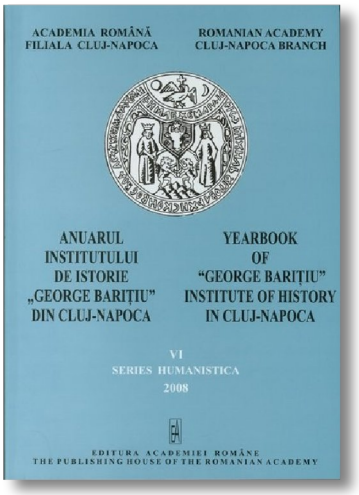

ISSN 1584-4404

Yearbook of the George Barițiu History Institute of Cluj-Napoca
Series *Humanistica*

humanistica.ro

Freedom of Movement in Relation to Sport

Roberto Branco Martins

How to cite this article:
Martins, Roberto Branco (2008) *Freedom of Movement in Relation to Sport*, Yearbook of the George Barițiu History Institute of Cluj-Napoca, Series Humanistica, Vol. 6, pp. 339–356. DOI: 10.5281/zenodo.22965781

© 2008: The Publishing House of the Romanian Academy.
Humanistica Yearbook is published online since 2003.
Submit your article to Humanistica Yearbook: secretariat.dcsu@acad-cj.ro

FREEDOM OF MOVEMENT IN RELATION TO SPORT

Roberto Branco Martins

TCM Asser Institute, Haga

Since the mid-seventies it has become clear that sport falls under European Union Law whenever it becomes an economic activity[1]. One major area of EU law that has proved to have sports implications is the free movement of workers. The purpose of this study is to illustrate the legal freedom of movement framework in the EU, specifically as it affects sport. I will also illustrate that situations exist impeding the free movement of workers, or having an impact on the movement of workers. These latter situations particularly involve workers from the to new Member States or third-country nationals falling under the conditions as codified in association or partnership agreements with the European Union.

Analysing the status of free movement in sport and adjacent territories will lead to a description of criteria that need to be respected to guarantee the free movement of workers in the European sports sector. I will then question whether these criteria are still being respected in European sport, by looking at some practical issues. If not, are there alternatives to safeguard the free movement of workers in European sport?

1. FREE MOVEMENT OF WORKERS

The free movement of workers is one of the European Union pillars and stems from Article 3c of the EC Treaty:

> *For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital.*

[1] Case 36/74 Walrave & Koch v Union Cycliste Internationale [1974] ECR 1405.

An. Inst. de Ist. „G. Barițiu" din Cluj-Napoca, Series Humanistica, tom. VI, 2008, p. 339–356

The free movement of workers is founded on the old Article 48 of the EC Treaty, and its use in practice was elucidated in Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community[2]. To describe the application of the free movement rules to the European sports sector clearly one needs to start with the basis and mention the content of Article 39 (48) of the EC Treaty:

> *1. Freedom of movement for workers shall be secured within the Community.*
> *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.*
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: a) to accept offers of employment actually made; b) to move freely within the territory of Member States for this purpose; c) to stay in 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; d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.*

To describe the application of the free movement rules in practice one can immediately focus on the European sports sector. The most famous case in the young history of free movement in the European Union is also the most famous case in European sports: the legendary Bosman case.

1.1. THE BOSMAN CASE[3]

Jean Marc Bosman was an employee of the Belgian RC Liege club and was working under a contract which had almost expired. Before its expiration RC Liege offered him a new contract. But this new offer entailed a substantial reduction in his wages, of almost 75%. Logically, Bosman refused this new offer and as a consequence was put on the so-called 'transfer list'; he needed to look for a new club and his contract with RC Liege expired. Eventually Bosman found a club in the French second division, US Dunkerque, willing to employ him.

In accordance with the rules and regulations for international transfers, the Belgian football association had to pass a transfer certificate to the French football association within a specific time. However RC Liege and US Dunkerque had agreed on the extent of a transfer fee and its payment as a precondition for the (one-season) transfer of Bosman. But for reasons which are not clear, RC Liege

[2] For a more elaborate description of the history of free movement see R. Blanpain, *European Labour Law*, Kluwer Law International, 2003.

[3] Case 415/93 ASBL Union Royale Belge des Societes de Football Association and others v Jean-Marc Bosman [1996] 1 CLMR.

began to have doubts about US Dunkerque's financial solvency and refused to give the Belgian football association permission to issue Bosman's transfer certificate. Bosman was bound to his old club and was unable to work as a professional football player for the French club of his choice, even though he had a free transfer status.

It became clear to him, after a long journey through the Belgian judicial system, that all European clubs were boycotting him because of his actions, despite his free transfer status. He was forced to play for a third-division Belgian club. Yet he persisted and eventually came before the European Court of Justice, which ruled the following in his favour. I will focus on the most relevant decision in the light of free movement:

> *(114) The answer to the first question must therefore be that Article 48 (39) of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.*
> *(137) It follows from the foregoing that Article 48 (39) of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States*[4].

The Bosman case meant the first step towards a crystallisation of the rule on the free movement of workers in the European sports sector. A second case has sharpened the contours of the free movement rules in sport further – the Lehtonen case[5].

1.2. LEHTONEN CASE

The Belgian Castors Namur-Braine ASBL basketball club signed an employment contract with the Finnish player Jyri Lehtonen. The transfer deadlines in Belgian basketball were as follows: the transfer of a player from one Belgian club to another could only occur from 15 April to 15 May; the transfer of a player from a European club to a Belgian club could only occur from 15 April to February 28 and all other players from outside the European zone could transfer up until 31 March. But Lehtonen's transfer occurred after the deadline for players from European clubs outside Belgium, just at the start of the playoffs on 3 April. The opponent of Castors Namur-Braine ASBL, Belgacom-Quaregnon, complained to

[4] For a further elaboration on the Bosman case and its implications see R. Blanpain, *The Bosman Case: The End of The Transfer System*, London, Sweet and Maxwell, 1996.

[5] Case C-176/96 Jyri Lehtonen and others v Fédération Royale Belge des Sociétés de basket-ball ASBL (FRBSB), (1996).

the arbitrational authorities for Belgian basketball, and were declared winners of the play-offs because of the participation of a non-eligible player on the Castor NamurBraine ASBL side. Lehtonen should have been prevented from participating in the match, and as a consequence he would be obstructed in carrying out the duties deriving from his employment contract.

After bringing the case to the Belgian courts Lehtonen ended up before the ECJ, which decided as follows:

> *(60) In the light of all the foregoing, the answer to the national court's question, as reformulated, must be that Article 48 of the Treaty precludes the application of rules laid down in a Member State by sporting associations which prohibit a basketball club from fielding players from other Member States in matches in the national championship, where they have been transferred after a specified date, if that date is earlier than the date which applies to transfers of players from certain non-member countries, unless objective reasons concerning only sport as such or relating to differences between the position of players from a federation in the European zone and that of players from a federation not in that zone justify such different treatment.*

The Lehtonen and Bosman cases have laid down the minimum requirements for the application of the rules on free movement of workers in the European Union. However, some other practical matters occurred after these two cases that, on first sight, appear to have a close connection to the free movement of workers in sport. Given the scope of the topic and for the sake of clarity I will include these two cases in this Article before concluding on the overall status of free movement in European sports and the position of workers performing under an employment contract.

The following two cases have had an impact on the movement of workers in Europe's professional sports sector. But this impact mainly concerns workers of the new EU Member States, and third-country nationals falling under a partnership or cooperation agreement with the European Union.

1.3. THE KOLPAK CASE[6]

Maros Kolpak is a Slovak national and the goalkeeper of the German TSV Ostringen handball club. Kolpak's contract was renewed so that he now had an employment contract until 30 June 2003.

But Kolpak fell under the regulations of the German handball associations which stated that only two non-EU or EEA nationals could be lined up per competition match. These players had a special mark, an 'N in their registration pass. Kolpak was the third player in the TSV Ostringen team with an 'A' licence and he was thus prohibited from performing his duties deriving from his employment contract.

[6] Case C-438/00 Deutscher Handballbund and Maros Kolpak, ECJ 8 May 2003.

Kolpak argued that he was entitled to receive the same treatment as all other EU/EEA nationals. He pointed out that under the conditions of the association agreement between Slovakia and the EU he should not be hindered from working by the mere fact that there were two other 'A' players in his team.[7]

Kolpak brought his case before the ECJ and was successful. The court decided the following in his favour:

> *(51)Thus, the first intent of Article 38(1) of the Association Agreement with Slovakia precludes any application to Mr Kolpak of a rule such as that laid down in Rule 15(1)(b) and 15(2) of the SpO in so far as that rule gives rise to a situation in which Mr Kolpak, in his capacity as a Slovak national, although lawfully employed in a Member State, has, in principle, merely a limited opportunity, in comparison with players who are nationals of Member States or of EEA Member States, to participate in certain matches, that is to say, league and cup matches of the German federal or regional leagues, which constitute, moreover, the essential purpose of his activity as a professional player.*

This case established or made concrete the rights of all workers falling under an association agreement[8] and was actually the European Union variant of a case in French basketball[9].

A similar case, decided by the ECJ, concerned football - that of the Russian football player Igor Simutenkov.

1.4. SIMUTENKOV CASE[10]

The Simutenkov case deals with the situation of a football player who is a national of a third-country as opposed to the European Union[11]. Simutenkov had a contract with Spanish side Union Deportivo Tenerife. He was registered as a non-EU player and the regulations of the Spanish football federation impeded a team from fielding more than a certain amount of these non-EU players. Simutenkov wanted to acquire the same status as EU/EEA players on the basis of a cooperation agreement between his country Russia and the EU[12]. The ECJ followed his argumentation and decided against the Spanish football federation. The main

[7] Available at europa.eu.int/comm/enlargement/pas/assoc_agreements.htm.

[8] Details of the various agreements the EU has with other countries including agreements with comparable conditions as the condition at stake in the Kolpak case can be found on www.consilium.europa.eu/cms3_Applications/applications/Accords/doSearch.asp.

[9] CE 30 December 2002, n° 219646, Fédération Française de Basket-Ball, affaire Malaja.

[10] Case C-265/03 Igor Simutenkov v Abogado de Estado, Real Fedración Espanola de Ftitbol and Ministerio Fiscal, ECJ 12 April 2005.

[11] For a more elaborate description of the Simutenkov case in the light of the EU and its agreements with third countries see K. A. Schuilenburg, *The ECJ Simutenkov Case: Is Same Level not Offside after All?*, "Policy Papers on Transnational Economic Law", April 2005, no. 13.

[12] Supra no.7.

decision was that Article 23 of the Communities – Russia Partnership agreement fully applied:

> *"...[Article 23] establishes for the benefit of Russian workers lawfully employed in the Member State, a right to equal treatment in working conditions of the same scope as that which, in similar terms, nationals of Member States are recognised as having under the EC Treaty, which precludes any limitation based on nationality..."*

The Kolpak and Simutenkov cases differ from those of Bosman and Lehtonen, but still have a tremendous impact on European sport[13].

The Kolpak and Simutenkov cases clearly illustrated the position of non-EU workers working with a lawful employment contract as regards the applicability and execution of association regulations in EU sports. In essence these cases deal with the free movement of workers in EU professional sports. An interesting consequence of these cases is that the implications are applicable not only to nationals of these states but to nationals of up to 80 countries[14].

2. **STATUS OF THE FREE MOVEMENT RULES IN EUROPEAN SPORT**

Thus far I have described the landmark cases that have led to an understanding of the applicability of the free movement of workers rule in relation to European sport. From this one can distil the following two principles:

> *1. Free movement of workers must be guaranteed (Bosman), unless objective reasons concerning only sport as such, justify a different treatment (Lehtonen);*
> *2. Non-EU nationals with an employment contract do not fall under the free movement rules but benefit of employees' rights (Kolpak and Simutenkov).*

These conditions seem to be quite clear; however sport is a fascinating sector of the European industry. Sport itself has existed for ages and has traditionally been self-regulatory. With the commercialisation of sport, it became an economic activity and subsequently general law and EU law became applicable to sport. The commercialisation of sport is still proceeding and is ever-increasing. With this continuous evolution new situations may surface – new situations that may not be in accordance with the rules and principles of law, amongst others laid down in the Treaty and ECJ decisions.

This leads me to question whether the conditions for the free movement of sportsmen as set down in Bosman and Lehtonen, and less concretely in Kolpak and Simutenkov, are still being respected by the European sports sector. Is the sports

[13] See in this respect the opinion of Richard Parrish on www.euractiv.com/ en/sports/comment-simutenkovspanish-football-federation-case/ Article-135o23

[14] R. Branco Martins, *The Kolpak Case: Bosman Times io, Football Fears the Arrival of Bosman, Bosmanovic and Osman*, "The International Sports Law Journal", 1–2, 2004, p. 26.

sector still 'Bosman-proof'? And if not, can these situations that impede the application of 'Bosman' fall under objective reasons of justification connected to the sport as such?

Logically I cannot analyse the entire sports sector. I will therefore focus on seven notable issues that emerged in recent history, namely: the system of payment of training and education costs in the FIFA transfer system; the system of solidarity payments in the FIFA transfer system; the use of nationality clauses in Italian water polo; the UEFA home grown player rule; the use of registration/federative rights in international sports; the definition of amateur players and the application of immigration rules in relation to the issuing of work permits for professional sportsmen.

2.1. TRAINING COMPENSATION, FIFA TRANSFER REGULATIONS ARTICLE 20

An alternative transfer system saw the light after the Bosman case. This transfer system is referred to as the 'Post-Bosman' system.[15] In this system the payment of transfer fees at the end of a contract was substituted by the payment of a fee for a preliminary breach of contract. The basis for the payment became the compensation for the damages incurred by the 'selling' club arising from this breach. The result was that lengthy fixed-term contracts were concluded between a player and a club. This practice led to players never reaching the end of the contract; this was simply not the intention of the parties. The amount of compensation for damages soon skyrocketed and the European Commission opposed this practice with a statement of objection on 14 December 1998[16].

The FIFA was forced by the European Commission to draft a new transfer system. This new system received the European Commission's informal support in 2001[17]. In 2005 FIFA drafted new transfer regulations which are currently still in force. Article 20 of the FIFA transfer regulations contains the instrument of training compensation:

> *Training compensation shall be paid to a player's training club(s) (1) when a player signs his first contract as a Professional and (2) on each transfer of a Professional until the end of the Season of his 23rd birthday. The obligation to pay Training Compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning Training Compensation are set out in Annex 4 of these Regulations.*

[15] L. Halgreen, *European Sports Law: A comparative Analysis of the European and American Models of Sport*, Copenhagen, 2003; Thomson and Van den Bogaert S., *From Wembley to San Siro: Regulation of the mobility of sportsmen in the EU post Bosman*, EUI, Florence, 2003.

[16] See for more general info on the transfer rules and the actions of the European Commission ec.europa.eu/dgs/education_culture/mag/í4/page2í_en

[17] Letter, Joseph S. Blatter to Martio Monti 5 March Zool and letter Mario Monti to Joseph S. Blatter 5 March Zool, to be found on www.fifa.com.

This system of training compensation embodies a possible restriction of the free movement of workers. Why? The training compensation is due when a young player moves, or transfers, from one club to another. The player's previous clubs are entitled to receive this payment and should they have any doubt that the new club is not able to pay this compensation, they may block the player's movement. In any case, the payment of an extra sum of money whenever a young player moves forms a possible restriction[18].

But does this restriction fall under 'objective reasons concerning only sport as such'? I believe this not to be the case.

Advocate General Lenz stated in the Bosman case that a suitable payment could be admissible whenever a player transfers from one club to another. He argued that these payments only needed to entail the actual training costs and were only due to be paid after the first transfer of a player. A logical contra argument is that the club that sells the player should be entitled to receive a suitable compensation. However AG Lenz has illustrated that there are less restrictive measures possible to compensate clubs without jeopardising the rules of the free movement of workers.[19] Blanpain has demonstrated that calculating training compensation can lead to a serious amount of money and that it forms a true restriction[20].

What must be borne in mind here is that the European Commission never gave its formal consent to the transfer system. Neither is the European Commission the right body to judge on the legality of the rules in relation to the free movement of workers. Although the opinions in literature concerning the restriction to the free movement differ[21], the prevailing view seems to be that FIFA will have a tough time defending the legality of this rule before the European Court of Justice.

2.2. SOLIDARITY PAYMENTS, FIFA TRANSFER REGULATIONS ARTICLE 21

This Article is part of the FIFA transfer regulations and reads as follows:

> *If a Professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annex 5 of these Regulations.*

[18] The FIFA circular letter on the calculation of training and education costs can be found on http://www.fifa.com/ documents/static/regulations/ PS%2o826%2oEN.pdf.

[19] Opinion of Advocate-General Lenz in Bosman, supra 3.

[20] See for a clear illustration of the restricting effect of the training and education cost system R. Blanpain, *The Legal Status of Sportsmen and Sportswomen under International, European and Belgian National and Regional Law*, Wolters Kluwer, 2004.

[21] See for dissenting opinions amongst others S. Jellinghaus, *Het opleidings en solidariteitssysteem van de FIFA: de stand van zaken*, ARA ed. 2, 2005, p. 4–45 and S. Kesenne, *Het Transfersysteem in de sport: nodig of overbodig?*, in *Transfers en Makelaars in de sport*, Hendrickx F. (ed.), Antwerpen, Intersentia, 2002, p. 43–53.

The most striking difference between the solidarity payment and the payment of training and education costs is that the payment of the solidarity contribution is only due whenever a player transfers during his contract, hence, whenever there is a 'profit'. At first sight it seems that the payment of training and education costs is a more severe danger to Article 39 than the solidarity payments. However the solidarity payments need to be paid whenever a player moves from one club to another, no matter what his age. In addition, the price of the player is always raised by 5%.[22] And in certain circumstances the solidarity payment will exist alongside the obligation to pay training and education costs[23].

The same arguments as those mentioned above for the training and education costs concerning the existence of a restriction on the free movement of workers, apply to the solidarity payments. It is unlikely that such a 'double' restriction will survive scrutiny in a case before the ECJ.

2.3. THE USE OF NATIONALITY CLAUSES IN ITALIAN WATER POLO

The next example derives from a case concerning the best water polo player the Netherlands ever had: Harry van der Meer. The facts were as follows.

In 1997 Harry van der Meer transferred from the Dutch water polo competition to the lucrative Italian water polo, becoming a water polo professional. In 2002 he was offered a three-year contract by the top Italian club Savona to work for them under favourable conditions. There was only one problem. The Italian clubs (and with the clubs the Italian swimming association) had agreed to limit the amount of foreigners in a water polo team to three. Unfortunately Savona already had the maximum amount of foreign players in its team. The transfer of Harry van der Meer could still be concluded under the condition that Van der Meer would apply for Italian nationality. This was not a difficult procedure given the fact that Van der Meer had been living and working in Italy for the preceding five years. Nor did Van der Meer have much time to think about other options: if he would not adopt Italian nationality Savona would proceed to offer 'his' contract to an Eastern European player who had already expressed willingness to change his nationality.

Van der Meer felt forced to obtain Italian nationality, to be able to perform his work in the first place. Eventually he became Italian and has been one of the key Savona players ever since.

This history only came to public notice when Van der Meer appeared in the Netherlands to play for the Dutch national team. Unfortunately for him this turned out to be impossible... Van der Meer could no longer play for the Dutch national team because he was not a Dutch national! Harry tried to recover his Dutch

[22] In annex 5 of the FIFA regulations the system for calculating the solidarity payment is outlined.

[23] See in this respect the Annexes 4 and 5 of the FIFA regulations in relation to each other.

nationality alongside Italian, but did not succeed despite several procedures before the Dutch courts[24].

Two things immediately become apparent in this case. The first is that the practices of the Italian water polo teams and association are clearly an infringement of the free movement of workers. It is so clear that one does not even have to assess whether an objective justification could be identified. The second thing is the question as to why Harry van der Meer, or his lawyers, decided to lodge a case against the Dutch state for refusing to return Dutch nationality to Van der Meer instead of taking legal action against the Italian water polo clubs! The fear of becoming a 'persona non grata' in the business sector where he earned his money was bigger than the fear of his losing face before Dutch society. This case is an interesting illustration of the powers that sport employers are able to exert over sport employees and it also teaches us that Jean Marc Bosman really deserves (more) respect for showing such courage.

2.4. THE UEFA HOME-GROWN PLAYER RULE

The home-grown player rule was introduced as a result of UEFA's ordinary congress in April 2005 in Tallinn. With the home-grown player rule, clubs participating in UEFA competitions will be forced to set a minimum quota of locally-trained players on a sliding scale starting from the 2006-07 season. From then, clubs entering UEFA competitions will have to have four 'locally-trained' players, defined as players between the ages of 15 and 21 who have been registered with the club for three seasons/years.

The home-grown player rule seeks to enhance training and development of young players. One of UEFA's views is that clubs have a responsibility to the community, to players and to the sport to provide training. The increasing danger is that clubs with the best financial resources are now favoured: they simply buy the best players[25].

The term 'home-grown player' means every player between 15 and 21 years old who has spent three years in that club's training centre or academy, irrespective of their nationality. From the four fielded players a minimum of two need to be trained by the club in question and another two by a club belonging to the same association.

Is the home-grown player rule 'Bosman-proof'?

Article 39 not only forbids direct discrimination on nationality but also indirect discrimination: discrimination based on criteria other than nationality. It is not difficult to understand that the home-grown player in the majority of cases will

[24] Raad van State 21 December 2005.

[25] See also www.euractiv.com/en/sports/uefa-home-grown-player-rule-may-courteu-law-professor/Article-139418.

be a national of the country of the club that wants to field this player. This would entail an indirect discrimination against foreigners, and nationals of other Member States are also foreigners for this rule[26].

That leads us to consider whether there would be a possible justification for this rule. The main goal UEFA wants to reach[27] with this rule is the creation of a 'level playing field': it has been proved that the current system leads to a situation whereby the richest clubs buy the best players; the smaller clubs need a helping hand to be competitive again. But there is a lack of legal backing for a rule that infringes as the home-grown player rule does. The only legally binding guideline in this respect is the Bosman case, and the explanatory vision of Advocate General Lenz mentions that less restrictive measures should be applied than measures that seriously infringe the free movement of workers.

In addition, the implementation and use of the home-grown player rule may encourage the trafficking of young players. If, for example, a 15-year-old Nigerian boy starts his training at a European club for at least three years he will be regarded as a home-grown player and he may be fielded in competitions. This situation can be contrasted with a 22-year-old who intends to transfer from Brazil to Europe for the first time.

The abovementioned conditions lead me to think that the homegrown player rule will not prove to be compatible with the rules on the free movement of workers in the EU.

2.5. REGISTRATION RIGHTS / FEDERATIVE RIGHTS

According to FIFA:

> *"....Federative rights can be defined as a juridical link existing between a club and a player, which began with the registration of the player for that specific club at an Association. This link ended with a new registration of the player for another club. This juridical link was separate and independent from the link created by the employment contract signed by the player and the aforementioned club...."*[28]

The FIFA also argues that the term 'federative' no longer exists. This is actually not the case. In the Netherlands a situation occurred concerning the acquisition of the federative rights of two players of Feyenoord Rotterdam: Salomon Kalou, now a Chelsea FC player, and Dirk Kuijt, now a Liverpool FC

[26] See also Gerlinger M, *UEFA Homegrown Player Rule*, "International Sports Law Journal", 1–2, 2005.

[27] The Independent football review, carried out by Mr Arnaut, elaborates on the need for a home-grown player rule. The complete report can be found on www.independentfootballreview.com and specifically p.39-40.

[28] Fax received from the FIFA Director of the Legal Division and Omar Ongano, Head of Player Status on 27 February 2006.

player. These players were supposed to be subject to the acquisition of their transfer rights by an investment fund in football players. Although the negotiations, the contract and the approach of the investment fund to the agent of one of the players turned out to be false, a signed contract appeared in a Dutch newspaper.[29] The articles of the contract dealing with federative rights read as follows:

> *The interest of the Company is to acquire the following percentages of the economic rights derived from the federative rights of the indicated players: 100% (one hundred percent) of the economic rights derived from the federative rights of the player SALOMON KALOU, for the amount of NINE MILLION EUROS (9,000,000); 50% (fifty percent) of the economic rights derived from the federative rights of the player DIRK KUIJT, for the amount of FIVE MILLION EUROS (5,000,000).*
>
> *These terms shall have the following meaning: "Federative right" is the right of subscribing the player in an official competition. "Economic right derived from the federative" is any amount that a third party may credit for the acquisition of the player's federative rights, and shall include any amount that the player himself may credit to the CLUB as compensation for the termination of the labour agreement between the player and the CLUB, under the terms of the applicable rules.*

Federative rights are therefore also used in European Union Member States' competitions but cannot be easily identified. However a country like Spain mentions that federative rights only belong to the player, thus acknowledging the existence of these rights.[30] In other jurisdictions such as Argentina[31], Brazil[32] and Bulgaria[33], federative rights are also used in practice and mentioned in regulations or laws.

These federative rights may entail an infringement of the free movement of workers. In practice it may occur that a third party has acquired the right to register a player. This means that the player may be willing to sign a contract with a new club but that the third party, the party that owns the right to register the player, blocks the transfer, e.g. by asking for an amount of money from the player's new club to enable the acquisition of this right to register the player.

This situation not only constitutes a serious impediment to the free movement of workers, but it also opens the door to dubious practices in football. The use of federative rights encourages third parties to (externally) invest in (mainly young) talented football players. Due to the continuous application of labour law and the

[29] The (fake) contract between Kuijt - Kalou and the investors in the federative rights was published in the Algemeen Dagblad on 8 August 2005.

[30] In the regulations of the Spanish league it is stated that the clubs need to register the parties that have a specific federative right to an individual player. The regulations can be found on www.lfp.es.

[31] Proyecto de Ley del Senado y Cámara de Diputados de la Nación Argentina, etc. Ley de Regulacion de Derechos Federativos Y Economicos en el Deporte.

[32] Pessotti A, *Direito do Atleta*, Lumen Juris, 2003.

[33] Simov T., and Kolev B., *Players' contracts in Bulgarian Football*, "International Sports Law Journal", 1–2, 2005.

free movement rules to football these investors seek a method to guarantee a return on their investment, and the use of these federative rights could well serve this purpose[34].

2.6. DEFINITION OF AN AMATEUR

A clear definition of an amateur sportsman or a professional sportsman does not exist in international sport. Realising that the rules of free movement only apply to workers, it may be clear that on first sight one may believe every sportsman with amateur status does not fall under the free movement of workers rule. But an athlete with amateur status could well fall under the definition of a worker, given that the criteria for the existence of an employment contract are applicable to him or her[35]. Many cases may exist within the regulations of federations that infringe on the rules of free movement. Unfortunately these are not out in the open generally speaking, and are therefore difficult to assess.

Yet again in football, a couple of easily identifiable infringements of the free movement of workers do exist deriving from the non-transparent application of the status of an amateur player.

In the Netherlands for example, some players in the professional football sector work under a so-called 'training agreement'. This agreement is characterised by the fact that the player is obliged to train with the first team; it has a duration of a year; the club will enter into an employment agreement with the player after he has appeared in five official matches; the player does not receive a wage but mostly receives his premiums from all the matches in which he played or appeared on the bench, after he signs the employment contract (after five matches).

The agreement also states that the club has a unilateral clause to offer the player a contract. In addition the player is not allowed to sign a contract with a club, nor in the home country of the player or abroad, during the existence of the training agreement. This can last for a year.

The restriction of free movement is twofold in these cases. Firstly, mainly the lower-ranked clubs with small budgets use this type of contract. The player is dependent on the manager to be fielded, and sometimes the manager is not allowed to field the player more than four times. The reason is that the club would then have to enter into an employment contract with the player, while the club would

[34] A recent case in which a transfer and the investment in the players was questionable was the transfer of Tevez and Mascherano to West Ham United. The role of the MSI investor company is still not clear to the public.

[35] Generally speaking in most of the jurisdictions the criteria for the existence of an employment contract are the duty to work; falling under the authority of someone and receiving remuneration for the work done.

also be responsible for paying training compensation to the player's previous club(s). For small clubs this is a reason to 'rotate' with players under this type of contract[36].

The second reason for the impediment of free movement is the fact that the player is not allowed to sign a contract, even if it is an offer for a genuine employment contract, with another club as long as the unilateral offer stands. Even though the player is an amateur, the club still has the power to prevent him entering into an employment contract with another club.

There does not appear to be a possibility of justifying these situations on the basis of purely sporting-related objective reasons. On the contrary, it is sporting reasons making it possible that such infringements may occur.

2.7. THE ISSUING OF WORK PERMITS IN INTERNATIONAL FOOTBALL

This aspect does not have a direct effect on the free movement of workers for persons from the EU Member States, but it does have implications for the movement of workers from third countries or from workers from the new Member States.

Currently there is no equal access to the labour market in sports for non-EU workers. This might seem logical at first sight, but turns out to be less so if one realises that in football for example, we are truly dealing with an international labour market. A small case study may serve to illustrate the lack of a level playing field in the European Union in terms of issuing work permits.

2.7.1. **The Netherlands**

To employ a 20-year-old non-EU football player a Dutch professional football club needs to organise his work permit.

There are three important and specific criteria for employers in football. These are the income criterion, the quality criterion and the contingency principle.

In professional football, the income criterion and the age criterion are the most objective of those used by the CWI. Previously, employers had to explain to the authorities, with no grounds specified, why a foreign player was considered more suitable than a Dutch player. With the establishment of the income criterion the employer no longer needs to have this discussion. If the employer is prepared to pay the player a minimum salary that has been established beforehand, this will

[36] In a Dutch football magazine, Voetbal International of 2 October 2006, a chairman of the football club BV Veendam stated openly that he instructed the coach not to field a player for a fourth time to avoid the payment of the train ing and education costs due whenever a player makes his fifth official appearance.

indicate that the player is considered suitable to play for the club. Further interference from the authorities concerning the ins and outs of this suitability does not occur.

The income criterion is established annually by the CWI in accordance with the average gross annual income in the Premier League in the previous season. The salary information is supplied by the KNVB (Royal Dutch Football Association). Employers in football have to be prepared for changes in the income criterion around February of each year.

For non-EEA players the following remuneration is regarded as being in accordance with the market:

- The guaranteed income of players aged 18 and 19 must be at least 75% of the established average gross annual income in the Premier League in the previous season;
- The guaranteed income of players aged 20 and over must be at least 150% of the established average gross annual income in the Premier League in the previous season.

The criterion in calculating the guaranteed minimum income as of 1 July 2006 is 228,518 gross a year. This results in the following minimum remuneration:

- players aged 18 and 19 171,388.50;
- players aged 20 and over 341,704.50.

In determining whether the income which the employee will receive is in accordance with the established criterion, the following salary components can be included in the calculation:

- basic salary;
- possible guaranteed premiums;
- so-called earnest money, (a bounty), apportioned as an annual component;
- holiday allowance.

To be eligible for a permit the employer must be able to show, based on objective information, that the player has certain qualities. He may demonstrate that the player has these qualities based on one of the following two objective facts:

- just prior to his employment, the player participated in a competition which is at least as strong as the highest division of the Dutch competition. A competition is assumed to be as strong when it is
- the highest of a country which at the time when the work permit was applied for ranked among the top 40 countries on the FIFA country ranking list;
- the player has proved in some other way to have at least comparable qualities.

This quality criterion is based entirely on the player's individual performance. The criterion has been met when the alien played in:

- the national team of his country;
- the Olympic team of his country;
- a national youth selection of his country;

– recognised international club tournaments such as the Champions League, UEFA Cup, Copa Libertadores, etc.

The player must meet either criterion 1 or criterion 2. This is therefore not a cumulative criterion. It should also be noted that the experience may have been gained at any point during the player's career. It is therefore not necessary that this occurred shortly before the work permit application.

It is clear that it is quite difficult for a Dutch club to employ a Brazilian player, although there is no limit to the use of Brazilian players.

The same player would also need a work permit in Belgium, although conditions there are different. The player in Belgium would also need a work permit, but the only requirements are that the player receives a written contract and a minimum salary of around 60,000 euros[37].

Criteria also exist in Italy[38], Portugal[39] and Spain[40]. The player needs a work permit but is also subject to criteria issued by the football authorities. These criteria are not in fact illegal because these football governing bodies have received a formal mandate from the relevant governmental authorities to draw up rules and regulations for the entry of non-EU players into the football labour market.

Clubs in these countries may thus not align more than two or three non-EU nationals. As regards the Brazilian player in our case study: Portugal has a bilateral agreement with Brazil which is beneficial for Portuguese clubs, and they can employ Brazilians far more easily than other EU countries.

2.7.2. **Conclusion case study**

There is currently not a level playing field in the EU when it comes to the employment of non-EU nationals. On a national level different rules apply to the employment of these non-EU nationals.

2.8. GENERAL CONCLUSIONS

It appears that the free movement of workers in the professional sports sector is not safeguarded in a number of concrete cases. The issues covered here might be

[37] In the act KB of 9 June 1999 it is stated in Article 9 sub ii that professional sportsmen will receive a work permit if they earn at least 4 times the amount of the minimum wage that is mentioned in the law of 79 concerning professional sportsmen. That amount in total would then be calculated at around 60,000 euros.

[38] In the Italian Testo Unico 286/98 it is stated that professional sports also falls under a specific quota system. However this quota system, its creation and its implementation is left to the responsibility of the CONI, the Italian Olympic Committee.

[39] Email received by Prof. João Leal, lawyer of the Portuguese Football Federation, 18 November 2002.

[40] The general law on immigration is the Real Decreto 511/92 but in the regulations of the Spanish league one may find a quota system. The Spanish Ley 10//1990 del Deporte regulates the authority of the League in this respect.

brought to court as a result of a legal action taken by an athlete or worker. Three main elements may be identified as possible sources for the infringement of the right to free movement in the European Union.

First there are issues connected to the termination of contracts, such as the payment of training and education costs, solidarity payments and registration rights. All these aspects arise when a player or athlete transfers from one employer to another, hence the termination of one contract and the start of a new one.

Secondly, we have dealt with issues of third-country nationals. In the case of Van der Meer the nationality clauses were even in force for EU nationals, let alone third-country nationals. We have also noted that a level playing field for non-EU nationals still does not exist because of the differing status concerning the issuing of work permits in the sports sector.

Third is the defence of employees' interests. In the amateur players example it is clear that the player is in fact carrying out the same work under the same conditions as players with an employment contract. In practice the rights of these amateurs are not being defended, although the amateurs might be considered as workers or can be blocked should they want to become workers.

I mentioned in the introduction that there might be an alternative for a sound solution to these problems. In earlier articles and researches[41] I have made clear that in my opinion the future of European sports, mainly football, lies in the outcome of the European Social Dialogue.

3. THE EUROPEAN SOCIAL DIALOGUE

The European Social Dialogue can be defined as a consultation mechanism set up for employers and employees, both sides of the industry, at a European Union level. The objectives of the Social Dialogue can be twofold: on the one hand the Social Dialogue can serve as the basis for European-level organisations of workers and employers (the European Social Partners' organisations) to negotiate and conclude agreements, while on the other there is cooperation between the Community institutions and the European Social Partners' organisations[42].

The Social Dialogue is laid down in the Treaty Articles 137–139. There are three different types of Social Dialogue: cross-industry, sector level and enterprise level.

The negotiations between the social partners at the EU level in a specific sector can lead to agreements. These agreements can be put forward to the Council by the European Commission, with the intention of issuing a directive which is

[41] R. Branco Martins, *European Sports First Collective Bargaining Agreement*, FBO publication, 2002; R. Branco Martins, *A European Football Match Heading towards extra time*, "International Sports Law Journal", 3-4, 2004.

[42] E. Franssen, *Legal aspects of the European social dialogue*, Intersentia, Antwerp, 2002, p. 3.

then binding on every member state. Another possibility for making the EU-level agreement 'drip down' to the national level is to implement the agreement according to national practice.[43] This latter option does not imply obligatory implementation of the agreement.

In relation to this article I would like to point out the content of Article 137 sub 3. This Article clearly illustrates that binding agreements can be reached on all of the topics that have been discussed in relation to the free movement of workers, and needs to be read in connection with Article 139 of the EC Treaty:

> **Article 139 (ex Article 118b)**
> *1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.*
> *2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 137(3), in which case it shall act unanimously.*

> **Article 137 sub 3**
> *However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas: * social security and social protection of workers; * protection of workers where their employment contract is terminated; * representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6; * conditions of employment for third-country nationals legally residing in Community territory; * financial contributions for promotion of employment and job creation, without prejudice to the provisions relating to the Social Fund.*

4. **CONCLUSION**

It has become clear that the sports sector is still not 'Bosman-proof', and that a lot needs to be done still. The outcome of this article may still be the 'tip of the iceberg'. Given that this is the year of Job Mobility in the European Union, the time is right to assess the European sports sector thoroughly. In addition to this important factor, the European Commission DG Education and Culture will issue a White Paper on sport. It would not be surprising if the Social Dialogue will be addressed as a possible instrument to let the sports world itself, more specifically the football world, safeguard application of the rules on the free movement of workers.

[43] Article 139(2) EC Treaty.