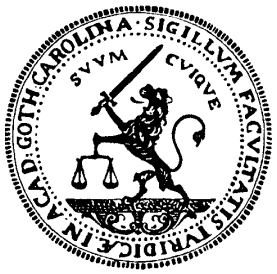

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Player Mobility Restraints Within the European Football Industry

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Contents

Summary

For the past fifteen years, ever since the Court of Justice's ruling in its landmark case *Bosman*, the sporting rules governing player mobility have been a hot topic. The ruling prohibited transfer fees for players out-of-contract thus putting an end to the restrictive transfer system hindering the free movement of football players. The Court also abolished the nationality restriction where clubs were prohibited from fielding more than three foreigners in club competitions arranged by UEFA. However, the Court took into account the specificity of sport and considered encouraging recruitment and training of young players and maintaining a competitive balance between clubs as objectives capable of justification. After a long struggle of the EU institutions to get the football governing bodies to adapt to the *Bosman* ruling, FIFA finally adopted the 2005 FIFA regulations on the Status and Transfer of Players allowing for training compensation related to the actual cost of training a player up to the age of 23. Even though the regulations appear more lenient, they still contain restrictive measures such as the requirement of training compensation, the solidarity mechanism, transfer windows and the contractual stability rules, all capable of hindering the players' right to free movement. The contractual stability rules are of particular concern as they provide the clubs with different tools to discourage or hinder a player from moving to another club if he desires to do so. There appears to be a problem of proportionality when it comes to the sanction imposed on the player and the compensation to be paid to his former club in case of unilateral breach of contract. It is seriously questionable whether those rules would survive a challenge before the Court as they would have to be justified on grounds of public interest.

With the entry into force of the Lisbon Treaty in December 2009, for the first time a special article on sport explicitly recognizing the "specific nature of sport" was inserted. Article 165 TFEU now provides the Commission with soft competence and the sports governing bodies with a supervised autonomy when dealing with sports governance. One can detect a new approach by the Court in its recent ruling in *Bernard*, a much feared case by the sports governing bodies because of its resemblance to *Bosman*. The Court implicitly gave its blessing to the FIFA Regulations providing rights to training compensation while taking into account the uniqueness of sport. When FIFA has intentions to enforce the so called 6+5 rule requiring clubs to field at least six club-trained players, the relationship between the EU institutions and the sports governing bodies and the approach towards players' free movement contra the specificity of sport will be put to the test. The future challenge is to find a fair balance between the players' rights to free movement and the specific nature of sport when dealing with disputes concerning player mobility where the assessments by the Court of Justice in collaboration with the Court of Arbitration for Sport will have a decisive role.

Preface

My interest in football dates back a long time. The discipline is fascinating in many ways as it engages, attracts and ties people of all ages and backgrounds together. Being part of the "football-family" myself, brings one closer to understanding the sport, and what is so special about it. However, one cannot forget that the beauty of the game has some serious implications on those involved in it, when football nowadays is big business. As the EU has now gained soft competence in the field of sports with the insertion of Article 165 TFEU, my choice of subject for this thesis was not very difficult as I saw a possibility to join the concepts of football with EU law, especially the controversial issue of player mobility and the specificity of sport. Free movement as a fundamental right within the EU and the competition rules are confirmed to be applicable to sports in the Court's case-law. With the recognition of the "specificity of sport" in Article 165 TFEU, i.e. the special characteristics of sporting activities, sporting rules and the governing structure, the challenge of the EU institutions and of the entire sporting movement will be to reconcile the rights to free movement of the players in shape of workers and the special status that sports now enjoy. My intentions are to establish the status of player mobility, whether their freedom won by the Belgian player Jean-Marc Bosman in the controversial *Bosman* case from 1995 which eventually led to the revised 2005 FIFA regulations on the Status and Transfer of Players, provides them with enough incentives to break away from their employer to seek success elsewhere, just as any other worker would be permitted to do.

My many thanks go to my supervisor Xavier Groussot for supporting my ideas for this thesis and for giving me freedom to go my own way. I would also like to thank my fellow classmates at the Masters' Programme in European Business Law for their support, interesting and inspiring discussions and, most importantly, the many laughs we have shared. Without them, the long days spent at the Juridicum library have been a lot easier to bear. To the people dearest to me, who have been patient with the past months' isolation, lack of time and stress on my part; thank you for believing in me.

Victoria Lundberg
Lund, May 2010

Abbreviations

AG	Advocate General
CAS	Court of Arbitration for sport
DRC	Dispute Resolution Chamber
EC Treaty	Treaty establishing the European Community
EEA	European Economic Area
EPFL	European Professional Football Leagues
ESLPI	European Sports Law and Policy Initiative
EU	European Union
FIFA	International Federation of Association Football
FIFPro	International Football Players' Union
FINA	International Swimming Federation
GNP	Gross National Product
IOC	International Olympic Committee
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UCI	International Cycling Union
UEFA	Union of European Football Associations
URBSFA	The Belgian National Football Association

1 Introduction

1.1 Background

> "In the view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between the 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".

This is the mantra stated by the Court of Justice[1] in *Bosman*[2]. the ruling that has had major implications on the football industry since the judgment on the 20 September 1995. The statement has been subject to controversy over the years as its underlying meaning seems to be read and interpreted differently depending on whether one is a stakeholder within the football industry believing that the "special characteristics" of sports should be respected or whether one embraces the application of EU law to sports just as any other sector.

The sports industry accounts for 2 percent of the combined GNP of the 27 member states of the EU[3] altogether. It therefore constitutes a significant part of the total economic activity within the EU. Football holds a considerable social and educational importance in Europe, being a part of the European tradition by engaging all kinds of people. From spectators, supporters, sponsors, trainers to young-, semi-professional and professional players. However, the European soccer industry is nowadays big business, clearly constituting an economic activity subject to EU law as it exerts economic effects on different levels of the market. Player transfers, sales of gadgets, souvenirs and tickets, matches, sponsorship deals, sales of broadcasting rights, player salaries and member fees are all examples of economic activities within the football sphere which all carry economic implications. Hence, it leaves no doubt that sports and economics overlap. However, different voices have been raised concerning the "specificity of sports" or the "special characteristics of sports". The general approach mainly of the international sports federations FIFA[4] and UEFA[5] is that sports should be considered as unique because of its special characteristics and therefore entitled to immunity from any legal control. Others find sports in no way different from any other economic activity and should therefore fall under EU law.

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[1] The Court of Justice will occasionally be referred to as "the Court".
[2] C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman* (*Bosman*) [1995] ECR I-4921, para 106.
[3] Blackshaw, "The 'specificity of sport' and the EU White Paper on sport: some comments", *ISLJ* 3-4, p 87.
[4] International Federation of Association Football.
[5] Union of European Football Associations.

In its landmark cases, *Walrave and Koch*[6], *Donà*[7] and *Bosman*[8], the Court has ruled that sport is subject to EU law, more precisely the rules governing free movement and competition, as far as it constitutes an economic activity. The European football industry has, ever since the controversial *Bosman* case concerning the transfer rules, been eager to separate sports from the application of EU law arguing that the case-by-case approach taken by the Court so far leads to legal uncertainty.

Rules governing player mobility such as the player transfer system are generally perceived to be a part of the control mechanism of management over players[9], hence providing the clubs with power and imposing restraints over the players' services and free movement. Player mobility is probably the most argued upon issue between the sporting movement, players and the EU, constituting a clash between the players' rights of free movement and the special characteristics of sport. Moreover, the interdependence between clubs separates it from all other normal industries. In the pre-*Bosman* era, as well as some time after the judgment due to the sports governing bodies' unwillingness to adapt to the ruling, clubs were forced to pay compensation for the transfer of a player out-of-contract, that way restricting players' ability to chose another employer if the clubs could not agree upon a transfer fee. The *Bosman* aftermath eventually led to a revision of the FIFA regulations on the Status and Transfer of Players in 2005. The Rules currently require a training compensation to be paid by the acquiring club for players up to 23 years of age related to the cost of training, in order to promote recruitment and training of young players and to safeguard the competitive balance between the clubs, objectives which in *Bosman* were regarded as capable of being justified. The *Bosman* ruling also prohibited the condition to field a maximum of three foreign players and two assimilated players as the rule amounted to discrimination based on nationality.

With the ratification of the Lisbon Treaty, the" specificity of sport" has now been recognized in Article 165 TFEU, providing the EU with soft competence regarding sporting matters and recognizing sports governing bodies' conditional autonomy in that their sporting rules have to comply with EU law, while taking into account the special characteristics of sport. Application of Article 165 TFEU might result in a, so desired by the sports governing bodies, move-away from the case-by-case approach to this point applied by the Court. However, the recognized autonomy might also allow a more aggressive lobbying for a re-introduction of the nationality clauses, as FIFA is aiming at imposing a 6+5 rule meaning that a club would be required to field at least 6 club-trained players. In March 2010 the Court handed down its judgment in *Bernard*[10], a case similar to *Bosman*. The football industry feared another *Bosman*-like chaos, again unraveling the

[6] Case 36/74, *B.N.O. Walrave and L.J.N. Koch vs Union Cycliste Internationale and others (Walrave and Koch)* [1974] ECR 1405.
[7] Case 13/76, *Gaetano Donà vs Mario Mantero* (*Donà*) [1976] ECR 1333.
[8] See supra note 2.
[9] Caiger & O'Leary, "The End of the Affair: The Anelka Doctrine – The Problem of Contract Stability in English professional Football " in Caiger & Gardiner 2000, p 198.
[10] C-325/08 *Olympique Lyonnais vs Olivier Bernard and Newcastle United* (*Bernard*) [2010] ECR I- 00000.

entire transfer system to the detriment of the clubs. The fear was, as I will show, rather overacted. Despite the revised FIFA regulations on the Status and Transfer of Players, the freedom enjoyed by the players is still restricted and new challenges are lurking around the corner, specifically when it comes to achieving a fair balance between the players' rights to free movement and the special characteristics of sport.

1.2 Aim

In the light of recent activities by the EU institutions regarding "sports law", such as the entry into force of the Lisbon Treaty and the latest ruling by the Court of Justice in the *Bernard*[11] case, my aim is to examine the current status of player mobility within Europe, specifically sporting rules amounting to restrictions on player mobility, in relation to EU's legal framework and the challenges the football industry is facing in order to comply with EU law. The transfer system is football's biggest institutional challenge since the 1995 *Bosman*[12] Court ruling which forced FIFA to adapt its Transfer Rules for out-of-contract players and drastically abolish its limits on foreign players to be fielded. However, the question still remains; is the freedom that Jean-Marc Bosman won the football players really adequate? To be able to answer the question, player mobility restraints in shape of the transfer system will therefore be in focus of this thesis. Nationality clauses, which is another measure able of limiting players freedom of movement and implicitly connected to the transfer system, will as well be examined and analyzed. In addition, my overall intentions are also to illustrate the developments in the area of sport in relation to EU law and then to highlight the potential change in approach to sporting matters by EU institutions when the specific nature of sport is now explicitly mentioned in the Treaty.

1.3 Method and materials

In order to achieve my aim of performing a legal analysis in the status of player mobility and developments of sports law in relation to EU trade law[13], I have primarily based the research on traditional legal method systematizing and interpreting applicable law by using mainly case-law from the Court of Justice, relevant literature and articles, Treaty Articles, guide-lines and other non-binding documents of the EU institutions. Considering the purpose, the relevant sporting rules governing player mobility have as well served as a primary source throughout this thesis. Thus, the purpose of the thesis has determined the choice of material for the research. I would like to point out that the amount of literature on sports law is limited since the discipline is still under development due to its novelty as

[11] See supra note 10.
[12] See supra note 2.
[13] Regularly referred to as a common term for free movement for workers, freedom of establishment, freedom to provide services and competition law in the sports law doctrine.

a field of law. However, books and articles by prominent scholars within the field of sports law like Richard Parrish, Samuli Miettinen and Stephen Weatherill have been very helpful during my work. The number of cases from the Court of Justice regarding sport disputes involving questions on compatibility of sporting rules with the Treaty provisions is not vast either, where *Bosman* is still the leading precedent. Since a professional sports career is rather short, bringing a case before the Court of Justice is time-consuming and costly for the individual sportsman/woman who risks to waste his or her career while waiting for a ruling to be handed down. Most sports disputes are therefore instead settled in the Court of Arbitration for Sport (CAS). I have used relevant cases by the Court of Justice that are connected to free movement of sportsmen combined with three important decisions of CAS as well as decisions from the FIFA Dispute Resolution Chamber (DRC) in order to enhance the substance of the analysis. Moreover, in support of my arguments two statistical studies have been relied on; a recent review of football finance performed by Deloitte Sports Business Group and a review of the professional football players' labour market provided by the Professional Football Players' Observatory (PFPO). In order to amplify the analysis, certain financial aspects have been addressed as well in that economics is a crucial factor within the sports industry in general and within the football industry in particular. Depending on how the law is interpreted and applied, there will be economic consequences for the industry. My objective has not been to set out explicit evidence of consequences of the transfer system and nationality clauses when using statistics, but rather to illustrate the general development of player mobility and transfer spending in Europe as well as the trends of club-trained players.

In addition, due to the fact that some of the primary sources, such as the FIFA regulations on the Status and Transfer of Players dating back to 2001 and earlier, a Commission Statement of objection, some press releases and communications, are removed from the internet, I have had to rely on secondary sources on occasions where I needed to refer to those documents.

1.4 Delimitation

Since sports law is a multi-faceted discipline, there is a vast amount of subject matters one could choose to examine. Sports cover aspects such as labor, broadcasting rights, trademarks and intellectual property, players' agents rules, betting, multiple club ownership and state aids which are all subject to different provisions of the Treaty. Trying to cover all the different aspects in a thesis like this involves a risk of there not being much space left to make a substantial analysis. I have therefore chosen to focus the thesis on the controversial labor aspect. More precisely rules governing player mobility that are capable of hindering the free movement of players, specifically the transfer system and nationality clauses. The thesis takes account of professional players within the territory of the EU. The Treaty rules governing free movement of workers are fundamental throughout the thesis. However, since sporting rules governing mobility can also be caught under the competition rules, that set of rules has to be taken into account as

well where appropriate. Any extensive analysis of the compatibility of the transfer system or nationality clauses with EU competition law will thus be disregarded.

Due to the recent legal developments regarding the applicability of EU law to sporting rules and the relationship between sports and the EU institutions with the entry into force of Article 165 TFEU, I found it both necessary and crucial to present the reader to the possible changes of approach in applying EU law to sporting rules by the Court of Justice. Thus, the overall development of sports law in connection to player mobility from the time of *Bosman* pervades throughout the entire thesis.

1.5 Disposition

I have taken into account the fact that sports law is still considered a new field of law within the framework of EU law and consequently the possibility of the reader's vague awareness of this subject. Therefore, I found it appropriate to start out by giving a basic introduction to the structure and organization of football in Europe, the established applicability of free movement rules and competition law to sports by the Court. The thesis then follows by a thorough presentation of the controversial *Bosman*[14] case regarding the transfer system of players that turned the football industry upside down as it questioned the autonomy of the sporting rules in a legal context, specifically those governing the mobility of players. In order to understand the implications of the *Bosman* ruling and what mobility restraints players encounter today, I will in Chapter 4 introduce the reader to the increasing interventions and involvement by the EU institutions requiring the sports governing bodies to adapt to the *Bosman* judgment, which eventually led to the adoption of the new FIFA transfer rules. In Chapter 5 my analysis focuses on the provisions of the transfer system that exert restrictive effects on the free movement of players and the grounds of justification those provision are able to enjoy. I have as well examined cases from the CAS and from FIFA's Dispute Resolution Chamber (DRC), in order to understand the assessment made and to detect the consequences of the decisions and their implications in terms of free movement and the specific nature of sport. The last parts of the thesis are dedicated to recent developments within the area of sports in relation to EU law since the 2006 Court's ruling *Meca-Medina* and the Commission's policy in its 2007 White Paper on Sport became a springboard for a new approach. Possible implications of Article 165 TFEU which explicitly recognizes the specific nature of sport is discussed in the context of the nationality clauses and future Court rulings in connection with player mobility restraints. Finally, I have examined the recent Court ruling in the *Bernard* case which the sports governing bodies feared to become a new *Bosman*, and the implications of the Court's assessment in the light of the recent developments. The conclusion gathers the main findings of the analysis, answering the question initially asked.

[14] See *supra* n. 2.

2 Football and EU law – Background

2.1 Horizontal application of the provisions on free movement and competition law to sports

In *Walrave and Koch*[15], *Donà*[16] and *Bosman*[17], the Court has insisted that Article 45 TFEU is applicable to private parties as sporting associations despite their nature of private bodies. The main criterion under which free movement rules take direct horizontal effect is when the free movement of persons is restricted by collective regulation[18].

It has been clear ever since the first case on professional sport, *Walrave and Koch*[19], from 1973 that sports fall within the scope of the Treaty only insofar as it constitutes an economic activity within the meaning of Article 2 EC Treaty[20]. Discrimination against foreign players is accepted when it comes to matches between national teams as they are not of economic nature but only a matter of national identity and a traditional way to measure rivalry between countries. However, the said principle cannot apply in a league match since clubs do not constitute national representative teams. League football does instead constitute an economic activity. Many clubs are registered companies and some are even listed on the stock market. Hence, clubs are primarily businesses. Does Article 45 TFEU have horizontal direct effect? I.e., can a private party invoke the Article against another private party? In *Walrave and Koch* the Court made clear that the provisions of Article 45 are not only of vertical effect, but can be extended to apply to private bodies as well as state bodies. The rules under challenge in this judgment made up by the international sporting association UCI (Union Cycliste Internationale) which governs cycling, stated that the cyclist and his motorcycle pacemaker who assists on long rides must be of the same nationality. Two Dutch pacemakers, Bruno Walrave and Noppie Koch, had been accompanying cyclists of other nationalities due to the low amount of Dutch top cyclists. The UCI rules deprived them of their capacity to make a living on their profession and they therefore challenged the rules before the Court. The Court had to consider whether the treaty rules could be applied on UCI as a private body. The Court stated the following:

[15] See *supra* n. 6.
[16] See *supra* n. 7.
[17] See *supra* n. 2.
[18] Reich 2007, "Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights", *CMLR* 44, p 716.
[19] *Walrave and Koch*, para 4.
[20] Repealed and replaced by Article 3 TFEU.

> "Prohibition of such discrimination does not only apply to the actions of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services"[21].

It was then up to the national Court to decide whether the rule derived from a" pure sporting interest" or not. The *Walrave and Koch* ruling was confirmed in *Donà* which concerned discriminatory rules of the Italian Football Federation (FIGC[22]). The rules of the FIGC provided that only players who were affiliated to the FIGC could participate in matches as professional or semi-professional players. Further, affiliation was in principle open only to players of Italian nationality. The Court repeated the ruling in *Walrave* stating that Article 45 is applicable to rules or practices adopted by a sporting organization which limit the possibilities to take part as a professional or semi-professional player in a game to nationals of the Member State in question[23].

The exceptions laid down in Article 45 (3)-(4) are not applicable to football authorities. The reason is that the exceptions seem to be limited to State bodies. The exceptions hence only cover public considerations. Therefore it is not likely that a private party would be able to successfully invoke one of the exceptions to justify a discriminatory rule. There is a risk of overlap in the scope of application of Article 45 and the competition rules in the private sphere[24]. In particular AG Lenz expressed in his opinion in *Bosman* that "no reason can be seen why the [transfer] rules at issue in this case should not be subject both to Article 48 [now Article 45 TFEU] and to EC competition law. The EC Treaty at various places regulates the inter-relationship of the various fields in which its provisions apply. For Article 45 on the one hand and Article 85 [now Article 101 TFEU] on the other hand there is no such provision, so that in principle both sets of rules may be applicable to a single factual situation"[25]. However, he then explained that an impediment of Article 45 cannot be saved by the exemptions laid down in Article 101 (3) anyway as free movement of persons is a fundamental freedom protected by the Treaty[26].

There is not much to question about the generally accepted fact that clubs as well as football associations are regarded as "undertakings" or "associations of undertakings" within the meaning of Articles 101 and 102 TFEU. They all participate in the common market, and are involved in different economic transactions. As mentioned before regarding free movement, national representative teams are excluded from the scope of the competition rules as well as they are separated from the economic activity framework.

There is nothing that indicates why the national discriminatory football rules should not be able to be examined under the competition rules. There might exist agreements between national clubs and their governing associations which could fall under Article 101. A football league might be

[21] *Walrave and Koch*, para 17.
[22] Federazione Italiana Gioco Calcio.
[23] *Donà* see *supra* n. 7, para 19.
[24] Weatherill 2007, p 60.
[25] Opinion of Advocate General Otto Lenz, ECR [1995] I-04921, para 253. My additions.
[26] Ibid., paras 277-78.

considered to be an association of undertakings within Article 101, consequently with the player regulations being regarded as decisions of an association of undertakings. There could also be agreements between such associations and the European football federation UEFA. They are all together part of the same cartel with an aim to restrict players movement and distorting competition. The discriminatory practices by national associations might also constitute abuse of a dominant position within the meaning of Article 102. Competition law will not be applicable to all rules and practices applied by sports bodies and associations. Therefore, the competence of the European Commission under Articles 101 and 102 TFEU is limited to economic activities of the sports governing bodies and associations[27].

2.2 The European sports model

Even though most people, even the most uninterested ones, are familiar with the concept of football as such, I believe it is necessary to first briefly introduce the reader to the organization of football in Europe in order to understand the legal environment surrounding it.

In 1999 the European Commission recognized the existence of a "European Model of Sport" by publishing a Consultation Document with a detailed description of the core features of the model[28]. The Consultation Document identified six specific features which form the corner stones of the model. The core feature is perhaps the structure of the organization of football in Europe. International football is organized in a hierarchical pyramid structure, with FIFA on top of the pyramid. FIFA is a private association operating under Swiss law and has its base in Zurich. It organizes international competitions like the World Cup and sets up rules and regulations which are to be followed by the actors further down in the hierarchy. As FIFA is exercising monopoly power over football, it is treated as a quasi-public body, hence, using its independency in a way that makes its practices somewhat unpredictable[29]. One step under FIFA in the hierarchy are the continental federations who are part of FIFA and whose regulations require its approval. Europe has one football federation, UEFA, also governed by Swiss law, with one member representing each country. UEFA organizes European championships as the prestigious UEFA Champions league where the top clubs in each national league participate,

[27] *Walrave and Koch,* para 4; *Donà,* para 12; *Bosman,* para 73; Joined Cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union Européenne de judo* (C-51/96) *and François Pacquée* (C 191/97) (*Deliège*) [2000] ECR I-2549, paras 41-42; Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB) (Lehtonen)* [2000] ECR I-2681, paras 32-33.

[28] European Commission , DG X, "The European Model of Sport – Consultation Document of DG X", 1999. Available at: http://www.sport-in-europe.com/SIU/HTML/PDFFiles/EuropeanModelofSport.pdf

[29] Beloff et al. 1999, p 18.

the recently formed Europa League[30] and the European Football Championship. At third level are the national football associations[31]. UEFA is comprised of 53 national associations[32], including in particular those of the Member States which, under the UEFA Statutes, have undertaken to comply with those Statutes and with the regulations and decisions of UEFA[33].

The national associations organize national championships and regulate the sport activities. Each national association enjoys competence to regulate itself subject to national legislation as there typically is only one association regulating each sport[34]. Regional federations form the next level downwards in the pyramid. They are responsible for organizing regional championships on regional level. Clubs are usually members of such federations. In Germany for instance, there are regional umbrella-organizations which comprise all the clubs in one region[35].

At the bottom of the pyramid are the clubs, the players, other interested actors at national level and amateur bodies and the so called "grass roots". The grass root feature of the European Sports Model is perhaps the one which attracts most voluntary leadership. In 2007 some 10 million volunteers were estimated to be actively involved in training players and organizing competitions in 700 000 clubs[36]. Hence, the clubs bear most of the responsibility for the development of players and putting together teams[37]. The pyramid structure implies an interdependence between the levels both on the organizational as well as on the competitive level, as competitions are organized on all levels. The system of promotion and relegation is to be found on each level in the pyramid and is the key feature of the European Sports Model. By winning promotion, a team on regional level can either qualify to national or European championships, or get relegated if it fails to qualify. The system allows for arrival of new competitors and makes the championships both more interesting and unpredictable than a closed one. As far as concerns the organization and the regulating of football, FIFA has a monopoly on global level whereas UEFA possesses a monopoly on European level. Generally, the monopolistic nature and the institutional structure of the federations is accepted as being the most efficient way of organizing sports. The rules of most national and

[30] Replaced the former UEFA Cup. The number of competing teams from each domestic league are qualified according to a special scheme. For more details concerning the qualifications to the different championships, visit: www.uefa.com

[31] Some examples are FIGC (Federazione Italiana Gioco Calcio, Italy), FA (the Football Association, England), RFEF (Real Federacíon Española de Fùtbol, Spain), FFF (Fédération Française de Football, France) and SvFF (Svenska Fotbollsförbundet, Sweden).

[32] See UEFA.com /memberassociations/index.html.

[33] UEFA Statutes 2010 edition, article 7bis. Available at: http://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/General/01/47/69/97/1476997_DOWNLOAD.pdf

[34] Nafziger "A Comparison of the European and North Amrican Models of Sports Organisation" in Gardiner et al 2009, p 37.

[35] See the consultation document *supra* n.14, para 1.1.1.2.

[36] Commission Staff Working Document "The EU and Sport: Background and Context" SEC (2007) 935, 11 July 2007. Accompanying Document to the White Paper on Sport, para 2.4.1.

[37] See Nafziger *supra* n. 34, p 39.

international federations stipulate that their members may only participate in championships that are organized or at least authorized by the federations themselves[38].

[38] See *supra* n. 36, para 3.2.

3 *Bosman* – how it all began

3.1 Introduction

> "The fact that the manifestly unlawful transfer rules which were established and relentlessly imposed by FIFA, UEFA and the Belgian Football Association lasted for more than 30 years before an explicit European Court judgment condemning them was finally obtained is no accident. It is due to a deliberate conspiracy on the part of those who run the game to keep the law on the matter rigorously in their own hands and mercilessly crush any attempt to attack the system through the normal system of law, to the extent of depriving individuals of their livelihood"[39].

These harsh words, aimed at the regulatory sports bodies, constitute a conspiracy theory accusing the football federations of deliberately wanting to keep football as a law unto itself whatever the cost. Academics seem to be convinced that football is a tight cartel where FIFA and UEFA are strong entities leaning on the assumption that their influence on the international football arena renders them immune from any legal intervention[40]. The *Bosman*[41] ruling in fact launched a first attempt to provide a European regulatory framework for sport[42]. *Bosman* was therefore, as will be shown, a ground breaking judgment concerning post-contractual labor mobility of players in the Union, leading to a transformation of the rules of international football by forcing FIFA to revise the rules on international transfers in order to get them in line with the ruling of the Court. I will start by briefly presenting the background to the transfer market and the applicable transfer rules and nationality clauses at the material time of *Bosman*.

3.1.1 Why transfer fees?

The original intention of the transfer market was to keep the salaries of the better players on a decent level and to prevent all talent from ending up in just a few large clubs leading to a loss of excitement and unpredictability of the competition[43]. In order to avoid that scenario, clubs would get paid every time a player was transferred to another club. This is what has caused so much commotion over the years as legal experts believe that the transfer rules are contrary to EU law, at the same time as the football associations defend the transfer market arguing that sports should be governed by different rules other than those governing other economic industries. One of the main arguments defending the transfer fees is the concern over the

[39] Blainpain & Inston, 1996, p 2.
[40] Weatherill, 2007, p 87.
[41] C-415/93 *Union Royal Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman* (*Bosman*) [1995] ECR I-4921.
[42] Halgreen, 2004, p 47.
[43] Blainpain & Inston, 1996, p 19 who in turn refer to S. Késenne, "Voetbal kan zonder transfermarkt", *De Standaard*, 2-3 December 1995.

financial survival of smaller clubs. Redistribution of income[44] by receiving a transfer fee would keep the smaller clubs solvent and encourage recruitment and development of young talents. Further, there is a concern that the training and development of young players will suffer as the talents are able to leave the club that trained them without any compensation being granted to the club, both for the economic loss and for the loss of competitive power suffered by the club.

3.1.2 The old transfer system and the "3+2" rule

According to the old FIFA and UEFA regulations, clubs were entitled to compensation for international transfers of players. If two clubs could not agree on a transfer fee, a UEFA board of experts would rule on it to a maximum limit of five million Swiss francs. However, subsequent amendments removed the maximum sum. Both the FIFA and UEFA Regulations required a player who moved from one country to obtain an international transfer certificate before he could take up employment with his new club[45].

The FIFA Regulations and UEFA Rules provided in particular that a professional player could not leave the association he was affiliated to as long as he was bound by his contract and by the rules of his club and the national association. An international transfer could not take place unless the former national association had issued a transfer certificate confirming that all financial commitments, including a transfer fee, had been fulfilled[46]. There was, and still is, a transnational underpinning by the UEFA/FIFA Regulations which are enforced at national level regarding the relationship between the clubs and the players. The selling club would not release the player's registration until it was satisfied with the terms offered by the buying club normally involving a transfer fee from the buyer to the seller. According to the 1994 FIFA Regulations governing the status and transfers of football players, applicable to both amateur and non-amateur players[47], a non-amateur player would only be free to conclude a contract with another club if his contract with his present club had expired or would expire within six months[48]. If a non-amateur player would conclude a contract with a new club, his former club would be entitled to compensation for his training and/or development[49]. The amount of compensation was to be agreed upon between the two clubs involved. Any agreement made between the player

[44] Weatherill, 2007, p 89.
[45] Dabschek 2004, "The Globe At Their Feet: FIFA's New Employment Rules – I", *Sport in Society*, 7: 1, p 74.
[46] *Bosman* see *supra* n. 41, para 16.
[47] Players who have never received any remuneration for their participation in activity connected with association football are regarded as amateur, while any player who has received remuneration for his activity that exceeds the amount of his expenses is to be regarded as non-amateur. See for instance article 2(2) of the FIFA regulations on the Status and Transfer of players (2009 edition).
[48] Regulations governing the Status and Transfer of Football Players (1994), article 12. The regulations are inserted in Blainpain & Inston 1996, p 39-56.
[49] Ibid., article 14.

and his former club or between a third party and the former club regarding the amount of compensation would be disregarded[50].

The FIFA/UEFA Regulations clearly demonstrate that a football player, at the time of the *Bosman* case, was not free to work his or her contract through to its expiry and then offer his services to another employer on the labor market if he or she wished to do so. Until the clubs had arranged the transfer of the player's registration certificate, the buying club would be forbidden to field the player in any official match under the rules of the relevant national association[51]. It was, however, stipulated that a player, in case of disagreement regarding the amount of the transfer fee between the trading clubs, would not be prevented from practicing his sporting activity and a transfer certificate could not be refused for this reason[52]. Nevertheless, the transfer rules provided loopholes to the advantage of the selling club. The requirement imposed on the buying club to pay a transfer fee to the selling club, underpinned by sanctions in the event of failure to pay, had distortive effects on the planning by clubs and consequently also on the players' opportunities to conduct their profession by not being able to choose employee, while the selling club remained in control of the situation.

In addition to the restrictive transfer rules, at the material time, clubs were not free to field any player they wanted in official matches. Interestingly, in April 1991 a compromise was struck in a "Gentleman's Agreement" between UEFA and the Commission regarding the nationality restriction rules. The restriction generally followed the "3+2" model, meaning that a club could field only three "foreign" players and two "assimilated"[53] players at the same time in a game, and was mandatorily imposed in club competitions organized by UEFA. In national leagues the number of foreign players could be higher. However, clubs were free to *sign* as many foreign players they wished. From the end of the 1996/97 season the 3+2 rule was to apply not only in the highest division clubs in each Member State, but in all other divisions as well which were regarded as professional. It may seem a bit surprising that the "3+2" rule was given green light by the Commission when the compatibility of it under EU law was clearly disputable[54].

3.2 Facts and the dispute

Jean-Marc Bosman, a Belgian national born in 1964, was a promising young football player playing as a professional in the Belgian club RC Lìege from 1988. His contract with RC Lìege[55] expired on 30 June 1990. In April 1990 RC Lìege offered him a new contract for one season, however, reducing his salary to the minimum amount provided for in the statutes of the Belgian

[50] Ibid., article 15.
[51] Weatherill, 2007, p 89.
[52] See *supra* n. 48, article 20(1).
[53] An assimilated player had played in the country of the association in question for a period of five years in a row without interruptions, including three years in a youth team.
[54] Parrish, "Reconciling Conflicting Approaches to Sport in the EU" in Caiger & Gardiner 2000, p 28.
[55] SA Royal Club Liégeois.

national football association, URBSFA[56]. Mr. Bosman refused to sign the contract since he could not support his family on the salary offered to him and was consequently placed on the transfer list. The amount of the transfer fee was fixed to BRF 11 743 000, based on age and salary, in accordance with rules of the URBSFA. As no club showed any interest of the transfer, Mr. Bosman contacted the French club US Dunkerque[57] which played in the French second division. US Dunkerque and RC Lìege reached an agreement on the terms of Bosman's transfer, which stipulated that Bosman was to be transferred to US Dunkerque for one season in return for a payment of BRF 1 200 000 which was to be realized on the receipt on the transfer certificate from URBSFA. However, both contracts, i.e. the one between Bosman and US Dunkerque and the one between US Dunkerque and RC Lìege were subject to the condition that the contracts would become void if the URBSFA transfer certificate would fail to reach the French Football Federation by 2 August 1990. RC Lìege began to have some doubts as to the solvency of US Dunkerque and therefore decided not request the URBSFA to forward the transfer certificate to the French Football Association. In other words, RC Lìege refused to release Mr. Bosman's registration, consequently leaving the contracts null and void. RC Lìege asked the URBSFA to suspend Mr. Bosman on the grounds that he had refused to sign the contract offered to him by the club and that no other club had shown interest in signing him. A suspension meant that RC Lìege would not have any obligation to continue paying Mr. Bosman's salary as from 30 June 1990. At this point Mr. Bosman was left without any source of income and was not able to play in the 1990/91 season.

Mr. Bosman decided to take his case to court. In addition he applied to the Lìege Court of First Instance for an interlocutory decision ordering RC Liège and URBSFA to refrain from impeding his engagement, in particular by requiring payment of a monthly sum of money. His main argument was that the transfer system was a violation of the right of free movement of persons within the EU and a violation of the EU rules on competition. Despite the interim order granted to him, the referring court spelled out their suspicion that Bosman was being boycotted[58] by leading clubs after 1990 as he found himself playing for ever smaller clubs as his case progressed through the courts. The matter reached the Court of Justice in October 1993 after the Lìege Court of Appeal decided to stay the proceedings, as the examination of the claims raised against RC Lìege, URBSFA and UEFA involved an examination of the lawfulness of the transfer rules. The national Court referred following questions to the Court for a preliminary ruling under Article 177 EC[59]:

> "Are Articles 48, 85 and 86[60] of the Treaty of Rome of 25 March 1957 to be interpreted as (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club; (ii) prohibiting the national and

[56] ASBL Union Royale Belge des Sociétés de Football Association.
[57] SA d'Économie Mixte Sportive de l'Union Sportive du Littoral de Dunkerque.
[58] Weatherill 2007, p 91.
[59] Now Article 267 TFEU.
[60] Now Articles 45, 101 and 102 TFEU.

international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organize?"[61]

The Court found itself having to determine the legality of the transfer system in the light of EU law. The first question referred to the Court by the national court relates to the obstacles that Mr. Bosman had to face in connection with the unsuccessful move to US Dunkerque. The second question might appear as not having anything to do with Mr. Bosman's situation. However, the national court considered, after a suggestion by Mr. Bosman, that a review of the lawfulness of the nationality clauses was in place since Mr. Bosman's claim in their regard was based on Article 18 of the Belgian Judicial Code, which permits actions "with a view to preventing the infringement of a seriously threatened right". Mr Bosman had adduced factual evidence suggesting that the damage which he fears, i.e. that the application of those clauses may impede his career, would in fact occur[62]. The Court therefore considered itself able to answer both questions referred to it by the national court.

3.3 Judgment of the Court

3.3.1 The opinion of AG Lenz

The opinion of AG Otto Lenz is probably one of the longest[63], complex, most substantiated, nevertheless comprehensive opinions I have encountered so far. This intensely discussed opinion deserves to be highlighted, as it is a great attempt to clarify the principles of EU law applicable to the case of sports. His opinion is divided into fractions dealing with the organization of sports, transfer rules and the nationality restriction of the football industry separately, basing his argumentation mostly on a vast amount of previous case-law. AG Lenz recognizes, in the first paragraph of his preliminary observation[64], the major implications and impact of the case on the professional football industry within the EU. He then goes on with a thorough examination of the admissibility of the questions referred, especially concerning the second question which had caused several objections as to how the nationality restriction affected Mr. Bosman. The facts relating to the second question were alleged to be a merely hypothetical factual situation. The AG stated that a question is not hypothetical just because the fact on which it is based has not yet occurred[65]. However, the most striking argument put forward by AG Lenz regarding the admissibility of the second question can be found in paragraph 117 of his opinion where he argues that it is "extremely unlikely" that a reference will ever reach the Court again which raises the question of compatibility of the restriction on foreign players with EU law. He basis his

[61] *Bosman* see *supra* n. 41, para 49.
[62] Ibid., para 44.
[63] The opinion consists of 287 paragraphs and no less than 367 footnotes.
[64] AG Lenz opinion in *Bosman*, para 56.
[65] Ibid., para 99.

statement on the claim that is clear that the football associations are unwilling to abandon those rules and that they moreover consider them to be compatible with Community law. In addition he stated that "the insistence with which they have put forward their argument that the second question submitted is inadmissible might easily give an impartial observer the impression that they simply do not want the rules on foreign players to be tested by reference to Community law"[66].

After confirming the admissibility of the referred questions AG Lenz established, without any need of deeper analysis, that the nationality restrictions is discriminatory as they place players from other Member States at a disadvantage with regard to employment access compared to players who are nationals of the relevant Member State[67]. The fact that the nationality restriction had been approved by the Commission was according to the AG of no legal relevance as it is for the Court alone to interpret the provisions of the Treaty. The Commission has therefore no right to amend the scope of the Treaty by its own actions[68]. He then turns to the question of the transfer system and its compatibility with Article 45 in conjunction with Article 49 regarding the freedom of establishment, stating that there is a clear parallel between those two provisions when it comes to the solution to certain factual situations[69]. Based on previous case law of the Court AG Lenz encourages an interpretation of Article 45 as a general prohibition on restriction of free movement, hence extending the scope of Article 45 beyond the mere prohibition of discrimination on grounds of nationality[70]. As a professional football player could not move freely to a club in another Member State under the applicable transfer rules since the rules directly impeded the *access* to the employment market in other Member States. The fact that the UEFA/FIFA transfer rules had been somewhat liberalized not making the entitlement to play dependent on a transfer fee being paid did not make any difference since the transfer itself was due the payment of a fee. Thus AG Lenz considered the transfer rules falling within the scope of Article 45. They could only be lawful if they were to be justified by imperative reasons in the general interest and did not go beyond what was necessary in order to achieve the objectives[71]. AG Lenz found the transfer rules not to comply with the principle of proportionality[72] and found mainly two alternative ways to reach the objective of securing the economic and competitive balance between the clubs; redistribution of income at national level or within the relevant association[73], or alternatively, a collectively agreed salary cap[74]. The objectives sought such as a degree of balance between clubs and encouragement of recruitment and training of young players could hence be obtained by less restrictive means which would not impede the free movement of professional players.

[66] Ibid., para 117.
[67] Ibid., para 135.
[68] Ibid., para 148.
[69] Ibid., para 165.
[70] Ibid., para 194.
[71] Ibid., paras 215, 223.
[72] Ibid., para 234.
[73] Ibid., paras 232-233.
[74] Ibid., para 226.

AG Lenz then went on to the application of the competition rules to sports stating that there is no reason why both sets of rules (i.e. Article 45 and Articles 101 and 102 TFEU) cannot be applied. Both the nationality restriction and the transfer rules are horizontal agreements between clubs (undertakings[75]) subject to Article 101 which impede competition between the clubs as they are not able to field certain players[76]. As far as concerned Article 102 AG Lenz considered it not being relevant since the case did not concern undertakings occupying a dominant position but agreements between undertakings[77].

After the summary of AG Lenz's main points I will now turn to the judgment of the Court which, as will be shown, largely confirmed the conclusion reached by the AG.

3.3.2 Ruling of the Court

The Court started out by confirming the applicability of EU law referring back to the *Walrave and Koch* and *Donà* judgments[78] hence rejecting the arguments put forward by the football associations that smaller clubs carry on an economic activity only to a negligible extent[79]. Even though the Court was not prepared to give football as an industry special treatment regarding the applicability of EU law, it was aware of the serious implications the judgment would have on it. However, the Court stated that the awareness of the implications could not "go so far as to diminish the objective character of law and compromise its application on the ground of the possible repercussions of a judicial decision"[80]. The Court basis its ruling on Article 45, consequently rejecting the argument by the German government regarding the principal of subsidiarity tied to the freedom of association and autonomy enjoyed by sporting federations under national law. It declared that intervention by EU authorities cannot not be limited to what is strictly necessary, hence, allowing the freedom of sporting associations to adopt sporting rules that impede the exercise of rights conferred on individuals by the treaty[81]. The Court tied the scope of Article 45 together with Article 49 specifically stating that the rights of free movement would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State[82]. Therefore, provisions that restrict the exercise of an individual right do constitute an obstacle to that freedom even if the provisions are not based on nationality[83]. By referring to its previous judgment in *Daily Mail*[84] the Court emphasized the importance of establishing coherent principles which link

[75] See p 7.
[76] AG Lenz opinion in *Bosman,* para 262.
[77] Ibid., para 286.
[78] *Bosman* see *supra* n. 41, para 73.
[79] Ibid., paras 70-71.
[80] Ibid., para 77.
[81] Ibid., para 81.
[82] Ibid., para 97.
[83] Ibid, para 96.
[84] Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc* (*Daily Mail*)[1988] ECR 5483, para 16.

the different treaty provisions governing the internal market together. As far as concerns Article 34 TFEU[85], the Court made a reference to *Keck and Mithouard*[86] stipulating that Article 34 TFEU does not apply to measures which restrict or prohibit certain selling arrangements as long as they apply equally to all relevant traders operating within the national territory and as long as they affect in the same manner in law and in fact the marketing of domestic products as well those originating from other Member States. The rules at issue in the main proceedings indeed applied to both transfers between clubs belonging to the same national association and to clubs belonging to different national associations, however, the rules still directly impeded the player' access to the employment market in other Member States. For this reason the Court did not regard the rules at issue to be comparable with the case-law in *Keck and Mithouard* where it was held that the rules on selling arrangements fall outside the scope of Article 34[87]. While the direct impediment of the access to the employment market also affected those who wished to obtain market access in their home state as the transfer between clubs belonging to the same national association was dependent on a transfer fee, perhaps the correct analytical basis should have been Article 101. Yet, by using aforesaid expressions the Court avoided a further discussion on the application of the competition rules and instead followed the Court's ruling in *Alpine Investments*[88] as a clarification to *Keck and Mithouard* that a restriction on market access without any nationality discrimination does not automatically escape EU trade law. In *Keck and Mithouard* the limit on commercial freedom could not be directly connected to any cross-border aspect of the activity in question. The Court in *Bosman* clearly followed the market access approach drawn upon in *Alpine Investments*[89]. In the latter case the Court rejected pleas of analogy to selling arrangements in *Keck*, stating that the contested rules prohibiting so called "cold calling" "directly affect access to the markets in services in other Member States"[90].

The Court considered the transfer rules to be contrary to Article 45, thus constituting an obstacle to freedom of movement for workers. The rules could only be justified if they pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. However, the application of the transfer rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose[91]. In paragraph 106 of the judgment the Court lays down two aims which could be possible grounds for justification of the rules. The first ground relates to the need for maintaining the competitive balance between

[85] Ex Article 28 EC Treaty,
[86] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (*Keck*) [1993] ECR I-6097, para 16 and *Bosman*, para 102.
[87] *Bosman* see *supra* n. 41, para 103.
[88] C-384/93 *Alpine Investments vs Minister van Financiën* (*Alpine Investments*) [1995] ECR I-1141.
[89] *Keck and Mithouard* see *supra* n. 86, para 16
[90] *Alpine Investments* see *supra* n. 88, para 38. For further explanation and analyses of the Courts's return to a model of Treaty rules based on non-discrimination and market access see Barnard 2007, p 262-273.
[91] *Bosman* see *supra* n 41, para 104.

clubs and the other one is attached to the importance of encouraging the recruitment and training of young players. However, the Court emphasized that the transfer fees are contingent and uncertain as they are calculated on the basis of age and salary of the player and not on the actual costs borne. Moreover, it is impossible to predict the sporting future of young players and only a limited number of those players go on to play professionally. Therefore, the transfer fees cannot constitute a decisive factor when it comes to financing training activities[92]. The Court concluded that the aims could be achieved by less restrictive means which did not impede free movement for workers, just as the AG had pointed out in point 226 of his opinion. The transfer rules were therefore held to be incompatible with Article 45[93].

Regarding the nationality rules, the Court found that they limited chances of employment consequently constituting an obstacle to free movement for workers. In so far as participation in matches is essential for a professional player's activity, a rule which restricts that participation naturally also restricts the player's chances of employment[94]. The Court made an interesting point in paragraph 131 of the judgment:

> "[A] football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region or, in the case of the United Kingdom, the territory covered by each of the four associations. Even though national championships are played between clubs from different regions, towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such matches".

The Court was convinced that players' nationalities is not in any way associated with the identity of the clubs, thus separating club competitions from competitions between national teams[95]. Regarding the fact that the Commission had given green light to the nationality restriction clause, the Court said that the Commission may not give guarantees concerning the compatibility of certain practices with the Treaty provisions. Consequently, the Court ruled that Article 45 precludes the nationality restriction as well.

What is worth noticing is the Court's reluctance to assess the applicability of Articles 101 and 102. According to the Court there was no need to rule on the interpretation of the competition rules as both rules at issue in the case had been condemned to be contrary to Article 45[96].

3.4 Comments

From a legal point of view the *Bosman* ruling was not very surprising, especially regarding the nationality clauses, as they had already been decided on in *Donà* and no justification was presented in order to enjoy an exemption from Article 45. With regard to the abolition of the transfer rules it could be argued that the transfer system per se was non-discriminatory since it treated national and foreign players in the same way. However,

[92] Ibid., para 109.
[93] Ibid., para 114.
[94] Ibid., para 120.
[95] Ibid., para 127.
[96] Ibid., para 138.

taking into account the fact that free access to the labor market is fundamental within the EU, the Court chose to apply the principles stipulated in the *Cassis de Dijon* case[97]. The Court took into account the specificity of sport in so far as it accepted a training compensation in view of the social importance of sporting activities and in particular football in within the EU[98].

One of the conclusions that can be drawn from the judgment is the awareness of the difficulty to convince EU authorities to leave sports alone. The judgment shows how, at the time, EU law could spread into areas outside its boundaries where the EU[99] lacked explicit competence. AG Lenz and the Court crushed every argument put forward by the football industry and every attempt to persuade the Court that football is not economic in nature. Nor did the Court accept the argument that FIFA and UEFA are placed in Switzerland and therefore lie beyond the jurisdiction of the EU. Their statutes are implemented within the territory of the EU, thus having to comply with EU law.

When reading the opinion and the judgment, one can get the impression that both AG Lenz and the Court are treating the football industry like any other industry operating on the market. This is only true to a certain extent. Since sport is undoubtedly an economic activity it is subject to EU law, thus similar to other industries exerting economic effects. However, the Court did acknowledge the specificity of sports[100], leaving open a possibility of "special treatment" by EU authorities. In fact, the two alternative routes proposed by AG Lenz could perhaps even be considered unlawful if they were to be applied within another industry. Especially his main suggestion; the redistribution of income between clubs in order to safeguard the existence of smaller clubs. There would probably not even be any incentives to conduct such a system within a "normal" industry. It all comes down to the interdependence between the different clubs. Without a mutual interdependence no possibility would exist to measure the strength of the clubs in between each other, which is the purpose of sports as such. In contrast, within a normal industry the undertakings strive to eliminate their competitors. No competition, no sport. It is as simple as that.

Regarding the nationality restriction in relation to national team competitions, the Court referred back to its judgment in *Donà* stating that rules which exclude foreign players from certain matches for reasons which *are not of an economic nature* and are thus of *pure sporting interest* like matches between national teams from different countries, are not precluded

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[97] Case 120/78 *Rewe-Zentrale AG vs Bundesmonpolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649. The *Cassis de Dijon* judgment stipulated a principle of mutual recognition, see especially paras 14(4), 8. The fundamental assumption is that once goods have been lawfully marketed in one Member State they should be allowed into another State without restrictions (unless the State of import could invoke one of the mandatory requirements, i.e. effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer), hence encapsulating a market access approach confirmed in *Alpine Investments* and *Bosman.*

[98] *Bosman*, para 106.

[99] EC, at the material time.

[100] *Bosman*, para 106.

by the Treaty provisions on free movement[101]. The reasoning seems completely plausible at first appearance. However, whether this statement would still be valid today is questionable. Normally, players do get remunerated[102] for participation in their respective national teams. I would therefore disagree with the Court's statement that national team matches are entirely of non-economic nature. Participation in national representative matches clearly exerts economic effects, at least in relation to the players' activity[103]. In support of my argument, AG Lenz in fact had a similar line of reasoning in his opinion when stating that "in view in particular of the fact that matches between national teams - as in the football World Cup - nowadays indeed have considerable financial significance, it is hardly still possible to assume that this is not (or not also) economic activity"[104]. On the other hand, the *formation* of national representative teams is a question of purely sporting interest and has nothing to do with economic activity as it is a matter in the public interest and of national rivalry in allowing national teams contest each other on the field. Clearly, without a nationality restriction in connection with nationality teams there would be no sense of having representative teams competing with each other, and consequently no World Cup or European Championship, if a nationality restriction was to be abolished completely from all professional football. My only concern is that it might have been more appropriate to justify nationality clauses in games between national teams based solely on the "pure sporting interest" notion.

Why the Court was unwilling to use the competition rules in *Bosman* is to some quite surprising. However, my presumption is that the reason to the decline might perhaps be the "stretched out" free movement rules in the judgment. It has to be remembered that *Bosman* did not involve any particular cross-border problem while he would have encountered the same obstacle (requirement of a transfer fee) had he wished to transfer within Belgium. Thus applying the competition rules as well would risk to cause too much of a commotion than it already did. Doubtlessly, there is a complexity attached to the application of competition rules to sports. As has already been shown, it is perfectly possible that a rule which complies with Articles 101 and 102 might still violate Article 45[105]. It seems , thus, that an assessment of the free movement rules in a case such as that in *Bosman* has to be made anyway even if the Commission has declared that the competition rules have not been infringed. An assessment in the light of the competition rules is perhaps more convenient in cases concerning other

[101] Ibid., para 127.
[102] Remuneration usually takes the form of bonuses. Confirmed by Mr. Lars Richter, financial manager of the SvFF, by email dated 2010-04-23.
[103] It has to be pointed out that according to the FIFA regulations for the Status and Transfer of Players (2009) Annex 1 Article 3(1) a player who has been called up by the association he is affiliated to must, *as a general rule*, respond affirmatively. How this obligation affects the relationship between the player and the national association is a matter for discussion. I would claim that the forgoing strengthens my suggestion that participation in the national team consists of more than only a sporting element, but an economic element as well.
[104] AG Lenz opinion, para 139.
[105] See p 10.

subject matters like ticket sales[106] and broadcasting rights[107] where the Commission has been quite active. The Commission's actions in those areas are in part provoked by the *Bosman* ruling which triggered awareness of the role of litigation in relation to sports and the massive importance of broadcasting within the sports sector alongside the development of media.

What is remarkable about the *Bosman* case is that one cannot but ask why Bosman had to take his case all the way to court in order to get released from his contract when the rules of URBSFA and UEFA actually provided that a player was not to be affected by a transfer dispute between his former and his new club. My simple explanation to this reflection would be that it all came down to obtaining "the rights" of the player, for which there were only two ways; the club could either train the player from the beginning in its youth academy or it could buy *the rights to field a player* by paying the transfer fee to the former club. Bosman was subject to the latter situation. By not having obtained Bosman's registration the contracts between US Dunkerque and Bosman and between RC Liege and US Dunkerque respectively, were considered null and void. The release of the transfer certificate being conditional upon a payment of the transfer fee, was what stopped Bosman from playing for his new club, clearly demonstrating a loophole in the old transfer system despite the stipulation that a player would not be affected by a transfer dispute.

[106] See for instance; 1998 Football World Cup, Commission Decision 2000/12/EC, *OJ* 2000 L 5/55.
[107] See for instance; UEFA's broadcasting regulations, Commission Decision 2001/478/EC, *OJ* 2001 L 171/12.

4 The effects of *Bosman*

4.1 Introduction

The period following the Bosman ruling opened up for real confrontation between the sports governing bodies and EU institutions where the former considered the judgment a disaster and an attack on the football community[108]. As far as concerns the governance structure of football, the intervention from the EU institutions in connection with Bosman had a twofold effect. First, the EU institutions have since *Bosman* gained a supervisory role as football was ruled to be subject to EU law, and second, the ruling opened up for new stakeholders such as FIFPro[109]. However, in line with the delimitations of this thesis, the most remarkable consequence was the eventual revision of the transfer rules and the abandonment of the nationality clauses. As professor Lars Halgreen describes it: "[The] Bosman case killed overnight two of the most sacred cows in European Professional sport, namely the old transfer system and the nationality clauses"[110]. As far as concerns the transfer system, the ruling affected only about 10 percent[111] of the active soccer players in Europe, i.e. players out of contract, who were now able to take advantage of their strengthened negotiation position, getting paid at their real value. However, the rest of the players were left unaffected by the ruling as the judgment left under-contract issues unresolved. In order to make the best out of the situation, clubs started instead to transfer players during the course of their contract period to make sure they gain economically, whereas the most valuable players were tied to the clubs on longer terms to limit the risk of losing them upon expiry of their contract[112].

The "football may be different but football players should not be"-approach taken by the Court led to a scrutiny of the entire system by the Commission.

4.2 The international FIFA transfer rules rivisited

In January 1996 the Commission sent a letter of warning to FIFA/UEFA requiring them to comply with the *Bosman* ruling and EU law by abolishing the transfer rules and nationality clauses in question and to inform the

[108] García 2007, "The New Governance of Football: What Role for the EU?" in Gardiner et al. 2009, p 117.
[109] International Football Players' Union (FIFPro) is the leading representative organization for all professional football players.
[110] Halgreen 2004, p 167.
[111] Drolet 2006, "Extra Time: Are the New FIFATransfer Rules Doomed?" in Gardiner et al. 2009, p 169.
[112] Ibid., p 169-70.

Commission within six weeks of the measures taken[113]. FIFA decided to adopt new transfer regulations in October 1997[114]. According to the new Regulations players were allowed to move to another club in another Member State at the end of their contract without the transfer being conditional on a transfer fee. The nationality clauses were in turn abolished and in UEFA competitions clubs were no longer restricted to fielding only a certain number of foreign players. The new system nevertheless contained restrictive provisions. Particularly it prohibited players from transferring to a new club following a unilateral termination of the contract, even though the player had complied with national law governing sanctions in connection with breach of contract. Moreover, it allowed clubs to receive transfer fees for players whose contracts had been terminated by mutual consent. Further, the regulations still contained encouragement of high transfer fees which were unconnected to the training costs actually incurred by the selling club. The Regulations also allowed a transfer fee to be paid for transfer of players from non-EU countries to EU countries who were either under or out of contract[115]. The Commission consequently launched a formal investigation[116] in December 1998 objecting to the mentioned provisions which amounted to a potential breach of Article 101. The Commission stipulated a deadline of 31 October 2000 for FIFA to submit formal proposals to amend the international transfer system. In case of failure to do so, the Commission would declare the transfer system incompatible with Article 101. FIFA and UEFA formed a transfer task force and produced a joint "Negotiation Document"[117] on a revised transfer system which was sent to the Commission. The document stipulated the desire to maintain contract stability, possibility for clubs to be rewarded for the investment in training and recruitment of young players and a requirement to enforce a new system of distribution of income in order to maintain the competitive balance between clubs. The international players union, FIFPro, rejected the proposals made by FIFA on grounds that the desire to keep contractual stability imposed undue restraints on players because of the impossibility to unilaterally break a contract and freely move to another club once compensation had been paid in accordance with national labor law. FIFPro held that the hidden agenda behind the Negotiation Document was the desire of the clubs and the football

[113] See Commission press release "Professional Football: Letter of Warning From the Commission to Uefa", IP/96/62. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/96/62&format=HTML&aged=1&language=EN&guiLanguage=en

[114] FIFA Regulations for the Status and Transfer of Players, October 997.

[115] Parrish & Miettinen 2008, p 175. The 1997 FIFA Regulations have been removed from the internet.

[116] Ibid., p 175. The investigation is not available to the author. However, see as well Commission press release "Commission closes investigations into FIFA regulations on international football transfers", IP/02/824. Available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/824&format=HTML&aged=1&language=EN&guiLanguage=en

[117] Parrish & Miettinen 2008, p 175-176 who refer the FIFA/UEFA Negotiation Document (International Transfer of Players) which unfortunately is not available on UEFA's website anymore.

governing bodies to continue limiting players' earnings and negotiation power.

4.2.1 The Helsinki Report on Sport

By the end of 1999, the socio-cultural coalition[118], comprising FIFA/UEFA, Commission was facing success in the attempts to turn around the Commission's approach[119]. In December that same year the Commission presented a Report to the European Council on the important social functions of sport[120]. The Report announced that the "social function" of sports, which is also asserted in the Amsterdam Treaty's Declaration on Sport[121], had faced new challenges. In the section "Clarifying the Legal Environment of Sport"[122] the Commission gave brief summary of the pending disputes like the failure to cope with the economic consequences post *Bosman* in connection with unrestricted player mobility. The Commission embraces in its Helsinki Report the notion that sport provides for at least two aims that distinguishes it from a "normal" industry[123] which would allow specific justifications for restrictive practices within the sport industry. The Helsinki Report outlines three specific categories of situations into which sporting rules could fall; i) practices which do not come under the competition rules, ii) practices that are, in principle, forbidden by the competition rules and iii) practices likely to be exempted from the competition rules.

4.2.1.1 Practices which do not come under the competition rules[124]

Practices like "the rules of the game" consist of ground rules, the rules of the national associations which determine the composition of the national teams and rules necessary for the organization of the competition[125]. Rules permitting only eleven players on each team on the field in a game, or that of national representative teams which restrict the nationality of the players do not fall under Article 101 (1) since they are of pure sporting interest and

[118] The socio-cultural coalition believes that sport should be largely exempted from EU law due to its social and cultural characteristics which merit a soft touch application of law. Actors of the socio-cultural coalition within the football sector are typically the sports governing bodies. See Branco Martins, "Regulation of Professional Football in the EU: The European Social Dialogue as a Basis For the Creation of Legal Certainty" in Gardiner et al. 2009, p 332f.

[119] Dabschek 2004, "The Globe At Their Feet: FIFA's New Employment Rules – I", Sport in Society, 7: 1, p 83.

[120] Report from the Commission "The Helsinki Report on Sport", COM (1999) 644 final. (The Helsinki Report).

[121] The Declaration states specifically: "The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport".

[122] The Helsinki Report, p 6ff.

[123] See *Bosman supra* n. 2, para 106.

[124] I exclude practices which fall outside the aim of the thesis.

[125] The Helsinki Report, p 8.

are necessary for the organization of the sport itself. As mentioned earlier[126], there is a traditional competition between national representative teams, which in itself carries discriminatory selection policies. However, it lies beyond the scope of EU law as it is a rule based on pure sporting interest, despite the possibility players are given to increase their earning potential when exposing themselves international caps. In *Deliège*[127] which concerned a female Belgian judo practitioner who had not been selected to take part in an international tournament due to disciplinary issues, the Court pointed out that, in contrast to the rules in *Bosman*, the selection rules at issue did not determine the conditions governing access to the labor market and did not contain any nationality clauses, but governed the number of places in a tournament[128]. Further, the Court stated that although selection rules like those at issue inevitably have the effect of limiting the number of participants in a tournament, such a limitation is "inherent" in the conduct of an international high-level sports event[129], thus confirming that the aim of the rules of the game is not to distort competition but to actually allow it.

4.2.1.2 Practices that are, in principle, forbidden by the competition rules

Obviously, the systems of international transfers based on arbitrarily calculated payments which bear no relation to training costs seem to have been prohibited, irrespective of the nationality of the player concerned[130].

4.2.1.3 Practices likely to be exempted from the competition rules

Under this category, which perhaps is the most interesting and intriguing one, the Commission cites the *Bosman* ruling when stating that an exemption would probably be granted to agreements which are aimed at achieving the objectives of maintaining a balance between clubs, while preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players[131]. The same would probably apply to a system of transfers or standard contracts based on objectively calculated payments that are related to the costs of training. However, the provisions of the Treaty must be complied with in this area, especially those who guarantee free movement for professional sportsmen and women.

Redistribution of income as a measure to attain the aims stipulated, is likely to be exempted from the competition rules with regard to the paragraph 106 statement made by the Court in *Bosman*. Thus, wealth distribution among the clubs could be regarded as inherent to sport due to the interdependence which characterizes the football industry. Without

[126] See section 2.4.
[127] *Deliège* see *supra* n. 27.
[128] Ibid., para 61.
[129] Ibid., para 64.
[130] The Helsinki report, p 8-9.
[131] *Bosman*, para 106.

arrangement of income redistribution amongst the clubs, the crucial uncertainty would be lost in professional sport[132].

The problematic part in relation to this category of situations is the distinction and definition of practices that are of pure sporting nature such as the rules of the game and rules which are of economic nature and which have to be exempted in order to escape the provisions of the Treaty[133]. What obviously is at stake here are the roles of the Commission and the governing bodies of the football industry, where the latter are pushing for more autonomy regarding what they consider to be rules of the game and of pure sporting interest, whereas the Commission has been reluctant to playing the role of a sports regulator[134]. However, with the entry into force of the Lisbon Treaty, the EU institutions have now soft competence in the area of sports. I will discuss the implications of the sports Treaty Article in section 6.3.

4.2.2 The emergence of the new transfer system

Following the December 2000 European Council in Nice, a Declaration on sport was pronounced and annexed to the Presidency Conclusions[135]. The Declaration supported, in relation to the transfer system, a dialogue on the transfer system between the sports 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[136]. Despite objections from FIFPro and disagreements between FIFA and UEFA as to how the negotiations with the Commission had been handled, a new transfer system was finally agreed in March 2001. Commissioner Mario Monti confirmed in a letter to FIFA President Sepp Blatter that the Commission will not adopt a negative decision in the procedure that was open against FIFA with regard to the Transfer Rules[137]. The discussion

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[132] One of the measures to redistribute income amongst the clubs is collective selling of broadcasting rights. However, such agreements must comply with Article 101. The Helsinki report warns that any exemptions granted in the case of joint sale of broadcasting rights must take account of the benefits for consumers and of the proportional nature of the restriction on competition in relation to the legitimate objective pursued. See the Helsinki report, p 9.

[133] Weatherill 2007, p 150.

[134] The reluctance of the Commission could be illustrated by its decision regarding the 1998 World Cup Ticket distribution where the organizing committee for the tournament had violated Article 82 of the EC Treaty and a symbolic fine of €1000 was imposed. Considering the small fine, the value of the Decision could be seen as negligible. Nevertheless, it is a warning that such conduct will not be tolerated in the future. See *supra* n. 106.

[135] Presidency conclusions, "*Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies*". Nice European Council meeting on 7-9 December 2000.

[136] Ibid., para 16.

[137] Letter from Mario Monti to Sepp Blatter qouted in Parrish & Miettinen 2008, p 176 as the letter is not available to the author.

between the Commission and FIFA/UEFA resulted in an agreement upon a set of principles which were regarded as compatible with Community law.

The principles relevant for the thesis allowed for a compensation mechanism for players aged under 23 to encourage recruitment and development of young players, a solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and education of a player, including amateur clubs and allowed one transfer period per season, including a further limited mid-season window, with a limit of one transfer per player per season. As far as concerned contract stability, the principles stipulated a minimum and maximum duration of contracts of respectively 1 and 5 years and contracts were to be protected for a period of 3 years up to the age of 28 and 2 years thereafter. The contract length was intended to avoid tying the players to clubs for unreasonably long time. A system of sanctions was introduced to preserve the regularity and proper functioning of sporting competition so that unilateral breaches of contract were only possible at the end of a season. Further, financial compensation was allowed in case of unilateral breach of contract either by the player or the club. Proportionate sporting sanctions were to be applied to players, clubs or agents in the case of unilateral breaches of contract without just cause, in the protected period. In case of a dispute, arbitration was to be voluntary and did not prevent recourse to national courts[138]. The Executive Committee of FIFA undertook, in agreement with UEFA, to proceed immediately to change its existing Regulations . FIFA adopted the new Transfer Rules in July 2001, referred to as the "Monti rules"[139].

FIFPro was however unhappy about the new international Transfer Rules, claiming them to be even more restrictive with regard to the free movement of players than before. The objection was aimed at, amongst other things, the minimum contract length, the sanctions in case of unilateral breach of contract and the operation of the sporting just cause[140]. FIFPro's wish was obviously to bring players' contractual rights into conformity with national employment laws[141]. Nonetheless, FIFPro and FIFA reached an agreement in August 2001 on FIFPro's participation in the implementation of the new rules[142]. Following the agreement, the new Regulations came into force in

[138] Commission Press Release, "Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers". IP/01/314. Available at:
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/314&format=HTML&aged=0&language=EN&guiLanguage=en

[139] FIFA Regulations for the Status and Transfer of Players, July 2001. It is said that Commissioner Mario Monti had been personally implicated in the drafting of the new transfer rules, thereof referred to as the "Monti rules".

[140] Parrish & Miettinen 2008, p 177 who in turn refer to M. Bennet, "They Think It's All Over … It Is Now! How Extra Time Was Required to Finally Settle Football's Transfer Saga", 9(3) *Sport and the Law Journal* (2001).

[141] Parrish & Miettinen 2008, p 177.

[142] See "Joint Press Release of FIFA and FIFPro" on 31 August 2001. Available at:
http://www.fifa.com/aboutfifa/federation/releases/newsid=79159.html#joint+press+release+fifa+fifpro

September 2001[143], whereby the Commission closed the investigation of FIFA's international Transfer Rules[144]. However, the Monti rules still showed some inconsistencies. In line with the Helsinki Report, the Monti rules tried to provide clubs with more incentives to recruit and train young players. Nevertheless, the new system did not guarantee any additional investment in training and development as the fees would have to be sufficiently high in order to be effective[145]. In addition, the 2001 Transfer Rules still contained a compensation requirement for young out of contract-players, leaving wide discretion to the national associations to determine the compensation ceiling, apparently contradictive to the *Bosman* ruling. Despite the call for taking into consideration the absence of a contract[146], the rules would probably have been struck down again had they been challenged before the Court. From the quite large amount of circulars sent by FIFA to the national associations regarding the application and interpretation of the new Transfer Rules[147] one can detect an obvious ineffectiveness of the 2001 Transfer Rules leaving clubs, national associations and others involved in a state of uncertainty. In order to manage the complex compensation system, a new level of bureaucracy had to be created, adding more to the feeling that the new system was worse than the old one apart from the questionable legality of it[148].

[143] The 2001 version of the FIFA Regulations for the Status and Transfer of Players and the accompanying Regulation governing the Application Of the Regulations regarding the Status and Transfers of Players ("Application Regulations"), are removed from FIFA's website, however referred to by Drolet 2006, see *supra* n. 111, in Gardiner et al. 2009, p 175-177.

[144] Commission Press Release "Commission Closes Investigations into FIFA Regulations on International Football Transfers". IP/02/824. See *supra* n. 116.

[145] Drolet 2006, "Extra Time: Are the New FIFA Transfer Rules Doomed?" in Gardiner et al 2009, p 175.

[146] Application regulations, para 5 (5) referred to by Drolet 2006 see *supra* n. 143.

[147] FIFA issued as many as seven circulars from the time of the adoption of the 2001 transfer rules. See circular no. 769 (24 August 2001), 775 (3 October 2001), 799 (19 March 2002), 801 (28 March 2002), 818 (12 September 2002), 826 (31 October 2002) and 867 (18 September 2003), all relating to the interpretation of the new transfer rules. Available at: http://www.fifa.com/newscentre/news/releaseslist.html

[148] Drolet 2006, see *supra* n. 145, p 177. As for the legality of the new system, an argument that the Commission had approved the 2001 Transfer Rules has not much bearing as it had done the same with the rules applicable in *Bosman* which were later invalidated by the Court.

5 The 2005 FIFA regulations and player mobility restraints

In order to meet the criticism, FIFA had to simplify the Monti rules while still having to comply with the *Bosman* ruling. It did so by introducing the 2005 transfer system[149]. The FIFA Transfer Rules have been amended a few times since 2005, and the latest edition is dated to October 2009. However, comparing the 2005 and 2009 editions no major changes have been made in the latter version[150], nor any changes of relevance for the thesis. Most of the literature refers to the 2005 version. Therefore it is perfectly compatible to use the 2005 edition as a point of reference without diminishing the legitimacy of the facts or arguments put forward as they are still valid today. Are the new Transfer Rules completely satisfactory with regard to the *Bosman* ruling? Being able to answer this question in affirmative would of course be optimal. However, it is not the case. When examining the new Transfer Rules it is not hard to find inconsistencies that have remained even in the new system. Some issues remain concerning the provisions on contractual stability, the provisions on training compensation for young players, and the transfer windows as well as the solidarity mechanism. I will now continue with an examination of the relevant provisions of the FIFA Regulations which are connected to player mobility.

5.1 Training compensation

The transfer fees are now called training compensation[151]. According to article 20 of the Transfer Regulations training compensation shall be paid to the club or the clubs that trained the player when he signs his first contract as a professional and on each transfer until the end of the season of his 23rd birthday. Further, article 21 stipulates a solidarity mechanism. When a professional player is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his former club as a solidarity contribution. The out-of-contract system maintained in the revised Transfer Rules could be regarded as a clear deviation from the *Bosman* ruling. However, one has to keep in mind that the Court in *Bosman* accepted the need to maintain a financial and competitive balance between clubs as legitimate, where the need to train and develop young players is one of the

[149] FIFA Regulations for the Status and Transfer of Players, 2005. Available at: http://www.fifa.com/mm/document/affederation/administration/50/02/49/status_transfer_en_25.pdf

[150] See FIFA circular no. 1190 (20 May 2009). Available at: http://www.fifa.com/newscentre/news/releaseslist.html
Apart from purely linguistic amendments, the revised regulations also contain additions and amendments to their content, the vast majority of which relate to the protection of minors as well as of the clubs investing in the training and education of young players.

[151] FIFA Regulations for the Status and Transfer of Players (2009 edition), Annex 4 Article 2(1).

means to reach those objectives. The Court held that the transfer system which permitted payment of transfer fees for players out-of-contract is precluded by Article 45 TFEU. The new provisions are less restrictive as they apply only to young players up to the age of 23. One could now instead argue that there is a discrimination based on age attached in the rules regarding training compensation as they impose a restraint on the free movement of young players. Still, I would like to point out that the rules in question are designed to protect the existence of small clubs by encouraging recruitment and training of such young players. Rewarding recruitment could therefore be regarded as legitimate and suitable to the objectives sought. The legality of article 20 could also be questioned under Article 101 TFEU. The object or effects of the training compensation could amount to a limitation of player supply. Egger and Stix-Hackl[152] identify three types of markets connected to the Transfer Regulations; the exploitation market, the contest market and the supply market[153]. The market of relevance here is the last-mentioned as the supply and acquisition market is the relevant market for transfer regulations. The clubs sell and buy players who can be regarded as production factors. They are the most important source of supply for the clubs. The transfer system restricts the amount of choice when it comes to player recruitment as the clubs share the sources. This is why, according to Egger and Stix-Hackl, the transfer system affects mostly small and economically weaker clubs[154]. In order to keep up the legality of the new transfer system, FIFA will have to demonstrate a clear connection between the training compensation and the incentives for clubs to invest in youth, as well as showing that no less restrictive measures are available to achieve the objectives. The *Bosman* judgment prohibited out-of-contract transfers, but left under-contract transfers unresolved. Transfer fees for players under contract could serve as a measure of maintaining the incentives to invest.

When a player signs his first professional contract, all clubs that trained him between the age of 12 and 21 will receive a training compensation. If the player is already professional, the former club will issue a training compensation only to the former club for the time that the club trained him. The complex system of determining the training cost and the method of classification of clubs into different categories was changed where the training compensation is now calculated on confederation basis which in turn base the training compensation on the real costs of the training multiplied by the ratio of the number of players it takes to produce one professional player. This simplified, but still rather complex, method of calculation is done by FIFA which publishes a chart on the costs of training a player for one year[155]. The calculation method may be considered as a departure from *Bosman*. It has to be remembered that the Court in *Bosman* found the transfer fees to be contingent, uncertain and completely unrelated

[152] Egger & Stix-Hackl "Sports and Competition Law: A Never-ending Story?", *ECLR* (2002), p 81-91.
[153] Ibid., p 86f.
[154] Ibid., p 88.
[155] See FIFA Circular no. 1185 (22 April 2009) for 2009 listing of training costs and categorization of clubs. Availbale at:
http://www.fifa.com/mm/01/05/33/87/circularno.1185-fifaregulationsonthestatusandtransferofplayers.pdf

to the actual cost of training a player. Therefore, receiving a transfer fee could not be considered a decisive factor in encouraging the training of young players[156]. FIFA's calculation formula is based on estimated training costs. As a consequence, it could be argued that the costs incurred do not necessarily relate to the actual costs borne by the clubs, which is a deviation from the *Bosman* ruling. In addition, the multiplier built into the formula is based on the costs of training that certain number of players it takes to produce one that will advance to professional level, and not on the actual cost. From small clubs' point of view, this system could be justified on grounds of administrative convenience since calculating the actual training cost of a player would be very tricky compared to big clubs which do have the knowledge and the resources to keep accurate accounting systems[157]. Taking into account the possibility for the smaller clubs to keep up with the calculation system, I would state that the multiplier is not unreasonable as long as FIFA's calculation formula is proven to give an as accurate picture as possible of the actual training costs incurred. In cases of disagreement about the compensation amount, FIFA provides recourse to the Dispute Resolution Chamber (DRC), which is another measure to preserve the accuracy of the calculation formula.

Annex 4 article 6 creates a *lex specialis* for the EU/EEA countries. Article 6 (2) is of special concern. It reproduces the, legally doubtful, provision in the Monti rules that allows the clubs to determine the time of the end of the training period. It opens for legal uncertainty as clubs are given a possibility to control the training compensation by being able to bring the cost in line with their own preferences. Article 6 (3) states that a club has no right to training compensation for a player under the age of 24 without a valid contract, in contrast to the 2001 Transfer Rules which required compensation in such cases[158]. In case the club requires compensation, it has the burden of proof to show that it has the right to be compensated. How this is supposed to be done in practice is not really clear. The only guidelines provided on how to determine what would give a club the right to be compensated for a player without a valid contract can be found in a Commentary on the Transfer Regulations[159] and in a decision from the FIFA DRC[160]. The commentary provides in connection with article 6 (3) that if the former club does not offer a professional player a new contract, it loses its right to training compensation, unless it can justify that it is entitled to such payment. The justification may be very difficult to prove and limited to extraordinary circumstances. The former club must offer the player a contract at least equivalent to the value of the current contract in order to

[156] *Bosman* see *supra* n. 2, para 109.
[157] Parrish & Miettinen 2008, p 181.
[158] Article 5 (5) of the Application regulations required compensation for young players out-of-contract, a clear contradiction to *Bosman*. See Drolet 2006 *supra* n. 145 and 146, p 176.
[159] FIFA Commentary on the Regulations for the Status and Transfer of Players, 2007 (The Commentary). Available at: http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf
[160] Decision no.6754 of the Dispute Resolution Chamber, 8 June 2007. Available at: http://www.fifa.com/aboutfifa/federation/administration/decision.html

demonstrate its intentions to continue its relationship with the player in question[161]. Hopefully these guidelines will be transformed into explicit criteria by the DRC through its decisions. So far the number of decisions regarding this particular article is rather low. However, in the abovementioned decision from 2007, the DRC was given the opportunity to give an interpretation of article 6 (3)[162]. Referring to a decision taken by the Court of Arbitration for Sport (CAS)[163] in February 2007 in a transfer dispute between ADO Den Haag and Newcastle Untied FC[164], the Chamber stated that where the player had not been offered a contract, the club would have to justify that it nevertheless was entitled to training compensation. According to the Chamber, such justification means to show a *bona fide* and *genuine interest* to retain the player for the future. Thus, it is not enough to show that the club has trained the player for a certain amount of time to be entitled a training compensation. The club has to demonstrate an appreciative approach towards the player's services despite that no contract has been offered (yet)[165]. This statement does not clarify the situation completely, but it at least spells out additional requirements in order to be entitled to training compensation. In addition, the Commentary provides an interesting footnote that states that if a club descends to a lower division in which it is not entitled to register players as professionals, that club will not be in a position to offer employment contracts to its young players. This scenario will however not jeopardize its entitlement to training compensation[166]. It is doubtful if entitlement to training compensation on both former and latter grounds is in line with *Bosman*.

Having regard to the foregoing, the new Transfer Rules appear to be more resistant from a legal intervention than the former Monti rules from 2001. However, they still show inconsistencies which risk to be struck down if they were to be assessed by the Court, as it is clear that young players' mobility is restrained up until the age of 24. Dabschek makes a strong point when commenting the age discrimination with the following statement:

> "FIFA's new regulations with the resurrection of compensation fees for players under 23 will adversely impact on the rights and earnings of such players, and discriminate against them in comparison to players 23 and over. For many players such regulations will affect them at the peak of their playing proficiency. It is ridiculous to think that a player under 23 playing with a 'leading' club, and who represents his country (regularly) in internationals has not completed his training, whereas a player over 23 who has never represented his nation has"[167].

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[161] The Commentary, see *supra* n. 159, p 125.
[162] The first sentence of article 6(3) applies both to amateur and professional players. Decision no. 6754 see *supra* n. 160, para 15.
[163] According to article 62(1) of the FIFA Statutes (2009 edition), FIFA has recognized CAS since December 2002 for resolving disputes between FIFA, members, confederations, leagues, clubs, players, officials and licensed match agents and players' agents.
[164] CAS 2006/A/1152 *ADO Den Haag vs Newcastle United FC*. Available at: http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/Forms/All%20Decisions.aspx
[165] Decision no. 6754 of the DRC, see *supra* n. 160, para 22.
[166] The Commentary, see *supra* n. 159, p 125.
[167] Dabschek 2006, "The Globe At Their Feet: FIFA's New Employment Rules – II", Sport in Society, 9: 1, p 10.

In addition, considering that the Commission never gave its formal consent to the transfer system and that the European Commission is the appointed body to judge on the legality of free movement, it seems that the provision on training compensation could be subject to challenge before the Court.

Are there any less restrictive means to reach the objective sought? Sharing of revenues is the most promoted of the potentially less restrictive means, which was also advocated by AG Lenz in *Bosman*. The question though still remains whether this "solidarity pool"[168] would create enough incentives for the clubs to invest in young players. One has to remember, despite the interdependence between the clubs, that the clubs are undertakings striving for making profit. A mechanism for redistribution of income, or establishment of a solidarity fund, would most likely be difficult to impose on the football clubs without loud protests. Dabschek proposes an upper limit on the size of the club squads[169]. Such a solution would according to him prevent rich and successful clubs from storing talented players since clubs will have to release a player every time a new player arrives. Dabschek means that a limit on the squads would redistribute players amongst clubs, allowing players who rarely get to play to move to another club enhancing the overall quality of football. In introducing such a limit it would be necessary to strengthen the enforcement of players' contractual rights. I would have to partly object to such a solution. It certainly would redistribute income, allowing a winding-up of the transfer compensation system. However, I can in no way see how it would improve players' contractual stability. It would rather leave them in a state of insecurity regarding clubs' intentions and their own professional situation. I can neither see how this sort of practice would be less bureaucratic than the one in force right now as major adjustments will have to be made both in the organization of football and in the individual contracts.

Interestingly, a study from 2009 provided by the Professional Football Players' Observatory (PFPO)[170] demonstrates that the percentage of club-trained players has fallen for the fourth year in a row to only 21 percent in European clubs, despite the more lenient transfer system introduced in 2005. Further, in its annual review of football finance Deloitte's Sports Business Group has found that the total wage cost of the "big five" premier leagues in Europe[171] has increased by 14 percent as from the 2006/07 season[172]. At the same time the gross transfer spending across the 92 top professional clubs in

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[168] Parrish & Miettinen 2008, p 183.

[169] Dabschek 2006, see *supra* n. 167, p 12 ff.

[170] Annual Review of the European Football Players' Labour Market 2009 provided by the PFPO, p 8. Available at:
http://www.eurofootplayers.org/-publications-

[171] La Liga (Spain), Serie A (Italy), Premier League (England), Ligue 1 (France), Bundesliga (Germany).

[172] Deloitte Annual Review of Football Finance 2009, p 6. Total wage costs for the "big five" European leagues were €4,8 billion, €588 million (14 percent) higher than in 2006/07. All of the "big five" leagues experienced significant wage costs growth, with Serie A (€250 million) and the Bundesliga (€105 million) providing the largest Euro increases. Premier League wage costs increased by 23 percent in Sterling terms to €1,5 billion. The review highlights available at:
http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/b698526bd32fb110VgnVCM100000ba42f00aRCRD.htm

Europe has increased by 35 percent from 2006/07 to 2008/09[173]. Could this be understood as the incentives to train and develop young players has dropped and instead shifted towards wages and transfer spending overseas[174]? If this would be the case, will the system of training compensation provided in article 20 and 21 in the FIFA Regulations be able to be justified? I believe a further examination is needed on this matter in order to be able to determine the reasons for the decrease of club-trained players and if the system has created incentives enough for clubs to invest in young talents. Also, one has to remember that the FIFA Regulations do not regulate transfers of players under-contract from which clubs, especially the top clubs where the most talented players are to be found, can extract big money. This matter I will deal with in section 5.5.

5.2 Solidarity mechanism

Article 21 of the FIFA Regulations[175] provides for a solidarity mechanism which is also deserves to be mentioned in relation to Article 45 TFEU since it first appears as a more lenient practice than the training compensation. Any club that has contributed to the education of a player has the right to receive a proportion of the compensation paid to his previous club. The difference between the solidarity contribution and the training compensation is that the former is only due whenever the player transfers during the course of his contract. Thus, solidarity payments have to be made at whatever age and every time the player moves from one club to another. One can apply the same arguments as those regarding training compensation in relation to free movement. I will therefore not develop any further discussion on this matter.

5.3 Contractual stability? – From *Mexès* to *Webster*

The football governing bodies maintain that contractual stability, i.e. the provisions on compensation and sanctions in case of unilateral breach of contract, is needed in order to preserve the regularity, proper functioning and competitive balance of the game, to be able to build a stable squad, ensure employment stability for players and to provide a possibility of identification between the supporters and the team[176]. The contract stability rules are to be found in Chapter IV of the 2005 regulations (2009 edition) in articles 13 to 18. These provisions are not a new set of rules, but merely a modification of the Monti rules on contractual stability. Even though the provisions on contract stability and sporting sanctions are more lenient than during the pre-*Bosman* era, they can still deter a player from moving

[173] Transfer spending amounted to £779 million in 2007/08.
[174] The majority of the Premier League clubs' spending continues to be with overseas clubs. See highlights of the annual review *supra* n. 161, p 8.
[175] The provisions concerning solidarity mechanism are set out in Annex 5 of the FIFA regulations.
[176] See p 30 and *supra* n. 138.

between clubs belonging to different Member States. The rules thus constitute a restriction on free movement, and will have to be justified in order to enjoy exemption from Article 45 TFEU. The minimum contract length of one year is likely to amount to a restriction of free movement, however it is in principle justifiable in that it pursues the legitimate objective of preserving the regularity of sporting competitions[177].

The new transfer regulations provide that contracts are to be protected for a period of three years up until the age of 28 and two years thereafter. Article 13 of the FIFA regulations state that a contract may only be terminated upon expiry of the contract and by mutual agreement between the player and the club, i.e. the *pacta sund servanda* principle is valid and underlined here[178]. However, where there is just cause, or sporting just cause, both parties can unilaterally terminate the contract without any consequences[179]. What constitutes "just cause" is unfortunately not spelled out. From the players point view, a just cause to unilaterally breach the contract could be failure by the club to remunerate him for his performances according to what is stipulated in the contract[180]. An example of "sporting just cause" is however set out in article 15. If the player has been fielded in less than ten percent of the official games in the course of the season, the player has the right to terminate the contract without any sanctions being imposed, nevertheless, compensation may still be payable. The breach will have to be assessed on a case-by-case basis. Since no other indications exist as to what constitutes a just cause, it amounts to legal uncertainty as it is left to the members of the DRC to decide on each case. The players and the clubs are put in a difficult situation as there are no guidelines to base their decision on.

Article 17 (1) stipulates the consequences in cases of unilateral breach of contract. The article is the result of bargaining between FIFA and the European Union in the strive to bring the FIFA rules into conformity with the rights of free movement[181]. The provision states that the breaching party has to pay compensation which is either already determined in the contract or according with national law, taking into account the specificity of sport and other objective criteria. These criteria shall include the remuneration and other benefits due to the player, the time remaining of the existing contract, the fees and expenses incurred by the former club and whether the breach falls within the protected period. In addition, according to article 17 (3), sporting sanctions shall also be imposed if the player breaches the contract during the protected period. The sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. Unilateral breach outside the protected period does not result in any sporting sanctions. However, if the player fails to give notice of termination within 15 days of the last official match of the season, disciplinary measures may be imposed. The

[177] C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine vs Fédération Royale Belge des Sociétés de Basket-Ball ABSL* (*Lehtonen*) [2000] ECR I-2681, para 53.
[178] Halgreen 2004, p 257.
[179] FIFA Regulations, article 14 and 15.
[180] Parrish & Miettinen 2008, p 184.
[181] See *supra* n. 138.

complexities of this system[182] can be illustrated by two remarkable disputes concerning article 17, decided in the Court of Arbitration for Sport (CAS)[183]. Quite recently the CAS gave its verdict in the so called *Webster* case[184]. Andy Webster, born in 1982, was a player of the Scottish club Heart of Midlothian (Hearts). He was a an important member of the first team and enjoyed significant success both nationally and internationally. After a conflict with the club owner in 2006 he was punished to sit on the bench. Webster therefore decided to rely on article 17 of the FIFA regulations maintaining a unilateral termination of the contract outside the protected period without just cause so that no sporting sanction would be imposed. Instead he signed a three year employment contract with Wigan. Neither the player nor Wigan offered Hearts any compensation upon Websters departure. Hearts therefore lodged a complaint to the FIFA DRC claiming compensation for breach of contract against Webster and Wigan jointly. The DRC decided, in accordance with article 17, that Webster should pay 625 000 GBP[185] to his former employer and imposed a sanction on him stating that he was not eligible to play for his new club for two weeks due to the failure to give Hearts due notice of the termination of the contract. Webster disputed the decision of the DRC before the CAS claiming the amount of compensation to be excessive and the two-week suspension to be disproportionate to the four-day delay to give notice. Concerning the two-week suspension CAS ruled that it had no jurisdiction to rule on that matter[186]. It also concluded that the DRC had not met the requirements of article 13 (4) of the FIFA Regulations which state that the decisions of the DRC must contain "reasons for its findings"[187]. CAS found that the most appropriate criteria to determine the level of compensation is the remuneration remaining due to the player, i.e. the residual value, which the CAS found to amount to 150 000 GBP[188]. The *Webster* case can be compared with the *Mexès* case[189] which was decided some two years earlier. The two cases differ however on one crucial point; the time in which the contracts were breached. In contrast to Webster the French defender Philippe Mexès, born in 1982, unilaterally breached his contract with AJ

[182] Gardiner & Welch, "The Contractual Dynamics of Team Stability versus Player Mobility: Who Rules 'the Beautiful Game'?", *ESLJ* 5:1, p 4.
[183] The arbitration body was initially established by the International Olympic Committee (IOC) in 1984. For more information, see www.tas-cas.org
[184] CAS 2007/A/1298 *Wigan Athletic FC vs Heart of Midlothian,* CAS 2007/A/1299 *Heart of Midlothian vs Webster & Wigan Athletic FC,* CAS 2007/A/1300 *Webster vs Heart of Midlothian* (*Webster*), 30 January 2008. Available at: http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/Forms/All%20Decisions.aspx
[185] Decision no. 47936 of the DRC 4 April 2007. The Chamber took into account, apart from the remaining value of the contract, appearance bonuses and former transfer compensation paid by Hearts, and most importantly the crucial fact of the way in which Hearts had contributed to Webster's development.
[186] *Webster*, p 13.
[187] Ibid., para 35.
[188] Ibid., para 85. The residual value was undisputed by the parties.
[189] CAS 2005/A/902 & 903 *Philippe Mexès & As Roma vs AJ Auxerre* (*Mexès*), 5 December 2005. The decision is available in French only. Available at: http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/Forms/All%20Decisions.aspx

Auxerre (Auxerre) in June 2004 within the protected period without just cause. By a letter dated 11 June 2004 Mexès communicated to Auxerre his willingness to leave the club. The next day, he signed a new four-year employment contract with the Italian club As Roma (Roma) and was immediately registered with the Football League. It appears very clear that Mexès had been negotiating with Roma for a long time and his signature was a mere formalization of their agreement[190]. The DRC permitted the player to register for Roma with immediate effect, however imposing a six-week ban[191] on his eligibility to play for his new club and ordered him to pay a sum of €8 million to his former club[192]. Roma was prohibited from registering any new players, both nationally and internationally, until the expiry of the second transfer period following the notification of the decision[193]. In July 2005 CAS dismissed the appeal against the sanction and modified the compensation sum to €7 million instead. When deciding the amount of the compensation CAS took into account the objective criteria in, what is now, article 17 of the FIFA Regulations such as the value of the remaining contract between the player and Auxerre, the rejected transfer offer made by Roma amounting to €4,5 million and the former club's inadequate co-operation during the transfer negotiations, and the investments made by Auxerre with regard to the player and his development during his seven years in the club[194].

By highlighting these two cases, my aim is not to discuss if the compensation amounts are justified or not, but rather to show what huge importance it has whether the contract was terminated within or outside the protected period. I would also like to point out the diverging assessments made by the CAS in these two cases regarding the compensation. It seems as if the amount of compensation for unilateral breach of contract outside the protected period will be limited to the residual value of the contract, whereas a breach inside the protected period takes into account a number of other aspects besides the remaining value of the contract, thus sky-rocketing the amount of the compensation. Will the residual value be the only ground for compensation due to a breach outside the protected period? I doubt it will be the only criteria in future cases as it is clear that contract disputes are decided on a case by case basis. Whether the case-by-case approach is the right one is yet another story. It leaves a legal uncertainty for players (as well as for clubs) to determine if a contractual breach is the right solution both economically and professionally. In addition, most decision of the

[190] Decision no. 65503 of the DRC 23 June 2005, p 8. In this case the old Monti rules applied where the provisions on contractual stability were to be found in article 21-24.
[191] Decision taken by the DRC on 31 August 2004. The document is not published on FIFA's website, but is referred to in CAS 2005/A/902 & 903, p 5. The decision was disputed and dismissed by CAS in CAS 2004/A/708, 709 & 713 *Philippe Mexès & As Roma vs AJ Auxerre & FIFA.*
[192] In its decision of 13 May 2005 (which is not published on FIFA's website but referred to in CAS 2005/A/902 & 903, p 6), the DRC ordered the player to pay €8 million in compensation to Auxerre, whereas Auxerre had demanded €18 million. The decision was partially upheld by the CAS which instead ordered a payment of €7 million.
[193] Decision no. 65503 of the DRC 23 June 2005. The registration ban was reduced in CAS 2005/A/916 *As Roma vs FIFA*, 5 December 2005, to end after the January transfer window.
[194] *Mexès*, para 79-81.

DRC are censored leaving the players without a clear point of reference in making a decision regarding their future and whether it is worthwhile walking away from a contract.

With the *Webster* case, the football industry feared to experience another *Bosman*-like tremor. Indeed, article 17 provides footballers with rights that any other worker would expect, but it has still the effect of scaring off players from unilaterally breaching their contracts. The bilateral effect of article 17 is thus limited in my opinion[195]. The provision, and especially the outcome of the *Webster* decision, was obviously not appreciated by the clubs who feared that their players will be able to just walk away from their contracts[196]. The clubs will have to re-evaluate their position and approach when they deal with long-term contracts. By making use of so called "buyout clauses"[197], the clubs have an opportunity to reset the balance of the contractual stability. The buyout clause is an amount agreed upon and stipulated in the contract between the club and the player. By paying this certain amount, the player is free to terminate the contract at any time without just cause. At the same time clubs will not risk to lose the player leaving them with only the remaining value of his contract should he leave after the protected period. However, it appears that the buy-out clauses are at times completely disproportionate. To demonstrate the discouraging effects on mobility, Swedish national Zlatan Ibrahimovic, upon signing with the Spanish top club FC Barcelona, a buy-out clause amounting to astronomic €250 million[198] was inserted into the contract. It is unlikely that any club will ever be willing or even able to pay such an amount in case the player decides to move during the course of his contract. Even though the contents of contracts are often not disclosed to the public, there are incentives to believe that other top players are as well bound by outrageous buy-out amounts. The same reasoning applies to the payment of compensation in case the player breaches his contract in order to move to a new club. The player will be forced to stay with his current club if the new club is not willing to pay the damages awarded to the former club[199].

My concern regarding the legal uncertainty and disproportion can further be demonstrated with CAS's decision in the *Matuzalem* case from May 2009[200]. Even though the situation involves a third country national and a

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[195] Normally clubs do not have as strong incentives to breach a contract with its player as they rely on his performances on the field.

[196] De Weger 2008, "The *Webster* Case: Justified Panic As There Was After *Bosman*?" in Gardiner et al. 2009, p 198f.

[197] FIFA Commentary, p 47. See *supra* n. 159. FIFA states, in particular in footnote 76, that the sports legislation of certain countries (e.g. Spain, Real Decreto 1006) provides for a buyout clause to be included as compulsory in contracts. Other countries cannot include such a clause in their contracts as it is not compatible with mandatory labour law.

[198] See http://www.fcbarcelona.cat/web/english/noticies/futbol/temporada09-10/07/n090727107758.html

[199] Gardiner & Welch, see *supra* n. 182, p 3.

[200] CAS 2008/A/1519 *FC Shaktar Dontesk vs Mr. Matuzalem Francelino da Silva & Real Zaragoza SAD & FIFA*, CAS 2008/A/1520 *Mr. Matuzalem Fracelino da Silva & Real Zaragoza SAD vs Shaktar Donetsk & FIFA* (*Matuzalem*), 19 May 2009. Available at: http://www.tas-cas.org/d2wfiles/document/3229/5048/0/Award%201519-1520%20_internet_.pdf

non-EU Member State club, it is still necessary to give it some attention as the case could be interpreted as shifting back the balance towards the clubs.

The Brazilian player Matuzalem Francelino da Silva (Matuzalem), signed a five-year employment contract with the Ukrainian club Shaktar Donetsk (Shaktar) effective from 1 July 2004 until 1 July 2009. On 2 July 2007 the player notified Shaktar that he unilaterally terminated their contractual relationship with immediate effect and in accordance with article 17 of the FIFA Regulations. In particular, he indicated that the notification was served within 15 days following the last game of the season in Ukraine and at the end of the so-called protected period. It was undisputed that the contract was terminated without just cause or without sporting just cause, although Matuzalem had claimed family matters as the reason for the contract breach. On 19 July 2007 Matuzalem signed a contract with Spanish club Real Zaragoza (Zaragoza). On 2 November 2007 the FIFA DRC ordered Matuzalem and Zaragoza to pay €6,8 million jointly to Shaktar. The DRC specifically pointed out that, with regard to the "specificity of sport" the player appeared to have seriously offended the good faith of Shaktar as he accepted a salary raise at the end of the season, and did not indicate to the club that he was looking for another employer[201]. Shaktar's compensation claim amounted to €25 million. That same amount was stipulated in the contract between Shaktar and Matuzalem upon which in case the former would receive a transfer offer equivalent or exceeding that sum, Shaktar would be obliged to arrange his transfer. On the basis of the law of the country concerned, the specificity of sport and any other objective criteria such as the player's remuneration, the time remaining of the contract, expenses and fees incurred by the former club and whether the breach of the contract occurred outside or within the protected period, CAS ordered, after a very detailed examination, Matuzalem and Zaragoza to jointly pay a compensation to Shaktar amounting to €11,858,934. Putting aside the case-by-case approach for a moment when dealing with contract breaches and considering the resemblance of the Matuzalem case with the Webster case, one cannot help but wonder where the incredible difference between the compensation amounts ordered stems from. In my view, the key is to be found in paragraphs 154 and 155 of the decision where the CAS puts heavy weight on the "specificity of sport". In paragraph 154 CAS specifically states:

> "[W]hen weighing the specificity of the sport a panel may consider the specific nature of damages that a breach by a player of his employment contract with a club may cause. In particular, a panel may consider that in the world of football, players are the main asset of a club, both in terms of their sporting value in the service for the teams for which they play, but also from a rather economic view, like for instance in relation of their valuation in the balance sheet of a certain club, if any, their value for merchandising activities or the possible gain which can be made in the event of their transfer to another club. Taking into consideration all of the above, the asset comprised by a player is obviously an aspect which cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player."

[201] *Matuzalem*, p 9.

To regard players as an asset, or a product, clearly is a threat to the ability and courage of the players to breach their contracts and move to new employers since an assessment based on this assumption, and of the clubs' potential over-evaluation of their "product" might very well trigger the compensation amount. The essential element is to find the right balance between the "specificity of sports" and the rights of the players as employees without infringing their right to free movement. Considering the specific nature of the football industry, recognition of its specificity is very much needed. But not to the detriment of the right to free movement depriving the players of their rights to put their services in disposal of another employer for whatever reason they might have. In addition, it is possible that CAS will reach different decisions in cases where the facts and circumstances coincide with that of the Webster case since its procedural rules do not recognize any *stare decisis*, i.e. each new CAS panel is not bound by previous decisions[202].

5.4 Transfer windows

Transfer windows is another measure restricting player mobility. The FIFA Regulations provide for one transfer period per season including a limited mid-season window. One transfer per player per season is permitted[203]. Transfer windows hinder players from seeking new employment and clubs form signing them. Thus, transfer windows could be subject to both free movement and competition law. The motives behind the agreement between the Commission and FIFA/UEFA to introduce a transfer window emerged from the aim to put all clubs in the same position regarding spending possibilities, i.e. to eliminate unfair competition, and to bring about stability of employment for those players under contract[204]. The windows are however departing from the right to free movement which was advocated in *Bosman*. In *Lehtonen*[205] the national court referred questions regarding the compatibility of transfer windows with Articles 12, 39, 81 and 82 of the EC Treaty[206]. The case concerned a Finnish basketball player who transferred from a Finnish to a Belgian team. The Belgian basketball federation refused to register him on the grounds that the transfer had occurred outside the permitted transfer window. Consequently, Lehtonen was not able to play any matches due to his status as an unregistered player. However, he had already represented his new team Castor Braine which resulted in an overturn of the positive result. Lehtonen and Castor turned to the national court seeking an interim relief of the overturned game result and the sanctions imposed on the player. The Court stated that the fact that the rules in question concern the extent to which cubs may field players in matches,

[202] Soek 2008 "The Prize for Freedom of Movement: The *Webster* Case" in Gardiner et al 2009, p 201.
[203] FIFA regulations, article 5-6.
[204] McAuley 2003, "Windows, Caps, Footballs and the European Commission. Confused? You Will Be." *ECLR* issue 8, p 396.
[205] See supra note 156.
[206] Now Articles 18, 45, 101 and 102 TFEU.

and not the employment of players, is irrelevant[207]. The Court first established the existence of an obstacle to free movement for workers[208]. It then went on to an assessment of the existence of justifications. On this point, the Court submitted that late transfer could result in a substantial change of the sorting strength of a team during the course of a championship, thus jeopardizing the credibility and compatibility of the results between the teams and the proper functioning of the championship as a whole[209]. However, the Court found the rules at issue in the main proceedings going beyond what is necessary to achieve the objectives sought as they differentiated between players from a federation outside the European zone and those inside it. The former were subject to a later transfer deadline than the latter player category. Just as in *Bosman* the Court did not touch upon the competition rules. It concluded by stating that the rules at issue were prohibited by Article 45 TFEU unless objective reasons concerning only sport as such or relating to the differences between the position of players from a federation outside the European zone and that of players from within that zone could justify such different treatment[210]. Following the assessment made by the Court in *Lehtonen* it seems thus as if the FIFA Regulations on transfer windows are compatible with Article 45. The rules nonetheless ensure the proper functioning of the competition which is inherent to the sport. Do the windows go beyond what is necessary to achieve this aim? Parrish and Miettinen[211] suggest that a less restrictive mean to achieve the objective would be to let players move between clubs more than once in a season but to be prevented from playing for two different teams which are competing with each other in the same competition during the course of the season. I cannot see how such arrangement would solve any problem as the main activity of a football player is to be fielded in official games in order for him to prove his skills and by that increase his market value. The question whether transfer windows apply to out-contract-players has been solved by FIFA permitting such players to sign for new clubs outside the official transfer windows[212]. Any restriction would otherwise deprive such players from the fundamental right to practice his trade and career. However, FIFA has left discretion to the national associations to preserve the integrity of their domestic championships by preventing an abuse of this provision. Gardiner and Welch[213] argue that the transfer windows could fail the test of proportionality in that they are too restrictive and that contract stability during the season is ensured by the contractual stability rules in article 13 to 18 of the FIFA Regulations. I cannot entirely agree on this point. My belief

[207] *Lehtonen* see *supra* n. 177, para 50.
[208] Ibid., para 51.
[209] Ibid., para 54.
[210] Ibid., para 58-59.
[211] Parrish & Miettinen 2008, p 189 who in turn refer to S. Vand den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (The Hague, Kluwer 2005) p 303.
[212] FIFA Media Release ”Out-of-contract players given permission to sign for new clubs”, 12 September 2002. Available at:
http://www.fifa.com/aboutfifa/federation/releases/newsid=83169.html
[213] Gardiner & Welch, see *supra* n. 182, p 6.

is that the transfer windows could very well prove to be necessary in order to achieve the aim of maintaining a balance between the clubs by preserving a certain degree of equality and uncertainty as to results, which otherwise would risk to be distorted if clubs were allowed to strengthen their squads by recruiting new players whenever they like. The argument put forward by Gardiner and Welch that the windows favour rich clubs who can afford to assemble large squads and spend significant amounts on players in a concentrated period of time, does not seem reasonable either. The risk of big clubs stock-piling players to the detriment of small clubs would be higher in a system without transfer windows.

As the aim of the transfer windows was to eliminate unfair competition by establishing an equal market, it is not very likely that a challenge under the competition rules would succeed. The reluctance of the Court, both in *Bosman* and *Lehtonen*, to assess an application of the competition rules has left the relationship between football and competition law on vague ground. In *Meca-Medina*[214], a judgment from 2006, the Court finally assessed sporting rules in relation to competition law, which implications of will be dealt with in Chapter 6.

5.5 Transfer fees for under-contract players

The *Bosman* ruling did not resolve the case of transfer fees for under-contract-players. Neither do the FIFA Regulations regulate this matter explicitly. The only provision set out in the Regulations can be found in article 13 which states that a contract can only be terminated upon the expiry of the term of the contract or upon mutual agreement between the player and the club. Instead, we have noted record-breaking transfer fees during the years after *Bosman*. Hence, the game of transfer fees if far from over. The record was set in 2009 when Portuguese national Cristiano Ronaldo was transferred from Manchester United to Real Madrid for the astronomic amount equivalent to about € 94 million[215], followed by Swedish national Zlatan Ibrahimovic who transferred from FC Inter to Barcelona the same year for approximately €69 million[216]. The enormous spending on overseas players could be one of the elements explaining the decline in club-trained players in the big five leagues. As the overseas transfers escalate, the top leagues develop into a competition between the wealthiest clubs, distorting the balance between the clubs and consequently the degree of equality between them and uncertainty of results. In order to get the payments of arbitrary fees to selling clubs in line with the objectives sought, the transfer system for players under contract should be based on

[214] C-519/04 P *David Meca-Medina and Igor Majcen vs Commission* (*Meca-Medina*)[2006] ECR I-6991.
[215] See http://www.forbes.com/2009/06/11/soccer-madrid-ronaldo-lifestyle-sports-soccer-madrid.html?feed=rss_news
[216] See http://www.fcbarcelona.cat/web/english/noticies/futbol/temporada09-10/07/n090727107758.html

strict criteria such as age, wages, the residual value of the contract and the training cost invested into the player.

The system of transfer fees for players under contract as it stands today runs the risk of being caught under Article 101 TFEU as a concerted practice[217]. There is no explicit agreement or provision that stipulates a requirement of a transfer fee being paid to the selling club. Therefore, the payment of a transfer fee can be regarded as a sort of coordination between the clubs or custom within the football industry. Notwithstanding, assuming that two clubs cannot agree on the transfer fee regarding a player who wishes to be transferred to that other club. Can free movement rules be invoked in such a situation? Since, as stated above, there is no explicit agreement that requires transfer fees to be paid for under-contract players, there is no link to a collective agreement. As settled in the Court's case law, Article 45 extends not only to actions of public authorities but also to rules of any other nature aimed at regulating gainful employment in a collective manner[218]. I would therefore state that application of free movement rules on such conditions would be difficult to sustain.

[217] Craig & De Burca 2008, p 957-963.

[218] *Walrave and Koch* see *supra* n 21, para 17; *Donà* see *supra* n.7, para 17; Bosman see *supra* n. 41, paras 10 and 82; *Meca-Medina* see *supra* n. 214, paras 23-24; C-325/08 *Olympique Lyonnais SASP vs Olivier Bernard and Newcastle United FC* (*Bernard*) [2010] ECR I- 00000, para 30.

6 Recent developments

6.1 Introduction

We have so far seen that sports governance becomes a matter of EU law where its practices collide with the objectives of the Treaty. The EU has no explicit authority under the Treaty to adopt legislation that dictates the actions of the sports governing bodies[219].

In its 2006 ruling, *Meca-Medina*, the Court made an important adjustment to its approach by rejecting the assumption of the existence of "purely sporting" rules" falling outside the Treaty and instead confirmed that sporting rules shall be studied on a case-by-case basis requiring separate analytical frameworks for free movement and competition law[220]. Heavily reliant on this ruling, the Commission published its White Paper on Sport in July 2007[221]. It is argued that the Commission has offered the sports governing bodies a supervised autonomy, where the specific role of the federations has been recognized in exchange for increased stakeholder representation within their governing structures[222]. So, has anything really changed when it comes to the EU competence of regulating sports matters? With the entry into force of the Lisbon Treaty in December 2009, for the first time an Article recognizing "the specific nature of sport" was inserted. The EU's new powers regarding sport relates to incentive measures such as direct EU funding and non-binding instruments such as recommendations. Thus, it seems that the EU law which regulates sporting activities that can be categorized as economic activity will continue to be the most relevant in connection to sport[223]. With the modified governance structure and the recognition of the specificity of sport in Article 165 TFEU, FIFA and UEFA are again opting for re-introduction of nationality clauses which were doomed by the Court in the *Bosman* ruling. The proposed 6+5 rule by FIFA was, in addition, given green light by a board of experts in 2008[224]. Whether the possible re-introduction stems from a misuse of the notion "specificity of sports" now that it has been recognized in the Treaty is a matter for discussion. I will address these issues and developments below.

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[219] Weatherill 2007, "The Influence of EU Law on Sports Governance" in Gardiner et al. 2009, p 79.
[220] Parrish & Miettinen 2008, p 235.
[221] Commission White Paper on Sport, COM (2007) 391, 11 July 2007.
[222] García 2009, "Sport Governance After the White Paper: the Demise of the European Model?" *IJSP*, 1: 3, p 272f.
[223] James & Miettinen, "Are There Any Regulatory Requirements for Football Clubs to Report Against Social and Environment Impacts", p 5. January 2010 Working paper. Available at: http://valuefootball.substance.coop/files/Regulatory_Working_Paper-Social_Value_of_Football.pdf
[224] See Institute for European Affairs (INEA) "Expert Opinion on the Compatibility of the "6+5 Rule" with European Community Law " (INEA Report). Available at: http://inea-online.com/download/regel/gutachten_eng.pdf

6.2 *Meca-Medina* – Remodelling the application of the Treaty rules to sport

The applicants David Meca-Medina and Igor Majcen in *Meca-Medina*[225] were professional swimmers who had failed a drug test provided by the FINA[226], swimming's governing body. Consequently, they were banned from competing for two years whereby they had been deprived of their possibilities to make a living. The swimmers complained to the Commission[227] that the anti-doping rules[228] prohibiting them from competing constituted a violation of the Treaty competition rules, but their complaint was rejected. Meca-Medina and Majcen applied to the General Court[229] asking for annulment of the Commission's decision. The General Court rejected their claim[230] by stating that the provisions of the Treaty do not apply to "purely sporting rules". The General Court's assessment deserves a bit of attention considering that the Court of Justice set aside its ruling by stating that the General Court had erred in law, even though it still dismissed the applicants' pleas in the end. At paragraph 41 in the judgment the General Court pointed out that "rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity […], and which relate to the particular nature and context of sporting events, are inherent in the organisation and proper conduct of sporting competition and cannot be regarded as constituting a restriction on the Community rules on the freedom of movement of workers and the freedom to provide services". The General Court contradicts itself when it states in paragraph 44 that "the campaign against doping does not pursue any economic objective" and that "the purely social objective is sufficient to justify the campaign against doping", when it at the same time in paragraph 57 recognizes that the organizers might have had in mind " of safeguarding the economic potential of the Olympic games" when adopting the rules at issue. The Court of Justice began by remembering that sport is subject to EU law insofar as it constitutes an economic activity, i.e. when a sporting activity takes the form of a gainful employment or the provision of services for remuneration[231]. The Court stated that the mere fact that a rule is purely sporting in nature does not remove the person engaging in the activity affected by that rule from the scope of the Treaty. Paragraph 28 constitutes the key of the ruling:

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[225] C-519/04 P *David Meca-Medina and Igor Majcen vs Commission* (*Meca-Medina*) [2006] ECR I-6991.
[226] Fédération Internationale de Natation/International Swimming Federation (FINA).
[227] Commission Decision COMP 38.158 of 1 August 2002 *Meca Medina et Majcen /CIO* (only in French). Not published in the Official Journal. Available at: http://ec.europa.eu/competition/antitrust/cases/decisions/38158/fr.pdf
[228] The threshold of what constitutes doping was set to 2 ng/ml Nadrolone in the athletes urine.
[229] Former Court of First Instance.
[230] T-313/02 *David Meca-Medina and Igor Majcen vs Commission* [2004] ECR II-3291.
[231] *Meca-Medina* see *supra* n. 225, para 22-23.

> "If the sporting activity falls within the scope of the Treaty, the conditions for engaging in it are then subject to *all the obligations which result from the various provisions of the Treaty*. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition"[232].

The General Court was thus deemed to have erred in law[233] when it assumed that purely sporting rules which have nothing to do with economic activity and which therefore do not fall within Articles 45 and 56 TFEU, also do not fall under the competition rules[234]. The Court of Justice rejected the swimmers' application on the grounds that the general objective of the anti-doping rules was to eliminate doping in order to allow competition on a fair basis. However, the restriction still must be limited to what is necessary. The Court ruled that the rules did not constitute a restriction of competition within the meaning of Article 101 TFEU since they are justified by a legitimate objective and did not go beyond what is necessary to achieve the objective sought[235]. The *Meca-Medina* case implicates that a "purely sporting rule" does not of itself escape the scope of the Treaty and is not immune from the requirements set out in the provisions of EU trade law. A practice "purely sporting" in intent must still be tested against the demands of EU trade law where it exerts economic effects[236]. The Court simply applied general principles governing the interpretation of Article 101 (1) by referring to its previous ruling in *Wouters*[237] which has nothing to do with sport but concerned rules of the Dutch bar prohibiting multi-disciplinary partnerships between accountants and advocates. What is established in *Meca-Medina* is that the majority of the sporting rules are also of economic nature or exert economic effects, and their compatibility with EU law has to be assessed on a case-by-case basis. Rules that are "inherent" in the proper functioning and organization of sport do not constitute restrictions of competition and therefore fall outside the scope of the Treaty[238]. The unpredictability of the application of EU trade law to sports is of course a basis for criticism. The outcome of *Meca-Medina* was certainly not

[232] Ibid., para 27-28. My emphasis.
[233] Ibid., para 33-34.
[234] T-313/02 *David Meca-Medina and Igor Majcen vs Commission, OJ* C 300,04/12/2004 P, para 47.
[235] *Meca-Medina* see *supra* n. 225, para 45-55.
[236] Weatherill 2007, "The Influence of EU Law on Sports Governance" in Gardiner et al. 2009, p 83.
[237] C-309/99 *J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV vs Algemene Raad van de Nederlandse Orde van Advocaten* (*Wouters*) [2002] ECR I-1577, para 97: "[…], 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, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience".
[238] *Meca-Medina* see *supra* n. 225, paras 42 and 44.

appreciated by the sport governing bodies. UEFA responded to the ruling in a paper[239] written by Gianni Infantino, UEFA General Secretary, by stating that "looking at the precise language used by the Court, it is now more difficult to identify specific sports rules that are not capable of challenge under EU law"[240], with reference to paragraph 28 in the Court's ruling. Further, Infantino stated that "encouraged by the judgment in Meca-Medina, it is to be expected that complainants will now amplify arguments to the effect that sports rules and practices have 'disproportionate' effects or are 'not limited to what is necessary for the proper conduct of competitive sport' and, in this way, 'prove' a violation of competition law"[241]. Infantino expresses his, I would state legitimate, fear that all professional sport, even amateur, now falls under the Treaty. Further, there are many sports rules and practices regulating eligibility to participate in competitions which could be described as representing conditions for "engaging in" professional sport. Following the judgment in *Meca-Medina*, it seems that if a sports rule can be classed as a condition for "engaging in" sporting activity then review of that rule under free movement law or competition law becomes inevitable[242]. However, applying the approach of the Court in *Meca-Medina* in a case such as *Walrave and Koch*, I believe the outcome still would not have changed. Indeed, the nationality rules governing selection to play for a national team exert economic effects, but the discrimination is necessary in national representative football. Otherwise, the character of international competition would be destroyed. The implications of *Meca-Medina* could lead to a possible opening up of a floodgate of litigation regarding sporting rules that will anyway be treated as inherent to the sport in question. It is questionable whether it is worthwhile to challenge such sports rules both in terms of time and money as the careers of professional sportsmen and women tend to be short. The Court's approach in the somewhat unclear paragraph 28 in *Meca-Medina* could perhaps have been clarified in *Charleroi*[243], a case concerning the FIFA Rules of player release for international representative matches which require clubs to release players for a defined period of time and do not provide any remuneration for the clubs. However, due to a deal struck between the (former) G-14 group[244] and the governing bodies in football the Court abandoned the case.

The ruling in *Meca-Medina* was embraced by the Commission in its 2007 White Paper on Sport[245] and in its lengthy accompanying Staff Working

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[239] Infantino, "Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?", UEFA paper 2006-10-02. Available at: http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/480401_DOWNLOAD.pdf

[240] Ibid., p 2.

[241] Ibid., p 8f.

[242] Ibid., p 5f.

[243] C-243/06 *SA Sporting du Pays de Charleroi and G-14 Groupement des clubs de football européens vs FIFA* (*Charleroi*) (Removed from the register on 2008-11-25).

[244] G-14 was a group consisting of the 18 wealthiest clubs in Europe. The group dissolved in the beginning of 2008 as part of the deal and instead the European Club Association (ECA) was instituted comprising 144 clubs drawn from everyone of the 53 national associations within UEFA. See www.ecaeurope.com for more information.

[245] Commission White Paper on Sport, COM (2007) 391, 11 July 2007.

Document[246] which provides a more detailed legal analysis. It is submitted that the remodeled approach in *Meca-Medina* is not limited to the interpretation of the competition rules. Section 2.2 of the Staff Working Document confirms that the fact that the Court has in some cases found that sporting rules did not violate Articles 45 and 56 EC does therefore not permit to conclude that these rules do not infringe Articles 101 or 102 TFEU in the absence of an analysis concerning the anti-competitive effects, the inherent nature and proportionality of the sporting rule in question. Likewise, compliance with Articles 101 and 102 EC does not establish compatibility with the internal market rules. The White Paper ignores the findings and proposals in the Independent European Football Review (IESR)[247] which instead is heavily dependent of the General Court's ruling in *Meca-Medina*, calling for provision of an exhaustive list of sporting rules which do or do not breach the Treaty rules[248]. The Commission is firm in its view that a case-by- case assessment is required[249]. As to the "specificity of sport" the White Paper claims that the Court and the Commission have taken into account and recognized the notion, but that it is not enough to justify a general exemption from the application of the Treaty provisions. The Commission provides at least some guidelines regarding the specificity of sport, stating that it can be approached through two prisms:

> "i) The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;
> ii) The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators the organisation of sport on a national basis, and the principle of a single federation per sport"[250].

To conclude, an overlap between EU law and "sports law" is thus recognized, but without depriving the sport governing bodies of the right to show how and why their specific rules are necessary to ensure their particular aims or how they are inherent in the structure of sports governance, hence providing them with a supervised autonomy.

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[246] Commission Staff Working Document "The EU and Sport: Background and Context" SEC (2007) 935, 11 July 2007.
[247] Independent European Sport Review (IESR) 2006. The review process was initiated by the UK Presidency of the EU in 2005. The Commission indicates in the White Paper that the review was financed by UEFA and thus provides a biased assessment (See p 7). The IESR available at:
http://www.independentfootballreview.com
[248] Ibid., p 103-105.
[249] Commission Staff Working Document, p 78.
[250] White Paper on Sport, p 13.

6.3 Article 165 TFEU – recognizing the specificity of sport

Article 165 TFEU under title XII[251] in combination with Article 6 TFEU provides the EU with a soft competence on sport. Article 165(1) reads as follows:

> "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.
>
> The Union shall contribute to the promotion of European sporting issues, while *taking account of the specific nature of sport*, its structures based on voluntary activity and its social and educational function"[252].

Article 165(2) provides that:

> "Union action shall be aimed at […] developing the European dimension in sport, by promoting fairness, and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen , especially the youngest sportsmen and sportswomen".

The vast majority of sport-related competences and actions thus remain with the Member States and sport governing bodies following the principle of subsidiarity[253]. Insertion of the sports Article into the Treaty recognizing the specificity of sport was welcomed by the sporting movement in general. FIFA expressed its enthusiasm in a press release[254] in connection with the ratification of the Lisbon Treaty hoping it will give leeway for legal challenges regarding pure sporting rules such as rules aimed at protecting national teams and rules concerning free movement of professional athletes to be addressed in the light of sport-specific rules and the special characteristics of international sport.

Does Article 165 mean a move away from the case-by-case approach? The primary objective of the non-binding declarations which accord a special function to sport is to provide support for why proportionate sporting practices should be justified even where they restrict free movement or proper competition[255]. Thus, the specificity of sport will continue to be the decisive factor in determining whether EU law applies in a certain sporting situation or not. Whether the desire of the sport governing bodies to move away from the case-by-case assessment in order to bring some legal certainty will be embraced is yet, in my view, too soon to tell. I believe the

[251] Education, vocational training, youth and sport.
[252] My emphasis.
[253] The principle of subsidiarity is spelled out in Article 5(3) TEU.
[254] FIFA Media Release "Lisbon Treaty gives a boost to sport", 30 November 2009. Available at:
http://www.fifa.com/aboutfifa/federation/releases/newsid=1141618.html
[255] James & Miettinen, "Are There Any Regulatory Requirements for Football Clubs to Report Against Social and Environment Impacts", see *supra* n. 223, p 8.

expansion of EU law applied to sport will be dependent on the development of the cooperation and of the relation between the Court of Justice and the CAS. CAS has already shown, in i.e. its decision in *Matuzalem*, that it takes due account of the special nature or sport. If the judicial bodies will be able to assemble a coordinated case-law, basing its assessment on the same grounds, I believe that the future for bringing the much desired legal certainty into sporting matters is bright where the Commission so far has denied to provide an exhaustive list of sporting rules which are conform or not conform with the Treaty[256].

6.4 Nationality clauses resurrected?

After the condemnation of the 3+2 nationality clause in *Bosman*, nationality restrictions are again on the agenda of the sports governing bodies. FIFA has intentions to establish a 6+5 rule that requires clubs to field at least six domestic players, whereas UEFA promotes a system of "home-grown players"[257]. While player mobility increased as a consequence of the *Bosman*, financial disparities between clubs have widened. Clubs spend heavily on overseas players while figures show a steady decline in club-trained talent[258]. The percentage of expatriate players in the top five European leagues has risen for the fourth year in a row to 42,6 percent[259]. The stock-piling of talented players within the top clubs has instead led to a diminution of the competitive balance between the latter, which is undisputed if one has a look at the European top leagues where usually the same clubs compete with each other year after year. AG Lenz in *Bosman* stated that "it is unlikely that the influx of foreign players would be so great that native players would no longer get a chance"[260]. Following the figures, their chances have at least diminished, hence showing that the prediction of AG Lenz was not completely correct since, as stated above[261], the percentage of club-trained players has fallen for the fourth year in succession. Further, according to Conzelmann[262], it is shown that very few young players actually get the opportunity to enter a foreign European League and succeed in establishing himself there. Due to the lack of playing experience, the training and development of young players is currently inadequate. In support of that argument, the 2009 Annual Review of the European Football Players' Labour Market shows that the percentage of matches played by club-trained players has shrunk from 16,5 percent to 15,9 percent[263].

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[256] See section 6.2.
[257] A home-grown player is defined by UEFA as a player who has been trained by his club (club-trained player) or by another club belonging to the same national association as the former (association-trained player) for at least three years between the age of 15 and 21. The common name for both categories of players is "locally-trained players".
[258] See p 37f.
[259] 2009 Annual Review of the European Football Players' Labour Market, p 8.
[260] AG Lenz opinion, para 146.
[261] See p 37f.
[262] Conzelmann 2008, "Models for the Promotion of Home Grown Players for the Protection of National Representative Teams" in Gardiner et al. 2009, p 216f.
[263] See *supra* n. 259, p 8.

In order to deal with these concerns UEFA promotes a home-grown player system. UEFA's regulations of the UEFA Champions League 2009/10 provide that no club may have more than 25 players on List A during the season. As a minimum, eight places on List A are reserved exclusively for "locally trained players" and no club may have more than four "association-trained players" listed in places 18 to 25[264]. In contrast to the home-grown player rule, FIFA is opting for a 6+5 rule connected to eligibility to play for national teams. The rule would require clubs to field at least six players qualified to play for the national team in the association in which they play[265]. In 2008 FIFA's congress passed a resolution to fully support the objectives of the 6+5 rule. The proposed 6+5 rule appears to amount to direct discrimination on grounds of nationality. In the light of the Court's case-law it is difficult to reckon how the rule could possibly survive. In *Bosman*[266], *Kolpak*[267] and *Simutenkov*[268] the Court has ruled that nationality restrictions will never constitute a purely sporting rule except for in relation to national representative teams, hence rejecting any kind of argument suggesting the reverse. Direct discrimination on grounds of nationality raises strong burdens of justification and can only be justified on grounds of public policy or public security[269], or, with regard to non-discriminatory or indirectly discriminatory rules, on grounds of pressing reasons of public interest as stated in *Cassis de Dijon* (mandatory requirements)[270]. Hence, grounds for justification of indirect discrimination is not confined to the exceptions set out in the Treaty. In my view, the most remarkable conclusion provided by the INEA Report is that the 6+5 rule amounts to indirect discrimination since it legally is not directly linked to the nationality of the professional footballer but applies to the qualification for the national

[264] Regulations of the UEFA Champions League 2009/10, article 18.08. In addition, the same rules regarding player eligibility apply in UEFA's other club competition Europa League. The UEFA regulations are available at:
www.uefa.com

[265] FIFA and FIFPro showed joint support for the 6+5 rule in a Memorandum of Understanding published on 2 November 2006. See article 2.6 of the Memorandum. Version available at:
http://www.rdes.it/RDES_3_06_FIFPRO.pdf

[266] Para 128.

[267] C-438/00 *Deutscher Handballbund eV vs Maros Kolpak* (*Kolpak*) [2003] ECR I-4135, paras 54-56. The case concerned a Slovak national employed as goalkeeper in a second division handball club in Germany challenging a national rule of the German sports federation that limited the number of non-EU nationals to be fielded during league or club matches.

[268] C-265/03 *Igor Simutenkov vs Ministerio de Educación y Cultura and Real Federación Española de Fútbol* (*Simutenkov*) [2005] ECR I-2579, para 38. The case concerned a professional football player of Russian nationality holding a license as non-Community player while playing for the Spanish club Deportivo Tenerife. The issue in the main proceedings regarded a rule provided by the Spanish federation limiting the number of non-EU nationals that could be fielded in national competitions.

[269] Article 45(3) TFEU. In this regard see also and C-388/01 *Commission vs Italy* [2003] ECR I-721, paras 19-20, where Italy was conducting discriminatory and advantageous rates for admission to cultural sites only in favor of Italian nationals and persons residing in Italy.

[270] The maintenance of a competitive balance between clubs and the training and development of young players have been recognized as pressing grounds of public interests by the Court in *Bosman*. See para 104 and 106 of the judgment.

team[271]. However, the Report seems not to take into account that eligibility to play for the national representative team actually is conditional on the player's nationality which is explicitly stipulated in the FIFA Statutes[272]. I would therefore state that the argument is unfounded. Consequently, the 6+5 rule will restrict clubs from signing non-eligible players. Further, the Commission has shown the 6+5 rule a red card when stating that "the 6+5 rule would constitute direct discrimination on the basis of nationality, which is unacceptable to the Commission"[273]. The position of the Commission is thus clear.

UEFA's home-grown player rule, on the other hand, is drafted in a way as to avoid direct reference to nationality as it is connected to residency requirements of the players. The rule therefore amounts to indirect discrimination on grounds of nationality capable of objective justification beyond the grounds provided in the Treaty. Maintaining a competitive balance between clubs and encouraging recruitment and training of young players are legitimate objectives UEFA could pursue. The home-grown player rule has been shown support by the Commission on several occasions. The European Parliament resolution on the White Paper on Sport[274] explicitly asks the sport associations not to introduce new rules that create direct discrimination based on nationality such as the FIFA 6+5 rule in contrast to the more proportionate and non-discriminatory UEFA home-grown player rule. In addition, the Commission states in its White Paper on sport that "rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination on grounds of nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued […]"[275]. At greatest risk of condemnation is UEFA's objective of maintaining a link of identification between the supporters and the clubs[276]. In *Bosman* the Court stated that such link does not exist[277]. Parrish and Miettinen[278] make an important point when stating that "UEFA's rule will not necessarily lead to a higher proportion of genuinely local players representing their local club as the rule is neutral in terms of nationality and it places no restriction on the number of home-grown players that must be *fielded* in a starting eleven. Thus it is still possible for a club, subject to the rule, to field eleven non-nationals". The argumentation is supported by the Court in *Bosman* which held that international club competitions are limited to clubs that have reached certain

[271] The INEA Report, p 13.
[272] FIFA Statutes (2009 edition), article 15. Available at: http://www.fifa.com/mm/document/affederation/federation/01/24/fifastatuten2009_e.pdf
[273] Message from Commissioner Vladimir Spidla "Commission shows a red card to the 6+5 rule proposed by FIFA", 28 May 2008.
[274] European Parliament resolution on the White Paper on Sport, INI/2007/2261.
[275] White Paper on Sport, p 6. See supra note 230.
[276] Parrish & Miettinen, "Nationality Discrimination in Communtiy Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)", *ESLJ* 5:2, p 13.
[277] *Bosman*, see *supra* n. 41, para 131.
[278] See *supra* n. 276, p 13.

results in their domestic leagues, without any particular significance being attached to the players' nationalities[279]. The Commission has performed an independent study[280] regarding the UEFA home-grown player rule where it came to the conclusion that the rule promotes objectives of general interest such as the training of young players and the maintenance of the balance of sports competitions. Therefore, even though they might lead to indirect discrimination on grounds of nationality, the UEFA rules have been backed up by the Commission. The practical consequences of the rules are subject to a review by 2012.

Notwithstanding, the Lisbon Treaty strengthens the position of the sport governing bodies by recognizing their competence in the field of sport. In combination with the basic right of freedom of association set out in Article 12(1) of the Charter of Fundamental Rights which is put at the same level as the fundamental freedoms following Article 6(1) TEU, there could be a loophole for lobbying the 6+5 rule as the autonomy of sporting associations in principal includes the right to lay down discriminatory rules. If the 6+5 rule would come into force it would have serious consequences for clubs where expatriate players are superfluous and in smaller European countries where national talent is hard to find over night. FIFA would at least have to abandon the direct reference to nationality in order for the 6+5 rule to be able to enjoy a justification on grounds of pressing reasons of public interest.

At this point, the status of the relationship between the sports governing bodies and the EU institutions is difficult to establish considering that is has not been put to the test yet. I find unlikely a departure from the Court's case-law regarding direct discrimination on grounds of nationality. Thus, the chances of the 6+5 rule to survive rest on shaky ground. Why would the Court, after having struck down the former 3+2 rule, change course and give green light to an even more restrictive rule? Nevertheless, there is a possibility that the developments discussed above might lead the Court of Justice to adopt a softer approach in future legal challenges regarding sporting rules, even when it comes to discriminatory nationality clauses. The UEFA home-grown player has bigger chances of surviving a legal challenge before the Court than the, already by the Commission condemned, FIFA 6+5 rule.

[279] *Bosman*, see *supra* n. 41, para 132.

[280] Independent study commissioned by the Commission on UEFA's rules on home-grown players, "European Union: Study on Training of Young Sportsmen/women in Europe", April 2008. The study is available at:
http://ec.europa.eu/sport/pdf/doc272_en.pdf

7 The *Bernard* case – a new *Bosman*?

7.1 Introduction

The Court recently showed tendencies to a more lenient approach in its March 2010 ruling in *Bernard*[281]. According to the French transfer system[282], a player trained by a certain club was obliged to sign a his first contract as a professional with that club. Any subsequent move of the player to a new club entitled the former club to receive training compensation. The French system was proposed as a potentially less restrictive measure to achieve the objective of increasing incentives for clubs to train and develop young players, but was rejected by the Commission during the post-*Bosman* negotiations as representing a potential breach of Articles 45 and 101[283]. The Court had the opportunity to rule on a related issue in the *Bernard* case. Expecting the judgment, the football industry feared a new *Bosman*-like chaos. I will now examine the case and its implications showing that the fear was unnecessary as there are indication of acceptance by the Court of the current FIFA Regulations on the Status and Transfer of Players.

7.2 Facts and the dispute

On 1 July 1997 Olivier Bernard signed a "joueur espoir" contract for three seasons with the French Ligue 1 club Olympique Lyonnais (Lyon). At the material time the employment of football players in France was regulated in the Professional Football Charter (the Charter) which had the status of a collective agreement. A "joueur espoir" contract was a fixed-term contract for players between the age of 16 and 22 who were employed as trainees in professional clubs. This category of employment was regulated in Article 23 of the Charter which provided that at the end of the training with the club a "joueur espoir" was obliged to sign his first professional contract with that club if it required him to do so. The Charter did not contain any compensation scheme in case the player refused to sign a professional contract with his training club. However, in such a case the club had the possibility to bring action for damages against the "joueur espoir" in accordance with the Employment Code for breach of contractual obligations flowing from Article 23 of the Charter.
Before the contract expired, Lyon offered Bernard a professional contract for one year from 1 July 2000. He refused to sign that contract and instead

[281] C-325/08 *Olympique Lyonnais SASP vs Olivier Bernard and Newcastle United FC* (*Bernard*) [2010] ECR I- 00000.
[282] The French Professional Football Charter followed suit and now contains comparable rules for domestic situations as those in the new FIFA regulations. See AG Opinion in *Bernard*, para 59.
[283] Parrish & Miettinen 2008, p 183.

signed with Newcastle United (Newcastle) in August 2000. On learning of that contract, Lyon sued Bernard before the employment tribunal in Lyon seeking damages against him and Newcastle jointly. The amount claimed was €53 357,16 and responded to the remuneration Bernard would have received over one year had he accepted the contract offered to him by Lyon. The employment tribunal ruled that Bernard had terminated the contract unilaterally and ordered him to pay €22 867,35. The national court did not explain the difference between the amount awarded and the amount claimed by Lyon.

The judgment was appealed to the Court of Appeal which considered that the obligation to sign a contract at the end of a training period infringed Article 39 EC. Lyon appealed to the Cour de Cassation which, referring to *Bosman*, stated that the dispute in question raises serious difficulty in interpreting Article 39 EC with regard to if such a restriction can be justified or not as the rule did not prevent the player from signing with another club but rather discouraged him from doing so. It therefore stayed the proceedings and referred for a preliminary ruling under Article 234 EC[284] the following questions:

> "1) Does the principle of free movement for workers laid down in article 39 EC preclude a provision of national law pursuant to which a jouer espoir who at the end of his training period signs a professional player's contract with a club of another Member State may be ordered to pay damages?
> 2) If so, does the need to encourage the recruitment and training of young professional players constitute a legitimate objective or an overriding reason in the general interest capable of justifying such a restriction?"

In contrast to *Bosman*, Lyon's claim was based on Bernards failure to comply with the obligation to sign the contract with the club that trained him, rather than on the prohibition to sign with another club in the French league. The difficulty of interpreting Article 45 TFEU in this case stems from the material circumstances that the jouer espoir was not prohibited from signing with another club, but was likely to be dissuaded from doing so as he could be liable to pay damages. In addition, at the material time of the case, the 2005 FIFA Regulations on the Status and Transfer of Players did not exist.

7.3 Judgment of the Court

7.3.1 The opinion of AG Sharpston

AG Sharpston delivered her opinion on 16 July 2009[285]. She initiates her opinion with the following statement:

> "To those who follow 'the beautiful game', it is a passion, even a religion. Armies of dedicated fans travel the length of the Union to support their team at every match; and the likely performance of potential new recruits

[284] Now Article 267 TFEU.
[285] Opinion of Advocate General Eleanor Sharpston [2010] ECR I- 00000.

> (possible transfer signings and home-grown talent) is a matter of burning importance. For gifted youngsters, being spotted by a talent scout and given an apprenticeship […] with a good club is a magic key opening the door to a professional career. Sooner or later, however, the dream of footballing glory is necessarily allied to the hard-nosed reality of earning the highest income achievable over a limited time span as a professional player with the club that is prepared to offer the best wages packet. At the same time, clubs are understandably reluctant to see 'their' best young hopefuls, in whose training they have invested in heavily, poached by other clubs. Where the apprenticeship club is small and relatively poor and the poaching club is large and vastly more wealthy, such manoeuvres represent a real threat to the survival (both economic and sporting) of the smaller club"[286].

Whereas AG Lenz in *Bosman* was accused of not understanding the game of football and the environment surrounding it[287], AG Sharpston, by initiating her opinion with the above-referred statement, shows a genuine interest and understanding of the football industry both economically and culturally which leaves its mark on the rest of her opinion.

According to AG Sharpston, the specific characteristics of sport in general, and football in particular, do not seem to be of paramount importance when considering whether there is a prohibited restriction on free movement. However, she states, they must be considered carefully when examining possible justifications for any such restriction[288]. With regard to the first question referred by the national court, AG Sharpston stated that rules which require payment of a transfer, training or development fee between clubs upon the transfer of a professional player are in principle an obstacle to the free movement of workers. Even where the rules apply equally within the Member State they still impose a restriction on the possibility to move to another Member State[289]. The same cross-border element was elaborated in *Bosman* as well[290]. The requirement to pay a sum of money, either by himself or persuade the new employer to cover his liability, is an immediate and important consideration for any worker who needs to refuse an employment offer in order to accept another[291]. She then dismissed the submission of Lyon that the situation at issue is not concerned by Article 39 EC because that Article is intended to cover discrimination on grounds of nationality, and that the dispute falls within the competition rules. AG Sharpston pointed out that it is clear from the Court's case-law that Article 39 EC does cover restrictions on freedom to contract as long as they derive from actions of public authorities or rules aimed at regulating gainful employment in a collective manner. As regards the issue of competition law, those matters had not been touched upon by the referring court. However, if the dispute did raise issues of competition

[286] AG Sharpston opinion, para 1.
[287] Blainpain & Inston1996, p 1f.
[288] AG Sharpston opinion, para 30.
[289] Ibid., para 40.
[290] *Bosman*, para 98-99.
[291] AG Sharpston Opinion, para 41.

law, it would still not hinder the application of the provisions on free movement as stated in *Meca-Medina*[292].

As to the second question, AG Sharpston made an extensive, yet solid, analysis concerning the possible justifications. In order for the hindering measures at issue to escape prohibition, they must pursue a legitimate aim compatible with the Treaty and fulfill four conditions: i) they must be non-discriminatory, 2) they must be justified by overriding reasons in the general interest, 3) they must be suitable for attaining the objective pursued, 4) and they must not go beyond what is necessary for that purpose. These conditions were spelled out by the Court in *Kraus*[293], *Gebhard*[294] and *Bosman*[295]. AG Sharpston then goes on by pointing out that it can hardly be questioned that the recruitment and training of young players is a legitimate aim[296]. However, rules like the ones at issue are perhaps not decisive to encourage clubs to recruit and train youngsters as it is impossible to predict how many of those players will go on to play at professional level[297]. There is a wide public consensus that training and recruitment of young players shall be encouraged. According to AG Sharpston, if employers can be sure that they benefit from the services of an employee whom they have trained, that in itself gives an incentive to train which also in the long run benefits the employees. She can, nevertheless, not accept that the national rule at issue is suitable to achieve that objective and does not go beyond what is necessary for that purpose and proposes compensation in term of actual training costs[298]. Further, AG Sharpston is not convinced that the liability to pay compensation should lie only on the new employer and not on the former trainee[299]. Interestingly, she considers it not being unreasonable that the trainee should be required to "balance the account" if on the expiry of the training period, the difference between the training cost and the services provided by the employee has not been fully compensated, and provided that the skills of the employee have been acquired on the employer's expense[300]. Two different ways of compensation are proposed; compensation between clubs should be based on the cost of training *n* players in order to produce one who will succeed on professional level, whereas would the player himself be liable to pay training compensation then the amount should be calculated on the basis of the individual cost of training him. Consequently, compensation based on the player's future earnings or on the training club's future profits, or future loss, would not be acceptable. AG Sharpston's answer to the questions referred is that the need to encourage the recruitment and training of young professional football players is capable of justifying a requirement to pay training compensation to a club where the player does not respect the obligation to sign a

[292] Ibid., para 43 and *Meca-Medina*, para 28.
[293] C-19/92 *Dieter Kraus v Land Baden-Württemberg* (*Kraus*) [1993] ECR I-1663, para 32.
[294] C-55/94 *Reinhard Gebhard vs Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (*Gebhard*) [1995] ECR 1-4165, para 37.
[295] Para 104.
[296] AG Sharpston Opinion, para 45.
[297] Ibid., para 46 and *Bosman*, para 109.
[298] Ibid., paras 46-51.
[299] Ibid., para 55.
[300] Ibid., para 56.

professional contract with that club at the end of the training period. However, such a rule will only be justified if the compensation to be paid to the training club is based on the actual training costs spent by the former club, or based on the individual training cost of the player should he be liable to pay[301].

7.3.2 Ruling of the Court

AG Sharpston proposed not to consider the broader implications of the case in any detail and suggested the Court to confine its ruling to the specific context of the main proceedings as the Court had not heard sufficient submissions to deal with the wider issue properly[302]. According to the French Government, United Kingdom Government and the Commission, who submitted observations during the proceedings, the current FIFA Regulations comply with the principle of proportionality and requested the Court to approve the current FIFA regulations[303]. However, those were not in force at the material time of the case. AG Sharpston pointed out that, nonetheless, it does not mean that the reasoning of the Court and her statements will not be applied in possible future cases regarding the compatibility of those rules with EU law[304].

The Court gave its judgment on 16 March 2010 starting out by remembering that sport is subject to EU law in so far as it constitutes an economic activity, i.e. where the activity takes the form of a gainful employment as laid down in *Walrave and Koch*[305], *Donà*[306], *Bosman*[307] and *Meca-Medina*[308]. Since the Charter had the status of a collective agreement it fell within the scope of Article 45 TFEU[309]. The Court stated that all provisions of the TFEU relating to free movement for persons are intended to facilitate professional activities for Member State nationals throughout the EU. Even if the national measures that impede the free movement apply to all nationalities, they still constitute restrictions on that free movement[310]. With regard to the foregoing the Court ruled that the national provision at issue in the case constitute a restriction on the right to free movement for workers as it discourages the exercise of that right[311].

The Court then went on to examine possible justifications of the restriction. The Court spelled out the four conditions which have to be satisfied in order for a restrictive measure to be justified[312]. It confirmed AG

[301] Ibid., paras 57-59.
[302] Ibid., para 31. The Netherlands government had submitted that the case touches upon the general issue of an employer willing to invest in training an employee but reluctant to see him leave and place his skills at the service of a competing employer.
[303] *Bernard*, para 25.
[304] AG Sharpston Opinion, para 62.
[305] Para 4.
[306] Para 12.
[307] Para 73.
[308] Para 22.
[309] *Bernard*, para 32.
[310] Ibid., para 33-34.
[311] Ibid., para 36-37.
[312] *Kraus* see *supra* n. 293, para 32; *Gebhard* see *supra* n. 294, para 37; Bosman see *supra* n. 41, para 104.

Sharpston's statement in her opinion regarding the social and educational importance of football in the EU by referring to the second subparagraph of Article 165(1) TFEU where those factors are mentioned. Account has to be taken of these parameters in considering whether a system which restricts the freedom of movement of such players is suitable to ensure that the said objective is attained and does not go beyond what is necessary to achieve it[313]. In that regard the Court accepted that receiving a transfer fee is likely to encourage clubs to train and develop young players[314]. In assessing the relevance of the compensation, the Court stated that the returns on investments in training are uncertain as only a limited amount of the players trained succeed on professional level, thus confirming what was settled in *Bosman*[315] and in AG Sharpston's opinion[316]. Clubs, especially small ones, could be discouraged from investing in young talents if they could not obtain reimbursement for the training provided if the player decides to sign with another club at the end of the training period. Therefore, the Court rules that a scheme providing training compensation in a situation where a player decides to sign a contract with another club can in principle be justified by the objective of encouraging recruitment and training of young players. Such a scheme must, still, be proportionate and capable of attaining that objective taking due account of the costs borne by the clubs in training both future professional players and those who will never play professionally[317]. However, the compensation scheme at issue was characterized by payment of damages calculated in a way unrelated to the actual training costs incurred. According to the Court, that arrangement went beyond what is necessary to achieve the aim[318].

7.3.3 Comments

What can first be established from the outcome of the judgment is that the ruling of the Court in *Bernard* clearly supports the uniqueness of sport. So far, no significant reactions of objection have been submitted in connection to the ruling[319]. The sporting movement seems rather content with the outcome[320]. It is clear that this will be a landmark case for the future of European football, and especially for the youth sector. The confirmed right to training compensation will hopefully be a boost for the clubs to engage in development of young talents and turn around the negative trend that has

[313] *Bernard*, para 40.
[314] Ibid., para 41.
[315] Para 109.
[316] *Bernard*, para 46.
[317] Ibid., para 45.
[318] Ibid., para 50.
[319] Just recently (on 29 April 2010) a conference was held by the European Sports Law and Policy Initiative (ESLPI) regarding the impact of the judgment on the world of sports. However, no conclusion is available as of yet. See: http://www.eslpi.eu/profile.htm
[320] See for instance statement by FIFPro Lawyer Wil van Megen and statement by the association of European Professional Football Leagues (EPFL). Available at: http://www.fifpro.org/news/news_details/220 and http://www.epfl-europeanleagues.com/EPFL_welcomes_ejcs_ruling.htm respectively.

been demonstrated in the reviews presented in this thesis. In my opinion the Court succeeds in laying down a fair balance between the social and cultural importance of sports and the rights of free movement, without giving one of the elements priority to the detriment of the other.

Given that the Court did not take into account the proposal made by AG Sharpston of having two different systems of compensation depending on whether the player is liable to pay or the club at the end of his training period, one can detect an implicit approval by the Court of the current FIFA Regulations governing training compensation as they stand today. The FIFA Regulations provide for the compensation of training costs and satisfy the criteria imposed by the Court for the validity of a compensation scheme. The payment system described in article 20 and in annex 4 of the regulations is strictly related to the training costs, and if a player leaves after his 23rd birthday no training compensation can be required. The *Bernard* ruling shows that EU law does possess the necessary and sufficient instruments to provide a balanced judgment in sporting matters, without having to deviate from earlier case-law.

Weatherill stated in connection to *Meca-Medina* that "one cannot exclude the possibility that a differently constituted Court might in future change course again, and extend greater protection to sporting autonomy than does *Meca-Medina*"[321]. The *Bernard* ruling partially confirms his thesis. Indeed, recognition of sporting autonomy transpires in the judgment where both the Court and AG Sharpston emphasize the social and educational significance of sport in the society, and by the Court's reference to the second subparagraph of Article 165 (1). The fear of the sporting movement to encounter another post-*Bosman* situation has therefore proved to be exaggerated. The Court's confirmation of the necessity of European clubs to be able to recruit, train and benefit from young talent as justified objectives given the special status of football in Europe demonstrates a will to leave the governance of sports to the sports associations; the ones who know it the best. However, on the condition that the sporting rules comply with EU law and do not go beyond what is necessary to reach their objectives. The conditional autonomy left to the sports governing bodies is further demonstrated by the Court's reluctance to specify how the cost of the training compensation should be calculated. It appears that the Court indirectly accepts the current calculation method provided in the FIFA Regulations, despite that one could argue that it is not based on the actual training cost but rather on assumptions or estimations.

To conclude, in contrast to Jean-Marc Bosman, I believe Olivier Bernard's name will not be remembered as turning the whole transfer system, and with that the entire industry, upside down. Instead, Olivier Bernard has done the youth sector a significant favor with the Court's confirmation of the right to training compensation, while the 2005 FIFA transfer system has been left at status quo.

[321] Weatherill 2007, "The Influence of EU Law on Sports Governance" in Gardiner et al. 2009, p 85.

8 Concluding remarks

From my findings, I would state that the freedom enjoyed by the players is a conditional one, since, as has been shown, clubs and the sports governing bodies always find a way to restrain their mobility either by imposing buy-out clauses, severe sanctions or high compensation amounts in case of unilateral breach of contract, despite that the transfer system appears to be more lenient[322], or by again putting nationality clauses on the agenda. At the same time, one has to remember the specificity of sport and its important societal role but also that clubs are businesses striving for their right to get remunerated for their "products". This is where the problem stands and is a constant battle between the sports governing bodies, clubs, players and the EU; to be able to distinguish and at the same time consolidate the economic and societal role of sport without risking players to become modern slaves and without limiting the club's possibilities to prosper. Arrangements restricting players' mobility as those conducted in the football industry would never be accepted by workers in another industry that in the eyes of the beholder would be regarded as "normal". The winner of the battle is too early to announce. However, the sports governing bodies have partially succeeded with regard to Article 165 TFEU which recognizes their conditional autonomy and the specificity of sport, ending their fifteen year fight for a legal basis for sport in the Treaty[323]. The Court of Justice in collaboration with the CAS will therefore have a decisive role for the future when applying the notion of "specificity of sport". In my view, if the Court will continue on the same line as in the *Bernard* case, then EU law possesses the necessary tools in order for the Court to provide fair and balanced judgments taking into account both the special characteristics of sports and players' rights of free movement without prioritizing one over the other.

The provisions on contractual stability show an obvious legal uncertainty amounting to an obstacle of the free movement of the players. When comparing the CAS decisions in the Webster and the Mexès cases where the unilateral breach of contract occurred outside respectively inside the protected period, they illustrate that the CAS applies diverging assessments and takes into account different criteria when establishing the compensation and the sanction to be imposed on the player. In the first case the CAS decided that the residual value of the contract was a enough compensation whereas in the Mexès case a vast list of additional criteria were regarded, consequently sky-rocketing the compensation amount and imposing a stricter disciplinary sanction. In addition, I am not convinced at all by the fact that CAS is not bound by the *stare decisis* principle. It adds to the legal uncertainty and the potential discouragement of players to break away from their employer. On the other hand, one has to remember that the reason or

[322] At least for players under 24 years of age.
[323] See FIFA Media release "Lisbon Treaty gives a boost to sport", 30 November 2009. Available at:
http://www.fifa.com/aboutfifa/federation/releases/newsid=1141618.html

cause of the unilateral breach is individual from case to case. Applying the same criteria when determining the seriousness of the breach is therefore risky as well when a uniform approach in each different case would result in disproportionate outcomes. The problem seems thus to be that of proportionality in relation to the compensation to be paid and the sporting sanction imposed on the player in case of unilateral breach within the protected period.

The football industry faces a big challenge with regard to whether the requirements of training compensation will promote incentives to train and develop young talents, as recent figures are showing a consistent negative trend. If the football industry will not be able to show that the requirement of training compensation provided in the FIFA Regulations is necessary to encourage recruitment and training of young players, then the system will have difficulties surviving a future legal challenge. Despite that there is a tendency pointing at a decrease of club-trained players even though clubs have the right to claim training compensation, the scheme in any case provides incentives to recruit and train young talents with regard to its objectives. The fact that the provisions on training compensation restrain the mobility of players under 24 years of age can amount to discrimination based on age could in my view be tolerable. The age limit has to be drawn somewhere, albeit it appears contingent and haphazard. On what grounds the age limit would enjoy justification apart from reliance on the specific nature of sport in case of a Court challenge is thus unclear.

The future of the nationality clauses which have the same objectives as those of the transfer system is vague as well. The fact that the implications of the UEFA home-grown player rule will not be assessed until 2012[324] makes it difficult to draw any conclusions regarding their restrictive effect on player mobility and what effects they have exerted as of yet. However, the home-grown player rule applies only in international competitions arranged by UEFA which appears less restrictive and thus is capable of enjoying justification on grounds of public interest such as promotion of recruitment and training of young players. In contrast, the FIFA's 6+5 rule which is connected to eligibility to play in the national representative team appears far-fetched and arbitrary and is in my opinion doomed from the very beginning. It seems that the attempts to enforce the rule are reliant on the recognition of the conditional autonomy enjoyed by the sports governing bodies, but also on the recognition of the specific nature of sport in the Treaty. The Commission has already had its say on the matter rejecting FIFA's proposal by reason that the rule amounts to direct discrimination on grounds of nationality. It is therefore unlikely that the Court would depart from its own case-law and line of reasoning.

So, do football players really enjoy such freedom of movement as any other worker? Yes they are free to leave. But, their freedom and mobility is conditional and often discouraged by measures such as severe sanctions, high compensation fees and completely disproportionate and unacceptable buy-out clauses. Thus, I fear that the contractual stability rules, especially the rules governing unilateral breach of contract within the protected period,

[324] See *supra* n. 280.

are the main obstacles to the players' freedom of movement at the moment. The provisions on contractual stability could very well be considered as going beyond what is necessary or being disproportionate in order to reach their objectives as they exert discouraging effects or hinder players from moving to another employer. It is therefore questionable whether those rules would survive a Court challenge and whether they would be able to be justified on grounds of preserving the regularity, proper functioning and competitive balance of the game, ensuring stable squad-building and employment stability, and the need to provide identification between the fans and the club. The Court in *Bosman*[325] has already established that that no link exists between the identification of the supporters and the team. One could argue that following the provisions set out in national law in case of unilateral breach of contract should be enough to settle a case of unilateral breach or providing a longer period of notice within the protected period. Yet, this is where the specific nature of sport can be invoked as ensuring a stable squad and a competitive balance are objectives capable of being regarded as legitimate.

It is now up to the stakeholders involved to determine the future role of sports and with that the role of the players in shape of workers. The future challenge will be to reconcile and lay down a fair balance between the players' right of free movement and the taking into account of the specific nature of sport.

[325] See *supra* n. 41, para 131.

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