

[Home](#)[About ESLJ](#)[ESLJ Team](#)[ESLJ Issues
Volume 3
Number 1](#)[Boyes](#)[Submission Standards](#)[Call For Papers](#)[News](#)[Conferences](#)[Copyright](#)[Exclusivity](#)[Links](#)

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[Accessibility](#)

ESLJ Volume 3 Number 1 Articles

Contents

[Introduction](#)[‘Foreign’ Cricketers
in the English
County Game](#)[English Cricket and
the ‘Bosman Effect’](#)[Dealing with
Bosman: Ducking a
Bouncer?](#)[Beyond a Boundary?
The Kolpak Problem](#)[Hitting Back? The
ECB’s New Strategy](#)[Playing With a
Straight Bat –
Justifying
Discrimination](#)[Quotas](#)[The National
Interest](#)[Supporting the
National Team](#)[Competitive
Balance](#)[A Problem of
Nationality?](#)[Developing the
European Game](#)[The Final Over](#)[References](#) [Download](#)

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Caught Behind or Following-On? Cricket, the European Union and the ‘Bosman Effect’

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ABSTRACT

English County Cricket has struggled for a number of years with the problems posed by ‘foreign’ players. This issue has been magnified by the judgments of the European Court of Justice in the Bosman and, latterly, Kolpak cases. Many ‘foreign’ players now play first-class cricket in England unrestricted as a result in the regulations adopted by the England and Wales Cricket Board in the light of those judgments. This article contends that cricket may, in fact, be in a position to

legitimately exclude such players within the limitations of European Community law. It is argued that the unique structure of professional cricket within the European Union and globally places it in a different legal position to that of more widespread sports, such as football. Similarly it is argued that the internal configuration of cricket means that the protection of development of domestic players as a means of supporting the international team is a legitimate one. This is not least because international cricket provides the bulk of the finance for cricket in England and without this the game at all levels would struggle to be viable. The article contends that the socio-cultural importance



Volume 3 Number 1
Content

[➔ Editorial](#)

Articles

[➔ Simon Boyes](#)[➔ Ian Warren](#)[➔ Geoff Pearson](#)

Interventions

[➔ Yvonne Morris and
Paul Randle](#)

Reviews

[➔ Call for Reviewers](#)[➔ Richard Parrish](#)[➔ Hazel Hartley](#)

of cricket means that discrimination aimed at, and proportionate to, the protection of the international game ought to be considered as lawful. It further argues that such an approach is supported by the existence of other measures aimed at this objective, such as central contracts and the re-structuring of domestic competition. Finally, the article contends that such an approach may be perceived as being valid where it also strives to enhance the game of cricket at a European level.

KEYWORDS

Sport – European Union – Discrimination – Quotas – Legitimate Objective – Proportionality.

INTRODUCTION

English cricket is undergoing something of a boom 1
time at present, with the national team regaining the Ashes in spectacular style. Nevertheless, the English game has had some difficulties of late, not least the ructions over the 2004 tour to Zimbabwe and that pertaining to the sale of broadcasting rights for home Test series from 2006-2008 to a subscription based broadcaster. Perhaps foremost amongst the concerns that the cricketing fraternity faces is the ongoing problem posed by the numbers of foreign cricketers playing in the domestic first-class game.

'FOREIGN' CRICKETERS IN THE ENGLISH COUNTY GAME

The potential problems of having 'too many 2
foreigners' playing domestic cricket is one that the cricketing authorities have chosen to regulate for over thirty-five years. The initial restrictive approach was to limit county teams to registering one 'special' overseas player every three years and a second player qualified by means of an extended period of residence. The rigid adherence to this rule by the then Test and County Cricket Board (TCCB) meant that this rule would be strictly applied, even if the relationship between player and county terminated prior to the expiry of the three year period (Birmingham Post, 2003). The position since then has weakened considerably, with the county game first allowing the fielding of any one overseas player in any given game and then the expansion of that number to two in 2002. This is the current position. The argument surrounding the question of overseas players is, and always has been, that their presence – whilst having the potential to raise the standard of county cricket – ultimately acts as an obstacle to emerging domestic talent (The Times, 2003; BBCi, 2002a). It is often claimed that the prime function of county cricket is to provide talented players for the England team, so

the argument follows that reducing the throughput of talented domestic players into the county game stifles the international side's long-term prospects. In a similar vein it is being strongly argued that many of the resources being channelled into cricket for the purposes of developing young domestic cricketers, including lottery funding, are being effectively utilised to support the recruitment of a growing number of expensive overseas players (The Sunday Telegraph, 2003).

ENGLISH CRICKET AND THE 'BOSMAN EFFECT'

The issues highlighted above have been further exacerbated by the impact of the ruling in *Union Royales Belge des Societes de Football ASBL v Jean-Marc Bosman* (Case C-415/93 [1996] 1 CMLR 645 (hereafter '*Bosman*')) on the game of cricket. The headline grabbing element of the judgment of the European Court of Justice in *Bosman* was the outlawing of the imposition of transfer fees upon the expiry of a footballer's playing contract. The cricketing fraternity may have noted this with some interest but would have felt justified in feeling somewhat insulated against the impact of this aspect of judgment, being involved in a sport that did not operate a fee-based transfer system. The second element of the *Bosman* judgment – the prohibition of player quotas based on nationality and having the effect of preventing EU nationals from obtaining employment – might have seemed to have been of similarly small consequence. This is especially so given that professional cricket in the Northern Hemisphere, much less the European Union, is largely restricted to the United Kingdom. Recent history provides examples of small numbers of European players featuring in English first-class cricket, such as the Dutch players Baz Zuiderent (Sussex) and Roland Lefebvre (Somerset), but other instances are few and far between.

However, outside of cricket, the importance of obtaining a passport from an EU Member State in order to be able to secure free movement within the Union soon became apparent. The primary impact of the nationality aspect of the *Bosman* judgment upon the rules and regulations of football and other professional sports in Europe was a simple amendment, replacing quantitative restrictions on non-domestic nationals with limitations on non-EU or EEA nationals. Thus the acquisition of an EU passport became an important objective for any player originating from outside of these countries seeking to maximise their employment opportunities within the free trade area of the European Community. This is true to the extent that a small number of players

and agents in Italian football were prepared to engage in forgery in order to secure employment with leading EU-based clubs (Boyes, 2001a). French football has actively recruited and naturalised players from former colonies, to the extent that the French national side itself draws a significant proportion of its component players from these backgrounds. Similarly Spain, Italy and Portugal's close ties with South American nations provide a relatively speedy and trouble free route to naturalisation and the attendant ability to freely obtain employment within the Community. A similar trend has also been prevalent in the rugby codes.

Despite any initial thoughts that cricket would remain largely untouched by the *Bosman* judgment, there has been a steady creep of 'EU-qualified' players into the English first-class game. These are not players coming from the continent of Europe, but those emanating from cricket's more established heartlands – predominantly Australia, New Zealand and South Africa – holding dual nationality with an EU member state. The BBC estimated that in 2003 there were sixteen regular first team players in the (eighteen-club) county game qualified as 'domestic' players by dint of their dual nationality (BBCi, 2003a), and there were as many as twenty-two players qualified in this way on the counties' playing staffs (Birmingham Post, 2003). The Times calculated that as many as sixty 'overseas' players were registered by county sides for the 2004 season (The Times, 2004). These players have often been characterised as being 'mercenaries' by those critical of their involvement in the first-class game. This image has not been enhanced by the recent comments of the Worcestershire and Western Australia fast-bowler Matt Mason. Mason qualifies to play for Worcestershire as an 'EU national' by virtue of holding an Irish passport and was recently approached by Ireland to represent them in the 2007 World Cup. Mason has been quoted as saying:

The qualification period, 100 days between now and early 2005, meant I would have been away from home for a bit longer than I would like to be ... there was also the fact that the offer didn't excite me enough ... Ireland is not my country. I do have ties via my father but I always grew up wanting to play for Australia. (Sporting Life, 2003; BBCi, 2002b)

This has led to calls from players, past and present, administrators and the counties themselves to place restrictions on the numbers

of such players able to participate in the county game (Wisden Cricinfo, 2003). Of course, there may be some hypocrisy in the adoption of such a position. The England team have never been slow to call upon 'foreigners' with a British ancestry or passport to bolster the national team's chances. Players such as Basil d'Olivera, Alan Lamb and Graeme Hick are all examples of this process working in England's favour (BBCi, 2001). The excitement surrounding the recent qualification of the highly promising South African born batsman Kevin Pietersen has been palpable.

DEALING WITH *BOSMAN*: DUCKING A BOUNCER?

The concerns of the cricketing fraternity in this regard have been dealt with by means of the introduction of new rules that seek to place limitations on the type of cricket that 'EU-qualified' players may play. Regulation 2 of the England and Wales Cricket Board's 'Regulations Governing the Qualification and Registration of Cricketers' requires that to be registered without restriction a player must be an EEA national and have not: 7

within the 12 months leading up to April 1st immediately before the season in Question, either played cricket for any Full Member Country outside the EEA at U17 level or above, or played First Class Cricket in any such Full Member Country except as an overseas cricketer ... or in any other circumstances approved by the ECB. (England and Wales Cricket Board, 2005, p.230)

The Regulations also require that cricketers should make a declaration as follows, if so requested by the ECB: 8

To the England and Wales Cricket Board: I declare that it is not my desire or intention to play cricket for any Full Member Country outside the European Economic Area and accordingly I will not play, and I am not seeking and will not seek to qualify to play, in a Test Match, a One Day International Match, any other First Class Match or any other Match at Under 17 level or above for any such Full Member Country. (England and Wales Cricket Board, 2005, p.248)

If enforced these regulations would have the impact of excluding those cricketers qualified as 9

EU nationals, whilst also playing cricket as a domestic national in a third state, such as Australia, from playing county cricket in England. This is an issue that has not been encountered in football, as players will generally not be seeking to effectively exercise their dual status concurrently, at least in regard of their club teams. The approach of the ECB to this unique cricketing phenomenon appears to fly in the face of the rationale of the judgment in *Bosman*. The *Bosman* judgment outlawed the imposition of quotas on the composition of teams as being in breach of Article 39(2) EC which expressly provides that freedom of movement of workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment. These principles are further developed by Article 4 of Regulation 1612/68 EEC which specifically outlaws the subjection of Member State nationals to restrictions based on quotas or other similar limits on numbers. Here, this measure would effectively force EU nationals into the category of an 'unqualified' player, of which county teams are restricted to registering two per season (subject to the introduction of substitutes where a player becomes unavailable through injury or selection for a national team). This would clearly restrict those EU nationals holding dual nationality with a Test playing nation in terms of the numbers that could be registered during any one season.

In any case these rules, whilst they appear to have been effective in preventing current international cricketers from exercising rights as an 'EU national', appear to be less useful in preventing counties acquiring 'journeyman' players by means of dual nationality. The comments of Matt Mason, highlighted above, to the effect that he wished to represent Australia, seem to fly in the face of the ECB's regulations and suggest either an unwillingness or inability to enforce these rules. 10

BEYOND A BOUNDARY? THE *KOLPAK* PROBLEM

The ability of non-EU nationals to ply their trade freely within the EU has been further expanded by the decisions of domestic courts in Italy and Spain. These landmark decisions concerned two east-European footballers, Ukrainian Andrei Shevchenko and Estonia-born Valeri Karpin. Both had complained that nationality restrictions concerning the number of non-EU nationals allowed in teams offended against their employment rights as nationals of states with association agreements with the European Union. These cases replicate an earlier French decision in 11

Malaja v French Basketball Federation (Court Administrative d'Appel de Nancy, 3 February 2000), which determined that a Polish basketball player could not be discriminated against under the terms of nationality quota restrictions. A similar case was brought before the European Court of Justice by a Hungarian footballer, Tibor Balog. In *Tibor Balog v Royal Charleroi Sporting Club* (Case C-246/98), the threat of legal action was a prime driver behind the amendment by FIFA of the transfer regulations to the effect that the *Bosman* approach to transfers was extended beyond the EU and across the globe (Lowrey *et al*, 2001).

This approach has since been adopted by the ECJ 12 in the case of *Deutscher Handballbund v Maros Kolpak* (C-438/00 [2003] ECR I-4135 (hereafter '*Kolpak*'). The case involved a Slovakian handball player who was employed as a professional by a German second division team. As a national of a then non-European Economic Area (EEA) State, Kolpak was not considered by the German regulator to qualify for the benefits emergent from the decision in *Bosman*. On this basis the Handballbund limited the number of non-EEA nationals which a team could field in any one professional fixture. *Kolpak* suggested that an association agreement between Slovakia and the European Union entitled him to be treated in the same manner as an EEA national as regards treatment once in employment. The key element in the judgment of the European Court of Justice was that the relevant part of the association agreement was capable of direct effect, that is being applied by a EEA Member State court, and thus that sporting bodies were, in effect, unable to discriminate against nationals of association agreement countries once they were legally employed within an EEA Member State (Boyes, 2003; van den Bogaert, 2004). On its face, this is a relatively limited expansion of the *Bosman* ruling, as the EU has a small number of association agreements with other European states. However, the ruling has the potential for a significantly greater impact as a result of the existence of the Cotonou Agreement. This is an international agreement signed between the EU and nations from forming the ACP (Africa, Caribbean, Pacific) Group, now numbering over 70. Article 13(3) of the Cotonou Agreement contains provisions substantially similar to those applied in *Kolpak*, meaning that it is likely that this will spread the impact of the judgment to nearly 100 nations (Branco Martins, 2004). This is of particular importance to cricket, as this expands the non-discrimination requirement beyond the boundaries of the European Union and extends it to Test playing nations such as South Africa and those comprising the West Indies. The response of the cricketing authorities thus far has been to

treat *Kolpak* players in the same way as it has treated *Bosman* qualified players – simply requiring that they do not play international cricket for a Test side. The link with nationality is relatively tenuous in this respect, for International Cricket Council rules permit players to represent a nation with which they have no connection other than a semi-permanent residence status over the course of a four year period (International Cricket Council, 2003, p.167).

However, it is important to note that the *Kolpak* ruling applies only to the treatment of affected players once lawfully employed in an EU Member State, and does not provide a right of entry or access to employment for association agreement State nationals or a right of movement between EU Member States (Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura* [2005] 2 CMLR 11). Nevertheless, the judgment has some serious implications for cricket as it potentially shifts regulatory responsibility from the game's authorities onto the State, as the rules applied in the granting of work permits is now key if cricket is to avoid 'a flood of imported cheap foreign players' (Gardiner, 2001; Wisden Cricketer, 2004). The government in the United Kingdom has already taken steps to limit access to work permits by foreign players by amending the conditions of the Commonwealth citizens' working-holiday work permit scheme to explicitly exclude such workers from taking up positions as professional sportspersons (see <http://www.workingintheuk.gov.uk>). The combination of easy access to work permits with the *Kolpak* prohibition on discrimination in employment would have the impact of opening the market for first-class cricketers in England extremely widely. As it is, the ECB negotiates with the Home Office to reach agreement on specialist schemes for the issuing of work-permits for professional cricketers. One potential solution which appears not to have been considered would be for the ECB to undertake a 'shadow' work permit scheme for non-EU nationals wishing to take up employment as a county cricketer. Such a scheme could require that players from outside of the EU obtain a license from the ECB prior to taking up employment with a county club. This would mean that any potentially discriminatory measures could be applied before the player entered employment. As the *Kolpak* position only applies to workers once they are in employment, such an approach would arguably fall outside of this area of law.

HITTING BACK? THE ECB'S NEW STRATEGY

In early 2005 the ECB announced its new strategy designed to promote the fielding of

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English players in county cricket. Under this scheme counties will be paid around £200 per player per day for each England qualified player fielded by English counties in senior competition. This could result in the ECB making payments of as much as £20,000 per season per player, if a player appears in all of a county's games (BBCi, 2004)

This measure has been touted as providing a solution to the equal treatment requirements imposed by the *Bosman* and *Kolpak* cases. This appears to be somewhat naïve. A conservative ECJ might well take the view that this still constitutes discrimination based on nationality, given that it places UK nationals in an advantageous position, and thus amount to a potential breach of Article 39 EC and any similar *Kolpak* type provision. It is arguable that this measure could be considered not to be directly discriminatory, as outlined above the relative ease with which it is possible to acquire qualification for the English Test side might suggest that this is a requirement which does not necessarily depend wholly on being a UK national. Nevertheless, this would still mean that the ECB have failed to take account of the approach to indirect discrimination adopted by the European Court of Justice. Article 7(1) of Regulation 1612/68 states that a migrant worker must not be treated 'differently from national workers in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or reemployment.'

This new approach would be almost certain to fall foul of the ECJ's strict conception of indirectly discriminatory measures. Any measure which is 'likely to constitute an obstacle to the free movement of workers' (as to which see Case C-224/01 *Köbler v Austria* [2004] QB 848) is likely to be considered by the Court to be a *prima facie* breach of the free movement principle. It is significantly more likely that a UK citizen would be 'England qualified' than a national of any other state. A measure which would incentivise first-class counties to field England qualified players would of necessity discourage the employment of players without this qualification. The ECJ in *Bosman* considered that:

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 therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.

In this respect the new regulations adopted by the ECB appear to be something of a curiosity. Though the discrimination is not as direct as a simple ban on the fielding of non-English players, the effect will place significant burdens on 'foreign' cricketers seeking employment in the English game. Quite why the ECB believes that their new approach is any less likely to fall foul of Community law is unclear. Though the less direct approach may be marginally less objectionable than an outright ban, that it *prima facie* breaches Community law appears indisputable. 17

PLAYING WITH A STRAIGHT BAT – JUSTIFYING DISCRIMINATION

The approach adopted by the ECB is symptomatic of a broader, 'blanket' approach which appears to have been adopted by many team sports in the wake of the judgment in *Bosman*. The assumption appears to be that any discrimination based on nationality put in place by sports regulators will be considered illegal under Community law in this respect. This approach fails to take account of the context in which the regulation of cricket is occurring; cricket is not a global game like football, as already noted the UK is the only EU Member State in which professional cricket is played and which incorporates a nation having Test status. As a different game, with different characteristics, cricket may be better able to justify this discrimination than football or any other more ubiquitous sport. 18

QUOTAS

It is relatively easy to perceive cricket's situation as being analogous to that of football in respect of the operation of quota systems and thus seeing their imposition as contrary to EU law. It is, however, worth considering the rationale of the ECJ in its decision in *Bosman*. Despite the fact that an infringement of Article 39 EC rights can only be justified by the necessity to protect public policy, public security and public health – and that these justifications have traditionally been treated relatively narrowly – the Court was prepared to entertain the possibility that these restrictions might be excused in some way. Earlier, in the case of *Dona v Mantero* (Case 13/76 [1976] 2 CMLR 578), the Court had accepted that proportionate rules of a non-economic nature placing restrictions upon, or excluding 'foreign' players could be acceptable where they related to the particular context and nature of such matches and were thus of only sporting interest. 19

THE NATIONAL INTEREST

The first argument proposed in *Bosman* was that 20
the restriction on 'foreign' players was put in
place to maintain the link between the teams and
the country in which they were playing, the
second that it ensured there would be an
adequate supply of suitably proficient players
qualified to play for the national team.

The Court's response to these arguments was 21
unsympathetic. It saw the argument of an
essential allegiance between State and team as
being no more necessary than an allegiance with
the team's locality or region. Given that these
were not protected in the same way in respect of
club football, restrictions on nationality could
certainly not be justified in this manner. On this
point cricket might seek to argue that it is
differentiated from football. County clubs still tend
to draw the bulk of their domestic players from
young local talent brought up through the
academy system or through players emerging in
league cricket. For instance, until the early 1990s
Yorkshire CCC applied a self-imposed restriction
whereby it would only employ cricketers born, or
at least bred, within the old boundaries of the
county. The club still has a fairly inward look to it
in 2005: with the exclusion of its overseas players
and one *Kolpak* player seventeen of the twenty-
one man first team squad were born in the
county. Of the remaining four, England captain
Michael Vaughan was born in Manchester and
raised in Sheffield and Michael Lumb, born in
South Africa, is the son of a former Yorkshire
cricketer. Nevertheless, other counties, most
notably Surrey, have exercised a much more
aggressive transfer policy in acquiring players
from other counties, and this along with the
failure of the cricketing authorities to impose
analogous regulation in respect of regional
restrictions could well undermine any claim put
forward on this basis.

SUPPORTING THE NATIONAL TEAM

The ECJ's view on the 'adequate supply of 22
domestic talent' argument was similarly one of
indifference. The Court took the view that there
was little merit in this approach; players did not
necessarily have to play for a club in a given
country in order to represent it at international
level and while opportunities to develop as a
player in domestic competition would be
diminished by the abolition of quotas, there would
be reciprocal enhancements in the opportunities
available in other Member States. The same
cannot be said of cricket (indeed it is arguable
that the ECJ was mistaken in its analysis of the
labour market for professional football). England's
County Championship provides the only
opportunity to play First-Class professional cricket

within the boundaries of the EU and England is the region's only Test-playing nation. Outside of England, only the Netherlands, Scotland and Ireland compete at a significant international level and they are limited to associate membership of the ICC and thus not covered by the ECB's regulations. Although the *Kolpak* countries may owe an obligation to reciprocate in respect of the lifting of restrictions pertaining to discrimination in employment based on nationality they are not subject to the jurisdiction of the European Court of Justice and thus far nationality limitations in professional cricket do not appear to have been lifted in these countries. There is no such obligation to reciprocate from those nations, such as Australia and New Zealand, which do not have agreements with the EU, but which may effectively provide Bosman and Kolpak 'dual nationality' cricketers. Thus it is arguable that restrictions based upon the need to ensure a sufficient throughput of suitably talented cricketers for the national team could be justifiable in relation to cricket. Domestic cricket offers the only realistic means of providing cricketers of satisfactory ability to participate in Test cricket and the want of another suitable European league in which to develop means that this is not compensated for by the creation of opportunities elsewhere.

That development of talent for the international team is the genuine objective of the restriction can be evidenced by the other measures that have been put in place. The County sides are underpinned to a significant degree by the financial support that the ECB is able to provide as a direct result of the profits from international cricket. Any reduction in income from the international game would be likely to threaten the structure of domestic cricket and, as such, the underpinning of the national team is not a solely economic exercise. Because the income generated flows down to domestic cricket at all levels the continued commercial success of international cricket is essential for the continued viability of the sport at a domestic level. The objective is not an economic one, but a socio-cultural one, aimed at the continued development of the sport. This has been heavily emphasised recently by the controversy over the award of the rights to broadcast Test cricket between 2006 and 2008 to BskyB, which in effect removes home Test matches from free to air terrestrial television for the first time. The ECB has made it clear that this decision was motivated by the significant sum of money which BskyB was able to offer for the rights, which represents the main income stream for the English game as a whole and the source of important income for the 'grass roots' (Daily Telegraph, 2005). The importance of Test matches

as a source of income for cricket as a whole, and thus as a legitimate subject for protection, has been judicially recognised by the English High Court in the case of *Greig v Insole* ([1978] 1 WLR 302). The judicially perceived importance of television revenues to sport more generally is also demonstrated by the relatively liberal approach to the application of competition law to the acquisition and sale of rights to sporting events and the relatively few events which are protected as being of particular national import (Fraser and McMahon, 2002; Boyes, 2001b). The significance of the Test team to English cricket has been further emphasised by the introduction of a system of 'central contracts' whereby the ECB takes over the playing contract of a select number of top English players to enable them to be utilised appropriately in county competition, with the aim of ensuring their fitness for international matches and the continual development of their skills. Indeed, this programme has been expanded to allow the England management to exercise at least a degree of control over the cricketing activities of up to twenty five players over the course of the English summer as a part of the reforms announced in early 2005. That this evidences the importance of international cricket is clear, a similar system in football, where clubs dominate, would be unthinkable. Although relationships between counties and the ECB regarding the management of centrally contracted players has occasionally been strained, the type of 'club versus country' debate so frequently found in football and, to a lesser extent, rugby union, is relatively rare. In addition to the introduction of central contracts the structure of domestic cricket has been overhauled in recent years, with the introduction of a two league system in both first-class and limited-overs county cricket. These reforms have been with the explicit aim of providing an enhanced competitive environment for domestic cricketers, providing them with a more rigorous preparation for the challenges of Test Match cricket, and the significance of provision of protection for the national team is not one which has been disregarded by Community law:

The pursuit of a national team's interests constitutes an overriding need in the public interest which, by its very nature, is capable of justifying restrictions on the freedom to provide services. In order to meet that overriding need, it is possible to grant certain powers to the sports teams or to the national sports federations, which are also exclusively responsible for selecting

The ECJ has also specifically acknowledged the 24
importance of recruiting and training young
players.

COMPETITIVE BALANCE

A subsidiary point, taking into account the 25
importance of Test cricket both nationally and
internationally, is the need to maintain
competitive balance between the Test sides.
Sport is premised on the principle of uncertainty of
outcome, this is what makes it interesting to the
spectator (Weatherill, 2003, p.55). The reforms
initiated in terms of league structure and the
introduction of innovations such as Twenty20
Cricket also reflect the drive towards providing
greater excitement and attraction for England
cricket fans. English cricket became notorious as a
finishing school for the players who went on to
comprise the great West Indies' sides of the '70s
and '80s and Australian international batsman
Simon Katich has recently spoken of the great
value derived by 'foreign' players competing in
English cricket. It is no coincidence that the ECB's
ability to secure such a lucrative TV deal arises at
a time when the English Test team is truly
competitive and for the first time in two decades
has been in a position to defeat the all-
conquering Australian team. So the benefits of
denying potential competitors access to the
benefits of playing in England and the
corresponding increase in opportunities for
domestic players to develop is likely to further this
aim. Such an approach has certainly been
successful for Australian cricket. Although English
players often overwinter in the second tier of
competition – 'grade' cricket – access to the
Sheffield Shield, first-class cricket, is at a premium.
If evidence were needed of this, one only needs
to consider that Graham Thorpe, England's
leading Test batsman of the last decade will play
only a marginal role as overseas player for
Australian state side New South Wales when he
plays in Australia during the 2005/6 season.
Despite this the contrary view must also be
considered, namely that the participation of
overseas cricketers raises the level of domestic
competition and enhances the development of
England-qualified players. However, the
requirement imposed by the ECB that *Kolpak* or
Bosman cricketers are not current internationals,
coupled with the full-time nature of such cricket in
the modern era, has had the result that the
majority of cricketers taking advantage of the

Bosman/Kolpak rulings tend to be 'journeymen' or in the twilight of their career rather than top class international players.

In *Bosman* the ECJ acknowledged both competitive balance and youth development as legitimate objectives to be pursued by sporting bodies: 26

In view of the considerable social importance of sporting activities ... in the Community, the aims of maintaining a balance ... 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. (*Bosman*, para 106)

Community law has long recognised the importance of taking into account the social significance of sporting activity. In particular it was noted by Advocate General Cosmas in *Deliège* that this had been expressly identified by the Member States in the declaration attached to the Treaty of Amsterdam: 27

It should again be noted that highlighting that dimension of sport appears to have been one of the concerns of the Community's constitutional legislature during the discussions leading to the conclusion of the Treaty of Amsterdam. In Declaration No 29 on sport, the Conference 'emphasises the social significance of sport, in particular its role in forging identity and bringing people together.' Nor is it a coincidence that the same declaration recognises the need to listen to sports associations when important questions affecting sport are at issue. (*Deliège*, opinion of A-G Cosmas at para. 75)

The maintenance of competitive balance has been further acknowledged as a legitimate objective by the European Court of Justice, albeit in the context of transfer windows and the express outlawing the differential application of the provisions based upon nationality (Case C-176/96 *Jyri Lehtonen & Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische* [2000] ECR I-2681). Nevertheless, the Court has consistently recognised the need for sport to be able to put in place facilitative structural rules, as long as those 28

rules meet the requirements of proportionality under the 'rule of reason'.

A PROBLEM OF NATIONALITY?

One alternative, though less persuasive, approach which the ECB might adopt would be to frame their rules in such a way as to relate the qualification for participation in county competition to 'affiliation' to English cricket rather than nationality. As outlined above, the relative ease with which it is possible to qualify to represent England at international level (and indeed to represent more than one nation during a professional career) suggests that this could be arguable. In *Deliège* the European Court of Justice considered that rules might not be considered discriminatory where they related affiliation to an organisation rather than a nationality requirement. 29

So the ECJ could reasonably take the view that the extremely limited opportunities to play professionally elsewhere, coupled with the immense significance of Test cricket to the sport as a whole in the United Kingdom, might justify the imposition of restrictions of this nature. Indeed, the less harsh, incentivised approach recently adopted may assist in this, as it is not as discriminatory as an all-out ban; whilst encouraging the engagement of England qualified players it does not exclude the non-qualified 'foreigner' completely. 30

DEVELOPING THE EUROPEAN GAME

The ECB might wish to make one minor adjustment to the approach adopted and incentivise the counties to field genuinely 'European' players – i.e. those qualified to play international cricket for an EU Member State. This would encourage the development of cricket in the EU as a whole, whereas the uniform approach adopted in respect of both *Bosman* and *Kolpak* players could effectively stunt the development of cricket in Europe outside of the UK as European players would effectively be excluded from professional cricket in England and be similarly disadvantaged in respect of other major cricket nations outside of the EU. Such a change could further persuade the ECJ that the measures are genuinely targeted at the protection of a legitimate interest, rather than a straightforward discrimination based on nationality. Indeed English cricket has already made strides down this road with the inclusion of a Scottish team in the one-day league and alongside Ireland and the Netherlands in the C&G Trophy one-day competition – thus it might well be able to make out its case for imposing restrictions of this nature. Indeed, this approach has already been 31

supported by Advocate General Cosmas in *Deliège*:

In other words, the idea of representativeness also includes the need for balanced development of the sport at pan-European level; that need is directly linked to the ideal of noble competition which is, or at least should be, espoused in sport. Accordingly, the restrictions on access ... which are imposed ... in the interest of the balanced development of the sport at pan-European level, are justified, even if they may be equivalent to restrictions on the freedom to provide services. (*Deliège*, opinion of A-G Cosmas at para. 85)

THE FINAL OVER

Thus it seems likely that cricket has the capacity 32 to provide much stronger justifications for discrimination against 'foreign' players than is the case with football and other more ubiquitous sports. Indeed it seems strange that cricket, along with many other less mainstream sports, have simply accepted that law, in particular European Community law, applies to their sport in the same manner as it does in those with which the European Court of Justice has been concerned in its judgments. This 'one size fits all' approach seems at odds with the claim made by Weatherill that sport is often too ready to claim that it is 'special', and thus should receive individual treatment under Community law, without necessarily ever providing an intellectually and legally satisfying account of why this should be the case (Weatherill, 2004, p. 113). Conversely – and cricket is a prime example – it may also be the case that sports organisations have perhaps been too ready to accept the consequences of the application of European Community law without ever giving genuine consideration to the applicability of that law in the individualised circumstances of that sport. On this basis the ECB and their advisors would do well to consider the extent to which they might legitimately revise their rules in a more restrictive way, for the benefit of English (and European) cricket and to take heed of the view of Advocate General Cosmas in *Deliège*:

Community law does not require sport to develop in a particular direction, in the sense that it does not demand that individual sports become fully commercialised or fully professional. On the contrary, in principle, it respects the choices

made by the governing bodies of each sport, who are also the legitimate representatives of its practitioners, its fans and anyone with an interest in it generally. The Community legal order merely prohibits the commercialisation or professionalisation of sport in breach of the rules of the Treaty. I take the view, in other words, that the right of self-regulation which sport enjoys and to which I referred above is protected by Community law. It ensures that sporting institutions have the power to promote a sport in a manner which they consider to be most consistent with their objectives, provided that their choices do not give rise to discrimination or conceal the pursuit of economic interests. Accordingly, any decision by sporting institutions which has as its exclusive aim or objective the promotion of the social dimension of sport, over and above any intention of an economic nature, is in principle justified even where it entails a restriction on Community freedoms. This is dictated by the need to guarantee sport's right of self-regulation. (*Delière*, opinion of A-G Cosmas at para. 87)

Cricket must realise that it now operates in a new 33 politico-legal environment in the European Union, an environment in which the socio-cultural importance of sport is increasingly being recognised (Parrish, 2004, pp. 16-19 and Chapter 6; Foster, 2001, pp.43, 60-64; Parrish, 2001, pp. 33-42). In such circumstances English cricket may be more able than it realises to achieve its legitimate objectives in respect of the domestic and continental game through the imposition of restrictions on participation in county cricket. As Weatherill comments:

'Sport' is simply not a single social phenomenon and it is becoming increasingly apparent that it is fruitless, or perhaps worse, to attempt to develop a policy that will comfortably fit all the ambitions of those involved in sporting activity.' (Weatherill, 2004, p. 91)

Similarly in another piece Professor Weatherill 34 notes that, 'all too often it appears that sporting bodies feel little need to engage in sophisticated legal debate.' (Weatherill, 1999, p.24). In this instance the reference was to the perceived

arrogance of sporting bodies in assuming that their economic clout would be sufficient to confer immunity from Community law; nevertheless, the opposite might well be applicable in the context of cricket and perhaps the sport's authorities would be well advised to consider a more 'sophisticated' approach in their response to European Community law.

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