

European Sports Law and Policy Bulletin

THE BERNARD CASE SPORTS AND TRAINING COMPENSATION

THE BERNARD CASE

SPORTS AND TRAINING COMPENSATION

EDITORIAL BOARD

Editor in chief and founding editor:

Prof. Michele Colucci (European College of Parma and Tilburg University)

Scientific Board:

Prof. Roger Blanpain (Leuven and Tilburg Universities)

Prof. Raul Caruso (University of Milan)

Prof. Frank Hendrickx (Leuven and Tilburg Universities)

Prof. Richard Parrish (Edge Hill University)

Prof. Rob Siekmann (Asser Institute – The Hague)

Advisory Board:

Paolo Amato, Efraim Barak, Roberto Branco Martins, Eduardo Carlezzo, Juan De Dios Crespo, Domenico Gullo, Karen L. Jones, Paolo Lombardi, Felix Majani, Piermario Mattera, Ettore Mazzilli, Stuart McInnes, Wouters Lambrecht, Gianpaolo Monteneri, Omar Ongaro, José Juan Pintó Sala, Robert Pongracz, Rui Botica Santos, Stefano Sartori, Christian Sentinelli, Ruggero Stincardini, Blair Toner, Pieter Van den Brande, Wil Van Megen, Adam Whyte, Julien Zylberstein.

Assistant to the Editorial Board:

Antonella Frattini

Editorial Office:

Sports Law and Policy Centre

Via Cupetta del Mattatoio 8

00062 Bracciano, Rome, Italy

www.slpc.eu - info@slpc.eu

CONTENTS

EDITORIAL by <i>Michele Colucci</i>	11
INTRODUCTORY REMARKS by <i>Roger Blanpain – Michele Colucci – Frank Hendrickx</i>	13
CHAPTER I	
<hr/>	
JUSTIFICATION OF TRAINING COMPENSATION IN EUROPEAN FOOTBALL: <i>BOSMAN</i> AND <i>BERNARD</i> COMPARED by <i>Frank Hendrickx</i>	19
CHAPTER II	
<hr/>	
JUDGMENT OF THE COURT OF 16 MARCH 2010 IN THE CASE C 325/08: <i>OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD</i> <i>AND NEWCASTLE UNITED FC – ANALYSIS</i> by <i>Gianluca Monte</i>	37
CHAPTER III	
<hr/>	
THE <i>OLIVIER BERNARD</i> JUDGMENT: A SIGNIFICANT STEP FORWARD FOR THE TRAINING OF PLAYERS by <i>Julien Zylberstein</i>	51
CHAPTER IV	
<hr/>	
THE SYSTEM OF TRAINING COMPENSATION ACCORDING TO THE FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS by <i>Omar Ongaro</i>	69
CHAPTER V	
<hr/>	
THE <i>OLIVIER BERNARD</i> CASE COMPARED by <i>Wil Van Meegen</i>	93

CHAPTER VI

FROM <i>EASTHAM</i> TO <i>BERNARD</i> – AN OVERVIEW OF THE DEVELOPMENT OF CIVIL JURISPRUDENCE ON TRANSFER AND TRAINING COMPENSATION by <i>Vitus Derungs</i>	105
--	-----

CHAPTER VII

PROTECTION OF MINORS VS. EUROPEAN LAW by <i>Rob Simons</i>	121
---	-----

CHAPTER VIII

THE <i>BERNARD</i> CASE: AN OPPORTUNITY FOR ALL SPORTS STAKEHOLDERS by <i>Michele Colucci</i>	143
--	-----

SELECTED BIBLIOGRAPHY	157
-----------------------------	-----

ANNEX I

JUDGEMENT OF THE COURT OF JUSTICE <i>OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD AND NEWCASTLE UNITED FC</i>	161
---	-----

ANNEX II

OPINION OF THE ADVOCATE GENERAL	175
---------------------------------------	-----

ANNEX III

FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS	191
--	-----

ANNEX IV

COMPARATIVE TABLE ON TRAINING COMPENSATION IN 16 INTERNATIONAL SPORTS ASSOCIATIONS	197
--	-----

EDITORIAL

by Michele Colucci

The *European Sports Law and Policy Bulletin* («ESLPB») aims to foster the debate on the future of sport and the law at European level. In fact, after the entry into force of the Lisbon Treaty, for the first time in the history of the European Union the «specificity» of sport has been recognized in a primary source of EU law.

In this context the ESLPB aims to increase the knowledge of sports law and related policies and, at the same time, it wants to better identify the role of the EU institutions on one hand and the expectations of all Sports stakeholders on the other.

On this basis, the ESLPB will deal with both EU and national rules as well as with the regulations of sports associations and it will focus on the legal, economic, and political issues which affect sport at international, European, and at national level.

The ESLPB is designed for anyone who wants to learn and/or is willing to share with colleagues his/her analysis or opinion on the major issues concerning Sport and the European Union, their relationship, and, of course, their core values.

Finally, the *European Sports Law and Policy Bulletin* is addressed to sports law practitioners, policy makers, and sports enthusiasts, for whom, we hope, the ESLPB will represent an important source of information and inspiration in this dynamic and fascinating field.

Brussels, 1 September 2010

Michele Colucci

INTRODUCTORY REMARKS

by Roger Blanpain – Michele Colucci – Frank Hendrickx

The Bernard case, again confronts us with the relationship of sports to the law. The question runs as follows: is the compensation that football clubs ask for the training of players, at the occasion of a transfer of a player (amateur) to another club – in a European context - contrary to the free movement of workers? In the *Bosman* case (1995), where the player was at the end of his contract, the European Court ruled that a transfer fee was contrary to that freedom. Fifteen years later (2010), the Court decided in the *Bernard* case that training compensation was compatible with EU law. The Court ruled:

«In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken of the specific characteristics of sport in general, and football in particular, and of their social and educational function.

The Court's view, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players.

The Court stated that: a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be capable of actually attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.

It follows that the principle of freedom of movement for workers does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it».

This is a very significant judgement for many reasons. First of all, sports have an increasingly social importance with regard to recreation, social inclusion, health, economic, and employment. This is not only the case locally, but also nationally, across Europe (regional), and even worldwide.

Secondly, sports organisations, being part of our democracies are «autonomous», enjoying freedom of association, in the real spirit of autonomy. The organisers are free to go their way and to do things as they see fit. But this does not take away from the fact that sports organisations are part of society at large and must, like any other institutions or citizens, follow and take existing legislation into account, especially fundamental human-social rights (freedom of association, the principle that labour is not a commodity, freedom of expression, privacy and the like); the same goes for mandatory law.

Furthermore, and above all, the specificity of sport is recognised by EU case law and now explicitly by the Treaty on the Functioning of the European Union (art. 165). Specific rules have to be proportionate and objective. The Bernard judgement is a case in point.

So quite a number of questions arise:

- Is the reasoning of the Court regarding the importance of training and its consequent compensation payment also valid for vocational training of youngsters and workers in general, or is it only limited to sports?
- The judgment of the Court is rather vague:
 - Which training costs are intended to be covered by the judgement?
 - How should they be calculated?
 - Is a lump sum per category of club in line with the judgment or does each club have to prove its costs?
 - Should the amount be the same for all players, including the ones who are not «stars?»
 - Is it acceptable that a player cannot become a professional in another club because the compensation asked for is too high (e.g. 90.000 Euro per year of training)?
- Does the Bernard judgment apply to national transfers?
- What about the «home grown players»?
- Does the «specificity of sports» also apply to the (FIFA) solidarity payments in case of a transfer for a player?
- Does the «specificity of sports» also apply to the (FIFA) contractual stability rules for professional players?
- After the entry into force of the Lisbon Treaty what is the EU competence regarding sports?

These and other points are addressed in the articles that follow. A major point, which comes to the forefront, concerns the principle that payment of compensation should be organised in such a way that it does not infringe upon the individual freedom of movement of the players. Should payment not be made through a mutual fund, which is financed by clubs and gives drawing rights to clubs, whose players move on?

These and other questions were discussed during the occasion of the Conference organised by The European Sports Law and Policy Initiative (ESLPI) – Institute for Labour Law (University of Leuven) in Brussels (www.eslpi.eu) in co-operation with the Sports Law and Policy Centre (www.slpc.eu) in Brussels, 29 April 2010.

The program was as follows:

Introduction

Prof. Dr. Roger Blanpain

Tilburg University, Member of the Royal Flemish Academy of Belgium

The Bernard Case: a brief overview

Prof. Dr. Michele Colucci

Tilburg University, Lessius & K.U. Leuven

Bosman and Bernard compared

Prof. Dr. Frank Hendrickx

K.U. Leuven, Tilburg University

The International Sports Associations' viewpoints

Mr. Omar Ongaro

FIFA Players' Status and Governance

Mr. Julien Zylberstein

UEFA Professional Football Services

Mr. Wil Van Megen

FIFPRO Legal Department

Round table: Training compensations in a European and national perspective

Mr. Ivo Belet

Member of the European Parliament

Mr. Gianluca Monte

European Commission, DG EAC, Sport Unit

Mr. Frans Van Daele

European Council, Head of Cabinet of the President

This book contains the reports and the discussion of this very interesting conference as well as some relevant contributions.

Brussels, 1 September 2010

Roger Blanpain, Michele Colucci & Frank Hendrickx

CHAPTER I

JUSTIFICATION OF TRAINING COMPENSATION IN EUROPEAN FOOTBALL: *BOSMAN* AND *BERNARD* COMPARED

by *Frank Hendrickx**

SUMMARY: Introduction – 1. A brief overview of the discussion in the *Bernard* case – 2. Training compensation from *Bosman* to *Bernard* – 2.1 Facts and setting – 2.2 Historical connection – 2.3 Underlying problem – 2.4 Considerations with regard to training compensation – 2.5 Specificity of sport versus the broader labour market – 2.6 Employment law perspectives in and beyond sport – 3. Justified training compensation under EU free movement law – Conclusions

Introduction

On 16 March 2010 the European Court of Justice delivered its judgment in the case of *Olympique Lyonnais SASP v Olivier Bernard, Newcastle United FC*, in short referred to as the «*Bernard case*».¹ This contribution aims to provide an analysis of the *Bernard* case in comparison with the *Bosman* case.² The *Bernard* case shows a lot of resemblance with the *Bosman* case, but this is not very surprising. Both cases have quite a lot in common. In both cases, the European Court of Justice considered professional sport, more in particular football in a European context, as an economic activity. On each occasion, a violation was found of European Union law, as there was an irregular limitation of the free movement of workers. Both the *Bosman* and the *Bernard* case also have relevance outside the world of sport. They consider a broader labour market problem, which is the encouragement of training of talented workers and the protection of human capital investment of the employer.

The present contribution aims to go beyond a mere comparison of the *Bosman* and *Bernard* cases. Taking the cases together, an attempt is made to define the conditions under which a training compensation in professional football could be considered valid under European free movement law.

* *Professor of Labour Law, University of Leuven, Jean Monnet Professor, Reflect, Tilburg University.*

¹ ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR.

² ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

1. A brief overview of the discussion in the Bernard case

Olivier Bernard is a football player who signed a so-called «promising player»-contract («*joueur espoir*») with the French football club *Olympique Lyonnais*, for three seasons, with effect from 1 July 1997. Before that contract was due to expire, *Olympique Lyonnais* offered him a professional contract for one year from 1 July 2000.³ *Olympique Lyonnais* seemed to act in line with the applicable Professional Football Charter, which, at the time, regulated employment of football players in France. This Charter had the status of a collective agreement and included the position of «*joueurs espoir*», like Bernard (i.e. players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract).⁴ At the end of his training with a club, the Charter obliged a «*joueurs espoir*» to sign his first professional contract with that club, if the club required him to do so.⁵ Bernard, however, did not accept the offer of *Olympique Lyonnais* but, instead, in August 2000, signed a professional contract with the English club *Newcastle United*.⁶

On learning of that contract, *Olympique Lyonnais* sued Bernard before the *Conseil de prud'hommes* (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and *Newcastle United*. The amount claimed was EUR 53 357.16 which was the equivalent to the remuneration which Bernard would have received over one year if he had signed the contract offered by *Olympique Lyonnais*.⁷ The *Conseil de prud'hommes* considered that Bernard had terminated his contract unilaterally, and ordered him and *Newcastle United* jointly to pay *Olympique Lyonnais* damages of EUR 22 867.35 on the basis of Article L. 122-3-8 of the French Employment Code.⁸ This article provided: «In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure. (...) Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered».⁹

The Court of Appeal quashed the judgment of the *Conseil de prud'hommes*. It considered that the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training, also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 45 TFEU.¹⁰ At this procedure, it became clear, in particular, that there was no provision specifying the compensation to be paid in respect of training in the event of premature termination.¹¹

³ Cf. Opinion of the AG Sharpston, *Bernard*, para. 18, not yet published in the ECR.

⁴ ECJ, *Bernard*, para. 3.

⁵ ECJ, *Bernard*, para. 4.

⁶ Cf. Opinion of the AG Sharpston, *Bernard*, para. 18.

⁷ Cf. Opinion of the AG Sharpston, *Bernard*, para. 19.

⁸ Cf. Opinion of the AG Sharpston, *Bernard*, para. 20.

⁹ ECJ, *Bernard*, para. 6.

¹⁰ ECJ, *Bernard*, para. 12.

¹¹ Cf. Opinion of the AG Sharpston, *Bernard*, para. 21.

In further appeal, the French *Cour de cassation* considered that the Charter did not formally prevent a young player from entering into a professional contract with a club in another Member State, but nevertheless, its effect was to hinder or discourage young players from signing such a contract, inasmuch as breach of the provision in question could give rise to an award of damages against them.¹² In this context, and having regard to the principles of the *Bosman* case, the *Cour de Cassation* decided to stay the proceedings and refer the case to the European Court of Justice for a preliminary ruling. The question was whether the rules according to which a «*joueurs espoir*» may be ordered to pay damages if, at the end of his training period, he signs a professional contract, not with the club which provided his training, but with a club in another Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players.

2. Training compensation from *Bosman* to *Bernard*

As mentioned before, the *Bernard* case shows a lot of resemblance to the *Bosman* case. In fact, *Bernard* can be seen as an expected follow-up of the *Bosman* case. It would thus be appropriate to analyse the *Bernard* case in comparison with the *Bosman* ruling.

2.1 Facts and setting

The facts in the *Bosman* and *Bernard* cases are quite similar. Nevertheless, there is also some degree of difference. Jean-Marc Bosman was a professional football player and the contract with his club-employer came to an end before he wanted to move for playing in France. Olivier Bernard, a so-called «*promising player*» («*joueurs espoir*»), is considered, like Bosman, as a professional player. Bernard came at the end of his training period with his club-employer (*Olympic Lyon*), but not at the end of his contractual obligations versus his club-employer. His transfer to the English club *Newcastle United* implied a violation of his promise to play another year for *Olympic Lyon*. This violation, according to French labour law and as shown in the case, was qualified as a premature and unlawful unilateral termination of an employment contract for a fixed duration.

In *Bernard*, the Court held that, in such a case, the club which provided the training could bring an action for damages against the «*joueurs espoir*» under Article L. 122 3 8 of the French Employment Code, for breach of the contractual obligations. Article L. 122 3 8 of the French Employment Code, in the version applicable to the facts in the proceedings, provided that «In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure. (...) Failure on the part of the employee to comply with these provisions gives the

¹² ECJ, *Bernard*, para. 14.

employer a right to damages corresponding to the loss suffered».

The importance of the fact that the *Bernard* case differs at this point with *Bosman*, seems to be only relative. Indeed, the Court's conclusion in *Bernard* on the issue of training compensations can also be applied to players' transfers at the end of the contract. However, the *Bernard*-hypothesis may have some further relevance when related to the contract stability provisions and compensation-for-breach-principles in labour law. This will be shown further below.

2.2 Historical connection

On the basis of the *Bosman*-judgment, the then applicable FIFA-transfer system was to be considered contrary to European Union law. In order to find a solution for the issue of players' transfers and training compensation in European professional football, the European Commission and the football representatives came together. In August 2000 the football world expressed its willingness to modify the transfer rules. A procedure of negotiations started between FIFA and the European Commission and in a common statement of 14 February 2001, coming from Commissioners Monti, Reding and Diamantopoulou, as well as FIFA-president Blatter en UEFA-president Johansson, a declaration of principles was adopted concerning a number of essential issues that should lay the basis for a new FIFA-transfer regulation.

In this declaration, the principle of compensation for training costs was accepted. However, with regard to the method of calculation of these training costs, no agreement existed. The Commission emphasised that this was for the football bodies to develop, but also that in light of European Union law, these training costs must reflect the actual incurred costs of training and cannot form a disproportionate limitation of the free movement.

A final agreement was concluded on 5 March 2001 on the basis of an exchange of letters between Commissioner Monti and FIFA-president Blatter.¹³ This exchange of letters concerns a document called «*Principles for the amendment of FIFA rules regarding the International Transfers*». According to the words used by Blatter, the document reflects the discussion between FIFA and the European Commission. The document comprises a sort of package of principles relating to certain aspects involving the protection of minors, a training compensation for young players (i.e. until 23 years old), the principle of contract stability, a solidarity mechanism, the principle of transfer windows and the creation of an arbitration system.

These «principles» are, therefore, not the FIFA-regulation as such. These regulations were adopted separately and in more detail by FIFA, on the basis of the declaration of principle. In a meeting of the European Parliament on 13 March 2001, Commissioner Reding defended this method of operation and the

¹³ Cf. R. PARRISH, *Sports law and policy in the European Union*, Manchester, Manchester University Press, 2003, 148.

Commission's attitude by stating that the application in detail of the principles is a matter for FIFA to deal with and that the European Commission will see to it that the implementation of the «principles» will be effectively realised.¹⁴

On 5 July 2001 a new FIFA regulation concerning the status and transfer of players, involving a training compensation system, was adopted. The FIFA rules were later modified, but the system has remained the same every since. Therefore, there was a lot of interest to know how the European Court of Justice would evaluate this new training compensation system under European Union law, especially in the context of free movement of workers. It must be pointed out that the *Bernard* case does not involve an explicit evaluation of the FIFA regulations. However, both the involved parties as well as the Advocate-General noted the fact that FIFA adopted new rules at the time of the proceedings. These rules, as is explained in the Advocate-General's opinion and by the submissions of the parties, governed situations such as that of *Bernard* but were not in force at the material time of the case.

As they were adopted in order to seek compliance with the Court's case-law, in particular the judgment in *Bosman* and as the French Professional Football Charter contained comparable rules for domestic situations, some parties requests the Court to give «its blessing to the rules currently in force».¹⁵

However, the Court did not evaluate the FIFA rules, but it seems obvious that the reasoning of the Court in *Bernard* can, at least implicitly, be used to evaluate the existing FIFA rules.

2.3 Underlying problem

What is now the real issue in the *Bosman* and *Bernard* cases as far as training compensation is concerned? The *Bosman* ruling considered the existing transfer rules contrary to European Union law. The argument that this system was designed to address training efforts of clubs did not sufficiently convince the Court. However, the conflict between the FIFA rules and European Union law did not relate to the question *whether* the requirement to pay for training compensation would be legitimate. According to the *Bosman* ruling, training compensation is not, *per se*, unjustified. The question is, more precisely, *under what conditions* training compensation would be compatible with the free movement of workers and, in light thereof, how the fees for compensation should be calculated and payable.

In the negotiations with the European Commission, mentioned above, training compensation was also accepted as a matter of principle. But the exchange of letters of 5 March 2001 between the European Commission and FIFA did not give any indication as regards the exact amounts (of training compensation) that would be payable in the new system. For example, FIFA pointed to a cap for

¹⁴ *Idem*; Meeting of 13 March 2001.

¹⁵ Opinion of the AG Sharpston, *Bernard*, paras 60-61.

training compensation, in order to avoid a disproportionate obligation to pay such fees.¹⁶

From the beginning it was made clear that it is quite difficult to effectively calculate the training cost for every player individually. Therefore, a system of fixed tariffs would be applicable and clubs were categorised in conformity with their financial investment in training of players. Also in the new FIFA rules (since 2001), the idea of a fixed amount, depending on certain factors, for training compensation is laid down. The actual FIFA rules provide that «training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract».¹⁷ Also a training period is defined. «A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21».¹⁸

2.4 Considerations with regard to training compensation

It is relevant to have a look at the different considerations and positions of the European Court of Justice before drawing further conclusions with regard to the legal conditions under which training compensation may be justified in light of the European free movement provisions. There are some differences in the respective reasonings, but there is also a large degree of uniformity.

A number of principles are similar in both the *Bosman* and the *Bernard* case. In *Bosman*, the Court already approved the principle of training compensation as it made clear that, «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».¹⁹ Furthermore, in both *Bosman* and *Bernard*, the Court recognises that «the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players».²⁰ In both cases, the Court refuses to accept a system of compensation that does not relate to the actual costs of training.²¹

¹⁶ Cf. R. BLANPAIN, *The legal status of sportsmen and sportswomen under international, European and Belgian national and regional law*, The Hague, Kluwer Law International 2003, 52.

¹⁷ Article 20 of the FIFA Regulations on the status and transfer of players (*version 2010*).

¹⁸ Annex 4 of the FIFA Regulations on the status and transfer of players (*version 2010*).

¹⁹ *Bosman*, para. 106.

²⁰ *Bosman*, para. 108; Cf. *Bernard*, para. 41.

²¹ *Bosman*, para. 109; *Bernard*, para. 46 and para. 50.

A degree of variation in reasoning can be found in the Court's more detailed assessment of training compensation in professional football. In both the *Bosman* and *Bernard* case, the Court recognises that there are some difficulties in establishing an individual training cost per player. In *Bosman* the Court stresses that «it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain».²² In *Bernard*, the Court points out that «the returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club».²³

In *Bosman*, this fact seems to weigh in the Court's rejection of the (lump sum based) training compensation system at issue. Taking into account the point of the uncertainties in the calculation of costs, it concludes that «the prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs».²⁴ In *Bernard*, the Court does not seem to be hindered anymore by the argument of uncertainty in the calculation of training compensation, as it holds that «under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport».²⁵ The Court would nevertheless adopt further conditions for a valid training compensation system. But it would appear that the suggestion has been made that the issue of specificity of sport has added up to the defense of the training compensation schemes. That issue will be addressed below.

2.5 *Specificity of sport versus the broader labour market*

The issue of training compensation is not a discussion that only concerns professional football or sport. Also the broader labour market is concerned with investment in training and education of workers, in short human capital development. There is equally an employer concern of keeping a return on investment when a worker has been trained on his expenses.

²² *Bosman*, para. 109.

²³ *Bernard*, para. 42.

²⁴ ECJ, *Bosman*, para. 109.

²⁵ ECJ, *Bernard*, para. 44.

More precisely, the Netherlands government has pointed at this broader debate in the *Bernard* case. It referred to «the Lisbon Strategy adopted by the European Council in March 2000, and the various decisions and guidelines adopted since then with a view to its implementation in the fields of education, training and lifelong learning, accord primordial importance to professional training in all sectors». It continued «if employers can be sure that they will be able to benefit for a reasonable period from the services of employees whom they train, that is an incentive to provide training, which is also in the interests of the employees themselves».²⁶

In this light, it is then relevant to verify what role the specificity of sport has played in the Court's reasoning in the *Bernard* case. About this specificity of sport, indeed, a lot has been said already and it is often used as an argument for exceptions or exemptions with regard to sporting issues under European Union law.²⁷ It is to be remembered that the Court has held that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of the Treaty.²⁸ This doctrine, confirmed in later case law, has allowed the Court to exclude certain matters from the scope or operation of the Treaty. As the Court's proposition would seem to be that sport *does not*, in principle, fall under Community law, *unless* it concerns an economic activity, it could be referred to as creating a doctrine of specificity of sport. It has, however, also become clear that the Court's concept of what constitutes an economic activity has been a quite broad one.

Interesting is to first point to Advocate-General Sharpston's paragraph 30, where she notes that: «The specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether there is a prohibited restriction on freedom of movement. They must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector». This seems to confirm the view that the notion of specificity of sport cannot be used as a sort «standard clause» or «style formula» to exclude sport from any further requirement of justifying limitations on the free movement of workers. A mere reference to the specificity of sport is, therefore, not sufficient. It would thus also require that specific reasons for the justification of training compensation are being put forward. It is also clear that this possibility of specific justification stands open for any other sector of activity in the labour market. One might indeed imagine that other «sectoral» labour markets, such as those of pilots, artists, scientists, etc. are capable of producing a set of specific

²⁶ Opinion of the AG Sharpston, *Bernard*, para. 48.

²⁷ R. SIEKMANN, «*Is sport special in EU law and policy?*», in R. Blanpain, M. Colucci, F. Hendrickx (eds.) *The future of sports law in the European Union. Beyond the EU Reform Treaty and the White Paper*, Bull. Comp. Lab. Rel. 2008, Vol. 66, 37-49.

²⁸ ECJ, Case 36/74, *Walrave v. Union Cycliste Internationale*, ECR 1974, 1405, para. 4.

characteristics on the basis of which a limitation on the free movement by a training compensation scheme could be justified.

The advantage for the sports sector, however, is that the specific characteristics of sport are «officially» recognised by the European institutions and enshrined in the Treaty on the Functioning of the European Union. Article 165(1) TFEU provides that «the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function». The Advocate-General also states that «professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged rather than discouraged. More specifically, the European Council at Nice in 2000 recognised that the Community must ... take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured». In addition, the Commission's White Paper on sport and the Parliament's resolution on it both place considerable stress on the importance of training.²⁹

The Court has attached importance to this reference, where it states that «account must be taken, as the Advocate-General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU».³⁰

2.6 *Employment law perspectives in and beyond sport*

It has been suggested above that the meaning of the *Bernard* case is broader than the world of sport. The question then arises how the Court's judgment is related to employment law principles. Furthermore, as will be pointed out, there are also links with the contract stability issue in sport, such as in professional football.

During the time of the facts of the case, Bernard was employed with Olympic Lyon under a contract that was governed by French employment law as well as by a «Charter» which had the legal status of a collective agreement under French law.

It should be pointed out, in this context, that Bernard was held liable, under French law, for breach of his contractual obligations. More precisely, following article L. 122-3-8 of the French Employment Code, in the version applicable to the facts in the proceedings, he was held liable for breach of a fixed-term employment contract, that could «be terminated before the expiry of the

²⁹ Opinion of the AG Sharpston, *Bernard*, para. 47.

³⁰ ECJ, *Bernard*, para. 40.

term only in the case of serious misconduct or force majeure. (...) Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered».³¹ The Court has made specific, on the basis of the French Government's statements, that pursuant to the French Employment Code, «the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. In addition, as Newcastle United FC pointed out, the amount of that loss was established on the basis of criteria which were not determined in advance».³² The Court then comes to the conclusion that «under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities».³³

Relevant to note is that, like in France, some employment laws in European jurisdictions would operate the calculation of damages for breach of a fixed-term employment contract on the basis of the residual value of the contract or on a comparable lump sum basis.³⁴ The question is whether such determination may include lost investment in training. If the Court's reasoning in *Bernard* is followed, a lump sum compensation would not seem to be easily possible, since a direct relation with real and actual incurred costs is necessary. At the same time, the design of a lump sum calculation of damages, in an employment law context, including the case of breach of a fixed-term contract, may have certain advantages (e.g. legal certainty) and would probably, for the employer, still relate to lost investment in his employee, although not exclusively as incurred damages may relate to, for example, costs of finding and hiring an equally qualified replacement.

The (implicit) suggestion made in *Bernard* would be that a distinction is to be made between damages for breach on the one hand, and reimbursement of training costs on the other hand. It may be remembered that this issue has also been dealt with in the *Webster* case³⁵ of the Court of Arbitration for Sport (CAS). The situation of Webster, a football player who transferred from *Hearts* to *Wigan*, before the end of his fixed term-employment contract, was qualified as «a breach of contract».³⁶ Therefore, the CAS went into the issue of establishing criteria for the calculation of the compensation in case a fixed-term contract of employment

³¹ Currently, a new version of the French Labour Code is applicable. Information of current and older versions can be obtained at www.legifrance.gouv.fr/.

³² ECJ, *Bernard*, para. 47.

³³ ECJ, *Bernard*, para. 48.

³⁴ Cf. R. BLANPAIN and C. GRANT (eds.), *Fixed-term employment contracts. A comparative study*, Bruges Vanden Broele, 2009, 441.

³⁵ Arbitration CAS 2007/A/1298 *Wigan Athletic FC v/ Heart of Midlothian* & CAS 2007/A/1299 *Heart of Midlothian v/ Webster* & *Wigan Athletic FC* & CAS 2007/A/1300 *Webster v/ Heart of Midlothian*, award of 30 January 2008 (further referred to as «CAS, *Webster*»); For comments and analysis, see: I. BLACKSHAW, «The CAS Appeal Decision in the Andrew Webster case», *Int. Sports Law J.*, 2008, Nr. 1-2, 14; F. DE WEGER, «The Webster Case: Justified Panic as there was after *Bosman*?», *Int. Sports Law J.*, 2008, Nr. 1-2, 20.

³⁶ CAS, *Webster*, para. 118.

was terminated. The CAS Panel clearly stated that «compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and players are put on equal footing in terms of the compensation they can claim or are required to pay. In addition, it is in the interest of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible».³⁷

In search for a method of calculating the damages for the player's breach of contract, the CAS Panel noted that a distinction should be drawn between the contract stability issue (article 17 of the FIFA Regulations) and training compensation: «A second preliminary point is that according to the wording of its first paragraph article 17 is not intended to deal directly with Training Compensation – such compensation being specially regulated in detail by other provisions of the FIFA Status Regulations».³⁸ Then it continues: «The Panel finds therefore that in determining the level of compensation payable to Hearts under article 17 of the FIFA Status Regulations as a result of the Player's unilateral termination without cause, the amounts having been invested by the Club in training and developing the Player are irrelevant, i.e. are not factors that come into consideration under article 17. Consequently, the Panel disagrees with Heart's submission that among the relevant circumstances in calculating compensation for unilateral termination under article 17 “... is the sporting and financial investment Hearts has made in training and developing the Player during the last 5 years”».³⁹ It is known that, as far as the calculation for damages of breach of contract is concerned, the CAS opted for a calculation of damages based on the «residual value» of the contract, i.e. the payment of «the remuneration remaining due to the Player under the employment contact upon its date of termination, which the parties have referred to as the residual value of the contract».⁴⁰

The *Bernard* case leaves room for interpretation and discussion. In the case, it is not made very explicit how the shift is to be made between the determination of «compensation for breach» and the calculation of «training compensation». Taking into account the facts of the case, it seems likely that the French Football «Charter», holding Bernard's obligation to sign his first professional contract with the training club, including no specific sanction otherwise, but for a non-competition clause (at least within France), has been decisive in (implicitly) qualifying the training employer's claim and the subsequent award for damages, as a compensation of training costs. Also the Court of Appeal of Lyon, who considered the Charter's provisions as illegal, paid much attention to the fact that the training club was entitled to propose a professional contract to the player, whereby only if the club would not make use of this prerogative, the player would

³⁷ CAS, *Webster*, para. 73.

³⁸ CAS, *Webster*, para. 54.

³⁹ CAS, *Webster*, para. 55.

⁴⁰ CAS, *Webster*, para. 87.

be free to go to another club. But if the training club would make the offer, the player who refused, was not entitled to play for another club in France for a period of three years without the training club's consent. The Court of Appeal, furthermore, stressed that the Charter did not provide a training compensation clause.⁴¹ Nonetheless, there remains some room for discussion. If national employment termination laws would apply a system of lump sum based calculation of damages for breach, such as damages based on the residual value of the employment contract, the question remains what the *Bernard* judgment means with regard to the conditions of including the item of lost investment in training. It is, furthermore, predictable that the *Bernard* case will be used to challenge non-competition clauses in employment contracts under EU free movement law.

3. *Justified training compensation under EU free movement law*

On the basis of the case law of the European Court of Justice, as developed in *Bosman* and *Bernard*, taking into account the considerations of both the respective Advocates-General as well as those of the Court itself, an attempt can be made to synthesise the conditions of justification of training compensation schemes under European free movement law.

In *Bosman*, as well as in *Bernard*, the Court accepted the principle that training compensation schemes may be acceptable, as it made clear that «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».⁴²

It would, however, seem that the following conditions should be met:

1. Reimbursement of real costs: Both the *Bosman* and *Bernard* rulings make clear that training compensation must be related to the real and actual costs of training.⁴³ As the Advocate-General in the *Bosman* case stated, «the transfer fee would actually have to be limited to the amount expended by the previous club (or previous clubs) for the player's training».⁴⁴

2. Individual and global costs: The Court has accepted that not only individual costs, but also a relevant proportion of a club's global training costs may be part of the training compensation. In both *Bosman* and *Bernard* the degree of difficulty of calculating (real and actually incurred) individual training costs has been addressed. In *Bosman*, it is suggested that this is problematic «because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain».⁴⁵ Also in *Bernard*, the Court has

⁴¹ Cour d'Appel de Lyon, Chambre Sociale, Arrêt du 26 février 2007, R.G. 03/06278.

⁴² ECJ, *Bosman*, para. 106.

⁴³ Cf. ECJ, *Bosman*, para. 109; *Bernard*, para. 50.

⁴⁴ Opinion of the AG Lenz, *Bosman*, para. 239.

⁴⁵ ECJ, *Bosman*, para. 109.

remarked that «investments in training made by the clubs providing it are uncertain by their very nature».⁴⁶ In *Bernard*, the Advocate-General, adopts the view that, «since only a minority of trainee players will prove to have any subsequent market value in professional football, whereas a significantly greater number must be trained in order for that minority to be revealed, investment in training would be discouraged if only the cost of training the individual player were taken into account when determining the appropriate compensation. It is therefore appropriate for a club employing a player who has been trained by another club to pay compensation which represents a relevant proportion of that other club's overall training costs».⁴⁷ The Court's words in *Bernard* are slightly different but seem to stay at the same bottom line in referring to «taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally».⁴⁸ The Court does not refer to the Advocate-General's opinion that, «if the player himself were to bear any liability to pay training compensation, the amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs».⁴⁹

3. Proportionate mechanism for different training clubs: According to the Advocate-General, «it may transpire that the training of a particular player has been provided by more than one club, so that any compensation due should, by some appropriate mechanism, be shared *pro rata* among the clubs in question».⁵⁰

4. Decreasing obligation: In the *Bosman* case, the Advocate-general pointed out that, for a training compensation to be valid, it «would come into question only in the case of a first change of clubs where the previous club had trained the player. Analogous to the transfer rules in force in France, that transfer fee would in addition have to be reduced proportionately for every year the player had spent with that club after being trained, since during that period the training club will have had an opportunity to benefit from its investment in the player».⁵¹ The obligation to pay a reimbursement of training costs must, therefore decrease over time. In other words, the longer an employer (club) has been able to receive return on its investment in the training of a given player, the higher the free movement should be respected.

5. Payment by club or player: The Advocate-general pointed out, in the *Bernard* case, that the validity of a training compensation scheme should not always require that only the employer (cf. the player's new club) should be liable for payment. As the Advocate-General in *Bernard* points out: «I am less convinced by a third concern which has been voiced, namely that the liability to pay the compensation should lie only on the new employer and not on the former trainee».⁵² The Advocate-

⁴⁶ ECJ, *Bernard*, para. 42.

⁴⁷ Opinion of the AG Sharpston, *Bernard*, para. 52.

⁴⁸ ECJ, *Bernard*, para. 45.

⁴⁹ Opinion of the AG Sharpston, *Bernard*, para. 57.

⁵⁰ Opinion of the AG Sharpston, *Bernard*, para. 53.

⁵¹ Opinion of the AG Lenz, *Bosman*, para. 239.

⁵² Opinion of the AG Sharpston, *Bernard*, para. 55.

General explains that «such considerations will, however, vary according to the way in which training is generally organised in a particular sector. If, as appears to be the case, training of professional footballers is normally at the clubs' expense, then a system of compensation between clubs, not involving the players themselves, seems appropriate».⁵³

There may nevertheless be a difference in calculation, depending on who is liable for payment of training compensation. According to the Advocate-General, «if the player himself were to bear any liability to pay training compensation, the amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs».⁵⁴

6. Free movement not impossible: Both in *Bosman* as well as in *Bernard* it has been emphasised that any system of training compensation should be proportionate in relation to the limitation of the free movement of workers and not go beyond what is necessary.⁵⁵ This would imply that the amounts calculated for training compensation may pose a limitation, but should not put a disproportionate burden on the free movement of workers. Arguably, this limits the amounts that can be asked for training compensation. It is not very clear, however, what amount would exactly be allowed or rejected under free movement law. Furthermore, rather than focusing on its height or any maximum of the amount,⁵⁶ the Court rather criticised the unspecified (lump sum) nature of the training compensation due to the absence of established and predetermined criteria for its calculation.⁵⁷ But there is room to assume that, even with a predefined and duly calculated amount of training compensation, a disproportional limitation of the free movement of workers may still arise, taking into account the height of the amount. The question has been somewhat indirectly touched by the Advocate-General in the *Bosman* case. He stated: «Nor can it seriously be argued that a player, for example, who is transferred for a fee of one million ECU⁵⁸ caused his previous club to incur training costs amounting to that vast sum».⁵⁹ This opinion may be linked to the difficulty of matching real costs of training with such a high amount. But it may also be seen in light of the degree of interference with the free movement of workers.

Conclusions

The *Bosman* case was (and still is) seen as the most significant case in the series of sport case law that the European Court of Justice has produced. At the time, it

⁵³ Opinion of the AGI Sharpston, *Bernard*, para. 57.

⁵⁴ Opinion of the AG Sharpston, *Bernard*, para. 57.

⁵⁵ ECJ, *Bosman*, paragraph 104; *Bernard*, paras 38-48.

⁵⁶ In *Bernard*, the damages were set by the French *Conseil de prud'hommes* at 22 867.35 Euro (cf. *Bernard*, para. 11; the original amount claimed was 53 357.16 Euro, cf. *Bernard*, para. 10).

⁵⁷ Cf. ECJ, *Bernard*, paras 46 and 47.

⁵⁸ Comparable with one million Euro (ECU stands for European Currency Unit, an old unit used to indicate a basket of national European currencies, before the introduction of the Euro).

⁵⁹ Opinion of the AG Lenz, *Bosman*, para. 237.

was highly commented and discussed in public and academic media. The *Bosman* case, for sure, still earns this landmark status. In comparison, the *Bernard* case is less widely known and discussed, although it is quite clear that it is a natural follow-up of the *Bosman* case and its relevance also seems to go beyond the interests of the sport sector. The free movement cases, not so surprising, touch important aspects of employment law. In *Bernard*, the issue of human capital investment of employers is at stake. It leaves some room for further discussion as this is a broader problem in employment law in general although, in the case at hand, it is translated to the specific football sector. It shows that there is a strong relationship between two of the central issues already at stake in the *Bosman* case, underlying the (old) transfer system: development and training of young players and contract stability. In *Bernard*, the breach of a (collectively agreed) promise to play after having completed a training period seems to stand at the junction of both contract stability (from the facts it seems that, according to French employment law, a fixed-term contract was unlawfully terminated by Bernard and damages needed to be determined) and training compensation (the calculation of the damages should correspond with real and actually incurred training costs). It does not always appear very clear how these two issues are to be kept apart (although in the FIFA rules, as in the *Webster* case,⁶⁰ they remain separate issues). It would, eventually, seem that the (new) FIFA regulations on the status and transfer of players receive a large degree of implicit approval by the Court – but for the height of the amounts actually paid during players' transfers, which may run into rather high numbers. On this latter point, the *Bosman* case, including the Advocate-General's opinion, might still be relevant. While the Court, in *Bernard*, seems to have been willing to accommodate the logics of the sports labour market, the *Bosman*-principles remain quite leading in its case law.

⁶⁰ See above: Arbitration CAS 2007/A/1298 *Wigan Athletic FC v/ Heart of Midlothian* & CAS 2007/A/1299 *Heart of Midlothian v/ Webster & Wigan Athletic FC* & CAS 2007/A/1300 *Webster v/ Heart of Midlothian*, award of 30 January 2008.

CHAPTER II

**JUDGMENT OF THE COURT OF 16 MARCH 2010 IN THE CASE C
325/08: OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD AND
NEWCASTLE UNITED FC**

ANALYSIS

by *Gianluca Monte**

SUMMARY: 1. Introduction – 1.1 The facts – 1.2 The questions – 1.3 The ruling – 1.4 Analysis – 2. The legal scope of the ruling – 3. The consequences of the ruling in other sectors besides sport – 4. The relation of the ruling with the Court's past case law – 4.1 The application of EU law to sport – 4.2 The application of EU law to acts adopted by private persons – 4.3 The definition of obstacles to free movement independent of nationality – 4.4 The definition of the recruitment and training of players as legitimate objective – 4.5 The analysis of training compensation schemes – 5. The question of the recognition of the specificity of sport – 6. The question of the validation of existing training compensation schemes, notably in football – 7. The question of the role of amateur sport

1. Introduction

The ruling of the Court in the Bernard case is of particular importance, as it is the first ruling, covering a sport-related case, adopted after the entry into force of the Treaty on the Functioning of the European Union (TFEU). The ruling makes an explicit reference to article 165 TFEU which includes provisions on the objectives and instruments for the EU's action in the field of sport. The ruling also gives further insight into the Court's interpretation of the issue of free movement of professional sportspeople, 15 years after the landmark Bosman ruling.¹ The focus of the Bernard ruling concerns limitations to the EU's free movement rules (article 45 TFEU) arising from training compensation schemes existing in sport. The concept

* The author of this article works as policy officer in the European Commission, Directorate General for Education and Culture, Sport Unit. This text is strictly personal and does not express the opinion of the European Commission.

¹ ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

of the specificity of sport is explicitly mentioned by the Court, which in this ruling provides useful elements of guidance on the application of EU law to professional sport.

1.1 *The facts*

The Charter of Professional Football regulates employment of football players in France, having the status of a collective agreement. Former article 23 of the Charter, concerning «joueur espoir» (players between the ages of 16 and 22 employed as trainees by a professional club) stipulated that at the end of his training, a «joueur espoir» was obliged to sign his first professional contract with the training club, if the club required him to do so.

If the player refused to sign, the training club could bring an action for damages against the player under Article L. 122–3–8 of the Code du travail (Employment Code) for breach of contractual obligations. In particular, Article L. 122–3–8 of the Code du travail provided that failure on the part of the employee to comply with contractual obligations gives the employer a right to damages corresponding to the loss suffered.

On 12 August 1997, French football player Olivier Bernard signed with Olympique Lyonnais a «joueur espoir» contract for the duration of three seasons with effect from 1 July 1997. At the expiration of this contract, Olympique Lyonnais offered to Mr. Bernard to sign a professional contract for the duration of one year starting on 1 July 2000. Mr. Bernard refused to sign, opting instead for a professional contract with English club Newcastle United FC.

Olympique Lyonnais lodged a complaint against Mr. Bernard and Newcastle United FC before the *Conseil de prud'hommes* (Labour Tribunal) in Lyon, asking for damages amounting to EUR 53,357.16 – the amount of the remuneration which Mr. Bernard would have received if he had signed the one-year contract offered by Olympique Lyonnais. The *Conseil de prud'hommes* on 19 September 2003 ordered Mr. Bernard and Newcastle United FC to jointly pay Olympique Lyonnais damages of EUR 22,867.35 on the basis of Article L. 122–3–8 of the Employment Code.

On 26 February 2007, the Court of Appeal of Lyon overruled this sentence, considering that the provisions laid down in article 23 of the Charter were contrary to EU law, in particular to article 45 TFEU (ex article 39 TEC). The French Cour de Cassation subsequently observed that article 23 of the Charter did not formally forbid a player to sign his first professional contract with a club in another Member State, although the player might be dissuaded to do so at the risk of being condemned to pay damages to the training club. As a consequence, the Cour de Cassation considered that the dispute raised problems of interpretation of article 45 TFEU and on 9 July 2008 it decided to bring the question before the Court of Justice of the EU.

1.2 The questions

The questions for preliminary ruling raised by the French Court are as follows:

1. Does the principle of the freedom of movement for workers laid down in article 45 TFEU preclude a provision of national law pursuant to which a «joueur espoir» who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?
2. If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?

1.3 The ruling

The Court replied to the questions giving the following ruling:

Article 45 TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

A scheme such as the one at issue in the main proceedings, under which a «joueur espoir» who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

1.4 Analysis

The following elements deserve to be examined in detail with a view to outlining an analysis of the nature and consequences of the Court's ruling in the Bernard case:

1. The legal scope of the ruling;
2. The consequences of the ruling in other sectors besides sport;
3. The relation of the ruling with the Court's past case law notably with regard to:
 - a. The application of EU law to sport;
 - b. The application of EU law to acts adopted by private persons;
 - c. The definition of obstacles to free movement independently of nationality;
 - d. The definition of the recruitment and training of players as legitimate objectives;
 - e. The analysis of training compensation schemes.

Three questions raised by the ruling also need to be closely scrutinised:

4. The question of the recognition of the specificity of sport;
5. The question of the validation of existing training compensation schemes, notably in football;
6. The question of the role of amateur sport.

2. *The legal scope of the ruling*

The scope of the Bernard ruling is clear: the reference for preliminary ruling concerns article 45 TFEU (ex article 39 TEC) on freedom of movement for workers. This article states that any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other work conditions has to be abolished; it also grants the right to EU citizens to move freely within the territory of the Member States to accept offers of employment actually made, subject to limitations justified by reasons of public policy, public security or public health.

The dispute in the Bernard case concerns a potential obstacle to the freedom of contract, notably the freedom to sign the first contract as professional player. The Court's ruling therefore does not address generally free movement of citizens or free movement of students and trainees – these categories of persons are covered by other articles in the Treaty. The focus of the case is on the employment relationship between a club and a player: the same subject matter of the Bosman ruling.

The Court does not provide an interpretation of the application of EU competition law, either. As underlined by the Advocate General in paragraph 43 of her opinion, the case has in fact potential implications with regard to competition law, but these were not raised by the referring court and the observations submitted by the Member States and the Commission do not touch upon this issue. Besides, potential competition law implications would not exclude the scrutiny of the case under the angle of free movement rules.

3. *The consequences of the ruling in other sectors besides sport*

An important aspect of the case concerns the possible effects of the ruling on other sectors of the economy besides sport. As declared by the Advocate General at the hearing organised on the case, this is the very reason why the Court decided to meet in Grand Chamber: the repercussions of its ruling could in fact touch upon a very large segment of employment relations across Member States.

This point was raised in the written observations submitted by the government of The Netherlands, who noted that the case at hand may be seen as exemplifying the issue of the need to protect the investment in training made by employers.² Putting into question the possibility for an employer offering training

² Opinion of the Advocate General Sharpston, *Bernard*, para. 29, not yet published in the ECR.

to an employee to safeguard the training results from the free riding of competing employers may have significant consequences for sectors where this practice is well established (such as, inter alia, the health care sector or the training schemes in places for airplane pilots).

At the hearing, upon solicitation by the Advocate General and the judges, all the parties replied that the case at hand had to be examined as a case concerning specifically the training system existing in sport, more particularly in professional football. As a consequence, both the Advocate General and the Court decided to restrict the judgment to the specific context of sport, thereby excluding possible side effects in other sectors.

As observed by the Advocate General, the specific characteristics of sport in general and of football in particular need to be taken into account when examining the possible justifications for the restriction analysed in this case. The same approach would have to be followed to examine justifications for restrictions established in other sectors of the economy.

4. *The relation of the ruling with the Court's past case law*

As underlined above, the Bernard ruling provides an interpretation of the EU's free movement rules in the area of professional football following the Bosman ruling which marked a watershed in this respect. The Court examines in the Bernard case the compatibility with EU law of schemes for training compensation, which was one of the issues raised in the Bosman case. Other aspects analysed in the Bernard case were also covered by the Bosman ruling. It seems therefore appropriate to focus the analysis of the relation of the Bernard ruling with the Court's case law on the Bosman ruling; other rulings in the area of free movement and sport may also be considered in this framework.

The following issues deserve to be highlighted when comparing the Bernard ruling with previous case law:

- a. The application of EU law to sport;
- b. The application of EU law to acts adopted by private persons;
- c. The definition of obstacles to free movement independent of nationality;
- d. The definition of the recruitment and training of players as a legitimate objective;
- e. The analysis of training compensation schemes.

4.1 *The application of EU law to sport*

In the Bernard ruling, the Court does not depart from the position taken in Bosman: sport is subject to European Union law in so far as it constitutes an economic activity.³ This formulation is identical to that used in the first ruling of the Court on a sport case.⁴ The impression is that nothing has changed in the way EU law

³ ECJ, *Bernard*, para. 27; ECJ, *Bosman*, para. 73.

⁴ ECJ, 12 December 1974, *Walrave & Koch*, 36/74, ECR 1405, para. 4.

applies to sport since 1974, when the EU was still named the EEC: it is the economic dimension of sport that puts it under the spotlight of European justice.

However, in the meantime, major evolutions took place: the EEC transformed itself from an economic community into a union of peoples underpinned by common values; more importantly, for the case at hand, sport became an area where the EU has a competence to carry out actions to support, coordinate and supplement the action of the Member States (article 6 TFEU). The objectives of the EU in this **area** go beyond the economic dimension of sport and are laid down in article 165 of the Treaty. They relate in particular to the social and educational aspects of sport, and to its structures based on voluntary activity – elements that may be seen in antithesis with the economic dimension of sport. The Court itself for the first time mentions article 165 in the *Bernard* ruling.⁵

How to explain this perceived contradiction? The most plausible explication seems to be linked to the case that was brought before the Court. The dispute concerns the interpretation of the article of the Treaty dealing with free movement of workers and it has clear economic consequences. By noting that sport is subject to the application of EU law when it has an economic dimension, the Court underlines that the inclusion of sport as an area of responsibility for the EU does not imply its exclusion from horizontal provisions of the Treaty in areas such as the Internal Market and competition law. Insofar as sport constitutes an economic activity, the relevant EU rules will continue to be applicable to it.

4.2 *The application of EU law to acts adopted by private persons*

The Court confirms the interpretation given in *Bosman*, that «since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application».⁶ This interpretation also draws back to the first landmark ruling of the Court in the field of sport.⁷

This shows a consistency of the Court in underlining that private acts such as the regulations adopted by sport federations, when they have an effect on the working conditions of professional players, should comply with EU rules on free movement of workers. Extrapolating from the case at hand which concerns specifically article 45 TFEU, it is possible to say that the same private acts should comply with other relevant provisions of the Treaty – notably provisions on competition law (articles 101 and 102 TFEU), on prohibition of discrimination on grounds of nationality (article 18 TFEU) and on free movement of citizens (article 21 TFEU).

⁵ ECJ, *Bernard*, para. 40.

⁶ ECJ, *Bernard*, para. 31; ECJ, *Bosman*, para. 84.

⁷ ECJ, *Walrave & Koch*, para. 19.

4.3 *The definition of obstacles to free movement independent of nationality*

Again, the Court repeats the formulation used in *Bosman* whereby «national 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 restrictions on that freedom even if they apply without regard to the nationality of the workers concerned».⁸

In the case at hand, the rules laid down in the French Charter were applicable to all «joueur espoir» independent of their nationality. The Court reminds on this point that direct or indirect discrimination on the basis of nationality is not the only reason that may lead to consideration of a sporting rule as non-compliant with the EU's Internal Market rules. Even rules which are indistinctively applicable to all players but which may deter or discourage them to find employment in another Member States should be scrutinised to assess whether they represent a disproportionate obstacle to the free movement of workers.

4.4 *The definition of the recruitment and training of players as legitimate objective*

In the *Bosman* ruling, the Court identified two legitimate objectives that may justify restrictions to the application of EU law in view of the social importance of sport in Europe: the maintenance of a balance between clubs by preserving a certain degree of equality and uncertainty as to results and the encouragement of the recruitment and training of young players.⁹ In the *Bernard* ruling, the second objective is once again upheld by the Court.¹⁰

In line with the policy objectives of the Union as laid down in article 166 TFEU, the Court confirms the importance of vocational training as an essential element to facilitate the integration of trainees and workers in the labour market. In the case at hand, however, the purpose of training is not only limited to its function as a tool to improve skills and capacities that will be used in the workplace. As underlined by the Advocate General,¹¹ professional football is not only an economic activity in Europe; it also enjoys a considerable social importance, particularly when one looks at the links existing between professional and amateur sport and at the virtues of amateur sport. The Advocate General stresses this point with multiple references, notably to the Nice Declaration, to the White Paper on Sport and to the European Parliament's Resolution on the White Paper. The Court simply mentions the second subparagraph of article 165(1) TFEU which in the meantime has entered into force.

The persistence of the Court in underlining the importance of promoting training in sport, both as a factor of employment and as an essential element of the

⁸ ECJ, *Bernard*, para. 34; ECJ, *Bosman*, para. 96.

⁹ ECJ, *Bosman*, para. 106.

¹⁰ ECJ, *Bernard*, para. 39.

¹¹ Opinion of the Advocate General Sharpston, *Bernard*, para. 47.

social and educational dimension of sport activities, is significant as it serves as indicator to assess measures and rules that were not brought to the attention of the Court in the case at hand. In particular, various schemes aimed at encouraging the training of locally-grown athletes have been adopted by sport authorities in a number of disciplines. Based on the Court's ruling in the Bernard case, such schemes may be considered as pursuing a legitimate objective insofar as their purpose is to foster the training of young sportspeople.

4.5 *The analysis of training compensation schemes*

This is the element of novelty included in the Bernard ruling when compared with previous rulings and notably Bosman. In the Bosman case the Court analysed transfer rules, and notably transfer fees that had to be paid by a club to another club at the expiry of a player's contract with the first club. Based on article 45 TFEU (at that time article 48 of the Treaty), the Court had considered those transfer rules as not compatible with EU law.

The nature of transfer fees examined by the Court in Bosman is however substantially different from the nature of training fees which are the subject of the Bernard ruling. In the Bosman case, the Court was confronted with fees that had to be paid at the end of a professional players' contract in order to allow the transfer of such player. In the Bernard case, those fees concern the beginning of the player's professional career.

In Bosman, end-of-contract transfer fees were scrutinised by the Court in their potential to encourage clubs to develop or train young players. In this context, the Court observed that those types of fees were «by nature contingent and uncertain» and «in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally», because «it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally».¹² As a consequence, the Court considered that the perspective of receiving such fees was not an appropriate incentive for the promotion of training, particularly with smaller clubs.

In the Bernard case, the fees at stake are of a different nature. The Court does not deal here with general transfer fees but with training fees, i.e. with a sum which is supposed to compensate the investment in training made by a football club over the years to develop the skills of football players in order to obtain their services by signing the first professional contract with a number of them. The Court considers that «the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club».¹³

¹² ECJ, *Bosman*, para. 109.

¹³ ECJ, *Bernard*, para. 44.

The Court therefore concludes that «a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players».¹⁴ In line with its consolidated case law, the Court adds that the scheme in question must of course be inherent and proportionate to the attainment of this objective.

In order to examine whether a scheme is proportionate to achieve the objective of promoting the recruitment and training of young player, attention must be given to the payment mechanism: only compensation which is related to the actual costs of training as incurred by the clubs can be considered as proportionate. This was not the case of the scheme in place in France, which linked the payment to potential damages suffered by the clubs and thus unrelated to the training costs.¹⁵

The Advocate General had underlined this point in her conclusions¹⁶ by observing that a training compensation scheme based on the club's prospective loss of profits would be too uncertain and consequently not acceptable. The Advocate General also observed that a compensation scheme based on the player's future earnings would be subject to possible manipulations by the clubs and should therefore be considered equally unacceptable.

On top of these considerations, the Court offers another important element in order to assess whether training compensation schemes are inherent and proportionate to their legitimate objective: when carrying out this assessment, account should be taken of the costs borne by the clubs in training both future professional players and those who will never play professionally. The Court affirms hereby the principle that training costs may be calculated on the basis of the so-called «player factor», i.e. the number of players that need to be trained in order to produce a professional player. This principle was also developed by the Advocate General in her opinion.¹⁷

Based on the arguments presented here above, it is possible to conclude that the Bernard ruling confirms most of the elements and the legal reasoning developed by the Court in the Bosman ruling, at a distance of 15 years. This is to be stressed, particularly in light of comments and observations made ahead of the Bernard ruling and arguing that Bosman was outdated and not in line with current developments in professional football. On the other hand, the Bernard ruling has to be welcome since it brings a higher degree of legal certainty and provides useful orientation with regard to the analysis of the compatibility with EU law of training compensation schemes in sport.

The Court establishes some important principles that will have to be followed when performing such an analysis: the Court states that compensation is

¹⁴ ECJ, *Bernard*, para. 45.

¹⁵ *Bernard* ruling, para. 46.

¹⁶ Opinion of the Advocate General Sharpston, *Bernard*, paras 50 and 51.

¹⁷ Opinion of the Advocate General Sharpston, *Bernard*, para. 52.

justified by the objective of encouraging the recruitment and training of young players and that it must be calculated on the basis of the actual cost of training. Furthermore the Court provides guidance on how to calculate training costs: the actual costs of training can take due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.

Three questions raised by the ruling need to be further analysed, namely: the recognition of the specificity of sport; the validation of existing training compensation schemes, notably in football; and the role of amateur sport.

5. *The question of the recognition of the specificity of sport*

In the *Bernard* ruling, the Court makes for the first time reference to the provisions on sport laid down in article 165 TFEU. In particular, the Court mentions two elements included in the Treaty as being constitutive of the EU's action in the field of sport: the social and educational function of sport as well as its specific nature. These two aspects are interlinked, the social and educational values of sport being one of the characteristics which make sport special and set it apart from other sectors of the economy.

This is the first explicit reference made in a Court's ruling to the much debated concept of specificity of sport. The novelty resides in the wording, whereby the Court mentions «the specific characteristics of sport in general, and football in particular».¹⁸ However, the specificity of sport is a concept which was long ago integrated in the Court's case law. It is possible to argue that the Court itself established this principle as far back as in 1974 in the first ruling dealing with sporting issues.

In the *Walrave and Koch* case, the Court defined the composition of national teams as a question of «purely sporting interest» which has «nothing to do with economic activity».¹⁹ This concept was further developed two years later in the *Donà v. Mantero*²⁰ ruling where the Court mentioned sporting rules or practices which are motivated by reasons which are not of an economic nature, which are related to the particular nature and context of certain matches (in this case matches between national teams from different countries) and which are of «sporting interest only». The specific nature of sport, in one of its most characteristic elements, notably the selection of athletes for the composition of national teams, was therefore recognised by the Court very soon.

Other aspects of the specificity of sport, such as the need to ensure the proper and smooth functioning of sport competitions, the discretionary power of federations in selecting athletes for participating in high level competitions, the legitimacy of setting deadlines for transfers of players have been integrated in successive rulings of the Court. The Commission has also repeatedly recognised

¹⁸ ECJ, *Bernard*, para. 40.

¹⁹ ECJ, *Walrave & Koch*, para. 8.

²⁰ ECJ, *Donà v. Mantero*, 13/76, ECR 1333, para. 14.

the specificity of sport in a number of decisions in the field of antitrust and in other documents. The White Paper on Sport offers a concise but dense definition of the concept of specificity as developed by the European Commission. The interpretation of specificity given by the Court in the Bernard ruling seems to be in line with this long series of EU's case law and practice: EU law can be applied to sport taking into account sport's specific characteristics, insofar as the sporting measures concerned pursue a legitimate objective and are necessary and proportionate to the achievement of such an objective.

6. *The question of the validation of existing training compensation schemes, notably in football*

The facts examined by the Court in the Bernard case originate in provisions of the French Charter which were in force in 1997. Following the Bosman ruling and as a consequence of an investigation of the Commission in the framework of an antitrust case, FIFA proceeded to review the transfer system for professional football players. The new system was put in place with the adoption in 2001 of FIFA's Regulation on the Status and Transfer of Players. The adoption of these new rules put an end to the Commission's investigation by an exchange of letters between the Commissioners responsible for the file and FIFA.

The 2001 Regulations include provisions concerning training fees. According to article 20 of the Regulations, training compensation is to be paid to a player's training club when a player signs his first professional contract and each time a professional player is transferred until the end of the season of his 23rd birthday. Annex 4 of the Regulations lays down the details of the objectives, modalities and functioning of the payment of training compensation. Based on this Annex, all clubs are divided into four categories in accordance with the clubs' financial investment in training.

The training costs are established for each category of clubs and correspond to the investment needed to train one player for one year multiplied by an average «player factor», which is the ratio of players who need to be trained to produce one professional player. Compensation is due by the club where the player signs his first professional contract to all the previous training clubs on a *pro rata* basis taking into account the actual training costs as reflected in the category of the different clubs.

This system was not in place in 2000 when Mr. Bernard signed his contract with Newcastle United FC. The Court therefore did not have to examine the system agreed between the Commission and FIFA. However, the Advocate General makes a direct reference to the FIFA rules in points 59 to 62 of her opinion. The Advocate General explains that, even though it is not appropriate for the Court to judge on a system which was not in place at the time of the case at hand, the reasoning of the Court may be relevant to provide elements of guidance in case the system adopted by the FIFA had to be scrutinised to assess its compatibility with EU law.

On the basis of the principles of the Court's legal reasoning as presented above, it is possible to say that the Bernard ruling provides an endorsement of some of the key elements of the system negotiated between the Commission and FIFA in 2001: notably that compensation for training is acceptable insofar as it is necessary and proportionate to its underlying objective, that it must be based on the actual costs of training and that to calculate these costs it is legitimate to take into account the «player factor» to remunerate the investments needed to train both future professional players and those who will never play professionally. The detailed functioning of the FIFA's Regulation, in particular the calculation of training costs and the division of clubs into different categories were not submitted to the Court's attention. If this is the case in future, the Court might be able to provide further elements of orientation to determine the compatibility with the EU legal framework of training compensation systems in sport.

7. The question of the role of amateur sport

As noted above, the Court in the Bernard ruling defines sport as being subject to the application of EU law insofar as it constitutes an economic activity. At the same time, the Treaty in force since 1 December 2010 includes sport amongst the areas where the EU has coordinating and supportive powers to act. Whilst the position of the Court in the case at hand is to be explained with the characteristics of the case involving the exercise of sport as a remunerated activity, the inclusion of sport in the Treaty may potentially trigger significant legislative developments in terms of the application of EU law to amateur sport.

As part of the Treaty, sport, in all its aspects including non-economic practice, is now subject to horizontal provisions of the Treaty such as the prohibition of discrimination on grounds of nationality (article 18 TFEU). This means that the Court may be called one day to judge a case involving the application of EU law to amateur sport, if so required. Such a case would be likely to provide much needed orientation and guidance in a new field of competence for the EU: whereas past case law of the Court has explored the economic dimension of sport or the economic consequences of sporting rules, the Commission is confronted with a growing number of cases concerning amateur sport and cannot rely, for the moment, on any ruling of the Court in this field.

CHAPTER III

THE OLIVIER BERNARD JUDGMENT: A SIGNIFICANT STEP FORWARD FOR THE TRAINING OF PLAYERS

by *Julien Zylberstein**

SUMMARY: Introduction – 1. Clarification of the legal status of compensation designed to cover the training costs of young athletes – 1.1 A case that appears to follow ECJ case law concerning the freedom of movement of athletes – 1.1.1 The practice of professional sport, the subject of the dispute – 1.1.1.1 Subjection of the sole economic dimension of sport to the fundamental freedoms enshrined in the Treaty – 1.1.1.2 Classification of an athlete who has completed his training as a worker under EU law – 1.1.2 An incomplete legal argument? – 1.1.2.1 Purely sporting rules generally considered to be outside the scope of the principle of free movement of workers disregarded – 1.1.2.2 The Court’s silence on the inapplicability of competition law in this case – 1.2 Reasonable treatment of training compensation – 1.2.1 Rejection of the assimilation of the situation of a player who has completed his training period with that of a player at the end of his contract – 1.2.1.1 Training compensation: an obstacle to the free movement of workers – 1.2.1.2 An obstacle to Article 45 TFEU proportionate to the protection of training – 1.2.2 Strict definition of the means of calculating training compensation – 1.2.2.1 Taking into account actual training costs – 1.2.2.2 A measured solution? – 2. A consensual legal development that supports federations’ efforts to protect and promote the training of young players – 2.1 A judgment in line with the initiatives taken by football’s governing bodies – 2.1.1 Partial and implicit endorsement of football’s current international transfer system? – 2.1.2 A solution beneficial to the UEFA rules on locally trained players – 2.2 The unanimity of the EU institutions on the importance to be attached to the promotion of training – 2.2.1 Repeated declarations of intent – 2.2.2 Recognition of the social benefits of training implicit in the wording of Article 165 TFEU?

Introduction

Shortly after the coming into force of the Lisbon Treaty, which gives the European

* UEFA Legal Counsel, EU Affairs Advisor. The views expressed in this article are those of the author alone and do not necessarily reflect those of UEFA.

Union (hereinafter: «EU») competence in the field of sport for the first time, the Court of Justice of the European Union (hereinafter: «the Court») issued a judgment that had been eagerly anticipated by the whole sports community.¹ By ruling that a club is entitled to demand compensation for a player whom it has trained signs his first professional contract with another club upon completion of his training period, the Court closed a key chapter of the controversy triggered by the *Bosman* judgment² 15 years ago. A breath of fresh air for the European sports model, whose structures have been under pressure since the *Meca-Medina* judgment.³

In this case, a French trainee footballer, Olivier Bernard, left his training club, Olympique Lyonnais, at the end of his training period in order to sign for the English club Newcastle United. However, under the provisions of the *Charte du football professionnel* (Professional Football Charter) in force at the time, the player should have signed his first professional contract with the club that had trained him, or otherwise face a demand for compensation, in accordance with Article 122-3-8 of the *Code du travail* (Employment Code).

Believing that its rights had been infringed, Olympique Lyonnais instigated legal proceedings. In the first instance, the *Conseil des Prud'hommes* (Employment Tribunal) in Lyon jointly sentenced the player and Newcastle United to pay damages of EUR 22,867.35 to the French club.

Mr Bernard and the English club appealed this decision with the *Cour d'Appel* (Appeal Court), which dismissed the judgement of the *Conseil des Prud'Hommes*.

Olympique Lyonnais subsequently appealed this decision before the *Cour de Cassation* (Court of Cassation), which referred a question to the Court of Justice of the European Union for a preliminary ruling. It was asked whether Article 45 TFEU is contravened by a rule under which a player may be ordered to pay damages if, at the end of his training period, he signs a professional contract with a club in a different Member State from that of the club that provided his training. If so, the Court was asked to decide to what extent the need to encourage the training of professional players might justify a restriction of the principle of the freedom of movement.

Agreeing with the opinion of Advocate General Sharpston,⁴ the Court recognised the legitimacy of training compensation and, at the same time, laid down limits within which such compensation may be calculated (1). Showing respect for a fundamental component of the specificity of sport, this decision further reinforces the efforts made by sports federations to protect and encourage the training of young athletes (2).

¹ ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR.

² ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

³ ECJ, 18 July 2006, *David Meca-Medina & Igor Mejcen*, C-519/04, ECR I-6991.

⁴ Opinion of Advocate General Sharpston, 16 July 2009, not yet published in the ECR.

1. *Clarification of the legal status of compensation designed to cover the training costs of young athletes*

The *Bernard* judgment, which concerns the compatibility of a sporting rule with European law, generally follows previous case law in this field, although it does differ in some respects (1.1). Basing its decision on the principle of the freedom of movement of workers, the Court ruled that training compensation was legitimate, which was the subject of dispute in the main proceedings, and strictly defined how it should be calculated (1.2).

1.1 *A case that appears to follow ECJ case law concerning the freedom of movement of athletes*

Since the dispute concerned a sportsman who was about to begin a career as a professional player, the Court began by categorising this as an economic activity, an indispensable condition if the dispute was to be dealt with under EU law (1.1.1). In order to do this, it used an argument the upshot of which appears entirely convincing, but which the legalist might find somewhat incomplete (1.1.2).

1.1.1 *The practice of professional sport, the subject of the dispute*

The Court reaffirms that only the economic aspect of sporting activities is subject to EU law (1.1.1.1) and, without any discussion, considers that an athlete who has completed his training is a worker (1.1.1.2).

1.1.1.1 *Subjection of the sole economic dimension of sport to the fundamental freedoms enshrined in the Treaty*

In accordance with a fundamental principle governing EU legislative action, the EU may only act if it has competence to do so under the Treaty. This is the expression of the principle of conferral of competences that is now enshrined in Article 2 TFEU.

In the absence of any legal basis in the field of sport – from the Treaty of Rome to the Treaty of Nice, which was in force at the time of the events that gave rise to the dispute – sport fell under the scope of EU law as a result of a teleological assessment of sport. According to established case law dating back more than 35 years and resoundingly confirmed in the *Bosman* judgment of 1995, sport is only subject to EU law «*in so far as it constitutes an economic activity*».⁵ Faithful to its previous rulings, the Court clearly reiterated this principle in the present case.⁶

⁵ ECJ, 12 December 1974, *Walrave & Koch*, 36/74, ECR 1405, para. 4; ECJ, 14 July 1976, *Donà*, 13/76, ECR 1333, para. 12; ECJ, 15 December 1995, *Bosman*, cit., para. 73; ECJ, 11 April 2000, *Deliège*, C-51/96 and C-191/97, ECR I-2549, paras. 13 and 41; ECJ, 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, ECR I-2681, para. 32; ECJ, 18 July 2006, *Meca-Medina*, cit., para. 22.

⁶ ECJ, Para. 27 of the judgment.

1.1.1.2 Classification of an athlete who has completed his training as a worker under EU law

According to the categories defined in the social legislation of the EU, an athlete at the end of his training period may, in principle, be considered analogous to a student,⁷ or as a worker. It would even appear that he is at the crossroads between these two categories. The extent to which his freedom of movement is restricted depends on which status applies.

In this case, the Court stated quite plainly that Mr Bernard was a worker, simply asserting that «*Mr Bernard's gainful employment falls within the scope of Article 45 TFEU*».⁸ This goes completely unchallenged: according to an established precedent, a non-amateur athlete is either a provider of services or a worker, i.e. «*a person [who], for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration*».⁹

1.1.2 An incomplete legal argument?

Having been gradually constructed on the basis of one-off decisions, the sports-related case law of the ECJ is naturally fragmented. Therefore, the judgment in this case represented an opportunity for the Court, firstly, to refine its approach concerning the scope of rules traditionally considered as lying outside the scope of Article 45 TFEU (1.1.2.1), and secondly, to reaffirm the inapplicability of competition law to a rule (a sporting rule in this case) adopted by means of a collective agreement (1.1.2.2).

1.1.2.1 Purely sporting rules generally considered to be outside the scope of the principle of free movement of workers disregarded

As a corollary of the principle that sport falls within the scope of Community law «*only and precisely*»¹⁰ because it constitutes an economic activity, rules of a purely sporting nature, i.e. those that are justified by «*reasons which are not of an economic nature, which relate to the particular nature and context of certain matches and are thus of sporting interest only*»¹¹ do not, in principle,

⁷ Or, to quote Directive 2004/38, «*a Union citizen enrolled at a private or public establishment, accredited or financed by the State, for the principal purpose of following a course of study*». See Article 7(1)(c) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30 April 2004, 77-123.

⁸ Para. 29 of the judgment.

⁹ ECJ, 3 July 1986, *Lawrie-Blum*, C-86/96, ECR I-2691, para. 17.

¹⁰ Opinion of the Advocate General, para. 27.

¹¹ ECJ, 14 July 1976, *Donà*, cit., para. 14; ECJ, 15 December 1995, *Bosman*, cit., para. 127; ECJ, 11 April 2000, *Deliège*, cit., para. 43; ECJ, 13 April 2000, *Lehtonen*, para. 34.

fall within the scope of EU law. This is particularly the case where provisions regulating the composition of national teams are concerned. For example, a rule stating that the football team representing Italy must be composed exclusively of players of Italian nationality could not be disputed on the basis of Article 45 TFEU because it is «*inherent*»¹² in the organisation of international sports competitions. It therefore seems that rules of play and provisions necessary for the organisation of competitions, known together as «purely sporting rules», are exempt from the provisions of the Treaty.

The *Meca-Medina* judgment cast a shadow over the special treatment afforded to these «purely sporting rules». Since then, although the purely sporting nature of a rule may be sufficient to exempt it from the scope of application *rationae materiae* of Articles 45 and 56 TFEU, the same rule does not automatically fall outside the scope of competition law.¹³ This highly significant principle narrows the scope of the previously established exemption regime. Nevertheless, there is nothing to suggest that the exemption regime applicable to «purely sporting rules» vis-à-vis the principle of the free movement of workers is in question.

However, for the first time in a case concerning the application of Article 45 TFEU in the field of sport, the Court failed to mention this fundamental principle in its judgment, an omission that campaigners for the specificity of sport will regret, since consideration of this specificity has largely come about on the basis of this exemption regime.¹⁴

1.1.2.2 *The Court's silence on the inapplicability of competition law in this case*

The *Meca-Medina* judgment teaches us a great deal. Since it was issued, all sporting rules, whatever their nature, have been exposed to an examination of their alleged anti-competitive effects.¹⁵

The spectre of this case law at least crossed the mind of the Advocate General, who accepts in this case that «*whilst the dispute may well touch on matters of competition law, those matters have not been raised by the referring court (...)*».¹⁶

This theory is based on a premise that is false on two counts.

First, competition law is only directly enforceable against the activities of

¹² ECJ, 11 April 2000, *Deliège*, cit., para. 64.

¹³ ECJ, 18 July 2006, *Meca-Medina*, cit., para. 31.

¹⁴ J. ZYLBERSTEIN, *The Specificity of Sport: a concept under threat*, in *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper*, (R. Blanpain, M. Colucci, F. Hendrickx eds.), 2008, Kluwer Law International, 95-106.

¹⁵ See European Commission decision of 12 October 2009, *Certain joueur de tennis professionnel c/ AMA, TAP Tour et Fondation internationale de l'arbitrage en matière de sport*, case COMP/39471.

¹⁶ Opinion of the Advocate General, para. 43.

undertakings.¹⁷ However, a sports federation does not meet the EU definition of an undertaking set out in the *Höfner and Elser* judgment¹⁸ when it adopts a sporting rule. Therefore, it does not exercise an economic activity that can justify the application of the competition rules enshrined in the Treaty.

Second, the Court itself recognises that, notwithstanding their obligation to respect Article 45 TFEU, «*agreements concluded in the context of collective negotiations between management and labour (...) must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101](1) of the Treaty*».¹⁹ The contradiction here is all the more striking since the Advocate General herself had recognised that the French Professional Football Charter took the character of a national collective agreement. The Court also notes this²⁰ but did not deem it necessary to explain that competition law did not apply in this case.

1.2 Reasonable treatment of training compensation

The core issue in this case was about the possibility for a club to claim a sum of money for a player whom it has trained who then refuses to sign his first professional contract with his training club upon completion of his training period. As the result of detailed reasoning, the Court concluded that the protection of training justified a compensation mechanism, excluding damages (1.2.1), and described how such compensation should be calculated (1.2.2).

1.2.1 Rejection of the assimilation of the situation of a player who has completed his training period with that of a player at the end of his contract

Repeating a two-stage argument outlined in the *Bosman* judgment, the Court in this case held that the level of restriction imposed on players by the Professional Football Charter represented an obstacle to the free movement of workers (1.2.1.1). However, this obstacle was acceptable in view of the objective of protecting training as long as it consisted of actual compensation rather than damages (1.2.1.2).

1.2.1.1 Training compensation: an obstacle to the free movement of workers

In order to render it fully effective, the Court adopts a broad interpretation of Article 45 TFEU. As well as discrimination based on nationality, non-discriminatory obstacles are prohibited, i.e. any regulatory obstacle, applicable regardless of

¹⁷ ECJ, 16 November 1977, *GB-Inno-BM*, 13/77, ECR 2115, para. 31; ECJ, 11 December 2007, *ETI e.a.*, C-280/06, ECR 10893, para. 38; ECJ, 1 July 2008, *MOTOE*, C-49/07, ECR 4863.

¹⁸ ECJ, 23 April 1991, *Höfner and Elser*, C-41/90, ECR I-1979, para. 21.

¹⁹ ECJ, 21 September 1999, *Albany International BV*, case C-67/96, ECR I-5751, para. 60.

²⁰ ECJ, para. 32 of the judgment. See also para. 8 of the Advocate General's opinion.

nationality, that might hinder an EU citizen wishing to work in another Member State. The origin of the measure, whether public or private, is irrelevant.²¹

In this case, the Court points out that any rule that has the aim or effect of requiring fees to be paid for transfers or training in the event of a transfer constitutes an obstacle to the free movement of workers.²² This was true of the obligation set out in the French Charter for a player to sign a contract with the club that trained him, and the requirement for damages to be paid if this obligation was not met. Such a mechanism was likely to discourage him from exercising his right to freedom of movement or, at the very least, to make *«the exercise of that right less attractive»*.²³

1.2.1.2 An obstacle to Article 45 TFEU proportionate to the protection of training

If a sporting rule contravenes a fundamental freedom enshrined in the Treaty, its validity may be 'restored' if, on the one hand, it pursues an aim that the Court considers to be in the general interest and if, on the other, the means implemented by the disputed rule and the objective pursued are not excessive. This is the sacrosanct test of proportionality, on which all legal treatment of the specificity of sport is now based.

In the case at hand, the Court reiterated its findings from the *Bosman* judgment, i.e. that *«the prospect of receiving training fees is likely to encourage football clubs to (...) train young players»*.²⁴ If this were not the case, *«the clubs which provided the training could be discouraged from investing in the training of young players»*.²⁵ In other words, training compensation can be justified as an obstacle that is in the public interest, on the grounds that it is designed to promote the training of young athletes.

Nevertheless, the Court considers that the obligation to pay damages set out in the Professional Football Charter went *«beyond what was necessary to encourage recruitment and training of young players and to fund those activities»*.²⁶ Bearing no relation to real training costs, they wander from the straight and narrow of Community law. This tacitly implies that Olympique Lyonnais did not sustain losses sufficient to justify the payment of damages; it would probably have been different if Olivier Bernard had left the club during his training period.²⁷

It is therefore clear that only the payment of compensation aimed at

²¹ Paras 30 to 32 of the judgment.

²² Paras 33 and 34 of the judgment.

²³ Paras 35 and 36 of the judgment.

²⁴ Para. 41 of the judgment. See also *Bosman*, cit., para. 108.

²⁵ Para. 44 of the judgment.

²⁶ Paras 46 and 47 of the judgment.

²⁷ The CAS holds that the unilateral breaking of a training contract by the player justifies not only the payment of damages, but also disciplinary sanctions (CAS, 27 June 2005, no. 2004/A/791, *SASP Le Havre Athlétic v FIFA, Newcastle United and N'Zogbia*).

reimbursing the costs incurred by the club would be acceptable. A restriction on the freedom of movement of players is in fact justified by the need for clubs to harvest the fruits of their training activities.

1.2.2 *Strict definition of the means of calculating training compensation*

It remained for the Court to determine how this compensation should be calculated. Here, the stakes are high, since inadequate remuneration might jeopardise training activities. However, by allowing the reimbursement of the actual training costs incurred by clubs for all the players that they train (1.2.2.1), the Court provided a solution which, although it is not perfect, seems measured (1.2.2.2).

1.2.2.1 *Taking into account actual training costs*

Following the recommendations of Advocate General Sharpston, which were themselves inspired by those of her colleague Lenz in the *Bosman* judgment,²⁸ the Court establishes the principle that the compensation of a player's training costs should not be limited to the nominal cost alone. Since only a minority of players who receive training become professional players,²⁹ the Court allows schemes that take into account «*the costs borne by the clubs in training both future professional players and those who will never play professionally*».³⁰ The Advocate General's proposal that such a mechanism should be tempered if the player himself is liable to pay compensation when leaving the club, inasmuch as he should only have to pay the individual cost of his own training,³¹ was rejected by the Court – and quite rightly, since such a scenario appears unrealistic: experience shows that a player who changes club will ensure that the sum is paid by his new club.

As regards any profit that the training club might earn by claiming *damnum emergens* (damage suffered) or *lucrum cessans* (loss of income), the Court does not comment on this. The Advocate General, for her part, had dismissed the idea because of its uncertain nature and the fact that it would not help achieve the objective of encouraging training, particularly on the grounds that it would be «*susceptible to manipulation by the club*» that provided the training.³²

1.2.2.2 *A measured solution?*

The basis on which the Court states that training compensation should be calculated could appear inadequate from the training clubs' perspective. The latter might

²⁸ Opinion of Advocate General Lenz, submitted on 20 September 1995.

²⁹ Opinion of the Advocate General, para. 52.

³⁰ Para. 45 of the judgment. See also ECJ, *Bosman*, cit., para. 109.

³¹ Opinion of the Advocate General, para. 57.

³² Opinion of the Advocate General, paras. 50 and 51.

think that they should be entitled to more than what is strictly necessary to fund training.

In France, for example, between 300 and 400 players, in various age groups, join the country's 32 training centres each year. However, professional football clubs only require an average of around 75 new players per season.³³ In other words, the level of compensation for one player who leaves his training club at the end of his training period should be sufficient to fund the training of five or six others who do not become professional players.

Taking account of the uncertainty and the high failure rate, training clubs could justifiably consider that the reimbursement of actual training costs barely enables them to recover their costs, without any substantial financial compensation. Rather than being encouraged to provide training, they would, at most, not be discouraged from doing so. With no significant financial return, there is therefore a significant danger that these clubs will cease to invest in training.

In addition, the reimbursement of training costs bears no relation to possible future profits which may be related to the player's performances, should he subsequently contribute to the sporting success of his new club or if his transfer value increases. The initial sum of compensation covering just his own training costs may therefore appear derisory.

There is no doubt that the arguments in favour of training compensation that extends beyond overall training costs are not unfounded; far from it.

Taking note of the proceedings that were still in progress in relation to the main case, particularly the ruling of the Appeal Court, which had hastily condemned the notion of training compensation, the unions and management of French professional football devised an ameliorative system for calculating compensation for training costs.³⁴ Since 24 June 2008, this system has replaced the previous rule banning players who refuse to sign their first professional contract with their training club from being able to sign for a French club with professional status.

At present, a player at the end of his training period can sign his first professional contract with another French club, provided the latter pays compensation that is calculated according to a clever mixture of factors, including:

- firstly, a lump sum payment corresponding to the training costs, calculated according to the ranking of the training centre of the training club and an annual scale fixed by the French Football Federation, with an upper limit of EUR 90,000 (see *infra*);
- secondly, a training value fee depending on the number of Ligue 1 or national team appearances made by the player, up to a maximum of EUR 1 million;
- thirdly, a fee payable if the player extends his professional contract with his new club or 20% of the transfer fee if he is sold by his new club.

³³ E. BESSON, «Accroître la compétitivité des clubs de football professionnel français», November 2008, 74.

³⁴ Article 261-2 of the Professional Football Charter, 2010/11 edition.

This system is applicable at domestic level and does not take into account players who leave France to join a foreign club. However, it demonstrates that it is possible to create a compensation mechanism that balances the protection of the interests of training clubs with the fundamental rights of players who receive training.

2. *A consensual legal development that supports federations' efforts to protect and promote the training of young players*

Reading between the lines of the *Bernard* judgment, it appears that a system that seeks to put a higher value on the training of young footballers does not sit easily with an economic policy of non-intervention. This is why FIFA and UEFA have set up mechanisms aimed at keeping the system profitable and promoting training at local level. The *Bernard* judgment gives substantial legal protection to these mechanisms (2.1). Hence, the Court has added to the various instruments which have recognised the importance of training young players at the highest political level (2.2).

2.1 *A judgment in line with the initiatives taken by football's governing bodies*

Although it is not expressly mentioned in the judgment, the solution adopted by the Court for determining how to calculate compensation for training costs is directly inspired by the *FIFA Regulations on the Status and Transfer of Players*. The part devoted to training compensation has therefore been given the seal of approval as far as EU law is concerned (2.1.1). As for UEFA's rule on locally trained players, its validity, which has already been recognised by the European Commission, is now in very little doubt (2.1.2).

2.1.1 *Partial and implicit endorsement of football's current international transfer system?*

Following the *Bosman* judgment, numerous questions continue to be raised concerning the compatibility of the international transfer system with EU law, particularly the competition rules set out in the Treaty. Several complaints were lodged with the European Commission³⁵ against FIFA.³⁶ Discussions were then held between FIFA, UEFA and the European Commission, in order to define new rules on the subject, which were formalised in an agreement dated 5 March 2001.

³⁵ In accordance with the procedure provided for in Council Regulation (EEC) no. 17/62 of 6 February 1962, OJ 13, 21 February 1962, 204. This Regulation has since been superseded by Commission Regulation (EC) no. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27 April 2004, 18.

³⁶ See in particular the Commission's decisions of 28 May 2002 in the cases *SETCA & FGTV v FIFA*, case COMP 36.583; and *Sport et Libertés*, case COMP 36.726.

The rules are inspired from 11 fundamental principles, including greater compensation for training. The relevant provisions are now found in Annexe 4 to the *FIFA Regulations on the Status and Transfer of Players*.

In summary, financial compensation must be paid to the club(s) that contributed to a footballer's training when he signs his first professional contract, and subsequently when he is transferred until the end of the season in which he reaches the age of 23.³⁷ The compensation should be paid by the player's first professional club to all clubs that contributed to his training on a pro rata basis, according to the period of training that the player spent with each club, starting from the season of his 12th birthday.³⁸

In order to calculate this sum, FIFA divides the national football federations by confederation, then into four categories according to the level of investment made by their respective clubs in player training. An amount is set for each category: this is the annual cost of training one player multiplied by a «player factor», which is the ratio of players who need to be trained to produce one professional player per year.³⁹ It is this so-called «player factor» mechanism that the Court approved in the *Bernard* judgment when stating that the system for compensating training clubs should take into account «*the costs borne by the clubs in training both future professional players and those who will never play professionally*».⁴⁰

The regulations further stipulate that «*to calculate the training compensation due to a player's former club(s), it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself*»⁴¹ – a process that neither Advocate General Sharpston nor the Court mentioned in this case, even though it prevents the player's new employer from profiting at the expense of its predecessor by not paying any training costs.

In addition to this measure, there is, finally, a solidarity contribution, a sort of tax on the transfer of players aged over 23 who change clubs during the course of a contract, fixed at 5% of the fee and shared, where applicable, between the clubs that contributed to the player's training.

Although they were drawn up jointly with the European Commission, the

³⁷ Article 1(1) of Annexe 4 to the *FIFA Regulations on the Status and Transfer of Players*, 2010 edition (hereinafter: «the Regulations»).

³⁸ Article 3(1) of Annexe 4 to the Regulations.

³⁹ EUR 10,000 (category 4), EUR 30,000 (category 3), EUR 60,000 (category 2) and EUR 90,000 (category 1) per player per year of training. See Article 4(1) of Annexe 4 to the Regulations. However, Article 5(3) of Annexe 4 stipulates that the training costs for the seasons between the player's 12th and 15th birthdays are always based on the training costs of category 4 clubs (unless the transfer takes place before the 18th birthday of the player). For a player trained by a French club between the ages of 12 and 21, who wishes to sign his first professional contract in England, as was the case with Bernard, compensation would be EUR 570,000 (3 x EUR 10,000 + 6 x EUR 90,000). However, the average cost of training one player for one year in France is estimated as around EUR 115,000, i.e. a total of EUR 1,035,000 in this case. In France, therefore, the actual cost of training appears higher than the level of compensation provided under the FIFA regulations.

⁴⁰ Court judgment, para. 45. See also ECJ, 15 December 1995, *Bosman*, cit., para. 109.

⁴¹ Article 5(1) of the Regulations.

FIFA regulations do not benefit from legal immunity. In the *Bosman* judgment, the Court itself noted, in its condemnation of the so-called «3+2» rule,⁴² that, «*except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty*».⁴³ At least as far as the part relating to training compensation is concerned, thanks to the *Bernard* judgment, the FIFA regulations now appear to be safe from being deemed incompatible with EU law.

2.1.2 *A solution beneficial to the UEFA rules on locally trained players*

Since the *Bosman* judgment, training activities have undergone an erosion process. Profiting from the opening of borders following the removal of nationality rules, many elite clubs have systematically resorted to the transfer market to build their squads, to the detriment of local players, whose development is deemed to be less profitable. The main victims of this frantic race to buy the best players are the training clubs, whose own squads fall prey to a real «*muscle drain*».

In the absence of any valid legal protection, beginning with the 2006/07 season, UEFA introduced a rule requiring clubs playing in the European club competitions to register a squad limited to 25 players, a certain number of whom must have been «locally trained» (four when the measure was introduced, then six in 2007/08 and, finally, eight since 2008/09). In order to be categorised as «locally trained», a player must have been contracted to the club concerned or to other clubs affiliated to the same national federation for at least three seasons between the ages of 15 and 21, whatever his nationality.⁴⁴

This rule gives players who are receiving training a greater chance of playing at a professional level and offers better protection to the squads of training clubs. It also ensures that every European country has a base of talented players, which in turn stimulates competition: since squad sizes are limited, the best players are now on the pitch rather than on the substitutes' bench of the richest clubs. The standard of competitions is therefore higher.

The merits of this rule have been acknowledged by the European Parliament and European Commission.

In its *Resolution on the future of professional football in Europe*, adopted in March 2007, the European Parliament expressed its «*support for the UEFA measures to encourage the education of young players by requiring a*

⁴² On 18 April 1991, the European Commission and UEFA had signed a «gentlemen's agreement» recognising the so-called «3+2» rule. This enabled national federations to limit to three the number of foreign players who could be fielded by a club in a first division match, in addition to two «assimilated» players, i.e. players who had played for an uninterrupted period of five years in the country of the national federation concerned, including three years in youth teams.

⁴³ ECJ, 15 December 1995, *Bosman*, cit., para 136. See also ECJ, 27 May 1981, *Essevi and Salengo*, 142/80 and 143/80, ECR 1413, para. 16.

⁴⁴ Article 18 of the UEFA Champions League Regulations, 2010/11 edition; article 18 of the UEFA Europa League Regulations, 2010/11 edition.

minimum number of home-grown players in a professional club's squad and by placing a limit on the size of the squads»,⁴⁵ before suggesting a few months later that this rule should serve as an example to other sports.⁴⁶

On 28 May 2008, Vladimír Špidla, member of the European Commission responsible for employment, social affairs and equal opportunities, said that this rule seemed *«to be proportionate and to comply with the principle of free movement of workers»*. He took the opportunity to point out that encouraging training of young players and strengthening the balance of competitions were *«legitimate objectives of public interest»*.⁴⁷

So far, a dozen federations and/or national leagues, including those of Germany, England, Italy and Portugal, have adopted the UEFA measures or variations of them.

For its part, the Luxembourg Football Federation has opted for its own measure, different from that proposed by UEFA, and which merits particular attention, if only because it has been examined in depth by European Commission staff. The rule requires clubs in the Luxembourg first division to include at least seven players who were first registered with a Luxembourgish club on a match sheet that is limited to 16 players; their nationality is irrelevant. This rule was therefore said to create indirect discrimination⁴⁸ against nationals of other Member States, since most players who have not been first registered in Luxembourg are non-nationals. However, according to the European Commission itself, statistics provided by the Luxembourg authorities showed that, in practice, the rule on first registration did not preclude employment of foreign players and *«does not represent (...) discrimination on grounds of nationality»*.⁴⁹

Although they are not a panacea, these examples nevertheless represent useful instruments with regard to the value of training activities, which have been weakened by the deregulation of the employment market for professional athletes following the *Bosman* judgment. They also demonstrate the efforts made by sports federations in this area. Of course, uncertainties persist with regard to the room for manoeuvre that sports governing bodies have vis-à-vis EU law. The *Bernard* judgment should therefore be interpreted as a promising development for the local

⁴⁵ European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (Belet Report), para. 34.

⁴⁶ *«The European Parliament (...) believes that the UEFA (...) rule can serve as an example to other federations (...).»* European Parliament resolution on the White Paper on Sport (Mavrommatis Report), 2008, para. 34.

⁴⁷ See press release of the European Commission, IP/08/807 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807> (September 2010)

⁴⁸ In other words, *«a covert form of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result»* (ECJ, 12 February 1974, *Sotgiu*, 152/73, ECR 153, para. 11).

⁴⁹ European Commission, *Free movement: EU closes case against Luxembourg over footballers' nationality*, IP/10/665, 3 June 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/665&format=HTML&aged=0&language=EN&guiLanguage=en> (September 2010).

training of young athletes, particularly since it states that *«investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport»*.⁵⁰

2.2 *The unanimity of the EU institutions on the importance to be attached to the promotion of training*

The central role of training in the organisation of sport has been recognised several times at European level (2.2.1), although the writers of the Lisbon Treaty did not believe it should be mentioned in Article 165 TFEU (2.2.2).

2.2.1 *Repeated declarations of intent*

Severely impacted by *Bosman*, training activities have been exposed to the effects of the principle of free movement of workers and the corresponding deregulation of the employment market.

In order to help sports governing bodies to adapt their structures to this new political, economic and social context, in 1998 the European Commission published a working paper in which it reiterated that *«it is available at all times to assist [them] to find ways compatible with Community legislation to encourage the recruitment and training of young players and ensure that the equilibrium between clubs is maintained»*.⁵¹

At the European Council meeting in Nice in December 2000, the Member States appended to the conclusions of the French Presidency of the EU a *Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*. By warning against the risks of training being outsourced and the weakening of the solidarity between amateur and professional sport that might result, this text points out that *«training policies for young sportsmen and -women are the life blood of sport, national teams and top-level involvement in sport and must be encouraged»*. The Nice Declaration also invites *«sports federations, where appropriate in tandem with the public authorities, (...) [to take] the action needed to preserve the training capacity of clubs affiliated to them and to ensure the quality of such training, with due regard for national and Community legislation and practices»*.

In two resolutions, the European Parliament, for its part, underlined *«the important social and educational role of training centres and the vital role which they play in both the well-being of clubs and the future development of football talent»*.⁵² before subscribing to *«the principle that players should*

⁵⁰ ECJ, para. 44 of the judgment.

⁵¹ *The development and prospects for Community action in the field of sport*, Commission staff working paper, 29 September 1998.

⁵² European Parliament resolution on the future of professional football in Europe, cit., para. 39.

sign their first professional contract with the club which has trained them».⁵³ The reference to the *Olivier Bernard* judgment, which at the time was in gestation before the French courts, is implicit, but unquestionable...

In its White Paper on Sport, the European Commission, for its part, recognised that «*investment in and promotion of training of young talented sportsmen and sportswomen in proper conditions is crucial for a sustainable development of sport at all levels*».⁵⁴

There is no doubt that the promotion of training is one of the most unifying components of the specificity of sport. The European sport model is particularly based on the development of young players, which will be enhanced if it is encouraged. The *Bernard* judgment establishes training compensation as the most consensual way of contributing to this process.

2.2.2 *Recognition of the social benefits of training implicit in the wording of Article 165 TFEU?*

The Lisbon Treaty, which entered into force on 1 December 2009, contains a historic provision concerning sport, giving the EU competence to support and coordinate member states' initiatives in this field.

According to the new Article 165, the EU «*shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function*» (para. 1). To achieve this, its action shall be aimed at «*developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen*» (para. 2).

While Article 165 TFEU sets in the stone of EU constitutional law the need to take account of the specific characteristics of sport, this does not mean that it will legitimise sporting rules that violate the most fundamental rules of EU law. Recognition of the specificity of sport should not be confused with its exemption from the scope of the Treaty.

In this particular case, the Court mentioned Article 165 TFEU for the first time. However, this reference is hardly a reason for enthusiasm: pushed to the end of the paragraph, Article 165 is used in a subsidiary manner in order to underline the need to take account of the specific characteristics of sport and of its social and educational function.⁵⁵ In this respect, it is regrettable that the wording of Article 165 does not explicitly refer to the promotion of young athletes: unless the writers of the Treaty agreed that its very structure prevented its inclusion, there was no obvious reason for excluding it.

⁵³ European Parliament resolution on the White Paper on Sport, cit., para. 37.

⁵⁴ White Paper on Sport, European Commission, COM(2007) 391, 11 July 2007.

⁵⁵ Para. 40 of the judgment.

Even so, the *Bernard* judgment represents a crucial step forward for the training of young athletes. A precious victory for the specificity of sport, which emerges from the discussion richer and more widely recognised, and the protection of which turns out more than ever to be consubstantial with the sustainable development of European sport...

CHAPTER IV

THE SYSTEM OF TRAINING COMPENSATION ACCORDING TO THE FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS

by *Omar Ongaro**

SUMMARY: 1. Introduction – 1.1 General remarks – 1.2 Brief historical summary – 2. Training compensation – 2.1 Regulatory basis – 2.2 Principles – 2.2.1 Training period – 2.2.2 Events giving rise to the right to training compensation – 2.2.3 Events precluding the right to training compensation – 2.3 Training costs – 2.3.1 Categorisation of clubs – 2.3.2 Criteria for the determination of the training costs – 2.3.3 Actual calculation of the training costs per category – 2.4 Calculation of training compensation – 3. Solidarity Mechanism – 3.1 Regulatory basis – 3.2 Structural differences to the training compensation – 3.3 Principles – 4. Conclusions

1. Introduction

1.1 General remarks

I deem that following the ECJ judgement in the Bernard case,¹ FIFA has reasons to be cautiously optimistic that the principles it included in its regulations in order to reward clubs investing in the training and education of young players will stand before the legal appreciation by the competent courts in respect of the compatibility of the pertinent existing rules applicable to international transfers with European law. Indeed, various of the considerations of the Grand Chamber appear to sustain the system adopted by FIFA within the scope of the international transfer of players.

The encouraging aspects clearly prevail. Most notably, the judgement confirms the approach adopted by the Dispute Resolution Chamber of FIFA (DRC)² according to which a player at the end of his training and education cannot be

* Head of the FIFA Players' Status and Governance Department. The position expressed in this short article reflects the personal opinion of the author and does not necessarily correspond to the official position of the Fédération Internationale de Football Association (FIFA).

¹ ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR.

² DRC decision no. 114660 of 9 November 2004; DRC decision no. 114667_09 of 9 November

forced to sign a professional contract with the training club and thus be prevented from signing with another club if he decides to do so. Equally, a player choosing to act in the latter way is not liable for the payment of compensation to his training club based on breach of contractual obligations. In other words, a scheme characterised by the payment of damages to the training club would not be compatible with European law. This contrary to a scheme establishing the payment of compensation for the training and education of a player.³

Moreover, the ECJ points out that various political instances (Governments), most importantly the European Commission, support the training compensation system provided for by the FIFA regulations.⁴

An extremely important aspect is the recognition by the court of the player factor,⁵ which also forms part of the training compensation system provided for by the FIFA Regulations on the Status and Transfer of Players (hereinafter: the FIFA Regulations).⁶

In summary, it can be said that the decision of the Grand Chamber fully supports a system to reward clubs investing in the training and education of young players. It has been made very clear that football clubs may seek compensation for the training of young players whom they have trained when those players wish to sign a professional contract with a club in another Member State. The amount of that compensation is to be determined taking into account the overall training costs of the club. Compensation based on the players' prospective earnings or on the clubs' prospective loss or profits would not be acceptable. Once again, this is a full confirmation of the approach adopted by the DRC so far.

Yet, it is also true and consequently needs to be mentioned that in various aspects the relevant decision has remained vague and therefore does not provide for a high grade of security. In particular, the judges did not consider the matter at stake in the light of competition law. Probably because, as the Advocate General Sharpston had already indicated, those matters were not raised by the referring court, i.e. the Cour de cassation in France. However, again according to the Advocate General, the dispute could have touched on matters of competition law.⁷ To what extent, if at all, such line of argument could indeed be justified remains to be analysed.

Furthermore, while clearly establishing *«that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one*

2004; DRC decision no. 114667_26 of 26 November 2004, all available at www.fifa.com/aboutfifa/federation/administration/decision.html (September 2010).

³ Cf. ECJ, Bernard, point 46 et seqq.

⁴ Cf. ECJ, idem, point 25.

⁵ Cf. ECJ, idem, point 45.

⁶ Annexe 4, art. 4 par. 1 of the current FIFA Regulations 2009 available at www.fifa.com/mm/document/affederation/administration/66/98/97/regulationsstatusandtransfer_en_1210.pdf (September 2010).

⁷ Cf. Opinion of Advocate General Sharpston, not yet published in the ECR, point 43.

which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players»,⁸ the ECJ judgement does not concretely and in round terms establish possible limits of amounts claimed under the title of training compensation. In fact, the ECJ confines itself to concluding that «such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally».⁹ The message thus is that the training compensation payable should be proportionate and related to the actual and real training costs incurred by the training club. Yet, no further specification is made as to where exactly the limits are and as of when such costs should be considered as being disproportionate. Effectively, this was not the issue at stake in the relevant procedure.

1.2 Brief historical summary

Following intensive discussions held, both on a political and legal level, between FIFA/UEFA and the European Commission in order to find solutions acceptable for everybody regarding the international transfer system of football players, in March 2001 an agreement was finally found between the aforementioned parties on the principles that should govern the future international transfer rules.

Basically, the agreement focused on the following five pillars, which came to form the general principles of the completely revised FIFA Regulations that entered into force on 1 September 2001.

- Maintenance of contractual stability: this principle refers to the contractual relation between professional players and their clubs.¹⁰
- Protection of minors.¹¹
- Dispute Resolution System.¹²
- Training of young players.¹³
- Solidarity in the football world.¹⁴

For the purpose of the present article, obviously, the focus will lie on the last two of the mentioned principles.

Already at that time there was a general acknowledgement by all stakeholders of the world of football (i.e. in particular, member associations, clubs, players) as well as by the European Commission and the ECJ that clubs investing

⁸ Cf. ECJ, Bernard, judgement, point 45.

⁹ *Ditto*.

¹⁰ Cf. Chapter IV. of the FIFA Regulations 2009, art. 13 to 18.

¹¹ Cf. Chapter VI. of the FIFA Regulations 2009, art. 19 and 19bis.

¹² Cf. Chapter VIII. of the FIFA Regulations 2009, art. 22 to 25.

¹³ Cf. Chapter VII. of the FIFA Regulations 2009, art. 20, and Annexe 4 to the FIFA Regulations 2009.

¹⁴ Cf. Chapter VII. of the FIFA Regulations 2009, art. 21, and Annexe 5 to the FIFA Regulations 2009.

in the training and education of young players should be rewarded. In fact, the considerable social importance of sporting activities and in particular football, legitimates the objective of encouraging the recruitment and training of young players. This approach and recognition of fundamental importance was once again explicitly confirmed also in connection with the Bernard case.¹⁵

Since the coming into force of the FIFA Regulations 2001 the system of training compensation in the broader sense provided for by the pertinent FIFA provisions is based on two institutions: the training compensation in the narrower sense (cf. point 2. below) and the solidarity mechanism (cf. point 3. below).

2. *Training compensation*

2.1 *Regulatory basis*

Art. 20 and Annexe 4 to the FIFA Regulations 2009 provide for the regulatory framework for the institution of the training compensation. While art. 20 of the FIFA Regulations 2009 merely summarises the main principles of the system, the particularities are to be found in the aforementioned technical Annexe. In particular, the latter describes in detail the objective of the pertinent institution (art. 1), under which circumstances training compensation becomes due (art. 2), which party is responsible for the payment of training compensation (art. 3) and how the relevant amount should be calculated (art. 4 and 5). Finally, an entire article is dedicated to special provisions for the European Union (EU) and the European Economic Area (EEA) (art. 6).

2.2 *Principles*

2.2.1 *Training period*

Thorough analysis and evaluations have led the major stakeholders of the football family (in particular, member associations, clubs and players) to agree in principle to the conclusion that a player's training and education takes place between the ages of 12 and 23. Starting from this fundamental principle, the FIFA Regulations 2009 (like their previous editions) establish that training compensation shall be payable, as a general rule, up to the age of 23. However, the relevant entitlement is limited to the training incurred up to the age of 21 (cf. Annexe 4, art. 1 par. 1 of the FIFA Regulations 2009). In this respect, for the sake of clarity it needs to be emphasised that, despite the mentioned provision referring to the player's age, what is actually meant is the season of the player's respective birthday. This can be deduced from the wording chosen in the more specific articles 2 par. 1,¹⁶ 3 par.

¹⁵ Cf. Opinion of Advocate General Sharpston, point 47. and the references contained therein; ECJ judgement, point 39 and the pertinent reference to the Bosman ruling.

¹⁶ «... before the end of the season of his [the player's] 23rd birthday».

1¹⁷ and, particularly, art. 5 par. 2,¹⁸ all of Annexe 4 of the FIFA Regulations 2009.

At first sight the aforementioned terms may be a bit confusing. But what do they exactly mean? Provided all other pertinent prerequisites are met (cf. point 2.2.2 below), an entitlement to claim training compensation arises only if the event giving rise to the right to training compensation occurs before the end of the season of the player's 23rd birthday (cf. Annexe 4, art. 2 par. 1 of the FIFA Regulations 2009). However, the relevant compensation can only be claimed for the seasons between the player's 12th and 21st birthday (maximum thus 10 seasons). In other words, if a club trained a player during the seasons of his 18th to his 22nd birthday, and at the beginning of the season of his 23rd birthday the player moves internationally to another club, the respective training club will only be entitled to claim training compensation for four seasons. The season of the player's 22nd birthday will not be taken into account anymore.

In case it is evident that a player has already terminated his training period before the age of 21, the seasons to be taken into consideration will only be those between the player's 12th birthday and the season in which he completed his training period. The club that needs to pay the pertinent compensation carries the burden of proof with regard to the alleged premature termination of the training period. Furthermore, the term «evident» indicates that such circumstance should only be considered to have occurred if absolutely clear indications do not leave space for another conclusion. In particular, the signing of a first professional contract alone does not automatically mean that the training period has been completed.¹⁹

2.2.2 Events giving rise to the right to training compensation

Basically, training compensation is due if one of the following two situations occurs (Annexe 4, art. 2 par. 1 of the FIFA Regulations 2009):

- when a player is registered for the first time as a professional; or
- when a professional player²⁰ is transferred between clubs of two different associations.

As already mentioned, training compensation will only become an issue, if either of the aforementioned events occurs before the end of the season of the player's 23rd birthday. Consequently, in case a player only signs his first professional contract during the season of his 24th birthday, training compensation will never become due to any of his training clubs.

The responsibility of the new club to pay training compensation varies depending on whether it is the club, for which the player signs his first professional

¹⁷ «... starting from the season of his [the player's] 12th birthday».

¹⁸ «..., in principle from the season of the player's 12th birthday to the season of his 21st birthday».

¹⁹ CAS 2003/O/527 *Hamburger Sport-Verein v/ Odense Boldklub*; CAS 2004/A/594 *Hapoel Beer-Sheva v/ Real Racing Club de Santander*; CAS 2006/A/1029 *Maccabi Haifa F.C. v/ Real Racing Santander*.

²⁰ A player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs (art. 2 par. 2 of the FIFA Regulations 2009).

contract or if he joins the new club following a transfer as a professional player (cf. Annexe 4, art. 3 par. 1 of the FIFA Regulations 2009). The main idea behind the relevant structure is that, at best, any club that trained a player between the seasons of his 12th and 21st birthday will only be entitled to receive training compensation once.

On the one hand, on registering as a professional for the first time, the new club with which the player is registered is responsible for paying training compensation to every club with which the player has previously been registered starting from the season of his 12th birthday. The amount payable is calculated on a *pro rata* basis according to the period of training that the player spent with each club.²¹

On the other hand, in the case of subsequent transfers of a professional player (i.e. the player was registered as a professional with club A and moves to club B, affiliated to another association, where he registers again as a professional), training compensation will only be owed to his former club for the time he was effectively trained by that club. Colloquially this particularity is described by the statement that «the first registration of a player as a professional breaks the chain».²²

In the case of an international transfer of a professional player, the obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract (art. 20 and Annexe 4, art. 2 par. 1 ii. of the FIFA Regulations 2009). This means that, in case a professional player is transferred internationally before the end of the season of his 23rd birthday during the course of a still valid contract concluded between the player and his former club, in principle, besides the amount the new club is willing to pay in order to obtain the services of the player and thus having the former club accepting the early termination of the relevant contractual relation, training compensation would also become payable. In this respect, according to the established jurisprudence of the DRC,²³ in case no specification or indication to the contrary is contained in the relevant transfer agreement concluded between the former and the new club, it is to be assumed that the agreed amount of compensation for the transfer includes both the amount due for the early termination of the existing contract between the player and the former club as well as the training compensation.

²¹ At the beginning of the season of his 19th birthday a player is transferred internationally from club A to club B, where he signs his first professional contract. Prior to that move, the player had been trained two seasons by club Z (seasons of his 12th and 13th birthday), two seasons by club X (seasons of his 14th and 15th birthday) and three seasons by club A (seasons of his 16th, 17th and 18th birthday). Club B will be responsible for the payment of training compensation to the clubs Z, X and A for the respective periods of training.

²² Reference is made to the example in footnote 22. At the beginning of the season of his 21st birthday the player is transferred internationally to club C, where he signs a new professional contract. Club C will be responsible for the payment of training compensation to club B only, for the two seasons of training that club B provided to the player.

²³ DRC decision no. 3830 of June 2008; DRC decision no. 78026 of July 2008; DRC decision no. 39328 of 12 March 2009, all available at www.fifa.com/aboutfifa/federation/administration/decision.html (September 2010).

Equally, the FIFA Regulations congruously establish that the obligation to pay training compensation is without prejudice to any obligation to pay compensation for breach of contract (cf. Annexe 4, art. 1 par. 2 and art. 17 par. 1 of the FIFA Regulations 2009). Consequently, if a professional player prematurely terminates the contract with his club without just cause and therefore, becomes liable for the payment of compensation on the basis of art. 17 par. 1 of the FIFA Regulations 2009, his move to a new club before the end of the season of the player's 23rd birthday will, in addition, give reason to the payment of the respective amount of training compensation.

With respect to the Bernard case it is of particular importance to emphasise that the facts of the case at the basis of the ECJ judgement did not concern a player still contractually bound to his training club. As a result, considerations regarding possible additional compensation for breach of contract in order to compensate the training club's contractual damage had not to be tackled. This needs to be taken into consideration when reading the judgement and in particular, the conclusion of the ECJ according to which compensation payable for damages calculated in relation to the total loss suffered by the training club would go beyond what is necessary to encourage the recruitment and training of young players and to fund those activities.²⁴ Compensation for breach of contract, and thus payable in order to compensate a club's damage deriving from the violation of contractual obligations (which was not an issue in the Bernard case), and training compensation need to be treated independently from one another.

Finally, reference shall be made to a specific particularity provided for by the FIFA Regulations in connection with the move of players from one association to another inside the territory of the EU/EEA (Annexe 4, art. 6 par. 3 of the FIFA Regulations 2009). In order to ensure that only clubs really interested in the services of the player shall be entitled to claim training compensation, the relevant provision states that if the former club does not offer the player a contract, no training compensation is payable. However, there might be situations in which the training club was not (yet) in a position to offer a contract to the player (e.g. club is a pure amateur club participating to a national championship at a level where the engagement of professional players is not permitted by the pertinent national regulations). Therefore, the FIFA Regulations establish that a club which did not offer a contract to the player has the possibility to provide evidence or concrete indications justifying that it is nevertheless entitled to such compensation. A very illustrative example for such constellation was dealt with by the Court of Arbitration for Sport (CAS) in a dispute concerning the training compensation for the player Tim Krul.²⁵ Besides clarifying that the provision in question is applicable to both amateur and professional players, when analysing what could be considered as a justification for the entitlement to receive training compensation despite the missing offer of a contract, the Panel dealing with the relevant matter concluded that the

²⁴ Cf. ECJ, *Bernard*, points 47 and 48.

²⁵ CAS 2006/A/1152 ADO *Den Haag v/Newcastle United FC*.

training club must show a *bona fide* and genuine interest in retaining him for the future.

2.2.3 Events precluding the right to training compensation

Annexe 4, art. 2 par. 2 of the FIFA Regulations 2009 enumerates three specific events following which no training compensation will be due.

The first situation is the case where the former club terminates the player's contract without just cause. The obvious aim of the relevant provision is to prevent a club that did not respect its contractual obligations from nevertheless obtaining financial benefits from the departure of a player that it has provoked by its own actions. Actually, the provision goes towards the same target as the previously mentioned Annexe 4, art. 6 par. 3 of the FIFA Regulations 2009, in the sense that if a club does not show any interest in the services of the player by not respecting its contractual obligations, it shall not be entitled to any training compensation.

Likewise, no training compensation is due if a professional player reacquires amateur status on being transferred. However, if a player re-registers as a professional within 30 months of being reinstated as an amateur, his new club shall pay training compensation in accordance with art. 20 and Annexe 4 of the FIFA Regulations 2009 (cf. art. 3 par. 2 of the said FIFA Regulations).

Finally, no training compensation is due if the player is transferred to a category 4 club, i.e. a club on the lowest level of the categorisation ladder of clubs with respect to the training compensation (cf. point 2.3.1 below) as the majority are purely amateur clubs.

2.3 Training costs

2.3.1 Categorisation of clubs

The member associations are instructed to divide their affiliated clubs into a maximum of four categories. The criterion for the allocation is the clubs' financial investment in training players (cf. Annexe 4, art. 4 par. 1 of the FIFA Regulations 2009).

Art. 6 par. 2 of the Regulations governing the Application of the FIFA Regulations 2001 contained an explicit characterisation of the various categories. The same terms were also indicated in the FIFA circular no. 769 of 24 August 2001,²⁶ which served as explanatory document for the implementation of the FIFA Regulations 2001, and was then reproduced without modification in the FIFA circular no. 799 of 19 March 2002.

Category 1 (top level, e.g. high quality training centre):
all clubs of first division of member associations investing as an average a similar amount in the training of players.

²⁶ Available at www.fifa.com/mm/document/affederation/administration/ps_769_en_68.pdf (September 2010).

Category 2 (still professional, but at a lower level):

all clubs of second division of member associations with category 1 clubs and all clubs of first division in all other countries with professional football.

Category 3:

all clubs of third division of member associations with category 1 clubs and all clubs of second division of all other countries with professional football.

Category 4:

all clubs of fourth and lower divisions of member associations with category 1 clubs, all clubs of third and lower divisions of all other countries with professional football and all clubs of countries with only amateur football.

The FIFA Regulations 2009 do not contain these explanatory elements anymore. Equally, both aforementioned FIFA circulars were repealed (cf. art. 29 par. 1 of the FIFA Regulations 2005). All the same, the criteria for the allocation of the clubs to the various categories have remained unchanged. As a result of this grid not all member associations have all categories at disposal when dividing their clubs into one of them. While applying the above-described elements and after consultation with various stakeholders, FIFA has assigned to each member association the various categories it may dispose of (cf. FIFA circular no. 1223 of 29 April 2010²⁷).

2.3.2 *Criteria for the determination of the training costs*

The training costs are set for each category of clubs. They correspond to the amount needed to train one player for one year multiplied by an average «player factor», which is the ratio of players who need to be trained on average by a club to produce one professional player (cf. Annexe 4, art. 4 par. 1 of the FIFA Regulations 2009).

As already mentioned in the introductory part of this article (cf. point 1.1 above), in its judgement pertaining to the Bernard case the ECJ has explicitly recognised that when identifying the training costs to be taken into account for the assessment of the training compensation due, one must consider the costs borne by the clubs whilst training both future professional players and those who will never play professionally.²⁸ In other words, the ECJ has accepted the application of the player factor.

Congruously, the player factor for each given category is obtained by dividing the total number of players being effectively trained, on average, by a club in that category (i.e. the number of players between 12 and 21 years of age who are trained by a club, who have not yet completed their training and who are

²⁷ Available at www.fifa.com/mm/document/affederation/administration/01/27/61/28/circularno.1223-regulationsonthestatusandtransferofplayers-categorisationofclubsandregistrationperiods.pdf. The relevant allocation had first been made in 2002 and was communicated by means of the FIFA circular no. 826 of 31 October 2002 available at www.fifa.com/mm/document/affederation/administration/ps_826_en_87.pdf (September 2010)). It has remained unchanged to date.

²⁸ Cf. ECJ, Bernard, point 45.

registered to play for that club), by the average number of those players being offered a full professional contract each year.

When introducing the principle of training compensation in its regulations, FIFA was hoping that the member associations would indicate the types of costs that they believed should be taken into account in calculating training compensation fees. Upon receipt of sufficient responses and information FIFA intended to issue guidelines as to which types of costs were to be taken into account in the calculation of training compensation costs. Unfortunately, however, only a handful of member associations replied to the relevant request and provided their input as to the type of costs that they believed should be taken into account. Faced with this situation, and with the firm intention to ensure that the details of the then newly implemented system could be put into operation as soon as possible, FIFA decided to nevertheless work on the basis of the scarce responses that it had received, as well as on the results of studies carried out by its general secretariat, and proceeded to set out guidelines as to the types of costs that member associations should take into account in establishing training compensation fees. These guidelines were communicated by means of the FIFA circular no. 799 of 19 March 2002.

The guidelines were not intended to be exhaustive. But by means of the aforementioned circular it was made clear that when calculating a value for the actual costs of training young players at clubs, the pertinent costs had to be *«limited to those which are incurred by clubs in each category in the country concerned in training young players»*.

The list communicated to the member associations comprised the following criteria:

- Salaries and/or allowances and/or benefits paid to players (such as pensions and health insurance)
- Any social charges and/or taxes paid on salaries
- Accommodation expenses
- Tuition fees and costs incurred in providing internal or external academic education programmes
- Travel costs incurred in connection with the players' education
- Training camps
- Travel costs for training, matches, competitions and tournaments
- Expenses incurred for use of facilities for training including playing fields, gymnasiums, changing rooms etc. (including depreciation costs)
- Costs of providing football kit and equipment (e.g. balls, shirts, goals, etc.)
- Expenses incurred whilst playing competitive matches including referees expenses, and competition registration fees
- Salaries of coaches, medical staff, nutritionists and other professionals
- Medical equipment and supplies
- Expenses incurred by volunteers
- Other miscellaneous administrative costs (a percentage of central overheads to cover administration costs, accounting, secretarial services, etc.)

According to FIFA, member associations should thus take into account these types of costs incurred by their training clubs when establishing training compensation fees for each category of clubs at their disposal.

In connection with the Bernard case, which is at the basis of the present essay, in her conclusions, the Advocate General Sharpston now raises a very interesting consideration. In her opinion, when calculating the amount of training compensation due to a training club, it is necessary to take into account not only the actual training costs incurred by the training club, but also those saved by the new club.²⁹ As will be exposed at a later stage, FIFA's system of training compensation follows this general idea and effectively takes into consideration also the training costs that the new club saved by acquiring the services of an already widely trained and educated player instead of carrying out the relevant formation work.

2.3.3 Actual calculation of the training costs per category

Originally, the idea of FIFA was that on the basis of the criteria communicated by means of the FIFA circular no. 799 of 19 March 2002 (cf. point 2.3.2 above), member associations would determine an average training compensation amount for each different category of clubs within their association. Furthermore, in the EU/EEA, the member associations were instructed to meet with representatives of both players and clubs to work out this amount. In other words, the aim was to collect as much reliable information as possible from the various stakeholders so as to be able to fix a standardised average amount of training compensation for each category of clubs per year and member association.

This goal was meant to be achieved by means of the following process, which the member associations were asked to follow.

- a) For each different category of clubs (and based on the criteria for calculating training compensation mentioned above in point 2.3.2), the member associations had to arrive at a figure, which represented the average annual training costs incurred by a club in that category.
- b) The figure established for each category in accordance with a) above, had then to be divided by the total number of players that were effectively trained, on average, by a club in each category, i.e. the number of players between 12 and 21 years of age who were trained by a club, who had not yet completed their training and who were registered to play for that club. The resulting figure represents the average cost for training one player at a club in a particular category.

²⁹ Opinion of Advocate General Sharpston, point 58: «... the need to encourage the recruitment and training of young professional football players is capable of justifying a requirement to pay training compensation where an obligation to remain with the training club for a specific period after completion of training is not respected. However, that will be so only if the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club ...».

- c) Finally, to work out the training compensation amount for each category, the figure obtained under b) had to be multiplied by the average player factor (cf. point 2.3.2 above).

The final result of these proceedings would have been that each member association would be in a position to inform FIFA of the average annual training compensation amount per player for each category of clubs.

Unfortunately, once again the feedback from the various member associations was everything else but exuberant. Actually, only 23 member associations did undertake the aforementioned tasks with diligence. A very large number of associations were, however, not able to provide any answers. As a result, FIFA had no alternative but to conclude that, despite the clear instructions contained in the FIFA circular no. 799, many member associations were unable to compile the data required to put the calculation system in place.

In addition, during the ongoing consultations with member associations, leagues, clubs and players' representatives, concerns about the complexity of the new system were repeatedly expressed.

On account of this situation, in summer 2002, thus almost a year after the coming into force of the FIFA Regulations 2001 and the envisaged implementation of the new training compensation system, FIFA was faced with the fact that the necessary data for having the system actually running were not at their disposal and that the various stakeholders encountered difficulties in applying and complying with the relevant provisions in practice due to their reported complexity. It appeared thus that on paper and in theory an extremely reasoned system had been created. However, in practice, the latter proved to be by far too sophisticated and difficult to properly implement.

Despite these unforeseen and critical occurrences, FIFA remained determined to implement the pertinent training compensation system. This not least in view of the agreement it and UEFA had found together with the European Commission. On the basis of art. 45 of the FIFA Regulations 2001 the Players' Status Committee took a hand in the matter and recognised that a properly working system pertaining to the payment of training compensation could only be put in place if the various provisions were simplified so as to render them realisable in practice. The system had to become more realistic in order to be feasible. As a result, a certain grade of simplification was inevitable. In particular, it became evident that it would not be possible to establish average annual training compensation amounts per player for each category of clubs for each single member association. On the other hand, it remained also very clear that, despite any simplification, the training compensation amount, however determined, had to remain oriented towards and reflect the actual training costs incurred by the respective clubs.

The FIFA administration was therefore instructed to intensify the consultations with the member associations, leagues, clubs and players' representatives in order to find solutions complying with the above-described necessities.

The results of the various exchanges were then presented to the Players' Status Committee, which, after thorough evaluation, came to certain conclusions that were also endorsed by the FIFA Executive Committee.

The member associations – and through them also their leagues and clubs – as well as the players' representatives were informed of the pertinent conclusions by means of the FIFA circular no. 826 of 31 October 2002. The most essential and incisive point was that the various stakeholders would receive assistance with respect to the calculation of training compensation amounts by means of FIFA establishing indicative amounts per confederation, which would be subject to review by the DRC in individual cases.

It goes without saying that the amounts communicated by means of the above-mentioned circular letter were not unilaterally fixed by FIFA without having previously had an in-depth analysis of all the relevant circumstances and a thorough assessment of the available data. Particular importance was given to the information and data received by the few member associations on the basis of the FIFA circular no. 799. But, obviously, the indications and clarifying elements gained through the consultation process with all stakeholders also played a major role in the pertinent proceedings. Equally, it is of utmost importance to point out that FIFA strived to find a high grade of consensus amongst all stakeholders with regard to the training compensation amounts prior to fixing them. Therefore, it can be said that the established indicative annual training compensation amounts per confederation, in principle, enjoyed a widely spread common agreement.

As a result, together with the categories for clubs at disposal of each of the member associations (cf. point 2.3.1 above), also the indicative annual training compensation amounts per confederation and category of clubs were communicated to the stakeholders by means of the FIFA circular no. 826.

The following table provides an overview of the various amounts:

Confederation	Category I	Category II	Category III	Category IV
AFC		USD 40,000	USD 10,000	USD 2,000
CAF		USD 30,000	USD 10,000	USD 2,000
CONCACAF		USD 40,000	USD 10,000	USD 2,000
CONMEBOL	USD 50,000	USD 30,000	USD 10,000	USD 2,000
OFC		USD 30,000	USD 10,000	USD 2,000
UEFA	EUR 90,000	EUR 60,000	EUR 30,000	EUR 10,000

In addition, in case a party objected to the result of a calculation based on the rules on training compensation, it was entitled to refer the matter to the DRC. The Chamber would then review whether the training compensation fee calculated on the basis of the indicative amounts and the principles of the applicable provisions had to be considered to be clearly disproportionate to the case under review. Should it deem that particular circumstances were given, the DRC was entitled to adjust the amounts for the training compensation so as to reflect the specific situation of a case.

The steps leading to these results (i.e. determination of the indicative amounts etc.) had to be taken under quite some time pressure in order for the envisaged system to be ready for implementation and application in practice without further delays. As a result, FIFA intended to further consider the matter also after communication of the aforementioned amounts and, if need be, in particular on the basis of experience gained in application of the established sums, to reconsider certain aspects.³⁰

However, in practice the simplified system and the clear structure of the process soon proved to be extremely efficient and rapidly gained in acceptance even at the single club's level. Whereas the DRC had to decide on quite a number of disputes concerning the application of the indicative amounts in the first couple of years following their communication, since one of the parties considered them to be disproportionate for the specific matter at stake, the number of such cases has drastically diminished in the recent years. Actually, such litigations have become a real exception. Clubs appear to appreciate the necessary simplicity and clarity of the system and the indicative amounts that were determined seem to be close to reflecting reality.

In view of this development, FIFA considered that it would not be advisable or, for the time being, needed, to again interfere in the system. As a consequence, within the scope of the revision of the FIFA Regulations in 2004 (the FIFA Regulations 2005 came into force on 1 July 2005) the relevant principles were included in the regulations.

The current edition of the FIFA Regulations continues to be based on the same principles. Annual average training costs are established on a confederation basis for each category of club.³¹ In case of objections, the DRC may review disputes concerning the amount of training compensation payable and shall, in particular, have discretion to adjust this amount if it is clearly disproportionate to the case under review.³²

With regard to the latter aspect, particular importance is given to the fact that the DRC limits its interference to cases where really exceptional and particular circumstances apply. In other words, only if evidence is provided to unequivocally prove that the amount calculated on the basis of the relevant average training costs is clearly disproportionate to the case under review (cf. the respective wording of the pertinent article), the DRC will proceed to adjust the due training compensation amount. This approach was recently also confirmed by the CAS.³³ Actually, to this day, neither the DRC nor the CAS have ever proceeded to adjust the respective amounts for having considered them to be clearly disproportionate

³⁰ Cf. FIFA circular no. 826, point (i) «indicative amounts»: «Until a more definitive calculation system is put into place ...» and «FIFA will reconsider these indicative amounts before 1 September 2003, in the light of further information received as well as the jurisprudence of the Dispute Resolution Chamber».

³¹ Cf. Annexe 4, art. 4 para. 2 of the FIFA Regulations 2009.

³² Cf. Annexe 4, art. 5 para. 4 of the FIFA Regulations 2009.

³³ CAS 2009/A/1908 *Parma FC S.p.A. v. Manchester United FC*.

to the case under review.

As already indicated, the training compensation amounts determined within the scope of the extensive process initiated by FIFA with the participation of all stakeholders as explained in detail above, as well as the applicable calculation principles, have reached an amazing grade of recognition and credibility. The parties have recognised that the grade of simplification applied is a mandatory prerequisite for the system to work in an acceptable and quite efficient way. However, this does not mean that the relevant amounts are considered to be the final word now and forever. The FIFA administration is constantly following the jurisprudence of the DRC and the CAS as well other developments related to the training costs. Equally, indications and information provided by the various stakeholders are always properly taken into account and thoroughly analysed. All these measures aim at being ready to react, if need be. In principle, the possibility to adjust the amounts in question exists on a yearly basis.³⁴ A circular letter confirming the respective training costs is sent out every year.³⁵

And finally, prior to explaining the procedure concerning the calculation of training compensation, one last reference to the judgement of the ECJ in the Bernard case. As explained above, while acknowledging that any system of training compensation must be oriented towards the actual training costs incurred by a club, experience gained over the last 9 years has clearly shown that without a certain grade of abstraction and simplification, the system would not be working. FIFA is convinced that by means of its pertinent rules it has found a proper balance and deems that its realistic approach corresponds to a proportionate measure to achieve the higher-ranking objective of motivating clubs to invest in the training and education of young players. The simplicity, clarity and transparency of the system certainly constitutes a key factor in this respect. This consideration appears to be shared by other institutions, in particular by the Italian Government.³⁶

2.4 Calculation of training compensation

The general rule provides that the basis for the calculation of training compensation due to a player's former club, are the training costs that would have been incurred by the new club if it had trained the player itself.³⁷ As already previously mentioned, the Advocate General Sharpston also confirmed that the actual training costs saved by the new club form a justifiable base for the amount of training compensation

⁴³ Cf. Annexe 4, art. 4 para. 2 of the FIFA Regulations 2009: «They [the training costs] are updated at the end of every calendar year».

³⁵ The last of the series was the FIFA circular no. 1223 of 29 April 2010.

³⁶ Cf. ECJ, *Bernard*, point 24: «The Italian Government considers that a compensation scheme may be regarded as a proportionate measure to achieve the objective of encouraging the recruitment and training of young players in so far as the **compensation is determined on the basis of clearly defined parameters** and calculated in the light of the burden borne by the club which provided the training.» (emphasis added).

³⁷ Cf. Annexe 4, art. 5 para. 1 of the FIFA Regulations 2009.

due (cf. point 2.3.2 above).³⁸

Despite FIFA's fundamental objective and intention to issue global and binding rules concerning the transfer of players between clubs belonging to different associations, which are equally applicable on a worldwide basis, with regard to the system of training compensation a few special provisions have been included in the FIFA Regulations (cf. Annexe 4, art. 6 of the FIFA Regulations 2009). They aim at taking into account the very specific particularities pertaining to certain aspects of European law, most notably the principle of the freedom of movement for workers.³⁹

The particularity relating to the contractual offer (cf. Annexe 4, art. 6 par. 3 of the FIFA Regulations 2009) was already previously addressed in this article (cf. point 2.2.2 above). Another deviation from the general rule concerns the basis for the calculation of training compensation for players moving from one association to another inside the territory of the EU/EEA. Under such circumstances, in case a player moves from a lower to a higher category club, the calculation of the training compensation amount due will be based on the average training costs of the two clubs.⁴⁰ According to the general rule stipulated in Annexe 4, art. 5 par. 1 of the FIFA Regulations 2009, the training costs of the higher category club would need to be considered.⁴¹

The actual training compensation amount due is finally calculated by taking the training costs of the new club (the average training costs of the two clubs in case of a transfer of the player from one association to another inside the territory of the EU/EEA and the new club being a higher category club than the previous club) multiplied by the number of years of training from the season of the player's 12th birthday to the season of his 21st birthday.⁴² The amount payable is calculated on a *pro rata* basis according to the period of training that the player effectively spent with each club.⁴³

In order to determine which clubs are entitled to claim training compensation, the so-called player passport⁴⁴ plays an essential role. This in

³⁸ Opinion of Advocate General Sharpston, point 58: «... the need to encourage the recruitment and training of young professional football players is capable of justifying a requirement to pay training compensation ... However, that will be so only if the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club ...» (emphasis added).

³⁹ Specific provisions for the EU/EEA are also provided for in connection with the protection of minors (cf. art. 19 par. 2 b) of the FIFA Regulations 2009).

⁴⁰ Cf. Annexe 4, art. 6 par. 1 a) of the FIFA Regulations 2009.

⁴¹ For the transfer of a player from a category 3 club in Spain to a category 1 club in England, the training compensation due to the Spanish club for each year of training provided to the player would thus correspond to EUR 60,000 (average of EUR 30,000 [training costs for category 3 clubs within UEFA] + EUR 90,000 [training costs for category 1 clubs within UEFA]), and not to EUR 90,000, as it would be the case on the basis of the general rule.

⁴² Cf. Annexe 4, art. 5 para. 2 of the FIFA Regulations 2009.

⁴³ Cf. Annexe 4, art. 3 para. 1 of the FIFA Regulations 2009.

⁴⁴ Cf. art. 7 of the FIFA Regulations 2009.

particular in case the entitlement to training compensation arises on grounds of the player signing his first professional contract. In fact, as already explained (cf. point 2.2.2 above), in such a case all clubs that trained the player prior to his first registration as a professional will be entitled to training compensation. For a club intending to sign the player it is thus important to precisely know a player's career history. In case of a transfer of a professional player the situation is less complex since only the former club will be entitled to training compensation, if at all.

The player passport is to be issued by the association of the player's former club and has to be attached to the international transfer certificate (ITC).⁴⁵ Furthermore, in order to facilitate the process pertaining to the payment of training compensation, the association registering a player is instructed to inform the associations of the clubs that trained the player between the ages of 12 and 21 of the registration of the player as a professional after receipt of the pertinent ITC.⁴⁶

Last but not least, reference is made to a particularity concerning the calculation of training compensation for the first years of training and education provided to a player. For the seasons between a player's 12th and 15th birthday (i.e. the first four seasons to be taken into consideration when assessing the right to claim training compensation) the training costs of a category 4 club are always to be applied, independent of the new club's actual category.⁴⁷ By means of that rule FIFA aims at ensuring that training compensation for very young players is not set at unreasonably high levels.

In recent times the topic of the protection of minors in connection with international transfers of players has gained considerable attention and become one of the main fields of concern for FIFA. Within the scope of the evaluation of possible means to further strengthen FIFA's efforts and determination to fight the (financial) exploitation of very young players, *inter alia*, measures were also taken with respect to the rules on training compensation. The amendment to Annexe 4, art. 5 par. 3 of the FIFA Regulations 2009, which came into force on 1 October 2009 and stipulates that the exception mentioned in the preceding paragraph will not apply in case of the transfer of a minor player,⁴⁸ has to be seen in this context. FIFA considers that the need to protect minors prevails over the aim that the relevant exception pursues.

3. *Solidarity Mechanism*

3.1 *Regulatory basis*

From an external point of view, it may be considered that the system of training

⁴⁵ Cf. Annexe 3, art. 1 para. 3 of the FIFA Regulations 2009.

⁴⁶ Cf. Annexe 3, art. 1 para. 4 of the FIFA Regulations 2009.

⁴⁷ Cf. Annexe 4, art. 5 para. 3 of the FIFA Regulations 2009.

⁴⁸ «... This exception [exclusive application of training costs of category 4 clubs] shall, however, not be applicable where the event giving rise to the right to training compensation ... occurs before the end of the season of the player's 18th birthday».

compensation in the broader sense according to the FIFA Regulations is completed by the so-called solidarity mechanism. Yet, if the history of origins is contemplated, one will note that the latter principle of the FIFA Regulations is actually based on a different approach, i.e. the notion of solidarity within the football family. This fact is best illustrated by means of the agreement reached between FIFA/UEFA and the European Commission in March 2001, wherein a clear distinction is made between the training of young players and the solidarity in the football world (cf. point 1.2 above). As a result, when analysing the solidarity mechanism this essential difference must always be taken into consideration.

The FIFA Regulations 2009 deal with the solidarity mechanism in their art. 21 and Annexe 5. Like art. 20 of the FIFA Regulations 2009 for the training compensation, art. 21 of the said Regulations merely mentions the main principles of that institution, whilst the detailed provisions concerning the solidarity contribution are set out in the aforementioned technical Annexe. In particular, it describes under which circumstances a solidarity contribution becomes due and how it is to be distributed amongst the training clubs concerned (art. 1). Furthermore, the payment procedure is also exposed in detail.

3.2 Structural differences to the training compensation

Contrary to the training compensation payable for a specific player, to which a training club is entitled only once, if at all, by means of the solidarity mechanism clubs that trained and educated a player will profit from his international transfers as a professional during his entire career.

Apart from this fundamental difference, there are other structural distinctions between the training compensation as described under point 2. of this article and the solidarity mechanism. Firstly, the right to enforce the solidarity contribution is not linked to a specific age limit. Even if a professional player is transferred at the age of, for example, 34, and all prerequisites for the payment of solidarity contribution are met, the respective training clubs will be entitled to claim the relevant sums.

As was explained under point 2.2.1 above, the major stakeholders of the football family agree in principle to the conclusion that a player's training and education takes place between the ages of 12 and 23. With regard to the solidarity contribution, unlike for the training compensation, where only the seasons between the player's 12th and 21st birthday are taken into consideration, the entire training and education period between 12 and 23 entitles the clubs concerned to claim their share of the pertinent contribution. Since, like for the training compensation, it is the season of the player's respective birthday that needs to be considered, there are thus a maximum of 12 seasons of training that may entitle a club to solidarity contribution.⁴⁹

⁴⁹ Cf. Annexe 5, art. 1 of the FIFA Regulations 2009.

The last essential structural difference between the training compensation and the solidarity mechanism lies in the fact that the latter only applies if a professional player moves during the course of a contract. As will become evident by reading the following paragraphs, this actually is the crucial and compulsory prerequisite for the entitlement to solidarity contribution to arise.

3.3. Principles

The solidarity contribution is inseparably linked to the transfer compensation agreed between two clubs. At the latest since the Bosman ruling⁵⁰ it is an established principle that no transfer compensation will be due if a player is transferred at the end of his contract with his previous club. Consequently, it is obvious that the first and basic precondition for the solidarity mechanism to become applicable is a player moving between two clubs belonging to different associations before the expiry of his contract.⁵¹

5% of any compensation, not including training compensation, paid to a player's former club has to be deducted from the total amount of this compensation and distributed by the new club as a solidarity contribution to the clubs involved in the player's training and education over the years between the seasons of his 12th and 23rd birthday.⁵² In case a player was trained by a club during less than an entire season, the relevant part of the solidarity contribution will be calculated on a *pro rata* basis. At this stage it is important to emphasise that according to the FIFA Regulations, by means of the solidarity mechanism no additional financial burden is put on the new club. Considering that the solidarity contribution is to be deducted from the amount of compensation agreed between the two clubs, all that changes is the way the money is being distributed.⁵³

The 5% solidarity contribution is to be shared between the clubs entitled to the respective payment. The specific breakdown provided for by the FIFA Regulations⁵⁴ ensures that the distribution reflects the number of seasons the player was registered with the relevant training club. One will note in particular that, like for the training compensation,⁵⁵ the first four seasons of training (i.e. the ones between the player's 12th and 15th birthday) entitle to a smaller share of the 5% than the subsequent years of training.

⁵⁰ ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

⁵¹ Cf. art. 21 and Annexe 5, art. 1 of the FIFA Regulations 2009.

⁵² Cf. Annexe 5, art. 1 of the FIFA Regulations 2009.

⁵³ Example: Player X is trained by club A between the seasons of his 12th and his 17th birthday. Subsequently the player is trained by club B between the seasons of his 18th and 21st birthday. Finally, the player is trained by club C during the seasons of his 22nd and 23rd birthday. At the age of 29, player X moves internationally and prior to the expiry of his contract from club D to club E. The two clubs agree on a compensation amounting to 1 Mio. Club E will pay 1 Mio, 95% of it to club D and 5% to the clubs A, B and C, which contributed to the training of the player during the relevant period of time.

⁵⁴ Cf. Annexe 5, art. 1 of the FIFA Regulations 2009.

⁵⁵ Cf. Annexe 4, art. 5 para. 3 of the FIFA Regulations 2009.

As a final remark it should be noted that the solidarity mechanism in the sense of the FIFA Regulations only applies on the basis of a transfer of a professional player between clubs belonging to different associations. Consequently, even if the new club of the player, which is responsible for the payment of the relevant contribution, and the training club are affiliated to different associations, but the transfer at the basis of the claim is a national one, no solidarity contribution will be due. The respective jurisprudence of the DRC was repeatedly confirmed by the CAS.⁵⁶

4. Conclusions

By means of the system of training compensation included in the FIFA Regulations, rules pertaining to the international transfer of players (i.e. transfers between clubs belonging to different associations) have been established and implemented, which pursue a legitimate aim and are justified by reasons in the public interest. In fact, the objective of the pertinent provisions is to encourage the recruitment and training of young players. In its recent judgement in the Bernard case, the ECJ has confirmed that such target must be accepted as legitimate.⁵⁷ Moreover, considering the manifold and specific characteristics of football as well as of its uncontested social and educational function (as the Advocate General Sharpston correctly states, «*professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged ...*»⁵⁸), it certainly lies in the public interest to have a system in place that aims at ensuring that small and relatively poor training clubs do not disappear. Unfortunately, it is a reality that large and vastly more wealthy clubs constantly try to attract young promising talents with contractual offers that the aforementioned small clubs will never be able to present to the players they have trained and educated.⁵⁹

Likewise, the system provided for by the FIFA Regulations is suitable to ensure that the abovementioned objective is attained and does not go beyond what is necessary. In fact, as the ECJ confirmed, the prospect of receiving training compensation is likely to encourage football clubs to seek new talent and young players.⁶⁰ As requested by the ECJ, the scheme providing for the payment of training compensation incorporated in the FIFA Regulations is clearly related to the real training costs of the clubs, while taking into account the so-called player

⁵⁶ CAS 2007/A/1287 *Danubio FC v/ FIFA & Internazionale Milano*; CAS 2007/A/1307 *Asociación Atlética Argentinos Juniors v/ Villarreal C.F. SAD*.

⁵⁷ Cf. ECJ, *Bernard*, point 39.

⁵⁸ Cf. Opinion of Advocate General Sharpston, point 47; cf. also Opinion of Advocate General Sharpston, point 1: «To those who follow 'the beautiful game', it is a passion – even, a religion».

⁵⁹ Cf. hereto the same considerations of the Advocate General Sharpston in point 1. of her opinion.

⁶⁰ Cf. ECJ judgement, point 41.

factor, which the ECJ also recognises. However, the calculation of the training compensation due is in no way affected or related to damages in relation to the total loss suffered by the training club. In particular, training compensation in accordance with the FIFA Regulations is not based on breach of contractual obligations and does thus not constitute the payment of damages to the training club. Equally, the player's prospective earnings or the club's prospective loss or profits are not taken into consideration.

Finally, the system of training compensation according to the FIFA Regulations is also proportionate to the objective it aims at attaining. First and foremost, the actual payment of training compensation in the narrower sense (cf. art. 20 and Annexe 4 of the FIFA Regulations 2009; point 2. above) is limited in time in a double sense: Firstly, the right to training compensation is only enforceable until the end of the season of the player's 23rd birthday. Secondly, as a general rule, only the seasons of training between the player's 12th and 21st birthdays are to be compensated. In addition, any training club will benefit from the training compensation only once, if at all. Merely the solidarity contribution may become due several times. However, as explained (cf. point 3.1 above), the nature of the solidarity mechanism is to be found in the notion of solidarity within the football family rather than in the actual recuperation of training costs.

A further characteristic of the training compensation system of the FIFA Regulations is the fact that training compensation for very young players (i.e. for the first four seasons of relevance between a player's 12th and 15th birthdays) is always based on the training costs of category 4 clubs. This precisely to ensure that training compensation for very young players is not set at unreasonably high and thus disproportionate levels.

Small amateur clubs normally do not need to pay any training compensation since they either belong to the category 4 or because the player joins them in an amateur capacity. In any case, training compensation for a player joining a club from a club of a higher category will always be calculated on the basis of the training costs of the lower category.

In principle, only clubs that demonstrate a real interest in the services of a player they have educated and trained shall be entitled to claim training compensation. The FIFA Regulations pursue this important target by stating that no training compensation is due if the former club terminates the player's contract without just cause (cf. Annexe 4, art. 2 par. 2 i. of the FIFA Regulations 2009). This applies on a worldwide basis. Moreover, as regards transfers of players from one association to another inside the territory of the EU/EEA, a special provision obliges training clubs to offer the player a contract or to show by means of irrefutable evidence that they had a real and genuine interest in the player's services despite not having offered him a contract, in order to be able to claim training compensation (cf. Annexe 4, art. 6 par. 3 of the FIFA Regulations 2009).

And finally, bearing in mind the particular attention that must be given to the principle of the freedom of movement for workers within the territory of the EU/EEA, the FIFA Regulations also establish that in case a player moves between

two clubs (from a lower to a higher category) affiliated to two associations inside the said territory, training compensation shall be calculated on the basis of the average training costs of the two clubs concerned and not the ones of the higher category club.

In summary, it has thus to be concluded that, in general, the system of training compensation according to the FIFA Regulations appears to comply with the main principles requested by the ECJ in its recent judgment in the Bernard case.

CHAPTER V

THE OLIVIER BERNARD CASE COMPARED

by *Wil Van Megen**

SUMMARY: Introduction – 1. The general significance of the Bernard judgment – 2. Specific implications: allocation of costs – 3. Right to clarity – 4. The approach to damages in the Bernard Case – Conclusions

Introduction

In order to be able to put the Olivier Bernard case into the right perspective, it is advisable to see the decision in the correct European context. I will begin by doing so and will take this as a basis for a consideration of the significance of this judgment for European law and sports law, specifically the decisions handed down by the FIFA Dispute Resolution Chamber and the CAS.

In the Walrave-Koch case,¹ the European Court of Justice (ECJ) issued its first signal that the professional pursuit of sport was not outside the reality of European law. The Bosman judgment² interpreted this in explicit terms, with the opinion of Advocate General Lenz also playing a very important role. Both the freedom of movement for workers and the competitive aspects were discussed at length. The Bosman case was finally decided on the basis of the free movement of workers.

The relationship between sport and competition law followed in the Meca Medina judgment.³ The question there was whether an exclusion due to the use of doping could be examined for compatibility with European competition law. Although the Court of First Instance was of the opinion that a purely sports rule was involved here, the ECJ decided otherwise on appeal.

Both cases make it clear that the professional pursuit of sport as a whole falls under the scope of European law, to the extent that the pursuit of an economic

* Wil Van Megen is FIFPro legal counsel.

¹ ECJ, case 36/74 *B.N.O Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo*, [1974] ECR 1405.

² ECJ, 15 December 1995, Case C-415/93 *Union royale belge des sociétés de football association ASBL and others v Jean-Marc Bosman and others*, [1995] ECR I-4921.

³ ECJ Case C519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECR 2006 I-6991.

activity is concerned. The Bernard case⁴ relates to an aspect already addressed in the Bosman case, i.e. the situation with regard to the training of young football players at their clubs. A sound training structure is essential to the supply of successful top sports men and women. In order to ensure a return on the investment involved, a regulation existed in France that obliged young players to sign a contract with the club that trained them, as soon as a contract of this kind was offered to them. The regulation also contained a provision that applied in the case of the player refusing to sign the contract. This provision implied that the player could not play in France for a period of two years and compensation was payable in the event of the player's departure for a country other than France. In this case, the French club Olympique Lyonnais claimed compensation from the English club Newcastle and the player Olivier Bernard.

The most important question submitted to the ECJ was whether the French regulation constituted a restriction on the freedom of movement of workers and, if so, whether the importance of the regulation was capable of justifying this restriction. The Court found that the French regulation was incompatible with EU law. In addition, the Court stated that the training of young players is a legitimate objective that deserves to be protected. This should be done, however, within the framework of the general principles that apply in this respect.

1. *The general significance of the Bernard judgment*

First of all, the judgment confirms that the provisions of European law can be applied effectively to the pursuit of professional sport. Once again, the necessity of exempting sport from this framework has not been demonstrated.

The demands of the major sports organizations, such as the IOC, FIFA and UEFA to grant more autonomy to sport, certainly have no legal basis. Article 165 TFEU recognizes sport as an area of special attention within the European Union, but as no more than that. It certainly does not constitute European acknowledgment of the autonomy of sport. The FIFA has now halted attempts to have the 6+5 rule⁵ introduced, apparently because realization has dawned there too that this rule is incompatible with the right of freedom of movement of workers inside the EU.

On the other hand, the Court states that it has taken the specific characteristics of sport into account. This is by no means exceptional, because the Court has also taken account of the special aspects of business sectors other than sport in the judgments it has passed. There is no valid reason to assume that sport is so special that it should be exempted from Community law.

⁴ Case C-325/08 *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United*, 16 March 2010, not published yet in the ECR.

⁵ The 6+5 rule means that a football match should start with at least 6 players from the same national background as the club for which they play.

In this judgment, in fact, the Court endorses the importance of uniformity within the Union. If it accepted that Community law does not apply to one particular business sector, it consequently becomes practically impossible to preserve the unity so keenly pursued.

2. *Specific implications: allocation of costs*

The judgment is also significant in other respects. The opinion of the Advocate General Sharpston is important in this context where the allocation of training costs is concerned. She does not confine herself to the professional pursuit of sport in her analysis, but considers the general situation with regard to training costs, placing great emphasis on the differentiation in the allocation of training costs incurred by the employer. When these costs are passed on, it is possible that they will be recovered from the employee himself or from his new employer.

The Advocate General states that when the employee himself must repay the training costs incurred for him, the costs in question can only be the costs actually incurred. A different criterion applies when these costs can be claimed from a subsequent employer. By taking on a trained employee, the new employer is saving the costs for a training system required for the adequate training of employees. In such cases, the total costs of training and a reasonable allocation of these may be taken into account. What the Advocate General is saying in fact is that the (training) costs should be assigned to the proper party.

The FIFA system for training and education that came into effect in consultation with the European Commission after the Bosman judgment is based on the recovery of training costs from a player's new club. This does justice to the system of European law as set out by the Advocate General.

The same system for the allocation of costs is contained in the compensation rule in the event that a player breaches his contract without having just cause to do so. On the basis of the FIFA regulations,⁶ both the player and his new club are jointly and severally liable for payment of the compensation in relation to the breach of contract. In practice, it is always the club that pays the compensation.

Part of that compensation may be the as-yet unamortised portion of the fee that the club paid to the previous club for the transfer of the player. In cases of this kind, these may be very substantial amounts, on which the player himself has no influence whatsoever. The clubs alone conclude a mutual agreement on the transfer fee for a player.

The player experiences no direct disadvantage, due to the fact that these costs are allocated to the next club. Indirectly, however, it may mean that the player is no longer able to find a new club, because a very substantial price tag is attached to him and there is little interest on the part of other clubs as a result. An example of this is Ariel Ortega, who could not find another top club after the

⁶ Art. 17 par. 2 FIFA Regulations on the Status and Transfer of Players (2010).

termination of his contract with Fenerbahce, due to the compensation that would have to be paid by the new club. He was not able to play again until a settlement was reached, but he never returned to the top flight again.

When there is no new club, the player is the only one from whom it is possible to claim the compensation to be paid, including the proportional part of the transfer fee. It is the end of a player's career when this happens, because he will never be able to earn back the transfer fee by playing. This was the fate of the Rumanian player Adrian Mutu after he was dismissed by Chelsea FC for the use of prohibited substances and the tribunals that adjudicate in football, which are the FIFA Dispute Resolution Chamber and the CAS, held him individually liable for the transfer fee that Chelsea had paid to his former club Parma.⁷ The FIFA DRC and the CAS took no account whatsoever of the fact that no club was held jointly liable for payment of the compensation. The internet reference is to a FIFA article on their website which I think is relevant.

The distinction made by the Advocate General in the Bernard case with regard to training costs, i.e. the different valuation of the fact whether the player or the new employer is responsible for the costs, should also be made in this situation. When compensation for the consequences of breach of contract is claimed from the player alone, the transfer fee previously paid for him should certainly be disregarded, because he had absolutely no control over this. This component could play a limited role, however, if there is a club from which payment can be claimed. The effect of compensation of this kind must not be that the player is forced to end his career because no club is prepared to pay that compensation. In any case, the right to compensation for the transfer fee should lapse if the original period of the breached contract has expired. The club will, after all, have amortised this transfer fee over that period.

3. *Right to clarity*

Another aspect that makes the Bernard case an important decision is the fact that the Court emphasizes that parties must have clarity regarding their situation. In other words, it must be clear in advance where someone stands if the parties do not continue their relationship. The Court describes this clarity as being of great worth in social and economic life.

The point here once more is that the decision refers to training costs. It is impossible to understand, however, why this should not apply to the payment of the transfer fee when contracts are terminated prematurely. It is important to realize that a contract of employment is involved with mutual obligations. The player is obliged to make suitable efforts to perform to the best of his ability in

⁷ Cf. FIFA, DRC reaches decision on MUTU, available at www.fifa.com/aboutfifa/federation/administration/news/newsid=850413.html; Cf. also **CAS 2008/A/1644 Adrian Mutu v/ Chelsea Football Club Limited** available at www.tas-cas.org/d2wfiles/document/3459/5048/0/Award%201644%20FINAL.pdf (September 2010).

matches and during training. The reciprocal obligation on the club is to pay the agreed salary.

The consequences of a contract being breached by a club without just cause have been crystal clear to clubs since the introduction of the FIFA system. The club must then pay the residual value of the contract to the player. If the player finds other employment in the original period of the breached contract, his earnings over that period are deducted from the compensation to be paid. It is simple, therefore, for a club to calculate the costs of breach of contract.

It would be completely logical to assume that this reasoning would also be followed in the event that termination of the agreement without just cause is attributable to the player. The player, in that case, no longer delivers his part of the agreement, i.e. his professional performance on the field. Since the club no longer receives this performance for the further duration of the agreement, the club is also entitled to claim the residual value of the contract, to the amount of the player's salary. This salary reflects, after all, the value of the player's performance for the club.

This line of reasoning was followed seamlessly by the CAS in the Webster case.⁸ The Webster doctrine is summarized concisely in a single sentence: «There is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit». The compensation to be paid by Andy Webster was calculated solely by the residual value of his contract.

This decision also provided players with clarity on the consequences of breaching a contract without having a good reason to do so. This clarity only applies, however, if the relevant breach takes place outside what is known as the protected period.

The Bosman judgment made it clear that players are employees just like all others in the EU and clubs are ordinary employers. The manner of terminating the agreement between them is determined, therefore, by the ordinary rules of employment law. Within the framework of the consultations with the European Commission, the FIFA emphasized forcefully in 2001 that the professional football sector has specific characteristics and the nature of those characteristics is such that the agreement requires extra protection. The Commission proved to be open to this argument and agreed that football contracts should include a protected period that lasts three years if the player concerned is younger than 28 years of age when his contract enters into force and two years in the case of players older than 28 years. The protection implies that when a player breaches his contract in the course of the protected period, he is excluded from playing matches for a period of four to six months, in addition to being liable for the payment of a sum in compensation. This rule is satisfactory in practice, since breach of contract by players is rare in the first years of a contract.

The consequence of the limitation of the protected period is that extra

⁸ CAS 2007/A/1298, *Wigan Athletic FC v / Heart of Midlothian*. CAS 2007/A/1299, *Heart of Midlothian v/ Webster & Wigan Athletic FC*. CAS 2007/A/1300, *Webster v/Heart of Midlothian*.

protection ceases to apply to the football contract after expiry of this period and the termination of the contract is then governed solely by the provisions of national employment law applicable to everyone. In order to avoid this consequence, clubs present their players with a new agreement before the contract expires, as a result of which a new protected period commences with effect from the date on which the new agreement enters into force. This appears to be in conflict, incidentally, with the purpose of the agreements made with the Committee at the time, because the protection was intended first and foremost to protect investments made in training and/or transfer fees. These interests no longer play a role, however, when a contract is extended.

The Webster judgment caused much unrest among the employers and there were demands for the amendment of article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP), in order to change the criteria for determining the compensation in the event of breach of contract. This change was intended to result in the compensation payable by players who breached their contracts being calculated on the basis of the market value of the player or a comparable alternative.

The clubs completely disregarded the fact that the existing rules had come about in consultation with the Commission and had to be compatible with EU Law. Compatible with EU law means in this case that the rules of normal employment law are applicable, although with additional protection superimposed on these in the form of the protected period. The specific characteristics of professional football were, therefore, taken into consideration when the new FIFA regulations were drafted! It is even questionable whether these measures would survive a review by the European Court for compliance.

Understandably enough, the FIFA did not agree to the clubs' demands to amend art. 17 RSTP in such a way that a different criterion would apply to players than applied to clubs and the market value criterion was not incorporated into the regulations.

The clubs did receive support from the CAS, however. Following the EU-compatible judgment in the Webster case, a number of other cases were addressed in which the CAS appears to have taken a different direction. Examples are the Matuzalem case;⁹ the Kakuta case¹⁰ and the El Hadary case.¹¹

The player Matuzalem waited until the protected period had ended before terminating his contract. His wife's homesickness was the reason for his breach of his contract with Shakhtar Donetsk, which was still in force. On the basis of the interpretation of the CAS in the Webster case, the compensation payable by

⁹ Cr. FIFA DRC decision of 2 november 07, and cf. CAS 2008/A/1519, *FC Shakhtar Donetsk (Ukraine) v/ Mr. Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*, available at www.tas-cas.org/d2wfiles/document/3229/5048/0/Award%201519-1520%20internet_.pdf (September 2010).

¹⁰ *Kakuta*, FIFA DRC 27-08-2009, CAS 04-02-2010, award not published.

¹¹ CAS 1-6-2010, 2009/A/ 1856, 1857, case *FC Sion / El-Hadary / FIFA / AL-Ahly* available at www.tas-cas.org/d2wfiles/document/4267/5048/0/Award%201880-1881.pdf.

Matuzalem would amount to Euro 2.4m., i.e. the residual value of his contract. In addition, a proportional share of the transfer fee paid by Shakhtar was open to consideration. The CAS, however, arrived at the significantly higher figure of Euro 12.4m, an amount based on various components that are clarified separately. The most conspicuous of these are the replacement value of the player and a kind of punitive sanction imposed on him because of the time at which he terminated the agreement.

Starting with the latter, it should be noted that Matuzalem terminated his agreement completely in accordance with the limits of the FIFA RSTP. The provision taken as the basis for the imposition of the punitive sanction is a rule taken from Swiss law, which the CAS may invoke complementarily. The Swiss provision does exist, but it is invoked exclusively against unscrupulous employers. It is a dead letter with regard to employees and it is extremely strange that the CAS had recourse to this.

Furthermore, the replacement value is cited as a criterion for the calculation of the compensation. It must be stated first and foremost that art. 17 RSTP sets out a number of criteria that may play a role in the termination of the employment contract without just cause. This list is not exhaustive, but does include the most obvious criteria, such as remuneration under the existing contract and/or the new contract, the time remaining on the existing contract the fees and expenses paid or incurred by the former club and whether the contractual breach falls within a protected period. The replacement value is not one of these, which is only logical, bearing in mind that the RSTP have been brought into conformity with European law. As stated above, it follows from the Bosman judgment that regular employment law applies to an agreement between player and club. The replacement value of an employee on termination of a contract of employment plays no role in employment law and should not, as a consequence, be a factor in professional football either. The effect of this would, in fact, be to create a veiled transfer system for which there is neither a regulatory nor a legal basis. Furthermore, it would naturally be extremely strange if the most compelling criterion had been forgotten in art. 17 RSTP and this is emphatically not the case. No other conclusion is possible, therefore, than that the CAS applied an incorrect criterion.

The demand for the amendment of art. 17 has not subsided, in spite of this decision, which illustrates that the clubs realize that there are, in fact, no grounds for the decision by the CAS.

At the Congress on international football law in Madrid in 2009, CAS arbitrator M. Bernasconi stated in a clarification of the decision given, that the FIFA Regulations were not a manual that a player could use to make a simple calculation of how much compensation he would have to pay. Why he took this position and why this would be clear to the clubs remained obscure in his remarks.

The FIFA DRC adopted the Matuzalem decision practically unchanged in a subsequent important case in this context, i.e. Racing Club de Lens vs. Kakuta and Chelsea FC. This resulted in total compensation to an amount in excess of Euro 700,000.00 in a case in which the residual value of the player's contract was

only a few tens of thousands of euro. This was not a major problem for Chelsea FC, the acquiring club. It had apparently not been taken into account that the DRC would impose a sanction on the club for inducing a breach of contract by the player, but Chelsea was banned from registering any new players during two transfer windows. This was a problem, however, and a reason for Chelsea to lodge an appeal and submit a request for suspension of the decision.

After the suspension was granted, the parties reached an amicable settlement. On payment of a substantial sum of money, the French club suddenly proved to be prepared to declare that there was no contract with the player, breach of contract could be ruled out as a consequence, and the settlement was ratified by the CAS. The fact that the Dispute Resolution Chamber of the FIFA was made to look completely ridiculous was considered acceptable. The parties themselves could take no action with regard to the punishment, but the CAS conveniently came to the rescue in this respect as well, and a sanction was no longer considered opportune in view of the agreement reached.

In the El Hadary case the CAS simply picked up again where it had left off and arrived, on the basis of what is known as the replacement value, at a sum in compensation that is well in excess of the residual value of the contract. Sampson and Limbert explain in a review of this decision that the method used by the CAS to calculate compensation is based on the Swiss principle of «positive interest», the aim of which is to restore the aggrieved party to the position it would have been in if the contract had been performed properly.¹² They point out that this interpretation is in line with the English common law approach to damages and the CAS is praised for its broad interpretation of art. 17 FIFA RSTP. It is questionable, however, whether the CAS is able to do this.

4. *The approach to damages in the Bernard Case*

The lawyers from Hammonds deserve a compliment first of all in that they were able to persuade the CAS to go to the extent of departing so far from the text and intention of art. 17 RSTP as to apply principles that fall outside the system of the FIFA Regulations. Art. 17 specifies the most important criteria on the grounds of which the compensation must be calculated in the event of breach of contract.

These do not include the replacement value of a player, nor is punitive compensation mentioned.

In a case in which a purely English or Swiss situation is submitted, it is possible that a dispute of this kind can be solved on the basis of national principles, such as positive interest or common law.

This is impossible, however, in a dispute with an international dimension that falls under the scope of the FIFA Regulations. It must be emphasized once

¹² Review Sports Law Group, *FC Sion v Essam EL-Hadary & FIFA/Fenerbahce v Appiah – Important decisions on compensation in clubs v player disputes*, www.hammonds.com/FileServer.aspx?oID=22990, June 2010.

more that the FIFA rules were brought into line with EU law in 2001, which implies – among other things – that the contract between a professional player and his club is a normal employment contract. FIFA and the European Commission agreed, in recognition of the specific characteristics of sport and notwithstanding normal employment law that extra protection in the form of a protected period would apply for a limited term. This departure is laid down in the FIFA Regulations.

In view of the fact that the possible departures from EU law have been explicitly provided for in the FIFA Regulations, this means a restriction of the interpretative options of the bodies charged with the resolution of disputes. The case law of the FIFA DRC makes it clear that the DRC has always been aware of this fact. The replacement value of a player had never been a factor in the jurisprudence of the DRC until the Kakuta case, in which the Matuzalem formula of the CAS was adopted. The CAS seems to have failed to realize at any time whatsoever since the Webster case (in which a decision was made in conformity with EU law and the Bosman doctrine) that decisions in employment issues with an international dimension in professional football are governed by EU law through the FIFA Regulations. There is absolutely no scope in this context for the application of incompatible principles of Swiss law and English common law.

The club in the Bernard case had asked for full compensation. In paragraphs 46 to 48 inclusive of the judgment, the Court states with regard to the training compensation that calculation of the compensation on the basis of the total loss is excessive within the framework of European law. This same principle should also be applied with regard to breach of the contract of employment, which already has adequate extra protection conferred by the sanctions attaching to the protected period. It also explains why art. 17 RSTP does not mention the criteria of replacement value or market value, since these concepts simply cannot be applicable. The CAS has no freedom, therefore, to introduce this criterion and certainly not pursuant to the application of principles of law that are not relevant here. The FIFA regulations grounded in EU law are more than adequate, after all, to enable the DRC to arrive at a balanced opinion.

It is also important to note here that the salary offered was the only component used by Lyonnais to calculate the value of the contract proposal presented to Olivier Bernard and its claim was based on this. The Court regards this as full compensation, which illustrates (perhaps unnecessarily) that the salary is the sole relevant component in calculating loss due to breach of contract.

Finally, it should also be stated that art. 17 RSTP requires that the criteria used in the calculation of compensation should be objective. Replacement value does not earn this qualification, being pre-eminently a criterion that is susceptible to all kinds of subjective factors.

Conclusions

The Bernard judgment demonstrates once more that there are no difficulties in

applying the European legal system to professional football. There is no necessity whatsoever for sport to be exempted from the European system, despite the arguments put forward by the major sports organizations. The fact that a special position of this kind also has substantial disadvantages is explained by B. Garcia.¹³

The Court points out that both parties are entitled to know in advance what the consequences are of non-acceptance of a contract and there is no reason to suppose that this should be any different in the event of the premature termination of a contract. After initial endorsement of this in the Webster decision, the CAS wrongly abandoned this position. The clubs have complete clarity as a consequence, but this is denied to players.

The criteria observed by the CAS for the calculation of the amount of the compensation in the event of breach of contract, specifically the replacement value of the player and the principle that the aggrieved party must be restored to the position it would have been in had the contract run its normal full term, is inconsistent with EU law and the FIFA Regulations on the Status and Transfer of Players. Article 17 RSTP rightly does not mention the concept of replacement value. First of all, because it is in conflict with European legislation and furthermore, because this concept does not fulfil the objectivity requirement stipulated by this provision. This is underlined by the Court's approach to the concept of loss in the Bernard case and it would be helpful if the CAS were to take this into account in future.

¹³ B. GARCIA, *Sport governance after the White Paper: the demise of the European model?*, *Journal of Sport Policy*, 1 (3), Routledge (Taylor & Francis), 2009, 267-284, www.informaworld.com/smp/6561329-16846738/content~db=all~content=a917015551.

CHAPTER VI

**FROM EASTHAM TO BERNARD – AN OVERVIEW OF THE
DEVELOPMENT OF CIVIL JURISPRUDENCE ON TRANSFER AND
TRAINING COMPENSATION**

by *Vitus Derungs**

SUMMARY: 1. Introduction – 2. The Eastham Case (Wales & England 1963) – 3. The Perroud Case (Switzerland 1976) and the Decision of the Cantonal Civil Court of Basel (Switzerland 1977) – 4. The Bosman Case (EU 1995) – 5. Decision of the Zurich Commercial Court (Switzerland 2004) – 6. The Kienass Case (Germany 1996) and successive decisions – 7. The Bernard Case (EU 2010) – 8. Conclusion

1. Introduction

In the following article, the author provides an overview of the jurisprudence of civil courts regarding sports associations' rules on transfer and training compensation. Based on this overview, the author establishes that sports associations generally operate in an area of tension between their freedom of association and mandatory civil law when issuing rules about transfer and training compensation.

In this respect, the author first demonstrates that sports associations' freedom of association, particularly when issuing rules on transfer and training compensation, was almost unlimited until close to the end of the 20th century. In fact, until the 1960s, sports-related disputes were in general considered to be non-judicial. Therefore, the prevailing opinion was that civil courts lacked the authority to decide sports-related disputes.¹ Consequently, sports associations were not subject to any restriction on their freedom of association at that time and did not have to respect any limit when issuing rules on the transfer of players between clubs and on transfer and training compensation.

* The author is a Swiss lawyer. He worked as a lawyer in FIFA's Players' Status Department for six years, before setting up as an independent legal counsel in the field of sports law (www.vitusderungs.com) in 2009. His doctoral thesis about «Training compensation in football and ice hockey» will be published towards the end of 2010.

¹ B.S. MEYER, A.N. WISE, *International Sports Law and Business*, Vol. 2, Den Haag 1997, 1421 f.

Secondly, the author shows that above all in the 1990s and the first few years of the following decade, rules on transfer and training compensation were generally considered invalid by civil courts based on totally unrealistic conditions. Sports associations' freedom of association when issuing rules on transfer and training compensation was thus basically inexistent at that time.

Finally, the author demonstrates that, nowadays, it is established that sports associations' freedom of association when issuing rules on transfer and training compensation exists but is only effective in as far as the rules issued do not conflict with mandatory norms of civil law. Consequently, sports associations' rules on transfer and training compensation need to comply with mandatory civil law. In this regard, sports associations' freedom of association is limited in particular by players' right of personality. For example, in view of his right of personality, a young player should not be limited by rules on transfer and training compensation beyond a certain degree when seeking employment, but in reality, rules on transfer and training compensation may prompt a club to refrain from signing this young player and thus infringe his right of personality. Further restrictions on sports associations' freedom of association may also arise from competition law.

In conclusion, if a sports association wishes to issue or apply rules on transfer and training compensation today, its possibilities are limited to a certain degree by mandatory civil law. In order to define those limits and the conditions under which civil courts may now accept sports associations' rules on transfer and training compensation, reference is made hereinafter to the most important decisions of civil courts on such rules.

2. *The Eastham Case (Wales & England 1963)*

Until the 1960s, a so-called retain-and-transfer system was applied in English football. According to the retention rules, a club could renew expiring employment contracts with its players unilaterally and repeatedly without any time limit. Thus, a club could continually prevent its players from moving to another club. At the same time, the salary conditions of the renewed employment contract could be worse than the conditions of the previous contract. The application of these retention rules could be avoided only if a committee of the English Football Association considered the salary conditions to be inappropriate. Based on the transfer rules, a player could only be transferred if his current and his future club reached an agreement on the financial compensation for the transfer. The player himself had basically no influence on his transfer. He could only challenge the amount of compensation requested by his club before a body of the English Football League. A player could thus move to a new club only if his club did not apply its right of retention or transfer, if the promised salary was considered inappropriate, or if the requested transfer compensation was excessive.²

² B.S. MEYER, A.N. WISE, *International Sports Law and Business*, Vol. 2, Den Haag 1997, 1484 f.; A. CAIGER, J. O'LEARY, *Contract Stability in English Professional Football*, in Andrew Caiger, Simon Gardiner, *Professional Sport in the European Union: Regulation and Re-regulation*,

In a judgement dated 4 July 1963, the Chancery Division of the High Court of Wales and England considered that the retention rules were a restraint of trade, as they limited the right of football players to perform their profession even if they were no longer bound to a club by an employment contract.³ The court also considered the transfer rules to be a restraint of trade, but decided that such restriction was less serious than the restraint produced by the retention rules, as a player had the possibility to either challenge the amount of the requested transfer sum or to move to a club outside the English Football League, in which case no compensation was due.⁴ With respect to the question of whether such interference in players' rights was justified, the court considered on the one hand that the rules in question were based on a legitimate public interest, i.e. the solidarity and the principle of equal opportunity among clubs, but on the other that the requirement of proportionality was not fulfilled, as the degree of the limitation on the players' right to seek employment, particularly the clubs' rights to their players even after the expiry of their employment contract, was neither necessary nor suitable to uphold the existing legitimate public interest. The court therefore concluded that the restraint of trade resulting from the retain-and-transfer-system was unjustified.⁵

The retain-and-transfer rules described above are a typical example of the various transfer systems that existed in national and international sports associations until close to the end of the 20th century. The Eastham judgement was the first judgement of a civil court that considered such transfer rules to be illegal.⁶ The message of the Eastham judgement was unambiguous: any rights of a club to retain a player upon expiry of his employment contract are unjustified. In all cases, a player shall be entitled to move to another club and to immediately play for his new club in official matches if the employment contract with his previous club has expired. The interest of players to seek employment and to work, i.e. to play, is placed above any possible legitimate public interest or interest of the clubs. However, the decision of the Chancery Division of the High Court of Wales and England did not address whether and under which conditions it was justifiable for a sports association to enact a rule stipulating that financial compensation was payable in the case of an out-of-contract player moving to a new club when the compensation payment was not combined with a retention right of the player's former club.

3. *The Perroud Case (Switzerland 1976) and the Decision of the Cantonal Civil Court of Basel (Switzerland 1977)*

In the 1970s, the regulations of the Swiss Professional Football League stipulated

Den Haag, 2000, 200.

³ Chancery Division of the High Court of England and Wales, judgement of 4 July 1963, *Eastham v Newcastle United* [1964] Ch. 413, 430 f.

⁴ *Ibid.*, 431.

⁵ *Ibid.*, 433 ff.

⁶ S. GREENFIELD, *The Ties that Bind: Charting Contemporary Sporting Contractual Relations*, in

that a professional footballer could leave his club and register as a professional for another club in the same league only if he were given a release letter (*lettre de sortie*) by his club. The issuance or refusal of the release letter was at the club's discretion and did not depend on whether the player's employment contract was still valid, had already expired, or had been terminated by mutual agreement or unilaterally by one of the parties with or without just cause. Without a release letter, a player could register with another club in the Swiss Professional Football League only after a retention period of two years, beginning with the end of the season of his last match for his club.⁷

Before the Perroud case, sports-related disputes were generally considered by Swiss courts to be non-judicial. For example, in 1956, a Swiss civil court rejected a club's appeal against a points deduction pronounced by a football association committee, considering that the dispute was non-judicial due to its relation with sport.⁸ However, based on the distinction between the rules of a game and the rules of law, established and published by Kummer⁹ in 1973, Swiss courts in the 1970s started to consider sports-related disputes in which rules of law were to be applied as judicial.¹⁰

In its decision in the Perroud case of 1976, the Swiss federal tribunal considered a dispute about the validity of the Swiss Professional Football League's rules such as outlined above as a dispute about rules of law and therefore judicial, and decided that these rules infringed three aspects of mandatory civil law:

- The rules of the Swiss Professional Football League were understood as a restraint of competition (art. 340 ff. of the Swiss Code of Obligations¹¹). However, as these rules did not constitute a valid restraint of competition such as stipulated in the Swiss Code of Obligations, they were considered null.¹²
- According to the applicable rules, if a professional player under contract with a club wanted to avoid a retention period of two years, he had to accept any offer of renewal of his employment contract. In view thereof, the federal tribunal decided that the rules in question were null¹³ also because

Steve Greenfield, Guy Osborn, *Law and Sport in Contemporary Society*, London, 2000, 134 ff.

⁷ Swiss Federal Tribunal, BGE 102 II 211, 213, available at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.

⁸ Court of Cassation of Zurich, judgement of 18 June 1956, in *Schweizerische Juristen-Zeitung* SJZ 53 (1957), 152 ff.; for further comparable jurisprudence cf. M. KUMMER, *Spielregel und Rechtsregel*, Bern 1973, 80 f.

⁹ M. KUMMER, *Spielregel und Rechtsregel*, Bern 1973, 45.

¹⁰ For an overview on the jurisprudence after the publication of the distinction by M. KUMMER, cf. B.S. MEYER, A.N. WISE, *International Sports Law and Business*, Vol. 2, Den Haag 1997, 1422 ff.

¹¹ The Swiss Code of Obligations is available at www.admin.ch/ch/d/sr/220/index2.html (September 2010).

¹² Swiss Federal Tribunal, BGE 102 II 211, consid. 5., 217 f., available at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (September 2010).

¹³ *Ibid.*, consid. 8. b), 222.

they illegally restricted the players' right of personality, as protected by art. 27 par. 2 of the Swiss Civil Code,¹⁴ particularly players' right to carry out their sports activity.¹⁵

- Moreover, the respective rules were considered by the federal tribunal to interfere with Swiss anti-trust law without justification.¹⁶

One year later, in 1977, the cantonal civil court of Basel, Switzerland, had to consider whether a football club could, based on the regulations of the association it was affiliated to, validly refuse to release an amateur player who wished to play as an amateur for another club, for a retention period of one year. As in the Perroud case, the court decided that the regulations invoked violated the players' right of personality as protected by art. 27 par. 2 of the Swiss Civil Code, because this provision protected not only economic aspects of the personality, but the personality in general. According to the court, the rules challenged in the case seriously affected amateur players' right of personality, particularly their right to play association football without remuneration.¹⁷ Moreover, the rules in question also constituted an indirect restriction of the right to withdraw from an association and thus conflicted with art. 70 par. 2 of the Swiss Civil Code.¹⁸

In the Eastham case and the two aforementioned Swiss cases, the violation of the players' rights essentially resulted from the retention rights. The main difference between the rules challenged was that the rules examined in the Eastham case stipulated an unlimited retention right, whereas in the Perroud case and the Basel civil court case the retention right was for periods of two years and one year respectively. This leads to the conclusion that applying retention rights to out-of-contract professional players or to amateur players is to be considered illegal regardless of the duration of the retention period. Neither the Eastham nor the Swiss decisions explicitly excluded the validity of rules stipulating that financial compensation was payable upon the transfer of an out-of-contract player. Instead, these decisions allowed the assumption that obligatory compensation payments for the transfer of an out-of-contract player would be acceptable as long as the retention rights were entirely eliminated. However, the question remained: under what conditions were such obligatory compensation payments acceptable and to which amount?

4. *The Bosman Case (EU 1995)*

In the field of sports law, the Bosman case is without doubt the most cited case

¹⁴ The Swiss Civil Code is available at www.admin.ch/ch/d/sr/210/index1.html (September 2010).

¹⁵ Swiss Federal Tribunal, BGE 102 II 211, consid. 6., 218 ff., available at www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (September 2010).

¹⁶ *Ibid.*, consid. 7., 220 f.

¹⁷ Cantonal civil court of Basel, judgement of 15 July 1977, in *Basler Juristische Mitteilungen* 24 (1977) consid. 4.a), 244 ff.

¹⁸ *Ibid.*, consid. 4.b), 246.

ever. I shall therefore refrain from describing the regulations that were challenged in that procedure and the decision of the European Court of Justice (ECJ), as I assume that every reader of this publication is aware of them. Instead, I shall draw the conclusions from the Bosman case which are relevant to the present article and in respect of the aforementioned Eastham and Swiss decisions.

Just like the courts in the aforementioned cases, the ECJ could not find any justification in the Bosman case for imposing a retention period on a player moving to a new club upon termination of the employment contract with his previous club. The interest of an out-of-contract player to seek employment was placed above the interests of clubs by the ECJ. Art. 20 par. 1 of the FIFA Regulations for the Status and Transfers of Players that came into force shortly after the Bosman ruling in 1997 therefore stipulated that «Any disagreement between two clubs regarding the amount of compensation for the training or development of a player shall not affect his sporting or professional activity and an international transfer certificate may not be refused for this reason. The player shall therefore be free to play for the new club with which he has signed a contract as soon as the international transfer certificate has been received».

With respect to the financial compensation payable upon the transfer of an out-of-contract player, the ECJ considered that such compensation might represent an interference with the players' freedom of movement. However, it also decided that, in view of the social importance of sporting activities and in particular of football, encouraging the recruitment and training of young football players should be accepted as a legitimate public interest for this interference with the players' rights. Furthermore, the ECJ accepted that the prospect of receiving transfer, development or training fees was indeed likely to encourage football clubs to seek new talent and train young players. However, since it was impossible to predict the sporting future of young players with any certainty and because only a limited number of such players would go on to play professionally, those fees would by nature be contingent and uncertain and in any event unrelated to the actual cost borne by the clubs of training both future professional players and those who would never play professionally. According to the ECJ, the prospect of receiving such fees could not therefore be either a decisive factor in encouraging the recruitment and training of young players or an adequate means of financing such activities. Furthermore, the court considered that the intended objectives could be achieved at least as efficiently by other means that would not impede the players' freedom of movement.¹⁹

Despite rejecting the validity of rules stipulating that financial compensation was payable upon the transfer of an out-of-contract player, the ECJ indirectly gave an indication of the following conditions that a system of compensation for the transfer of out-of-contract players would have to fulfil in order to justify the interference with the players' freedom of movement that resulted immanently from such a system:

¹⁹ ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

- compensation payments should not be contingent and uncertain;
- the amount of compensation should be related to the actual cost borne by clubs of training both future professional players and those who will never play professionally, and
- the payment of compensation shall not be combined with the club's right to retain a player.

5. *Decision of the Zurich Commercial Court (Switzerland 2004)*

According to the FIFA rules on training compensation that came into force on 1 April 1999, training compensation was due whenever an out-of-contract player moved to another club and registered as a professional player with it, except if the transfer took place within the EU or the EEA. The amount of training compensation was to be agreed upon by the clubs involved in the transfer. In case of dispute about the amount, the clubs could refer the case to a body of FIFA. This body had discretionary power to fix the amount of compensation, as the FIFA regulations did not specify how the compensation was to be calculated.

In 2004, the commercial court of Zurich had to examine a decision of the said FIFA body ordering a Spanish club to pay USD 500,000 to a Croatian club based on the rules described. The court was of the opinion that the provision applied by FIFA interfered without any justification with the clubs' economic liberty, as protected by art. 27 of the Swiss Civil Code, and with Swiss and European anti-trust law. In particular, the court could not accept that an association body could fix the amount of training compensation with discretionary power, and that the association's regulations did not contain any indication on how the amount of compensation was to be calculated. Therefore, it decided that the rules in question were invalid.²⁰

This decision did not have a huge impact on FIFA, as by the time it was taken, in 2004, FIFA had already fundamentally changed its rules on training compensation, particularly with the edition of these rules that came into force on 1 September 2001. As a side note to its sentence, the commercial court of Zurich mentioned that the 2001 edition of the relevant FIFA rules did not seem to interfere with European anti-trust law, as the said edition of the FIFA rules was based on an agreement between FIFA and the European Commission.²¹

6. *The Kienass Case (Germany 1996) and successive decisions*

Shortly after the Bosman ruling of the ECJ, the German Federal Labour Court was confronted with an almost identical case, in which a German ice hockey player called Kienass had unilaterally terminated the employment contract that

²⁰ Zurich commercial court, judgement of 21 June 2004, in: *Zürcherische Rechtsprechung* 104 (2005), 97 ff.

²¹ *Ibid.*, 106.

had bound him to his German club on the grounds of outstanding salary payments, and had signed a new contract with another German club. A body of the German Ice Hockey Federation, based on that federation's own rules, decided that the player's new club had to pay training compensation of approximately EUR 70,000 to his previous club.

The German Federal Labour Court decided that the rules applied in the case interfered with the constitutional right of professional liberty, as stipulated in art. 12 of the German Constitution.²² Such interference could not be legitimated either with reference to the economic interests of the clubs or to the interest of achieving financial equalisation between clubs of different economic power. The latter objective could also have been achieved without infringing the player's rights. In addition, the court denied that the compensation was to be understood as an indemnity for the cost of training players, as the compensation was focused on the value of players and not on the costs of their training. Only those costs that could be allocated to a specific player were applicable in the case of a reimbursement of training costs. In any case, this was not possible in the case of team sports.²³

In 1999, the German High Court had to consider the case of a German amateur footballer who had moved within Germany from his training club to another club to become a professional player. Based on the rules of the regional football association in question, the player's new club had to pay training compensation of approximately EUR 25,000 to the player's training club. The German High Court took the view that, although there might be a legitimate public interest for the rules in question, the application of such rules interfered with the players' professional liberty without justification. The court declared those rules to be null for the following four reasons:

- due to the impossibility of predicting the sporting future of young players with any certainty, training compensation is contingent and uncertain;
- the amount of compensation is fixed as a lump sum;
- the compensation is unrelated to the actual cost borne by the training clubs; and
- the training compensation is aimed at economic rather than idealistic interests.²⁴

After this decision of the German High Court, the rules in question were revised. The new rules stated that if an amateur player moved to another club and, at the same time, became professional for the first time before the age of 23, training compensation was payable by his new club. The amount of compensation was based on the division to which the player's previous and new clubs belonged, but could not be higher than DEM 17,500 (approximately EUR 9,000). Ten per

²² The German Constitution is available at www.gesetze-im-internet.de/gg/art12.html (September 2010).

²³ German Federal Labour Court, judgement of 20 November 1996, Az. 5 AZR 518/95, in *SpuRt 3* (1997) 94 ff.

²⁴ German High Court, judgement of 27 September 1999, Az. II ZR 305/98, in *NJW 52* (1999), 3552 ff.

cent of such compensation was to be paid to the club for which the player had first played for a period of three years, and the remainder was to be distributed *pro rata temporis* between those clubs that had trained the player during the five years before he turned professional.

These revised rules were examined by a German civil court, i.e. the Oldenburg State High Court, in 2005. This court considered that in application of the revised rules, the amount of training compensation could, under certain circumstances, be negligible, but was high enough in most cases to prevent a club from signing a talented young player. The rules thus interfered with the players' constitutional right of professional liberty. The court considered that this interference with the players' rights was not justified and that three of the four criteria established by the German High Court in its decision of 1999 had still not been fulfilled: training compensation was still contingent and uncertain; unrelated to the actual training cost borne by clubs; and not aimed at idealistic interests. The only criteria fulfilled in the revised rules was that compensation was no longer fixed as a lump sum, as the amount of compensation depended on the divisions to which the two clubs involved in the transfer belonged.²⁵

In conclusion, while the Bosman ruling only indicated two conditions under which an interference with players' freedom of movement caused by rules on training compensation could be justified (training compensation shall not be contingent and uncertain; it shall be related to the actual training cost borne by the training club), the German civil courts established two additional conditions (training compensation shall not be fixed as a lump sum; it shall be aimed at idealistic rather than economic interests). The jurisprudence of the German civil courts was strongly criticised by several authors, particularly by GERLINGER. Concerning the reproach that training compensation would be contingent and uncertain, GERLINGER stated that a system of training compensation could obviously be based only on cases of players who became professionals. In this respect, practical experience would show that clubs that invested in the training of young players would benefit from the training compensation system. Concerning the reproach that economic interests would dominate the system of training compensation, GERLINGER stated that the economic interests of the clubs would indeed be a factor, as any system encouraging the training of young players would not work without a financial incentive for the training clubs. Concerning the fact that the training compensation was unrelated to the actual cost borne by the training clubs, the author stated that while consideration of the actual training cost was indeed necessary, it was in reality only possible up to a certain point, beyond which it became unrealistic. Finally, on account of the «freedom of sport» and the freedom of association, and for reasons of legal security, GERLINGER supported to a certain degree the fixing of training costs as lump sums.²⁶

²⁵ Oldenburg State High Court, judgement of 10 May 2005, Az. 9 U 94/04, in *Causa Sport 2* (2005), 186 ff.

²⁶ M. GERLINGER, *Anmerkungen zum Urteil des Oberlandesgericht Oldenburg vom 10. Mai 2005*, in *Causa Sport 2* (2005), 192 f.

7. *The Bernard Case (EU 2010)*

On 17 July 2008, the French Court of Cassation referred the following two questions to the ECJ for a preliminary ruling:

«1. *Does the principle of the freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which an espoir player who at the end of his training period signs a professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?*

2. *If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?»*²⁷

The ECJ first noted that the damage rules at stake were a restriction on the freedom of movement for workers guaranteed within the EU by Art. 45 of the Treaty. This restriction was acceptable only if the rules in question were compatible with the Treaty based on a legitimate aim and justified by overriding reasons in the public interest.²⁸ In view of the considerable social importance of sporting activities and in particular football in the EU, the ECJ accepted the objective of encouraging the recruitment and training of young players as a legitimate aim for a restriction on the freedom of movement for workers.²⁹ It then examined whether the system in question was suitable to attain the said objective and did not go beyond what was necessary to attain it.

With respect to the question of suitability, the ECJ accepted that the prospect of receiving training compensation is likely to encourage football clubs to seek new talent and train young players.³⁰ With respect to the question of necessity, it stated that clubs might be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose in cases where, at the end of his training, a player enters into a professional contract with another club.³¹ Consequently, the ECJ concluded that a system of training compensation could, in principle, be justified in cases where a young player, at the end of his training, signs a professional contract with a club other than the one that trained him.³² The fact that the returns on the investment in training made by the clubs providing such training are uncertain by their very nature³³ was not considered

²⁷ Reference for a preliminary ruling from the Court of Cassation (France) lodged on 17 July 2008, *Olympique Lyonnais v Olivier Bernard, Newcastle United FC*, C-325/08, not yet published in the ECR.

²⁸ ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, paragraphs 34 – 36, not yet published in the ECR.

²⁹ *Ibid.*, paragraphs 38 and 39.

³⁰ *Ibid.*, paragraph 41.

³¹ *Ibid.*, paragraph 44.

³² *Ibid.*, paragraph 45.

³³ *Ibid.*, paragraph 42.

by the ECJ to be an obstacle to the previous conclusion, as long as the compensation scheme took due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.³⁴ Furthermore, the ECJ stated that the costs generated by training young players should be only partly compensatable, as the benefits that the club providing such training could derive from those players during their training period would also have to be taken into consideration.³⁵

Finally, the ECJ considered that the compensation scheme at issue was characterised by the payment to the club which provided the training not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.³⁶ The possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.³⁷ In consequence, the court considered that the restriction on the freedom of movement for workers in this case was unjustified.

In conclusion, according to the decision of the ECJ in the Bernard case, a restriction on the players' rights resulting from a system of training compensation may be justified only under the following three conditions:

- a player enters into a professional contract with a club other than his training club at the end of his training (this implies that training compensation may not be payable in cases where an amateur player moves to another club where he also registers as amateur);
- training compensation shall be a reimbursement of the amounts spent for the purpose of training young players (as far as that condition is fulfilled, training compensation may take into due account the costs borne by the clubs in training both future professional players and players who will never play professionally); and
- benefits a club providing the training to a player could derive from that player during the training period shall be taken into consideration.

The reproaches made by German civil courts, according to which compensation schemes were fixed as lump sums and aimed at economic rather than idealistic reasons, were ignored by the ECJ.

8. Conclusion

Any rules of a sports association which stipulate that an amateur player or an out-of-contract professional player may be retained by his former club for a certain period of time if there is no agreement on his transfer or if compensation due to his

³⁴ Ibid., paragraph 45.

³⁵ Ibid., paragraph 43.

³⁶ Ibid., paragraph 46.

³⁷ Ibid., paragraph 48.

club is outstanding are always invalid. The interference of retention rights with the personality rights of amateur or out-of-contract professional players is not justified under any circumstances.

Any rules of a sports association which stipulate that a club that wishes to register an amateur or out-of-contract professional player must pay compensation to the training club(s) of that player may also be in conflict with civil mandatory law. Under certain circumstances, however, such rules may be justified, as the objective of encouraging the training of young players has always been accepted as a legitimate aim for restricting players' rights. Civil courts have therefore never categorically excluded the possibility that a sports association's rule on training compensation may be valid, provided it was not combined with a retention right. However, the criteria used by courts to measure the validity of training compensation systems have changed fundamentally over the course of time.

Until the 1960s, sports associations were not limited at all in their acts by civil law, as civil courts considered sports-related disputes to be non-judiciable. As of 1963 (Eastham case), civil courts started to examine association rules, including rules on training compensation, and established the conditions under which such rules could be considered valid. During the development of this jurisprudence, the conditions applied to training compensation systems became more and more severe, culminating in a decision of the German High Court in 1999 in a catalogue of four conditions that could, in reality, not be fulfilled by any training compensation system.

Strict adherence to the German jurisprudence would have brought an end to training compensation systems in team sports. However, in the EU, a series of developments running counter to the development of the German jurisprudence took place after the Bosman ruling. The most important of these developments was the agreement of 5 March 2001 between the EU Commission, FIFA and UEFA setting out the principles for FIFA's new training compensation system.³⁸ Other important developments in this respect included the declaration on sport in the Amsterdam Treaty of 10 November 1997, the Helsinki report on sport of 10 December 1999, the Nice declaration on the specific characteristics of sport of 9 December 2000, and the White Paper on Sport of 11 July 2007. The most recent development is the ECJ decision in the Bernard case, which defines the conditions a training compensation system needs to fulfil in order that it may be considered valid.

With its decision in the Bernard case, the ECJ mitigated the conditions established in the Bosman case and by the German civil courts. While the ECJ maintained the condition that compensation shall be related to the actual cost borne by the training club, it considered that returns on the investment in training made by a club providing such training are contingent and uncertain by their very nature. However, this uncertainty does not necessarily render a training compensation system invalid. Moreover, the ECJ ignored the reproaches made by the German

³⁸ T. KERR, *Freedom of movement in sport inside and outside the European Union*, in Marco Del Fabro, Urs Scherrer, *Freizügigkeit im Europäischen Sport*, Zurich 2002, 22.

civil courts that compensation schemes were illegally based on lump sums and aimed at economic rather than idealistic reasons. After all, if compensation is to be a reimbursement of the actual amount spent for training a young player, it cannot simply be a lump sum. Moreover, economic incentives are inevitable to encourage clubs to train young players.

In the Bernard case, however, the ECJ established two additional conditions: firstly, training compensation is only due if a player signs an employment contract, i.e. becomes a professional player, with a club other than his training club. In other words, training compensation is not payable in the case of an amateur player who moves to another club but retains his amateur status. Secondly, the training compensation must take into consideration benefits the club providing the training to a player could derive from that player during the training period. These conditions are, contrary to the conditions established by the German civil courts, conditions that may in reality be respected by training compensation rules. Unlike the German civil courts, the ECJ supported the basic idea behind training compensation. As far as a training compensation system fulfils the conditions established by the ECJ in the Bernard case, the concomitant interference with the players' rights will presumably be considered as justified by other civil courts. At the same time, training compensation systems that do not fulfil these requirements might not stand up before any tribunal in the future.

Thanks to the decision in the Bernard case, training compensation systems encouraging clubs to train and develop young players will continue to exist in the future. This is to the detriment of the minority of young players who may face difficulties finding a club ready to pay for their training compensation, but it is to the benefit of the majority, since a large number of players would never be trained by a club if the clubs did not have the incentive of compensation for training players that move to another club during or at the end of their training period.

CHAPTER VII

PROTECTION OF MINORS VS. EUROPEAN LAW

by *Rob Simons**

SUMMARY: 1. Introduction – 2. Organization of sport – 2.1 Pyramid model of Sport – 2.2 Specificity of sport and autonomy of sports organizations – 3. Freedom of movement and the protection of minors – 4. New FIFA initiatives – 4.1 FIFA Players' Status sub-committee – 4.2 Academies – Article 19bis of the FIFA RSTP – 4.3 Training compensation – 4.4 FIFA Transfer Matching System – 4.5 Awareness campaign – 5. UEFA Regulations regarding the Protection of Minors – 5.1 UEFA Homegrown Rule – 5.2 International Transfer Prohibition U-18 – 6. Sports agents – Study performed by the European Commission – 7. European Parliament & European Commission Reports – 8. Conclusion

1. Introduction

As already extensively discussed in this book, the concept of training compensation as such infringes the EU free movement law provisions. However, it is justified by the Court since it encourages the recruitment and training of young players. The free movement of workers is one of the core elements in the EU and is laid down in article 45 TFEU. For this article to apply, and to comply with the term «worker», one evidently must first have reached the minimum age to be competent to sign an employment contract. In general this age is set at 16 years old by the Member States.

Olivier Bernard was 17 years old when he signed his «joueur espoir» contract with Olympique Lyonnais. At that age the free movement law provisions fully applied to Bernard. However, FIFA has, together with other stakeholders in football, implemented strict regulations when it comes to minors and international transfers.¹ Therefore instead of going into the legality of the Bernard judgment, interesting is to take a further look at the 2009 FIFA Regulations on the Status and Transfer of Players (*FIFA RSTP*) concerning minors and its combination with EU law.

* Rob Simons is lawyer at DVDW Advocaten in Rotterdam, the Netherlands.

¹ See article 19 of the FIFA RSTP.

In 2009 FIFA has revised its regulations, especially in the field of the protection of minors. Not only article 19 of the FIFA RSTP was extended and amended, also other measures were taken to improve the protection of minors, e.g. the introduction of a Players' Status sub-committee, a Transfer Matching System and partially revised training compensation provisions.

This chapter will step aside the Bernard case and will take a deeper look into the freedom of movement of minors and the new FIFA regulations regarding minors. Attention will be given to the organization of sports, the freedom of movement and the FIFA Regulations concerning the protection of minors, including its new measures. Moreover UEFA's homegrown rule and UEFA's resolution to prohibit transfers in Europe under the age of 18 will be discussed. Furthermore relevant in the protection of minors is the European Commission's study on sport agents.² Finally the European public law provisions will shortly be discussed through reports from the European Commission and the European Parliament.

2. *Organization of sport*

The major role FIFA plays in football is due to the pyramid structure of football. Thereby, as a result of the autonomy of sports organizations and the «specificity» of sports, sports organizations have a certain margin to make up rules and regulations.

2.1 *Pyramid model of Sport*

The current model of organization of sport in Europe (the so-called «European Sport Model») tends to be represented by means of a pyramid. The wide base comprises the pool of players, who are organized to form clubs, which in turn are members of national associations that are responsible for organizing championships and governing football at national level. The national associations then group together in continental associations. Finally, the peak of the pyramid represents the international association.³

Sports associations thus usually have practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sports events under Article 82 EC⁴ (currently Article 102 TFEU).

An example of the application of the pyramid model can be seen in international transfers. In case a player wants to move to another country to play for a (foreign) club, not only the clubs need to agree on the transfer, also the

² EUROPEAN COMMISSION, KEA – CDES – EOSE: *Study on Sports Agents in the European Union*, November 2009.

³ R. BLANPAIN, M. COLUCCI & F. HENDRICKX, *The Future of Sports Law in the European Union: beyond the EU Reform Treaty and the White Paper*, Alphen aan de Rijn, Kluwer Law International, 2008, 96, footnote 1.

⁴ Commission Staff Working Document, *The EU and Sport: Background and Context accompanying document to the White Paper on Sport*, 68.

agreement of the national football associations is required in terms of an International Transfer Certificate.

2.2 *Specificity of sport and autonomy of sports organizations*

Article 165 of the TFEU, which came into force on 1 December 2009, states that «*The Union shall contribute to the promotion of European sporting issues while taking into account of its specific nature, its structures based on voluntary activity and its social and educational function*».

Ever since the first case on sports law before the European Court of Justice in 1974, it is settled case law that sport is subject to EC law only insofar as it constitutes an economic activity.⁵ However, at the same time the Court stated that «rules of purely sporting interest» are not subject to EC law as long as the rule remains «limited to its proper objective».⁶ Examples of these rules of purely sporting interest are rules of the game (e.g. rules fixing the length of the matches or the number of players in the field), rules related to selection criteria in competitions and the «home and away rule».⁷

In its White paper on Sport published in 2007, the European Commission states that sport has certain specific characteristics, which are often referred to as «specificity of sport,» which falls foul of EC law. The specificity of European sport can be approached through two prisms:

- The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;
- The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.⁸

At the same time, the Commission states that «in the line with established case law, the specificity of sport will continue to be recognised, but it cannot be construed so as to justify a general exemption from the application of EU law».⁹

⁵ Case 36/74, *B.N.O Walrave and L.J.N. Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo*, [1974] ECR 1405, at para. 4. E.g. also: Case C-415/93, *Union royale belge des sociétés de football association ASBL and others v Jean-Marc Bosman and others*, [1995] ECR I-4921, at para. 73 and again repeated in Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle United*, 16 March 2010, at para. 27.

⁶ *Walrave and Koch*, *supra* note 5, at para. 9.

⁷ See J. ARNAUT, *Independent European Sport Review: a Report by José Luis Arnaut* (2006), 97.

⁸ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.1.

⁹ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.1.

Very interesting in this regard is also the *Meca Medina* judgment of the European Court of Justice from 2006. In its decision, the Court of Justice made an important legal point by rejecting the theory of the existence of «purely sporting rules», falling a priori outside the TFEU (and therefore its articles 101 and 102¹⁰) and affirming to the contrary that each sporting rule should be studied case by case in the light of the provisions of articles 101 and 102 TFEU.¹¹

So the question whether European law applies to sports activities can be answered affirmative. However, already in 2001 an agreement was reached between FIFA and the European Commission where it was said that «it is now accepted that EU and national law applies to football, and it is also now understood that EU law is able to take into account the specificity of sport (...)».¹² Provisions in the FIFA Regulations like contract stability, transfer windows, training compensation and regulations concerning minors, which in principle infringe European law, were allowed as being «specific».

In conclusion, to some extent sports federations have their own autonomy to set up rules within the «specificity of sports». Before the *Meca Medina* judgment, these rules were not subject to EC law since they were for «purely sporting interest». However, as determined in *Meca Medina* by the European Court of justice; «if the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition».¹³

3. *Freedom of movement and the protection of minors*

In the *Bernard* case it was decided that even though the concept of training compensation forms a violation of article 45 TFEU, the infringement is justified by the objective of encouraging the recruitment and training of young players. This is not the first time the Court has assessed sports regulations to the freedom of movement provisions. The most famous example in this regard is the 1995 *Bosman* case where the transfer system at the time, which required a club to pay a transfer fee for a player whose contract with another club had expired, was declared incompatible with the EU freedom of movement of workers.

When it comes to minors and the freedom of movement of workers, important to emphasize is that in order to be able to rely on this right the youngster

¹⁰ At the time of the *Meca Medina* judgment, the competition law provisions were laid down in Articles 81 and 82 EC. In the TFEU, these articles were renumbered to Articles 101 and 102 TFEU.

¹¹ Wathélet Report, *Sport governance and EU legal order: present and future* 2007, 25.

¹² *Press Releases RAPID*, Commission closes investigations into FIFA regulations on international football transfers, Brussels, 5 june 2002.

¹³ Case C519/04 P, *David Meca-Medina and Igor Majcen v. Commission*, ECR 2006 I-6991, at para. 28.

must have reached the age, in line with national law, to be competent to enter into an employment contract. According to the Community Charter of Fundamental Social Rights of Workers «without prejudice to such rules as may be more favourable to young people, in particular those ensuring their preparation for work through vocational training, and subject to derogations limited to certain light work, the minimum employment age must not be lower than the minimum school-leaving age and, in any case, not lower than 15 years».

In its regulations FIFA has determined that international transfers of players are only permitted if the player is over the age of 18. Three exceptions exist to this rule as can be read in article 19 paragraph 2 of the FIFA RSTP:

Article 19 FIFA RSTP 2009 - Protection of minors

1. International transfers of players are only permitted if the player is over the age of 18.
2. The following three exceptions to this rule apply:
 - a) The player's parents move to the country in which the new club is located for reasons not linked to football;
 - b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:
 - i) It shall provide the player with an adequate football education and/or training in line with the highest standards.
 - ii) It shall guarantee the player an academic and/or school and/or vocational and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.
 - iii) It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club etc.).
 - iv) It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations.
 - c) The player lives no further than 50km from a national border and the club with which the player to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.
3. The conditions of this article shall also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time.
4. Every international transfer according to paragraph 2 and every first

registration according to paragraph 3 is subject to the approval of the sub-committee appointed by the Players' Status Committee for that purpose. The application for approval shall be submitted by the association that wished to register the player. The former association shall be given the opportunity to submit its position. The sub-committee's approval shall be obtained prior to any request from an association for an International Transfer Certificate and/or a first registration. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code. In addition to the association that failed to apply to the sub-committee, sanctions may also be imposed on the former association for issuing an International Transfer Certificate without the approval of the sub-committee, as well as on the clubs that reached an agreement for the transfer of the minor.

Especially the first exception has been abused a lot (par. 2(a)). In many circumstances the family of the player does not move to a foreign country for real labour or similar reasons, but are offered a fictitious job, in order to legitimate a transfer of a minor player that is already agreed upon. Leading case in this matter is CAS Cádiz C.F. & Caballero v/FIFA & Asociación Paraguaya de Fútbol.¹⁴

In this case the international transfer of minor player Caballero was rejected on the basis of paragraph 2(a). At the age of 16 Caballero signed a contract with Spanish football club Cádiz C.F. A week after signing, the player's mother signed a contract of employment with a restaurant in Spain. However the Paraguayan Football Association refused to issue an International Transfer Certificate due to the player's age and the fact that the conditions of article 19 had not been met.¹⁵ In appeal CAS concluded, in line with the FIFA Player Status Committee (*FIFA PSC*), that the player's decision to move to Spain was made first and the decision of the mother of the player to move to Spain was thus directly linked to the contract signed between the player and the club.¹⁶ Therefore the exception in paragraph 2(a) did not apply.

The second exception, article 19 paragraph 2(b), is meant for international transfers within the EU. An international transfer in the EU is allowed if the player is between the age of 16 and 18 and adequate (academic) education is provided.

An interesting case in this matter is CAS F.C. Midtjylland.¹⁷ In June 2006 Danish club F.C. Midtjylland registered three minor Nigerian players, previously registered with Nigerian club F.C. Ebedei, as amateurs at the Danish Football Association. The Nigerian players had been granted a residence permit by the Danish Immigration Service as students (without the right to work), and had been given an upper secondary school education in Denmark.¹⁸

¹⁴ CAS 2005/A/955 *Cádiz C.F., SAD v/FIFA en Asociación Paraguaya de Fútbol & CAS 2005/A/956 Carlos Javier Acuña Caballero v/FIFA en Asociación Paraguaya de Fútbol*.

¹⁵ CAS *Caballero*, *supra* note 14, paras 2.1–2.12.

¹⁶ CAS *Caballero*, *supra* note 14, para. 7.3.1.

¹⁷ CAS 2008/A/1485 *FC Midtjylland A/S/ v/ FIFA*.

¹⁸ CAS *FC Midtjylland*, *supra* note 17, paras 2.3–2.6.

In February 2007, the Fédération Internationale des Associations de Footballeurs Professionnels (*FIFPro*) contacted FIFA alleging that F.C. Midtjylland was systematically violating Article 19 par. 1 of the FIFA RSTP transferring minor Nigerian players. After investigations, the FIFA PSC agreed with FIFPro and issued a decision against F.C. Midtjylland and the Danish Football Association.¹⁹ In its decision the FIFA PSC stated that «to prevent abuse and maltreatment of young players, a strict, consistent and systematic implementation of Article 19 of the FIFA RSTP is necessary».²⁰

In one of its arguments in appeal at CAS F.C. Midtjylland refers to the partnership agreement between the European Union and a number of African countries, including Nigeria, called the «Cotonou Agreement».²¹ The club argues that a Nigerian citizen, who is a legal resident in Denmark, could invoke Article 13.3 of the Cotonou Agreement to be treated equally as a Danish citizen.²² Moreover, F.C. Midtjylland, referring to the *Simutenkov* case before the European Court of Justice,²³ is of the opinion that the exception in Article 19 par. 2(b) of the FIFA RSTP «should be interpreted that it can also benefit citizens from third countries which have made a bilateral agreement with the European Union to secure third countries' citizens from discrimination caused by nationality in terms of working conditions».²⁴

However, CAS rejects these arguments. First CAS argues that article 19 of the FIFA Regulations equally applies to amateur and professional minor players.²⁵

With regard to European law and the Cotonou Agreement, CAS states that the Nigerian players cannot benefit from the Agreement since the relevant provisions prohibiting discrimination on the basis of nationality only apply to «workers» and only as far as working conditions are concerned. It does not apply to students or other persons who intend to enter the employment market in a European Community Member State.²⁶ The appeal made by F.C. Midtjylland was dismissed.

Finally the third exception, article 19 paragraph 2(c), applies in case the player lives within 50 kilometers from the border and wants to move to a club in a

¹⁹ CAS *FC Midtjylland*, *supra* note 17, para. 2.8.

²⁰ CAS *FC Midtjylland*, *supra* note 17, para. 2.8.

²¹ 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

²² Article 13.3 of the Cotonou agreement: «The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, relative to its own nationals. Further in this regard, each ACP State shall accord comparable non-discriminatory treatment to workers who are nationals of a Member State».

²³ Case C-265/03, *Igor Simutenkov v. Ministerio de Education y Cultura and Real Federación Española de Fútbol*, [2005] ECR I-02579.

²⁴ CAS *FC Midtjylland*, *supra* note 17, para. 3.3.

²⁵ CAS *FC Midtjylland*, *supra* note 17, paras 7.2.4–7.2.7.

²⁶ CAS *FC Midtjylland*, *supra* note 17, paras 7.4.5–7.4.16.

neighboring country. This is permitted in case the maximum distance between the domicile of the player and the (new) club does not exceed 100km.

Article 19 of the FIFA RSTP, due to its additional conditions, limits the player's freedom of movement. The validity of this article was challenged in the above CAS Caballero case. However CAS came to the conclusion that the FIFA rules limiting international transfer of players under 18 years old do not violate any mandatory principle of public policy («ordre public») under Swiss law or any other national or international law, insofar as:

- i) they pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives, particularly if, as often happens the football career eventually fails or, anyways, is not as successful as expected;
- ii) they are proportionate to the objective sought, as they provide for some reasonable exceptions.²⁷

As with the Bernard judgment, the transfer limitation of minors, and thus a limitation in the freedom of movement, is justified since a legitimate objective is pursued and the rules are proportionate.

4. *New FIFA initiatives*

Despite the fact that CAS strictly applied the FIFA Regulations in international transfers of minors in the above CAS judgments, this was not sufficient enough to prevent further abuse of the Regulations. Therefore it was decided at the end of 2008 to revise some articles of the FIFA Regulations to combat these practices, including article 19 of the FIFA Regulations, which came into force on 1 October 2009. However, also other measures were taken by FIFA. Hereby an overview starting with article 19 par. 4 of the FIFA Regulations, the FIFA Players' Status sub-committee.

4.1 *FIFA Players' Status sub-committee*

From 1 October 2009 onwards, every international transfer involving minors is subject to the approval of a specially created sub-committee. The sub-committee consists out of a total of 9 representatives: of the players, clubs, minors' confederations of origin (e.g. CAF and CONMEBOL) and confederations of adoption (e.g. UEFA). This sub-committee is responsible for approving transfers of minors and to ensure that the exceptional circumstances laid down in Article 19, paragraph 2 of the FIFA Regulations are applied correctly.²⁸ This means that the responsibility does no longer lie with the member associations of FIFA.

²⁷ CAS Caballero, *supra* note 14, para. 7.2.2.

²⁸ FIFA, *Protection of minors and training clubs, principles approved by the FIFA Executive Committee*, Zurich, 24 October 2008, 1.

4.2 Academies – Article 19bis of the FIFA RSTP

Another amendment is the inclusion of an extra article in the FIFA Regulations, Article 19bis, which deals with minors at academies:

Article 19bis – registration and reporting of minors at academies

1. Clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minors who attend the academy to the association upon whose territory the academy operates.
2. Each association is obliged to ensure that all academies without legal, financial or de facto links to a club:
 - a) run a club that participates in the relevant national championships; all players shall be reported to the association upon whose territory the academy operates, or register with the club itself; or
 - b) report all minors who attend the academy for the purpose of training to the association upon whose territory the academy operates.
3. Each association shall keep a register comprising the names and dates of birth of the minors who have been reported to it by its clubs or academies.
4. Through the act of reporting, academies and players undertake to practise football in accordance with the FIFA Statutes, and to respect and promote the ethical principles of organised football.
5. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code.
6. Article 19 shall also apply to the reporting of all minor players who are not nationals of the country in which they wish to be reported.

This article is a first step to better regulate the organization of football academies. From now on, in order to control the emergence of private academies outside of association structures, such academies will be integrated within FIFA's member associations.²⁹ A distinction is made between academies linked to a club and private academies, like e.g. the Pepsi academy.³⁰ In case academies are legally, financially or de facto linked to a club, the club is required to report all minors who attend the academy to the association upon whose territory the academy operates (paragraph 1). If there is no direct link to a club, the association has to ensure that the academy runs a club that participates in the national championships. All players have to be reported to the association upon whose territory the academy operates or have to be registered with the club itself (paragraph 2a). Furthermore the association is obliged to ensure that all minors at the academies on its territory are reported to the association (paragraph 2b).

A major challenge will be to monitor all academies. Only in Accra, Ghana alone there are an estimated 500 illegal, non-reported and non-affiliated to the national association, academies operating.³¹ Given that the players in these types

²⁹ FIFA, *Protection of minors and training clubs*, *supra* note 28, 1.

³⁰ The website of the Pepsi football Academy is available at www.pepsifootballacademy.com.

³¹ D. McDougall, «The scandal of Africa's trafficked players», *The Observer*, Sunday 6 January 2008.

of academies are not affiliated with a club or federation, they fall outside any legal and administrative regulations that are aimed at safeguarding young players from unscrupulous agents.³²

4.3 Training Compensation

Also the challenged scheme in the Bernard case, training compensation, was amended. The objective of training compensation is to compensate clubs that have contributed to the player's training and education between the ages of 12 and 23 years old. As can be read in Annexe 4 of the FIFA Regulations, training compensation shall be payable, as a general rule, up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21.³³

Clubs are divided in different categories. Depending on the category of the club (1 to 4, the better the club, the higher the category, 1 being the highest), the amount of the training compensation per season is determined (which in Europe varies from EURO 90.000 for category 1 clubs, EURO 60.000 for category 2 clubs, EURO 30.000 for category 3 clubs and to EURO 10.000 for category 4 clubs). Under the old regulations, training compensation between the ages of 12 to 15 was always based on a club-category 4 amount (i.e. EURO 10.000).

However article 5 paragraph 3 of Annexe 4 of the FIFA RSTP now stipulates that where the event giving rise to the rights to training compensation occurs before the end of the season of the player's 18th birthday, the training costs for players for the seasons between their 12th and 15th birthdays (i.e. four seasons) shall no longer be based on the training and education costs of category 4 clubs, but on the category of the new club.³⁴ This means that the higher the category of the club, the more expensive it becomes for this club to sign a minor before the age of 18.

4.4 FIFA Transfer Matching System

Another new initiative was the involvement of minors in the FIFA Transfer Matching System (TMS) as can be read in Annexe 2 of the FIFA Regulations. The objective of the TMS is, on the one hand, to make sure that football's authorities have more details available to them on each and every transfer, and on the other hand, to increase the transparency of individual transactions, which will in turn improve the credibility and standing of the entire transfer system. At the same time, the system will also ensure that it is indeed a player who is being transferred

³² P. DARBY, G. AKINDES & M. KIRWIN, «Football Academies and the Migration of African Football Labor to Europe», *Journal of Sport and Social Issues*, 2007, 153.

³³ Article 1 Annexe 4 of the 2009 FIFA RST.

³⁴ FIFA Circular no. 1190, «Revised regulations on the status and transfer of players – protection of minors», 20 May 2009, 2.

and not merely a fictitious player being used to move money («money-laundering»). And last but not least, it will also contribute towards safeguarding the protection of minors.³⁵

Via the TMS, the movement of players is monitored through a central database, from which also ITC's can be issued. From October 2010 onwards, the use of TMS will become a mandatory step for all international transfers of professional players, including minors, and any professional player registrations made without the use of TMS will be deemed invalid by FIFA.³⁶

4.5 Awareness campaign

Finally in conjunction with FIFPro an awareness campaign is being launched directed at minors' countries of origin, in order to draw the attention of the public authorities, as well as of parents and minors themselves, to the consequences and social dangers posed by the issue of minors in football today.³⁷ Important to emphasize is that it is not always in the best interest of the child to leave his country at a young age in order to try to obtain a contract in mainly Europe.

5. UEFA Regulations regarding the protection of minors

Besides FIFA (club) competitions, clubs also participate in UEFA (club) competitions, the UEFA Champions League and the UEFA Europe League (formerly known as UEFA Cup). Also UEFA has taken measures to protect minors in its (European) competitions. Already in 2005, the homegrown rule was introduced and recently a resolution was adapted to prohibit international transfers of a player under 18 years old.

5.1 UEFA Homegrown Rule

In 2005 UEFA agreed on the introduction of a so-called *homegrown-rule*. This rule states that squad lists for UEFA club competitions will continue to be limited to 25 players for the main «A» list. From season 2006/07, the final four places were reserved exclusively for «locally trained players». A locally trained player is either a «club trained player» or an «association trained player». In the following two seasons, one additional place for a club trained player and one additional place for an association trained player was reserved on the A list with the final number of four club trained and four association trained players in place for the 2009/10 season. A club trained player is defined as a player who, irrespective of his nationality and age, has been registered with his current club for a period, continuous or non-continuous, of three entire seasons or of 36 months whilst between

³⁵ FIFA Circular no. 1205, «FIFA TMS transition phase», Zurich, 23 September 2009, 1.

³⁶ FIFA Circular no. 1205, «FIFA TMS transition phase», Zurich, 23 September 2009, 1.

³⁷ FIFA, «Protection of minors and training clubs», *supra* note 28, 2.

the ages of 15 and 21. An association trained player fulfils the same criteria but with another club in the same association. In the event that a club fails to meet the new conditions for registration, the maximum number of players on the «A» list will be reduced accordingly.³⁸

As can be read in articles 18.08 – 18.14 of the 2009/10 UEFA Regulations this system is still in place, clubs are, in UEFA club competitions, required to have (minimum) four locally trained players and (maximum) four association trained players listed in places 18 – 25 on list A.

Even though this rule is obviously (indirectly) discriminating, UEFA is of the opinion that this rule can be justified since it is proportionate and pursues a legitimate objective; reaching a «competitive balance» between clubs and «to encourage and protect the training and education of players».³⁹

In *Bosman* a rule which limited the number of professional players who were nationals of other Member States to be fielded (3+2 rule) was dismissed as being contrary to the freedom of movement since it was directly discriminating and moreover could not be justified.⁴⁰ At the same time, in paragraph 106 of the *Bosman* judgment the Court stated that «in the 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».

The difference between the 3+2 rule in *Bosman* and the UEFA homegrown rule is that the homegrown rule is «legally distinguishable in that although the objective is an attempt to link attributes of residence and players' club affiliations, the method employed does not constitute direct nationality discrimination but indirect discrimination which arises from requirements which more nationals than non-nationals are likely to fulfill. Since it is indirectly discriminatory, categories of objective justification beyond the limited Treaty grounds may be available».⁴¹

A very important side effect in this regard should not be forgotten. A player must be registered with a club for three years between the ages of 15 – 21 in order to be considered a homegrown player. This means that the younger a player when registered with a club (i.e. 15 years old), the sooner he can be regarded as homegrown, which is an advantage for the club to field another non-homegrown player. This could encourage clubs to attract players at a young age rather than to protect these youngsters.

³⁸ S. MIETTINEN & R. PARRISH, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 (2) *Entertainment and Sports Law Journal* (2007), 3.

³⁹ Also supported by the European Parliament as can be read in the European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (2006/2130(INI)), para. 34-35.

⁴⁰ *Bosman*, *supra* note 5, para. 15 summary.

⁴¹ S. MIETTINEN & R. PARRISH, *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 (2) *Entertainment and Sports Law Journal* (2007), 9.

Though, in combination with the new strict FIFA Regulations and additional measures regarding minors which are in place as summarized above, this rule can indeed encourage and protect the training of young players. However, the FIFA Regulations should be observed strictly.

5.2 *International Transfer Prohibition U-18*

In 2009 a resolution was ratified by UEFA together with representatives of the associations, clubs, leagues and players, in which it was agreed that «no international transfers (or first registration of non-nationals) of players under 18 into Europe or within Europe should be permitted. This means in particular that the third exception foreseen today in Article 19, paragraph 2 b), of the FIFA Regulations for the Status and Transfer of Players, and which relates only to the EU/EEA, should be reviewed in order to guarantee that the same system regarding transfer bans of under-18 year old players applies both within and outside Europe and that this system is strictly monitored».⁴²

However, within the European Union, as already mentioned, one of the core principles is the internal market and the freedom of movement provisions. In particular Article 45 of the TFEU applies in this matter, which deals with the freedom of movement of workers. As can be read in this article (paragraph 2, the freedom of movement of workers «shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment». In paragraph 3 of Article 45 TFEU it is explained what this right explicitly entails; the right to accept offers of employment actually made (sub a), to move freely within the territory for this purpose (sub b), to stay in a Member State for the purpose of employment in accordance with the provisions governing employment of nationals of that State laid down by law, regulations or administrative sanction (sub c) and to remain in the territory of a Member State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission (sub d).

An international transfer ban for players under 18 years would obviously infringe this fundamental right of EU citizens. Even though this rule would apply irrespective of nationality, a legitimate question is whether such limitation on the freedom movement is proportionate.

6. *Sports agents – Study performed by the European Commission*

Faced with a steady rise in the price of players, many European clubs are increasingly turning to non-European markets, most of which are located in the African and South American continents, where it is possible to acquire talented

⁴² UEFA MEDIA RELEASE, *Protection of young players and encouragement of youth development, Resolution of the Professional Football Strategy Council*, Nyon, 9 March 2009.

players at significantly lower prices than in Europe.⁴³ Trafficking in sportspersons mainly concerns young sportspersons from third countries, particularly from Africa and Latin America. In the specific case of football, these continents represent a reservoir of young talent and are the main areas of origin of foreign professional football players who play in European championships.⁴⁴

In 2009, the European Commission published a study on sports agents in the European Union. This report describes in 7 steps how minor football players, from Africa and South-America in particular, are being trafficked by agents:

- 1) An intermediary spots a – usually young – player and promises to have him recruited by a European club. In most cases these players, who wish to emulate their idols, practice their sport in informal settings which are not easy to monitor.
- 2) The intermediary asks the player's family for money in exchange for finding a «placement» for him in Europe. Sometimes the player's family will sell all their possessions or take out a loan to pay the intermediary, in the hope of receiving a quick return on their investment.
- 3) The player arrives in Europe, in most cases with a one-month tourist visa. The travel conditions are often illegal (e.g. travelling as a stowaway in a ship) and dangerous (excessively long journeys, dehydration, hypothermia, etc.).
- 4) Once he arrives in Europe, the player is «put to the test» by several clubs, which are not necessarily those promised by the intermediary. He is taken from one club to another until the intermediary is satisfied or gives up the process.
- 5) If the tests are successful, the player signs a (usually, short-term) contract with the club (in fact, very often the intermediary encourages the player to sign a short-term contract). The contract is often precarious and its terms are disadvantageous to the player. If the player no longer has a contract with a club, the intermediary often «drops him».
- 6) If the player does not pass any of the tests and is not recruited by a club, the intermediary usually abandons him to his fate.
- 7) In principle, an intermediary who brings a player to Europe should bear the costs of his stay as well as all travel costs, including the return fare to the country of origin. However, many intermediaries will abandon the player when the tests with the clubs do not lead to a contract. With no money, no connections and often unable to speak the language of the country where he stays, the abandoned player usually has no choice but to remain in Europe in an irregular situation, i.e. without a work permit or a stay permit. He will end up doing undeclared, casual jobs for a living, possibly sending part of his earnings to his family back home. Most often, the player is unable to return

⁴³ EUROPEAN COMMISSION, KEA – CDES – EOSE: *Study on Sports Agents in the European Union*, November 2009, 120.

⁴⁴ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 121.

to his country of origin because he cannot afford the fare or because he does not wish to return, since this would be perceived as failure by his family, which made sacrifices for him. In general, it is apparent that very few players from these countries are recruited or given a contract in relation to the high numbers who travel to Europe – which results in a large population of destitute persons who are reluctant to return to their countries of origin and who try to remain in Europe at any price.⁴⁵

Sports agents are influential economic actors. The commissions earned by player agents on transfers of players in European football are estimated at EUR 200 million per year.⁴⁶ According to the study performed by the European Commission on Sports Agents, there are currently between 5.695 and 6.140 sports agents – including both official and unofficial agents in the various sports disciplines considered in the study – operating in the territory of the European Union, of which football is by far the sport with the largest number of official sports agents.⁴⁷ At FIFA, at a worldwide level, there are 5208 of licensed agents registered.⁴⁸ Remarkable is that in Spain only, 550 licensed agents are registered.

However, according to FIFA, only 25 to 30 percent of the transfers are performed by licensed agents.⁴⁹ Therefore FIFA is considering abolishing the FIFA licensing system. However, by opening this market, a morbid growth of player agents would be created. Instead FIFA could consider a system whereby clubs are sanctioned if dealing with unlicensed agents. This way unlicensed agents are forced to obtain a license or they will lose their business. All licensed agents should be published and with every transfer made it should be made clear who represented the player. Since clubs are affiliated with FIFA, FIFA is able to impose sanctions upon clubs who (also indirectly) deal with unlicensed agents. This should include (malicious) licensed agents who are put forward by unlicensed agents to formally finalize an agreed transfer.

The Commission concludes in its report that «sports federations are not adequately equipped to combat and punish offences against public order, particularly in the fields of human trafficking (which falls within the province of migration and security policies) and financial crime (which falls within the province of financial supervision, fiscal control and crime prevention/law enforcement policies)». However, the Commission states, «a number of recent initiatives by the sports federations, such as the introduction of a licensing system for clubs or the Transfer Matching System seem to be moving in the right direction in terms of promoting good governance in sport and strengthening the supervision and transparency of financial flows».⁵⁰

⁴⁵ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 121.

⁴⁶ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 4.

⁴⁷ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 4.

⁴⁸ See www.fifa.com/aboutfifa/federation/administration/playersagents/list.html.

⁴⁹ FIFA.COM, «*FIFA acts to protect core values*», 15 July 2009, www.fifa.com/aboutfifa/federation/administration/news/newsid=1081337.html.

⁵⁰ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 43, 172.

According to the Commission, «states must play a complementary role by supervising the measures implemented by national federations and imposing criminal penalties for offences against public order. This involves, for example, such measures as the following:

- Intensify the audits and checks performed by tax, social welfare and labour inspectors in sports clubs. Carry out checks of various aspects, including financial flows, work permits, social security registration, undeclared labour, working conditions, housing etc.;
- Improve the control of training centers in Europe to ensure compliance with national laws on the protection of minors;
- Establish indicators to measure the “sport variable” in statistics on illegal immigration and financial fraud».⁵¹

The Commission is of the opinion that governments should play a stronger role in protecting minors. Sports federations alone cannot solve this problem themselves.

Furthermore, more transparency in professional sport is recommended by the Commission, e.g. inform about reprehensible or illegal practices by sportspersons, agents, clubs, organizers of sports events or federations (including information on sanctions imposed by the sports authorities or public authorities); publish a list of sports agents and their clients (including, if possible, information on the duration of the contracts signed with the clients as well as on the qualifications and experience of the agents); include, in all placement contracts, the name of the agent and his/her remuneration and publish and make available to the members of the boards of directors (of clubs/organizers of sports events) the accounts concerning placement of sportspersons.⁵²

7. *European Parliament & European Commission Reports*

The scale and importance of protecting minors cannot only be solved by rules laid down by sporting organizations. At European level, already in 2007, both the European Parliament and the European Commission have recognized the problems regarding minors in respectively the European Parliament Resolution on the Future of professional football in Europe and the White Paper on Sport. In its resolution on the Future of professional football in Europe in 2007, the European Parliament confirms the problems regarding minors and calls for action. In its report the European Parliament:⁵³

37. Insists that immigration law must always be respected in relation to the recruitment of young foreign talent and calls on the Commission to tackle the problem of child trafficking in the context of Council Framework Decision

⁵¹ EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 46, 172-173.

⁵² EUROPEAN COMMISSION, *Study on Sports Agents in the European Union*, *supra* note 46, 175.

⁵³ European Parliament Resolution on the future of professional football in Europe, 29 March 2007 (2006/2130(INI)), paras 37-38.

2002/629/JHA of July 2002 on combating trafficking in human beings and/or in the context of the implementation of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work; points out that young players must be given the opportunity for a general education and vocational training in parallel with their club and training activity, so that they do not depend entirely on the clubs; calls for action to prevent social exclusion of young people who are ultimately not selected;

38. Calls on the football governing bodies and the clubs to engage in the fight against human trafficking by

- subscribing to a European charter for solidarity in football, that commits subscribers to respect good practices concerning the discovery, recruitment and reception of young foreign football players;
- the creation of a Solidarity Fund that would finance prevention programmes in countries most affected by human trafficking;
- reviewing Article 19 of the FIFA Regulations for the Status and Transfer of Players in relation to the protection of minors.⁵⁴

The problems are acknowledged and the European Parliament advocates for active action to prevent further exploitation of minors. E.g. immigration law provisions should play an important role in this regard, with the help of European Directives. Not only the European Parliament supports action, but also the Commission calls for measures in the White Paper on Sport.

In its White Paper, the European Commission continues and confirms that «there are concerns that the exploitation (sometimes referred to as “trafficking”) of young players is continuing. It is reported that an international network managed by agents takes very young players to Europe, especially from Africa and Latin America. The most serious problem concerns children who are not selected for competitions and are abandoned in a foreign country, often falling in this way in an irregular position which fosters their further exploitation».⁵⁵

The Commission further elaborates on the immigration law provisions already mentioned by the European Parliament: «as far as violations of immigration law are involved, Member States must apply the protective measures for unaccompanied minors envisaged by national legislation, where appropriate in accordance with Council Directive 2004/81/EC of 29 April 2004 on the residence permit.⁵⁶ In line with the UN Convention on the Rights of the Child, the best interest of the child must be a primary consideration for Member States when applying national legislation, especially concerning education and social integration. Finally, according to the Commission’s proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country

⁵⁴ Reviewing Article 19 of the FIFA RSTP was done in 2009 as can be read in this chapter.

⁵⁵ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.5.

⁵⁶ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

nationals, the “best interest of the child” should be taken in due account when making any decision on the return of the child, in particular with respect to the duration of the child’s stay in the Member State and of the existence of family, cultural and social ties with the country of origin». ⁵⁷

Active action cannot be done without the Member States. In the end, the responsibility to criminalize the phenomenon and to prosecute traffickers remains the responsibility of national legislations. ⁵⁸

8. Conclusion

This chapter took a step back from the Bernard judgment and took a deeper look into the protection of minors and European law.

European law allows for specificity of sports. Therefore also regarding minors specificity exists even though this specificity limits the freedom of movement of the players and despite the fact that this right fully applies to minors from the age they are competent to sign an employment contract. Examples in this regard are the transfer limitations mentioned in article 19 of the FIFA Regulations for players under 18 years of age. Limitations that are justified on the grounds of pursuing a legitimate objective and being proportionate to this objective, namely the protection of young players from international transfers which could disrupt their lives (see CAS Caballero).

FIFA has taken important initiatives to improve the protection of minors with the introduction of a Players’ Status sub-committee, the inclusion of article 19bis that concerns academies, changes in the calculation of training compensation and the involvement of minors in the FIFA Transfer Matching System.

Due to these measures, UEFA’s homegrown rule has become much more effective too since it has become more difficult to abuse the FIFA Regulations. Therefore clubs are obliged to pay more attention to recruiting and training its own youth players rather than to sign minors at a young age, whilst avoiding the FIFA Regulations, in order for them to become «homegrown» as soon as possible.

However, UEFA’s resolution to prohibit transfers U-18 in Europe is contrary to the EU free movement provisions. Whether such limitation is justifiable and proportionate under EU law will be an important question.

Also the European Parliament and the European Commission support action to improve the protection of minors and call for Member States to take action e.g. through Directives. As the protection of minors looks sufficient on paper, important is that this is reflected in practice. Therefore it is very essential that all actors, FIFA, UEFA, national associations, but also Member States work close together and strictly supervise all provisions.

⁵⁷ EUROPEAN COMMISSION, *White Paper on Sport*, 11 July 2007, para. 4.5.

⁵⁸ J. SCHERRENS, *The Muscle Drain of African Football Players to Europe: Trade or Trafficking?* European Master in Human Rights and Democratisation 2006-2007, 58.

Furthermore the European Commission's study on sport agents was a clear signal that FIFA should also actively act against malicious agents. E.g. a blacklist of agents could be created who make the minors sign killer contracts or abandon players after unsuccessful trials. Moreover, an interesting option could be to sanction clubs for doing any business with these malicious and/or unlicensed agents.

In conclusion, the protection of minors is a good legitimate cause. However, all measures and initiatives should always be carefully balanced with the fundamental right of free movement.

CHAPTER VIII

**THE BERNARD CASE:
AN OPPORTUNITY FOR ALL SPORTS STAKEHOLDERS**

by *Michele Colucci**

SUMMARY: Introduction – 1. The legal reasoning of the Court – 2. Alternative measures to training compensations – 2.1 Football: transfer compensation and solidarity mechanism – 2.2 Basketball and the establishment of a «solidarity fund» – 2.3 Handball: negotiated compensation among the parties – 2.4 Rugby: effective and real training costs but also quality of training – 3. Training compensation and EU competition law – Conclusions

Introduction

For the first time in the case *Olympique Lyonnais v Olivier Bernard and Newcastle United FC* (hereafter «Bernard»)¹ the Court of Justice delivered a judgement on a sport issue by making an explicit reference to the «specificity»² of sport as it has been recognised in art. 165 of the Treaty on the Functioning of the European Union.³

Fifteen years after the *Bosman*⁴ judgement when the Court of Justice

* Professor of *International and European Sports Law*, Tilburg University. President of the *Sports Law and Policy Centre*. He is also a member of the FIFA Dispute Resolution Chamber and the EHF – ECA (European Handball Federation – Court of Arbitration).

The Author wishes to thank Giuseppe Ferraro, Domenico Gullo, Karen L. Jones, and Adam Whyte, for their precious comments.

¹ ECJ, 16 March 2010, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR.

² A definition of «specificity» of sport is contained in para. 4.1. of the *White Paper on Sport* (2006) published by the European Commission and available at http://ec.europa.eu/sport/white-paper/index_en.htm (October 2010).

R. BLANPAIN, M. COLUCCI & F. HENDRICKX, *The Future of Sports Law in the European Union: beyond the EU Reform Treaty and the White Paper*, Alphen aan de Rijn, Kluwer Law International, 2008.

³ Art. 165 TFEU reads as it follows: «The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function».

⁴ ECJ, 15 December 1995, *Bosman*, C-415/93, ECR I-4921.

declared that a *transfer* compensation at the end of contract was against EU law, then in *Bernard* the judges decided that a *training* compensation is an obstacle to the freedom of movement of workers but, in principle, it could be justified by the objective of encouraging the recruitment and training of young players.

In particular the Court decided, in light of the specificity of sport, that training compensation must reflect the real costs sustained by the clubs and that the amount of that compensation is to be determined on the basis of the costs borne by the clubs in training both future professional players and those who will never play professionally.

It is definitely an important judgement which can be defined as a «balanced» one. However it is also vague in its attempt to guarantee the freedom of movement of the athletes on one side and football club's economic interests on the other.

The judgement now needs to be implemented in the legislation of all EU Member States, and above all, in the regulations of all sports associations at every level: international, European, and national.

Therefore the relevant sports associations could be obliged to amend their regulations – where it is necessary – and could be confronted with the problem of how to calculate the actual training costs of their athletes.

In the present article the author will focus exclusively on those legal aspects which have not been retained in the judgement and then will review other training compensation systems as well as equivalent measures adopted by some sports international associations – other than football ones – in order to achieve the objective to encourage the training of young athletes.

The goal of such analysis is to try to understand what will be the impact of such an important judgement on sport in general and what will be the role of all sports stakeholders in calculating the training costs and therefore the related compensation.

1. *The legal reasoning of the Court*

In line with its previous case law the European Court of Justice recalls that with regard to the objectives of the European Union, sport is subject to European Union law in so far as it constitutes an economic activity⁵ and, therefore, the one carried out by a «jeune espoir» like Mr. Bernard falls within the scope of article 45 TFEU on freedom of movement of workers.⁶

In that regard the judges point out that all of the provisions of the Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and forbid measures which might place nationals of the Member States at a disadvantage when they wish to pursue an economic

⁵ ECJ, *Bernard*, para. 27; ECJ, *Bosman*, para. 73.

⁶ See, in particular, ECJ, 18 July 2006, *David Meca-Medina & Igor Mejcen*, C-519/04, ECR I-6991, para. 23 and the case-law cited.

activity in the territory of another Member State.⁷

National 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 restrictions on said free movement even if they apply without regard to the nationality of the workers concerned.

The French sport rules applicable to Mr. Bernard, regarding «*joueur espoir*», state that at the end of his training period, he is required under pain of being sued for damages, to sign a professional contract with the club which trained him. These rules somewhat restrict the player's right to free movement.⁸ They are contrary to the principle of freedom of movement enshrined in the Treaty on the Functioning of the European Union.

The Court recalls that a measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by «*overriding*» reasons in the public interest.

Further, even if that is the case, the application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose.⁹

More precisely the Advocate General in her opinion states: «*National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may none the less escape prohibition if they pursue a legitimate aim compatible with the Treaty. In order for that to be so, however, they must fulfil four further conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary for that purpose*».¹⁰

With regard to professional sport, the Court has already had occasion in the *Bosman* case to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate.¹¹

In considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is obtained and does not go beyond what is necessary to reach it, account must be taken of the specific characteristics of sport in general, and football in particular, and of their social and educational function.

⁷ ECJ, *Bosman*, cited above, para. 94; Case C-109/04 *Kranemann* [2005], ECR I-2421, para. 25; and Case C-208/05 *ITC* [2007], ECR I-181, para. 31.

⁸ ECJ, *Bernard*, para. 35.

⁹ ECJ, *Bernard*, para. 38; ECJ, *Bosman*, para. 104.

¹⁰ Opinion of Advocate General Sharpston, 16 July 2009, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, not yet published in the ECR, para. 44.

¹¹ ECJ, *Bosman*, para. 106.

The Court chooses a line of reasoning which does not consider the broader implications of the case on employment and, in particular, its impact on training of young people in the workplace in general. It does so for a practical reason: «the Court did not hear sufficient submissions to deal with the wider issue adequately»¹² and then because the specific characteristics of sport «must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector».¹³

The Court refers to the new legal basis of the Treaty on Sport (art. 165 TFEU)¹⁴ rightly stressing the fact that professional football is not merely an economic activity but also a matter of considerable social importance in Europe and, in this perspective, training and recruitment of young players should be encouraged rather than discouraged.¹⁵

Thus a training compensation represents the justification of the obstacle to freedom of movement.

Already in the *Bosman* case the Court held that the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players.¹⁶ The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club.

Nevertheless the costs generated by training young players are, in general, only partly compensated for by the benefits which clubs can derive from those players during their training period.

Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club.

In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.¹⁷

On the basis of this reasoning the judges conclude that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the

¹² AG, Opinion, *Olympique Lyonnais v Olivier Bernard and Newcastle United FC*, C-325/08, para. 31.

¹³ AG, *Idem*, para 30.

¹⁴ ECJ, *Bernard*, para. 40.

¹⁵ ECJ, *Bernard*, para. 41; ECJ, *Bosman*, para. 108.

¹⁶ ECJ, *Bernard*, para. 42; ECJ, *Bosman*, para. 109.

¹⁷ ECJ, *Bernard*, paras 43-44.

recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally.¹⁸ The reasoning of the Court is sound and logical and the conclusions are founded on both the relevant case law and the new legal basis on sport written in the Treaty on the Functioning of the European Union. Nevertheless it is quite interesting to note that in searching the justification for the obstacle to the freedom of movement of workers the Court does not consider the existence of alternative measures to training compensations but it based its reasoning on «overriding reasons» and «legitimate objectives».

One could doubt that clubs would be encouraged in training young players if they can cover only the training costs. Furthermore, the problem of how to calculate such costs still exists.

Finally, the Court does not even examine the compatibility of the French training compensation in the light of the competition law.

The following paragraphs examine more in details the above mentioned issues.

2. *Alternative measures to training compensations*

In the Bernard judgment there is no empirical analysis. The European judges do not consider, or better to say, they do not have the opportunity to take into account other alternative measures to training compensation contrary to what they did in the Bosman case when they retained that «because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those (transfer) fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs».¹⁹

Then it admitted that the same aims of the «transfer compensation» could have been achieved at least as efficiently by other means which do not impede freedom of movement for workers.²⁰

In particular the Advocate General Otto Lenz²¹ was of the opinion that it would be conceivable to distribute the clubs' receipts among the clubs. Specifically, that means that part of the income obtained by a club from the sale of tickets for its home matches is distributed to the other clubs. Similarly, the income received

¹⁸ ECJ, *Bernard*, para. 45, ECJ *Bosman*, para. 109.

¹⁹ ECJ, *Bosman*, para. 109.

²⁰ ECJ, *Bosman*, para. 110.

²¹ AG, Carl Otto Lenz, Opinion delivered on 20 September 1995, Case C-415/93. ECR, 1995, I-4921, paras. 226 and ff.

for awarding the rights to transmit matches on television, for instance, could be divided up between all the clubs.²²

In comparison with *Bosman*, in *Bernard* there is no empirical analysis: international and national sports associations have adopted several compensation measures in order to stimulate the amounts that clubs shall receive should they train athletes, which safeguard their rights. If the judges would have had the opportunity to examine them, they likely would have delivered a different judgment or at least would have been in the condition to say more on how the training compensation should be calculated.

By doing a simple exercise of comparative analysis one would realize that many sports associations – both at national and international level – have adopted their own rules with regard to training compensation.

In the name of the autonomy and the specificity of sport, some of these associations have no training compensation at all and yet their clubs still survive and keep on training young athletes while some others have adopted quite complex methods of calculation.

In particular, the associations in which no training compensation is foreseen are the ones concerning cricket, cycling fencing, hockey, motor sports, polo, skiing, swimming, volleyball, and all watersports.

2.1 *Football: transfer compensation and solidarity mechanism*

The FIFA Regulations on the Status and Transfer of Players²³ now in force contain rules on training compensation when a player signs his first professional contract or is transferred before the end of the season of his 23rd birthday. Those rules were elaborated in collaboration with the Commission, in the wake of the Court's *Bosman* judgment.

In accordance with Article 20 of the FIFA regulations and Annex 4 thereto, training compensation is paid to a player's training club or clubs when he signs his first contract as a professional and, thereafter, each time he is transferred as a professional until the end of the season of his 23rd birthday.

On first registration as a professional, the club with which he is registered pays training compensation to every club that has contributed to his training, *pro rata* according to the period spent with each club. For subsequent transfers, training compensation is owed to his former club only for the time he was effectively trained by that club.

²² The Advocate General stressed that distribution of income represents a suitable means of promoting the desired balance. The concrete form given to such a system will of course depend on the circumstances of the league in question and on other considerations. In particular it is surely clear that such a redistribution can be sensible and appropriate only if it is restricted to a fairly small part of income: if half the receipts, for instance, or even more were distributed to other clubs, the incentive for the club in question to perform well would probably be reduced too much.

²³ FIFA Regulations on the Status and Transfer of Players (2010 edition), entered into force on 1 October 2010, available on line on www.fifa.com/mm/document/affederation/administration/01/27/64/30/regulationsstatusandtransfer2010%5fe.pdf (October 2010).

Clubs are divided into categories according to their financial investment in training players. The training costs set for each category correspond to the amount needed to train one player for one year multiplied by an average «player factor» – the ratio of players who need to be trained to produce one professional player.

The calculation takes account of the costs that would have been incurred by the new club if it had trained the player itself. In general, the first time a player registers as a professional, compensation is calculated by taking the training costs of the new club multiplied by the number of years of training. For subsequent transfers, the calculation is based on the training costs of the new club multiplied by the number of years of training with the former club.

However, for players moving within the European Union or the European Economic Area, if the player moves from a lower to a higher category club, the calculation is based on the average training costs of the two clubs; if he moves from a higher to a lower category, the calculation is based on the training costs of the lower category club.

There is also a «solidarity mechanism» governed by Article 21 and Annex 5. If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training between his 12th and 23rd birthdays receives a proportion of the compensation paid to his former club. It amounts in all to a maximum of 5% of the total compensation, spread over the seasons and among the clubs concerned.

It is interesting to note that in order to establish the amount of the compensation for the clubs in each of the categories identified by FIFA, the latter tried to get the information about the training costs from all different national associations which were invited to contact all relevant stakeholders (leagues, clubs, trade union associations) but unfortunately very few of them sent feedback.

Nevertheless FIFA decided to work on the basis of the scarce responses that it had received, as well as on the results of studies carried out by its general secretariat, and drafted some guidelines as to the types of costs that member associations should take into account in establishing training compensation fees.²⁴

2.2 *Basketball and the establishment of a «solidarity fund»*

In basketball there is a reference to a «reasonable» training compensation,²⁵ and above all, to a «solidarity fund». According to the FIBA (the International Basketball Association) rules governing players, coaches, support officials, and players' agents «compensation is based primarily on the investments made by the club(s) that have contributed to the development of the player».

²⁴ For a detailed analysis of the FIFA training compensation system see O. Ongaro, «The system of training compensation according to the FIFA Regulations on Status and Transfer of Players», *ESLPB*, Issue I-2010.

²⁵ FIBA Regulations H. Rules governing players, coaches, support officials and players' agents, disponibili on line all'indirizzo web www.fiba.com/pages/eng/fc/FIBA/ruleRegu/p/openNodeIDs/897/selNodeID/897/baskOffiRule.html (October 2010).

Just like in Bernard case, the club or other organisation for which he is licensed at his eighteenth (18) birthday (the «club of origin»), has the right to sign the first contract with the young player.²⁶

However, the difference with the French football compensation applicable to Bernard is that if a basketball player refuses to sign such contract and elects to move to a new club in another country, the two clubs would have had to agree on a compensation sum. In the event that the clubs are unable to agree on the compensation, the latter is determined by FIBA.

The player shall not be allowed to play for his new club until the compensation agreed upon by the two clubs or determined by the Secretary General has been paid.²⁷

For the calculation of the training compensation the following criteria are taken into account when making the decision on the authorisation of the transfer:

- i. The player's new club shall guarantee adequate academic and/or school and/or vocational training which prepares him for a career after his career as a professional athlete.
- ii. The new club shall provide appropriate basketball training in order to develop and/or further the player's career as a professional athlete.
- iii. The new club shall demonstrate that it conducts an appropriate training programme for young players of the nationality of the club's home country.
- iv. The new club shall make a contribution to a Solidarity Fund established by FIBA to support the development of young players.
- v. The young player, his parents, the new club, and the new national member federation shall declare in writing that, until his eighteenth (18) birthday, the player will make himself available for his home country's national team and, if necessary, for the preparation time as well as for training camps provided that they do not interfere with school activities.
- vi. The transfer does not disrupt the player's schooling.²⁸

Finally in transfer cases linked to basketball where the player lives close to the border, as determined by FIBA on a case by case basis, FIBA may waive the contribution to the solidarity fund and not include such transfers in the total inward/outward number of transfers of the national member federations involved.

2.3 Handball: negotiated compensation among the parties

In Handball, the training compensation is negotiated directly among the clubs and if the negotiation leads to no results then a competent body fix compensation at 2500 euro for each season during which they had a contract with the player.²⁹ No

²⁶ FIBA, Regulations H.3.4.2.

²⁷ FIBA, Regulations H.3.4.7.

²⁸ FIBA, Regulations H.3.4.1.1.

²⁹ Cfr. Art. 5 delle EHF rules on procedure for Transfer, available at http://cms.eurohandball.com/PortalData/1/Resources/1_ehf_main/11_downloadsregulations_forms/1_regulations/5_transfer/gesamt_englisch.pdf (October 2010). In particular art. 5 of the EHF Rules on Procedure for Transfer.

specific criteria are set in order to determine the amount of the training compensation.

2.4 *Rugby: effective and real training costs but also quality of training*

In Rugby the regulatory framework and the calculation of training compensation appears more complex since it takes into account the effective and real costs sustained by the club, but also the quality and the regularity of the training given to the athletes, and (sic!) to the market value of the athletes.³⁰ Pursuant to the IRB Regulation 4 on Player status, Player contracts and Player movement, in recognition of the investment made by Unions, Rugby Bodies or Clubs (as the case may be) in the training and/or development of Players, they are entitled to compensation.

With regard to the so-called *Associate Players*³¹ a compensation may be payable whether the player is transferred before acquiring the status of a *Contract Player*³² or if his registration should be transferred while he is still an Associate Player. The compensation is agreed among the parties and should reflect the actual investment made by a Union, Rugby Body or Club in a player registered with a Licensed Training Centre. This will include the quality, regularity, frequency of training and coaching received.

In case of a dispute about the amount of compensation a Judicial Officer or Judicial Committee shall take into account some following factors like: (a) the length of time the Player trained with the relevant Union, Rugby Body or Club; (b) actual training costs incurred by the relevant Union, Rugby Body or Club; (c) the quality and regularity of the training undertaken; and (d) the progress of the Player during his time at the relevant Union, Rugby Body or Club.³³

A club may request training compensation if a player is transferred to a club in another country of Europe under the following conditions:

- the player must be between 16 and 23 years old at the time of his/her transfer
- the club must have had a contract with the player at any time between his/her 16 and 23 years old
- the contract with the player must be terminated at the date of his/her transfer
- the training compensation shall be requested during the transfer procedure (by the last club having a contract with the player)
- the transfer/request for training compensation shall be made within 12 months after the end of the last contract of the player with a club in the respective country (by the last club having a contract with the player).

³⁰ Cfr. art. 4.7. and ff. of the IRB Regulations on Players status, Players Contracts and Player movement, disponibili on line all'indirizzo web www.irb.com/mm/document/lawsregs/0/091209_gfirbhandbooksectionreg4_9525.pdf (October 2010).

³¹ Pursuant to art. 3 of the IRB regulations Under an Associate Player scheme, players over the age of 16, but under the age of majority, who are receiving regular/frequent training and/or coaching services in a Licensed Training Centre, may be registered in that Licensed Training Centre as an Associate Player.

³² Art. 4.5.7 makes a distinction between Contract Players and Non-Contract Players whereas the formers are those who are registered and are currently receiving, or who have received, Material Benefit shall be regarded (save for those Players who are no longer classified as Contract Players). All other Players who are registered shall be regarded as «Non-Contract Players».

³³ Pursuant to art. 4.7.4 the amount of compensation payable shall be calculated as it follows:

In the Rugby regulations reference is made also to the so called «Standard Annual Development Investment figure» which represents the average level of per Player funding attributable to development programmes in IRB High Performance and Performance Unions.³⁴

The factors below constitute a guide to what is included within the Standard Annual Development Investment:

- (a) Actual and identifiable training costs in relation to Player development incurred by the Union, Rugby Body or Club (as the case may be) including, but not limited to: (i) proportionate salary or compensation paid to coaches; (ii) board and lodging; (iii) proportionate costs of training infrastructure (for example, hire of facilities, equipment);
- (b) Other general costs that can be attributed, either in full or in part, to a Player's rugby education, training and development; and
- (c) Assembly costs for next senior fifteen-a-side National Representative Team, senior National Representative Sevens Team and National Age Grade Teams.

It is quite interesting that some items are specifically excluded from the Standard Annual Development Investment, and these are medical and non-rugby specific costs (e.g., school fees and other education costs); domestic and international competition costs; and assembly costs for domestic club teams and international club teams.

From this general overview on training compensations in several sports organizations we may conclude that there are valid alternatives to training compensation, such as the «Solidarity Fund» established in basketball, and that a training compensation – if necessary – should take into account several factors, the quantity but also the quality of training offered.

None of the examined regulations foresee the possibility for young athletes to pay themselves for the training that they receive. In practice it happens that many (both amateur and professional) clubs ask for money from young athletes in order to use training facilities or to participate in training camps. The problem is that these young athletes are simply not able to demonstrate the amounts paid because – in the majority of cases – they do not get any invoice. This is also because the football market is basically an informal market where some clubs could also «inflate» the training costs in order to justify other expenses.

3. *Training compensation and EU competition law*

In *Bernard* the Court has limited its analysis to the legitimacy of the training compensation in light of the principle of freedom of movement of workers.

A = B x C Where A = the compensation payable; B = the Standard Annual Development Investment of £5,000; C = the number of years, between the ages of 17 and 23, a player has spent in development programmes of the Current Union.

³⁴ FIBA, Regulations, art. 4.7.5.

Contrary to what happened in *Bosman*,³⁵ *Deliège*³⁶ and *Lethonen*³⁷ no preliminary question was asked with regard to the relevant EU antitrust rules and namely to artt. 101 and 102 TFEU.

The reason for which most likely being the existence of «French Charter» examined in the Bernard case. Said charter has the status of a national collective agreement and the ECJ had the opportunity to affirm that, notwithstanding their obligation to respect Article 45 TFEU, «*agreements concluded in the context of collective negotiations between management and labour (...) must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101](1) of the Treaty*».³⁸

Nevertheless this does not necessarily mean that every kind of collective bargaining agreement should be regarded as exempted by competition law, but rather only those agreements which – by their nature and content – aim to improve working conditions.³⁹

Moreover the Advocate General herself has admitted that, «whilst the dispute between Olympique Lyonnais and Newcastle United may well touch on matters of competition law, those matters have not been raised by the referring court, so that the Member States and the Commission have not had an opportunity to comment on them. Moreover, if the dispute did raise issues of competition law, that would not of itself preclude the application of the Treaty provisions on freedom of movement».⁴⁰

Suppose that the collective agreement at stake would have fallen under EU Law or that the FIFA regulations on training compensation themselves were to be judged in the light of competition law, the question is whether in the Bernard case the Court would have applied the rules set out in its past decisions or not and, namely, whether it would have applied the so called *Meca Medina* test.

In the *Meca Medina* judgment of 18 July 2006,⁴¹ the European Court of Justice rejected the notion that a «purely sporting» rule might fall outside the scope of EU competition law. The case concerned anti-doping rules adopted by the International Olympic Committee and implemented by the swimming governing body, Fédération Internationale de Natation Amateur.

In that occasion the Court decided that rules on sporting activities must fulfil the Treaty's provisions on free movement of workers, the freedom of services and free competition.

The ECJ first underlined that a sporting regulation's compatibility with European competition law cannot be ascertained in an abstract manner but should

³⁵ ECJ, *Bosman*, see above.

³⁶ ECJ, 11 April 2000, *Deliège*, C-51/96 and C-191/97, ECR I-2549.

³⁷ ECJ, 13 April 2000, *Lehtonen and Castors Braine*, C-176/96, ECR I-2681.

³⁸ ECJ, 21 September 1999, *Albany International BV*, case C-67/96, ECR I-5751, paras 60 - 64.

³⁹ ECJ, C-115/97 and 117/97, *Brentjens*, para. 61; ECJ, 21 September 1999, C-219/97, *Drijvende Bokken*, para. 51; ECJ, 12 September 2000, joined cases C-180/98 and C-184/98, *Pavlov*, para. 67).

⁴⁰ Opinion of the Advocate General, para. 43.

⁴¹ ECJ, judgement of 18 July 2006, case C-519/04 P, JO C 224 of 16 September 2006, 8.

be investigated on a case-by-case basis. Therefore, it stated that all agreements between undertakings, or associations of undertakings that restricts the parties' freedom of action, should be carefully examined in order to assess whether they fall within the scope of Article 101, para. 1, TFEU⁴² and whether they could benefit from one of the exceptions under paragraph 3 of the same article.

For the purposes of the application of that provision to a particular case, one must take note of the overall context in which the decision of the association of undertakings was taken. More specifically, one must take note of the objectives of the decision. Then it should be considered whether or not the effects which restrict competition are necessary for the objectives pursued and are implemented in a proportionate fashion.⁴³

On this basis, the Court concluded that the rules in question did not infringe Art. 101, para.1, TFEU.

In fact the overall objective of the rules was to combat doping in order to ensure fair competition for all athletes, the promotion of the health of athletes, the integrity, objectivity and fairness in competitive sport and the preservation of the ethical values of sport. The limitations of actions imposed on athletes were inherent in the organisation and proper conduct of competitive sport. It was not established that the rules at issue were disproportionate.

By applying the *Meca Medina test* to the Bernard case it is very likely that the payment of damages would have been considered as contrary to the relevant EU competition law. In fact such a measure could have been easily challenged as not adequate and disproportionate to the aim it wants to achieve.

On the contrary, a training compensation scheme could have been regarded as legitimate in the light of EU competition law but only if the amount of compensation would have been determined on the basis of clearly defined

⁴² Art. 101 TFEU provides that «1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: a) any agreement or category of agreements between undertakings, b) any decision or category of decisions by associations of undertakings, c) any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».

⁴³ ECJ, *Meca Medina*, para. 42.

parameters which take into account the real training costs.

With regard to the overall context in which the such compensation is foreseen, it could be argued that the general objective of training compensation is legitimate in so far as it aims to encourage the training of youth players.

In addition, given the fact that clubs need money to train players, the effect on players' freedom of action could be considered to be, in principle, inherent itself in the sports system. Nevertheless the amount of compensation requested, or more precisely, the criteria adopted to calculate it, are critical.

In fact a compensation which is not considerate as adequate nor justified because it does not reflect the real costs occurred, it could then result in an athlete's unwarranted exclusion from sporting events as well as in the impossibility for some clubs to acquire the players' services.

It follows that, in order to avoid the prohibition laid down in art. 101, para. 1, TFEU, the restrictions thus imposed by rules on training compensation must be limited to what is necessary to ensure the proper conduct of competitive sport.

Conclusions

In some aspects the *Bernard* case is not innovative since the judges, once again, declare that a sporting activity falls within the scope of EU law in so far as it constitutes an economic activity. At the same time, when they examine the compatibility of a sporting rule with the Treaty, they take into account the peculiarities of sport.

Nevertheless it is certainly an important decision because for the first time it contains a reference to art. 165 of TFEU and the concept of the specificity of sport is recalled to justify some obstacles to the freedoms of movement of athletes when all conditions laid down by the Court with regard to the overriding reasons of public interest are met.

This is the case concerning a compensation asked for in order to encourage clubs to train young athletes upon the conditions that it reflects the real and effective costs sustained by the relevant clubs.

Such a compensation should be reasonable and proportionate so that the players can freely move and clubs can buy their services.

The principle is sound and logical, but its implementation could be very difficult. In fact, no indication is given regarding criteria or parameters that should be taken into account for its calculation. In that regard it is quite unfortunate that the judges were not able to examine alternative measures to training compensations such as the solidarity fund foreseen in the basketball regulations.

Moreover, the Court could only give some general guidelines leaving the task to determine such costs to the individual sports associations.

A training compensation scheme which could be effective and legitimate under EU law should take into account not only the quantity but also the quality of the training.

Finally, in order to be credible and sustainable any kind of training compensation should be determined in common agreement with all relevant sports stakeholders: federations, leagues, clubs, and players' trade unions. The European judges gave them this opportunity and they cannot miss it.

SELECTED BIBLIOGRAPHY

- ARNAUT J., *Independent European Sport Review: a Report by José Luis Arnaut* (2006), 97.
- BESSON E., *Accroître la compétitivité des clubs de football professionnel français*, November 2008, 74.
- BLACKSHAW I., «*The CAS Appeal Decision in the Andrew Webster case*», *International Sports Law Journal*, 2008, Nr. 1-2, 14.
- BLANPAIN R., *The legal status of sportsmen and sportswomen under international, European and Belgian national and regional law*, The Hague, Kluwer Law International 2003, 52.
- BLANPAIN R. and GRANT C. (eds.), *Fixed-term employment contracts. A comparative study*, Bruges Vanden Broele, 2009, 441.
- BLANPAIN R., COLUCCI M. & HENDRICKX F., *The Future of Sports Law in the European Union: beyond the EU Reform Treaty and the White Paper*, Alphen aan de Rijn, Kluwer Law International, 2008, 96.
- CAIGER A., O'LEARY J., *Contract Stability in English Professional Football*, in Andrew Caiger, Simon Gardiner, *Professional Sport in the European Union: Regulation and Re-regulation*, Den Haag, 2000, 200.
- DARBY P., AKINDES G. & KIRWIN M., «*Football Academies and the Migration of African Football Labor to Europe*», *Journal of Sport and Social Issues*, 2007, 153.
- DE WEGER F., «*The Webster Case: Justified Panic as there was after Bosman?*», *Int. Sports Law J.*, 2008, Nr. 1-2, 20.
- EUROPEAN COMMISSION, *White Paper on Sport*, Bruxelles, 2006, available at http://ec.europa.eu/sport/white-paper/index_en.htm.
- GARCIA B., *Sport governance after the White Paper: the demise of the European model?*, *Journal of Sport Policy*, 1 (3), Routledge (Taylor & Francis), 2009, 267-284, www.informaworld.com/smpp/6561329-16846738/content~db=all~content=a917015551.
- GERLINGER M., *Anmerkungen zum Urteil des Oberlandesgericht Oldenburg vom 10. Mai 2005*, in *Causa Sport 2* (2005), 192 f.
- GREENFIELD S., *The Ties that Bind: Charting Contemporary Sporting Contractual Relations*, in Steve Greenfield, Guy Osborn, *Law and Sport in Contemporary Society*, London, 2000, 134 ff.
- KERR J., *Freedom of movement in sport inside and outside the European Union*, in Marco Del Fabro, Urs Scherrer, *Freizügigkeit im Europäischen Sport*, Zurich 2002, 22.
- KUMMER M., *Spielregel und Rechtsregel*, Bern 1973, 45.
- MCDougall D., «*The scandal of Africa's trafficked players*», *The Observer*, Sunday 6 January 2008.
- MEYER B. S., WISE A. N., *International Sports Law and Business*, Vol. 2, Den Haag 1997, 1421f.

- MIETTINEN S. & PARRISH R., *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5 (2) *Entertainment and Sports Law Journal* (2007), 3.
- PARRISH R., *Sports law and policy in the European Union*, Manchester, Manchester University Press, 2003, 148.
- SCHERRENS J., *The Muscle Drain of African Football Players to Europe: Trade or Trafficking?* European Master in Human Rights and Democratisation 2006-2007, 58.
- SIEKMANN R., «*Is sport special in EU law and policy?*», in R. Blanpain, M. Colucci, F. Hendrickx (eds.) *The future of sports law in the European Union. Beyond the EU Reform Treaty and the White Paper*, Bull. Comp. Lab. Rel. 2008, Vol. 66, 37-49.
- ZYLBERSTEIN J., *The Specificity of Sport: a concept under threat*, in *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper*, (R. Blanpain, M. Colucci, F. Hendrickx eds.), 2008, Kluwer Law International, 95-106.

ANNEX I

**OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD AND
NEWCASTLE UNITED FC**

JUDGMENT OF THE COURT (Grand Chamber)

16 March 2010*

(Article 39 EC – Freedom of movement for workers – Restriction – Professional football players – Obligation to sign the first professional contract with the club which provided the training – Player ordered to pay damages for infringement of that obligation – Justification – Objective of encouraging the recruitment and training of young professional players)

In Case C 325/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 9 July 2008, received at the Court on 17 July 2008, in the proceedings

Olympique Lyonnais SASP

v

Olivier Bernard,

Newcastle United FC,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts and P. Lindh, Presidents of Chamber, C.W.A. Timmermans, A. Rosas, P. Kûris, E. Juhász, A. Borg Barthet and M. Ilešič (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M.-A. Gaudissart, Head of unit,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 5 May 2009, after considering the observations submitted on behalf of:

- Olympique Lyonnais SASP, by J.-J. Gatineau, avocat,
- Newcastle United FC, by SCP Celice-Blancpain-Soltner, avocats,
- the French Government, by G. de Bergues and A. Czubinski, acting as Agents,
- the Italian Government, by I. Bruni, acting as Agent, and D. Del Gaizo, avvocato dello Stato,
- the Netherlands Government, by C.M. Wissels and M. de Grave, acting as Agents,
- the United Kingdom Government, by S. Ossowski, acting as Agent, and D.J. Rhee, Barrister,
- the Commission of the European Communities, by M. Van Hoof and G. Rozet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2009, gives the following

Judgment

- 1 This reference for a preliminary ruling concerns Article 39 EC.
- 2 The reference has been made in the course of proceedings brought by Olympique Lyonnais SASP («Olympique Lyonnais») against Mr Bernard, a professional football player, and Newcastle United FC, a club incorporated under English law, concerning the payment of damages for unilateral breach of his obligations under Article 23 of the Charte du football professionnel (Professional Football Charter) for the 1997 – 1998 season of the Fédération française de football («the Charter»).

Legal context

National law

- 3 At the material time in the main proceedings, employment of football players was regulated in France by the Charter, which had the status of a collective agreement. Title III, Chapter IV, of the Charter concerned the category

known as «joueurs espoir», namely players between the ages of 16 and 22 employed as trainees by a professional club under a fixed-term contract.

- 4 At the end of his training with a club, the Charter obliged a «joueur espoir» to sign his first professional contract with that club, if the club required him to do so. In that regard, Article 23 of the Charter, in the version applicable at the material time in the main proceedings, provided:

«...

On the normal expiry of the [«joueur espoir»] contract, the club is then entitled to require that the other party sign a contract as a professional player.

...»

- 5 The Charter contained no scheme for compensating the club which provided the training if the player, at the end of his training, refused to sign a professional contract with that club.

- 6 In such a case, however, the club which provided the training could bring an action for damages against the «joueur espoir» under Article L. 122-3-8 of the Code du travail (Employment Code) for breach of the contractual obligations flowing from Article 23 of the Charter. Article L. 122-3-8 of the French Code du travail, in the version applicable to the facts in the main proceedings, provided:

«In the absence of agreement between the parties, a fixed term contract may be terminated before the expiry of the term only in the case of serious misconduct or force majeure.

...

Failure on the part of the employee to comply with these provisions gives the employer a right to damages corresponding to the loss suffered».

The dispute in the main proceedings and the questions referred for a preliminary ruling.

- 7 During 1997, Olivier Bernard signed a «joueur espoir» contract with Olympique Lyonnais for three seasons, with effect from 1 July of that year.

- 8 Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year from 1 July 2000.

- 9 Mr Bernard refused to sign that contract and, in August 2000, signed a professional contract with Newcastle United FC.
- 10 On learning of that contract, Olympique Lyonnais sued Mr Bernard before the Conseil de prud'hommes (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and Newcastle United FC. The amount claimed was EUR 53 357.16 – equivalent, according to the order for reference, to the remuneration which Mr Bernard would have received over one year if he had signed the contract offered by Olympique Lyonnais.
- 11 The Conseil de prud'hommes in Lyon considered that Mr Bernard had terminated his contract unilaterally, and ordered him and Newcastle United FC jointly to pay Olympique Lyonnais damages of EUR 22 867.35.
- 12 The Cour d'appel, Lyon, quashed that judgment. It considered, in essence, that the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 39 EC.
- 13 Olympique Lyonnais appealed against that decision of the the Cour d'appel, Lyon.
- 14 The Cour de cassation considers that although Article 23 of the Charter did not formally prevent a young player from entering into a professional contract with a club in another Member State, its effect was to hinder or discourage young players from signing such a contract, inasmuch as breach of the provision in question could give rise to an award of damages against them.
- 15 The Cour de cassation points out that the dispute in the main proceedings raises a problem of interpretation of Article 39 EC since it raises the question whether such a restriction can be justified by the objective of encouraging the recruitment and training of young professional footballers in accordance with the judgment in Case C 415/93 *Bosman* [1995] ECR I 4921.
- 16 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - «(1) Does the principle of the freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which a “joueur espoir” who at the end of his training period signs a professional player’s contract with a club of another Member State of the European Union may be ordered to pay damages?

- (2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?»

Consideration of the questions referred for a preliminary ruling

- 17 By its questions, which should be examined together, the national court asks, in essence, whether the rules according to which a «joueur espoir» may be ordered to pay damages if, at the end of his training period, he signs a professional contract, not with the club which provided his training, but with a club in another Member State, constitute a restriction within the meaning of Article 45 TFEU and, if so, whether that restriction is justified by the need to encourage the recruitment and training of young players.

Observations submitted to the Court

- 18 According to Olympique Lyonnais, Article 23 of the Charter is not an obstacle to effective freedom of movement for «joueur espoir» since they are free to sign a professional contract with a club in another Member State subject to the sole condition that they pay compensation to their former club.
- 19 On the other hand, Newcastle United FC, the French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission of the European Communities argue that rules such as those at issue in the main proceedings constitute a restriction on freedom of movement for workers, which is, in principle, prohibited.
- 20 If it is held that Article 23 of the Charter constitutes an obstacle to freedom of movement for «joueur espoir», Olympique Lyonnais considers, on the basis of the judgment in *Bosman*, that that provision is justified by the need to encourage the recruitment and training of young players inasmuch as its only objective is to permit the club which provided the training to recover the training costs it incurred.
- 21 On the other hand, Newcastle United FC contends that the judgment in *Bosman* clearly placed any «compensation fee for training» on the same footing as a restriction incompatible with freedom of movement for workers, since the recruitment of young players does not constitute an overriding reason in the public interest capable of justifying such a restriction. Moreover, Newcastle United FC contends that, under the rules at issue in the main proceedings, damages are calculated according to arbitrary criteria which are not known in advance.

- 22 The French Government, the Italian Government, the Netherlands Government, the United Kingdom Government and the Commission argue that, according to the judgment in *Bosman*, the fact of encouraging the recruitment and training of young footballers constitutes a legitimate objective.
- 23 However, the French Government argues that, under the rules at issue in the main proceedings, the damages that the club which provided the training could claim were calculated in relation to the loss suffered by the club rather than in relation to the training costs incurred. According to the French Government and also the United Kingdom Government, such rules do not meet the requirements of proportionality.
- 24 The Italian Government considers that a compensation scheme may be regarded as a proportionate measure to achieve the objective of encouraging the recruitment and training of young players in so far as the compensation is determined on the basis of clearly defined parameters and calculated in the light of the burden borne by the club which provided the training. The Italian Government states that the possibility of claiming a «compensation fee for training» is of particular importance for small clubs, which have limited structures and a limited budget.
- 25 The French Government, the Italian Government, the United Kingdom Government and the Commission refer to the Regulations on the Status and Transfer of Players of the Fédération internationale de football association (FIFA), which came into force during 2001, after the material time in the main proceedings. Those regulations lay down rules for the calculation of «compensation fee for training» which apply to situations in which a player, at the end of his training in a club in one Member State, signs a professional contract with a club in another Member State. According to the French Government, the United Kingdom Government and the Commission, those provisions comply with the principle of proportionality.
- 26 The Netherlands Government points out, in a more general manner, that there are reasons in the public interest, related to training objectives, which could justify rules by virtue of which an employer who provides training to a worker is justified in requiring the worker to remain in his employment or, if he does not do so, to claim damages from him. The Netherlands Government considers that, in order to be proportionate, compensation must fulfil two criteria, namely that the amount to be paid must be calculated in relation to the expenditure incurred by the employer in that training and account must be taken of the extent, and for how long, the employer has been able to enjoy the benefit of the training.

Findings of the Court

The existence of a restriction on freedom of movement for workers

- 27 First, it is to be remembered that, having regard to the objectives of the European Union, sport is subject to European Union law in so far as it constitutes an economic activity (see, in particular, *Bosman*, paragraph 73, and Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991, paragraph 22).
- 28 Thus, where a sporting activity takes the form of gainful employment or the provision of services for remuneration, which is true of the activities of semi-professional or professional sportsmen, it falls, more specifically, within the scope of Article 45 TFEU et seq. or Article 56 TFEU et seq. (see, in particular, *Meca-Medina and Majcen v Commission*, paragraph 23 and the case-law cited).
- 29 In the present case, it is common ground that Mr Bernard's gainful employment falls within the scope of Article 45 TFEU.
- 30 Next, it is settled case-law that Article 45 TFEU extends not only to the actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner (see *Bosman*, paragraph 82 and the case-law cited).
- 31 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application (see *Bosman*, paragraph 84).
- 32 In the present case, it follows from the order for reference that the Charter has the status of a national collective agreement, and it thus falls within the scope of Article 45 TFEU.
- 33 Finally, as regards the question whether national legislation such as the legislation at issue in the main proceedings constitutes a restriction within the meaning of Article 45 TFEU, it must be pointed out that all of the provisions of the FEU Treaty relating to the freedom of movement for persons are intended to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures which might place nationals of the Member States at a

disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, in particular, *Bosman*, cited above, paragraph 94; Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 25; and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 31).

- 34 National 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 restrictions on that freedom even if they apply without regard to the nationality of the workers concerned (see, in particular, *Bosman*, paragraph 96; *Kranemann*, paragraph 26; and *ITC*, paragraph 33).
- 35 Rules such as those at issue in the main proceedings, according to which a «joueur espoir», at the end of his training period, is required, under pain of being sued for damages, to sign a professional contract with the club which trained him are likely to discourage that player from exercising his right of free movement.
- 36 Even though, as Olympique Lyonnais states, such rules do not formally prevent the player from signing a professional contract with a club in another Member State, it none the less makes the exercise of that right less attractive.
- 37 Consequently, those rules are a restriction on freedom of movement for workers guaranteed within the European Union by Article 45 TFEU.

Justification of the restriction on freedom of movement for workers

- 38 A measure which constitutes an obstacle to freedom of movement for workers can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the objective in question and not go beyond what is necessary for that purpose (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; *Bosman*, paragraph 104; *Kranemann*, paragraph 33; and *ITC*, paragraph 37).
- 39 In regard to professional sport, the Court has already had occasion to hold that, in view of the considerable social importance of sporting activities and in particular football in the European Union, the objective of encouraging the recruitment and training of young players must be accepted as legitimate (see *Bosman*, paragraph 106).
- 40 In considering whether a system which restricts the freedom of movement

of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to attain it, account must be taken, as the Advocate General states in points 30 and 47 of her Opinion, of the specific characteristics of sport in general, and football in particular, and of their social and educational function. The relevance of those factors is also corroborated by their being mentioned in the second subparagraph of Article 165(1) TFEU.

- 41 In that regard, it must be accepted that, as the Court has already held, the prospect of receiving training fees is likely to encourage football clubs to seek new talent and train young players (see *Bosman*, paragraph 108).
- 42 The returns on the investments in training made by the clubs providing it are uncertain by their very nature since the clubs bear the expenditure incurred in respect of all the young players they recruit and train, sometimes over several years, whereas only some of those players undertake a professional career at the end of their training, whether with the club which provided the training or another club (see, to that effect, *Bosman*, paragraph 109).
- 43 Moreover, the costs generated by training young players are, in general, only partly compensated for by the benefits which the club providing the training can derive from those players during their training period.
- 44 Under those circumstances, the clubs which provided the training could be discouraged from investing in the training of young players if they could not obtain reimbursement of the amounts spent for that purpose where, at the end of his training, a player enters into a professional contract with another club. In particular, that would be the case with small clubs providing training, whose investments at local level in the recruitment and training of young players are of considerable importance for the social and educational function of sport.
- 45 It follows that a scheme providing for the payment of compensation for training where a young player, at the end of his training, signs a professional contract with a club other than the one which trained him can, in principle, be justified by the objective of encouraging the recruitment and training of young players. However, such a scheme must be actually capable of attaining that objective and be proportionate to it, taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally (see, to that effect, *Bosman*, paragraph 109).
- 46 It is apparent from paragraphs 4 and 6 of the present judgment that a scheme such as the one at issue in the main proceedings was characterised by the

payment to the club which provided the training, not of compensation for training, but of damages, to which the player concerned would be liable for breach of his contractual obligations and the amount of which was unrelated to the real training costs incurred by the club.

- 47 As the French Government stated, pursuant to Article L. 122-3-8 of the French Employment Code, the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. In addition, as Newcastle United FC pointed out, the amount of that loss was established on the basis of criteria which were not determined in advance.
- 48 Under those circumstances, the possibility of obtaining such damages went beyond what was necessary to encourage recruitment and training of young players and to fund those activities.
- 49 In view of all the foregoing considerations, the answer to the questions referred is that Article 45 TFUE does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.
- 50 A scheme such as the one at issue in the main proceedings, under which a «joueur espoir» who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

Costs

- 51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 45 TFUE does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided

the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.

A scheme such as the one at issue in the main proceedings, under which a 'joueur espoir' who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective.

[Signatures]

ANNEX II

OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 16 July 2009¹

Case C-325/08

Olympique Lyonnais

v

Olivier Bernard and Newcastle United

(Reference for a preliminary ruling from the Cour de cassation (France))

(Freedom of movement for workers – National rule requiring a football player to compensate the club which trained him if, on completion of training, he contracts as a professional player with a club in another Member State – Obstacle to freedom of movement – Justification by the need to encourage recruitment and training of young professional players)

1. To those who follow «the beautiful game», it is a passion – even, a religion.² Armies of dedicated fans travel the length of the Union to support their team at every match; and the likely performance of potential new recruits (possible transfer signings and home-grown talent) is a matter of burning importance. For gifted youngsters, being spotted by a talent scout and given an apprenticeship (that is, a training contract) with a good club is a magic key opening the door to a professional career. Sooner or later, however, the dream of footballing glory is necessarily allied to the hard-nosed reality of earning the highest income achievable over a limited time span as a professional player with the club that is prepared to offer the best wages

¹ Original language: English.

² As Bill Shankly put it (perhaps apocryphally) when reflecting on the relationship between the Liverpool and Everton fans, «Some people believe football is a matter of life and death. I am very disappointed with that attitude. I can assure you it is much, much more important than that». For other versions of what may (or may not) have been said, see www.shankly.com/Webs/billshankly/default.aspx?aid=2517.

packet. At the same time, clubs are understandably reluctant to see «their» best young hopefuls, in whose training they have invested heavily, poached by other clubs. Where the apprenticeship club is small and relatively poor and the poaching club is large and vastly more wealthy, such manoeuvres represent a real threat to the survival (both economic and sporting) of the smaller club.

2. The facts giving rise to the present reference may be set out briefly. A young football player was offered a professional contract by the French club which had trained him for three years. He declined, but accepted another offer to play professionally for an English club. At the time, the rules governing professional football in France rendered him liable in damages to the French club. That club sued both him and the English club in the French courts for a sum based on the annual remuneration which he would have received if he had signed with the French club.
3. In that context, the Cour de cassation (Court of Cassation) asks whether the rules described conflict with the principle of freedom of movement for workers enshrined in Article 39 EC and, if so, whether they can be justified by the need to encourage the recruitment and training of young professional players.

Relevant provisions

Community law

4. Article 39 EC secures freedom of movement for workers within the Community. Such freedom entails in particular the right, subject to limitations justified on grounds of public policy, public security or public health, (a) to accept offers of employment actually made, (b) to move freely within the territory of Member States for that purpose and (c) to stay in a Member State for the purpose of employment.

National provisions

5. At the material time,³ Article L. 120-2 of the French Code du Travail (Employment Code) provided: «No one may limit personal rights or individual or collective liberties by any restriction which is not justified by the nature of the task to be performed and proportionate to the aim sought».
6. Article L. 122-3-8 of the same code provided that a fixed-term employment

³ A new code took effect on 1 May 2008. The substance of the provisions in issue remains unchanged, but the numbering and presentation are no longer the same.

contract could be terminated prematurely only by agreement between the parties or in cases of serious misconduct or force majeure. If the employer terminated the contract prematurely in other circumstances, the employee was entitled to damages at least equal to the salary he would have received had the contract run its term. If the employee terminated the contract, the employer was entitled to damages corresponding to the loss incurred.

7. At that time, the Code du Sport (Sport Code) contained no provision relating to training of sports professionals, although Article L. 211-5 now provides that professional training contracts may require a trainee, on completion of training, to enter into a contract of employment with the training club for a period of no more than three years.
8. Employment of football players was further regulated in France by the Charte du Football Professionnel (Professional Football Charter), having the status of a collective agreement for the sector. Title III, Chapter IV, of the charter (1997-1998 version) concerned a category known as «joueurs espoir» – promising players between the ages of 16 and 22 hoping to embrace a professional career, employed as trainees by a professional club, under a fixed-term contract. Article 23 of that chapter⁴ provided, inter alia:

«...

On the normal expiry of the contract, the club is then entitled to require that the other party sign a contract as a professional player.

...

1. If the club does not exercise that option, the player may resolve his status as follows:
 - (a) by signing a professional contract with a club of his choice, without any compensation being due to the previous club;

...

2. If the player refuses to sign a professional contract he may not, for a period of three years, sign with another club in the [French national

⁴ Although, from the copy of the charter produced by the French Government, it seems that the provision concerned is Article 23 of Title III, Chapter IV, of the charter, the parties and the national courts have uniformly referred to it as Article 23 of the charter. To avoid inconsistency, I shall follow suit and refer to it as «Article 23 of the Football Charter». The same provision is currently Article 456 of the 2008-2009 version of the charter.

football league] in any capacity whatever, without the written agreement of the club in which he was a “joueur espoir” ...

...»

9. At the material time, that charter – which applied and continues to apply only within France – did not regulate compensation between clubs in cases where a player had been trained by one club and then signed a contract with another club, although it now does. According to the agent for the French Government at the hearing, the rules now applicable in France correspond closely to the present FIFA rules set out below.

International rules

10. As regards transfers between football clubs in different countries, the FIFA Regulations on the Status and Transfer of Players now contain rules on training compensation when a player signs his first professional contract or is transferred before the end of the season of his 23rd birthday. Those rules were elaborated in collaboration with the Commission, in the wake of the Court’s Bosman judgment.⁵
11. In accordance with Article 20 of the FIFA regulations and Annex 4 thereto, training compensation is paid to a player’s training club or clubs when he signs his first contract as a professional and, thereafter, each time he is transferred as a professional until the end of the season of his 23rd birthday.
12. On first registration as a professional, the club with which he is registered pays training compensation to every club that has contributed to his training, pro rata according to the period spent with each club. For subsequent transfers, training compensation is owed to his former club only for the time he was effectively trained by that club.
13. Clubs are divided into categories according to their financial investment in training players. The training costs set for each category correspond to the amount needed to train one player for one year multiplied by an average «player factor» – the ratio of players who need to be trained to produce one professional player.
14. The calculation takes account of the costs that would have been incurred by the new club if it had trained the player itself. In general, the first time a player registers as a professional, compensation is calculated by taking the training costs of the new club multiplied by the number of years of training.

⁵ Case C-415/93 [1995] ECR I-4921.

For subsequent transfers, the calculation is based on the training costs of the new club multiplied by the number of years of training with the former club.

15. However, for players moving within the EU or the EEA, if the player moves from a lower to a higher category club, the calculation is based on the average training costs of the two clubs; if he moves from a higher to a lower category, the calculation is based on the training costs of the lower category club.
16. There is also a «solidarity mechanism» governed by Article 21 and Annex 5. If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training between his 12th and 23rd birthdays receives a proportion of the compensation paid to his former club. It amounts in all to a maximum of 5% of the total compensation, spread over the seasons and among the clubs concerned.
17. As with the situation in France, no such international rules existed at the material time.

Facts, procedure and questions referred

18. In 1997, Olivier Bernard signed a «joueur espoir» contract with the French football club Olympique Lyonnais, with effect from 1 July that year, for three seasons. Before that contract was due to expire, Olympique Lyonnais offered him a professional contract for one year from 1 July 2000. Mr Bernard (apparently dissatisfied with the salary proposed) did not accept the offer but, in August 2000, signed a professional contract with the English club Newcastle United.⁶
19. On learning of that contract, Olympique Lyonnais sued Mr Bernard before the Conseil de prud'hommes (Employment Tribunal) in Lyon, seeking an award of damages jointly against him and Newcastle United. The amount claimed was EUR 53 357.16 – equivalent, according to the order for reference, to the remuneration which Mr Bernard would have received over one year if he had signed the contract offered by Olympique Lyonnais.
20. The Conseil de prud'hommes considered that Mr Bernard had terminated his contract unilaterally, and ordered him and Newcastle United jointly to pay Olympique Lyonnais damages of EUR 22 867.35 on the basis of Article L. 122-3-8 of the Employment Code. The judgment did not give any reasons

⁶ The facts of the present reference therefore concern two very well-known and well-funded clubs. However, the principles at stake apply to all professional football clubs, however wealthy the destination club or impoverished the training club.

for the difference between the amount of damages claimed and the amount awarded.

21. The defendants appealed to the Cour d'appel (Court of Appeal), Lyon, which considered that Article 23 of the Football Charter was unlawful. The restriction it imposed was incompatible with the fundamental principle of freedom to exercise a professional activity and with Article L. 120-2 of the Employment Code. In particular, there was no provision specifying the compensation to be paid in respect of training in the event of premature termination. To require a player to continue to work for the club which trained him was a restriction on freedom to contract which was disproportionate to the protection of the club's legitimate interests, regardless of the cost of the training.
22. Neither of those courts considered it necessary to refer a question for a preliminary ruling, although asked to do so by Newcastle United. The Cour d'appel, however, while its ruling was based on French law, did consider that the requirement imposed by Article 23 of the Football Charter was also contrary to the principle in Article 39 EC.
23. Olympique Lyonnais has now appealed to the Cour de cassation. That court points out that Olympique Lyonnais's claim is based on Mr Bernard's failure to comply with the obligation to sign a contract with the club that trained him, not on the prohibition on signing with another club in the French league. The obligation in question does not prohibit a player from signing with a foreign club, but is likely to dissuade him from doing so in so far as he is likely to incur liability in damages. On the other hand, such liability might be justified by the club's legitimate interest in keeping a novice player whom it has just trained.
24. The Cour de cassation refers to the ruling in Bosman, that Article 39 EC «precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee», and considers that the case raises a serious difficulty in interpreting that article.
25. It therefore seeks a preliminary ruling on the following questions:
 - «(1) Does the principle of freedom of movement for workers laid down in [Article 39 EC] preclude a provision of national law pursuant to which a "joueur espoir" who at the end of his training period signs a

professional player's contract with a club of another Member State of the European Union may be ordered to pay damages?

- (2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?»

26. Written observations have been submitted by Olympique Lyonnais and Newcastle United, by the French, Italian, Netherlands and United Kingdom Governments, and by the Commission. At the hearing on 5 May 2009, Olympique Lyonnais, the French Government and the Commission presented oral argument.

Assessment

Preliminary remarks

Implications of the questions

27. It seems to me important to remember that the pursuit of sport falls within the scope of Community law only and precisely because and to the extent that it takes place within the sphere of the economic and individual activities and freedoms with which that law is concerned. That is indeed one of the basic premisses underlying the Bosman judgment.⁷
28. If, consequently, the principles and rules of Community law apply to a situation such as that in the present case, then, by the same token, the Court's ruling in this case has, potentially, wider implications for employees and employers in all sectors concerned by those principles and rules.
29. The Netherlands Government is therefore right to point out that the case impinges on the general issue of an employer willing to invest in training an employee but reluctant to see that employee immediately carry off the valuable skills acquired and place them at the service of a competing employer. That issue concerns Community law in so far as any restrictions placed on the employee's freedom to seek or accept other employment might restrict his freedom of movement within the Community.
30. The specific characteristics of sport in general, and football in particular, do not seem to me to be of paramount importance when considering whether

⁷ See in particular paras 73 to 87 of that judgment and the case-law cited there; see also Case C-519/04 *P Meca-Medina and Majcen v Commission* [2006] ECR I-6991, para. 22 et seq.

there is a prohibited restriction on freedom of movement. They must, however, be considered carefully when examining possible justifications for any such restriction – just as the specific characteristics of any other sector would need to be borne in mind when examining the justification of restrictions applicable in that sector.

31. Having said that, however, I do not consider that the Court has heard sufficient submissions to deal with the wider issue adequately. The Netherlands Government, which raised the more general issue in its written observations, was not present at the hearing, and none of the parties who were present enlarged upon the issue, even after prompting by the Court. In those circumstances, I do not propose to consider the broader implications of the case in any detail; and I suggest that the Court should confine its ruling to the specific context of the main proceedings.

Scope of the contested rule

32. As both Newcastle United and the United Kingdom Government point out, Article 23 of the Football Charter contains no explicit requirement for compensation to be paid by a player who contracts with a club in another Member State on completion of his training with a French club.
33. However, the questions referred concern the compatibility with Community law not of any specific provision, but of a rule «pursuant to which a “joueur espoir” who at the end of his training period signs a professional player’s contract with a club of another Member State of the European Union may be ordered to pay damages». That is the effect which the Conseil de prud’hommes gave to Article 23 of the Football Charter and Article L. 122-3-8 of the Employment Code, and neither the Cour d’appel nor the Cour de cassation has taken the view that it was mistaken in that interpretation – merely that the effect in question is, or may be, incompatible with a higher rule of law.
34. Consequently, this Court’s concern must be with the effect described, whatever the provisions in which it is embodied.

Question 1: Compatibility with Article 39 EC

35. The first question may be answered briefly and simply: a rule which produces the effect described is, in principle, precluded by Article 39 EC. The reasoning which leads to that conclusion has been set out, in greater or lesser detail, in most of the observations submitted to the Court.

36. Sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 EC. The remunerated employment of professional or semi-professional footballers is such an economic activity.⁸
37. Article 39 EC extends not only to the actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner, including football association rules.⁹ All the provisions referred to in the present case fall within one or other of those categories.
38. The situation of a French player, resident in France, who enters into a contract of employment with a football club in another Member State, is not a wholly internal situation which would fall outside the scope of Community law. It is the acceptance of an offer of employment actually made, to which Article 39 EC specifically applies.
39. Rules are liable to inhibit freedom of movement for workers if they preclude or deter a national of one Member State from exercising his right to freedom of movement in another Member State, even if they apply without regard to the nationality of the workers concerned,¹⁰ unless the potential impediment to the exercise of free movement is too uncertain and indirect.¹¹
40. Rules which require payment of a transfer, training or development fee between clubs on the transfer of a professional footballer are in principle an obstacle to freedom of movement for workers. Even where they apply equally to transfers between clubs in the same Member State, they are likely to restrict freedom of movement for players who wish to pursue their activity in another Member State.¹² Rules under which a professional footballer may not pursue his activity with a new club in another Member State unless it has paid his former club a transfer fee constitute an obstacle to freedom of movement for workers.¹³
41. If a rule which requires the new employer to pay a sum of money to the former employer is thus in principle an obstacle to freedom of movement for workers, that must be equally or all the more true if the employee is himself liable to any extent. Either he must persuade the new employer to cover his liability or he must meet it out of his own resources, which are

⁸ See *Meca-Medina and Majcen*, paras 22 and 23 and the case-law cited there.

⁹ See Case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 17; *Bosman*, para. 82; and Case C-176/96 *Lehtonen* [2000] ECR I-2681, para. 35.

¹⁰ See *Bosman*, para. 96; Case C-190/98 *Graf* [2000] ECR I-493, paras 18 and 23; and *Lehtonen*, paras 47 to 50.

¹¹ See *Graf*, paras 23 to 25.

¹² See *Bosman*, paras 98 and 99.

¹³ See *Bosman*, para. 100.

likely to be less than those of an employer. Nor is the potential impediment to the exercise of free movement in any way uncertain or indirect. A requirement to pay a sum of money is an immediate and important consideration for any worker contemplating refusing one offer of employment in order to accept another.¹⁴

42. That analysis is not, in my view, affected by the submissions of Olympique Lyonnais to the effect that a situation of the kind in issue is not concerned by Article 39 EC because that article was intended to cover discrimination on grounds of nationality, not restrictions of freedom to contract in the context of reciprocal onerous obligations, and/or because the dispute in fact falls within the sphere of competition law, as an instance of (allegedly) unfair competition.
43. As regards the first point, it is clear from the Court's case-law that Article 39 EC does indeed cover restrictions on freedom to contract if they are such as to preclude or deter a national of one Member State from exercising his right to freedom of movement in another Member State, at least as long as they derive from actions of public authorities or rules aimed at regulating gainful employment in a collective manner. As regards the second point, whilst the dispute between Olympique Lyonnais and Newcastle United may well touch on matters of competition law, those matters have not been raised by the referring court, so that the Member States and the Commission have not had an opportunity to comment on them. Moreover, if the dispute did raise issues of competition law, that would not of itself preclude the application of the Treaty provisions on freedom of movement.¹⁵

Question 2: Possible justification

44. National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may none the less escape prohibition if they pursue a legitimate aim compatible with the Treaty. In order for that to be so, however, they must fulfil four further conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary for that purpose.¹⁶

¹⁴ In contrast to the situation in *Graf* (see in particular paras 13 and 24 of that judgment).

¹⁵ See, for example, *Meca-Medina and Majcen*, para. 28.

¹⁶ See Case C-19/92 *Kraus* [1993] ECR I-1663, para. 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37; *Bosman*, para. 104. The phrase «raisons impérieuses d'intérêt général», used systematically by the Court in French, has been translated into English in a variety of ways; «overriding reasons in the public interest» seems to be the most recent, and the one which best reflects the meaning.

45. It can hardly be questioned that the recruitment and training of young professional footballers is a legitimate aim which is compatible with the Treaty. Not only do all those who have submitted observations agree on the point, but the Court itself has said so.¹⁷ Nor is there any suggestion in the present case that the rules in issue are applied in a discriminatory manner.
46. As the Court pointed out in *Bosman*,¹⁸ it is impossible to predict the sporting future of young players with any certainty. Only a limited number go on to play professionally, so that there can be no guarantee that a trainee will in fact prove a valuable asset either to the training club or to any other club. Rules such as the one in question here are therefore perhaps not decisive in encouraging clubs to recruit and train young players. None the less, such rules ensure that clubs are not discouraged from recruitment and training by the prospect of seeing their investment in training applied to the benefit of some other club, with no compensation for themselves. An argument that rules with that effect are justified in the public interest seems plausible.
47. On the one hand, professional football is not merely an economic activity but also a matter of considerable social importance in Europe. Since it is generally perceived as linked to, and as sharing many of the virtues of, amateur sport, there is a broad public consensus that the training and recruitment of young players should be encouraged rather than discouraged. More specifically, the European Council at Nice in 2000 recognised that «the Community must ... take account of the social, educational and cultural functions inherent in sport and making it special, in order that the code of ethics and the solidarity essential to the preservation of its social role may be respected and nurtured».¹⁹ In addition, the Commission's White Paper on sport²⁰ and the Parliament's resolution on it²¹ both place considerable stress on the importance of training.
48. On the other hand, more generally, as the Netherlands Government has pointed out, the Lisbon Strategy adopted by the European Council in March 2000, and the various decisions and guidelines adopted since then with a view to its implementation in the fields of education, training and lifelong learning, accord primordial importance to professional training in all sectors. If employers can be sure that they will be able to benefit for a reasonable period from the services of employees whom they train, that is an incentive to provide training, which is also in the interests of the employees themselves.

¹⁷ See *Bosman*, para. 106.

¹⁸ At para. 109.

¹⁹ Annex IV to the Presidency Conclusions of the Nice European Council Meeting (7, 8 and 9 December 2000).

²⁰ COM(2007) 391 final.

²¹ Non-legislative resolution of 8 May 2008 (document P6_TA(2008)0198).

49. It is, however, rather more difficult to accept that a rule such as that at issue in the present proceedings is suitable for securing the attainment of that objective and does not go beyond what is necessary for that purpose.
50. All those who have submitted observations – including Olympique Lyonnais – agree that only a measure which compensates clubs in a manner commensurate with their actual training costs is appropriate and proportionate in that way. Consequently, compensation based on the player’s prospective earnings or on the club’s prospective (loss of) profits would not be acceptable.
51. That appears to me to be a correct analysis. Of the last two criteria, the former might be susceptible to manipulation by the club and the latter would be too uncertain. Neither would appear to have any particular relevance to the essential question of encouraging (or at least not discouraging) the recruitment and training of young players. Compensation related to actual training costs seems considerably more relevant. A number of further caveats have, however, been expressed.
52. First, since only a minority of trainee players will prove to have any subsequent market value in professional football, whereas a significantly greater number must be trained in order for that minority to be revealed, investment in training would be discouraged if only the cost of training the individual player were taken into account when determining the appropriate compensation. It is therefore appropriate for a club employing a player who has been trained by another club to pay compensation which represents a relevant proportion of that other club’s overall training costs.
53. Second, it may transpire that the training of a particular player has been provided by more than one club, so that any compensation due should, by some appropriate mechanism, be shared pro rata among the clubs in question.
54. Both of those concerns seem relevant when determining whether a particular scheme of compensation is appropriate and proportionate to the aim of encouraging the recruitment and training of young professional football players.
55. I am less convinced by a third concern which has been voiced, namely that the liability to pay the compensation should lie only on the new employer and not on the former trainee.
56. That, it seems to me, is not a proposition which can be upheld unconditionally. In general, the skills and knowledge which render an individual valuable on the employment market may be acquired at his own expense, at the public

expense or at the expense of an employer who trains him in return for his services. If, on the expiry of the training period in the latter case, the ‘balance of the account’ between training costs and services rendered indicates that the cost of the training has not yet been compensated in full, then it does not seem unreasonable that the trainee should be required to «balance the account», either by providing further services as an employee or (if he does not wish to do so) by paying equivalent compensation. Whilst the need to pay training compensation may discourage an employee from accepting a contract with a new employer, in either the same or another Member State, there seems no particular reason why he should be placed, at the training employer’s expense, in a better position to accept such a contract than another candidate who has trained at his own expense.

57. Such considerations will, however, vary according to the way in which training is generally organised in a particular sector. If, as appears to be the case, training of professional footballers is normally at the clubs’ expense, then a system of compensation between clubs, not involving the players themselves, seems appropriate. And I would stress that, if the player himself were to bear any liability to pay training compensation, the amount should be calculated only on the basis of the individual cost of training him, regardless of overall training costs. If it is necessary to train n players in order to produce one who will be successful professionally, then the cost to the training club (and the saving to the new club) is the cost of training those n players. It seems appropriate and proportionate for compensation between clubs to be based on that cost. For the individual player, however, only the individual cost seems relevant.
58. To sum up, the need to encourage the recruitment and training of young professional football players is capable of justifying a requirement to pay training compensation where an obligation to remain with the training club for a specified (and not over-lengthy) period²² after completion of training is not respected. However, that will be so only if the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club and, to the extent that the compensation is to be paid by the player himself, limited to the outstanding cost of the individual training.

The current French and FIFA rules

59. Many of the parties submitting observations have drawn the Court’s attention to the rules currently contained in Articles 20 and 21 of, and Annexes 4 and

²² Thus, within the context of a total professional playing career that is necessarily limited in length, an obligation to spend (say) the first 10 years from the date of signing the first professional contract with the training club would plainly be unacceptable.

5 to, the FIFA Regulations on the Status and Transfer of Players. Those rules now govern situations such as that of Mr Bernard but were not in force at the material time in the present case. They were adopted in 2001, with the Commission's approval, and seek to ensure compliance with the Court's case-law, in particular the judgment in *Bosman*. The French Government points out in addition that the French Professional Football Charter has followed suit and now contains comparable rules for domestic situations.

60. The United Kingdom Government in particular points out that, under the current FIFA rules, the club, not the player, pays compensation; the compensation is calculated on the cost of training a player, adjusted by the ratio of trainees needed to produce one professional player; various safeguards and limits render the compensation proportionate to the aim sought; and a solidarity mechanism apportions compensation between clubs when several have contributed to training.
61. Explicitly or implicitly, those parties also request that the Court should give its blessing to the rules currently in force.
62. It seems to me, however, that specific approval would not be appropriate in the context of the present case, which concerns a situation to which those rules did not apply. That said, some of the reasoning which I have set out above, and some of the reasoning which will be used by the Court in its judgment, may well be relevant if and when it may become necessary to examine the compatibility of those rules with Community law.

Conclusion

63. In the light of all of the foregoing, I am of the opinion that the Court should give the following answers to the questions raised by the Cour de cassation:
 - (1) A rule of national law pursuant to which a trainee football player who at the end of his training period signs a professional player's contract with a club of another Member State may be ordered to pay damages is, in principle, precluded by the principle of freedom of movement for workers embodied in Article 39 EC.
 - (2) Such a rule may none the less be justified by the need to encourage the recruitment and training of young professional football players, provided that the amount concerned is based on the actual training costs incurred by the training club and/or saved by the new club and, to the extent that the compensation is to be paid by the player himself, limited to any outstanding cost of the individual training.

ANNEX III

FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS

(omissis)

art. 20 Training compensation

Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations.

art. 21 Solidarity mechanism

If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annexe 5 of these regulations.

(omissis)

* * *

ANNEXE 4

Training compensation

1 Objective

1. A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In the latter case, training compensation shall be payable until the end of the season in which the player reaches the age of 23, but the calculation of the amount payable shall be based on the years between the age of 12 and the age when it is established that the player actually completed his training.

2. The obligation to pay training compensation is without prejudice to any obligation to pay compensation for breach of contract.
- 2 Payment of training compensation
 1. Training compensation is due when:
 - i. a player is registered for the first time as a professional; or
 - ii. a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday.
 2. Training compensation is not due if:
 - i. the former club terminates the player's contract without just cause (without prejudice to the rights of the previous clubs); or
 - ii. the player is transferred to a category 4 club; or
 - iii. a professional reacquires amateur status on being transferred.
 - 3 Responsibility to pay training compensation
 1. On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation within 30 days of registration to every club with which the player has previously been registered (in accordance with the players' career history as provided in the player passport) and that has contributed to his training starting from the season of his 12th birthday. The amount payable is calculated on a pro rata basis according to the period of training that the player spent with each club. In the case of subsequent transfers of the professional, training compensation will only be owed to his former club for the time he was effectively trained by that club.
 2. In both of the above cases, the deadline for payment of training compensation is 30 days following the registration of the professional with the new association.
 3. If a link between the professional and any of the clubs that trained him cannot be established, or if those clubs do not make themselves known within 18 months of the player's first registration as a professional, the training compensation shall be paid to the association(s) of the country (or

countries) where the professional was trained. This compensation shall be reserved for youth football development programmes at the association(s) in question.

4 Training costs

1. In order to calculate the compensation due for training and education costs, associations are instructed to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average «player factor», which is the ratio of players who need to be trained to produce one professional player.
2. The training costs, which are established on a confederation basis for each category of club, as well as the categorisation of clubs for each association, are published on the FIFA website (www.FIFA.com). They are updated at the end of every calendar year. Associations are required to keep the data regarding the training category of their clubs inserted in the transfer matching system (TMS) up to date at all times (cf. Annexe 3, article 5.1 paragraph 2).

5 Calculation of training compensation

1. As a general rule, to calculate the training compensation due to a player's former club(s), it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself.
2. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs of the new club multiplied by the number of years of training, in principle from the season of the player's 12th birthday to the season of his 21st birthday. In the case of subsequent transfers, training compensation is calculated based on the training costs of the new club multiplied by the number of years of training with the former club.
3. To ensure that training compensation for very young players is not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays (i.e. four seasons) shall be based on the training and education costs of category 4 clubs. This exception shall, however, not be applicable where the event giving rise to the right to training compensation (cf. Annexe 4 article 2 paragraph 1) occurs before the end of the season of the player's 18th birthday.

4. The Dispute Resolution Chamber may review disputes concerning the amount of training compensation payable and shall have discretion to adjust this amount if it is clearly disproportionate to the case under review.

- 6 Special provisions for the EU/EEA
 1. For players moving from one association to another inside the territory of the EU/EEA, the amount of training compensation payable shall be established based on the following:
 - a) If the player moves from a lower to a higher category club, the calculation shall be based on the average training costs of the two clubs.
 - b) If the player moves from a higher to a lower category, the calculation shall be based on the training costs of the lower-category club.
 2. Inside the EU/EEA, the final season of training may occur before the season of the player's 21st birthday if it is established that the player completed his training before that time.
 3. If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player's previous club(s).

- 7 Disciplinary measures

The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this annexe.

ANNEX IV

**COMPARATIVE TABLE ON TRAINING COMPENSATION IN 16
INTERNATIONAL SPORTS ASSOCIATIONS**

by

Paolo Amato, Michele Colucci, Kathleen E. Carey, Ann Marie Litt, Daniel Cassidy, Sabina van Nijnatten-Bestulic, Giampiero Pastore, Maelle Hofmaan, Dennis Koolgaard, Lieke van Berkel, Stefan Kamenski, Maria Josefina Gonzalez Lopez, Dennis Koolgaard, Nikolaus Stelzig, Tim de Klerck.

Whereas in the name of *autonomy* and *specificity* of sport each Sports Association both at International and national level has adopted its own rules on training compensation, the following table aims to give a general overview of the training compensation systems in some International Sports Associations.

Hopefully the analysis of the relevant provisions will enable everybody to better understand the impact of the Bernard Judgement by the Court of Justice on the sports world. I am very grateful to all authors who made this table possible.

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
<p>FOOTBALL <i>Paolo Amato</i> <i>Michele Colucci</i></p>	<p>Art. 1 FIFA Regulations on Status and Transfer of Players</p> <p>«A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs».</p>	<p style="text-align: center;">Yes</p> <p>Art. 20 FIFA regulations on Status and Transfer of Players</p> <p>«Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations».</p> <p>Art. 21 FIFA regulations on Status and Transfer of Players</p> <p>If a professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club (solidarity contribution). The provisions concerning solidarity contributions are set out in Annexe 5 of these regulations.</p>	<p>ANNEX 4 FIFA regulations on Status and Transfer of Players</p> <p>Art. 2 Payment of training compensation</p> <p>1. Training compensation is due when:</p> <ul style="list-style-type: none"> i. a player is registered for the first time as a professional; or ii. a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday. <p>Art. 4 Training costs</p> <p>1. In order to calculate the compensation due for training and education costs, associations are instructed to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players. The training costs are set for each category and correspond to the amount needed to train one player for one year multiplied by an average «player factor», which is the ratio of players who need to be trained to produce one professional player.</p> <p>Art. 5 Calculation of training compensation</p> <p>1. As a general rule, to calculate the training</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>compensation due to a player's former club(s), it is necessary to take the costs that would have been incurred by the new club if it had trained the player itself.</p> <p>2. Accordingly, the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs of the new club multiplied by the number of years of training, in principle from the season of the player's 12th birthday to the season of his 21st birthday. In the case of subsequent transfers, training compensation is calculated based on the training costs of the new club multiplied by the number of years of training with the former club.</p> <p>FIFA circular letter 1185</p> <p>All Clubs are divided per category:</p> <p>i. Category 1 (top level, e.g. club possesses high quality training centre):</p> <ul style="list-style-type: none"> - all first-division clubs of national associations investing on average a similar amount in training players. <p>ii. Category 2 (still professional, but at a lower level):</p> <ul style="list-style-type: none"> - all second-division clubs of national associations with clubs in category 1 - all first-division clubs in all other countries with professional football.

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>iii. <u>Category 3</u>:</p> <ul style="list-style-type: none"> - all third-division clubs of national associations with clubs in category 1 - all second-division clubs in all other countries with professional football. <p>iv. <u>Category 4</u>:</p> <ul style="list-style-type: none"> - all fourth and lower division clubs of the national associations with clubs in category 1 - all third and lower division clubs in all other countries with professional football - all clubs in countries with only amateur football. <p>FIFA circular letter 769 (now repealed) Training Costs should cover:</p> <ul style="list-style-type: none"> - Salaries and/or allowances and/or benefits paid to players (such as pensions and health insurance); - Any social charges and/or taxes paid on salaries; - Accommodation expenses; - Tuition fees and costs incurred in providing internal or external academic education programmes; - Travel costs incurred in connection with the players' education Training camps; - Travel costs for training, matches, competitions and tournaments; - Expenses incurred for use of facilities for training including playing fields, gymnasiums, changing rooms etc. (including

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>depreciation costs);</p> <ul style="list-style-type: none"> - Costs of providing football kit and equipment (e.g. balls, shirts, goals etc.); - Expenses incurred in playing competitive matches including referees expenses, and competition registration fees; - Salaries of coaches, medical staff, nutritionists and other professionals; - Medical equipment and supplies; - Expenses incurred by volunteers; - Other miscellaneous administrative costs (a % of central overheads to cover administration cost accounting, secretarial services etc.). <p>FIFA circular letter 799 (now repealed)</p> <p><u>i. For each different category of clubs,</u> national associations should arrive at a figure, which represents the average annual training costs incurred by a club in that category.</p> <p>ii. The figure arrived at for each category at (i) above, should then be divided by the total number of players that are effectively trained, on average, by a club in each category i.e. the number of players between 12 and 21 years of age who are trained by a club, who have not yet completed their training and who are registered to play for that club. The resulting figure represents the average cost</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>for training one player at a club in a particular category.</p> <p>iii. Finally, to work out the training compensation amount for each category, the figure obtained under (ii) should be multiplied by what is referred to in the Application Regulations as an average «player factor». The «player factor» is a <i>ratio</i> that takes into account the number of players who need to be trained on average by a club in a given category in order to «produce» one professional player .</p> <p>The player factor for each given category is obtained by dividing the total number of players being effectively trained, on average, by a club in that category (as defined at (ii) above), by the average number of those players being offered a full professional contract each year.</p>
BASEBALL <i>Kathleen E. Carey</i>	International Federation defers to National level for regulation	No specific rules; League by league basis	N/A
BASKET <i>Ann Marie Litt</i>		<p>FIBA Regulation H RULES GOVERNING PLAYERS, COACHES, SUPPORT OFFICIALS, AND PLAYERS' AGENTS</p> <p>H.3.4.1.2 Compensation for the development of a player under the age of eighteen (18) where the transfer has been approved under H.3.4.1.1.b.</p> <p><u>The Secretary General shall fix a reasonable compensation for the development of the player</u></p>	<p>H.3.4.1.1 Special cases</p> <p>a. If the proposed transfer is not linked to basketball, the transfer may be authorised.</p> <p>b. <u>If the proposed transfer is linked to basketball, the following criteria shall be taken into account when making the decision on the authorisation of the transfer:</u></p> <p>i. <u>The player's new club shall guarantee adequate academic</u></p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
		<p><u>payable as per H.3.4.8. Such compensation shall be based primarily on the investments made by the club(s) that have contributed to the development of the player and shall take into account the aspects as per H.3.4.1.1.b.</u></p> <p>H.3.4.2 At or after the player's eighteenth (18) birthday, the club of origin, i.e. the club or other organisation for which he is licensed at his eighteenth (18) birthday (the «club of origin»), has the right to <u>sign the first contract with the young player.</u></p> <p>H.3.4.3 Such contract shall be in written form and respect the law of the country and of the federation of origin. It shall have a minimum duration of one (1) year and a maximum duration of four (4) years. A copy of such contract shall be submitted to the Secretary General who shall keep it on a confidential basis.</p> <p><u>H.3.4.4 Should the player refuse to sign such contract and elect to move to a new club in another country, the two clubs shall agree on a compensation sum to be paid as per H.3.4.8 and inform FIBA.</u></p> <p><u>H.3.4.5 In the event that the clubs are unable to agree on the compensation within four (4) weeks of the date on which a letter of clearance for the player in question was first requested by the new club's federation, either club has the right to request that the compen-</u></p>	<p><u>and/or school and/or vocational training which prepares him for a career after his career as a professional athlete.</u></p> <p><u>ii. The new club shall provide appropriate basketball training in order to develop and/or further the player's career as a professional athlete.</u></p> <p><u>iii. The new club shall demonstrate that it conducts an appropriate training programme for young players of the nationality of the club's home country.</u></p> <p><u>iv. The new club shall make a contribution to a Solidarity Fund established by FIBA to support the development of young players.</u></p> <p><u>v. The young player, his parents, the new club, and the new national member federation shall declare in writing that, until his eighteenth (18) birthday, the player will make himself available for his home country's national team and, if necessary, for the preparation time as well as for training camps provided that they do not interfere with school activities.</u></p> <p><u>vi. The transfer does not disrupt the player's schooling.</u></p> <p><u>c. Not more than five outward transfers of players under the age of eighteen (18) can be approved in any one year from any one national member federation; similarly,</u></p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
		<p>sation be determined by FIBA. Such request has to be made in writing within six (6) weeks of the date on which a letter of clearance for the player in question was first requested by the new club's federation.</p> <p>H.3.4.6 The decision as per H.3.4.5 shall be taken by the Secretary General who may hear the two clubs and/or federations involved and/or the player if he deems it appropriate.</p> <p><u>H.3.4.7 The player shall not be allowed to play for his new club until the compensation agreed upon by the two clubs (H.3.4.4) or determined by the Secretary General (H.3.4.6) has been paid as per H.3.4.8.</u> In the event that an appeal is filed against the decision of the Secretary General, the player shall be allowed to play for his new club as soon as the sum of compensation determined by the Secretary General has been paid into an account of FIBA or the FIBA Zone where it will be held in escrow until the decision on the compensation is final.</p>	<p>not more than ten such transfers inward can be approved for any one national member federation.</p> <p>These restrictions relate only to transfers linked to basketball, apply separately to male and female players and shall be based on the order in which transfer requests were received by FIBA.</p> <p>National member federations have the right to withdraw a transfer request for a young player before FIBA issues a decision on the matter.</p> <p>d. In transfer cases linked to basketball where the player lives close to the border, as determined by FIBA on a case by case basis, FIBA may waive the contribution to the Solidarity Fund and not include such transfers in the total inward/outward number of transfers of the national member federations involved. Any subsequent national transfer of the player before his eighteenth (18) birthday, requires approval by FIBA and shall be included in the inward/outward number of transfers.</p>
CRICKET <i>Daniel Cassidy</i>	Professionals only when they are registered.	No training compensation	
CYCLISM <i>Sabina van Nijnatten-Bestulic</i>	JOINT AGREEMENTS part of UCI Cycling regulation (ROAD RACES) Art.6. Contract shall be for a specified period ending on 31 December.	UCI Cycling regulation (ROAD RACES) 2.16.041 On the expiry of the term of the contract, the rider is free to leave the professional continental team and join another team.	NO

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>Contracts coming into force before 1 July of the registration year shall be valid at least until 31 December of the same year.</p> <p>For a new professional, the contract shall be valid until at least 31 December of the following registration year.</p> <p>Contracts coming into force after 30 June shall be valid at least until 31 December of the following registration year and, in the case of a new professional, until 31 December of the year after that.</p> <p>Art. 7 1. The status of new professional is given to any rider who joins a UCI ProTeam or Professional Continental Team for the first time no later than during his twenty-second year.</p> <p>For the application of this article the date of joining shall be the date on which the rider's contract comes into force.</p> <p>The age of the rider is determined by the difference between the year of his hiring and the year of his birth.</p> <p>2. The status of new professional ends:</p> <p>a. If the contract comes into force before 1 July: on 31 December of the subsequent registration year;</p> <p>b. If the contract comes into force after 30 June: on 31 December of the second subsequent registration year.</p> <p>During this period the rider shall retain the status of new professional even if:</p>	<p>All transfer payment systems are prohibited.</p> <p>The same applies to other types of cycling: € TRACK RACES 3.7.023, 3.7.024, 3.7.025 € MOUNTAIN BIKE 4.10.019, 4.10.022</p>	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>a. The rider reaches the age of 23 during this period;</p> <p>b. The contract is terminated early and the rider changes team.</p> <p>3. If, at the time that the new professional's contract comes into force, the remaining term of the contract between the paying agent and the principle partner or contracts between the paying agent and the two principal partners is less than duration of the contract as determined under the first paragraph of point 2 above but equal to at least one year, the duration of the new professional's contract may be limited to the remaining duration of the contract with the principal partner or the longer of the contracts with the two principal partners.</p> <p>If, on expiry of the contract between the paying agent and the principle partner or the contracts between the paying agent and the two principle partners, the team continues its activities or the paying agent continues its activities in another team, he must reemploy the rider at that rider's request for at least one year and under conditions which may not be less favourable to the rider.</p> <p>Art. 8 The contract of employment shall not provide a trial period.</p> <p>Art. 9 Before 30 September prior to the end of the contract, if the contract has not already been renewed, each party shall inform the other in writing of their</p>		

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	intentions as regards any renewal of the contract. A copy of this document shall be sent to Cyclistes Professionels Associés (CPA)		
FENCING <i>Giampiero Pastore</i>	Amateurs	No Training Compensation	
FLOORBALL <i>Pekka Albert Aho</i>	<p>The International Floorball Federation (IFF) Transfer Regulations¹ contains the following definition of the status of a Floorball player:</p> <p>§ 1 GENERAL <i>A player is a person belonging to a club of an IFF member Association participating in a national or regional competition, organized by this IFF member Association.</i></p> <p><i>A player can only be licensed for one club at a time.</i></p> <p><i>An International transfer, hereafter transfer, is when a player transfers from a club, the giving club, in one member association which is member of IFF to a club, the receiving club, in another member association also member of IFF.</i></p> <p>The rules therefore make no distinction between professional players and amateur players. The same rules apply to the status and transfer of players registered to a club that belongs to an IFF member association regardless of whether the player is a professional or an amateur.</p>	No system for training compensation is provided for in the rules of the IFF. National associations have in place systems for training compensation for domestic transfers.	
HANDBALL <i>Maelle Hofmaan</i>	Art. 2IHF PLAYERS' ELIGIBILITY CODE Player status Players in national federations under the International Handball	Article 5 of the EHF Rules on Procedure for Transfer. A club may request training compensation if a	

¹ www.floorball.org/

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>Federation are either a) non-contract players or b) contract players, including professionals</p> <p>Article 3 IHF PLAYERS' ELIGIBILITY CODE Non-contract players 3.1. Players without a written contract between themselves and their club or federation, and who are not paid compensation over and above the customary costs of game participation, shall be termed non-contract players. 3.2. Customary costs, which all players may receive without affecting their player status, shall be in the form of travel and accommodation expenses in connection with a match, sports clothing, insurance and training participation. Financial contributions which are not related to any customary costs shall in principle be regarded as remuneration for the player's services as a handball player.</p> <p>Article 4 IHF PLAYERS' ELIGIBILITY CODE Contract players 4.1. Each player receiving payment over and above the re-imbursements mentioned in (3) is a contract player. A written agreement/contract, defining the rights and duties of the parties involved, shall be concluded. 4.2. National federations shall generate a central register of contract players within their jurisdiction by 31 December of each year. 4.3. Every national federation shall provide a</p>	<p>player is transferred to a club in another country of Europe under the following conditions:</p> <ul style="list-style-type: none"> - the player must be between 16 and 23 years old at the time of his/her transfer - the club must have had a contract with the player at any time between his/her 16 and 23 years old - the contract with the player must be terminated at the date of his/her transfer - the training compensation shall be requested during the transfer procedure (by the last club having a contract with the player) - the transfer/request for training compensation shall be made within 12 months after the end of the last contract of the player with a club in the respective country (by the last club having a contract with the player) <p>If a request for training compensation is made during the transfer procedure of a «young» player under the conditions defined here above, each club which had a contract with this player (between the age of 16 and 23) can receive a training compensation from the «new» club. The compensation can be agreed on between the «new» club and the «training clubs»; if no agreement is reached, the</p>	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>central register of all contract players to their continental federation concerned by 28 February of each year. The continental federation shall record the contract players and communicate a complete list to the IHF by 31 March.</p> <p>4.4. The IHF or the continental federation concerned has the right to determine the status of a player by itself. The respective request may be forwarded by the national federation, a club or a player.</p> <p>4.5. The agreement/contract between the player and the club shall include all details that rule the mutual rights and duties and shall be valid for a concrete period of time.</p> <p>The details mentioned in the specimen contract (see Regulations IV) can be considered elements of an agreement/contract between the a player and a club.</p> <p>The parties involved are free to rule further details in the respective agreement/contract which must not contravene the specimen contract.</p> <p>4.6. In case of disputes, a copy of the contract shall be made available to the IHF or the continental federation concerned, if required.</p> <p>4.7. National federations may add their own provisions to their player contracts, so long as they do not contradict this Player Eligibility Code.</p> <p>Article 5 IHF PLAYERS' ELIGIBILITY CODE Professional players</p>	<p>EHF regulations provide that the «training» clubs shall receive 2,500Euro for each season during which they had a contract with the player.</p> <p>The EHF Regulations also provide that the respective National Federation may request a training compensation if a «young» player is transferred to a club in another country of Europe; the conditions are the following:</p> <ul style="list-style-type: none"> - the player must be between 16 and 23 years old at the time of his/her transfer - the player must have been part of the national team in an official match at least once before his/her transfer (he/she shall appear at least once in the match report of an official match of the national team – friendly games are not valid) - the training compensation shall be requested during the transfer procedure <p>The compensation can be agreed on between the “new” club and the National Federation; if no agreement is reached, the EHF regulations provide that the National Federation shall receive 500Euro as training compensation for each season the player was at least once part of the national team in an official match.</p>	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>5.1. Professional players are defined as players whose livelihood is derived from playing handball.</p> <p>5.2. In addition, the provisions of (4) shall apply.</p>		
<p>HOCKEY <i>Dennis Koolaard</i></p>	<p>There are no regulations in the FIH Status and Bye-Laws on the status of players. So all players are considered amateurs.</p> <p>(Due to the increasing power of money in Hockey, the Dutch Hockey Association (KNHB) initiated regulations for the transfers of players. Disputes between clubs will be settled by the Dutch Football Association (KNVB).)</p>	<p>No, but maybe through:</p> <p>FIH Statutes and Bye-Laws</p> <p>Art. 20 The Juridical Commission and any other body authorised under the Statutes, Bye-Laws, Rules and Regulations to hear and determine any complaint, protest, claim, dispute or appeal may impose such sanction or sanctions as are laid down by the Statutes, Bye-Laws, Rules and Regulations or, by default thereof, such sanction or sanctions as it considers appropriate including but not limited to reprimand, fine (including interest), disqualification or suspension for such period as it determines appropriate, compensation, an order requiring a party to do or refrain from doing any act or thing and may also in its discretion award costs (including fees, charges and expenses).</p>	<p>There are no regulations in the FIH Statutes and Bye-Laws on the calculation of training compensation.</p>
<p>ICEHOCKEY <i>Lieke van Berkel</i></p>	<p>Section II of the IIHF International Transfer Regulations, art 1 definition of a professional players contract:</p> <p>The provisions below will be applied by the IIHF with regards to international transfers of professional players.</p> <p>A professional player shall be an ice hockey player who is paid more for his ice hockey player activity</p>	<p>Yes, there is a sort of a transfer fee:</p> <p>Art. 8 Fees</p> <p>8.1 The IIHF Council will establish the IIHF fee for ITC and for fax approvals. The IIHF administration costs incurred by each fax approval will be charged by the IIHF office in each individual case.</p> <p>8.2 A transfer service fee reflects the costs connected</p>	<p>There are no real provisions that calculate the transfer compensation fees, other than art. 8 that gives a straight fee. But there are two articles in the IIHF International Transfer Regulation that give the procedure of the transfer:</p> <p>2 The Transfer Procedure</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>than the expenses he directly incurs through playing ice hockey. The IIHF General Secretary may, at its sole discretion decide whether a player is a professional according to this definition.</p> <p>These provisions on stability of professional player contracts solely apply to professional players as defined above. The provisions of section I solely apply to the extent that they are not provided for in this chapter.</p>	<p>with the execution of the transfer procedures. The former member national association shall not charge more than a CHF 500.- service fee for the complete transfer procedure.</p>	<p>2.1 The player transfer procedure must be prepared first by negotiation of the two clubs concerned. Items to negotiate include the length of the contract and the corresponding length of the transfer. Following an agreement between the two clubs to transfer the player, the new club to which a player wishes to transfer, must begin the transfer process by acquiring and completing the ITC with the details and signatures of the player and the new member national association and must immediately inform the former club and send the ITC by way of the new member national association to the former member national association for their approval.</p> <p>2.2 The former member national association shall immediately inform the former club and forward the signed ITC to the IIHF office, or submit the reasons for refusal of the transfer with all the relevant evidence to the IIHF office, at the latest 7 days after the receipt of the ITC. The former member national association may not refuse to sign the transfer card unless the player wishing to transfer has not fulfilled his contractual obligations to his former club, has not</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>fulfilled financial commitments to his former club such as unpaid debts or has not returned the club's equipment, or other issues between the two clubs regarding the player transfer other than issues concerning compensation (for professional players please also refer to section II of these regulations). If the IIHF office does not receive any reply within the 7 day period or receives a refusal of the transfer without clear reasons, it will be regarded as an approval of the transfer.</p> <p>2.3 If the transfer is refused by the former member national association the IIHF office will immediately inform the new member national association with a copy of the objections as submitted by the former member national association. The new member national association is responsible to inform the new club and the player about the refusal.</p> <p>2.4 The player is entitled to appeal to the IIHF General Secretary against the refusal of his transfer. In the appeal the player must provide the reasons for his transfer with all relevant evidence and address the objections submitted by the former member national association.</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>The IIHF office will immediately inform the former member national association about the appeal and provide a copy of the appeal to the former member national association.</p> <p>2.5 If within seven days the IIHF office does not receive any objections against the reasons for refusal of the transfer from the player, it will be regarded as withdrawal of the transfer application.</p> <p>If within seven days the IIHF office does not receive any objections against the player's appeal from the former member national association, it will be regarded as consent with the transfer.</p> <p>2.6 If objections are received from either the player or the former member national association, the case will be investigated and decided within seven days by the IIHF General Secretary. His decision may be appealed to the IIHF Executive Committee within seven days by the player or the former member national association.</p> <p>2.7 Any party deemed by the IIHF office to have raised an unsubstantiated objection to a transfer may be referred to the Disciplinary Commit-</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>tee for possible sanction.</p> <p>2.8 A player cannot transfer during the period when he is under suspension by the IIHF or by his member national association (when such suspension is recognised by the IIHF.</p> <p>Section II art. 4 Transfer of Players Under Contract</p> <p>4.1 During the period of an existing contract a player shall not be approached by an official of any other club, or by a person in connection with any other club, in membership with another member national association or league with the goal of inducing the player to breach his current contract and to join a new club.</p> <p>4.2 A club wishing to contract the services of a player who is at present under contract with another club shall be obliged, before commencing any negotiations with that player, to inform his current club in writing of its interest.</p> <p>4.3 Breach of article 4.1 or 4.2 could be referred to the IIHF Disciplinary Committee and could result in restrictions on or disqualification from IIHF activities or other sanctions.</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>4.4 The transfer of a player during the term of his contract will not be subject to any restrictive regulations, provided that an agreement is reached between all three parties concerned (the former club, the player and the new club). However the transfer procedure (as set in section I, article 2) shall be applicable.</p> <p>4.5 A player may be transferred during the term of his contract, for a limited period of time, provided that an agreement is reached between all three parties concerned (the releasing club, the player and the receiving club). During the period of such limited transfer the player will be under the jurisdiction of the new member national association. After termination of the limited transfer the player shall continue his contractual obligations to his former club. The transfer procedure (as set in section I, article 2) shall be applicable.</p>
<p>MOTOR SPORTS (Organized by FIA) <i>Stefan Kamenski</i></p>	<p>Article 108 ISC (Registration for Competitors and drivers): Any person wishing to qualify as a competitor or as a driver, as defined in Articles 44 and 45, shall make a formal application for a licence to the ASN of the country of which they are a citizen (see Article 47). If the driver enters the car, then they are also the</p>	<p>No specific rules The results of my research showed that the big manufacturers organise training courses for jeune espoirs themselves and I suppose that they conclude individual contracts with every young driver individually. However this is total speculation since I haven't seen such a contract myself. Below you can find a link to a</p>	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>competitor must hold the two corresponding licences (see Article 109).</p> <p>Article 109 ISC (Issuing of licences): Certificates of registration drawn up in accordance with a model approved by the FIA, bearing the name of the ASN and termed either 'Competitor's licence' or 'Driver's licence' may be issued by the ASN (see Article 113). Two different kinds of FIA international licences have been established i.e. :</p> <p>Each ASN is authorised to issue these licences as specified under Article 110. An ASN may also issue national licences, the model of which may be chosen by that ASN. It may use for that purpose the FIA licences by adding an inscription which will restrict the validity to its country only, or to a specific category of sporting event.</p> <p>Article 110 ISC (Rights of issuing licence) Each ASN shall be entitled to issue licences</p> <ol style="list-style-type: none"> 1) to its nationals; 2) to the nationals of other countries represented on the FIA, in compliance with the following statutory conditions : <ol style="list-style-type: none"> a) that their parent ASN gives its prior agreement to the issuing which may only take place once a year and in special cases; b) that they can produce for their parent ASN (the country of their passport) a permanent proof of residence in the other country; c) that their parent ASN 	<p>programme for jeune espoirs organized by McLaren Mercedes Team: http://mclaren.com/article/2010/mclaren-driver-development-programme-1</p> <p>Transfer Compensation There are no specific provisions governing the training compensation regime. This is rather strange since it is obvious that drivers competing in series such as Formula 1, GP 2 and GP 3 are professionals with contracts with their respective teams. However, in Formula one Sporting regulations one can find under Appendix 5 Regulations of the Driver Contract Recognition Board. However the substance of these regulations are inaccessible because they are "reserved for the exclusive use of competitors entered in the FIA Formula One World Championship" Below, I am providing an article concerning cases decided by the Driver Recognition Board. However for me it was impossible to find neither the decisions on the merits nor the rules of procedure of this body. www.grandprix.com/ns/ns13683.html</p>	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>has recovered the licence originally issued.</p> <p>No person authorised by their parent ASN to apply for a licence from some other ASN shall hold a licence from their parent ASN valid for the current year. Exceptionally bona fide students at an ASN recognized competition driving school may take part in up to two national events organised by that school on the strict condition that they have the agreement of both their parent ASN and the host ASN. In such cases their original licence must be lodged with the host ASN who will then issue a suitable licence for the event. This licence will be exchanged for their original licence at the conclusion of the event(s).</p> <p>If for very special reasons however, a licence-holder wishes to change the nationality of his licence during the current year, he would only be able to do so after having obtained his parent ASN's consent and once his old licence has been taken back by his parent ASN.</p> <p>An ASN may also grant a licence to a foreigner belonging to a country not yet represented on the FIA but only on condition that the FIA is immediately informed of the intention to do so, in which case the FIA will at once state if there is any reason why such a licence should not be granted. An ASN shall advise the FIA of any refusal on its part to comply with a request of this nature.</p> <p>The requirement for acquiring different types of</p>		

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>licences <i>granting rights for participation in different series</i> organized by FIA can be found in Appendix L of the International Sporting Code, Chapter I.</p> <p>The only documents that contain distinction between professionals, semi-professionals and amateurs are the Sporting Regulations of FIA GT2 and GT3 series. However, there is no definition of amateurs and professionals. Instead these are stated in the different categorizations of drivers which are based on the drivers' performance and various other indicators including age. The categorization is: PLATINUM category – professional driver (other requirements); GOLD – semi-professional (other requirements); SILVER – amateurs (other requirements); BRONZE – amateurs (other requirements). See Article 42 and 43 2010 Sporting regulations – FIA GT2 European Championship and Article 38 2010 Sporting regulations – FIA GT3 European Championship</p> <p style="text-align: center;">Lex Specialis</p> <p>We can see the influence of EU law and especially the freedom of movement of worker over the International Sporting Code of FIA in the provisions regulating the issue of licencing rights. For example Article 47(a) 3rd subparagraph ISC states: A parent ASN is the ASN of the country of which the licence-holder is a</p>		

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>national. In the case of a professional competitor or driver as defined by article 18 of the present Code, a parent ASN may also be the ASN of the E.U. country of which the licence-holder is a bonafide permanent resident.</p> <p>Another similar provision concerns the access of nationals of EU Member States to national competitions of other Member States, namely this is Article 47(b) 1st subparagraph ISC which states:</p> <p>National licences issued by an E.U. ASN or ASN of a comparable country by decision of the FIA, to professional competitors or drivers, as defined by article 18 of the present Code, will allow their holders to take part in national events taking place in E.U. countries (or <i>comparable country</i> by decision of the FIA) without the need for special authorisation. Such national competition licences will feature an E.U. flag.</p> <p>Each E.U. ASN or ASN of a comparable country by decision of the FIA will ensure that insurance arrangements take these regulations into account.</p> <p>The problematic issue here is the existence of the term <i>comparable country</i>, determined by FIA on the basis of criteria unknown to me. It seems that by designating a comparable country FIA unilaterally extend the free movement rights to third country nationals, a provision which will be rather problematic if it ends up in ECJ.</p>		

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
<p>POLO <i>Maria Josefina Gonzalez Lopez</i></p>	<p>There are no regulations in the FIP Status/Bylaws on the status of players or contracts of players. Meaning that all players would legally be considered as amateurs.</p> <p>(In the world of polo - as in several other sports - it's a thin line between amateurs and players who get paid for playing as they regularly play together and against each other.)</p> <p>However for example art. 1.6 of the HPA Regulations 2009 (English association of polo) states the following about financial commitments: <i>«Associate Members of the HPA are expected to settle or procure settlement of all accounts arising in consequence of their involvement in playing Polo promptly in the ordinary course of business even though they may not be the actual legal creditor. Such accounts include, without limitation, agreed payments to players, farrier's charges, vets charges, feed accounts, livery charges and transport. Accordingly, provided the matter is not the subject of an ongoing Court case or arbitration, where the HPA is informed that such accounts are outstanding the Chief Executive shall seek an explanation from the Associate Member. This will be passed to the Disciplinary Steward who shall cause to be convened a Disciplinary Enquiry if he considers the failure to settle the account(s) to be a Disciplinary Incident. Where a Court or</i></p>	<p>No training compensation.</p> <p>Some extra information about how players make a living out of playing polo: <i>«To be a patron and sponsor a medium goal team a player will pay a pro anywhere from \$3500 per game to \$150,000 and up for a high goal tournament. Pros usually require housing and vehicles for themselves (and their families) while they are playing in tournaments which can last anywhere from two weeks to two months. A patron can spend from \$300,000 to \$1,000,000 and up to compete in high goal polo at the tournament level. Many polo professionals also derive income from club management and teaching».</i>¹</p>	<p>N/A</p>

¹ «Professional Polo Players» available at www.sportpolo.com/default.htm (visited 31 March 2010).

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p><i>arbitration process has found that an Associate Member or any company or entity with which he may be connected has avoided or delayed settling an account alleged to arise in connection with the Associate Member's involvement in playing polo, the Stewards shall impose without any enquiry an immediate and automatic suspension on the Associate Member concerned until the account has been settled or is being met in accordance with the directions of the Court or arbitrator. The Associate Member concerned may apply in writing to the Disciplinary Steward to have his suspension lifted pending an appeal to the courts. The Stewards shall also be empowered to impose such an immediate and automatic suspension without enquiry where an Associate Member has admitted that an account arising in consequence of his involvement in playing polo is outstanding even though he may not be the legal creditor.»</i></p> <p>The following is mentioned about players' contracts in art. 1.7 of the HPA Regulations 2009 (English association of polo): «Stewards consider financial arrangements between players and patrons to be a civil contract and would not expect to get involved unless they were concerned that the dealings of either party were either prejudicial to the good order of the HPA or the game of polo, or all</p>		

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<i>parties concerned, including the HPA, were in agreement that they should do so».</i>		
RUGBY <i>Dennis Koolgaard</i>	<p>Contract Players:</p> <p>IRB Regulation 4 on Player status, Player contracts and Player movement</p> <p>Art. 4.5.7 Players who are Registered and are currently receiving, or who have received, Material Benefit shall be regarded as Contract Players (save for those Players who are no longer classified as Contract Players in accordance with the provisions of Regulation 4.8.1 below). All other Players who are Registered shall be regarded as Non-Contract Players.</p> <p>Art. 4.8.1 A Player who has been Registered as a Contract Player will continue to be classified as a Contract Player until a period of 12 months has elapsed from the date such Player competed in his last Match when registered as a Contract Player.</p>	<p>Contract Players:</p> <p>Yes</p> <p>IRB Regulation 4 on Player status, Player contracts and Player movement</p> <p>Art. 4.7.2 In recognition of the investment made by Unions, Rugby Bodies or Clubs (as the case may be) in the training and/or development of Players, when:</p> <p>(a) a Contract Player whose written agreement has expired enters into a written agreement for the first time with a Union, Rugby Body or Club outside his Home Union, his Home Union (or Rugby Body or Club in membership of his Home Union as the case may be) shall, be entitled to compensation for his training and/or development;</p> <p>(b) a Non-Contract Player enters into a written agreement for the first time with a Union, Rugby Body or Club outside his Home Union, his Home Union (or Rugby Body or Club in membership of his Home Union as the case may be) shall be entitled to compensation for his training and/or development; and</p> <p>(c) a Non-Contract Player moves outside his Home Union and retains his status as a Non-Contract Player, then, subject to Regulation 4.8.3, the Player's Home Union (or</p>	<p>Contract Players:</p> <p>Paragraph 4.7 IRB Regulation 4 on Player status, Player contracts and Player movement.</p> <p>Art. 4.7.3 Disputes over which Union constitutes a Player's Home Union for the purposes of determining entitlement to compensation for a Player's training and development may be referred, by Unions or Associations only, to the CEO who shall via the Judicial Panel Chairman, or his designee, refer such disputes to a Judicial Officer or Judicial Committee to be dealt with in accordance with the provisions of Regulation 18.10. In determining such entitlement, the Judicial Officer or Judicial Committee shall, in particular, take into account the following factors:</p> <p>(a) the length of time the Player trained with the relevant Union, Rugby Body or Club;</p> <p>(b) actual training costs incurred by the relevant Union, Rugby Body or Club;</p> <p>(c) the quality and regularity of the training undertaken; and</p> <p>(d) the progress of the Player during his time at the relevant Union,</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
	<p>Associate Players:</p> <p>SECTION 3. Compensation for the training and development of young players</p> <p>Art. 3 Under an Associate Player scheme, players over the age of 16, but under the age of majority, who are receiving regular/frequent training and/or coaching services in a Licensed Training Centre, may be registered in that Licensed Training Centre as an Associate Player.</p>	<p>Rugby Body or Club in membership of his Home Union, as the case may be) shall have no claim to compensation.</p> <p>Associate Players:</p> <p>Yes</p> <p>SECTION 2. Young players protocol</p> <p>Art. 6 Compensation for the investment made in Associate Players may be payable whether the player is transferred before acquiring the status of a Contract Player or if his registration should be transferred while he is still an Associate Player. Any compensation payable in such circumstances should reflect, and be based on the factors set out in paragraph 13 of Section 3 of these Guidelines, in particular, the actual investment made by a Union, Rugby Body or Club in a player registered with a Licensed Training Centre. This will include the quality, regularity/frequency of training and coaching received.</p>	<p>Rugby Body or Club.</p> <p>Art. 4.7.4 The amount of compensation payable pursuant to Regulation 4.7.2, shall be calculated in accordance with Figure 1 below: Figure 1 $A = B \times C$ Where A = the compensation payable; B = the Standard Annual Development Investment of £5,000; C = the number of years, between the ages of 17 and 23, a player has spent in development programmes of the Current Union. For illustrations of the formula see Section 7 of the Explanatory Note to Regulation 4.</p> <p>Art. 4.7.5 The Standard Annual Development Investment figure represents the average level of per Player funding attributable to development programmes in IRB High Performance and Performance Unions. The factors below constitute a guide to what is included within the Standard Annual Development Investment: Investment: (a) Actual and identifiable training costs in relation to Player development incurred by the Union, Rugby Body or Club (as the case may be) including, but not limited to: (i) proportionate salary</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>or compensation paid to coaches;</p> <p>(ii) board and lodging</p> <p>(iii) proportionate costs of training infrastructure (for example, hire of facilities, equipment);</p> <p>(b) Other general costs that can be attributed, either in full or in part, to a Player's rugby education, training and development; and</p> <p>(c) Assembly costs for next senior fifteen-a-side National Representative Team, senior National Representative Sevens Team and National Age Grade Teams.</p> <p>For the avoidance of doubt, the following items are specifically excluded from the Standard Annual Development Investment:</p> <p>(d) Medical and non-rugby specific costs (e.g., school fees and other education costs);</p> <p>(e) Domestic and international competition costs; and</p> <p>(f) Assembly costs for domestic club teams and international club teams.</p> <p>Art. 4.7.6</p> <p>The number of years a Player has spent in development programmes of the Current Union is a key component of the calculation. It is recognised that there is a defined period in which Unions invest in Player development, and this is deemed to be between the ages of 17 and 23. During the defined development</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>period therefore, there is a maximum of seven years investment in Player development.</p> <p>Art. 4.7.7 Any disagreement over the fee payable pursuant to Regulation 4.7.2 and Figure 1 for such Player's training and/or development, may be referred, by Unions or Associations only, to the CEO who shall via the Judicial Panel Chairman, or his designee, refer such disputes to a Judicial Officer or Judicial Committee to be dealt with in accordance with the provisions of Regulation 18.10.</p> <p>Art. 4.7.8 Any disagreement between the relevant parties regarding the payment of compensation for the training and/or development of a Player, shall not affect a Player's playing activity and Clearance may not be refused for this reason.</p> <p>Art. 4.7.9 Compensation for a Player's training and development shall be paid by the Rugby Body or Club (as the case may be) to which the Player is proposing to move, to the Player's Home Union.</p> <p>Art. 4.7.10 Each Union shall be entitled to establish its own regulations for the distribution of compensation monies received by it to Rugby Bodies</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>and Clubs in its membership or otherwise.</p> <p>Art. 4.7.11 When compensation for a Player's training and development is payable by a Rugby Body or Club, then the Union with which such Rugby Body or Club is affiliated shall, in the event of default or non-performance by such Rugby Body or Club be liable for the payment of the compensation as principal debtor.</p> <p>Associate Players:</p> <p>SECTION 3. COMPENSATION FOR THE TRAINING AND DEVELOPMENT OF YOUNG PLAYERS</p> <p>Specific criteria for compensation:</p> <p>Art. 9 An Associate Player who is registered with a Licensed Training Centre shall be entitled, at any time, to apply to the Licensed Training Centre for cancellation of his registration as an Associate Player. In the event of such an application, an Associate Player cannot be registered with a Licensed Training Centre (and may not be registered with or play or train for a Union Rugby Body or Club for a period of 6 months from the date of the application),</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>except with the consent of the Licensed Training Centre with which he was registered as an Associate Player, and/or on payment of compensation to that Licensed Training Centre by the Licensed Training Centre, Union, Rugby Body or Club for whom the player wishes to register. If an Associate Player believes that the Licensed Training Centre that he is registered with is in breach of its obligations and/or failing to provide appropriate training and development activities, the Associate Player may apply to the Union that licenses the Centre in question and request that his registration be cancelled. The Union should undertake an investigation into such application and, where appropriate, refer the matter to its relevant body for adjudication.</p> <p>Art. 10 If an Associate Player's registration is transferred from one Licensed Training Centre to another, or the player is registered with a Union, Rugby Body or Club in another capacity, the Union, Rugby Body or Club responsible for funding/operating the Licensed Training Centre, at which the player received regular training and coaching services and was registered as an Associate Player, is</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>entitled to make a claim for compensation for the training and development of the Associate Player. When the Union, Rugby Body or Club responsible for the operation of a Licensed Training Centre believes that it is entitled to compensation then the Union, Rugby Body or Club, as the case may be, must complete a standard form setting out the basis of the claim and submit it to the relevant Union, Rugby Body or Club. It should then seek to agree the amount of compensation as soon as possible.</p> <p>Art. 11 Associate Players approaching or attaining majority may, where appropriate, be offered a contract pursuant to which he will receive Material Benefit, and sign as Contract Players, with the Union, Rugby Body or Club operating the Licensed Training Centre. Such offers may only be made within the 6 months before the player acquires the age of majority. If the Associate Player rejects the offer to become a Contract Player with the Union, Rugby Body or Club (as the case may be) that operated the Licensed Training Centre that he is registered with as an Associate Player (and in which he received</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>his training/coaching services) then, if that player elects to move to another Union, Rugby Body or Club as a Contract Player within 12 months from the date of the offer made through the Licensed Training Centre with which he is registered as an Associate Player the Union, Rugby Body or Club that funded/operated the Licensed Training Centre shall be entitled to claim compensation for that Associate Player's training and development.</p> <p>Calculation of the amount of compensation:</p> <p>Art. 12 The amount of compensation, if any, payable pursuant to paragraphs 9, 10 or 11 above shall be agreed between the relevant parties. If no agreement can be reached between the relevant parties within 28 days from the request for compensation, the relevant Union, Rugby Body or Club having jurisdiction over and/or responsible for the funding of the Licensed Training Centre(s) should refer the matter to the body designated by the Union or IRB (as the case may be) who shall set the appropriate level of compensation, if any, for that player's training and development.</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>Art.13 If a dispute over the payment of compensation for the registration of an Associate Player arises and such dispute is between Licensed Training Centres or Rugby Bodies or Clubs within the Jurisdiction of one Union, then the dispute should be dealt with by that Union having Jurisdiction over those Licensed Training Centre(s), Rugby Bodies or Clubs. If the dispute concerns Licensed Training Centres or Rugby Bodies or Clubs in different Unions then the matter shall be adjudicated on by the CEO or his designee(s). The CEO or his designee(s) shall be entitled to regulate its own procedures provided the parties are allowed to make representations and have a reasonable opportunity to present their case. For the avoidance of any doubt, any dispute over the payment of compensation for the training and development of an Associate Player shall not prevent that player from moving, subject to paragraph 9 above, and/or where that player is in breach of the Associate Player regulations.</p> <p>Art. 14 In determining the amount of compensation, if any, in respect of an Associate Player's training and</p>

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
			<p>development the following factors shall be taken into account:</p> <p>(a) Actual training costs in relation to the player incurred by the relevant Union, Rugby Body or Club operating the Licensed Training Centre during the period of the player's registration with the Licensed Training Centre. Training costs shall include, but not be limited to:</p> <p>(i) proportionate salary or compensation paid to coaches;</p> <p>(ii) board and lodging;</p> <p>(iii) proportionate costs of training infrastructure (for example, hire of facilities, equipment);</p> <p>(b) Medical costs expended on the player;</p> <p>(c) Non-rugby related expenditure in respect of a player provided by the Licensed Training Centre (for example, schooling and academic expenses);</p> <p>(d) Other general costs that can be attributed, either in full or in part, to the player's rugby education, training and development.</p> <p>(e) National Representative Team appearances of the player (at all age levels);</p> <p>(f) Age of the player; and</p> <p>(g) Length of time the player trained in the Licensed Training Centre.</p>
SKYING <i>Nikolaus Stelzig</i>	No relevant rules	No relevant rules	
SWIMMING (including	FINA REGULATIONS	NO TRAINING	

SPORT	STATUS	TRAINING COMPENSATION	CRITERIA FOR CALCULATION
Waterpolo, Open Water Swimming, Diving and Synchronised Swimming) <i>Tim de Klerck</i>	NO OFFICIAL STATUS «any swimmer who is a member to a national federation would automatically qualify as a competitor and be therefore eligible to compete in games».	COMPENSATION	
VOLLEYBALL <i>Nikolaus Stelzig</i>	NO specific rules In Austria: Contract players and Amateur players. Contract Players are players, which have signed a contract with a club, and are obliged to play for the club and get remuneration	NO TRAINING COMPENSATION At international level In Austria , «a compensation is a equivalent to former performances and training costs of the former club. The new club has to pay those costs, which the new club did not have to spend for education and training costs».	
WINTERSPORT (Alpine Skiing, Ski Jumping, Nordic-Combined, Cross-country, Freestyle skiing and Snowboard) <i>Nikolaus Stelzig</i>	Art 204.1.2 of the International Ski Competition rules ICR 2008 the athlete is not allowed to accept directly or indirectly any money to participate in a competition.	NO training compensation	

SPORTS LAW AND POLICY CENTRE

Via Cupetta del Mattatoio 8 - 00062 Bracciano RM

P.IVA 10632481007

www.slpc.eu – info@slpc.eu

Other SLPC Publications:

VINCOLO SPORTIVO E INDENNITÀ DI FORMAZIONE
I regolamenti federali alla luce della sentenza Bernard

by *Michele Colucci – Maria José Vaccaro*

ISBN 978-88-905-114-00

Price Euro 60,00

THE BERNARD CASE

SPORTS AND TRAINING COMPENSATION

EDITORIAL

by *Michele Colucci*

INTRODUCTORY REMARKS

by *Roger Blanpain - Michele Colucci - Frank Hendrickx*

JUSTIFICATION OF TRAINING COMPENSATION IN EUROPEAN FOOTBALL: *BOSMAN* AND *BERNARD* COMPARED

by *Frank Hendrickx*

JUDGMENT OF THE COURT OF 16 MARCH 2010 IN THE CASE C 325/08: *OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD AND NEWCASTLE UNITED FC* - ANALYSIS

by *Gianluca Monte*

THE *OLIVIER BERNARD* JUDGMENT: A SIGNIFICANT STEP FORWARD FOR THE TRAINING OF PLAYERS

by *Julien Zylberstein*

THE SYSTEM OF TRAINING COMPENSATION ACCORDING TO THE FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS

by *Omar Ongaro*

THE *OLIVIER BERNARD* CASE COMPARED

by *Wil Van Meegen*

FROM *EASTHAM* TO *BERNARD* - AN OVERVIEW OF THE DEVELOPMENT OF CIVIL JURISPRUDENCE ON TRANSFER AND TRAINING COMPENSATION

by *Vitus Derungs*

PROTECTION OF MINORS VS. EUROPEAN LAW

by *Rob Simons*

THE *BERNARD* CASE: AN OPPORTUNITY FOR ALL SPORTS STAKEHOLDERS

by *Michele Colucci*

SELECTED BIBLIOGRAPHY

ANNEX I

JUDGEMENT OF THE COURT OF JUSTICE *OLYMPIQUE LYONNAIS SASP V OLIVIER BERNARD AND NEWCASTLE UNITED FC*

ANNEX II

OPINION OF THE ADVOCATE GENERAL

ANNEX III

FIFA REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS

ANNEX IV

COMPARATIVE TABLE