PROFESSIONAL TEAM SPORTS – NATIONALITY DISCRIMINATION AND EU LAW

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ABSTRACT

There is an ongoing conflict involving the right to regulate sport in the EU. Sports associations emphasize that sport is special and different from other industries, whereas the EU stresses interests related to the internal market. This article discusses free movement of workers and nationality discrimination in professional team sports. The focus is on the Finnish sports scene, but the problem is also examined on a more European level. All in all, direct discrimination is rare nowadays, while indirectly discriminatory provisions are still common. In addition to the homegrown players rule, the biggest problem in Finnish sports is that domestic transfers are often treated more favorably than international transfers. The problem stems from the fact that there are two regulators: the national associations and the international federations. The discriminatory rules and practices in Finnish sports pursue legitimate aims but they are likely not compatible with the free movement of workers because they are not proportionate.

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SISÄLTÖ

1. INTRODUCTION

Sport encompasses everything from a leisurely jog to the Olympic Games. The European Sports Charter defines sport as "all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels."[2] Nowadays, sport is a global multi-billion dollar business. In 2004, the sports industry generated 407 billion euros accounting for 3.7 % of the EU's GDP and employed 15 million people accounting for 5.4 % of the EU's labor force. [3]

The commercialization of sport has also led to its juridification.[4] The EU first ventured into sporting issues in 1974 in Walrave. The case involved international motor-paced cycling competitions whose rules stated that the pacemaker and the stayer had to be of the same nationality. As there was no mention of sport in the EU Treaties, the European Court of Justice (ECJ) had to first determine whether sport was subject to EU law or not. The ECJ concluded that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity."[5] However, the ECJ also noted that this "does not affect the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity."[6]

Accordingly, sport is not automatically excluded from the scope of EU law. It is in principle subject to the EU Treaties under the same conditions as any other activity. Nevertheless, the ECJ recognized that there is something special about sport. Unlike other industries, sport is based on mutual interdependence. Sports teams need competitors in order to sell their product – the game. Sport also has an important social, educational and cultural function and can be used to promote health and social inclusion among other things.[7]

It was not until the Treaty of Lisbon came into force in 2009 that sport was introduced into the EU Treaties. Article 165 (1) of the Treaty on the Functioning of the European Union (TFEU) contains the following statement: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function." The Article has not changed the ECJ's or the Commission's fundamental approach to sport so far and is not likely to do so in the future either. It might nonetheless lend some more weight to previously existing arguments related to the special nature of sport.[8]

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2 Recommendation No. R (92) 13 Rev of the Committee of Ministers to Member States on the Revised European Sports Charter, art. 3 (1)(a).
3 Commission White Paper on Sport, p. 11.
4 Parrish 2003, p. 6.
5 C-36/74 Walrave, para. 4.
6 Ibid., para. 8.
7 Pijetlovic 2015, p. 34-36.
8 Parrish and others 2010, p. 10-11.

This article discusses the free movement of workers and, more specifically, whether there is nationality discrimination in the rules and regulations of Finnish sports associations. However, sport is also examined on a more European level since domestic rules are complemented by international rules. Non-discriminatory restrictions on the free movement of workers are only discussed briefly and in relation to discriminatory restrictions. Amateur and individual sports are also outside the scope of this study. Much of the focus is on football since it is arguably the most popular team sport in the world.

2. FREE MOVEMENT OF WORKERS AND SPORT

2.1. The Scope of Free Movement

Free movement of workers is enshrined in Article 45 TFEU. The Article aims to abolish all discrimination based on nationality between workers from Member States in regards to employment, remuneration and other conditions of work and employment. The Article contains the right to accept offers of employment, the right to move freely within the Member States for this purpose, the right to stay in a Member State for this purpose and the right to remain in a Member State after having been employed there.

As the wording of Article 45 suggests, only EU nationals enjoy the right to free movement. The Article also only applies in situations where there is an inter-state element. However, the Article's scope is extensive since it encompasses both actual and potential restrictions according to the Dassonville formula.[9] Therefore, either past, present or prospective movement is enough to trigger Article 45.[10] Nevertheless, neither wholly internal[11] nor purely hypothetical situations[12] are covered.

The established definition of a worker is a person who "performs services for and under the direction of another person in return for which he receives remuneration."[13] Furthermore, the worker must be engaged in genuine and effective economic activity that cannot be regarded as purely ancillary and marginal.[14] The term worker is given a broad Union-wide meaning based on objective criteria so the Member States themselves cannot exclude someone trough national laws.[15] In general, the ECJ will classify the individual as a worker if possible.[16]

9 C-8/74 Dassonville, para.5.
10 Nic Shuibhne 2013, p. 155.
11 C-175/78 Saunders, para. 11.
12 C-180/83 Moser, para. 15.
13 C-66/85 Lawrie-Blum, para. 17.
14 C-53/81 Levin, para. 17.
15 Ibid., para. 11.
16 Barnard 2013, p. 276.

The ECJ has routinely considered professional team sports players to be workers without much further analysis. After all, players are remunerated for playing and required to take part in matches and training under the supervision of their clubs. Moreover, even part-time sportspeople with regular jobs usually qualify as workers, provided that the sporting activity and the remuneration are proportional to each other.[17]

Finally, it is worth noting that free movement provisions generally have full vertical direct effect but only limited horizontal direct effect. In other words, they can usually be enforced against the Member States, but invoking them against other private individuals is only possible in special circumstances.[18] However, the ECJ has authorized full horizontal direct effect for Article 45. First, the Article's scope was extended to rules that regulate employment in a collective manner in Walrave.[19] Later, the ECJ ruled that even private employers are bound by Article 45 in Angonese.[20] This is especially important in sport because the Member States rarely regulate sport extensively. Instead, various private sporting bodies are the most important regulators.

2.2. Restrictions and Justifications

The principle of non-discrimination can be regarded as the cornerstone of the internal market, and it prohibits all forms of discrimination based on nationality. Direct discrimination refers to differential treatment that is expressively based on nationality. Indirect discrimination, on the other hand, refers to measures that are seemingly neutral towards nationality but have greater impact on migrant workers.[21] This does not mean that it is necessary to prove empirically that the measures have a discriminatory effect. It is sufficient to prove that they are intrinsically liable to do so.[22] Residency and language requirements are typical examples of indirect discrimination.[23]

However, the principle of non-discrimination is not always enough to fully secure the working of the internal market. Accordingly, even non-discriminatory measures can constitute restrictions on free movement if they prevent or hinder market access.[24] As Advocate General Jacobs noted in Leclerc-Siplec, "[i]f an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade."[25]

Restrictions on free movement are not always unlawful, and they can be justified. Direct discrimination can only be saved by the express derogations listed in Article 45: public policy, public health and public security. Indirectly discriminatory and non-discriminatory restrictions can also be excused by objective

17 Schön 2002, p. 21.
18 Nic Shuibhne 2013, p. 101-113.
19 C-36/74 Walrave, para. 17.
20 C-281/98 Angonese, para. 36.
21 Nic Shuibhne 2013, p. 198.
22 C-237/94 O'Flynn, para. 20.
23 Barnard 2013, p. 247.
24 See Nic Shuibhne 2013, p. 209-256.
25 Opinion of AG Jacobs on C-412/93 Leclerc-Siplec, para. 39.

justifications, also called mandatory or imperative requirements.[26] They are national interests worthy of protection that are often based on Union policies found in the Treaties. The ECJ has accepted most justifications proposed by the Member States but has steadfastly rejected aims based on purely economic considerations.[27] Nevertheless, the distinction between the two types of justifications has become blurred in recent case law. The ECJ has repeatedly accepted imperative requirements as justifications for direct discrimination, especially in cases involving environmental protection.[28]

Regardless, a legitimate objective is not enough by itself, and the measure also has to pass the three-part proportionality test. Firstly, the measure must be suitable to achieve the aim. Secondly, the measure must be necessary, meaning there are no less restrictive alternatives that could attain the same results. The third and final part of the test examines proportionality in the strict sense. Even if the measure is suitable and necessary, it must not have an excessive effect in relation to the individual's interests.[29]

2.3. Discrimination and Third-Country Nationals

As mentioned before, Article 45 only offers protection against discrimination to EU nationals. In addition, members of the European Free Trade Association – Iceland, Norway, Liechtenstein and Switzerland – have concluded agreements with the EU to provide equivalent rights to their nationals. Moreover, third-country nationals are not completely without protection either.

Firstly, the EU has entered into multiple non-discrimination agreements with countries such as Ukraine, Armenia and Morocco.[30] International agreements can have direct effects, and it is therefore possible to invoke them in court. However, some of these agreements might not be directly effective because they do not fulfill the necessary criteria.[31] Direct effect requires that the provisions in question are clear, precise and unconditional and do not call for any further measures.[32]

The ECJ has ruled on three similar cases involving nationality quotas and third-country nationals.[33] For example, the agreement with Slovakia in Kolpak provided that "treatment accorded to workers of Slovak Republic nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals."[34] The ECJ concluded in all three

26 Barnard 2013, p. 528.
27 Ibid., p. 171-173.
28 Nic Shuibhne, 2013, p. 203-204. See for example C-379-98 PreussenElektra.
29 Jans 2000, p. 243-249.
30 For a list of agreements see Lahti 2010, p. 53.
31 Ibid., p. 54.
32 Gáspár-Szilágyi 2015, p. 352.
33 C-438/00 Kolpak, C-265/03 Simutenkov and C-152/08 Kahveci.
34 Europe Agreement establishing an association between the European Communities and their Member States, of one part, and the Slovak Republic, of the other part, art. 38(1).

cases that the non-discrimination agreements had direct effects and the nationality quotas were unlawful.

All of the cases so far have involved direct discrimination. Consequently, the question that follows is whether non-discrimination agreements also prohibit indirect discrimination. The answer seems to be in the affirmative, though it ultimately depends on the individual agreement. For example, the wording of the agreement in Kolpak supports this conclusion since the agreement seeks to abolish any discrimination based on nationality.[35] Furthermore, allowing indirect discrimination would easily frustrate the purpose of these agreements since the prohibition against discrimination could be circumvented by simply removing all express references to nationality.

Third-country nationals who are not covered by non-discrimination agreements can invoke Council Directive 2003/109/EC on long-term residents. Article 11 of the Directive guarantees long term residents equal treatment with nationals as regards to a number of things, including access to employment. According to Article 4, the status of a long-term resident can be granted after legally and continuously residing in a Member State for five years. Consequently, it is prohibited to discriminate against foreign sportspeople who are long-term residents. It is likely that the Directive applies to both direct and indirect discrimination since it promises equal treatment.[36]

In conclusion, the prohibition against nationality discrimination often extends beyond EU nationals. Be that as it may, it should be kept in mind that the rights enjoyed by EU nationals and the rights enjoyed by third-country nationals are not identical. Importantly, non-discrimination agreements do not provide the right to immigrate or work. Protection against discrimination can only be invoked after already gaining lawful access to the labor market.[37]

2.4. The ECJ's Four-Staged Approach to Sport

All of the above mentioned principles apply when it comes to sport. Nevertheless, the ECJ's doctrine on sport has some unique nuances. Walrave and the subsequent case law resulted in the development of the term sporting exception. On one hand, it refers to some rules being completely removed from the scope of EU law. On the other hand, it also refers to applying the law with consideration to the specific features of sport.[38] The ECJ's case law on sport can be broken down into a four-stage approach.[39]

35 Lahti 2010, p. 54.
36 Ibid., p. 55.
37 C-438/00 Kolpak, para. 42.
38 Parrish – Miettinen 2008, p. 73.
39 See ibid., p. 73-101.

Firstly, non-economic sporting activity falls completely outside of the scope of EU law as stated in Walrave.[40] This exception only applies when both the rule and its effects are non-economic. Therefore, rules of the game, for example the offside rule, escape the application of free movement provisions completely.[41]

The second stage of the analysis involves rules that have economic effects but are based on purely sporting motives.[42] In the doping case Meca-Medina,[43] the ECJ stated that sporting rules are not removed completely from the scope of EU law just because they are based on purely sporting motives.[44] However, they can be justified if they relate to the particular context of sporting events and remain limited to their proper objectives.[45] So far, the ECJ has only mentioned the composition of national teams as an example, but there seems to be no reason why other rules could not potentially qualify under this category as well.[46]

Thirdly, inherent sporting rules do not constitute restrictions as demonstrated in Deliège.[47] The case involved an amateur judoka who claimed that limiting the number of participants in competitions constituted a restriction. The ECJ dismissed such claims by stating that such rules were "inherent in the organization of such a competition."[48]

Fourthly, if none of the aforementioned exceptions apply, the ECJ examines whether there is a restriction and whether it can be justified. The difference between inherent rules and ordinary restrictions is that the ECJ's application of the proportionality test is less rigorous in the former situation.[49] However, a vague reference to the special nature of sport is not a valid justification, and there has to be some more concrete interest related to sport. So far, the ECJ has accepted justifications based on ensuring the regularity of competitions,[50] combating doping,[51] maintaining competitive balance and encouraging the training and education of young players.[52]

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40 Ibid., p. 100.
41 Pijetlovic 2015, p. 218.
42 Parrish – Miettinen 2008, p. 100.
43 C-519/04 Meca-Medina involved competition law rather than free movement law. The case was about two swimmers who were banned from competing after failing their drug tests. In the end, the ban was found to be lawful.
44 C-519/04 Meca-Medina, para. 27.
45 Pijetlovic 2015, p. 218-219. See C-36/74 Walrave, paras. 8-9, and C-13/76 Doná, paras. 14-15.
46 Pijetlovic 2014, p. 219.
47 Parris – Miettinen 2008, p. 101.
48 C-51/96 and 191/97 Deliège, para. 69.
49 Parrish – Miettinen 2008, p. 101.
50 C-176/96 Lehtonen.
51 C-519/04 Meca-Medina.
52 C-415/93 Bosman.

2.5. Case Law on Sportspeople as Workers

Doná was the second important sports case after Walrave. It involved Italian football rules which provided that only Italian nationals could play professional football. The ECJ stated that the rules were incompatible with the free movement of workers "unless such rules or practice exclude foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only."[53]

However, the Union of European Football Associations (UEFA) did not abolish nationality restrictions. Instead, the so-called 3+2 rule was negotiated in co-operation with the Commission. Clubs could only field three foreign players and two assimilated foreign players who had played for five years in the country in question.[54] The ECJ was tasked with evaluating the legality of this new rule in Bosman. The facts of the case had actually very little to do with nationality discrimination, but the ECJ ruled on the issue anyway. The ECJ noted that it was irrelevant that the rule concerned fielding players and not their employment. Rules that restrict participation in matches obviously also affect the prospects of finding employment.[55] The ECJ rejected all justifications and held the rule to be unlawful.

The second question in Bosman involved transfer fees. Before Bosman, transfer rules varied between Member States, but the key point was that players could not change teams freely even after their contract had expired. Instead, the clubs negotiated a transfer deal which usually required the new club to pay a transfer fee. Transfer fees of millions of euros were commonplace.[56] After playing in a Belgian club, Bosman had signed a new contract with a French club. The two clubs had already agreed on a transfer fee, but the deal fell through. As a result, Bosman was prevented from playing in any club.

Even though similar fees existed for domestic transfers, the ECJ concluded that transfer fees constituted an obstacle to the free movement of workers because they prevented footballers from playing in their new team before the fees were paid.[57] Ensuring competitive balance and encouraging the training and education of young players were legitimate objectives, but the transfer fee system was not proportionate. Richest clubs could still hire the best players despite the rules, and the uncertain nature of the fees meant that they could not decisively influence decisions related to the training and education of young players. Moreover, less restrictive methods were capable of achieving the same objectives.[58]

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53 C-13/76 Doná, para. 14.
54 Parrish – Miettinen 2008, p. 191.
55 C-415/93 Bosman, para. 120.
56 Weatherhill 2014, p. 103-104.
57 C-415/93 Bosman, paras. 98-100.
58 Ibid., paras. 106-110.

Out-of-contract fees still persist in sports even after Bosman, but they are nowadays called training compensations instead of transfer fees. The ECJ was faced with assessing their legality in Bernard. According to French regulations, young footballers were required to sign their first professional contract with the club that had trained them. Bernard signed a contract with another club so his old club sued him for damages for training costs. The ECJ decreed that there was an obstacle to the free movement of workers because the threat of damages was likely to deter players from exercising their right to free movement.[59] The ECJ noted that a system for compensating training costs could in principle be justified by the desire to promote the education and training of young players.[60] However, the measures in Bernard were not proportionate since the damages were not in relation to actual training costs and the criteria for compensation were not determined in advance.[61]

Lehtonen is another important sports case, especially because of the logic used by the ECJ. The case involved a Finnish basketball player who transferred to a Belgian team. He had transferred outside the transfer window for EU players but within the window for third-country players. Transfer windows were deemed to constitute restrictions because they prevented players from pursuing their profession in another Member State.[62] They could potentially be justified by the need to ensure the regularity of competitions and the comparability of teams, but in this particular case they failed to pass the proportionality test. [63] If transfers from third countries did not endanger these objectives, then neither could transfers from other Member States.[64]

3. EVALUATING DISCRIMINATORY RULES AND PRACTICES

3.1. Nationality Quotas

Virtually all Finnish sports associations have removed nationality quotas involving EU nationals after Bosman. Even international non-discrimination agreements have been taken into consideration fairly well. For instance, the nationality quota on foreign footballers does not apply to nationals of UEFA members or nationals of countries that have concluded a non-discrimination agreement with the EU.[65] There are no references to long-term residents, but this could be a mere oversight since such situations probably do not arise very often.

Regardless, there have been various informal nationality quotas in Finnish sports throughout the years. For example, the 11 clubs of Korisliiga have agreed with each other to only field up to four

59 C-325/08 Bernard, para. 35.
60 Ibid., para. 49.
61 Ibid., para. 47.
62 C-176/96 Lehtonen, para. 49.
63 Ibid., paras. 53-54.
64 Ibid., paras. 57-58.
65 Suomen palloliiton kilpailumääräykset 2015, 22 § 3.

foreign players.[66] This gentlemen's agreement is well known in the media, and even the national association acknowledges its existence and, at least officially, condemns it.[67] In the end, it is irrelevant whether a binding contract between the clubs exists or not since Article 45 has full horizontal direct effect and is therefore binding on individual private employers. Nevertheless, challenging such unofficial quotas could prove more difficult than usual.

3.2. Homegrown Players Rule

European football was faced with serious problems after Bosman. The richest clubs were able to hire the best players from all over Europe and dominate competitions. This trend also reduced the incentive to train young players.[68] UEFA adopted the so called homegrown player rule in 2005 as a solution. The rules of the Champions League dictate that a minimum of 8 out of a squad of 25 must be locally trained players. Locally trained players can be either club-trained or association-trained. Club-trained players are those who have been registered with their club for at least three years between the ages of 15 and 21. Association-trained players are those who have been registered with some other club affiliated with the relevant national association for the same period of time. At least four players must be club-trained, but there is actually no obligation to field the locally trained players or even to put them on the match sheet.[69]

A similar rule has been adopted in Finnish football. The definition of locally trained players is the same, except locally trained players are those who have trained between the ages of 12 and 21.[70] Unlike the UEFA rule, the Finnish rule directly limits participation in matches because half of the players on the match sheet must be association-trained and at least four of them must be fielded. Another difference is that the Finnish rule does not contain any obligations related to club-trained players.[71]

The Commission's initial response to the UEFA rule was cautiously positive.[72] However, as the ECJ noted in Bosman, the Commission is not authorized to give any guarantees unless it has been expressly granted such powers.[73] The Commission ordered a study on the subject which concluded that the homegrown players rule is indirectly discriminatory. It does not contain any

66 Kaarto, Antti: Korisliigat päättivät neljästä ulkomaalaisesta. Kymen sanomat 10 February 2015. http://www.kymensanomat.fi/Online/2015/02/10/Korisliigaseuratpäättivätneljästäulkomaalaisesta/2015318617812/4, accessed 9 October 2015.

67 Ranta, Jarmo, Ministeriö: Korisliigan sopimus kuulostaa ongelmalliselta. Yle Urheilu 7 April 2014. http://yle.fi/urheilu/ministerio_korisliigan_sopimus_kuulostaa_ongelmalliselta/7175329, accessed 9 October 2015.

68 Siekmann 2012, p. 262.

69 Regulations of the UEFA Champions League 2015–2018: Cycle. 2015/2016 Season, arts. 43.03-43.0.6

70 Suomen palloliiton kilpailumääräykset 2015, 3 § x.

71 Ibid., 15 §.

72 Commission Press Release IP/08/807.

73 C-415/93 Bosman, para. 136

express references to nationality, but it has a greater impact on foreign footballers because nationals are more likely to fulfill the criteria for locally trained players due to simple geography.[74]

The homegrown players rule, like all indirectly discriminatory measures, can be potentially justified by imperative requirements, namely the desire to promote competitive balance and encourage the education and training of young players. However, the aforementioned study tentatively concluded that the rule is not proportionate. While the restrictive effects of the rule are quite modest, its impact on competitive balance and youth football is also negligible. Less restrictive alternatives would likely achieve the same results.[75]

It has sometimes been suggested that classifying association-trained players as homegrown players reveals that the rule has a discriminatory intent and not just a discriminatory effect. The study rejected this view because using association-trained players improves competitive balance by limiting the clubs' recruitment choices. Furthermore, small clubs benefit from the transfer fees and training compensations that they receive when their players transfer to bigger clubs. Finally, removing the association-trained part of the rule would encourage clubs to hire players at an earlier age in order to qualify them as club-trained.[76]

The study's result cannot be directly applied to the Finnish rule because, in addition to the rule itself being different, there is an essential difference between the Champions League and the Finnish Veikkausliiga. The Champions League is an international league, and the pools of association-trained players are different for Real Madrid and Liverpool since they belong to different national associations. On the other hand, the pool of association-trained players is the same for all clubs in Veikkausliiga. The richest clubs in Veikkausliiga can still hire all of the best association-trained players and the best foreign players regardless of the rule. Training compensations for domestic transfers are also so miniscule that their effect on competitive balance is virtually non-existent. As a result, the Finnish homegrown rule cannot be justified by the desire to promote competitive balance.

Since the Finnish homegrown players rule does not require clubs to have any club trained-players on their roster, they do not actually have to train any young players if they do not wish to do so. Therefore, somewhat paradoxically, a more restrictive measure that also requires using club-trained players might actually be more proportionate. While most clubs probably do train young players despite not being forced to do, this observation still has some merit.

There is little to no data available on what effects the rule has had on youth football. It is therefore worth questioning whether the rule actually provides any additional incentive to train young footballers or would the same number of players be trained regardless because of various

74 Dalziel and others 2013, p. 88-89.
75 Ibid., p. 109-111.
76 Ibid., p. 105.

circumstances related to Finnish football.[77] After all, only a fourth of the players in Veikkausliiga are foreign, and only a fourth of them are EU nationals.[78] Moreover, Finland is currently ranked as the 64th best football country in the world according to the International Federation of Association Football (FIFA).[79] This is well below average for a European country. It could be argued that Finland is simply not the most attractive destination for European footballers. Consequently, if the number of European players is not detrimental to the training and education of young players in Finland, then the restriction cannot be justified by such objectives.

All in all, the Finnish homegrown players rule is at odds with Article 45 because it is indirectly discriminatory and disadvantages players from other Member States based on residency. The rule is intrinsically quite restrictive since it directly limits foreign players from participating in matches. It cannot be justified because less restrictive alternatives, for example training obligations or some kind of revenue sharing system, could achieve the same results.[80] In fact, even the UEFA version of the rule is more justifiable since it is less restrictive.

3.3. Training Compensation

As demonstrated in Bernard and Bosman, even non-discriminatory out-of-contract fees can be unlawful if they prevent market access. However, the biggest problem with the training compensation schemes in Finnish sports is the fact that training compensations for international transfers are categorically much higher than the compensations for domestic transfers. Football is used as an example, but the problem is present in other sports as well.

According to FIFA regulations, training costs are accumulated between the ages of 12 and 21.[81] Compensation for them is paid by the new club when the player signs his first professional contract and for each transfer between different national associations before the age of 23.[82] The system is based on average training costs which have been multiplied by the so called player factor. The player factor is determined by the number of trainees needed in order to produce one professional player.[83] Leagues are divided into different categories based on approximate training costs. The yearly training cost is 90.000 euros in the top European leagues and 30.000 in Veikkausliiga.[84]

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77 Freeburn 2009, p. 213.
78 Keskitalo, Tapio and Virtanen, Ari, Veikkausliiga alkaa tänään: Liiga on kansainvälisempi kuin koskaan. Helsingin Sanomat 12 April 2015. http://www.hs.fi/urheilu/a1428646960542, accessed 9 October 2015.
79 FIFA/Coca-Cola World Ranking: Men's Ranking. 1 October 2015. http://www.fifa.com/fifa-world-ranking/ranking-table/men/index.html, accessed 9 October 2015.
80 Freeburn 2009, p 217-219.
81 FIFA Regulations on the Status and Transfer of Players 2015, annexe 4 art. 1.
82 Ibid., art. 20.
83 Ibid., annexe 4 art. 4.
84 FIFA Regulations on the Status and Transfer of Players - Categorisation of Clubs and Registration Periods 2015, table 6.

The conditions for paying training compensation for domestic transfers are mostly the same. However, the amounts are dramatically lower. The highest yearly training compensation is just 300 euros. In addition, the national association pays up to 500 euros for every international championship match the player has participated in.[85]

Bernard does not offer an answer on whether the abovementioned systems are lawful even if examining them separate from each other. It remains uncertain whether compensation should be limited to actual training costs in a concrete case or whether some kind of formula based on average costs can be used. Additionally, it is not clear whether only individual training costs can be included. Clubs also incur costs from players that never become professionals and may be discouraged from training young players if they do not get anything in return for such players.[86] However, many commentators have agreed that a formula based on average costs could be lawful and both individual and global training costs could be included in the compensation.[87] It would therefore appear that the basic principles behind the two systems are not problematic themselves.

However, as Advocate General Lenz noted in his opinion on Bosman, a difference between domestic and international transfer fees constitutes indirect discrimination since it is clear that the situation can deter players from transferring to another Member State.[88] The same logic can be applied to training compensations. The difference results in domestic transfers being much cheaper than international transfers. This will obviously have an impact on the clubs' recruitment choices. The less advantageous treatment is directly based on the player choosing to exercise his right to free movement instead of staying in his home country. Domestic transfers usually involve nationals while international transfers involve nationals of other Member States.

Promoting the training and education of young players is a legitimate aim, but there has to be a reason why a higher training compensation is necessary when the player transfers to or from another Member State. A difference based on actual training costs would probably be justified. It stands to reason that training costs for players in the English Premier League are higher than for players in Veikkausliiga due to different levels of play. However, the difference between international and domestic transfers is significant even when examining transfers between clubs in similar situations. An example is useful in illustrating the problem. If a player has trained for seven years between the ages of 12 and 18, training compensation for a transfer between two different clubs in Veikkausliiga would amount to 2.100 euros.[89] An international transfer to a similar league would cost 130.000 euros.[90] Following the logic used in Lehtonen, if low domestic

85 Suomen palloliiton kasvattajarahamääräykset 2015, 5 §.
86 Weatherhill 2014, p. 490.
87 See for example Hendrickx 2010, p. 393-39, and Weatherhill 2014, p. 490.
88 Opininion of Advocate General Lenz on C-415/93 Bosman, para. 155.
89 Suomen palloliiton kasvattajarahamääräykset 2015, 5 §. 7x300=2.100.
90 FIFA Regulations on the Status and Transfer of Players 2015, annexe 4 art. 5. Training compensation for the first four seasons between the ages of 12 and 15 is lower than normal. (4x10.000)+(3x30.00)=130.000.

training compensations do not endanger the objective of training young players, then neither do low international training compensations. Accordingly, higher training compensations for international transfers are not compatible with Article 45.

Nevertheless, there is likely no malicious intent to discriminate behind the differential treatment. The real reason for the discriminatory system can probably be found in the economic realities of Finnish football. The highest salary budget for a club in Veikkausliiga is 1.2 million euros.[91] Finnish clubs simply cannot afford to pay hundreds of thousands of euros for each transfer. Consequently, harmonizing the domestic system with the FIFA system is not a realistic possibility. Potential solutions include that FIFA completely overhauls its own system or sets up a revenue sharing fund that distributes compensation for training costs

3.4. Other Discriminatory Fees

There are also other discriminatory fees in Finnish sports. For instance, there is a yearly registration fee of 110 euros for foreign basketball players. There is no equivalent fee for Finnish players.[92] The obligation to pay the registration fee is expressively based on nationality so the fee is directly discriminatory. It is difficult to imagine any applicable justifications. The fact that the fee is so small and probably does not actually hinder anyone from playing in Finland is irrelevant since the ECJ has steadfastly refused to recognize the de minimis principle on the internal market.[93]

Additionally, national associations usually require the payment of a relatively small administrative fee for each transfer. Again, the fees for international transfers are categorically higher, and the difference can range from tens of euros up to a thousand euros. It is quite common that the difference is only partly explained by the international federation's rules. For example, in ice hockey, the fee is 100 euros for domestic transfers and 1.250 euros for international transfers.[94] Only 300 Swiss francs, approximately 290 euros, are mandated by the International Ice Hockey Federation.[95] Harmonizing the fees would be an easy way to resolve the issue since slightly higher fees for domestic transfers would probably not cause any problems.

4. CONCLUSIONS

All in all, direct discrimination is rare nowadays, but indirect discrimination is still common. In general, there are potential justifications for the problematic rules, but they do not pass the

91 Keskitalo – Virtanen, Veikkausliiga alkaa tänään: Liiga on kansainvälisempi kuin koskaan. 12 April 2015.
92 Suomen koripalloliiton kilpailusäännöt 2015–2016, 29 §, and Suomen koripalloliiton sarjamaksut 2015–2016.
93 Hojnik 2013, p. 31.
94 Suomen jääkiekkoliiton maksutaulukko 1.3.2015 alkaen.
95 IIHF International Transfer Regulations 2014, p. 20

proportionality test. Furthermore, it should be noted that these issues are not exclusive to Finnish sports. The homegrown players rule and training compensations are problematic on a Europe-wide level as well, though the latter mostly from a market access point of view.

An important theme that emerges from this study is that national associations are not free to set their own rules without regard to the international federation's rules. More advantageous rules for domestic transfers constitute indirect discrimination which is prohibited under EU law. On the other hand, failing to follow the international federation's rules can lead to sanctions. This puts national associations in a difficult spot if the international rules are not compatible with the economic realities of the Finnish sports scene.

Finally, it is worth pondering why these discriminatory provisions have not been challenged. For example, the difference between administrative fees for domestic and international transfers is quite small in the grand scheme of things so high litigation costs and long trials provide an effective deterrent. However, the more likely answer is that the people challenging these rules rarely come out on top in the end. For example, Bosman may have won his case, but his career was ruined by boycotts.[96] The story of how the informal nationality quota in Finnish volleyball was abolished provides another telling example. The president of the club that challenged the quota was promptly removed from his position as the league's vice president.[97] A push from an outside source might be needed to abolish discriminatory rules, but it remains unclear what that source might be. The Commission is likely not interested in such small matters, and the Finnish authorities do not seem eager to do anything either.

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