OPINION OF ADVOCATE GENERAL ALBER

delivered on 22 June 1999 *

A — Introduction

1. In these proceedings for a preliminary ruling the Tribunal de Première Instance (Court of First Instance), Brussels, seeks to know whether certain transfer rules which apply to basketball players in Belgium are compatible with the rules on freedom of movement for workers and competition law. For the 1995/96 season, the season concerned in the main proceedings, there were three different transfer periods. Players could be transferred between Belgian clubs only before the start of the season, in the period from 15 April to 15 May 1995. Players from the European zone, on the other hand, could be transferred until 28 February 1996, and those from third countries until as late as 31 March 1996.

2. While the *Bosman* case [1] concerned the transfer fees which a club had to pay if it wished to engage a player from another club after the player's contract with that club had expired, and also the rules on foreigners under which football clubs could play only a limited number of foreign professionals — both rules were held by the Court of Justice, in its judgment of 15 December 1995, to be incompatible with Article 48 of the EC Treaty (now, after amendment, Article 39 EC) —, the present case concerns provisions which impose time-limits on transfers of players between clubs, if the player concerned is to play for the new club during the current season.

3. The applicant in the main proceedings, professional basketball player Mr Lehtonen, who is Finnish — and so comes from the European zone —, was not engaged until 30 March 1996, and the first two matches of his club and co-applicant Asbl Castors Canada Dry Namur-Braine (hereinafter 'Castors Braine') in which he played or was on the team sheet were therefore declared forfeited, and other sanctions threatened.

4. The defendant in the main proceedings is the Belgian basketball federation (Asbl Fédération Royale Belge des Sociétés de

* Original language: German.

1 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921.

Basket-ball, hereinafter 'the FRBSB') — which is responsible for organising basketball at amateur and professional level in Belgium —, supported as intervener by the Belgian basketball league (Asbl Ligue Basket Belgium, hereinafter 'the Belgian League'), which consisted at the time of eleven out of the twelve clubs.

5. Basketball is organised at international level by the International Basketball Federation (Fédération Internationale de Basket-ball, hereinafter 'FIBA'), whose rules must be observed by the national federations.

B — Relevant provisions

6. Under Rule 1(b) of the FIBA Rules, the international transfer rules apply to all national federations equally. Under Rule 1(c) of the rules, the national federations are obliged, as regards national transfer rules, to be guided by the international rules and to establish their own rules accordingly.

7. For the Belgian federation, three different zones apply with respect to the transfer rules: the national zone, the 'European' zone, and that of third countries. The European zone comprises the players and federations of the Member States of the European Union together with Switzerland, Iceland, Norway and Liechtenstein.

8. For the first zone, Belgium, Rule 140 et seq. of the FRBSB Rules fix transfer periods for transfers of players between Belgian clubs. For the 1995/96 season the period ran from 15 April to 15 May 1995, which was before the league season started. After the end of that transfer period no further transfer could take place between Belgian clubs for the current season.

9. For the second zone, Rule 3(c) of the FIBA Rules provides that clubs in principle may not engage players who have already played during the same season in another country in the same zone, if such a transfer takes place after the transfer periods determined by FIBA. The actual wording of Rule 3(c) [translation from French] is:

'For the European zone, the deadline for registration of foreign players is 28 Febru-

ary. After that date it is still permitted for players from other zones to be transferred to a European club.'

10. As regards such transfers of players from third countries — that is, the third zone — Rule 144 of the Belgian FRBSB Rules provides in turn that:

'Players who are not registered with the club... may not be fielded.... Foreign or professional players... who join after 31 March of the current season will no longer be qualified to play in... matches of the current season.'

C — Facts

11. Mr Lehtonen is a basketball player of Finnish nationality. During the 1995/96 season he first completed the Finnish championship. He was then engaged by the Belgian club Castors Braine for the final stage of the 1995/96 Belgian championship. [2]

12. The club notified the FRBSB of the player's engagement by letter of 30 March 1996, after the Finnish federation had released him on 29 March 1996. The contract itself — which provided for a remuneration of BEF 200 000, payable in four instalments of BEF 50 000 each, for the duration of the engagement, which was the months of April and May, and a win bonus of BEF 15 000 a time — was concluded on 3 April 1996.

13. By letter of 5 April 1996 the FRBSB informed the club that licence approval by FIBA, required for the player to be validly played, had not yet been given, and that sanctions could be imposed on the club if Mr Lehtonen was played none the less.

14. FIBA, by letter of 9 April 1996, had refused to register Mr Lehtonen, on the ground that the transfer deadline of 28 February 1996 applicable to him had passed.

15. Before that, on 6 April 1996, Castors Braine played Mr Lehtonen in a league match against Belgacom-Quaregnon. Castors Braine won the match 104-102. The

2 — It should be observed that the first division of the men's basketball championship in Belgium is divided into two stages. All clubs in the division take part in the first stage; in the second stage, only the best teams take part in play-offs to decide the champion, and the two bottom clubs play off to decide which is relegated from the first division.

losing club protested against allowing the result of the match to stand, and the FRBSB awarded the match to Belgacom-Quaregnon by 20-0. That was on the ground that Mr Lehtonen had been played in breach of the FIBA Rules. Mr Lehtonen also appeared on the team sheet for the following match, but in the end he did not play. For that too, the club was penalised by a defeat. In order not to be exposed to further sanctions, Castors Braine did not select or play Mr Lehtonen in the remaining play-off matches.

16. Mr Lehtonen and Castors Braine thereupon brought an application for interim measures in the Tribunal de Première Instance, Brussels, seeking essentially an order quashing the award of the match by 20-0 to Belgacom-Quaregnon and prohibiting the FRBSB, on pain of a monetary penalty, from imposing further sanctions on the club if it continued to play Mr Lehtonen. In the context of those proceedings Mr Lehtonen, Castors Braine and the defendant FRBSB agreed that the club would not play Mr Lehtonen any more in the 1995/96 season, the FRBSB would suspend the sanctions which had so far been imposed, and the Belgian court would refer the case to the Court of Justice for a preliminary ruling.

17. By decision of 23 April 1996 the judge hearing urgent applications at the Tribunal de Première Instance, Brussels, held that a reference to the Court of Justice was justified and that the case was urgent for the purposes of the urgent procedure.

D — The question referred

18. The Tribunal de Première Instance, Brussels, refers the following question to the Court for a preliminary ruling:

Are the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specified date contrary to the Treaty of Rome (in particular Articles 6, 48, 85 and 86) in the case of a professional player who is a national of a Member State of the European Union, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely the need to prevent distortion of the competitions?

19. In the proceedings before the Court of Justice Mr Lehtonen, the FRBSB, the Belgian League, the Austrian, French, German, Greek and Italian Governments and the Commission have submitted written observations. Apart from the Austrian and German Governments, all those parties also

took part in the oral procedure before the Court, at which the Danish and Spanish Governments also expressed their views on the question referred.

E — Opinion

1. *Admissibility*

Submissions of the parties

20. Doubts were expressed by the French and Italian Governments and the Commission as to the admissibility of the reference for a preliminary ruling.

21. They submit, first, that the order for reference contains hardly any information on the facts and its observations on the law are also too concise. In particular, it is not clear from the order to what extent Mr Lehtonen is to be classified as a worker, the applicable transfer rules are not described in sufficient detail, and the information needed for an assessment of the applicability of competition law is also missing. Second, there is no urgency, since the 1995/96 season is already over.

22. The Commission also considers that the dispute has largely become irrelevant in practice. Castors Braine have since gone into liquidation and Mr Lehtonen is playing basketball in France. The judge who made the order for reference also cannot on the basis of the question referred make a decision which would be binding in any proceedings on the substance.

23. Mr Lehtonen and the FRBSB, on the other hand, maintain that the reference is indeed admissible. It is for the court making the reference to determine whether the reference is necessary for its decision and, in urgent proceedings, whether a decision is urgent. Moreover, the plaintiff still has an interest in legal protection, since financial sanctions against the player are still possible and a decision on the costs of the main proceedings has not yet been made. Furthermore, taking a 'benevolent' approach, all that is needed for a decision of the Court of Justice may be gathered from the order for reference. It is apparent that Mr Lehtonen is a professional player in a professional club. The transfer periods are clearly set out, the Community law which may be applicable is sufficiently defined, the grounds of justification put forward by the FRBSB are included in the order, and on the basis of the 'professional player — professional club — federation' constellation an assessment may also be made from the point of view of competition law. They submit that the reference is therefore admissible.

Opinion

(a) Sketchy account of the facts

24. The Court of Justice held in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others*[3] that it could give a useful interpretation of Community law only if 'the national court define[s] the factual and legislative context of the questions it is asking or, at the very least, explain[s] the factual circumstances on which those questions are based'. There are especially high requirements for questions on competition law. The possibility that the relevant information may later be gleaned by the Court of Justice from the case-file forwarded, the written observations and the statements of the parties at the hearing thus does not release the referring court from the obligation to set out in the order for reference the necessary information for the Court of Justice, so that it can give a useful answer to the questions referred with sufficient knowledge of the facts which are at the origin of the main proceedings.

25. In the order in Case C-458/93 *Saddik*[4] the Court emphasised in addition that the content of the order for reference serves not only as information for the Court but is also intended to give the Member States an opportunity to submit observations on the points of law in the reference pursuant to Article 20 of the EC Statute of the Court of Justice; the Member States receive only the order for reference, not the documents in the case-file.

Information concerning freedom of movement for workers

26. In the present case it appears from the order for reference that Mr Lehtonen is a Finnish professional basketball player who wished to transfer to a Belgian professional basketball club. He was refused permission for the transfer by the FRBSB, ultimately by reference to the transfer rules in force, which are contained in the order for reference. The transfer periods in force at the material time may thus be seen from the order for reference, as may the justification for those rules put forward by the federation, namely to avoid competition between teams being distorted by their being able to engage players at any time.

27. The order for reference thus contains all the information needed to give a useful answer to the question of the applicability of the provisions on freedom of movement

3 — [1993] ECR I-393, paragraph 6.

4 — Order of 23 March 1995, [1995] ECR I-511, paragraph 13.

for workers, and the reference for a preliminary ruling is admissible in that respect.

Information concerning competition law

28. On the other hand, the order for reference contains no information as to what facts are thought to justify the application of competition law, even though the Court of Justice has consistently held that especially careful statements of reasons are necessary in that field. In particular, there is no indication of how economic activities are divided up in Belgian basketball between the clubs, the Belgian League and the federation, what economic importance Belgian basketball has, and what is the economic situation of players of Belgian clubs in the Belgian league. There are thus no facts on which to base an assessment of central questions of competition law, such as the clubs' status as undertakings, the possibility of trade between Member States being affected, the distortion, obstruction or restriction of competition, the presence of a dominant position and its abuse. The question is therefore inadmissible in so far as it relates to Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC).

(b) Continuation of the proceedings

29. The Court has consistently held that it is for the court making the reference to assess whether a preliminary ruling is needed. [5] If, then, that court considers a reference to be necessary, as a rule it is not for the Court of Justice to review that decision. On the other hand, the Court of Justice, in the preliminary-ruling procedure, is an organ of the administration of justice and so has jurisdiction only over questions which concern actual legal disputes. [6] For references during the procedure for adoption of interim measures, the Court spelt out those criteria in its *Pardini* judgment. [7] A reference is admissible only if the court making the reference is still entitled to give a decision for which it can use the Court's answer. Jurisdiction of the Court of Justice cannot therefore derive from the possibility of a future action for damages by Mr Lehtonen against the FRBSB.

30. In the present case, the main issue of the dispute has lapsed, since it is no longer possible for Mr Lehtonen to play for

5 — See, for example, Case 26/62 *Van Gend & Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, p. 11, and Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 25.

6 — Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraph 25 et seq.

7 — Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041, paragraph 9 et seq.

Castors Braine in the 1995/96 season. In other respects too, the provisional arrangement between the parties can — as regards the bringing into effect of hitherto suspended sanctions by the FRBSB against Castors Braine — no longer be altered with any practical effect, if Castors Braine — as submitted by the Commission — have gone into liquidation. The concrete assessment of those facts is, however, not for the Court of Justice but for the referring court alone. In any event, it appears from the order for reference that at least the decision on costs remains to be made. It may be supposed that the probable outcome of any substantive proceedings would influence that decision. Consequently, answering the question referred is still of importance for a judicial decision.

31. The question referred for a preliminary ruling is therefore admissible, in so far as it concerns the interpretation of Article 48 and Article 6 of the EC Treaty (now, after amendment, Article 12 EC). With respect to the interpretation of the rules of competition law (in particular Articles 85 and 86 of the EC Treaty), however, the question is inadmissible, since it does not contain sufficient information on the facts of the main proceedings. In case the Court of Justice should, however, decide that the question is admissible in this respect too, the competition law aspect will also be discussed briefly below.

2. Discrimination on grounds of nationality (compatibility with Articles 48 and 6 of the EC Treaty)

32. Since Article 6 of the EC Treaty applies only without prejudice to any special provisions in the Treaty and Article 48 constitutes a special rule on freedom of movement for workers, there is no need to consider whether the rule in question is compatible with Article 6.

33. In so far as the parties address the question of discrimination, it is not disputed that the rules of sports federations fall in principle within the scope of Community law where they concern economic relationships. [8]

34. It is likewise common ground that the transfer rules at issue do not contain any discrimination against citizens of the Union on the ground of nationality. All the parties agree that the present transfer periods do not discriminate against players from federations of other Member States compared to players in the FRBSB. As between those two groups, it is only the players of Belgian clubs who might be treated less favourably. But the transfer of players within the

8 — See already Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405, paragraphs 4 to 10, and Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, paragraphs 14 to 16.

Belgian league is not the subject of the question referred. It is also undisputed that Community law contains no rule which might, from the point of view of nationality, prohibit treating players who have previously played for clubs in other Member States less favourably than players who have previously played for clubs outside the European zone. [9] There is therefore no occasion to consider the prohibition of discrimination against workers under Article 48 of the EC Treaty or the general prohibition of discrimination under Article 6 of the EC Treaty.

3. Obstruction of freedom of movement for workers under Article 48 of the EC Treaty

Submissions of the parties

35. Mr Lehtonen and Castors Braine submit that Mr Lehtonen is a worker within the meaning of Article 48 of the EC Treaty. That provision prohibits not only discrimination against workers from other Member States but also restrictions on freedom of movement for workers. There is such a restriction here, since the transfer periods deprive players at certain times of any possibility of taking up employment. The exercise of the sport of basketball by a professional player with a professional club falls within the scope of Community law, since according to the case-law of the Court of Justice professional sport forms part of the economic activities mentioned in Article 2 of the EC Treaty (now, after amendment, Article 2 EC). Since the present case concerns the economic aspects of sport and the exercise by Mr Lehtonen of a fundamental freedom, the application of Article 48 of the EC Treaty is not precluded by the freedom of association of the clubs and the resulting autonomy of the federation, nor by the principle of subsidiarity. It is also settled case-law of the Court that Article 48 can apply to private legal relations.

36. The Belgian League submits, relying on the *Walrave* and *Donà* judgments, that Article 48 of the EC Treaty is not applicable to the present case, since the rules of the FRBSB and FIBA are based on non-economic and purely sporting grounds. [10]

37. The FRBSB, the Belgian League and Denmark take the view that application of Article 48 of the EC Treaty is to be restricted to the free movement of goods, in accordance with the *Keck and Mithouard* judgment. [11] The Court of Justice should draw a distinction between rules for the exercise of a profession and

9 — However, it might be considered whether Article 6 of the EC Treaty prohibits (indirect) discrimination against Europeans compared to nationals of non-member countries. The wording would probably not oppose such an interpretation, if the citizens of the Union concerned are in a situation which is covered by Community law.

10 — Judgments in *Walrave* and *Donà*, cited in note 8.

11 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

restrictions on access. Article 48 is to be limited to restrictions on access and mere rules of exercise should be excluded from its application.

38. Italy considers that the national court gives no information on whether the player is to be regarded as a worker at all.

39. Greece assumes that Article 48 of the EC Treaty applies in principle to rules such as those made by the FRBSB and FIBA. The present case, however, concerns a purely internal Belgian situation, since a Belgian player is just as ineligible to play if he misses the transfer deadline. According to the settled case-law of the Court, Article 48 does not apply to purely internal situations. Freedom of movement for workers, as protected by Article 48, is also not affected.

40. France, Spain and the Commission, on the other hand, consider that freedom of movement for workers is affected. Germany and Austria concede at least the possibility that it may be affected.

Opinion

(a) Whether there is an obstacle to freedom of movement for workers

41. As follows from the Court's case-law, having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the EC Treaty. [12] If the Court then goes on to state that this applies to the activities of professional or semi-professional footballers where they are in gainful employment or provide a remunerated service, the same must be true of professional basketball players in a similar situation.

42. Since it is further not necessary — for the Community provisions on freedom of movement for workers to apply — for the employer to be an undertaking, all that is required being an employment relationship or the intention to create one, Article 48 of the EC Treaty must be taken to apply in principle in the present case.

43. The Italian Government is indeed right to say that the order for reference contains

12 — *Bosman*, cited in note 1, paragraph 73, and *Walrave*, cited in note 8, paragraph 4.

scarcely any information on the question whether Mr Lehtonen is a worker. It merely mentions that Castors Braine 'engaged' Mr Lehtonen as a basketball player. However, according to the order and the further procedure, it is not disputed between the parties that Mr Lehtonen is to be regarded as a worker. Article 48 of the EC Treaty consequently applies in principle.

44. On obstacles to freedom of movement for workers, the Court held in *Bosman*: 'Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement... constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned...'. [13]

45. Accordingly, the transfer periods obstruct freedom of movement for workers under Article 48 of the EC Treaty: once they have expired, they prevent nationals of other Member States from leaving their country of origin in order to play professional basketball in Belgium.

(b) Application by analogy of *Keck and Mithouard*

46. There is no occasion to follow the view expressed by the FRBSB and Denmark and restrict the scope of Article 48 of the EC Treaty in accordance with the judgment in *Keck and Mithouard*. [14] Even if the Court were to draw a distinction, as suggested, between rules on access and rules on exercise, [15] it would not follow in the present case that Article 48 was not applicable. The Court of Justice has already stated on this point, in the *Bosman* judgment:

'It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They

13 — *Bosman*, cited in note 1, paragraph 96.

14 — Cited in note 11.

15 — This was considered by Advocate General Lenz in *Bosman* (Opinion of 20 September 1995, [1995] ECR I-4930, point 205).

cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in *Keck and Mithouard* were held to fall outside the ambit of Article 30 of the Treaty...' [16]

47. That finding applies correspondingly to the transfer periods: they not only affect the exercise of basketball within the jurisdiction of the FRBSB, but also at certain times prevent access by players who have previously played in another federation and on being transferred to Belgium (necessarily) wish to exercise their right to freedom of movement. This is therefore a rule on access, which even on this view should be assessed entirely under Article 48 of the Treaty.

48. Moreover, independently of the present case, there is no reason to introduce such a restriction of the scope of Article 48 of the EC Treaty. In *Keck and Mithouard* the Court limits the wide scope of the free movement of goods under the *Dassonville* judgment [17] by largely excluding rules of a certain kind, namely on selling arrangements. Selling arrangements are characterised by the fact that they do not necessarily affect those who import or export a product, but only the subsequent sale to the final consumer. A foreign producer does not therefore, with respect to selling arrangements, have to alter his product according to the sales market he has in mind. Selling arrangements thus as a rule affect trade in goods only very indirectly. If trade in goods between Member States were nevertheless affected to a greater degree than internal trade within the Member State, then the formulation used in *Keck and Mithouard* would no longer apply, as its very wording shows. Furthermore, product-related requirements always come under free movement of goods, according to the Court's case-law. [18] Rules on the exercise of a profession are much closer to product-related rules than to rules on selling arrangements. Rules on exercise must, like product-related rules, be complied with directly by a citizen of the Union who wishes to assert the fundamental freedom under Article 48 of the EC Treaty. He must take account of new rules of exercise and acquire corresponding qualifications, possibly after every cross-frontier change of employment.

49. The filter effect of the *Keck and Mithouard* judgment is also not necessary in the field of freedom of movement for workers in the same way as it is with

16 — *Bosman*, cited in note 1, paragraph 103; see also, on freedom to provide services, Case C-384/93 *Alpine Investments* v *Minister van Financiën* [1995] ECR I-1141, paragraphs 36 to 38.

17 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

18 — Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 13.

respect to the free movement of goods. According to *Keck and Mithouard*, the only selling arrangements which are compatible with free movement of goods are those which apply in the same way to all the products concerned or affect national and foreign products in the same manner in fact and in law. That fundamental freedom continues to apply, on the other hand, to selling arrangements which have a specially burdensome effect on trade in goods. Admittedly, freedom of movement for workers also has a wide definition — comparable to the *Dassonville* formula — but it is already restricted by the fact that freedom of movement may be relied on only in a cross-border situation. That starting point for reliance on freedom of movement already has a similar restrictive effect to that under *Keck and Mithouard* for selling arrangements.

50. Transfer periods thus in principle hinder freedom of movement under Article 48 of the EC Treaty. However, the Court has held, again in *Bosman*, that obstacles to freedom of movement for workers could be compatible with the Treaty if and in so far as they 'pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose...' [19]

19 — *Bosman*, cited in note 1, paragraph 104.

(c) Justification of the obstacle

Submissions of the parties

51. Mr Lehtonen and Castors Braine do not accept that the restriction of freedom of movement for workers is justified in order to protect sporting competition from distortions. They argue that restricting transfer possibilities cannot guarantee that competition is preserved. Rather, competition is distorted if clubs cannot compensate for any unavailability of important players. The rules also entrench the existing imbalance between clubs. Rich clubs can engage players to have in reserve, while poor clubs, on the other hand, without the possibility of transfers during the season, are exposed to all the blows of fate.

52. Moreover, the rules are not necessary. The spectre of a massive transfer merry-go-round is not realistic. A transfer is successful only if a club can sign better players, who must of course be out of contract. New players are often difficult to integrate into existing teams. The English football league, in which transfer periods have been abolished, shows that transfer periods are not necessary. Even the FRBSB allows transfers of players from third countries up to 31 March.

53. Finally, the Court must balance the interest in undistorted sporting competition against the players' interest in employment. Freedom of movement for workers is based on the EC Treaty and at the same time embodies the fundamental right of freedom to pursue a profession, in particular the free choice of employer, as the Court held in *Katsikas and Others*.[20] Sporting competition, on the other hand, cannot be derived directly from the Treaty, but takes its legitimation in Community law solely from the *Bosman* judgment.[21]

54. They submit, in the alternative, that any transfer periods which might be justified would have to be proportionate temporally, that is, determined with great restraint. There must be no difference in treatment between different players. Finally, such a system requires legitimation by means of legislation.

55. The FRBSB relies, as justification for the transfer deadline, on the necessity of sporting associations having in principle to define the rules of the sport in question, so that it can exist at all. With respect to the various deadlines, it refers to 'sporting ethics' and the risk that competition within a championship might be distorted at a particular time by the signing of new players. The phasing of the transfer periods for players from the European zone and players from other countries is intended, in particular, to stop players from being able first to complete a national championship in order then, by a transfer in the closing stage of another championship, to distort competition there. The deadline prevents players from being enticed away from clubs of other federations in the European zone which are still in decisive stages of the competition. The FIBA deadline is chosen in such a way that it comes before the end of a considerable number of European championships which end early. Championships of other countries, in particular the USA, end later, on the other hand.

56. In the opinion of the Belgian League too, a temporal restriction of transfer possibilities is necessary, as otherwise there will be a threat of competition being distorted in the league.

57. Germany takes the view that transfer periods are justified in any case. Otherwise there is a threat of distortion of sporting competition by the same players playing for different clubs during the same season, and especially of other teams being weakened by players being lured away. That objective is justified on grounds in the public interest.

20 — Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas* v *Konstantinidis, Skreb and Schroll* v *Stauereibetrieb Paetz* [1992] ECR I-6577, paragraph 32: '... must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen'.

21 — Cited in note 1.

Article 48 of the EC Treaty merely prohibits different transfer periods for players from the home country and those from other Member States.

58. Austria too refers to the risk of players moving inside a league, if it has not yet been decided. There is otherwise a danger that success will be decided by financial capability alone. A league requires a certain continuity of the teams taking part.

59. France submits that the transfer rule is justified on sporting grounds, [22] namely the need for a sporting competition to be carried on by teams which are put together for a season, not from match to match on the basis of financial possibilities and the availability of players.

60. According to Greece, the transfer periods are justified on grounds of the public interest, namely avoiding distortions of sporting competition, ensuring equality of chances and openness of results, and preserving a financial balance between clubs.

61. In Spain's view, they are justified simply because basketball is a team sport. The different phasing of the transfer periods follows from the different scheduling of leagues inside and outside Europe.

62. In the Commission's opinion, the transfer deadline could be justified in accordance with the Court's findings in the *Bosman* judgment. [23] If after a certain date a team can no longer be strengthened by new players, that guarantees to a certain extent equality of chances and uncertainty of results. [24] At the hearing the Commission concentrated in particular on the phasing of the transfer periods. The transfer deadline of 28 February for European players is appropriate for preventing distortion of competition only if competition cannot be distorted after that deadline by transfers from third countries.

Opinion

(a) Preliminary observation

63. The Court held in *Bosman* specifically on sporting grounds of justification for

22 — In this connection France refers to the 29th Declaration annexed to the Treaty of Amsterdam, emphasising the social significance of sport, in particular its role in forging identity and bringing people together.

23 — Cited in note 1.

24 — See also the Commission staff working paper of 29 September 1998, 'The development and prospects for Community action in the field of sport', http://europa.eu.int/comm/dg10/sport/publications/doc_evol_de.html, point 4.1.2., Sport and competition policy.

obstacles to freedom of movement for workers: 'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.' [25]

64. In the present case, none of those interests is affected. Only a very remote connection with encouraging the training of young players might be discerned, in that any transfer restriction prevents trained players from leaving the club where they have been trained. That justification is not put forward by any of the parties.

65. Besides, as Mr Lehtonen and Castors Braine submit, transfer periods ensure neither that a balance is created, nor a certain equality of opportunity and uncertainty of results. A transfer deadline merely, when it expires, creates uncertainty as to the success of the arrangements made until then. In the further course of the season it then as a rule becomes clear what the balance of power is within a league. The restriction of transfers then leads to the preservation of the existing imbalance between the clubs in a league and increases the probability that the expected results of matches will occur. Mr Lehtonen and Castors Braine put forward the convincing view that transfers of players would in principle promote competition, since weaker teams would get the chance to move up to join the stronger teams. That is a condition for teams which are initially weaker to be able to succeed in contests against stronger teams, which would thus promote uncertainty of results.

66. In the parties' submissions on justification, two further grounds of justification can be seen, however, for the objective pursued by transfer deadlines, namely excluding the strengthening of teams after a certain point in time. First, it is based on a rather idealistic view of sporting competition, put forward by the FRBSB under the rubric 'sporting ethics'. Second, there is also an actual risk of distortion of competition between different teams within a competition.

(b) The federations' organisational authority

67. The idealistic justification lies in an analogy between team competitions and

25 — *Bosman*, cited in note 1, paragraph 106.

individual competitions. On this view, success in a sporting competition should reflect the performance of the participants — that is, either individuals or teams — over the entire duration of the event. Changes to the composition of a team in the middle of a season might contradict that aim. However, this is an organisational motive which can never be fully realised in the case of team sports because of their particular circumstances.

68. Such motives on the part of sporting organisations should admittedly be recognised by Community law, since sport differs from most other spheres of application of the fundamental freedoms in that it cannot exist without defining rules. Usually the exercise of fundamental freedoms presupposes only freedom and in certain cases a commitment to contractually based obligations. All other rules are typically not preconditions to the exercise of the fundamental freedom, but are justified only by the compelling public interest. Activity as a professional sportsman, however, presupposes the existence of a sport. Sport can exist only within fixed rules.

69. It is that necessity which enables the sporting associations to interfere with the rights of sportsmen without the legislation demanded by Mr Lehtonen and Castors Braine. That legislative deficit is, though, a necessary consequence of the fact that sportsmen traditionally create their own organisation in defining their sports, rather than waiting for the State to make rules. In a similar way to the dialogue of management and labour recognised by Community law under Article 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), that self-regulation is appropriate in principle. [26] It is also justified by freedom of association, a principle of Community law, which may also be found in similar form in Article 11 of the European Convention on Human Rights. So the necessity of sporting rules is itself an object of protection which is recognised in principle by Community law when rules of sporting associations are under review.

70. Rules of professional sport can in principle affect the fundamental freedoms of Community law. In the context of justification, it must then be said that the organisational authority of sporting associations is in itself a public interest deserving of protection, and that any rule of the sporting associations is in principle suitable for implementing the exercise of that organisational authority to precisely the extent provided for. As a rule there is also no less severe means of implementing the

26 — See also the 29th Declaration annexed to the Treaty of Amsterdam (Declaration on sport), according to which the bodies of the European Union are to listen to sports associations when important questions affecting sport are at issue.

objective of regulation — in this case realisation of the ideal of an analogy between individual and team sports — to the precise extent desired. What is decisive is therefore the reasonableness of the organisation compared to the interference with the fundamental freedom. Here it must basically be presumed that mere rules of exercise of the sport may admittedly affect freedom of movement for workers if they require the person concerned to acquire new qualifications, but they do not normally constitute an unreasonable hindrance to freedom of movement for workers. Overt or covert barriers to access, on the other hand, interfere so radically with fundamental freedoms that they require a more weighty justification than the sporting associations' necessary organisational authority.

71. The present case concerns an overt barrier to access, since access by sportsmen from other Member States is impossible at certain times. For transfer deadlines, a justification which consists merely in the organisational authority of the sporting associations is therefore excluded.

(c) Comparability of results of matches

72. A justification may, however, follow from the much more objective risk to sporting competition within a particular sporting event which arises if teams may be strengthened during the competition. Thus the teams which were fortunate enough to play against a team before it was strengthened had better chances of success than the other teams which subsequently had to play the strengthened team. The final table is thus influenced by results which are no longer directly comparable. In contrast to the organisational motive of realising an analogy between individual and team sports, with this form of competition it is objectively necessary to prevent such distortions. No other forms of competition are apparent which would make it possible for all teams in a league to compete with each other on an equal basis but could guarantee comparability of results without transfer deadlines.[27] The league championship form of competition and its objective requirements are therefore to be recognised in principle from the point of view of Community law. The justification of the transfer deadline of 28 February which affects Mr Lehtonen must be judged against that criterion.

(d) Justification of 'delayed' transfer periods

73. First, it must be observed that these transfer deadlines do not intervene at the

27 — Cup competitions, which in principle do not imply comparable results but only presuppose success in the various individual matches, represent a completely different form of competition, which generally takes place in parallel to the league championship.

start of the season but during it, that is, they are 'delayed'. An *arbitrarily* fixed transfer deadline would not be appropriate for ensuring comparability of results. Even at this stage, then, justification would fail.

74. The situation would be different, however, if the transfer deadline was not set arbitrarily, but was adjusted to the course of the competition in such a way that comparability of results was ensured at least after the transfer deadline expired. Possibilities here are, for instance, the start of the second half of the season when all teams are due to play each other, or of play-offs, and even probably each new round in the case of elimination competitions.

75. Such transfer periods would be suitable for ensuring comparability of results to a diminished extent. Nor would any less severe means of attaining that objective to the same extent be apparent.

76. At the reasonableness stage, the preservation of comparability of results would have to be set against freedom of movement for workers. Mr Lehtonen and Castors Braine rightly emphasise here that freedom of movement for workers is of great weight as both a fundamental freedom and a basic right. The basic right to the free choice of employer was stressed by the Court in *Heylens*: '... free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community'. [28]

77. Mr Lehtonen and Castors Braine are also correct in emphasising the particular conditions of the occupation of professional sportsman. The professional activity of a sportsmen is as a rule limited to a period of from ten to at most twenty years; it may indeed be very much shorter, for all sorts of reasons. Remuneration is not very high, precisely in the less popular sports, but also in less successful clubs.

78. However, the existence and organisation of a league championship is a precondition for basketball players such as Mr Lehtonen to be able to exercise their sport professionally at all. In principle, therefore, the rules of the sporting associations are not arbitrary measures which adversely affect sportsmen's professional life. The Court held on this point as early as the 1970s that Community law does not pre-

28 — Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097, paragraph 14; confirmed, as regards sport, in *Bosman*, cited in note 1, paragraph 129.

clude sporting rules, in so far as they are based on purely sporting grounds. [29] Similar reasoning is apparent in the decision of the European Commission of Human Rights on the application by Mario Azzopardi against Malta. [30] That decision concerned a change in the rules of two rowing events, restricting participation to a maximum of three races in each case, against which Mr Azzopardi, who had previously successfully taken part in up to five individual races in each case, brought an — unsuccessful — complaint.

79. Delayed transfer deadlines may be reasonable if they are not set arbitrarily. A transfer deadline may thus be justified on sporting grounds in the public interest if the deadline for sportsmen who have previously played for clubs in other Member States is chosen in such a way that comparability of the results of that competition is not affected by the transfers which take place before the deadline.

(e) Justification of 'phased' transfer deadlines

80. The present case raises the further question, however, of how far phased transfer deadlines are justified. Transfers of players to teams in the Belgian League are subject to different deadlines, depending on the federation to which the player's previous club belongs. Within a season, any transfer between Belgian clubs is excluded. [31] Players of other clubs in the European zone — such as Mr Lehtonen — may be transferred to a Belgian club up to 28 February, on the basis of a FIBA transfer deadline. Finally, players from clubs in third countries may still be transferred to a Belgian club up to 31 March, on the basis of the FRBSB transfer deadline.

81. The prohibition of transfers between clubs in the Belgian League is not material to the present case. It does not affect Mr Lehtonen's freedom of movement in this case. Nor is it of any discernible significance for assessing the justification of the effect on that freedom of the transfer deadline of 28 February.

82. On the other hand, the transfer deadline for players from third countries may not be disregarded when assessing the justification for a transfer deadline for European players. As explained above, it may be justified by the preservation of

29 — *Walrave* and *Donà*, cited in note 8, paragraphs 4 to 10 and 14 to 16 respectively.

30 — Decision of 15 January 1998, application No 35722/97.

31 — This is not the place to decide how far a transfer deadline still exists at all for players of Belgian clubs following the decision of the judge representing the President of the Tribunal de Première Instance, Brussels, of 4 March 1996 in Case 96/196/C (*Kalut* v *FRBSB*) and under the new Rule 86 of the FRBSB Rules.

comparability of results. If, however, as a result of a phased transfer deadline, players who have previously played in third countries can still be transferred to teams in the Belgian League after this is prohibited for players who have previously played in other European States, then the comparability of results is still jeopardised. Precisely in basketball, players from third countries — good players from the USA or Brazil, perhaps — could significantly influence the existing balance within the Belgian League. Consequently, phased transfer periods of this kind are no longer suitable for ensuring comparability of results. On the basis of what has been said above, then, the stages in a system of phased transfer periods which prevented the transfer of players from other Member States before the end of the last stage would no longer be proportionate.

83. The submissions of the FRBSB contain another possible justification, however, in the reference to the end of national competitions in other countries in the European zone. Players are to be prevented from first completing a championship and then taking part in the final stage of another championship. It is doubtful whether the prevention of such a follow-on transfer is an objective to be recognised in Community law. That is certainly not so in the individual case. There is no evident reason why a player should be able to transfer to another championship shortly before the end of a season but not shortly afterwards when the season is over.

84. At the end of a championship, however, not merely individual players, but at least in theory a large number of attractive players become available on the market. The follow-on transfer of a large number of players between federations whose championships end early and federations whose championships end late would appear problematic. The migration of, say, ten top players of a national league to the four best teams of another league would no doubt fundamentally alter the previous balance of powers. Regardless of comparability of results, such a development would largely reduce *ad absurdum* the ideal of an analogy between individual and team sports. If the phased transfer deadline were to serve the purpose of preventing such a 'transfer movement', it might develop a justifying effect going beyond the mere organisational authority of the sporting associations. From the point of view of Community law, that objective ought to be recognised in principle simply because it is Community law which has first made it possible to play a large number of players from other Member States.[32] As long as the sports organisations were able to limit the number of foreign players, the risk of a 'follow-on transfer movement' was also kept within bounds.

85. If the means of phased transfer periods is to be justified, the phasing must, however, be appropriate and necessary as such to achieve the objective of preventing a

32 — See the *Bosman* judgment, cited in note 1.

'follow-on transfer movement', and be proportionate to the restriction of freedom of movement for workers.

86. Appropriateness would be excluded if there existed even one championship which was not covered by the phased deadline and there was reason to fear a 'follow-on transfer movement' from there. [33] Appropriateness would be at least doubtful if the phased deadline with respect to championships of very high standard intervened only very belatedly. There would then be a risk of a 'follow-on transfer movement' if teams in those leagues no longer had any targets to play for in the competition, because they could not affect the outcome of the championship. In such cases a transfer of several top players could be attractive for those concerned even some time before the end of the championship.

87. In the present case, it has not been shown that the European transfer deadline of 28 February meets those requirements. The FRBSB mentions only a very small number of championships which ended between 28 February and 31 March 1996. How the close of each of those championships turned out, that is, whether there was a risk of a follow-on transfer movement on the part of teams which were already out of contention, is not evident. A 'follow-on transfer movement' from third countries appears excluded in any case. Regardless of the dates of the championships there, the participation of players from third countries is limited to one or two players per match under the FRBSB Rules. [34]

88. Considerable doubts are also indicated as regards the necessity of the phased transfer deadline. If it really is to be appropriate, then precisely in the case of the strong championships with early deadlines referred to above it catches, as well as 'follow-on transfer movements', also transfers of players who wish for other reasons to leave their club although the club is still in the sporting competition of the championship. No reason can be seen why those players should be disadvantaged compared to players from third countries.

89. A less severe means would be a system of approval for transfers, not based on deadlines but introducing material criteria for a transfer during a season which deal in particular with the problem of 'follow-on transfer movements'. Such a system would have, first, to guarantee that no other transfer failed because of a phased transfer period and, second, to prevent a 'follow-on transfer movement' taking account of the current positions of the teams of a cham-

33 — That would be the case in particular with a championship of the European Union and the EEA, since players from those Member States may be played without any restriction on numbers. That risk might possibly be rebutted, however, by proving that that championship was of such a low standard that a transfer movement was in fact not to be feared.

34 — Rule 245(1) of the old and Rule 87(2) of the new FRBSB Rules.

pionship. A starting-point might be the existing FIBA Rules. Since under the FIBA Rules a player requires a release from his club in any case, that club could determine whether there is evidence of a 'follow-on transfer movement' or whether the transfer is taking place for reasons of another kind. That procedure would, however, be more difficult to carry out than the phased transfer period, and would be exposed to attacks by those who wish to take part in a 'follow-on transfer movement'. Decisions would have to be made quickly and there would presumably be a possibility of appealing. These difficulties argue rather against rejecting even the necessity of phased transfer periods.

90. Phased transfer periods are in any case, however, not reasonable. Only as relatively complex systems of rules are they suitable at all for achieving their objective, and in so doing they also cover transfers which ought not to be prevented at all. They are therefore to be regarded as rules of a relatively low quality for achieving the objective.

91. In addition, at this point in the examination at the latest the actual probability of a 'follow-on transfer movement' must be taken into account. Not every risk justifies every protective measure. Rather, the restriction of fundamental freedoms by a protective measure must be reasonably proportionate to the probability of the risk coming true. Additional earning possibilities for players and the transferring clubs could argue for a follow-on transfer movement. Experience abroad could also appear attractive. In the present case it is not evident that there is a risk of a 'follow-on transfer movement'. The practical difficulties appear considerable and the sporting gain doubtful. Problems could arise with the integration of new players shortly before the end of a competition, and with the long-term planning of all the clubs involved.

92. Taking that situation into account, the extremely unfocused means of a phased transfer deadline cannot appear justified for preventing a not very probable 'follow-on transfer movement', when set against the highly important protected right of freedom of movement for workers. If the national court were given more convincing information on the risk of a 'follow-on transfer movement' and the precision of the effect of phased transfer periods, it would then be for that court to reconsider the question of justification on that basis.

93. A transfer period can therefore be justified on sporting grounds in the public interest only if the period is no shorter for players who previously played for clubs in other Member States than for players who previously played in third countries.

4. *Applicability of Articles 85 and 86 of the EC Treaty*

94. It must be stated to begin with that the applicability of the rules on competition is being considered only in the alternative. First, the reference for a preliminary ruling is inadmissible in this respect, as shown in point 28 above. Second, the contested provisions on transfer periods — as has been shown — infringe the rules on freedom of movement for workers under Article 48 of the EC Treaty, in so far as citizens of the Union may rely on that fundamental freedom. The Court already held in *Bosman* that there is no need to rule on the interpretation of Articles 85 and 86 of the EC Treaty when there is already a breach of Article 48 of the EC Treaty. [35]

Submissions of the parties

95. According to the applicant in the main proceedings, professional basketball players and the professional clubs represented in the Belgian basketball league are undertakings within the meaning of Article 85 of the EC Treaty. The federation, the FRBSB, is then to be classified as an association of undertakings. The FRBSB Rules are consequently to be regarded as an agreement between undertakings or a decision of associations of undertakings. Trade between Member States is affected in so far as the rules on transfer periods affect all clubs and basketball players within the European Union and adversely affect the engagement of players from other Member States. Any economic exchange between the Member States is to be regarded as trade here. Competition is restricted in two ways. First, players from other Member States cannot compete with Belgian players or players from third countries and so apply for employment with Belgian clubs. Second, the clubs' possibilities of competing with each other to engage the players in question are restricted. That restriction of competition affects essentially the 'market in players', since the players are workers who wish to perform contracts of employment or who provide services within the meaning of Article 59 of the EC Treaty (now, after amendment, Article 49 EC). In the absence of an exemption under Article 85(3) of the EC Treaty, the rules on transfer periods are to be regarded as incompatible with the common market and as prohibited under Article 85 of the EC Treaty.

96. As regards the application of Article 86 of the EC Treaty, the view is taken that the relevant market is the market in professional basketball players, who act either as workers or as providers of services. Geographically, the relevant market is to be

35 — *Bosman*, cited in note 1, paragraph 138.

regarded as the entire market within the Community. In that the transfer rules in question restrict the players' possibilities of freely changing employer outside certain periods, there is an abuse of a dominant position. It is also possible, however, to determine the relevant market as that in which the Belgian clubs which play in the first division are active. Those clubs then joined together in the Belgian League to exclude any competition in the Belgian market. The dominant position on the market then follows from the monopoly position which the clubs — united in the federations — have. Since this conduct makes it impossible for other clubs to approach certain 'production factors', that is, basketball players, in order to engage them for the current season, there is an abuse of a dominant position.

97. The FRBSB and the Belgian League consider that Article 85 of the EC Treaty is inapplicable because basketball players, in their opinion, are not undertakings. At most the big clubs are to be regarded as undertakings. Furthermore, the federations are not associations of undertakings and, moreover, the contested rules on transfer periods serve merely to create fair and undistorted competition. As regards Article 86 of the EC Treaty, they submit that there is no relevant market for basketball players, trade between Member States is not affected, and no position of economic power indicates an abuse of a dominant position.

98. According to the German Government, the rules of competition law are not applicable to the present case, since in particular there is no trade in basketball players between Member States. In the alternative, the transfer periods are in any case a necessary measure in order to make a competition between the clubs possible at all.

99. The Austrian, French, Greek, Italian and Spanish Governments also take the view that the competition rules do not apply to the present case. Such application is ruled out either because the players and clubs are not undertakings or because this is a case not of economic operations but of a sporting competition between the players or clubs. The clubs and federations are indeed also economically active, that being made manifest in particular in ticket sales, advertising, the award of television rights and merchandising. The present case, however, concerns the regulation of transfer periods, which constitute sporting 'rules of

the game' only, and are thus not within the scope of Articles 85 and 86.

Opinion

(a) Article 85 of the EC Treaty

100. In the Commission's view, the application in principle of Articles 85 and 86 of the EC Treaty to the present facts is beyond doubt. Both the players and the clubs constitute undertakings, with the consequence that the federations may very well be associations of undertakings. Trade between Member States is affected in so far as the freedom of clubs to enter into contracts with professional players even during a current league season is restricted. The same applies to restriction of competition within the common market. The question arises, however, whether the rules concerning transfer periods are necessary for organising a sporting competition between the clubs. In principle they are not unsuitable for achieving that objective; however, it follows from the phasing of the transfer periods that the rules as a whole are disproportionate. In the context of Article 86 of the EC Treaty, a dominant position can be held only by the clubs gathered together in the league. The relevant market could then only be the market in which players are engaged. For there to be a dominant position in the market, however, there must also be an economic connection between the clubs capable of giving rise to an oligopolistic structure in the market. The information provided by the referring court is too concise overall, however, for such conclusions to be reached. It must be taken that neither Article 85 nor Article 86 of the EC Treaty precludes the provisions in question on transfer periods.

101. In the context of Article 85(1), it must be examined whether the acts at issue are attributable to undertakings and whether they are liable to affect trade between Member States and competition.

102. According to the Court's case-law, in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of its status and the way in which it is financed. [36] Despite the lack of information from the national court, it may be presumed — also on the basis of the submissions of the parties — that the professional clubs organise sporting events for paying spectators, market television transmission rights and obtain income by means of advertising. They are thus indeed engaged in an economic activity.

36 — Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 21; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* v *Assurances Générales de France and Others* [1993] ECR I-637, paragraph 17; and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 20 et seq.

103. By contrast, however, there are no indications in the present case as to how fat the FRBSB and FIBA are themselves economically active. But since the FRBSB too is at least made up of economically active clubs, it is to be regarded in any case as an association of undertakings within the meaning of Article 85(1) of the EC Treaty. It is not necessary for the association to pursue an economic activity of its own. FIBA accordingly acts as an association of associations of undertakings. The rules both of the FRBSB and of FIBA are therefore decisions of associations of undertakings.

104. It is also the case that trade between Member States may be affected. The concept of trade must not be restricted to trade in goods alone but given a wide interpretation. [37] It must therefore be possible to find that trade is affected in a case in which the exercise of fundamental freedoms is obstructed. Transfer periods generally are liable to affect trade between Member States in so far as they may at certain times prevent changes of club by professional players within the Member States and so — as shown above — restrict freedom of movement for workers.

105. Since the development of economic activities by the clubs, that is, by undertakings, is obstructed by these transfer rules, there is probably also a restriction of competition within the meaning of Article 85(1) of the EC Treaty. A transfer period prevents clubs from increasing the attractiveness of their 'product' by taking on new players during a certain period.

106. The provisions on transfer periods could, however, be necessary for creating and guaranteeing a competition between the clubs at all. As may be seen from the grounds of justification already put forward in connection with the examination of freedom of movement for workers and effects thereon, the transfer rules as a whole are capable of calling into existence and then guaranteeing fair competition between the clubs.

107. The Court rejected a purely formal application of the competition criterion in the *DLG* judgment. [38] According to that judgment, the rules of competition law are not to be applied in the abstract, but always by reference to the particular provisions and the economic conditions prevailing in the relevant market. Competition-restricting rules such as in the present case which have the effect of promoting the establishment of competition on the market in question may therefore be compatible with Articles 85 and 86 of the EC Treaty if they are necessary and reasonable for achieving that objective.

37 — Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraph 18.

38 — Case C-250/92 *Gottrup-Klim Grovvareforening* v *Dansk Landbrugs Grovvareselskab (DLG)* [1994] ECR I-5641, paragraph 30 et seq.; see also Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 19 et seq.

108. That reasoning may be transposed, at least partially, to the present situation. In so far as the present transfer deadlines do not disproportionately affect freedom of movement for workers, they guarantee comparability of results of matches within a season. That objective is decisive for the competition between clubs which consists in increasing the attractiveness of their matches. Transfer periods are therefore compatible with Article 85 of the EC Treaty to the extent that they may be reconciled with freedom of movement for workers.

109. No exemption has been granted, so there is no question of the application of Article 85(3) of the EC Treaty.

110. To sum up, it may be said that transfer deadlines are not compatible with Article 85 of the EC Treaty if in particular the comparability of results in a season would be affected by transfers of players before the expiry of the transfer deadline and the transfer period is shorter for professional sportsmen who previously played for a club in another Member State than for professional sportsmen who previously played in third countries. It must be pointed out once more that this conclusion is based solely on hypothetical considerations, as the order for reference does not contain enough factual information for a definitive examination with respect to Article 85 of the EC Treaty.

(b) Article 86 of the EC Treaty

111. The applicability of Article 86 of the EC Treaty to the present case presupposes first the existence of a dominant position. [39]

112. It follows from the Court's judgment in *Centro Servizi Spediporto* that mere participation in a body which coordinates competition does not suffice for the conclusion that there is a collective dominant position. The undertakings must rather be so closely linked that they can adopt the same conduct on the relevant market. [40]

113. In the present case the question thus does not arise of whether on the basis of their cartel the clubs actually *could be linked* so closely together, but of whether they *are linked* so closely that they can act independently of the players.

114. However, the statements of fact and law by the referring court needed to answer that question are lacking. Whether Article 86 of the EC Treaty applies to the main proceedings must therefore be left open.

39 — On the definition of a dominant position, see Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 38, and also Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraph 359, and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 273.

40 — Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraphs 32 to 34.

F — Conclusion

115. For that reason I propose the following answer to the question referred:

Provisions of a sports association under which a basketball club is prohibited from playing a professional basketball player who is a national of a Member State competitively (for the first time) if he was engaged only after a specified transfer date may be justified on sporting grounds in the public interest, and are therefore compatible with Article 48 of the EC Treaty (now, after amendment, Article 39 EC), if, for professional sportsmen who previously played for clubs in other Member States, that date is chosen in such a way that competitions are not distorted, in particular that comparability of the results of that sporting competition is not affected by transfers of players taking place before the expiry of the transfer period, and if that period is no shorter than for professional players who previously played in third countries.