

UEFA's "Homegrown" Rules

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The celebrated 1995 decision by the European Court of Justice in the claim brought by Jean-Marc Bosman¹ has revolutionised the world of football. It has led to what many believe to be an irreversible shift in the balance of power in the transfer market towards an elite class of European players and those clubs that have the commercial strength to attract and retain them. That those players now routinely play for clubs outside of their own home countries has also led to increasingly multinational leagues where for example the FA Premiership featured 252 foreign players last season.

Many commentators have noted that Bosman's removal of the earlier restrictions on the number of foreign players that could be picked per team has also created new obstacles that block the progress of young players local to a team from breaking into the first team. The old apprenticeship system used to be relied on to blood talented youngsters in Britain, but its replacement – the system of club academies – has done little to staunch the inflow of foreign imports. UEFA has concluded that something must be done to tip the balance back again in favour of those younger players, and its proposed new rules – introduced on 2 February 2005 - are designed to foster so-called "homegrown" players aim to do just that.

However, the constraints imposed by the Bosman judgment mean that the proposals may be vulnerable to legal challenge. The reason for this stems from the rationale for that judgment, which was based on an interpretation of Article 48 (now Article 39) of the EC Treaty which guarantees free movement of labour within the territory of the EU's Member States. There was little dispute that the restrictions then imposed by UEFA – allowing only five foreigners per team in UEFA competitions – were inconsistent with the terms of Article 48. However, UEFA argued that sport, although a commercial enterprise, had specific characteristics that deserved its exemption from the full application of Article 48.

Those characteristics were identified by the Court in its judgment as:

*"the need to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players."*²

¹ Case C-415/93 (15 December 1995)

² Paragraph 105

It went on:

"In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate".³

The court went on to conclude that UEFA's then-restrictions were not a necessary means of attaining those objectives. As a result, those restrictions were forcibly removed.

The current proposals fall somewhat short of the pre-Bosman arrangements. They involve minimum quotas of players, aged 15-21, in each 25-man squad that are (a) trained by the club's own football academy or (b) at the academies of other clubs within the same national association. To count towards the quota each of the players must have been registered with the club (or another club within the same national association) for at least three previous seasons. The quota is set to start at two in season 2006-7, rising to three in the following season and four in season 2008-9.

Some observers have questioned the legality of any restriction on the ability of clubs to select players without reference to their nationality. This view is borne out of the acceptance that sport really is a mature 'industry' and that the special legal privileges it previously enjoyed are remnants of a bygone quasi-amateur status that is quite out of keeping with its characteristics today. Although sport has indeed become a great deal more commercial (as media outlets have fed hungrily on its outstretched hand for content) this does not mean that Article 39's impact has been changed.

The proposals have been carefully drafted and structured. They refer not to the nationality of players – which would certainly contravene Article 39 – but instead to a more fluid concept, that could be described as "nurture". It is for that reason that the location of the club academies and the affiliation of the relevant club will be of paramount importance. There is nothing in this concept that is necessarily inconsistent with Article 39.

Furthermore, even if that justification were to fail, UEFA could be expected to rely on those aspects of the Bosman judgment that underline the availability of an exception per se for sport. To be sure, Bosman did not rule that such exceptions were always illegal; only that they would be permitted only insofar as they met objectives that were legitimate.

The quotations from the judgment above lend credence to UEFA's position since they unequivocally permit intervention on certain grounds. UEFA's public position has carefully stressed factors that share much in common with those mentioned approvingly by the ECJ in Bosman. For instance, its vice-president, Per Rayn Omdal has said *"Some clubs are fielding teams with eleven foreign players....We have to ask ourselves whether this is a development that is wanted in football."*

³ Paragraph 106

Indeed, the proposals follow UEFA's identification of a number of perceived problem areas such as a lack of incentive in player training, a lack of local and regional identity as far as many club teams are concerned, a lack of competitive balance, overstocked squads and concentration of wealth among an élite few clubs in many countries. It is not clear that the ECJ would reject such objectives as illegitimate.

The debate over the legality of the proposals will doubtless be informed by the current EC Commission investigation into the restrictions currently imposed by the Maltese Football Association ("MFA") on the number of non-Maltese EU players allowed to play for top flight teams. These restrictions impose a minimum of eight 'home grown' players to be on the field during each Premier League match. The Maltese definition of 'home grown' has much in common with that appearing in the UEFA proposals: a home grown player is one who has spent at least three years registered with a Maltese club and has participated in an official MFA youth competition. Vladimir Spidla of the Commission has apparently claimed that the Maltese restrictions "seem to be in contradiction with Community Law as interpreted by the Court of Justice in Bosman and subsequent judgments and in particular Article 39 of the EC Treaty". In view of the similarities between the two definitions, the outcome of the Commission investigation is likely to prove crucial in any assessment of the legality of the UEFA proposals.

Perhaps more fundamentally, sport has – even since Bosman – been permitted to derogate from Article 39 for non-economic reasons. For instance, international fixtures can and do preclude the appearance of players who are not qualified on grounds of nationality to play for either of the two teams⁴. The ECJ has however stated that that restriction on the scope of the EC Treaty must remain limited to its proper objective, and may not be relied on to exclude the whole of sporting activity. But arguably, the aim of boosting the profile of youth training is indeed a non-economic activity since it is highly speculative. Indeed the ECJ in Bosman recognised that "*it is impossible to predict the sporting future of young players with any certainty and only a limited number of such players go on to play professionally*"⁵. This very uncertainty could be expected to lead to clubs sticking to known quantities and signing foreign professionals instead. To that extent, since profitability is anything but guaranteed when investing in youth training, a rational business – which a football club nowadays is – may be expected to be risk-averse (particularly if it is answerable to the banks and other creditors) and consequently, under-invest in youth training. This very market failure is what has prompted UEFA's initiative and it is that which may yet permit it to be accommodated within the confines of the Bosman judgment.

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⁴ Donà –v- Mantero [1976] ECR 1333, paragraphs 14-15

⁵ Ibid. Paragraph 109