Chapter 2
Discrimination on Grounds of Nationality in Sport

Contents

2.1 Introduction

This paper is concerned with labour practices which are discriminatory on grounds of nationality and which are put into effect by private employers. The example chosen for the purposes of analysis is the discrimination against non-nationals practised by football clubs in most Member States of the Community, but it is suggested that the problem under investigation extends beyond football and indeed beyond sport, to discriminatory preferences which may be exercised by private bodies such as trade unions, professional bodies, employers, or employers' associations. The legal issue which appears to pose most difficulty in this area is the

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potential overlap between Articles 48 and 85–86 of the Treaty of Rome. It is suggested that the discrepancies which exist between these provisions are accentuated by the possibility that action to combat the discriminatory rules may be taken on two levels, at Community level and/or at national level, making use of national systems of remedies before national courts.

2.2 The Discriminatory Player Restrictions

All the fifteen national football associations in the 12 Member States of the European Community[1] are members of UEFA.[2] European football's governing body, the headquarters of which are in Switzerland and which has over thirty member national associations. In most countries, limits are placed on the number of foreign players who are permitted to play for clubs in domestic fixtures, ostensibly in order to protect the well-being of the domestic game. The limits vary. In Italy, the maximum has recently been raised from two to three, and all leading clubs take advantage of this concession. In England, where in practice foreign players are relatively rare, clubs may not field more than three players who are not citizens of the United Kingdom or who have not been resident in the United Kingdom for a continuous period of five years. The first condition is an instance of direct discrimination on grounds of nationality; the second condition, a residence requirement, constitutes indirect discrimination on grounds of nationality. Both forms of discrimination are caught by Community law.[3] Within these limits, however, there are various anomalies and concessions. For example, in the English League, it is unsurprising that Scottish, Welsh, and Northern Irish players are not classed as foreign for the purposes of football team selection; but neither are nationals of the Republic of Ireland. France has a special regime for Algerians, Portugal for Brazilians, By contrast, a small number of countries, including Scotland, impose no restrictions at all.

These limits, which appear discriminatory on grounds of nationality, are imposed by the individual governing bodies of the Football Leagues in each Member State, with the support of UEFA. Naturally, the clubs themselves are also involved in the application of these rules in declining to sign extra foreign players, in the performance of their contractual obligations to the national bodies. The precise legal nature of the limits imposed and the legal interrelation between the various bodies concerned is of considerable importance in identifying whether, and, if so, how, the limits may be susceptible to challenge.

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[1] The numerical discrepancy arises because there are four associations in the UK.

[2] *Union des Associations Européennes de Football.*

[3] On indirect discrimination, see, e.g., Case 152/73 *Sotqiu* v. *Deutsche Bundespost* [1974] *ECR* 153. On objective justification for such discrimination, see below, Sect. 2.3.2.1.

The European Commission has taken the view that these restrictions contravene the principle of free movement of labour in the European Community, but talks aimed at removing the limits have broken down on a number of separate occasions over the last decade, most recently in 1987 when UEFA withdrew from negotiations. The Commission, stating that 1992, the intended date for the completion of the single internal market,[4] is the deadline for the elimination of these restrictions,[5] has indicated that it will support individual clubs wishing to initiate a legal challenge to the system.

UEFA's response has been to insist on the special situation of the football industry. It has announced the introduction of a new rule which will govern player eligibility in the three annual European club football competitions for which UEFA bears organizational responsibility.[6] This stipulates that in the three tournaments each club shall be restricted from the start of season 1988–1989 to four 'non-national' players.[7] A non-national player is one not qualified to play in international matches for the national representative team of the national association to which that club belongs. The basis of eligibility for such a national representative team is the link of nationality.[8] Obviously a French player in Italy or a Greek player in Belgium would be a 'non-national', but on a domestic note, it should be realized that for these purposes a Scot is to be regarded as a non-national in England and, vice versa and perhaps more pertinently given recent player transfer trends,[9] an Englishman is a non-national in Scotland.

The matter has also attracted the interest of a number of Members of the European Parliament, leading to the adoption by the Parliament of a Resolution approving a report drawn up by Mr Janssen van Raay on behalf of the Committee on Legal Affairs and Citizens' Rights.[10] This text places the issues raised by the practices prevailing in the football industry firmly in the general context of the

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[4] Art. 8A EEC, introduced by Art. 13 SEA.

[5] This should not be taken to suggest that the period up until the end of 1992 constitutes a new transitional period, during which the existing Treaty rules lapse – though cp. in this respect the concerns of Pescatore 1987, 9–18. It is submitted that the 1992 date in this context has no formal legal significance and is instead merely a date chosen by the Commission in the exercise of its powers to enforce Community competition law.

[6] The three competitions are the European Cup the most prestigious, contested every year since 1956 by the national champions) the European Cup-Winners Cup, and the UEFA Cup.

[7] Art. 12(3) Regulations of the UEFA Club Competitions, 1989–90. A transitional period applies: a non-national registered prior to 3 May 1988, is excluded, i.e. is treated as a national, until the termination of the players registration with the club or the end of season 1990–1, whichever is earlier.

[8] The precise nature of the required link varies from State to State. The matter is particularly complicated in the UK, *above* note 1.

[9] When Glasgow Rangers lost the 1983 Scottish FA Cup Final they had no English players; their team defeated in the 1989 Final contained 6 English players.

[10] Doc. A2-415/88, adopted 11 April 1989.

individual worker's fundamental right of free movement within the common market.[11] The Parliament's Resolution uncompromisingly declares:

> the restriction on the number of foreign players entitled to play for a professional football team to be a proscribed discrimination on grounds of nationality, a contravention of freedom of movement pursuant to Article 48 of the EEC Treaty and a violation of Article 85 of the EEC Treaty, in so far as nationals of the Member States of the European Community are concerned.

This paper will investigate these allegations. It will assess the applicability of Article 48 and Article 85, both of which are mentioned in the Janssen van Raay Report, and will consider whether infringements have occurred. Methods of enforcement of the Treaty rules will be examined. This is of particular importance given the fact that Community law is subject to 'dual vigilance'[12] and consequently its enforcement may be undertaken both by the Commission and by individuals pursuing litigation before national courts. It should be emphasized that the several issues raised illuminate areas of the application of Community law of a significance far more extensive than the football industry. It is submitted that some fundamental legal issues relating to the treatment of labour practices in the common market and to the enforcement of Community law are raised.

2.3 Is There a Breach of the Treaty?

2.3.1 Sport and the Treaty of Rome

The European Community is not omnicompetent. Therefore it must first be established that sport falls within the ambit of the Treaty, before application of the rules of Community law to the discriminatory player restrictions can be considered.

It has been clear that professional sport may fall within the Treaty since the European Court's decision in *Walrave and Koch* v. *Union Cycliste Internationale*,[13] a case considered more fully below. The Court declared that: 'Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the

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[11] The Report also considers the football transfer system unlawful: '[…] a latter-day version of the slave trade […]' On English law and the transfer system, see the leading case of *Eastham* v. *Newcastle United* [1964] Ch. 413; for a historical survey, see Grayson 1988, 35–7, 260–8; for analysis in the legal context, see, e.g., Treitel 1987, 349. On a separate matter, the Report also declares 'without legal base and […] contrary to the free movement of people' the exclusion of English clubs from European competition as a result of the tragedy at the Heysel Stadium, Brussels in 1985. On this point, see profound analysis by Evans 1986, 510–48.

[12] Case 26/62 *Van Gend en Loos* [1963] *ECR* 1 [1963] *CMLR* 105.

[13] Case 36/74 [1974] *ECR* 1405, [1975] 1 *CMLR* 320.

meaning of Article 2 of the Treaty.'[14] 'Economic activity within the meaning of Article 2' is of such breadth that there can be no doubt that professional football, which represents a minor but genuine aspect of the market economy,[15] is subject to the Treaty rules designed to achieve a single market.

Which specific Treaty rules may be breached? There are two obvious candidates, already alluded to; Article 48, which provides for the free movement of workers within the Community and the abolition of discrimination based on nationality; and Articles 85 and 86, the Treaty rules on competition, which forbid activities by undertakings incompatible with the common market. Rules which seek to preserve a special status for footballers who are nationals of the State within which the particular League is situated appear prima facie to infringe both sets of provisions.

It may already be noted that the potential overlapping jurisdiction of Article 48 and Articles 85/86 is of especial interest. There are significant differences between the scope of the provisions and therefore the potential parallel application of the rules is capable of creating practical and theoretical difficulties. However, as a means of initiating the inquiry, the two provisions will be considered separately, first, Article 48, then Articles 85 and 86.

2.3.2 Article 48 EEC

Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. 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 […]

Paragraph (3) of Article 48 proceeds to identify particular rights inherent in this general provision, including rights to accept offers of employment actually made and to move freely within the territory of Member States for this purpose.

Article 48 is an amplification in a specific area of the fundamental Community rule against discrimination on grounds of nationality found in Article 7 EEC:

> Within 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.

Article 48 should also be read in conjunction with Articles 52 and 59, which apply parallel regimes to the freedom of establishment and the freedom to provide services in the Community. As a general proposition, these three sets of provisions

[14] Para. 4 of the judgment.

[15] The total 'live' audience (i.e., excluding television) for League football in England and Wales alone in season 1988–9 was 18,447,565 (Source: *The Football Trust*).

should be read as a complementary package.[16] For the present purposes, analysis will be confined to Article 48, for it is plain that a professional footballer is a worker, rather than self-employed or the provider of services. It should however be noted that sportsmen and women competing in individual events such as golf and tennis may be covered by Articles 52 or 59, rather than 48 The same is true of sports teams.[17] Such cases would require careful investigation to determine whether they fall within the limited, anomalous areas under Articles 52 and 59 in which rules different from those applicable to workers under Article 48 reign.[18]

Finally, Article 48 is amplified by a range of secondary legislation, which elaborates the application of the rule against nationality-based discrimination in particular cases. Thus, for example, Regulation 1612/68 amplifies rights of equality in eligibility of employment in Title 1: and in Title II assures the migrant worker of equal treatment in respect of a range of conditions of employment, including the broadly-defined 'social and tax advantages'.[19]

The Treaty of Rome therefore outlaws discrimination in employment on grounds of nationality by dint of, in ascending order of specificity, Article 7, Article 48, and the range of secondary legislation which supports Article 48. Consequently, it may be thought that, prima facie, Article 48 and Regulation 1612/68[20] are infringed in the cases under consideration. One might compare *Commission* v. *France*, commonly referred to as the *French Merchant Seamen* case.[21] The French *Code du Travail Maritime*, as implemented by Ministerial Order, stipulated that the crew of French merchant ships should comprise at least three Frenchmen to each seaman of any other nationality. The European Court ruled that the legislation was discriminatory and unlawful under Article 48. However, the discriminatory football player restrictions are not legislative measures; nor are they connected with a central

[16] On the parallel interpretation of these provisions. See Case 48/75 *Royer* [1976] *ECR* 497, [1976] 2 *CMLR* 619, where the Court responded to questions referred under Art. 177 despite the fact that the national court had failed to specify whether the case was covered by Art. 48 or 52. It should also be noted in this respect that the Court in *Walrave and Koch*, above, note 13, saw no need to determine whether a contract of service (Art. 48 or a contract for services (Art. 59) was in issue, because 'the rule of non-discrimination covers in identical terms all work or services' (Para. 7 of the judgment). The same approach may be identified in *Donà* v. *Mantero*, below, note 26.

[17] See Evans 1986, 510–48.

[18] See Wyatt and Dashwood 1987, 206–7. The most significant distinctions between the three provisions reside in the scope of the rights granted to beneficiaries by virtue of supporting secondary legislation. Most strikingly, Reg. 1612/68 applies only to workers under Art. 48, these falling within Arts. 52 or 59 must rely on the general rule against discrimination on grounds of nationality enshrined in Art. 7 EEC, the scope of which is inexplicit. This issue lies beyond the scope of the present analysis and is of no direct relevance to it, but compare, e.g., Case 795/83 *Gravier* v. *City of Liège* [1985] *ECR* 593, [1985] 3 *CMLR* 1; Case 39/86 *Lair* v. *University of Hanover* [1989] 3 *CMLR* 545; Case 197/86 *Brown* v. *Secretary of State for Scotland* [1988] 3 *CMLR* 403; Case 63/86 *Commission* v. *Italy* [1989] 2 *CMLR* 601.

[19] Art. 7(2) of the Reg. See Wyatt and Dashwood 1987, 176–80; O'Keeffe 1985, 93.

[20] See particularly Arts. 1(2), 4.

[21] Case 167/73, [1974] *ECR* 359. [1974] 2 *CMLR* 216. See Goyder 1988, 76; Wyatt and Dashwood 1987, 175.

feature of the market economy such as shipping. Fuller analysis is required to support the submission that they should be held contrary to Article 48 in a manner similar to that applied in the *French Merchant Seamen* case.

2.3.2.1 Are the Rules Within the Scope of the Treaty?

A strict application of this rule against discrimination could give rise to some surprising results. Is there discrimination on the basis of nationality, contrary to the Treaty, if selection for the Italian national football team is limited to Italians? The answer is plainly in the negative and the reason can be discerned from the Court's statement in *Walrave and Koch*, alluded to earlier.[22] Professional sport falls within the Treaty when it constitutes an economic activity, but there are circumstances in which its rules fall outside the scope of this classification. In *Walrave and Koch*, the Court was prepared to accept the legality of discrimination against foreign participants 'for reasons which are not of an economic nature', citing as an example 'matches between national teams from different countries'. The discrimination inherent in the selection of a national representative team occurs for longstanding reasons of a purely sporting nature, rather than for economic reasons. The matter to which the rule relates falls outside the scope of the Treaty of Rome. Therefore, limiting eligibility for selection for the Italian national football team to Italian nationals is permissible under Community law, for it constitutes discrimination imposed without reference to economic motives or considerations. It is a matter of 'national pride and identity',[23] outwith the economic sphere.[24]

However, this does not lead to the conclusion that the several discriminatory rules in different Member States relating to League football are outwith the ambit of the Treaty and therefore permissible. Such special considerations advanced in the case of national teams appear inapplicable in the case of normal football League matches, since such fixtures are not in general played by distinctively representative teams. League football is an economic activity of some significance; English clubs are registered companies and one, Tottenham Hotspur plc, is listed on the Stock Exchange. The clubs are primarily businesses, rather than representatives, and their player selection policies reflect this fact.[25]

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[22] See *above* note 13.

[23] Consideration 10 of the Parliament's Resolution adopting the Janssen van Raay Report, *above* note 10 which endorses the special status of national representative teams.

[24] This approach could also uphold discrimination in the selection of traditionally representative regional teams. Yorkshire County Cricket Club only selects Yorkshire-born players – it is the only one of the 17 first class counties to maintain this restriction. The discrimination is permissible, because it forms the means of preserving the uniquely representative nature of the team; it is not part of the economic structure or motivation of the club.

[25] This suggests that amateur clubs practising discrimination are not covered by the Treaty; *sed quaere* the possible relevance of Art. 7(2) Reg. 1612/68, *above* note 19; see Ubertazzi 1976, 635, 644–7.

However, Advocate-General Trabucchi in *Donà* v. *Mantero*[26] appeared cautiously prepared to consider ordinary League clubs practising discrimination to be unaffected by the Treaty on the ground that they may qualify as national representatives in European inter-club competition; and that therefore their discriminatory practices exist for purely sporting reasons. It is submitted that this is an unwarranted curtailment of the scope of the Treaty. A club side is not a representative eleven analogous to a national selection. A club may be thought to represent a city and a country, but, exceptional cases apart,[27] the players themselves are not selected on such a basis – 'Die Person und die Herkunft der einzelnen Spieler bleibt im Hintergrund' – 'the identity of the individual player is of only background interest'.[28] Few leading club sides possess more than a minority of players native to the club's home city,[29] and even fewer successful clubs are without overseas representation in their ranks.[30] This is particularly true in England where it is common for club honours to be won by teams boasting a minority of English players.[31] There is no evidence that the clubs are deprived of local support and identity as a result of such player recruitment policies.[32] In the light of these practices, Advocate-General Trabucchi's suggestion that professional club football can be seen as representative and therefore pursuing discriminatory policies for purely sporting reasons must be rejected.

It must be admitted that the Court has on occasion shown itself receptive to the argument that rules which produce an effect which is discriminators on grounds of nationality may none the less fall outside the scope of the Treaty if the differentiation is explicable on objective grounds unconnected to nationality.[33] Thus, third

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[26] Case 13/76 [1976] 2 *CMLR* 578, [1976] *ECR* 1333.

[27] A small number of exceptions exists, where player selection is governed by local representativity criteria, e.g., in cricket, Yorkshire, *above* note 24; in football, the Spanish League side Real Sociedad de San Sebastian, which finally surrendered its Basques-only policy at the start of season 1989–1990.

[28] Hilf 1984, 517, 521 [the translation is the author's own]; cf. consideration 8 of the Parliament's Resolution adopting the Janssen van Raay Report.

[29] For example, for the 1989–1990 season, Liverpool's playing staff of 34 consisted of only 10 Liverpool-born players, 18 were born outside England (*Rothman's Football Yearbook. 20th Year*, Queen Anne Press). This pattern is typical of most English First Division clubs.

[30] Liverpool's first victory in the European Cup came in 1977 with a team including two non-English players. Since then, the only team to win the trophy with an entirely 'home-grown' 11 was Steaua Bucharest in 1986. The victory of Milan in 1989 was typical; they fielded 8 Italians and 3 Dutchmen.

[31] Three of the last live FA Cup winning teams (up to 1989) have fallen into this category. The last English team to reach the European Cup Final were Liverpool in 1985, when 9 of their 11 players were internationals of countries other than England.

[32] *Quaere* the value of such evidence, if adduced, as a means of escaping the ambit of the Treaty, the issue under consideration in this Part; or as a means of justifying such discrimination, cf. below, Sects. 2.3.2.3, 2.3.3.3 and 2.4.2.2. Note also, issues of proportionality: is it permissible to subject all clubs to such rules even if evidence of some lost support exists?

[33] Schermers 1983, Paras. 89–94; Sundberg-Weitman 1977, 70–85, 109–11.

party liability insurance required to register a motor car in Germany was generally available with the benefit of a 'no claims' bonus. However, this advantage was not offered in the case of cars with customs registration plates. It was argued[34] that this rule prejudiced car owners who were either not nationals of or not resident in the Federal Republic. Such owners would have a particular need for such plates, in view of their interests outside the Federal Republic. The system did not automatically advantage German nationals over nationals of other Member States; indeed, the complainant was a German national resident in Belgium. However, it was argued that the consequence in practice was indirect discrimination on grounds of nationality prohibited by the Treaty,[35] because the rule would mainly affect nationals of Member States other than the Federal Republic. The Court found no illegality. The system was based 'exclusively on objective actuarial factors and on the objective criterion of registration under customs plates'.[36] The indirect effect based on nationality was held purely incidental. There appears to be little scope for arguing that the rules of the English League, which are tied to citizenship and residence,[37] could be upheld on this basis, but one might argue that the rules of UEFA applicable to European club competition[38] are tied not to nationality *per se*, but to eligibility for national representative teams. Since such national teams are permissible under Community law.[39] The related rules in club football also acquire objective justification despite their indirect discriminatory effect. This argument possesses some force, but it is submitted that it should not be accepted. The flaw, put crudely, is the absence of causal link. Why should the composition of a club side be tied to the incidental fact of individual eligibility for national representative football? It is submitted that the preceding analysis of the practice of team selection demonstrates that a club is an entity independent of the identities of particular football players. Liverpool are no less an English club, or indeed a Merseyside club, when they field a majority of players unavailable for selection as England internationals.[40] There is no objective reason for supposing that the nationality of the playing staff of a club should reflect the identity of the State in which the club plays.[41]

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[34] Case 251/83 *Haug-Adrion* [1984] *ECR* 4277, [1985] 3 *CMLR* 266. See also Case 182/83 *Fearon* [1984] *ECR* 3677, [1985] 2 *CMLR* 228.

[35] The insurance rules were State approved; this was not simply a case of horizontal direct effect, cf. Sect. 2.3.2.2 above.

[36] Ibid., Para. 16. The Court did not expand on this view. The defendant had argued that cars bearing a plate are an increased insurance risk because the car is likely to be driven abroad in areas unfamiliar to the driver (see A-G Lenz's Opinion).

[37] See above, Sect. 2.2.

[38] See above, Sect. 2.2.

[39] *Walrave and Koch*, note 13 above.

[40] See notes 29–31 above.

[41] The rules of the English League, which make no distinction between English, Welsh, Scottish, or Irish players, offer strong support for this view. The UEFA rules, which make this distinction, can scarcely be objectively justifiable, given that the British association themselves see no need

It is therefore concluded that UEFA's requirement of eligibility for the national representative team is not susceptible to objective justification. At both domestic and European level, the rules are in fact a device to protect the health of the domestic game, by preventing an influx of overseas players who would be capable of denying opportunities for development to young home players. Without assessing the merit of this contention, it must, at this stage of the analysis at least, be rejected. The argument advanced is essentially a broad economic justification and cannot support a contention that the rules under examination escape the ambit of the Treaty. Such arguments are relevant only to justification within the specific exceptions permitted by the Treaty – in this case, Article 48(3), considered below.

2.3.2.2 Are the Treaty Rules Horizontally Directly Effective?

The discriminatory rules under consideration are promulgated by private bodies. It is necessary to establish that the personal scope of Article 48 is sufficiently broad to cover such institutions. Is Article 48 'horizontally directly effective' – that is, can it be invoked by private parties against other private parties?[42] It is generally[43] accepted that the answer is in the affirmative. Private bodies, as well as State bodies, are subject to the Treaty prohibition against discrimination in employment on grounds of nationality. The case in which this first became apparent was *Walrave and Koch* v. *Union Cycliste Internationale (UCI).*[44]

The UCI, an international body governing the sport of cycling, regulated the conduct of championship events for paced cycle racing. In this sport, a cyclist is assisted on long rides by a pacemaker on a motor cycle, whose lead the cyclist follows in order to obtain shelter and maintain a steady speed, often approaching 100 kilometres per hour. The UCI declared that from 1973 pacemaker and cyclist competing in the world championships must share the same nationality. Bruno Walrave and Noppie Koch, two leading pacemakers of Dutch nationality, had previously been accustomed to pacing cyclists of other nationalities, because of a dearth of top quality Dutch cyclists, and they were consequently perturbed by the implications of the new rule for their earning capacity. They challenged the UCI's ruling before a district court in Utrecht in the Netherlands, from which the matter was referred to the European Court under the Article 177 preliminary reference procedure. The Court first ruled that sport could fall within the ambit of the Treaty, as explained above. The Court was then obliged to consider whether the Treaty

(Footnote 41 continued)
for such differentiation (see also note 96, below). The British case may be 'special', note 1 above, but it is submitted that in all Leagues, the identity of the club, not of the individual players, is the predominant concern.

[42] 'Vertical direct effect' refers to the enforceability of rules between State and private individual. This is the phenomenon at issue on Case 167/73, note 21 above.

[43] See note 53–55, below.

[44] See note 13 above.

rules in question could be enforced against the UCI, a private body unconnected with any State. In this context, the European Court declared that:

> 'Prohibition of such discrimination [under Articles 7, 48, 59] does not only apply to the acts of public authorities, but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services'.[45]

The European Court, having established that even the rules of a private sporting organization are in principle subject to Article 48, then left to the Dutch court the task of applying this finding to the facts of the case in order to determine whether the UCI's discriminatory rule could be seen as deriving from concerns of 'purely sporting interest' relating to the composition of a national team. This reflects the division of function between interpretation, the preserve of the European Court, and application, the province of the national judge, which is central to the structure of Article 177.[46] One might feel that the cyclist alone was the real competitor, that the pacer was not part of a 'national team', and that therefore the UCI's same-nationality requirement could not be upheld. However, the reality of effective extra-legal power intervened and, despite apparent probably success, Walrave and Koch declined to press for judgement by the court in Utrecht, because, it seems, the UCI had threatened to withdraw paced cycle racing from the world championship schedule.[47]

The assumption that Article 48 (and the other provisions relating to the free movement of persons) are horizontally directly effective and can therefore be invoked by private party against private party is also implicit in *Donà* v. *Mantero*,[48] a case concerning the discriminatory rules of the Italian Football Federation, a private body. The case involved an expenses claim by an agent who had attempted to recruit players from abroad, rather than a direct challenge to the rules by a frustrated foreign footballer. However, on the important point of principle, the European Court held that Article 48 should be applied to 'rules or a national practice, even adopted by a sporting organisation, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question.[49]

Burrows suggests that the direct effect of Article 48 is horizontal in so far as it covers 'collective action taken by bodies which, although not governmental, nevertheless in practice controlled the activities of the individual employers'[50] but that individual employers themselves are not caught. This would mean that both national football associations and UEFA (which affects the legal status of individuals within

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[45] Ibid., Para. 17.

[46] For analysis, and some scepticism as to the purity in practice of this distinction, see Hartley 1988, 278–80; Steiner 1988, 233–4; Rasmussen 1986, 442–50; Schermers 1983, Para. 611 et seq.; Weatherill 1988, 87, 100.

[47] Van Staveren 1989, 67; Hilf 1984, 517, 520, note 22.

[48] Case 13/76, note 26 above.

[49] Ibid., Para. 13.

[50] Burrows 1987, 131.

the Community even though its headquarters are situated outside the Community)[51] are within the scope of Article 48, but that individual clubs are not. Against this, it should be pointed out that the Court has never explicitly embraced such a distinction, and that the Opinion of Advocate-General Warner in *Walrave and Koch* declares that these provisions (Art. 59 and, 'in every material respect parallel' thereto, Art. 48) are 'apt to relate to restrictions imposed by anyone'. Moreover, Article 7(4) of Regulation 1612/68 refers to 'collective or individual' agreements which discriminate on grounds of nationality.[52]

Although the decisions of the European Court in *Walrave and Koch*[53] and *Donà* v. *Mantero*[54] point in favour of the horizontal direct effect of these provisions and although academic writing largely proceeds on that assumption,[55] there are nevertheless suggestions that as a matter of policy, drawn from the construction of the Treaty, this conclusion may be doubted.[56] It seems plain that Article 30 is not horizontally directly effective,[57] but that Articles 85 and 86 clearly are.[58] The role played by Article 48 is in this context rather obscure and remains unexplained by the Court. Specifically – if Article 48 *is* directly effective between individuals, how does it co-exist with Articles 85 and 86 in so far as the same subject matter may fall within the ambit of both provisions? This overlap may give rise to considerable difficulties both substantively and in relation to enforcement, whether by the Commission or by individuals. The status of Article 48 and whether its horizontal direct effect ought to be acknowledged in accordance with majority opinion will be reconsidered in Sect. 2.6.3.1 below.

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[51] The extension of Community competence to cover such bodies is implicit in *Walrave and Koch*, note 13 above. However, this is not an example of the controversial 'effects doctrine' of jurisdiction, being justifiable on normal territorial and nationality principles; see Para. 28 of the judgment in *Walrave*.

[52] Art. 7(l) Reg. 1612/68 also appears to assume this wider scope. Cf. also Art. 119 EEC (and supporting Directives) below, note 58, 78.

[53] See note 13 above.

[54] See note 26 above.

[55] Wyatt and Dashwood 1987, 18, 29–30, 205–6; Burrows 1987, 240–1; Kapteyn and Van Themaat 1989, 377, 354, 414; Leleux 1976, 83; Barents 1981, 271, 275; March Hunnings 1975, 170; Sundberg-Weitman 1977, e.g., 36. 163–4; *Halsbury's Laws of England*, 4th edn, 1986, Vols. 51–2, Paras. 3.05. 15.13. The Janssen van Raay Report, note 10 above, clearly assumes horizontal direct effect.

[56] Evans 1986, 510, 526.

[57] For analysis and conclusion to this effect, see Quinn and MacGowan 1987, 163. For the Commission's similar view, see, e.g., Written Question 835/82 *OJ* 1983 C 93/1.

[58] See below, Sect. 2.3.3.2. Analysis is not here devoted to Art. 119 EEC. This provision is also horizontally directly effective, which demonstrates that there is no reason in principle why Community rules forbidding discrimination should not be enforceable against private employers. Art. 119, however, appears in the Part of the Treaty setting out the Policy of the Community, in contrast to Art. 48, which is included in the Part entitled 'Foundations of the Community'.

2.3.2.3 Justification

The national rules appear plainly in breach of Article 48. There are however two areas of permissible restrictions on the free movement of workers found in Article 48. The first, Article 48(4), excludes 'employment in the public service' from the rule against discrimination; this is of no relevance to football. However, Article 48(3) justifies limitations on the right of free movement 'on grounds of public policy, public security or public health' and this derogation plainly requires assessment in the present context.

Supporting Community secondary legislation and the jurisprudence of the European Court have made it clear that these exceptions within Article 48(3) must be construed narrowly, because they are derogations from the basic principle of free movement in the common market. Specifically, recourse to these exceptions is only permissible if a threat to public policy, public security or public health is caused by the particular circumstances of an individual worker. Article 3(1) of Directive 64/221 demands that 'measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned'. This narrow interpretation of the scope of available derogations is confirmed, and in fact yet further restricted, by the jurisprudence of the European Court.[59]

Article 48(3) does not justify general, preventative measures and, consequently, concerns about the harmful effects of imported footballers on the domestic game cannot justify a general policy of discrimination against players from other Member States.

A further, perhaps more fundamental, reason why the Article 48(3) exceptions may be unavailable to football authorities is that the construction of Article 48(3) appears to limit its use to the State, not private bodies.[60] The exception explicitly covers 'public' considerations. It is probable that such ends cannot be invoked by a private party and this view is supported by reference to Directive 64/221, which amplifies the Article 48(3) exception, and which refers in Article 2 only to 'measures […] taken by Member States on grounds of public policy, public security or public health'. Essentially, Article 48(3) is concerned with protection of the interests of the State, not particular sectoral concerns. Legally, this indicates that Article 48(1) and (2) are horizontally directly effective; but that the Article 48(3) exceptions are not. Discrimination by a private employer against a national of another Member State could only be justified by State intervention in the shape of legislative or administrative action authorizing that discrimination. The State measure would then, of course, be subject to the need to relate that discrimination to the demands of a particular case in accordance with the normal rules relating to Article 48(3).

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[59] See, e.g., Case 30/77 *Bouchereau* [1977] *ECR* 1999, [1977] 2 *CMLR* 800. Wyatt and Dashwood 1987, 186–95.

[60] Cf. similar arguments advanced in respect of Art. 36 by Quinn and MacGowan 1987, 163, 176–7.

2.3.2.4 Discrimination Internal to a Single Member State

The Treaty of Rome only operates to outlaw discrimination within its sphere of application. Just as discrimination for purely sporting ends is not caught by the Treaty,[61] discrimination within a Member State against nationals of that State is also not subject to the Treaty. Articles 7 and 48 do not forbid 'reverse discrimination'.[62] Consequently, rules may be enforceable within a State against nationals of that State where their enforcement against Community migrants would be impermissible.

This is of direct relevance to the new rules which UEFA is proposing to introduce to control the number of 'non-national' players who may appear in club sides in European competition. As explained, English clubs will be obliged to discriminate against Scottish, Welsh, and Northern Irish workers, just as against Danes and Italians. However, whereas players from other Member States will be able to invoke EEC law to counter such discrimination, Scottish, Welsh, and Northern Irish players will be unable to do so due to the absence of an EEC element in their case.[63] Their exclusion would be a matter purely internal to a single Member State and their remedies, if any, would be found only in national law.[64]

This difference in treatment will have particularly striking consequences for footballers qualified to appear for the Republic of Ireland. The rules of the English League treat such players as home players, on a par with Scottish, Welsh, and Northern Irish players; the new rules will however, be ineffective against them, as nationals of another Member State of the Community, while prejudicing Scottish, Welsh, and Northern Irish players.

It is small wonder that the proposed new UEFA rules have caused consternation among leading British clubs, who have traditionally made no distinction between English, Scottish, Welsh, or Irish players. However, British football, in declining

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[61] See Sect. 2.3.2.1 above.

[62] Case 175/78 *Saunders* [1979] *ECR* 1129. For analysis, see Greenwood 1987, 185, 193–205; *Halsbury's Laws of England*, 4th edn., 1986, Vol. 52, Para. 15.10. Cf. reverse discrimination and Art. 30, Cases 80 & 159/85 *Nederlandse Bakkerij* v. *Edah* [1986] *ECR* 3359, [1988] 2 *CMLR* 113.

[63] *Quaere* the case of a Scottish, Welsh, or Northern Irish player returning from employment in another Member State to play in England; see discussion by Greenwood 1987, 185, 193–205.

[64] If an English court were to find the rules unlawful as being in restraint of trade, it seems that the court would be prepared to grant relief on terms which might require the domestic football authorities to refuse to obey the rules of the international governing bodies; see *Cooke* v. *Football Association*, *The Times*, 24 March 1972, discussed by Grayson 1988, 206–7; cf. the more celebrated case relating to cricket. *Greig* v. *Insole* [1978] 1 *WLR* 302. NB: however, the immunity of an employers' association from the doctrine of restraint of trade, s 3(5) Trade Union and Labour Relations Act 1974; considered and held inapplicable in *Greig* v. *Insole*, ibid. 359–62.

to make such a distinction in club football while simultaneously maintaining four separate national representative sides possessed of one vote each on international governing bodies, here finds itself hoist by its own petard.[65]

2.3.3 Articles 85 and 86 EEC

Article 85 states:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Article 86 states:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Both Articles offer a non-exhaustive list of the types of conduct forbidden.

These two Articles form the core of the Treaty rules on competition, which are designed to prevent commercial undertakings partitioning the market along national lines. They thus complement Treaty provisions such as Articles 30 and 48, which prohibit State barriers to trade. Articles 85 and 86 possess distinct aims – Article 85 controls cartels, Article 86 monopolies – but they are clearly complementary provisions. This has been explicitly recognized by the European Court: '[they] seek to achieve the same aim on different levels'.[66] However, the extent to which Article 48, relating to free movement of persons, and the competition rules in Articles 85 and 86 may be seen as complementary or overlapping is considerably more problematic, in order to demonstrate this difficulty, the four headings considered in the previous section in relation to the application of Article 48 to the discriminatory player restrictions will now be considered in the light of the application of Articles 85 and 86.

2.3.3.1 Are the Rules Within the Scope of the Treaty?

Professional sport can constitute an economic activity and is therefore in principle subject to the competition rules of the Treaty of Rome. The Court has consistently affirmed that in principle Articles 85 and 86 regulate all sectors of the economy

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[65] This separate status at international level does not however, constitute objective justification for tying eligibility to play for English clubs in European competition to eligibility for the English national team; the individual player is not a representative in his her own right in club football. See text, at note 28 above, 41.

[66] Case 6/72 *Continental Can* v. *Commission* [1973] *ECR* 215, [1973] *CMLR* 199.

and that exclusion from the scope of these rules is only achieved by specific provision in the Treaty.[67] No such exclusion applies to sport.

There seems little difficulty in classifying clubs as 'undertakings' and football governing bodies[68] as 'undertakings' and, or 'associations of undertakings' within the meaning of Articles 85 and 86. The Court has chosen not to attempt to define exhaustively the meaning of the term 'undertaking',[69] but has preferred to indicate its broad scope through a series of judgments in which a wide range of entities have been accepted as 'undertakings' for the purposes of Articles 85 and 86.[70] Thus, for example, the concept embraces companies, partnerships, or sole traders; groups of companies or trade associations. The common feature of such bodies is, in a very general sense, their economic participation in the common market.[71]

This approach probably excludes from the scope of the competition rules the discriminatory practices of national representative football teams. Such restrictions are inherent to the competitive, sporting composition of the team and are not imposed within the framework of the economic function or motivation of the activity. In this way, the ambit of Articles 85 and 86 runs parallel to that of Article 48 and covers club football, but not international representative football.[72]

Does 'trade' under Articles 85 and 86 cover footballers? EEC Competition law normally relates to restrictive practices concerning goods; it can also clearly cover agreements relating to services[73]; but it is submitted that there is no reason in principle why it should not also be interpreted to include restrictive practices concerning labour.[74] The free movement of not only goods and services, but also labour is fundamental to the concept of the creation of free trade within the

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[67] See, e.g., Cases 209-13/84 *Ministère Public* v. *Asjes* [1986] *ECR* 1425, [1986] 3 *CMLR* 173; Case 45/85 *Verband der Sachversicherer* v. *Commission* [1987] *ECR* 405; Goyder 1988, 72–9.

[68] Cf. *Ninth Report on Competition Policy*, Paras. 116–7.

[69] The term is not defined for the purposes of the competition rules by the Treaty of Rome; cf. Arts. 52, 58 EEC; Art. 80 ECSC.

[70] Goyder 1988, 79–80; Korah 1986, 14–15; Wyatt and Dashwood 1987, 345–7; Whish 1989, 213–5; Bellamy and Child 1987, Para. 2.003; Green 1986, 229 et seq.

[71] Cf. A-G Roemer in Case 32/65 *Italy* v. *Council and Commission* [1966] *ECR* 389; '[…] apart from legal form or the purpose of gain, undertakings are natural or legal persons which take part actively and independently in business and are not therefore engaged in a purely private activity […]'.

[72] An alternative means of reaching the same result would be to deny that such rules concern 'trade' within Arts. 85/86.

[73] See, e.g., Case 155/73 *Sacchi* [1974] *ECR* 409, [1974] 2 *CMLR* 177 (television broadcasts); Case 172/80 *Zeuchner* v. *Bayerische Vereinsbank* [1981] *ECR* 2021, [1982] 1 *CMLR* 313 (banking); for further examples, see Bellamy and Child 1987, Para. 2.115.

[74] Cf. Case 42/84 *Remia* v. *Commission* [1985] *ECR* 2545, [1987] 1 *CMLR* 1, Paras. 49–51 of the judgment, individual treated as an 'undertaking'; Commission Decision. *re Unitel OJ* 1978 L 157/39, [1978] 3 *CMLR* 30, where the implication is that the Commission intends to treat opera singers as 'undertakings'; it is submitted that footballers would not be so classified, because they must integrate into a team and therefore lack independent economic status in the sense of an 'undertaking' within Art. 85.

common market.[75] The Treaty of Rome provides no explicit exclusion of labour practices from the application of the competition rules.[76] The Court, for its part, has consistently indicated that the notion of 'trade' is to be broadly interpreted.[77] Accordingly, private action in all these spheres which is contrary to the concept of the common market should fall within the ambit of the competition rules.[78] It is therefore submitted that there is no reason in principle why the discriminatory national football rules should not be considered in the light of the Treaty of Rome's competition rules.

It is a more complex task to decide precisely which arrangements fall within which prohibitions.[79] As explained above, Article 85 and Article 86 are complementary, but distinct in their spheres of application and, in certain important respects, they operate separate legal regimes. This is particularly apparent in the possibility of exemption under Article 85(3), which is formally unavailable under Article 86. This feature is considered more fully below, in Sect. 2.3.3.3.

There may be agreements of the type controlled by Article 85 between national clubs and their governing associations. A Football League might be considered an association of undertakings within Article 85, with the result that the player regulations themselves could be characterized as decisions of an association of undertakings.[80] There may also be such agreements between the associations and European football's governing body, UEFA. Taking a broad view, these are in fact all part of the same cartel in the sense that all share the common overall aim of restricting players' free movement and distorting competition. More precisely, the agreements involving clubs and national associations may constitute unlawful agreements in respect of domestic fixtures; UEFA appear to become involved in the illegality when European inter-club fixtures are in issue.

Apart from the agreements covered by Article 85 which may be in operation, it seems conceivable that the discriminatory practices of national associations constitute an abuse of a dominant position contrary to Article 86 in respect of domestic fixtures, while UEFA are guilty of a similar breach of Article 86 in respect of international club fixtures. In this context, it should be noted that the European Court

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[75] Arts. 3(a), 3(c), 8A EEC.

[76] Contrast the position under English law, where restrictive labour practices are explicitly excluded from the scope of the statutory provisions – ss 9(6), 18(6) Restrictive Trade Practices Act 1976.

[77] See, e.g., Para. 18 of the judgment in case 172/80, note 73 above.

[78] Cf. Art. 119 EEC, which concerns labour and clearly covers private employers; cf. note 58 above.

[79] Cf. Evans 1986, 540 et seq.

[80] See Goyder 1988, Ch. 18; Green 1986, Ch. 14; Whish 1989, 220–l. On the rules of self-regulatory bodies in industry as agreements within Art. 85, see, e.g., four decisions adopted by the Commission on 10 December 1986, *OJ* 1987 L 19/18-30, [1989] 4 *CMLR* 287–308. Even non-binding advice given by trade associations has been held within Art. 85, Case 8/72 *Cementhandelaren* v. *Commission* [1972] *ECR* 977, [1973) *CMLR* 7; on Trade Associations, see Watson and Williams 1988, 121.

has accepted that both Article 85 and Article 86 may be infringed by a dominant undertaking which imposes restrictive agreements on its trading partners.[81]

To some extent, one may accept that there is no pressing need to define exactly what type of practices are in issue.[82] For example, it would seem to make little difference of substance whether the player regulations are held to be the decisions of an association of undertakings or the product of decision-making by several separate undertakings. In either event, Article 85 is in issue.[83] However, the precise nature of the various relationships will be of relevance in some important circumstances and it is therefore incorrect to content oneself with the adoption of a vague analysis. For example, if it is considered desirable to tackle the Leagues themselves, rather than or in addition to the individual clubs, it might prove more prudent to characterize the arrangements as the decision of an association of undertakings,[84] rather than decisions of undertakings. More fundamentally, it may be arguable that a more monolithic approach is appropriate; that the Leagues of each country should be seen as the holders of a dominant position in that territory, and that therefore their conduct should be assessed in the light of Article 86, to the exclusion of, or perhaps in addition to, Article 85.[85]

The fundamental problem resides in the extent to which a separation between the League and its individual clubs can be seen to exist. On the one hand, the clubs are companies which undertake independent economic activity in the sense that, for example, each sets its own price for admission to a stadium which, in most cases, is owned by the club. Furthermore, each club enters into contracts with its own employees, including, most importantly, players. This autonomy indicates that Article 85 is in issue. However, against this, it must be conceded that the clubs possess a range of common interests within the League structure. There is decision making of a necessarily collective nature, in respect of, for example, fixtures and rule making. The clubs cannot enjoy autonomy in such matters if the industry is to function effectively and therefore in this sense the clubs are all acting as one – to borrow a phrase common in United States anti-trust parlance, as a 'single entity'.[86] This would indicate the application of Article 86, rather than Article 85.

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[81] Case 66/86 *Ahmed Saeed Flugreisen*, judgment of 11 April 1989.

[82] See, e.g., Goyder 1988, 76 et seq; Bellamy and Child 1987, Para. 2.031.

[83] Cf. the Opinion of A-G Lenz in Case 311/85 *Vlaamse Reisbureaus* [1987] *ECR* 3801, [1989] 4 *CMLR* 213, 228, Question (B)(a).

[84] See, e.g., Commission Decision 82/896 *AROW* v. *BNIC* [1983] 2 *CMLR* 240; fine of 160000 ECU's imposed on National Cognac Industry Board for minimum price fixing; cp. Cases 89/85 *et al. Ahlstrom and others* v. *Commission* (Woodpulp Cartel) [1988] 4 *CMLR* 901, Paras. 24–8, decision declared void in so far as it concerned a trade association (KEA).

[85] For a challenge to a Commission decision on the basis that insufficient attention was paid to the distinct spheres of application of Arts. 85 and 86, see Case 97/89 *Fabrica Pisana* v. *Commission*, lodged at Court Registry 22 March 1989 [1989] 4 *CMLR* 569. Note also the link between Arts. 85 and 86 exposed by the Court in Case 66/86 *Ahmed Saeed Flugreisen*, note 81 above.

[86] For discussion in this context, see Goldman 1989, 751–97; cf. responses by Grauer 1990, 71; Roberts 1990, 117.

The tests for distinguishing the respective fields of application of Articles 85 and 86 are, perhaps inevitably given the diversity of conduct under review, imprecise. The European Court and the Commission have on several occasions been obliged to assess the practices of groups of firms and have shown themselves prepared to rule that even a legally binding contract under national law does not constitute an agreement within Article 85, if the deal is in reality simply a reflection of the allocation of functions within a single economic actor.[87] The test is one of 'economic independence',[88] which implies the necessity for an examination of corporate structure and control.[89]

It is submitted that, delicate though the application of these tests undoubtedly is, the football rules in question are more properly seen as falling within the Article 85 regime, rather than that of Article 86. The player restrictions are admittedly part of the governing structure of the League as a homogenous, regulatory entity, but they are the product of the independent input of each club and affect the independent business decision making of each club in player recruitment policy in the wider labour market.[90] The League is in this sense not to be described as a 'single entity'. In reality, the independence of the clubs precludes the dominance of the League as an autonomous governing body. The control exercised by the League as coordinator of the system is simply the consequence of an aggregation of power as a result of agreement between the clubs. It is therefore submitted that the League stands with the individual clubs as a party to an agreement covered by Article 85,[91] rather than constituting a dominant undertaking within Article 86.

In conclusion, it is submitted that prima facie breaches of Article 85 are established. The Football League rules constitute agreements concluded by the clubs and the League itself. At the level of the European club competitions. UEFA may be added as a party to the agreement. The applicability of Article 86 seems

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[87] In English company law terms, the Commission will for these purposes 'pierce the corporate veil'; see Mann 1973, 35, 48. A similar result is achieved In English cartel law by s43(2) Restrictive Trade Practices Act 1976.

[88] Case 22/71 *Beguelin* [1971] *ECR* 949, [1972] *CMLR* 81; Case 170/83 *Hidrotherm Gerärebau* v. *Andreoli* [1984] *ECR* 2999; Case 30/87 *Bodson* v. *Pompes Funèbres*, 4 *MLR* 984 (1989); cf. the Commission's decision in *Christiani and Nielsen OJ* 1969 L 165/12, [1969] *CMLR* D36, See further, Whish 1989, 239–41; Wyatt and Dashwood 1987, 353–4; Goyder 1988, 82–3; Bellamy and Child 1987, Para. 2.146; Green 1986, 231–4; Van Bael and Bellis 1987, Para. 205.

[89] Cf. the US S Ct decision in *Copperweld Corp* v. *Independence Tube Corp* 467 US 752 (1984); parent corporation and wholly owned subsidiary held legally incapable of conspiring with each other for the purposes of s 1 Sherman Act.

[90] It is submitted that this view accords with Goldman's 'Synthesis and Proposed Analysis' in the US context, in Goldman 1989, 789–96. Note that if, in conformity with the arguments of Grauer and Roberts, note 86 above, considered under Art. 86, the League(s) would only have to justify the rules as a non-abusive if dominance is established: *quare* the relevant market for these purposes – football, sport, or entertainment generally.

[91] Cp KEA, which did *not* play a separate role in the agreement in Case 89/85 *et al. Ahlstrom and others* v. *Commission* note 84 above with the result that the Commission decision was annulled in so far as it applied to KEA.

less likely, because these are instances of collusion rather than dominance. Finally, it should be noted that the competition rules only bite if an agreement has as its object or effect 'the prevention, restriction or distortion of competition within the common market'. This condition is satisfied in the case under review, for clubs are inhibited by the rules from recruiting players throughout the market without reference to the nationality of the worker. It might at this point be argued that the UEFA rules are in fact justifiable on objective criteria, being linked not to nationality *per se*, but to the composition of national representative sporting teams, a matter unaffected by the Treaty.[92] The Court has shown itself prepared to accept that an agreement which differentiates between different cases on objective grounds may be held to fail out with the scope of Article 85.[93] This is commonly known as the 'rule of reason' under Article 85.[94] This is a parallel argument to that discussed and rejected in relation to Article 48[95] and it is submitted that here too it must be rejected. There is no objective reason for imposing restrictions on eligibility for a club side which are based on eligibility for a national representative team. If the player restriction rules are to be upheld, it can only be by virtue of the more general economic justification found in Article 85(3).[96]

2.3.3.2 Are the Treaty Rules Horizontally Directly Effective?

There is no difficulty in establishing the horizontal direct effect of the competition rules. It is fundamental to the nature and purpose of these provisions that they bind private parties and this has long been recognized by the European Court:

> As the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.[97]

2.3.3.3 Justification

Agreements which contravene Article 85(1) can none the less be exempted from the scope of the prohibition under Article 85(3).[98] This exemption provision

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[92] *Walrave and Koch*, note 13 above.

[93] A striking example is found in the area of Selective Distribution, see Case 26/76 *Metro* v. *Commission* [1977] *ECR* 1875, [1978] 1 *CMLR* l (on which see Goebel 1987, 605).

[94] This has been the subject of extensive academic examination. For recent analysis, see, e.g., Whish and Sufrin 1987, 1; Green 1988, 195.

[95] Section 2.3.2.1 above.

[96] Section 2.3.3.3 below.

[97] Case 127/73 *BRT* v. *SABAM* [1974] *ECR* 51, 62; [1974] 2 *CMLR* 231, 271.

[98] Goyder 1988, Ch. 8; Whish 1989, 253 et seq.; Wyatt and Dashwood 1987, 379 et seq.; Bellamy and Child 1987, Ch. 3.

contains, crudely, two 'positive conditions' and two 'negative conditions' for exemption, all of which must be satisfied. Under Article 85(3), exemption may be granted to an agreement […]

> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, which allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

On a strict reading, all commercial contracts could fall foul of Article 85(1), for the contracting parties, in binding themselves to each other, thereby restrict their freedom to contract with a third party in relation to the subject matter of the contract which they have concluded. This would be plainly absurd. Exemption under Article 85(3), the purpose of which is to permit restrictive but broadly beneficial arrangements, prevents such absurdity. There is no parallel justification provision under Article 86, but doubtless a similar result can be achieved by a dominant firm anxious to demonstrate the beneficial effect of its conduct by establishing that no 'abuse' has been committed.

It must be stated that the Commission alone is empowered to grant an exemption under Article 85(3). It derives this power from Regulation 17/62. Undertakings must notify agreements to the Commission to seek exemption and in the absence of such notification the agreement cannot be exempted even if theoretically meeting the Article 85(3) requirements.[99] No national football rules of the type under scrutiny have been notified and exemption is thus at present impossible. However, it is useful – for academic and practical reasons – to consider whether the football rules may be susceptible to exemption under Article 85(3); or whether they may be held to constitute non-abusive conduct under Article 86 on the part of the dominant football authorities.

It is immediately apparent on a reading of Article 85(3) that it is on its literal terms unsuited for application to an agreement restrictive of the movement of labour, rather than goods. However, it is submitted that the validity of the application in principle of Article 85 in such cases has already been established[100] and therefore due allowance in literal interpretation must be made. With that observation in mind, the following arguments may be advanced.

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[99] Apart from the limited number of agreements covered by Art. 4(2) Reg. 17/62, which may be exempted without notification. The list in Art. 4(2) has no application to the discriminatory player rules under investigation.

[100] Section 2.3.3.1 above.

2.3.3.3.1 The Straightforward Application of Article 85(3)

The agreements possess the necessary economic benefits to comply with the first positive condition in that they secure the long term future of the national game by encouraging large numbers of young players to commit themselves to a career in football, secure in the knowledge that places of employment will be available to them in the higher echelons of their national professions.

To turn to the second positive condition, there is significant consumer benefit[101] in that clubs are assured of a regular supply of young employees; football spectators gain by the continued existence of a large number of professional clubs, staffed by nationals attracted into the profession by the employment opportunities available at the highest level.

The first negative condition is, it may be submitted, satisfied, for the restrictions imposed are indispensable to the attainment of these objectives. Without the restrictions, secure employment opportunities would be reduced to such a degree that the supply of young players would be severely diminished. Some discussion of detail would doubtless revolve around the precise number of foreign players to be allowed, but a restriction to two or perhaps three seems proportionate to the objective in view.

Finally, competition for players will not be eliminated by the system. There remains a sufficient number of employers even at national level to ensure the maintenance of effective competition. In relation to Article 86, it can be argued that no abuse has occurred and that the control exercised by the dominant bodies is in fact for the welfare of the industry and is designed to protect its proper status within the common market. This is plainly a similar, though less formalized, argument than that advanced in relation to exemption under Article 85(3).

In this manner, it is arguable that the restrictive rules do not in fact infringe the competition rules. The assumption is that the preservation of national restrictions, contrary to the basic principle of the common market, must none the less be seen as permissible, for otherwise the national production of footballers and the long-term welfare of the game in each State will be detrimentally affected.

2.3.3.3.2 The Straightforward Application of Article 85(3) Doubted

Such arguments would be of little weight if advanced to support discrimination on grounds of nationality in the production or supply of goods, as opposed to the use of labour. In *Coöperatieve Stremsel- en Kleurselfabriek* v. *Commission*[102] all

[101] The word 'consumer' should not be construed narrowly to cover only the end user. The French word 'ultilisateur' possesses the broader meaning which more accurately reflects Commission practice in relation to the second positive condition.

[102] Case 61/80 [1981] *ECR* 851.

Dutch cheese-making co-operatives had joined a co-operative which produced rennet used in the process of making cheese. The rules required members to purchase their required supplies of rennet from the co-operative, on pain of the imposition of fines and possible expulsion. The effect of the arrangement was that supplies of rennet were not acquired from outside the Netherlands. A breach of Article 85 was held to have occurred. This is closely analogous to the football rules, which limit opportunities for using labour, rather than goods, from outside the home State. The same approach applies to discrimination in conditions of supply as well as in methods of production. In its decision in the *Citroen* case,[103] the Commission was clearly of the view that Citroen was in breach of Article 85 by offering special deals only to consumers living in Belgium and Luxembourg. This constitutes discrimination on grounds of residence, but, as the Commission points out, the practice was likely to discriminate against final buyers according to their nationalities'; it was a case of indirect discrimination on grounds of nationality.[104] *Citroen* is an instance of discrimination practised against customers, rather than in respect of the means of production, but the illegality is in a general sense analogous to the Football League rules which favour nationals at the expense of Community migrants. In similar fashion, Article 86 has been held infringed by a dominant firm which seeks to discriminate on grounds of nationality.[105] A fundamental economic tenet of the common market is that if domestic production is harmed by the pressure of competition from industries in other Member States, then so be it. This is the nature of free competition and it is a means of promoting efficiency. The national resources should be reallocated to a use which is more suitable and valuable, in accordance with consumer demand and the market forces of traditional economic theory.

So, following the normal approach under Article 85(3), can it be argued that if an influx of foreign players is likely to harm the national game and opportunities for home players within it, so much the worse for the national game and for such players? It/they must compete or die!

2.3.3.3.3 Making a Special Case for Sport

The objection to this ruthlessly pro-competitive approach is derived from the nature of the sports industry and its role within the integrated common market. The logic of economic integration includes the withering away of the relevance of national boundaries in the conduct of the vast majority of manufacturing and service industries. However, the relevance of national boundaries in football

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[103] [1989] 4 *CMLR* 338.

[104] Cf. note 3 above and accompanying text on the subject of the restrictive rules of the English Football League. Note also that the residence requirement lacks objective justification; cf. note 35 above and accompanying text.

[105] See, e.g., Case 7/82 *GVL* v. *Commission* [1983] *ECR* 483, [1983] 3 *CMLR* 645; Van Bael and Bellis 1987, Para. 908, Bellamy and Child 1987, Para. 8.060.

cannot be dismissed so easily. They are not simply barriers to trade which impose arbitrary isolation on the market. Instead, they constitute an important aspect of the structure and attraction of the industry. In a sense, this is an extension of the 'non-economic' argument accepted by the European Court in *Walrave and Koch.*[106] The attainment of national superiority through competitive, sporting endeavour is the essence of the activity. In contrast to most industries, there is no compelling, economic reason for extending the industry throughout Europe. Indeed, the arguments run completely contrary to this integrative objective. The national identity of the League within an individual State is an important element in its economic function and definition. This is recognized in the Parliament's Resolution adopting the Janssen van Raay Report.[107] Recital D declares that: '[…] sport is an integral part of national culture and identity whose diversity adds to the richness of European culture and builds friendships among peoples'.

2.3.3.3.4 The Special Case for Sport: The Argument Redefined

The core of the argument must be defined carefully. There are two issues. One is the existence of national Leagues access to which is limited to teams based in particular States. The other, separate question concerns access of players who are not nationals of a particular Member State to play without restriction in the League situated in that State. The arguments advanced above are sufficient to resist any attempt to apply EEC competition law to the maintenance of national leagues. The logic of market integration cannot be taken to mean that the rules of the Treaty of Rome possess the objective of the creation of a unified European (or at least EEC) League. National Leagues remain legitimate economic entities, being so comprised for essentially traditional, sporting reasons.[108] In the context of common market integration, they are a special case.

However, these arguments are much more problematic when deployed in favour of the perpetuation of the player restrictions within the national Leagues. It is incumbent on the football authorities to provide evidence as to why these are necessary to maintain the health of the domestic game. They need to demonstrate that the game will be harmed at the domestic level without these restrictions. The assumptions of market integration run contrary to such assertions. The arguments advanced above in relation to Article 85(3) to the effect that the restrictions are necessary in order to encourage young players into the game are countered by pointing out that the removal of restrictions will in fact increase the attraction for youth, for the employment opportunities throughout the Community are multiplied

[106] See note 13 above.

[107] See note 10 above.

[108] Although certain minor anomalies exist; e.g., Berwick Rangers' home ground is in England, although they play in the Scottish League; Derry City's home ground is in Northern Ireland, although they play in the Republic's League of Ireland.

several times over. This is the fundamental logic informing the creation of a European economic space and it is applicable to employment opportunities for labour as to marketing opportunities for goods. Similarly, just as the free movement of goods provides the consumer with a wider and more attractive choice of purchases, so too the free movement of labour improves the attraction of the 'product' on display each match-day. The Janssen van Raay Report declares that as a result of the lifting of the nationality-based restrictions 'there is every reason to expect that the game will receive a shot in the arm through the demonstration of a high level and, possibly, a different kind of footballing skill'.[109]

Yet there are grounds for supposing that an argument based on Article 85(3) to justify the player restrictions is not wholly implausible. Free movement of players may detrimentally affect both States which import and those which export players. In the case of the importing State, it has been argued that unfettered choice of players from all Member States would reduce incentives for promoting youth teams in the home State. This is not convincing, given the sheer number of players and clubs at all levels of the game. However, a more convincing case can be made in respect of the exporting State. The loss of leading players is likely to damage the health of the domestic game. There is admittedly a difficulty in the collection of empirical evidence, but it is submitted that there are genuine arguments that unrestricted free movement of players will seriously jeopardize the viability of national Leagues in the States where the football industry is economically relatively weak,[110] because of their inability to retain players of above-average ability.[111] Once one has accepted the legitimacy of national Leagues, as elaborated above, incidental rules to protect them may be justified, if proportionate. Consequently, the exporting State's industry is legitimately protected by imposing limits on demand in importing States by means of the player restrictions. In this fashion, the pattern of arrangements throughout the Community achieves a compromise between the special status of the football industry and the general objective of economic integration. The cartel is constituted by a Community-wide network of arrangements at the level of the national Leagues and justification under Article 85(3) is possible.

This paper has consistently rejected the view that the football authorities can claim objective justification for the application of nationality-based rules to the composition of club sides.[112] It is however, submitted that such rules, if directed to the maintenance of quality levels, may be supported, albeit by virtue of the justifications found in the Treaty, rather than the claim to objectivity. The quality of a

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[109] See note 10 above, Para. 16.

[110] 'To allow free movement of footballers would certainly have a devastating effect on the British game. Already clubs in France and West Germany and Belgium, quite apart from Spain and Italy, pay much higher salaries than our own […] It is easy to foresee the departure of most of our leading players.' (Brian Glanville, *World Soccer*, May 1987, 22).

[111] See the Resolution tabled by MEPs Ephremidis, Adamou, and Alavanos, Doc B 2-1547/86, Annex IV to the Janssen van Raay Report, note 10 above; cf. Hilf 1984, 521.

[112] Sects. 2.3.2.1 and 2.3.3.1 above.

club side and its national League is a material consideration deserving protection, where the nationality of the individual players is not.

These are complex arguments, which do not appear formally to have been addressed, since the football authorities have never applied for exemption under Article 85(3). However, it is submitted that this analysis demonstrates that the applicability of Article 85(3) to the discriminatory player restrictions cannot be wholly discounted.

2.3.3.4 Discrimination Internal to a Single Member State

Just as Article 48 is inapplicable to actions which discriminate in circumstances wholly internal to one Member State, without any Community element, so too Articles 85 and 86 are inapplicable to restrictive or abusive practices which produce effects purely internal to a single Member State. Articles 85 and 86 are only relevant where a connection with inter-State trade can be shown. On a superficial analysis, this appears to mean that practices, such as the new UEFA rule,[113] which restrict the movement of Scottish, Welsh, Northern Irish, and English players within the United Kingdom fall outwith the ambit of Community law.

This limited interpretation of the scope of Community law is, however, open to challenge. If a Scottish club is only allowed to play four British nationals who are not Scots in European club competition, then this will inevitably affect their readiness to purchase such players. The result will be that the club will look outside the United Kingdom to buy players, for the rules would be unlawful and therefore unenforceable as applied to, say, German players. It may also mean that English players will look to move outside the United Kingdom, where the restrictive rules are unlawful under Community law, rather than to move within the leagues in the United Kingdom. On this analysis, the UEFA rule, even as applied internally within the United Kingdom, distorts trade patterns within the Community, albeit indirectly, and therefore it falls to be considered under Articles 85 and 86.[114] It might be objected that the causal link between rule and trade distortion is not watertight. However, with regard to the burden of proof which is in this context borne by the Commission, the Court has declared that:

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[113] See Sect. 2.2, above.

[114] See the broad approach of the European Court in decisions such as Case 8/72 *Cementhandelaren* v. *Commission* [1972] *ECR* 977, [1973] *CMLR* 7 (conduct on the Dutch market alone had effects on other national markets within the Community). The requirement of an effect on inter-State trade is plainly not construed as a major obstacle to Community competence. For analysis, see Goyder 1988, Ch. 7; Whish 1989, 242–9; Wyatt and Dashwood 1987, 375; Bellamy and Child 1987, Para. 2.116 et seq.

> Article 85(1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect.[115]

It is submitted that this test can be met in the present case.

It appears that a discrepancy in the scope of Article 48 and Article 85 has been exposed. In Sect. 2.3.2.4, the conclusion was reached that Article 48 was of no assistance in the 'internal' case under examination. Yet here it is suggested that Article 85 does cover the case. The discrepancy arises because of the broad interpretation given by the European Court to the effect on inter-State trade condition under Article 85, which has not been extended to Article 48.[116] It is possible that the European Court, provided with an appropriate opportunity by the accidents of litigation, will rule that the logic of the Treaty demands that Article 48 and Article 85 be interpreted in a parallel manner in such a case. This would mean that the UEFA rule could be attacked on the basis of both provisions, even as applied *prima facie* internally to the United Kingdom. Until such time as this occurs, a potential inconsistency between Article 48 and Article 85 exists.

2.3.4 Conclusion

The discriminatory player restrictions appear to fall foul of Article 48, with no possibility of justification. The only doubt concerns the question of the horizontal direct effect of Article 48, but it is submitted that an overwhelming weight of judicial and academic opinion has been assembled in favour of this attribute. The player restrictions are also caught by Article 85 (but probably not by Article 86), but there are genuine arguments of substance that exemption under Article 85(3) is a live possibility.

There is a significant difference between Article 48 and Article 85 because of this distinction in the nature of the exemption rules. In addition, other anomalies have been revealed, such as the apparent more flexible treatment of the condition that an effect on inter-State trade be shown under Article 85.

The focus of this article now turns to Enforcement of Community law in this area. In Sect. 2.4, close attention is devoted to the enforcement powers and practice of the Commission. In Sect. 2.5, attention is paid briefly to the opportunities for enforcement by private individuals before national courts. A central theme will remain the anomalies between the use of Article 48 and Article 85.

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[115] Case 19/77 *Miller* [1978] *ECR* 131, Para. 15. See also Case 61/80 *Cooperatieve Stremsel- en Kleurselfabriek* v. *Commission* [1981] *ECR* 351, Para. 14, which refers to the need to show 'a sufficient degree of probability'. In both cases, the Commission discharged its burden. See further Bellamy and Child 1987, Para. 2.119; Van Bael and Bellis 1987, Para. 222; Green 1986, 238.

[116] Cf. Case 180/83 Moser [1984] *ECR* 2539 and discussion by Greenwood 1987, 185, 199, 203.

2.4 Enforcement by the Commission

2.4.1 Article 48

There are no means whereby the Commission can enforce Article 48 against private parties. It is, however, worth considering whether it would be possible for the Commission to initiate Article 169 infringement proceedings against all Member States requiring them to legislate against discrimination contrary to the Treaty occurring on their territory.

Advocate-General Trabucchi in *Donà* v. *Mantero*[117] suggests that this possibility should not be allowed. He declares:

> I cannot accept the principle that the State should be made liable for activities carried out on its territory by individuals exercising their contractual autonomy solely on the ground that they have adopted measures which conflict with directly applicable Community rules.

The Advocate-General contends that the State's duty does not extend beyond the duty to 'withhold legal recognition' from clauses which restrain sports clubs from signing foreign players. He supplements this view with the astute constitutional point that an acceptance of the propriety of the Article 169 action in these circumstances could distort the structure of legal obligations imposed by the Treaty. According to the Advocate-General, Article 48 is 'directly applicable'.[118] If a Member State were required to promulgate domestic legislation in order to force its nationals to comply with Article 48, then the true Community source of the legal rule would be obscured. This would introduce an uncertainty prejudicial to the integrity of the Community legal system.[119]

It is at least arguable that as a matter of law this is an unduly restrictive approach. The private bodies concerned have contravened Article 48 and should be subject to legal control; the States have committed a separate Treaty infraction by allowing parties within their jurisdiction to act in a manner contrary to Article 48. They are in breach of Articles 5 and 7 EEC by undermining the efficacy of Article 48, and this denial of the obligations of Community solidarity should be the subject of legal challenge under Article 169. By adopting this more rigorous approach, an effective solution may be achieved. Article 48 is made binding on private parties; national authorities are obliged to secure compliance.

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[117] See note 26 above.

[118] Here is not the place for analysis of the debate about the distinction between 'direct applicability' and 'direct effect', see Winter 1972, 425. *Quaere* whether the phrase is of value in relation to Articles of the Treaty, see *Halsbury's Laws of England*, 4th edn., 1986, Vol. 51, Para. 3.41.

[119] Cf. in respect or EEC Regulations. Case 39/72 *Commission* v. *Italy* [1973] *ECR* 101. See Hartley 1988, 195 et seq. Contrast EEC Directives, which require domestic implementation (Art. 189 EEC).

However, this seems to go further than the European Court has been prepared to go in its view of the extent of Member State obligations in this area. A State must not support Treaty infractions committed by private parties by, for example, legislating purportedly to sanction or to encourage the illegality or by creating a legal environment within which the Treaty infringement is immune from challenge.[120] A national court's refusal to withhold legal validity from rules unlawful under Community law which are pleaded before it could also expose the Member State to proceedings under Article 169 for breach of Article 5 EEC. But there seems to be no State responsibility where the State is guilty of a simple omission to take steps against a private body acting in breach of the Treaty.[121]

Quite apart from these legal arguments against the use of Article 169, there are strong practical reasons for accepting the good sense of Advocate-General Trabucchi's desire to eschew Article 169 proceedings against the State in these circumstances. The real target is of course the private football organizations. To attack their illegality though the medium of the national State is both cumbersome and time-consuming. This is recognized in the Parliament's Resolution adopting the Janssen van Raay Report, which indicates that although such action against the State is 'theoretically possible',[122] it 'would not be appropriate'.

This being so, it is necessary to analyse the preferable course of action – proceedings against the football organizations directly. The next section, Sect. 2.4.2, examines such action brought by the Commission. Section 2.5 mentions opportunities for enforcement by private individuals.

2.4.2 Articles 85 and 86

2.4.2.1 The Commission's Enforcement Powers[123]

In contrast to Article 48, the Commission is given specific and sophisticated powers of enforcement against private parties in relation to the competition rules. These are found in Regulation 17/62, which covers initiation of the procedure, the powers of investigation and the range of decisions from which the Commission may select as a means of disposing of the case. The Commission has power to

[120] Cases 209-13/84 *Ministère Public* v. *Asjes* [1986] *ECR* 1425, [1986] 3 *CMLR* 173; Case 311/85 *Vlaamse Reisbureaus* [1987] *ECR* 3801, [1989] 4 *CMLR* 213. See Slot 1987, 179; Whish 1989, Ch. 9(6).

[121] Cf. from the perspective of remedies, the Court's unwillingness to grant a 'mandatory injunction' against a State in Art. 169 proceedings; see Hartley 1988, 300.

[122] See the Report itself, note 10 above, Para. 11.

[123] On enforcement, see Whish 1989, Ch. 10; Wyatt and Dashwood 1987, Ch. 16; Korah 1986, 34; Kerse 1988, 60–6; Bellamy and Child 1987, Ch. 12.

exempt a *prima facie* restrictive agreement under Article 85(3), but this power can only be exercised on notification of the agreement by the parties.

If the Commission takes the view that the football bodies are in breach of the competition rules, it has power to issue a decision requiring termination of the anti-competitive practice and, in addition, it may decide to impose a fine.[124]

2.4.2.2 Why has the Commission not Initiated Such Proceedings?

Hampered by scarce resources, the Commission's preference is for informal settlement. To save time and money and, as far as is possible, to preserve goodwill, it will usually decline to initiate formal proceedings if voluntary undertakings or informal remedial action can be extracted.[125]

It has endeavoured to pursue this course in relation to football. A cautious approach on the part of the Commission can be detected. In relation to the ban on English club sides competing in European competitions, imposed in the aftermath of the Heysel Stadium tragedy of 1985, which is arguably unlawful under Community law,[126] the Commission, 'having regard to the very particular circumstances in which the ban in question was imposed by UEFA', has preferred to maintain a non-interventionist stance.[127]

In relation to the discriminatory rules of the national Leagues regarding foreign players, the Commission has been engaged in a policy of persuasion for over ten years.[128] It must now be conceded that this conciliatory strategy has not met with success. In this light, the Commission now finds itself urged to take more positive action in the exercise of its powers of administration of the competition rules. It is, however, of interest that even the Janssen van Raay Report, adopted by the Parliament,[129] supplements its call for action by the Commission under Article 85 with the suggestion that a gradual, rather than an immediate, increase in foreign players should be secured and that 'certain safeguards to allow clubs and

[124] Arts. 15, 16, Reg. 17/62.

[125] Van Bael 1986, 61; more than 95 per cent of cases are terminated by 'settlement', the remainder by formal decision. See also Waelbroeck 1986, 268; Green 1986, 304 et seq.

[126] Evans 1986, 510–48.

[127] Written Question 154/87 *OJ* 1988 C 46/7. The Commission's preferred inactivity does not exclude the possibility that the clubs may proceed before national courts on the basis that their directly effective Community law rights of free movement have been infringed. However, the only litigation pursued in this instance was based on English law and it failed; see Evans 1986, 529.

[128] Grayson 1988, 211–2.

[129] See note 10 above.

spectators to identify with the teams' be elaborated. It is therefore plain that the Commission remains likely to use a subtle, measured approach ideally with the objective of achieving a negotiated settlement.[130]

It is submitted that this, while admittedly legally inconclusive, is at least partial confirmation of the finding made in Sect. 2.3.3.3 that some protection may legitimately be claimed for the player restrictions by national Leagues on the basis of Article 85(3).

2.4.3 Remedies Against the Commission

There is no direct method whereby an individual can bring proceedings against the Commission in respect of a Commission failure to initiate Article 169 proceedings against a Member State. An Article 175 EEC action for failure to act is unavailable because of the restrictive rules of *locus standi* under that Article.[131] The individual could launch an indirect challenge to the Commission's inactivity by bringing an action for damages under Article 215. In *Denkavit* v. *Commission*,[132] the applicants claimed to have suffered pecuniary loss as a result of the detention at the Italian border of feeding stuffs which contained a potassium nitrate level exceeding that permitted under a regulation introduced as a matter of urgency by the Italian Minister of Health. Denkavit alleged that the Commission's delay in securing the repeal of this unlawful Italian regulation constituted a wrongful act yielding a right to compensation. Advocate-General Mayras, following the opinion of Advocate-General Warner in *Meyer-Burckhardt* v. *Commission*,[133] was plainly unreceptive to the idea of such a claim against the Commission,[134] but the Court adopted a rather more flexible position. While the Court declined to hold the Commission liable, it chose to do so on the basis that the Commission had not been guilty of a delay which could be considered wrongful in the circumstances. The Court appeared to regard the action as in principle available. Notwithstanding this apparent generosity, it is submitted that the difficulties in showing illegality on the part of the Commission and in satisfying the rules of causation, *inter alia*, make this an avenue of redress which should inspire little optimism in applicants.

The prospects of success are rather different in respect of Commission neglect to initiate enforcement proceedings against a private individual for breach of the competition rules.

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[130] Cf. Resolution tabled by MEPs Ford and Stewart (Doc 2 – 1167/84, Annex I to the Janssen van Raay Report, note 10 above) '[…] demands that a full investigation […] be undertaken before premature decisions are taken that might (a) damage further an industry in severe decline, and (b) damage national and Community prestige at large, hidden, economic cost'.

[131] For analysis, see Schermers 1983, Paras. 341–5, 434; Hartley 1988, 300–2, 390–2.

[132] Case 14/78 [1978] *ECR* 2497; see Hartley 1988, 300–4, 464–5.

[133] Case 1/75 [1975] *ECR* 1171.

[134] See note 132 above, 2515–6.

Under Article 3(2) of Regulation 17/62 'natural or legal persons who claim a legitimate interest' may apply to the Commission to find that there is an infringement of Articles 85 and or 86. The 'legitimate interest' necessary to acquire standing to submit such a complaint under Article 3(2) has been broadly interpreted[135] and a footballer or a club would have standing to submit a complaint about the discriminatory rules to the Commission. The submission of the complaint then confers on the complainant a privileged status in the subsequent conduct of the investigation in respect of the following matters:

(i) if the Commission addresses a decision to the body under investigation, the complainant third party has sufficient standing to challenge the decision under Article 173(2)[136];
(ii) if the Commission declines to proceed with the investigation, it must inform the complainant of its reasons for this decision and it must offer the complainant an opportunity to submit further observations. This duty is imposed on the Commission by Article 6 of Regulation 99/63.

If the Commission adheres to its decision not to proceed despite these further observations, there follows no explicit legislative right vested in the complainant. On a strict reading of the legislation, it could simply be ignored. However, the Commission's practice is to issue a final letter to the complainant explaining why further action is not envisaged.[137] It is, however, submitted that apart from this practice there is in fact a legal right vested in the complainant to receive a final rejection decision.[138] This right must be implied in order to give effective content to the complainant's special status under Regulations 17/62 and 99/63, for otherwise the Commission could simply grant the hearing required under Regulation 99/63 and then ignore the complainant. This is not the intended legal role for the complainant. It is consequently submitted that there is a right to receive a final decision, enforceable under Article 175, and that the decision itself is reviewable under Article 173. Thus, the complainant is not entitled to a final decision on the infringement,[139] but is entitled to a final decision on the complaint.[140]

Finally, an Article 215 action against the Commission may be considered. This would amount to an allegation that the Commission's neglect to pursue the matter

[135] See, e.g., *Kawasaki* [1979] 1 *CMLR* 448, where the investigation was prompted by the complaint of an individual consumer.

[136] Case 26/76 *Metro* v. *Commission* [1977] *ECR* 1875, [1978] 2 *CMLR* 1.

[137] As in, e.g., Cases 142 and 156/84 *BAT and Reynolds* v. *Commission* [1988] 4 *CMLR* 24.

[138] For fuller analysis, see Kerse 1988, 60–6; Weatherill 1989, 47.

[139] Case 125/78 *GEMA* v. *Commission* [1979] *ECR* 3173, [1980] 2 *CMLR* 177; and see Cases 142 and 156/84 note 137 above.

[140] It should always be remembered that if the Commission refuses to act on the complaint, the aggrieved party may have recourse to the national courts, making use of the direct effect of the provisions in question.

has caused loss to the applicant. However, it has already been suggested that although this type of action may be available in principle,[141] in practice the rules which are imposed in relation to liability under Article 215 are extremely restrictive and it is difficult to imagine that such an action would prove successful.

2.5 Enforcement by Private Parties Before National Courts

The *sine qua non* for enforcement of EEC law by private parties before national courts is the direct effect of the provisions concerned. In the case of the football restrictions, which are imposed by private parties, the matter concerns an action between private parties, with no element of direct State involvement, and therefore the *sine qua non* is horizontal direct effect. These issues have been discussed in Sects. 2.3.2.2 and 2.3.3.2 and for the present purposes the horizontal direct effect of Articles 48 and 85/86 is assumed.

This indicates that the player restrictions could be challenged before national courts. Community law stipulates that it is for the national system to determine the procedural rules which apply and the remedies to be made available in litigation to vindicate rights derived from Community law,[142] subject to two qualifications[143]:

(i) the remedy must be available on conditions no less favourable than those applied to a similar right of action in purely national matters; and
(ii) the conditions must not make it impossible in practice[144] to exercise the rights under Community law which national courts are under a duty to protect.

In English law, the judicial approach has been to regard the cause of action as breach of statutory duty[145]; breach of the duty under the European Communities Act 1972 to observe enforceable Community rights.[146] But what remedies are available?

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[141] Case 141/78, note 132 above; the issues are analogous even though the specific powers under Reg. 17/62, rather than the general powers under Art. 169 are in issue.

[142] See Bridge 1984, 28.

[143] First elaborated in Case 45,76 *Comet* v. *Produktsch.* [1976] *ECR* 2043, [1977] 1 *CMLR* 533; Case 3376 *Rewe* v. *Landwirtschaftskammer* [1976] *ECR* 1989, [1977] 1 *CMLR* 533, and since regularly repeated, see, e.g., Case 130/79 *Express Dairy Foods* v. *Intervention Board* [1980] *ECR* 1887, [1981] 1 *CMLR* 451. See Barav and Green 1986, 55; Oliver 1987, 881.

[144] 'Impossible in practice' [praktisch unmöglich] is the phrase used in *Rewe*, note 143 above. In Case 199/82 *San Giorgio* [1983] *ECR* 3595, [1985] 2 *CMLR* 658, the Court uses the phrase 'virtually impossible or excessively difficult' in the course of its judgment, but reverts to 'virtually impossible' in its ruling; *quaere* if this is intended to amend the formulation in Rewe.

[145] See, e.g., the cases mentioned at note 151 below.

[146] S 2(1). The phrase may be taken to accord with the notion of directly effective provisions in the jurisprudence of the European Court; see Hartley 1988, 239–40.

A litigant could seek to establish the non-enforceability of the rules restricting the numbers of foreign players in a team on the basis of Article 48 or Articles 85/86, or both, by means of a challenge before the High Court. In accordance with the principle stated above, it is for the English system to determine the nature of the remedy and this immediately demands consideration of the legal nature of the League rules. The issue is the distinction between public law and private law; proceedings by way of judicial review under Order 53 of the Rules of the Supreme Court or by writ for an injunction and/or declaration. These are broad issues which cannot be tackled here. It is, however, submitted that despite the recent willingness of the English courts to look to the function of a body, rather than its form,[147] in determining its legal status for these purposes, a sports body, even though exercising a regulatory function, is properly regarded as a creature of private law and therefore susceptible to challenge by writ.[148] It is also submitted that a declaration and/or injunction could be sought even in the absence of existing contractual obligations, for example by a player against a national association.[149]

More intriguingly, a litigant might seek damages for loss suffered as a result of the discriminatory rules. There seems to be no reason in principle why the action should not be pursued in relation to breaches of both Article 48 and Article 85. Admittedly, it would prove difficult to demonstrate a quantifiable loss. However, it is conceivable that the remedy sought would take the form of an interlocutory injunction, thereby requiring the Court to assess the value of damages to the plaintiff at trial in accordance with the principles set out by the House of Lords in *American Cyanamid* v. *Ethicon*.[150] These several issues have been explored by the courts[151] and by academic writers[152] in relation to the action for damages before English courts for breach of Article 30 and Articles 85/86, and this exploration has revealed much complexity, largely arising, it seems, out of the application of the public private distinction to the availability of remedies. The introduction of Article 48 in this context cannot be investigated in depth within the confines of this paper. However, it is submitted that the implications of the direct effect of Article 48 and of Article 85 and their consequent availability to litigants before national courts render still more acute the problematic implications of their overlap in substantive scope. Briefly, one could imagine a case where a domestic litigant would be unable to attack a practice on the basis of Article 85, because Commission has acted, formally

147 *R* v. *Panel on Take-Overs and Mergers*, *ex p Datafin* [1987] QB 815.

148 See *Law* v. *National Greyhound Racing Club Ltd* [1983] 1 *WLR* 1302; cf. Beloff 1989, 95.

149 *Eastham* v. *Newcastle United* [1964] Ch. 413.

150 [1975] AC 396.

151 See particularly *Baurgoin* v. *MAFF* [1986] QB 716, [1985] 3 *WLR* 1027 (Art. 30); *Garden Cottage Foods* v. *Milk Marketing Board* [1984] AC 130, [1983] 3 *WLR* 143 (Art. 86).

152 See, e.g., Barav and Green 1986, 143 (and see references at 96 note 175); Oliver 1987, 881; Steiner 1987, 102; Davidson 1985, 178; Meade 1986, 101; Picanol 1983, 1; Goyder 1988, 76; Kerse 1988 (and see references at note 93, 316).

or even informally,[153] to 'protect' the practice under its Regulation l7/62 administrative powers, but where the same practice could be successfully attacked instead on the basis of incompatibility with Article 48. The discriminatory player restrictions may provide such an instance, given the earlier finding that they are more likely to be justifiable under Article 85 than under Article 48. In this way, Article 48 could be used to circumvent obstacles to an action based on Article 85. This could be profoundly unsettling for the Community structure, in that Commission compromises under the competition rules could be upset as a result of domestic enforcement of Article 48. It is submitted that the enforcement of Article 48 before English courts requires deeper analysis than that which can be supplied in this article. At present, it can only be observed that the overlap of Article 48 and of Article 85 is a problem not just for the Community system, but also, by virtue of the direct effect of the provisions, for national systems.

2.6 Concluding Remarks

2.6.1 General

The organization of football appears to be on a collision course with more than one area of the Treaty of Rome. This should not occasion surprise. The industry is one which retains strong national identities, while at the same time operating, as it has for many years, internationally. European attitudes are beneficial to football, in that the sphere of attractive and lucrative competition is widened, but also constitute a threat to the game in the light of the fact that a continuing national identity within a national League remains a strong motive for continued spectator/customer support.

The arguments for giving special protection to the football industry are diverse. They have been alluded to earlier in this article[154] and will not be addressed in greater depth here. It will however, be noted that if free movement of players within the Commission is established, this will give a peculiarly disunified face to European football, for, presumably, in all other European States, in which the writ of the EEC does not run, restrictions will be enforceable. This reveals that the EEC is not a coherent organizational body in this sector of the economy. It is 'disfunctional', a criticism which may be attached to it in other rather more important spheres, including those impinging on the political.[155]

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[153] 'Comfort letters' are not binding on national courts, but may be taken into account; Case 253/78 *Guerlain* [1980] *ECR* 2327, [1981] 2 *CMLR* 94, on which see Korah 1981, 14.

[154] See Sect. 2.3.3.3 above.

[155] Cf. President Gorbachev's plea for a 'common European home' and the instability of 'Eastern' Europe.

2.6.2 The Overlap Between Article 48 and Article 85

The central legal complexity which emerges from this article is that announced in the opening sentence – under which Treaty provision or provisions should action by private parties discriminating in employment against nationals of other Member State fall to be considered? and – how should such action be eliminated – by Commission action and/or individual litigation? This, of course, is a problem of relevance beyond the football related issues examined in this article and certainly beyond sport in general. One might consider the practices of a trade union, or, as referred to by Advocate-General Warner in *Walrave and Koch*,[156] those of an employers' association choosing employees on the basis of nationality.

One may begin with the submission that discriminatory labour practices in the private sector are in principle subject to both Article 48 and Articles 85/86. However, these provisions are not co-extensive. Several points of departure have been noted in the course of this analysis. It has been suggested that individual clubs may fall outwith the scope of Article 48, but not of Articles 85/86.[157] Article 85 seems to have a broader scope than Article 48 in that the notion of an effect on inter-State trade under the competition provisions allows practices *prima facie* internal to a single Member State to be caught by the prohibition.[158] The exemption procedures differ markedly under the provisions, that under Article 85 being significantly more likely to avail the football authorities than that under Article 48, for reasons of both material and personal scope.[159] Perhaps most fundamental of all, the enforcement procedures under the provisions are quite different.

These are essentially problems of coherence in Community law, but they become problems for national courts given that Articles 48, 85, and 86 are all directly effective. Consequently, these anomalies could confront a national court. The problem would arise in its most acute form where a litigant chose to base an action on one Article where the same set of facts litigated under a different, though in principle applicable, Article would not succeed, i.e. where the litigant is seeking to take advantage of the anomaly.

To use the example elaborated in this article, a particular problem will arise if a player and or a club challenge the discriminatory rules before a national court on the basis of Article 48, even though the Commission has, formally or informally, decided to take no action to put an end to the practices, on the basis that the rules are compatible with Article 85, i.e., the use of Article 48 to circumvent obstacles to an action based on Article 85. This presents a risk of distortion of the Community legal structure.

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156 See note 13 above, *ECR* 1425.

157 Sections 2.3.2.2 and 2.3.3.1.

158 Section 2.3.3.4.

159 Sections 2.3.2.3 and 2.3.3.3.

2.6.3 A Solution

Is there a solution? One could remove the overlap by establishing a demarcation at Community level between Articles 48 and 85. Or one could accept the overlap and leave its practical consequences to be dealt with as and when they arise. Which is best for the advancement of Community law?

2.6.3.1 Demarcation at Community Level

Two possible demarcations can be identified. Both centre on the 'troublesome' category which is the focus of this article – private sector barriers to the free movement of workers.

First, such rules could be exclusively dealt with by Article 48, by denying that the competition rules apply to restrictive practices concerning labour, i.e. that 'trade' under the competition rules covers goods (and services) alone, while acknowledging the horizontal direct effect of Article 48.

Second, they could be exclusively dealt with by Articles 85/86, by accepting that 'trade' within the competition rules covers labour as well as goods (and services), while denying the horizontal direct effect of Article 48.

Both approaches achieve demarcation; the first between rules and practices concerning goods (covered by Articles 30 and 85) and rules and practices concerning persons (Art. 48); the second between barriers imposed by the State in its legislative capacity (Arts. 30 and 48) and barriers imposed in the commercial sphere (Arts. 85/86).[160] That is to say, the first approach concentrates on what the rules apply to, the second on the applier of the rules.

However, it is submitted that, neat though both means of demarcation may seem, neither would make a valuable contribution to the coherent development of Community law. The first approach, which denies the application of the competition rules to labour practices, is unattractive. The competition rules apply to restrictive practices concerning goods and services. Their scope is to be interpreted broadly.[161] There is no indication in the Treaty that restrictive practices concerning labour constitute a special ease. Accordingly, it is not rational to suppose that labour practices can be excluded from the scope of a set of provisions plainly designed to control distortions relating to any of the factors of production which are fundamental to the market economy referred to in the basic Treaty provisions such as Articles 2, 3, and 8A EEC.

The second approach would deny the horizontal direct effect of Article 48. It must be conceded that there are arguments against the horizontal direct effect of Article 48. If the derogations in Article 48(3) are unavailable to private parties, then

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[160] This may embrace the commercial activities of the State under Arts. 85/86 or, in the case of public undertakings, Art. 90. See Goyder 1988, 80, 366–71; Whish 1989, Ch. 9(6).

[161] See Sect. 2.3.3.1, note 75 and accompanying text.

it might seem logical that the prohibition in Article 48(1) should not bind private parties. More fundamentally, since the Commission cannot enforce Article 48 against private parties, such matters should be dealt with only under Articles 85/86, where the Commission is equipped with the sophisticated enforcement mechanism of Regulation 17/62.

However, it is submitted that it would be an unacceptable retrograde step for Community law to concede that Article 48 is not horizontally directly effective. Most jobs are in the private sector. In the light of this, the limitation of Article 48 to vertical direct effect would not simply produce anomalies and distort the structure of enforcement of Community obligations, it would also severely curtail the efficacy of Community law as a means of achieving the integrative objects set out in the basic Treaty provisions such as Article 2, 3, and 8A EEC.

There is in addition a substantial amount of evidence that the Court[162] and the legislature[163] of the Community regard the horizontal direct effect of Article 48 as inherent in the structure and purpose of the Treaty.

2.6.3.2 Accepting the Overlap

This, then, leads to the conclusion that the overlap must be tolerated. So the problems of substance and of enforcement procedure at Community and at national level must be confronted.

This is not a novel result for Community law. The Court has in the past been prepared to rule that the same practice may fall to be considered under two separate sets of Treaty provisions. In *Commission* v. *Italy*,[164] the Court held that a measure could be subject to scrutiny under both Article 92, concerning State Aids, and Article 95, which prohibits discriminatory systems of internal taxation.

Before looking more closely at judicial practice in eases of overlap, it is possible to deal with some of the problems of substantive overlap without great difficulty in order to preclude irrational anomalies between the scope of Article 48 and the competition rules. It is submitted that individual clubs are the subject of both provisions, notwithstanding the reservations on this subject expressed by some sources.[165] Furthermore. although the present state of the law indicates that the criterion of an effect on inter-State trade is interpreted more strictly in relation to Article 48 than Articles 85/86,[166] it is submitted that this apparent anomaly is simply the result of a paucity of Article 48 litigation on the point and that the European Court will, when presented with the opportunity, be ready to interpret

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[162] See particularly Para. 19 of the Court's judgment in *Walrave and Koch*, note 13 above.

[163] Art. 7(4) Reg. 1612/68; see note 52 above.

[164] Case 73/79, [1980] *ECR* 1533. See further, Wyatt and Dashwood 1987, 473–4; Bellamy and Child 1987, Para. 14–32.

[165] See note 50 above, 56 and accompanying text.

[166] Section 2.3.3.4.

the provisions in the same manner – in accordance with the broad approach already taken under Articles 85/86.

However, the differences between the justifications available under Article 48 in contrast to those under the competition rules[167] cannot be ironed out by a process of interpretation. These differences constitute an important distinction in the scope of the provisions. In the light of the fundamentally different enforcement procedures which attach to the provisions[168] these distinctions in scope confront not only the Community legal order, but also the national courts.

Should one follow the approach chosen in *Commission* v. *Italy*[169] with regard to Articles 92 and 95, with the result that conformity with both Articles 48 and 85 is demanded? Or should one provision take priority over the other, with the result that conformity with the former will suffice? On this second approach, one would suppose that Article 48 would be accorded priority. Because it forms part of the 'Foundations of the Community' in the Treaty of Rome; the competition rules are merely part of the Policy of the Community'.[170] Given the finding that the football rules are capable of justification under Article 85, but seem beyond redemption under Article 48,[171] the choice between these two approaches is of no moment. On either analysis, conformity with Article 48 is the difficult hurdle which must be crossed, but which the rules appear to be incapable of crossing.

This appears to rule out reliance on the arguments which have been advanced under Article 85(3).[172] In consequence, the Commission's formal powers under Regulation 17/62 and the informal strategy often preferred[173] become valueless. This does not seem satisfactory. The private party is locked into Article 48 with minimal opportunities for justifying the practices in question, given the strong indications that the derogations under Article 48 are intended to justify State action in the general interest, not private sector conduct.[174] The Article 85(3) justification is available in respect of restrictive practices concerning goods and services, but not labour. Restrictive labour practices in the private sector thus appear to be treated in an extremely harsh manner. Does this lure the analysis back to the attractions of

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[167] Sections 2.3.2.3 and 2.3.3.3.

[168] Section 2.4.

[169] See note 164 above.

[170] Cf. discussion of possible conflict between Arts. 30 and 85 in Wyatt and Dashwood 1987, 5, 12–3. See also in this respect Bellamy and Child 1987, Para. 772; 'The Court in *Nungesser* [Case 258/78 [1982] *ECR* 2015] was clearly concerned that parties should not seek to retrieve by contract what would be prohibited under Articles 30 and 36'. See similarly, Case 58/80 *Dansk Supermarked* v. *Imerco* [1981] *ECR* 181, [1981] 3 *CMLR* 590, Para. 17 of the judgment. For analysis of these issues, see Turner 1983, 103.

[171] Section 2.3, above, summarized at Sect. 2.3.4.

[172] Section 2.3.3.3.

[173] Section 2.4 above.

[174] Section 2.3.2.3 above. The problem of the inflexibility of Art. 48 is encountered even if an Art. 86 analysis of the status of the League is preferred, note 86 above, 90.

demarcation, considered above?[175] One might argue that Article 85 alone should apply,[176] but the weight of legislative and judicial evidence against this is formidable. One might argue that Article 48 alone should apply, but this would emphasize even more clearly the anomalously harsh treatment of this category of practice.

It is submitted that a compromise solution should be sought. The restrictive labour practice is a curious creature which does not fit comfortably into the structure of the Treaty of Rome. This justifies a special regime. A strict application of Article 48 denies the genuine arguments of justification which can be made on the basis of Article 85(3). It is therefore suggested that a hybrid regime under which Article 85(3) arguments may be advanced should be devised. The Court has indicated an unwillingness to allow Article 85 to be used as a means of outflanking article,[177] but there seems no reason for adopting such a reluctant approach to the interrelation of Article 85 and Article 48. Unlike Articles 85 and 30, both Articles 85 and 48 are capable of applying to the same practice in the private sector and it is far from dear that the strongly integrationist nature of the provisions relating to free movement should override. A system whereby both provisions can be taken into account should be devised.

There is every likelihood that this matter will first be raised before a national court in litigation based on the direct effect of the relevant Treaty provisions. A national court could not decide for itself a complex matter of this nature relating to the structure of Community law. In the pursuit of the integrity and coherent development of Community law national courts are entitled to expect assistance in this difficult area.[178] However, it is far from clear what can be expected of either the European Court in the exercise of its Article 177 jurisdiction, or the Commission, in its administrative capacity, given the fact that these complexities emerge from the basic structure of the Treaty itself It is none the less submitted that the rules under investigation justify a radical approach with the objective of creating a regime more flexible than that available under Article 48 as normally interpreted.

It has frequently been asserted that the law is playing an increasing role in sport.[179] There is mutuality in this relationship. Sport can play an important role in developing the law. *Walrave and Koch*[180] is a long-standing example of this. It is submitted that the resolution of the issues discussed in this article could serve to illuminate some complex areas of Community law.

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[175] Section 2.6.3.1.

[176] Cf. Evans 1986, 510–48, text at note 125.

[177] See note 170 above. See especially Turner 1983, 114–6, who concludes that 'Further discussion of the relationships between the different Treaty provisions would be worth while'.

[178] This is not to suggest that a simple and satisfactory answer will be forthcoming; cf., e.g., the formidable (though, in comparison to the test, less fundamental) difficulties caused in national courts applying EEC competition law by the fact that Arts. 85(1) and (2) are directly effective, whereas Art. 85(3) is not; see, e.g., Greaves 1987, 256 and cf. note 153 above on 'comfort letters' before national courts.

[179] See, e.g., Grayson 1988, 35–7, 260–8; Beloff 1989, 95.

[180] See *above* note 13.

References

Barents (1981) CML Rev 18S:271, 275
Barav and Green (1986) YEL 6:55, 96
Bellamy and Child (1987) Common market law of competition, 3rd edn, Sweet & Maxwell, Para. 14–32, Para. 772, Para. 2.003, Para. 2.031, Para. 2.115, Para. 2.116 et seq., Para. 2.119, Para. 2.146, Ch. 3, Para. 8.060, Ch. 12
Beloff (1989) Public Law, 95
Bridge (1984) EL Rev 9:28
Burrows (1987) Free movement in EC law, Oxford University Press, 131, 240-1
Davidson (1985) ICLQ 34 :178
Evans (1986) LQR:510, 510-48, 526, 529, 540 et seq, Para. 17
Goebel (1987) CML Rev 24:605
Goldman (1989) Sports, antitrust and the single entity theory. TUL L Rev 63:751–97, 789–96
Goyder (1988) EEC competition law, Oxford University Press, 72-9, 76 et seq., 79-80, 80, 82–3, 366–71, Ch. 7, Ch. 8, Ch. 18
Grauer (1990) TUL L Rev 64:71
Grayson (1988) Sport and the law. Butterworths, 35–7, 206–7, 211–2, 260–8
Greaves (1987) ECLR 256
Green (1986) Commercial agreements and competition law, Graham and Trotman, 229 et seq, 231–4, 238, 304 et seq., Ch. 14
Green (1988) ECLR 195
Greenwood (1987) YEL 7:185, 193–205, 199, 203
Hartley (1988) The foundations of EC law, 2nd edn. Oxford University Press, 195 et seq, 239–40, 278–80, 300, 300–2, 300–4, 390–2, 464–5
Hilf (1984) Die Freizügigkeit des Berufsfussballspielers innerhalb der EG. Neue Juristische Wochenschrift, 517, 520, 521 [the translation is the author's own]
Kapteyn and Van Themaat (1989) The law of the ECs, 2nd edn, Kluwer, 377, 354, 414
Kerse (1988) EEC Antitrust procedure, 2nd edn. ELC, 60–6
Korah (1981) EL Rev 6:14, 34
Korah (1986) EEC Competition law and practice, 3rd edn. ESC 14–15
Leleux (1976) in Jacobs F, ed, European law and the individual. North-Holland, 83
Mann (1973) ICLQ 22:35, 48
March Hunnings (1975) JBL, 170
Meade (1986) NILQ 37:101
O'Keeffe (1985) YEL 5:93
Oliver (1987) MLR 50:881
Pescatore (1987) CML Rev 24:9–18
Picanol (1983) LIEI 2:1
Quinn and MacGowan (1987) EL Rev 12:163, 176–7
Rasmussen (1986) On law and policy in the European Court of Justice. Nijhoff, 442–50
Roberts (1990) TUL L. Rev, 64:117
Schermers (1983) Judicial protection in the ECs, 3rd edn. Kluwer, Paras. 89–94, Paras. 341–5, 434, Para. 611 et seq.
Slot (1987) EL Rev 12:179
Steiner (1987) EL Rev 12:102
Steiner (1988) Textbook on EEC law, Blackstone, 233–234
Sundberg-Weitman (1977) Discrimination on grounds of nationality, North-Holland, 36, 70–85, 109–11, 163–4
Treitel (1987) The law of contract, 7th edn. Stevens, 349
Turner (1983) EL Rev 8:103, 114–6
Ubertazzi (1976) RTDE, 635, 644–7
Van Bael (1986) CML Rev 23:61

Van Bael and Bellis (1987) Competition law of the EEC, CCH, Para. 205, Para. 222, Para. 908
Van Staveren (1989) 18th Colloquy on European law, sport and the law. Proceedings published by the Council of Europe, Strasbourg, 67
Waelbroeck (1986) EL Rev 11:268
Watson and Williams (1988) YEL 8:121
Weatherill (1988) EL Rev 13:87, 100
Weatherill (1989) The company lawyer 10:47
Whish (1989) Competition Law, 2nd edn., Butterworths, 213–5, 220-l, 239–41, 242–9, 253 et seq, Ch. 9(6), Ch. 10
Whish and Sufrin (1987) YEL 7:1
Winter (1972) CML Rev 9:425
Wyatt and Dashwood (1987) The substantive law of the EEC, 2nd edn. Sweet & Maxwell, 5, 12–3, 29–30, 175, 176–80, 186–95, 205–6, 206–7, 345–7, 353–4, 375, 379 et seq, 473–4, Ch. 16

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