OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 6 JULY 1976 [1]

Mr President
Members of the Court,

The object of the questions submitted by the Giudice Conciliatore de Rovigo is, in essence, to establish whether, under Community law, it is in order for a private sporting organization to require the possession of the nationality of the State as a condition for playing in professional football matches.

The Italian magistrate has raised this question because the Federazione Italiana del Gioco del Calcio (Italian Football Federation) (FIGC), in which the country's football clubs are organized and which is the only body with a right to control the activities of those clubs on the national territory, requires possession of a federation membership card as a condition for playing in matches and because this card is, in accordance with the provisions of Article 28 (g) of the Federation's rules, normally granted only to players of Italian nationality residing in Italy. An exception is made in the case of foreign nationals who have never been members of a foreign federation, who are resident in Italy and ask to be enrolled as 'youths', 'amateurs' or for recreational purposes. As regards the enrolment of all other players, Italian or foreign, coming from federations abroad the said provision of the rules of the Italian Football Federation provides that 'The Federal Council shall take a decision before 30 April of each year'. The possibility of an exception being made for professional players is not, therefore, ruled out but it is a matter at all times wholly at the discretion of the governing body of the Federation. In practice foreign football players are disqualified from acting as professionals in Italian clubs. There is nothing, of course, to prevent a football club which does not belong to the said Federation from making unrestricted use of the services of foreign players but it must be emphasized that membership of the FIGC alone enables a football club to compete for the championships. If this condition is not satisfied, it is in practice impossible to play as a professional.

In its judgment in Case 36/74, *Walrave*, the Court held that when the practice of sport constitutes an economic activity when it has the character of gainful employment or remunerated service, it comes within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty. These provisions, which give effect to the general rule laid down in Article 7 of the Treaty, prohibit any discrimination based on nationality in the performance of the activity to which they refer; [1974] ECR 1417. In the case referred to, in the relationship between athlete and club, the prevalence of the element of gainful employment over the sporting element was very clear since it involved a type of cycle race in which some of the participants, two of whom were plaintiffs in the main action, played a secondary and subordinate role. In the case of a football team, the element of athletic subordination, if I may call it that, is not present; the fact remains, however, that the players have a professional or semi-professional status which, in fact, puts them in the position of employees as against the club which runs the team.

This is a sufficient reply to the second question referred by the national court and, accordingly, also to the first question in so far as the outcome of the case referred to concerns the court making the reference.

1 — Translated from the Italian.

In the judgment referred to above, the Court nevertheless recognized the existence of limits to the general principle mentioned. It stated in fact that, in so far as the general prohibition in Article 7 embodies the rules concerning the free movement of workers and of services, it does not affect the composition of sports teams, and 'in particular' national teams (and here I depart from the somewhat inaccurate Italian translation of the operative part of the judgment) 'the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity'.

Although this gloss on the general principle must be strictly interpreted it should however be borne in mind that the Court has clearly indicated its wish to regard as purely and simply an example the specific case to which it referred of teams representing a country in international competitions. We can also take as an example the composition of sports teams which compete for the national championship. In such a case there is, in my view, nothing to prevent considerations of purely sporting interest from justifying the imposition of some restriction on the signing of foreign players or at least on their participation in official championship matches so as to ensure that the winning team will be representative of the State of which it is the champion team. A condition of this kind seems all the more reasonable when it is borne in mind that the team which wins the national championship is often chosen to represent its own State in international competitions.

Moreover, as the agent for the Commission himself acknowledged at the hearing, the same naturally applies at the local level whenever there is a wish to make the local sports team really representative of the area or locality. Of course, in this second situation, the restrictions must extend not only to foreigners but to nationals who belong to a different locality from that represented by the local team. While, within those limits, the principle of engaging only local players is, as one of the principles of freedom to manage one's own business, normally accorded unreservedly to sporting clubs, if the restriction means the exclusion only of foreign nationals, its justification as an exception to the full application of the rules on freedom of movement for workers or the freedom to provide services must be based on solid sporting or athletic requirements.

For all these reasons I am therefore of the opinion that even sporting activities run on a business basis may nevertheless fall outside the application of the fundamental rules of the Treaty against discrimination in cases where the restrictions on the ground of the player's nationality are based on purely sporting considerations, provided that such restrictions are appropriate and proportionate to the end pursued.

The judgment in *Walrave* has, in fact, a dual significance. The Court rightly stressed the value of sporting activity as such and the need to encourage it; at the same time, it reaffirmed the general principle of the right to freedom of movement for those who, in the world of sport, want to take part in it as a preponderantly economic activity of a professional nature.

The agent of the Commission drew the Court's attention to the requirement that the prohibition of discrimination on grounds of nationality must operate not only for the purposes of engagement but also, later, as regards playing in matches. Nevertheless it must be said that there can, under the Treaty and apart from any contractual provision, be no question of foreign professional players who have been engaged by a football club in another Member State having the right to take an active part in championship matches. There exists no right to be signed on, only a right that no legal impediments shall be placed, even by

private parties, in the way of the engagement of foreign football players whenever a football club wants to engage one; it is equally difficult to imagine that under the Community system, a player (even if he were an alien) should have the right to play in matches against the wishes of those who manage the affairs of the club by whom he is employed. The only right the player has is that there shall be no legal objection, based on his nationality, to having him play in matches, unless objections on this count are justified by those very considerations of purely sporting interest which, as I pointed out above, may avail to legitimize even restrictions on his engagement.

Subject to these explanations and reservations, the third question submitted by the Giudice Conciliatore di Rovigo can, in my view, be answered by referring to the ruling given by the Court in the abovementioned judgment in *Walrave* on the application of Articles 7, 48 and 59 of the Treaty to individuals. The prohibitions contained in those articles apply not only to the acts of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services; otherwise, as the Court has declared, the abolition as between Member States of obstacles to freedom of movement for persons and the freedom to provide services would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.

A clear reply to the fourth question is also to be found in the same decision, which lays down that prohibition of any discrimination whatsoever based on nationality is a rule which, as from the end of the transitional period, has direct effect in respect of both the free movement of workers and the provision of services.

On the other hand, I am unable to follow counsel for the plaintiff in suggesting that the Court should rule that, in a situation of the kind described by the Giudice Conciliatore di Rovigo, the national authorities are jointly liable for the existence of private conditions, such as those laid down by the rules of the FIGC, which unjustifiably cut down the rights conferred on foreign players by the directly applicable provisions of the EEC Treaty. I cannot accept the principle that the State should be made liable for activities carried out on its territory by individuals exercising their contractual autonomy solely on the ground that they have adopted measures which conflict with directly applicable Community rules.

If we are dealing with a body which operated in the private sector but the activities of which were nevertheless specifically subject to control by administrative authorities (as may be the case in, for example, the field of banking or insurance) the organs of the State might conceivably be liable for neglecting to act. But, in the present case, the task of the State was and is merely to uphold the right of private parties, the sports clubs, to sign on foreign workers and to withhold legal recognition from a clause to the contrary contained in the rules applicable to them.

This is sufficient to protect the right conferred by the Treaty on foreign players and which, as I have explained, does not consist of a right to be signed on, since there is no corresponding obligation on the sports club, but merely of the preservation of the opportunity to be engaged. So, to return to the case in hand, the Rovigo Football Club could not have extricated itself from its obligation towards Mr Donà by relying on impossibility of performance because, on the basis of the principle set out above, the clause of the football federation's rules on which it relied must be regarded as illegal and therefore invalid.

I confess my inability to see what justification there would be, in a private sector where Community law directly applies, for action by State authorities other than judicial bodies. It would be difficult to imagine administrative authorities intervening in the affairs of private parties which were being conducted wholly within the field of private law. Moreover, government action could do no more than repeat Community orders which are in themselves directly applicable. The claim by counsel for the plaintiff that the national governments have to ensure that their nationals comply with the Community rules applicable in this case could, therefore, conflict with the principle laid down by this Court and, moreover, expressly confirmed by the Italian Constitutional Court itself in judgment No 232 of 1975, that it is incompatible with Community law to adopt national provisions which, in an act of the national legislature, reproduce the content of directly applicable Community provisions, because they would be liable to generate dangerous uncertainty as to which law applied and give rise to distortion in the functioning of the machinery of judicial review provided for under the Treaty.

If the limitations imposed by the Treaty on the contractual autonomy of private parties were to prove insufficient to ensure the proper functioning of the Community system, and if it were in the public interest of the Community that there should be a systematically uniform regulation of matters which do not fall within the field subject to the Community's legislative powers and which the States or some of them leave to the discretion of private parties, the Commission could, within the limits and conditions contained in Article 100 *et seq.* of the Treaty, encourage the harmonization and approximation of national legislation, if need be even by subjecting such matters and the actions of private parties in that field to control by the administrative authorities. But such a decision is obviously one for the Commission and the Council and certainly not for this Court as part of the present proceedings.

Finally, I do not agree that the present case provides a suitable basis on which to consider the question referred to by the agent for the Commission concerning the right of migrant workers and of members of their family not to have obstacles placed on grounds of their nationality in the way of their joining sports clubs of the host country in order to play as amateurs. It would not in the slightest degree prejudge the solution of that problem to restrict the principle laid down by the Court in paragraph 1 of the operative part of the *Walrave* judgment to professional sporting activity of an economic nature. The said question does not involve the free movement of the professional player, which is guaranteed by Community law precisely inasmuch as it is an economic activity, but the living conditions of the emigrant and the members of his family in the host country. In this respect, which the Court was not called upon to consider in *Walrave,* it is conceivable that private activities of an economic character also may call for attention in connexion with the application of the prohibition of discrimination based on nationality.

But this question involves interpretation of legislative instruments such as, in particular, Regulation No 1612/68, which have nothing to do with the questions submitted in this case by the national court.

For these reasons, I propose that, in reply to the questions submitted by the Giudice Conciliatore di Rovigo, the Court should once more confirm in substance the principles laid down in the judgment in Case 36/74 *(Walrave),*

subject to the further clarification that sporting activities of an economic nature may avoid the application of the prohibition of discrimination in cases where the restrictions based on the nationality of the player meet needs and pursue objects of purely sporting interest and provided that the said restrictions are, on the facts, appropriate and commensurate with the end in view.