

## THE CASE AGAINST STRENGTHENING THE HOME GROWN PLAYER RULE.

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SUMMARY: 1. Introduction – 2. The home grown player rule under EU law – 2.1 Restriction indirect discrimination – 2.2 Legitimate aims – 2.3 The proportionality of the home grown player rule with the legitimate aims invoked – 3. Strengthening the home grown player rule

### 1. Introduction

The training of young players is regarded as a legitimate aim under European Union law and has subsequently been a clear incentive for football clubs and football federations to engage in the home grown player rule. The move was initially initiated by the Union of European Football Association (hereafter, UEFA) which imposes that 8 players over the age of 25 engaged in the competition (Europa League or UEFA Champions League) fulfil the ‘home grown’ condition. In short, there are two groups of 4 players each that must qualify as home grown: those trained by the club for three years between 15 and 21 years old; and those trained by a club within the same federation as the one they play for during three years between 15 and 21 years old. This is a key difference with the nationality clauses prohibited by the European Court of Justice (hereafter, ECJ) in 1995 given the fact that there is no obligation to field any of these 8 players in the starting line-up or during the game<sup>2</sup>. Since then, national federations have created similar rules for their national championship with a view to guarantee a *pool of young talents* which would be locally trained.

This article will focus on the recent developments regarding the strengthening of the home grown player rule. It has been suggested that the rule did not go far enough to the extent that locally trained players were sometimes not given a chance to play a single game for their team because clubs relied more heavily on transfers than on their own formation system. Some national federations<sup>3</sup> have identified the key role of the home grown player rule in that process. In that respect, football federations have issued recommendations that would oblige football clubs to field locally trained players amongst the 11 players of the starting line-up. Here, it is submitted that strengthening the home grown player rule in such a way is contrary to European Union law. That argument is not limited to players coming from the European Union. As shall be described below, it is also of crucial importance for African players willing to begin their football career within the European Union. This article is divided into two parts. It will first briefly remind how the existing home grown player rule is currently assessed under EU law. It will then discuss the proposed amendment to the rule following the Court of Arbitration for Sport (hereafter, CAS) decision of 28 June 2013<sup>4</sup>.

### 2. The home grown player rule under EU law

Since the introduction of the rule by the UEFA, it is fair to say that scholars and academics<sup>5</sup> have been rather sceptical towards this rule which seems to be an elaborated way to reintroduce nationality clauses prohibited by the *Bosman* judgment. However, the European institutions were the first to publicly welcome the introduction of this rule in the European sporting landscape. The European Parliament resolution of 8 May 2008 on the White Paper on Sport explicitly acknowledged that “*investment in young talented sportsmen and sportswomen is crucial for the sustainable development of sport*”. It further added that it “*believes that the*

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<sup>2</sup> The nationality clauses in *Bosman* allowed for a maximum of three foreign players only on the match sheet. This amounted to a restriction incompatible with the EU Treaty. ECJ, 15 December 1995, *Bosman*, C-415/93.

<sup>3</sup> France and the United Kingdom are the most prominent ones. See for instance the recent declarations of Greg Dyke, FA Chairman Elect, in the Guardian, <http://www.theguardian.com/football/2013/mar/21/greg-dyke-fa-chairman-david-bernstein>, 21 March 2014.

<sup>4</sup> CAS decision of 28 June 2013, CAS 2012/A/2852 Football Club Cluj v. Romanian Football Federation.

<sup>5</sup> F. MAJANI, « One Step Forward, Two Hops Backwards : Quotas – The return. An excavation into the Legal Deficiencies of the FIFA 6+5 Rule and the UEFA Home-Grown Players Rule in the Eyes of European Union Law », *International Sports Law Journal*, vol. 1-2, January 2009, pp. 20 et seq.; S. MIETTINEN, R. PARRISH, « Nationality Discrimination in Community Law: an assessment of UEFA Regulations governing player eligibility for European club competitions », *Entertainment and Sports Law Journal*, vol. 5, n°2.

UEFA home-grown player rule can serve as an example to other federations, leagues and clubs”<sup>6</sup>. In a similar fashion, the European Commission recognized that “rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued”<sup>7</sup>.

The effects of this rule are discussed below and have been addressed comprehensively in a report ordered by the European Commission on the proportionality of this rule in football, basketball and waterpolo<sup>8</sup>.

### 2.1. Restriction : indirect discrimination

On the face of it, the rule seems to primarily affect professional sportsmen insofar as they may be deterred from using their right to free movement given the fact that places are obviously limited in favour of locally trained players in clubs from other Member States. A similar restriction had already been identified in the *Lehtonen* judgment where the ECJ found that the rules at issue “are nevertheless liable to restrict the freedom of movement of players who wish to pursue their activity in another Member State”<sup>9</sup>. Similarly, it may be the case that clubs are deterred from recruiting another foreign EU player if the latter was not trained in the country for three years between 15 and 21 years old, even though there is no obligation to field those players on the match sheet. As the ECJ recalled in *Bosman*, “in so far as participation in such matches is the essential purpose of a professional player’s activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned”<sup>10</sup>.

In stark contrast with the FIFA “6+5” rule<sup>11</sup>, the UEFA home grown player rule does not rely (at least openly) on any nationality criteria to establish who is locally trained and who is not. The sole condition is that the player must have been trained by the club or at least by a club of the same federation for three years between 15 and 21 years old. It is therefore possible that a Belgian player qualifies as a *local* player in the United Kingdom as long as he was effectively trained in the United Kingdom for three years between 15 and 21 years old. However, if that very same Belgian player came back in Belgium in the latter days of his career, he would not however qualify as home grown given the fact that nationality is not the criteria to determine who is home grown and who is not.

Despite being neutral in terms of nationality, it is nonetheless clear that the *national* players are being favoured by the mere existence of such rule. The mere fact of resorting to the geographic criteria of *local training* is likely to put foreign sportsmen living in other Member States at a disadvantage. As highlighted by the European Commission in its White Paper on sport, such restriction therefore amounts to an indirect discrimination on the grounds of nationality, contrary to Article 45 TFEU. However, such indirect discrimination is not in itself prohibited as the rule may be justified by a legitimate aim and that the means to achieve it satisfy the conditions of the proportionality test.

### 2.2. Legitimate aims

Indirect discrimination may be justified by imperative requirements in the general interest<sup>12</sup>. Over the last few years, three distinct objectives have been put forward. First and foremost, it seems only reasonable to assume that the rule promotes the formation and training of young players within the European Union. This has already been recognized as a legitimate aims by political documents as well as judgments of the European Court of Justice. Second, the rule is also deemed to promote and guarantee the conditions for a fair

<sup>6</sup> European Parliament resolution of 8 May 2008 on the White Paper on Sport, 2007/2261/(INI), §§34-38.

<sup>7</sup> White Paper on Sport of the European Commission of 11 July 2007, COM(2007) 391 final, para. 2.3(9).

<sup>8</sup> M. DALZIEL, R. PARRISH, G. PEARSON, A. SEMENS, *Study on the Assessment of UEFA’s ‘Home Grown Player Rule*, study report ordered by the European Commission, 11 March 2013.

<sup>9</sup> ECJ, 13 April 2000, *Lehtonen*, C-176/96, para. 49.

<sup>10</sup> ECJ, 15 December 1995, *Bosman*, C-415/93, para. 120.

<sup>11</sup> Which imposes that each club fields at least 6 players eligible for the national team of the club they play for. Such rule, which amounts to a direct discrimination based on nationality, was never given much consideration in EU Law.

<sup>12</sup> On indirect discriminations and their justification, see the long established case-law of the ECJ : ECJ, 12 February 1974, *Sotgiu*, C-152/73; ECJ, 18 May 1996, *O’Flynn*, C-237/94; ECJ, 3 December 1974, *Van Binsbergen*, C-33/74; ECJ, 5 December 1989, *Commission v. Italy*, C-3/88.

competition. The rule indeed limits and constraints the ability of big clubs to take up players at a young age to the expense of financially less capable clubs.

The third reason is a more controversial one. It has been suggested that the win of Greece in the Euro Championship in 2004, to the expense of Italy, Spain, Germany or Portugal was a less than glamorous win that few people would have predicted. Commentators described this tournament as a total surprise and came as a huge disappointment for the 'Big 4' engaged in the competition. This is where the link between the home grown player rule and the performance of national teams lies. Indeed the home grown player rule has the effect of investing money in the training of *local* players who in most cases are *national* players. In that particular case, the rule does not serve the interests of local training of young players but merely the strengthening of the performances of the national team for the future. Using the rule as a way to strengthen the performance of the national team has become critical for the recent propositions towards the strengthening of the home grown player rule. The legitimacy of such aim is discussed in the second part of this article.

### 2.3. *The proportionality of the home grown player rule with the legitimate aims invoked*

Even though the measure may be justified by legitimate aims that would be compatible with the ECJ's case-law, it remains to be seen whether the means put forward to achieve those aims are proportionate, that is to say that they are both suitable and necessary. It is indeed acknowledged that the potential negative effects of such rule on the right to the free movement of sportsmen within the European Union may be outweighed by the potential advantages of such rule since its introduction in 2006.

Stakeholders tend to agree that it is reasonable to assume that the obligation to register at least 8 locally trained players is suitable to achieve the development and promotion of the education of young sportsmen. However, in terms of encouraging the formation of young players, it seems that the home grown player rule "*is neutral or at best marginally positive*"<sup>13</sup>. It is indeed claimed that the most significant effects on the training of local players was witnessed between 2001 and 2006<sup>14</sup>, before the introduction of the rule in Europe. Similarly, the need to ensure a fair competition must be tempered. Even though the rule applies equally to any club engaged into a European competition, it would seem that the effects of the rule do not last beyond a certain stage of the competition<sup>15</sup>.

One may argue that the rule is nonetheless still suitable to achieve the legitimate aims invoked above. It remains to be seen whether it is necessary to achieve them. The necessity of the rule could be examined in light of the intensity of the restriction that it entails. Contrary to the nationality clauses dealt with in *Bosman*, there is no obligation to field any of the local players during a football game. It could also be argued that the rule *merely* affects 8 players over the 25 registered to participate in the competition. In other words, one could still argue that the home grown player rule strikes a fair balance between the need to ensure that money is put in the education of young players, and the need to respect the free movement provisions.

### 3. *Strengthening the home grown player rule*

This article suggests that the home grown player rule seeks to ensure that performances of national teams are enhanced as a result. This is due to the fact that encouraging the formation of locally young players would guarantee that the benefits of such training are passed on the performances of the national team. Several propositions have been put forward in recent times to enhance the effect of the home grown player rule on the national team. In France for instance, an information report on the financial fair-play has been sent to the *Assemblée Nationale* in which the issue of promoting local talents has been addressed. Imposing the presence of locally trained players on the match sheet is one of the recommendations put forward by this

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<sup>13</sup> M. DALZIEL, R. PARRISH, G. PEARSON, A. SEMENS, quoted above, page 100.

<sup>14</sup> A study performed by the European Club Association in 2012 reveals that increases in spending in youth academies were not a result of the UEFA rule and rather that such investments would have taken place anyway. For more information on this study, see <http://www.ecaeurope.com>, accessed on 22 March 2014.

<sup>15</sup> Simply put, the winning clubs seem to always come from three or four different countries only, namely Spain, Germany, Italy and the UK.

report<sup>16</sup>. It is submitted in this article that such strengthening of the home grown player rule would be contrary to EU Law.

The ECJ's reasoning in *Bosman* is not only relevant for players of the European Union. African players willing to engage with European clubs would be equally affected by a strengthening of the home grown player rule. Indeed, the mere existence of the rule limits the careers' opportunities of young player willing to export their talent abroad. It is our view that a strengthening of the rule serves no other purpose than improving the performance of national teams to the expense of foreign players. Therefore, African players would also benefit from a strong challenge under European Union law against any attempt to protect national players.

First, it must be noted that strengthening the home grown player rule with a view to guarantee that benefits of this training are passed on the national team would not be a legitimate aim under European Union law. It is indeed quite striking that such objective is not motivated by purely sporting interests only. It could be argued that this entails objectives of an economic nature<sup>17</sup> which are incompatible with the case-law of the ECJ. In particular, an economic aim cannot "*constitute a reason relating to the general interest that justifies a restriction of a fundamental freedom guaranteed by the Treaty*"<sup>18</sup>.

Second, assuming that a strengthening of the home grown player rule would be justified by legitimate aims compatible with the Treaty freedoms, it seems highly unlikely that such strengthening would be proportionate. This is best exemplified by the CAS decision of 28 June 2013<sup>19</sup> in which the arbitral tribunal addressed the Romanian Football Federation rules implementing the UEFA home grown player rule. In particular, the Romanian Football Federation was willing to increase the minimum number of "*players trained at national level*" who must be registered on the referee's report of each official match. This was challenged before the CAS which based the merits of the case on an interpretation of EU Law.

The first question examined by the CAS on the interpretation of EU law was whether the Treaty freedoms were applicable in that particular case. In that respect, the Romanian Football Federation made a last-ditch attempt to revive the *sporting exemption* by relying on its autonomy to self-regulate football without EU intervention<sup>20</sup>. Taking into account the ECJ case-law<sup>21</sup> on that matter, the CAS correctly answered that "*sporting activities were subject to the same guarantees under Community law as were other economic activities*"<sup>22</sup>.

The CAS then went on to discuss the differences between the Romanian Football Federation rules on the local training of players and the UEFA rule as well as the FIFA "6+5" rule. The principal argument is the following: assuming that the UEFA home grown player rule is compatible with EU law and that the FIFA rule is incompatible with EU law, to which extent is it possible for the Romanian Football Federation to depart from the legal framework established by the home grown player rule?

The CAS answers the question with a table which compares the conditions of application of each method<sup>23</sup>. The relevant parts are reproduced below:

<sup>16</sup> See, in French, the "Rapport d'information déposé par la Commission des affaires culturelles et de l'éducation sur le fair-play financier européen et son application au modèle économique des clubs de football professionnel français", by Thierry Braillard on the 3rd July 2013. Available here: <http://www.assemblee-nationale.fr/14/rap-info/i1215.asp>.

<sup>17</sup> Taking part in international games has an economic impact on the value of the player, on the sponsoring partnerships of the national team, on the prizes that go with winning, etc. In a similar fashion, see the ECJ judgment in *Deliège*, ECJ, 11 April 2000, *Deliège*, C-51/96, para. 57.

<sup>18</sup> ECJ, 5 June 1997, *Ypourgos Ergasias*, C-398/95, para. 23.

<sup>19</sup> Cited above, CAS decision of 28 June 2013, CAS 2012/A/2852 Football Club Cluj v. Romanian Football Federation.

<sup>20</sup> CAS Decision of 28 June 2013, *Cluj v. Romanian Football Federation*, para. 72.

<sup>21</sup> It is now established that sporting federations cannot longer rely on a sporting exemption to avoid the application of EU law. Instead, the Court values the concept of *specificity of sport* which guarantees that the characteristics of Sport will be taken into account when assessing the compatibility of sporting rules with EU law. It has since been formally transcribed in the Article 165 TFEU. See the relevant case-law: ECJ, 12 December 1974, *Walrave*, C-36/74; ECJ, 14 July 1976, *Donà*, C-13/76; ECJ, 18 July 2006, *Meca-Medina*, C-519/04.

<sup>22</sup> CAS Decision of 28 June 2013, *Cluj v. Romanian Football Federation*, para. 77.

<sup>23</sup> *Ibidem*, para. 105.

	<b>FIFA 6+5 Rule</b>	<b>UEFA HGP rule</b>	<b>RFF rule</b>
Players registered on the match sheet		25	18
Players who can be fielded	11	11	11
Players who must be locally trained/eligible	6	8	8
Minimum number of locally trained players in the starting XI	6	0	1
Minimum number of locally trained players fielded if the three substitutes are used	3	0	4

Following this table, it appears quite clear for the CAS that the Romanian Football Federation rules have striking similarities with the FIFA rule, deemed *incompatible* with EU law<sup>24</sup>.

In our view, this is where the strengthening of the home grown player rule would clearly affect its proportionality according to EU law. It has been submitted above that the home grown player rule could be assessed in relation to the intensity of its effects on the chances of employment of a player. By doing so the rule does strike a balance between the need to promote the local training of young players and the obligation to respect the free movement right of professional sportsmen across Europe. In that respect, it could be that the rule is not overly restrictive or disproportionate given the fact that it only affects 8 players and that there is no obligation to field them in the starting XI.

However, the Romanian Football Federation goes far beyond than what is required by the UEFA rule in imposing that a minimum of local players are registered in the starting line-up<sup>25</sup>. It must be recalled that the UEFA rule is, at the very least, still a *restriction* to the freedom of movement of workers guaranteed by Article 45 TFEU. In that sense, it is not contested that it could nevertheless be compatible with EU law provided that it is justified and proportionate. Yet, strengthening and reinforcing the effects of the measure on the freedom of movement of sportsmen across the European Union could have damaging consequences on its already fragile compatibility with EU law. In particular, the proportionality of the measure would be affected and it seems highly unlikely that such requirement would be deemed suitable or necessary by the European Court of Justice.

<sup>24</sup> *Ibidem*, para. 106.

<sup>25</sup> The conclusion of the CAS is that one: the Romanian Football Federation could not legitimately argue that it is merely implementing the UEFA rule and it failed to demonstrate how the challenged rules could be proportionate by exceeding the UEFA requirements.