

Expert Opinion
on the Compatibility of the “6+5 Rule”
with European Community Law
(Summary)

6+5

Introduction

The Institute for European Affairs (INEA) traditionally focuses its activities on fields that are of particular importance for the development of Europe. This includes such diverse fields as the "Development of South-Eastern Europe as an All-European Responsibility" or the "Co-existence of Religions in Europe".

The Institute for European Affairs is concerned about the lack of acceptance of the European institutions by European citizens and also the considerable scepticism about the idea to further develop the political cooperation of the countries under the umbrella of the European Union.

This situation can only be changed to the better if culture – including sports – is developed as the outstanding platform for European integration. Only if the national cultural identities allow for a common European identity to develop, a corresponding common consciousness will have the chance to arise among the citizens of Europe.

On this background, the Institute for European Affairs met the FIFA's request to have an expert group made up of high-ranking European scientists prepare an expert opinion on the compliance of the "6+5 Rule" with Community law.

The Institute for European Affairs attached the following conditions to the acceptance of this order:

1. The expert group is chaired by Prof. Dr. Dr. h. c. mult. Dimitris Th. Tsatsos, who is also a Member of the Board of the Institute for European Affairs. The appointment of the members of the expert group is the exclusive responsibility of Prof. Tsatsos and the Board of the Institute for European Affairs.
2. The expert opinion is prepared in cooperation between the appointed members of the expert group. The coordination of their work is done internally within the expert group and in cooperation with the Institute for European Affairs.
3. The expert opinion is prepared without preconceived notions as to the result as our client FIFA has no supervisory authority.

The Institute for European Affairs (INEA) hopes that the expert opinion on hand will contribute to the clarification that is so urgently needed on an international level as the issue of the compatibility of the "6+5 Rule" with Community law does not only concern football, but is also important for other team sports as basketball, ice hockey, or handball.

24 October 2008

Prof. Dr. Jürgen Gramke
- Chairman of the Board -
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Experts

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Instructions for the Expert Opinion and Method of Investigation

The expert opinion examines the question of whether the “6+5 Rule” that FIFA intends to introduce for professional football can be implemented in line with European law.

To this end, the five experts have jointly developed a concept on the basis of ongoing coordination and cooperation. Each of the relevant sub-issues has been examined independently.

Summary of Results

The experts come to the conclusion that the concept of a **"6+5 Rule"** currently pursued by FIFA **can be implemented in line with European Community law.**

I. Dramatic changes to professional football

It is undisputed that the Bosman judgment has had the effect that the number of foreign players in professional football has increased drastically due to the greater possibilities to use foreign players, so that in the meantime up to 56.3% of the national league players at top level are not eligible to play for the national team of the league for which they play, while the number of non-European players within this group of players accounts for up to 50%.

Accordingly, the balance of the sporting competition has changed dramatically. This is true at the level of national leagues, but above all at the level of international competition. The manifestation of this sporting and financial concentration process is, among others, a significantly higher number of players, who are not eligible to play in the national team of the association, in the top European teams, which compete with one another internationally for the acquisition of the best players without having to observe quotas. Small and financially less strong clubs are no longer able to keep up at the top, so that differences in the levels of performance and dominance will increase more and more in the competitions.

At the same time, this development results in less encouragement of young talents, because clubs can recruit fully trained players from other countries, often even for less money, and the time that those talented young players, who are eligible to play in the relevant national team, spend playing with the national team is also statistically reduced. An additional side effect is the socially alarming appearance literally of human trafficking in young talents from Africa or South America to the European clubs.

Finally, this process has effects on the quality and substance of each of the national teams, because the lack of emerging talents who are eligible to play for the national team not only affects the club level but also directly affects the national teams, which, under the current structure, are reliant on the development of players nationally at club level.

II. Legal and political framework of the “6+5 Rule”

In both European primary law and the relevant official “soft law rules” and resolutions the primacy and the general autonomy of sporting associations when it comes to making rules for the sport are recognised and promoted in the interests of the function of sport in society. Article 151 EC Treaty and the new Article 165 TFEU of the Lisbon Treaty highlight the entelechy of sport in comparison to the purely commercial orientation of the fundamental freedoms and the competition regime. It is exactly this approach that is put into effect with the “6+5 Rule”.

It is already questionable whether the requirements of Community law apply at all to the “6+5 Rule”, because it is a rule of the game that is purely motivated by the needs of the sport. It is established in the interests of promoting sporting competition and merely affects the line-up of the players at the beginning of a match. Sporting competition cannot be likened to economic competition, as the “match/competition” structures are different. The rules of a world sporting association only have standing if they are followed by all (national) associations and are not undermined regionally. The “6+5 Rule” is also compatible with Article 39 EC Treaty from a teleological perspective.

The objects of the “6+5 Rule” are decisive for its legal existence. The central aim of generating and safeguarding sporting competition should be emphasised. The overriding goal of the “6+5 Rule”, which can be incisively summarised as “sport should remain sport”, is already supported by objectives, which are legitimate under European law due to its interest in counteracting inequalities and primarily guaranteeing sporting competition. Where effective incentives to focus on emerging young talent are also set, this purpose will be conducive to the acceptance of the rule. In addition, the “6+5 Rule” serves to protect the national identity and the national team, which supports football as a national cultural heritage in concordance with Articles 6 (3) and 151 EC Treaty.

The “6+5 Rule” maintains the legal approach of the Bosman judgment. This results in a *conclusio (novum)* for the recognition of the effect of fundamental rights between private parties at the expense of FIFA on the one hand compared with the conflicting fundamental rights of FIFA on the other. This occurs on the basis of the model for the balancing of fundamental rights established in the Schmidberger judgment in the field of sports. This legal approach achieves those duties to protect by proportionately weighing up the conflicting fundamental freedoms and fundamental rights and legitimately arranging them.

III. Analysis und application of the Bosman judgment

The core of the right to freedom of movement will not be affected by the “6+5 Rule”. This rule is purely a rule of the game, adopted in the sole interest of the sport in order to improve the sporting balance between the clubs and associations and so to ensure appropriate sporting competition between them.

In as far as Bosman applies at all, the arguments presented in the case are no longer relevant because reality has not developed as expected but is instead contrary to the prognosis of the ECJ in its judgment and to the opinion of Advocate General Lenz in the same case (paragraph 146, 235) in relation to EU players – as explicitly mentioned in the Bosman judgment. The same applies to the situation of non-EU players, as was assumed by the ECJ in its Simutenkov judgment.

According to the Bosman judgment, Article 39 EC must be interpreted in light of the principle of trust (Article 31 Vienna Convention on Consular Relations). Supported by the principle of trust, the new development in the form of the Treaty of Lisbon, which is not yet in force and which accords sport a special importance in the interests of the EU, must be accommodated. In addition, Advocate General Lenz already accentuated in his opinion in Bosman that certain restrictions to Article 39 are in principle possible in the field of professional sport (Paragraph 270).

In light of this jurisprudence the public significance and the public interest in sport has to be taken into account as must the close connection to the local towns and communities as well as its relevance for health and the close cultural connection, particularly in light of FIFA’s obligation to further fundamental civil values such as fair play.

IV. Justification of the “6+5 Rule”

The “6+5 Rule” constitutes, at the most, an indirect or concealed discrimination within the meaning of Article 39 EC Treaty because, in contrast to the rules on foreign players, it is legally not directly linked to the nationality of the professional footballer but applies to the qualification for the national team. It can therefore at most legally involve an indirect discrimination, which can be justified, according to the unwritten restraints developed in the so-called Cassis formula, if there are compelling reasons in the general interest.

Even if one assumes that there is a direct discrimination it must be possible to assert the conflicting fundamental rights of FIFA in consideration of the effect on third parties. The autonomy of FIFA as a federation, which is a consequence of the fundamental freedom of association, in principle justifies the restriction of market freedoms. Even in the case of a direct discrimination, therefore, an unwritten restraint would be established as justification for the “6+5 Rule”.

The “6+5 Rule” is also specifically justified by this restriction. In particular, it is designed in accordance with the principle of proportionality. The “6+5 Rule” serves the combat of barriers to a balanced sporting competition, the encouragement of emerging talent and the protection of the national identity of football and the national teams, and is therefore to be seen as appropriate.

The existence of the UEFA model of a home-grown player rule does not oppose the necessity of the “6+5 Rule”. On the one hand, the UEFA model is not a less restrictive measure, because it would more strongly affect the rights of youths by continuing to abet the illegal “child trafficking” in young players. On the other hand, it is not also equally appropriate because it cannot fulfil the additional aim of the “6+5 Rule” with respect to the promotion of the national team.

The “6+5 Rule” is also appropriate, because its implementation-related limitation on the use of players who are not eligible to play in the national team is of lesser importance and, at the most, might only occasion less significant economic disadvantages for individual clubs. In contrast, these disadvantages are outweighed by considerations supporting the “6+5 Rule” in any balancing of interests especially given the serious deficiencies in sporting competition and the important goal of intensified encouragement of emerging talent.

V. Competition and antitrust law assessment

The “6+5 Rule” is also compatible with competition and antitrust law provisions. It is with good reason that the application of these provisions to professional sport is already questionable or, in any case, that an exemption is accepted for the sector. This is because the “6+5 Rule” constitutes a purely sporting rule of the game that is not subject to the domain of economic competition law.

In addition, upon substantial assessment there is no restriction of competition within the meaning of Article 81 EC Treaty. First of all, the definition of the relevant market for the “6+5 Rule” already causes significant difficulties, which is an indication that the application of the competition provisions to the “6+5 Rule” can only be substantiated through a very unclear, overly broad application of the concepts. The only possible market that could be used is the so-called “market for players”, but that very wide definition would yield results that would be questionable in practice. In addition, the rule is obviously not a restriction of competition, because it even seeks to uphold balanced sporting competition and it is essential and proportionate to this goal, which the telos of Article 81 EC Treaty precisely allows. The concept is not capable of affecting the trade between EU Member States. Finally, an infringement against Article 81 (1) EC Treaty can be eliminated by application of the de minimis criteria. The effect on the market for players is in any case not appreciable and is moreover proportionate.

It is already doubtful whether “6+5 Rule” falls within the scope of application of the prohibition against the abuse of a dominant position in accordance with Article 82 (1) EC Treaty. Previous jurisprudence of the ECJ can, at any rate, not be understood as inferring that decisions within a sport should be measured against Article 82 EC Treaty. This notwithstanding, it should be noted that FIFA does not have a dominant position with respect to the object of the “6+5 Rule”. Without any direct participation of its own on the market for players, FIFA is at the most to be classified as an “association of undertakings”, which are not caught by Article 82 EC Treaty. In addition, for systematic and teleological reasons the intended adoption of the “6+5 Rule” does not fulfil all the conditions required for the finding of an abuse within the meaning of Article 82 (1) EC Treaty. Finally, because any effect on trade is not appreciable, an infringement of Article 82 (1) EC Treaty can be eliminated.

In closing, it should be noted that the considerations, which substantiate the compatibility of the “6+5 Rule” with European law, also apply structurally to other types of team sports, such as handball, basketball and ice hockey.

- Prof. Dr. Dr. h. c. mult. Dimitris Tsatsos -

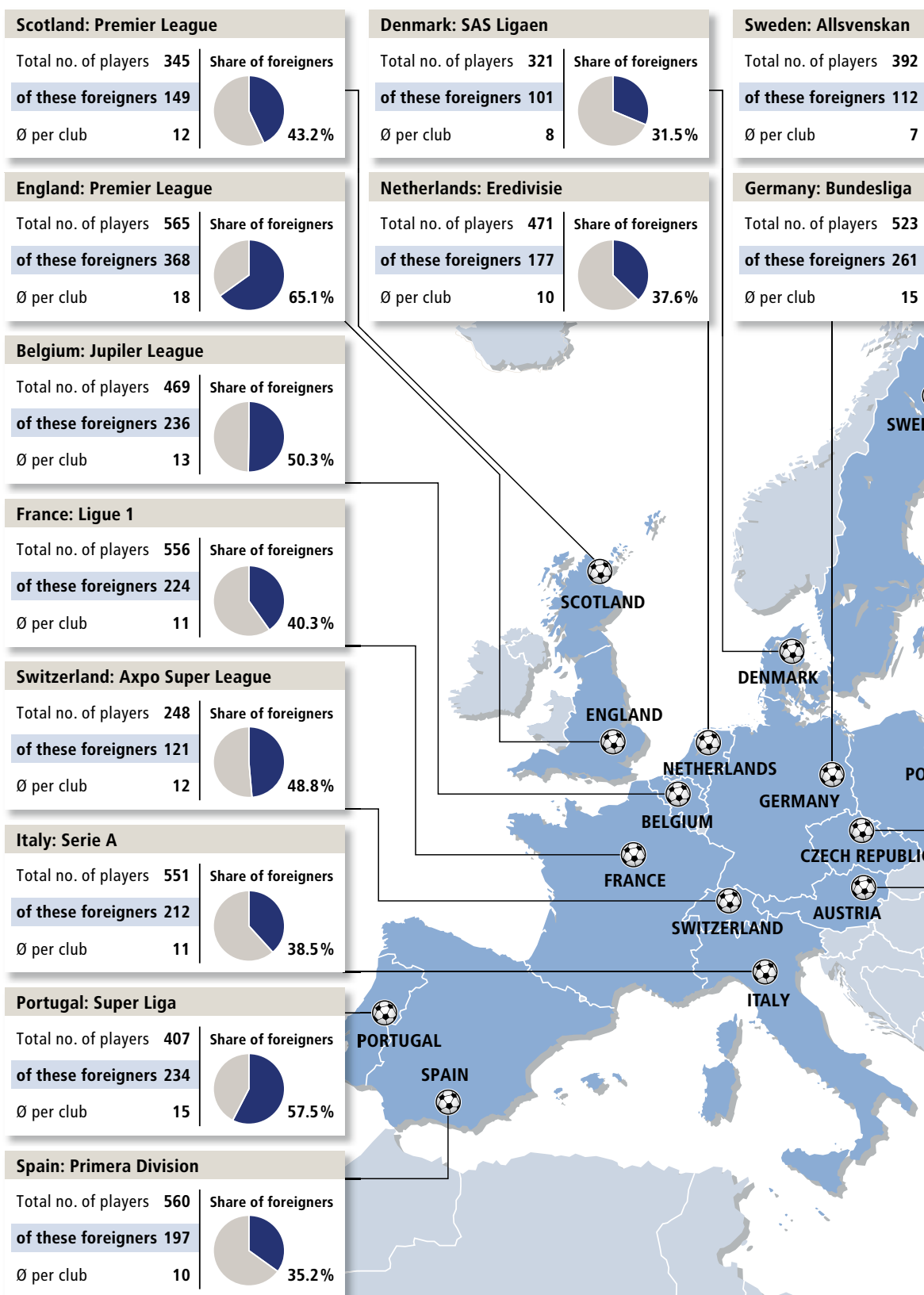
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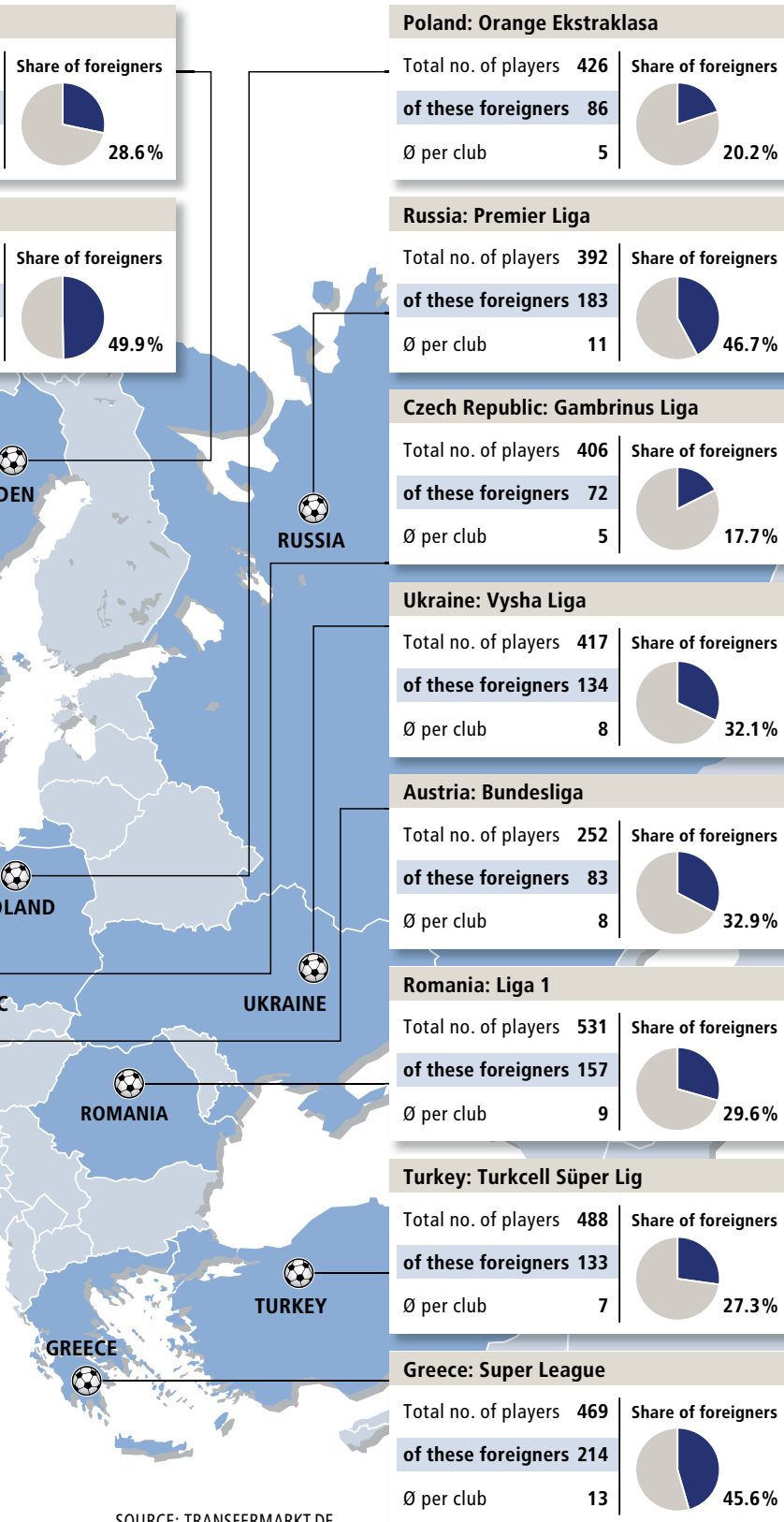
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- Prof. Dr. Paolo Ridola -

Share of foreign professionals in the most important



European football leagues



FOREIGNERS IN THE GERMAN BUNDESLIGA

from:	No.
Brazil	32
Czech Republic	15
Croatia	15
France	11
Switzerland	11
Poland	10
Denmark	8
Serbia	8
Netherlands	7
Argentina	7
Bosnia and Herzegovina	7
Greece	6
Portugal	6
Turkey	6
Bulgaria	6
USA	6
Romania	6
South Africa	5
Australia	5
Cameroon	5
Sweden	4
Uruguay	4
Belgium	4
Slovakia	4
Nigeria	4
Albania	4
Ghana	3
Japan	3
Mexico	3
Austria	3
Iran	3
Ivory Coast	3
Dem. Rep. of the Congo	3
Macedonia	3
Hungary	3
Canada	2
Tunisia	2
Slovenia	2
Italy	2
Paraguay	2
Georgia	2
Russia	2
Cyprus	1
Peru	1
Finland	1
Belarus	1
Montenegro	1
Guinea	1
Ukraine	1
Chile	1
Egypt	1
China	1
Senegal	1
Rep. of the Congo	1
Namibia	1
Algeria	1

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ILLUSTRATION TAKEN FROM THE GERMAN SUNDAY NEWSPAPER "WELT AM SONNTAG"; TRANSLATED FROM THE GERMAN LANGUAGE

◀ Illustration

“Share of foreign professionals in the most important European football leagues”

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