that the rules on transfers must in any event be regarded as justified on the basis of various considerations. [286] Those possible grounds of justification must now be examined.

(ff) Possible grounds of justification

(1) General remarks

214. It is first necessary, however, to return to the question, already addressed in connection with the rules on foreign players, of the point of view from which the possible grounds for justification should be discussed.

285 — *Neue Juristische Wochenschrift* 1979, p. 2582, at p. 2583.

286 — Thus URBSFA, UEFA and Italy. Germany said nothing on this point, but expressed the view that such grounds for justification could be adduced for the rules on foreign players. Only France did not adopt a position on this question.

As stated above, in the *Walrave* and *Donà* judgments the Court spoke in this context of non-economic reasons relating exclusively to sport. [287] From the case-law on Article 30 on the one hand and Article 59 on the other hand, however, it follows that restrictions which are caught by those provisions may be justified not only by reasons of a *non-economic* nature. Considerations of an economic nature may also be relevant in so far as they are imperative reasons in the general interest. That can be seen in particular from the abovementioned *Bachmann* and *Commission* v *Belgium* judgments, in which the Court held that restrictions on freedom of movement can be lawful if they are necessary to ensure the 'cohesion of the tax system'. [288]

215. The formulation chosen in *Walrave* and *Donà* thus presumably meant something else. In my opinion the Court is referring in those judgments to rules which are of an *exclusively* sporting nature and are therefore not covered by Community law. For the right to freedom of movement enshrined in Article 48, it is indeed irrelevant whether a match lasts 90 or only 80 minutes, for example, or whether two points or three are awarded for a win. The rules on transfers are different. They directly restrict the right to freedom of movement, and are thus lawful only if justified by imperative reasons in the general interest.

216. In this connection it appears appropriate to address an argument of principle which is used in justification of those and other rules. It is argued that sports associations can rely on the right to freedom of association, and that that right may clash with the individual sportsman's right to freedom of movement and must therefore be brought into harmony with that right. [289] Now it is certainly undeniable that the sports associations have the right and the duty to draw up rules for the practice and organization of the sport, and that that activity falls within the association's autonomy which is protected as a fundamental right. [290] That does not mean, however, that for resolving the conflict between the right to freedom of movement and the right of association, a simple 'balancing of rights' would suffice. [291] The fundamental importance of Article 48 for the internal market, which the Court has expressly emphasized on several occasions, [292] would not be given sufficient account thereby. One must therefore agree with the view that only an 'interest of the association which is of paramount importance' could justify a restriction on freedom of movement. [293] Such interests can, if they arise, be subsumed in my opinion under the concept of imperative reasons in the general interest.

217. It should be mentioned, finally, that the question of the possible justification of the

287 — See points 122 and 124 above.

288 — *Bachmann*, cited above (note 265), paragraph 21 et seq.; *Commission* v *Belgium*, cited above (note 266), paragraph 14 et seq.

289 — See, for example, Werner Schroeder, *Sport und Europäische Integration*, Munich 1989, p. 191 et seq.

290 — See, for instance, with respect to German law, the judgment of the Bundesgerichtshof of 28 November 1994 (*Neue Juristische Wochenschrift* 1995, p. 583, at p. 584).

291 — As argued by Schroeder, however, op. cit. (note 289), p. 199.

292 — See only the passage from the *Heylens* judgment cited above (point 174 above).

293 — Hilf, op. cit. (note 123), p. 522.

transfer rules is also important with respect to the provisions on competition, and has been discussed by the parties in that context. In so far as necessary for the examination of the present issue, I shall therefore also address here the arguments which have been put forward on Articles 85 and 86.

(2) Maintenance of the financial and sporting equilibrium

218. A number of points have been put forward as justification of the transfer rules. The most significant of them is in my opinion the assertion that the rules on transfers are necessary in order to preserve a certain financial and sporting balance between clubs. It is argued that the purpose of those rules is to ensure the survival of smaller clubs. At the hearing before the Court of Justice URBSFA expressly submitted in this connection that the transfer fees paid guaranteed the survival of the amateur clubs.

That argument amounts to an assertion that the system of transfer rules is necessary to ensure the organization of football as such. If no transfer fees were payable when players moved, the wealthy clubs would easily secure themselves the best players, while the smaller clubs and amateur clubs would get into financial difficulties and possibly even have to cease their activities. There would thus be a danger of the rich clubs always becoming even richer and the less well-off even poorer.

219. If that assertion was correct, then in my opinion it could indeed be assumed that the transfer rules were compatible with Article 48. Football is of great importance in the Community, both from an economic and from a sentimental point of view. As I have already mentioned, many people in the Community are interested in football. The number of spectators in stadiums and in front of television screens emphatically confirms that. In some towns the local football team is one of the big attractions which contribute decisively to the fame of the place. Thus in Germany there are probably only a few interested contemporaries who do not associate the town of Mönchengladbach with football. The big clubs have in addition long since become an important economic factor. It would thus be possible, in my opinion, to regard even the maintenance of a viable professional league as a reason in the general interest which might justify restrictions on freedom of movement. In this connection it should be observed that I share the opinion — as moreover do the other parties to the proceedings — that a professional league can flourish only if there is no too glaring imbalance between the clubs taking part. If the league is clearly dominated by one team, the necessary tension is absent, and the interest of the spectators will thus probably lapse within a foreseeable period.

Even more important is the field of amateur sport. There are currently a great many

amateur clubs in which young people and adults are given an opportunity for sporting activity. The importance for society as such of the availability of a sensible leisure occupation needs no further explanation. If the transfer rules were necessary to guarantee the survival of those amateur clubs, that would without doubt be an imperative reason in the general interest, relevant in the context of Article 48.

220. It must therefore be examined whether the rules on transfers in fact have the significance attributed to them by URBSFA, UEFA and others. A distinction must be drawn between the effects on amateur clubs on the one hand and professional clubs on the other hand.

221. As regards the amateur clubs, no specific arguments, let alone figures, have been submitted to support the assertion that the abolition of the transfer rules would have life-threatening consequences for those clubs or at least for some of them. But the question need not be considered further in any case. The corresponding question submitted by the Liège Cour d'Appel for a preliminary ruling relates to the situation under the transfer rules of a player *whose contract expires*. What is concerned is thus the transfer of a *professional player* to another club. As I have stated above, [294] there is thus no need to clarify in the present proceedings whether it is compatible with Community law that a transfer fee is payable on the transfer of an amateur player to a professional club. The present question is thus confined to professional football. It cannot be seen what effect the answer to the question of the lawfulness of the rules on transfers in *that* field could have on amateur clubs.

222. As regards the professional clubs too the interested associations have produced little convincing, specific material to support their argument. In my estimation the report on English football by Touche Ross, submitted by UEFA and already mentioned above, has the greatest significance for the examination required here. In England there is of course a four-level professional league divided up into — from top to bottom — the Premier League and the First, Second and Third Divisions. From the figures given in that report it can be seen that in the period used as a basis [295] the clubs in the Premier League spent a total of about £ 18.5 million net (that is, after deducting income from transfer fees received by them) on new players. After deducting that sum from total receipts, the clubs were still left with a total profit of £ 11.5 million. The clubs in the First Division, by contrast, made a surplus on transfer deals of a good £ 9.3 million, those in the Second Division a

294 — See point 60 above.

295 — This was (apart from some exceptions) the 1992/93 season.

surplus of just £ 2.4 million and those in the Third Division a surplus of around £ 1.6 million. It is noteworthy in addition that for the latter three divisions there was in each case a loss on ordinary trading which was more than covered by the income from transfers. [296]

Those figures are an impressive demonstration of what an important role the lower divisions play as a reservoir of talent for the top division. They also show that income from transfers represents an important item in the balance sheets of the lower division clubs. If the transfer rules were to be regarded as unlawful and those payments thus ceased, one would expect those clubs to encounter serious difficulties.

223. I thus entirely agree with the view, once more put forward clearly by URBSFA and UEFA at the hearing before the Court, that it is of fundamental importance to share income out between the clubs in a reasonable manner. However, I am nevertheless of the opinion that the transfer rules in their current form *cannot* be justified by that consideration. It is doubtful even whether the transfer rules are capable of fulfilling the objective stated by the associations. In any event, however, there are other means of attaining that objective which have less effect, or even no effect at all, on freedom of movement.

224. With reference to the question of the suitability of those rules for achieving the desired objective, it must first be observed that the rules currently in force probably very often force the smaller professional clubs to sell players in order to ensure their survival by means of the transfer income thereby obtained. Since the players transferred to the bigger clubs are as a rule the best players of the smaller professional clubs, those clubs are thereby weakened from a sporting point of view. It is admittedly true that as a result of the income from transfers those clubs are placed in a position themselves to engage new players, in so far as their general financial situation permits. As has been seen, however, the transfer fees are generally calculated on the basis of the players' earnings. Since the bigger clubs usually pay higher wages, the smaller clubs will probably hardly ever be in a position themselves to acquire good players from those clubs. In that respect the rules on transfers thus strengthen even further the imbalance which exists in any case between wealthy and less wealthy clubs. The Commission and Mr Bosman correctly drew attention to that consequence.

225. Mr Bosman has also submitted with some justification that the rules on transfers do not prevent the rich clubs from engaging the best players, so that they are only suitable to a limited extent for preserving the sporting equilibrium. The obligation to expend a sometimes substantial sum of

296 — Op. cit. (note 65), appendices 1-4.

money for a new player is indeed no great obstacle for a wealthy club or a club with a wealthy patron. That is emphatically shown by the examples of AC Milan and Blackburn Rovers. [297]

The financial balance between the clubs is moreover also not necessarily strengthened by the rules on transfers. If a club engages players from clubs in other Member States or non-member countries, the funds required for the purchases flow abroad without the other clubs in the same league as the club in question benefiting therefrom.

226. Above all, however, it is plain that there are alternatives to the transfer rules with which the objectives pursued by those rules can be attained. Basically there are two different possibilities, both of which have also been mentioned by Mr Bosman. Firstly, it would be possible to determine by a collective wage agreement specified limits for the salaries to be paid to the players by the clubs. That possibility was described in more detail by Mr Bosman in his observations. He observed, however, that that possibility is not as effective as the alternative, which I am about to discuss. In view of what I am about to say, it is thus not necessary for me to say any more on this possibility. Secondly, it would be conceivable to distribute the clubs' receipts among the clubs. Specifically, that means that part of the income obtained by a club from the sale of tickets for its home matches is distributed to the other clubs. Similarly, the income received for awarding the rights to transmit matches on television, for instance, could be divided up between all the clubs.

To avoid any misunderstanding, I would like to state clearly in this connection that I do not include financial support by means of State subsidies among the alternatives discussed here. The reason for that is that such subsidies would go beyond what is possible for the football associations, on the basis of their autonomy, using their own resources. Professional football would thereby be placed on a basis quite different from that at issue in the present proceedings.

227. It can scarcely be doubted that such a redistribution of income appears sensible and legitimate *from an economic point of view*. UEFA itself has rightly observed that football is characterized by the mutual economic dependence of the clubs. Football is played by two teams meeting each other and testing their strength against each other. Each club thus needs the other one in order to be successful. For that reason each club has an interest in the health of the other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. Therein lies — as both UEFA and Mr Bosman have rightly stated — a significant difference from the competitive relationship between undertakings in

297 — According to the Touche Ross report, Blackburn Rovers ended the 1992/93 season, which was very successful for them from the sporting point of view (Rovers were promoted to the Premier League), with a loss of some £ 6.4 million before tax (op. cit. (note 65), appendix 1). AC Milan ended the 1992/93 season, according to the information available to me, with a loss of 1.7 thousand million lire; in the previous accounting period the loss had been as much as 8.3 thousand million lire (*Neue Zürcher Zeitung*, international edition, No 196 of 25 August 1995, p. 46).

other markets. It is likewise correct that the economic success of a league depends not least on the existence of a certain balance between its clubs. If the league is dominated by one overmighty club, experience shows that lack of interest will spread.

If every club had to rely on financing its playing operations exclusively by the income it received from the sale of tickets, radio and television contracts and other sources (such as advertising, members' subscriptions or donations from private sponsors), the balance between the clubs would very soon be endangered. Big clubs like FC Bayern München or FC Barcelona have a particular power of attraction which finds expression in high attendance figures. Those clubs thereby also become of great interest for television broadcasters and the advertising sector. The large income resulting from that permits those clubs to engage the best players and thereby reinforce their (sporting and economic) success even more. For the smaller clubs precisely the converse would happen. The lack of attractiveness of a team leads to correspondingly lower income, which in turn reduces the possibilities of strengthening the team.

Mr Bosman has admittedly pointed out that there are those who consider that the necessary balance results as it were automatically, since by reason of the facts described above no club can be interested in achieving an overwhelming superiority in its league. Experience shows, however, that club managements do not always calculate in that way, but may at times allow themselves to be led by considerations other than purely sporting or economic ones. It therefore is indeed necessary, in my opinion, to ensure by means of specific measures that a certain balance is preserved between the clubs. One possibility is the system of transfer payments currently in force. Another possibility is the redistribution of a proportion of income.

228. Mr Bosman submitted a number of economic studies which show that distribution of income represents a suitable means of promoting the desired balance. [298] The concrete form given to such a system will of course depend on the circumstances of the league in question and on other considerations. In particular it is surely clear that such a redistribution can be sensible and appropriate only if it is restricted to a fairly small *part* of income: if half the receipts, for instance, or even more was distributed to other clubs, the incentive for the club in question to perform well would probably be reduced too much. [299]

298 — See, for example, Stefan Késenne, 'De economie van de sport. Een overzichtsbijdrage', *Economisch en Sociaal Tijdschrift* 1993, p. 359, at p. 376.

299 — J. Cairns, N. Jennett and P. J. Sloane, 'The Economics of Professional Team Sports: A Survey of Theory and Evidence', [1986] *Journal of Economic Studies*, p. 3, put forward the view (citing Professor Noll) that the following solution would be reasonable: the home club receives 50% and the away club 25% of the receipts; the remaining 25% goes to the association for distribution among all the clubs in the league. Also of interest in this connection are the observations by Professor R. Noll, submitted by him in July 1992 in the case of *McNeil* v *NFL* in the District Court of Minnesota, 4th Division, of which Mr Bosman has supplied a transcript. According to those observations, at the material time in the USA 60% of income received in American football (more than in any other sport) is distributed. In Professor Noll's opinion, that proportion was too large, since it reduced the incentive to perform (op. cit., columns 2654 ff.).

229. Neither URBSFA no UEFA disputed that that solution is a realistic possibility which makes it possible to promote a sporting and financial balance between clubs. If I am not very much mistaken, they did not even attempt to rebut the arguments put forward by Mr Bosman in this connection.

230. It seems to me that that is not a matter of chance. The associations too can scarcely dispute that that possibility is an *appropriate* and *reasonable* alternative. The best evidence for that is the circumstance that corresponding models are already in use in professional football today. In the German cup competition, for example, the two clubs involved each to my knowledge receive half of the receipts remaining after deduction of the share due to the DFB. The income from awarding the rights of television and radio broadcasts of matches is distributed by the DFB among the clubs according to a specified formula. [300] The position is presumably much the same in the associations of the other Member States.

A redistribution of income also takes place at UEFA level. Under Article 18 of the UEFA statutes (1990 edition), UEFA is entitled to a share of the receipts from the competitions it organizes and from certain international matches. A good example is the UEFA Cup rules for the 1992/93 season, which have been produced to the Court by URBSFA. Under those rules UEFA receives for each match a share of 4% of gross receipts from the sale of tickets and 10% of receipts from the sale of the radio and television rights. For the two legs of the final UEFA's share is increased to as much as 10% and 25% respectively. [301]

231. While that system serves to cover the expenditure of UEFA and thus only indirectly — by means of corresponding grants by UEFA to certain associations or clubs [302] — leads to a redistribution of income, the case is different with the 'UEFA Champions League'. That competition, which took the place of the earlier European Champions' Cup, was introduced by UEFA in 1992. A UEFA document produced to the Court by Mr Bosman provides information on the purpose and organization of that competition. The objective is stated to be the promotion of the interests of football. It is specifically noted that the profit is not only to be for the benefit of the clubs taking part, but all the associations are to receive a share of it.

A balance of the 1992/93 season makes that clear. According to that, the eight clubs which took part in the competition each kept

300 — See on this point Paragraph 3(5) of the Lizenzspielerstatut of the DFB.

301 — See Articles 28 and 21 of the rules.

302 — One may mention, for example, the support given by UEFA to certain associations in eastern Europe and the former Soviet Union, enabling the countries concerned to take part in the qualifying matches for the European football championship.

the receipts from the sale of tickets for their home matches. In addition to that, the competition produced an income of 70 million Swiss francs from the marketing of television and advertising rights. That amount was divided up as follows. The participating clubs received SFR 38 million (54%). A further SFR 12 million (18%) was distributed to all the clubs which had been eliminated in the first two rounds of the three UEFA competitions for club teams. SFR 5.8 million (8%) was distributed between the 42 member associations of UEFA. The remaining SFR 14 million (20%) went to UEFA, to be invested for the benefit of football, in particular for the promotion of youth and women's football.

232. The example of the Champions League in particular clearly demonstrates, in my opinion, that the clubs and associations concerned have acknowledged and accepted in principle the possibility of promoting their own interests and those of football in general by redistributing a proportion of income. I therefore see no unsurmountable obstacles to prevent that method also being introduced at national level or at the level of the relevant association. By designing the system in an appropriate way it would be possible to avoid the incentive to perform well being reduced excessively and the smaller clubs becoming the rich clubs' boarders. I cannot see any negative effects on the individual clubs' self-esteem. Even if there were such effects, they would be purely of a psychological nature and thus not such as to justify a continued restriction on freedom of movement resulting from the transfer system.

233. Finally, it must be observed that a redistribution of a part of income appears substantially more suitable for attaining the desired purpose than the current system of transfer fees. It permits the clubs concerned to budget on a considerably more reliable basis. If a club can reckon with a certain basic amount which it will receive in any case, then solidarity between clubs is better served than by the possibility of receiving a large sum of money for one of the club's own players. As Mr Bosman has rightly submitted, the discovery of a gifted player who can be transferred to a big club for good money is very often largely a matter of chance. Yet the prosperity of football depends not only on the welfare of such a club, but also on all the other small clubs being able to survive. That, however, is not guaranteed by the present rules on transfers.

234. In so far as the rules on transfers pursue the objective of ensuring the economic and sporting equilibrium of the clubs, there is thus at least one alternative by means of which that objective can be pursued just as well and which does not adversely affect players' freedom of movement. The transfer rules are thus not indispensable for attaining that objective, and thus do not comply with the *principle of proportionality*.

(3) Compensation for the costs of training

235. The second important argument on which the associations concerned base their opinion that the transfer system is lawful consists in the assertion that the transfer fees are merely compensation for the costs incurred in the training and development of a player. The Italian and French Governments have also adopted that argument. It is of course closely connected with the first argument, which I have just discussed.

236. However often that view has been repeated in the course of these proceedings, it still remains unconvincing.

237. The transfer fees cannot be regarded as compensation for possible costs of training, if only for the simple reason that their amount is linked not to those costs but to the player's earnings. Nor can it seriously be argued that a player, for example, who is transferred for a fee of one million ECU caused his previous club to incur training costs amounting to that vast sum. A good demonstration that the argument put forward by the associations is untenable can be found in the DFB transfer rule, described above, for the transfer of an amateur player to a professional club. As we have seen, under that rule a first division club had to pay a transfer fee of DM 100 000, whereas a second division club had to pay only DM 45 000 for the same player. [303] That shows that the amount of the transfer fee quite evidently is *not* orientated to the costs of training.

A second argument against regarding transfer fees as a reimbursement of the training costs which have been incurred is the fact that such fees — and in many cases extraordinarily large sums — are demanded even when experienced professional players change clubs. Here there can no longer be any question of 'training' and reimbursement of the expense of such training. Nor does it make any difference that in such cases it is often 'compensation for development' (not compensation for training) which is spoken of. Any reasonable club will certainly provide its players with all the development necessary. But that is expenditure which is in the club's own interest and which the player recompenses with his performance. It is not evident why such a club should be entitled to claim a transfer fee on that basis. The regulations of the French and Spanish associations have, quite rightly in my opinion, drawn the conclusion that — at least after a specified moment in time — no transfer fees can be demanded any more. [304]

303 — See point 29 above.

304 — See point 31 et seq. above.

238. Finally, it is self-evident that the training of any player involves expense. Reimbursement of that expenditure would thus depend on whether or not that player was transferred to another club. That too shows that the reasoning advanced by the interested parties does not hang together.

239. That does not mean, however, that a demand for a transfer fee for a player would, following the view I have put forward, have to be regarded as unlawful in every case. The argument that a club should be compensated for the training work it has done, and that the big, rich clubs should not be enabled to enjoy the fruits of that work without making any contribution of their own, does indeed in my opinion have some weight. For that reason it might be considered whether *appropriate* transfer rules for professional footballers might not be acceptable. Mr Bosman himself concedes that such transfer rules might be reasonable as regards transfers of amateur players to professional clubs. That question need not be discussed further in the present proceedings, which concern only changes of clubs by professional players. The Commission, however, suggested quite generally that a *reasonable* transfer fee may be justified.

Such rules would in my opinion have to comply with two requirements. First, the transfer fee would actually have to be limited to the amount expended by the previous club (or previous clubs) for the player's training. Second, a transfer fee would come into question only in the case of a first change of clubs where the previous club had trained the player. Analogous to the transfer rules in force in France, that transfer fee would in addition have to be reduced proportionately for every year the player had spent with that club after being trained, since during that period the training club will have had an opportunity to benefit from its investment in the player.

The transfer rules at issue in the present case do not meet those requirements, or at best meet them in part. Moreover, it is not certain that even such a system of transfer rules could not also be countered by Mr Bosman's argument that the objectives pursued by it could also be attained by a system of redistribution of a proportion of income, without the players' right to freedom of movement having to be restricted for that purpose. The associations have not submitted anything which might refute that objection. It should be noted, moreover, that the above-mentioned DFB rules on the transfer of amateur players to professional clubs, for instance, appear to follow basically similar considerations with their differing standard amounts.

(4) Other arguments

240. In addition to the above arguments, a number of other considerations have also been put forward as justification for the rules on transfers; they must now be considered.

241. UEFA has submitted that the payment of transfer fees enables and even encourages the clubs to search for talented players, an activity which is vital for football. Even if that is the case, I do not see why it should be necessary for that purpose to make the transfer of players depend on the payment of a transfer fee. The possibility, already referred to several times, of redistributing a share of income would also give clubs the financial means for the discovery and training of talented young players. Such a system of redistribution can also very well be designed in such a way as to allow incentives to be maintained for seeking out talent and providing good training. [305]

242. The argument, also advanced by UEFA, that transfer fees make it possible for the clubs to take on staff — which probably did not only mean players — I do not find convincing. As I have already shown, there are other possible methods of financing open to the clubs which do not affect the freedom of movement of players.

243. The argument that the payment of transfer fees must be permitted in order to compensate clubs for the amounts they themselves have had to spend on transfer fees when engaging players requires no further discussion: that argument contains a *petitio principii*. So does the argument that the purpose of the transfer fee is to compensate the loss which the club incurs because of the player's departure: that presupposes precisely that a player can be regarded as a sort of merchandise for the replacement of which a price is to be paid. Such an attitude may correspond to today's reality, as characterized by the transfer rules, in which the 'buying' and 'selling' of players is indeed spoken of. That reality must not blind us to the fact that that is an attitude which has no legal basis and is not compatible with the right to freedom of movement.

244. Mr Bosman has expressed the supposition that the transfer rules are intended to serve the purpose of reserving the sums in question for the clubs: according to the view he has put forward, the abolition of the transfer rules would lead to a general increase in players' wages. There is something to be said for that view. If the transfer rules really were — *inter alia* — based on

305 — One could for example, imagine a system which takes into account, when distributing the corresponding sum to the clubs, how many of each club's players have been engaged by big clubs or clubs in higher leagues.

that (economic) purpose, it would in any event not be such as to justify the consequent restriction on freedom of movement, since no interest of the clubs deserving of legal protection can be discerned in their paying lower salaries than would be payable in normal circumstances in the absence of the transfer rules and thereby benefiting at the expense of the players.

245. URBSFA has submitted that the present rules on transfers pursue the aim of guaranteeing the quality of football and promoting sporting activity and the sporting ethos. That argument appears to me to be directed essentially to the amateur sphere, which — to repeat it once again — is not concerned by the present proceedings. Moreover, it is not evident in any case how the transfer rules are supposed to help attain those very generally stated objectives. I also have considerable doubts as to whether a system which ultimately amounts to treating players as merchandise is liable to promote the sporting ethos.

246. A more important objection is that the continued existence of those rules is necessary to guarantee the maintenance of the worldwide organization of football. The question of the compatibility of those rules with Community law is of significance for world football only in so far as the associations in the Community are affected. It is thus clear that the decision in the present case will apply to those associations only. If the Court follows the opinion I am advancing, it will no longer be possible within the Community to make the transfer of a professional footballer whose contract has expired and who is a national of a Member State to a club in another Member State depend on the payment of a transfer fee. It will, on the other hand, be open to associations in non-member countries to maintain those rules. That would have the result that a club in the Community wishing to engage a player who previously played for a club in a non-member country would still have to pay a transfer fee — even if that player was a national of one of the Member States of the Community. That could well create difficulties.

Those difficulties must not be exaggerated, however. The example of France (and to a certain degree Spain) shows that even now the system of transfer fees can be largely dispensed with within a Member State while continuing to be applicable to relations with other countries. There is thus nothing to prevent the Community being treated as a unit within which transfer fees are to be dispensed with, while being maintained for transfers to or from non-member countries. Moreover, that altogether corresponds in my opinion to the logic of the internal market.

247. Finally, I must mention the fear that the abolition of the existing rules on transfers would lead to dramatic changes in football or even to an expropriation. [306] The view I have put forward would certainly mean that

306 — See, for example, Jean-Paul Lacomble, 'De quelques problèmes de cohabitation entre le monde sportif et le monde civil', *Journal des tribunaux de travail* 1992, p. 461, at p. 463 ('une véritable expropriation').

considerable changes would have to be made to the organization of professional football in the Community. In the medium and long term, however, no insuperable difficulties should arise. As the introduction by UEFA of the Champions League shows, for instance, the associations are perfectly capable of taking the measures necessary for the good of football. In the short term the abolition of transfer fees will certainly entail some hardships, especially for those clubs which have only recently invested money in such transfer fees. There can be no question of an expropriation, however. If someone regards players as merchandise with a monetary value, whose value may in some cases even be included in the balance sheet, he does so at his own risk. Moreover, it must be observed that the abolition of transfer fees will at the same time bring a club benefits, by giving it the possibility of taking on new players without having to pay a transfer fee. As to the clubs which have only just 'bought' new players, it must be noted that the contracts concluded with the players run for a specified term, during which those players can leave the club only with the club's agreement. The ending of transfer fees will thus become noticeable for those clubs only when that period has expired.

(5) Recapitulation

248. From all the above, it thus follows in my opinion that the transfer rules hitherto in force are not justified by a reason in the general interest. The legitimate objectives pursued by them can also be attained by means of other alternatives which have less effect, or even no effect, on the players' right to freedom of movement. The transfer rules are therefore not indispensable for attaining those objectives. The most important of those alternatives consists in a redistribution of part of the income received by the clubs. That method is already applied today in specific areas by the associations and clubs concerned. It is thus by no means a hypothetical or unrealistic alternative forced on football from outside. Which system the associations and clubs put in the place of the present transfer rules with their system of transfer fees is in any event a matter for them themselves. The only condition imposed by Community law in that respect is that the right of players to freedom of movement, protected by Article 48 of the EC Treaty, must remain guaranteed.

249. The answer to the question of the Cour d'Appel, Liège, relating to the rules on transfers — as regards Article 48 — must therefore be that it is not compatible with that provision if, on the transfer of a professional player whose contract has expired, the new club has to pay a transfer fee to the previous club.

250. That not only corresponds to the view put forward by Mr Bosman. The Commission too expressed the same opinion at the hearing.

251. It seems to me to be especially significant, however, that a Member State — the Kingdom of Denmark — has also put forward this view. That shows that the Member States have no inherent interest in the preservation of that transfer system.

252. The view put forward here is also in harmony with the view for which the European Parliament has long contended. In this respect I may content myself with referring to the report of its Committee on Legal Affairs and Citizens' Rights on the freedom of movement of professional footballers within the Community of 1 March 1989 [307] and the report of the Committee on Culture, Youth, Education and the Media on 'The European Community and Sport' of 27 April 1994 [308] and to the resolutions of the European Parliament, adopted on that basis, of 11 April 1989 [309] and 21 November 1991. [310]

V — *Interpretation of Articles 85 and 86*

1. Relationship with Article 48

253. The Commission expressed the opinion in its written observations that with respect to the rules on transfers, only the competition provisions of the EC Treaty should be applied, and not Article 48. At the hearing, however, it rightly resiled from that position. No reason can be seen why the rules at issue in this case should not be subject both to Article 48 and to EC competition law. [311] The EC Treaty at various places regulates the inter-relationship of the various fields in which its provisions apply. [312] For Article 48 on the one hand and Article 85 et seq. on the other hand there is no such provision, so that in principle both sets of rules may be applicable to a single factual situation.

2. Applicability of Article 85

(a) Undertakings and associations of undertakings

254. Article 85(1) covers agreements between undertakings, decisions by associations of undertakings and concerted practices. It must therefore first be examined whether the football clubs — and possibly their associations — can be regarded as *undertakings* and the football associations as *associations of undertakings* within the meaning of that provision.

255. The concept of undertaking, which is not defined in the EC Treaty, has the same

307 — Document PE 127.478/fin. of the European Parliament.
308 — Document PE 206.671/A/fin. of the European Parliament.
309 — OJ 1989 C 120, p. 33.
310 — OJ 1991 C 326, p. 208.

311 — On the question of the applicability of Article 85 et seq., see point 271, however.
312 — See, for instance, Article 42 and the first paragraph of Article 60.

content for Article 85 and Article 86. [313] According to the case-law, it encompasses 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. [314] It can therefore not seriously be disputed, in view of what has already been said on this point, [315] that the professional clubs engage in such an economic activity. URBSFA's argument that that is true only of the large clubs, but not of the clubs concerned by the present proceedings, since the latter carry on only a minor economic activity, is not correct: the size of the undertaking does not matter. [316] The activities of US Dunkerque and RC Liège are not different in character from those of bigger clubs. What is different is only the economic success obtained by the clubs in question from their activity. That circumstance is not relevant, however, to the question of whether there is an undertaking. The Italian Government's objection that football clubs are non-profit-making organizations is thus also wide of the mark. Even if that assertion were correct — which I consider very doubtful — it would be of no importance, since the concept of undertaking which underlies EC competition law does not presuppose a profit-making intention. [317]

256. There is likewise no doubt that the individual football associations are to be regarded as associations of undertakings within the meaning of Article 85. The fact that in addition to the professional clubs, a large number of amateur clubs also belong to those associations makes no difference.

Moreover, associations of undertakings may also be regarded as 'undertakings' within the meaning of that provision, in so far as they themselves engage in economic activity. [318]

257. That also corresponds to the case-law so far and to the decision-making practice of the Commission. In a decision of 27 October 1992 [319] the Commission discussed the compatibility with Article 85 of certain practices relating to the sale of tickets for the 1990 football World Cup in Italy. The Commission found in that connection that FIFA and the Italian football association *inter alia* carried on activities of an economic nature and were thus to be regarded as undertakings. [320] That decision has since become final. The Court of First Instance recently had to decide on an action brought by the Scottish Football Association. [321] That action was

313 — Judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 358.

314 — Judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; also judgment in Joined Cases C-159/91 and C-160/91 *Poucet* [1993] ECR I-637, paragraph 17.

315 — See point 125 and point 126 et seq. above.

316 — Gleiss and Hirsch (Martin Hirsch and Thomas O. J. Burkert), *Kommentar zum EG-Kartellrecht*, vol. 1, 4th ed., Heidelberg 1993, paragraph 26 on Article 85(1).

317 — See the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 88.

318 — Helmuth Schröter, in: Groeben, Thiesen and Ehlermann, *Kommentar zum EWG-Vertrag*, 4th ed., Baden-Baden 1991, preliminary observation on Articles 85 to 89, paragraph 17.

319 — OJ 1992 L 326, p. 31.

320 — Ibid., points 47 and 53.

321 — Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039.

directed against a decision of the Commission taken pursuant to Article 11 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty. [322] That provision allows the Commission to obtain information from undertakings and associations of undertakings. The Scottish Football Association raised various objections to the Commission's decision. It did not, however, dispute that the Commission could rely on that provision against it. The Court of First Instance therefore did not deal with the point either. That judgment has since become final and binding.

(b) Agreements between undertakings or decisions by associations of undertakings

258. The rules on foreign players and the rules on transfers are laid down in the rules of the associations concerned. At first sight there is thus much to support the assumption that the present case concerns decisions of associations of undertakings. URBSFA objects, however, that those rules merely faithfully reflect the will of the members of the associations. It appears thus to be of the opinion that what is concerned is rather agreements between the clubs. However, since Article 85 applies in the same way to both those forms of coordination, the distinction is of no importance here. [323]

259. With one exception, none of the parties has seriously attempted to dispute the view that the present case concerns agreements or decisions which are to be assessed by reference to Article 85. Only the French Government adopted the position in its written observations that the transfer rules could not be traced back to an agreement or decision. It argued that the hindrance to freedom of movement challenged by Mr Bosman did not result from the circumstance that a transfer fee had to be paid but from the fact that excessive transfer fees were demanded; no concerted practice could be seen therein, however; instead this was merely the consequence of an actual situation ('la conséquence d'une situation de fait').

I must admit that I am incapable of following that logic. In my opinion it is obvious that the transfer rules are not a natural phenomenon, but were created by the clubs and their associations.

(c) Effect on trade between Member States

260. Anti-competitive agreements and decisions fall within Article 85 only if they may affect trade between Member States. Agreements are thus covered only if they are 'capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the

322 — OJ, English Special Edition 1959-1962, p. 87.
323 — But see point 278 et seq. below.

Member States'. [324] The adverse effect must also be *appreciable*. [325] Both the former and the latter condition are fulfilled in the present case. For the rules on foreign players that is in any event self-explanatory. The rules on transfers also, however, have a substantial effect on trade between Member States. The figures for Italy quoted above, for example, tell a plain tale in that respect. [326] Moreover, it would suffice if trade between Member States was *potentially* affected in an appreciable manner. [327] That is certainly the case.

261. The objections against that assessment, advanced by UEFA in particular, are not convincing. When UEFA submits that transfers of players do not affect 'trade', it overlooks that that expression in Articles 85 and 86 is not restricted to trade in goods but covers all economic relations between the Member States. [328] The assertion that only a few players would transfer abroad cannot be used either to counter the view put forward here. As mentioned above, for trade between Member States to be affected, even a potentially appreciable effect suffices. Moreover, it is clear in any event in view of the figures which have been mentioned that even today those rules already have a considerable effect on trade between Member States. Nor does the observation by URBSFA that a considerable number of foreign players are already playing in the Belgian league speak against the assumption that the rules in question affect trade between Member States. Instead they appear to me to confirm that there is a considerable interest among players in moving abroad. As I have already mentioned, the rules on foreign players were introduced in the 1960s — that is, after the entry into force of the Treaty. The introduction of those rules and their vehement defence by the associations in the present proceedings would be incomprehensible if they in fact had no appreciable effect on trade between Member States. The rules on foreign players, like the rules on transfers, are liable to obstruct the realization of the corresponding intentions.

(d) Restriction of competition

262. In my opinion, it is also perfectly clear that the effect of the rules at issue in this case is a restriction of competition within the meaning of Article 85(1). The *rules on foreign players* restrict the possibilities for the individual clubs to compete with each other by engaging players. That is a restriction of competition between those clubs. [329] The Commission has rightly observed that those

324 — Judgment in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraph 17.

325 — See, for example, the judgment in Case 28/77 *Tepea* v *Commission* [1978] ECR 1391, paragraphs 46 and 47.

326 — See point 57.

327 — Judgment in Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraphs 14 and 15.

328 — See, for instance, the judgment in Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraph 18. For further references see Richard Whish, *Competition Law*, 3rd ed., London and Edinburgh 1993, p. 220 et seq.

329 — See, for example, Alessandra Giardini, op. cit. (note 119), p. 452; Guido Vidiri, 'La circolazione dei calciatori professionisti negli stati comunitari ed il trattato istitutivo della CEE', in: *Il rapporto di lavoro sportivo*, Rimini 1989, p. 41, at p. 52; Ruiz-Navarro Pinar, op. cit. (note 135), p. 181.

rules 'share ... sources of supply' within the meaning of Article 85(1)(c). Analogous considerations apply to the *rules on transfers*. As the Commission has stated, those rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of the chances, with respect to the engagement of players, which would be available to them under normal competitive conditions. If the obligation to pay transfer fees did not exist, a player could transfer freely after the expiry of his contract and choose the club which offered him the best terms. Under those circumstances a transfer fee could be demanded only if the player and his club had contractually agreed that in advance. The current transfer system, on the other hand, means that even after the contract has expired the player remains assigned to his former club for the time being. Since a transfer takes place only if a transfer fee is paid, the tendency to maintain the existing competition situation is inherent in the system. The obligation to pay transfer fees therefore by no means plays that 'rôle neutre' with respect to competition which UEFA ascribes to it. The rules on transfers thus also restrict competition. [330] The representative of the Danish Government also put forward that view at the hearing.

The factual elements of Article 85(1) are fulfilled if the restriction of competition represents the purpose or the effect of the corresponding agreement. In the present case it is quite obvious that the restriction of competition is not only the effect of the rules in question, but was also intended by the clubs and associations.

263. The competition which is restricted by those rules is that between the clubs. Mr Bosman admittedly also observes that the rules in question restrict the players' freedom at the same time, and in his opinion keep players' wages at a lower level than would otherwise be the case. Against that it has been argued, however, that the players themselves cannot be regarded as undertakings within the meaning of EC competition law. Admittedly, it cannot be ruled out that individual persons too may be regarded as undertakings if their activity represents a provision of services for consideration. [331] As I have already stated, however, the better reasons are probably currently in favour of regarding professional footballers as workers and not as providers of services. [332] I therefore have great doubts as to whether the considerations advanced by Mr Bosman can be relevant at all in the context of examining whether the conditions for the application of Article 85(1) are present.

The same applies to Mr Bosman's theory that the transfer rules set up a barrier to access to the market, so that for that reason

330 — The same view is expressed by Zäch, op. cit. (note 152), p. 852, who assesses the transfer rules as 'typical cartel agreements' within the meaning of Article 85(1)(c).

331 — See, for example, Lennart Ritter, Francis Rawlinson and W. David Braun, *EEC Competition Law*, Deventer and Boston 1991, p. 32; Gleiss and Hirsch, op. cit. (note 316), paragraph 23 on Article 85(1).

332 — See point 134 and point 201 above.

too there is a restriction of competition. The obstacle set up by those rules is of a purely financial nature. Anyone who has sufficient money can therefore create a top team out of a weaker or even insignificant one. There are several examples of that. It is thus highly questionable whether that aspect can be relevant for the question of the presence of a restriction of competition.

264. Against the view put forward here, doubts have been expressed essentially in three respects in the present case. Those doubts concerned firstly the question whether the rules on transfers could restrict competition at all, since they applied for all clubs and therefore constituted a factor which was neutral for competition. I have just expressed my opinion on that point. The other two arguments are substantially more important. It was argued that the restrictions in question basically served the promotion of competition and were thus compatible with Article 85(1). It was further argued that this case concerns the field of employment law, where Article 85 is quite generally inapplicable.

265. As to the first of those two arguments, it can hardly be denied that the approach behind it is correct in principle. If a rule which at first sight appears to contain a restriction of competition is necessary in order to make that competition possible in the first place, it must indeed be assumed that such a rule does not infringe Article 85(1). It would be unconvincing to reject that argument on the ground that *paragraph 3* of Article 85 in any event provides the possibility of exemption from the prohibition in paragraph 1.

266. UEFA and the Italian Government have referred in this context to the 'rule of reason'. That is a doctrine developed in American antitrust law. At the centre of the antitrust law of the United States is the general prohibition, laid down in Section 1 of the *Sherman Act*, of agreements which restrict competition. [333] Unlike Article 85, American law does not have the possibility of exemption by official decision from the prohibition of cartels. Since in principle every contract, considered purely formally, contains a restriction of competition, legal practice was thus faced with the difficulty of deciding which contracts were caught by that provision and which were not. The case-law developed a distinction between agreements which fell as such — *per se* — within that provision and those where that was not the case. In the latter cases the courts are to observe a 'rule of reason' which obliges them in particular to balance the elements in an agreement which restrict competition against the features of that agreement which promote competition. [334]

333 — 15 U. S. C. A. § 1. The corresponding passage reads: 'Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce ... is hereby declared to be illegal'.

334 — See, for instance, Whish, op. cit. (note 328), pp. 19 f. with further references.

267. It has often been argued that such a 'rule of reason' should also be applied in EC competition law. [335] Against that it has rightly been argued, however, that the differences between the two legal systems prevent the American law doctrine being taken over into Community law, [336] and the case-law has in fact so far refused to adopt that doctrine. In a judgment handed down last year the Court of First Instance expressly adopted the position that in Community law there are no '*per se*' infringements against the prohibition in Article 85(1) which cannot be exempted under Article 85(3). [337] In some of the judgments delivered by the Court of First Instance in April this year in the welded steel mesh cases, it was left open whether a 'rule of reason' could be applied in Community law, since the restrictions of competition at issue would then have to be regarded as *per se* infringements in any case. [338]

268. A glance at the case-law shows at the same time, however, that in interpreting Article 85(1) the Court of Justice does not proceed from a formal concept of restriction of competition, but carries out an evaluation. Thus it does not regard clauses which are objectively required for the performance of a specific contract which is not in itself objectionable as restrictions of competition within the meaning of that provision. That applies, for example, for (reasonable) prohibitions of competition in the event of the sale of an undertaking. [339] Moreover, the Court also regards restrictions of competition as compatible with Article 85(1) if, taking all the circumstances of the particular case into account, it is apparent that without those restrictions the competition to be protected would not be possible at all. [340] A good example of that case-law is the judgment of the Court of Justice of 14 December 1994 referred to by UEFA at the hearing. [341] That case concerned restrictions in the statutes of a cooperative association which prohibited members from participating in other forms of cooperative organization in direct competition with that association. The Court held that the compatibility of the relevant clauses with EC competition law could not be assessed 'in the abstract', but depended on the content of the particular clauses and the 'economic conditions prevailing on the markets concerned'. It concluded that membership of a competing cooperative would jeopardize the proper functioning of the cooperative and its contractual power in relation to producers. The prohibition of dual membership thus did not 'necessarily constitute a restriction of competition within the meaning of Article 85(1)' and might even 'have beneficial effects on competition'. [342]

335 — As a representative example, see the well-known work by René Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective*, Liège 1967.

336 — See, for example, Schröter, op. cit. (note 318), paragraph 75 on Article 85; Whish, op. cit. (note 328), p. 209.

337 — Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 85.

338 — Judgments of 6 April 1995 in Case T-147/89 *Société métallurgique de Normandie* v *Commission*, [1995] ECR II-1057, paragraph 90, and Case T-151/89 *Société des treillis et panneaux soudés* v *Commission*, [1995] ECR II-1191, paragraph 90.

339 — See the judgment in Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 20.

340 — See in particular the judgment in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at p. 250.

341 — Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641.

342 — Ibid., paragraphs 31 to 34.

269. Cases such as those just described show that the Court of Justice does indeed attach weight to the concerns on which the 'rule of reason' doctrine is based. Whether one can therefore say that the case-law discloses a certain trend to follow an approach based on that doctrine in Community law too, may be left open. [343] The last-mentioned judgment in any case also shows quite plainly the bounds of that case-law. The Court stated there that such restrictions escaped falling within Article 85(1) only if they were 'necessary' to ensure that the cooperative functioned properly and maintained its contractual power. It also had to be examined whether the penalties for non-compliance with the provision in question were 'disproportionate' and whether the minimum period of membership prescribed in the statutes was 'unreasonable'. [344]

That shows that only restrictions of competition which are *indispensable* for attaining the legitimate objectives pursued by them do not fall within Article 85(1).

270. As I have already stated, the field of professional football is substantially different from other markets in that the clubs are mutually dependent on each other. [345] In view of those special features, the possibility cannot therefore be dismissed that certain restrictions may be necessary to ensure the proper functioning of the sector. However, it has not been shown in the present proceedings that precisely the rules on foreign players and rules on transfers concerned here are necessary and indispensable for that purpose. The possible beneficial effects of those provisions can therefore be examined only in the context of Article 85(3).

As regards the transfer rules, I have already explained in the context of the examination under Article 48 why they are not indispensable for attaining the objectives they pursue — in so far as those objectives are legitimate. There exist alternatives, such as the redistribution of a proportion of income, for instance, which permit those objectives to be realized at least as well. I can therefore content myself here with a reference to those observations. [346]

Similar considerations apply to the rules on foreign players. With respect to them, it is much simpler still to reach the conclusion that they are not necessary or indispensable for attaining the objectives ascribed to them. [347] I can refer here to those observations too.

343 — Thus, for example, Bellamy and Child, *Common Market Law of Competition*, ed. Vivien Rose, 4th ed., London 1993, point 2-063.

344 — Cited above (note 341), paragraphs 35 and 36.

345 — See point 227 above.

346 — See point 218 et seq. above.

347 — See point 137 et seq. above.

271. The last objection to be considered here is based on the argument that it is the sphere of employment law which is concerned here. In UEFA's opinion the present case is a 'concealed wage dispute'. UEFA argues that the relationship between employer and employee is not, however, subject to the provisions of competition law, and also refers on this point to the example of American law.

272. The transfer rules do indeed relate directly to the relationship between the player and his (previous or future) employer. If, then, the sphere of employment law were not subject to competition law, it could be argued that that must also apply to the rules on transfers.

Whether that also applies to the rules on foreign players is doubtful. In view of the following observations, however, I need not go into that question.

273. There is in my opinion no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty. Nor is there any such rule, moreover, in the law of the United States, which UEFA relies on. It is not necessary here to discuss in detail the bases and different varieties of the 'labor exemption'. [348] From the judgments of American courts which UEFA itself has produced to the Court, it can be seen that that exception applies to *collective agreements* between employers' associations and trade unions and the necessary prior agreements on the part of those involved. [349] The statutory exemption of baseball from antitrust law is obviously a special case which is of no relevance for the present proceedings, if only because Community law does not have any corresponding provision for football (or any other sport).

Mr Bosman relied in particular on the judgment of the United States Court of Appeals, Eighth Circuit, in *Mackey* v *National Football League*. [350] That judgment concerned provisions of a sporting association which closely resembled the transfer rules at issue in the present case. The court concluded that the rules in question could not benefit from the 'labor exemption' and developed a view

348 — For more detail see, for example, the article by Gary R. Roberts, 'Antitrust Issues in Professional Sports', in: Gary A. Uberstine (ed.), *Law of Professional and Amateur Sports*, Part 2, Deerfield, New York and Rochester 1994, p. 19-1 (especially pp. 19-45 ff.).

349 — See the judgment of the United States Court of Appeals, Second Circuit, of 24 January 1995 in *National Basketball Association* v *Williams* 45 F. (Federal Reporter) 3d 684, where the lower court's opinion that antitrust law was not applicable to 'collective bargaining negotiations' was confirmed; the judgment of the United States Court of Appeals for the District of Columbia Circuit of 21 March 1995 in *Brown* v *Pro Football, Inc.* 50 F. 3d 1041 also observes that according to the case-law of the Supreme Court the 'labor exemption' (in so far as it is 'non-statutory') allows '*some* union-employer agreements' a '*limited*' exception from antitrust law.

350 — Judgment of 18 October 1976, 543 F. 2d 606.

which is at times very close to the one I am putting forward. However, it need not be discussed in more detail how faithfully that decision reflects the American legal position.

274. That is because in my opinion the conclusion from American law for Community law is only that in order to guarantee the collective bargaining autonomy of employers and trade unions, it may be necessary to exclude collective agreements from competition law where that is necessary for that purpose. A corresponding restriction of the scope of Article 85 — similar to that already existing in the laws of individual Member States [351] — might indeed exist. [352] It would admittedly be limited in character. [353]

275. In the present case that question is, however, of no relevance. As the Commission rightly stated at the hearing, this case does not concern *collective agreements* but simple *horizontal agreements* between the clubs. For that reason alone UEFA's submission must fail: no reason can be seen why *such* agreements or decisions should not fall within the scope of Article 85. [354]

276. As I have already mentioned, in Spain the rules on transfers are determined in a collective agreement. The Charte de Football Professionel, in force in France, also appears to be of a similar nature. [355] Those documents merely regulate changes of clubs *within* the association in question, however. For transfers to clubs *in other Member States*, at issue here, the rules of UEFA or FIFA apply, which quite certainly are not collective agreements.

Similar considerations apply to the circumstance that the laws of some Member States permit the establishment of rules under which the payment of transfer fees is made an obligation. In this connection it would otherwise have to be observed in any event that the laws in question merely *permit* such rules to be drawn up, but do *not oblige* the clubs and associations to do so.

351 — For German law see, for instance, Hermann-Josef Bunte, in: Langen and Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, 7th ed., Neuwied 1994, point 155 et seq. on § 1.

352 — For a contrary opinion, see Weatherill, op. cit. (note 135), p. 69, who notes the absence of a corresponding derogation in the law.

353 — See Gleiss and Hirsch, op. cit. (note 316), point 20 on Article 85(1).

354 — Zäch, op. cit. (note 152), takes a different view, however; without discussing the question at all, he adopts the position that the transfer rules concern the employment market and are thus not caught by Article 85.

355 — See point 31 et seq. above. It is probably not a matter of chance that the transfer rules of those two countries are more favourable for players than those of the other associations in the Community.

(e) Article 85(3)

277. There is no need to examine here whether the rules on transfers and rules on foreign players could be exempted under Article 85(3). Such an exemption could be granted only by the Commission. That would presuppose that a corresponding application had been made. [356]

278. Merely for the sake of completeness, I mention that if such an application were made, it would admittedly appear theoretically conceivable that the Commission might grant those rules, which are in breach of Article 48, an exemption from the prohibition in Article 85(1). Since such an exemption would, however, make no difference to the breach of Article 48, it would make sense for the Commission to take that factor into account in the exemption procedure. A uniform result ought to be aimed at in any case. [357] That would mean that an exemption under Article 85(3) would also have to be ruled out. [358]

3. Interpretation of Article 86

279. Finally, it must be ascertained whether the rules on foreign players and rules on transfers at issue in this case are compatible with Article 86 of the EC Treaty. Under that provision, 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it' is prohibited as incompatible with the common market 'in so far as it may affect trade between Member States'.

280. I have already established in my examination of Article 85 that the professional clubs may be regarded as undertakings within the meaning of that provision. The same applies to their associations, in so far as they engage in economic activities themselves. I also established at that point that the rules in question here affect trade between Member States. [359]

281. The most important of the points still to be examined is thus the question whether one can speak of a *dominant position* within the meaning of Article 86 in the present case.

356 — Castellaneta, op. cit. (note 136), p. 659, correctly points out that the 'gentlemen's agreement' of 1991 between the Commission and UEFA, which related to the new UEFA rules, cannot be regarded as an exemption within the meaning of Article 85(3). Such an exemption would require a formal decision. There was no such decision, however, as the Court of Justice found in an action brought by Mr Bosman (see the order in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraphs 13 to 15).

357 — See also Marticke, op. cit. (note 123), p. 74. Compare also the interesting arguments of Weatherill, op. cit. (note 135), p. 88 et seq.

358 — As also argued, with respect to the rules on foreign players, by Giardini, op. cit. (note 119), p. 455; also Peter Karpenstein, 'Der Zugang von Ausländern zum Berufsfußball innerhalb der Europäischen Gemeinschaft', in: Michael R. Will (ed.), *Sportrecht in Europa*, Heidelberg 1993, p. 171, at p. 188.

359 — See point 255 et seq. above and point 260 et seq. respectively.

According to the case-law, that term refers to a 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'. [360] As the wording of Article 86 shows, it is also possible for several undertakings together to occupy a dominant position.

282. It must therefore first be ascertained whether it is the clubs or their associations which must be considered in the present connection. Since the rules in question are contained in the regulations of the various associations, the obvious approach would in itself be to look at their position on the market. If, for example, the present case concerned the question of the marketing of television rights for the UEFA Champions League, one would plainly have to consider the market position of UEFA, which organizes and markets that competition. This case, however, concerns rules which relate to the engagement of players. The Commission has rightly drawn attention to the fact that the engagement of players is a matter for the clubs, not the associations. In its opinion those rules are therefore to be regarded as agreements between the clubs. In the present connection, therefore, at most a dominant position of the clubs might come into question, but not of the associations. I find that convincing. That approach also does justice to the view expressed both by the Commission and by URBSFA that the rules in question were not dictated by the associations, but merely faithfully reflected the wishes of the clubs.

It thus need not be discussed in the present proceedings whether UEFA perhaps holds a dominant position as against its member associations or whether necessarily only a single association can in principle exist in each Member State.

283. The rules on foreign players are contained in the regulations of the individual associations, while the rules on transfers to other Member States are laid down in the regulations of UEFA and FIFA. The question thus arises whether the professional clubs of the relevant association in the former case and the professional clubs of the entire Community in the latter case *together* occupy a dominant position. The answer to that question depends on the conditions under which it is possible to speak of a *collective* dominant position on a market.

284. The Commission has already on numerous occasions in its decision-making practice assumed the existence of such a

360 — Judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38; consistent case-law.

collective dominant position. [361] The Court of Justice and Court of First Instance have only had to consider the point on a few occasions. The 1994 judgment in *La Crespelle* [362] concerned a French provision giving the 50-odd cattle insemination centres the exclusive right to carry on the corresponding activity in the territory allotted to them. The Court of Justice held that by establishing those monopolies, which were territorially limited but together covered the entire territory of France, a dominant position within the meaning of Article 86 had been created. [363] Much more important in the present context is the judgment, now final and binding, of the Court of First Instance in the *SIV* case. [364] The Court of First Instance stated *inter alia* in that judgment:

'There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. ... However, it should be pointed out that for the purposes of establishing an infringement of Article 86 ... it is not sufficient ... to "recycle" the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market, that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position.' [365]

285. In my opinion it could very well be assumed that the clubs in a professional league are 'united by such economic links' that together they are to be regarded as having a dominant position. One could cite in particular here the fact, referred to several times above, that those clubs are dependent on each other if they wish to be successful. [366] Such a natural community of interests can probably be found in scarcely any other sector.

286. The question need not be gone into in more depth here, however: the present case does not concern the power on the market which the clubs taken together have against competitors, customers or consumers. [367] The *players* do not, in my opinion, belong to any of those categories. There would be such a question, by contrast, if — to take an example already mentioned — the clubs themselves acted as a group to market the television rights for their matches. The present case, however, concerns rules which restrict the possibility of taking on players. Those rules lead to a restriction of competition between the clubs. That is not,

361 — See, for example, Decision 89/93/EEC of 7 December 1988 (flat glass), OJ 1989 L 33, p. 44, point 78 et seq.; Decision 92/262/EEC of 1 April 1992 (French-West African shipowners' committees), OJ 1992 L 134, p. 1, point 55 et seq.; and Decision 93/82/EEC of 23 December 1992 (Cewal and others), OJ 1993 L 34, p. 20, point 57. See also the decisions in the field of merger control, for example Decision 92/553/EEC of 22 July 1992 (Nestlé/Perrier), OJ 1992 L 356, p. 1, point 108 et seq.

362 — Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne* [1994] ECR I-5077.

363 — Ibid., paragraph 17.

364 — Cited above (note 313). That judgment followed an action against the Commission Decision of 7 December 1988 referred to in note 361.

365 — Ibid., paragraphs 358 and 360.

366 — See, for instance, point 227 above.

367 — See the judgment of the Court of Justice quoted in point 281.

however, to be seen as an abuse within the meaning of Article 86, since in that respect only the relationship between the clubs and their players is affected.

In conclusion, then, like UEFA, URBSFA, the Commission and the Italian and French Governments, I am of the opinion that there is no infringement of Article 86.

C — Conclusion

287. I therefore consider that the questions put by the Cour d'Appel, Liège, should be answered as follows:

1. Article 48 of the EC Treaty is to be interpreted as prohibiting

   (a) a football club from being able to demand and receive payment of a sum of money when one of its players whose contract has expired is engaged by another club;

   (b) the access of players who are nationals of another Member State to the club competitions organized by the national and international associations from being restricted.

2. Article 85 of the EC Treaty is to be interpreted as precluding agreements between clubs and decisions of sports associations whose content is as described at 1(a) or 1(b) above.