



FACULTY OF LAW  
University of Lund

David Nilsson

The Revised FIFA Regulations  
for the Status and Transfer of  
Players' Compatibility with EC  
Competition Law-The Transfer  
System Revisited

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Hans-Henrik Lidgard

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# Summary

Following the *Bosman* verdict from the ECJ in 1995, FIFA, the governing body of football, had to change its rules for the status and transfer of players to bring them in line with EC law. With the threat of an outright prohibition decision against the international transfer system under the EC Competition rules, FIFA reached an agreement with the Commission, in March 2001, on the principles for the amendment of said rules. These principles were later implemented in the revised FIFA Regulations for the Status and Transfer of Players, pre-dominantly regulating the transfer of football players between clubs belonging to different national associations. The rules provide *inter alia* for the payment of transfer and/or training fees when a player changes his club affiliation under and at the expiry of his contract.

2006, five years after the initial deal, there still remains a number of question marks regarding the compatibility of the new system with the competition rules of the Treaty.

Football does have some peculiar features that need to be taken into account in the application of Articles 81 and 82. These are in particular the maintenance of a balance between clubs by preserving a certain degree of equality and uncertainty as to results. Rules designed to attain those aims are capable of eluding Articles 81 and 82 altogether. Sport and football further have a somewhat special status under EC law, since there are no provisions in the Treaty on sport. The regulation of sport within the EU is also influenced by politics to a great extent.

Nevertheless, sport in its economic sphere is subject to the Treaty, including the competition provisions. It is my purpose with this thesis to establish whether the transfer system in place under the FIFA Regulations is compatible with Articles 81 and 82 of the Treaty.

# Preface

As regards my choice of subject for this thesis, I first encountered the subject "Sports Law" during my exchange semester at the Faculty of Law in Copenhagen, autumn 2005.

I found the subject to be instantly fascinating given the novelty of the field of study and the need for more research in the area.

At first I found it to be a bit contradictory given my limited interest in sports as such, especially in football, but I can't escape the fact that I am intrigued by the appeal football has to people of all generations. In terms of commercial success and public interest there seems to be no outer bound as to where football is heading.

Given the fact that Sports law is a new field of law I decided to analyze the subject matter, namely the revised FIFA Regulations for the Status and Transfer of Players, out of an EC Competition law perspective, an established legal discipline, which is at the heart of my legal interest.

I would like to extend my thanks to Hans Carell, Xavier Grousot, Gert Persson and Mads Øland for being invaluable discussion partners for the subject and Hans-Henrik Lidgard for supervision on the thesis.

# Abbreviations

A.G.	Advocate General
BFR	Belgian Francs (The Belgian currency before the Euro)
CHF	Swiss Francs (Official Swiss Currency)
CAS	The Court of Arbitration for Sports
EEA	European Economic Area
(EC) Treaty	The Treaty establishing the European Community
EU	European Union
ECJ	European Court of Justice
FIFA	Federation Internationale de Football Association
FIFPro	The International Football Player's Union
GBP	Great Britain Pound (Official U.K. currency)
NCA	National Competition Authority
UEFA	The Union of European Football Associations
URBSFA	Union Royale Belge des Sociétés de Football Association ASBL (The Belgian National Football Association)

# 1 Introduction

## 1.1 Background

Sport in Europe and especially football has experienced an increasing regulatory interest by the Community institutions over the last ten years. It all started with the famous *Bosman*<sup>1</sup> case, from 1995. The judgement had far reaching implications for European football and it sparked the active involvement of the Commission in applying the competition rules of the Treaty to the practice of sport.

*Bosman* put an end to out-of-contract transfer payments for football players within the EU. In effect, this meant that football players at the end of their contracts were free to move to any other club. The free movement of football players within the EU was thus secured, or so it seemed.

The transfer system<sup>2</sup>, a system operated by the football's governing body FIFA, had other aspects as well. Aspects that attracted the keen interest by a European Commission that was intent on settling the affair once and for all now that the ECJ had laid out the foundation.

The Commission maintained objections to other parts of the international transfer system, especially the part where a transfer fee was still payable if a player transferred under contract.

Following the initiation of a formal investigation into the transfer system based on the competition rules of the Treaty, FIFA finally agreed to revise the system. But as it turned out, FIFA had a few aces in their sleeve and would not let the Commission have it their way.

The governing bodies of football and the Commission have never exactly had a smooth relationship, to say the least and meddling into the popular game of football didn't exactly boost the popularity of the Commission.

The idea was to bring the transfer system in line with EC law and give football players the same rights as any other European citizen under the Treaty.

What FIFA had and what the Commission was lacking, was the support from politicians and the public. This advantage would turn out to be of pivotal importance when the affair went in to its last rounds of negotiations.

Finally in 2001, 6 years after *Bosman*, FIFA and the Commission reached an agreement on principles to amend the transfer system. These principles were later implemented in the revised FIFA Regulations for the Status and Transfer of players, adopted in the same year.

It didn't take long before the first lawsuit was initiated against the new rules, incidentally brought by FIFPro, the football players international union. The case was later withdrawn following a settlement with FIFA.

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<sup>1</sup> Case C-415/93 Union Royale Belge des Sociétés de Football Association, Royal Club Liegeois, UEFA v Jean-Marc Bosman and others (1995) ECR I-4921. Hereinafter referred to as "the *Bosman* ruling"

<sup>2</sup> See section 1.1.1

The legality of the new rules have been in doubt ever since. But the chances of another case brought by a football player are unlikely since frankly, FIFA won't let it happen. In 2001, FIFA settled a lawsuit out-of-court that was brought by a Hungarian football player against the international transfer system.<sup>3</sup>

Interestingly, a case is pending before the Danish High Court, brought by the Danish player's association, against the new rules. A reference for a preliminary ruling was scheduled for submission to the ECJ regarding *inter alia* the compatibility of said rules with the competition rules of the Treaty by February this year, but this has reportedly not happened yet.<sup>4</sup>

To sum up, the new rules remain in limbo as concerns the compatibility with EC law.

The competition law provisions of the Treaty have frequently lingered in the background in sports related cases. The ECJ, however, has repeatedly refused to adjudicate sports related cases on them, including *Bosman*. This may in part be explained by the peculiar features of sport but also because other provisions of the Treaty have proved to be just as effective in deciding sports related cases, in particular the provision on freedom of movement of workers, Article 39 EC.

In order to understand the full scope of sports' entanglement in EC law, one must be aware of the political dimension. The governing bodies of sport, with FIFA in the pole position, have on numerous occasions tried to persuade the Member States of the EU to exempt the practice of sport from the scope of EC law. Even though, they have continuously failed in this ambitious task, they have managed to secure political support, manifested in e.g. non-binding declarations annexed to the Treaty.

Symptomatic for European sports policy is the predominant use of soft law. The Member States have not been prepared to grant sport a full exemption from EC law but they have been prepared to recognise the special status of sport compared to other sectors. Although, not legally binding, the use of soft law has turned out to be an effective instrument to influence the Community institutions in their decision-making in sports related cases. Even the ECJ has recognised the social importance of sport in the Community.<sup>5</sup>

When applying EC law to sport, due attention should thus be paid to the politics that have influenced not least the Commission in their decision making in sports related cases.

Long story short, I figured it was time to test the revised transfer system against EC Competition law.

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<sup>3</sup> Case C-264/98, Tibor Balog v Royal Charleroi Sporting Club, removed from the Court's register on 2 April 2001. According to Weatherill the opinion of the Advocate General in that case favoured a finding of incompatibility with Article 81 (Weatherill, "Fair Play Please!": Recent Developments in the Application of EC Law to Sport" at page 80, note 98)

<sup>4</sup> See press release from FIFPRO, "Players Union in Court Case in Denmark Against Transfer System", 13/12-2005

<sup>5</sup> See e.g. the *Bosman* ruling at para. 106

### 1.1.1 The Transfer System

I take it that everyone is familiar with the game of football. What may be new to some is the subject matter of this thesis; the transfer system. I will therefore devote a few lines to explain the peculiar system that has managed to stir so much attention over the last ten years.

Football has since its transition from purely amateur to more professional leagues operated a transfer system. A “transfer” is in principle defined as the process by which a player belonging to one club changes his club affiliation.<sup>6</sup> In practice the transfer system meant that a club could retain the services of a player even at the expiry of his contract. Alternatively the club could sell the player to another club and charge a transfer fee. Should the player initiate a transfer, either under contract or at the expiry of his contract, the transfer was contingent upon the payment of a transfer fee to be paid by his new to his old club. The obligation to pay a transfer fee is to be seen in conjunction with the player license system. A football player must be registered under the national association that his club is affiliated to. Any change in club affiliation would require that the national association to which his former club belonged had transferred his player license certificate to the national association of his new club. The transfer of the license was contingent upon the payment of the transfer fee. Should the new club choose to field the player without having received the validly transferred player license, all the matches in whom he participated were disqualified, since he would be regarded as an “illegitimate” player. In addition the clubs fielding the “illegitimate” player could be sanctioned through fines or even forced relegation by the relevant football authority.<sup>7</sup> The player license system is thus an intrinsic part of the transfer system.

The transfer system in conjunction with the license system in other words acted as a severe restriction on the mobility and freedom of contract of football players. It also served to distort the competition on the player market since the clubs could not compete for the services of players under normal competitive conditions.

Following the ECJ judgement in *Bosman*, however, players who had come to the end of their contract could transfer freely between the Member States of the EU/EEA, unrestrained by the transfer system.

### 1.1.2 The Organisation of European Football - The European Model of Sport

In order for the reader to get an idea of the regulatory environment in football it is necessary to understand how football is organised.

The structure of the organisation of football is coherent with the *European Model of Sport*. One of the most predominant features of the European model is the pyramid organisational structure with its built-in hierarchy.<sup>8</sup>

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<sup>6</sup> Halgreen, “European Sports Law” at page 174

<sup>7</sup> *ibid*

<sup>8</sup> *ibid* at page 66

Football, on an international basis is organized and regulated by FIFA, a private association registered under Swiss law, with its headquarters located in Zurich, Switzerland. FIFA also organises international football competitions such as the FIFA World Cup. FIFA, like most other sport governing bodies, are strongly independent and autonomous, and can therefore perhaps be expected to act in less predictable ways than if they were statutory bodies created by legislation.<sup>9</sup> FIFA is at the top of the hierarchy in football.

Under FIFA are the continental confederations. The Confederations are the umbrella organisations of the national football associations on each continent, UEFA being the confederation for Europe. UEFA distinguishes itself from other confederations since Europe is considered to be the number one football continent in the world in terms of successful clubs and prestigious club tournaments. UEFA organises *inter alia* the UEFA Champions League, the biggest and most prestigious club tournament in Europe.<sup>10</sup>

Under UEFA are the national associations like e.g. the Swedish Football Association ("Svenska Fotbollsförbundet")<sup>11</sup>. The national associations organise and regulate the sport at the national level.

The national clubs constitute the bottom of the pyramid. They primarily abide by the regulations set by their national associations, however with FIFA and UEFA regulations sometimes applying nationally as well.

This level of the pyramid comprises both amateur and professional clubs. It is this level of the *European Model of Sport* that is closely linked to amateur sport.<sup>12</sup> In the beginning, almost every European club was for amateurs only, and the professional branch of a club has in most cases been a "superstructure" on the amateur branch. In this context it should be pointed out that probably more than 95% of the total number of participants in any given sport still are amateurs and youth players. According to Halgreen, this proportion has been the driving force behind the following compelling political and legal argument: As governing sports bodies assume such an important role in promoting the overall interests of sport, which is beneficial to society, it is both necessary and legitimate for these bodies to exploit the commercial value of sport in order to re-distribute some of the revenues downwards towards the "grassroots" of the game and thus promote so-called "vertical" solidarity between amateur and professional interests.<sup>13</sup>

The pyramid structure of the *European model of Sport* is characterized by the "one-federation-for-sport" principle. Based on this principle, FIFA has a monopoly in organising and regulating football worldwide and UEFA a

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<sup>9</sup> Beloff, Kerr and Demetriou, "Sports Law" at page 18

<sup>10</sup> The Champions League is a competition where the domestic champions of each national association, as well as clubs who finish just behind them in their respective domestic championship compete. The number of clubs that can be entered by an association and their entry point in the competition depends on the association's position in UEFA's coefficient ranking list. For more info see [www.uefa.com](http://www.uefa.com)

<sup>11</sup> In some countries there are also regional federations under the national associations

<sup>12</sup> The European Model of Sport, Consultation Document of Directorate-General X at page 2

<sup>13</sup> Halgreen at page 69, who in turn refers to Ken Foster: "Can sport be regulated by Europe"

monopoly over Europe. This is manifested in rules, usually involving sanctions for those taking part in championships, which have not been recognised or authorised by either FIFA or UEFA. In this way they can effectively maintain their position.<sup>14</sup>

## 1.2 Purpose

Since the revised transfer system under the FIFA Regulations has not yet been tried under EC Competition law in a court, it is my purpose with this thesis to analyse the compatibility of the rules under Articles 81 and 82 of the Treaty.

I am aware of the delicacy that the practice of sport poses compared to other sectors of the economy given the political dimension and the limited decisional practice in sports related cases from the Community institutions.

I would like to stress that I don't think that sport should enjoy any special treatment under EC Competition law. I do however acknowledge that sport, and football in particular, has certain features that are not present in other business sectors, and that these features must be taken into account when applying Article 81 (ex 85) and 82 (ex 86). But contrary to the apprehension of FIFA, I do believe that these Articles are well capable of taking the peculiar features of football into account without the need for a special status for sport under the Treaty.

It is my firm belief that some aspects of the transfer system that are present under the FIFA Regulations, seriously undermine the freedom of the players and clubs alike. The FIFA Regulations are in essence employment rules for football players, and as such have great impact on their trade. Applying a pecuniary compensation obligation under or at the expiry of a player's contract effectively puts the free market forces out of play, replacing the normal system of supply and demand by a uniform machinery. This lies at the very heartland of competition law. It further limits the possibilities of a football player to find employment and for clubs to find football players to employ. It is my thesis that there exists other means to achieve the objectives that the transfer system is supposed to attain that are less restrictive of the rights of the clubs and players and the functioning of the common market.

The underlying question to be answered in this thesis is what makes sport and football so special in order to justify a special treatment from EC law in general and EC Competition law in particular. As Weatherill points out the inherent conflict, "Sport cannot have it both ways. It cannot scoop up the fruits of commercialisation yet aspire to keep Community law at bay".<sup>15</sup>

## 1.3 Method and material

This thesis will be based on legal dogmatism in that I intend to perform a legal analysis of how the relevant provisions of the FIFA Regulations

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<sup>14</sup> Consultation Document, *supra* note 12 at page 3

<sup>15</sup> Weatherill, "The Helsinki Report on sport" at page 291

comply with Articles 81 and 82 of the Treaty. I will primarily use case law from the Community institutions, advisory opinions and policy statements by the Commission to clarify the legal picture.

The availability of material on the subject has been somewhat limited, given the novelty of the field. This has caused me to sometimes rely on secondary sources. I have however avoided using secondary sources for the analysis. You might consider this a reservation. Unfortunately, it is unavoidable since some authors rely on Internet sources that have seized to exist and some Articles are published in legal journals that are not accessible from the resources that are available from [www.jur.lu.se](http://www.jur.lu.se) or the facilities at the faculty. I beg for your understanding on this point.

For the competition law analysis I will use the Advisory Opinion of A.G. Lenz in *Bosman* as a blueprint.

Sports law in Europe is still in its infancy when it comes to the legal study of the subject. There are however a number of scholars that have written quite extensive theses on the subject. I will of course use the doctrine that is relevant for this thesis. On this note I would like to draw your attention to the authors that have been pivotal for my work on this thesis. They are Weatherill, Beloff, Halgreen and Parrish and I can strongly recommend the doctrine and articles written by them for research not only regarding the transfer system but also other important aspects of European Sports law.

## 1.4 Delimitation

The scope of this thesis is limited to the potential anti-competitive elements of the FIFA Regulations that relate to the transfer system, namely the provisions on training compensation, solidarity mechanism, contractual stability and the registration of players. Even though the Regulations have a potential to affect national transfers of players, I will only analyse the effects of the Regulations on player movement between the Member States of the EU. Transfers from or to third countries outside the EU and within a Member State are consequently outside the scope of this thesis

Since the adjudication on sport under the EC Treaty is such a delicate matter and not within the explicit legal competence of the Commission, I feel that I must give the reader a rather substantial background on the relationship between the governing bodies of football and the Commission in order to illustrate the impact of politics on the application of EC law to sport and to facilitate the understanding of the subject-matter of this thesis.

When analysing the conformity of the transfer system under the FIFA Regulations with EC Competition law it is unavoidable to touch upon the provisions on the freedom of movement and establishment of the Treaty, *inter alia* Article 39 (ex 48), as adjudicated on in *Bosman*. This, since these provisions have dominated the legal scrutiny of sport in the ECJ. They have shaped the jurisprudence in sports related cases. It is not intended to be an extensive analysis of the application of these provisions to sport, but they have come to form something of a *Lex Sportiva* under EC law, which is why they are also important for the application of Articles 81 and 82 of the Treaty to sport.

The thesis is neither intended to be an analysis in its own right of the impact that politics have had in shaping the regulation of sport in Europe, but this cannot be ignored either since it in fact has seemed to influence both the Commission and the Community Courts in their decision making.

Even though the American major league sports experienced commercialisation earlier than European football and player restraints similar to the transfer system have been successfully challenged by American athletes under the American equivalent to Articles 81 and 82, the Sherman act, I have not performed a comparative analysis with American law due to spatial limitations.

Regarding the alternative solutions proposed for the transfer system, these are a result of the legal analysis. They are not analysed out of an economic perspective. If these alternative solutions are commercially viable is outside the scope of this thesis.

## 1.5 Disposition

I will start by introducing the reader to the *Bosman* case. The reasoning of the ECJ in that case forms the foundations of European sports law. The reasoning is in fact still accurate for some parts on the revised transfer system as well.

I will thereafter give an account of the events that led to the adoption of the new FIFA Regulations after *Bosman* in order to illustrate the importance of politics in the adoption of the new Regulations.

Chapter 4 will deal with the practical application of the FIFA Regulations.

In order to develop a coherent framework on the application of the competition rules to sport, the Commission has been active in producing guidelines and other policy documents. These will be presented in chapter 5 alongside the jurisprudential notion of the sporting exception in EC law.

I have divided the analysis of Article 81 into two chapters. The first provides for the constituent procedural elements of the Article. The actual effect on competition is analysed in depth in chapter 7. This is to provide for a more sensitive analysis for the specificity of sport and the fact that the provisions relating to the transfer system have different objectives to be considered in their respective light.

Before going into my conclusions I will analyse the applicability of Article 82.

For the sake of simplicity the male gender applies to both the male and female gender through the whole of this thesis.

## 2 *Bosman* - Remembered

In order to introduce the reader to the reasoning in sports related cases and to get acquainted with the famous *Bosman* case, I will in this chapter give an account of the case that catapulted sport on to the agenda of the EU institutions.

*Bosman* came to the ECJ by way of a reference for a preliminary ruling under Article 234 of the Treaty from a Belgian court.

The importance of the *Bosman* case cannot be understated. Without *Bosman* there probably wouldn't be anything called European sports law and policy.<sup>16</sup>

The importance of the judgement is twofold for this thesis. One, it dealt with the transfer system and caused the revision that led to the FIFA Regulations under scrutiny and two, the reasoning of the Court is as compelling and relevant now as it was then.

### 2.1 *Bosman* – The Case That Made a Difference for Football

The *Bosman* case stands out as a landmark case, not so much because of the judgement itself, but because of its consequences for the world of football.

When I say that it wasn't so much the judgement itself that makes it a landmark case I mean that the outcome of the case was no surprise, legally speaking. The transfer system had always had it in for an inevitable clash with EC law seen in the light of the Treaty provisions on free movement.

The big surprise was that it took that long for the transfer system to actually come before the ECJ. As Parrish puts it, even though “*football had experienced financial modernisation, the status and rights of its employees (the players) had not experienced similar progress*”.<sup>17</sup>

In his pursuit of justice Mr Bosman was prevented from playing football as a result of the boycotts to which he was subject and 8 years separated the initiation of his court proceedings until he finally received compensation in the form of an out-of-court payment made to him by the Belgian Football Authorities.<sup>18</sup>

Today the name Bosman is as famous as any other big football star. The difference, however, is that Bosman did not become famous for his actions on the football field but for his actions in court. He paved the way for better conditions for all the football players after him. A “*Bosman*” is synonymous with a free transfer, loved by the players and their agents and equally loathed by the clubs.

*Bosman* differed from the earlier ECJ judgements in sports related cases in that it actually had profound consequences for professional football. FIFA had to take positive action in order to accommodate the judgement. Inaction

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<sup>16</sup> Parrish, "Sports Law and Policy in the European Union", chapter 1

<sup>17</sup> Parrish, “Football’s Place in the Single European Market” at page 2

<sup>18</sup> Weatherill, *supra* note 3 at page 72

on behalf of FIFA in the face of *Bosman* would have resulted in action by the Commission because of *Bosman*.

### 2.1.1 The Facts

Jean-Marc Bosman was a Belgian national who played professional football with the Belgian club RC Liège from 1988 to 1990. When his contract expired, RC Liège offered him to renew his contract at the minimum salary established by the Belgian football association. The salary cut was in the range of 75%. Mr Bosman refused the offer and was put on the so-called compulsory transfer list. Since no club expressed any interest in a compulsory transfer, Mr Bosman contacted the French second division club US Dunkerque on his own and managed to negotiate a contract, which was considerably more favourable than the terms offered by RC Liège. A contract was concluded between his old and new club for a temporary transfer for one year, against the payment of 1 200 000 BFR. The transfer was conditional on the transfer certificate for Mr Bosman (his player license) being sent from the Belgian to the French Football Association. RC Liège did however not request the certificate being sent since they had doubts as to US Dunkerque's solvency. The deal fell through and as a consequence Mr Bosman was suspended from playing for the remaining season of 1990. Since Mr Bosman was effectively hindered from playing professional football, even though there was a club prepared to employ him, the situation left him no other choice than to go to court.<sup>19</sup> After a prolonged journey through the Belgian court system, a reference for a preliminary ruling under Article 234 EC was requested from the ECJ on the legality of the Transfer system and nationality quotas under Articles 39, 81 and 82 of the Treaty.

### 2.1.2 The Reasoning of the Court

The ECJ confirmed that sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.<sup>20</sup> The Court acknowledged the difficulties of severing the economic aspects from the sporting aspects of football. Reiterating what it had said in the *Dona*<sup>21</sup> judgement, the Court stated: “the provisions of Community law concerning freedom of movement of persons and of provisions of services do not preclude rules or practices justified on *non-economic grounds*, which relate to the particular nature of certain matches”. Such a restriction on the provisions in question must, however, remain limited to its proper scope. It cannot be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.<sup>22</sup>

Having confirmed that a sporting exception from EC law, indeed was limited, the Court held that; “Article 48 of the Treaty therefore applies to

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<sup>19</sup> The *Bosman* ruling at paras. 28-34

<sup>20</sup> *ibid* at para. 73. This was established in the first sports related case before the ECJ; Case 36/74 Walrave v Union Cycliste Internationale (1974) ECR 1405 at paragraph 4

<sup>21</sup> Case C-13/76 *Dona vs. Mantero* (1976) ECR 1333

<sup>22</sup> The *Bosman* ruling at para. 76

rules laid down by sporting associations such as URBSFA, FIFA and UEFA, which determine the terms on which professional sportsmen can engage in gainful employment". With this, the Court, confirmed the horizontal direct effect of Article 39; that the reach of the Article went beyond the acts of public authorities to rules of any nature aimed at regulating employment in a collective manner.<sup>23</sup>

On the transfer rules' compatibility with Article 39, the Court concluded that since they provide that a professional football player may not pursue his activity with a new club in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to the freedom of movement of workers.<sup>24</sup>

As regards the existence of justifications for obstructions to freedom of movement for European workers within the sport industry, the ECJ pronounced the most important passages of the judgement. The Court held: "*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***".<sup>25</sup> These aims represent two justifications in law and must thus be considered when applying EC law to the practice of sport.

As for the transfer rules under review under the first of those aims "*the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus, considerably altering the balance between clubs*".<sup>26</sup>

As regards the second aim "*it must be accepted 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.*"<sup>27</sup>

The Court went on; "*However, 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 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*".<sup>28</sup>

On the achievement of the above aims, the Court concluded, that the same aims can be achieved at least as efficiently by other means which do not

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<sup>23</sup> The *Bosman* ruling at paras. 82 and 87.

<sup>24</sup> *ibid*, para. 100

<sup>25</sup> *ibid*, para. 106

<sup>26</sup> *ibid*, para. 107

<sup>27</sup> *ibid*, para. 108

<sup>28</sup> *ibid*, para. 109

impede freedom of movement of workers, referring to the means suggested by the Advocate General.<sup>29</sup>

The Court dismissed the argument that the transfer rules were necessary to safeguard the worldwide organisation of football, since the proceedings did not affect the relations between the national associations of the Member States and those of non-member states. Finally it was argued by the football associations that the said rules are necessary to compensate clubs for the expenses, which they have had to incur in paying fees on recruiting their players. This is essence would be to seek justification for the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.<sup>30</sup>

### 2.1.3 The Verdict

The Court declared that Article 39 of the Treaty precluded the application of rules laid down by sporting associations, under which a professional football player 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 paid to the former club a transfer, training or development fee.<sup>31</sup> The Article further precludes the application of rules laid down by sporting associations under which in matches in competitions, which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States (invalidation of nationality quotas).<sup>32</sup>

### 2.1.4 The Effects of *Bosman*

The two most obvious effects of the ruling were (i) the dismantling of out-of-contract transfer payments for trans national transfers within the EU/EEA for EU/EEA citizens and (ii) the abolition of nationality quotas for EU/EEA citizens in club football in the EU/EEA.

As regards the transfer system as a whole, the ruling left some parts of the system in a status quo. National transfers and transfers that take place during the course of a contract were outside the scope of the ruling. The limited scope of the judgement relates in part to the scope of Article 39. Article 39 does not apply to relations that only concern a Member State internally.<sup>33</sup>

Regardless of which specific rules that were under scrutiny in *Bosman*, the judgement is directed at the general system, which restricts post-contractual labour mobility in the EC.<sup>34</sup>

The greatest beneficiaries of the judgement were the football players whose contracts have expired and their agents. The money that was exchanged between clubs in the form of transfer fees before *Bosman*, now

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<sup>29</sup> See section 7.1.3.2

<sup>30</sup> The *Bosman* ruling at paras. 111-113

<sup>31</sup> *ibid* at para. 114

<sup>32</sup> *ibid* at para. 137, as this part is outside the scope of this thesis I have not elaborated on the reasoning of the Court on this question

<sup>33</sup> See e.g. Case 175/78 *La Reine v Vera Ann Saunders*, (1979) ECR 1129 at paras. 10-11

<sup>34</sup> Weatherill, "Annotation to case C-415/93" at page 995

went directly to the player in the form of signing-on-fees and salaries. Since out-of-contract players were no longer restrained by the transfer system they could enter into free negotiations with potential employers, considerably increasing their bargaining power.

The clubs obviously lost out on the transfer fees that they would have received pre-*Bosman*. But one club's loss is another club's gain; the clubs could now sign out-of-contract players without having to compensate the former club.

Since the transfer system was a closed system before *Bosman* in the sense that money remained in the game, the transfer fee money for out-of-contract players now ended up with the players. It was argued that transfer fee money that remained amongst the clubs could be re-invested in new players, new stadiums and training facilities.<sup>35</sup> But while the clubs certainly lost out on transfer fee payments for players whose contracts had expired, they compensated this by signing the players on longer contracts, enabling them to demand a transfer fee under contract.

*Bosman* certainly did not mark the end of transfer payments. Some of the highest transfer fees in history were recorded after *Bosman*, e.g. for the French player Zinedine Zidane, who transferred from the Italian Club Juventus to the Spanish club Real Madrid at a sensational 45.62 million GBP (approximately 640 million Swedish Crowns).<sup>36</sup>

Following the abolition of nationality quotas by FIFA and UEFA in Europe, the migration of players increased since there were no longer any limits as to how many non-nationals<sup>37</sup> a club in the EU could field. Football clubs could now recruit labour from all parts of the EU/EEA.

It is important to note that the ECJ did acknowledge that sport had a unique character that should be considered when applying EC law (see above).

After *Bosman* it was unequivocally clear that EC law applied to the realm of European club football.

Even though *Bosman* was not adjudicated under the competition law provisions of the Treaty, the principles extracted from the judgement, as regards the application to sporting regulations of the Community provisions in respect of the freedom of movement of persons and services, are equally valid as regards the Treaty provisions relating to competition.<sup>38</sup>

Maybe the most important effect of the judgement was in the sudden active involvement by the Commission in the practice of sport. The Commission had not enforced the earlier sports related judgements from the ECJ. After *Bosman*, however, the Commission became more energetic in enforcing the competition policy implications of the ruling.<sup>39</sup>

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<sup>35</sup> Fact Sheet 16: The Bosman Ruling, Football Transfers and Foreign Footballers, available at [www.le.ac.uk/so/css/resources/factsheets/index.html](http://www.le.ac.uk/so/css/resources/factsheets/index.html)

<sup>36</sup> See [www.footballtransfers.co.uk](http://www.footballtransfers.co.uk)

<sup>37</sup> Non-nationals from other EU/EEA states

<sup>38</sup> Case T-313/02, David Meca-Medina and Igor Majcen v Commission of the European Communities, European Court reports 2004, Page 0000 at para. 42

<sup>39</sup> Parrish, *supra* note 16 at page 101

## 3 From *Bosman* to the New FIFA Regulations

After *Bosman*, the Commission took the clear view that the transfer system needed to be restructured in order to come in line with EC law. If the ECJ applied the law in *Bosman* as it was written, something happened in the course that led to the adoption of the new FIFA Regulations, because it is clear that the Commission did not apply the law as it is written when they accepted the proposals for the new Regulations, at least not seen in the light of *Bosman*.

Something happened to the conviction of the Commission from *Bosman* to the agreement concluded between the Commission and FIFA that provided the foundation for the new FIFA Regulations. This something was the impact of the socio-cultural approach to sports regulation in Europe that became apparent when the Commission accepted the FIFA/UEFA proposals to the new transfer system.

The political aftermath of *Bosman* saw the EU divide itself in two opposing coalitions when it came to formulating a European policy on the future regulation of sport. The Single Market Coalition, maintains that sport has to comply with the same standard of community law as any other business regardless of its supposedly unique character, whereas the Socio-Cultural Coalition, stressing the social, cultural and educational qualities of sport, want to create some form of "Sports Exemption" or special "Sports Article" to be inserted in the EC Treaty, further advocating a more sensible application of EC Law to sport respecting the unique character of sport compared to other businesses.<sup>40</sup>

In this chapter I will provide an outline of the events that led up to the adoption of the new Regulations from *Bosman* in order to illustrate the impact that politics or the "socio-cultural approach" had on the acceptance of the new transfer system by the Commission.

### 3.1 In the Wake of *Bosman*

Despite *Bosman*<sup>41</sup>, FIFA/UEFA refused to take action to accommodate the judgement. This is symptomatic for both FIFA and UEFA and a clear manifestation of their independence and unwillingness to abide by laws other than those they have set themselves.

In January 1996, the Commission, formally notified FIFA/UEFA that it was launching an infringement procedure based on Article 81(1) against the continued use of *inter alia* the international transfer system. They were also notified that they had to comply fully with *Bosman* within six weeks.<sup>42</sup>

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<sup>40</sup> *ibid* at pages 66-67

<sup>41</sup> The judgement was passed on the 15 December, 1995

<sup>42</sup> Commission of the European Communities, *Information on the Bosman Case* (Brussels: Directorate General X, Sport Info Europe, 1996), available at [www.europa.eu.int](http://www.europa.eu.int)

The response from FIFA was the “FIFA Regulations for the Status and Transfer of Players” from 1997. In these regulations the international transfer system was altered according to *Bosman* i.e. the abolition of compensation fees for out-of-contract players who moved between Member States within the EU/EEA. This would have sufficed to accommodate *Bosman* in that regard. But the Commission maintained objections to other parts of the transfer system as well. In June 1996 the Commission notified FIFA/UEFA that in their view Article 81(1) had been breached by the requirement for payment of fees for international transfers within the EEA of players from third countries at the end of their contracts and the obligation imposed by FIFA to national associations within the EU/EEA to establish national transfer systems. The Commission added that both these matters were ineligible for exemption under Article 81(3).<sup>43</sup>

On national transfers, the Commission, took the view that continuing with national transfer systems may limit the freedom of clubs to hire players that they want, or that their choice may be distorted by the maintenance of national transfers.<sup>44</sup>

FIFA and UEFA responded by declaring that they would not do more than was required of them by the *Bosman* ruling. This was deemed to be inadequate by the Commission, who informed FIFA/UEFA that formal infringement proceedings would be initiated.<sup>45</sup>

In the midst of the proceedings between the Commission and FIFA/UEFA, the Amsterdam European Council summit meeting was held in Amsterdam to discuss the revision of a new Treaty. Even though FIFA, alongside other interest holders, wanted a general exemption from EC law for sport in the new Treaty, the Member States responded by attaching a legally non-binding Declaration on Sport to the 1997 Treaty of Amsterdam.<sup>46</sup> Disappointed at the outcome, FIFA had to resume the negotiations with the Commission. Important to note about the Amsterdam Declaration, even though not legally binding, was expressly referred to by the ECJ in both the *Deliège*<sup>47</sup> and the *Lethonen*<sup>48</sup> cases. This can be seen as an indication that soft-law actually is able to influence the ECJ in its application of EC law to sport.

FIFA/UEFA presented a number of proposals to the Commission but none of which were deemed to be satisfactory. In the meantime the Commission had also received formal complaints on the 1997 FIFA Regulations from

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<sup>43</sup> *ibid*

<sup>44</sup> *ibid*

<sup>45</sup> *ibid*

<sup>46</sup> Commission of the European Communities, “The Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, No.14, Brussels, 1997

<sup>47</sup> Joined cases C-51/96 and C-191/97, *Deliège v Asbl Ligue Francophone de Judo and Others* (2000) ECR I-2549 at para. 42

<sup>48</sup> Case C-176/96, *Jyri Lethonen and Castors Canada Dry Namur-Braine v Fédération Royale des Sociétés de Basketball and Ligue Belge-Belgische Liga* (2000) ECR I-2681 at para. 33

two Belgian unions who claimed that the 1997 regulations violated Articles 39 and 81 EC.<sup>49</sup>

In light of the inadequate actions by FIFA/UEFA and with two formal complaints lodged against FIFA's inadequate actions, the Commission launched a formal investigation into the operation of the international transfer system on 15 December 1998.

### 3.1.1 The Commission's Statement of Objection

In the Statement of objections ("SO") sent to FIFA/UEFA, regarding the operation of their international transfer system, the Commission *inter alia* objected to the following:

1. Prohibiting players from transferring to another club following their unilateral termination of contract, even if the player has complied with national law governing the penalties for breach of contract;
2. Allowing a club to receive payment for a player leaving a club if the contract had been terminated by mutual consent;
3. Encouraging high transfer fees which bear no relation to the training costs incurred by the club selling the player, a practice condemned by the Court in *Bosman* and one which limits the ability of small clubs to hire top players;
4. Allowing for a transfer fee to be demanded for the transfer of players (both in and out-of-contract) from a non-EU country to a Member State of the EU and vice versa

It was indicated by the Commission that these 4 points infringed Article 81(1) and that no exemption based on Article 81(3) could be justified. According to the Commission these provisions restrict the ability of clubs to recruit the players they want whilst also limiting the freedom of movement of players.<sup>50</sup>

Karel van Miert, the Commissioner responsible for the Competition-Directorate at the time, found that, with exception of the 1997 *Bosman* amendment, the Regulations applied to all international transfers within the EU/EEA: "*and as the compensation sums reach very large amounts, we are facing a case of a cartel agreement that is in violation of Article 85...and a case of a considerable restraint on competition and/or distortion of competition in the market of the sports professional soccer spectacle in the EU/EEA. In addition, due to the amount of compensation fees charged the small clubs are only able to hire top players in very exceptional circumstance, which causes the rich clubs to maintain their place in the rankings*".<sup>51</sup>

FIFA and UEFA were slow to respond and the result of this inactivity was that the Commission threatened to take unilateral action in the form of a formal decision to secure the changes necessary unless FIFA/UEFA

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<sup>49</sup> Rejection of Complaint Decision, Comp/36.583, "Affaire IV/36.583-SETCA-FGTB/FIFA", Brussels, 28 May 2002, (non-confidential version)

<sup>50</sup> Parrish, *supra* note 16 at page 141

<sup>51</sup> Dabscheck, "The Globe At Their Feet: FIFA's New Employment Rules - I", page 79, who in turn refers to European Commissions Directorate-General IV – Competition, Points of objection, p.8

submitted formal proposals to amend the international transfer system by 31 October 2000.<sup>52</sup>

The political dimension of the affair was fuelled by a joint statement by the then German Chancellor Gerhard Schröder and the British Prime Minister Tony Blair who expressed their support for the transfer system.<sup>53</sup>

At last realising the reality of the situation i.e. an outright prohibition decision by the Commission, FIFA and UEFA finally took things seriously and established a task force to examine potential amendments to the international transfer system in light of the objections from the Commission.<sup>54</sup> This task force presented a Negotiation Document<sup>55</sup> containing measures to meet the objections by the Commission. The hostility by FIFA/UEFA towards the Commission is apparent in the document. Serious doubts regarding the competition law analysis by the Commission is put forward in the document, even referring to it as incorrect. It was however acknowledged that the transfer system had some imperfections that could be improved.

The document *inter alia* outlined the following proposed changes to the transfer system:

1. Training compensation for young players: A training compensation is to be paid on every transfer of a player up to the age of 23, regardless of if the transfer takes place during the life of his contract or at the expiry;
2. Respect for contracts: In order to maintain contractual stability, as a matter of sporting regulation, any contract lasting for a period of up to 3 years must be respected (by the player and the club);
3. Transfer Periods: In order to maintain contractual stability and to protect the integrity of sporting competition, certain periods should be introduced for when the transfer of players may not occur;
4. Transitional Arrangements: Should the system be changed, the alterations made to the transfer system should protect existing contractual arrangements between clubs and players.

The negotiations on the acceptability of the proposals by FIFA/UEFA were influenced by the discussion of sport at the December 2000 Nice European Council and the rejection of the Negotiation Document by FIFPro.<sup>56</sup>

### **3.2 Declaration on the Specific Characteristics of Sport; the Nice Summit**

At the Nice Summit in December 2000, the sports world took the opportunity to make the case for a protective protocol on sport to be

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<sup>52</sup> Parrish, *supra* note 16 at page 141

<sup>53</sup> *ibid* at page 142, who in turn refers to the German Government Press Release No.425/00 from 2000-10-09

<sup>54</sup> *ibid*, page 142

<sup>55</sup> Joint FIFA/UEFA Negotiation Document

<sup>56</sup> Parrish, *supra* note 16 at page 143

attached to the new Treaty. Despite support from Europe's major football countries, the Commission opposed a legally binding mention of sport in the Treaty for fear of setting a precedent of allowing certain professions exemption from the Treaty.<sup>57</sup>

In making a special case for sport under EC law, FIFA released a press statement on the 6 December 2000, stressing that sport and football in particular cannot be reviewed only in an economic context, as they have a wider educational function in helping social integration and citizenship. Also that it is essential to maintain solidarity between amateur and professional sport. The FIFA President acknowledged however that sport cannot live outside the laws which rule society but at the same time, that sport cannot be allowed to be blindly subject to legal principles, rules or regulations which could endanger the fragile equilibrium that exists between different sections of the football family.<sup>58</sup>

To exempt sport from the scope of EC law, in the form of a protective protocol attached to the Treaty or the insertion of a special Article on sport in the Treaty, is no small undertaking since this would require the unanimous support of all the Member States.<sup>59</sup>

Even though the sports world failed in their attempt to win support for a special sports exemption in the Treaty, they did secure political support for their cause in form of a Presidency Conclusion entitled "Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of which Account should be taken in implementing Common Policies".<sup>60</sup> In paragraph 16 of said declaration it is stated "The European Council is keenly supportive of dialogue on the transfer system between the sport movement, in particular the football authorities, organisations representing professional sportsmen and –women, the Community and the Member States, with due regard for the specific requirements of sport, subject to compliance with Community law".

In a press release from the Commission, dated the 6 December 2000, it is stated, "Contrary to what may have been understood, the Commission has never sought to abolish the existing transfer system but only that it should be modified in a way that respects Community law".<sup>61</sup>

What then happened to the very grave objections that Karel van Miert put forward in the SO against the transfer system in 1998 (see above)? The objections, read at face value, gave the impression that the very essence of the transfer system was in violation of Article 81 EC. It was, as Brascheck pointed out, "as if Karel van Miert had never objected to FIFA's regulations".<sup>62</sup>

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<sup>57</sup> *ibid* at page 146

<sup>58</sup> "FIFA reiterates call for a special status for sport", FIFA Press Release 6 December 2000

<sup>59</sup> Weatherill, *supra* note 3 at page 88

<sup>60</sup> The Nice European Council Presidency Conclusions (7-9//12/2000), Annex IV

<sup>61</sup> European Commission, "Football transfers: Commission underlines the prospect of further progress", IP/00/1417

<sup>62</sup> Dabscheck, *supra* note 51 at page 84

### 3.3 FIFPro's Objections

FIFPro, in its initial objections to the Negotiation Document by FIFA/UEFA, put forward some interesting points regarding the working conditions for football players. Their objections were outlined in an alternative submission sent to the Commission, entitled "Time for a New Approach. The International Player Transfer System".<sup>63</sup>

FIFPro shared the concerns with the Commission in relation to the inability of players to unilaterally break a contract of employment with a club and move freely to another once compensation for breach of contract has been paid in accordance with national labour law. FIFPro questioned the alleged benefits of contractual stability as put forward by FIFA/UEFA in their Negotiation Document. The latter claimed that the restraint is needed to ensure contract stability. FIFPro pointed to an increase in both player mobility and transfer spending in the period between 1996/1997 and 1999/2000. It was alleged that the maintenance of transfer fees gave the clubs an incentive to sell contracted players. Therefore, according to FIFPro, stability of contract cannot be seriously seen as a positive symptom of the transfer system. Consequently it was argued that the abolition of transfer fees would eliminate this distortion and grant footballers equal rights to freedom of movement enjoyed by other economically active European Citizens.<sup>64</sup>

FIFPro agreed with FIFA/UEFA that a balance between clubs needed to be upheld and that clubs should be encouraged to recruit and train juniors. FIFPro, however, argued that less-restrictive means than the transfer system could achieve the same objectives. In contrast to the FIFA/UEFA document, stressing the importance of the transfer system for small clubs, FIFPro argued that the distribution of income was in decline, primarily as a result of the income generated by the sale of television rights.

On FIFA/UEFA's claim that the transfer system was required in order to encourage clubs to recruit and train young players, FIFPro pointed out, that due to transfer fee inflation, most top clubs have heavily invested in youth academies in order to develop their own juniors.<sup>65</sup>

### 3.4 FIFA/UEFA vs the Commission 1-0 - The Final Transfer Settlement

Six months after the Negotiation Document was presented to the Commission, an agreement was reached on "Principles for the amendment of FIFA rules regarding international transfers (new basic rules) in March 2001."<sup>66</sup> The agreement was formalised through an exchange of letters

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<sup>63</sup> I have not been able to get a hold of the submission, since it is no longer published on the homepage of FIFPro. This has caused me to rely on Parrish's account of it. I will in the following refer to Parrish.

<sup>64</sup> Parrish, *supra* note 16 at page 144

<sup>65</sup> *ibid* at page 144

<sup>66</sup> IP/01/314, "Outcome of Discussion between the Commission and FIFA/UEFA on FIFA Regulations on International Football Transfers", 5 March 2001

between FIFA President Blatter and Competition Commissioner Monti. The Commission stated that the principles agreed upon could pave the way to a positive solution on the competition procedure, open against FIFA, provided that the principles are fully reflected in the FIFA Regulations to be amended, as far as the compatibility with Community law is concerned.

The Principles relevant for this thesis agreed upon were the following:

- In the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training efforts of clubs, in particular small clubs;
- Creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs;
- Creation of one transfer period per season, and a further limited mid-season window, with a limit of one transfer per player per season;
- Minimum and maximum duration of contracts of respectively 1 and 5 years;
- Contracts to be protected for a period of 3 years up to 28; 2 years thereafter;
- The system of sanctions to be introduced should preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract are only possible at the end of a season;
- Financial compensation can be paid if a contract is breached unilaterally whether by the player or the club;
- Proportionate sporting sanctions to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period;
- Arbitration is voluntary and does not prevent recourse to national courts.<sup>67</sup>

As a compromise, the agreement clearly favours FIFA/UEFA, since it is not departing very much from the proposals put forward by FIFA/UEFA in their Negotiation Document (see above).

FIFPro were outraged by the agreement. They wanted far more lenient conditions for players. "It's a very black day for European sport and footballers", the spokesperson for FIFPro declared, referring to the day the agreement was reached.<sup>68</sup> FIFPro even initiated legal proceedings before the Brussels Court of First Instance, wishing to test the provisions of the new FIFA Regulations against EC law.<sup>69</sup> These proceedings were later cancelled because FIFA and FIFPro had reached an amicable agreement about FIFPro's participation in the implementation of the FIFA Regulations. As part of the overall agreement, FIFPro agreed to cease the legal challenges it had initiated against the new rules.<sup>70</sup>

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<sup>67</sup> *ibid*

<sup>68</sup> Article in BBC Sport 2001-03-05, available at <http://news.bbc.co.uk/sport1/hi/football/1202527.stm>

<sup>69</sup> Parrish, *supra* note 17 at note 27

<sup>70</sup> "Joint press release of FIFA and FIFPro", press release from 2001-09-03

FIFA amended its regulations in conformity with the principles at a meeting by the FIFA's executive committee on 5 July 2001 in Buenos Aires. The new regulations entitled "The Revised FIFA Regulations for the Status and Transfer of Players" came into force on 1 September 2001.

### 3.5 Comment

Much remains to be said about the politics that influenced the outcome of the negotiations between FIFA/UEFA and the Commission and by extension the regulation of sport in Europe.<sup>71</sup> I feel, however, that to go more into them would be to go outside the scope of this thesis. The reason I included a chapter on them anyway is because I want to illustrate that the regulation of sport in general and football in particular in Europe is not just a matter of EC law. It is, to an even greater extent, about politics and the events that led up to the FIFA Regulations illustrate the impact that the socio-cultural approach has had. The agreement between FIFA/UEFA and the Commission is founded more on the will of the former than compliance with EC law in my view.

If one looks at the proposals put forward by FIFA/UEFA in the Negotiation Document and the principles agreed upon in the final agreement, it is clear that FIFA, in terms of a compromise, got the better half of the deal. This can in part be explained by the reluctance of the Commission to act as a regulator in an area where they don't have any direct competence under the Treaty.<sup>72</sup> On the other hand, they are the guardians of the Treaty and are responsible for the administration of the competition rules of the Treaty. Sport, in its economic sphere, is subject, in full, to the Treaty like any other sector.

I find it to be a bit curious that, despite the grave objections that van Miert put forward in December 1998 against the transfer system, FIFA not only managed to keep the transfer system intact, albeit in a modified form, but also to resurrect compensation fees for players under the age of 23, even at the expiry of a player's contract. The latter clearly in contravention of *Bosman*.

Now, one must not forget that the agreement between FIFA/UEFA and the Commission, only serves as a basis for the FIFA Regulations and that FIFA/UEFA themselves are responsible for the implementation of the principles in the agreement.

I would like to comment on the statement made by the FIFA President (see above) on the specificity of football. I agree that sport in general and football in particular have special features that are not present in other sectors of the economy. Professional and amateur football, however, are played on entirely different playing fields. I do not doubt, in fact I concur, that football has a wider educational function in helping social integration and citizenship. Those are, however, not objectives that are relevant for

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<sup>71</sup> For a thorough account of the major events and machinations associated with the development of FIFA's 2001 rules see "The Globe At Their Feet: FIFA's New Employment Rules – I" by Dabscheck, B (see Bibliography)

<sup>72</sup> There is no Treaty base for the regulation of sport, since there is no provision that even mentions sport

professional football. Given the commercialisation of football, I cannot imagine that these objectives have any bearing on professional football clubs. Most professional football clubs today in the top-flight divisions of the national leagues are businesses in their own right. They are in the business to make money and money is made by finding the best possible players, train them accordingly and win matches. The notion that there should be solidarity between amateur and professional sport is unrealistic, because every club is for themselves and unless they are not obliged to share money for a “greater good”, I very much doubt that they would do for the sake of idealism.

Why should professional football enjoy any special treatment under EC law if the professional football clubs operate on the same premises as any other business?

To find an alternative solution to the transfer system is not an easy task, but not to try hard to find one is to make things a little too easy. It is obvious that FIFA won't go great lengths to find one. Naturally they want to keep the transfer system they themselves created and operated for a long time under the rationale “If it ain't broke, why fix it”. But this is not a rationale that is acceptable in order to justify the system under law.

Finally, one must take into account the strong political support of the transfer system, which has been demonstrated since *Bosman* and which can hardly avoid influencing the outcome of any future court decision to some extent.

# 4 The FIFA Regulations

In order for the reader to fully understand how the FIFA Regulations are supposed to work in practice, I will in this chapter explain the pertinent rules relevant for this thesis.

The Regulations are to be read in conjunction with FIFA Circular Letters<sup>73</sup> and annexes that clarify *inter alia* the interpretation of the provisions.

The Regulations have been revised once since 2001. I will naturally peruse the latest version of the Regulations from 2005. The revision only affected minor and procedural parts of the Regulations.<sup>74</sup> The five principles that FIFA agreed with the Commission in March 2001 have not been amended, which is why the Circular Letters issued on the previous version of the Regulations and the literature are still valid as to content. There may however be some inconsistencies in the references since the Circular Letters and literature referred to, refer to the previous Regulations. This however does neither affect the substance nor the validity of the references. The pertinent provisions are the same as in the 2001 Regulations, albeit under different articles.

The pertinent parts of the Regulations are in short:

- Training Compensation for Players under 23.<sup>75</sup>
- Providing contractual stability by imposing a protected period for contracts for 3 years up to the age of 28 and 2 years thereafter. Breach of contract under the protected period can result in sporting sanctions combined with compensation for players, clubs and agents alike. Contracts to be limited from 1 to 5 years.<sup>76</sup>
- Two harmonised transfer windows per season
- Solidarity mechanism.<sup>77</sup>

## 4.1 The Legal Basis for the Regulations

The legal basis for the FIFA regulations is the agreement between the Commission and FIFA/UEFA made in March 2001 entitled "Principles for the amendment of FIFA rules regarding international transfers (new basic rules)".<sup>78</sup> The effects of this agreement were that the Commission withdrew

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<sup>73</sup> For the implementation of the FIFA Regulations, FIFA issued a number of Circular Letters. They are relevant for the interpretation of the FIFA Regulations. Although not regulations in a strict legal sense, they reflect the understanding of FIFA and the general practice of the federations and associations belonging thereto. See CAS case 2003/O/527 *Hamburger Sport-Verein v/ Odense Boldklub* at page 10

<sup>74</sup> FIFA Press Release from 19/12-2004, "FIFA Executive Committee ratifies transfer regulations"

<sup>75</sup> FIFA Regulations for the Status and Transfer of Players, Article 20. Hereinafter referred to as "Regulations"

<sup>76</sup> Regulations Articles 13 through 18

<sup>77</sup> Regulations Article 21

<sup>78</sup> See section 3.4

its anti-competitive complaints put forward in the investigation into the international transfer system initiated at the end of 1998. The agreement thus marked the end of years of discussion and negotiations between the parties. The legal part of this agreement consisted in an exchange of letters between the FIFA president and the Commissioner for Competition Policy.<sup>79</sup> The procedure to settle the case by the Commission was an informal one. Had the Commission wished to adopt a formal decision exempting the transfer rules under Article 81(3) they could have done so, thus dressing the agreement in more legal certainty.

The Commission closed its investigation into the rules governing international transfers of football players after having formally rejected two complaints relating to the 1997 FIFA Regulations.<sup>80</sup> In a press release dated 5 June 2002 the Commission declared their involvement in disputes between players, clubs and football organisations to be over.<sup>81</sup>

The official declaration by the Commission and the fact of an agreement between FIFA/UEFA and the Commission, gives FIFA/UEFA legitimate expectations that the affair might well be settled once and for all.

The agreement, though, only ascertained the principles, upon which, the new FIFA Regulations were adopted. The legality of the Regulations can only in part find justification in the initial agreement. It is in the application of the Regulations in practice that the legality must be ascertained. The initial agreement in no way prohibits the Commission from reopening the case and to continue formal proceedings in case of non-compliance or new facts.<sup>82</sup>

## 4.2 Scope of the Regulations

The Regulations apply worldwide, i.e. the territory of all the member associations affiliated to FIFA, predominantly regulating the transfer of players between clubs belonging to different national Associations.<sup>83</sup> Even if it is stated that the rules do not apply to domestic transfers, some of the provisions apply at a national level as well. National Association are also obliged to include in their regulations appropriate means to protect contractual stability and must consider the principles laid down in certain Articles of the Regulations.<sup>84</sup>

The Regulations apply to all contracts concluded after the entry into force of the previous Regulations i.e. 1 September 2001.<sup>85</sup> The current version of the Regulations entered into force on 1 July 2005.<sup>86</sup>

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<sup>79</sup> Egger and Stix-Hackl, "Sports and Competition Law: A Never-Ending Story?" at page 81

<sup>80</sup> Rejection of Complaint Decision, Comp/36.583, "Affaire IV/36.583-SETCA-FGTB/FIFA, Brussels, 28 May 2002, (non-confidential version)

<sup>81</sup> IP/02/824, "Commission closes investigations into FIFA regulations on international football transfers", 5 June 2002

<sup>82</sup> Egger and Stix-Hackl at page 91

<sup>83</sup> Regulations Article 1.1

<sup>84</sup> Regulations Articles 1.3 (a) and (b)

<sup>85</sup> Regulations, 2001 version, Article 46

<sup>86</sup> Regulations, Article 29.2

## 4.3 Training Compensation

According to Article 20 training compensation is to be paid to a player's training club(s); (1) when a player signs his first contract as a professional, and (2) on each transfer in the capacity as a professional until the end of the season of his 23rd birthday. This obligation arises whether the transfer takes place during or at the end of the player's contract.

The aim of the provision is to encourage the recruitment and training of young players and to create solidarity among clubs, by awarding financial compensation to club which have invested in training young players.<sup>87</sup>

Apparently, a player's training and education takes place between the ages of 12 and 23. The compensation is 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, the compensation is payable until the end of the season in which the player reached the age of 23, but the calculation of the amount payable shall be based on the years between 12 and the age when it has been established that the player actually completed his training.

The club responsible for paying the compensation will naturally argue that a player completed his training before his 21st birthday. What triggers the end of a player's training and/or education is still uncertain. According to FIFA Circular Letter No 801, it is a matter of proof, which is at the burden of the club that is claiming this fact. A player who regularly performs for a club's "A" team could be considered as having accomplished his training period. Ultimately, the decision on this will have to be taken on a case-by-case basis.<sup>88</sup> In other words, until a substantial body of jurisprudence has been established, the matter of what triggers the end of a player's training is thus uncertain.

It is to be emphasised that the training compensation is supposed to be related to effective or actual training.

### 4.3.1 When Is Training Compensation Due?

According to Annex 4 of the Regulations, Article 2, training compensation is due whenever a player signs his first non-amateur contract with a club different from the club from which he received his training, and each time he changes his club in the same capacity up until the age of 23. The amount payable is calculated on a pro rata basis according to the period of training that the player spent with each club. 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 (non-amateur), the Training Compensation shall be paid to the Association(s) of the country (or countries) where the professional was trained. This compensation is to be earmarked for the furtherance of youth football in the country concerned.<sup>89</sup>

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<sup>87</sup> FIFA Circular letter no. 769 at page 2

<sup>88</sup> FIFA Circular letter no. 801 at page 5

<sup>89</sup> Regulations, annex 4, Article 3

There are also cases envisaged where training compensation is not due.<sup>90</sup> In this regard special provisions apply for the EU/EEA. No training compensation is due if the former club does not offer the player a contract, unless the club can justify that it is entitled to such a compensation. Such an offer shall be at least the equivalent value to the current contract.

### **4.3.2 The Basis for Calculating the Training Compensation**

The basis for calculating the training calculation is the division of national clubs into four categories in accordance with the club's financial investment in training players. The training costs are set uniformly for each category and are supposed to correspond to the amount needed to train one player for one year multiplied by a so-called "player factor", which is the ratio between the number of players who need to be trained in order to produce one professional player.<sup>91</sup> This is, supposedly, to make the system more manageable and to ensure the predictability as to the amount of training compensation due.<sup>92</sup>

The training costs are established on a confederation basis for each category of club. Under UEFA, the national associations will determine the four categories to which their clubs belong every year, having heard the representatives of players and clubs. They then submit their findings to FIFA. The costs for every category are supposed to be updated at the end of every calendar year.<sup>93</sup>

The training costs for the clubs under UEFA and the designation of the respective categories are the following<sup>94</sup>:

- Category 1 (top level, e.g. high quality training centre): all clubs of first division of national associations investing as an average a similar amount in the training of players (90 000 Euros);
- Category 2: all clubs of second division of the national associations of category 1 and all clubs of first division of all other countries having professional football (60 000 Euros);
- Category 3: all clubs of third division of the national associations of category 1 and all clubs of second division of all other countries having professional football (30 000 Euros);
- Category 4: all clubs of fourth and lower divisions of the national associations of category 1, all clubs of third and lower divisions of all other countries having professional football and all clubs of countries having only amateur football (10 000 Euros).

The designation of the categories is misleading since not all national associations are deemed to have category 1 clubs. Under UEFA only the big football nations such as Germany, Italy and France are deemed to have

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<sup>90</sup> *ibid*, Article 2

<sup>91</sup> *ibid*, Article 4

<sup>92</sup> Circular letter no.769 at page 5

<sup>93</sup> Regulations, annex 4, Article 4

<sup>94</sup> FIFA Circular letter no. 769 at page 3. The training costs listed were those for 2005 according to FIFA Circular Letter 959-Annex

category 1 clubs. The top clubs from countries like Sweden and Denmark belong to category 2.<sup>95</sup>

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.<sup>96</sup> This in effect means that if a player is trained in country A, and the player moves to country B, his training compensation is based on the training cost in country B. I fail to see the where this compensates for the actual and effective training of the player.

The training costs for players for the seasons between their 12<sup>th</sup> and 15<sup>th</sup> birthday shall be based on the training costs of category 4 at all times.<sup>97</sup>

The 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 12<sup>th</sup> birthday to the season of his 21<sup>st</sup> birthday.<sup>98</sup>

If a player moves between clubs associated to different associations within the EU/EEA, and his former club belongs to a lower category club and his new to a higher, the calculation is based on the average of the training costs of the two clubs. If the player moves from a higher to a lower category club, the calculation is based on the training costs of the lower category club.<sup>99</sup>

### 4.3.3 Practical Illustration

The rules on training compensation are complex, especially the calculation principles. I will therefore summarise a case from the CAS on the calculation of the compensation.<sup>100</sup>

The Danish player Lars Jacobsen transferred from the Danish club "Odense Boldklub" to the German club "Hamburger Sport-Verein" on the 10 June 2002, the same year in which he turned 23 years. He had played with the Danish club since 1991.

In accordance with the FIFA rules on training compensation the Danish club claimed training compensation for 10 full years of training, i.e. between the age of 12 and 21. Against this the German club objected that the player had finished his training before the age of 21, namely when he appeared regularly on the "A"-team of the Danish club, which was during the season 1996-1997.

The Danish club belonged to category 2 and the German club to category 1. Since the player transferred from a lower to a higher category club within the EU/EEA, the calculation was based on the average between category 1 and 2, which equalled 75 000 Euros. Between the age of 12 and 15 the calculation was based on category 4, for which the indicative amount was set to 10 000 Euros.

In its calculation, CAS ruled in favour of the German club's assertion that the training was completed at the end of season 1996-1997. The total

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<sup>95</sup> FIFA Circular Letter no. 959 – Annex at pages 8-9

<sup>96</sup> Regulations, Annex 4, Article 5.1

<sup>97</sup> *ibid*, Article 5.3

<sup>98</sup> *ibid*, Article 5.2

<sup>99</sup> *ibid*, Article 6

<sup>100</sup> CAS 2003/O/527 Hamburger Sport-Verein v/Odense Boldklub

number of years for which compensation could be claimed was thus 6, i.e. from the season 1991-1992 until the end of season 1996-1997. 3 years under category 4 resulted in 30 000 Euros and 3 years based on the average of category 1 and 2 resulted in 225 000 Euros. The total amount of training compensation due was calculated to 255 000 Euros.

## 4.4 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 previous club (solidarity contribution).<sup>101</sup>

The compensation referred to is either in the form of financial compensation resulting from a breach of contract or a transfer fee.

Regardless of the age of the player, the new club concerned is to distribute 5% of the compensation paid to the former club to all the club(s) where the player played between the age of 12 and 23. This distribution of monies is meant as a solidarity contribution to all the clubs involved in the training and education of the player. The solidarity contribution is apportioned depending on where the player played at a certain age.<sup>102</sup>

Similar to the training compensation, if it cannot be ascertained within 18 months of his transfer which clubs trained him, the solidarity contribution shall be paid to the association(s) of the country(ies) where the player trained. The monies will in that case go to youth football development programmes in the association(s) in question.<sup>103</sup>

## 4.5 Contractual Stability

The provisions on contractual stability can be summarised as follows:

- A contract is in principle irrevocable for the first 2-3 years depending on the age of the player, unless there is just cause or sporting just cause;
- A player or club may be subject to sporting sanctions in addition to compensation for a unilateral breach of a contract during the so called protected period;
- Minimum and maximum contract length is in principle between 1 to 5 years.

In the initial agreement between FIFA/UEFA and the Commission a system of contract specification for footballers was foreseen that (i) permitted free movement of labour as set out in the Treaty (ii) satisfied the requirements of clubs in respect to team planning and, (iii) did not require a general exemption for sport from EC law.<sup>104</sup>

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<sup>101</sup> Regulations Article 21

<sup>102</sup> Regulations, Annex 5, Article 1

<sup>103</sup> *ibid*, Article 2.3

<sup>104</sup> Simmons, "Making sense of the FIFA/UEFA Proposals to Reform the Football Transfer System"

In order to understand the provisions on contractual stability there are some terms that need to be explained. The “Protected period” refers to a period of three years, following the entry into force of a contract, if such a contract was concluded prior to the 28<sup>th</sup> birthday of the player, and two years thereafter. If a contract is concluded after the 28<sup>th</sup> birthday of a player the protected period is thus two years.<sup>105</sup> The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.<sup>106</sup>

The section on contractual stability in the Regulations starts by emphasising the respect of contract. A contract between a professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement.<sup>107</sup> It is the latter that is relevant for transfer fee payments under contract. To fully understand how transfers under contract work in practice it is pivotal that any other form of premature termination of a contract other than by mutual agreement is severely restricted and discouraged.

FIFA claims that the system for contractual stability responds to the specific needs of football and strikes the right balance between the respective interests of players and clubs and preserves the regularity and proper functioning of sporting competition.<sup>108</sup>

The Regulations stipulate two forms of justified contractual terminations; “just cause” and “sporting just cause”. In the former case a contract may be terminated without consequences of any kind (neither payment of compensation nor imposition of sporting sanctions). In the latter compensation may still be payable.<sup>109</sup>

The determination of “just cause” refers to regular national employment law or existing FIFA rules. An example of the latter would be if a player has not been paid his contractual salary for several months.<sup>110</sup>

What constitutes sporting just cause is to be established on a case-by-case basis. Hence, there will be uncertainty as to this cause until a substantial body of case law on the issue has emerged. As a mere example the Regulations state that if a player, in the course of a season, has appeared in less than 10% of the official matches in which his club has been involved, may terminate his contract prematurely on the basis of sporting just cause.<sup>111</sup>

Regardless of if a player has the right to terminate his contract, either by “just cause” or “sporting just cause”, a contract cannot be unilaterally terminated during the season.<sup>112</sup>

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<sup>105</sup> Regulations, Definitions, page 5

<sup>106</sup> Regulations Article 17.3

<sup>107</sup> Regulations Article 13

<sup>108</sup> FIFA Circular letter no. 769 at page 10

<sup>109</sup> Regulations Articles 14-15

<sup>110</sup> FIFA Circular letter no. 769 at page 14

<sup>111</sup> Regulations Article 15

<sup>112</sup> Regulations Article 16

### **4.5.1 Consequences of Terminating a Contract Without Just Cause**

Compensation is payable in all cases, subject to termination on “sporting just cause”, in which compensation may be payable. The Regulations state that compensation shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. Criteria that are to be taken into account are the remuneration and other benefits due to the player on the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of 5 years, the fees and expenses paid or incurred by the former club and whether the breach falls within the “protected period”.<sup>113</sup>

In addition to compensation, sporting sanctions are also envisaged for a player and/or club responsible for a unilateral breach of contract. Sporting sanctions can only be imposed for breach inside the protected period. The sanction is a restriction of four months on a player’s eligibility to play in official matches and in the case of aggravating circumstances a restriction of six months. The period of ineligibility begins at the start of the season of the new club. In the case of a club responsible for a unilateral breach or the inducement of a breach of contract during the protected period, the club shall be banned from registering new players, either nationally or internationally, for two registration periods.

Disciplinary measures may still be imposed outside the protected period for failure to give due notice of termination, i.e. fifteen days following the last match of the season.<sup>114</sup>

### **4.5.2 Contract Length**

The minimum length of a contract is stipulated to be from its entry into force to the end of the season and the maximum length is set to five years. Contracts of any other length are only permitted if consistent with national laws. Contracts for players under the age of 18 are limited to a maximum of three years.<sup>115</sup>

A player is only free to conclude a contract with another club at the expiry of his contract or within six months before it expires. A club that wishes to conclude a contract with a player must inform his current club in writing before entering into negotiations with the player. Any behaviour contrary to the foregoing can be subject to sanctions.<sup>116</sup>

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<sup>113</sup> Regulations Article 17.1

<sup>114</sup> Regulations Article 17.3 and 17.4

<sup>115</sup> Regulations Article 18.1

<sup>116</sup> Regulations Article 18.3

## 4.6 Registration of Players and Registration Periods

An integral part of the organisation of football is that every player must be registered with a national association to play for a club either as a professional or an amateur. Only registered players are eligible to participate in organised football. A player may furthermore only be registered for one club at a time. If a player who has not been registered with an association appears for a club in any official match, that player will be considered as having played illegitimately. The fielding of an illegitimate player may result in sanctions on the player and/or the club<sup>117</sup>

The registration system enables FIFA, the clubs and the associations to keep strict control over player movement.

The movement of players is restricted to certain registration periods, commonly referred to as transfer windows. It is only within these periods that a player can transfer between clubs. They are fixed in time and any movement outside those periods is prohibited.

Under the Regulations there are two transfer windows.<sup>118</sup> A player may only be registered for three clubs during the period from 1 July until 30 June, the following year. Furthermore he is only eligible to play in official matches for two clubs in the same season.<sup>119</sup>

Any transfer between national associations is subject to the issuing of an International Transfer Certificate (ITC). A precondition for registering a player is that his ITC has been validly transferred from the association of his old club to the association of his new club.<sup>120</sup>

The national association from which the ITC is requested must contact the player and his old club to ascertain whether (i) their contract has expired, (ii) early termination was mutually agreed, or (iii) a contractual dispute exists. In the first two scenarios the ITC shall be issued free of charge without any conditions or time limitation. Under the third scenario, however, the national association shall not issue an ITC. All the parties concerned are entitled to refer the matter to FIFA's Dispute Resolution Chamber, which shall decide on the matter within 60 days.<sup>121</sup>

The transfer windows effectively restrict the possibilities for clubs to buy and sell players and for players to transfer between clubs. Furthermore any transfer must be accompanied by an ITC and a player must be registered in order to be able to play.

Both players and clubs must abide by the rules subject to sanctions. The rules in this section are a textbook example for how the autonomy of FIFA and the associations is preserved. There is no leeway to manoeuvre outside the organisation of FIFA.

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<sup>117</sup> Regulations Articles 5 and 11

<sup>118</sup> Regulations Article 6

<sup>119</sup> Regulations Article 5

<sup>120</sup> Regulations Article 9

<sup>121</sup> Regulations, Annex 3, Article 2, Regulations Articles 9, 22 and 24

# 5 The Relationship Between Sport and EC Competition law

Before going into the application of Articles 81 and 82 to the FIFA Regulations, I will present an outline of the competition policy the Commission has developed since *Bosman*. Given the special status of sport in the Community, special consideration must be given to certain aspects of the practice of sport when applying Article 81.

## 5.1 The Application of the Competition Rules to the Sports Sector

The Commission has acknowledged that there exists a difference between the way competition works in sport and in other sectors of the economy. In order to accommodate the special features of sport in a coherent competition policy the Commission developed a taxonomy that can be used as guidelines when assessing sporting rules and practices under Article 81 outlined in a report entitled the “Helsinki Report on Sport”<sup>122</sup>. The report sets out that account must be taken “of the specific characteristics of sport, especially the interdependence between sporting activity and the economic activity that it generates, the principle of equal opportunities and the uncertainty of the results”. Sporting rules and practices are divided into three categories.

The first category concerns “*Practices which do not come under the competition rules*”. These are “rules without which a sport could not exist, or which are necessary for its organisation or for the organisation of competitions”. These are rules inherent to sport; “first and foremost” the “rules of the game” like e.g. the offside rule. The rules envisaged in this category would remain within the autonomy of the sporting organisations and escape the reach of EC law altogether.

The second category concerns “*Practices that are, in principle, prohibited by the competition rules*”. This category mainly concerns economic activities generated by sport that have nothing to do with the special characteristics of sport that are deemed worthy of protection from the reach of EC law. In other words, these are practices that have nothing to do with the social, cultural and integrating role of sport. Neither do they adhere to any legitimate aim such as the guaranteeing the uncertainty of results. These are pure economic arrangements, when sport is business and not sport as sport. Examples of practices listed in this category are “restrictions on parallel imports of sports products” and “the sale of entrance tickets to stadiums that discriminates between users who are resident in a particular Member State and those who live outside that Member State”.

The third category concerns “*Practices likely to be exempted from the competition rules*”. Here the Commission draws upon the objectives that

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<sup>122</sup> The Helsinki Report on Sport, (COM (1999) 644 final) was the first major policy document by the Commission after *Bosman*

were recognized by the Court in *Bosman* as legitimate: objectives designed to “maintain a balance between clubs, while preserving a degree of equality of opportunity and the uncertainty of the result, and to encourage the recruitment and training of young players”. Alongside these objectives, the Commission thinks it “likely” that genuine agreements that meet these objectives can be granted an exemption under Article 81(3). In order to be granted an exemption, the other provisions of the Treaty must be complied with in this area, especially those that guarantee freedom of movement for professional sportsmen and women. That the Commission considers the objectives recognised by the Court in *Bosman*<sup>123</sup> to be eligible for exemption is self-evident, since these objectives represent justifications in law. It goes without saying that any agreement designed to achieve the said objectives must also be proportionate and the restrictions must be indispensable to the attainment of these objectives.

The most favourable category for sporting organizations is the first category. They will try to extend the concept of rules inherent to sport as far as possible since these rules, according to the approach laid down by the Commission, would escape the net of Article 81 altogether.

In a press release issued almost contemporaneously with the Helsinki Report the Commission stated that, “rules of sports organisations that are necessary to ensure equality between clubs, uncertainty as to results, and the integrity and proper functioning of competitions are not in principle caught by the Treaty’s competition rules”.<sup>124</sup>

This is inconsistent with the Helsinki Report, where rules that are designed to meet those objectives were placed under “*Practices likely to be exempted from the competition rules*” under Article 81(3).

Since a degree of financial and sporting equality amongst clubs in a league and uncertainty as to results are intrinsic features of football, it is submitted that the better view is that, means that are necessary to achieve these aims should fall outside the scope of the Treaty rather than be exempted under Article 81(3).

In concluding the Helsinki Report the Commission stresses that “the basic freedoms guaranteed by the Treaty do not generally conflict with the regulatory measures of sports associations, provided that these measures are objectively justified, non-discriminatory, necessary and proportional”.<sup>125</sup>

In another press release issued by the Commission, the following general principles were outlined to guide the application of the competition rules of the Treaty to the European Sports Sector<sup>126</sup>:

- Safeguarding the general interest in relation to the protection of private interests;
- Restricting Commission action solely to cases which are of Community interest;
- Applying the *so-called de minimis* rule, according to which

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<sup>123</sup> The *Bosman* ruling at para. 106

<sup>124</sup> Press Release, IP/99/965, “Limits to application of Treaty competition rules to sport: Commission gives clear signal”, Brussels, 9 December 1999

<sup>125</sup> Helsinki Report, page 9

<sup>126</sup> IP/99/133, “Commission debates Application of its Competition Rules to Sport”, Brussels, 24 February 1999

agreements of minor importance do not significantly affect trade between Member States;

- Applying the 4 authorisation criteria laid down in Article 81(3) of the EC Treaty, but also refusing an exemption to any agreements which infringe other provisions of the EC Treaty and in particular freedom of movement for sportsmen;
- Defining reference markets pursuant to the applicable general rules but adapted to the features specific to each sport.

## 5.2 The Sporting Exception

The practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.<sup>127</sup> Hence EC law does not apply to all the activities of the sport sector since not all activities are of a genuine economic character. It is in this context that the ECJ developed the notion of a sporting exception. The ECJ held in *Walrave* that the prohibition on nationality discrimination in the context of freedom of movement and provision of services applied to sport as an economic activity. It said, however: “This prohibition does not affect the composition of sports teams, in particular national teams, the formation of which is a *question of purely sporting interest* and as such has nothing to do with economic activity”. The Court added, that the restriction on the scope of the provisions in question must remain limited to its proper objective.<sup>128</sup>

The *Dona* case dealt with nationality restrictions in Italian football. This case re-affirmed the notion of a sporting exception. The Court held that “Rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the state in question, are incompatible with Article 7 and as the case may be, with Article 48 to 51 or 59 to 66 of the Treaty, unless such rules or practice exclude foreign players from participation in *certain matches* for reasons which are *not of an economic nature*, which relate to the particular nature and context of such matters and are thus of *sporting interest only*”.<sup>129</sup> As an example of *certain matches* the Court took matches between national teams from different countries and repeated that the scope of the provisions in question must remain limited to its proper objective.<sup>130</sup>

The sporting exception is to be understood as rules that escape EC law altogether or, put in another way, rules that remain within the autonomy of the sporting community.

The sporting exception requires that the rule under scrutiny relate to sports exclusively and should be limited to its proper objective or original purpose. The latter confirming that an exception by nature should be construed

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<sup>127</sup> Case 36/74 *Walrave & Koch v Union Cycliste International et al* (1974) ECR 1405 at para. 4

<sup>128</sup> *ibid* at paras. 8-9

<sup>129</sup> Case C-13/76 *Dona v Mantero* (1976) ECR 1333, operative part at para. 1

<sup>130</sup> *ibid* at para. 14

narrowly. The ECJ has repeatedly stressed that it cannot be relied on to exclude the whole of sporting activity from the provisions of the Treaty.<sup>131</sup>

The key test for the sporting exception is that the rule in question must be of sporting interest only or whether it really is a necessary and inherent feature of the particular sport.<sup>132</sup> On the concept of purely sporting interest, it has been submitted that a rule should be considered as of purely sporting interest only if it is a reasonably necessary condition for the creation or the organisation of a given competition.<sup>133</sup>

An illustrative example of the sporting exception is the Meca-Medina case from the Court of First Instance, where two suspended athletes argued that the doping sanctions they were subject to, fell foul under Articles 81 and 82 EC, since the sanctions effectively restricted their ability to compete professionally and thus had economic repercussions for them. The argument was that rules and regulations cannot be of a purely sporting nature if they have economic repercussions.<sup>134</sup>

The Court acknowledged that high-level sport has become, to a great extent, an economic activity. The campaign against doping, however, does not pursue any economic objective. It serves the objective to preserve the spirit of fair play, without which sport, be it amateur or professional, is no longer sport. That purely social objective was regarded as sufficient by the Court to justify the campaign against doping.<sup>135</sup> A purely social objective is as such unquantifiable and cannot under any interpretation be construed as economic.

Interesting to note is that the Commission, who first rejected the claims by the athletes under Articles 81 and 82, considered that the anti-doping rules at issue might restrict the athlete's freedom of action, but that such a limitation is not necessarily a restriction of competition within the meaning of Article 81 EC because it may be inherent in the organisation and proper conduct of sporting competition.<sup>136</sup>

The reasoning for the sporting exception is comparable to the reasoning concerning "ancillary restraints" in e.g. the *DLG* case<sup>137</sup>, where the ECJ held that restrictive rules that are necessary to ensure that an agriculture cooperative operates properly and maintains its contracting power against producers, such as the prohibition against being a member of a rival cooperative, would escape Article 81(1). Even though they are comparable, the reasoning under the sports exception seems to be that rules are justified because of their sporting non-economic nature whereas the reasoning in the *DLG* case seems based on a "rule-of-reason" test.

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<sup>131</sup> See e.g. the *Bosman* ruling at para. 76

<sup>132</sup> Beloff, "The Sporting Exception in EC Competition Law" at page lx

<sup>133</sup> Beloff, Kerr and Demetriou at page 71

<sup>134</sup> Case T-313/02, David Meca-Medina and Igor Majcen v the Commissions (2004), ECR 0000 at paras. 51-53

<sup>135</sup> *ibid* at para. 44

<sup>136</sup> Rejection of Complaint Decision, Comp/38.158, "Affaire COMP/38.158 Meca Medina et Majcen ./ CIO, Brussels 1 August 2002 at para. 42

<sup>137</sup> Case C-250/92 Gøttrup-Klim v. DLG (1994) ECR I-5641

# 6 Applicability of Article 81

Article 81 essentially prohibits restrictive agreements or practices involving collusion between undertakings, which are economically independent of each other. Article 81 is commonly known as the anti-trust provision, designed especially to eradicate cartels and hard-core restrictions to competition.<sup>138</sup>

The constituent elements of Article 81 have been given a wide interpretation by the Commission, responsible for the administration of the competition rules, and the Community courts, responsible for the supervision over the Commission's decisions.

In short, for the Article to be applicable, there must be some form of collusion between at least two undertakings, a decision by an association of undertakings or a concerted practice. The agreement must affect trade between Member States and have as its object or effect the prevention, restriction or distortion of competition within the common market. According to settled case law the effects on competition and trade between Member States must furthermore be appreciable in order for the Article to be applicable (see section 6.5 and 7.1.2.1).

The key to deciphering Article 81 is to look at the facts of each case independently and distinguish the law from the case law from the relevant Community institutions. In this regard decisions from the Commission also form legally binding "case-law".

An agreement that *prima facie* restricts competition may still be compatible with Article 81(1) or be exempted under 81(3) with the result that the consequence of Article 81(2) does not occur.

## 6.1 Method of Analysis

Egger and Stix-Hackl suggest that the transfer system be examined as a whole. This since the different rules of a transfer system are not only connected with each other but also form part of a complex transfer system. In support of this method they assert that parts of a system are, according to the case law of the ECJ and legal academic writing, to be treated as a whole.<sup>139</sup>

I, however, would like to divide the analysis in two parts. In this chapter, I will establish the more procedural constituent elements of Article 81(1). In the next chapter I will analyse the substantive element of Article 81(1), namely the anti-competitive object or effect of the provisions related to the transfer system in the Regulations.

Whereas I agree with Egger and Stix Hackl that the procedural constituent elements of the Article are better established for the Regulations as a whole, I have separated the analysis of the procedural elements from the substantive element of the Article. This is to be better able to distinguish

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<sup>138</sup> Wish, "Competition Law" at page 91

<sup>139</sup> Egger and Stix-Hackl at page 83

between the objectives of the pertinent provisions as to anti-competitive object or effect, since they not all share the same objective as the transfer system as a whole.

This methodology is in part chosen to be able to analyse the principles agreed on in the agreement between FIFA/UEFA and the Commission that provide for the foundation of the Regulations under EC law and whether the implementation of the principles in the Regulations are reconcilable with the competition law provisions of the Treaty. Also, because this methodology provides for a more sensitive application of Article 81 to the specificity of sport.

## 6.2 The Relevant Market

Central to competition law analysis is the definition of the relevant market. The market definition plays a more pertinent part under Article 82 when considering whether an undertaking has abused a dominant position. It is however also necessary to define the relevant market under Article 81(1), when considering whether an agreement has the effect of restricting competition and further if that agreement appreciably restricts competition.<sup>140</sup>

Defining the relevant market is not an exact science and furthermore the concept of the "relevant market" is an economic one.<sup>141</sup> I will not perform an extensive market definition for this thesis, since this is an undertaking that would require empirical economic data, to which I don't have access.

As for the relevant geographic market the Regulations establish global and binding rules for the transfer of players between clubs belonging to different national associations, including the associations of the Member States of the EU. That the geographic market covers the territory of the Member States of the EU is therefore self-evident.

As for the relevant product market, professional sport has some peculiar features in this regard that separates it from other business sectors, rendering a definition of the relevant product market more difficult compared to other sectors. Even though the football clubs are undertakings independent of each other they are also dependent on each other. One football club alone cannot provide a product of their own. The product is the football match or to a wider extent the football competitions or leagues in which the clubs participate such as the national championships, the UEFA Champions league. In order for a league to operate properly there has to be some form of financial and sporting equality amongst the clubs in order to secure uncertainty as to results. The organisation of football competitions calls for rules that guarantee the integrity of the competition and the preservation of the regularity and proper functioning of the sporting competition.

For the purpose of determining whether an agreement has the effect of restricting competition, however, a definition of the relevant product market is still necessary.

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<sup>140</sup> Wish at pages 26-27

<sup>141</sup> *ibid* at page 24

Egger and Stix-Hackl have distinguished three markets altogether; (i) the exploitation market, (ii) the contest market and (iii) the supply market. Their assertion is that the relevant market for the transfer regulations is the market, which is formed by the supply and demand of players or in other words the acquisition market.<sup>142</sup>

The rules on transfers in the FIFA Regulations govern the business relationships between clubs rather than the employment relationships between clubs and players, but relate to the engagement of players. The fact remains that the employing clubs must in some cases pay fees when recruiting a player from another club and this affects the players' opportunities for finding employment and the terms under which such employment is offered.<sup>143</sup>

Further support for finding the relevant product market in the acquisition market is that the transfer system impedes the right of clubs freely to compete in the labour market. A right, which is protected *inter alia* by Article 81.<sup>144</sup>

## 6.3 Undertaking under Article 81(1)

The concept of an undertaking is not defined in the Treaty, but has been given a wide interpretation by the Community institutions. It needs to be established whether the clubs, FIFA/UEFA and/or the players can be regarded as undertakings in the sense of Article 81(1).

### 6.3.1 The Clubs

At its most basic the concept of an undertaking comprises "every legal entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".<sup>145</sup> A football club, regardless of its legal form may thus constitute an undertaking, since the legal form of an undertaking is not a determining factor. The concept of an undertaking is furthermore not conditional on that the activities of the entity are carried out with a profit-making motive or even with an economic purpose.<sup>146</sup> A football club may well pursue essentially unquantifiable aims such as sociability, prestige or a higher position in the table. For the application of Article 81(1) however, it is the activities actually embarked on which are decisive.<sup>147</sup> *Wish* writes "a particular entity might be acting as an undertaking when carrying out certain of its functions but not acting as an undertaking when carrying out others".<sup>148</sup> This way of determining whether an entity qualifies as an undertaking is part of the functional approach that underlies the application of Articles 81 and 82.

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<sup>142</sup> Egger and Stix-Hackl at pages 86-87

<sup>143</sup> The *Bosman* ruling at para. 75

<sup>144</sup> Beloff, Kerr and Demetriou at pages 68-69

<sup>145</sup> Case C-41/90 Höfner and Elser v Macotron GmbH(1991) ECR I-1979 at para. 21

<sup>146</sup> *Wish*, page 81. See also Joined Cases 209 to 215 and 218/78 Van Landewyck v Commission (1980) ECR 3125 at para. 88

<sup>147</sup> Egger and Stix-Hackl at page 84

<sup>148</sup> *Wish* at page 82

Professional football clubs, these days, are involved in a wide range of economic activities such as the sale of tickets, sports merchandising, television rights and advertising. There can thus be no doubt that professional football clubs constitute undertakings in the sense of Article 81(1). Evidence to that assertion is not least the fact that some of the biggest football clubs in Europe, such as Manchester United, Chelsea FC and Arsenal are publicly listed companies on the stock market. Football clubs more and more resemble enterprises in their own right.

Finally, the size of an undertaking is not decisive. The Belgian football association argued in *Bosman* that only large clubs may constitute undertakings in the sense of Article 81(1) and that clubs like RC Liège, only carry on minor economic activity and thus do not constitute undertakings in the above sense. A.G. Lenz dismissed this argument as incorrect. What differentiates small and medium sized clubs from the larger clubs is the degree of success they derive from their commercial activity. The degree of success is however immaterial to the question of whether there is an undertaking in the sense of Article 81(1).<sup>149</sup>

### 6.3.2 FIFA

International and national associations such as FIFA, UEFA or the Swedish Football Association may also constitute undertakings under Article 81(1) in so far as they themselves are engaged in economic activity.<sup>150</sup> This has been legally determined in cases from the Community institutions.<sup>151</sup>

The fact that both FIFA and UEFA are responsible for the administration and negotiation of the television rights for the competitions they organise and more importantly profit of must be regarded as being engaged in economic activity, especially given the value of the rights. To illustrate the financial stakes that are at hand, the Television rights for the UEFA Champions league alone were worth 800 million CHF<sup>152</sup> in 2001.<sup>153</sup> The TV rights alone accounted for 80% of the Champion's League's total revenue, illustrating further the value of television rights compared to other sources of revenue. Out of the total revenue of 800 CHF, 25% remains with UEFA to cover organisational and administrative costs. After further deductions, UEFA makes 47.2 million CHF.<sup>154</sup> To put things in an even bigger perspective, FIFA's media partner Prisma paid approximately 1.8 billion US Dollars for the rights to the 2002 and 2006 Soccer World cup.<sup>155</sup>

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<sup>149</sup> Advisory Opinion by A.G. Lenz in the *Bosman* case at para. 255. Hereinafter referred to as "opinion in *Bosman*"

<sup>150</sup> Opinion in *Bosman* at para. 256

<sup>151</sup> Egger and Stix-Hackl at page 85, Commission decision of October 27, 1992, (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup) (1992) O.J. L 326/31 in which an association concluded agreements for the sale of tickets

<sup>152</sup> Swiss Francs

<sup>153</sup> Commission memo: "UEFA-Champions League-Background) of July 20 2001 (Memo/01/271)

<sup>154</sup> *ibid*

<sup>155</sup> Halgreen at page 125

If these associations are not themselves deemed to be engaged in economic activity they may still constitute associations of undertakings, under Article 81(1).<sup>156</sup> The fact that the associations also comprise a large number of amateur clubs makes no difference to this conclusion.<sup>157</sup>

The distinction of whether FIFA should be regarded as an undertaking or an association of undertakings is irrelevant for the application of Article 81, since the Article is equally applicable to both forms.

### 6.3.3 A Football Player

There is nothing that prevents an individual from constituting an undertaking, given the wide definition by the ECJ in the *Höfner* case (see above). On the contrary the ECJ has held that individuals can constitute undertakings if they act independently as an economic actor.<sup>158</sup> The Commission held in *Coapi* that "Industrial property agents constitute undertakings within the meaning of Article 85 (1) of the EC Treaty where they practise their profession a self-employed persons. Such agents provide their services on a long-term basis and for consideration."<sup>159</sup>

A worker, however, in the sense of EC law cannot constitute an undertaking within the meaning of Article 81(1) (ex 85(1)) since he forms an integral part of the economic entity by which he is employed.<sup>160</sup> A worker cannot, in that capacity, act as an independent economic actor. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.<sup>161</sup>

A football player is not self employed, even though he may employ activities by his own right in his capacity as professional football player such as closing advertising deals, endorsements and sponsor contracts for his own benefit. Those are however, as pointed out, for his own benefit and not to that of his club, even if they can benefit from his image. A football player is under contract with a club and in that relationship he is an employee and the club his employer.

Even if the player should employ economic activities on the side in his capacity as a football player, the centre of gravity of his activities lies with the club i.e. his main occupation is training and participating in matches for his club, by which he is employed and remunerated.<sup>162</sup>

The better view is thus that a football player, while under contract, should be regarded as a worker under EC law. This was also foreseen by A.G. Lenz in his opinion in *Bosman*.<sup>163</sup> The ECJ has furthermore held that the

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<sup>156</sup> Opinion in *Bosman* at para. 110

<sup>157</sup> *ibid* at para. 256

<sup>158</sup> See e.g. Case 42/84 *Remia v Commission* (1985), ECR 2545 at paras. 49-50 or Case C-170/83 *Hydrotherm v Andreoli* (1984) ECR 2999 at paras. 11-12

<sup>159</sup> Commission decision of 30 January 1995(IV/33.686 - *Coapi*) (1995) O.J. L 122/37 at para. 32

<sup>160</sup> Case C-22/98 *Jean Claude Becu* (1999) ECR I-5665 at para. 26

<sup>161</sup> Case 66/85 *Deborah Lawrie-Blum v Land Baden Württemberg* (1986) ECR 2121 at para. 17

<sup>162</sup> Plath, "Individualrechtsbeschränkungen im Berufsfußball" at page 83

<sup>163</sup> Opinion in *Bosman* at para. 262

activities of professional and semi-professional football are protected by the freedom of movement of workers, and that they consequently may be considered as workers under EC law.<sup>164</sup>

## 6.4 Agreement Between Undertakings, Decisions by Associations of Undertakings or Concerted Practices

The second element that needs to be established for the application of Article 81 is whether the FIFA Regulations constitute an agreement between undertakings or a decision by associations of undertakings. In this regard transfer fees under contract should be considered separately since these are not explicitly regulated in the Regulations.

The FIFA Regulations were adopted by the FIFA Executive Committee and are based on Article 5 of the FIFA Statutes of October 2003 and establish binding rules for its members i.e. all the associations and clubs.<sup>165</sup> The FIFA Regulations can therefore be regarded as a decision adopted by a private body establishing binding rules for its members. These bodies may, as referred to above, be regarded as associations of undertakings. By support of this simple reasoning it can fairly be asserted that the FIFA Regulations laid down are therefore to be regarded as a decision by an association of undertakings. The character of a decision is furthermore apparent by the fact that the Regulations were adopted on the legal basis of the federation's statutes, which are to be regarded as a collective act.<sup>166</sup>

It was however asserted by URBSFA in *Bosman* that the transfer rules merely faithfully reflect the will of the members of the associations"<sup>167</sup>. In that case, as was rightfully pointed out by A.G. Lenz, the rules may just as well be regarded as agreements between the clubs.<sup>168</sup> It should be added that they are then to be considered as horizontal agreements.

An agreement in the sense of Article 81(1) has been given a wide interpretation by the Community institutions. Neither the precise legal form of the agreement nor its actual contents are of any direct relevance.<sup>169</sup> For example a protocol that reflects a mere concurrence of wills is evidence enough of an agreement under Article 81(1).<sup>170</sup> Thus it is not a condition that an agreement must be in the form of a legally enforceable contract. As Article 81(1) applies equally to both decisions of associations of undertakings and agreements between undertakings this distinction is irrelevant for the application of the Article.

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<sup>164</sup> Case 13/76 at paras. 12-13

<sup>165</sup> Preamble of the FIFA Regulations

<sup>166</sup> Egger and Stix-Hackl at page 85

<sup>167</sup> Opinion in *Bosman* at para. 258

<sup>168</sup> *ibid* at para. 258

<sup>169</sup> Weatherill and Beaumont, "EU Law-The Essential to the Legal Workings of the European Union" at pages 794-795

<sup>170</sup> Commission decision of 29 March 1994 (IV/33.941 - HOV SVZ/MCN) (1994) O.J. L104/34 at para. 46

## 6.4.1 Transfer Fees under Contract

The notion of a concerted practice envisages a looser form of collaboration.<sup>171</sup> In order to avoid circumvention of Article 81(1), the concept of concerted practices was included to catch conduct, which is not attributable to an agreement or a decision. According to Wish's interpretation, the legal test of what constitutes a concerted practice for the purposes of Article 81(1) is that there must be a mental consensus whereby practical cooperation is knowingly substituted for competition; however the consensus need not be achieved verbally, and can come about by direct or indirect contact between the parties.<sup>172</sup>

The Regulations don't provide explicitly for the payment of transfer fees under contract. They seem to stem from a costume in football. The Regulations simply state that a contract between a professional football player and a club may only be terminated on expiry of the term of the contract or by mutual agreement.<sup>173</sup> A club will thus only release a player under contract if they are content with the terms of the release, or in other words the payment of a transfer fee. The payment of transfer fees for players moving to another club under contract may therefore be considered as a concerted practice rather than a decision or an agreement.

Neither this distinction is, however, relevant for the application of Article 81(1) since all three forms of collusion are caught under the Article.

## 6.5 Effect on Trade between Member States

The scope of Article 81 is limited to agreements, decisions or concerted practices, which may affect trade between Member States. This is a jurisdictional condition that defines "the boundary between the areas respectively covered by Community law and the law of Member States".<sup>174</sup>

The inter-state trade clause has been given a wide interpretation by the Community institutions so that "most agreements of any commercial significance within a single Member State will satisfy the inter-state trade threshold".<sup>175</sup>

The ECJ has developed a test for assessing the required effect; the so called STM test: "it must be possible to foresee with a sufficient degree of probability on the basis of a set objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states".<sup>176</sup> The effect must thus not be direct or actual for Article 81(1) to apply, considerably widening the scope of the Article. Thus, it suffices to establish that an impact on the

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<sup>171</sup> Weatherill and Beaumont at page 797

<sup>172</sup> Wish at page 100

<sup>173</sup> Regulations Article 13

<sup>174</sup> Case 22/78 Hugin Kassaregister AB v Commission (1979) ECR 1869 at para. 17

<sup>175</sup> Weatherill and Beaumont at page 810

<sup>176</sup> Case 56/65 Société Technique Minière v Maschinenbau Ulm(1966) ECR 235 at para. 249

patterns of trade between member states can be made probable, to fulfil the inter-state trade requirement.

It has been argued that the “trade” in football players would escape Article 81 because they are neither goods nor services.<sup>177</sup> On the same note, UEFA argued in *Bosman* that transfers of players do not affect “trade”. This argument was dismissed by A.G. Lenz on the basis that “trade” in both Article 81 and 82 is not restricted to trade in goods but covers all economic relations between Member States.<sup>178</sup>

Needless to say, football players form the very essence of a football match. The players are thus an inherent element in the product that is a football match or to a greater extent a football competition or league. It is not the trade in football players *per se* but the services they provide that affects inter-state trade. This is to be seen against the background that football, especially in Europe, employs a wide range of commercial activities. The football players form the very foundation for those activities. In this regard trade is certainly affected by the transfer of football players.

According to A.G. Alber in the *Lethonen* case it must further be possible to find that trade is affected in a case in which the exercise of fundamental freedoms is obstructed.<sup>179</sup> The rules concerning *inter alia* training compensation must be seen as obstructing the freedom of movement of workers, Article 39 EC, since any change of clubs for a player under the age of 23 requires the payment of a training compensation, even at the expiry of a player’s contract under the same rationale as in *Bosman*.

That the Regulations may affect inter-state trade is further evident from the scope of the rules since they establish global rules *inter alia* for the transfer of players between clubs belonging to different national associations, including the associations of the Member States. It is not even required that trade between Member States has been affected, since according to the STM test, it would be sufficient that it is reasonably foreseeable that it might do so. In this regard the abolition of nationality quotas in European club football is material. European clubs have every incentive to look across their national borders to recruit from other countries, either for economic or sporting reasons. A prime example of this is the English Premier League club Chelsea FC that on Boxing Day 1999 notoriously fielded a team with no English players at all in a match.<sup>180</sup> Chelsea’s first team consists of players from *inter alia* Holland, France, Portugal and Spain.<sup>181</sup> In the year 1999 Spain had 200 foreign footballers in its premier division, Germany had 185, Italy 163, England 116 and France 85.<sup>182</sup> The same applies for the players that by virtue of the *Bosman* judgement and the new Regulations can move freely at the expiry of their contract if they are over 23 years old. This provides the players with every incentive to move to a club where they are paid according to their skill and

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<sup>177</sup> Vahrenwald, “Am I so round with you as you are with me? The Bosman Case before the European Court of Justice”

<sup>178</sup> See Opinion in *Bosman* at para. 261

<sup>179</sup> See Opinion by A.G. Alber in Case C-176/96 at para. 104

<sup>180</sup> Fact Sheet 16, *supra* note 35 at para. 7.1

<sup>181</sup> [www.chelseafc.com](http://www.chelseafc.com)

<sup>182</sup> Fact Sheet 16, *supra* note 35 at para. 7

since Europe is the home to the largest and most financially viable clubs in the world, movement is likely to be confined to Europe.

As stated, the primary purpose of the Regulations is to regulate transfers of players between clubs belonging to different national associations. Agreements between sports leagues or clubs located in different Member States must therefore be capable of affecting inter-state trade.<sup>183</sup> That player movement affects inter-state trade can thus be concluded.

To satisfy the inter-state trade requirement, the effect has moreover to be appreciable.<sup>184</sup> If an agreement has an appreciable effect has to be determined on the basis of economic evidence.<sup>185</sup> I don't have access to sufficient information in order to make a quantitative analysis to assess the appreciable effect of player transfers between the Member States of the EU. A.G. Lenz, however, found that the requirement was fulfilled in *Bosman* based on statistics showing that in the 1995-1996 season, 18 clubs in the Italian first division spent more than 51 000 000 Euros on foreign players.<sup>186</sup>

It can further be deduced from the calculation principles for the training compensation that the rules are capable of having an appreciable effect on trade since the payments for a single player can reach amounts in the vicinity of 580 000 Euros, if a player transfer from one category 1 club to another and training compensation has to be paid for the full ten years of training.

The National competition authorities and courts in the Member States are also competent to apply Articles 81 to national agreements that have an appreciable effect on inter-state trade. This since Article 81 is directly applicable and produces direct effects.<sup>187</sup> The national NCA's and courts are now also competent to apply Article 81(3) by virtue of Regulation 1/2003 ("Modernisation Regulation"), which according to the old rules was exclusively in the jurisdiction of the Commission. This means that the future of the national transfer systems, and the FIFA Regulations for that matter, may be tried in a national court under Article 81. The effects of an infringement finding before a national court would have the same implications as a Commission decision or an ECJ ruling since it is based on EC law and consequently applies in all the Member States.

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<sup>183</sup> Beloff, Kerr and Demetriou at page 145, they furthermore assert that inter-state would certainly be affected

<sup>184</sup> See e.g. Case 28/77 Tepea v Commission (1978) ECR 131 at para. 47

<sup>185</sup> Case 27/87 SPRL Louis Erauw-Jacquery v La Hesbignonne SC (1988) ECR 1919 at para. 19

<sup>186</sup> Opinion in *Bosman* at para. 57

<sup>187</sup> Regulation 1/2003, Articles 1 and 6

# 7 Distortion of competition

Article 81(1) prohibits agreements, decisions or concerted practices “which have as their object or effect the prevention, restriction or distortion within the common market”. “Object or effect” are alternative requirements, indicated by the conjunction “or”. Consequently, one must first consider the purpose of an agreement in the economic context in which it is to be applied. Where this analysis does not reveal the effects on competition to be “sufficiently deleterious”, the consequences of the agreement should be considered. For it to be caught by the prohibition it is then necessary to find that factors are present which show that competition has in fact been prevented restricted or distorted to an appreciable extent.<sup>188</sup> Where an agreement has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anti-competitive effect in order to find an infringement of Article 81(1).<sup>189</sup> In this regard it should be pointed out that a concerted practice is also capable of having as its object the restriction of competition.<sup>190</sup>

I will first analyse the rules on training compensation. Then transfers under contract. Transfers under contract are analysed in conjunction with the provisions on the registration of players and contractual stability.

Finally the provisions on transfer windows will be analysed.

## 7.1 Training Compensation

The system for the payment of training compensation is designed to encourage more and better training of young football players and to create solidarity among clubs.

For the competition law analysis the system is treated as a closed system for players under the age of 23 in that, like in *Bosman*, a player is not free to sign a contract, even at the expiry of his contract, with a new club unless the new club compensates the old club in the form of a training compensation fee. The springing point here is that even if the player has fulfilled all his obligations towards his old club at the expiry of his contract he is not free to go into the market place and offer his services to another club. If the new club should refuse to pay the training compensation, the association of the old club will not issue an ITC for the player to the association of the new club, disabling the player from being registered with the new association thus effectively preventing him from playing for his new club. The game’s cartels constrain the players from freely selling their labour in accordance with normal assumptions of contract law.<sup>191</sup>

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<sup>188</sup> Case 56/65, *supra* note 176 at para. 249

<sup>189</sup> Joined cases 56 and 58-64 *Établissements Consten A.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (1966) ECR 299 at para. 342

<sup>190</sup> Case C-1992/92 *Hüls AG v Commission of the European Communities*, (1999), ECR I-4287 at para. 164

<sup>191</sup> *Weatherill, supra* note 34 at page 994

On a first view these rules seem better placed to be scrutinised under Article 39 EC, the provision on free movement of workers. They are in fact a lot like the rules scrutinised in *Bosman*, albeit not as restrictive and based on different calculation principles, but at the end of the day they represent an obstacle to the freedom of movement of football players. For the competition law analysis I will content myself with the assumption that they represent an obstacle for the freedom of movement based on Article 39 EC, based on the scope of the judgement in *Bosman*; invalidation of the general system, which restricts post-contractual labour mobility in the EC.

### 7.1.1 The Sporting Exception

Could the rules on training compensation be justified on non-economic grounds concerning only sport as such and thus fall within the ambit of the sporting exception?

The Court stated in *Bosman* that Article 39 EC applies to rules laid down by sporting associations, which determine the terms on which professional sportsmen can engage in gainful employment.<sup>192</sup> The rules on training compensation have that character and are thus subject to the Treaty, including the provisions on competition.

It is however submitted that the objectives to encourage the development of young players and to create solidarity among clubs are capable of being recognised as concerning only sport and means that are indispensable for achieving these aims may consequently fall within the sporting exception. I will however establish that the rules on training compensation are not indispensable for attaining said aims.

### 7.1.2 Restriction of Competition

The rules on training compensation restrict the possibility for clubs to take on players. In other words they represent a restriction of competition between the clubs, since they are the only active undertakings on the relevant market; the acquisition market. Even if the competition situation between clubs is different from other markets in the sense that they are in a way mutually dependent on each other to create a league or competition, they still compete with each other for football players in order to reinforce their sporting strength.

In examining whether an agreement is to be considered as prohibited by reason of distortion of competition, it is necessary to examine the competition within the actual context in which it would occur in the absence of the agreement.<sup>193</sup> In this case it would be to compare with a regime where the players were free to offer their services at the expiry of their contract unrestrained by the obligation of the new club to compensate the old club in the form of a training compensation. Any club could offer to engage the player and the player could then choose the club that offered him the best terms.

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<sup>192</sup> The *Bosman* ruling at para. 87

<sup>193</sup> Case 99/79, *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV* (1980) ECR 2511 at para. 24

Under the current regime the players have price tags that are additional to their remuneration demands. A club that wants to engage a player must first compensate his old club. The payment of training compensation may also have a deflationary effect on player wages because a club naturally has limits as to how much it can spend on players. The rules thus affect third parties, namely the players in this respect.<sup>194</sup>

To illustrate the distortion of competition I would like to elaborate with an example. The Danish club A is interested in the Swedish player X. X is 22 years old and has played with the Swedish club B since he was 12 years old. Both clubs are category 2 clubs and compensation must be paid for the full 10 years of training, as the training was not completed before X's 21<sup>st</sup> birthday. The indicative amount of training compensation for a category 2 club is set at 60 000 Euros per year. Between the years 12 and 15 the compensation is based on the indicative amount of category 4, which is 10 000 Euros per year. The calculation for the training compensation due would result in 400 000 Euros. This is the amount that club A has to pay to club B if it wants to engage the player. If it doesn't pay the fee, the Swedish association will not transfer the ITC of the player to the Danish association, preventing his registration and participation in any matches of club A.

Club A cannot afford to pay 400 000 Euros plus the salary demands of the player, which were 350 000 Euros for a three year contract. If the player could have offered his services under normal competitive conditions club A would have signed him, but because of the training compensation the deal fell through. The player was ultimately forced to sign a deal that paid him less in Sweden because the training compensation due is less in Sweden for national transfers than international transfers. The maximum amount of training compensation that a first division club can demand from another first division club in Sweden is set at 450 000 Swedish Crowns (approx 45 000 Euros).<sup>195</sup>

That the calculation basis for training compensation is set differently on an international and national level further serves to distort the competition between clubs.

The fact that a training compensation has to be paid mainly benefits the larger, more financially viable clubs, since they can afford to pay the training compensation and still offer the players lucrative salaries and bonuses. The rules favour the larger clubs and can be seen as reinforcing their position and ultimately controlling the player movement in football, for without the training fee, more clubs could participate in the engagement of players. Smaller and less financially viable clubs are thus put at a competitive disadvantage compared to the larger clubs. That the position of the larger clubs is reinforced by the provisions on training compensation further contravenes one of the fundamental conditions for a viable football league, namely that there should be a balance between clubs by preserving a certain degree of equality and uncertainty as to results. The rules on training compensation, while beneficial in the sense that small clubs may receive compensation, deprive smaller clubs of the chances to engage players since

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<sup>194</sup> Egger and Stix-Hackl at page 88

<sup>195</sup> "Svenska Fotbolls Förbundets Tävlingsbestämmelser 2006", Swedish Transfer Rules, Chapter 4 -17§4",

basically they don't have the same economic means as larger clubs. The competitive structure of the market is thus altered in favour of clubs that can afford to pay the training compensation and offer the player competitive remuneration.

The competition law analysis by A.G. Lenz in *Bosman* is in fact still valid under the rules on training regulation. He stated for the transfer rules under scrutiny in *Bosman*: “those rules replace the normal system of supply and demand by a uniform machinery which leads to the existing competition situation being preserved and the clubs being deprived of the possibility of making use of their chances, with respect to the engagement of players, which would be available to them under normal competitive circumstances. If the obligation to pay transfer fees (read training compensation) did not exist, a player could transfer freely after the expiry of his contract and choose the club which offered him the best terms”. He went on: “The current transfer system, on the other hand, means that even after the contract has expired the player remains assigned to his former club for the time being. Since a transfer takes place only if a transfer fee (training compensation fee) is paid, the tendency to maintain the existing competition situation is inherent in the system.”<sup>196</sup>

The substantive elements of Article 81(1) require that “an agreement... has either the object or effect the prevention, restriction or distortion within the common market”. That the rules not only have an anti-competitive effect but also object is obvious in that the rules are binding and the payment of training compensation is mandatory for all transfers of players up until the age of 23.

### 7.1.2.1 Appreciable Effect

The prohibition in Article 81(1) will only catch agreements that have an appreciable impact on competition. This is a consequence of the *de minimis* doctrine, which was formulated by the ECJ as follows: “an agreement falls outside the prohibition of Article 81(1) where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question”.<sup>197</sup>

For the purposes of establishing whether an agreement has an appreciable effect on competition, it suffices to establish that such agreements are capable of having that effect.<sup>198</sup>

The rules on training compensation apply for every transfer of a player between clubs in all the national associations of the Member States under the age of 23. All players participating in organised football must be registered with an association to play for a club as either a professional or an amateur.<sup>199</sup> The only undertakings active on the relevant market – the supply market – are the clubs. All sources of supply are thus in principle brought into the transfer system, governed by the FIFA Regulations.<sup>200</sup>

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<sup>196</sup> See opinion *Bosman* at para. 262

<sup>197</sup> Case 5-69 *Völk v Vervaecke*, (1969), ECR 295 at para. 5/7

<sup>198</sup> Egger and Stix-Hackl at page 89, see also Case 19/77 *Miller v the Commission* (1978) ECR 131 at para. 15

<sup>199</sup> Regulations Articles 2 and 5

<sup>200</sup> Egger and Stix-Hackl at page 89

The rules affect all the clubs, regardless of size and all transfers between the Member States for players under the age of 23. That the rules at least are capable of having an appreciable affect on competition can therefore be concluded.

### 7.1.3 Existence of Justifications

It remains to be analysed whether the rules could be justified under a “rule-of-reason” test. I am aware of the fact that applying a “rule-of-reason” test is misleading in EC Competition law since it is an American concept and not officially incorporated into the reasoning under Article 81. The meaning I ascribe to it here is the reasoning the ECJ performed in *inter alia* the *DLG* and the *Wouters* case.

In this regard the observations of A.G. Cosmas in the *Deliège* case<sup>201</sup> are relevant. He stated “It must also be recognised, however, that Article 85(1) does not apply to restrictions on competition which are essential in order to attain the legitimate aim they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition”. The A.G. referred to the reasoning in the *DLG* case<sup>202</sup>. That case concerned rules of a cooperative association, which prohibited its members from participating in other cooperative associations if they were in direct competition to it. The Court reasoned that the compatibility of such rules with the competition rules of the Treaty cannot be assessed in the abstract. It will depend on the particular rules and the economic conditions prevailing on the markets concerned.<sup>203</sup> On the objective of such a prohibition the Court concluded that dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. The prohibition of dual membership was therefore not deemed to necessarily constitute a restriction of competition within the meaning of Article 81(1) and may even have beneficial effects in competition.<sup>204</sup> On the scope of such restrictive rules the Court emphasised that in order to escape the prohibition laid down in Article 81(1) the restrictive rules must remain limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers. It must further be determined whether the penalties for non-compliance with the rules are disproportionate to the objective they pursue and whether the minimum period of membership is unreasonable.<sup>205</sup> Consequently, only rules that are

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<sup>201</sup> Opinion of A.G. Cosmas in joined cases C-51/96 and C-191/97 *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de Judo ASBL Union européenne de judo (C-51/96) and Francois Pacquée (C-191/97)*, (2000), ECR I-2549 at para. 110

<sup>202</sup> Case C-250/92 *Gøttrup-Klim v. DLG* (1994) ECR I-5641

<sup>203</sup> *ibid* at para. 31

<sup>204</sup> *ibid* at para. 34

<sup>205</sup> *ibid* at paras. 35-36

indispensable for achieving a legitimate aim may escape Article 81 in its entirety.

Another interesting case in this regard is the *Wouters*<sup>206</sup> case, in which the ECJ held: “However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives(...) It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.” Restrictions indispensable to the proper functioning of a sports league lie in an arena of autonomous sporting regulation unaffected by the “hot breath of Article 81”.<sup>207</sup>

Encouraging the recruitment and training of young players was accepted as a legitimate aim in *Bosman*. The Court seems to have considered small clubs in particular.<sup>208</sup> The Court even acknowledged that the prospect of receiving training fees would encourage football clubs to encourage football clubs to seek new talent and train young players.<sup>209</sup> The problem with the rules under scrutiny in *Bosman* was that they were considered disproportionate for achieving the aim since they were *inter alia* not related to the actual training costs.<sup>210</sup>

The prospect that a club should be compensated for the training it has done, and that the big rich clubs should not be enabled to enjoy the fruits of that work without making any contribution of their own did, partially, also persuade A.G. Lenz in his Opinion in *Bosman*. He however maintained that such rules would have to comply with two requirements. First, the compensation fee would actually have to be limited to the amount expended by the previous club(s) for the player’s training. Second, a compensation fee would come into question only in the case of a first change of clubs where the previous club had trained the player.<sup>211</sup> I assume that by meeting those requirements, the rules could be justified under Article 81.

It goes without saying that the training of young players is necessary to ensure the future of football. It is also true that the prospect of receiving training fees will encourage football clubs to seek new talent and train young players. The question is if the rules on training compensation are indispensable.

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<sup>206</sup> Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap, (2002) ECR I-1577 at para. 97

<sup>207</sup> Weatherill, *supra* note 3 at page 83

<sup>208</sup> The *Bosman* ruling at paras. 106 and 109

<sup>209</sup> *ibid* at para. 108

<sup>210</sup> *ibid* at para. 109

<sup>211</sup> Opinion in *Bosman* at para. 239

### 7.1.3.1 Training Compensation Based on Actual Training Costs?

To come in line with the requirements of *Bosman* the training fee would have to be limited to compensation for actual training costs and come into question only in the case of a first change of clubs where the previous club had trained the player. The latter of those requirements is not met since it is payable on each transfer between clubs of a professional until the end of the season of his 23<sup>rd</sup> birthday.

In the *Hamburger* case referred to above, the training compensation amounted to 255 000 Euros. A seemingly large sum to cover the training costs for only one player. Naturally, one cannot consider the cost of training only one player since not all players go on to play professionally. Therefore it seems reasonable that when setting the training costs for each category account should be taken of the ratio between the number of players who need to be trained to produce one professional player. But that the training between the ages 12 to 15 should be included in the calculation seems unreasonable. I very much doubt that players between the ages 12 and 15 require resources as to justify the inclusion of those years in the calculation of the training fee. Some thought seems to have been given to the foregoing since the Regulations state “to ensure that training compensation for very young players are not set at unreasonably high levels, the training costs for players for the seasons between their 12<sup>th</sup> and 15<sup>th</sup> birthday shall be based on the training and education costs for category 4 clubs”.<sup>212</sup> It would be reasonable to assume that such training costs are very low and that the training provided is more in tune with “sport and play” rather than technically and physically challenging training to improve specific skills in the player. To ensure that training compensation is not set at unreasonably high levels it would be more accurate simply to ignore what happens between the ages 12 and 15.

All clubs affiliated to FIFA have the right to receive training compensation, even amateur clubs. It would be reasonable to surmise that the operation of these clubs is sustained mainly on the goodwill of their members, tax money and member’s subscription. These clubs would fall under category 4 in FIFA’s system, for which the indicative training amount is set to 10 000 Euros per year. An amateur club is thus entitled to receive 10 000 Euros per year for a player they have trained when the player signs his first professional contract. Assume that a player does that at the age of 16. This would result in a training compensation of 40 000 Euros due for the player. It seems rather unlikely that a player trained by an amateur club has incurred costs in that amount. To talk about compensation for actual training costs in such a case would be exaggerated. Since amateur clubs operate under different conditions and objectives than a professional club, the former should be left out of the calculation for training compensation.

The difficulty in tailoring an international system for training compensation with a uniform calculation basis for every confederation is obvious, given the differences between how much clubs in different national associations invest in training. On the accuracy of the calculation as

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<sup>212</sup> Regulations, Annex 4, Article 5.3

reflecting actual training costs, the system under the FIFA Regulations seems like the most viable solution in an almost impossible framework. It is however submitted that the international character of the regulations is nevertheless not a justification for making the calculation principles less accurate as to reflect the actual training cost. Such appraisals are better placed in a system that is manageable, for example in a collective bargaining agreement for every national association. The Regulations could then refer to the pertinent agreement for ascertaining the actual training costs for a player.

Nurturing talent is furthermore a speculative activity. As Rob Simmons points out, "*transfer activity is very much a speculative activity. For a lower league club to benefit, it must first unearth talented players not spotted earlier by rival clubs and then reveal to the top clubs that these players are worth buying. Such an uncertain, speculative activity seems a weak basis on which to sustain the fortunes of smaller clubs*".<sup>213</sup> Clubs in some national associations may only succeed in transferring a very small number of players under the age of 23, but the national association may nevertheless have submitted its calculated training costs to FIFA in order to categorise its clubs in all four categories. The amount of training compensation in such cases would therefore be arbitrary and in no way relate to the actual training costs.

In conclusion, the rules on training compensation are not sufficiently accurate as to reflect the actual training costs of a player. Consequently they fall short of the requirements in *Bosman* so that any justification based on those requirements would fail.

### **7.1.3.2 Necessity of Training Compensation**

Similar to other areas of employment, football players are paid because they provide services that enable their employer to obtain revenue from their employment. Clubs offer young players contracts because their employment will enhance the revenue and income of their club.<sup>214</sup> The latter two sentiments are plain common sense. The player recompenses his club with his performance while under contract.

Training compensation is further only one source of potential revenue for football clubs to finance the training of players. Given the revenues from television rights, advertising, sponsorship contracts, merchandising and so on, there are other ways to secure the financial viability of clubs so that they can invest in training players. What then would justify the clubs earning even more money on the player when his contract has expired?

The only reasonable justification is that larger clubs should not be able to reap the benefits of the labour of small clubs for free in the spirit to maintain some kind of solidarity between clubs. But with the prospect of receiving a training fee, in addition to a transfer fee if the player is sold under contract, smaller clubs will have an incentive to release their best players, which would decrease their sporting ability for the gain of the larger clubs always

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<sup>213</sup> Simmons, "Making sense of the FIFA/UEFA Proposals to Reform the Football Transfer System"

<sup>214</sup> Dabscheck, "The Globe At Their Feet: FIFA's New Employment Rules – II" at pages 9-10

becoming more powerful, both in a financial and in a sporting sense. Good players are essential for sporting success. Success leads to more spectators, more appearances on television and greater merchandising sales. By using their financial muscle the larger clubs attract and retain the best players, and further sporting success follows. As pointed out by Veljanovski, “these positive feedback effects can create a virtuous circle”.<sup>215</sup> The competitive advantage created by the rules on training compensation for the larger clubs widens the gap between clubs, so that only a handful of clubs dominate the game. This contravenes the most fundamental requirements of a viable league, namely that there should be some kind of balance between clubs by preserving a certain degree of equality and uncertainty as to results.<sup>216</sup>

It is submitted that if the rules on training compensation should be deemed as justified, it must be proven that they benefit the small clubs first and foremost.

In the negotiations between FIFA/UEFA and the Commission in 2001, FIFPro presented a report that pointed out that due to transfer fee inflation, most top clubs have invested heavily in youth academies in order to develop their own juniors. Given the financial commitment of these clubs to their youth academies the rules on training compensation would therefore result in resources flowing to these clubs and not from them.<sup>217</sup> The big clubs will be likely to train more players than they themselves need in order to secure their options. A player who is not good enough to play in the first division may still qualify to play for clubs in lower divisions. This could lead to player movement from the higher to the lower divisions and consequently compensation fees flowing from smaller clubs in the lower divisions to the clubs in the higher divisions. This would defeat the argument that the training compensation fee would benefit smaller clubs because without the obligation to pay said fee, the smaller clubs could hire the players that don't qualify for the top clubs at a lower cost.

Support for the above reasoning can be found in the English football league. Based on data from the *Rothmans's Football Yearbook* for the season 1999/2000, the authors of the article “Employment Rights in Team Sports: Towards Free Agency”, found that player movement between English divisions is downwards rather than upwards. For example, 18 players moved from Division 1 of the Football league to the Premier league<sup>218</sup> while 35 moved in the opposite direction. Only 7 players moved from division 2 to the Premier league while 14 moved in the reverse direction. They found this development to be partly because clubs in the higher divisions have an excess supply of recently trained players.<sup>219</sup>

One of the fundamental arguments against the training compensation fee is why the clubs need it in the first place since it should be in their own very best interest to train the players they have in order to improve and win

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<sup>215</sup> Veljanovski, C, “Is Sports Broadcasting a Public Utility?” at section 2

<sup>216</sup> See e.g. the *Bosman* ruling at para. 106

<sup>217</sup> Parrish, *supra* note 16 at pages 144-145, citing from the FIFPro report “Time for a new approach. The international player transfer system”

<sup>218</sup> In the English league system the Premier league is the highest division

<sup>219</sup> Forrest and Simons, “Employment Rights in Team Sports: Towards Free Agency” at pages 75-76

matches, without the possibility of receiving training compensation. Training expenditure is in the club's own interest and which the player recompenses with his performance.<sup>220</sup> The training of employees is not a peculiar feature to football. All professions have some kind of training program but no other sector of the economy that I know of, applies a similar mechanism to the training compensation. The question then is what makes football so special in order to justify such a restrictive system compared to e.g. the legal profession. A newly graduated law student will start his practical training at his first employment, developing the skills he has earned in law school. There is nothing that prevents him from moving after 5 years to another employment e.g. a law firm, without his old employer being able to charge a training compensation fee from the new employer. It may be that certain farm clubs i.e. clubs that specialise in the training of young players have costly training facilities. This training could then be compared to the years a law student spends in law school, which is not funded by the law firms themselves. But it can also reasonably be surmised that only the bigger clubs in the higher divisions have costly training facilities. These clubs have other sources of revenue to rely on to finance their training facilities e.g. revenues from television rights, advertising, receipts from merchandise, tickets and sponsorship agreements.

Smaller clubs in lower divisions operate under different conditions. Naturally they have smaller means than the bigger clubs and the prospect to receive training compensation for a player they have trained must of course be considered as beneficial. But to sustain their fortunes on such an uncertain, speculative activity as the transfer of players seems inapt to encourage more and better training of football players.

Necessity implies that the same aim cannot be achieved as effectively by any other means. The reason why any justification for the rules on training compensation would fail is that they are neither necessary nor indispensable for attaining the aim of encouraging more and better training of players and to create solidarity among clubs. For there exists an alternative that is even better suited to attain those aims, which is less restrictive of competition. This was a solution proposed by A.G. Lenz in *Bosman*, namely a fairer and more equitable sharing of the revenues generated within a league or competition among all the participating clubs. This alternative solution was also proposed by FIFPro, as an alternative to the transfer system.<sup>221</sup>

Revenue sharing may take on different forms but the general idea is that since all the clubs in a league are mutually dependent on each other and are jointly responsible for creating the product; sharing revenues would be justified and to the benefit of all parties involved.

A sporting contest requires the cooperation of competitors to produce the product – namely a game, or more correctly, a series of games. Further, if a league or competition is to generate interest, and enhance its income earning potential, it needs to maximise the uncertainty of results of any game. Uncertainty excites fans, sponsors and broadcasters, whereas predictability turns them away.<sup>222</sup> To achieve this, there needs to be some kind of balance

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<sup>220</sup> Opinion in *Bosman* at para. 237

<sup>221</sup> Parrish, *supra* note 16 at page 145

<sup>222</sup> Dabscheck, *supra* note 51 at page 70

in a league so that smaller are not entirely relegated, depriving the larger teams from necessary competitors. Further, there would be nothing to gain for a football club if it would force all the other clubs out of the market, literally speaking.

One of the economic peculiarities in professional sports is that “receipts depend upon sporting competition among the sportors or the teams, not upon the business competition among the firms running the contenders, for the greater the economic collusion and the more the sporting competition the greater the profits”<sup>223</sup>.

All the clubs in a league should thus have an interest in the health of one another.

A system could be set up that assured the redistribution of a proportion of income. A.G. Lenz pointed out that such a system would only be feasible if it was restricted to a fairly small portion of the income generated. If half the receipts or more were redistributed to other clubs, the incentive for the clubs in question to perform well would probably be reduced too much.<sup>224</sup>

The idea to redistribute income is not new in football. It is used *inter alia* in the UEFA Champions League. 75% of the revenue received by UEFA from television and sponsorship contracts and 50% of the revenue received by UEFA from new media contracts is redistributed to all the participating clubs. A small share of that income is also redistributed to the leagues, which have one representative or more in the competition. Part of the remaining revenue is used for solidarity payments to all the member associations of UEFA, including those of the Member States.<sup>225</sup> In order to make the system effective UEFA is exclusively entitled to exploit, retain and distribute all revenues derived from the exploitation of *inter alia* the television rights.<sup>226</sup>

A system by which the revenue from television rights is redistributed to all the participating clubs in a league could be set up at the national level in all the national associations as well. Even in a small football nation like Sweden the television rights to the Swedish top league "Allsvenskan" have proved to be worth a substantial amount of money. The television rights alone for the seasons 2006 to 2010 are worth 1.4 billion Swedish Crowns.<sup>227</sup> That money can be divided among the clubs in the league according to a formula that does not deprive the clubs of the incentive to perform well. Further, a small proportion of the television revenues could also be set aside in a solidarity fund to be redistributed e.g. for the promotion of training young players in lower divisions.

A further source of revenue that could be shared is the revenues derived from gate receipts. In the American football league “NFL” as much as 40% of the net gate receipts go to the visiting team in every match.<sup>228</sup> It need not even be so much as 40%. Even if 30% of the gate receipts go to the visiting

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<sup>223</sup> Neale, “The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition” at page 2

<sup>224</sup> Opinion in *Bosman* at para. 228

<sup>225</sup> Regulations of the UEFA Champions League 2006/2007, Article 24.06

<sup>226</sup> *ibid*, Article 25.02

<sup>227</sup> See Article in *Dagens Industri* 2006-03-02, available at [www.di.se/index/nyheter/2006/03/02/178095.htm?src=xlink](http://www.di.se/index/nyheter/2006/03/02/178095.htm?src=xlink)

<sup>228</sup> Halgreen at page 79

team, this would reinforce the solidarity among the clubs in a league and provide small clubs that lack big stadiums with money that could be invested in the training of players. On this note A.G. Lenz referred to an economic study by J. Cairns, N. Jennett and P.J. Sloane, 'The Economics of Professional Team Sports: A Survey of Theory and Evidence', [1986] *Journal of Economic Studies*, p. 3, where it was submitted that the following solution would be reasonable: the home club receives 50% and the away club 25% of the receipts; the remaining 25% goes to the association for distribution among all the clubs in the league.<sup>229</sup>

In my opinion, the revenue from television and related media rights, gate receipts and sponsorship revenue associated to the league or competition are most suitable for sharing, since these are revenues that are jointly created. FIFPro suggested that the revenue derived from merchandising should also be subject to sharing.<sup>230</sup> This may be reasonable for merchandise related to the league or competition as such e.g. bearing the trademarks of the national league or competition for example. The club related merchandise for example is only indirectly related to the joint cooperation of all the clubs and is more a result of the activities of the single club itself. The sharing of revenue that is generated by the clubs themselves would not be equitable in my opinion and would be more equal to a tax.

A redistributive system would permit the clubs concerned to budget on a considerably more reliable basis. Given the uncertain nature of training compensation payments, if a club could count on a certain basic amount which it will receive in any case, then solidarity among clubs is better served.<sup>231</sup> Instead of relying on the prospect to find a player that is likely to play professionally for another club, smaller clubs could plan their training activities in a more certain and foreseeable way.

In conclusion a redistributive system, like the one proposed above, is better suited to achieve the objectives of encouraging more and better training of young players and to create solidarity among clubs and which does not adversely affect competition within the common market. The rules on training compensation are thus not indispensable for attaining those objectives and thus do not comply with the principle of proportionality.

On the compatibility of Article 81(1) of the suggested redistributive system above, it was submitted by Beloff that "the creation, subject to scrutiny, of a common pool objectively distributing a proportion of the receipts from sporting events among clubs to encourage the development of young players" would not be affected by Article 81(1).<sup>232</sup>

### **7.1.4 Exemption under Article 81(3)**

According to the Helsinki Report on Sport referred to above the Commission found it likely that genuine agreements that meet the objective of encouraging the recruitment and training of young players can be granted an exemption under Article 81(3). In order to be granted an exemption, the

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<sup>229</sup> Opinion in *Bosman* at note 299

<sup>230</sup> Parrish, *supra* note 16 at page 145

<sup>231</sup> Opinion *Bosman* at para. 233

<sup>232</sup> Beloff at page lx

other provisions of the Treaty must be complied with in this area, especially those that guarantee freedom of movement for professional sportsmen and women.

There are two main reasons why the rules on training compensation would be found ineligible for exemption under Article 81(3). One, they restrict the freedom of movement of footballers, as was established in *Bosman*, since their change of clubs is made subject to the payment of a fee even at the expiry of their contract. This was also contemplated by A.G. Lenz, who argued that an exemption under Article 81(3) would make no difference to the breach of Article 39 EC. He consequently ruled out an exemption on that ground.<sup>233</sup>

Secondly, the rules are not indispensable, which is required under Article 81(3)(a).

### 7.1.5 Conclusion

The rules on training compensation have both as their object and effect the distortion of competition. They cannot be justified either under the sporting exception or a “rule-of-reason” test. Neither would they be eligible for exemption under Article 81(3).

## 7.2 Transfers under Contract

These kinds of transfers are not explicitly regulated in the Regulations. The starting point seems to be that a contract between a player and a club only can be terminated prematurely by mutual agreement.<sup>234</sup> The payment of a transfer fee seems further to be a matter between the player, his old club and his new club. If a player wants to move during his contract, he must obtain the consent, alternatively risk sanctions and compensation if he terminates his contract unilaterally, from his old club and they will not release the player if the new club does not agree to pay a transfer fee. More importantly the old club will not release his player license and the national association of the club will not issue an ITC. Before the player can play for his new club he must be registered under the new association and they in turn must receive a validly transferred ITC from the association of the old club. If a player moves under contract without the consent of his old club the association to which the old club is affiliated, will inform the new association that the ITC cannot be issued because the contract between the old club and the player has not expired and that there has not been a mutual agreement regarding its early termination.<sup>235</sup>

The old club will not consent to the transfer of the player under contract if they are not satisfied with the terms of the release. The transfer fee will in that case reflect the market value of the player, as it results from bargaining and not set calculation principles. As the market value of football players can be very high, transfer fees are set accordingly.

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<sup>233</sup> Opinion in *Bosman* at para. 278

<sup>234</sup> Regulations Article 13

<sup>235</sup> Regulations, Annex 3, Article 2.4

## 7.2.1 The Sporting Exception

The maintenance of transfer fees in football has been defended by the aim to maintain a financial and competitive balance between clubs.<sup>236</sup>

Equality among clubs and uncertainty as to results are intrinsic features to football and rules necessary to achieve those aims are in principle not caught by Article 81, according to the Commission.<sup>237</sup> It is however submitted that the payment of transfer fees for players moving under contract is not indispensable for attaining those aims, as will be established under section 7.2.3.

The rules on contractual stability aim to preserve the regularity and proper functioning of sporting competition. It is submitted that rules that are designed to meet these aims may be considered as justified on non-economic grounds necessary for the organisation of football. The organisation of football competitions requires some stability during season so that management, training and planning can be conducted with some foresight. It seems thus to be reasonable to protect contracts during season. In this regard consideration needs to be paid to the specificity of football. If the protected period of 2-3 years is reasonable is another question. It is not the fact of having a protected period but the length of it that is questionable. 2-3 years may be stretching the proportionality of it a bit too far. It is submitted that irrevocable contracts for one year or season are legitimate in the light of preserving the regularity and proper functioning of sporting competition, but that 2-3 years must be regarded as going beyond what is necessary to achieve the aim pursued. Besides, the rules on transfer windows should suffice to take care of unreasonable player movement in season.

## 7.2.2 Restriction of Competition

In examining whether an agreement is to be considered as prohibited by reason of the distortion of competition, it is necessary to examine the competition within the actual context in which it would occur in the absence of the agreement.<sup>238</sup> In this case it would be to compare with a regime where a player could terminate his contract unilaterally subject to national labour law principles such as proper notice and compensation for breach of contract. Under this regime the national association of his old club should also transfer his ITC unconditionally in any case where the player wants to transfer to another club, provided that the player has complied with said requirements of national law.

In principle the effect on competition is the same as under the rules on training compensation. High transfer fees favour the large and financially viable clubs, since they are the only clubs that can afford to pay them. Since an interested club has to pay a transfer fee to the old club of the player and remuneration to the player, it can fairly be asserted that transfer fees serve to

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<sup>236</sup> The *Bosman* ruling at para. 105

<sup>237</sup> See section 5.1

<sup>238</sup> Case 99/79, *SA Lancôme and Cospafrance Nederland BV v Etos BV and Albert Heyn Supermart BV* (1980) ECR 2511 at para. 24

artificially raise the price of a player. Player movement is therefore likely to be restricted to the large clubs. The Portuguese player Luis Figo for example commanded a transfer fee of 37 million GBP when he transferred from Barcelona to Real Madrid in the year 2000.<sup>239</sup> Naturally only a handful of clubs could afford to pay that amount. High transfer fees have the effect of reducing the choice available to the clubs in respect of players who might be recruited by them.<sup>240</sup>

Again, I would like to elaborate with an example. Club A has a five-year contract with player X, who is 25 years old. It is assumed that the player has neither just nor sporting just cause to terminate the contract. In this case the club can be relatively certain that the player will remain with the club for at least three years, given the suspension the player would face should he decide to terminate the contract unilaterally during this period. The club can also be relatively certain that another club will not induce the player to break his contract during this period, since that club could then be banned from registering any new players, either nationally or internationally, for two registration periods.<sup>241</sup>

There is no provision in the FIFA Regulations that would prevent another club from contacting club A, expressing an interest to buy player X. Neither is it prohibited for the player to first discuss a possible transfer with his club. Club A could then consider whether they are interested in selling the player. The contract of player A is now officially for sale. The transfer fee is set to ten million Euros. Only the biggest clubs in Europe can afford to pay such a high transfer fee and still afford to meet the remuneration demands of the player.

Had it not been for the rules on contractual stability, the player could inform himself of interested clubs and at the end of the season terminate his contract unilaterally. The player would probably be held to be in breach of his contract and would have to compensate his old club. That is however a matter between him and his old club, which does not affect any other club. Since the rules on contractual stability lead to a scenario that would require the involvement and consent of the old club, that club will not release the player unless a transfer fee is paid. Without the payment of a transfer fee, more clubs could be involved in offering the player a contract.

The rules on contractual stability in conjunction with the rules on player registration put the old club in a position of control and bargaining power. The payment of transfer fees under contract, favour the large clubs and distort the competition in their favour.

Implicit in the rules on contractual stability is that contracts should be protected unless they are terminated in mutual agreement, which presupposes agreement on the payment of a transfer fee. The rules act as a deterrent against unilateral termination of contracts and basically all behaviour where the club with the contract is not involved. The rules can thus be said to favour the club, owning the contract of the player.

Since these transfer fee are not regulated in the Regulations there remains some uncertainty as to the compatibility with Article 81. Player contracts

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<sup>239</sup> <http://www.footballtransfers.co.uk/transfers/rectrans.php>

<sup>240</sup> Egger and Stix-Hackl at page 88

<sup>241</sup> See pertinent rules under section 4.5.1

might for example have so-called buy-out clauses that stipulate in case of a transfer that the old club of the player is entitled to a transfer fee at a fixed amount. In that case it is not the result of a system, but an agreement in advance between the player and his old club. A.G. Lenz implied that a transfer fee could be demanded if the player and his old club had contractually agreed on it in advance.<sup>242</sup>

Apart from the cases where a transfer fee has been agreed in advance, it appears however that the payment of a transfer fee for players moving under contract is the result of a system or a concerted practice. For further analysis on the effect on competition I refer to the analysis under the training compensation rules in section 7.1.2.

That competition is affected to an appreciable extent can reasonably be surmised since transfer fees under contract can reach very high amounts. Player movement is therefore likely to be restricted among the big clubs. For further analysis on appreciable effect, I refer to the analysis under section 7.1.2.1.

### 7.2.3 Existence of Justifications

The aim to maintain a financial and competitive balance between clubs by preserving a certain degree of equality and uncertainty as to results was recognised by the Court in *Bosman* as legitimate.<sup>243</sup>

The finding of the ECJ in *Bosman* that transfer rules “neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs” is however still accurate under the new rules, since they allow transfer fees for transfers under contract.<sup>244</sup>

The national leagues in Europe tend to be dominated by a few teams. A prime example of this is the Scottish league. Seen in a perspective over the last 20 years, the club “Glasgow Rangers” have won the league 14 times and the other Glasgow club “Celtic” 6 times.<sup>245</sup> In the same time perspective “Manchester United” has dominated the English Premier League with 8 championship titles, followed by “Arsenal” with 5 and “Liverpool” with 3.<sup>246</sup> The German top division “Bundesliga”, has been dominated by “FC Bayern Munich” with 12 titles, followed by “Werder Bremen” with 3, “Borussia Dortmund” with 3 and “1.FC Kaisers Lautern” with 2.<sup>247</sup>

These statistics tell a plain tale of the equality among clubs and uncertainty as to results in European football. It can of course be argued that the dominant clubs are dominant because of their management and sporting ability. But that the transfer system leads to maintenance of a financial and

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<sup>242</sup> Opinion in *Bosman* at para. 262

<sup>243</sup> The *Bosman* ruling at para. 106

<sup>244</sup> *ibid* at para. 107

<sup>245</sup> <http://worldsoccer.about.com/od/scotland/a/splwinlist.htm>,

<sup>246</sup> <http://worldsoccer.about.com/od/england/a/engleaguewins.htm>

<sup>247</sup> [www.bundesliga.de/statistik/liga/saison.php](http://www.bundesliga.de/statistik/liga/saison.php)

competitive balance between clubs and uncertainty as to results is not convincing in the light of the statistics.

It is true that with the payment of transfer fees between clubs, money remains in the game, as opposed to leaving it in the form of payments directly to players in the form of salaries. It is also true that money may flow from the larger clubs to the smaller clubs with the system, if the latter were to succeed in unearthing talented players with the potential of playing in the big clubs. But, as was asserted under the rules on training compensation, transfer fees provide the smaller clubs with an incentive to sell their best players, presumably to the larger clubs. This would lead to the altering of the sporting balance in favour of the larger clubs and further widen the economic gap between the smaller and the larger clubs since sporting success is intrinsically linked to financial success.

It is also true that if smaller clubs should manage to transfer players, they could use the income generated by the transfer fees to sign new players. But, as was pointed out by Lenz, “since the bigger clubs usually pay higher wages, the smaller clubs will probably hardly ever be in a position themselves to acquire good players from those clubs”.<sup>248</sup>

As was asserted under the analysis of the rules on training compensation, any justification for the maintenance of transfer fee payments for players under contract would fail since they are not indispensable for attaining the aims they are said to do. In this regard the finding of the Court in *Bosman* referred to above is still accurate.

The aims are better achieved by a system where revenue is shared between the participating clubs of a league or competition and the establishment of a solidarity pool for lower leagues. I can content myself here with a reference to the observations under section 7.1.3.2 above.

On the compatibility of a redistributive system under Article 81 under the aims referred to above, Weatherill submits that “keeping a balance between clubs that prevents results for being a foregone conclusion is an intrinsic feature of sport and systems for sharing out income that are indispensable to the maintenance of this balance would be capable of eluding Article 81 altogether even though hard currency is very obviously involved”.<sup>249</sup>

## 7.2.4 Exemption under Article 81(3)

The main reason why the system of transfer fee payments for players under contract would fail is that they are not indispensable for attaining the objectives they are said to do, which is required by Article 81(3)3a.

It might also be the case that these transfer payments act as an obstacle to the freedom of movement of workers, protected by Article 39 EC. In a compelling analysis by Weatherill of the *Bosman* case, he points out that, “where a player wishes to switch from club A to club B while still under contract with club A, it would be as much a violation of the player’s Article 48 rights for the industry to impose sanctions on club B if it fails to acquire the player’s registration by paying a fee as it would were the circumstances

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<sup>248</sup> Opinion in *Bosman* at para. 224

<sup>249</sup> Weatherill, *supra* note 16 at page 82

to arise at the end of the player's contract. It is submitted that the principle asserted in the *Bosman* ruling suggests that rights under Article 48 to challenge rules laid down by sporting associations which require payment of a transfer fee should apply irrespective of the player's contractual relationship at the time with the club". "If the industry attempts to add sanctions against the contract-breaker it will violate that individual's Article 48 rights".<sup>250</sup>

The provisions on contractual stability furthermore act as a restriction on the player's freedom of contract and by extension his freedom of movement. The imposition of sporting sanctions and compensation for a unilateral termination act as a deterrent against it and as was pointed out by Halgreen, "As long as the rules say loud and clear ("Don't even try"), they have served their purpose".<sup>251</sup>

An exemption under Article 81(3) would not change the fact that the system is in breach of Article 39.

## 7.2.5 Conclusion

It is submitted that an implicit effect of the rules on contractual stability is that they provide for the clubs to demand a transfer fee for players moving under contract. The system, whereby clubs are allowed to demand a transfer fee for players moving under contract most likely confines player movement among the big clubs. The market structure is thus altered in their favour. It can even be said that the system allows for sharing of sources in supply between the big clubs within the meaning of Article 81(1)(c). The payment of transfer fees for players moving under contract seems to be an inherent feature of the transfer system. It can thus fairly be asserted that the system not only has the effect of distorting the competition but also the object.

## 7.3 Transfer Windows

Transfer windows in general restrict the possibilities for clubs to recruit new players and transfer players. It equally restricts the opportunities for players to move between clubs. It can also be said that transfer windows prevent clubs from increasing the attractiveness of their product by taking on new players during a certain period.<sup>252</sup>

The ECJ dealt with the issue of transfer windows, albeit under Article 39 of the Treaty, in the *Lethonen* case.<sup>253</sup> The Court acknowledged that the setting of deadlines for player transfers may meet the objective of ensuring the regularity of sporting competitions. Late transfers might be liable to change substantially the sporting strength of one or more teams in the course of the championship, thus calling into question the comparability of

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<sup>250</sup> Weatherill, *supra* note 34 at page 1029

<sup>251</sup> Halgreen at page 258

<sup>252</sup> Opinion of A.G. Alber in Case C-176/96 at para. 105

<sup>253</sup> Case C-176/96, *supra* note 48

results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole.<sup>254</sup>

It was thus established in *Lethonen* that transfer windows serve the legitimate aim to ensure the regularity of sporting competition. The Court, however, emphasised that such rules must not go beyond what is necessary for achieving the desired aim.<sup>255</sup>

It is submitted that rules on transfer windows could be regarded as justified on non-economic grounds relating to organisation of football and consequently fall outside the scope of the Treaty, if applied in a proportionate, objective and non-discriminatory way. This assertion is supported by Beloff, who considers “rules laying down fixed transfer periods for the transfer of players, provided that they guarantee a certain balance in the general economy of the relevant sport” in principle would not be affected by Article 81(1).<sup>256</sup> Weatherill also submits that rules on transfer windows would escape Article 81 in its entirety. He reasons that “such a restriction on buying and selling players amounts to a contribution to limiting the occasions on which money can talk and to focusing primary attention on clubs’ abilities to succeed by astute deployment of existing player resources”.<sup>257</sup>

Transfer windows essentially prevent richer clubs from buying the best players from other clubs in a league or competition during season in order to maintain sporting competition. This must be considered as legitimate. The rules provide for stability in a league during season. It would be no sport if in before a final for example, a financially more powerful club could simply buy the best players from the competition. This would substantially alter the competitive structure and the sporting outcome would have nothing to do with sporting merit.

It remains then to ascertain whether the rules are laid down in an objective, proportional and non-discriminatory manner.

The problem with the rules under scrutiny in the *Lethonen* case was that they provided for different transfer deadlines depending on which country or “zone” the transferred player originated from i.e. where he played before the transfer. Players from countries outside the European zone could transfer later in the season than players from the European zone. This was seen as going beyond what was necessary to achieve the aim pursued by the Court.<sup>258</sup>

According to the FIFA rules on transfer windows it is for the national association to fix the registration periods relevant for their territory. It is however mandated that these periods shall be fixed at certain points of the season. The first of those periods shall begin after the completion of the season and shall normally end before the new season starts. The period may not exceed twelve weeks. The second period shall normally occur in the middle of the season and may not exceed four weeks.<sup>259</sup>

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<sup>254</sup> *ibid* at paras. 52-54

<sup>255</sup> *ibid* at para. 56

<sup>256</sup> Beloff at page lx

<sup>257</sup> Weatherill, *supra*, **note 3** at page 83

<sup>258</sup> Case C-176/96, *supra* **note 48** at para. 57

<sup>259</sup> Regulations Article 6

The length of the football season varies somewhat between the national associations in Europe. Consequently the registration periods may fall differently between the associations. The Swedish top division season<sup>260</sup> for example falls between the 15 November and the 14 November the following year whereas the English top division season<sup>261</sup> falls between the 1 July and the 31 May the following year.

The objective of the FIFA rules on transfer windows, however, seems to be the establishment of harmonised transfer periods. That the national seasons in some cases vary are not by design to ascribe to the FIFA rules. The rules seem to be laid down in a proportional and objective manner since they do not explicitly discriminate on grounds of nationality or origin and are thus not to be regarded, as going beyond what is necessary to achieve the aim pursued

In conclusion the rules on transfer windows are a *question of purely sporting interest* and consequently fall under the sporting exception. As the rules escape Article 81 in its entirety, there is no need to analyse if they act as a restriction on competition.

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<sup>260</sup> Swedish Transfer Rules, Chapter 4 - 1§3

<sup>261</sup> “Rules of Association”, English Transfer Rules, section C2

## 8 Applicability of Article 82<sup>262</sup>

The Article only applies where an undertaking has a dominant position. The ECJ has defined a dominant position as a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.<sup>263</sup> It should be pointed out that Article 82 is also capable of application to a situation where two or more undertakings occupy a dominant position, so called “collective dominance”.

As the excerpt from the case referred to above implies, the finding of dominance presupposes a market definition of the relevant market (see section 6.2 above). Since FIFA is not active on the relevant market, which is the acquisition market for football players, it remains to be ascertained whether the clubs could be regarded as holding a dominant position together on that market. I should add that, even if the Regulations were regarded as a decision of associations of undertakings by FIFA, it would make no difference since they are not actively engaged in the transfers of football players. As A.G. Lenz pointed out, the question is if the professional clubs of the entire community occupy a dominant position.<sup>264</sup>

That there exists some kind of common interest among the clubs could be argued since they are mutually dependent on each other to provide the product; the competitions and leagues in which they participate. The interests of the clubs are, however, opposed when it comes to the engagement of football players since every club wants to engage the best players for themselves. The potential anti-competitive effects of the provisions in the FIFA Regulations are between the clubs and not between them as a collective and other competitors, customers or consumers. The clubs are the only active undertakings on the relevant market. The question of a collective dominant position of the clubs affiliated to FIFA in the Community could only be relevant if there existed an alternative organisation to FIFA or UEFA with clubs affiliated to this alternative organisation. In that case it could be argued that the Regulations reinforce the position of the clubs affiliated to FIFA in comparison to other clubs outside that organisational structure and that basically all sources of supply are brought within the system of FIFA, effectively preventing competing clubs from another organisation to engage players. But as that is not the case Article 82 is not in my opinion applicable to the transfer system under the FIFA Regulations.

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<sup>262</sup> As for the constituent elements of the Article, the terms “undertaking” and “trade between Member States”, have the same meaning as in Article 81 (see Chapter 6 above).

<sup>263</sup> Case 27/76 United Brands Company and United Brands Continentaal BV v Commission of the European Communities (1978) ECR 207 at para. 65

<sup>264</sup> Opinion in *Bosman* at para. 283

## 9 Conclusions

My main conclusion is that the transfer rules caught by Article 81 distort the competition on the acquisition market in favour of the large clubs. In terms of providing for a financial and sporting equilibrium between clubs the system of transfer and training payments has a fundamental weakness since they cannot guarantee that balance. If the training of young players is centralised to the youth academies of the big clubs and in effect very few players are transferred from smaller clubs, these clubs are put at a disadvantage both financially and competitively. They would have to compensate the big clubs if they wished to recruit players from them and at the end of the day the big clubs control all the talent anyway, enabling them to secure their place in the top of the leagues.

A redistributive system could at least guarantee that the money generated by a football league or competition is shared among all the clubs and a solidarity fund could be set up to guarantee that money “trickles down” from the top divisions to the lower and amateur divisions, ensuring that the solidarity between professional and amateur football is upheld. If in addition transfer and training fees were abolished, ultimately more clubs could be involved in player recruitment, providing for a more sound sporting competition between the clubs.

It would admittedly be difficult for FIFA to introduce an alternative system in the form of more equitable sharing of revenues. FIFA would have to make the case to the big clubs and they would naturally be opposed to a system that would mean less income and less control for them. The abolition of the transfer system would most likely also result in some organisational havoc before a new system could be properly installed. But as the ECJ stated in *Bosman* in terms of changing a system to conform with the law, “the possible consequences of a judgement on the organisation of football as a whole, although the practical consequences of any judicial decision must be weighed carefully, cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision”.<sup>265</sup> My point is that even if a fundamental organisational change would be difficult to execute, the law needs to be complied with regardless of the practical consequences.

Big clubs in different national associations only compete against each other in pan-European competitions such as the UEFA Champions League. They primarily compete in their respective national leagues. That a common interest to control player movement among the big clubs in different associations could perceivably exist is not outright impossible. These are however only speculations and a thorough investigation would have to be carried out in order to ascertain if such a common interest really did exist.

In my view, to regulate the transfer of players in an international framework such as the FIFA Regulations is not a feasible solution, since it is not capable of taking into account the differences among the clubs in higher and lower divisions and between the national associations.

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<sup>265</sup> The *Bosman* ruling at para. 77

The provisions of the Regulations that relate to the players' opportunities for finding employment and the terms under which such employment is offered e.g. the provisions on training compensation and contractual stability would be better placed in collective bargaining agreements. There could for instance be a pan-European agreement between UEFA and FIFPro and one for every national association. This way the rights of the players could be effectively safeguarded in a quid pro quo bargaining process. This solution would also have the advantage that the competition rules of the Treaty would not be applicable by virtue of the *Albany* case, where the ECJ held that agreements concluded in the context of collective negotiations between management and labour must be regarded as falling outside the scope of Article 81(1).<sup>266</sup>

The transfer system under the FIFA Regulations is also vulnerable, maybe even more so, under the provisions of free movement of the Treaty, most notably under Article 39. The application of Article 81 is more complex, since more requirements have to be fulfilled in order for the Article to apply compared to e.g. Article 39. Article 39 is further better suited to safeguard the rights of the players. The reason why the Commission investigated the international transfer system under Article 81 is because the Commission has no powers to bring proceedings directly against private parties for violation of Article 39.<sup>267</sup>

I don't necessarily advocate another intervention by the ECJ as in *Bosman*, but considering the judicial inactivity and the seemingly political influence asserted on the Commission, maybe the football world needs another *Bosman* to bring the system in line with EC law once and for all.

Sport in general and football in particular does have some peculiar features that separate it from other sectors of the economy. These features render the application of the competition rules more complex. It is thus understandable that the ECJ has repeatedly chosen to adjudicate sports-related cases under the provisions of free movement of the Treaty. But both Article 81 and 82 are well fit to take these features into account for a sensitive application to sport and football.

Professional football is a commercial activity in its own right. Apart from the rules inherent for the organisation of the game, and rules that serve to protect sports related non-economic interests as e.g. doping rules, there must be a thorough analysis of the rules that serve a commercial objective or that produce primarily economic effects under EC law, performed primarily by the Commission.

Even if the international transfer system is a settled affair for the Commission, the system is still vulnerable for individual litigants who can bring a case before a national court that can then refer the matter before the ECJ by way of a reference for a preliminary ruling. FIFA will probably go to great lengths to settle a case that has the potential of becoming another *Bosman*. In this regard it will be interesting to follow the case currently pending before the Danish courts for two reasons. One, the case deals with the legality of the rules on training compensation under *inter alia* Articles

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<sup>266</sup> Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfond*s Textielindustrie (1999) ECR I-5751 at paras. 59-60

<sup>267</sup> Weatherill, *supra* note 3 at page 85

81 and 82. Two, the case is brought by the Danish player's association, who is less likely to accept a settlement with FIFA unless the rules are substantially changed.

The ECJ will only consider a case on the merits and under the law. They will, thus not be as receptive for a compromise as the Commission was in the agreement with FIFA/UEFA from 2001. But in light of the successful use of soft-law by the sport world to influence the application of EC law and the uncertain position of sport under EC law, it is hard to predict with certainty how the ECJ would adjudicate on the transfer system in place under the FIFA Regulations.

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