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(F)linging (I)ndispensible (F)reedoms (A)side: Why FIFA's "6+5" Will Not Survive

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**(F)LINGING (I)NDISPENSABLE (F)REEDOMS (A)SIDE:
WHY FIFA’S “6+5” WILL NOT SURVIVE**

Michael Levinson*

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I. INTRODUCTION

Imagine if Portuguese soccer¹ star Cristiano Ronaldo was not allowed to start for Manchester United (“Man Utd.”), an English club, in the 2008 Union of European Football Associations (“UEFA”) Champions League final match because of his nationality. His goal – just twenty-six minutes into the match – might never have transpired, which may have prevented his team from ultimately defeating English rival Chelsea 1-1 (6-5).² While the above hypothetical is certainly extreme, it would be in the realm of possibilities if Federation Internationale de Football Association (“FIFA”) President Sepp Blatter has his way. Blatter’s proposed “6+5” rule, which the 58th FIFA Congress has overwhelmingly approved,³ simply states that, “[a]t the beginning of each match, each club must field at least [six] who are players eligible to play for the national team of the country of the club.”⁴ Though many prominent figures have offered their support for the rule’s objectives,⁵ the rule contravenes certain established principles of European Community (“EC” or “Community”) law.⁶ If that is the case, the rule, as it currently stands, would not be

¹ This article uses the term “soccer” rather than the more widely used “football.”

² Soccerway.com, Chelsea vs. Manchester United, <http://www.soccerway.com/matches/2008/05/21/europe/uefa-championsleague/chelsea-footballclub/manchester-united-fc/616598/> (last visited Jan. 24, 2010).

³ Media Release, FIFA, FIFA Congress Supports Objectives of 6+5 (May 30, 2008), <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783657.html> [hereinafter “FIFA Congress Supports Objectives”]. At its meeting in Sydney on May 29 and 30, 2008, the FIFA Congress approved the measure with a significant majority (155 yes, 5 no). *Id.*

⁴ *Id.* In the above example, Ronaldo would clearly still be eligible for Man Utd.’s starting lineup, despite being ineligible to play for the English national team. The reference is only used to demonstrate that many of the game’s most prominent clubs could be without the services of key foreign players – which are so heavily relied upon – if the rule is deemed legal.

⁵ Former soccer “greats” Pele, Franz Beckenbauer, and Johann Cruyff have offered support for FIFA’s proposal. *See, e.g.,* Vicki Hodges, *FIFA Congress Backs President Sepp Blatter Over ‘6+5’ Foreign Quota Proposal*, TELEGRAPH (UK), May 30, 2008, available at <http://www.telegraph.co.uk/sport/football/2301939/Fifa-Congress-backs-president-Sepp-Blatter-over-65-foreign-quota-proposal.html> (last visited Mar. 3, 2009).

⁶ The Treaty of Rome established the European Economic Community in 1957, which created a common market under the premise that people, goods, and services

applicable to the clubs of national associations based in European Union ("EU") Member States.

This note examines the legality of FIFA's proposed "6+5" rule as it relates to the principles of antidiscrimination, the free movement of workers, and basic elements of competition law elucidated in the Treaty on the Functioning of the European Union.⁷ Part II reviews the history of important European Court of Justice ("ECJ" or "Court") decisions involving sports figures and the applicability of EC law.⁸ Part III lays out the present issues and analyzes whether the rule is in opposition to, or can overcome, established Community law, which the recent Institute of European Affairs ("INEA") report indicates is a very realistic possibility. Part IV discusses possible solutions to the

be allowed to move freely across borders, and served as the legal basis for current European Community law. *See generally* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (as in effect 1957) [hereinafter Treaty of Rome]. Commonly referred to as the EEC Treaty, the Treaty of Rome was amended in 1992 by the Treaty of Maastricht, in 1997 by the Treaty of Amsterdam, in 2001 by the Treaty of Nice, and in 2007 by the Treaty of Lisbon. EUROPA, The History of the European Union, http://europa.eu/abc/history/19451959/index_en.htm (last visited Mar. 30, 2009). The Treaty of Lisbon also renamed the EEC Treaty as the Treaty on the Functioning of the European Union. Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, art. 1, Dec. 13, 2007, 2007 O.J. (C 306) 10; *see generally* KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW 7-24 (Routledge-Cavendish 2007) (2001).

⁷ Any reference to an Article within this paper is to the version of the EEC Treaty, as amended by the Treaty of Lisbon. Treaty on the Functioning of the European Union, Dec. 13, 2007, 2007 O.J. (C 83) 47.

⁸ Though there is no doctrine of *stare decisis* in Community law, the ECJ tends to decide cases consistent with its prior rulings. *See* Joel Vander Kooi, *The Asean Enhanced Dispute Settlement Mechanism: Doing it the "Asean Way,"* 20 N.Y. INT'L L. REV. 1, 16-17 (2007) ("[T]he principle of binding precedent, or *stare decisis*, has developed within the EC to a significant degree despite the silence of the EC treaties on the subject."); *see also* CURIA, Court of Justice, Presentation, http://curia.europa.eu/jcms/jcms/Jo2_7024/presentation (last visited May 10, 2009) [hereinafter Presentation] (stating "[w]here a question referred for a preliminary ruling is identical to a question on which the Court has already been called on to rule, or where the answer to the question admits of no reasonable doubt or may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, give its decision by reasoned order, citing in particular a previous judgment relating to that question or the relevant case-law.").

quandary, including UEFA's "Homegrown Player" rule,⁹ and explains why that rule has stronger legal standing than the "6+5" rule under EC law. Finally, Part V concludes that FIFA is unlikely to win its battle with the EU Commission given that the "6+5" rule encroaches upon fundamental freedoms guaranteed by EC law and surmises that a *Bosman*-like ruling¹⁰ could be forthcoming.

II. THE INGREDIENTS LEADING TO *BOSMAN* AND BEYOND

A. *Sport as an Economic Activity and the Struggle to Enforce It*

The discussion of Community law and sports in relation to the ECJ dates back to 1974.¹¹ In *Walrave v. Ass'n Union Cycliste Internationale*, the Court was faced with the question of whether sport falls within the parameters of EC law.¹² The ECJ answered this question affirmatively, but with some restriction, as it held, "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."¹³ Only when the activity is of "purely sporting interest" can it escape the scope of Articles 45-48 and 56-62 of the Treaty.¹⁴ As a result,

⁹ UEFA is one of six soccer confederations in the world – which are considered umbrella organizations of the national soccer associations on each continent – and it governs European soccer. A confederation can stage its own competitions at both the club and international levels, such as the Champions League or UEFA Cup, and it helps support FIFA, while still allowing the national associations to hold certain rights. FIFA.com, Football Confederations, <http://www.fifa.com/aboutfifa/federation/confederations/index.html> (last visited May 9, 2009). UEFA also plays a role in FIFA's administration, as it elects two FIFA vice presidents and five members of FIFA's executive committee. EXEC. COMM. OF THE UNION OF EUR. FOOTBALL ASS'NS, RULES OF PROCEDURE OF CONGRESS: REGULATIONS GOVERNING THE IMPLEMENTATION OF THE STATUTES, art. 19, § 4 (June 2007), available at <http://www.uefa.com/newsfiles/19081.pdf>.

¹⁰ See discussion *infra* Part II.B.

¹¹ See Case 36/74, *Walrave v. Ass'n Union Cycliste Int'l*, 1974 E.C.R. I-1405 (1974) (challenging the legality of a Union Cycliste International rule requiring the pacemaker and the stayer to be of the same nationality for cycling teams).

¹² See RICHARD PARRISH, *SPORTS LAW AND POLICY IN THE EUROPEAN UNION* 86 (Simon Bulmer ed., 2003).

¹³ *Walrave*, 1974 E.C.R. at I-1417.

¹⁴ *Id.* at I-1418.

national teams are permitted to discriminate based upon nationality.¹⁵ Additionally, the Court found that Articles 45 and 56 of the Treaty carry horizontal direct effect, meaning nondiscrimination principles apply to public authorities as well as any set of rules designed to collectively regulate gainful employment and services.¹⁶ This last holding is of particular importance in relation to the “6+5” rule because it means FIFA is not able to implement policies that conflict with Community law.

Two years after its *Walrave* decision, the ECJ faced similar sports-related issues. In *Donà v. Mantero*,¹⁷ the Italian national court asked the ECJ to decide whether Articles 18, 45, and 56 of the Treaty accord EU nationals the right to provide a service anywhere within the EU and, if so, whether that right applies to soccer players in the nature of a gainful occupation.¹⁸ The Court held that rules permitting only the nationals of a State to participate in a professional or semi-professional match are incompatible with the Articles in question, “unless such rules or practices exclude 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.”¹⁹ As some commentators have noted, this decision created uncertainty as to what constitutes “sporting interest only.”²⁰ Over three decades later, that uncertainty has yet to be resolved, and the crux of the debate concerning FIFA’s “6+5” rule pertains to whether this broad exception from *Walrave* and *Donà* applies.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ Case 13/76, *Donà v. Mantero*, 1976 E.C.R. 1333 (involving a challenge by an agent to the Federazione Italiana del Gioco del Calcio (“FIGC”) rules stating that normally only soccer players of Italian nationality residing in Italy can be issued the card required to be eligible to play within a league of the country).

¹⁸ PARRISH, *supra* note 12, at 87-88.

¹⁹ *Donà*, 1976 E.C.R. at 1341.

²⁰ *See* Duncan McHardy, *Reconciling Soccer Authorities and European Union Institutions: Who is Best Placed to Administer Governance within the European Soccer Market?*, 18 SETON HALL J. SPORTS & ENT. L. 105, 123 (2008) (noting that “the ECJ failed to define a competition of ‘sporting interest only’”).

Despite the ECJ's rulings in *Walrave* and *Donà*, the European Commission ("Commission") did not fully adhere to the principles set forth in those cases.²¹ As such, the Commission and UEFA battled over nationality restrictions for nearly two decades. In 1991, UEFA implemented the "3+2" rule – an older cousin of FIFA's "6+5" rule – which allowed each team participating in UEFA competitions to field up to three foreign players plus two "assimilated"²² foreign players.²³ This new rule was a compromise with the Commission, as it did away with the old system limiting the number of foreign players to two, not including "assimilated foreign" players.²⁴

Though on the surface the "3+2" rule appears to have a discriminatory feature much like the "6+5" rule, the Commission still sought total freedom of movement at a later date.²⁵ One possible explanation for the Commission's relaxed position concerning UEFA's rule is that, in 1991, European soccer could be regarded "as a marginal economic activity at best."²⁶ As soccer became more visible on a global scale due to various telecommunications developments,²⁷ it could no longer be denied that soccer went beyond "purely sporting interest." With the Commission and UEFA engaged in a two-decade stalemate, the playing field was set for the ECJ to serve as referee. All it needed was a banner case – a case that the European Community and the rest of the world would take notice of – and it got just that in the symbolic figure of Jean-Mark Bosman.

²¹ PARRISH, *supra* note 12, at 91.

²² An assimilated player is one who has played in a country for five straight years without interruption, including at least three years on a junior team. *Id.* at 92.

²³ See Lindsey Valaine Briggs, *UEFA v The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 440-41 (2005).

²⁴ See Rachel B. Arnedt, *European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT'L L. REV. 1091, 1104 (1998).

²⁵ See PARRISH, *supra* note 12, at 92.

²⁶ *Id.*

²⁷ See Michael Siebold & Angela Klingmüller, *Sports Facility Financing and Development Trends in Europe and Germany 2003*, 15 MARQ. SPORTS L. REV. 75, 83 (2004) (noting that broadcasting rights are being packaged in a creative and sophisticated manner, and include not only the broadcasts of live games, but also video on demand, mobile telephones, and broadband Internet rights).

B. Bosman: *The Facts, The Results, and The Legal Ramifications*

1. Who is Bosman?

Jean-Mark Bosman was a Belgian national playing for a Belgian club, RC Liège, in a Belgian league governed by the Union Royale Belge des Sociétés de Football Association ASBL (“URBSFA”), whose contract was set to expire on June 30, 1990.²⁸ Two months prior, the club offered Bosman the minimum contract allowed under URBSFA rules, at the rate of BFR²⁹ 30,000 per month – a quarter of his monthly salary for the current season.³⁰ The offer was promptly rejected, and Bosman was placed on the transfer list, as stipulated by URBSFA rules, for a transfer fee of BFR 11,743,000.³¹ The transfer fee seemed to prevent other clubs from contacting RC Liege concerning Bosman’s availability, so Bosman became proactive and struck a deal with US Dunkerque, a French second division team.³² The deal gave the French club an irrevocable offer for full transfer contingent upon URBSFA sending a transfer certificate to the Fédération Française de Football (“FFF”) before the start of the season on August 2, 1990.³³ RC Liège had doubts about the solvency of US Dunkerque and so did not ask URBSFA to send the transfer certificate to the FFF.³⁴ As a result, the contract Bosman signed with the French club became void, and RC Liège suspended him for the 1990-91 season in accordance with URBSFA rules.³⁵

²⁸ Case C-415/93, *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman*, 1995 E.C.R. I-4921, I-5050.

²⁹ “BFR” stands for Belgian Francs – the Belgian form of currency before the implementation of the Euro in 2002.

³⁰ *Bosman*, 1995 E.C.R. at I-5050.

³¹ *Id.*

³² *Id.*

³³ *Id.* at I-5051.

³⁴ *Id.*

³⁵ *Id.*

Bosman filed for relief in the Belgian courts, and eventually the case was referred to the ECJ for a preliminary ruling.³⁶ The two main issues brought before the Court were: (1) whether Articles 45, 101, and 102 of the Treaty³⁷ prohibit a transfer fee when a player signs with a new club upon the completion of his contract, and (2) whether national and international sporting associations can restrict access to foreign players within the EU from the competitions which they organize.³⁸

2. Justifications Denied

Concerning the first question, the ECJ held that, "Article [45] . . . precludes the application of rules . . . under which a professional footballer who is a national of one Member State may not, on the expiry of his contract . . . be employed by a club of another Member State unless the latter club has paid to the former club a transfer . . . fee."³⁹ The Court noted the transfer system does not protect against the richest clubs securing the best players and does not prevent financial resources from being a crucial factor in sports.⁴⁰ Additionally, the Court found that the need to develop and maintain young players as a result of the transfer system does have validity, but that there is too much uncertainty for it to serve as an overriding justification.⁴¹

As to the second question, the ECJ concluded, "that Article [45] of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of

³⁶ See *id.* at I-5051 to -55; see also Amikam Omer Kranz, *The Bosman Case: The Relationship Between European Union Law and the Transfer System in European Football*, 5 COLUM. J. EUR. L. 431, 436-37 (1999).

³⁷ Article 45(2) states: "[s]uch 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." Treaty on the Functioning of the European Union, *supra* note 7, at 66. Articles 101 and 102 both pertain to rules on competition and rules applicable to undertakings. See *id.* arts. 101-102.

³⁸ *Bosman*, 1995 E.C.R. at I-5056.

³⁹ *Id.* at I-5073.

⁴⁰ *Id.* at I-5071 to -72.

⁴¹ *Id.* at I-5072.

professional players who are nationals of other Member States.”⁴² The Court rejected the defendants’ tendered justifications and noted that being a foreign player does not preclude one from playing for his or her country’s national team.⁴³ Furthermore, the Court stated that Article 45 gives workers a greater chance of finding employment in other Member States⁴⁴; that nationality clauses do not prevent the richest clubs from securing the services of the best domestic players⁴⁵; and that the Commission does not have the power to authorize practices which are contrary to the Treaty.⁴⁶ Finally, the Court found that because the two referred questions are contrary to Article 45, it was unnecessary to rule on the interpretations of Articles 101 and 102 of the Treaty.⁴⁷

3. The ECJ’s Decision: Opportunities for Future Challenge?

The *Bosman* ruling had several temporal effects, both in present and future scope. Of immediate relevance, *Bosman* did not affect transfers of non-EU nationals from one EU Member State to another; it applied to all sports⁴⁸ in EU Member States that placed restrictions on nationals; and it did not affect the composition of national teams.⁴⁹ In terms of having a lasting impact, the decision imparted that, not only do nationality restrictions constitute discrimination, but they also serve as an obstacle to free movement in terms of access to the employment market.⁵⁰ This is of particular significance because it potentially broadens the scope of sporting rules that

⁴² *Id.* at I-5078.

⁴³ *Id.* at I-5077.

⁴⁴ Defendants argued that opening up the employment market to nationals of other Member States would reduce workers’ chances of finding employment within the Member State for which they are nationals. *Id.*

⁴⁵ Defendants argued nationality clauses prevent the wealthiest clubs from constantly outbidding each other for the best foreign talent. *Id.*

⁴⁶ Defendants cited the Commission’s approval of versions of the “3+2” rule in support of the legality of nationality restrictions. *Id.* at I-5078.

⁴⁷ *Id.*

⁴⁸ Examples include ice hockey, basketball, handball, volleyball, and rugby.

⁴⁹ See PARRISH, *supra* note 12, at 98.

⁵⁰ See *id.* at 99.

can fall within Article 45's range.⁵¹ As one scholar states, "rather than 'contracting into the Treaty, sport must justify why it should 'contract' out of it."⁵²

Perhaps the most striking concept taken from the decision, however, is the Court's implicit acknowledgement that sport can be separated from other industries if proper justification is given.⁵³ While the ECJ analyzed the justifications raised by the defendants, it held they were not strong enough to outweigh the Treaty principles.⁵⁴ It did give special recognition to the argument that transfer fees encourage clubs to seek new talent and to develop young players but used words such as "contingent" and "uncertain" when describing its effects.⁵⁵ The crucial point to note is that the Court did not explain what justifications could be sufficient to overcome EC law.

The opinion of Advocate General Carl Otto Lenz provides further insight into what justifications may be strong enough to overcome the stringent balancing test.⁵⁶ First, Advocate General Lenz noted that the Court has since expanded its holdings from *Walrave* and *Donà* to potentially include economic justifications that are in the general interest of the Community.⁵⁷ Taking this into consideration, however, the transfer rules, as implemented, were unnecessary to achieve the legitimate aim of maintaining competitive balance within the professional leagues, as there were less restrictive means of achieving economic and sporting equilibrium among the clubs.⁵⁸

⁵¹ *See id.*

⁵² *Id.*

⁵³ *See* Stephen Weatherill, *Resisting the Pressures of 'Americanization': The Influence of European Community Law on the 'European Sport Model,'* in *LAW AND SPORT IN CONTEMPORARY SOCIETY* 155, 164 (Steve Greenfield & Guy Osborn eds., 2000).

⁵⁴ Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, I-5081.

⁵⁵ *See id.* at I-5071 to -72.

⁵⁶ *See id.* at I-5012 to -25 (opinion of Advocate General Lenz).

⁵⁷ *See id.* at I-5013; *see also* Case C-300/90, *Comm'n v. Belgium*, 1992 E.C.R. I-305, I-320, I-321 (holding restrictions on freedom of movement can be lawful if necessary to ensure cohesion of the tax system).

⁵⁸ *See Bosman*, 1995 E.C.R. at I-5017 (opinion of Advocate General Lenz) (arguing there could be limits agreed upon to control the upward spiral of player salaries, and there could be greater wealth distribution between clubs that generate higher

Stated differently, “[t]he transfer rules are [] not indispensable for attaining that objective, and thus do not comply with the *principle of proportionality*.”⁵⁹

In addressing the argument that transfer fees serve as compensation for costs incurred in the training and development of players, Advocate General Lenz remained unconvinced.⁶⁰ He opined that the fees are associated with a player’s earnings as opposed to team start-up costs and that high fees are exchanged even when experienced players change clubs.⁶¹ Advocate General Lenz did propose, however, that transfer fees might be justifiable if two conditions are met: “[f]irst, 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[;] [s]econd, 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.”⁶² Unlike the Court, Advocate General Lenz lent more insight into what actions could be considered justifiable to overcome Treaty principles.⁶³ Nevertheless, he still stopped short of listing specific criteria, leaving the door open for more challenges to come.

C. *Bosman’s Progeny*

In response to *Bosman*, the ECJ began to narrow the broad relationship it had established between Article 45 and sport ever so slightly.⁶⁴ In particular, there were two major cases, both of which tended to be more favorable to sports governing bodies. In *Deliège v. Asbl Ligue Francophone de Judo*,⁶⁵ a Belgian judoka claimed that her

revenues and those disadvantaged in smaller markets – neither of which run afoul from freedom of movement principles).

⁵⁹ *Id.* at I-5020 (opinion of Advocate General Lenz).

⁶⁰ *Id.* at I-5021 (opinion of Advocate General Lenz).

⁶¹ *See id.*

⁶² *Id.* at I-5022 (opinion of Advocate General Lenz).

⁶³ *See generally id.* at I-5012 to -25 (opinion of Advocate General Lenz).

⁶⁴ Andreas Joklik, *The Legal Status of Professional Athletes: Differences Between the United States and the European Union Concerning Free Agency*, 11 SPORTS LAW. J. 223, 252 (2004).

⁶⁵ Joined Cases C-51/96 & C-191/97, *Deliège v. Ligue Francophone de Judo*, 2000 E.C.R. I-2549.

career had been hindered by the country's judo governing body in that the government refused to let her participate in the 1992 and 1996 Olympic Games.⁶⁶ The issues presented were: (1) whether she needed to be authorized by a federation to compete in a high-level international event, and (2) whether the denial of this notion violated Article 56⁶⁷ of the Treaty.⁶⁸ The Court held that, "[a] rule . . . does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 56 of the EC Treaty."⁶⁹ Based on this principle, FIFA would merely need to show that the "6+5" rule protects elements of competition.

Deliège is significant because it shows that selection criteria do not necessarily impose restrictions under Article 56.⁷⁰ Similarly, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball ASBL* also demonstrates potential sporting exceptions to Treaty law.⁷¹ In *Lehtonen*, the Belgian basketball federation refused to register Lehtonen, a transfer player from a Finnish league, because the transaction did not take place within the specified transfer window.⁷² As a result, Lehtonen was ineligible to play for his new team.⁷³ The ECJ was called upon to determine whether "the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specified date [are] contrary to the Treaty of Rome (in particular Articles [18, 45, 101 and 102]). . . ." ⁷⁴ The Court found the rule operated to restrict free movement of workers even though it had more to do with participation than employment.⁷⁵ Despite this assertion, the Court agreed with the

⁶⁶ See *id.* at I-2602.

⁶⁷ Article 56 governs the free movement of services. See DAVIES, *supra* note 6, at 149.

⁶⁸ See *Deliège*, 2000 E.C.R. at I-2612.

⁶⁹ *Id.* at I-2620.

⁷⁰ See PARRISH, *supra* note 12, at 104; see also Joklik, *supra* note 64, at 250-52.

⁷¹ Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basketball ASBL*, 2000 E.C.R. I-2681, I-2682 to -83.

⁷² See *id.* at I-2721 to -22.

⁷³ See *id.*

⁷⁴ *Id.* at I-2723 to -24.

⁷⁵ *Id.* at I-2732 to -33.

defendants that the rules on transfer deadlines were necessary for the organization of the game, reasoning that the regulations protect against drastically altering a team in the course of the championship.⁷⁶ In condoning this justification, the Court was careful to point out that such rules must not go beyond what is necessary to achieve the desired aim.⁷⁷ Once again, this case serves as an example that justifications to Treaty exceptions can work if they can be classified as non-economic sporting interests. This is the challenge FIFA faces as it takes on EC law.

D. *The ECJ Finally Tackles Articles 101 and 102 . . . Sort of*

Throughout the previously discussed cases, the ECJ analyzed the issues raised primarily using an Article 45 framework, with the free movement of workers and antidiscrimination at the forefront.⁷⁸ A common theme evolved in relation to Articles 101 and 102 in that the Court refused to decide the cases based on competition law principles.⁷⁹ In 2006, the Court finally addressed the issue in the sporting context.⁸⁰

In *Meca-Medina*, two professional swimmers who tested positive for the banned substance nandrolone challenged their resulting suspensions by the Fédération Internationale de Natation ("FINA"), swimming's international governing body, on the theory that the disciplinary action infringed upon their right to compete.⁸¹ The athletes did not object to the sporting objectives⁸² of the anti-doping rules; instead, they argued that the rules had an underlying economic component designed to protect the International Olympic Committee's interests and were therefore excessive by nature.⁸³ By

⁷⁶ *Id.* at I-2734.

⁷⁷ *See id.*; *see also* Joklik, *supra* note 64, at 249-52.

⁷⁸ *See* discussion *supra* Parts II.B-C.

⁷⁹ *Id.*

⁸⁰ *See* Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991.

⁸¹ *See id.* at I-7009 to -11.

⁸² The objectives "included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport." *Id.* at I-7024.

⁸³ *See id.*

virtue of being excessive, the rules lost their "sporting interest only"⁸⁴ status and were no longer exempt from falling within the jurisdiction of Article 101.⁸⁵

The Court began by framing the competition analysis under Articles 101 and 102, noting, "it will be necessary to determine . . . whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States."⁸⁶ Even though the Court set forth this foundation, it did not need to fully apply these factors; the athletes did not supply scientific evidence to support their claim that the level of nandrolone in one's system deemed prohibitory was too low to be considered fully accurate.⁸⁷ As such, the athletes' claims were dismissed,⁸⁸ but not before the Court was able to throw a bit of a wrinkle into its "purely sporting interest" discussions from previous cases.⁸⁹

The Court declared that rules implemented with a purely sporting interest in mind can still be challenged under the Treaty if they are not proportionate to the desired goal.⁹⁰ As the Court stated, "in order not to be covered by the prohibition laid down in Article [101(1)], the restrictions [] imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport."⁹¹ Though this reasoning is similar to the Court's Article 45 analysis, it stands out because, for the first time, the Court confirmed that sporting rules will face heavy scrutiny when a challenge under Article 101, and seemingly Article 102, has been raised. Additionally, this means a rule could conceivably satisfy the sporting interest criterion for purposes of free movement law but not pass muster

⁸⁴ See discussion *supra* Part II.A.

⁸⁵ See *Meca-Medina*, 2006 E.C.R. at I-7024.

⁸⁶ *Id.* at I-7020.

⁸⁷ See *id.* at I-7024 to -26.

⁸⁸ See *id.* at I-7026 to -27.

⁸⁹ See Hayden Opie, *Survey: A Global Perspective on the Most Important Cases Affecting the Sports Industry*, 16 VILL. SPORTS & ENT. L.J. 99, 116 (2009).

⁹⁰ See *Meca-Medina*, 2006 E.C.R. at I-7024.

⁹¹ *Id.*

under competition law.⁹² Should a rule such as the anti-doping procedures in *Meca-Medina* be challenged, the sporting organization will have to show that the rule necessary, that it is not excessive, and that it does not produce adverse effects on competition. Consequently, this makes it more difficult for a rule-making body to bring about change⁹³ and is yet another obstacle facing FIFA regarding the “6+5” rule.

Subsequent to *Meca-Medina*, the ECJ was scheduled to rule on another potentially groundbreaking case concerning the free movement of goods, the free movement of services, and competition law.⁹⁴ In *SA Sporting du Pays de Charleroi v. Fédération Internationale de Football Ass’n Charleroi*, a Belgian soccer club filed suit against FIFA after one of its players was injured while playing for the Moroccan national team.⁹⁵ The club claimed FIFA’s rule requiring teams to release players for international competitions was violative of the Treaty and so sought compensation for missing one of its key players

⁹² See GIANNI INFANTINO, UEFA, MECA-MEDINA: A STEP BACKWARDS FOR THE EUROPEAN SPORTS MODEL AND THE SPECIFICITY OF SPORT? 7 (2006), http://www.uefa.com/multimediafiles/download/uefa/keytopics/480391_download.pdf.

⁹³ See, e.g., *id.* at 2 (lamenting that, based on the precise language of the Court’s ruling in *Meca-Medina*, “it is now more difficult to identify specific sports rules that are not capable of challenge under EU law”).

⁹⁴ In *SA Sporting du Pays de Charleroi v. Fédération Internationale de Football Association*, the question referred to the Court was as follows: “Do the obligations on clubs and football players having employment contracts with those clubs imposed by the provisions of FIFA’s statutes and regulations providing for the obligatory release of players to national federations without compensation and the unilateral and binding determination of the coordinated international match calendar constitute unlawful restrictions of competition or abuses of a dominant position or obstacles to the exercise of the fundamental freedoms conferred by the EC Treaty and are they therefore contrary to Articles 81 and 82 [amended as Articles 101 and 102] of the Treaty or to any other provision of Community law, particularly Articles 39 and 49 [amended as Articles 45 and 56, respectively] of the Treaty?” Case C-243/06, *SA Sporting du Pays de Charleroi v. Fédération Int’l de Football Ass’n*, 2006 O.J. (C 212) 11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:212:0011:0011:EN:PDF>).

⁹⁵ See Raf Casert, *Despite FIFA Club Compensation Deal, Charleroi Maintains Landmark Court Case*, AP WORLDSTREAM, Feb. 13, 2008, available at WL, APWORLD 15:03:45.

and for his medical expenses.⁹⁶ Before the ECJ could rule on the legality of the rule, the two sides reached a general settlement in which clubs will receive approximately £2,800 for each day one of their players is involved in an international tournament.⁹⁷

There are several reasons why the case might have settled; specifically, FIFA may have considered the Court's trend of narrowing the sporting exception and decided the current status of the rule should not be left to chance. *Charleroi* demonstrates that FIFA is potentially willing to compromise when it comes to contro-versial rules, which ultimately may be FIFA's best play in trying to implement the "6+5" rule.

E. *Laying the Foundation*

Thus far, the case studies in this article have demonstrated that sport falls within the precipice of EC law, and that certain non-economic, and potentially economic, reasons can override Treaty principles. Nevertheless, it is yet to be clearly established what factors may be strong enough to overcome these principles, though the burden appears to be high. Faced with such uncertainty, the legal battle over the "6+5" rule has been formulated. Now, the primary issues in play are: (1) whether the rule violates Articles 45, 101, and 102 of the Treaty; (2) whether justifications based on some combination of reasonableness, necessity, and proportionality can be offered if the rule is deemed in violation; and (3) whether those justifications are strong enough to overcome established Treaty law.

III. ASSESSING THE RULE'S LEGALITY

A. *The Arguments*

1. **The Treaty of Lisbon**

With the rise of sport on a global and economic level, there has been much debate in the EU as to whether it can be regulated

⁹⁶ *See id.*

⁹⁷ *See* Gary Jacob, *United and Real Head for Meeting*, TIMES (LONDON), July 7, 2008, at 2.

under Treaty law as if it is just another industry.⁹⁸ The ECJ has consistently found that sport is not above the basic freedoms ensured to all EU citizens,⁹⁹ but there is growing support in the Community that this position is softening.¹⁰⁰ The Treaty of Lisbon is what FIFA is using as a basis for the “6+5” rule’s legality.¹⁰¹ As Blatter has explained, “[w]e do not want to go against the existing laws. Regarding Europe, we want to use the legal basis of the Treaty of Lisbon, which acknowledges the specificity of sport and its structures and organisations, and comes into force on 1 January 2009.”¹⁰²

While Blatter’s initial assessment of the rule’s legal foundation seems rational and could garner support,¹⁰³ problems can still be anticipated. Even though the Treaty of Lisbon has now entered into force,¹⁰⁴ it is still unclear – based on the broad language of the Articles – how it would relate to other aspects of established Community law or what, and how much, authority it gives to sports governing bodies. Given such uncertainty, Blatter’s reliance on the Treaty

⁹⁸ See Markku Laitinen & Tiinu Wuolio, *European Constitutional Treaty to Include Sports*, MOTION – SPORTS IN FINLAND, Jan. 2003, at 28, available at http://www.lts.fi/filearc/355_28_European_Constitutional.pdf?LTS_reg=tqjcsor4anl8rmuv6o89dk3507 (quoting Erkki Liikanen, a member of the European Commission, as saying, “[s]port has to respect the law just as other economic or social activities do,” but also, “[s]port is of major interest for citizens in general[;] [i]t can be compared to culture and education”).

⁹⁹ See, e.g., Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991, I-7018 (stating “[s]port is subject to community law in so far as it constitutes an economic activity within the meaning of Art. 2 EC”).

¹⁰⁰ See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 2, ¶ 124, Dec. 13, 2007, 2007 O.J. (C 306/1) 82, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0042:0133:EN:PDF> (“The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function”).

¹⁰¹ See FIFA Congress Supports Objectives, *supra* note 3.

¹⁰² *Id.*

¹⁰³ See, e.g., *Sports: Ministers Tackle FIFA 6+5 Rule*, EUR. SOC. POL’Y, Dec. 8, 2008 (mentioning French Minister Bernard Laporte’s strong backing of sport being a separate EU competency within the Treaty of Lisbon).

¹⁰⁴ EUROPA, Treaty of Lisbon, Taking Europe into the 21st Century, http://europa.eu/lisbon_treaty/index_en.htm (last visited Feb. 4, 2010).

of Lisbon for the "6+5" rule is at best premature, and at worst overly speculative.

2. The Commission's Stance

In response to the mounting questions concerning the specificity of sport and sport's growing social, cultural, and economic influence within the EU, the European Commission drafted a White Paper to discuss these issues.¹⁰⁵ Regarding player quotas, the White Paper concluded:

Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players. The ongoing study on the training of young sportsmen and sportswomen in Europe will provide valuable input for this analysis.¹⁰⁶

Since the White Paper's publication, the Commission has come out swinging against the "6+5" rule.¹⁰⁷ Vladimir Spidla, the Commissioner for Employment and Social Affairs, stated, "[t]he European Commission is showing a red card to the six plus five rule. This would be direct discrimination on the basis of nationality, which is unacceptable. It's a non-starter."¹⁰⁸ Given that the "6+5" rule is based on nationality, FIFA is facing an insurmountable obstacle in relation

¹⁰⁵ *Commission White Paper on Sport*, COM 2007 (391) final (July 11, 2007), available at http://ec.europa.eu/sport/white-paper/doc/wp_on_sport_en.pdf.

¹⁰⁶ *Id.* § 2.3.

¹⁰⁷ See George Caulkin, *Sepp Blatter's Quota System Given "Red Card,"* TIMES (UK), May 31, 2008, available at <http://www.timesonline.co.uk/tol/sport/article4036181.ece>.

¹⁰⁸ *Id.*

to direct discrimination. Alternatively, its best course of action is to argue that, even if indirect discrimination exists, the objectives are proportionately justifiable for the good of the game.

3. Proffered Justifications

When passing the “6+5” resolution, FIFA stressed that soccer is predicated on finding a balance between supporting national and club teams.¹⁰⁹ As a result, the rule is needed to protect against financial inequalities in soccer associations worldwide, to help ensure competitiveness, and to promote the game’s development.¹¹⁰ In particular, FIFA has stated that “[s]afeguarding (i) the education and training of young players, (ii) training clubs, and (iii) the values of effort and motivation in football, particularly for young players, is a fundamental element of protecting national teams and restoring sporting and financial balance to club football.”¹¹¹ While these justifications may be strong enough to fit within the “purely sporting interest” classification, it does not necessarily follow that the rule is valid under EC law. Even if FIFA can get around issues concerning direct discrimination, it still must show that the justifications cannot be accomplished by less obtrusive means.¹¹² Therein lies another challenge for soccer’s governing body, especially as the larger and more powerful teams have sought to throw their weight behind the status quo.¹¹³

B. *The INEA Report*

Even if a group supports the objectives of the “6+5” rule, the general position is that such support is conditioned upon the rule

¹⁰⁹ FIFA Congress Supports Objectives, *supra* note 3.

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *See generally supra* Part II.B.

¹¹³ *See, e.g.,* Matt Hughes, *Peter Kenyon Defends Dominance of ‘Big Four,’* TIMES (UK), July 29, 2008 (quoting Chelsea’s chief executive Peter Kenyon as stating, “[w]e don’t support ‘six plus five’ and I don’t think there is any appetite for it across Europe. It will not solve the problem. We shouldn’t dumb down and use artificial ways to get an even platform.”), *available at* http://www.timesonline.co.uk/tol/sport/football/premier_league/chelsea/article4419168.ece.

complying with Community law.¹¹⁴ In response to the current dilemma, INEA¹¹⁵ set out to examine whether the “6+5” rule can overcome the Commission’s wrath. By ultimately deciding that FIFA’s grand plan is legal,¹¹⁶ INEA’s report has become the first prominent authority, outside of FIFA, to reach such a conclusion.¹¹⁷ It bears mentioning that the INEA report may be of controversial scholarly value given its inherent bias, despite contrary assertions from the organization itself. The group has been known to engage in legal lobbying and was essentially hired by FIFA as an expert witness to help prove its case. Nevertheless, it is still necessary to analyze the rationales used in the report and to examine how they hold up against the ECJ cases discussed in Part II of this article, for those are arguments that FIFA relies upon as well.

¹¹⁴ See Hodges, *supra* note 5 (quoting then-chief executive of the English Football Association, Brian Barwick, as saying, “[c]ertainly, we can understand the general principle of a further exploration, but we are keen exponents of things staying within domestic and international law”).

¹¹⁵ INEA is an “ideational organization” consisting of professors and scientists, both political and social. See Institute for European Affairs, Tasks and Goals, http://www.inea-online.com/index.php?option=com_content&task=section&id=3&Itemid=13&lang=english (last visited Mar. 31, 2009). Founded in 1995, the Institute “initiate[s] conferences, ambassador forums and discussion circles, deliberate[s] on the themes of future events and provide[s] content impetus.” *Id.* Its objective is “to achieve a greater European convergence and a greater familiarity among European leadership personalities, and . . . to avoid or alleviate emerging or already existing problems and tensions among European partners.” *Id.* Furthermore, the Institute claims “[a] successful change of EU law, e. g[.], the so-called EU-Legal-Lobbying, is attributable to our repute.” Institute for European Affairs, Locations, http://www.inea-online.com/index.php?option=com_content&task=section&id=4&Itemid=14 (last visited Mar. 31, 2009).

¹¹⁶ See INSTITUTE FOR EUROPEAN AFFAIRS, EXPERT OPINION ON THE COMPATIBILITY OF THE “6+5 RULE” WITH EUROPEAN COMMUNITY LAW 184 (2009) [hereinafter “INEA REPORT”], available at http://www.inea-online.com/index.php?option=com_content&task=view&id=35&Itemid=1.

¹¹⁷ Of note, the INEA Report was commissioned by FIFA. Simon Johnson, *Boost for Blatter in his Plan to Cut Foreign Invasion*, EVENING STANDARD (LONDON, UK), Feb. 26, 2009. INEA claims the study was completely independent and not dictated by its client. INEA REPORT, *supra* note 116, at 5.

1. Direct Discrimination, Indirect Discrimination, or No Discrimination?

The report provides an overview of its discrimination analysis by questioning whether the “6+5” rule can even be governed by Article 45 because “it is not a commercially motivated rule; [it] is merely a sporting rule.”¹¹⁸ It then proceeds to favorably compare the “6+5” rule with other soccer rules, such as the basic rule that a club is to field eleven players at the start of each match, and argues that the “6+5” rule similarly governs the proportions of players in the starting lineup.¹¹⁹ Next, it points out that the rule only applies at the start of each match, and that a team may liberally use substitutions to essentially end the game in a “3+8” situation, with the latter number being the number of players ineligible for the national team of the Member State in which the club is based.¹²⁰ From an ideological perspective, the report interprets Article 45’s broad exceptions to entail that “sports associations are entitled to regulate in the area of sport.”¹²¹ Finally, the report cautions against using *Bosman* as a basis for defeating the “6+5” rule because new problems affecting soccer on an international level have developed,¹²² which call for new, alternative remedies.¹²³ As the report frames it, “[i]n general, the error of taking the existing case law of the European Court of Justice as an absolute certainty when it comes to interpreting European community law should be avoided.”¹²⁴

¹¹⁸ INEA REPORT, *supra* note 116, at 64. To justify this assertion, the report further states that “[i]n professional sport, commercial activity is merely the basis for sporting investment and so indirectly for sporting success – it is just a means to an end.” *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 64–65.

¹²¹ *Id.* at 67.

¹²² *See id.* at 47. Among the listed problems include a drastic spike in the number of foreign players within UEFA leagues, which has augmented the competitive advantages that perennially more economically powerful clubs usually enjoy, and the concomitant declines in the development of junior team players and the quality of national team play. *See id.*

¹²³ *See id.* at 67–68.

¹²⁴ *Id.* at 68.

In evaluating the INEA report's Article 45 analysis, the most startling aspect is what little regard it gives to prior ECJ decisions relating to the subject matter. While it broadly asserts that case law "regarding fundamental freedoms is generally causing ever increasing disquiet within member states,"¹²⁵ it fails to connect that statement to the specific views of the Member States in response to the "6+5" rule, or to actually protrude deeply into the reasoning behind the *Bosman* line of cases. This is a necessary step because the Court is the institution in charge of interpreting Community law, including fundamental freedoms, and making sure the other institutions, along with the Member States, do what the law requires.¹²⁶ If the authors had properly gone through this process in detail, they would have found that, despite occasional inconsistencies and ambiguous language, sport has long been regarded as falling within the jurisdiction of EC law if an action falls outside the "purely sporting interest" confines. Though the INEA report claims the rule meets this exception, closer scrutiny reveals that is not necessarily the case.

One of the justifications the report cites in favor of the "6+5" rule is that the regulation would mitigate the growing economic divide between the clubs able to spend lavishly on free agents and those without the availability of such resources, and in turn would produce more competitive leagues.¹²⁷ This rationale tends to weaken the claim that the rule is designed to fit the "purely sporting interest" standard. Admittedly, the Court has been vague about what the criteria are for this standard,¹²⁸ but under a literal application of the standard, the rule does not seem to measure up. Essentially, the report claims the "6+5" rule is not commercially motivated;¹²⁹ yet, one of the justifications for the rule is based on economic factors and commercial inequalities.¹³⁰ INEA offers no explanation for this

¹²⁵ *Id.*

¹²⁶ See EUROPA, The Court of Justice, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Apr. 2, 2009) (providing an overview of the ECJ's tasks and functions).

¹²⁷ See INEA REPORT, *supra* note 116, at 37-38.

¹²⁸ See discussion *supra* Part II.A.

¹²⁹ INEA Report, *supra* note 116, at 64.

¹³⁰ See FIFA Congress Supports Objectives, *supra* note 3.

apparent paradox, and attempts to create a hybrid standard by watering down the “purely sporting interest” definition to include a mix of economic factors.¹³¹ Furthermore, in determining if the *Walrave* and *Donà* holdings apply, it is not the “motivation” behind a rule that serves as the dispositive factor, but rather the application of the rule and determining its effects.¹³² Using a criminal law analogy, to hold otherwise would place a disproportionate emphasis on the *mens rea* (intent) requirement when the *actus reus* (result) requirement is an equally important element to prove a crime. Thus, the basis for the “6+5” rule is heavily intertwined with both sport and economic factors, making it far from clear that the “purely sporting interest” exception to EC law can even be applied.

Given the reservations in deeming the “6+5” rule as a “purely sporting interest” rule, the next step is to scrutinize whether the rule discriminates against players who do not meet the necessary criteria required to be eligible for the national team of the Member State in which the league is based. Under EC law, it is illegal to use nationality as a basis for discrimination.¹³³ There are two main types of discrimination – direct and indirect.¹³⁴ Direct discrimination can be defined as a situation, “where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of [sex, racial, or ethnic origin].”¹³⁵ Nationality can easily be inserted within this definition based on Articles 18 and 45 of the Treaty.¹³⁶ Indirect discrimination can be defined as “the imposition of national rules that are more easily satisfied by nationals than by migrant workers.”¹³⁷ One key difference between the two forms is

¹³¹ See McHardy, *supra* note 20.

¹³² See PARRISH, *supra* note 12.

¹³³ Article 18 of the EEC Treaty states: “[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.” Treaty on the Functioning of the European Union, *supra* note 7, at 56.

¹³⁴ See generally EVELYN ELLIS, EU ANTI-DISCRIMINATION LAW 88-91 (Francis G. Jacobs ed., 2005).

¹³⁵ *Id.* at 90 (quoting the near-identical definitions used in the Equal Treatment Directive, the Race Directive, and the Framework Directive, respectively).

¹³⁶ Treaty on the Functioning of the European Union, *supra* note 7, art.18.

¹³⁷ DAVIES, *supra* note 6, at 109.

that certain justifications may be cited to overcome indirect discrimination, whereas the same does not hold true for direct discrimination.¹³⁸

Focusing on direct discrimination first, the INEA report finds that the "6+5" rule does not violate this fundamental right.¹³⁹ In reaching this conclusion, the report reasons that the "6+5" rule only governs the *start* of a game and therefore does not affect a team's ability to sign foreign players.¹⁴⁰ It then goes on to state that players included in a starting lineup to meet the rule's requirements can be substituted at any time.¹⁴¹ Accordingly, "the rule only concerns the manner in which games are played and does not directly affect the employability and contract terms of a newly recruited player."¹⁴²

Not only is the INEA report's analysis on this section incorrect, but it blatantly disregards ECJ case law. In *Bosman*, the defendants tried to argue that player quotas only affect the players involved in the match and that clubs are still free to sign as many foreign players as they choose.¹⁴³ The Court emphatically rejected this contention, as it held:

The fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a profes-

¹³⁸ See *id.* at 137; see also Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165, I-4197 to -98 (holding "that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil [sic] four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it").

¹³⁹ See INEA REPORT, *supra* note 116, at 102.

¹⁴⁰ *Id.*

¹⁴¹ See *id.* at 103.

¹⁴² *Id.*

¹⁴³ See *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, I-5073 to -74.

sional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.¹⁴⁴

It is logical to assume clubs will only invest in players who can help them win, especially given the economic benefits and prestige that accompany success. Whether it is due to injury, ineligibility, or character concerns, if a player cannot fully participate in a match, it directly impacts his chance of obtaining employment. The INEA report has failed to make this inference, and its argument falls short as a result. While it is true that a club is free to substitute its domestic players in favor of foreign players after the match has begun,¹⁴⁵ this is still a direct limitation because a maximum of three substitutions per side are allowed in a FIFA-regulated match.¹⁴⁶ Based on the limited amount of substitutions, each move is magnified and must be carefully weighed in light of fatigue, injury, strategy, and situational concerns. Consequently, the rule not only affects players at the start of a match, but also in terms of management's decision to keep them on the roster. Thus, the rule has a strong correlation to a player's employment status and constitutes direct discrimination.

2. Indirect Discrimination and the Proportionality Test

Even though there is a strong likelihood that the "6+5" rule results in direct discrimination and cannot be overcome unless it meets the "purely sporting interest" guidelines, it is still necessary to analyze its impact in terms of indirect discrimination. The INEA report argues that "no players are discriminated against at the time of being hired" and "[a]t most, this constitutes an indirect discrimination . . ."¹⁴⁷ As the *Gebhard* court broadly asserted, certain justifications can overcome indirect discrimination.¹⁴⁸ Balancing procedures

¹⁴⁴ *Id.* at I-5074 to -75.

¹⁴⁵ See FIFA Congress Supports Objectives, *supra* note 3.

¹⁴⁶ FÉD'N INT'L DE FOOTBALL ASS'N, LAWS OF THE GAME 15 (July 2008), available at http://www.fifa.com/mm/document/affederation/federation/81/42/36/lotg_en.pdf.

¹⁴⁷ See INEA REPORT, *supra* note 116, at 103.

¹⁴⁸ See Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165. It is important to note that *Gebhard* pertains to

were also used in *Bosman*, but the ECJ did not feel the justifications were strong enough to override the discrimination caused by player quotas.¹⁴⁹ Accordingly, the successful adoption of the "6+5" rule could depend on the overall strength of the justifications and whether they can overcome the restrictions imposed.

As the INEA Reports indicates, "[t]he sole purpose of the '6+5 rule' is to balance the competitive strength of associations without restricting their economic freedom in terms of the employment and training of players."¹⁵⁰ Inherent in this notion is the idea that, if the clubs with greater financial resources continually raise the price of acquiring the best players, clubs relying primarily on the development of regional junior players for success will be priced out of the market. The report cites the *Cassis* formula¹⁵¹ as a guide for overcoming indirect discrimination,¹⁵² which is similar in concept to the *Gebhard* factors listed above. In using these cases as a model, the crucial point is that the justifications must be sufficient to overcome a potential violation of fundamental freedoms, and they must be proportional (i.e., "suitable," "necessary," and "adequate" to achieve the proffered goals).¹⁵³ The INEA Report recognizes this significance, and acknowledges that "[w]hether or not the concrete measure really is justified must, according to any dogmatic approach that may be taken, ultimately be measured by its proportionality, i.e. by establishing whether or not a balanced relation between ends and means exists."¹⁵⁴

Having formulated the dichotomy between justification and proportionality, it is entirely possible that one can occur without the other, but this does not change the fact that *both* are needed to overcome indirect discrimination. The justifications set forth by FIFA and

measures implemented by Member States. *See id.* As such, the holding does not directly apply to FIFA; however, the elements of indirect discrimination can still be used as a guide.

¹⁴⁹ *See* discussion *supra* Part II.B.2.

¹⁵⁰ INEA REPORT, *supra* note 116, at 104.

¹⁵¹ *See* Case C-388/01, *Comm'n v. Italian Republic (Cassis)*, 2003 E.C.R. I-721, I-739 to -42.

¹⁵² *See* INEA REPORT, *supra* note 116, at 137.

¹⁵³ *Id.* at 142.

¹⁵⁴ *Id.* at 141.

reinforced by the INEA Report seem entirely plausible in theory and appear to have the best interests of the game in mind. Sport is unlike any other business model because it thrives on competition, rather than seeking to destroy it.¹⁵⁵ Thus, “balanc[ing] the competitive strength of associations”¹⁵⁶ certainly promotes more fan interest both locally and globally, as certain clubs are not necessarily unofficially eliminated from championship contention prior to the start of the season. Furthermore, developing young talent is a way to ensure the game’s long-term success. It discourages the complacency of veteran players, who risk losing their livelihoods to players who are stronger, faster, and hungrier for an opportunity to excel. As such, FIFA’s justifications have the game’s best interests in mind.

Though FIFA’s justifications for the “6+5” rule may be sound, problems arise in determining whether the stated goals can satisfy the proportionality requirement. To frame the issue more specifically, the rule may be able to satisfy the adequacy element, but it is questionable whether the rule can sustain a challenge relating to suitability, and doubtful that it can withstand a challenge relating to necessity. In defining the adequacy of a new provision, the ECJ has stated that the current situation is in *need* of change to protect against possible detriments that could soon arise.¹⁵⁷ Applied to soccer, this means the game is inadequate in its current state and that the “6+5” rule is needed to facilitate its progression. This is a subjective test, as there are innumerable ways to interpret the health of the game. One may argue that soccer is as strong as ever based on the globalization of the sport combined with increased revenue and exposure; another might argue that only the “haves” contend for the best players and the championships each year, while the “have-nots” scrap for what is left, thus upsetting the competitive balance of the sport. Due to the

¹⁵⁵ See Ken Foster, *How Can Sport Be Regulated?*, in LAW AND SPORT IN CONTEMPORARY SOCIETY 267, 268 (Steve Greenfield & Guy Osborn eds., 2000).

¹⁵⁶ INEA REPORT, *supra* note 116, at 104.

¹⁵⁷ See Case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) v. Administración General del Estado*, 2001 E.C.R. I-1271, I-1280. In distinguishing between the necessity and adequacy requirements of the proportionality test, the necessity requirement is whether the rule, *as designed*, is indispensable toward bringing about the desired effects, whereas for adequacy, it is about whether a general rule, *in any form*, is needed. See *id.*

controversial nature of this debate, deference should be given to FIFA, given that it is the “guardian of the most cherished game.”¹⁵⁸ According to FIFA’s mission statement, its objective is to “[d]evelop the game,” “touch the world,” [and] “build a better future.”¹⁵⁹ Within that context, it must constantly seek ways to improve the game and adapt to changing circumstances. Consequently, if FIFA feels it needs to implement a rule so its mission statement can be carried out, the adequacy component is likely fulfilled.

The “6+5” rule may be deemed adequate, but this does not mean it is suitable or will have desirable results. The INEA Report interprets suitable to mean only that the rule “makes a *contribution* to the achievement of the objective.”¹⁶⁰ This overly broad definition, however, does not quite comport with the ECJ’s definition. In *Commission v. Portugal*, the Court found, in reference to proposed national legislation by the Portuguese government, that a regulation “must be suitable for securing the objective which it pursues.”¹⁶¹ Nowhere does it imply that a rule or law need only make a contribution toward achieving the purpose; if that was the case, the suitability requirement would be much easier to meet. Thus, in determining if the “6+5” rule is suitable, the focus is on whether it would actually achieve the stated objectives.

As previously indicated throughout this article, FIFA wants to use the “6+5” rule to close the economic gap between rich clubs and poor clubs in order to enhance competition and to protect national teams by promoting the training of younger players.¹⁶² Both of these considerations were weighed by the Court in *Bosman*.¹⁶³ In addressing the economic impact of transfer fees and player quotas, the Court stressed that neither plan really addresses or prevents the wealthier clubs from asserting their economic influence in obtaining

¹⁵⁸ FIFA.com, FIFA Brand – Our Commitment, <http://www.fifa.com/aboutfifa/federation/mission.html> (last visited Apr. 24, 2009).

¹⁵⁹ *Id.*

¹⁶⁰ INEA REPORT, *supra* note 116, at 144 (emphasis added).

¹⁶¹ Case C-367/98, *Comm’n v. Portugal*, 2002 E.C.R. I-4756.

¹⁶² See discussion *supra* Part III.A.3.

¹⁶³ See discussion *supra* Part II.B.2.

certain players.¹⁶⁴ The same reasoning applies to the “6+5” rule. Forcing each team to comply with player quotas only serves to make the wealthier clubs use their resources in different ways; it does not change the fact that they have more resources. For instance, a wealthier club can invest more heavily in the training of junior players in areas such as facilities, coaching, and equipment, which can attract and produce a greater caliber of players. Furthermore, while the rule may enhance the development of younger players, affluent clubs can still outbid other clubs for the best players. Accordingly, it is not entirely clear whether the “6+5” rule can actually accomplish its objectives or whether it merely prolongs current trends in a different form. Even in *Bosman*, the Court expressed concern as to whether transfer fees and player quotas could lead to the promotion of junior players, though it did not reach a formal decision on the matter.¹⁶⁵ As a result, in order to satisfy this requirement, FIFA may need to produce some sort of empirical evidence, such as a controlled study, to show a specific correlation between the rule and its intended results. If FIFA can offer such evidence, it may have a chance of overcoming this part of the proportionality test.

FIFA *may* be able to justify the “6+5” rule as adequate and suitable due to the degree of difficulty in evaluating intangible factors, but its toughest challenge will be showing that the rule is necessary to achieve its goals. The ECJ has clarified necessary to mean “inasmuch as the same objective could not be attained by less restrictive measures.”¹⁶⁶ When dealing with a fundamental freedom, such as the right of free movement of workers without being discriminated against, a less restrictive option must be chosen if possible.¹⁶⁷ As such, the “6+5” rule essentially needs to be indispens-

¹⁶⁴ See *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman*, 1995 E.C.R. I-4921, I-4976 to -77.

¹⁶⁵ See *id.* at I-4965 to -67.

¹⁶⁶ *Portugal*, 2002 E.C.R. at I-4775.

¹⁶⁷ Case 289/87, *Proceedings for Compulsory Reconstruction against Smanor SA*, 7 E.C.R. 4489, 4500 (1988) (noting that “such rules must also be proportionate to the aim in view[;] [i]f a Member State has a choice between various measures to attain the same objective, it should choose the means which least restrict free trade”); Case C-320/03, *Comm’n v. Austria*, 2005 E.C.R. I-9871, I-9894 (“In order to establish whether such a restriction is proportionate having regard to the legitimate aim

able toward hitting its targets, especially when matched against a fundamental freedom.

To begin this analysis, it is important to compare the current situation with some of the earlier described case studies. In *Deliège*, the Court found a judo association rule that potentially restricted the freedom of services under Article 56 to be acceptable because it constituted “a need inherent in the organisation of such a competition.”¹⁶⁸ In that case, the need was directly related to protecting who could compete for the national team.¹⁶⁹ The same cannot be said for the “6+5” rule. Whereas the rule in *Deliège* was narrowly tailored to have a direct correlation with the desired results, the “6+5” rule is more idealistic and remains speculative in terms of being able to actually obtain its objectives. Stated differently, the “6+5” rule has a problem with scope and, due to its general nature, has difficulty being classified as a “need” like that espoused in *Deliège*. Because the “6+5” rule is more of a desire than an actual need,¹⁷⁰ *Deliège* actually works against FIFA, despite serving as an example of an instance in which a sporting association was able to justify a rule seeming to violate a Treaty article.

Another case that would appear to benefit FIFA on the surface is *Lehtonen*. In that case, the ECJ agreed with a Belgian basketball association, holding that a rule concerning transfer deadlines was necessary to protect against late-season player additions that could change the course of a championship race.¹⁷¹ Once again, though, the “6+5” rule is easily distinguishable from this holding. Like *Deliège*, the rule in *Lehtonen* dealt with a very specific regulation with a

pursued in this case . . . it needs to be determined whether it is necessary and appropriate in order to secure the authorised objective.”).

¹⁶⁸ Joined Cases C-51/96 & C-191/97, *Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL*, 2000 E.C.R. I-2549, I-2578 (emphasis added); *see also* discussion *supra* Part II.C.

¹⁶⁹ *See Delière*, 2000 E.C.R. at I-2556.

¹⁷⁰ Perhaps the rule can be classified as a future need for a gradually developing problem, but it is difficult to reach beyond that without a more definitive timetable and description for how and when soccer will be directly affected to the point where a rule change in violation of a fundamental freedom is necessary.

¹⁷¹ *See* Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basketball ASBL*, 2000 E.C.R. I-2681, I-2692; *see also* discussion *supra* Part II.C.

confined purpose. It did not drastically alter the game like the “6+5” rule would – in fact, it did the opposite; *Lehtonen* made it so the game would *not* be drastically altered at the most important time of the season. Furthermore, the Court was careful to raise the issue of necessity,¹⁷² as if it was not only anticipating future challenges to certain sporting association rules, but also warning future plaintiffs that the burden in overcoming a fundamental freedom is still high despite the outcome of this case. Consequently, neither *Deliège* nor *Lehtonen* work to FIFA’s benefit because they did not involve challenges to rules as vast and uncertain as the “6+5” rule.

Perhaps the most important reason the “6+5” rule does not fulfill the necessity requirement is that the rule’s objectives can be accomplished through alternative methods that sidestep the issue of discrimination. Advocate General Lenz articulated this idea in his *Bosman* opinion. In discussing less obtrusive alternatives to transfer fees and player quotas, he comments:

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 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.¹⁷³

What Advocate General Lenz proposed are scaled salaries and revenue sharing similar to that found in American sporting leagues.¹⁷⁴ Both of these options would have the potential effect of balancing out

¹⁷² See *Lehtonen*, 2000 E.C.R. at I-2698.

¹⁷³ Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman, 1995 E.C.R. I-4921, I-5017 (opinion of Advocate General Lenz).

¹⁷⁴ See Jeffrey A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORT L. 419, 421 (1995) (discussing the effects of a salary cap and revenue sharing in American football and baseball).

the economic disparity between certain clubs, as they would limit the capitalist nature that currently exists and would put certain regulations in place to inhibit the richer clubs and strengthen the poorer ones. Whether one of these alternative solutions is more viable than the other, or whether either of them would achieve the exact results FIFA is looking for, is beyond the scope of this paper; however, they do show there are other means to equalize competition while avoiding restrictions on fundamental freedoms. Accordingly, it is in FIFA's best interest to analyze these alternatives, which show that "less restrictive measures" are available. As such, the "6+5" rule cannot be shown to be indispensable, and therefore, the necessity requirement is not met.

To summarize this section, FIFA's rationales are not the main issue in determining whether the "6+5" rule can comply with EC law; the problems arise when doing a proportionality analysis. The rule can potentially survive challenges concerning adequacy and suitability, although this is far from a sure thing and is purely speculative. The rule likely cannot overcome the necessity requirement, because there are ways to accomplish FIFA's goals without discriminating against certain players. Thus, the "6+5" rule likely constitutes direct discrimination under EC law and is illegal in its current state. Even if FIFA can get around this restriction, the rule is still tantamount to indirect discrimination, which likely cannot be overcome, because the means used are not proportionate to the ends achieved.

3. A Brief Assessment of Competition Law and the "6+5" Rule

As the Treaty-based, sports-related cases have shown, the ECJ has been reluctant to tackle competition law under Articles 101 and 102.¹⁷⁵ Nevertheless, it is important to focus on *Meca-Medina*, for it is conceivable that the aforementioned articles could serve as another legal barrier toward implementation of the "6+5" rule. In *Meca-Medina*, the Court set forth the elements needed to establish a claim

¹⁷⁵ Therefore, the scope of this paper does not delve into a full or complete analysis of the competition articles either; rather, it focuses on the ECJ's decision and reasoning in *Meca-Medina* and whether certain elements of it apply in relation to the "6+5" rule.

under Articles 101 and 102, but did not need to apply them due to the plaintiffs' failure to supply certain evidence.¹⁷⁶ Nevertheless, this framework established by the Court can be helpful in determining whether the "6+5" rule runs afoul of EC competition law.

Article 101 is only infringed upon if anticompetitive effects have an impact on a substantial part of the overall market.¹⁷⁷ Some commentators contend that "there is a relevant market for the purchase and sale of players which will be affected by the implementation of a foreign player rule."¹⁷⁸ The INEA Report agrees the relevant market can be difficult to define, but argues that if the market cannot be defined, then this provision cannot in turn be violated.¹⁷⁹ Ultimately, it is unclear at this time if this Article applies directly to the "6+5" rule,¹⁸⁰ and the ECJ would likely do an *ad hoc* analysis if a case were brought before it concerning this issue.

Similar to its neighboring provision, "Article [102] prohibits abuse of a dominant position by an undertaking(s) that may affect trade between [M]ember States."¹⁸¹ FIFA, as soccer's international governing body, meets the description of a dominant undertaking,¹⁸² but as *Meca-Medina* shows, even rules designed for sporting reasons by a dominant undertaking can be challenged for want of proportionality.¹⁸³ As such, the same proportionality test for determining if a measure can overcome indirect discrimination – namely, if it is suit-

¹⁷⁶ See discussion *supra* Part II.D.

¹⁷⁷ See Richard Williams & Alex Haffner, *FIFA Quotas Ruled Offside?*, 158 NEW L.J. 1017, 1017 (2008).

¹⁷⁸ *Id.* at 1018 (arguing the "6+5" rule may run afoul of competition law principals because it "is likely to increase the number of transfers of national players to domestic clubs and conversely reduce the number of foreign players being transferred.").

¹⁷⁹ See INEA REPORT, *supra* note 116, at 177.

¹⁸⁰ See Williams & Haffner, *supra* note 177, at 1018.

¹⁸¹ *Id.* at 1019.

¹⁸² *Id.*; Case T-193/02, *Piau v. Comm'n*, 2005 E.C.R. II-209 (finding FIFA holds a dominant position).

¹⁸³ See Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991, I-7024; see also Williams & Haffner, *supra* note 177, at 1018 (establishing a "rule of reason" doctrine similar to the one used in U.S. antitrust law cases, which allows for a provision to overcome restrictive effects on competition if it can be shown that it is necessary for the profession to function properly).

able, necessary, and adequate – can apply in a competition framework as well.¹⁸⁴ This means FIFA may be required to show that the “6+5” rule is proportional in two completely different contexts. Based on the difficulty of showing the rule’s proportionality within an Article 45 structure, serious reservations must be raised as to whether the rule can overcome additional Treaty articles. Consequently, the principles of competition law are yet another obstacle that FIFA must overcome if the “6+5” rule is to withstand legal scrutiny.

IV. POSSIBLE SOLUTIONS IN COMPLIANCE WITH EC LAW

A. *The “Homegrown Player” Rule*

In May 2008, the European Commission officially approved UEFA’s “Homegrown Player” rule, which has similar objectives to the “6+5” rule.¹⁸⁵ In particular, UEFA’s rule is designed to promote the development of younger players, to protect the composition of national teams, to help create more identity with local and regional teams, and to enhance competition.¹⁸⁶ To accomplish this task, each club must have at least four players on the squad who have been registered with their current club for a minimum of three years and are between the ages of fifteen and twenty-one.¹⁸⁷ Additionally, each club must have at least four players on the squad who were once registered with one or more clubs within the same national association as their current club for a minimum of three years between the ages of fifteen and twenty-one.¹⁸⁸ As UEFA spokesperson William Gaillard explained, “We can achieve exactly the spirit of ‘six plus five’ without nationality quotas. They are just not legal within the European Union.”¹⁸⁹

¹⁸⁴ See Treaty on the Functioning of the European Union, *supra* note 7, art. 101(3).

¹⁸⁵ See Constant Brand, *EU Backs UEFA’s ‘Homegrown Player’ Rules; Scorns FIFA Limits on Foreign Players*, AP WORLDSTREAM, May 28, 2008, available at WL, APWORLD 11:49:07.

¹⁸⁶ See Mark Chaplin, *Homegrown Player Plans Revealed*, UEFA, Feb. 3, 2005, <http://www.uefa.com/uefa/keytopics/kind=65536/newsid=276829.html>.

¹⁸⁷ See Williams & Haffner, *supra* note 177, at 1017 (classifying this requirement as “club trained” players).

¹⁸⁸ See *id.* (classifying this requirement as “association trained” players).

¹⁸⁹ Brand, *supra* note 185.

Gaillard's statement pertaining to nationality quotas marks a crucial distinction between the "6+5" rule and the "Homegrown Player" rule, and explains the main reason why the former rule may be illegal, while the latter rule appears to sidestep this issue. Whereas FIFA's rule is overtly based on nationality requirements, UEFA's rule is more open to players of any nationality.¹⁹⁰ Another key distinction is that the "6+5" rule correlates directly with a club's starting lineup, while the "Homegrown Player" rule only concerns a club's composition.¹⁹¹ Thus, it is possible that the "Homegrown Player" rule could have a minimal impact on a match, given that a squad consists of twenty-five players and there is no obligation to play any of the eight players subject to the quota requirements.¹⁹² Because of the lower level of discrimination¹⁹³ that results from the "Homegrown Player" rule compared to the "6+5" rule, the Commission's current position in relation to the respective rules is justified.¹⁹⁴ One rule seems to be "proportionate and compl[ies] with the principle of free movement of workers,"¹⁹⁵ while the other rule appears to be a form of direct discrimination in violation of EC law. As such, FIFA must find a way

¹⁹⁰ *But see* Briggs, *supra* note 23, at 451 (arguing "UEFA can thus create de facto nationality quotas without ever using the word 'nationality,' and UEFA will argue in support of the Homegrown Rule that it is largely nondiscriminatory in its application.").

¹⁹¹ *See* Williams & Haffner, *supra* note 177, at 1017.

¹⁹² *See id.* at 1018.

¹⁹³ *See id.* (arguing that the "Homegrown Player" rule "does not specifically place a limitation on foreign players, but by requiring a set number of players to be 'club trained' or 'association trained,' it is more likely to be satisfied by nationals of that country, and therefore constitutes indirect discrimination").

¹⁹⁴ Of note, the legality of the "Homegrown Player" rule is subject to further evaluation in 2012 when its impact will be known to a greater extent, and the rule will only apply to matches within the Champions League and the UEFA Cup. *See id.* One concern that some have with the "Homegrown Player" rule is that it will promote child trafficking in order to find the best players that can fulfill the age requirements of the rule. *See* Eur. Parl. Comm. on Culture & Educ., *Draft Report on the Future of Professional Football in Europe*, at 6, PE 378.708 (Sept. 20, 2006) (prepared by Ivo Belet), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/631/631110/631110en.pdf.

¹⁹⁵ Brand, *supra* note 185 (quoting Vladimir Spidla, the EU commissioner in charge of employment matters, in response to why the Commission has endorsed the "Homegrown Player" rule's legality).

to circumvent the nationality restrictions it seeks to impose before its rule can receive similar backing from the Commission.

B. Other Possibilities¹⁹⁶

As previously mentioned, FIFA hopes to use the Treaty of Lisbon as a legal foundation for implementing the “6+5” rule because the Treaty amendment includes provisions recognizing the specificity of sport.¹⁹⁷ It is unclear, however, how the proposed changes relate to fundamental freedoms, let alone whether they are strong enough to provide a sporting organization with the necessary discretion to override such freedoms. Given the uncertainty regarding the Treaty of Lisbon and the doubt regarding the rule’s legality based on the current version of the Treaty, FIFA needs to be open to varying the “6+5” rule in order to meet its objectives while not running afoul of cherished principles.

One possible approach to varying the rule might be for leagues to provide financial incentives to teams that play domestic players.¹⁹⁸ The English Cricket Board has tried this method of encouraging teams to develop homegrown players, but the results have not been successful.¹⁹⁹ Similarly, and perhaps more effectively, FIFA could look at variations of the proposals set forth by Advocate General Lenz’s opinion in *Bosman*, which mentions structured salaries and revenue sharing as means of improving the competitive balance of a league.²⁰⁰ Ultimately, FIFA has free reign to devise its own solution; however, it will only gain legal approval if it complies with the fundamental freedoms guaranteed by EC law.

¹⁹⁶ This section mentions possible alternatives to the “6+5” rule that may achieve similar objectives, but it does not examine the merits of such options. It is included to illuminate that the “6+5” rule is not the *only* way to accomplish FIFA’s desired aims.

¹⁹⁷ See discussion *supra* Part III.A.1.

¹⁹⁸ See Bruce Caldwell, *Six + Five = ?*, J. L. SOC. SCOT., June 2008, at 58, 58.

¹⁹⁹ See *id.* (pointing out that “[a] soft approach based on funding may not influence professional sports where central funding from a governing body is not sizeable in comparison to other revenue streams.”).

²⁰⁰ See discussion *supra* Part II.B.3.

V. CONCLUSION

It is ironic that FIFA is trying to implement the “6+5” rule – a rule that appears to place illegal restrictions on fundamental freedoms within EC law – when the rule appears to also be in opposition to its *own* underlying values.²⁰¹ As such, it is within FIFA’s best interest to adhere to the Commission’s warnings and to thoroughly examine the rule’s *negative* impact – especially when EC law is the obstacle – instead of just simply looking at the possible benefits. If FIFA was to do this, it would recognize that its current proposal is flawed and in need of tweaking, particularly in light of prior ECJ holdings. In formulating alternative proposals, the issue is not that the justifications are unsound, but that the methods used do not comply with proportionality; stated differently, the means are far too restrictive even if they could bring about the desired ends. Now is not a time, despite growing support,²⁰² for FIFA to be stubborn if it truly wants its objectives to be achieved, as it has yet to convince the Commission of the rule’s legality. Even if it can get around this obstacle, the ECJ would almost assuredly become involved following the rule’s implementation, as foreign players within the EU would undoubtedly line up to challenge it.²⁰³

²⁰¹ See Katherine Apps, *National Discrimination in Sport: FIFA’s 6+5 Rule*, SOLIC. J., June 2008, at 18, 19 (quoting Article 3 of the FIFA Statute, which states: “Discrimination of any kind against a country, private person or group of people on account of ethnic origin, gender, language, religion, politics or any other reason is strictly prohibited and punishable by suspension or expulsion.”).

²⁰² See Charles Carrick, *Fifa President Sepp Blatter Welcomes MPs 6+5 Backing*, DAILY TELEGRAPH (UK), Apr. 22, 2009, <http://www.telegraph.co.uk/sport/football/5196105/Fifa-president-Sepp-Blatter-welcomes-MPs-support-for-65-rule.html> (stating that an English group called the Parliamentary Football Group, which consists of 150 Members of the English Parliament, has recently endorsed the “6+5” rule); see also Media Release, FIFA, 6+5 to be Argued in European Parliament (Apr. 24, 2009), available at <http://www.fifa.com/aboutfifa/federation/releases/newsid=1051457.html#argued+european+parliament> (announcing the European Parliament will discuss the rule and specificity of sport with FIFA).

²⁰³ Given the importance of the issues at hand and their potential to have far-reaching effects, this article takes the position that any forum court would refer the matter to the ECJ for an interpretation of EC law. See Presentation, *supra* note 8 (“To ensure the effective and uniform application of Community legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the

To conclude this article, it is only fitting to place the context of the “6+5” dilemma in terms that even the most casual soccer fan can understand. Basically, FIFA is playing the role of a coach; it has crafted a well-designed play on the drawing board. However, in game-like conditions it is unlikely that the play can be executed due to the superiority of its opponent – EC law. Fortunately for FIFA, the game has not reached its ending stage yet, and there is still plenty of time remaining before the final whistle sounds. Rather, it is more like halftime, and even though FIFA is trailing, there is still time to implement changes to the game plan. A good coach must make in-game adjustments, and that is the challenge FIFA now faces. Currently, it is FIFA’s move, and as coach, it is free to draw up another play that it thinks will lead to a scoring opportunity; it just needs to be weary that the referees – the Commission and ultimately, the ECJ – are there to uphold the rules of the game and will always be watching.

Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.”).